



## Legal Alert: Legal Obligations Related to Managing Employee Requests for Religious Accommodations

Given the recent COVID-19 vaccination mandates by state and local health authorities<sup>1</sup> and mandatory vaccination policies adopted by a growing number of public agencies, many employees are asserting that they qualify for exemptions from such mandates due to the religious protections afforded to them under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Fair Employment and Housing Act (“FEHA”). These requests for religious accommodations, and the skepticism about their veracity, have caused employers to consider how to handle requests for religious accommodations. It is important that employers know their employees’ rights so that they can make the best decisions regarding such requests for accommodation.

Title VII and FEHA prohibit religious discrimination in employment and provide workplace protections to employees who decline COVID-19 vaccinations because of their sincerely held religious beliefs.<sup>2</sup> As a result, many employees, including some with newfound religious objections to vaccination, are seeking to avoid compliance with the COVID-19 vaccination requirements by seeking a religious accommodation. For employers seeking to comply with lawful health orders or to promote the health and safety of their workforce, employee requests for accommodation may seem unreasonable and unfounded.

Because religious accommodation requests are uncommon, employers may feel they are navigating through uncharted waters. The purpose of this update is to review and analyze important concepts related to religion and religious beliefs<sup>3</sup>, analyze employers’ obligations and provide practical guidance to employers for approaching employee requests for accommodation.

### Reasonable Accommodations

Employees with sincerely held religious beliefs may request an exemption from employer policies or practices that conflict with their beliefs. Employers must provide such employees reasonable

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<sup>1</sup> See August 5 and August 19 State Health Orders for workers in health care settings and high-risk congregate settings.

<sup>2</sup> For Title VII, see 42 U.S.C. § 2000e-2(a)(1); For FEHA, see Gov. Code §§ 12921(a); 12940(a). State law largely follows federal law on religious accommodations. (See *Friedman v. S. Cal. Permanente Med. Grp.* (2002) 102 Cal. App. 4th 39.)

<sup>3</sup> This update focuses on Ninth Circuit jurisprudence, but also cites to authority outside the Ninth Circuit to provide a more comprehensive review of law in this area.

accommodations to the extent that they do not impose an undue hardship on the employer or its operations.<sup>4</sup>

### **The Nature of a Religious Belief**

One of the difficulties in responding to religious accommodation requests stems from how broadly the Courts define “religious beliefs”.

Under Title VII and FEHA, “religion” or “religious creed” includes *all* aspects of religious belief, observance and practice.<sup>5</sup> Courts extend this inclusive principle to “religious beliefs” providing that:

- The beliefs include those that are commonly associated with the teachings or tenets of the established world religions (*i.e.*, Christianity, Judaism, Islam, Hinduism, and Buddhism).
- This can include new and uncommon beliefs,<sup>6</sup> and those that are not connected with any religious group.<sup>7</sup>
- The beliefs need not be strictly religious, so long as they are moral or ethical, and provide for what is right and wrong.
- The beliefs must be held with the sincerity and strength of traditional religious views.<sup>8</sup>

In an attempt to provide structure to questions concerning whether an individual holds a religious belief, the United States Supreme Court developed the following standard:

- Whether the religion addresses fundamental and ultimate questions having to do with deep and imponderable matters;
- Whether the religion is comprehensive in nature and consists of a belief-system as opposed to an isolated teaching; and
- Whether the religion can be recognized by the presence of certain formal and external signs.<sup>9</sup>

One Court applied these factors to an employee’s Title VII claim in opposition to a mandatory flu vaccination.<sup>10</sup> The Court concluded that the employee’s beliefs that “one should not harm their own body” and that the “vaccine may do more harm than good” did not “address fundamental

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<sup>4</sup> 42 U.S.C. § 2000e(j).

<sup>5</sup> 42 U.S.C. § 2000e(j).

<sup>6</sup> *Thomas v. Rev. Bd.*, (1981) 450 U.S. 707, 714; see also *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531; Commission Guidelines, 29 C.F.R. § 1605.1.

<sup>7</sup> 29 C.F.R. § 1605.1; *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1438.

<sup>8</sup> 29 C.F.R. § 1605.1; see also *United States v. Seeger* (1965) 380 U.S. 163 and *Welsh v. United States* (1970) 398 U.S. 333.

<sup>9</sup> *United States v. Seeger* (1965) 380 U.S. 163, 208-209; see also *Friedman v. S. Cal. Permanente Med. Grp.*, (2002) 102 Cal. App. 4th 39, 59; *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.* (4th Cir. 2017) 877 F.3d 487, 492.

<sup>10</sup> *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.* (4th Cir. 2017) 877 F.3d 487.

and ultimate questions having to do with deep and imponderable matters” and were not “comprehensive in nature” and was therefore not covered by Title VII.<sup>11</sup>

While we advise employers against questioning the nature of employee’s belief-systems, where an employee does not sufficiently articulate that their opposition to vaccination is part of a larger belief-system, an employer could reasonably ask questions to ascertain how the employee’s opposition to vaccination fits within the belief system itself. For example, an employer could ask an employee to describe in what specific ways the employer’s COVID-19 vaccination requirement conflicts with the employee’s belief system. This question would require that the employee articulate their beliefs and would elicit information that would allow the employer to determine whether the employee’s opposition to vaccination was part of a larger system of beliefs or was merely an isolated belief in opposition to vaccination.

