

COVID-19 AND RELIGIOUS ACCOMMODATION REQUESTS

OHR Guidance No. 22-02



Date: January 25, 2022

PURPOSE

To provide guidance on requests for religious accommodation in the workplace during the COVID-19 pandemic.

BACKGROUND

The District of Columbia Human Rights Act (DCHRA), as well as Title VII of the Civil Rights Act, makes it unlawful to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's religion, among other protected categories. D.C. Code § 2-1402.11(a)(1); 42 U.S.C. § 2000e *et seq.*

Like disability accommodation requests, religious accommodation requests are viewed within the context of discrimination prohibitions under Title VII and the DCHRA. A religious accommodation request requires employers to consider whether reasonable adjustment to the work environment can be made that will allow an employee or applicant to practice their religion while working. An employee is eligible for a religious accommodation if their sincerely held religious beliefs, practices, or observances conflict with their work requirements, unless the accommodation would create an undue hardship to the employer. *See* 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b); 4 DCMR § 516.

It is important to note that the term "religion" includes "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith. 29 CFR § 1605.1; *see also* 4 DCMR § 199 (defining the term "religion" as "any institutionalized system or personal set of attitudes, beliefs, and practices which relate to moral or ethical standards).

In considering whether a request would cause an "undue hardship," in the religious context, the approach is much different as compared to the disability context in that the hardship needs only to be "more than a *de minimis*" cost or burden. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *see also* D.C. Code § 1402.11(c)(5). Additionally, the costs to be considered in the "undue hardship" analysis for religious accommodations include consideration of situations beyond direct monetary costs, including the impairment of workplace safety or the requirement that the employee's coworkers perform potentially hazardous or burdensome work. Notably however, the mere assumption that many other employees with the same or similar religious beliefs might also request a similar accommodation "shall not be considered as evidence of undue hardship." D.C. Code § 2-1402.11(c)(5); *see also* 29 C.F.R. § 1605.2(c). Ultimately, determining the reasonableness of a religious accommodation request or the potential undue hardship on the employer if the request were to be carried out are fact-specific determinations that must be determined on a case-by-case basis.

As such, upon an employee's request for a religious accommodation, the parties should engage in a cooperative information-sharing process, similar to the interactive process required in the disability accommodation context, which, in part, allows the employer to gain the information necessary to meet its obligations. Generally, an analysis of whether or not an employee's religious belief is sincerely held is not at issue. However, in the accommodation context, where the employer has an objective basis for questioning either the religious nature or the sincerity of the employee's belief in it, employers are

permitted to make limited inquiries into whether the belief or practice at issue is religious and sincerely held or whether the belief conflicts with the workplace requirement(s).

PROCESSING RELIGIOUS ACCOMMODATION REQUESTS - GENERALLY

An employee is eligible for consideration of an accommodation for a sincerely held religious belief upon providing notice to the employer of the need for such an accommodation. When requesting the accommodation, however, the employee does not need to use specific words, such as “religious accommodation,” to make the request.¹ The employer is on notice of the request when the employee has requested an alteration to their work environment due to a conflict with the employee’s religious belief.

Upon submission of a religious accommodation request, the following steps should be taken:

1. Employer should review the request.
2. Employer may ask for additional information or documentation, if needed.
3. Both the employer and employee should engage in a conversation, where information can be exchanged and clarified.
4. Employer must determine whether the requested accommodation or an alternative accommodation can be provided.
5. Employer must provide a notice to the employee of its decision.
6. If the employer denies the request or notifies the employee that an alternative accommodation is being offered, the reason for that decision must be included in the notice of the decision.

Steps 1 – 3: The Request and Cooperative Exchange of Information

After the employer has received and reviewed the request, the employer should schedule a time with the employee to discuss their accommodation request. As noted in the Equal Employment Opportunity Commission’s (EEOC) guidance on religious accommodations, if an employer does not engage in this cooperative exchange of information, the employer may fail to collect the requisite information needed to correctly perform the “undue hardship” analysis and make its final determination on the employee’s request.

