

How NJ Senior Care Employers Can Handle Vaccine Mandate Exemption Requests

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As the coronavirus pandemic continues, new variants are creating wave after wave of outbreaks. To lower infection rates, save lives and avoid lockdowns, the federal government had attempted to mandate that all employers with 100 or more employees require their workers to get fully vaccinated or undergo regular testing. However, the mandate did not withstand legal scrutiny. In January 2022, the U.S. Supreme Court shot down the Biden administration's nationwide vaccine mandate for the most part, leaving it intact only for healthcare facilities that receive Medicaid and Medicare payments. Thereafter, the Biden administration withdrew the vaccination or testing requirement for large employers, but the mandate for healthcare workers remains in place.

New Jersey has taken its own steps to mandate vaccination or testing in lieu of vaccination for healthcare facilities. On August 6, 2021, [Governor Murphy signed Executive Order 252](#), which required "all workers in certain state and private healthcare facilities and high-risk congregate settings be fully vaccinated against COVID-19 by September 7, 2021 or be subject to COVID-19 testing at minimum one to two times per week." The recent U.S. Supreme Court decision enforcing the federal vaccine mandate for healthcare workers paved the way for further executive orders by Governor Murphy. On January 19, 2022, Governor Murphy [signed Executive Order 283](#), which requires that healthcare workers and those in high-risk congregate settings be fully vaccinated against COVID-19, including receiving a booster shot, or have their employment terminated. The weekly testing option is no longer available.

Since the beginning of the pandemic, senior care communities have faced a staffing crisis of epic proportion. Senior care employers are understandably concerned about how these recent changes may further affect staffing and productivity, and expose them to the risk of getting sued by employees.

Under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (CRA), employers must provide accommodations for people who seek medical and religious exemptions to vaccine mandates. Employers in New Jersey may be wondering what they can do if they receive a flood of requests for exemptions. What kinds of medical exemptions qualify? Do you have to grant exemptions to employees claiming religious beliefs? Do you risk exposure to a lawsuit if you deny those exemptions? How can you protect yourself legally while ensuring you protect your workers and residents?

Preparing for a Flood of Exemption Requests

Employees can seek two kinds of exemptions if they do not want to get a vaccine: medical and religious. Under the law, employers are legally required to make a good-faith effort to consider any requests for an exemption, and to try to reasonably accommodate those requests as long as they do not create undue hardship for the employer.

The first step an employer should undertake is to update all job descriptions to specify that vaccines are required under the federal/New Jersey mandate. The second step is to establish a protocol for reviewing exemption requests. The employer has to understand whether the employee has reasonable grounds for the medical exemption and what a sincerely held religious belief means. Then, employers must decide what kind of accommodations can reasonably be made for employees asking for exemptions. Accommodations in some offices can include regular testing, mask wearing, physical distancing or remote work options. In the assisted living and long-term healthcare field, some of these accommodations may not be feasible.

Medical Exemptions

What qualifies as a medical condition that would exempt an employee from a vaccine mandate? Generally, only those people with a known allergy to the vaccines themselves or to ingredients in the vaccine would qualify for a medical exemption.

When it comes to assessing exemption requests, the law does not require that the request be made in writing. The exemption review process does have to be interactive, which means there must be good-faith communication between the employer and the employee. A protocol might include a requirement for documentation from a medical professional and a description of the medical reasons needed for the exemption. However, employers must be very careful about the questions they ask employees about medical history. Asking certain questions about medical history, and then declining an exemption request and terminating the employee, may run afoul of the ADA and could create the risk of a lawsuit. Employers should ask experienced attorneys to develop or review their protocols for assessing medical exemption requests, including what kinds of questions are safe to ask during the interactive assessment process.

Religious Exemptions

Public distrust of vaccines has been around since the first vaccine [mandates](#) for smallpox in the early 1800s. For two centuries, people have couched political and personal opposition to vaccine requirements in religion, and the coronavirus vaccine is no different. Researchers have conducted [studies](#) of the world's major religions and found nothing in their canons that would prohibit vaccination. Religious leaders like the pope have even [encouraged](#) people to get vaccinated, stating that the vaccine is "morally acceptable." Nonetheless, these factors have not stemmed anti-vaccination sentiment.

Some people claiming religious exemptions to vaccines make claims about vaccines containing aborted fetal cell tissue. The three COVID-19 vaccines made by Pfizer, Moderna, and Johnson & Johnson [do not](#) contain any fetal tissue. The vaccines were developed or tested using [cell lines](#) derived from abortions performed decades ago — a common practice in the pharmaceutical industry. Scientists took cells from an aborted fetal tissue sample; replicated them many times over; froze them; and used them to develop, study or test the efficacy of the vaccines. That means there is a link to abortions, although the abortions happened decades ago, and the cells used in the formulation or testing of the vaccines are far removed from the original tissue samples.

Although no major religious denomination in the U.S. specifically opposes the vaccine, that does not mean that an employee cannot set forth a sincerely held religious belief warranting evaluation. The Catholic Church has been in the spotlight on this issue. The United States Conference of Catholic Bishops noted that the serious health danger posed by COVID-19 justifies the use of vaccines developed using these aborted fetal cell lines. However, these recommendations may not assuage the moral opposition of some workers.

While most people who claim religious exemptions to vaccines are using religion as a [cover](#) for personal distrust of vaccines or the government, the CRA does require employers to make reasonable accommodations for “sincerely held beliefs.” Employers should create protocols for considering religious exemption requests in a good-faith, interactive process.

The law does not require employers to grant exemptions or accommodations if doing so creates undue hardship for the employer. However, employers who decline exemption requests may expose themselves to litigation. As a general rule, healthcare providers are in a better position than most other industries to take the position that the accommodation would result in an undue burden.

Undue Hardship

Under the CRA, employers are required to accommodate medical and religious exemptions unless they create undue hardship on the employer. If a terminated employee files a lawsuit, the employer will have to demonstrate how making those exemptions and accommodations would have created this undue hardship. Therefore, employers have to be very careful about establishing protocols for assessing exemption requests, deciding what reasonable accommodations they can make and clarifying what kind of accommodations would create hardship.

The EEOC says that an employer may consider not only costs, but also “the risk of the spread of COVID-19 to other employees or to the public.” This guidance is particularly relevant in senior care communities and provides another tool for healthcare communities to employ when evaluating exemption requests from employees.

The experienced [employment attorneys](#) at Einhorn, Barbarito, Frost & Botwinick can help employers with their protocols to protect their patients and staff, and to satisfy the vaccine mandate while complying with the ADA and CRA.