SpencerFane®

COVID-19 and Religious Accommodation Requests: New Guidance From the EEOC

The U.S. Equal Employment Opportunity Commission snuck in some pre-Halloween updates to its Technical Assistance Questions and Answers for COVID-19, Title VII, and other EEO laws. In this latest round, published October 25, 2021, the agency finally gave us additional guidance on how employers should handle requests for religious-based exceptions to mandatory vaccination requirements, more commonly known as "religious accommodation requests."

1. Does an employer have an obligation to consider an employee's request for an exception to a COVID-19 vaccination requirement based on a religious belief?

   Yes, an employer subject to Title VII of the Civil Rights Act of 1964 must consider a request from an employee for an exception, or accommodation, from a requirement of employment that conflicts with the employee's sincerely held religious beliefs, practices, or observances.

2. How must an employee communicate a request for a religious accommodation?

   The EEOC's updated guidance emphasizes that "**employees do not need to use any 'magic words,' such as 'religious accommodation' or 'Title VII.**" However, employees are expected to provide employers with notice of a conflict between the employees' sincerely held religious beliefs and mandatory vaccination requirements.

   As a "best practice," the EEOC recommends that employers provide applicants and employees with information that specifies (1) the designated employer representative(s) that they should contact, and (2) the procedures they are expected to use when making religious accommodation requests.

3. Are employers required to use a specific form when considering religious accommodation requests?

   Neither Title VII nor the EEOC prescribes the use of any specific type of form for considering and processing accommodation requests, but in its latest guidance, the EEOC did take the unique step of making its own internal accommodation request form available here. However, the EEOC's example is not tailored to requests for accommodations from vaccination requirements, and employers may have reasons to develop and use vaccine-specific forms.

4. Does Title VII require employers to entertain accommodation requests based on political or social beliefs?

   No. The October 25 guidance confirms that "Title VII does not protect social, political, or economic views, or personal preferences." Doubling down on this point, the EEOC addressed a common issue facing employers grappling with employee objections based on personal views, preferences, and concerns. The agency asserts, "**objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as 'religious beliefs' under Title VII."**

5. Does an employer have the right to push back and question an employee's stated religious belief?

   Consistent with its previous guidance, the EEOC confirmed this week that "an employer should assume that a request for a religious accommodation is based on sincerely held religious beliefs." However, a little wiggle room remains. If the employer has an **objective basis** for questioning either (1) the religious nature or (2) the sincerity of a particular belief, then, according to the EEOC, the employer has justification for making a **limited factual inquiry** and **seeking additional supporting information**.

   The EEOC took its position a step further in the new guidance by providing employers with some additional ammunition: namely, "[a]n employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent

claim that the employer improperly denied an accommodation."

6. Does the employee's objection have to be based on a commonly-known, mainstream religion?

   No. In this week's update, the EEOC states that Title VII's definition of "religion" also "protects nontraditional religious beliefs that may be unfamiliar to employers." This means that an employer should not assume that a request for an exception to a vaccination requirement is invalid simply because it is based on an unfamiliar religious belief. Nevertheless, per the agency, "**employees may be asked to explain the religious nature of their belief**."

7. What if an employer suspects the employee is not sincere about his or her stated religious belief?

   Although the sincerity of an employee's stated religious belief should "not usually [be] in dispute," the EEOC does recognize there are certain factors that, "either alone or in combination," might undermine an employee's credibility. Specifically:

   - Whether the employee has acted in a manner inconsistent with the professed belief ("although the employees need not be scrupulous in their observance").
   - Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons (like working remotely 100% of the time).
   - Whether the timing of the request renders it suspect ("e.g., it follows an earlier request by the employee for the same benefit for secular reasons).
   - Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

   If one or more of the above factors exist, then the EEOC takes the position that an employer may ask for an explanation as to how the employee's religious belief conflicts with the employer's vaccination requirement.

8. What if the employee's stated religious belief is inconsistent with the employee's past conduct?

The EEOC's position is that this fact alone is probably not good enough. "Although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time and, therefore, an employee's newly adopted or inconsistently observed practices may nevertheless be sincerely held."

9. Does an employer always have to grant an employer's religious-based request for an exception to a vaccination requirement?

   No. The employer must determine if the employee's request for an exception can be accommodated without an "undue hardship." Importantly, with respect to exceptions to vaccination requirements, the EEOC asserts that this means that "an employer should thoroughly consider all possible reasonable accommodations, **including telework and reassignment.**"

   However, if an employer does demonstrate that it is unable to reasonably accommodate an employee's religious belief without an undue hardship to its operations, then the employer does not have to provide the accommodation pursuant to Title VII.

10. When does an "undue hardship" exists?

    With respect to religious-based accommodations, an undue hardship exists when providing the accommodation would require the employer to incur **more than a minimal cost.** In its October 25 update, the EEOC explains that this may include not just direct, monetary costs, "but also the burden on the conduct of the employer's business – including, in this instance, the risk of the spread of COVID-19 to other employees or to the public." The agency also provided specific examples where undue hardships have been found: when workplace safety is impaired, when the efficiency of other jobs is diminished, and when co-workers are forced to carry the accommodated employee's share of hazardous or burdensome work.

11. Can an employer take a company-wide position that all exceptions to vaccine requirements would cause an undue hardship to the employer's operations?

That might be a bad idea. The EEOC explains that whether a particular proposed accommodation imposes an undue hardship "depends on its specific factual context." For example, does the employee work indoors or outdoors? Does the employee work in a solitary or group setting? Does the employee have close contact with a vulnerable population?

However, this week's updated guidance does provide some wiggle room because employers **are permitted to consider "the number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).**" That said, the agency also warns that it is not permissible for an employer to simply assume that if one employee is granted an accommodation, then more requests will follow.

12. Can an employer withdraw a previously-granted accommodation?

    Yes. This week's guidance is helpful in that it confirms that employers have the right to change their minds. "The obligation to provide religious accommodations absent undue hardship is a continuing obligation that takes into account changing circumstances."

    In such situations, it is a "best practice" for the employer to discuss its concerns with the employee before revoking an accommodation, in addition to considering whether there might be alternative accommodations still available that would not impose an undue hardship.

Bottom Line

The EEOC's recent guidance on the process for evaluating requests for religious exceptions from vaccination accommodations places an emphasis on flexibility. In particular, the guidance confirms that employers should consider establishing a centralized process for the submission and consideration of accommodation requests, and such requests should be evaluated (and can later be re-evaluated) based on the then-current circumstances.

This blog post was drafted by Randi Winter, a partner in the Spencer Fane Minneapolis office. For more information, please visit www.spencerfane.com.