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As most of you have heard by now the Department of Public Health issued new mandates pertaining to State Prisons and vaccination of employees. Following this, Secretary Allison and Receiver Kelso issued a memo providing further direction on August 23, 2021.

Most relevant to our discussion today is the paragraph at the beginning which states, "The August 19, 2021, CDPH Public Health Order requires workers in specified correctional health care facilities to show evidence of full vaccination for COVID-19 by October 14, 2021, or to obtain approval for a reasonable medical or religious accommodation precluding them from the mandatory full vaccination. Staff for whom this requirement applies cannot opt out of vaccination or routinely test in lieu of vaccination."

There are still no definitive court decisions in California on the legality of mandating vaccines, but by all accounts, it is not hopeful they are going to block anything when they do come down. If you are a CDCR employee who falls under the mandate but does not wish to be vaccinated, how can you still keep your job?

TIME SENSITIVE – the vaccine deadline for those that fall under the most recent mandate is October 14, 2021. If you qualify for an exemption, you should prepare and file it as soon as possible for timely consideration.

As noted in the memo from Allison/Kelso, the two principle (and legal) ways by which an employee may seek accommodation is through either a medical or a Title VII/religious exemption. Let's look at both of these with an eye towards what an employee needs to do to establish either.

Medical Exemption

First it is important that every employee follow the correct process. Failure to do so may result in a technical denial or rejection of the employee's application. There is no legally established process so employees should follow the directions provided by CDCR. Those steps are as follows:

- 1) Reasonable accommodation requests shall be submitted on the CDCR Form 855, Request for Reasonable Accommodation
- 2) Form 855 should be accompanied with a written statement signed by a physician, nurse practitioner, or other licensed medical professional practicing under the license of a physician stating that the individual qualifies for the accommodation.
- 3) The statement should **not** describe the underlying medical condition or disability giving rise to the accommodation; and
- 4) The medical statement should state the probable duration of an individual's inability to receive the vaccine (or if the duration is unknown or permanent, so indicate).

For medical accommodations only, CDCR Form 855 and the associated medical statement need to be submitted to the employee's supervisor and to the Return-to-Work Coordinator at your facility.

A word of caution – if CDCR is flooded with applications claiming an inordinate number of individuals suddenly have a medical basis for exemption from a Covid vaccine, red flags will be raised. Here are a couple of things to consider:

- 1) Be certain the medical statement you obtain is from a credible medical provider who really has been treating you and knows your medical history.

- 2) If you have agreed to take other vaccines/medications in the past as a condition for working at CDCR, suddenly having a “medical” reason for only the Covid vaccine may seem suspicious.
- 3) Be cautious of inconsistency – if you have never before objected to any vaccine, medication, testing or other medical intervention – doing so now may seem more contrived than genuine.
- 4) That being said, beyond understanding that you have a medical condition signed off on by a medical provider, CDCR **cannot** ask any further questions regarding your actual condition or diagnosis.

For the benefit of yourself and others, make certain that your claim is valid. If too many claims are filed that appear to be frivolous or without merit, then CDCR may ultimately implement further steps of verification. While it is true that CDCR itself cannot delve into the details of your medical history, that doesn’t necessarily mean they couldn’t send you to an outside doctor (contracted with CDCR) to confidentially evaluate the basis of your claim. There is currently not such a system in place so preserving the integrity of the application process is important.

Religious Exemption

To apply for a religious exemption employees must do as follows:

- 1) Notify their supervisor and local Equal Employment Opportunity Coordinator of their request for religious accommodation.
- 2) Religious accommodation requests shall require a statement indicating that the individual has a **sincerely held religious belief** that precludes them from obtaining any COVID-19 vaccine.

Religious exemptions are clearly more subjective and personal. Whereas a medical doctor could (in theory) objectively evaluate a medical condition, there is no expert on all religions and the law frankly does not allow CDCR to question religious validity. However, we do know that the law requires that the basis for a religious exemption be a “sincerely held” belief and require a statement (from the employee) to substantiate that accordingly.

What is the basis for a religious exemption?

Religious accommodations stem from Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Together these acts prohibit many private and government employers from discriminating against their employees on the basis of— among other things—religion.

Title VII provides that an employer must accommodate an employee’s religious observance or practice unless the employer demonstrates that the employer is unable to reasonably accommodate the employee without imposing an undue hardship on the conduct of the employer’s business. 42 U.S.C. § 2000e(j). As the U.S. Supreme Court has stated, “[t]he intent and effect of this definition was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

Title VII also defines the term “religion” broadly. It includes “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000e(j). And courts have tended to interpret this definition liberally. However, it is of the utmost importance to realize—in the COVID-19 vaccination context in particular—that the objection to being vaccinated with a COVID-19 vaccine **MUST BE RELIGIOUS**. The importance of that point cannot be overemphasized, because, in many cases, people objecting to vaccines—and the COVID-19 vaccines in particular—may have reasons, other than religious reasons, for objecting to the vaccines.

What can CDCR *not* do?

