

# Employers Should Plan For Vaccine Religious Exemptions

By **Andrea Kirshenbaum** (September 29, 2020)

Researchers furiously are working to bring a COVID-19 vaccination to market as quickly as possible. As we all wait with bated breath for a COVID-19 immunization so that life can go back to some semblance of normal, many employers are considering whether and under what circumstances they should require employees to receive a COVID-19 vaccine as a condition of employment.



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Presently, there are four vaccine candidates in late-phase clinical trials. The U.S. Food and Drug Administration has said that to win regulatory approval, any COVID-19 vaccine will have to prevent disease, or decrease its severity, in at least 50% of the people who receive it.

More recently, it has communicated that it expects to spell out a tough new standard for an emergency authorization of a COVID-19 vaccine soon. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, testified before Congress last week that there should be around 700 million doses of the vaccine by April.

While only time, and data, will tell the efficacy of any COVID-19 vaccine, it certainly makes sense for employers to consider mandating a COVID-19 vaccine — with exemptions for religion and disability — as part of a larger COVID-19 mitigation strategy. Yet new poll data shows that as time goes on fewer and fewer Americans report that they would receive a COVID-19 vaccine if one (or more) becomes available.

A poll taken from Sept. 18-21 by Axios and Ipsos SA found that 60% of those polled were not very or not at all likely to get the first wave of COVID-19 vaccines when they are made available. A poll from Morning Consult conducted just two weeks earlier showed that 51% of Americans would get a COVID-19 vaccine, down from 72% of those surveyed in April.

As we pass the six-month mark of many employees working remotely and businesses shuttered or operating at less-than-full capacity, employers should assess what approach they would take if a safe and effective vaccine is approved by the FDA. Assuming that employers can get access to the vaccine, they have several options.

The first is to follow the typical influenza vaccination approach of many non-health care employers, i.e., offer the vaccine to employees free of charge on a strictly voluntary basis.

In a pandemic preparedness guidance document issued by the U.S. Equal Employment Opportunity Commission in 2009 during the H1N1 virus outbreak — and updated in response to the COVID-19 pandemic in March of this year — this is the approach suggested by the EEOC: "Generally, [Americans with Disabilities Act]-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it."

The second option would be to create a hybrid approach. That is, mandate the vaccine for certain employees — for example, those who cannot work remotely or cannot fully socially distance in the workplace.

The third option would be to mandate the vaccine for all employees who do not qualify for an exemption due to religion or disability.

Assuming that a safe and effective vaccine will, hopefully, be available in the next few months, now is the time for employers to weigh the various options and make decisions as to which approach they would follow.

### **Creating the Building Blocks of a Program**

If employers mandate the vaccine for any category of employee, they need to create an exemption process for religion and disability. Since at this point we do not know the components of the future vaccine or the medical contraindications, the disability exemption protocol will need to take place after FDA approval.

Employers can, however, develop their religious exemption process now and evaluate all requests in advance of FDA approval. That way, when the vaccine becomes available, employers will be poised to immunize their workforce — following the disability exemption process.

Employers looking to put in place a COVID-19 vaccine program need look no further than to the case law and guidance developed in the influenza vaccination context to guide their path.

### **The Legal Framework**

Title VII of the Civil Rights Act prohibits discrimination because of religion, among other protected categories, and requires employers to reasonably accommodate religious observance and practice, absent undue hardship. Under U.S. Supreme Court precedent, employers can establish undue hardship under Title VII if they can demonstrate that the accommodation would require "more than a de minimis cost."

The U.S. Court of Appeals for the Third Circuit's seminal 2017 decision in *Fallon v. Mercy Catholic Medical Center*<sup>[1]</sup> provides employers with a road map to implement a COVID-19 vaccination program. The hospital at issue in *Fallon* mandated the influenza vaccination absent an exemption due to religion or disability.

