

Can Our Health Center Mandate the Vaccine and Other Frequently Asked Questions (FAQs) and Answers

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Note: this document summarizes current legal parameters and general employment regulations when considering an employee vaccine mandate. This is not a document providing legal coverage or formal opinion and is instead intended to concisely inform the reader on key consideration and applicable guidance. Health centers should consult with local counsel to ensure compliance with state and local public health and employment requirements. This document will be updated by NACHC and FTLF in accordance with emerging conditions related to the COVID-19 pandemic. Please check the NACHC website COVID page for updates, at: [Novel Coronavirus \(COVID-19\) Information and Resources for Community Health Centers – NACHC](#)

UPDATE: September 09, 2021 -President Biden announced a COVID-19 vaccine requirement for all staff within Medicare and Medicaid-certified facilities, which includes FQHCs. See facilities list at <https://www.cms.gov/Outreach-and-Education/Find-Your-Provider-Type/Facilities/Facilities-page>

CMS is developing an Interim Final Rule with Comment Period that will be issued in October. CMS expects certified Medicare and Medicaid facilities to act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements. See [the CMS press release](#) in which they indicate health care workers employed in these facilities who are not currently vaccinated are urged to begin the process immediately. Facilities are urged to use all available resources to support employee vaccinations, including employee education and clinics, as they work to meet new federal requirements.

NACHC and FTLF will update this FAQ document as additional guidance becomes available.

1. Question: Can a health center mandate that its employees receive a COVID-19 vaccine?

Answer: Yes, as long as the health center accommodates any exemptions that an employee may be entitled to (*e.g.*, under federal law an exemption for a medical condition or an exemption for a sincerely held religious belief or, under some state laws, other similar exemptions). These exemptions will be discussed in more detail in the FAQs below.

On August 23, 2021, the Food and Drug Administration gave full approval to the Pfizer-BioNTech vaccine which should put to rest any concerns about mandating a vaccine under an Emergency Use Authorization (EUA). While the legal framework of mandating a fully approved vaccine has existed for more than one hundred years¹, the legality of mandating a vaccine with EUA approval only had been an issue of first impression (*i.e.*, a question that courts faced before the COVID-19 pandemic). Now, that the Pfizer-BioNTech is fully

¹ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

approved, health centers should feel more confident with instituting a mandate if desired by the health center's board and leadership.

Furthermore, health centers may find reluctant staff members who were in a "wait and see" mode more willing to consider becoming vaccinated now that a vaccine has full FDA approval. According to a Kaiser Family Foundation study, "[C]onsistent with last month's results, three in ten unvaccinated adults, rising to about half of those in the "wait and see" group, say they would be more likely to get vaccinated if one of the vaccines currently authorized for emergency use were to receive full approval from the FDA."²

The Federal Government announced in August 2021 that all federal government employees and onsite contractors will be asked to attest to their vaccination status. According to the White House, "[A]nyone who does not attest to being fully vaccinated will be required to wear a mask on the job no matter their geographic location, physically distance from all other employees and visitors, comply with a weekly or twice weekly screening testing requirement, and be subject to restrictions on official travel."³ Many states and local jurisdictions have also begun to issue their own vaccine mandates for various classes of workers including, not surprisingly, health care workers. Some of these mandates allow for weekly testing and masking in lieu of receiving the vaccine while others require vaccination. In some cases, health care worker is defined broadly to include all clinic staff including patient registration clerks and environmental services.

Health centers should pay attention to specific provisions in any newly released mandates in their states and local jurisdictions to assure that the health center's own mandate aligns with that of the jurisdiction(s).

2. Question: Can a health center require employees to provide proof that they have received a COVID-19 vaccination?

Answer: Yes, except in jurisdictions where inquiring about vaccination status is prohibited.⁴ While the Equal Opportunity Employment Commission has determined that inquiring about an employee's vaccination status is not a disability-related inquiry, the information is still confidential. The Americans with Disabilities Act requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination status.⁵

² See <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-june-2021/> (last accessed 8/23/21).

