

Prepare Now to Manage Employee Accommodation Requests Resulting from a Potential COVID-19 Vaccine Mandate

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In the wake of the Biden administration's announcements last week, including the release of its COVID-19 Action Plan, employers are scrambling to determine what federally-mandated COVID-19 vaccines and/or weekly COVID-19 testing could mean for their workplace. While OSHA has not yet released its related Emergency Temporary Standard, and legal challenges have already begun, employers should begin considering how to recognize and properly treat employee requests for exceptions should the mandate hold.

Applicable Laws

Accommodation requests, including requests for an exemption from a COVID-19 mandate, most commonly arise under the Americans with Disabilities Act ("ADA") or Title VII of the Civil Rights Act of 1964 ("Title VII"). The ADA prohibits discrimination against applicants or employees who are qualified individuals with disabilities, and requires employers to make reasonable accommodations to enable those individuals to perform the essential functions of their job. Title VII prohibits discrimination against applicants or employees on the basis of numerous protected categories, one of which is religion. While pregnancy in and of itself is not a disabling condition, accommodation requests from expectant employees may also implicate and create employer obligations under the Pregnancy Discrimination Act ("PDA") and other pregnancy-related state laws including, for South Carolina employers, the Pregnancy Accommodations Act. Accommodation requests arising under any applicable law must be considered individually and granted where legally required, else employers may face legal claims that are difficult to defend.

Generally speaking, once an employee lodges an accommodation request, the employer is obligated to engage in an interactive process whereby the employer and employee (and, as appropriate and applicable, the employee's treating healthcare provider or religious leader) work together

collaboratively to assess whether the request is a reasonable or will pose undue hardship on the employer, and whether a different type of accommodation may be equally as effective and cause the employer less hardship. Employees are not necessarily entitled to the specific accommodation(s) they request, and employers may offer effective alternatives.

Managing accommodation requests appropriately in accordance with applicable law is an area rife with potential legal pitfalls for employers, many of whom rely on managers who are ill-equipped to identify, much less appropriately manage, incoming employee requests. Mishandling these requests can result in protracted litigation and substantial liability for an employer.

Disability and Health-Based Accommodation Requests

Some applicants and employees have a health-related reason including, without limitation, a disability of some sort, which prevents them from receiving the COVID-19 vaccine. In such circumstances, these individuals may request and are potentially entitled to, an exemption from a vaccine mandate. Such situations may arise where an individual has had previous allergic or immediate hypersensitivity reactions to other vaccines, and/or a component of the COVID-19 vaccine or have recently had COVID, resulting in the necessity of a waiting period prior to vaccination. Alternatively, certain disabling health conditions may result in a treating healthcare provider recommending that certain applicants or employees not receive the COVID-19 vaccine. Such is the case with certain immuno-compromised individuals including, without limitation, those suffering from auto-immune disorders.

The ADA is very specific about what evidence of an alleged disability an employer may seek in follow-up to an accommodation request. Generally speaking, employers are entitled to direct the employee to obtain documentation from an appropriately qualified treating healthcare provider that describes the nature of the employee's impairment, what life activity or activities the impairment substantially limits, the duration of the impairment and the need for an accommodation, and the extent to which the impairment or health condition conflicts with the vaccination requirement. While employers may direct that employees aid them in obtaining clarification regarding information submitted by the employee's healthcare provider that is unclear or incomplete, an employer should use caution when seeking such clarification directly, so as not to exceed the scope of the necessary information. In the event an employer legitimately determines throughout the course of the interactive process that an individual is not a qualified individual with a disability, or that it cannot provide an accommodation to the employee without incurring undue hardship, the employer may deny the employee's accommodation request. Undue hardship for purposes of the ADA requires that an employer demonstrate that a particular accommodation would cause significant difficulty or expense – a very high burden that is carefully weighed and examined by courts.

Employers may also consider denying a disabled individual's accommodation request in the event she or he poses a direct threat to the health and safety of others in the workplace. This is an individualized and situation-specific assessment, during which the employer must assess the duration of the potential risk; the nature and severity of potential harm and the likelihood that it will occur; and whether the potential harm is imminent. However, even with all of these factors present, employers may not necessarily deny an accommodation requested, including a vaccine mandate exemption request. Employers must instead assess whether other accommodations could eliminate or reduce that risk including, without limitation, weekly or bi-weekly testing, mandatory masking, remote work, and social distancing. Employers will be hard-pressed to maintain that there is no other reasonable accommodation to the vaccine mandate in the event an employee seeks a legitimate, legally protected disability-based exemption.

Religious-Based Accommodation Requests

The EEOC defines “religion” broadly under Title VII, and employers are required to provide reasonable accommodations for employee’s sincerely held religious beliefs, observances, or practices. The EEOC also notes that, for purposes of Title VII, “religion” does not just include traditional, organized religions (i.e. Christianity, Judaism, Islam, Hinduism, and Buddhism), but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Religious beliefs can even include non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Courts generally resolve doubts regarding whether particular beliefs are religious by finding that they are; however, social, political or economic philosophies and mere personal preferences do not qualify. Because the determination regarding whether a certain practice or belief is religious in nature is accomplished through assessing the employee’s personal motivations, religious-based accommodation requests are notoriously difficult for employers to analyze.

