

EEOC UPDATES GUIDANCE FOR EMPLOYERS ON HANDLING REQUESTS FOR RELIGIOUS ACCOMMODATIONS FROM VACCINE MANDATES

OCTOBER 2021

On October 25, the Equal Employment Opportunity Commission (EEOC) updated its guidance regarding employers' obligation to respond to employees' requests for accommodation from mandatory vaccine policies when those policies conflict with those employees' sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964. Through a series of new questions and answers, the EEOC largely re-emphasizes key aspects of its prior guidance, but also responds to some of employers' unanswered questions, including with respect to whether employers need to accept the sincerity of employees' religious accommodation requests at face value. A summary of the EEOC's updated guidance is as follows:

- **No "Magic" Words:** While employees do need to make clear that they are requesting an exception to their employer's vaccine policy based on their religious beliefs (as opposed to their social or political views or fear of the vaccine), employees may not be required to use "magic words" like "religious accommodation" or "Title VII" to do so. The EEOC also recommends that, as a "best practice," employers should provide employees with information regarding whom to contact and the process for requesting an accommodation.
- **"Sincerely Held" Religious Belief:** One of employers' biggest questions is when, and to what extent, they can question whether an employee's claimed religious objection to a vaccine mandate is truly "sincerely held." In an attempt to provide clarity on this point, the EEOC offers the following guidance, which provides little meaningful help to employers struggling with this issue:
 - **Default – Assume the Religious Belief Is Sincere:** The EEOC reaffirms its position that employers should generally assume that an employee's request for religious accommodation is based on a sincerely held belief and stresses that the sincerity of that belief "is not usually in dispute."
 - **Acceptable to Inquire into the Religious Nature of Belief if Unclear:** The EEOC reminds employers that Title VII protects nontraditional religious beliefs that may not be familiar to employers, and that it does not violate Title VII for employers to ask employees to explain the religious nature of their belief, which employers should not be presumed to know.
 - **Employee Credibility:** While the EEOC stresses that the sincerity of an employee's religious belief is not usually in dispute and that employers should generally assume that it is sincere, the EEOC's guidance also states that an employee's sincerity in holding a religious belief is largely a matter of individual credibility. In its guidance, the EEOC also outlines the factors that "either alone or in combination – might undermine an employee's credibility," which include: "whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance); whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons." When considering these factors, the EEOC notes that no one factor is determinative and that employers should evaluate each employee's circumstances on an individual basis. Critically, after listing these factors, the EEOC cautions that employers should not rely too heavily on an employee's "prior inconsistent conduct" since "an individual's beliefs – or degree of adherence – may change over time" and that "newly adopted or

inconsistently observed practices may nevertheless be sincerely held." Further, the EEOC also emphasizes that employers should not question sincerity "simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion, or because the employee adheres to some common practices but not others." Therefore, employers should be cautious not to rely on the EEOC's first factor alone as the basis for challenging the credibility of an employee's sincerely held religious belief.

- **Objective Basis for Questioning Sincerity:** When an employer's reason for questioning the sincerity of an employee's request for religious accommodation goes beyond issues of credibility, and the employer has an objective basis for questioning either the religious nature or the sincerity of the employee's belief, the EEOC reinforces its prior guidance that the employer is justified in making a "limited factual inquiry and seeking additional supporting information."
- **Reasonable Accommodations:** The EEOC's guidance reiterates that employers should consider all possible reasonable accommodations when presented with a request. Such accommodations may include testing, telework, masking and social distancing protocols, and reassignment or scheduling changes, among others. When there is more than one effective accommodation available, the employer does not need to provide the employee's preferred accommodation. Rather, the employer should consider the employee's preference, but may choose which accommodation to provide based on its own determination of what works best for the employer. Further, while a specific accommodation may work for one employee, the employer is not then required to provide that same accommodation to all employees who request one. The inquiry as to whether an accommodation is reasonable or poses an undue hardship (discussed below) is an individual one for each employee.
- **Undue Hardship and Documentation:** Employers are not required to provide an accommodation when the only accommodations available would pose an "undue hardship" on the employer. The EEOC specifically emphasizes, citing the Supreme Court's interpretation, that in the context of a religious accommodation, "undue hardship" has been interpreted to mean anything that requires an employer to bear more than a "*de minimis*" or minimal cost, including not only monetary costs but also other burdens on the employer's business operations. The EEOC specifically references the risks of the spread of COVID-19 to other employees or the public as such a burden. Employers are required to assess whether a request for accommodation poses an undue burden by examining the circumstances of each situation, relying on objective (rather than speculative) hardships, and will "need to demonstrate how much cost or disruption the employee's proposed accommodation would involve." The EEOC provides a list of several common and relevant considerations related to COVID-19 that employers should evaluate when making these determinations, including whether the employee works outdoors or indoors; whether the employee works in a group setting; whether the employee has close contact with others and/or vulnerable individuals; the type of workplace and the nature of the employee's duties; the number of employees who are vaccinated or have sought similar accommodations; and how many individuals enter the workplace.
- **Reconsideration of Accommodations:** Finally, the EEOC's guidance acknowledges that whether an accommodation is reasonable or poses an undue burden may change as circumstances change. Therefore, "an employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances"; however, as a best practice, the EEOC recommends that employers discuss any concerns regarding a change in circumstances with the employee receiving the accommodation prior to revoking it.

ADDITIONAL INFORMATION

For more information, please contact:

- [Thomas R. Simmons](mailto:thomas.simmons@tuckerellis.com) | 216.696.5290 | thomas.simmons@tuckerellis.com
- [Christine M. Snyder](mailto:christine.snyder@tuckerellis.com) | 216.696.5593 | christine.snyder@tuckerellis.com
- [Melissa Z. Kelly](mailto:melissa.kelly@tuckerellis.com) | 216.696.2067 | melissa.kelly@tuckerellis.com

- **[Ndubisi \(Bisi\) A. Ezeolu](mailto:ndubisi.ezeolu@tuckerellis.com)** | 213.430.3239 | ndubisi.ezeolu@tuckerellis.com
- **[Lisa I. Carteen](mailto:lisa.carten@tuckerellis.com)** | 213.430.3624 | lisa.carten@tuckerellis.com
- **[Edward W. Racek](mailto:edward.racek@tuckerellis.com)** | 213.430.3405 | edward.racek@tuckerellis.com

This Client Alert has been prepared by Tucker Ellis LLP for the use of our clients. Although prepared by professionals, it should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.

©2021 Tucker Ellis LLP. All rights reserved.