

COVID-19 VACCINE

CONVERSATION WITH EVANDRO GIGANTE OF PROSKAUER ROSE REGARDING RELIGIOUS ACCOMMODATIONS TO COVID-19 EMPLOYER VACCINE MANDATE

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Below, Evandro Gigante, Labor and Employment Partner at Proskauer Rose, answers frequently asked questions pertaining to requests for religious accommodations made in connection with an employer policy requiring all employees entering the workplace to be vaccinated against COVID-19. The interview below will address critical issues that commonly arise in the context of a request for a religious accommodation, including: (i) whether an employee's stated beliefs are religious in nature; (ii) whether such beliefs are "sincerely held"; and (iii) whether the requested accommodation imposes an undue hardship on the employer.

Q: Which law(s) govern employees' requests for accommodations due to religious beliefs?

A: Title VII of the Civil Rights Act, New York State (NYS), and New York City (NYC) law all require employers to provide reasonable accommodations to employees who have a sincerely held religious belief, in this case that conflicts with receiving the COVID-19 vaccine, provided that such accommodation does not eliminate an essential job function or result in an undue hardship to the employer.

Title VII makes it illegal for employers to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. 2000e-2(a)(1). In addition to this prohibition on discrimination, employers are required to reasonably accommodate an employee's sincerely held religious beliefs unless doing so would cause an undue hardship to the employer. 42 U.S.C. § 2000(e)(j).

The same accommodation obligations exist under NYS and NYC law. The New York State Human Rights Law (NYSHRL) provides that employers may not impose upon an employee "any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion ... unless ... the employer demonstrates that it is unable to reasonably accommodate the employee's ... sincerely held religious observance or practice without undue hardship on the conduct of the employer's business." NYSHRL Sec. 296(10)(a). Likewise, the New York City Human Rights Law (NYCHRL) provides that employers may not impose upon an employee "any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion ... and the employer shall make reasonable accommodation to the religious needs of such person." N.Y.C. Admin. Code § 8-107(3)(a). That said, employers are not obligated to provide accommodations which impose undue hardships on the conduct of their business. See C.F.R. § 1605.2(e)(1); NYSHRL Sec. 296(10)(d). N.Y.C. Admin. Code § 8-107(3)(b).

Q: Generally speaking, once an employee has made a request for an accommodation from his/her employer, what are the next steps?

A: Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents them from complying with an employer policy or practice, employers must engage in a cooperative process to analyze the



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request and determine whether to provide a reasonable accommodation or whether an accommodation would pose an undue hardship to the employer's business.

Q: Does an employee need to specifically refer to his/her request as a "religious accommodation" in order to put the employer on notice?

A: No. The EEOC guidance makes clear that when requesting accommodations, employees need not use any "magic words," such as "religious accommodation", to put employers on notice of their request. See [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#). Rather, to be on notice, employers must have enough information to make them aware that there exists a conflict between the employee's religious observance, practice, or belief and, in this instance, an employer's policy requiring employees to be vaccinated for COVID-19. EEOC guidance states that "courts have endorsed a cooperative information-sharing process between employer and employee for religious accommodation requests, similar to the 'interactive process' used for disability accommodation requests under the ADA." *Id.*

In that regard, while an employer's failure to engage in the cooperative process is itself not an independent violation of Title VII, it is likely a violation of New York law. See *D'Amico v. City of New York*, 159 A.D. 3d 558 (N.Y. App. Div. 2018) ("plaintiff has adequately pleaded claims for disability discrimination under a theory of failure to accommodate under the State and City HRLs (citations omitted)... Notably, there is no indication that following plaintiff's request for light duty, defendants entered into an interactive dialogue with him in an attempt to reach some reasonable accommodation."). Specifically, NYC Administrative Code Section 8-107(28)(a) states that it is unlawful for an employer "to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation ...[f]or religious needs." In other words, there is an affirmative duty in New York City to engage in the cooperative process with an employee who raises a request for a religious accommodation.

Q: After engaging in a cooperative process, will an employee receive notification in writing of the outcome of their request?