One type of religious accommodation that an employee may seek involves an exception to an employer’s workplace policy mandating the COVID-19 vaccine. These requests may arise from an employee’s sincerely held religious beliefs opposing abortion, as whether or not cells taken directly from, or derived from descendant cells of, aborted fetuses were used in the creation and/or testing of various COVID-19 vaccines is a hotly contested issue. Employees may also lodge other religious-based exemption requests due to their sincerely-held religious beliefs requiring a certain diet with which the contents of the COVID-19 vaccines do not comport.

Generally speaking, employers are entitled to request additional information from employees to substantiate a religious accommodation request, including in order to probe whether a belief is “sincerely held,” provided an employer has a bona fide, objective doubt that this is the case. Because this assessment is highly subjective, employers should take caution before denying a religious-based accommodation request on the basis that the employer believes the professed belief is insincere. For example, employers may consider questioning whether an employee’s religious belief is sincerely held where the employee submits a “canned” religious exemption request or certification from an online church that the employee has not historically attended, or that is seeking donations or membership in exchange for providing COVID-19 exemption request certifications. Employers should also note that Title VII’s “undue hardship” burden on employers differs from that of the ADA, with Title VII requiring employers to show a reasonable accommodation in a given case poses more than a *de minimus* cost or burden.

What Employers Should Do Now

Employers should ensure that they have personnel policies in place that memorialize their compliance with the ADA, Title VII, the PDA, and other applicable laws, as well as their commitment to provide reasonable accommodations to qualified applicants and employees as may be required by those laws. The policies should set forth the procedure via which the employer expects its employees to submit an accommodation request, and provide details on how they should do so. Employers must bear in mind, however, that an employee is not necessarily required to follow this process in order to register an accommodation request under these laws. For example, if an employee expresses to his or her supervisor that an accommodation of some sort is needed (note that the employee does not even need to use the word “accommodation” in order to do so), the employer’s legal obligations, including the requirement that the employer engage in an interactive process with the employee, may be triggered. As such, employers should ensure now that all supervisors and managers –not just their Human Resources personnel—are trained on the laws related to

accommodation requests, how to recognize situations where an employee may be requesting an accommodation, and when and how to contact Human Resources for assistance.

Employers should also consider whether their application paperwork and/or process clearly informs applicants how to request an accommodation pre-employment. Critically, employers must ensure that their policies clearly prohibit retaliation against applicants and employees for having requested accommodations under applicable law, and assure employees that any medical information submitted in conjunction with an accommodation request will be kept in a confidential, restricted-access file separate and apart from the employee's personnel file. Employers should also review and update their existing job descriptions to ensure that they accurately document the essential functions of any given position. Supervisors can provide invaluable input in connection with such a review, given that they interact with and observe the specific duties that their employees actually perform on a daily basis.

Employers should also begin considering what might constitute an "undue hardship" in their workplace when it comes to unvaccinated employees. Bear in mind that an accommodation does not constitute an undue hardship simply because an employer says so. Rather, whether or not an undue hardship exists is a legal analysis that should involve input from the employer and the employer's attorneys. Undue hardship may be present in situations where an accommodation would be unduly costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their fair share of potentially hazardous or burdensome work.

What Employers Should Do If the Mandate Holds

If the mandate holds, employers should anticipate an influx of accommodation requests seeking exceptions, and should designate and train an internal team of employees who will handle the requests. Working with their legal counsel, employers should develop a policy pertaining to the vaccine mandate, and create a set of forms customized to their particular business which lawfully probe an applicant or employee's accommodation request. This could include forms that gather information from an employee regarding the employee's particular health condition that triggered the accommodation request, or information regarding an employee's religious beliefs and why those beliefs would purportedly prohibit the employee from obtaining the vaccine.

As always, employers should maintain appropriate documentation related to accommodation requests, especially in those instances where they determine that a particular accommodation constitutes an undue hardship and the request is denied. Employers who ultimately grant an accommodation request are also lawfully permitted to revisit that decision in certain circumstances, including in the event the accommodation ultimately proves to pose an undue hardship on the business in practice.

In many instances, employers will be able to require employees who obtain a COVID-19 vaccine mandate exemption to comply with other requirements which may include regular COVID-19 testing, mask-wearing, working remotely or socially distanced from co-workers at all times, unpaid leave of absence, or job transfers. Employers should identify these alternative accommodations and options for keeping their workplace safe in the event they are legally required to grant a vaccine mandate exemption.

In sum, if handled improperly, the accommodation process can create substantial legal exposure for employers under numerous laws. Employers should begin planning and preparing now in an effort to position themselves to

appropriately manage this process.