

EMPLOYER ASKS WORKERS SEEKING RELIGIOUS EXEMPTION FROM VACCINE MANDATE TO SWEAR OFF TYLENOL AND TUMS

Insights
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A hospital system in Arkansas mandating the COVID-19 vaccine among its workforce has taken an interesting approach during its review of religious exemption requests, asking employees to verify they don't or won't use popular medications like Tylenol, Aspirin, Motrin, Ibuprofen, Pepto Bismol, Tums, and Benadryl if they want to prove the sincerity of one particular religious belief. While each employer needs to make its own decisions about the lengths it will take to respond to religious accommodation requests (and our [3-Step Guide to Responding to COVID-19 Vaccine Religious Objections](#) provides an easy outline), this most recent example provides a creative approach that other employers may consider replicating.

Background

Given that about half of the country is not yet fully vaccinated as of the date of this publication, it is no surprise to employers that a good number of their employees are hesitant about receiving COVID-19 vaccines. As more employers are mandating COVID-19 vaccines in anticipation of the impending [new OSHA rule](#), they are beginning to face an influx of exemption requests from employees. Aside from accommodations based on disabilities, you may need to grant reasonable accommodations to mandatory vaccine policies due to an employee's sincerely held religious belief under Title VII.

According to the [Equal Employment Opportunity Commission](#), "Title VII protects all aspects of religious observance and practice as well as belief and defines

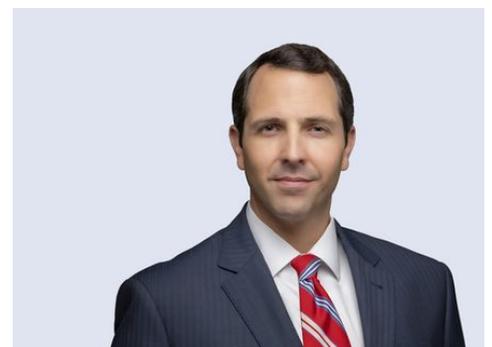
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Industry Focus

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religion very broadly for purposes of determining what the law covers. For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.” However, these do not include social, political, or economic philosophies or mere personal preferences. In other words, an employee does not assert a protected religious belief when the employee simply states a general aversion to vaccines.

Fetal Cell Lines

Employers around the country are beginning to encounter employees who have objections to COVID-19 vaccines because fetal cell lines derived from abortions were used in certain stages of vaccine development. According to a fact sheet issued by the [Los Angeles County Department of Public Health](#), some fetal cell lines are historically derived from elective abortions performed decades ago — not for purposes of vaccine development — and have been used to create vaccines for various diseases such as hepatitis A, rubella, and rabies. Fetal cell lines were used during early research of mRNA COVID-19 vaccines and during production of COVID-19 viral vector vaccine. None of the COVID-19 vaccines themselves actually contain aborted fetal cells.

Some members of religious communities, including those in the Catholic Church, have concerns about pharmaceutical companies using fetal cell lines derived from past abortions to develop the vaccines. Their objection is the belief that receiving the vaccine constitutes co-operation with abortion. However, in December 2020, the Vatican [announced](#) that, in the absence of ethically irreproachable vaccines, the available COVID-19 vaccines were “morally acceptable” given the danger of the pandemic. The announcement said that the use of such vaccines would “not constitute formal co-operation” with the abortions that took place in the past.

Prove It

On August 12, 2021, Conway Regional Health System, which employs about 1,830 employees, announced a mandatory COVID-19 vaccination requirement subject to medical or

religious exemptions. Thereafter, Conway began receiving numerous religious exemption requests, the majority of which were related to use of fetal cell lines in developing the vaccines. The number of these religious exemption requests were “significantly disproportionate” to what Conway had received in the past regarding the influenza vaccine it had typically mandated during flu season.

