

## CLIENT ALERT

### EEOC Issues Updated Guidance on COVID-19 Vaccines and the Workplace

November 1, 2021

The EEOC has provided [updated COVID-19 guidance](#) on workplace vaccine issues. Significantly, the EEOC's latest guidance addresses questions about religious objections to employer COVID-19 vaccine requirements and how they interact with equal opportunity employment laws such as Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII requires an employer to provide reasonable accommodations to employees who do not submit to COVID-19 vaccination because of a "sincerely held religious belief, practice, or observance," including nontraditional religious beliefs, unless doing so would pose an undue hardship on the operation of the employer's business. But Title VII does not protect "social, political or personal preferences" or "nonreligious concerns about the possible effects of the vaccine." As we [previously reported](#), the EEOC had updated its Technical Assistance Q & A earlier in the year regarding what employers should know about COVID-19, the Americans with Disabilities Act (the "ADA") and other federal EEO laws to address questions concerning vaccination and the workplace. Among other things, the updated guidance states that employees and applicants must inform the employer if they are requesting an exemption to a COVID-19 vaccination requirement due to a conflict with their sincerely held religious beliefs, practices or observances. Further, the same principles apply if they assert a religious conflict with getting a particular vaccine and desire to wait until an alternative version or specific brand of COVID-19 vaccine is available. Employees and applicants do not need to use specific language, or any "magic words," when making such a request.

The guidance repeats the EEOC's traditional position that employers should assume that a request for a religious accommodation is based on a sincerely held religious belief. Yet the guidance confirms that employers with an objective basis for questioning either the religious nature or the sincerity of the belief can make a limited factual inquiry and seek the supporting information necessary to make an individualized evaluation of the request. The sincerity of the belief is "largely a matter of individual credibility" but certain factors – either alone or in combination – can undermine an employee's or applicant's credibility and provide a legitimate basis to deny an accommodation request. These factors include whether they acted in a manner inconsistent with the professed belief, whether the accommodation sought is a desirable benefit that is likely to be sought for nonreligious reasons, whether the timing of the request renders it suspect (for instance, whether it follows an earlier request for the same benefit for nonreligious reasons), and whether the employer otherwise has reason to believe that the accommodation is not sought for religious reasons. An employee's or applicant's failure to cooperate with such an inquiry "risks losing any subsequent claim" on their part "that the employer improperly denied an accommodation."

Where an employer demonstrates that it is unable to reasonably accommodate an individual's religious belief without an "undue hardship" on its operations, Title VII does not require the employer to provide the accommodation. Undue hardship is defined as imposing "more than a *de minimis* cost," which includes "the burden on the conduct of the employer's business" such as "the risk of the spread of COVID-19 to other employees or to the public." The EEOC guidance now provides examples of the factors that an employer may assess in considering a request for a religious accommodation, including the type of workplace, the nature of the employee's duties, the number of employees who are fully vaccinated, the number of employees and nonemployees physically entering the workplace, and the number of employees who will need a particular accommodation. Other relevant considerations include the impairment of workplace safety, the negative impact of efficiency in other jobs, and

the resulting redeployment of other employees “to carry the accommodated employee’s share of potentially hazardous or burdensome work.” According to the EEOC, the assumption that many more employees will seek the same religious accommodation in the future is not an example of an undue hardship, but employers “may take into account the cumulative cost or burden of granting accommodations to other employees.”

Employers are not required to provide the religious accommodation preferred by the employee or applicant if there is more than one reasonable accommodation that would resolve the conflict. The obligation to provide religious accommodations absent undue hardship “is a continuing obligation that takes into account changing circumstances.” An employer has the right to discontinue an accommodation it previously granted “if it is no longer utilized for religious purposes” or if it “subsequently poses an undue hardship on the employer’s operations due to changed circumstances.”

The EEOC has also recently shared its own internal [Religious Accommodation Request Form](#) (“Form”) to assist employers in their individualized evaluations for such requests regarding vaccination requirements. The Form seeks general information and responses to four inquiries regarding the religious accommodation sought by the employee or applicant, as well as information regarding the employer’s response to the request.

The EEOC’s latest guidance seems to pave the way for the Occupational Safety and Health Administration’s (OSHA) Emergency Temporary Standard (ETS) for employers with 100 or more employees, which likely will require covered employers to ensure that their employees are either fully vaccinated or, if not vaccinated, produce a negative test result on at least a weekly basis. In the meantime, employers are strongly encouraged to review their COVID-19 policies and practices to ensure compliance with the EEOC’s newest guidance.

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