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COVID'S IMPACT ON THE INTERACTIVE PROCESS:

*Legal Updates and Best Practices for Responding to Disability and Religious
Accommodation Requests*

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LEGAL UPDATES

Approximately two years ago, the COVID-19 pandemic disrupted workplaces around the globe. The short-term impact was sudden and severe as workers were furloughed, laid off, and forced to adjust to working from home. Employers adopted new policies to deal with remote working, social distancing, visitors in the workplace, and workplace safety. Government agencies scrambled to issue guidance to help employers address employee requests for medical and religious accommodations from these new policies.

Today, as employers continue to work through the COVID-19 pandemic, the government agencies update and adjust guidance, and courts begin to adjudicate these new issues. We have set forth below some resources of which employers should be aware when dealing with accommodation requests arising from the pandemic.

A. Disability Accommodation Requests

The Equal Employment Opportunity Commission (“EEOC”) has issued guidance regarding the impact of COVID-19 on federal civil rights laws. The guidance is primarily in a question and answer format and is updated by the EEOC with some frequency. The current version of the guidance can be found here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

a. The reasonableness of the accommodation

During the pandemic and in the remote workplace, the EEOC has confirmed that employers are permitted to continue requesting medical documentation to determine whether an employee requesting an accommodation is “disabled” as defined by the Americans with Disabilities Act (“ADA”), assuming the disability is not obvious and/or already known. Further, employers may continue to engage in the “interactive process” to determine whether an employee’s disability necessitates an accommodation. The interactive process involves a dialogue between employer and employee. As a part of that process, some questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether the form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” of the employee’s position.

b. Whether undue hardship exists

Employers are not required to provide accommodations that pose an “undue hardship,” which the EEOC refers to as “significant difficulty or expense.” Importantly, the EEOC has acknowledged that COVID-19 impacts the “undue hardship” analysis, recognizing that accommodations that may not have posed an undue hardship previously may pose one now given the current health crisis. More specifically, the EEOC notes that it may now be significantly more difficult to provide employees with temporary assignments, remove marginal functions or to readily hire temporary workers for specialized positions. The impact of COVID-19 on the undue hardship analysis would seem to be particularly acute with respect to those providing essential services.

Additionally, the EEOC has recognized that the sudden loss of some or all of an employer’s income stream is a relevant consideration with respect to the undue hardship analysis. The amount of discretionary funds available to an employer may also be limited because of COVID-19 and is, therefore, relevant. Ultimately, the employer will need to weigh the cost of an accommodation against its current budget, while taking into account constraints created by the current health crisis.

c. Requests made to places of public accommodation

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The pandemic has not just impacted employment, which is covered by Title I of the ADA, but also places of public accommodations, which are covered by Title III of the ADA. Under Title III of the ADA, discrimination by any person who owns or operates a public accommodation against an individual on the basis of a disability is prohibited. Title III defines discrimination as a failure to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to provide services to those with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii).

Importantly, a place of public accommodation is not required to make a reasonable accommodation if it “can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” *Id.* The individual requesting the accommodation has the burden of proof with respect to whether the requested accommodation is reasonable and necessary for the disabled individual. The place of public accommodation must make the accommodation unless it can prove doing so would alter the fundamental nature of the public accommodation. To meet this burden, the place of public accommodation must complete an individualized inquiry to determine if a “specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.” *PGA Tour, Inc.*, 532 U.S. at 688. In short, the key to both Title I and Title III is the individualized inquiry.

B. Religious Accommodation Requests

Requests for religious accommodations to employer COVID-19 vaccine mandates are on the rise. In response to significant public interest, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its guidance to specifically address these religious accommodation requests. The updated guidance may be found here: <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-0>.

At the crux of the vaccine mandate and potential religious accommodation is Title VII of the Civil Rights Act of 1964 (“Title VII”), which requires employers to provide reasonable accommodations upon request when workplace rules interfere with sincerely held religious beliefs, practices, or observances, so long as the requested accommodation does not pose an undue hardship on the employer’s operations. This framework applies to requests from employees seeking an exemption from a COVID-19 vaccination requirement, and it considers such issues as the nature and sincerity of the employee’s belief; any undue hardship to the employer that may be created by granting the accommodation; and process considerations.

a. The religious nature and sincerity of an employee’s belief

When an employee presents a request for a religious accommodation from a vaccination requirement, the employer should start its analysis by confirming that the beliefs in question are, in fact, religious. Title VII does not protect objections based on social, political, or personal preferences. It does, however, offer protections for both traditional and nontraditional religious beliefs. The beliefs do not have to be aligned with a formal denomination or organized church, and the employee need not present “proof” from a minister, though an employee may be asked to personally articulate the religious nature of their belief, and how those beliefs conflict with vaccination.