In response to the large number of such exemptions requests, Conway decided to present employees with an attestation form. In signing the “[Religious Exemption Attestation for Covid-19 Vaccine](#)” form, employees must affirm that “their sincerely held religious belief is consistent and true” and they do not, and will not, use any prescription, over-the-counter, or other medication or vaccines that have used fetal cell lines in their development and/or testing. The form lists 30 medications that Conway states have used fetal cell lines in their development, including everyday medicines like Tylenol, Aspirin, Motrin, Ibuprofen, Pepto Bismol, Tums, and Benadryl. The form also advises unvaccinated employees of the requirements for periodic COVID-19 testing and possible reassignment to other positions to mitigate risk to patients and other staff.

News of Conway’s attestation form caused an uproar in social media circles. In a recent interview, Conway Regional’s CEO and President Matt Troup stated the form was not meant to shame the requesting employees. He instead said the intent was two-fold: (1) to ensure staff requesting the exemption are sincere in their beliefs, and (2) to educate staff who might have requested an exemption without understanding the full scope of how fetal cells are use in testing the development of common medicines. Troup said the debate was not about the validity of the particular belief about fetal cell lines, but whether such belief is sincerely held. Troup reported that if an employee declines to sign the attestation form, Conway would grant the religious exemption on a provisional basis and may ask the employee to sign the form at some later date. Troup also indicated the hospital may not be able to extend provisional status in the future due to changes in the pandemic.

Key Takeaways for Employers When Determining Religious Exemptions

Once it is established that an employee has a religious belief that is protected by Title VII, courts have routinely found that it is impermissible for an employer to question the validity of

that religious belief. It also does not matter that an employee's religious denomination or leaders do not follow or endorse the employee's particular belief. Nor does an employee have to prove the religious practice or belief is an express requirement of the employee's religion. However, this does not mean the employer cannot engage in the interactive process to determine if the religious belief is indeed sincerely held.

The EEOC provides that "although there is usually no reason to question whether the practice at issue is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is both religious and sincerely held, and gives rise to the need for the accommodation." The EEOC lists factors, either alone or in combination, which might undermine an employee's assertion that they sincerely hold the subject religious belief:

- whether the employee has behaved in a manner markedly inconsistent with the professed belief;
- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular 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.

No single one of these factors is dispositive.

Conway Regional Health System's attestation form by no means represents a simple or sure-fire way to resolve requests for accommodation based upon sincerely held religious beliefs. As noted, this is a complex, fact-specific process. Instead, the form simply seeks evidence of the first factor outlined by the EEOC. Employers should therefore be cautious in resting their determination that a religious belief is not sincerely held on evidence demonstrating an employee previously acted inconsistently with the sincerely held religious belief now professed. Courts have held that such evidence can be overcome because sincerely held religious beliefs can, and often do, change over time. Such

cases demonstrate that even if an employee is not diligent in their observance or did not openly profess their beliefs in the past, their religious beliefs are protected by Title VII nonetheless.

Employers should also remember that, even if a religious belief is found to be sincerely held, they may not need to accommodate an exemption request if it would pose an undue hardship under Title VII. In most of these cases, the issue of undue hardship is likely to be determinative of the employer's legal obligations. Because many employers allowed employees to work from home during the pandemic, whether it remains an undue hardship in certain industries to allow unvaccinated employees to be able to work from home as a reasonable accommodation will likely be the subject of litigation in the future. For more information, see our [3-Step Guide to Responding to COVID-19 Vaccine Religious Objections](#).

Moving Forward

Employers will likely face a variety of other religious exemption requests in the near future. In addition to the specific belief described above, recent reports show there is a growing number of groups and individuals claiming that recipients of the COVID-19 vaccines are branded with the "Mark of the Beast," a sign of allegiance to the Antichrist as professed in the New Testament's Book of Revelation. Accordingly, employers are strongly encouraged to consult with counsel in determining religious accommodation requests.

We will continue to monitor issues surrounding religious exemption requests to employers' mandatory vaccine requirements. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact the authors of this Insight, your Fisher Phillips attorney, or any attorney on our [FP Vaccine Subcommittee](#).