A: Yes. Upon the conclusion of the cooperative process, NYC law requires employers to provide employees with a writing that sets forth the requested accommodations being granted and, if any, those being denied. See N.Y.C. Admin. Code § 8-107(28)(d).

Q: More specifically, what is the first step employers will take when receiving an employee's accommodation request based on a religious belief?

A: In answering accommodation requests, employers first must determine whether the request is based on beliefs that are *religious* in nature. Title VII defines "religion" broadly to include "all aspects of religious observance and practice as well as belief," and not just practices that are mandated or prohibited by a tenet of the individual's faith. 42 U.S.C. § 2000e(j); see *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978).

According to the EEOC, religion, in this context, need not be acceptable, logical, consistent, or comprehensible to others. See *EEOC v. United Health Programs of America, Inc.*, 213 F. Supp. 3d 377, 395 (E.D.N.Y. 2016) (citation omitted). Under the case law, even religious beliefs that seem "preposterous" and non-traditional may be entitled to protection. *Id.* at 395 – 396 (citation omitted). "Sincerely held personal convictions, which others find nonsensical, may still fit within

the framework of a religious belief. There is, however, a rational limit to what courts are willing to accept as religious beliefs.” *Toronka v. Cont’l Airlines*, 649 F. Supp. 2d 608, 612 (S.D. Tex. 2009) (holding in Title VII case that a moral and ethical belief in the power of dreams that is based on religious convictions and traditions of African descent is a religious belief, and that this determination does not turn on veracity but rather is based on a theory of “man’s nature or his place in the Universe,” even if considered by others to be “nonsensical”) (citations omitted).¹

Notably, the EEOC explains that employers should not assume an employee’s request for accommodation is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar. Indeed, it may not be relevant whether employers view the request as implicating a religious belief, or that most people of the employee’s faith would not; rather, the employee’s own religious beliefs are relevant to the analysis. [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#). In fact, religious beliefs may be non-theistic as well insofar as the EEOC’s regulations say that “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 CFR § 1605.1.

Apart from the EEOC’s guidance, courts will analyze an employee’s stated beliefs to determine if those beliefs are *religious* in nature. In *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017), the Third Circuit set forth the following standard for determining whether a belief is religious: “[f]irst, 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.” The Court in *Fallon* was clear that social, political, or economic philosophies, as well as mere personal preferences, are not considered religious beliefs. *Id.* at 492.

In another case, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F. 3d 444, 451 (7th Cir. 2013), the court considered whether an employer had sufficient notice of the religious nature of an employee’s request for leave. In *Adeyeye*, an employee requested several weeks of unpaid leave to travel from the United States to Nigeria to lead his father’s burial rites. The employee explained to his employer that his participation in the funeral ceremonies was “compulsory” and failure to lead the burial rites would lead to his and his family’s spiritual death. After his request was denied, the employee traveled to Nigeria for the ceremonies anyway and was terminated upon his return to work. Recognizing that the employee’s religious practices were not as familiar as those “[close] to the modern American mainstream” and that Title VII protections are not limited to familiar religions, the court reasoned that the “law leaves ample room for dialogue on these matters.” The court thus found that nothing would have prevented the employer from asking the employee “to explain a little more about the nature of his request...” In light of this, the court found there was a genuine issue of material fact as to whether the employer had sufficient notice of the religious nature of the leave request.

Q: Is there guidance specifically pertaining to religious beliefs with regard to vaccine mandates?

A: In connection with a request to be exempted from a vaccine mandate on religious grounds, New York cases outside the employment context may be instructive. In those cases, courts have addressed religious accommodation requests under New York’s Public Health law for an exemption from the State’s requirement that students be vaccinated against

¹ Courts analyzing Title VII religious accommodation claims frequently cite to, and rely upon, First Amendment cases in analyzing whether a belief is “religious” in nature. See *EEOC v. United Health Programs of America, Inc.*, 213 F. Supp. 3d 377, 393 (“Delineating the meaning of “religion” for purposes of Title VII often requires resort to First Amendment cases, where non-traditional religions and religious practices are a frequent source of litigation”) (citations omitted).

certain diseases pursuant to NY Public Health Law § 2164. In conducting this analysis, courts have looked at whether parents' stated beliefs are truly religious in nature, or are based on personal or medical beliefs untethered to religion.