Title VII precedent makes it difficult, but not impossible, for an employer to challenge the sincerity of an individual’s religious belief. Newly adopted beliefs can be considered sincere. An employee’s beliefs are permitted to change over time, so the fact that an employee may have acted inconsistently with the stated belief in the past is not dispositive. If, however, there is objective evidence that suggests the belief is not bona fide – including prior inconsistent conduct, evidence suggesting the accommodation has actually been sought for nonreligious reasons, suspicious timing of a request (e.g., it closely follows an earlier, unsuccessful request for the same benefit for nonreligious reasons), or other similar grounds, an employer may ask the employee for further clarification. If the circumstances very clearly warrant it, an employer may choose to deny the exemption on the grounds that the

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employee's stated religious beliefs are not actually sincerely held.

b. The employer's "undue hardship" consideration

If an employee is able to demonstrate a sincere, conflicting religious belief, the employer must next consider whether the requested accommodation (exemption from vaccination, or perhaps work from home or unpaid leave) would impose an "undue hardship" on operations. Under Title VII, requiring an employer to bear more than a minimal cost is enough to be considered "undue hardship." This threshold can be met in many ways. Requiring an employer to violate systems based on seniority constitutes undue hardship. Requiring an employer to hire additional workers constitutes an undue hardship, as is requiring the employer to risk a loss of production due to staffing shortages. The EEOC includes "the risk of the spread of COVID-19 to other employees or to the public" as an undue hardship as well. While the law requires an employer to make reasonable accommodations for employee religious practices and beliefs, the law does not require employers to suffer financially or compromise worker safety to do so. An employer should conduct this analysis on the specific facts and interests implicated by each individual accommodation request.

C. COVID Litigation

Together Emples. v. Mass Gen. Brigham Inc., No. 21-11686-FDS, 2021 U.S. Dist. LEXIS 217386 (D. Mass. Nov. 10, 2021)

The district court found plaintiffs did not demonstrate a likelihood of success on a failure to accommodate claim under Title I of the ADA when the employer assembled two panels to consider requests for medical exemptions from the COVID-19 vaccine mandate. The panels completed an individualized review of each request, which included communication with plaintiffs, follow up requests for additional information, and individualized decisions.

Peebles v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020)

The district court granted a preliminary injunction deeming telework a reasonable accommodation under Title I of the ADA when the employee previously teleworked for four months, the supervisor indicated the employee could perform all essential job functions while teleworking, and the employer purportedly did not perform an individualized assessment of the accommodation request.

Mulryan v. RICS Software, Inc., No. 1:19-cv-05018-JMS-MG, 2021 U.S. Dist. LEXIS 99243 (S.D. Ind. May 26, 2021)

The district court denied a motion for summary judgment on a disparate treatment claim under Title I of the ADA. The employee had a medical restriction which permitted her to speak out loud for only four hours per day. The employee was fired because the employer determined she could no longer complete her essential job functions as a Support Consultant. In the course of the case, there was a disagreement over whether speaking for more than four hours, in violation of the employee's medical restriction, was an essential job function when among other things, during COVID-19, employees increasingly communicated with each other using Teams messages rather than over the phone.

Emanuel v. Walt Disney Co., No. 5:20-cv-04639, 2021 U.S. Dist. LEXIS 112536 (E.D. Pa. June 15, 2021)

The district court, in a case brought under Title III of the ADA, found Disney failed to reasonably accommodate a patron who could not wear a face mask due to his medical condition when Disney enforced its face covering policy without considering the reasonableness of the requested modification, a waiver of the face covering policy.

BEST PRACTICES

A. Documentation

Because the law requires an interactive process, employers are going to want proof of each request was evaluated on an individual basis. Even if an employer believes a vaccination exemption will or will not be granted, there is significant value in taking the time to engage in a documented, interactive process with each employee. A deliberate, thoughtful process will typically lead to better and more consistent results.

Employers may want to develop form documents that can be used in the interactive process and tailored to particular situations, as needed. The form documents may include authorizations for release of medical information, letters to healthcare providers, questionnaires for employees requesting accommodations, and job descriptions identifying essential functions. Employers should also consider confirming the interactive process in writing. In that regard, and to the extent oral communications occur as part of the interactive process, those communications can be confirmed in a letter to the employee or in a memo to file.

B. Decision-Makers

Managing the interactive process can be a full-time job, especially at large organizations. Whether it is a single person or a committee, the organization will want to make sure its decision-makers have the appropriate training, good judgment, and feel supported. In that regard, decision-makers will want to be current on the law, which has changed with the pandemic. Ideally, the decision-makers will be able to determine when situations need to be elevated to legal counsel.

APPLICATION

Scenario 1: The Remote Worker Who Refuses to Return

The employer operates an accounting firm, servicing clients throughout the state. Initially, the entire workforce was required to work remotely as a result of the pandemic. After several months of remote work, the accounting firm's management decided to require everyone to return to the workplace. Everyone came back, except Mary, an accountant who claimed she needed to continue working from home due to back pain.

Scenario 2: The Disabled Student Who Demands Online Learning

Immediately before the start of the fall semester, a third-year student at a small liberal arts college sent an email to the Vice President of Academic Affairs, requesting that the college allow her to attend courses online. The student, Sarah, was a non-traditional student, in her 60s, and cited her concerns about COVID-19 as the reason for her request. Sarah explained that she lived with and cared for her ailing mother. She also claimed to have her own health concerns.

Scenario 3: The "Religious" Objector to the Vaccine Mandate

The employer operates a bar in a metropolitan area. The bartenders regularly work in close proximity to each other, as the area behind the bar is only about 3 feet wide. The employer implemented a mandatory vaccination policy, and one bartender requested a religious exemption at the eleventh hour, after previously indicating he was "researching" the vaccine.

(Additional facts relevant to each scenario will be presented at the roundtable.)