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Defending Against Title VII Religious Objections to COVID Vax

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Title VII of the Civil Rights Act prohibits employment discrimination based on religion and requires that employers provide reasonable accommodations for employees' sincerely held religious beliefs, practices and observances. The COVID-19 pandemic and resulting employer vaccine mandates have brought this duty into sharp relief in the past year.

Employees—many of whom may never have expressed strong religious beliefs to their employer—are asserting vaccine-specific religious objections in unprecedented fashion.

While plaintiffs seeking religious exemptions from employer vaccine mandates subscribe to a variety of faiths, objections to receiving the COVID-19 vaccine have coalesced around the asserted beliefs that:

- It is morally wrong to receive a vaccine that used fetal cells in the development stage—the most commonly cited religious objection to the vaccines;
- The body is a temple that should not receive foreign or unnatural substances, and God will protect the body from sickness; and
- The immune system was created by God and should not be altered—often based on the misconception that the COVID-19 vaccine alters a recipient's DNA.

Often, these objections have been supported by conclusory assertions that, for example, receiving a vaccine that used fetal cells in the development stage is sinful. In some instances, plaintiffs have cited specific Bible verses to support their opposition to the vaccine, such as I Corinthians 6:19, Psalm 139:13 and Isaiah 49:1.

Whatever the purported basis, when an employee seeks an exemption from a mandatory vaccine policy, employers face two **difficult questions**:

1. Is the request based on a sincerely held religious belief, practice or observance?
2. If so, would granting the requested accommodation—e., an exemption from the vaccination requirement—result in an undue hardship?

Unfortunately, the existing body of administrative agency guidance and legal authority have not provided clear answers to either question.

An avalanche of religious accommodation litigation has been filed across the country, and as these cases make their way through the courts, clear trends in courts' rulings have been hard to come by.

In the vaccine mandate context, there are few published rulings to date that meaningfully address either the sincerity or religious nature of a purported religious belief that conflicts with vaccination for COVID-19.

On the other hand, employers may find helpful the early indication that, in certain contexts— e.g., health care, transportation and other settings in which employees work in-person—courts have been receptive to the argument that unvaccinated employees, and the health and safety risks that they present, may constitute an undue hardship for purposes of Title VII.

What Qualifies as a Sincerely Held Religious Belief Under Title VII

In some circumstances, an employer may reject a religious objection to a vaccination requirement by challenging whether it is based on a sincerely held religious belief, though this may be an uphill battle in most circumstances.

According to guidance from the U.S. Equal Employment Opportunity Commission:

> Title VII protects all aspects of religious observance and practice as well as belief and defines religion very broadly. … [R]eligion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.[1]

Even religious beliefs that seem preposterous and nontraditional may be entitled to protection under Title VII.[2] Religious beliefs may be nontheistic as well.[3]

Applying these principles outside of the COVID-19 vaccine context, courts have recognized an array of religious beliefs that qualify for Title VII protection, including the Church of Wicca;[4] Alcoholics Anonymous;[5] and belief in the power of dreams, where such belief was rooted in traditional convictions of a plaintiff's African origins.

However, social, political or economic philosophies, as well as personal preferences, are not considered religious beliefs under Title VII.[6]

Notably, in Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania,[7] the U.S. Court of Appeals for the Third Circuit in 2017 rejected a Title VII religious discrimination claim by a hospital employee who refused to be vaccinated against the flu based on "worries about the health effects of the flu vaccine," disbelief that the vaccine was harmless, and desire to avoid the vaccine.

The Third Circuit found that the plaintiff's beliefs were not sufficiently religious in nature because they did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature."[8] The court held that the employee's concern was "a medical belief, not a religious one."[9]

Prior to the COVID-19 pandemic, most religious accommodation cases under Title VII centered around a few common fact patterns, such as scheduling or time-off requests, and employer dress and grooming practices.[10]

Similarly, the EEOC's Title VII regulations regarding religious accommodations focus on accommodating scheduling issues and religious objections to union dues.[11]

Thus, case law and existing regulatory guidance have been of limited utility in confronting the flood of religious accommodation claims being filed by employees across the country.

The EEOC's recently updated COVID-19-related guidance does, however, provide some direction.[12] In general, the agency cautions that employers should presume that a request for an accommodation is based on a sincerely held religious belief, practice or observance.

But the guidance notes that an employer may be justified in making a limited factual inquiry and seeking supporting information if the employer has an objective basis for questioning the religious nature of a belief or the employee's sincerity.[13]

Consistent with case law prior to COVID-19, such as Fallon, the EEOC's updated guidance clarifies that

> objections to a COVID-19 vaccination requirement that are purely based on social, political, or economic views or personal preferences, or any other non-religious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs.[14]

However, when an objection is based on an overlapping political and religious belief, it may qualify for protection "as long as the view is part of a comprehensive religious belief system and is not simply an isolated teaching."[15]

Thus, employers should proceed with caution when making determinations that a belief is potentially nonreligious, especially in the case of objections that are interlaced with political, philosophical and religious language.