For example, in *NM v. Hebrew Acad. Long Beach*, 155 F. Supp. 3d 247 (E.D.N.Y. 2016), the court found evidence that plaintiff's "beliefs were formed with a primary view toward the children's health, and not their religion." Here, the court observed that "the record clearly does not support a finding that Orthodox Judaism, even as interpreted by these particular Plaintiffs, forbids [vaccination]." *Id.* at 258. Therefore, in the context of a preliminary injunction request, the court found that plaintiff failed to show a clear and substantial likelihood of succeeding on the merits because she did not meet the burden of establishing she had a genuine and sincere religious belief against vaccination. *Id.* at 259.

Likewise, in *Check v. N.Y.C. Dep't of Educ.*, No. 13 CV 791, 2013 U.S. Dist. LEXIS 71223, at *21 (E.D.N.Y. Mar. 22, 2013), plaintiff sought a preliminary injunction requiring the NYC Department of Education to admit her child to school without the child being vaccinated as required by the NYS Public Health Law. The court found that while plaintiff was dedicated to her child's health and safety, and while she attempted to characterize her opposition to immunization as based on her religious beliefs, her refusal to vaccinate her child stemmed from her desire to protect her child from all dangers, both real and perceived. This "resolve to protect her child [did] not constitute a religious belief" and was based on medical considerations, not religious beliefs. The court therefore held the plaintiff was unlikely to succeed on the merits of her case. See also *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 429 (E.D.N.Y. 2010) (finding plaintiff's objections to vaccinations were based on a "selective personal belief – not a religious belief"); *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503, 508 (E.D.N.Y. 2000) ("The Court is convinced that [plaintiffs] sincerely and genuinely oppose vaccinations for their children, but is not convinced that those objections are religious in nature. The preponderance of the evidence ... leads the Court to conclude that [plaintiffs'] objections to immunization are personal and represent a belief that inoculations would be damaging to the physical health of their children."). These cases demonstrate that courts, at least in the context of requests for exemptions from a mandatory vaccination policy in a school setting, will examine whether the beliefs are religious in nature.

Q: In addition to determining whether the employee's beliefs are religious in nature, what more must an employer do to satisfy itself that the employee has a valid basis for an accommodation?

A: Employees requesting accommodations based on religious beliefs must also *sincerely hold* those religious beliefs in order for an employer's reasonable accommodation obligation to apply.

Current EEOC guidance on Title VII and COVID-19 vaccinations states that employers considering reasonable accommodations should "ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance." [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Title VII and COVID-19 Vaccinations, K. 12](#). Still, if "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. See also 29 CFR 1605." *Id.* In other words, where employers have an objective, bona fide doubt as to the basis for the accommodation request, the guidance permits employers to make a limited inquiry into the facts and circumstances of the employee's claim that (i) the belief or practice at issue is *religious* and *sincerely held*, and (ii) that the belief or practice *gives rise to the need for the accommodation*. [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#).

Notwithstanding the EEOC's guidance, whether or not a belief is "sincerely held" is seldom at issue in religious accommodation cases. As explained in *Davis v. Ft. Bend Cnty.*, 765 F.3d 480, 486 (5th Cir. 2014) (quoting *Tagore v. United*

States, 735 F.3d 324, 328 (5th Cir. 2013)), an employee's sincerity is "largely a matter of individual credibility." Courts have found that in limited circumstances certain factors, either alone or in combination, may undermine the credibility of an employee's sincerely held belief. Such factors include whether employees have acted inconsistently with their professed beliefs, whether the accommodation sought is a desirable benefit likely sought for secular reasons, the timing of the request, and whether the employer otherwise has reason to believe the accommodation is sought for non-religious reasons. See, e.g., *Philbrook v. Ansonia Bd. of Educ.*, 757 F. 2d 476, 482 (2nd Cir. 1985) (noting the several factors that indicate insincerity include inconsistency, "if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine", and "the religion's size and history" (citations omitted)); *EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 57 (1st Cir. 2002); *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 596 (S.D.N.Y. 2001) (finding a reasonable juror could only conclude the employee used religion as an excuse after showing up to work unshaven, contrary to a work rule forbidding facial hair, and receiving a complaint from a supervisor about his beard, when employee had previously not complied with employer's other uniform requirements). None of these factors, however, is dispositive. Although prior inconsistent conduct is relevant to determining an employee's sincerity, the EEOC explains that employees' beliefs' may evolve over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#).

