

February 7, 2012

Attention: Chairman
Equal Opportunity Employment Commission
131 M Street, N.E.
Washington, D.C. 20507

**29 U.S.C. § 1601.91 REQUEST FOR TITLE VII
INTERPRETATION OR OPINION**

I. Names and addresses of the person making the request:

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Other interested persons:

- B. Hospital and other healthcare facility employers, employees and patients throughout the United States.

II. A statement of all known relevant facts:

INTRODUCTION

This issue concerns a recent, fast-growing trend on the part of healthcare employers nationally to implement policies requiring, as a condition of employment and on penalty of termination, all employees to be vaccinated with the influenza and other vaccines; and the apparent, widespread practice on of employers' denial of the vast majority of employees' requests for accommodation of their religious objections to vaccines. As any given healthcare employee's vaccination status may be of concern to other employees and patients, this is an industry-wide concern.

The Requestor is uniquely qualified to present these concerns, having counseled dozens of healthcare workers around the country in the past two years about their Title VII right to refuse employer-mandated vaccines for religious reasons. While most of the Requestor's clients have been accommodated, the vast majority of accommodation requests appear to be made without the assistance of counsel, and most of those appear to be rejected. In fact, some hospitals refuse all vaccine religious accommodation requests, categorically.

To the best of the Requestor's knowledge, there is no legal precedent directly on point with this issue. This combined with employers' aggressive, contrary agenda (to maximize employee vaccination rates) has led, in the Requestor's observations and opinions, to widespread violation of Title VII rights. However, in addition to Title VII precedent concerning religious accommodation generally, there is a line of federal legal precedent concerning vaccine religious exemptions in the school enrollment context that may have application here. Some of this precedent is cited in the attached Memorandum.

Regarding the concerns summarized above and the specific problems and questions detailed below, the Chairman is uniquely positioned to provide critically needed guidance to clarify and protect healthcare employees' Title VII rights, in a manner that gives proper consideration to employers' conflicting concerns. Accordingly, the Requestor respectfully presents this Request.

FACTS¹

- During and since the swine flu pandemic of 2009-2010, hospitals and healthcare facilities throughout the U.S. have been implementing new, mandatory flu vaccine policies requiring employees to receive an annual flu shot or face termination. Additional vaccines are already beginning to be added, and it is likely that will be added over time, given CDC recommendations for healthcare workers and similar trends in recent decades with childhood vaccine requirements.
- A significant number of healthcare employees have requested accommodation of their religious objection to vaccines. Such accommodation is typically referred to as an "exemption" by employer and employee alike. However, the vast majority of exemption requests appear to have been denied. For example, two large healthcare systems reportedly stated that they had received over a thousand requests for religious exemptions, but the system-employer allowed only four in one instance, and had denied nearly all in the other. While hospitals have an interest in refusing non-qualifying accommodation applicants, the widespread denial of the vast majority of employee requests is highly suspect and likely causing widespread harm.
- The widespread denial of employee accommodation requests appears to be substantially unlawful. For example, some hospitals categorically deny all such vaccine accommodation requests. In the Requestor's experience, the vast majority of employers that do allow accommodation impose strict, unlawful barriers, such as requiring applicants to have the support of a religious leader, and by scrutinizing applicants' religious beliefs according to arbitrary, hospital-administrator-designed criteria that is legally suspect.
- There is broad, inconsistency in hospital policies nationally, and there appears to be little or no regard for proper legal boundaries. Private hospitals sometimes assume that being private, they can do whatever they want, despite substantial ties to government (e.g., accepting Medicaid and Medicare).

¹ Based on the Requestor's personal knowledge, experience, research and/or professional judgment.

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- Hospitals appear to be providing no guidance to employees about hospitals criteria for accommodation, leaving employees to guess at what the hospital needs to see in order to approve an accommodation request.
 - To the best of the Requestor's knowledge, the only legal guidance available on this specific legal point is an EEOC statement that "once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation..."² However, the Requester has never encountered a hospital policy consistent with the plain language meaning of this statement.
 - A secondary concern has arisen in that many hospitals that do allow accommodation have implemented overreaching mask policies for the accommodated, unvaccinated workers. Many of these policies go well beyond DHHS and CDC recommendations. E.g., one employee reported that she had to wear a mask throughout her entire shift for eight months, and six month policies are common. Such extreme mask policies are inconvenient to employees, even preventing them from performing their job duties in many instances, and as such are clearly punitive and coercive in nature, going well beyond any reasonable healthcare needs. Accordingly, these policies raise a separate, secondary discrimination concern.
 - Another related issue may pose a sexual discrimination/accommodation concern. The Requestor's clients have reported hospitals denying pregnant employees' request to postpone vaccines while pregnant due to the documented lack of medical studies indicating whether or not, or how, vaccinations may harm an unborn fetus. This causes extreme distress for the affected employees and their spouses.

