Employer Mandates: Vaccine Exemptions Under Federal Law

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A. Introduction

1. No federal constitutional or statutory prohibitions on employer COVID-19 vaccine mandates.
2. Under federal law, employees may seek individual exemptions based on religious objections to COVID-19 vaccines and/or medical conditions (disabilities) for which COVID-19 vaccines are unsafe.
   (a) Many more religious claims than medical claims.
   (b) Potentially significant litigation costs for medical claims (medical records, expert testimony).
3. State and local laws may provide greater protections than federal law.
4. Complex areas of the law; consult statutes, regulations, annotated codes, treatises.

B. Religious Exemptions – Title VII

1. Issue: Employee objects to COVID-19 vaccines based on religious beliefs and practices.
2. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*
3. Covers private employers with 15+ employees, state and local governments, federal government. § 2000e(b); § 2000e-16(a) [Sec. 717]
   NB. *Gardner-Alfred v. Federal Reserve Bank of New York*, 22-CV-1585-LJL, 2023 WL 253580 (S.D.N.Y. Jan. 18, 2023) (applying RFRA to federal instrumentality not covered by Sec. 717).
4. Strict administrative exhaustion requirements: (i) Aggrieved employee must file charge with EEOC within 180 days of alleged discrimination (300 days in states with EEO agency), then file lawsuit within 90 days of receiving Notice of Right to Sue. § 2000e-5(e)-(f). (ii) Federal employees have 45 days to contact employer's EEO office, then must follow prescribed procedures. 29 C.F.R. § 1614.105(a).
5. Prohibits employment discrimination based on "race, color, **religion**, sex, or national origin." § 2000e-2(a); § 2000e-16(a).
6. Applies not only to decisions regarding hiring, firing, promotions, compensation, working conditions, etc. – also imposes an affirmative duty to **reasonably accommodate** religious practices and beliefs:
   (a) "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 2000e(j).

(b) "The intent and effect of this definition was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74 (1977).

(c) "Title VII does not demand mere neutrality with regard to religious practices – that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's' 'religious observance and practice.'. . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. 768, 775 (2015).

7. What religious beliefs and practices are protected by Title VII?

(a) Not defined by statute; very broadly interpreted by EEOC and courts.

(b) "In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (citing *United States v. Seeger,* 380 U.S. 163 (1965) and *Welsh v. United States,* 398 U.S. 333 (1970) (conscientious objector cases)).

(c) "In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned. . . . The[] task is to decide whether the beliefs professed by the registrant are sincerely held and whether they are, in his own scheme of things, religious." *Seeger, supra,* 380 U.S. at 184-85. *See, e.g., Philbrook v. Ansonia Bd. of Educ.,* 757 F.2d 476, 481-82 (2d Cir. 1985) (applying Free Exercise case law to Title VII), rev'd and remanded on other grounds, 479 U.S. 60 (1986).

(d) Membership in a recognized religious denomination is not required. *Frazee v. Illinois Dept. of Employment Sec.,* 489 U.S. 829, 832-34 (1989) (Free Exercise case involving eligibility for unemployment benefits). "The 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 a belief is a religious belief of the employee or prospective employee." 29 C.F.R. § 1605.1. *See, e.g., Kane v. De Blasio,* 19 F.4th 152, 167-69 (2d Cir. 2021) (enjoining NYC religious exemption appeal process for violating fundamental Free Exercise principles).

(e) Must be "religious" – not intellectual, philosophical, political, sociological, scientific, etc. *See, e.g., Seeger, supra,* 380 U.S. at 165 (religious belief "exclude[s] essentially political, sociological, or philosophical views"; test is whether "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"). *But see Welsh, supra,* 398 U.S. at 342 (religious belief does not preclude "a substantial political dimension" or "exclude those who hold strong beliefs about our domestic and foreign affairs").

(f) The burden on the employee to raise a religious objection is not a heavy one, but the employer may question the employee as to the religious nature and/or sincerity of the belief. *See, e.g., Adeyeye v. Heartland Sweeteners, LLC,* 721 F.3d 444, 450 (7th Cir. 2013) ("[A]n employee who wants to invoke an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict. . . . The employee must make the request reasonably clear so as to alert the employer to the fact that the request is motivated by a religious belief. The employer, in turn, must be alert enough to grasp that the request is religious in nature. If the employer is not certain, managers are entitled to ask the employee to clarify the nature of this request."). *See also* "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," § K.12 ("[I]f an

employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.") (available at www.eeoc.gov.).

