

# COVID-19 Vaccination Federal Mandate for Staff

## 8.22.21

### Top 15 Things to Know About Vaccinating Staff

COVID-19 has certainly taken its toll on the nursing home industry where staffing was a challenge even prior to the COVID-19 pandemic. The recent directive by the federal government that is mandating that **all employees of skilled nursing facilities** to be **COVID-19 vaccinated** on or about October 18<sup>th</sup>, 2021, (the estimated last day for final COVID-19 Vaccine shot on October 4, 2021) further compounds the staffing crisis and could result in significant negative ramifications to the clinical, financial, and operational performance of nursing facilities.

This new federal mandate comes shortly after the May 11<sup>th</sup>, 2021 regulation requiring nursing homes to **report weekly the status of completed COVID-19 vaccinations** for both **residents and staff** to Centers for Disease Control and Prevention's (CDC) National Healthcare Safety Network (NHSN).

"On **May 11, 2021**, the administration requires LTC facilities to **report weekly COVID-19 vaccination status data for both residents and staff**. The new vaccination reporting requirement will not only assist in monitoring uptake amongst residents and staff but will also aid in identifying facilities that may need additional resources and/or assistance to respond to the COVID-19 pandemic." CMS Press Release

#### 1. Download CMS Letter COVID-19 Vaccine Tracking May 11, 2021

#### 2. Download Final Rule COVID-19 Vaccine Tracking May 13, 2021

"On **August 18, 2021**, the administration said **nursing homes must vaccinate their staff** against COVID-19 if they want to **continue receiving federal funding**." CMS Press Release

On August 20<sup>th</sup>, 2021, Mark Parkinson, the President and CEO of the American Health Care Association and National Center for Assisted Living (AHCA/NCAL), made the following statement regarding the Federal requirement that nursing home staff must be vaccinated against COVID-19 in a forthcoming regulation:

"We appreciate the administration's efforts to increase COVID-19 vaccinations in long term care. Unfortunately, this action does not go far enough. The **government should not single out one provider group for mandatory vaccinations**. Vaccination mandates for health care personnel should be applied to all health care settings. Without this, nursing homes face a disastrous workforce challenge.

"Focusing only on nursing homes will cause COVID-19 vaccine-hesitant workers to **flee to other health care providers** and leave many centers without adequate staff to care for residents. It will make an already difficult workforce shortage even worse. The net effect

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of this action will be the opposite of its intent and will affect the ability to provide quality care to our residents. We look forward to working with the administration in the coming days to develop solutions to overcome this challenge.”

### 3. Download Mark Parkinson 8.20.2021 Letter

Advocates and lobbyists across the United States are requesting that States implement regulations that do **not exclusively direct** the COVID-19 vaccine mandate for staff solely at nursing homes, but instead, apply a regulation **that covers all health care workers regardless of the healthcare setting.**

States have already adopted this global concept including, Maine, Maryland, New York, California, and Rhode Island.

(**Reminder:** If a state regulation is different from a federal regulation, apply the more stringent regulation.)

**Currently, approximately 62% of workers in the nursing home industry are vaccinated.**

The fear of a greater staffing crisis is real. In order to help skilled nursing operators effectively implement the mandated COVID-19 vaccination requirements, this article provides the **top 15 things** providers need to know about **COVID-19 vaccination** of **persons** entering the nursing home.

#### 1.) Develop a Policy and Communicate Immediately

Be sure to effectively communicate the facility/company policy and process to residents, employees, contractors, volunteers, and other health care providers.

### 4. Download DRAFT COVID-19 Vaccine Policy and Procedure Template

#### 2.) Know the Rules

First and foremost, understand who needs to be vaccinated. To simplify, everyone that enters the facility (**except for visitors**) require a COVID-19 vaccination.

This applies to all onsite workers including employees, independent contractors, volunteers and providers of goods and services engaged in work in healthcare.

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**All employees**, regardless if they are licensed or not, are **required to be vaccinated**. Any and all contractors, regardless of type of work performed i.e., vendor, agency nurse, etc. This also includes all volunteers, i.e., activities, entertainment as well as other health care providers i.e., home health, hospice, therapy, etc.

At this time, visitors are not required to provide proof of vaccination.

### 3.) Exemptions

There are two situations in which an employee can become exempt from obtaining a COVID-19 vaccination. The first one is for **medical reasons** and the second one is for **religious reasons**. In both of these instances, the skilled nursing facility is responsible to offer **reasonable accommodations** (further as discussed in #4 below).

