

COVID-19 VACCINATION POLICIES

**What to
consider?**

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DISCLAIMER

The purpose of this webinar is to provide general information rather than legal advice. The information provided here is not provided in the course of and does not create or constitute an attorney-client relationship. For legal advice specific to your situation, please contact your library attorney.

The information provided here is current as of today (Feb. 18, 2021) but subject to change at any time. My remarks are specific to Indiana and while I have looked at federal law, I have not reviewed any other state or jurisdiction's statutes in preparing this webinar.

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OUTLINE

- EEOC Guidance & Federal Anti-discrimination Laws
 - ADA
 - Title VII
- Indiana Statute, Cases, and Plan
- What to consider?
 - Policy provisions
 - Other options
 - Other considerations: legal and non-legal
- Q & A

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BRIEF BACKGROUND

- Edward Jenner created the first smallpox vaccine in 1796, but similar methods had been used in ancient China, Egypt, and Turkey.
- In 1999 the CDC declared vaccinations one of the ten greatest public health achievements of the twentieth century.
- Despite monumental results preventing the spread of disease and death, vaccines have never been universally accepted.

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OVERVIEW OF RANGE OF POSSIBILITIES

Type of vaccine program

- Encourage and educate about vaccine availability and safety
- Voluntary program – provide incentive or reward
- Mandate some or all employees to become vaccinated

Ways to administer

- Directly administered by employer on site
- Employer contracts with a company or agency to administer on site
- Employee goes to any vaccine site off premises and turns in proof of vaccination to employer

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COVID-19 VACCINE DEVELOPMENTS

- First COVID-19 vaccine became available in December 2020 under FDA's Emergency Use Authorization (EUA).
- Currently, two COVID-19 vaccines are FDA authorized:
 - Pfizer-BioNTech
 - Moderna
- FDA must inform vaccine recipient that vaccine use is authorized under EUA and that person has the option to accept or refuse vaccine.
- FDA advisory is a fact sheet usually handed to vaccine recipient at the vaccine appointment. It's also available on FDA website.

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The slide features the text "EEOC GUIDANCE" in a large, black, sans-serif font centered on a white background. Below the text is a decorative graphic consisting of several overlapping, wavy, translucent shapes in shades of red, orange, green, and blue, creating a sense of motion and depth.

EEOC GUIDANCE

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EEOC GUIDANCE

- On December 16, 2020 EEOC issued guidance for employers indicating how Equal Employment Opportunity laws apply to questions relative to COVID-19 vaccinations.
- Broad statement: EEO laws still apply during the pandemic, but they don't interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.

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EEOC GUIDANCE

EEO laws include:

- Americans with Disabilities Act (ADA)
- Title VII of the Civil Rights Act of 1964
- Genetic Information Nondiscrimination Act (GINA)
- Pregnancy Discrimination Act

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ADA REQUIREMENTS



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ADA BACKGROUND

The Americans with Disabilities Act (ADA) is a federal civil rights law that:

- Prohibits an employer from discriminating against **qualified individuals with disabilities**.
- Covers private **employers** with 15 or more employees and includes state and local governments.
- Employer must provide **reasonable accommodation** for a known disability of a qualified applicant or employee unless it can show doing so would impose an “**undue hardship**.”

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WHAT THE ADA REQUIRES

- Limits Employers' ability to make **disability-related inquiries** and to conduct **medical examinations** unless inquiry or exam is **job-related** and consistent with **business necessity**.
- Employer must keep employees' medical information separate from other personnel files and maintain the information in a confidential manner.
- Can't exclude individual with disability from workplace for health and safety reasons unless they pose a **direct threat**.
- **Direct threat** is a significant risk of substantial harm to health and safety of the individual or others that can't be eliminated by a reasonable accommodation.

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EEOC GUIDANCE RE. ADA

Administering an FDA approved COVID-19 vaccine to an employee by an employer (or 3rd party with whom employer contracts for this purpose) is not a medical exam for ADA purposes.

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EEOC GUIDANCE RE. ADA PRESCREENING QUESTIONS

- Pre-vaccination medical screening questions are subject to ADA standards for disability-related inquiries. If employee is required to get vaccine, pre-screening questions must be "job related and consistent with business necessity."
- Prescreening questions don't trigger ADA protection if:
 - Employer provides vaccination to employees on a voluntary basis. (If employee doesn't answer the questions employer may refuse to give the vaccine but may not retaliate.)
 - If employee gets vaccine from a 3rd party who is not under contract with employer (such as pharmacy).

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EEOC GUIDANCE RE. ADA

Asking an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry.

- But asking why employee didn't get vaccinated is problematic unless meets the "job-related and consistent with business necessity" standard.
- May want to advise employees to avoid providing any other medical information when they provide proof of receiving vaccine.

