

## Undue Hardship: An Employer Response to Requests for Religious Accommodation To Avoid Mandatory Vaccination

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With the highly contagious COVID-19 Delta variant on the rise, mandatory vaccination requirements are becoming more prevalent in the workplace. Unless prohibited by law or a collective bargaining agreement, employers are free to determine the terms and conditions of work, including that vaccination against COVID-19 is an essential safety rule and qualification for employment. Those who object to getting the vaccine are responding

by increasingly seeking exemptions from mandatory vaccination based on their religious beliefs. Of the three possible responses by an employer—approval, rejection on the ground the employee’s religious belief is not credible, or that honoring the request would cause it undue hardship—this article focuses on the undue hardship defense. Unlike the heavy burden on employers to accommodate a physical or mental disability, in the religious accommodation context

an employer need only show that the accommodation would require it to incur more than a “de minimis cost.” This lower standard may allow many employers, not subject to more protective state or city laws, to holistically challenge requests for religious accommodation to sustain the integrity of their mandatory vaccination rules and the safety of its workforces.

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## The Regulatory Landscape

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1) and similar state and local anti-discrimination laws, make it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. It requires employers to accommodate employees' religious beliefs that are "sincerely held." A religious accommodation is an adjustment to the work environment in order to allow the employee to comply with his or her religious beliefs. The [EEOC Religious Accommodation Compliance Field Officer's Manual](#) contemplates a simpler pre-COVID-19 time for it states that accommodation requests will generally relate to "schedules, dress and grooming, or religious expression or practice while at work." EEOC Compliance Manual: Religious Discrimination §12-IV(A) (as last visited Aug. 23, 2021). Although issued during the COVID-19 pandemic in January 2021, the Manual's authors plainly did not anticipate the need for mandatory vaccinations or that many employees would seek to avoid vaccination by asserting their need for a religious accommodation.

Even though almost all organized religions support vaccination, the EEOC definition of what is "religion" is so broad that it encompasses an

infinite universe of religious beliefs and practices. A belief is religious, as opposed to a "social political, or economic philosophy," for Title VII purposes, "if it is "religious" in the person's "own scheme of things," i.e., it is a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by ... God." Id., at §12-I(A) (1). (The Third Circuit in *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017) is somewhat more grounded that it stated that a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters, consists of a belief-system as opposed to an isolated teaching, and often can be recognized by the presence of certain formal and external signs.") The individual employee's sincerity in espousing a religious observance or practice is "largely a matter of individual credibility." Id., at §12-I(A) (2). Unfortunately, neither the EEOC nor the courts provide employers a workable "test" for analyzing a religious accommodation request. Determining the sincerity of an employee's religious beliefs is a fact intensive task, and often beyond the capabilities of a human resource department or traditional discovery methods. Moreover, while a large employer might be willing to litigate



a religious accommodation request once or twice, it's not feasible to individually challenge what might be dozens or hundreds of applications for religious exemption. To complicate matters further, a whole cottage industry comprised of websites, YouTube videos, and Facebook pages have arisen to help those who are opposed to vaccines more effectively and "credibly" fill out religious accommodation application forms.



## Public Policy, Risk Mitigation and OSHA Favor Mandatory Vaccination Policies

Present day politics, by default or design; public policy; the law; and risk management have seemingly conspired to place the burden of protecting workers, and now seemingly the public, on the shoulders of employers. The upshot of this is that employers are under increasing pressure to implement mandatory vaccination rules. One strong motivation is that the Occupational Safety and Health Act's General Duty Clause compels almost every employer to provide workers a place of employment free from recognized hazards likely to cause death or serious physical harm. Occupational Safety and Health Act of 1970, 29 U.S.C. §654(a).

To avoid liability, employers have a further interest in maintaining an environment safe for vendors, visitors, clients or patients and others who enter the workplace or come into contact with an organizations' employees. Yet, standing in the way of holistic and effective vaccine mandate rules are suspect requests for religious accommodation, a form of anti-vaccine insurgency.