Any such inquiry by an employer should be individualized and should focus *not* on the employee’s stated religious practice (*i.e.*, refusal to be vaccinated), but on whether such practice is actually part of and pursuant to a system of religious beliefs held by the employee.<sup>12</sup>

### **Sincerity of a Religious Belief**

An additional complication related to determining whether to engage in the interactive process with individual employees is related to the sincerity of the employee’s religious beliefs.

Courts recognize that an employee’s sincerity is largely a matter of individual credibility. However, there is not clear guidance as to what factors may sufficiently undermine an employee’s credibility concerning their religious beliefs. As such, many employers may be hesitant to reject religious accommodation requests because of concern that the employee may claim that the employer engaged in discriminatory conduct by failing to engage the employee in the interactive process.

Courts have cited the following factors as undermining an employee’s credibility, although it is unclear which, if any, factor or combination of factors would be sufficient to undermine an employee’s request for accommodation such that the employer need not engage in the interactive process:

- Employee behavior that is markedly inconsistent with the professed belief<sup>13</sup>;
- The timing of the employee’s request renders it suspect<sup>14</sup>; and
- The employer has other reasons to believe that the employee’s request for accommodation is *not* sought for religious reasons.

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<sup>11</sup> *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.* (4th Cir. 2017) 877 F.3d 487, 492.

<sup>12</sup> *Davis v. Fort Bend Cnty.* (5th Cir. 2014) 765 F.3d 480, 485, 486-87

<sup>13</sup> *EEOC v. Union Independiente De La Autoridad De Acueductos* (1st Cir. 2002) 279 F.3d 49, 57.

<sup>14</sup> *EEOC v. Union Independiente De La Autoridad De Acueductos* (1st Cir. 2002) 279 F.3d 49, 57.

Each of these factors are ones that employers could reasonably apply to COVID-19 vaccination contexts. For example, an employer could question the credibility of an employee for any of the reasons provided below:

- The employee recently received other vaccinations, including potentially a first COVID-19 inoculation;
- The employee recently expressed personal or political objections to COVID-19 vaccinations, and did not cite any religious reasons for such opposition; or
- The employee purchased a religious exemption form from an online church with which they had no previous relationship.

Where the employee's conduct creates an objective basis for the employer to question the employee's credibility, the employer may make further inquiries into the sincerity of an employee's belief in opposition to COVID-19 vaccination. Employers should be mindful that this probing must be narrowly tailored to address the specific reason why the employee's credibility is now in question and should not be more intrusive than necessary to ascertain whether the employee's opposition to vaccination is sincere.<sup>15</sup>

However, where the employee's conduct creates no objective basis to the employee's credibility, the employer should refrain from additional probing questions that go to the sincerity of their belief.

### **Determination as to Reasonableness**

Should an employer determine that an employee is qualified for a religious accommodation based on the nature and sincerity of their religious belief in opposition to COVID-19 vaccination, the employer may still determine that it cannot accommodate the employee. However, employers should be mindful of the substantially different standard applicable under federal and state laws.

Under Title VII, an employer may determine that a request for religious objection is unreasonable if it imposes more than a *de minimis* cost to the employer.<sup>16</sup> This standard is easily satisfied. However, under the FEHA, the same "undue hardship" standard applicable to the determination of reasonableness under claims for disability-related accommodations applies to religious accommodations.<sup>17</sup>

As a result, public employers should be mindful to adhere to the heightened standard under the FEHA as opposed to the lower standard under Title VII when determining whether it can provide the requested accommodation. In the case of COVID-19 vaccinations, the most commonly

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<sup>15</sup> See *Thomas v. Nat'l Assoc. of Letter Carriers* (10th Cir. 2000) 225 F.3d 1149, 1155 n.5

<sup>16</sup> *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84; see also Commission Guidelines, 29 C.F.R. § 1605.2(e)(1).

<sup>17</sup> Gov. Code, §§ 12940(l)(1); 12926(u).

requested accommodations are COVID-19 testing as a workplace accommodation and teleworking as a non-workplace accommodation.

## **Conclusion**

The case law regarding religious accommodations is underdeveloped for its age, and will experience growing pains as result of litigation related to COVID-19 vaccination requirements. Thus, employers that are risk averse may adopt a conservative position on religious accommodations issues, not probe into the nature or sincerity of employee requests, and grant such requests as a matter of right.

Others that are willing to adopt a more assertive position on these issues should consider adhering to the following: (1) approach each accommodation request on an individualized case-by-case basis; (2) limit requests for information regarding the nature of the employee's purported religious beliefs to those that will assist the employer in ascertaining whether the opposition to vaccination is part of a larger belief system; (3) limit requests for additional information regarding the sincerity of employee's religious beliefs to situations where there is an objective basis for doing so; and (4) document the interactive process, including any determination that the requested accommodation is unreasonable or an undue burden.

*Information presented in this legal alert was provided by Liebert Cassidy Whitmore*