

COVID-19 immunizations and employee relations considerations for long-term care facilities

By Richard L. Hackman, Esq. and Collin T. Keyser, Esq. | December 1, 2020

With the imminent possibility of a COVID-19 vaccine, long-term care facilities must be prepared for staff questions and concerns related to immunization for the virus. A [recent Gallup survey](#) indicated that approximately 42% of Americans would decline an approved COVID-19 vaccination. Reasons for declining included: the rushed timeline for development of the vaccine; the desire to wait to confirm the vaccine is safe; no trust in vaccines in general; and the desire to wait to determine the effectiveness of the vaccine. These same concerns as voiced by the general populace most certainly will arise with facility staff, which will require an employer to engage in a balancing act between employee relations with staff who have concerns about the vaccine and the facility's obligation to protect its patients, residents and other staff from the potential hazards associated with COVID-19 through a mandatory immunization policy. Facilities will also need to be prepared for potential conflicts with staff who do obtain the vaccine versus those who may decline to do so.

May long-term care facilities impose a vaccination requirement?

Long-term care facilities may impose a vaccination requirement on staff, but certain considerations and exemptions exist. With respect to health care employers, courts have concluded that vaccination

requirements, such as flu vaccinations, imposed upon patient care workers are "job-related and consistent with business necessity." However, to date, no federal or state agency, including the U.S. Equal Employment Opportunity Commission (EEOC) or Occupational Safety and Health Administration (OSHA), has addressed whether an employer-imposed COVID-19 vaccine requirement is lawful. At this time, employers can only look to past guidance as a potential prelude for future direction.

Agency guidance and court decisions have opined that health care employers and other entities who work with vulnerable individuals may impose a vaccination requirement subject to certain exceptions under the Americans with Disabilities Act (ADA) for medical concerns or a disability and Title VII of the Civil Rights Act (Title VII) for sincerely held religious beliefs. Under both the ADA and Title VII, once an employer receives notice of either a disability-based or religious reason for refusal to be vaccinated, the employer must provide a reasonable accommodation unless it would pose an "undue hardship." During the 2009 H1N1 flu outbreak, OSHA also took the position that, with respect to employer-mandated vaccine policies, an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death may be protected under the provisions of the OSHA whistleblower provisions.

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In its recent COVID-19-related guidance, the EEOC recognized that the pandemic meets the ADA's "direct threat" standard. Employing a "direct threat" analysis signifies that someone with COVID-19 symptoms in the workplace poses a significant risk of substantial harm to themselves or others in the workplace. A "direct threat" finding provides employers more freedom to implement certain practices and standards that might otherwise be unlawful absent the pandemic. However, the EEOC has yet to formally extend this more expansive ability to mandatory vaccinations for COVID-19.

Practical steps to consider when implementing a COVID-19 vaccination policy

Choose the policy that is right for your workforce

Long-term care facilities need to determine exactly what type of policy would best meet their needs. For most facilities, a mandatory vaccination policy is necessary for all employees and should be considered a term and condition of employment (in other words, subject to the exceptions discussed above, if an employee refuses to get a vaccination, they could be terminated). However, for other facilities, mandating that only staff with direct resident/patient care duties be vaccinated may be more appropriate.

For several reasons, requiring all staff (subject to the exceptions under the ADA and Title VII) to be vaccinated is generally the more appropriate course of action. First, while some staff may not be responsible for direct patient/resident care, even administrative, maintenance and custodial employees have occasional contact with residents as part of their job duties. Further, while protecting residents from the threat of the virus is paramount, equally important is protection of all staff. Accordingly, even if a facility limits a vaccination requirement to those with direct care duties, this would not slow the spread of the virus as a result of intermingling of staff.

Provisions to include in an immunization policy

To the extent a facility does not currently have an immunization policy, or, in light of an imminent COVID-19 vaccine, seeks to revise its policy, there are a number of provisions that should be included. Under all circumstances, the policy should be clearly communicated to staff.

The basis for the policy. This provision should include an explanation as to the reasons for the policy, to whom the policy is targeted and to whom the policy applies.