During this conversation, the employer may ask the employee for additional information about their beliefs and practices that lead to the need for the accommodation, as well as potentially alternative accommodations. As noted above, employers generally need not question an employee’s religious belief or the sincerity of that belief, unless the employer has a reasonable or objective basis for making such inquiries. For example, in the EEOC religious request form, it states, “[p]lease describe the nature of your sincerely held religious belief or religious practice or observance that conflict with the EEOC requirement, policy or practice.”² The employer may request that the employee provide supporting documentation, but each request should be considered on its own facts, including whether or not supporting documentation is needed.

If supporting documentation is requested, the employee should provide information reasonably requested from the employer. Upon receipt of any such information, the employer must individually assess the request, avoiding any assumptions or stereotypes about what constitutes a religious belief.

Finally, it is best practice for the employer to provide information regarding its process for reviewing the request and the expected timeframe for a decision.

¹ Employers may wish to use the EEOC’s reasonable accommodation request form, which asks the employee for information necessary to review the request. The form is available at: <https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf>.

² For further examples of the types of inquiries that should be made, consult with the EEOC religious accommodation form at n. 1.

Steps 4 – 6: Consideration of the Request, Whether it Poses an Undue Hardship on the Employer, and the Resulting Decision

After the employer and employee have engaged in a conversation about the requested accommodation and any necessary documents have been obtained, the employer should review the specific facts of the request to make a determination.

- a. This assessment should include a consideration of all possible reasonable accommodations, including telework and reassignment.
- b. When making the assessment, the employer should not rely on speculative hardships, but, rather, should rely on objective information specific to the request under review.

Additionally, when assessing whether the request would result in more than a de minimis cost to the employer, the employer may look to the direct cost to the employer as well as whether the accommodation compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, violates a labor agreement or other law, or requires other employees to do more than their share of potentially hazardous or burdensome work. Generally, the payment of some costs, such as certain administrative costs or temporary payment of premium wages, such as overtime rates, would not be considered more than a de minimis cost.

- c. In the context of COVID-19, when determining whether a proposed or alternate accommodation is “safe,” employers should review this on a case-by-case basis and consult with Centers for Disease Control and Prevention (CDC) Guidance in effect at the time of the request and, where applicable, guidance from the D.C. Department of Health (DOH) to determine whether a proposed accommodation is “safe.” If an employer is aware of an alternative accommodation (other than that proposed by the employee), the employer should explore the possibility of providing that accommodation.

After the individualized review of each request, the employer should provide notice of its decision to the employee. If the employer decides that the requested accommodation is being denied and/or an alternative accommodation is being offered, the employer should provide the employee with written notice of its decision, which should include an explanation of the underlying reasons for its decision. If the employee believes the employer’s decision is a violation of their rights to a religious accommodation, they may file a complaint with OHR or the EEOC. It is highly encouraged that employers provide this language in its decisional letter.

FREQUENTLY ASKED QUESTIONS- COVID-19 RELATED VACCINE MANDATES

The D.C. Office of Human Rights (OHR) has received several questions related to religious exemption requests regarding employer-mandated COVID-19 vaccination. As a general matter, an exemption request to a COVID-19 vaccine mandate imposed by the employer, is a religious accommodation request, therefore, the above guidance and the guidance provided by the EEOC should be followed. Many of the frequently asked questions OHR has received are included below. OHR also directs readers to the EEOC’s What You Should Know About COVID-19 Guidance, particularly Sections K and L, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>

- 1. Does requesting a religious exemption from an employer-mandated COVID-19 mask or vaccine mandate qualify as a religious accommodation request?**

Yes.

- 2. What information must an employee provide regarding their religious objection to receiving a COVID-19 vaccination when requesting an accommodation?**

Although employees do not need to use any “magic words” to request an exemption from a vaccination requirement, according to the EEOC, employees are required to provide an employer

with information about their sincerely held religious beliefs, practices, or observances and how the sincerely held religious belief is in conflict with the vaccination requirement. An employee's failure to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief may affect a future claim that the employer improperly denied a religious accommodation request.

