

## MDS Alert

### Policies and Protocols: Understand How COVID-19 Vaccines Might Impact NFs

**If you don't already have a plan for employee vaccination, you're behind.**

Nursing facilities are trying to prioritize the safety of their residents and staff, but many realities of the pandemic are making things hard. Residents aren't thriving without social contact, staff are overwhelmed, and everyone is worried about whether the virus will hit their facility next, if it hasn't wreaked havoc already. While the COVID-19 vaccination may seem like the light at the end of the tunnel, there's a lot to figure out before we get there.

One major question to answer: Should facilities require that their employees get the vaccine?

#### Look to Policies for Flu Vaccine

While it's tempting, from a safety standpoint, to have a mandate that all employees are required to be vaccinated before coming to work, it may not be the best path forward.

"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.



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 said in a question-and-answer set on COVID-19, updated Dec. 16.

On the other hand, employers must 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 new 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?"

The long-term care industry is notorious for its staff turnover, and the reality of COVID plus the pressures of work only heighten the stakes. "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 said 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."

## Grapple with Partisan Perspectives

One big difference between the flu and the novel coronavirus is the way COVID-19 has been politicized. And nursing facilities need to figure out how to navigate the divide quickly, considering how many long-term care residents have already gotten sick or died and how many are still vulnerable.



"One of the challenges we're going to be dealing with ... is that there is a shadow of politics over the vaccine," said **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 termination, work with individual cases that require accommodation, and more, attorney **Shannon Farmer** with Ballard Spahr told the Philadelphia Inquirer newspaper. Even in healthcare, employers are much more likely to encourage than require vaccination, the Inquirer notes.

## Don't Waste Time

The American Health Care Association and National Center for Assisted Living (AHCA/NCAL) says that vaccination is an urgent matter.

"A one-month delay in distributing the vaccine to all long-term care residents and caregivers, could result in more than 20,000 of our residents losing their life when a vaccine could protect them. We're in a life or death race against the clock," said **Mark Parkinson**, president and CEO of AHCA/NCAL.

Many state leaders agree that long-term care residents and staff are priority recipients of the vaccination, and, in fact, some nursing homes have already received the vaccination and begun administering it to the residents and staff, as of publication. But experts are worried that not everyone will trust the safety of the vaccination. See story, page 4, for more information on how to communicate about the vaccine with residents, resident representatives, and staff.

With the aim of getting as many people vaccinated as quickly as possible, the Centers for Disease Control and Prevention (CDC) 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 said. Ranging from posters to "I got my COVID-19 vaccination" to sample social media messages, the tools aim to encourage vaccination.

Public figures and prominent politicians have also been consenting to receive their vaccinations while being filmed.

**Important:** 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 these 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.

