



Upcoming Order Mandating COVID-19 Vaccines for LTC Facilities

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Will there be a vaccine mandate for residents?

- **Short Answer: unlikely.**
- According to the CDC, the federal government does not mandate vaccinations for individuals.
- Requirements for Participation 42 CFR § 483.80(d)(v)
 - The resident, resident representative, or staff member has the opportunity to accept **or refuse a COVID-19 vaccine**, and change their decision.
- Resident Rights and Vaccine Refusal under 42 CFR 483.10(b), (c)
 - 42 CFR 483.10(c)(6) – *Planning and implementing care*. The resident has the right to be informed of, and participate in, his or her treatment, including: (6) The right to request, refuse, and/or discontinue treatment, to participate in or refuse to participate in experimental research, and to formulate an advance directive.
 - 42 CFR 483.10(b)(2) – The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights and to be supported by the facility in the exercise of his or her rights as required under this subpart.
- No retaliation against residents for refusing the vaccine.

Vaccines for Residents

Additional Federal Vaccine Requirements

- May 11, 2021 – CMS Establishes Long-Term Care Facility Vaccine Immunization Processes for Residents and Staff.
 - CMS Regulation § 483.80(d)(3)(i)-(vii) – vaccine education & offering vaccine.
 - LTC facilities must develop and implement policies to ensure the following:
 - Alert facility to the availability of the Covid-19 vaccine . . . ;
 - Education is provided to residents and staff member before Covid-19 vaccine is offered;
 - Education is provided for each additional vaccine dose;
 - Residents (and staff members) have the right to accept or refuse the vaccine and change their minds;
 - Facility maintains documentation related to resident's and staff's Covid-19 vaccinations.
 - CMS Regulation § 483.80(g)(1)(viii)-(ix) – reporting requirements.
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Even if a Facility Could Mandate a Vaccine, How Would it be Enforced?

- Involuntary Discharge or Transfer?
- Medicare and State laws protect residents from involuntary termination
- Iowa: 481— 58.40(1) Involuntary discharge or transfer permitted. A facility may involuntarily discharge or transfer a resident for only one of the following reasons:
 - a. Medical reasons;
 - b. The resident's welfare or that of other residents;
 - c. Nonpayment for the resident's stay, as described in the contract for the resident's stay
- Medicare: 42 C.F.R §483.15(c)(1)(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless— ... (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident; (D) The health of individuals in the facility would otherwise be endangered; ... (ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to § 431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to § 431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility.

Federal Fair Housing Law Liability?

- The Fair Housing Act (FHA) applies to IL (possibly AL) and prohibits (1) discrimination based on protected factors of race, color, national origin, religion, sex, familial status, and disability, (2) refusing reasonable accommodations for persons with disabilities seeking housing, and (3) some inquiries regarding disability.
- Although COVID-19 vaccination status is not a protected class and lack of COVID-19 vaccination not a disability, a facility might be alleged to have engaged in FHA-prohibited behavior while making rental decisions based on COVID-19 vaccination.
 - Examples:
 - Refusing to rent to or make reasonable accommodations for a person who is not COVID-19 vaccinated because of an auto-immune disability.
 - Making housing decisions based on an assumption that a prospective resident is not COVID-19 vaccinated because of their national origin, religion or another protected factor.

Iowa Specific Rules

- **Healthcare Providers CAN mandate vaccines, but just visitors.**
 - For vaccine mandate rules for residents, best to look to federal guidelines at the moment.
- **Proof of vaccination is prohibited in Iowa.**
 - Applies to Businesses and Government Entities.
 - Does NOT apply to Health Care Facilities.
 - Health Care Facilities include the following: residential care facilities, nursing facilities, intermediate care facilities for persons with mental illness, intermediate care facilities for persons with intellectual disabilities, hospice programs, elder group homes, and assisted living programs.
 - See Iowa Code § 686D.2(3).
 - See House File 889, 27B.2 Proof of vaccination.

