

Employee Vaccine Requirements: Protect Your Staff, Practice & Patients



Presented by:
Tracy Billows, JD

DISCLAIMER

© Healthcare Training Leader®. This 2021 Online Training Handout is published by Healthcare Training Leader, a division of Must Have Info, Inc. Reproduction or further distribution by any means, beyond the paid customer, is strictly forbidden without written consent of Healthcare Training Leader, including photocopying and digital, electronic, and/or Web distribution, dissemination, storage, or retrieval.

This training is an independent product of Healthcare Training Leader. It is not endorsed by nor has it any official connection with any other organization, insurance carrier, vendor, or company. Reasonable attempts have been made to provide accuracy in the content. However, of necessity, examples cited and advice given in a national online training such as this must be general in nature and may not apply to any particular case. The publisher, editors, board members, contributors, nor consultants warrant or guarantee that the information contained herein on coding or compliance will be applicable or appropriate in any particular situation.

© 2021 Healthcare Training Leader®.

All Rights Reserved

2277 Trade Center Way, Suite 101, Naples, FL 34109,
Phone: 800-767-1181 • Fax: 800-767-9706

E-mail: info@trainingleader.com

Website: www.hctrainingleader.com

About Your Expert



Tracy Billows, JD


Co-Managing Partner, Seyfarth Shaw


Tracy is the co-Managing Partner of the Chicago office's Labor & Employment department. Her practice concentrates on representing and counseling employers throughout the country in the entire range of employment law matters. Tracy provides extensive advice and strategic guidance to clients on a wide array of Human Resources topics and issues, including policy development and review, auditing the Human Resources functions, leave and absence management, EEO compliance, reductions in force, employee relations, labor relations, performance management, discipline and discharge and various other areas, with an emphasis on instituting best practices and avoiding litigation.

Tracy relieves her clients' day-to-day pain points related to performance management, discipline, terminations, and reductions in force, with an emphasis on compliance, business needs, and prevention of litigation. When clients have serious employee complaints, she assists with investigations—either advising in-house counsel and HR or conducting the investigation herself. She regularly trains managers, leaders, executives, HR departments, and legal teams on the full suite of labor and employment topics

Employee Vaccine Requirements: Protect Your Staff, Practice & Patients


Expert: Tracy Billows, JD






Mute

All attendee lines are muted.




Slides

The program slides and Certificate of Attendance are available for download under the "Handouts" tab on the webinar toolbar




Questions

Submit questions in the Q&A box on the bottom right of your screen. We will answer as many questions during the live broadcast as time allows.



Further Info & Updates

Get more helpful tips and targeted training for your practice at www.hctrainingleader.com or call us at (800) 767-1181.



1

Expert Online Training for Your Healthcare Practice



Employee Vaccine Requirements: Protect Your Staff, Practice & Patients

Expert: Tracy Billows, JD
Co-Managing Partner, Seyfarth Shaw





Get more helpful tips and targeted training for your practice at:
www.hctrainingleader.com
Call us: (800) 767-1181

2

Objectives

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

1

COVID-19 Mandatory Vaccine Exemption Accommodation Process and Legal Considerations

2

Paying for Mandatory Vaccine and COVID Testing

3

Mandatory Vaccine Religious-Based Exemption Accommodation Requests

3

COVID-19 Vaccine Exemption Accommodation Process

4

Mandatory Vaccine Programs Allowed

- **Mandatory vaccine programs are permitted**
 - Employers may require vaccines for employees to physically enter the workplace
 - Employers must comply with **ADA (disability) and Title VII (religion) accommodation requirements**
 - Also ensure providing job modifications for **pregnant workers** in the same manner as for other employees who are similarly unable to work (Updated EEOC Guidance)
 - Provide accommodations to **fully vaccinated employees** with underlying medical condition
 - Note there are state anti-vax laws that need to be taken into consideration
- If employers mandate vaccine, recommend that they do not administer the vaccine themselves or contract with a third party to provide the vaccine to employees
 - Can avoid ADA issues by having employees get the vaccine through their own health care provider or other community provider
 - If employer or agent administers vaccine, must meet heightened ADA standards – job related and consistent with business necessity; employee who does not answer pre-vaccination questions and therefore cannot get vaccinated poses a direct threat to EE's own health/safety or other's health/safety
 - EEOC updated Guidance affirmed that **third party must be an agent** of the employer to trigger heightened ADA standard

