

Caring for the Ages



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Caring for our aging citizens has always been a national challenge. Has the pandemic changed that? **18**

Opening Panel Mourns a Tragic Year, Looks to a Hopeful Future

By Joanne Kaldy

“It’s been quite a year,” said Joanne Lynn, MD, a policy analyst at the Center to Improve Eldercare at Altarum, at the start of the Opening General Session at PALTTC21: the virtual Annual Conference of AMDA – The Society for Post-Acute and Long-Term Care Medicine. She and a panel of experts took time to reflect on the lessons learned during the pandemic and to share gratitude, pay tributes, and look ahead to a future they all agree — with concerted efforts to make some changes — is full of possibilities.

“This experience has been grueling and very difficult. COVID has presented some unique problems,” she said. “To have residents treated like cattle with no preferences of their own has been hard to take. Preferences of residents have only begun to appear in guidance documents.”

Dr. Lynn noted, “We took a million people and quarantined them in an upside-down way to protect them from the public. How well it worked is something we really need to pay attention to.”



Screenshot collage by Anna Boyum

Panelists share reasons to be optimistic despite challenges.

A Very Different Place

While we are in a “very different place” than we were even six months ago, “we still have some challenges to

tackle,” offered Sharon Brangman, MD, FACP, AGSF, a distinguished service

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Pitfalls, Policy and Practice for a Mandatory Vaccination Plan

By Janet K. Feldkamp, RN, BSN, LNHA, CHC, JD, and Yelena G. Katz, JD

As vaccines become more readily available and an increasing percentage of the population becomes vaccinated, employers in the post-acute and long-term care field are grappling with whether they can, or should, mandate COVID-19 vaccinations for their employees. This article will summarize some of the legal ramifications of mandating COVID-19 vaccines and will provide prac-

tical guidance for implementing such a policy. Guidance regarding COVID-19 in the workplace is evolving on the federal, state, and local levels, so employers are cautioned to monitor updates.

ADA

Current guidance from the Equal Employment Opportunity Commission (EEOC) suggests that private employers

can generally require their employees to receive the COVID-19 vaccine, but employers *must* make religious- and disability-related exceptions for employees in accordance with Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and state law (“Pandemic

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Pitfalls

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Preparedness in the Workplace and the Americans with Disabilities Act,” ADA, Rehabilitation Act, 29 CFR Part 1630, updated March 21, 2020; <https://bit.ly/3xCUqZj>).

Mandatory vaccines implicate two portions of the ADA: (1) Reasonable Accommodations [42 U.S.C.A. § 12112(b)(5)] and (2) Medical Examinations and Disability-Related Inquiries [42 U.S.C.A. § 12112(d)(4)(A)].

Reasonable Accommodations

An employee may be exempt from a mandatory vaccination requirement based on an ADA disability that prevents him or her from safely taking the vaccine. The employer’s responsibility pursuant to the ADA to engage in the “interactive process” with an employee is triggered by the employee notifying the employer of a request for an accommodation from the vaccine requirement. Although the ADA does not require an accommodation request to be put in writing, having documentation of the request is a good practice. The interactive process involves communication between the employer and employee (and often the employee’s health care provider as well, with written authorization from the employee) regarding the disability and possible reasonable accommodations.

In the context of accommodating an unvaccinated individual in the workplace, the EEOC instructs that employers must determine whether the unvaccinated individual poses “a direct threat [to the workplace] due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation’” (K.5, in “What You Should Know About COVID-19 and

the ADA, the Rehabilitation Act, and Other EEO Laws: Technical Assistance Questions and Answers,” updated Dec. 16, 2020; <https://bit.ly/3aVEQOP> [citing 29 C.F.R. 1630.2(r)]). To make that determination, the employer must perform “an individualized assessment of four factors”: (1) the period of time when the employee presents a risk to others in the workplace, (2) the nature and severity of the potential harm that the employee can cause while at work, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.

If the employer determines that this unvaccinated employee will pose a direct threat, the employer must assess the feasibility of making a “reasonable accommodation” to keep the employee at work while keeping other employees safe. The unvaccinated employee can be terminated only if the reasonable accommodations — remote work, protective gear, and social distancing, for example — are impossible or impractical to make without the employer suffering undue hardship. An “undue hardship” under the ADA is defined as “an action requiring significant difficulty or expense” [42 U.S.C.A. § 12111(10)].

The interactive process and the reasonable accommodations analysis are fact specific. The employer may be able to accommodate a particular employee’s disability-related inability to be vaccinated while not accommodating a different employee’s request, so long as the justification for the difference is not discriminatory (i.e., based on a protected characteristic).