#### a.) Medical Exemption

An employee seeking a medical exemption must submit **some form of documentation** from their health care provider. HHI recommends utilizing a COVID-19 exemption status form.

- Employers need to rely on health care professional's advice and can seek clarification only.
- Employers can require the employee to become vaccinated if
  - There is a **direct threat**, and no reasonable accommodation reduces that threat, or
  - The **accommodation causes undue hardship** to the employer ("an action requiring significant difficulty or expense").
- Employers must **process the exemption request** even when it is anticipated that know reasonable accommodations are not feasible.

## 5. Download Sample COVID-19 Vaccine Medical Exemption Form

#### b.) Religious Exemptions

Religion is broadly defined as "all aspects of **religious observance and practice** as well as **belief**" that is:

- New or uncommon beliefs.

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- Beliefs not hard for a formal church or sect, only subscribed to by a small number of people.
- Can be “religious” even if the employee is affiliated with a religious group that does not espouse the same beliefs, observances, or practices, or if a few or no other people adhere to the same beliefs.
- The employee must show a “**sincere and meaningful**” belief.
- The employer must assume that a request is based on sincerely held religious beliefs.
- The employer **may request supporting documentation** if:
  - The employer has a “bona fide doubt” or an “objective basis” for questioning the religious nature or sincerity of the belief, or
  - Verification from a third party does not have to come from a clergy member or fellow congregant; a first-hand explanation may be sufficient
- The employer **can require vaccination** if no reasonable accommodation can be provided without **undue hardship to the employer** (“more than a de minimis” cost or burden).

Challenging the religious exemption is a very difficult endeavor. HHI recommends caution and to seek legal counsel if this type of situation arises in your facility.

## 6. Download Sample COVID-19 Vaccine Religious Exemption Form

### 4.) Reasonable Accommodations

Employers must provide reasonable accommodations to employees with:

- **Disabilities,**
- **Pregnancy** that prevents them from being vaccinated,
- Closely held **religious beliefs** that prevent them from being vaccinated.

The employer must engage in the “**interactive process**” with the person requesting the exemption. This means that the designated staff person should **gather information** on the request for exemption, **discuss the request** with employee, **consider possible accommodations**, and then **decide** what, if any, accommodations to provide and **document the entire process with a letter** to the employee.

The letter should include:

- **Acknowledging** the staff person’s request,

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- **Mentioning** conversations that occurred.
- **Stating** decision made, and
- Providing **basis for decision**.

In addition to the above-mentioned points for the letter, the employer must be diligent in:

- Attaching all **supporting documentation**, and
- Maintaining **confidentiality** on both the staff person's vaccination status and reasonable accommodations provided.

Please note, the employer may exclude the employee from workplace while the decision is being determined.

#### Examples of Reasonable Accommodations

- **COVID-19 Testing:** Requiring the employee to be COVID-19 Tested on a weekly basis.
- **Enhanced PPE (Personal Protective Equipment):** Providing the employee with additional PPE for the employee to wear on a regular basis.
- **Working Remotely:** Allowing the employee to work in a remote setting , however, this may not be allowed if the employee has a role that is considered a direct care position.
- **New role or Position:** Offering the employee a different role in the organization.

A final important component regarding reasonable accommodations is that the employer is **equally responsible** for providing **reasonable accommodations** to all staff even if the staff is from a **contract staffing agency or a vendor**. These staff persons qualify for the same exemption and reasonable accommodations as in-house staff. This applies to any contractor regardless of the kind of work rendered.

#### 5.) Enforcement

The Department of Health, CMS and other State and Federal Agencies will be allowed to request proof of vaccination at any time. The protocol for any complaint will follow the normal complaint and investigation processes within the Federal Guidelines. Citations will fall under an F-Tag.

#### 6.) Requirements of Participation (RoP) Medicare and Medicaid Program

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The Federal COVID-19 vaccination staff mandate requiring all workers to be fully vaccinated against COVID-19 will be a condition of participating in the Medicare and Medicaid programs and necessary to receive funding.

#### 7.) COVID-19 Vaccine Policy Elements

Drafting a COVID-19 vaccine policy is the first and most important step that each provider should initiate immediately. Key elements to be highlighted in the policy should include, but not limited to:

- The **effective date** of the required vaccination including specifying the date in which the last dose can be given in order to meet the deadline.
- Clearly identify exactly **who must be vaccinated**.
- Describe where the employees can **obtain the COVID-19 vaccine**.
- Outline the COVID-19 Vaccine **verification requirements** and process.
- Pay and Paid time off (further as discussed in #7 below).
- **Consequences** of not being vaccinated.
- **Reasonable accommodations** statement and practice.
- Safety protocols.