³ See <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/> (last accessed 8/23/21).

⁴ In at least one jurisdiction, Montana, employers are not permitted to require employees to provide their vaccination status. For information on other jurisdictions, see <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> (last accessed 8/23/21).

⁵ See Question K.4. at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed 8/23/21).

Furthermore, the health center cannot require that the employee provide any other medical information as part of the proof of the vaccine. This confidentiality requirement applies regardless of where the employee gets the vaccination—the information should be kept confidentially and separately in the employee’s confidential employee health record. Additionally, if the health center provides the vaccine to the employee as a patient of the health center, the health center should be aware of potential HIPAA implications with sharing that information with the health center’s human resources department (or other members of the health center staff) and ensure that employee authorizes the release of information to the health center (as employer) or provides the information themselves.

3. Question: Can a health center supervisor ask an employee about their vaccination status?

Answer: Yes, in general, as discussed in Question 2 above, an employee’s vaccination status in and of itself is not a disability-related inquiry that would be otherwise prohibited. However, as discussed in Question 2 above, an employee’s vaccination status is confidential, and that information must be treated confidentially. The health center supervisor may have a valid work-related reason to know the employee’s vaccination status (*e.g.*, whether the employee is in compliance with health center policy on PPE or the employee’s obligation to comply with the [OSHA Emergency Temporary Standard](#)). Additionally, if employees are exempt because of medical or religious exemption under federal anti-discrimination laws or some other state law exemption, the supervisor may need to be aware of the vaccination status to understand and accept the reasonable accommodation that the employee receives.

The health center should determine an approach to conveying this information to supervisors that does the most to protect the confidentiality of each employee’s vaccination status. Staff members should be trained to understand the confidentiality requirements under the Americans with Disabilities Act and what constitutes a disability-related inquiry. Any questions beyond the initial question as to whether an employee is vaccinated could constitute a disability-related inquiry including why the employee isn’t vaccinated and whether the employee can be vaccinated.

4. Question: Are patients entitled to know that health center staff members are vaccinated?

Answer: While a health center could report generally on its vaccination rates (*e.g.*, “82% of our staff members are fully vaccinated”), vaccination status is confidential information, and a health center should not report to patients as to the vaccination status of any specific staff member.

5. Question: Can employees be exempt from a health center requirement to be vaccinated?

Answer: Under federal law, some employees may be exempt from a health center’s requirement to be vaccinated pursuant to the reasonable accommodation provisions of Title

VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) and other Equal Employment Opportunity (EEO) considerations. Under these provisions, there are two types of exemptions: religious exemptions for sincerely held religious beliefs, practices and observances (*e.g.*, faith healing religious denominations that have traditions of declining vaccinations) and medical exemptions for certain disabilities (*e.g.*, an allergy to one of the vaccine components or a medical condition).

In general, these exemptions are considered reasonable unless providing such an accommodation would create an undue hardship on the operation of the health center's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability)⁶ or for a religion belief, practice, or observance.⁷ Health centers should ensure that they have appropriate processes in place to handle exemption requests confidentially and expeditiously.

While the specifics of each process for handling exemption requests will vary from health center to health center, in general, health centers should be following the process with the following components:

- (1) Confirming that the health center is covered by federal anti-discrimination laws like the ADA and Title VII.⁸
- (2) Reviewing the health center's existing policy on evaluating request for accommodations.⁹
- (3) Evaluating any requests by employees for exemption from the vaccine because of a disability or sincerely held religious belief (or any other exemption granted under state law).¹⁰
- (4) Engaging in an interactive process to understand the employee's request for an accommodation. The documentation requirements for accommodation requests under the ADA and Title VII are different (*i.e.*, if necessary and appropriate, requesting documentation from a health care provider that describes why the employee cannot get the vaccine for a disability related request vs. requesting documentation from a religious leader as to why vaccination is not permitted under the sincerely held religious belief), but the intention remains the same. Under both processes, the EEOC expects the health

⁶ See Question K.6. at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed 8/23/21).