Yelena G. Katz, JD

Medical Examinations and Disability-Related Inquiries

The ADA prohibits an employer from performing a medical examination of an employee or making a disability-related inquiry to an employee to determine “whether such employee is an individ-



Janet K. Feldkamp, RN, BSN, LNHA, CHC, JD

ual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity” [42 U.S.C.A. § 12112(d)(4)(A)].

Vaccination itself does not count as a medical examination. However, medical screenings conducted prior to vaccination to determine whether an individual may be vaccinated, trigger the ADA’s protections regarding disability-related inquiries because they are likely to elicit information about a disability. If an employer is involved in vaccinating its employees, the screening questions must be job related and consistent with business necessity (K.1, in “What You Should Know About COVID-19 and the ADA”).

To meet this standard, the employer must reasonably and objectively believe that an employee who fails to answer any question — and therefore fails to receive a vaccine — will pose a direct threat to the health and safety of themselves or others. This analysis applies only where the employer (or third party it contracts with) is mandating the vaccine rather than offering it on a voluntary basis.

Title VII

Title VII offers certain protections to employees who refuse a vaccine due to a sincerely held religious belief or practice [42 U.S.C.A. § 2000-e2]. Although courts have defined “religion” rather broadly, the term does not encompass social, political, or economic philosophies, which are largely not recognized as a religious belief or practice (“What You Should Know: Workplace Religious Accommodation,” Title VII, 29 CFR Part 1605, March 6, 2014; <https://bit.ly/3aWelsK>).

Employers should generally assume that an employee’s request for religious accommodation is based on a sincerely held belief. Requesting additional, supporting evidence is only appropriate if the sincerity of belief or its nature comes into question based on objective evidence available to the employer. Receiving a notice of inability to receive the COVID-19 vaccine for religious reasons obligates the employer to provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII. An undue hardship in this context means “more than

de minimis cost” to the operation of the employer’s business. This is a lower standard than under the ADA, but the employer may consider the same accommodations as discussed under the ADA (remote work, protective gear, social distancing, etc.).

If an employee cannot get vaccinated for COVID-19 because of a disability or for religious reasons, and reasonable accommodation cannot be made, then the EEOC guidance provides that “it would be lawful for the employer to exclude the employee from the workplace” (K.7, in “What You Should Know About COVID-19 and the ADA”). Before proceeding to termination, employers should consult with legal counsel to determine if any other rights under the EEO laws or other federal, state, and local regulations are implicated by the proposed termination.

OSHA

In 2009, the federal Occupational Safety and Health Administration (OSHA) issued an opinion letter in response to an employer’s questions about mandatory H1N1 influenza vaccinations. In its response, OSHA stated that “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 (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights” (Standard Interpretation: OSHA’s Position on Mandatory Flu Shots for Employees, Nov. 9, 2009; <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>).

The influenza vaccine in question had received final U.S. Federal Drug Administration approval whereas the COVID-19 vaccine has only been granted emergency use authorization. Although this guidance suggests that OSHA permits an employer to mandate the COVID-19 vaccine, the FDA status of the vaccine raises the possibility that an employee could refuse the vaccine based on it posing a health risk. If the employee has a medical condition that precludes vaccination, the employer’s policy should allow the employee to request alternative accommodations.

State Law Considerations

Health care employees are not new to mandatory vaccination programs. Indeed, several states have laws that require health care employers to offer the vaccine or to ensure that employees receive it, with exceptions. On the other hand, a number of states are beginning to consider passing legislation to prevent employers from mandating COVID-19 vaccinations and to protect those who refuse vaccinations. Employers should be aware of state laws and mandates that

MANDATING VACCINATION: KEY POINTS

- Current guidance from the Equal Employment Opportunity Commission (EEOC) suggests that private employers *can* generally require their employees to receive the COVID-19 vaccine, but employers *must* make religious- and disability-related exceptions for employees in accordance with Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and state law.
- Receiving a notice of inability to receive the COVID-19 vaccine for religious reasons obligates the employer to provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII.
- The ADA prohibits an employer from performing a medical examination of an employee or making a disability-related inquiry to an employee to confirm disability and determine its nature and/or severity.
- In the context of accommodating an unvaccinated individual in the workplace, the EEOC instructs that employers must determine whether the unvaccinated individual poses a threat in the workplace that cannot be eliminated by reasonable accommodation.
- The unvaccinated employee can be terminated only if the reasonable accommodations are impossible or impractical to make without the employer suffering undue hardship, i.e., “an action requiring significant difficulty or expense.”
- If an employee cannot get vaccinated for COVID-19 because of a disability or for religious reasons, and reasonable accommodation cannot be made, then the EEOC guidance provides that “it would be lawful for the employer to exclude the employee from the workplace.”

