

# For Employers Making the Tough Calls in the Vaccine Mandate Trenches: EEOC Issues Welcome Guidance Clarifying What is -- and Is Not -- a Proper Religious Exemption

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Over the last several weeks, employers, in tandem with their legal counsel, have been grappling in good faith with religious exemption requests pouring in following the imposition of COVID-19 vaccine mandates. The analysis is not an easy one, as discussed in our prior articles. Prior to COVID-19, the necessity for an employer to analyze reasonable accommodation requests based on a sincerely held religious belief have been few and far between. Yet, now, employers are flooded with requests that run the gamut from unique nutrition/lifestyle-based requests to canned internet exemption request printouts borne of a well-played Google search. And if an employer receives five identical requests from employees on the same shift, in the same department, are they all “sincerely held?” These kinds of questions are what we all collectively face in our ever-vigilant efforts to comply concomitantly with both federal employment law and the increasing vaccine mandates.

While there is no “one size fits all” answer to such accommodation requests, on October 25, 2021, the EEOC (the administrative agency responsible for enforcing Title VII), supplemented its COVID-19 technical assistance to include detailed guidance on navigating a religious exemption request, that at least gives *some* clarity to the analysis. The three most important takeaways in our view are (1) confirmation that “social, political, or economic views or personal preferences” against the vaccine do *not* qualify as “religious beliefs protected by Title VII; (2) the provision of individual credibility factors employers may consider in assessing an employee’s sincerity; and (3) the “cumulative cost or burden” on the employer relative to the number of employees seeking a similar accommodation is, in fact, a relevant consideration in an undue hardship analysis.

**Does the Employee Have an Obligation Here? Yes.** The EEOC explained that employees are responsible for notifying their employer of their religious belief and the conflict it poses with the COVID-19 vaccine. The EEOC noted that while the religious exemption does not require employees to include “magic words” to make a sufficient request, employees must provide a clearly articulated reason for the conflict existing between their sincerely held belief and their employer’s vaccination policy. The EEOC noted that it is a best practice for the employer to provide employees and applicants with a contact person and procedures for making such a request. The EEOC further noted that an employee should not assume that the employer already knows or understands the religious belief and may be asked to explain the nature of it.

**Can an Employer Seek Additional Information from Employee? Potentially.** In addressing the question of whether employers have to accept the employee’s request at face value, the EEOC explained that employers should generally assume that the request is based on a sincerely held religious belief. However, if there is an “objective basis” for questioning either (1) the religious nature or (2) its sincerity, the employer may make a “limited factual inquiry” for additional supporting information. Importantly, given the political climate surrounding the COVID-19 vaccine mandate, the EEOC further clarified that a religious exemption may not be based on “social, political, or economic views, or personal preferences” and such requests are not protected under Title VII. Indisputably, many of the requests being turned in are based on such beliefs.

**Does Sincerity Turn On Individual Credibility? Yes, primarily.** Despite an employer’s ability to make a factual inquiry where necessary, the EEOC cautioned that an employee’s sincerity in holding a religious belief is “largely a matter of individual credibility.” What does this mean? The EEOC provides some helpful guideposts in this regard for factors that “either alone or in combination” might undermine credibility, namely (1) whether the employee has acted in a prior inconsistent manner with the professed belief (though observance need not be “scrupulous”); (2) whether the accommodation sought is a particularly desirable benefit that an employee may seek for non-religious reasons; (3) is the timing of the request suspect, such as following an earlier accommodation request to be exempt from the vaccine for secular reasons; and (4) whether the employer otherwise has reason to doubt the request is based on religious reasons. The EEOC strictly cautioned that while prior inconsistent conduct is relevant to sincerity, even newly adopted beliefs may be sincerely held. As with all reasonable accommodation analyses, the EEOC reminds employers that this must be done on an individualized basis.

**Does a Cumulative Cost or Burden Trigger an Undue Hardship? Yes, potentially.** The EEOC explains that employers should consider all potential accommodations, including, without limitation, telework and reassignment. It notes that an employer is not required to bear more than a “de minimis” cost to accommodate an employee’s religious belief in order to demonstrate undue hardship. The EEOC notes that “costs” can include direct monetary costs, but also the burden on the employer, including the spread of COVID-19 to other employees or the public. In delineating the considerations for whether an undue hardship exists, the EEOC states that an employer can consider whether the employee works in or outdoors, in a confined or group setting, whether there is interaction between the employee and the public, and, importantly, *the number of employees seeking a similar accommodation*. In other words, the EEOC notes that an employer can consider the “cumulative cost or burden” on the business. For healthcare employers specifically, the guidance notes that another factor to be considered is whether the employee seeking the exemption from the mandate has contact with medically vulnerable individuals.

**Does the Employee Get His/Her Preferred Accommodation? No.** The EEOC confirms that the employer may choose which accommodation to offer. While an employee's preferences should be considered, the employer is not obligated to grant it but should explain why the preferred accommodation is declined.

**Can we Change Our Mind? Yes, potentially.** In a welcome confirmation, the EEOC notes that an undue hardship analysis is a "continuing obligation that takes into account changing circumstances." An employee's beliefs may evolve over time, resulting in new or different requests for accommodations, and the employer likewise has the right to change or discontinue a previously granted accommodation such as, for example, if an undue hardship arises. As a practical pointer, if an employer is analyzing and approving religious accommodation requests, the responsive communication back to the employee should always include the caveat that the employer expressly reserves the right to alter or discontinue the granted accommodation.

## Key Takeaways

Religious accommodation requests are complicated and always require an individualized assessment. While they are no doubt some of the most daunting requests employers have to analyze when navigating these federal COVID-19 vaccine mandates, working with your counsel and the EEOC Guidance, these requests can be managed effectively. The latest EEOC Guidance is another tool to help you be successful in this effort.