

# NOW & NEXT

## Labor & Employment Alert

OCTOBER 25, 2021

### Questions remain after EEOC releases updated guidance regarding religious objections to COVID-19 vaccine mandates

By Kimberly K. Harding, Rachel L. Conn, and Shelagh C.N. Michaud

The updated guidance lacks explicit instruction, yet offers insights for employers navigating employees' objections to vaccination mandates based on their sincerely held religious beliefs.



#### What's the Impact?

- / The guidance contains some best practices for communicating policies and procedures regarding evaluation of individual requests
- / Because the guidance does little to reduce the complexity of administering religious exemptions to mandatory vaccination policies, employers should reach out to experienced counsel for assistance navigating exemption requests and positioning themselves to defend against potential challenges

One of the most challenging aspects for employers seeking to implement policies mandating employee vaccination against COVID-19, either voluntarily or in response to one of the mandates previously announced by the Biden Administration, has been the consideration of employee exemption requests based on their sincerely held religious beliefs, practices, or observances (religious beliefs). As a result, many onlookers were encouraged this afternoon when the federal

Equal Employment Opportunity Commission (EEOC), which enforces Title VII of the Civil Rights Act of 1964, updated its [COVID-19 guidance](#) in a purported attempt to help employers navigate such requests. Unfortunately, much of the guidance was already apparent and/or previously stated, meaning some of the most frequently asked employer questions remain unanswered. Nonetheless, a summary of the biggest takeaways follows:

### **Provide information about accommodation process.**

The EEOC encourages, as a best practice, that employers provide employees and applicants with information about whom to contact and the procedures (if any) to use to request a religious accommodation.

### **Employees must cooperate with employers' reasonable requests for verification of the sincerity or religious nature of a professed belief.**

In the guidance, the EEOC blesses appropriate factual inquiries and/or requests for additional information by employers, provided they are based on the employer's objective skepticism about the religious nature or the sincerity of a particular belief. Employees also should not assume that employers are familiar with their particular beliefs and must understand that they may not only be asked to provide more information but may be appropriately denied an accommodation if they refuse or fail to cooperate.

### **Credibility counts.**

Given the current cultural climate, many employers are naturally skeptical that certain requests for religious accommodation are motivated not by religious beliefs but by social, political, or personal preferences or on nonreligious concerns about the possible effects of the vaccine (i.e., "vaccine hesitancy"). Regarding the latter, the EEOC has specifically stated that such objections are not considered "'religious' beliefs protected by Title VII."

In evaluating whether an employee's religious beliefs are sincere, the EEOC encourages consideration of the following factors that might undermine an employee's credibility: whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance); whether the accommodation sought is a particularly desirable benefit that is likely sought for nonreligious reasons; 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); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

### **Religious doctrine and/or dogma are not dispositive.**

Consistent with previous guidance, the EEOC reiterated that an employee's religious belief should not be assumed to be insincere simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion or because the employee adheres to some common practices but not others.

## Establishing a sincerely held religious belief does not necessarily entitle an employee to an accommodation.

Even though an employee may have a sincerely held religious belief, he or she may not be entitled to an accommodation if granting it would be “undue hardship” on the employer. In making this determination, the guidance reminds employers of the Supreme Court holding that an undue hardship under Title VII is merely anything that requires an employer to bear more than a *de minimis* or a minimal cost to accommodate an employee’s religious belief. In other words, the standard for establishing an undue burden under Title VII is lower than the standard for establishing the same under the Americans with Disabilities Act (ADA).<sup>1</sup>

According to the EEOC, in assessing whether an accommodation would impose an “undue burden,” employers should consider not only direct monetary costs but also the burden on the conduct of the employers’ businesses—including, specifically, “the risk of the spread of COVID-19 to other employees or to the public.”

The guidance further notes that undue hardship has been found to exist “where, for example, the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.” Nonetheless, again the EEOC cautions that the analysis is individualized and should take into account, “for example, whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals)” as well as the number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).

## Requests should be considered individually, but not necessarily in isolation.

The guidance advises that when determining whether a religious request for exemption from a vaccination requirement would impair workplace safety, the employer should consider each request individually based on the specific factual circumstances—such as the type of workplace, the nature of the employee’s duties, the number of employees who are fully vaccinated, how many employees and nonemployees physically enter the workplace, and the number of employees who will in fact need a particular accommodation.

The guidance cautions employers against speculating and/or relying on “a mere assumption” that other employees will come forward to request a religious accommodation if the request is granted. However, the EEOC repeatedly advises in the guidance that an employer may take into account the number of employees seeking a similar accommodation and/or the cumulative cost

---

<sup>1</sup> Note that, while the standard for establishing an undue burden under federal law is lower than in the ADA/disability context, some states (such as New York and Rhode Island) have amended their human rights statutes to impose a heightened standard. Employers accordingly should be mindful of both state and federal anti-discrimination laws as they implement such policies and requests for exemption and not rely solely on the EEOC guidance or Title VII.

or burden of granting accommodations to other employees and, specifically, notes that the obligation to provide religious accommodations absent undue hardship “is a continuing obligation that takes into account changing circumstances.” To this end, the guidance authorizes employers to revoke or discontinue previously granted religious accommodations if they subsequently pose an undue hardship on an employer’s operations due to changed circumstances (i.e., additional requests).

### **Where more than one accommodation would be effective, the employer (not the employee) may choose the accommodation.**

After an entitlement to exemption is established and an undue hardship is deemed not to exist, the employer should consider the employee’s preference for accommodation but is not obligated to provide the accommodation preferred by the employee. For instance, where an employee requests exemption from a vaccination mandate and suggests a work-from-home arrangement as an accommodation to prevent the spread of infection in the workplace, the employer may instead elect to rely on [CDC recommendations](#) regarding face coverings if they are deemed to be effective to achieve the same purpose.

While any assistance navigating the questions raised by requests for religious exemptions is welcome, the updated guidance does little to reduce the inherent complexity of administering religious exemptions to vaccination mandates, which is somewhat surprising given that increasing vaccination rates, including specifically by employer mandates, has been such a high-profile priority of the Biden Administration.

Nixon Peabody attorneys are following developments in this area of the law closely and remain available to help employers implement vaccination policies, navigate uncertainties surrounding accommodation requests, and best prepare to defend against any challenges.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

**[Kimberly K. Harding](#)**

585.263.1037

[kharding@nixonpeabody.com](mailto:kharding@nixonpeabody.com)

**[Rachel L. Conn](#)**

415.984.8216

[rconn@nixonpeabody.com](mailto:rconn@nixonpeabody.com)

**[Shelagh C.N. Michaud](#)**

401.454.1133

[smichaud@nixonpeabody.com](mailto:smichaud@nixonpeabody.com)

---