

# It's (a Little) Complicated: Employer Vaccination Programs in the Age of COVID-19

Shelley M. Jackson, Partner  
Krieg DeVault LLP



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## About the Speaker



**Shelley M. Jackson**  
Partner

Krieg DeVault LLP  
sjackson@kdlegal.com  
(317)238-6272

Shelley Jackson concentrates her practice in the areas of health law, employment law, professional license defense, and data privacy and security. She brings a diverse set of professional experiences to her work, including time spent both in a law firm setting and in-house as an assistant general counsel and chief privacy officer for a multi-national corporation.

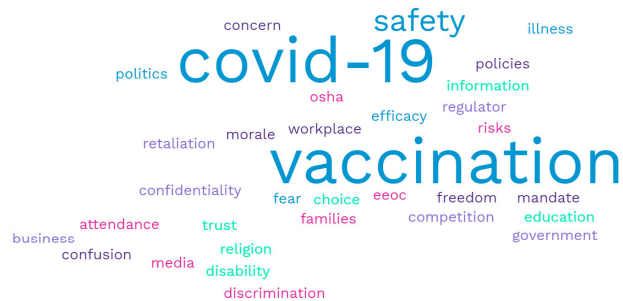
In addition to her legal work, Shelley is active in her community and currently serves on the Board of Directors for The Milk Bank, Inc., as a corporate Advisory Board member for Reveal Risk, Inc., and as a member of the Indianapolis Bar Association's Commission on Equality, Diversity, and Inclusion. She is involved in various civic and professional organizations and frequently writes and speaks on health care and employment law topics.

Shelley and her husband, Tim, have two young adult sons and live in Fishers, Indiana.



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## Setting the Stage: Employer Considerations



Source:  
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## Setting the Stage: Our (Semi-)Current Environment

- Employees have strong opinions on mandatory COVID-19 vaccination policies.
- Gallup Poll of employees taken between July 19-26, 2021:
  - 36% strongly favor (52% total in favor)
  - 29% strongly oppose (38% total opposed)
- Employers have largely deferred implementing mandatory vaccination policies but are encouraging vaccination.
- Gallup Poll of employers taken between July 19-26, 2021:
  - 9% requiring vaccination
  - 62% encouraging vaccination
  - 29% not indicating

Source: <https://news.gallup.com/poll/353825/workers-strong-views-vaccine-mandates-favor.aspx>



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## Old Employer Question: Can we require vaccinations?

- Generally, yes, with some caveats
- Legal grounds for objection: religion and disability
- State or local requirements/restrictions
- Public employers: added constitutional considerations



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## New Employer Question: Must we require vaccinations?

- The answer at some point will most likely be “yes,” though the landscape is constantly changing.
- Path Out of the Pandemic: President Biden’s COVID-19 Action Plan
  - The Department of Labor’s Occupational Safety and Health Administration (OSHA) is developing a rule that will require **all employers with 100 or more employees** to ensure their workforce is **fully vaccinated** or require **any workers who remain unvaccinated to produce a negative test result on at least a weekly basis** before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact **over 80 million workers** in private sector businesses with 100+ employees.

Source: <https://www.whitehouse.gov/covidplan/#vaccinate>



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## New Employer Question: Must we require vaccinations?

- Path Out of the Pandemic: President Biden’s COVID-19 Action Plan
  - To continue efforts to ensure that no worker loses a dollar of pay because they get vaccinated, OSHA is developing a rule that will require **employers with more than 100 employees** to provide **paid time off** for the time it takes for workers **to get vaccinated or to recover if they are under the weather post-vaccination**. This requirement will be implemented through the ETS.

Source: <https://www.whitehouse.gov/covidplan/#vaccinate>



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## New Employer Question: Must we require vaccinations?

- Path Out of the Pandemic: President Biden's COVID-19 Action Plan
  - Building on the President's announcement in July to strengthen safety requirements for unvaccinated federal workers, the President has signed an Executive Order to take those actions a step further and require **all federal executive branch workers** to be vaccinated. The President also signed an Executive Order directing that this standard be extended to **employees of contractors that do business with the federal government**. As part of this effort, the **Department of Defense**, the **Department of Veterans Affairs**, the **Indian Health Service**, and the **National Institute of Health** will complete implementation of their previously announced vaccination requirements that cover **2.5 million people**.

Source: <https://www.whitehouse.gov/covidplan/#vaccinate>



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## New Employer Question: Must we require vaccinations?

- Path Out of the Pandemic: President Biden's COVID-19 Action Plan
  - The **Centers for Medicare & Medicaid Services (CMS)** is taking action to require COVID-19 vaccinations for workers in **most health care settings that receive Medicare or Medicaid reimbursement**, including but not limited to **hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies**. This action builds on the vaccination requirement for **nursing facilities** recently announced by CMS, and will apply to **nursing home staff** as well as **staff in hospitals and other CMS-regulated settings**, including **clinical staff, individuals providing services** under arrangements, **volunteers**, and **staff who are not involved in direct patient, resident, or client care**. These requirements will apply to approximately **50,000 providers** and cover a **majority of health care workers across the country**. Some facilities and states have begun to adopt hospital staff or health care sector vaccination mandates. This action will create a consistent standard across the country, while giving patients assurance of the vaccination status of those delivering care.

