

# AFL-CIO Safety and Health

Date: 1/3/2003

To: Persons concerned with the smallpox vaccination program

From: Rob McGarrah

RE: Workers' Compensation and the federal smallpox vaccination program

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Since President Bush ordered the Departments of Defense (DoD) and HHS to begin vaccinating Americans who will be our first line of defense against a smallpox attack, a major disparity in the protections available to military and civilian smallpox responders has become glaringly apparent. The DoD smallpox program guarantees full protections and compensation from the federal government if military and civilian contractors, including household members, are injured or die from the vaccinia. Civilian smallpox responders and their household members, however, will have no federal protections or compensation available to them, short of a lawsuit under the Federal Tort Claims Act. Instead, they are left to fend for themselves, filing claims with widely varying and frequently inadequate state workers' compensation programs.

According to the Centers for Disease Control, for every million people **vaccinated**, 1,000 may suffer serious but not life-threatening reactions -- such as headache, fatigue, muscle aches or chills -- for a week or so.<sup>1</sup> And studies warn that between 14 and 52 of those million **vaccinated** will get seriously ill, and about one or two will die. Exposure to the *vaccinia* virus is especially dangerous to anyone with a weakened immune system, a group that includes anyone who has received a transplant, is HIV-positive, is being treated for cancer, or lives with anyone with one of those conditions. These individuals could even get ill if they come in close contact with someone inoculated within the last few days.

HHS Secretary Tommy Thompson framed the disparity between the DoD and HHS programs this way:

“Is that fair? [B]ecause hospital's workers compensation rates might go up as well as other employers, or the health insurance premiums might go up. The truth of the matter is is that we have not done anything in that regard as of yet, except to point out, quickly, that we have already given the states \$1.1 billion. The

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<sup>1</sup> <http://www.bt.cdc.gov/agent/smallpox/vaccination/reactions-vacc-clinic.asp>

See also: Waldholz M. “Bush's Smallpox Advice: Don't Follow My Lead,” Wall Street Journal, December 18, 2002.

balance of the money was sent out on June 1st of this year to the states to implement their plans.

“We anticipate when Congress passes the next appropriations bills for the Department of Health and Human Services, there will be included in there, almost \$1.5 billion, of which about \$535 million will be for hospitals, and we will be working with the states in the implementation of their plans, which have already been submitted for fiscal year 2003, to be able to amend those for fiscal year 2004, to be able to take into consideration any further costs that may result as a result of this vaccination program, and we are also looking at the potential of introducing some further legislation.

“I'm fairly confident that that is going to take place but at this point in time a decision has not been made on that and there has not been any legislation drafted in that regard.”<sup>2</sup>

Leading workers' compensation experts, including Rutgers Professor John Burton, who chaired the last federal commission that examined state workers' compensation programs in 1972, Northeastern University Law School Dean Emily Spieler and Louisiana State University Law School Professor Edward P. Richards who has been analyzing the federal smallpox program, agree that state workers' compensation programs are simply unable to meet the demands of a national wartime smallpox vaccination program. Joining them are attorneys representing workers' compensation claimants in each of the fifty states, the Workplace Injury Litigation Group. Among their concerns are the following:

1. All states have a waiting period before any compensation is provided (in the range of 3 to 7 days) that will not be compensated unless the worker is off work for an extended period (the retroactive date), which is typically 14 to 28 days.

2. States will deny compensation to some vaccinated workers because state laws require that diseases to be compensable must be characteristic of, or peculiar to, the worker's own occupation. A nurse who contracts a disease through the vaccination may qualify, while the hospital aide who gets the shot and has an adverse reaction or who is seriously injured because of exposure to vaccinia virus may not.

3. State workers' compensation programs may not cover the claims of workers who are ill or injured because they have voluntarily agreed to be vaccinated, thereby breaking the required workers' compensation link than an injury or illness arise, out of or in the course of employment.

4. Although it is highly contagious, household members who become sick or disabled from the vaccinia due to contact with health workers who have been vaccinated at work, are not eligible to file claims under state workers compensation programs. They

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<sup>2</sup> Centers for Disease Control, HHS Teleconference on Smallpox Policy, December 14, 2002.

will have to rely upon their own health insurance for medical care---a highly uncertain option---and they will have no recourse for lost wages.

5. State workers' compensation laws do not require coverage for every worker. Texas has a voluntary program, with optional coverage. Other states exclude or permit exclusion of self-employed workers, a particular concern in hospitals because nursing shortages have forced hospitals to rely upon self-employed, agency and contract workers.

6. State workers' compensation programs have limits on maximum benefits and caps on medical care, posing a particular problem for workers who suffer more severe illness as a result of the vaccination.

7. States like Florida limit death benefits under workers' compensation to \$100,000, regardless of the size of a worker's family or income at the time of death.

8. Physicians and other more highly compensated health care workers cannot receive adequate replacement of their lost wage income under state workers' compensation laws because states limit wage replacement. In New York the limit is \$400 per week.

9. Workers' compensation premiums are determined by the nature and severity of the claims experienced by each employer. As Secretary Thompson has noted the federal program places an unfair burden on employers and states, which are now more hard-pressed for cash than at any time since World War II, according to the National Governors Association.

**Conclusion:** The federal smallpox vaccination program is a national wartime effort that requires uniform protections for the American people. A smallpox terrorist attack will not distinguish between military and civilian employees. The Constitution permits only one Commander-in-Chief; there can be only one smallpox protection and compensation program in this time of war.