

LEGAL UPDATES

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COVID-19 Vaccines: Can Your Employee Purchase Evidence of a Sincerely Held Religious Belief on the Internet?

Title VII requires an employer to provide a reasonable accommodation for an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. According to Equal Employment Opportunity Commission (EEOC) records, in fiscal year 2020 the Commission received 2,428 religious discrimination charges, a mere 3.6% of all charges filed with the EEOC that year. As more and more employers begin to mandate vaccinations for COVID-19, the number of religious discrimination charges is likely to increase significantly due at least in part to religious exemption “packages” available for purchase by employees on the internet.

For a modest price (generally in the range of \$40 to \$60), enterprising organizations will provide your employee with everything needed to claim a religious exemption from your vaccine mandate, including written documentation mentioning your employee by name and describing why the organization believes the COVID-19 vaccine violates the specified faith or belief, and step by step directions on how to request an accommodation and what to do if the employer refuses to grant the accommodation.

While the accommodation process is similar to that used under the Americans with Disabilities Act (ADA) for accommodation of a disability, it has some differences, both practically and legally. Employers should be aware of those differences and adopt practices that continue to protect the employer’s business operations and prevent misuse of the religious exemption, while also respecting employees sincerely held religious beliefs.

Establishing the need for accommodation

As a practical matter, when an employer is evaluating the range of possible accommodations in the context of a disability under the ADA, the employer often has the ability to confer with a medical professional to help guide the process. The medical professional is asked to opine as to whether the employee's medical condition rises to the level of a disability and what reasonable accommodations may allow the employee to perform the essential functions of the job. While this process is not perfect, most employers eventually receive sufficient, objective evidence that their employee does in fact have a legally cognizable disability.

When evaluating a reasonable accommodation in the context of religion under Title VII, employers typically have far less, if any, objective evidence available to them. First, there is often no religious leader involved. The employer is left to its own devices to assess whether the employee's religious belief, practice or observance is, in fact, "sincerely held." Second, the cookie-cutter nature of the internet packages may suggest to some employers that the employee is less interested in expressing a sincerely held religious belief, and more interested in avoiding the vaccine by any means possible. Anecdotally, employers report employees bragging to their coworkers about purchasing the internet package of beliefs that will allow them to avoid the vaccine. Employers are justifiably concerned about the number of employees who may remain unvaccinated jeopardizing the safety of the remaining workforce and potentially the continuance of normal business operations.

Understanding the terms "religious" and "sincerely held" under Title VII

The broad deference given to employees' claims of a sincerely held religious belief by courts and the EEOC present employers with some difficulty in assessing and questioning employees' requests for a religious accommodation. However, according to the EEOC's recently updated Technical Assistance, dated May 28, 2021, employers that have an objective basis for questioning the religious nature or the sincerity of a belief, observance or practice may request additional limited information about the underlying basis for the request for accommodation.

The term "religious" belief is broadly defined by courts and the EEOC to include theistic, non-theistic, moral, and ethical beliefs as to "what is right and wrong, which are sincerely held with the strength of religious views." Religious beliefs are also described as "comprehensive" in nature as opposed to an "isolated teaching."

The difficulty in defining a religious belief is exemplified by a 2016 case out of the District of Nebraska in which the plaintiff claimed that "pastafarianism" is a religion that adheres to the Gospel of the Flying Spaghetti Monster and whose followers wear colanders on their heads. The district court found that pastafarianism is "not a religion within the meaning of relevant federal statutes and constitutional jurisprudence" but is meant to be a satire of religion. Yet, pastafarian practitioners and

churches have arisen across the globe, and Utah and Massachusetts have allowed pastafarians to pose for their driver's license photo with colanders on their heads. If this example seems extreme, consider that a court granted relief to a plaintiff who practiced Kemetecism, a "religion with ancient roots in Egypt" that worships the sun god Ra. Exotic or non-traditional religions are covered by Title VII.

Individual cases establish that the inquiry into whether the belief is "religious" focuses not on the nature of the activity or its reasonableness, but on the individual's motivation or reason for maintaining the belief. For example, anti-vaccination beliefs that may be held by some Christian Scientists can be part of a "broader religious faith" and require a religious accommodation. Anti-vaccination beliefs that are motivated by fear of the health effects of the vaccine, or suspicion around the underlying science or are simply motivated by personal preference are not religiously motivated. Determining an individual's motivation is difficult, and employers should be cautious in challenging the religious nature of the belief.

Similarly, the sincerity of a religious belief is generally presumed. Inquiries into the sincerity of the belief do not focus on the "motives or reasons for holding the belief." Rather, it is a matter of the individual's credibility. The sincerity of religious beliefs can be supported by an employee's oral or written statements that describe beliefs and practices and how an employee adheres to such beliefs.