Unlike with medical exemptions requiring a medical provider statement, an application for a religious exemption does not. In fact, legally speaking, CDCR cannot require that you “validate” your beliefs by having them co-signed by a religious leader or affiliated group.

According to the Equal Employment Opportunity Commission: “The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee.” (Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1.)

In short, the EEOC test does not require that the employee’s religious beliefs coincide with the tenets of the employee’s—or any—church or religious denomination. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). For that reason, an employer has no basis to require an employee to support the employee’s asserted religious belief with the statement of any other person or organization, including the employee’s clergy. Therefore, it is inappropriate for the employer to ask for any supporting statement from the employee’s clergy or other religious authority.

An employer may also not question the validity of an employee’s religious beliefs. By their nature, religious beliefs are matters of personal faith and oftentimes not subject to objective proof. It is for that reason that even courts cannot, and do not, inquire into whether a person’s religious beliefs are “correct” or not.

What *can* CDCR do?

Although an employer may not question the validity of an employee’s religious beliefs, employers may question the *sincerity* of such beliefs. Conduct of an employee that appears to be inconsistent with the religious beliefs underlying the employee’s religious objection to the COVID-19 vaccines may undermine the employee’s religious accommodation request. Therefore, an objecting employee’s religious beliefs—and whether the employee consistently applies those beliefs in other similar contexts—will be carefully examined before making an accommodation request. For example – if the employee has consistently been compliant with vaccines, medications, testing and other medical interventions throughout their career – and suddenly only religiously objects to the Covid-19 vaccine, that may call into question their sincerity. Or, if the employee has never expressed any religious persuasion and suddenly becomes a member of the First Church of the Last Unicorn on August 24th – sincerity may be questioned.

What CDCR *must* do – explore reasonable accommodations

In most cases an employer must demonstrate that it has attempted to accommodate an employee’s religious beliefs before claiming it cannot do so without imposing an undue hardship on the employer. See *Redmond v. GAF Corp.*, 574 F.2d 897, 901–02 (7th Cir. 1978).

In addition, the employer has the burden of demonstrating undue hardship. Evidence of undue hardship must be more than hypothetical and speculative. *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085–86 (6th Cir. 1987).

Fortunately, the EEOC has instructed employers that it would not constitute an undue hardship for them to grant religious accommodations (i.e. exempting religiously objecting employees from employer-mandated COVID-19 vaccination programs) because employers can utilize alternative health protections, such as masking, social distancing, periodic COVID-19 testing, modifying shifts, teleworking, and reassignment. For that reason, generally speaking, it will be more difficult for employers to refuse to grant accommodations to employees who object to the COVID-19 vaccines on what are clearly sincerely held religious grounds.

That said, CDCR is a unique employer engaging in the care, custody and control of an inmate population and may have greater limitations on its ability to utilize some accommodations otherwise available to employers.

Crafting the Religious Accommodation Request

As noted above, the most important aspect of a religious accommodation request is to make sure the stated objection is clearly religious. This can best be accomplished by:

1. **Making Sure the Objection is Clearly and Solely Religion- based.** Only clearly religious reasons for the objection to COVID-19 vaccination should be included in a religious accommodation request. Even though the objector may have multiple grounds for objecting to the vaccines, including both religious and non-religious grounds, expressing non-religious concerns in a religious accommodation request serves to dilute the claim that the objection is religious.
2. **Avoiding Health or Medical Concerns Dressed up As Religious Concerns.** Many objectors claim to have religious objections to the COVID-19 vaccines, but their objections are inseparably entangled with health and medical concerns. Like asserting both religious and non-religious objections, combining religious and nonreligious grounds together so that they appear inseparable also serves to dilute a claim that the employee's objections to the vaccines are religious, rather than based on health or medical concerns. If the employee has health or medical concerns, he or she may want to file a separate request for a medical accommodation.
3. **Supporting the Religious Objection with Religious Authority.** Although, as noted above, it is not *necessary* for an employee's religious beliefs to coincide with the religious beliefs of any other person or religious authority, if the objector does base his or her religious belief on a religious authority, such as a religious text, religious founders, or the tenets of the religious to which the objector belongs, it is helpful to cite such authority.

Letters or statement from a religious leader may also be attached in such circumstances, but only if the letter or statement clearly supports the objector's religious beliefs about the COVID-19 vaccines. Generalized statements, such as that the religious leader or organization supports the individual choices of its members, are probably not helpful. In fact, these may hurt the objecting employee by highlighting the fact that neither the church nor the religious leader shares the objector's beliefs.

I properly submitted my request, and I am being ignored or denied, now what?

We anticipate that CDCR will likely be careful to handle these requests as required by law. Failure to do so will certainly open them up to significant criticism and legal liability. But with so many multi-faceted factors involved, problems are sure to arise.

Should you find yourself facing difficulty with any aspect of your application process, or how CDCR is responding to you, please reach out to CCSO for immediate support.

These are difficult times, and we recognize that emotions are high and legal options are limited. More than ever CCSO is committed to providing any support it can and to remain "CCSO Strong" in the days to come.



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