5

Mandatory Vaccination Program

- **Policy Consideration: Soft vs. Hard Mandate**
 - Soft: e.g. required only if on-site; testing alternative, etc.
 - Hard: all must be vaccinated or terminated (unless accommodated)

6

Vaccine
Exemption
Accommodation
Process

- Mandatory COVID-19 vaccination policy directs employees to submit an exemption/accommodation form, making a disability-based or a religious-based request.
- Those with disability-based requests should also submit a completed COVID-19 vaccine-specific certification form from their medical provider
 - Part of the initial request or in a separate form.
- Review request form to ensure it is complete. If information is missing, ask the employee to complete it. Once complete, share the form with the designated review team.

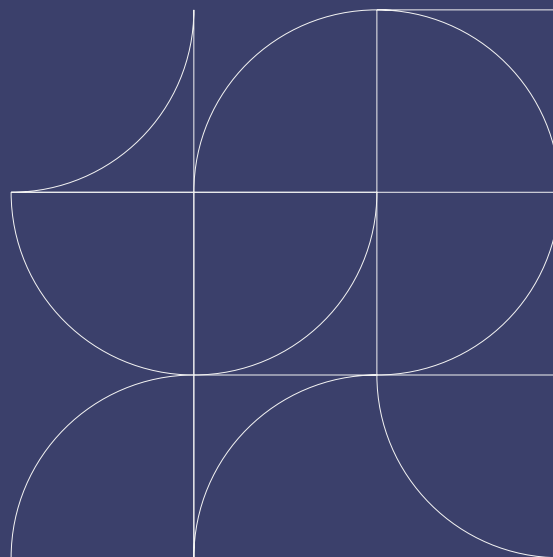
7

Vaccine
Exemption
Accommodation
Process

- In consultation with legal counsel, the review team determines if clarifying information/documentation is needed from the employee, the employee's medical provider, or others. If so, follow-up with the employee.
- If the review team has sufficient information, it approves or denies the exemption request.
 - If approved, the team will then determine if/how the employee can be reasonably accommodated, possibly in consultation with the employee's manager (e.g. frequent testing, remote work, masking/social distancing onsite, etc.).
 - If exemption is denied, the employer will decide whether to terminate the employee's employment or whether an alternative arrangement (e.g. unpaid leave) is warranted (depending on the employer decision re: soft vs. hard mandate).

8

Disability-based Vaccine Exemption Requests



9

ADA

- If actual disability AND need for accommodation => must reasonably accommodate unless undue hardship
 - Interactive process upon notice of disability AND need for accommodation
- Employee must be “otherwise qualified,” able to perform essential functions of job with or without the accommodation.
- Direct threat defense
 - Even if an employer determines that an employee’s disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship).

10

Medical/
Disability-based
Exemption
Request

Evaluate whether Employee Has A Disability That Could Prevent Vaccination

- **Anxiety** (not generalized fear; supported by medical certification)
- **Allergic reaction** (to a component of vaccine or prior vaccines where reaction was severe enough to cause anaphylaxis or hospitalization)
- Certain **autoimmune disorders**
- **Pregnancy/breastfeeding**
 - CDC says vaccine is safe for pregnant and breastfeeding individuals
 - Still, medical professionals differ
 - Ask follow up questions
 - With valid medical certification supporting inability to receive vaccine, best not to debate

11

Medical/
Disability-based
Accommodation

Consider Reasonable Accommodations

- Consider whether the employer can reasonably accommodate that employee and whether it poses an undue hardship
- Undue Hardship:
 - Means that the accommodation would cause great problems or expense (overly costly, far-reaching, sizeable or disruptive), or would basically alter the nature or operation of what the employer does
 - Means significant difficulty or expense comparing the resources and circumstances of the particular employer with the cost or difficulty of providing a specific accommodation