(g) Plaintiff's prima facie case: (1) employee held a bona fide religious belief conflicting with an employment requirement; (2) employee informed employer of this belief; and (3) employee was disciplined for failing to comply with conflicting employment requirement. *See, e.g., Baker v. The Home Depot,* 445 F.3d 541, 546 (2d Cir. 2006).

8. What constitutes a reasonable accommodation?

(a) "After an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual's religious practices." 29 C.F.R. § 1605.2(c). *See also, e.g., Baker, supra,* 445 F.3d at 546 ("Once a prima facie case is established by the employee, the employer must offer him or her a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship.") (cleaned up and citation omitted).

(b) "Interactive Process" – a judicially created doctrine – the employee is required to advise the employer of his or her need for a religious accommodation, and the employer is required to discuss with the employee possible reasonable accommodations; both parties must participate in good faith. *See, e.g., Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 (1986) ("courts have noted that 'bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business'") (citation omitted).

(c) A reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices . . . ." *Ansonia Bd. of Educ., supra,* 479 U.S. at 70. *See, e.g., Groff v. DeJoy,* 35 F.4th 162, 170 (3d Cir. 2022) (citing cases).

(d) The employer is required only to offer a reasonable accommodation, not the accommodation preferred by the employee. *Ansonia Bd. of Educ., supra,* 479 U.S. at 69.

(e) The only "accommodation" that eliminates the conflict between an employer's COVID-19 vaccination policy and an employee's good faith religious objections to COVID-19 vaccines is an **exemption**, i.e., not requiring the employee to be vaccinated.

(f) EEOC recognizes several possible alternatives to vaccination: "For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment." *See* "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," § K.2 (available at www.eeoc.gov).

9. What constitutes an undue hardship?

(a) An employer is not required to offer an accommodation that causes an "undue hardship" on the employer. § 2000e(j) [Sec. 701]

(b) Very low burden on the employer: "an accommodation causes 'undue hardship' whenever that accommodation results in '**more than *de minimis* cost**' to the employer." *Ansonia Bd. of Educ., supra,* 479 U.S. at 67 (quoting *Hardison, supra,* 432 U.S. at 84).

NB. The Supreme Court granted cert in *Groff v. DeJoy, supra,* and may reexamine the "de minimis" burden standard of undue hardship.

(c) State and local laws may impose a higher burden on the employer. *See, e.g.,* N.Y.C. Human Rights Law, Admin. Code § 8-107(3)(b)("significant expense or difficulty").

(d) The burden of proof is on the employer. *See* 29 C.F.R. § 1605.2(c) ("A refusal to accommodate is justified only when an employer . . . can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation."). Conclusory, hypothetical, and speculative assertions do not suffice. *See, e.g., Toledo v. Nobel-Sysco, Inc.,* 892 F.2d 1481, 1492 (10th Cir. 1989) (citing cases).

(e) "[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law." *See Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 830 (9th Cir. 1999).

(f) Federal district courts in New York have rejected Title VII religious accommodation claims on the grounds that the requested exemption would require the employer to violate the New York State Department of Health COVID-19 vaccination mandate for healthcare workers, which authorizes medical but not religious exemptions. *See, e.g., Marte v. Montefiore Med. Ctr.,* 22-CV-3491-CM, 2022 WL 7059182 (S.D.N.Y. Oct. 12, 2022); *Does 1-2 v. Hochul,* 21-CV-5067-AMD, 2022 WL 4637843 (E.D.N.Y. Sept. 30, 2022). NB. Federal courts in New York have consistently rejected arguments that Title VII via the Supremacy Clause requires religious exemptions for healthcare workers. *See, e.g., Does 1-2 v. Hochul, supra* (citing cases).

(g) Undue hardships cited by employers (and credited by courts):

- "increased risk" posed by unvaccinated employees
- administrative burden and expense of COVID-19 testing
- business difficulties involving third-party vaccination rules
- *See, e.g., Does 1-2 v. Hochul, supra*; *O'Hailpin v. Hawaiian Airlines, Inc.,* 583 F. Supp.3d 1294, 1309-11 (D. Haw. 2022); *Creger v. United Launch Alliance LLC,* 571 F. Supp.3d 1256, 1265-66 (N.D. Ala. 2021); *but cf. Richardson v. Grays Harbor County Public Hospital District No. 1,* C20-5814-TLF, 2021 WL 9649848, at *8 (W.D. Wash. Oct. 20, 2021) (denying employer's motion for summary judgment where plaintiff raised genuine issue of material fact regarding whether wearing mask was "sufficient way of mitigating the risk of transmitting the flu virus").