Procedures on how the vaccine will be obtained.

Staff should be advised as to the process and procedure for obtaining the vaccine. For example, will it be administered onsite or at another healthcare facility? Will employees be required to get the vaccination on more than one occasion (e.g., every 6 months)? In addition, new hires may be required to present proof of immunization prior to commencing employment.

Who pays for the immunization? In most cases, if it is a required term and condition of the job, employers should pay for the immunization. A policy should also address whether employees will be compensated for the time spent obtaining the vaccine, especially if the vaccination is administered offsite.

The process for requesting an exemption. Denote the designated person to whom staff should go should they seek an exemption from a mandatory immunization policy. In addition, set forth the basis for which an exemption may be granted, including certain medical conditions or religious beliefs. Further explain that, when requesting an exemption, staff will be required to engage in an interactive process with Human Resources to determine whether the facility can grant the exemption and to explore possible accommodations. Finally, facilities should require written declinations from employees who are granted an exemption.

Consequences for non-compliance. The policy should also identify the consequences of failure to comply with the mandates of the policy, which could include termination.

Handling requests for exemptions

Promulgating a mandatory vaccination policy necessarily requires a facility to have a process in place to address requests for exemptions.

Exemptions based on medical reasons or the ADA.

Some staff may refuse the vaccination due to a disability or a medical condition (such as a reaction to the shot). The ADA constrains an employer's ability to require employees to be vaccinated for such things as the flu. Additionally, the Pregnancy Discrimination Act (PDA) may also provide protections to certain employees.

At this time, without a vaccine currently available, employers lack adequate information as to the potential dangers associated with a COVID-19 vaccine as it relates to certain medical conditions. With respect to the flu, the Centers for Disease Control and Prevention (CDC) has identified individuals with certain medical conditions whom they recommend against receiving the flu shot, including those with a severe allergy to chicken eggs, a prior serious reaction to the flu vaccine and a history of Guillain-Barre syndrome. Accordingly, individuals with these medical conditions would have a sufficient basis to refuse the flu shot.

Certain staff may also decline the vaccine because of a disability under the ADA. For purposes of the ADA, a disability is “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; ... a record of such an impairment; or... being regarded as having such an impairment.” It is important to note that under the ADA each person’s physical impairment should be determined on a case-by-case basis. Accordingly, simply denying one individual an exemption based on a disability does not automatically mean that any employee with that same disability should similarly be denied an exemption.

Ultimately, since a COVID-19 vaccine is not currently available or medical contraindications known, an exemption from a mandatory vaccination policy based on medical reasons or a disability cannot be determined until further information becomes available.

Exemption Requests Based on Religious Beliefs.

Pursuant to Title VII, employers are required to grant an exemption to a mandatory vaccination policy to an employee based on their “sincerely held” religious beliefs unless it constitutes an undue hardship on the employer. A belief is defined as “religious” under Title VII if it is “‘religious’ in the person’s own scheme of things,” i.e., it is “a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by... God.” Conversely, courts have held that social, political, or economic philosophies, as well as mere personal preferences, are not religious’ beliefs requiring religious exemption. The EEOC has also indicated that it “is unlikely that ‘religious’ beliefs would be held to incorporate secular philosophical opposition to vaccination.”

Generally, an employer is required to assume a religious belief is sincerely held. However, if an employee declines a vaccination due to religious

beliefs, and the employer has an objective basis for questioning the religious nature or sincerity of those beliefs, the employer may ask for further details. Factors to consider in determining if a religious belief is sincerely held could be the nature of the accommodation requested, the benefits of the accommodation, and consistent behavior of the employee. If a facility determines an accommodation cannot be made, it is the facility’s burden to prove the accommodation would cause an undue hardship.