12

Medical/ Disability-based Accommodation

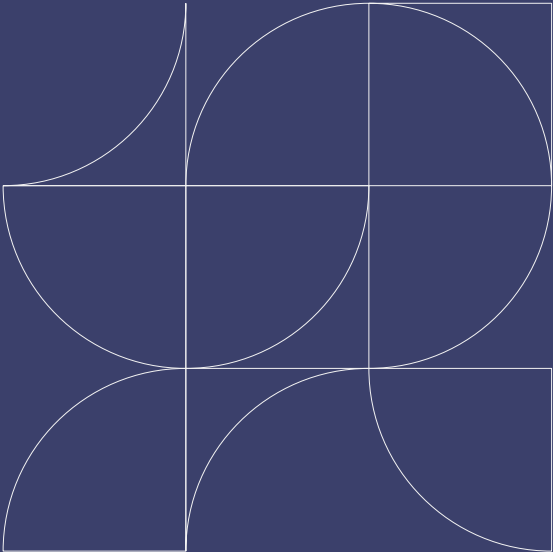
Consider Reasonable Accommodations

Consider whether you can reasonably accommodate under “**direct threat assessment**”

- **Direct threat** assessment cannot be based solely on the condition being on the CDC’s list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee’s disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence.
- According to the EEOC, the guidance from CDC or other public health authorities is such evidence.
- Consider all factors, including without limitation:
 - Nature of work (exposed to high-risk people?)
 - Contact with others
 - Vaccination rates in workplace
 - High-transmission area

13

Religious-based Vaccine Exemption Requests



14

Religious Accommodation Requests

- A religious accommodation is an adjustment to the work environment that will allow the employee to comply with his or her ***sincerely held religious beliefs***.
- An employer need not provide a reasonable accommodation if doing so would cause ***undue hardship*** on the conduct of the employer’s business.
 - meaning an accommodation that would require the employer to bear more than a *de minimis* cost or burden
- Duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion.

15

“Sincerely Held Religious Belief”

Evaluate Whether Employee Has A (1) Sincerely Held; (2) Religious Belief

- Individualized, fact-specific inquiry
 - can be complex, difficult, not possible to generalize
 - the organized religions whose teachings even arguably conflict is very small. <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion>
- Need not be organized. May be unfamiliar.
- **Consider whether employee’s belief, practice or observance prevents them from receiving vaccine** as distinguished from personal/secular beliefs
- **If doubt creeps in, what’s next:**
 - must have objective basis for questioning religious nature or sincerity in order to ask follow up Qs or request additional supporting information
- Consider reasonable accommodation using *iterative, interactive* process including *undue hardship* analysis
 - more than *de minimis* cost or burden to employer
 - lower burden than ADA

16

Religious Accommodation Requests

- If the employer reasonably needs more information, the employer and the individual should discuss the request.
 - The individual may need to explain the religious nature of the belief, observance, or practice at issue.
 - The employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar.
 - The employer should ask the individual to explain the religious nature of the practice and the way in which it conflicts with a work requirement.
- In determining if a conflict exists, it is irrelevant that the employer does not view the work requirement as implicating a religious belief, or that most people of the individual's faith would not; it is the individual's own religious beliefs that are relevant.

17

17

Religious Accommodation Requests

- Where request does not provide enough information to enable employer to make a determination, and employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.
- When requesting additional information, employees should provide information that addresses the employer's reasonable doubts.
 - That information need not, however, take any specific form; e.g. written materials or the employee's own first-hand explanation may be sufficient to alleviate employer's doubts about the sincerity or religious nature of the professed belief such that third-party verification is unnecessary.
 - Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested, it does not have to come from a clergy member or fellow congregant.
 - Rather, it could be provided by others who are aware of the employee's religious practice or belief.

