

## Employment Discrimination Claims Related to Vaccination Refusal – Religious Beliefs

By: Tanya A. Salgado and James P. Anelli

*Labor and Employment Alert*

12.10.20

As hospitals, large healthcare providers and employers in other industries prepare for the vaccine rollout, many will institute mandatory vaccination policies for their workforce. Employers who implement mandatory vaccination policies should be aware of the legal challenges arising from the enforcement of such policies and should implement best practices to minimize the risk of claims. But at the end of the day, this is a question of balancing the rights of co-workers to a safe workplace *and* the employee's legal rights to refuse to be vaccinated.

Employment lawsuits filed for refusal to comply with a mandatory vaccination policy typically arise as religious discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII) or disability discrimination claims under the Americans with Disabilities Act (ADA), or their state law equivalents. This article will discuss religious discrimination and accommodation issues in the context of mandatory employee vaccination programs, while our next part will discuss disability discrimination and accommodation issues.

### Religious Discrimination Claims Based on Vaccination Refusal

The definition of the word "religion" is often of a focus of Title VII religious discrimination claims. In *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981), the Third Circuit Court of Appeals defined the term "religion" as follows:

*"First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs."*

Some employees object to vaccination for reasons that are religious in nature. Title VII makes it an unlawful employment practice for an employer to discharge or discriminate against an employee because of such individual's religion. 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." To establish a claim of religious discrimination under Title VII, the employee must show that (1) they held a sincere religious belief that conflicted with a job requirement; (2) they informed their employer of the conflict; and (3) they were disciplined for failing to comply with the conflicting requirement. Employers have a statutory obligation under Title VII to make reasonable accommodations for the religious observances of employees<sup>[1]</sup>, but are not required to incur undue hardship.

The Equal Employment Opportunity Commission (EEOC) is currently seeking public input on a proposed updated Compliance Manual on Religious Discrimination. The proposed updated Compliance Manual addresses various aspects of religious discrimination and accommodation that will likely impact employer vaccination policies. The public is able to review the updates and provide comments on the proposal until December 17, 2020.

Per EEOC guidance, "Pandemic Preparedness in the Workplace," employers must take into account that employees may be entitled to an exemption from a mandatory vaccination requirement based on an employee's sincerely-held religious belief, practice or observance that prevents them from taking the vaccine:

*"[U]nder Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely-held religious belief, practice or observance prevents them from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA)."*

The EEOC takes the position that employers "should consider simply encouraging employees to get the influenza vaccine, rather than requiring them to take it." In the context of healthcare providers and other employers providing care to medically vulnerable populations, mandatory vaccination programs are generally recognized as acceptable. Outside of the healthcare setting, however, mandatory vaccination programs have been less common.

## Personal Preferences Are Not Sufficient

Employees who object to mandatory vaccination programs on the basis of personal preferences against vaccination have not been successful in asserting viable claims under Title VII. In the case of *Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487 (3d Cir. 2017), the Third Circuit Court of Appeals addressed the issue of a religious discrimination claim filed by a healthcare employee who refused to comply with his employer's mandatory vaccination policy. The plaintiff was employed as a psychiatric crisis intake worker by Mercy Catholic Medical Center. In 2012, the hospital began requiring employees to obtain a flu vaccination or submit a medical or religious exemption request. The plaintiff did not belong to any religious organization; however, he held strong personal beliefs opposed to the flu vaccine. In support of his request for a religious exemption from vaccination, the plaintiff submitted an essay explaining his beliefs. His employer requested a letter from a clergy person to support his request, but the plaintiff could not provide one. He was later terminated for failure to comply with the flu vaccine requirement. He sued Mercy Catholic for religious discrimination and failure to accommodate in violation of Title VII. The court dismissed his claims, holding that his anti-vaccination beliefs were not religious in nature. A similar result was reached in the case of *Brown v. Children's Hospital of Philadelphia*, 794 Fed. Appx. 226 (3d Cir. 2020) (employee's opposition to vaccination was not religious in nature).