As part of the exemption process, *Fallon* was asked to explain his views so that the hospital could assess whether his refusal to receive the influenza vaccination was "because of ... religion," and therefore protected under Title VII, and state law. In support of his exemption, *Fallon* submitted a detailed essay describing his views. After reviewing his essay, the hospital concluded that *Fallon*'s views were not religious, and he was terminated because he refused to receive the influenza vaccination.

In examining *Fallon*'s views, the Third Circuit was guided by a 1965 Supreme Court decision interpreting a conscientious objector statute that provided a religious exemption from conscription, *United States v. Seeger*.<sup>[2]</sup> In *Seeger*, the Supreme Court asked: "[D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"<sup>[3]</sup>

To evaluate Fallon's claim, the Third Circuit set out a three-part test:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[4]

Applying the three-part test, the Third Circuit concluded that Fallon failed on all three fronts. The Third Circuit found that Fallon's beliefs did not address fundamental and ultimate questions having to do with deep and imponderable matters, reasoning that, "[g]enerally he simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid the vaccine."[5]

The Third Circuit also held that Fallon's beliefs were not comprehensive in nature, finding that Fallon applied one general moral commandment "one should not harm their [sic] own body" which is an "isolated moral teaching" and "not a comprehensive system of beliefs about fundamental or ultimate matters."[6]

As to the third factor, the Third Circuit held that Fallon's "views were not manifested in signs such as 'formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions.'"[7]

While the Third Circuit reasoned that "certain anti-vaccination beliefs are not religious," it recognized that anti-vaccination beliefs can be protected if they are part of "a broader religious faith" and offered Christian Scientists as an example.[8]

In its opinion, the Third Circuit also made clear that employers cannot require a letter from a member of the clergy in order to consider an employee's request for religious exemption. In addition, the Third Circuit affirmed that, consistent with Supreme Court precedent and EEOC guidance, nontheistic beliefs can satisfy Title VII's requirements.

The EEOC also has offered guidance both generally and in the influenza vaccination context that employers should be aware of as they put in place COVID-19 vaccination programs. The EEOC's Compliance Manual states that

the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger* and *Welsh v. United States*. [9]

However, in a March 5, 2012, informal discussion letter regarding the influenza vaccination the EEOC indicated that it "is unlikely that 'religious' beliefs would be held to incorporate secular philosophical opposition to vaccination."

In its Compliance Manual the EEOC also has taken the position that an employee can have a valid exemption even though "no religious group espouses" the beliefs of the employee and even if the religious group to which the employee belongs does not accept that belief.

### **Applying the Framework**

Armed with the Third Circuit's three-part test and EEOC guidance, employers should evaluate the religious exemption requests of employees.

If an employer finds that an employee's exemption request was because of his or her religion, employers then need to consider potential reasonable accommodations. Employers should be guided by science and data in evaluating these requests while also keeping in mind the particular workplace and the role and work environment of the specific employee.

Employers also will need to assess whether a potential accommodation poses an undue hardship on the employer and its operations. In the influenza vaccination context, the EEOC offered informal guidance as to the nature and scope of undue hardship, stating:

Facts relevant to undue hardship ... would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation.

Creating a COVID-19 vaccination program certainly is not without legal risk. Yet the question that employers should be asking themselves is the same question that a mentor of mine used to ask: Compared to what?

While employers certainly may have some level of discomfort in being the arbiter of whether an employee's views are religious or not, the question is: What is the alternative? Now is the time for employers to begin asking and answering these questions. And if the decision is to move forward with a COVID-19 vaccination program, employers should begin creating and implementing that program now.

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[1] 877 F.3d 487 (3d Cir. 2017).

[2] 380 U.S. 163 (1965).

[3] *Id.* at 184.

[4] 877 F.3d at 491 (quoting *Africa v. Commonwealth of Pennsylvania*, 662 F.3d 1025, 1032 (3d Cir. 1981)).

[5] *Id.* at 492.

[6] *Id.*

[7] *Id.* (quoting *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J. concurring)).

[8] *Id.* at 492-93.

[9] Internal citations omitted.