### Undue Hardship

Given the enormous cost of challenging an individual employee's religious beliefs as well as the need to comply with OSHA and mitigate risk, an employer's only reasonable option may be to claim that heeding a request for accommodation would cause it "undue hardship." Almost 50 years ago, the U.S. Supreme Court decided *Trans World Airlines v. Hardison, et. al.*, 432 U.S. 63, 84 (1977) and ruled that TWA need not upset the seniority system set

forth in its union contract in order to accommodate an employee's religious belief that precluded him from working Saturdays. The court rejected proposals that the plaintiff's Saturday shift be filled by co-workers at premium rates or by a supervisor from another department. Both alternatives would involve costs to TWA in the form of "lost efficiency or higher wages" because they would require TWA to bear more than a de minimis cost. While certain Justices have recently voiced their displeasure with the de minimis standard, it remains the law.

This past April, the court let stand the de minimis standard by refusing to hear two cases in which the employer refused to grant religious accommodations based on undue hardship. In the first, a utility company declined to adjust the schedule of an electrician so he could attend Sunday morning services. *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 825 (6th Cir. 2020), cert. denied, 141



S. Ct. 1227 (2021). In the second, the employer rejected a request by a Seventh-day Adventist hired to work 12-hour shifts, seven days a week to help clean a nuclear power plant while it was offline, to have the Sabbath off. This rejection was issued after it was agreed by the parties that filling his position would cause the company to incur more than a de minimis cost. *Dalberiste v. GLE Assocs.*, 814 F. App'x 495, 498 (11th Cir. 2020), cert. denied, 141 S. Ct. 2463, (2021).

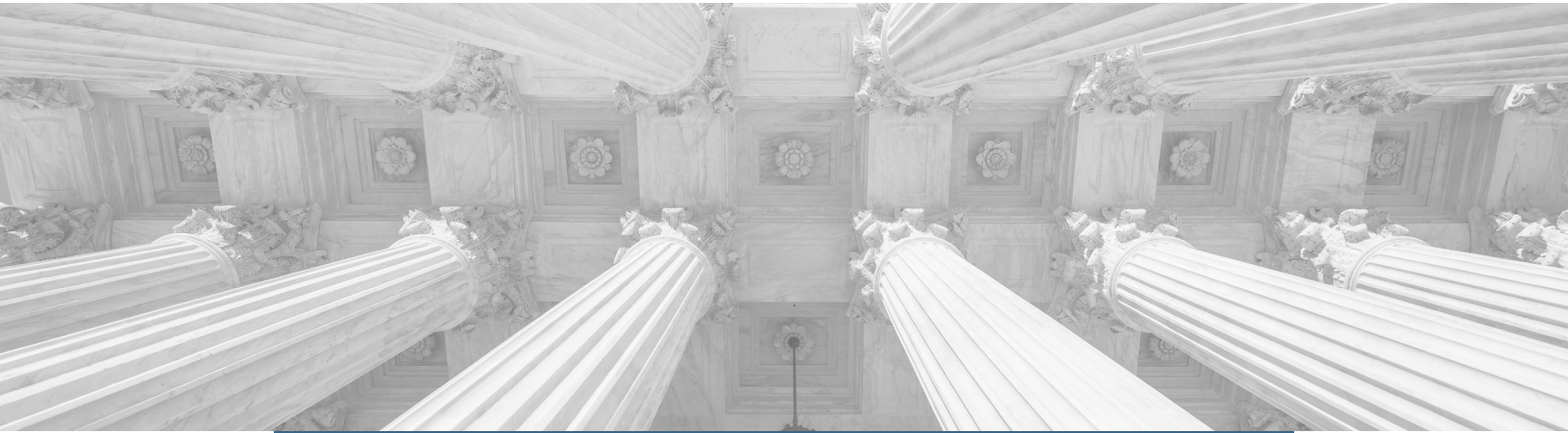
Apropos to COVID-19, when proposed accommodations threaten to compromise safety in the workplace, the burden of establishing undue hardship is particularly light. In *Kalsi v. New York City Transit Auth.*, a Transit Authority employee requested an accommodation exempting him from the employer's policy requiring car inspectors to wear hard hats for their personal safety and in compliance with OSHA regulations. The court found that the potential risk of injury to the

plaintiff, as well as potential injury to his coworkers who may be called to rescue him should he become incapacitated, required the employer to bear risks that would result in undue hardship. "Safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business." *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998), aff'd, 189 F.3d 461 (2d Cir. 1999) citing *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975). Similarly, in *Bhatia v. Chevron U.S.A.*, the Ninth Circuit affirmed summary judgement for an employer who required all machinists with potential exposure to toxic gases to shave all facial hair, finding that granting the plaintiff, a devout Sikh, an accommodation would expose the employer to liability under California occupational safety standards. *Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1384 (9th Cir. 1984). In a comparable case on the other side of the country, the

NYPD demonstrated to the court that it would face an undue hardship when it declined an Orthodox Jewish officer's request to forgo shaving because he would not be able to effectively wear a respirator that required a tight facial seal, thereby precluding him from responding to certain emergencies with his fellow officers. *Litzman v. New York City Police Dep't*, 2013 WL 6049066, at \*6 (S.D.N.Y. Nov. 15, 2013).