In the case of *Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546 (N.C. App. 2015), the employer, a skilled nursing and healthcare facility serving the elderly, instituted a policy requiring that all employees receive a flu shot. The flu shot requirement was mandatory and the policy was instituted in response to a flu outbreak at the facility. The plaintiff obtained a letter from a chiropractor, who was also her father, stating that she suffered from an autoimmune disease and had a fear of compromising her immune system if she received the flu vaccine. When the plaintiff presented the note to her employer, she also explained that she did not want to take the vaccine because of her religious beliefs as a Seventh-day Adventist. Her employer informed her that it could not accept the note from her father, a chiropractor, and gave her the opportunity to obtain a proper physician statement. The employer also informed the plaintiff that they had researched the Seventh-day Adventist Church's doctrine on flu vaccinations and determined that the church took no position. The plaintiff refused to take the flu shot and was terminated. Notably, the employer had accepted medical documentation from three other employees and granted each of them an exemption to the policy. The plaintiff sued, alleging wrongful discharge in violation of North Carolina public policy. She alleged that her discharge violated North Carolina's public policy against religious discrimination. The court dismissed the case on summary judgment, and the court of appeals affirmed. The court held that while the plaintiff had set forth a *prima facie* case of religious discrimination, the employer had articulated a legitimate, non-discriminatory reason for her discharge – namely, her refusal to take the flu shot without providing a medical excuse from a medical doctor. Notably, the plaintiff in this case did not sue under Title VII, which requires employers to provide reasonable accommodations for religious beliefs and practices. The court noted that North Carolina public policy did not include an accommodation requirement. We note that it is unclear if the same result would be reached if the matter involved a public entity, as opposed to a private one, and a constitutional attack to the policy is made under the First Amendment where a stronger review standard (strict scrutiny) may apply. This is particularly true given the recent U.S. Supreme Court's recent decisions protecting religious beliefs.

## Veganism and Religion

In the case of *Friedman v. Southern California Permanente Medical Group*, 102 Cal. App. 4<sup>th</sup> 39; 125 Cal. Rptr. 2d 663 (Cal. App. 2002), the plaintiff was hired by a temporary agency to work for a large medical group as a computer contractor at a pharmaceutical warehouse. The medical group offered him a permanent position and informed him that his hiring was contingent on receiving the mumps vaccine. The plaintiff refused the vaccination based on his beliefs as a vegan.[2] The plaintiff refused the mumps vaccine and the medical center withdrew the offer of employment. The plaintiff sued, alleging religious discrimination under the California Fair Employment and Housing Act (FEHA). The court dismissed his claims, holding that veganism is not a "religious creed" within the meaning of FEHA. Under California discrimination law, a "religious creed" includes "any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions." The plaintiff argued that his commitment to a vegan lifestyle occupied a place in his life parallel to that of traditionally recognized religions. In holding that veganism is not a religious creed, the court noted that there is no "apparent spiritual or other worldly component to plaintiff's beliefs...While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy."

## Undue Hardship

An employer can refuse to provide a reasonable accommodation if it would pose an "undue hardship." The term "undue hardship" is defined as "more than a *de minimis* cost" on the operation of the employer's business.[3] The "undue hardship" standard under Title VII is lower than the ADA's undue hardship standard. The EEOC's proposed Updated Compliance Manual on Religious Discrimination discusses the undue hardship analysis in the context of religious accommodation and notes that this determination must be made "...by considering the particular factual context of each case. Relevant factors may include 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." The EEOC further notes that the costs to be considered include "not only direct monetary costs, but also the burden on the conduct of the employer's business," including workplace safety.

## Best Practices for Religious Accommodation of Vaccination Requirement

The EEOC's proposed Updated Compliance Manual includes several "best practices" which are pertinent to religious accommodations in the context of vaccination policies. A few of the EEOC's proposed "best practices" recommendations include:

- Employers should inform employees and applicants that they will make reasonable efforts to accommodate religious practices;
- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees;
- Employers should consider developing internal procedures for processing religious accommodation requests;
- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate;
- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options; and
- Managers and supervisors should be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

One question that is unanswered is how undue hardship would be measured with respect to a deadly global pandemic. In short, will the EEOC and other state fair employment agencies treat this as business as usual and apply a flu related legal analysis or will the inquiry be broader and include not only the employer's undue hardship, but public health and safety concerns as well. We will find out when the first few cases are decided in this area. Of course, under a new administration, it is also possible that OSHA weighs in on this topic.

A related issue is how the courts would analyze this issue. For example, the recent opinions of the U.S. Supreme Court have been clear that pandemic-related executive orders cannot infringe upon the practice of religion, even if there may be a strong public safety element involved in the underlying state action.[4] Thus, there may very well be a constitutional dimension here that would tip the balance in favor of religious concerns. We shall see.

White and Williams's Labor and Employment Group is closely monitoring the COVID-19 vaccine rollout in anticipation of the general deployment of the vaccine across all industries (not just healthcare). You can read our first post related to what the vaccine means here.

If you have any questions please contact Tanya A. Salgado (salgadot@whiteandwilliams.com; 215.864.6368), Jim Anelli (anellij@whiteandwilliams.com; 201.368.7224) or any other member of the Labor and Employment Practice Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

[1] See, *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5<sup>th</sup> Cir. 2000)

[2] The mumps vaccine is grown in chicken embryos, and therefore, according to the plaintiff, this would be immoral

[3] See, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), "Undue hardship" exists as a matter of law where an employer is required to bear more than a *de minimis* cost"

[4] See, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. \_\_\_\_ (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."; *Harvest Rock Church, Inc., et al., v. Gavin Newsom, Governor of California*, No. 20A94, 592 U.S. \_\_\_\_ (Dec. 3, 2020)(vacating denial of injunction and remanding for further consideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo*)

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

