

Mandatory COVID-19 Vaccination and Religious Accommodations: A Roadmap for Employers

I. Religious Accommodation – Something Old, Something New

Mandatory vaccination policies are nothing new.¹ What is different in the COVID-19 context, are the deluge of requests for accommodation.² Given that vast case law under the Americans with Disabilities Act (“ADA”) and that the medical conditions which present a potential adverse reaction to the COVID-19 vaccinations are relatively pre-defined,³ the requests causing the most difficulty for employers are those for religious accommodation. Naturally, determining their legitimacy is an issue.⁴ What’s worse, religious leaders (and certain others who may be less scrupulous) have not been shy about announcing to people that they are willing to provide (sometimes for a fee) letters supporting these requests.⁵ Given this tremendous variation, the ease of availability, and the sheer number of requests coming in, employers are in need of a roadmap for dealing with accommodation requests to COVID-19 vaccine mandates.

II. Religious Accommodation – Title VII, EEOC Guidance and Regulations, and Case Law

Title VII of the Civil Rights Act of 1964 (“Title VII”) is the primary law protecting religious rights in employment and requires an employer to:⁶

Reasonably accommodate the sincerely held religious beliefs or practices of their employees when those beliefs or practices are in conflict with a work requirement or policy and the accommodation will not create an undue hardship on the operations of the employer’s business.⁷

From this requirement, employers can develop a simple outline of questions to use for every religious accommodation request:

Legitimacy Of The Request for Religious Accommodation Questions

- Is the employee’s claimed belief or practice sincerely held?
- Is the employee’s belief or practice “religious?”

Interactive Process Questions

- Does the employee's sincerely held religious belief or practice conflict with our COVID-19 vaccination mandate?⁸
- If the belief does conflict with the COVID-19 vaccination mandate, are there reasonable accommodations available?
- Do any of the available reasonable accommodations cause an undue hardship?

A. The Legitimacy of the Request for Religious Accommodation

The Equal Employment Opportunity Commission ("EEOC") has recently reaffirmed its position that an employee's sincerity and the "religiousness" of a belief should normally be assumed.⁹ Indeed, denying a request due to lack of sincerity is fraught with legal exposure.¹⁰ And denial due to the secular nature of a belief is almost equally as risky.¹¹

There are, though, two common strategies an employer may use in tandem when evaluating the legitimacy of a request. First, an employer may require, as part of its process, that an employee fill out a questionnaire. In doing so, the goal is to cause the employee to articulate their sincerity and religious belief in writing. Second, the questionnaire can contain an attestation. This may reduce instances of misrepresentation. This same strategy can be repeated for any follow up inquiries:

Questions for Introductory Inquiry –

1. Please describe your religious belief?
2. Please describe how this belief is in conflict with the COVID-19 vaccine?
3. Please describe any accommodations you believe would allow you to be exempt yet continue to perform your essential functions safely?
4. Are there alternative accommodations you would consider?

Questions for any Follow Up –

1. How long have you had your religious beliefs?

2. Have you taken other vaccines? If so, when, and what made that vaccine different?
3. Have you ingested or used any of these products?¹²
4. Did you receive any help in filling out your religious exemption request or rely on any other materials to answer?
5. What other fundamental tenets or beliefs does your religion hold?
6. How do you practice your religion?
7. Are there others who practice this religion? And, if so, do they ascribe to the same tenets?¹³

While these inquiries will not necessarily rule out *all* fraudulent requests, the objective of this strategy is to increase understanding and decrease misrepresentation – after all, if the employee refuses to put their request in writing and respond to permissible legal inquiries, they are likely to lose the legal protections available to them.¹⁴

B. The Interactive Process

Step two is to determine whether the employer can accommodate the individual. At the outset, there are important constraints on what an employee can legally expect from an employer with regard to reasonableness and undue hardship. First, the accommodation offered to an employee *need not* be the accommodation the employee asked for.¹⁵ The employer can choose an accommodation that is less costly, less, disruptive, or otherwise more desirable to the employer.¹⁶ In fact, an employer need not prove, that the accommodation chosen by the employer was in some way *better* than all the other available accommodations.¹⁷ Second, and more importantly, according to the United States Supreme Court, anything more than a *de minimis* cost or burden in accommodating a religious belief or practice would be tantamount to religious discrimination.¹⁸

To require [an employer] to bear more than a *de minimis* cost in order to give [an employee their religious accommodation] is an undue hardship ... to bear additional costs when no such costs are incurred to give other employees the [same privilege] that they want

would involve unequal treatment of employees on the basis of their religion.¹⁹

Thus, simply burdening another employee or the operations of an employer or requiring the employer to incur more than *de minimis* costs are undue hardships under Title VII.

Of course, knowing whether an accommodation is reasonable or an undue hardship for the employer requires knowing what accommodations are available. With a vaccine mandate, however, the question of available accommodations is less involved than in other instances of religious accommodation. The vaccine mandate is about *safety* – safety of the employee, coworkers, customers, and the community in general. Thus, the most obvious accommodations available are remote work, testing where site work and contact with others is required, transfer to an open position not subject to/in violation of a seniority system along with testing, and/or unpaid leave for a specific duration. While reasonableness concerns the level of material harm to the employee (and the object is to agree on the least harmful accommodation), an employer need not accommodate where an undue hardship is created.

In the vaccination context an undue hardship can arise for an employer for any number of reasons:

- Working remotely if the essential functions of the position cannot be performed, if too many non-essential duties would be shared by coworkers, or the employer would have to hire someone;
- Too many employees are seeking the religious accommodation so as to create a potential safety hazard
- Testing if the cost of testing and/or time spent testing becomes too burdensome;²⁰
- If the transmission rates in the community rise to a level that testing or other safety protocols no longer work;²¹
- The number of unvaccinated or immunocompromised individuals on a shift may make testing and other protocols an undue hardship;²² and

- Client/customer vaccination mandates may cause an undue hardship.

