Responding to a sudden rise in religious accommodation requests

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COMMENTARY

There has been substantial discussion about religious accommodations over the past few months, largely stemming from vaccine mandates issued by government entities and private employers. This is largely unchartered territory for many employers that likely have not had to address a request for religious accommodation before.

Accommodations due to disabilities are more commonly encountered by employers, and thus are more commonly litigated, giving us a sense of how certain scenarios may play out in court. Religious accommodations, however, are not made so frequently. In fact, the seminal United States Supreme Court case dealing with the question of when an employer has to provide an accommodation on religious grounds – *TWA v. Hardison* – is from 1977.

Employee religious beliefs, practices and observances are entitled to protection under Title VII so long as they are sincerely held and provision of a reasonable accommodation would not pose an undue hardship on the employer. Previously, the most commonly requested accommodations based on religious reasons were schedule accommodations (so employees could observe the Sabbath) or dress code modifications to allow for religious clothing. Now, however, the most common requested religious accommodations have to do with vaccine mandates.

Importantly, with respect to objections to vaccine mandates, as the Equal Employment Opportunity Commission (EEOC) has noted, "social, political or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII." For example, an employee requesting an accommodation because of an anti-vaccination stance is not a religious belief and therefore receives no protection from Title VII. As such, there is likely more leeway to investigate and ask for additional information to gauge whether an employee's request for an accommodation or exception to a mandatory vaccination policy is due to a sincerely held religious belief or not.

Sincerely held

As an initial point, employers are not tasked with playing "gatekeeper" to employees' religious beliefs, and in many instances, the sincerity of an employee's belief is usually not at issue. However, if the employer has information showing that the employee has acted in a manner inconsistent with his or her espoused religious beliefs, then that evidence factors into the evaluation of whether the employee's religious beliefs are truly "sincere."

The EEOC has listed its own factors that it believes could undermine an employee's sincerity in his or her stated beliefs: "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."

In short, if an employer has an objective reason to believe the employee's belief may not be sincere, the employer can ask for additional information prior to coming to a decision on the employee's accommodation request. If, after gathering additional information, it is clear the proffered religious belief is not sincerely held, then the accommodation need not be granted by the employer.

Undue burden

Even if an employee has a sincerely held religious belief, an employer is not required to provide an accommodation for that belief if it would be an undue hardship for the employer. As the U.S. Supreme Court concluded in the *TWA* case, "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." Likewise, employers are not required to deviate from collective bargaining agreements or seniority systems in order to favor one employee over another based solely on that employee's religious beliefs.

So how is an employer to know whether the accommodation would pose an undue hardship? As an initial consideration, in light of the *TWA* case, the standard for evaluating whether an accommodation on religious grounds is an undue hardship for an employer is lower than that of establishing an undue hardship based on disability accommodations under the ADA (that standard requires "significant difficulty or expense," while the standard under Title VII is "more than de minimis").

The EEOC provides some factors it believes should be considered in evaluating whether a requested religious accommodation is an undue burden on an employer, including whether "the accommodation is too costly; it would decrease workplace efficiency; the accommodation infringes on the rights of other employees; the accommodation requires other employees to do more than their share of hazardous or burdensome work; the proposed accommodation conflicts with another law or regulation; or it compromises workplace safety."

In light of the COVID-19 pandemic and the reason behind these vaccine mandates in the first place (employee safety), considerations of religious accommodation to vaccine mandates focus on workplace safety issues; that is, would granting an accommodation to a vaccine requirement jeopardize the safety of fellow employees or customers (such as patients in a hospital or residents in a senior care facility)?

If a religious accommodation is denied due to safety concerns (or another reason leading to the conclusion that the accommodation poses an undue hardship), the employer should consider whether another accommodation exists that can be offered instead. And while the standard is lower than under the ADA, it would still behoove savvy employers to discuss any decisions to deny an accommodation with their favorite employment law attorney.

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