Memorandum

To: AMFA Membership
From: National Executive Council and Local Leadership
Date: September 29, 2021
Re: COVID Vaccinations – A Review of Your Legal Rights

Dear Members:

With the Biden Administration’s announced intention to promulgate new federal regulations mandating vaccination programs for large employers, it appears that widespread compulsory vaccination may be part of our future.

It must be recognized that these new regulations are subordinate to federal law that may impose on an employer an obligation to reasonably accommodate those employees who have a bona fide objection to vaccination based on religious faith or disability.

Under federal law, the accommodation obligations relating to religious faith or disability arise under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disability Act (ADA), respectively. Claims under either statute must initially be filed with the Equal Employment Opportunity Commission (EEOC).

EEOC charges constitute extra-contractual claims and, therefore, AMFA will not provide representation services for those members filing those charges. Nevertheless, AMFA deemed it appropriate to task the Union’s legal counsel with providing an overview of the salient issues related to the assertion of a religious or disability-based vaccination exemption request.

Members seeking to assert such an exemption are strongly advised to obtain private legal counsel to guide them through the process of seeking an exemption from your carrier. The company’s rejection of a legitimate exemption request may give rise to a cause of action under federal law to be filed, initially, with the EEOC.

I. The Basis for a Religious Exemption

   A. General Standard

   Title VII requires an employer to provide reasonable accommodations for employees who, because of a sincerely held religious belief, practice or observance, do not get vaccinated for COVID-19, unless providing an accommodation would impose an undue hardship on the operation of the employer’s business.
B. Sincerely Held Religious Belief

For Title VII purposes, the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if 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.

Federal regulation has defined 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. 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 the belief is a religious belief of the employee or prospective employee.

Title VII broadly defines the term “religion” to include “all aspects of religious observance and practice, as well as belief…” 42 U.S.C. § 2000e(j). Consistent with this statutory definition, the Equal Employment Opportunity Commission has promulgated the following regulatory standard:

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.

* * *

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 the belief is a religious belief of the employee or prospective employee.

29 C.F.R. § 1605.1.

"Title VII's protections are not limited to beliefs and practices that courts perceive as 'acceptable, logical, consistent, or comprehensible to others,'" nor do E.E.O.C. guidelines on religious discrimination require a specific religious group to advocate the belief of the individual employee. Cloutier v. Costco Wholesale, 311 F. Supp.2d 190, 196 (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)) (citing 29 C.F.R. § 1605.1).

In Title VII litigation related to religion-based requests for reasonable accommodation, several courts have held that the employee bears the burden of proof of demonstrating that they have a sincerely held religious belief that conflicts with the employer’s policy. Therefore, an employee should be prepared to substantiate both the sincerity of their belief and the nature of the conflict with your carrier’s vaccination policy.

C. Reasonable Accommodation

Where an employee has established that they have a sincerely held religious belief, practice or observance that would prevent them from obtaining a COVID vaccination, the employer has an
obligation to accommodate that individual provided that it would not impose an **undue hardship** on the operation of the employer’s business.

The EEOC has recognized reasonable accommodation of an unvaccinated employee might include having to wear a face mask or other protective gear, improving ventilation systems, working at a distance from co-workers or non-employees, and/or getting periodic tests for COVID-19. Significantly, the EEOC has recommended as a “best practice” that an employer introducing a COVID-19 vaccination policy should notify all employees that the employer will consider requests for reasonable accommodation based on religious belief or disability on an individualized basis. To the extent that your carrier fails to provide such notice, any individual who seeks an exemption should provide written notice of their request, and the basis for that request, to your manager.

**D. Undue Hardship**

Under Title VII, courts define “undue hardship” as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA’s undue hardship standard, which applies to requests for accommodations due to a disability.

Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.

**II. The Basis for a Disability-Related Exemption**

**A. General Standard**

If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

Thus, even if an employer determines that an employee’s disability poses a direct threat to their own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship).

**B. Disability Analysis**

Whether an employee has a disability that conflicts with a mandatory vaccination lends itself to a more objective analysis than the question of religious exemption.

The CDC has stated that it considers a history of the following to be a contraindication to vaccination with COVID-19 vaccines:

- Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine
• Immediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine

Of course, one must keep in mind that an allergic reaction to a component of one of the mRNA vaccines (Pfizer and Moderna) may not preclude the usage of Janssen vaccine (Johnson & Johnson) and vice versa.

C. Reasonable Accommodation

See discussion under I.C above.

D. Undue Hardship

As referenced above under Section I.D, under Title VII, courts define “undue hardship” as having more than minimal cost or burden on the employer. By contrast, under the ADA, “undue hardship” means an action required “significant difficulty or expense.” 42 U.S.C. § 12111(10)(A). From the employer’s perspective, the ADA standard is substantially more demanding than the hardship standard under Title VII. This higher standard under ADA is deemed necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.

We hope the above analysis is useful to our Members either in the present context or with respect to any future action your carrier takes that may present a conflict with your religious beliefs and/or disability.

Fraternally,

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