⁷ See Question K.12 at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed 8/23/21).

⁸ If the health center has more than 15 employees, then it will be covered by the ADA and Title VII.

⁹ See "Reasonable Accommodation Policy Tips" at <https://www.eeoc.gov/employers/small-business/reasonable-accommodation-policy-tips> for assistance with a policy (last accessed 8/23/21).

¹⁰ Note that employees can request an accommodation in a variety of ways. Health center managers should be trained on recognizing a request and responding to an accommodation request. For assistance with this process, see "Requesting Reasonable Accommodation" at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting> (last accessed 8/23/21).

center to engage in an “informal dialogue” with the employee to understand the request for the exemption and how the health center might accommodate such a request.

- (5) Evaluating whether the employee has an ADA-covered disability¹¹ or a Title VII-covered sincerely held religious belief.¹²
- (6) Evaluating whether the accommodation would result in an “undue hardship” on the health center or otherwise create a “direct threat” to the health safety of other staff members, patients, or other third parties.¹³
- (7) Communicating with the employee in writing regarding the outcome of the interactive process while keeping in mind the confidential nature of the process.
- (8) Making adjustments to any accommodation based on the changing landscape of the pandemic, the business needs of the health center, and the employee’s condition.

In addition to the ADA and Title VII related exemptions in federal law, some states may also have their exemption framework which can include medical and religious exemptions, as well as philosophical exemptions. At this time at least 15 states allow some form of philosophical or personal belief exemption related to vaccination of children.¹⁴ Health centers should work with local employment counsel to ensure that all exemptions required by state law are also considered in any vaccine mandate policy. Importantly, the EEOC has noted that, “[U]ltimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.”¹⁵

6. Question: Can pregnant employees be exempt from vaccination?

Answer: Yes, pregnant employees have protections under both the ADA and Title VII of the Civil Rights Act of 1964. While a pregnancy itself is not an ADA-covered disability, medical conditions that develop during a pregnancy may be ADA-covered disabilities. Title

¹¹ For more information as to what is considered a disability under the ADA, see <https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008> (last accessed 8/23/21).

¹² For more information as to what is considered a sincerely held religious belief, see https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_Toc203359488 (last accessed 8/23/21).

¹³ See Question K.6. at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> for information about evaluating reasonable accommodations for disability-related exemption and Question K.12 at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> for information about evaluation reasonable accommodations for sincerely held religious beliefs (last accessed 8/23/21).

¹⁴ See “States With Religious and Philosophical Exemptions From School Immunization Requirements” <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (last accessed 8/23/21).

¹⁵ Question K.12 at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> for information about evaluation reasonable accommodations for sincerely held religious beliefs (last accessed 8/23/21).

VII, as amended by the Pregnancy Discrimination Act, protects pregnant women, childbirth and any other related medical conditions and requires that pregnant women be treated the same as others who have similar abilities/inabilities to work (*i.e.*, pregnant women are offered the same job modifications to accommodate their pregnancies that other employees are offered for other abilities/inabilities). Examples might include, remote work, modifications to work schedules and protected leave.¹⁶

If a pregnant employee seeks an exemption from the health center's vaccine mandate based on the employee's pregnancy, the health center must conduct the appropriate ADA analysis. Furthermore, the health center must ensure that the employee is not being discriminated against in any decision to mandate/not mandate the vaccine compared to other employees similar in their ability or inability to work. Health centers should train staff on these protections and how to handle such requests and consider whether there is a need to consult employment counsel regarding any decisions made to avoid [disparate treatment in violation of Title VII](#).¹⁷

In the meantime, health centers should be aware that the American College of Obstetricians and Gynecologists and the Society for Maternal-Fetal Medicine, the two leading organizations representing specialists in obstetric care, recommend that all pregnant women be vaccinated against COVID-19.¹⁸ Regardless of this guidance, however, pregnant employees may still request an exception from a mandatory vaccination policy.

