

# COVID-19 Updates for Nursing Homes and Long-Term Care Facilities

On August 18, 2021, President Biden announced that his administration would require all nursing home staff be vaccinated against COVID-19 as a condition to continue to receive Medicare and Medicaid funding. The same day, the Centers for Medicare and Medicaid Services (CMS) announced it would develop emergency regulations to enforce President Biden's initiative. CMS indicated it will issue the regulations by the end of September 2021.

In light of this announcement, nursing homes should review their obligations related to mandatory vaccination programs. Specifically, nursing homes should be prepared to administer a mandatory vaccination policy and to accommodate employees who qualify for accommodations under Title VII of the Civil Rights Act (Title VII) and the Americans with Disabilities Act (ADA).

Under Title VII, an employee with a "sincerely held religious belief" against vaccines may be legally exempt from being vaccinated. An employer does not have to honor an employee's religious accommodation request if the accommodation would pose an undue hardship to the employer. In the religious accommodation context, an accommodation constitutes an undue hardship when it imposes more than de minimis cost on the employer's business operations. This can include an accommodation that would pose a health or safety risk in the workplace.

Similarly, employees may be exempt from being vaccinated if they qualify for an accommodation under the ADA. Like Title VII, employers may not have to honor disability accommodation requests if the accommodation would pose an undue hardship to the employer.

Employees may also be exempt if they can show a medical reason for not receiving the vaccination such as an allergy to any of the ingredients of the vaccination or other reasonable medical reason.

Employers in the health care industry may be able to demonstrate that vaccination accommodations pose an undue hardship on their business because of employees' proximity to vulnerable patient populations and for patient safety. However, employers should note that the undue hardship standard under the ADA is harder to demonstrate than the standard under Title VII. Under the ADA,

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an accommodation constitutes an undue hardship if it causes a significant financial burden, is unduly extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

At this point, the mandatory vaccination requirement does not appear to apply to assisted living facility staff, hospice staff, hospital or health system staff, or other health care staff. Since most of these facility types directly or indirectly involve Medicare or Medicaid on some level, it's not clear whether the CMS emergency regulations will apply.

Nursing homes and other employers in the health care industry who wish to implement a mandatory vaccination policy need to do the following:

1. Draft and adopt a mandatory vaccination policy;
2. Notify employees of the policy; and
3. Consistently apply the policy.

If an employee does not comply with the policy and is not exempt for religious or health care reasons pursuant to Title VII or the ADA, the employer must discipline the employee, which may include termination.

The mandatory vaccination policy should clearly identify the process for employees to provide evidence of vaccination, such as providing a copy of their vaccination card or a redacted print out from the Wisconsin Immunization Registry (WIR). Employers should not search the WIR to verify their employees' COVID-19 vaccination status.

According to guidance from the Wisconsin Department of Human Services (DHS):

- Nursing homes and assisted living facilities cannot require their residents to receive the COVID-19 vaccination. Nursing homes and assisted living facilities should continue to provide fact-based education to their residents regarding the COVID-19 vaccines.
- Nursing homes and assisted living facilities should be routinely [testing](#) unvaccinated staff at intervals based upon the county positivity rate for the county in which the facility is located.
- Eye protection (i.e., face shields) should be worn in addition to masks by nursing home and assisted living facility staff any time such staff is in a resident

care area.

- Nursing homes and assisted living facilities must continue to allow visitation, including evening visitations, regardless of visitor vaccination status, pursuant to resident rights regulations and in accordance with DHS and CDC guidance. A facility that denies visitation by a visitor who is otherwise properly screened and approved by a resident based upon the visitor's vaccination status risks receiving a visitation violation citation.
- Nursing homes and assisted living facilities should continue to actively screen visitors, residents and staff in accordance with DHS and CDC guidance and the requirements from OSHA under its [Emergency Temporary Standard on COVID-19](#). DHS officials report that the most common way COVID-19 is entering nursing homes and assisted living facilities is through facility staff working while they are symptomatic (such staff frequently believe they are merely experiencing allergies or the common cold), so we anticipate staff screening policies and procedures to become an area of increased focus during DHS surveys. To the greatest extent possible, nursing homes and assisted living facilities should have a staff member or trained volunteer actively conducting symptom screenings of staff. If a facility does not have sufficient staff or trained volunteers available to actively screen their staff and instead implements a system of staff self-screening, the facility should have clear policies and procedures in place regarding such self-screening and maintain documentation evidencing the active enforcement of such policies and procedures. Such policies and procedures should include:
  1. Procedures for appropriate supervisors to check the self-screening documentation shortly after the start of each shift;
  2. A means for such supervisor to record checking the self-screening documentation; and
  3. Such supervisor actively following up each shift with any staff that did not complete the self-screening documentation for that shift or whose answers indicate the staff member should be tested or not working that shift.

Facilities relying upon the honor system alone with respect to staff self-screening are at risk of receiving a citation from DHS.



If you are a nursing home or an employer in the health care industry and you have questions regarding mandatory vaccinations policies, the COVID-19 vaccine, visitations or resident, staff and visitor symptom screening, contact [Robert Lightfoot](#), [Tristan Dollinger](#), [Shannon Toole](#) or any Reinhart attorney in our Health Care or Labor and Employment practices.

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