3. What can an employer ask related to an employee's religious belief and the sincerity of that belief when considering a request for an exemption from a COVID-19 vaccine mandate?

An employer should generally assume that a request for religious accommodation is based on sincerely held religious beliefs. If an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer may make a limited factual inquiry and seeking additional supporting information.

4. What guidance should employers rely upon with regards to safety concerns around COVID-19 and vaccine mandates?

When considering whether an employee's request for a religious exemption from a vaccine mandate could be an undue hardship due to safety concerns around COVID-19, employers may rely on CDC recommendations: <https://www.cdc.gov/coronavirus/2019-ncov/> as well as local public health authorities, such as the D.C. Department of Health: <https://coronavirus.dc.gov/>. Additionally, as noted by the EEOC, an employer can also look to whether the employee works indoors or outdoors, works in group or solitary setting, works in close contact with other employees or the public, and whether telework is possible. Where possible, reassignment that allows for telework might also be considered.

5. What guidance exists in understanding the de minimis cost standard as it relates to the consideration of whether a requested accommodation causes an undue hardship?

As noted above in this guidance and by the EEOC, an employer will need to assess each request individually, considering the particular facts of each situation. Although an employer cannot rely on speculative hardships, such as the potential of other employees requesting a similar accommodation, the cumulative costs associated with a large number of similar requests that have actually been made, may be considered in the undue hardship analysis. When assessing whether the request would result in more than a de minimis cost to the employer, the EEOC notes that the employer may look to the direct cost to the employer as well as whether the accommodation compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, violates a labor agreement or other law, or requires other employees to do more than their share of potentially hazardous or burdensome work. But, in considering "safety" concerns in the context of COVID-19, employer should consider each request on a case-by-case basis and engage in a factual analysis using guidance provided by the CDC and D.C. Department of Health. Denials of requests based on safety concerns without a factual analysis supporting such conclusions could result in a violation of the law.

6. Does requesting a religious exemption qualify as a protected activity for the purposes of a potential retaliation allegation?

Yes.

7. What is the difference between appealing an employer's decision or personnel action and filing a complaint with OHR or the EEOC?

In the COVID-19 context, for example, several employers are mandating vaccination of their employees. If an employee has requested an exemption from this vaccine mandate in the form of a religious accommodation, which the employer has denied, the employer will then likely place the employee on notice of the employment consequences associated with the employee's continued failure to be vaccinated. If the employee does not adhere to the employer's policy, the employer may ultimately take a personnel action, such as suspension or termination.

As an initial matter, several employers (not all) have policies outlining the process for “appealing” the employer’s personnel decisions, which may include consequences flowing from the failure to adhere to an employer mandate, such as a vaccination requirement. Employees should review any such policies in place, including collective bargaining agreements, personnel manuals, or other employer-specific internal guidance for information related to internal requests for appeal or reconsideration of any personnel actions proposed or taken by the employer.

As a separate process, the employee may also file a discrimination complaint alleging a violation of their rights under the DCHRA and Title VII with the courts, OHR, or the EEOC. This is NOT an “appeal” of the employer’s personnel decision. Rather, these complaints are alleging that the employer’s failure to provide a religious accommodation (e.g., religious exemption from the vaccine policy) is a form of discrimination based on religion. More specifically, for example, the employee might allege the employer failed to accommodate their sincerely held religious belief or that the employer retaliated against the employee for requesting the accommodation in violation of the DCHRA or Title VII.

In sum, while the personnel action may give rise to both a discrimination claim and a violation of personnel policies or regulations in place, each requires a separate process. Where an employee wants to make a discrimination complaint, they can file a DCHRA complaint with OHR, the federal EEOC, or they can file a private right of action directly with the D.C. Superior Court. On the other hand, if an employee wants to file an internal “appeal” or request “reconsideration” of the employer’s personnel action or the manner in which the action was taken, the employee should review internal policies and/or request information from the employer’s Human Resources department on how to proceed with challenging the personnel decision.

Additional OHR guidance issuances under the DCFMLA can be found at: ohr.dc.gov/page/OHRGuidance.