Q: What are the rules around asking an employee for documentation to demonstrate that a religious belief is "sincerely held"?

A: According to the EEOC, "[b]ecause the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information." [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#). In the event that additional information is needed to support a request for accommodation, including information about the sincerity of the employee's beliefs, such information need not take any specific form. Written materials or the employee's own first-hand explanation may be sufficient to support the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Moreover, depending on the facts and circumstances of the request, employers may also request that employees produce independent corroboration that their beliefs are sincerely held and religious. The EEOC warns, however, that employers "who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment." *Id.*

Whether employers have a reasonable basis for seeking to verify an employee's stated beliefs will depend on the facts of a particular case. For example, in *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066 (N.D. Ind. 2001), the court held that a union's request that an employee produce independent corroboration that his beliefs were sincerely held and religious did not violate Title VII. There, an employee had been a full dues-paying union member for over 20 years, before requesting the union treat him as a religious objector and grant him the option of paying his dues equivalent to a charity rather than the union. The court credited the fact that the certification the union requested was not required to be in any particular form or from any particular person, nor did it require membership in any particular religious organization. In that regard, *Bushouse* emphasizes the importance of carefully crafting requests for additional information in response to an accommodation request by an employee.

Q: After an employer has determined that an employee's request is based on a sincerely-held religious belief, what must an employer do to determine whether it needs to accommodate the employee?

A: Once an employer is satisfied that an employee's request is based on a sincerely held religious belief, the employer must determine whether it is reasonable to accommodate the request or whether doing so would cause an undue hardship. [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#).

Under federal law, "undue hardship" means an accommodation that would require employers to bear more than a *de minimis* cost or burden on the operation of the employer's business. 29 C.F.R. § 1605.2(e)(1); see also [EEOC Questions and Answers: Religious Discrimination in the Workplace](#). However, NYS and NYC law impose a more onerous standard on employers to show that an accommodation would cause an undue burden to the employer. Under the NYS- and NYCHRL, "undue hardship" means:

an accommodation requiring significant expense or difficulty (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 in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) 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;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

NYSHRL Sec. 296(10)(d). N.Y.C. Admin. Code § 8-107(3)(b).

Q: What are some of the factors an employer should consider in determining whether an accommodation will create an undue hardship?

A: Generally, whether a particular proposed accommodation imposes an undue hardship is a factual, case-by-case determination. The EEOC advises that factors to be considered in determining whether an undue hardship exists 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." [EEOC Compliance Manual on Religious Discrimination, Section 12: Religious Discrimination](#).

In *Litzman v. NYCPD*, 2013 WL 6049066 at *6, a New York City Probationary Police Officer challenged the NYPD's limited religious exemption to its general no-beard policy based on the Free Exercise and Due Process clauses of the U.S. Constitution, Title VII, and the NYCHRL. Plaintiff in *Litzman* requested a religious accommodation from the NYPD's no-beard policy, but his request was denied. The court found that the NYPD did not meet the NYCHRL's higher "undue

hardship” burden. Though “the cost of accommodation is more than minimal because there would be some lost efficiency” the court held that “[NYPD] ha[s] not shown that there would be ‘significant expense or difficulty.’” *Id.* at *7. Here, the court did not have information about the costs of accommodation and other individuals who may seek a similar accommodation, thus preventing the court from finding that an undue hardship existed.

In the context of a request for a religious accommodation, where an employee requests an accommodation from an employer’s vaccine mandate, employers should consider, for example, whether allowing an employee to work remotely or allowing the employee to report to work unvaccinated (albeit with safety protocols) present an undue hardship. In conducting this analysis, courts will likely consider, among other things, the nature of the workplace and the employee’s job duties within the workplace, the cost of providing the accommodation in relation to the employer’s operating costs and the number of employees in the workplace needing such an accommodation.