7. Question: Can employees be exempt from mask wearing?

Answer: The analysis for evaluating exemptions for mask wearing is the same as it is for the requirement to receive the vaccine. If an employee with a disability needs a reasonable accommodation under the ADA (*e.g.*, clear face masks for interpreters or others who communicate with employees with hearing loss who utilize lip reading) or a religious accommodation under Title VII (a modified face mask to accommodate religious dress), the health center should discuss the request and, if after analysis is deemed to be appropriate, provide either the accommodation requested by the employee or appropriate substitute if possible and not otherwise an undue hardship on the health center.¹⁹

Health centers in states that recognize philosophical exemptions will also be required to do that analysis as well. The same analysis (see Q. 5 above) would apply to employee requests to be exempt from frequent testing and or other COVID-19 related precautions.

¹⁶ See Question J.2. at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed 8/23/21).

¹⁷ See Question K.13. at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed 8/23/21).

¹⁸ See "ACOG and SMFM Recommend COVID-19 Vaccination for Pregnant Individuals" <https://www.acog.org/news/news-releases/2021/07/acog-smfm-recommend-covid-19-vaccination-for-pregnant-individuals> (last accessed 8/23/21).

¹⁹ See "Masks for COVID-19 Management and ADA Accommodations" <https://askjan.org/articles/Masks-for-COVID-19-Management-and-ADA-Accommodations.cfm> (last accessed 8/23/21).

8. Question: What if employees refuses to get the vaccine?

Answer: With the exception of union-represented employees (discussed below), a health center may discipline and/or terminate employees who refuse to be vaccinated and do not otherwise qualify for an exemption under a federal or state anti-discrimination law (*i.e.*, an ADA, Title VII, or state exemption). The health center should have a written policy that discusses the consequences of failing to be vaccinated and whether the health center would permit any alternatives to vaccination.

Health center staff and especially managers should be trained on the policy and the confines of the mandate to ensure that the mandate is applied fairly across members of the staff. Additionally, managers should be trained on how to handle requests for exemptions so that they are processed consistently. For union-represented employees, depending on the terms of the collective bargaining agreement (CBA), the health center may need to bargain with the union before mandating vaccines. Even if the CBA does not prevent the health center from mandating vaccines, it may be worthwhile to notify the union representative of the health center's plan for mandating.

9. Question: Does the Board of Directors of the health center have to approve the health center's policy to mandate the vaccine?

Answer: Boards can look to good practice and Health Resources and Services Administration (HRSA) Health Center Program Compliance in considering this question. [Element e from Chapter 19 of the HRSA Health Center Program Compliance Manual](#) (Compliance Manual) states that the Board has to adopt, evaluate at least once every 3 years, and as needed, approve updates to policies that support financial management and accounting systems and **personnel policies**. Neither the Compliance Manual nor the HRSA Site Visit Protocol specify *which* personnel policies.

The health center regulations require the Board to have specific responsibility for “[E]stablishing personnel policies and procedures, including selection and dismissal procedures, salary and benefit scales, employee grievance procedures, and equal opportunity practices.”²⁰ Using the policies enumerated in the regulation is typically a good start for the personnel policies that require Board approval. If the vaccine mandate updates any of those procedures, then the Board should approve the update.

If, on the other hand, the Board approves the Employee Handbook and the changes made from time to time and a vaccine mandate will require changes to the Employee Handbook, the Board should approve such updates.

Furthermore, even if approval of a vaccine mandate policy does not require Board approval under HRSA requirements, given how complicated the decision to mandate the vaccine for employees is/can be, from a good governance perspective, Board approval of (or at least ratification of) such a determination makes sense.

²⁰ 42 CFR § 51c.304(d)(3)(ii)

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