When a belief is clearly religious, an employer still may deny an accommodation if there are objective reasons to question the sincerity of the employee's beliefs.

The EEOC's updated guidance lists a number of factors that an employer may consider, including whether:

- The "employee has acted in a manner inconsistent with the professed belief";
- The "accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons";
- The timing of the employee's request makes it suspect, g., if it comes shortly after a denial based on a secular, nonreligious reason; and
- The employer has other reasons to doubt that the employee is seeking the accommodation for a religious [16]

However, in undertaking this analysis, the EEOC cautions that employees' beliefs and levels of adherence can change over time, "and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held."[17]

Further, the agency warns against assuming that an employee's faith is insincere merely because the employee deviates from some commonly held tenets of the employee's religion, or because the employee is not perfectly observant to all of a religion's beliefs or practices.[18]

Another Basis to Reject Religious Objections: Undue Hardship

Under Title VII, an employer is not required to reasonably accommodate a request for a religious accommodation if doing so would pose an undue hardship.[19] In the context of religious beliefs, the definition of an undue hardship under Title VII is an accommodation that imposes more than a de minimis cost on the employer.[20]

Where COVID-19 vaccination mandates are concerned, courts may find an undue hardship exists when having an unvaccinated employee would pose serious health and safety concerns; however, these concerns may be more or less compelling depending on the particular work environment.

The EEOC's updated guidance notes a number of common and relevant considerations that may be helpful in evaluating whether a request poses a hardship, including: (1) whether the requesting employee works outdoors or with others, or has close contact with members of the public, especially those who are particularly vulnerable to serious illness; and (2) the number of other employees who are seeking a similar accommodation.[21]

Current Litigation of Religious Accommodation Cases Provides Limited Answers

Vaccines against COVID-19 only were widely available in late 2020 and early 2021, and employer mandates are of even more recent origin. Accordingly, most cases challenging employers' failure to accommodate religious objections have yet to result in substantive rulings on the merits.

However, because some of these cases included requests for preliminary injunctive relief, rulings on these early questions may provide some indication about what arguments may be most viable in the future.

When defending against a Title VII religious discrimination case, employers generally have three possible avenues of argument: (1) the plaintiff's belief is not religious in nature; (2) the plaintiff's belief is not sincerely held; and (3) accommodating the exemption would pose an undue hardship.

Perhaps because the bar for a sincerely held religious belief is set very low, most injunctive relief litigation has focused on the third category of defense. And, in some contexts, courts have found employers' defenses sufficiently compelling to deny preliminary injunctive relief.

For example, courts have found that defendants can show undue hardship when accommodating an unvaccinated employee would risk the health and safety of other employees or individuals on the work site[22] or incur additional administrative burdens and costs, such as for regular testing in lieu of vaccination.[23]

These particular undue hardships generally relate to the necessity for an unvaccinated employee to be physically present at work, such as in the health care and transportation industries.

It remains unclear how employers in industries that permit remote work will fare in showing undue hardship.

Even what would seem to be the strongest employer argument—the potentially life-threatening risk of COVID-19 transmission to an unvaccinated employee's coworkers or customers—is not a universal silver bullet.

At least one court—the U.S. District Court for the Northern District of Illinois in Doe v. NorthShore University HealthSystem last November—has found that this argument does not necessarily **show undue hardship** for a medical facility, depending on what other safety measures the defendant has or has not [24]

Given this uncertainty, employers must shore up their objective reasons supporting an undue hardship argument.

As noted above, courts generally have not weighed in on the sincerity or the religious nature of a plaintiff's vaccine objection. One court, the U.S. District Court for the Middle District of Pennsylvania, bucked this trend in its November 2021 Federoff v. Geisinger Clinic decision,[25] finding that the plaintiffs' objections to the defendant's proposed accommodation—regular testing in lieu of vaccination—were:

- Not religious in nature, writing, "the Employees' hyper-focus on the 'science' of testing and its potentially harmful health effects in their papers only furthers this Court's skepticism that what objection they might have is rooted in a scientific or medical belief, not religion"; and
- Not sincere, since the plaintiffs were willing to undergo testing so long as vaccinated employees had to get tested as

Since most courts seem reluctant to grapple with the sincerity of religious beliefs, employers may fare better by focusing on the undue hardship argument instead.

What Are Employers to Do?