As should be clear from the above, religious accommodations may need to be reviewed as time progresses, not just because individuals may change their beliefs, or the pandemic changes, but because the cost of testing may, in and of itself, get too high or the accommodation becomes too burdensome on an employer's operations.²³

III. Conclusion

This article is intended to provide employers a reference for spotting issues and a general framework for navigating religious accommodation requests in the context of the COVID-19 vaccine mandates. Great care – usually seeking legal advice – should be exercised when navigating this very difficult issue. Unlike questions of legitimacy, the undue hardship analysis is not perfunctory. By determining all available accommodations, applying the reasonableness and undue hardship standards, and of course by documenting the steps taken, employers will be in a better position to navigate the religious accommodation and COVID-19 minefield. In so doing, employers will ultimately reducing the risks of costly EEOC charges and litigation arising from inconsistent processes and split-second accommodation decisions.

¹ See, e.g., Me. Rev. Stat. tit. 22, § 802(1)(D).

² While there is no way to calculate the numbers, in 2020, the EEOC only received 2,404 religious discrimination charges (including failure to accommodate and any other type of religious discrimination). Some employers may be receiving that many requests for religious accommodation alone. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, RELIGION-BASED CHARGES (CHARGES FILED WITH EEOC) FY 1997 - FY 2020, <https://www.eeoc.gov/statistics/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2020> (last visited November 1, 2021).

³ CENTER FOR DISEASE CONTROL, COVID-19 VACCINE QUICK REFERENCE GUIDE FOR HEALTHCARE PROFESSIONALS, <https://www.cdc.gov/vaccines/covid-19/downloads/covid19-vaccine-quick-reference-guide-2pages.pdf> (last updated Oct. 26, 2021).

⁴ For starters, these authors have seen religious accommodation requests in the form of objections because the employee's body is a temple and the vaccine contains toxins, the employee's body is perfectly created and able to fight off disease without medical intervention (and to use intervention is to lack faith in God), the employee's faith believes life begins at conception and the vaccines were developed with fetal cells/tissue, God told the employee not

to take the vaccine, the vaccine contains the mark of the beast, and an employee needs pure blood to cast spells, but the vaccine dilutes the blood so that they cannot cast spells.

⁵ Tom Hals, *U.S. Pastors, Advocacy Groups Mobilize Against COVID-19 Vaccine Mandates*, REUTERS (Oct. 14, 2021), <https://www.reuters.com/world/us/us-pastors-advocacy-groups-mobilize-against-covid-19-vaccine-mandates-2021-10-14/>.

⁶ A handful of states (Arizona, California, Minnesota, New Jersey, New York, North Dakota, and Oregon) have different standards from Title VII for accommodating religious beliefs and practices. Note that this roadmap for employers does not treat religious accommodation in the context of those laws. However, a consideration of undue hardship in those states would require something more akin to an undue hardship analysis under the Americans with Disabilities Act (“ADA”).

⁷ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977); 29 C.F.R. § 1605.2(b).

⁸ Technically, whether a belief is in conflict with a work requirement is part of the analysis, but for the purposes of this short article the authors assume that there is a conflict.

⁹ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SECTION 12: RELIGIOUS DISCRIMINATION, § 12-I(A)(3), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_984461328691610748665504, (last updated Jan. 15, 2021); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, § L(2), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Oct. 25, 2021).

¹⁰ For sincerity, while counting as evidence allowing an employer to inquire into an employee’s sincerity, an employee need not show consistency of practice, proof from a religious leader or text, or even practice or belief in the short term. *Id.*

¹¹ Likewise, while it cannot be secular in nature, to be “religious” a belief need not be true, consistent, rational, logical, sound, part of a recognized religion, or even consistent with the religion named. *Id.* So, what is religious then? The Supreme Court has indicated the belief must itself be, or be part of a system of beliefs that play the same role that a recognized religion does in a person’s life. *United States v. Seeger*, 380 U.S. 163, 166 (1965). Per the Eighth Circuit, this will include a belief system that tends to include beliefs or practices that 1) address deeply fundamental and important questions; 2) are part of a comprehensive teaching and not isolated; and 3) usually having formal or external signs of some sort. *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000) (citing *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1032 (3rd Cir.1981)). While not a rigid test, it can be used as an excellent guide for inquiring into the “religiousness” of a belief.

¹² While an individual need not be consistent in their practices, knowing which products use the same ingredients as the COVID vaccines in their development can be a wake up call for many employees. See, e.g., Andrea Hsu and Shannon Bond, *Getting a Religious Exemption to a Vaccine Mandate May not be Easy. Here’s Why*, NPR (Sept. 28, 2021) <https://www.npr.org/2021/09/28/1041017591/getting-a-religious-exemption-to-a-vaccine-mandate-may-not-be-easy-heres-whyf>.

¹³ While it is not necessary that a person follow all of the tenets of their religion, or all of the tenets that others follow who practice the same religion, knowing what the tenets are with regard to vaccination can be helpful for an employer and employee in discussion regarding the alleged belief. For a great article summarizing the world’s recognized religions and their stances on vaccination see VANDERBILT UNIVERSITY, IMMUNIZATIONS AND RELIGION, <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion> (last visited Oct. 31, 2021).

¹⁴ WHAT YOU SHOULD KNOW, § L(2).

¹⁵ SECTION 12, § 12-IV-A(2).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85, 97 S. Ct. 2264, 2277 (1977).

¹⁹ *Id.*

²⁰ WHAT YOU SHOULD KNOW, § L(2).

²¹ *Id.* § L(6).

²² *Id.* § L(2).

²³ *Id.* § L(6).