

COVID-19 Vaccination Requirements and Religious Accommodations

Public Agency Risk Managers Association (PARMA) Webinar | October 13, 2021

Presented by: Alexander Volberding & Daniel Seitz



COVID-19 Vaccination Requirements and Religious Accommodations

Public Agency Risk Managers Association
(PARMA) Webinar | October 13, 2021

Presented By:

Alexander Volberding & Daniel Seitz

Agenda

- I. Review
- II. Overview of Religious Accommodations
- III. Nature and Sincerity of Religious Beliefs
- IV. Questions and Answers



Part I: Review of PARMA Presentation



Review: Vaccination & Testing Requirements

- Federal COVID-19 action plan
- State and local health orders
- Discretionary vaccination or vaccination/testing policies



LIEBERT CASSIDY WHITMORE

Review: Accommodations Considerations

- Obligation to provide a safe and healthy workplace
- Obligations to engage qualified employees/applicants in interactive process
 - Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - Fair Employment & Housing Act (“FEHA”)
- Obligation to provide qualified employees/applicants a reasonable accommodation

Review: Religious Accommodations

- Title VII & FEHA terms
 - “Religion” & “Religious creed”
 - Religious beliefs, practices, and observances
- Employer review and determination
 1. Determination as to qualification for engagement in the interactive process
 - Nature of the belief
 - Sincerity of the belief
 2. Determination as to the reasonableness of the requested accommodation
 - Should *not* impose undue hardship
 - Must *not* pose a “direct threat”

Part II: Overview of Religious Accommodations



Overview: Applicable Laws

- Applicable laws:
 - Federal - Title VII
 - State - FEHA
- Scope of coverage
 - Covers the employer-employee relationship,
 - Covers employees and applicants for employment
 - Does not cover interns, volunteers, or contractors
- Purpose
 - Prohibit employment-based religious discrimination
 - Provide protections for employees whose religion conflicts with employer policies



LIEBERT CASSIDY WHITMORE

Overview: What is “Religion” and What are “Religious Beliefs”?

- Title VII
 - Religion - “All aspects of religious observance and practice”
 - Theistic and nontheistic
 - Moral and ethical beliefs of right and wrong
 - Comprehensive belief system, not merely an isolated teaching
 - Recognized religious organization or not
 - Individual beliefs may differ from the teachings and tenets of a religion
- FEHA
 - Similarly broad protection of religious beliefs, observances, practices
 - Beliefs that are sincerely held and occupy a place of importance in the individual’s life
 - Beliefs do not need to be part of a formally recognized religion

Overview: Requests for Religious Accommodation

- Employee requests for accommodation
 - Responsive to health order or employer policy
 - Form provided by employer for religious accommodation request purposes
 - Request submitted in other written form (e.g., email)
 - Other ways employees may request accommodation
 - Verbal - No “magic words” needed
- Minimum requirements
 - Employee must show that request for accommodation is:
 - Being requested for religious reasons; and
 - Based on a religious belief that conflicts with an employer policy

Overview: Religious Accommodation Request Forms

- Introduction
- Explanation of accommodations procedure (or reference to existing policy)
- Employee general info (name, worksite, supervisor, etc.)
- Statement of religious beliefs
 - Yes/no questions
 - I perform work onsite at an [Agency] worksite or facility.
 - My essential job duties require that I interact in person with [employees, visitors, public].
 - I perform work in shared or communal spaces or areas where [employees, visitors, public] may also be present.
 - Space to provide description of religious beliefs
 - Please describe how your sincerely held religious belief(s), practice(s), or observance(s) conflict(s) with the requirement that you receive a COVID-19 vaccination.
 - Other options
- Signature line



LIEBERT CASSIDY WHITMORE

Overview: Determination of Qualification to the Interactive Process

- Potential conflict between an employment policy or practice and an employee's religious belief, observance, practice
 - Employee articulates that request for accommodation is for religious reasons *and* is due to a conflict between the employee's religious belief that and the employer policy
 - Employer determines that there is a conflict between the policy/practice and the employee's belief *and* that employee qualifies based on the nature and sincerity of the employee's religious belief



LIEBERT CASSIDY WHITMORE

Overview: Engagement in the “Interactive Process”

- Obligation to engage in the interactive process
 - Title VII – Does *not* expressly require interactive process
 - BUT courts expect both sides to engage in “cooperative information-sharing process”
 - FEHA – Requires interactive process
- Obligation to follow more prescriptive applicable guidance
 - General rule applicable to the qualification determination, the interactive process and determination of reasonableness
 - Obligation to engage in interactive process as required by FEHA
- Interactive process should be individualized
 - Case-by-case review of individual qualifications and determination of requested accommodations