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EEOC GUIDANCE RE. ADA EXEMPTION FOR DISABILITY

Employer with mandatory vaccine program must provide exemption for employee who can't receive COVID-19 vaccination because of disability

- Consider:
 - Does individual pose a **direct threat**?
 - Can the threat be eliminated or reduced via **reasonable accommodation**?
- Employer can't exclude employee from the workplace unless employer can show:
 - No accommodation would reduce threat to an acceptable level, or
 - Accommodation would pose **undue hardship** on employer.
- Employer may not automatically terminate the employee.

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EEOC GUIDANCE RE. ADA ACCOMMODATIONS

- Employer and employee should engage in a flexible, interactive process to ID options that don't cause **undue hardship** (significant difficulty or expense)
- Possible accommodations might include:
 - Teleworking or performing employee's current position remotely
 - Temporary change to a position that involves less contact with public or other employees
 - Taking a temporary leave

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EEOC GUIDANCE RE. ADA ACCOMMODATIONS

Train managers and supervisors:

- How to recognize and respond to an employee's request for accommodation
- To whom request should be referred
- It is unlawful to:
 - Disclose that an employee is getting reasonable accommodations
 - Retaliate against employee for requesting accommodation

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TITLE VII REQUIREMENTS



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TITLE VII REQUIREMENTS



It shall be an unlawful employment practice for an employer to:

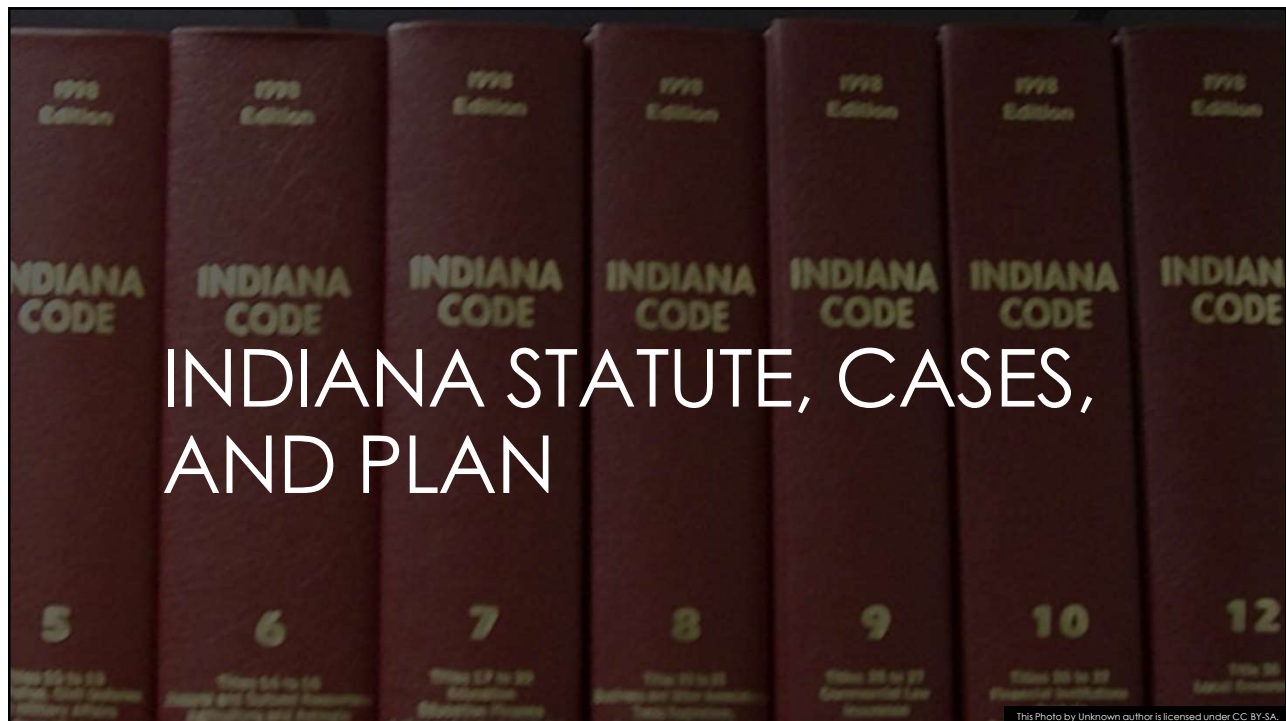
- (1) . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, **religion**, sex, or national origin; or
- (2) . . . deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, **religion**, sex, or national origin.

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EEOC GUIDANCE RE. TITLE VII

- Under Title VII an employer who requires vaccinations must provide reasonable accommodation for an employee who objects based on the employee's sincerely held religious belief, practice, or observance, unless it would pose an undue hardship.
- Courts define "undue hardship" in Title VII to mean "having more than a de minimus cost or burdent on the employer.
- The EEOC cautions the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for a religious accommodation is based on a "sincerely held" belief.
- If no reasonable accommodation is possible employer may exclude employee from workplace but may not automatically terminate the worker.