Questioning employees' sincerely held religious beliefs or practices

At the time the employee makes a request for a religious accommodation, the employer has an opportunity to engage in an interactive discussion with the employee to understand and to verify the reason that underlies the employee's request for a religious accommodation and to determine whether a duty to accommodate arises. Based on the interactive process, the employer may request limited additional information about the facts and circumstances that support the request for accommodation if the employer has an objective basis for doubting either the religious nature or the sincerity of a particular belief, observance or practice. It is important to note, however, that the employee's own written explanation may be considered sufficient, and if third-party verification is requested, a third party other than a religious official may provide the verification. The reasonableness of the employer's need to verify the information depends on the facts of the specific case.

The EEOC recommends that unless the employer has an objective basis for questioning the religious nature or sincerity of a belief, observance or practice, the employer should presume the request for religious accommodation is sincere. Employers are less likely to successfully challenge the existence of a sincerely held religious belief in the absence of an admission by the employee that their belief is based on a reason other than a sincerely held religious belief or actual evidence of fraud or deceit by an employee claiming a religious exemption.

Undue hardship defense

The undue hardship assessment provides employers with the better opportunity to evaluate a religious accommodation request. Under both the ADA and Title VII, the employer has a defense to providing accommodations if the employer can demonstrate “undue hardship.” Under the ADA, in order for an employer to prove undue hardship, the employer must prove the requested accommodation would be “an action requiring significant difficulty or expense.”

In contrast, Title VII’s undue hardship defense to providing religious accommodations has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses “more than a *de minimis*” cost or burden on the operation of an employer’s business. Although the burden is on the employer to prove undue hardship, this is a much easier standard for employers to prove. Factors to consider include the type of workplace, the nature of the employee’s duties, identifiable costs of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will need a particular accommodation.

Courts have found the existence of an undue hardship based on impairments to workplace safety, disruptions to operations, and direct costs attributable to the potential accommodation. With respect to accommodations related to vaccine mandates in particular, the EEOC suggests that the employer consider the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19, and the extent of the employee’s contact with non-employees whose vaccination status is unknown.

In the context of religious accommodation, employers are more likely to be successful relying on the undue hardship defense than on challenging an employee’s sincerely held religious belief.

Other considerations regarding religious accommodation requests

Under the ADA, an employee with a disability may not be required to comply with an employer’s safety-related standard that is job-related and a business necessity unless the employee poses a direct threat to the workplace. No direct threat assessment is required when evaluating religious accommodation requests under Title VII. Consequently, when considering religious accommodation requests, the employer need not evaluate the level of threat posed by the individual employee but can shift its focus directly to assessing whether a reasonable accommodation exists and the potential undue hardship of the accommodation to the employer.

The EEOC’s technical assistance clarifies that Title VII requires an employer to consider all possible reasonable accommodations with respect to unvaccinated employees. The type of reasonable accommodations that should be considered under Title VII are similar if not identical to those requiring consideration under the ADA: wearing a face mask, social distancing, modified shifts, periodic COVID-19 testing, teleworking, or reassignment. It’s important to remember that employers do have a choice in the selection of a reasonable accommodation; they are not obligated to provide the

employee with their preferred accommodation if there is more than one reasonable accommodation that would not pose an undue hardship. In turn, when there is an alternative means of accommodation that would not cause an undue hardship, the employer must offer the alternative which least disadvantages the individual with respect to employment opportunities. Similarly, an employer's proposed accommodation will not be considered reasonable if other employees receive more favorable accommodations for non-religious purposes.

Conclusion

The answer to the question is likely "yes," your employee may be able to purchase evidence of a sincerely held religious belief on the internet. Employers who choose to challenge the sincerity of the faith or belief should proceed with caution in order to avoid the wave of religious discrimination charges likely heading the EEOC's way. Employers that are aware of facts that "provide an objective basis" for suspecting the request for a religious accommodation is not genuinely related to a sincerely held religious belief also can use the interactive process to gather a limited amount of additional information to better assess the request. Many employers, however, may be better served by focusing on the undue hardship defense. Employers should utilize the interactive process to gain an understanding of the employee's concern and the type of accommodation requested to better assess whether the accommodation would pose an undue hardship on the business. A careful analysis and documentation of the interactive process, the costs of providing the reasonable accommodation requested as well as any alternative accommodations that do not cause an undue hardship should be completed. The process provides the employer with the supporting documentation for a decision that is necessary to protect the business and the workforce while fully complying with Title VII's protection of sincerely held religious beliefs.

Contact us

If you have questions about this update and how it impacts your organization, contact Barbara Grandjean, Tom O'Day or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.