COVID-19 Vaccination Requirements

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 In the coming weeks, private employers of over one hundred employees will need to require all employees to be vaccinated against COVID-19 or to produce a negative COVID-19 test on at least a weekly basis before entering the workplace. The new rules will affect approximately 80 million employees. This article explains the legal framework under Title VII and M.G.L. c. 151B (“Chapter 151B”) applicable to such vaccine requirements, addresses certain questions employers may have, and identifies potential issues that employers should be prepared to address.

On September 9, 2021, President Biden, as part of the continuing effort to fight the COVID-19 global pandemic, announced that the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) would issue an Emergency Temporary Standard (“ETS”); the ETS will require all private employers with more than one hundred employees to ensure their workforce is fully vaccinated against COVID-19 or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before entering the workplace. Because OSHA is not required to follow the traditional notice and comment process when issuing an ETS, the details will not be known until it is announced. The ETS will become effective shortly after it is announced and may be in place for up to six months; after six months, the ETS must be replaced by a permanent OSHA standard, which must be issued pursuant to the formal rulemaking process involving the typical notice-and-comment period. Legal challenges will seek to delay or block implementation of the ETS; several governors have already stated they will challenge the ETS.

Any requirement that all employees be vaccinated against COVID-19 must be administered in a non-discriminatory way. Under Title VII and Chapter 151B, an employee may request a reasonable accommodation to the vaccine requirement based on the employee’s sincerely held religious belief, practice, or observance as long as the accommodation does not pose an “undue hardship” on the employer.

**Title VII**

The definitions of “religion” and “religious” are broad under Title VII. They include “all aspects of religious observance and practice, as well as belief” and “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” 42 U.S.C. §2000e(j); 29 C.F.R. §1605.1; *United States v. Seeger*, 380 U.S. 163 (1965). An employee’s beliefs that are political, social, or philosophical in nature or an employee’s purely personal preference are not sufficient. *Seeger*, 380 U.S. at 178; *E.E.O.C. v. Union Independiente de la Autoridad de Acueductors y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) (citation omitted). To justify a request for a reasonable accommodation, the employee must demonstrate that their belief is religious, sincerely held, and that the COVID-19 vaccine requirement conflicts with the belief. *Union Independiente*, 279 F.3d at 55 (citations omitted); *Cloutier*, 311 F. Supp. 2d at 196 (citation omitted). An employer may inquire as to the sincerity of the employee’s belief. The EEOC has identified four factors that may raise questions as to the sincerity of the employee’s belief: “[1] whether the employee has behaved in a manner markedly inconsistent with the professed belief; [2] whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; [3] 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 [4] whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.” *See* <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (last visited on September 23, 2021).

“Undue hardship” has been defined by the Supreme Court as anything greater than a *de minimis* cost to the employer in accommodating the religious beliefs of an employee.” *Cloutier*, 311 F. Supp. 2d at 199 (*quoting* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)). “Undue hardship can also exist if the proposed accommodation would ‘either cause or increase safety risks or the risk of legal liability for the employer.’” *Robinson*, 2016 WL 1337255, at \*8 (citation omitted). The EEOC has identified the following factors relevant to an employer’s undue burden analysis: “the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.” *See* <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (last visited on September 23, 2021). According to current EEOC guidance specific to COVID-19 vaccines, “[c]onsiderations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.” *See* <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D> (last visited on September 23, 2021) at K.12.

If an employer is satisfied that the employee’s request for an accommodation is based on a sincerely held religious belief, the employer must offer a reasonable accommodation; the employer need not, however, offer the specific accommodation requested by the employee. “Once an employer offers a reasonable accommodation, its obligations under Title VII are satisfied.” *Cloutier*, 311 F. Supp. 2d at 198 (*citing Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68 (1986)).

An employee who files a claim under Title VII of religious discrimination based on a failure to accommodate, must show that “(1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the [employer’s] attention, and (3) the religious practice was the basis for the adverse employment decision.” *Union Independiente*, 279 F.3d at 55 (internal quotation marks and citations omitted). If the plaintiff makes this showing, “the burden shifts to the [employer] to show that it made a reasonable accommodation of the religious practice *or* show that any accommodation would result in undue hardship.” *Union Independiente*, 279 F.3d at 55 (emphasis added) (citations omitted).

