

Employer Mandates of COVID-19 Injections: Employee Rights and Responsibilities

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As corporations and schools heed the Washington political elites' call to issue mandates for COVID-19 injections, among employees at every level there is confusion as to their right to refuse. Mainstream media has made the situation worse by broadcasting the government narrative at the expense of balanced information. The purpose of this paper is to provide essential, balanced information to enable workers to know and exercise their rights to refuse under federal laws that have been on the books for decades.

The Legal Background

Under federal law, there are two common pathways to refusal that are legally available:

- 1) Religious objection under Title VII of the Civil Rights Act of 1964 (Title VII).
- 2) Medical objection under the 1990 Americans with Disabilities Act (ADA), as amended by the 2008 ADA Amendments Act (ADAAA).

This article will cover objections under Title VII, but objections under the ADA follow a similar process and in most cases provide even more protection to employees. Let's briefly review the laws against religious discrimination in employment. Title VII is codified in federal law beginning at 42 U.S.C. § 2000e. Section 2000e-2 states that:

It shall be an unlawful employment practice for an employer -

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Subsection 2000e(j) defines religion and sets out employer responsibilities:

- (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In addition to the statutes above, there is an implementing administrative regulation at 29 CFR § 1605.2. The regulation contains technical implementation details of the statute. Of particular importance is subsection (c) regarding employer's duty to provide reasonable accommodation:

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 CFR § 1605.2 also contains a discussion in subsection (e) of what constitutes "undue hardship" for an employer. Essentially, undue hardship may occur when the cost of making an accommodation would be more than the "regular payment of premium wages of substitutes." In practical terms, especially in the medical field, to make a showing of undue hardship, an employer must prove that the cost of any accommodation would be more than the cost of terminating the employee and rehiring for the position.

How to request a religious accommodation

The first rule to keep in mind when asserting your rights under the Title VII is this: be proactive. If your job is important to you, do not allow rumors or political narratives saying that termination is inevitable deter you from a successful resolution of your request for accommodation. Read all notices from your employer promptly and commit to meet all deadlines. Follow the process through to the end or until you are actually terminated. Whatever you do, do not resign! Submitting a resignation or failure to follow through before termination will seriously jeopardize any claim for unemployment. What follows is a general outline of the steps necessary to submit a request for reasonable accommodation.

1. Carefully read all notices and policies to determine whether any represents an actual mandate or merely a strongly worded recommendation. An actual mandate will contain dates by which you must take certain steps to remain employed.

2. If you receive a notice that represents a mandate, or if you know that one is imminent, prepare your request for accommodation. Your request should be in the form of a letter to your employer, and contain the following elements:
 - a. A *reference* to the notice, policy, or mandate to which you object for religious reasons,
 - b. A *notice* that you are invoking “Title VII of the Civil Rights Act of 1964” or equivalently, “42 U.S. Code § 2000e, et seq.” to formally request a religious accommodation to the documents referenced in (a).
 - c. A brief *description* of your religious objection that includes an *explanation* of how complying with the notice or mandate would cause you to violate your faith. Your employer is entitled to this information to assess reasonable accommodations and the sincerity of your objection. It is important to note that the objection need not be overtly religious; it may be a deeply-held moral or ethical belief. As long as the objection is sincere, it may be personal and need not be a doctrine of any particular faith community. This section must be in your own words and not copied from somewhere. It should be one or two paragraphs and not longer. Do not submit religious writings or letters of support from clergy at this stage. The purpose of this section is to inform your employer of your objection by providing enough information for the employer to access reasonable accommodations. It should be a declarative statement and not argumentative; this is not an opportunity to argue the correctness or morality of your belief. Your employer cannot legally argue against your belief, and should not do so. Your employer may, however, challenge the sincerity of the statement by claiming that you adopted it for the purpose of avoiding the mandate. In practice, employers do not challenge employee sincerity unless there is strong evidence to support doing so. If this occurs you will have a chance to submit a more detailed statement of faith along with letters of support from clergy, friends, and family.
 - d. A *request* for reasonable accommodation that includes your recommendations as to how your employer should accommodate your objection. Recommendations should be specific to your position. It is highly desirable to submit more than one accommodation recommendation in the section. Submit a minimum of two, preferably three. Your recommendations should address legitimate employer concerns as well as your own. Be creative and proactive. There are websites that list reasonable accommodations for particular situations. If your role does not permit you to work from home, consider requesting a lateral transfer or assignment to a different role. No one knows better than you what accommodation will work for you.
3. Submit your request for reasonable accommodation. If your employer has a religious “exemption” form, submit that as well, but do not consider it a replacement for your letter. Your responses on the form may refer to or restate your letter.
4. After your employer formally receives your request for reasonable accommodation, it has a legal obligation to consider all reasonable accommodations to your religious objection, not just the ones you recommend. Under the guidelines of the Equal Employment Opportunity Commission (EEOC), the next phase of your request should be a negotiation between you and your employer in search of an agreement regarding a reasonable accommodation. During this process, your employer may ask for more information. Provide additional information promptly and remain engaged in the process.
5. If the negotiation results in an agreement, your request has succeeded. If your employer informs you that there is no reasonable accommodation that is not an undue burden on its operations, ask whether your employer has an appeal process. Many large corporations have such a process in place. If it does have an appeals process, follow the process and submit all paperwork for the appeal. If at the end your employer denies your appeal, or you have otherwise exhausted all processes available to

you, continue to show up for work normally until you receive a final termination notice. This is very important for preserving your legal rights to unemployment or court damages. If you are terminated, you should expect to receive unemployment insurance benefits as well as compensation for accrued PTO, and all other benefits of former employees such as COBRA continuation health insurance and any accrued employer portions of retirement plans and 401(k)s.

About unemployment benefits

Some employers are implementing a policy of suspension without pay for a period of time before final termination. They are doing this to put further pressure on religious objectors as well as to avoid the bad public relations that would come from having to escort out employees due to their religious faith. It is important to recognize that a suspension without pay is a layoff for unemployment purposes. If this happens to you, file for unemployment compensation immediately and indicate that you have experienced a significant reduction in hours to zero.

Some employers are also telling employees that a refusal to receive the injection constitutes either a “voluntary” resignation or employee misconduct, and therefore either case is grounds for termination without possibility of unemployment compensation. This is false. If you properly submit your request for accommodation and follow the process to its completion, you have met your responsibility under unemployment compensation law. You are entitled to unemployment benefits. Likewise, following the law to request a reasonable accommodation for a religious objection is not employee misconduct. Quite to the contrary, under New Hampshire law, employee conduct that disqualifies an employee for unemployment benefits is defined in RSA-A:35 as “arson, sabotage, felony, assault which causes bodily injury, criminal threatening, or a single theft or multiple thefts in the aggregate of an amount equal to or greater than \$250, where such conduct is connected with his or her work.”

If you have completed the process outlined in this paper, have lost your job, and believe that your former employer did not properly follow this process or otherwise treated you unfairly, the Liberty Defense Fund of New Hampshire wants to hear from you. Please contact LDFNH at:

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