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may impact their mandatory vaccination programs

Drafting the Policy

Some employers may decide that they do not need all employees to receive the vaccine. For example, employers may consider differentiating by position, department, duties, or any other criteria. This is permissible so long as employers determine – in a non-discriminatory manner -- which employees will be required to get a COVID-19 vaccine. This means that the employer cannot require vaccination based on the age, disability status, or any other protected category of the employee.

The policy should be carefully drafted to:

- Define the scope of who is required to be vaccinated.
- Provide a deadline for employees to show proof of vaccination to the employer (this may depend on each state's vaccine rollout plans).
- Define the process for requesting an accommodation based on religion or disability, including noting how requests should be made and to whom, and whether a specific form should be submitted.
- Include the consequences for failing to provide proof of vaccination by the deadline without good reason.
- Address related issues, such as employee reimbursement for expenses incurred or time spent receiving the vaccine (e.g., employees can use paid time off [PTO] or sick time, or a special bank of PTO hours dedicated to receiving the vaccine) and options for employees who suffer side effects from receiving the vaccine (e.g., the employer allows a paid leave of absence during the time an employee is recovering from the side effects).

Implementation and Recordkeeping

Employers who institute a mandatory vaccination policy will need to implement a tracking system for fully and partially vaccinated employees. The employer should designate an individual or a small team to coordinate the implementation of the policy and the record-keeping component. This team should be trained regarding the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other laws applicable to an individual's personally identifiable information. The team should also be prepared to respond to employees' questions, document requests for accommodations, and be trained on how to engage in the interactive process with employees who request accommodations. Employers cannot disclose that an employee is receiving a reasonable accommodation nor can they retaliate against an employee for requesting an accommodation.

Read about the ethics of mandating COVID-19 vaccination on p. 15.

Employers may ask for proof of vaccination, such as a vaccine card, so long as the proffered proof does not contain medical information. The EEOC reasons that a request for proof of COVID-19 vaccination is not likely to elicit information about a disability, but, asking subsequent questions, e.g., why the employee did not receive vaccination, might. To avoid potentially running afoul of the ADA or the Genetic Information Nondiscrimination Act of 2008 (GINA), employers should consider warning employees not to provide any additional medical or genetic information as part of the proof of vaccination. (GINA may also be implicated in the prescreening questions discussed under the ADA section. For example, the prescreening questions may ask about family medical history or the immune systems of family members.)

Employers do not need to keep a copy of the vaccination card (or other type of proof provided by the employee). If they choose to keep such proof, this information constitutes personal data relating to an employee and should be collected, treated, and stored as confidential medical information. The employer should keep the proof of vaccination in confidential files (similar to employee medical files) that are separate from employee personnel files and accessible only to the trained individuals tasked with implementing the vaccination policy. Those with access must not disclose which employees have or have not been vaccinated.

For employees who refuse to be vaccinated for reasons other than disability and religion, employers must decide the consequences. Employers may ban these employees from entering the workplace and/or terminate their employment. As a practical matter, employers should not be too quick to terminate employment and should consider working with the employee to address his or her concerns. Finally, employers who choose to implement a mandatory vaccination policy must implement it consistently to avoid discrimination claims


Other Considerations

- Staffing. Many employers are concerned about losing employees with a COVID vaccine mandate. This is a valid concern and must be weighed as one of the potential ramifications of such action. Each provider must consider all risks and benefits of a mandate and its impact on resident and employee health, operations (including staffing), and potential litigation.
- Unions. Employers of unionized workers also need to consider obligations owed to union members based on the terms of the collective bargaining agreement. Although, through its General Counsel, the

National Labor Relations Board has recognized a greater unilateral right in employers to institute safety programs in light of the pandemic, employers should still implement mandatory vaccination policies with caution. The collective bargaining agreement may outright prevent mandatory vaccinations or may give rise to a duty to bargain.

- Workers' Compensation. If an employer chooses to vaccinate employees in the workplace, depending on the state where the employer operates, the employer should consider whether any alleged injuries sustained from the vaccination will trigger workers' compensation insurance coverage.

As of the date of this writing, private employers operating PALTC facilities generally may implement mandatory vaccination programs for their employees so long as they allow for accommodations for disability or religious-related reasons. However, the law regarding all aspects of this pandemic is rapidly changing. Employers who institute mandatory vaccination programs must also continue following general safety precautions because a mandatory vaccination policy does not exempt an employer from complying with state and local

regulations regarding COVID-19 and public health. 

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The information presented is accurate as of the date of publication. Please consult the sources.

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