18

18

Objective Basis to doubt:

(1) Sincerely Held or
(2) Religious

Objective Basis Could Result from (among others):

- Employee’s admission they’re making it up
- **Maybe:** conflicting behavior (e.g. prior flu vaccine); prior statements denouncing religious affiliation; bought or printed certification off internet

• **Examples:**

- Cannot undergo medical testing / procedures
- Body as holy temple
- “You can’t make medical decisions for me”
- “My religion prevents me from wearing masks made in China”

19

Process Workflow: Follow-up

Generally Permissible Follow-Up Questions

One size does not fit all

- Tell me more
- Any additional information regarding your beliefs/observances/practices that support your request
- I respect what you believe but I need to better understand
- Why are other safety protocols (social distancing, masking, handwashing, testing) consistent with your religion but vaccination is not
- What is it about your religious beliefs or practices that prevents (vaccination, testing, masking)
- Where and how do you adhere to these beliefs/observances
- Have your beliefs have strengthened/diminished, when, why
- How does the policy/procedure conflict with your beliefs/practices
- Do you have a spiritual leader; did they address the issue for which you are requesting accommodation

20

Process Workflow:
Follow-Up

Generally Permissible Follow-Up Questions

One size does not fit all

- Have you been vaccinated before, when, what’s the difference
- Do your religious beliefs prevent you from vaccinating for the sake of helping others avoid COVID-19
- Are you aware that the COVID-19 vaccines are not prohibited by [the religion], which views getting the vaccine as an act of charity
- Taking into account that vaccination is not treatment for the virus, does vaccination still interfere with your beliefs
- Do your religious beliefs prevent you from being tested (which is not treatment, and only a test involving a nasal swab with no injection or skin piercing)
- If requested, could you provide documentation from a third person with whom you have no familial/close relationship in support of your request

21

21

Process Workflow:
Decision –
Common Issues

ONCE ALL THE INFORMATION IS IN HAND:

1. If employee says their religion is X, which prevents them from being vaccinated, and if you can show beyond doubt that religion X does not oppose vaccination?
 - IF that’s the WHOLE RECORD with no other information, you probably can deny accommodation request.
2. But if employee presents support from someone with apparent authority on the teachings of X that says that religion opposes vaccination, or that religion respects an individual’s interpretation that they can’t be vaccinated due to certain tenets of religion X despite the general position of religion X?
 - You likely must accept. The employee does not need to present authority from a pastor or priest or someone else, but if they do that would be another piece of supporting evidence, and the employer should accept it.
3. Or if minister is a pay-for-play internet huckster selling letters for \$30 a pop?
 - That undermines the employee’s credibility and therefore the sincerity of their beliefs. Absent any other information, you have a basis for denying the request. But, other information may support accepting as sincerely held religious belief (despite huckster).

22

22

Deciding Reasonable Accommodation for Those Exempted

23

Process Workflow: Approval

If the employer approves an exemption, it will then consider whether it can reasonably accommodate the employee

Common accommodations: remote work, frequent testing, masking/social distancing, transfer/reassignment, leave

24

**Process Workflow:
Denial**

If the employer denies the exemption request, it will then decide whether to terminate the employee’s employment or some alternative

- Can be less risky to deny accommodation as unreasonable, undue hardship rather than disputing sincerely held religious belief or whether a disability
- Consider issuing denial referencing doubt about “sincerity” or “religion” (or both) *as well as* unreasonable to accommodate due to undue hardship

25

Does the employer have to pay for time spent on mandatory vaccination or testing?

The answer is always:

26

Does the employer have to pay for time spent on mandatory vaccination or testing?

The answer is always:

“It depends”

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

27

27

Does the employer have to reimburse employees for any cost of mandatory vaccination or testing?

The answer is always:

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

28

28

Does the employer have to reimburse employees for any cost of mandatory vaccination or testing?

