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Evaluating Religious Exemption Requests Under the CMS COVID-19 Vaccine Mandate

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In light of the CMS Interim Final Rule (“Interim Rule”) published on November 5, 2021, qualifying healthcare facilities have been tasked with implementing policies and procedures that ensure their staff are fully vaccinated from COVID-19 unless their employees are exempted from the vaccination mandate due to a qualifying disability or sincerely held religious belief. Many employees have resorted to the religious exemption to avoid vaccination requirements; however, this exemption is narrower than most people realize. This article addresses some of the top questions concerning religious exemption requests.

What is required for employers to comply with the Religious Exemption under the Interim Rule?

The Interim Rule requires that employers permit employees to be exempted from the vaccination requirement if the vaccination requirement conflicts with the employee's sincerely held religious belief, practice, or observance. Employers must evaluate religious exemption requests on a case-by-case basis. Employers are required to have a process for collecting and evaluating such requests, including the tracking and secure documentation of information provided by those staff who have requested exemption, the facility's decision on the request, and any accommodations that are provided. Failure to adequately document religious exemption requests may subject employers to certain penalties outlined in the Interim Rule including civil monetary penalties, denial of payment for new admissions, or termination of the Medicare/Medicaid provider agreement depending on the type of facility involved.

How should employers evaluate whether an employee request is a “sincerely held religious belief?”

Employers have the responsibility to inquire and determine whether an employee's religious exemption request qualifies for accommodation from COVID-19 vaccination requirements. In general, employers should employ a two-part test: Is the religious exemption request based upon a religious belief? If so, is the religious belief sincerely held?

1. What Qualifies as a Religion?

Religion is broadly defined by the U.S. Equal Employment Opportunity Commission (“EEOC”) as beliefs that address fundamental questions about life, purpose, and death. Religious beliefs include both theistic and non-theistic moral or ethical beliefs as to what is right and wrong. A

religious belief need not be associated with a widely recognized or organized religion and may conflict with religious beliefs of such organized religions. They include beliefs and practices with which the employer may be unfamiliar or beliefs that may have only one follower.

Certain beliefs do not qualify for protection as a religion. Social, political, or economic philosophies, as well as mere personal preferences, even if strongly held, are not religious beliefs protected under federal law. Similarly, ways of living, such as veganism, pacifism, or minimalism are not protected religious beliefs.

2. Is the Religious Belief Sincerely Held?

Religious beliefs must be “sincerely held” in order to qualify for accommodation. Employers should ordinarily assume that an employee's request for religious accommodation is sincerely held. However, if there is an objective basis upon which the employer may question the sincerity of the employee's religious belief, the employer may—but is not required to—request documentation or other information from the employee to assist in the employer's assessment of the employee's sincerely held belief, practice or observance.

Employers should be mindful that while prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.

Because the existence and sincerity of religious belief is by its nature personal and subjective, the EEOC and other government agencies have been hesitant to challenge an employee's religious belief that appears to be facially sincere. CMS is not likely to second guess or penalize an employer who decides to grant a religious exemption based on an employee's professed and documented sincerely held religious belief.

What supporting documentation may employers request from the employee?

Employers should have policies and procedures in place in which they request supporting documentation from employees requesting religious accommodation. Documentation that may be requested from the employee should include the following:

- A form or statement from the employee that addresses (i) the specific COVID-19 vaccine that, if administered, would conflict with the employee's religious beliefs; (ii) the religion or religious beliefs upon which the employee is basing his or her religious accommodation request; and (iii) the specific tenets of the religious beliefs, practices or observances which require religious accommodation; and
- If the employer has objective reasons for questioning the sincerity of the employee's professed religious belief, the employer may—but is not required to—request written statements or other

documents from third parties such as the employee's religious leader, practitioners, or others with whom the employee has discussed his or her beliefs or who has observed the employee's past religious adherence.

What should employers include in its “religious accommodation” form?

Employers should develop a “religious accommodation” form that may be used for religious accommodation requests. This form should include requests for employee responses that address the questions listed in the above section. It may also include language specifying that the employer may request additional information to confirm the nature of the religious beliefs of the employee; that the employer may grant or deny the religious request depending on relevant circumstances, including the potential impact the exemption may cause on the employer, the employer's staff, and its patients; that the employer may withdraw or terminate the exemption or modify any accommodations as appropriate; and that the employee agrees to comply with any conditions or precautions that the employer may require during the exception to protect employee, the employer's staff, and patients.

What accommodations must employers make for employees with qualifying religious belief exceptions?

Under the Interim Rule, employers must implement precautions to mitigate the transmission of COVID-19 for all staff who are not fully vaccinated, including those who have been granted religious exemptions. This may include COVID-19 testing, wearing masks, social distancing, work reassignments, and other precautions. CDC and OSHA guidance may be helpful in identifying appropriate accommodations.

If an employer grants a religious accommodation for a certain practice must it grant the same exception for all employees?

Not necessarily. Employers must make a case-by-case evaluation of all religious exemption requests. The religious exemption protects sincerely held religious beliefs, not specific practices. A certain practice by one employee may qualify as a sincerely held religious belief whereas the identical practice by another employee might not depending on the motivation for the practice.

For example, one employee might observe dietary restrictions for religious reasons while another employee observes the same dietary restrictions for health or environmental reasons. In this scenario, the employee whose practice is based upon a sincerely held religious belief qualifies for religious exemption whereas the employee who engages in the same practices but for secular reasons might not qualify for accommodation.

What if the employee is claiming a religious exemption on false information?

Employers may choose to not grant religious exemptions for religious beliefs that are based on health misinformation or incorrect statements or

the stance of certain religions toward COVID-19 vaccination. For example, if an employee makes a religious exemption request based upon their professed religion, but there is clear evidence that top leadership for that religion has endorsed COVID-19 vaccines, then the employer may provide the employee with this information. Such information may be relevant to the determination of whether a religious belief is sincerely held, but it is not determinative. An employee may have a sincerely held religious belief even if it differs from the tenets of an organized religion or the beliefs of a particular religious leader. Accordingly, employers should evaluate the employee's own religious beliefs.

What if an employee refuses to be vaccinated and does not qualify for an exemption?

Although the Interim Rule does not identify what actions an employer may take against a non-compliant employee, we anticipate the employer will be able to terminate the employee, or place the employee on unpaid leave, so long as the employee is not refusing to comply because of a disability or other exemption recognized by federal law. Employers should consult legal counsel before taking any actions.

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