



## MEMORANDUM

To:	IHCA/INCAL Members
From:	IHCA/INCAL
Date:	August 19, 2020
Subject:	Influenza Vaccinations as a Condition of Employment

### **Executive Summary**

Generally, a long-term care facility may establish a policy requiring employees to receive a yearly influenza (flu) vaccination as a condition of employment, so long as the exemptions to the facility's policy are in compliance with the Americans with Disabilities Act<sup>1</sup> (ADA), Title VII of the Civil Rights Act of 1964<sup>2</sup> (Civil Rights Act), and Indiana state law. Specifically, under Indiana law, "health facilities," which includes both licensed nursing facilities and assisted living communities, are required to annually administer or make available the flu vaccine to their employees.<sup>3</sup>

As an alternative to establishing a policy requiring flu vaccinations, a long-term care facility may strongly encourage employees to receive a flu vaccination on a yearly basis and/or conduct an educational campaign among staff regarding the benefits and importance of flu vaccinations in long-term care settings.

In utilizing information in this memorandum, IHCA/INCAL members should consult with their individual human resources professionals and legal counsel. This memorandum is intended to be guidance and not individual legal advice from IHCA/INCAL to its members.

### **Americans with Disabilities Act**

If a long-term care facility establishes a policy requiring flu vaccinations as a condition of employment, the policy must be compliant with the ADA. The ADA requires employers to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship to the employer.<sup>4</sup> An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.<sup>5</sup>

Accordingly, an employee may be entitled to an exemption from an employer's mandatory vaccination requirement based on an ADA disability that prevents the employee from taking the flu vaccine. When immunization for the flu is not recommended for an employee due to health-related reasons, it may be necessary for an employer to approve a reasonable accommodation, such as:

<sup>1</sup> 42 U.S.C. §§ 12101-12117, 12201-12213.

<sup>2</sup> 42 U.S.C. § 2000e *et seq.*

<sup>3</sup> Ind. Code § 16-28-14.5-2.

<sup>4</sup> "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,"

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

<sup>5</sup> 29 C.F.R. pt. 1630 app. § 1630.2(o).

- (1) Allowing the use of an approved mask or other types of personal protective equipment as an alternative infection control practice to the flu vaccine; and/or
- (2) Temporarily assigning job duties during flu season that do not require direct patient care.

However, an employer does not have an obligation to provide a reasonable accommodation if the change or modification would cause "undue hardship" to the employer.<sup>6</sup> An accommodation poses an undue hardship if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.<sup>7</sup> An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. A determination of undue hardship should be based on several factors, including:

- (1) The nature and cost of the accommodation needed;
- (2) The overall financial resources of the facility making the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources of the facility;
- (3) The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- (4) The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- (5) The impact of the accommodation on the operation of the facility.<sup>8</sup>

The U.S. Equal Employment Opportunity Commission (EEOC) has several examples of reasonable accommodations and undue hardships in the EEOC's "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA," which can be found in full [here](#).

### **Civil Rights Act**

If a long-term care facility establishes a policy requiring flu vaccinations as a condition of employment, the policy must also be compliant with the Civil Rights Act. Under the Civil Rights Act, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from taking the flu vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer.<sup>9</sup> The EEOC has stated a religious practice may be sincerely held by an individual even if it is newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion.<sup>10</sup>

Under the Civil Rights Act, an employer may assert undue hardship if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost," which is a lower standard than under the ADA.<sup>11</sup> The EEOC has provided several examples of burdens on businesses that are more than minimal, including violating

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<sup>6</sup> 42 U.S.C. § 12112 (b)(5)(A).

<sup>7</sup> 42 U.S.C. § 12111(10).

<sup>8</sup> See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997); TAM, supra note 49, at 3.9, 8 FEP Manual (BNA) 405:7005-07.

<sup>9</sup> "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,"

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

<sup>10</sup> "What you Should Know: Workplace Religious Accommodation," <https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation#:~:text=Title%20VII%20of%20the%20Civil,on%20operation%20of%20the%20business>.

<sup>11</sup> 29 CFR § 1605.2(e).

a seniority system, causing a lack of necessary staffing, jeopardizing security or health, or costing the employer more than a minimal amount.<sup>12</sup>

### **State Law**

As outlined above, Indiana law does not mandate flu vaccines for long-term care employees but does require comprehensive care facilities (nursing facilities) and residential care facilities (licensed assisted living communities) to annually administer flu vaccines to their employees **or** make flu vaccines available to their employees.<sup>13</sup> Accordingly, nursing facilities and licensed assisted living communities must at least make flu vaccines available to their employees each year between October 1<sup>st</sup> and February 1<sup>st</sup>.<sup>14</sup> State law also provides several exemptions for employees when a nursing facility or licensed assisted living community administers or makes available flu vaccines to all employees in compliance with state law, as follows:

- (1) The employee has written documentation from the employee's physician or other health care provider indicating the date and place that the individual received an immunization and that an additional immunization is not required;
- (2) The immunization is medically contraindicated for the employee;
- (3) Receiving the immunization is against the employee's religious beliefs; or
- (4) The employee refuses to permit the immunization after being fully informed of the health risks.<sup>15</sup>

Please note, while an employee may refuse to permit the immunization after being fully informed of the health risks when the immunization is being offered in compliance with state law, such an exemption does not apply if a long-term care facility has an internal policy requiring flu vaccinations as a condition of employment, unless the employee otherwise qualifies for an accommodation under the ADA or Civil Rights Act.

### **Best Practices and Further Considerations**

If a long-term care facility establishes a policy requiring flu vaccinations as a condition of employment, best practices indicate the following:

- (1) Employers should explore all readily available accommodations should an accommodation from the policy be requested.
- (2) Employers should establish a consistent process for employees to request an accommodation. A readily available form to request an accommodation may be helpful.
- (3) Employers should document and maintain clear records of the accommodation process (i.e., investigation into and determination of a requested accommodation), the accommodations provided, and the accommodations denied.

Consideration of the pros and cons prior to the implementation of a policy requiring flu vaccinations as a condition of employment is important as well. With the regard to the benefits, such a policy is likely to lead to a less impactful flu season in a facility, which can help ensure a healthier resident population and reduce the number of diagnostics needed when multiple residents are sick with the flu. Such a policy may also help with staffing shortages if less sick time is needed during flu season. However, such a policy may lead to some employee concern and creates additional documentation and compliance procedures. Further, if a facility's vaccination rate is already high under

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<sup>12</sup> "What you Should Know: Workplace Religious Accommodation."

<sup>13</sup> Ind. Code § 16-28-14.5-2.

<sup>14</sup> Ind. Code § 16-28-14.5-3.

<sup>15</sup> Ind. Code § 16-28-14.5-5.

a voluntary program, the risk of EEOC complaints may not outweigh the benefits. The risk-reward analysis will vary among all long-term care facilities and should be conducted on a case-by-case basis.

In summary, a long-term care employer may require flu vaccinations as a condition of employment so long as the employer's policy is consistent with the ADA, Civil Rights Act, and Indiana state law. If you have any questions, please contact Laura Brown at [lbrown@ihca.org](mailto:lbrown@ihca.org).