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INDIANA STATUTE, CASES, AND PLAN

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INDIANA CODE: VACCINE REQUIREMENT

(a) Every child residing in Indiana who is enrolled in an accredited elementary school or high school shall be immunized as determined by the state department of health against: [statute lists 10 diseases]

(b) The state department of health may expand or . . . modify the list of communicable diseases that require documentation of immunity as medical information becomes available that would warrant expansion or modification in the interest of public health.

IC 20-34-4-2

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INDIANA CODE: RELIGIOUS OBJECTION

A student may not be required to undergo any . . . immunization . . . when the child's parent objects on religious grounds. Objection must be:

1. made in writing;
2. signed by the child's parent;
3. delivered to the child's teacher or to the individual who might order . . .an immunization. . .absent the objection.

IC 20-34-3-2

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INDIANA CODE: EXCEPTION FOR STUDENT'S HEALTH

If a physician certifies that a particular immunization is or may be detrimental to a student's health the requirement for that particular immunization [doesn't apply to] the student until the immunization is found no longer detrimental to the student's health.

IC 20-34-3-3

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INDIANA SUPREME COURT CASES

Unvaccinated child was properly excluded from attending public school during smallpox epidemic or threat or danger of epidemic ensuing where parent refused to vaccinate child because he didn't believe the vaccine was safe or effective. Child was healthy and did not qualify for existing medical exemption. **Blue v. Beach**, 155 Ind. 121 (1900)

Emergency resolution of board of health excluding from school children who had not been vaccinated was not unconstitutional and did not abridge religious or civil liberty. **Vonnegut v. Baun**, 206 Ind. 172 (1934)

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INDIANA'S COVID-19 VACCINE DISTRIBUTION PLAN

Populations of Focus*		
Phase 1	Phase 2	Phase 3
Phase 1-A: <ul style="list-style-type: none"> • Paid and unpaid persons serving in healthcare settings who have the potential for direct or indirect exposure to patients or infectious materials and are unable to work from home. 	<ul style="list-style-type: none"> • Remainder of Phase 1 populations • Critical populations** • General population 	<ul style="list-style-type: none"> • Remainder of Phase 1 populations • Critical populations** • General population
Phase 1-B: <ul style="list-style-type: none"> • Other essential workers • People at higher risk of severe COVID-19 illness, including people 65 years of age and older 		

*Planning should consider that there may be initial age restrictions for vaccine products.

**See Section 4: Critical Populations for information on Phase 1 subset and other critical population groups.

Figure 2: COVID-19 vaccination program phases.

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WHAT TO CONSIDER?

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POLICY PROVISIONS TO CONSIDER

- Whether employer will encourage, incentivize, or mandate vaccination for all or part of staff
- How employer will administer vaccine program
- Employer's policy regarding time off for vaccination or potential side effects
- Vaccine shortage contingency language
- Process for medical and religious exemption requests
- Alternative means to earn incentive for employees who are exempt on medical or religious grounds
- Non-discrimination and non-retaliation provisions

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REAL WORLD INCENTIVES

- Kroger - \$100 bonus for any employee who receives COVID-19 vaccine
 - Must provide proof of vaccine to HR
 - Employees with medical or religious exemption may complete education and safety course for same bonus.
- Aldi – 2 hours of pay per dose received
- Dollar General – 4 hours of paid time

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OTHER LEGAL CONSIDERATIONS

- **Unions** If employees are in a union, employer must address collective bargaining obligations before communicating vaccine policy.
- **Worker's Compensation**
- **Genetic Information Nondiscrimination Act (GINA)** according to EEOC, may be implicated depending upon pre-vaccination screening questions.
- **Section 504 of the Rehabilitation Act of 1973**
- Acceptable size of incentives and whether they could violate wellness program rules

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SOME NON-LEGAL CONSIDERATIONS

- Potential administrative burden
- Availability of vaccinations
- Whether to stagger vaccinations
- Possible impact on employee morale
- Disproportionate impact and potential equity concerns

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SUMMARY

1. During this COVID-19 pandemic, an employer can require employees to be vaccinated even under Emergency Use Authorization.
2. Employer must consider reasonable accommodations or allow exemptions for employees who can't take vaccine due to disability, other health related concerns, or sincerely held religious beliefs.
3. Giving the vaccine is not a medical exam under ADA.
4. Pre-screening questions are likely to trigger ADA concerns unless vaccine program is voluntary or administered by an independent 3rd party.
5. Employer may require employees to submit proof they have received vaccine.

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TIME FOR QUESTIONS

What Questions
Do You Have
About COVID-19
Vaccine
Policies?

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HOW TO
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