C. Medical Exemptions – ADA/Rehabilitation Act

1. Issue: Employee with medical condition for which COVID-19 vaccines are unsafe – must fit into "disability" discrimination/accommodation framework.
2. Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.*
   (a) EEOC implementing regulations at 29 C.F.R. Part 1630.
3. Title I covers private employers with 15+ employees, state and local governments. § 12111(5), § 12202.
   (a) Federal employees are covered by Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.,* which applies same legal standards as ADA. § 791(f).
4. Same administrative exhaustion requirements and procedures as Title VII.

5. Prohibits employment discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." § 12112(a).

6. Imposes an affirmative duty to **reasonably accommodate** an employee's disability; defines "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).

    (a) Plaintiff's prima facie case: (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer refused to make such accommodations. *See, e.g., McBride v. BIC Consumer Prods. Mfg. Co.,* 583 F.3d 92, 97 (2d Cir. 2009).

7. What constitutes a disability?

    (a) The term "disability" means (i) a physical or mental impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment. § 12102(1).

    (b) Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." § 12102(2)(A).

    (c) Also includes the operation of major bodily function, including "the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." § 12102(2)(B).

    (d) Requires an individualized assessment. 29 C.F.R. § 1630.2(j)(iv).

    (e) "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(ii).

    (f) "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 29 C.F.R. § 1630.2(j)(vii).

    (g) ADA includes liberal rules of construction, 42 U.S.C. § 12102(4) – "shall be construed in favor of broad coverage of individuals under this chapter" and "without regard to the ameliorative effects of mitigating measures" except ordinary eyeglasses and contact lenses.

    (h) State and local laws may require lesser showing of "disability." *See, e.g.,* New York State Human Rights Law, N.Y. Exec. Law § 292(21) (defining "disability" as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques").

8. What constitutes a reasonable accommodation?

    (a) A reasonable accommodation "may include" "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "**job restructuring**, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, **appropriate adjustment or modifications of examinations, training materials or policies**, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

(b) EEOC recognizes several possible alternatives to vaccination: "For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment." *See* "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," § K.2 (available at www.eeoc.gov).

(c) Same "interactive process" requirement as Title VII. *See* 29 C.F.R. § 1630.2(o)(3): "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

9. What constitutes an undue hardship?

(a) "The term 'undue hardship' means an action requiring **significant difficulty or expense**, when considered in light of the factors set forth in subparagraph (B)." § 12111(10)(A).

(b) Factors include "the nature and cost of the accommodation needed," the number of employees, the employer's financial resources, the employer's operations, and the impact of the accommodation on the employer's operations and/or finances. § 12111(10)(B).

10. **"Direct Threat" defense:**

(a) An employer's "qualification standards" "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." § 12113(b).

(b) "The term 'direct threat' means a **significant risk** to the health or safety of others that cannot be eliminated by reasonable accommodation." § 12111(3).

(c) *See* 29 C.F.R. § 1630.2(r): "The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."

(d) Do unvaccinated employees pose a "direct threat" to others within the meaning of ADA? Some federal courts have said yes. *See, e.g., Together Employees v. Mass General Brigham Inc.,* 573 F. Supp.3d 412, 431-33 (D. Mass. 2021) ("it was reasonable for MGB to conclude that unvaccinated employees – who are more likely to become infected – pose a direct threat to patients and others"); *see also O'Hailpin v. Hawaiian Airlines, Inc.,* 583 F. Supp.3d 1294, 1309-11 (D. Haw. 2022) (crediting employer's argument under "undue hardship" prong regarding "the increased risk that unvaccinated employees in close quarters pose to other employees and passengers"); *Creger v. United Launch Alliance LLC,* 571 F. Supp.3d 1256, 1265-66 (N.D. Ala. 2021) (citing "heightened health risks to employees and customers" in crediting employer's undue hardship defense); *but cf. Richardson v. Grays Harbor County Public Hospital District No. 1,* C20-5814-TLF, 2021 WL 9649848, at *8 (W.D. Wash. Oct. 20, 2021) (denying employer's motion for summary judgment where plaintiff raised genuine issue of material fact regarding whether wearing mask was "sufficient way of mitigating the risk of transmitting the flu virus").

D. Resources

1. U.S. Equal Employment Opportunity Commission website: www.eeoc.gov.
2. EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," updated July 12, 2022.
3. EEOC, "Overview of Federal Sector EEO Complaint Process."
4. Sample Title VII Complaint (NYC employee).
5. Sample Title VII MTD Opposition Brief (nurses).
6. Sample Title VII MTD Opposition Brief (court officer).
7. Sample Title VII MTD Opposition Brief (teacher).
8. Sample Title VII Discovery Requests (teachers).