So, in the time of Delta, how do facilities increase vaccination rates among residents?

- Ask resident permission to talk about vaccination with him/her/them.
- Start the conversation with empathy and understanding.
- Listen to the resident's concerns.
- Leave the door open for future conversations.
- Discuss the benefits of vaccination.
- Provide clear message about vaccine availability.
- CDC Resources:
 - [Talking with Patients about COVID-19 Vaccination | CDC](#)
 - [Answering Patients' Questions about COVID-19 Vaccination | CDC](#)

Vaccines for Employees

CMS, CDC Order - Federal Vaccine Mandate for Nursing Home Staff

- **Announced August 18, 2021** – the Biden-Harris administration announced that HHS shall develop regulations where nursing homes must require that all of their staff be fully vaccinated against COVID-19 as a condition for participating in Medicare and Medicaid programs.
- **Emergency Regulation being developed (maybe like ETS?)**
 - **Expected in September**
- **Applies to Medicare and Medicaid-participating *nursing homes***
 - Applicable to approximately 15,000 nursing home facilities.
 - Approximately 1.6 million employees (1.3 million residents).
- **Requires staff vaccinations (not resident vaccinations)**
- **Does not conflict with Iowa's vaccination passport ban which specifically exempts healthcare providers and employers**

Sample Policy (pre-Biden order) for Employees

For Demonstrative Purposes Only

EMPLOYEE COVID-19 VACCINATION POLICY

Purpose

In accordance with the [Company Name]'s duty to provide and maintain a workplace that is free of known hazards, we are adopting this policy to safeguard the health of our employees and their families; our customers and visitors; and the community at large from infectious diseases, such as COVID-19 or influenza, that may be reduced by vaccinations. This policy is intended to comply with all applicable laws and is based on guidance from the Centers for Disease Control and Prevention (CDC) and local health authorities, as applicable.

Scope

This policy applies to all [Company Name] employees. It does not apply to volunteers, customers and/or visitors. The Policy is effective immediately.

Policy

Prior to working in [Company Name's] office(s), attending an in-person meeting, or any other in-person company-sponsored event, [Company Name] employees must either (a) establish that they have received the designated vaccine(s); or (b) obtain an approved exemption as a reasonable accommodation. The process for seeking an accommodation is explained below. Employees who do not fulfill one of these two requirements will not be permitted to work in-person in [Company Name's] offices, attend in-person meetings, or any other company-sponsored in-person events.

Employees will be notified by the Human Resources department as to the type of vaccination(s) covered by this policy. Employees will be required to provide either proof of vaccination from an authorized healthcare provider or an approved reasonable accommodation to be exempted from the requirements.

[Company Name] will pay for all employee vaccinations. Vaccinations should be run through employees' health insurance where applicable and otherwise be submitted for reimbursement.

All employees will be paid for time away from work used to obtain vaccinations. Employees are to work with their team to schedule appropriate time to comply with this policy.

Reasonable Accommodation

Employees in need of an exemption from this policy due to a medical reason, or because of a sincerely held religious belief must submit a completed Request for Accommodation form to the Human Resources department to begin the interactive accommodation process as soon as possible. Accommodations will be granted where they do not cause [Company Name] undue hardship or pose a direct threat to the health and safety of others in the workplace, or to the employee.

Please direct any questions regarding this policy to the Human Resources department.

Medical Exemptions

- **Prior EEOC Guidance**

- Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity.
- Does lack of vaccination pose a “direct threat:” a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation.
- Individualized assessment: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.
- Potential sources of medical information for the assessment: level of community spread at the time of the assessment, statements from the CDC, the employee’s health care provider.
- Possible reasonable accommodations: mask, staggered shift, changes in the work environment, telework, reassignment to vacant position or different workspace.