It is important to note that the de minimis standard is a federal one and state and local anti-discrimination laws, may have their own standards for what constitutes undue hardship. For example, New York State's Human Rights Law (NYSHRL) imposes a more stringent standard than Title VII, i.e., "an accommodation requiring significant expense or difficulty (emphasis added) (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." Factors to be considered





include “the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer” and the number of people seeking accommodation. Relatedly, a New York employer can meet its burden of proving undue hardship by showing that “an accommodation ... will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.” N.Y. Exec. Law § 296(10)(d) (1). New York City, which has its own human rights law, likewise regarded the federal *de minimis* standard as too low and amended its law in 2011 to add an undue hardship definition that mirror’s the NYSHRL’s. New York City Human Rights Law, N.Y.C. Admin. Code. §§8-102 and 8-107. There is, however, a paucity of case law in New York and thus there is little clarity,

in the religious accommodation context, where *de minimis* cost leaves off and where significant expense begins. Given, however, the danger posed by the Delta variant and New York State and City’s pro-mandatory vaccine mandates and orientation, it is likely that employers will be able to successfully argue that employee vaccination is essential if employers are to safely or efficiently operate their workplace.

#### How Best To Withstand Challenges to the Undue Hardship Defense

First, document and gather metrics to sustain the claim of undue hardship for all job classifications for which an exception to its mandatory vaccination policy will pose more than *de minimis* cost/risk—from extra equipment to hiring replacement staff to quantifying patient and worker illness or risk.

In the health care context for example, a hospital requiring mandatory vaccination could show that an employee’s request for religious

accommodation would increase the employee’s risk of contracting and spreading the highly contagious Delta variant based on inevitable exposure to patients with the virus. Additional costs may include permanently rearranging staffing assignments to minimize risk to patients and fellow staff members, providing additional PPE, or additional physical barriers, paying overtime, or the cost of hiring per diem or temporary help. This is a particularly salient concern at this juncture of the pandemic when health care staff are stretched thin.

In non-health care settings, such as a TV or film production where crew and actors often work in close proximity to each other in confined spaces, reasonable accommodation requests may negatively impact a production company’s ability to operate efficiently, for example having to redesign a set and staging, or having to incur the costs of actors (who may not be replaceable) or crew



who become ill mid-production.

Second, employers need to establish a procedure to take-in and process requests for religious accommodation. Not every employee in each job classification will be similarly situated. For example, there is a distinct difference between employees who are able to work remotely and others, for example, who have to report to work on a patient care floor, movie set, firehouse, or assembly line.

Third, consider standardized forms to document the employee's religious beliefs and the reasons for accepting or rejecting an individual's application. In some cases, the employer may find the request to be insincere, in others it will be due to hardship (cost, safety, or other reason).

Fourth, establish an internal review team to review challenged rejections. In cases where the employee is challenging the rejection of their request for

accommodation on the basis that there is no bona fide religious belief as opposed to undue hardship, it is suggested that such review team include employment counsel.

## Conclusion

Understandably, no employer wants to be the mandatory vaccination test case. Yet, denying what will likely be bogus requests for accommodation may be necessary if employers are to sustain the integrity of their mandatory vaccination rules and fulfill their obligation to maintain a safe work environment. Employers can take solace in the fact that the burden they face to sustain their vaccination rules is limited and that public policy and the law is on their side. But, just like employees are going to have to sustain the legitimacy of their religious beliefs, employers will have the burden of sustaining their basis for claiming undue hardship. In the face of the Delta

variant, however, it is foreseeable that claims for accommodations based on religious belief will face tougher scrutiny by the courts who, when deciding such cases, will also have to take into account the bind employers find themselves in as they balance Title VII and other human rights laws, OSHA, and the need to protect employee and public safety.



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