#### 8.) Hiring New Employees

- Do **not** request for proof of vaccination **before person is officially hired**.
- Do **not** request proof of vaccination **during the interview**.
- Be sure that the **offer for employment** only exists **if the employee** provides proof of vaccination. This proof is expected as soon as the candidate accepts employment.
- The employment offer should be **contingent** upon obtaining **full vaccination** or an **exemption**.
- New hire must provide **proof of vaccination** as soon as they accept the offer.
- Offer **delayed start** date for unvaccinated new hires.
- May offer a **bonus** contingent upon vaccination combined with a predetermined period of work.

#### 9.) Proof (Verification)

There are only **three mechanisms** that employers can accept as **documentation** to verify vaccination. **Employers must obtain 1 of the below 3 documents for proof of vaccination.**

- a) Copy or photo of **CDC vaccination card**.

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- b) Documentation from a **health care provider** or **electronic health record**.
- c) Documentation from the **state immunization information** system.

#### 10.) Vaccination Records

**Vaccination records** are **confidential medical records** which means they have to be maintained in a confidential manner. HHI recommends assigning a small group of people for the process of verifying documenting and maintaining these records. Begin thinking about the process and identifying all of the groups of people that need to be vaccinated.

#### 11.) Data Storage

Providers must identify the individual or team responsible for **data storage** i.e., for viewing, maintaining, and gathering the proof of vaccination records for all individuals while ensuring that information is stored in a **confidential location** with restricted access.

HHI recommends **maintaining a log** (that keeps track of the proof) that is also stored in a separate and confidential location. If the log is saved on a server, ensure it is located in a private folder with restricted access.

This data base of information stores the details for all the individuals that the provider has obtained proof of COVID-19 vaccination or the documentation supporting a reasonable accommodation. This method is critical for access when and if a state or federal agency requests provider systems proof or if the provider is responding to a complaint investigation

Currently, there is no electronic system that allows employers to verify vaccination.

#### 12.) Verification Process

Another key element in this COVID-19 Vaccination process is to establish procedures for monitoring, tracking, viewing, and maintaining records of verification documents.

Draft policies identifying the **designated staff person/department** who will:

- Verify COVID-19 vaccination.
- Maintain confidential storage of all records.
- Implement a log to easily track individuals who have provided proof of vaccination.

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- Notify employees, contractors, volunteers, and other health care provide on the requirements for vaccination.
- Communicate to employees, contractors, volunteers, and other health care provide how they must provide proof of vaccination (prior to visit or start of visit).
- Establish a check-in process at all facility entrances.
- Confirm all entering individuals are either a visitor or have provided proof of vaccination.
- Implement a process for handling Individuals who are not visitors and who have not provided proof of vaccination.

Persons	Verification Process
Employees	<ul style="list-style-type: none"> <li>• Employee provides copy before defined <b>DATE</b>.</li> <li>• Reasonable accommodations must be provided.</li> </ul>
Contractors	<ul style="list-style-type: none"> <li>• Contracting entity provides <b>proof before visit</b>.</li> <li>• Check-ins point for all others.</li> <li>• Reasonable accommodations should be handled by contractor, may require community participation for health care professional from staffing agency.</li> </ul>
Volunteers	<ul style="list-style-type: none"> <li>• Volunteer agencies provide <b>proof before visit</b>.</li> <li>• Volunteer schedules time to provide verification.</li> <li>• Check-ins point for all others.</li> <li>• Reasonable accommodations must be provided.</li> </ul>
Other Health Care Providers	<ul style="list-style-type: none"> <li>• Health care professional schedules time to provide, when possible.</li> <li>• Check-ins point for all others.</li> <li>• Reasonable accommodations must be provided.</li> </ul>

### 13.) Employee Pay and Employee Paid Time Off for Getting COVID-19 Vaccinated

Employees must pay current employees for time spent receiving the mandatory COVID-19 vaccine. There are multiple different configurations to handle this requirement and attention is best used by customizing employee pay to the facility specific benefits. A few options discussed below include the **OSHA Reasonable Time Off Requirement** and **COVID-19 Vaccine Time Bank**.