Until more substantive decisions are forthcoming, employers can continue to meet their Title VII obligations by (1) engaging in a good faith interactive process with employees who seek religious accommodations; (2) following the EEOC's updated guidance and not treating requests for religious accommodations differently than requests made on different grounds; and (3) consistently applying their vaccine policies in a neutral manner.

As to the interactive process, even when an employer has legitimate reasons to implement and enforce a vaccination mandate, it is nonetheless critical to engage with employees when they seek religious-based exemptions or other accommodations. Employers who fail to do so, and instead rely on blanket mandates, may risk discrimination claims under Title VII.

When engaging in the interactive process, employers should avoid politicizing employees' religious-based requests for accommodation, and they should engage in the same type of interactive process they would in the event of religious-related requests for schedule changes or dress and grooming policy exemptions.

While employers should assume that an employee's religious beliefs are sincere, employers who have reason for doubt can seek additional information as part of the interactive process. And, in the event a request seems completely unrelated to religion, employers should consider whether the request is eligible for accommodation at all.

Human resources teams and front-line managers, who are often the first recipients of accommodation requests, should be receptive to considering religious accommodation requests and endeavor to determine if an accommodation is possible.

To avoid discrimination claims, employers should apply their vaccination policies consistently and in an objectively defensible manner. If vaccination mandates are based on concerns about infection control and employee safety, those concerns should not shift because one employee is motivated by religion while another is motivated by disability.

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[1] "Questions and Answers: Religious Discrimination in the Workplace." U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/questions-and- answers-religious-discrimination-workplace (last visited Apr. 22, 2022).

[2] EEOC v. United Health Programs of America, Inc., 213 F. Supp. 3d 377, 395-396 (E.D.N.Y. 2016).

[3] See 29 CFR § 1605.1 ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.").

[4] Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986) (the Church of Wicca is a religion entitled to protection that the First Amendment affords prisoners.).

[5] Warner v. Orange Cty. Dep't of Prob., 115 F.3d 1068, 1075 (2d Cir. 1996) (Alcoholics Anonymous program that a convict was required to attend as a condition of his probation was religious in nature.).

[6] See, e.g., Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973) and Slater v. King Soopers, Inc., 809 F. Supp. 809, 810 (D. Colo. 1992) (Ku Klux Klan membership a social and political belief system rather than a religious one).

[7] 877 F.3d 487, 491-93 (3d Cir. 2017).

[8] Id. at 492.

[9] Id.

[10] See, e.g., Tagore v. U.S., 735 F.3d 324 (5th Cir. 2013) (challenge to Internal Revenue Service prohibition on Sikh employee wearing a kirpan with a blade exceeding two and half inches); E.E.O.C. v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997) (alleged religious discrimination based on failure to permit Jewish employee to take the day off for Yom Kippur); Smith v. Pyro Min. Co., 827 F.2d 1081 (6th Cir. 1987) (alleged religious discrimination based on employee's objection to work on Sundays); Tiano v. Dillard Department Stores, Inc., 139 F.3d 679 (9th Cir. 1998) (challenge to employer's refusal to permit employee to take time off during a specific period for a religious pilgrimage); Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (alleged religious discrimination based on employer's refusal to permit cashier to wear facial jewelry).

[11] See 29 C.F.R. § 1605.2(d).

[12] EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L (March 14, 2022).

[13] Id. at § L.2.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] See 42 U.S.C. § 2000e(j).

[20] See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

[21] EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," at § L.3.

[22] See, e.g., Barrington v. United Airlines, Inc., No. 21-cv-2602-RMR-STV, 2021 WL 4840855, at *4 (D. Colo. Oct. 14, 2021); O'Hailpin v. Hawaiian Airlines, Inc., No. 22-00007 JAO-KJM, 2022 WL 314155, at *10 (D. Haw. Feb. 2, 2022); Federoff v. Geisinger Clinic, No. 4:21-CV-01903, 2021 WL 5494289, at *9 (M.D. Pa. Nov. 23, 2021); Together Employees v. Mass Gen. Brigham Inc., No. 21-11686-FDS, 2021 WL 5234394, at *17 (D. Mass. Nov. 10, 2021), aff'd on other grounds, No. 21-1909, 2022 WL 1236952 (1st Cir. Apr. 27, 2022).

[23] See, e.g., Creger v. United Launch Alliance LLC, No. 5:21-cv-01508-AKK, 2021 WL 5579171, at *4 (N.D. Ala. Nov. 30, 2021); O'Hailpin at *10.

[24] Doe 1 v. NorthShore Univ. HealthSystem, No. 21-cv-05683, 2021 WL 5578790, at *5 (N.D. Ill. Nov. 30, 2021).

[25] Federoff at *9.

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