The answer is always:

“It depends”

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

29

29

- **What** is happening:
 - Vaccination, or
 - Testing?
- **Where** is it happening:
 - What state?
 - And where physically is the testing occurring?
- To **whom** is it happening?
 - All employees, or a
 - Certain tranche of them?
 - Is it intrinsic to their jobs?
- **When** is it happening:
 - On a day off,
 - At time of employee’s choosing, or
 - On way into work?
- **Why** is it happening:
 - Is it due to a government mandate?
 - And is that mandate on workers or employers?
- **How** is it happening:
 - Exactly how are employees being tested?
 - How long does it take?

Context is everything:

Ask the usual five Ws +

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

30

30

Let's first get vaccination out of the way

- Vaccination is low dollars
 - It happens only once
 - Some jurisdictions require employers to provide paid leave for vaccinations
 - Employers usually *want* to pay for vaccination time and even provide incentives for it
 - Regular rate issue? Probably and usually not
 - There usually is no cost for a vaccination, so no expense reimbursement issue
- The name of the game is **testing**
 - Usually occurs when
 - There often is an actual cost
 - It happens regularly, so the time – and thus dollars -- can add up
 - Many employers don't want to pay more money to those who won't get vaccinated than to those who will
- Also, we're talking here about **mandatory** programs, and not voluntary ones

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

31

31

Sources of law -- Federal

- WHD COVID-19 FAQs
- **If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?** Yes, under the FLSA, your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours."
- **My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?** It depends, under the FLSA, your employer is required to pay you for all hours that you work, including for time on your vacation day if the task you are required to perform is necessary for the work you are paid to do. For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic.
 - [COVID-19 and the Fair Labor Standards Act Questions and Answers | U.S. Department of Labor \(dol.gov\)](#)
- There are fact-specific authorities on compensability of medical attention
 - 29 C.F.R. § 785.43 (interpretive regulation); e.g., *Sehie v. City of Aurora*, 432 F.3d 749 (7th Cir. 2005)
- Use general interpretations of hours worked, including *Integrity Staffing Solutions v. Busk*, 574 U.S. 27 (2014)
 - A *de minimis* doctrine?
- No federal law on expense reimbursement other than the no kick-back rule for minimum wage compliance. 29 C.F.R. § 531.35
 - Is the expense of testing "for the employer's benefit?"
- Neither ADA or Title VII change the calculus

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

32

32

Sources of law – State and local

- Few states have COVID-specific authority on compensability of testing
 - Except, ... surprise, California's Labor Commissioner:
 - "If the employer requires an employee to obtain a COVID-19 test or vaccination, then the employer must pay for the time it takes for the testing or vaccination, including travel time."
[COVID-19 Testing and Vaccine FAQs \(ca.gov\)](#)
 - And Illinois: "Under the IMWL and the FLSA, if an employer requires employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time." [IDOL Vaccine Leave Guidance.pdf \(illinois.gov\)](#)
- Many have broader definitions of "hours worked" than under federal law and some lack equivalent to Portal-to-Portal Act
- Handful of states have expense reimbursement laws
- Many states have laws prohibiting employers from requiring employees to pay for cost of medical exams
- ***Look for states and localities that require certain workers to be vaccinated or regularly tested, and how those are worded***

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

33

33

Hypotheticals

1. Employer requires certain employees who have **close customer contact** to be vaccinated, but those who have a religious or medical exemption must provide every Monday proof of a negative non-rapid PCR test taken within the last 48 hours from a clinic of the employer's choosing
 - Is the time spent on the test compensable time?
 - Does the employer have to reimburse for the cost of the test? For what else?
2. What if the employer requires this of **all** employees?
3. What if the testing is an **at-home test** (that takes a **minute**)?
4. What if that at-home test has to be taken **just before** the commute?
5. What if the testing is rapid testing done **on the way into** the employer's facility after badging into the building, but before clocking in?
 - What if for **all** employees? Or only for those with **close customer contact**?
6. What if an employer doesn't require employees to come to the office, but, if they **voluntarily** do, they must get tested if not vaccinated?
7. What if **state or local law** requires vaccination? (see next slide)

