

Eli's Hospice Insider

COVID-19: Weigh Your Options When Crafting COVID Vaccination Policy

Mandatory vaccinations come with a host of problems, experts warn.

Incentives may work better than penalties when it comes to staff getting the COVID-19 vaccine as it becomes more available.

After months of the pandemic and due to the risk level for patients, hospice agencies may initially want to make vaccination a mandate for all employees - especially visiting staff. But think twice before taking that step.

"Because there is no law or regulation that directly addresses this issue, employers considering a mandatory COVID vaccination policy should analyze how mandatory flu vaccination policies have been interpreted," recommend attorneys **Jan Hensel, Jacqueline Rau, and Thomas W. Hess** with law firm Dinsmore & Shohl. "In the absence of state or local law to the contrary, employers may require employees to get vaccinated from the flu," the attorneys allow in online analysis. But "the Equal Employment Opportunity Commission (EEOC) has emphasized that an employee may be exempt from a mandatory vaccine if the employee has a disability covered by the Americans with Disabilities Act (ADA) that prevents them from taking the vaccine," they say.

"An employee may also qualify for a religious exemption under Title VII of the Civil Rights Act of 1964," the Dinsmore attorneys point out.

Mandatory vaccination may also implicate other laws, such as the Rehabilitation Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act, the EEOC says in a question-and-answer set on COVID-19 updated Dec. 16.

On the other hand, employers have to consider issues like liability if they don't require vaccination - although that may be something Congress eventually weighs in on.

"There are risks and benefits attendant to both approaches," observe attorneys with Hall Render in recent analysis. "Does an optional vaccine policy result in increased absences due to work-related illness, workers' compensation claims and/ or professional liability for hospital-acquired conditions that might have otherwise been avoidable? Does mandating the vaccine create new workers' compensation risks and reasonable accommodation challenges?"



Plus: "Because either approach could negatively impact staff relations and retention during a time in which retention is critical, the employer-employee relationship will be a crucial consideration for health care providers during the vaccine policy planning process," the Hall Render attorneys point out.

The EEOC does allow that "if an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace," the EEOC says in its Q&As. But "this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities," the EEOC points out.

"One of the challenges we're going to be dealing with ... is that there is a shadow of politics over the vaccine," says **L.J. Tan** with the Immunization Action Coalition, an advocacy group that supports vaccinations. "As a result, there's some fear about whether the vaccine can be safe, whether it can be approved appropriately. Because of that shadow, I think

it's going to be extremely difficult for an employer to make COVID-19 vaccination a condition of employment," Tan told AARP.

Companies requiring the vaccination must be ready to enforce the requirement - including with termination, work with individual cases that require accommodation, and more, attorney **Shannon Farmer** with Ballard Spahr told the Philadelphia Inquirer newspaper.

Even in health care, employers are much more likely to encourage than require vaccination, the Inquirer notes.

In a resolution, the National Association for Home Care & Hospice endorses just that. NAHC "urges all providers of health care in the home to: encourage all home care and hospice staff to receive a COVID-19 vaccination at the earliest possible time consistent with vaccine guidance" and "provide the support necessary to gain access to vaccines for home care and hospice staff," among other vaccination-encouraging steps, the trade group says in a new resolution on the matter.

Likewise, the National Hospice & Palliative Care Organization "calls on all hospice and community-based palliative care providers, and those they serve, to avail themselves of the COVID-19 vaccine as soon as they have access," the trade group says in a release.

"Hospice and palliative care professionals are on the frontlines of health care delivery in this country. Not only are they serving the most vulnerable population with complex medical needs, but they are caring for people in their homes, interacting with family caregivers, and traveling throughout the communities they serve," NHPCO CEO **Edo Banach** says. "For their own protection, the safety of those under their care, and the welfare of their families and communities, NHPCO encourages these dedicated professionals to receive the COVID-19 vaccine."

Agencies should also encourage and support vaccination of patients and their caregivers, NAHC adds.

With this aim, the Centers for Disease Control and Prevention is offering a "vaccination communication toolkit" for healthcare providers to "use or adapt ... to build confidence about COVID-19 vaccination among your healthcare teams and other staff," it says. Ranging from posters to "I got my COVID-19 vaccination" stickers to sample social media messages, the tools aim to encourage vaccination.

Don't overlook: Wise providers "should anticipate questions and concerns from patients and the public such that employers may be well-advised to have media statements prepared to address their employee vaccination policy," Hall Render recommends.

The Hall Render counselors suggest steps to tackle the vaccination issue:

- Establish a planning committee that will determine whether vaccination is mandated or optional.
- If mandated, determine for which job classes/facilities; in what order of priority; and identify reasonable accommodation alternatives for those who are exempt.
- If mandated, develop vaccine exemption request forms and a review committee for requests.
- Develop vaccine policy and procedure, including a tracking system and reporting process.
- Train managers and supervisors on any new or modified policies.
- Appoint a designated spokesperson for questions on vaccinations from employees, the community, and the media.

Note: The EEOC Q&As are at

www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. The CDC's toolkit is at www.cdc.gov/vaccines/covid-19/health-systems-communication-toolkit.html.