Pregnancy

- Do not create a separate policy
- This would be included in medical exemption
- Make sure you are treating pregnancy the same as any other medical exemption request
- The following groups have recommended that pregnant people get vaccinated for COVID-19:
 - American College of Obstetricians and Gynecologists (ACOG) and the Society for Maternal-Fetal Medicine (SMFM) (July 20, 2021)
 - CDC (August 11, 2021)

Sample Medical Exemption Form, pg. 1

REQUEST FOR ACCOMMODATION: MEDICAL EXEMPTION FROM VACCINATION

To request an exemption from required vaccinations, please complete section 1 below and have your medical provider complete section 2 before returning this form to the Human Resources department.

Section 1

Name:

Date:

Title:

Phone Number:

I am requesting a medical exemption from the [Company Name] mandatory vaccination policy for the following vaccination(s):

COVID-19

I verify that the information I am submitting to substantiate my request for exemption from the [Company Name] vaccination policy is true and accurate to the best of my knowledge. I understand that any falsified information can lead to disciplinary action, up to and including termination.

I further understand that the [Company Name] is not required to provide this exemption accommodation if doing so would pose a direct threat to myself or others in the workplace or would create an undue hardship for [Company Name].

Employee Signature:

Date:

Sample Medical Exemption Form, pg. 2

Section 2: MEDICAL CERTIFICATION FOR VACCINATION EXEMPTION

Employee Name: _____

Dear Medical Provider,

The [Company Name] requires vaccination against COVID-19 as a condition of employment. The individual named above is seeking an exemption to this policy due to medical contraindications.

Please complete this form to assist [Company Name] in the reasonable accommodation process.

The person named above is my patient:

- ☐ Yes
☐ No

I have advised the person named above against receiving a COVID-19 vaccine:

- ☐ Yes
☐ No

I certify the above information to be true and accurate, and request exemption from the COVID-19 vaccination for the above-named individual.

Medical Provider Name (print):

Medical Provide Signature:

Date:

Practice Name & Address:

Provider Phone:

Religious Exemptions

- **Prior EEOC Guidance**
- Should be processed according to the same standards that apply to other accommodation requests (see above).
- Definition of religion is broad and protects beliefs, practices, and observances that may not be familiar.
- Assume an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance.
- **However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.**

Iowa Law – Duty to Accommodate

- The duty to accommodate in an alleged religious discrimination employment case requires the employer to explore and implement alternatives which are compatible with the employee's religious beliefs without (1) compromising the employment entitlements of other employees or (2) requiring the employer to incur more than *de minimis* costs.
- The degree of accommodation required has not been defined; the employer must simply make some effort to accommodate the employee's religious beliefs.
- Once an attempt to accommodate has been made which the employee views as inadequate, the question becomes whether additional accommodation would constitute “undue hardship,” which is something greater than hardship, proved by more than assumptions or opinions based on hypothetical facts.
- *King v. Iowa Civil Rights Com.*, 334 N.W.2d 598, 602 (Iowa 1983)

Religious Exemptions

- <https://www.verywellfamily.com/religious-exemptions-to-vaccines-2633702>
- Among the few religions with an absolute objection to vaccines include:
 - Churches that rely on faith healing
 - Church of the First Born, End Time Ministries, Faith Assembly, Faith Tabernacle, and First Century Gospel Church
 - The First Church of Christ, Scientist (Christian Scientist) believes in healing through prayer and that vaccines aren't necessary.
- No absolute objection, but some opposed:
 - Amish, Dutch Reformed, Muslim fundamentalists

Collective Bargaining

As a matter of law, requiring an employer to contravene a collective bargaining agreement is not reasonable, as it imposes an undue hardship on the employer.

Husinga v. Fed.-Mogul Ignition Co., 519 F. Supp. 2d 929, 964 (S.D. Iowa 2007)

(Specific question from member on this?)