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

34

34

The role of government mandates

- An increasing number of state or local laws, ordinances, or orders require vaccination status of workers (e.g., healthcare, but that may grow)
 - Some require **companies to ensure** that workers sent to certain facilities be vaccinated
 - Others require that all **workers** entering the facility be vaccinated
- Exemptions?
 - Others expressly **require regular testing** as an alternative to vaccination
 - At least one (Rhode Island) requires testing as an alternative for those subject to medical, but not religious, exemption
 - Others allow for accommodation, but **do not specify** that it must include testing
 - Some (e.g., Denver) provide for **no express accommodation** at all

©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

35

35

Best Practices - Safety

Vaccines are only one part of the equation – multiple layers of protection

- Fully vaccinated employees do not need to wear masks or socially distance
- Keep these requirements for unvaccinated employees
- Consider keeping some physical barriers
- Health screening and temperature checks still important
 - first line of defense in detecting virus
 - Vaccinated employees can still get the virus - those who are symptomatic more likely to spread the virus than vaccinated employees with no symptoms
- Continue sanitization protocols and encourage handwashing
- **Consult new OSHA ETS** – focused on healthcare- some guidance for other industries/settings

36

36

Questions?

Tracy Billows, JD
Co-Managing Partner, Seyfarth Shaw

<https://www.seyfarth.com/people/tracy-m-billows.html>

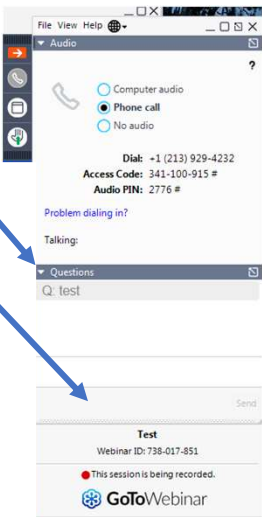


www.hctrainingleader.com

37

Submit Your Questions

- 1. To submit your questions, expand the “Questions” box on your webinar toolbar.
- 2. Type your questions into the “Questions” box to submit.
- 3. All questions will be addressed at the end of the webinar.




www.hctrainingleader.com

38

Thank You For Attending!

Tracy Billows, JD
Co-Managing Partner, Seyfarth Shaw


<https://www.seyfarth.com/people/tracy-m-billows.html>



www.hctrainingleader.com

39


Quick Reminder Upcoming Online Training



Stop \$85,000 Penalty: Comply with New Medical Records Fees Rule

Date: Thursday, September 9, 2021 1:00PM ET
Expert: Laura Fryan, JD

Failure to comply with new CMS regulations means your practice can be hit with an \$85,000 fine per penalty. Even innocent mistakes can land you in serious hot water.




Physician Service Agreements: Reduce Risk & Get Paid More

Date: Tuesday, September 14, 2021 1:00PM ET
Expert: Allison Pullins

Hospital service agreements are not written to protect your provider or your practice. Remember, the contract was written by hospital attorneys, to look after the hospital's interests, not yours.

Save 10%
Off Your Next Training
Use Coupon: **THANKYOU**



www.hctrainingleader.com

40

ALL ACCESS PASS!

Entire Library in ONE Place | Access from Anywhere, Anytime ...



Never miss an online training session again. As an **Annual Training Subscriber (ATS)** you will:

- ✓ Gain immediate access to **over 200+ online, expert-led, how-to trainings** for 1 year
- ✓ A guaranteed seat to **another 80+ NEW live online trainings** each year
- ✓ **Access for everyone at your location** by following a few simple steps
- ✓ Ready to view **in your VIP platform**, as often as you and your staff like, for 1 year
- ✓ Earn **AAPC-approved CEUs** every year
- ✓ And much more!

Added Benefits:

- Ask the experts for practical advice on how to **solve your toughest practice challenges**
- Sign up for **upcoming live sessions with 1 click**
- Jump into an **on-demand training at any time**



Save \$500
Off Your All Access Pass
with Coupon: **ALLTRAINING**

www.hctrainingleader.com