#### OSHA Reasonable Time Off Requirement:

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The OSHA Guidelines discuss allowing employees to obtain the COVID-19 vaccination during working hours. In these instances, be mindful of managing the timing of vaccinations to prevent scheduling conflicts and a deficit of staff to provide care and services.

Per OSHA, the reasonable time off hours for each COVID-19 shot:

- **4 hours per COVID-19 shot** to schedule, travel to and from, and receive vaccination.
- **8 hours per COVID-19 shot** for time off due to **side effects** from vaccination.
- These times should **not be included** in **overtime** calculations.

#### COVID-19 Vaccine Time Bank

A separate COVID-19 vaccination timebank is not required, however, if the employer requires employees to use existing hours of paid sick time or vacation time, then these hours will need to be tracked. In addition, the employer must ensure that individuals without 8 hours available in their benefit package, still receive 8 hours per shot to recover.

#### 14.) American Rescue Plan Act (ARPA)

The ARPA extended the Families First Coronavirus Response Act (FFCRA) from **April 1, 2021 through September 30, 2021** to qualifying employers that voluntarily chose to continue to provide Emergency Paid Sick Leave (EPSL) or Emergency Paid Family Leave (EPFL).

The FFCRA required entities (other than health care providers) to provide paid emergency sick leave for quarantining or isolating staff related to COVID-19 **expanded to include COVID-19 vaccination time**

- Up to 10 days of paid leave to obtain and recover from COVID-19 vaccination
- Applies to employers with fewer than 500 employees

The FFCRA has required a covered employer to provide a minimum amount of paid time off for EPSL for one of five pandemic-related reasons:

- The employee is subject to a government **quarantine or isolation order**.
- The employee is advised by a health care professional to **self-quarantine**.

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- The employee is **experiencing COVID-19 symptoms** and seeking a medical diagnosis.
- The employee is **caring for an individual** who is subject to a government quarantine or isolation order, or who has been advised to self-quarantine by a health care professional.
- The employee is **caring for a son or daughter** whose school or place of care has been closed or whose childcare provider is unavailable.

The ARPA has created broader coverage for these categories. Specifically, with respect to one through three above, an employee is entitled to full payment (100 percent) of his or her daily wages, up to \$511 per day and the tax credit will likewise be provided for wages paid up to \$511 per day. With respect to four and five, an employee is entitled to payment that is at least two-thirds of his or her daily wages, at least up to \$200 per day and the tax credit will likewise be provided for wages paid up to \$200 per day.

The ARPA has expanded the reasons for which an employer must provide EPFL. The expanded reasons include:

- Employee is seeking or **awaiting the results of a diagnostic test** for, or a **medical diagnosis of COVID-19**,
- Employee has been **exposed to COVID-19**,
- Employer has requested such **test or diagnosis**,
- Employee is obtaining **immunization** related to COVID-19, or
- Employee is **recovering from any injury, disability, illness, or condition** related to such **immunization** after 'public health emergency.

It is voluntary but employers who offer this are eligible tax credits to cover the cost of the time of staff getting vaccinated. In these instances, it is suggested that the employer **allocate a separate mechanism to track dollars** related to getting and recovering from the COVID-19 vaccine.

## 7. Download American Rescue Plan Act (Tax Credits) August 12, 2021

### 15.) Non-COVID-19 Vaccinated Employees Consequences

For those employees that are not yet COVID-19 vaccinated and do not have a medical or religious exemption, the **employer has two options**:

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- Place the employee on leave, or
- Terminate the employee.

#### Leave of Absence

For those employees who are **not yet vaccinated** and do not have a medical or religious exemption, employers should engage in a conversation to explore the rationale for non-vaccination. The employer may find many contributing factors such as, scheduling issues, recent COVID diagnoses (thus too soon to obtain vaccination), no access to an appointment, or even minimal to no access to a physician.

In these instances, in which employees are actively demonstrating an effort to obtain vaccination, the employer can place the employee on leave while the process evolves. This allows the employer to maintain a positive connection with the employee and affords a seamless and expeditious return to work when the vaccination is received.

#### Termination or Leave

For those employees who are **not yet vaccinated**, who do not have a medical or religious exemption, and who are not demonstrating any attempt to discuss, resolve or obtain a vaccination, the employer can **place the employee on leave or terminate** the employee.

Choosing the option to place this type of employee **on leave** reinforces the provider's relationship to the employee, maintains the rapport and provides the employer an opportunity to rehire the employee, if and when, the mandatory vaccination requirement changes.