The requirement to engage in the interactive

process. Under both the ADA and Title VII, when confronted with an employee request for an exemption, an employer is required to engage in the “interactive process.” An employer cannot simply terminate an employee who makes a legitimate request for an exemption. First, the employer needs to determine the reason for the request. This initial step may be accomplished through the use of a written “declination” form. Any request for an exemption for a medical reason should be accompanied by a physician certification or other relevant documentation. Any request for an exemption based on religious beliefs should identify at least some detail as to the basis. In either case, it is also important to have the employee identify any proposed accommodation to the requirement. Second, an in-person discussion should be held with the employee to discuss possible accommodations that could be made by the facility.

Accommodations that have been provided with respect to exemptions from the flu vaccine have included the requirement to wear a mask at all times and transfer to a position with limited resident/patient care. However, based on the current “mask mandate,” wearing a mask is already a requirement and, based on scientific data, the ultimate efficacy of simply wearing a mask as a deterrent to contagion for both the wearer and the resident is unclear.

Gaining “buy-in” for a mandatory COVID-19 vaccination policy

The uncertainty of the efficacy of a COVID-19 vaccine, along with skepticism borne of personal beliefs, will likely require employers to engage in an education plan to allay staff reticence and ensure voluntary participation. Upon receipt of peer-reviewed scientific support for the vaccine, employers should consider offering educational programs, seminars and provide summaries of the relevant studies to staff evidencing the safety of the vaccine.

Employers should also establish a “point person” for questions from staff related to the vaccine. This individual should be equipped to answer basic questions staff may have, as well as provide information or documentation explaining the process pursuant to which the vaccine was developed, tested and its purported efficacy.

Finally, facility leaders and management need to lead by example. Management who willingly and immediately become vaccinated and extol the benefits to the facility, and its residents will certainly contribute to the perception that becoming vaccinated for COVID-19 is vitally important not only to staff themselves, but to the greater community.

Liability risks of failing to implement a COVID-19 vaccination policy

Governor Wolf’s recent [veto of H.B. 1737](#) seeking to afford Pennsylvania healthcare facilities immunity from civil lawsuits related to the COVID-19 pandemic underscores the importance of your facility continuing to comply with public health guidelines and best practices. The Pennsylvania plaintiff’s bar vehemently opposed H.B. 1737 because it would have extended immunity to healthcare facilities while Governor Wolf’s [May 7 executive order](#) only granted limited immunity to individual health care providers such as nurses and certain physicians.

Generally, medical professional liability lawsuits against long-term care facilities focus on claims for corporate negligence and systemic failures. COVID-19 related lawsuits involve claims that the facility did not implement infection control procedures thereby increasing the risk that residents would contract COVID-19. As the pandemic continues, the opportunity for liability exposure likewise persists. Once a COVID-19 vaccine is made available to healthcare

providers, we suspect the plaintiff’s bar will contend that it was incumbent upon facilities to mandate COVID-19 immunization among staff because failing to do so increased the risk that residents would contract COVID-19. Accordingly, failing to impose a vaccination requirement on staff will likely create another opportunity for plaintiff’s attorneys to allege that the facility failed to exercise standard practices to limit resident exposure.

Even though the issues facing long-term care facilities have been unprecedented and the CDC is still developing recommendations for the vaccine, all it takes is a paid “expert” willing to opine that a facility “breached the standard of care” for a claim to go forward to trial. Accordingly, documentation of an implemented COVID-19 immunization policy will be critical to help mitigate the risk of COVID-19 related corporate negligence claims.

Seek further guidance

Although this article highlights several important considerations related to the COVID-19 vaccine, it is not inclusive of all aspects. Ultimately, long-term care facilities should carefully consider the process and procedures for implementing a mandatory COVID-19 vaccine policy. While there do exist some legal considerations, the benefits of a mandatory policy may outweigh the liability risks. However, employers should remain vigilant for further guidance from the EEOC and OSHA, which will hopefully clarify an employer’s rights and responsibilities with respect to mandating staff obtain a COVID-19 vaccination.

Saxton & Stump attorneys [Rick Hackman](#) and [Collin Keyser](#) are available to discuss your questions related to the COVID-19 vaccine and how our [Employment](#) and [Risk Mitigation and Safety](#) groups can help you devise an appropriate plan to navigate this complex issue.

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