Source: <https://www.whitehouse.gov/covidplan/#vaccinate>



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## Mandatory Vaccination: Other Risk Management Considerations

- Legal challenges to President Biden’s COVID-19 Action Plan
- Other state/federal requirements, *e.g.*, OSHA’s “general rule” requiring a safe workplace and the Pregnancy Discrimination Act
- Applicable state/local laws (including potential immunity from COVID-19 related claims)
- For public employers, constitutional considerations, *e.g.*, First Amendment (religious freedom) and Fourteenth Amendment (due process)
- Contractual relationships, including collective bargaining agreements
- Other considerations (*e.g.*, business relationships, client/customer/patient demand)

Source: <http://iga.in.gov/legislative/2021/bills/senate/74#document-94ebd1f5>



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## Mandatory Vaccination: Other Risk Management Considerations

Indiana Senate Bill 74: Would have prohibited an employer from requiring, as a condition of employment, an employee or prospective employee to receive any immunization if the immunization is medically contraindicated for the employee or receiving the immunization is against the employee’s religious beliefs or conscience. Allowed for a civil action against an employer for a violation.

Much broader than Title VII and ADA protections

- “Conscience” undefined
- No reasonable accommodation provisions
- No direct threat defense
- No undue hardship component

Source: <http://iga.in.gov/legislative/2021/bills/senate/74#document-94ebd1f5>



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## Key Consideration: Disability-Based Accommodation

- Equal Employment Opportunity Commission (EEOC): “As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.”
- The Americans with Disabilities Act (ADA) (along with corresponding state and local laws) requires employers to provide reasonable accommodations to employees with disabilities
- Limitation: if the reasonable accommodation would create an undue hardship for the employer
- Request documentation of medical necessity from healthcare provider

Source: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.5>



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## Key Consideration: Disability-Based Accommodation

- Engage in interactive process with employee to identify potential reasonable accommodations (EEOC has said look to CDC and OSHA guidance)
- Is there an effective accommodation/would it create an undue hardship, *e.g.*, operationally?
- Is there any way to avoid the employee posing a direct threat to the health or safety of others, even through offering a reasonable accommodation?
- Direct threat analysis: duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm



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## Key Consideration: Religious Accommodation

- EEOC guidance: “Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.”
- Title VII of the Civil Rights Act (and comparable state and local laws): Employers cannot discriminate against employees based on religion
- Requires employers to accommodate the sincerely held religious beliefs of employees

Source:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



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## Key Consideration: Religious Accommodation

- Employee may refuse vaccine due to sincerely held religious beliefs
- What reasonable accommodation is available?
- Limitation: Would the reasonable accommodation create an undue hardship (more than a *de minimis* cost or burden on the employer – different than ADA standard)?
- Documentation: What accommodation is needed and why?
  - EEOC examples of potential accommodations: “[W]ear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.”
- What if the employer has bona fide doubts about whether the religious beliefs are sincerely held?



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## Key Consideration: Religious Accommodation

- EEOC guidance:
  - A religious practice may be sincerely held by an individual even if newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion.
  - Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the 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 at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.
  - Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns 'ultimate ideas' about 'life, purpose, and death.' Social, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII.

Sources:

<https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation>  
<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#:~:text=224>  
<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>



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## Key Consideration: Religious Accommodation

- Examples of documentation to substantiate a need for religious accommodation:
  - Employee's own explanation
  - Written materials
  - Third party verification (note: does not necessarily need to be a clergy person or fellow congregant; can come from someone who is aware of the employee's religious practice or belief)

Source:

<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>



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## Practical Implementation Tips: General Risk Management

- Carefully monitor legal and regulatory landscapes – frequent changes
- Establish or revise formal process for evaluation, implementation, and modification of employee vaccination policies
- Identify key individuals who own the process (no hot potato!)
- Ensure confidentiality is maintained (required under ADA)
- Remain flexible and open-minded; be proactive when possible
- Evaluate accommodation options for those with exemptions



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## Practical Implementation Tips: Administration of Vaccination Program

- Require verification of vaccination status (does not constitute a medical inquiry under ADA) or administer an employee vaccination program?
- Administering employee vaccinations or contracting directly with a third party to administer employee vaccinations creates additional obligations and risks
  - Pre-vaccine screening questions are a medical inquiry under ADA (must be “job-related and consistent with business necessity”) and may elicit information protected by the Genetic Information Nondisclosure Act (GINA)
  - Vaccine-related accidents/injuries will likely be covered by workers’ compensation
  - How to prioritize employees when there is a shortage of vaccine?



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## Practical Implementation Tips: Employee Communication

- Communicate clearly, regularly, and with respect
- Educate employees using authoritative sources, e.g., [COVID-19 Vaccine in Indiana](#), [CDC's Vaccination Communication Toolkits](#), offer Q&A session with experts
- Offer paid time off to receive vaccination (may be mandatory)
- Consider offering incentives for voluntary vaccination (subject to compliance with applicable requirements)



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## Questions?



**Shelley M. Jackson**  
Krieg DeVault LLP  
[sjackson@klegal.com](mailto:sjackson@klegal.com)  
(317)238-6272

Source:

<https://www.istockphoto.com/video/covid-19-coronavirus-vaccine-vials-loopable-gm1218659356-356182070>



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