

Religious Accommodation and Patient Safety in Healthcare Industry

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Title VII of the Civil Rights Act requires employers in the healthcare industry to provide a reasonable accommodation to employees' sincerely held religious beliefs and practices. Common accommodation requests relate to:

1. Exemptions from the flu vaccination
2. Time off for Sabbath observance or to attend religious services
3. Prayer time breaks
4. Exemptions from participating in certain healthcare treatments

These requests for accommodation challenge healthcare employers in fulfilling the organization's mission to provide safe, quality patient care. For example, the arrival of flu season pits vaccination policies against employee objections on religious grounds to receiving a flu vaccination.

In addition, the U.S. Department of Health and Human Services' (HHS) "Protecting Statutory Rights in Health Care Rule" implements and enforces federal conscience and anti-discrimination laws protecting the rights of employees who refuse to assist in the performance of healthcare services to which they object on religious or moral grounds. The Rule is scheduled to go into effect on November 22, 2019, but it is being challenged in court and may be delayed.

Title VII and Religious Accommodations

1. What are employers' obligations under Title VII to accommodate employees' religious beliefs?

Employers must reasonably accommodate employees when their sincerely held religious beliefs, practices, or observances conflict with a work requirement, unless the accommodation poses an undue hardship to the employer.

2. What is a “sincerely held religious belief”?

It is any theistic or non-theistic system of belief that offers an answer to a fundamental life question. Typically, it is not a belief in an economic, social, or political philosophy.

3. May employers ask employees questions about their religious beliefs?

An employer may do so in order to understand how the employee’s belief motivates the requested accommodation. Such inquiries should be undertaken carefully and with the guidance of counsel.

4. What is a “reasonable accommodation”?

A “reasonable accommodation” is an accommodation that *eliminates* the conflict between religion and work. It is not a compromise that merely reduces the conflict (*i.e.*, allowing the employee to not work on some Sabbaths, but work on others).

- An accommodation is not “reasonable” if a more favorable accommodation is provided to employees for non-religious purposes (*i.e.*, employees are exempted from vaccination for health reasons, but not religious reasons).
- Employers must provide *continuing* accommodations; a temporary accommodation does not satisfy the obligation.

5. What is an “undue hardship” that exempts an employer from providing an accommodation?

Undue hardship means that there is a “more than de minimis” cost or burden on the employer to provide the accommodation. This is a lower standard than used in evaluating a request to accommodate a disability under the Americans with Disabilities Act.

- Factors that may give rise to an undue hardship include:
 - *Identifiable* costs in relation to the size and budget of the employer
 - Concrete concerns about workplace efficiency or patient safety
 - Whether the accommodation will infringe on the rights of other employees under a collective bargaining agreement or bona fide seniority system
 - Whether other employees will be overburdened with work
 - The number of employees who request the accommodation
- Employers typically cannot demonstrate undue hardship based upon:

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- Coworker resentment
 - Assumptions that other employees will want the same accommodation
 - Administrative costs and time spent on scheduling, timekeeping, or payroll

6. What are the keys to complying with employees' requests for accommodations under Title VII?

It is important to:

- Engage in an interactive process with the employee requesting the accommodation. Communicate with the employee to understand the employee's religious beliefs and practices to decide the reasonableness of the request
- Address the two key questions:
 - Does the employee's religious observance conflict with a work requirement?
 - Does the accommodation impose an undue hardship on the employer?
- Think creatively about solutions that accommodate the employee's religious beliefs and least affect operations and budget.

The HHS Rule

1. What is the Rule?

On May 21, 2019, HHS published a final rule to enforce previously enacted "conscience laws" that protect the right of employees who work for healthcare entities that receive federal funds to refuse to assist in the performance of healthcare activities to which they object on religious, moral, or ethical grounds (*i.e.*, abortion, sterilization, or assisted suicide). The Rule is scheduled to go into effect on November 22, 2019.

2. Is the Rule likely to go into effect as scheduled?

Legal challenges to the Rule are pending in the federal district courts in California and New York. Judge William Alsup, presiding over the matter pending in the Northern District of California, said during oral argument that he was unsure whether he would issue a decision by November 22. However, he indicated that he might consider a request to delay the Rule from taking effect.

Nevertheless, healthcare entities that are the recipients of federal funding should review their policies considering the November 22, 2019, effective date and evaluate needed changes.

3. What are some of the key elements of the Rule?

- The Rule protects employees from being required to assist "in the performance" of activities that have a specific, reasonable, and articulable connection to furthering a procedure or part of a health service program or research activity undertaken by or with another person or

entity. Examples of such activities include counseling, referral, training, or making arrangements for a procedure, program, or research activity.

- Employers may not ask job applicants about their religious or moral beliefs during the hiring process. Such inquiries may occur only after hire and only to the extent that there is a reasonable likelihood that an employee may be asked in good faith to perform, refer for, participate in, or assist in the performance of the healthcare activity to which the employee may have an objection. Further, inquiries may be made only once per calendar year unless there is persuasive justification.
- The comments to the Rule indicate that it should be interpreted to apply to some non-clinical staff members (*i.e.*, an employee who prepares the room for an abortion or schedules an abortion could fall under the definition, as could a driver who transports a patient to a clinic for an abortion).
- The Rule does not have an “undue burden” exception. Therefore, it arguably offers employees greater rights than Title VII.
- The Rule does not preempt existing federal and state laws that are equally or more protective of religious freedom and moral convictions. Similarly, the Rule provides that it should not be construed as narrowing the meaning or application of any laws protecting the free exercise of religious beliefs or moral convictions. Because the Rule appears to conflict with some existing state and federal laws, but expressly does not preempt them, employers must review laws that affect the healthcare they provide and consult with counsel about how to satisfy their obligations under these sometimes-conflicting laws.