The Requestor's experience and observations have revealed substantial confusion and inconsistency, nationally, concerning the application of Title VII employees' request for religious accommodation regarding employer-mandated vaccines. The result has likely been widespread violation of employee rights. Specific points of confusion and inconsistency are detailed and summarized in the following questions:

1. Does Title VII require hospitals to accommodate their employees' religious objections to the influenza and other vaccines? If 'yes' generally but not absolutely, when and under what conditions is employer-accommodation of a qualifying employee clearly required, and when is it optional?
2. What beliefs qualify for religious accommodation under Title VII in this context?
3. May hospitals scrutinize employees' religious beliefs to determine whether or not the beliefs qualify for religious accommodation under Title VII? If so, what is the proper criteria and appropriate procedure?
4. May hospitals require employee-applicants to have the support of a religious official?

² The U.S. Equal Employment Opportunity Commission, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, III. B. 13., http://www.eeoc.gov/facts/pandemic_flu.html, citing Equal Employment Opportunity Comm'n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf>.

5. May hospitals refuse to accommodate an employee's religious objections to immunizations if, in addition to presenting qualifying religious objections to immunizations, the employee also submits non-religious, "anti-vaccine" information?
6. May hospitals require non-vaccinated employees, whose non-vaccinated status is due to the employee's religious objections to immunizations, to wear masks? Are there boundaries beyond which such policies are discriminatory?
7. Must hospitals accommodate a pregnant employee's requests to refuse vaccines during the employee's pregnancy under Title VII?
8. Does a healthcare employee's receipt of vaccines in the past, in and of itself, relieve an employer of the obligation to accommodate the employee's present request for religious accommodation?
9. Does a hospital's Title VII obligation to accommodate employees' religious objections to immunizations apply to contract employees, hospital salespeople, pharmacists, and other employees in the healthcare field who are also increasingly being required to be vaccinated?
10. Does an employer's Title VII obligation to accommodate employees' religious objections to immunizations apply to college students doing clinical work in local hospitals as part of a college healthcare curriculum?
11. Does an employer's Title VII obligation to accommodate employees' religious objections to immunizations apply to both state-mandated vaccines and employer-required vaccines?

III. Statement of reasons why the title VII interpretation or opinion should be issued.

The bottom line is, neither employers nor employees have a clear understanding of what constitutes a legally valid accommodation request and accommodation requirement in this context. Therefore, the Chairman's issuance of a formal, published opinion addressing the above-cited problems and questions would:

- A. Bring badly needed clarity and uniformity to healthcare facilities' Title VII accommodation of healthcare employees' religious objections to immunizations, nationally;
- B. Reduce employer-employee conflict in the healthcare industry resulting from the above-cited problems, and widespread, corresponding emotional distress for employees. This distress has likely had an overall adverse effect on employee morale and risks negatively impacting overall quality of patient care;
- C. Reduce unnecessary employee job loss. A small but significant number of employees have been terminated for refusing to violate their sincerely held religious objections to immunizations in order to keep their job;
- D. Save time and confusion for both employers and employees with employer's processing of employee religious exemption requests; and save employers corresponding costs;

- E. If the result is a significant increase in accommodation of employee accommodation requests, there will be a corresponding decrease in the statistically unavoidable vaccine adverse events that necessarily occur to some percentage, however large or small, of all vaccine recipients; and
- F. Reduce the volume of corresponding EEOC complaints and potentially costly litigation caused by the confusion of all concerned, which complaints and litigation may otherwise increase over time as more employees learn about their rights and remedies and choose to pursue formal proceedings accordingly.

WHEREFORE, the Requestor respectfully requests that the Chairman of the Equal Opportunity Employment Commission publish a formal Opinion addressing the above concerns and answering the above questions, and additionally any other and further relevant concerns that may come to the Chairman's attention during the Chairman's investigation of this matter, for the benefit of all concerned.

The Requestor also respectfully requests that the Chairman review and consider the attached Memorandum – Proposed Answers, Considerations, and Legal Precedent, which Memorandum presents the Requestor's research and insights developed over the past two years concerning the factual and legal aspects of the issues discussed herein, and which Memorandum the Requestor respectfully offers in support of the Chairman's investigation and resolution of these issues.

Thank you for your kind consideration of the above. The honor of a reply is requested.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Alan Phillips". The signature is written in dark ink on a light-colored background.

Alan Phillips, J.D.
North Carolina Bar No. 30436