Religious Support for Vaccines

- **Catholics:** Even for the vaccines that some parents question, especially those for hepatitis A, rubella, and varicella, which are cultured in cells that were originally derived from aborted fetuses, the Church teaches that "if no safe, effective alternative vaccines exist, it is lawful to use these vaccines if danger to the health of children exists or to the health of the population as a whole."
- **Jehovah's Witnesses:** Although Jehovah's Witnesses had a past opposition to vaccines, in 1952 they stated that vaccination "does not appear to us to be in violation of the everlasting covenant made with Noah, as set down in Genesis 9:4, nor contrary to God's related commandment at Leviticus 17:10-14."
- **Jews:** Confusion still exists among some people over the fact that since some vaccines contain components with porcine (pig) and gelatin components, then it must be against Jewish dietary laws for their members to be vaccinated. However, the use of vaccines is "judged based on concepts of medical law contained in halachic codes" and is therefore encouraged.
- **Muslims:** Except for areas where polio is still endemic, several imams and other Islamic leaders issued clear statements and fatwas describing how immunization is consistent with Islamic principles.
- **Hindus:** None of the four major branches of Hinduism are opposed to vaccines and countries that are majority Hindu, including Nepal and India, have high vaccination rates.

Religious Exemption Requests

- Be on the lookout for uniform requests
- One of our clients (not in Iowa) reported late last week that they received several identical requests for religious exemption after employers mandated the COVID-19 vaccine
- **Opinion:** likely an objective basis for questioning and could request additional supporting information.
- Also look for exemption requests after first dose
- State of Washington new guidance (yesterday):
 - “You assert that you have a sincerely held religious belief or religious conviction that prevents you from receiving the COVID-19 vaccine.” Yes/No
 - “You affirm/agree that you have never received a vaccine or medicine from a health care provider as an adult.” Yes/No

Sample Religious Exemption Form, pg. 1

REQUEST FOR ACCOMMODATION: RELIGIOUS EXEMPTION FROM VACCINATION

To request an exemption from required vaccinations, please complete and return this form to the Human Resources department.

Name:

Date:

Title:

Phone Number:

I am requesting a religious exemption from the **[Company Name]** mandatory vaccination policy for the following vaccination(s):

COVID-19

Describe your reason(s) for requesting a religious exemption:

I verify that the information I am submitting to substantiate my request for exemption from the **[Company Name]** vaccination policy is true and accurate to the best of my knowledge. I understand that any falsified information can lead to disciplinary action, up to and including termination.

I further understand that the **[Company Name]** is not required to provide this exemption accommodation if doing so would pose a direct threat to myself or others in the workplace or would create an undue hardship for **[Company Name]**.

Employee Signature:

Date:

Sample Religious Exemption Form, pg. 2

HR USE ONLY

Date of initial request:

Date certification received:

Accommodation request (circle one):

APPROVED

Date:

Specific Accommodation Details:

DENIED

Date:

Specific Accommodation Details:

Unemployment

- Iowa Code § 96.5 – employees not eligible for UE if they voluntarily quit **without good cause attributable to employer**
- Good cause attributable to employer (relevant to this topic):
 - illness, injury or pregnancy upon the advice of a licensed and practicing physician with employer's consent; when employee released back to work, no work available (and no other jobs in the meantime)
 - leave for 10 days or less (unless employer allows more time) for “compelling personal reasons;” when employee released back to work, no work available (only entitled to UE upon attempted return, not during leave)
- Iowa Administrative Code 871—24.26 (more on voluntary quit and good cause)
- Additional examples of good cause attributable to employer:
 - Unsafe working conditions
 - Unlawful working conditions
 - Intolerable or detrimental working conditions
- None of these seem to be met by requiring a COVID-19 vaccine as mandated by the federal government

Unemployment

- Iowa Administrative Code 871—24.26(1)
 - A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.
- Is a vaccine mandated by the federal government a substantial change in working conditions? Maybe. Is the requirement willful by employer? Technically yes, but no choice.
- Put employees through progressive discipline related to attendance
 - Each unvaccinated day past deadline: unexcused absences until you get to voluntary quit or remedied
- **Ultimately we just need to see what regulations say**

Questions?