**Chapter 151B**

 “Claims of religious discrimination under Chapter 151B ‘ha[ve] been interpreted largely to mirror Title VII’ claims.” *Robinson v. Children’s Hospital Boston*, Civil Action No. 14-10263-DJC, 2016 WL 1337255, at \*6 (D. Mass. Apr. 5, 2016) (*quoting Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 131 (1st Cir. 2004)). Under Chapter 151B, “the words ‘creed or religion’ mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.” M.G.L. c. 151B, § 4(1A). The undue hardship standard under Chapter 151B is “notably different” from the definition under Title VII, but the two statutes “share substantial common ground.” *Robinson*, 2016 WL 1337255, at \*9 n.7 (internal quotations and citations omitted).

**Practical Considerations For Employers**

*Can an employer say it will not grant any accommodations to its COVID-19 requirement/policy?*

Yes, if the employer determines that granting any accommodation to its COVID-19 requirement will impose an “undue burden” on the employer. If an employer makes this determination, the employer should maintain the same position with respect to all employees. Moreover, given the ever-evolving nature of the COVID-19 pandemic, the employer should periodically re-evaluate the factual bases for its undue burden determination.

*Can an employer terminate the employment of an employee who refuses to be vaccinated? Can an employer temporarily lay off an employee who refuses to be vaccinated?*

Yes, as to both questions; nevertheless, an employer should anticipate the possibility that a former employee may bring a legal challenge to the permanent or temporary termination of employment. An employer can terminate (or temporarily suspend) the employment of an employee who refuses to be vaccinated if: (1) the employer has determined that it cannot offer any reasonable accommodations because to do so would impose an undue burden on the employer; (2) the employer has denied a request for an accommodation because the employer has determined that the request is not based on a sincerely-held religious belief; or (3) the employer has offered a reasonable accommodation and the employee has refused to accept that accommodation.

*What if an employee’s religious belief is not espoused by the employee’s religious group? What if the employee’s religious group takes a position that appears to conflict with the employee’s religious belief?*

 Given the language of 29 C.F.R. § 1605.1 and Chapter 151B, § 4(1A), an employee’s religious belief need not be espoused by the employee’s religious group; moreover, an employee’s religious belief can actually be at odds with the position of the religious group and still be entitled to protection under Title VII or Chapter 151B. Employers must conduct an individualized analysis, focused on the employee’s personal religious belief, not on the employee’s religion. Review of an applicant’s request for a religious accommodation, however, may reveal that the claim is based on personal, political, or philosophical views, not religious beliefs.

*What should an employer request from an employee to evaluate the employee’s request for an accommodation based on a sincerely held religious belief?*

 While an employer should ask an employee to submit materials to support the request for a religious accommodation, the law does not specify what materials an employer should or must request; the employer should simply ask the employee to submit those materials that the employee believes support their request. An employee may choose to explain their religious belief through a written statement that sets forth the belief, describes the religious nature of the belief, and demonstrates how the employee has previously abided by the belief. An employee may also choose to submit a writing from a religious or spiritual advisor to explain and support their request. An employer should consider all materials an employee submits in evaluating whether to grant a reasonable accommodation and, if necessary, an employer should request additional materials. Moreover, an employer should thoroughly evaluate the materials submitted by the employee as well as prior information the employee may have previously given to the employer. A cottage industry has developed to assist employees in seeking religious accommodations to COVID-19 vaccine requirements. For example, there are pastors who advertise online that they will provide, for a fee, a letter attesting to the employee’s religious belief. Additionally, there are online resources that, for a fee, advise employees how to apply for religious accommodations to COVID-19 vaccine requirements. While there is nothing *per se* wrong with an employee’s use of such resources, such efforts could bring into question the sincerity of the employee’s belief. As stated, the religious belief must be sincerely held. Lastly, during the period when vaccinations were being given under Emergency Use Authorizations granted by the FDA, some employees were refusing to be vaccinated on the grounds that the vaccination was merely “experimental.” That rationale no longer exists because on August 23, 2021, the FDA gave final approval to the Pfizer-BioNTech COVID-19 vaccine. *See* <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (last visited September 23, 2021).

**Conclusion**

Although employers will not know the details of OSHA’s ETS until it is announced and there is a chance that enforcement of the ETS may be delayed and/or blocked by legal challenges, employers should take the opportunity now to plan and prepare for addressing employee religious accommodation requests once the ETS becomes effective.

***The foregoing is informational only and does not, and is not intended to, constitute legal advice.  For legal advice concerning the issues in this article, contact your attorney.***