Overview: Determination of Reasonableness and Safety

- Employer authority to make determination
 - Should be articulable/defensible
 - Workplace accommodation requests should address both reasonableness and safety
 - Non-workplace accommodation requests should focus on reasonableness

Overview: Determination of Reasonableness and Safety

- Reasonableness
 - Accommodation should *not* pose a “undue hardship” to the employer or its operations
 - Determination made by analyzing the following factors:
 1. Nature and cost of the accommodation needed
 2. Financial resources of facilities involved, number of employees at facility, effect on expense and resources of facility, other impacts on operation of facility
 3. Employer’s overall financial resources, overall number of employees, number/type/location of facilities
 4. Type of operations (composition, structure, functions of the workforce)
 5. Geographic separateness or admin./fiscal relationship of the facility

Overview: Determination of Reasonableness and Safety

- Safety
 - Accommodation must *not* pose a “direct threat” to the health and safety of the requestor or others
 - Determination made by analyzing the following four factors:
 1. The duration of the risk;
 2. The nature and severity of the potential harm;
 3. The likelihood that potential harm will occur; and
 4. The imminence of the potential harm.

Overview: Best Practices

- Individualized case-by-case analysis
 - Employee's qualification for the interactive process
 - Employer's determination regarding the reasonableness/safety of requested accommodation
- Standard and uniform questions regarding nature of religious belief
 - Use of standardized form
 - Standard preliminary questions
- Specific and tailored follow-up questions
- Document accommodation process thoroughly



LIEBERT CASSIDY WHITMORE

Part III: Probing the Nature and Sincerity of Purported Religious Beliefs



Nature and Sincerity: Two Principal Questions

- Determination of qualification depends on two principal questions:
 - How does the employer policy conflict with the nature of the employee's religious belief, observance, or practice?
 - Is the employee's religious belief, observance, or practice sincerely held?
- Determination should be made on an individualized case-by-case basis
 - Analysis of employee's statement regarding the nature of their religious belief, and its conflict with the employer's policy
 - Analysis of the employee's conduct and whether such conduct calls into question the sincerity of the purported belief

LCW LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying a Religious Belief

- Religions have specific attributes
 - Distinguishable from other belief systems, such as personal and political belief systems, that are not protected by Title VII and FEHA
- Courts use the following three (3) factors to identify religion/religious beliefs:
 1. Whether the religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; and
 2. Whether the religion is comprehensive in nature and consists of a belief-system as opposed to an isolated teaching; and
 3. Whether the religion can be recognized by the presence of certain formal and external signs

(United States v. Seeger (1965) 380 U.S. 163)

LCW LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying a Religious Belief

- Potential follow-up questions :
 - What is the name of your religion?
 - Are you a member of a religious organization?
 - Please describe your belief system generally.
 - How does the agency's vaccination requirement conflict with such beliefs?
 - Please describe what practices and observances your belief requires?
 - Do you have any additional information that you would like to share regarding your religious beliefs that supports your request for accommodation?
- Case-by-case analysis
 - Questions should be tailored
 - Based on the employee's response in requesting accommodation



LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying Underlying Conflict

- Employee's request identifies:
 - Conflict between employer policy and employee's religious belief
 - Contextualizes the conflict in terms of a comprehensive religious belief system
 - Not merely an isolated teaching opposed to the policy
- Conflict should be specific
 - Vague and ambiguous conflicts may be insufficient
 - Clarifying questions may be necessary to ascertain specific conflict
- Purpose of accommodation: Resolve or reconcile the specific conflict
 - Effective accommodation resolves the conflict completely
 - Reducing, but not resolving, the conflict generally may be insufficient



LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying Underlying Conflict

- Potential questions to identify conflicts with COVID-19 vaccination:
 - Have you previously been vaccinated against a communicable disease (chicken pox, measles, mumps, rubella, seasonal influenza)?
 - If so, please explain how your religious beliefs allowed such vaccinations, but preclude receipt of the COVID-19 vaccine.
 - Have you received the first dose in a multi-dose COVID-19 vaccine series?
 - If so, please explain how your religious beliefs preclude you from completing the vaccine series.
 - Have you previously complied with other COVID-19 health and safety measures?
 - If so, please explain how your religious beliefs allowed compliance with such measures, but preclude receipt of the COVID-19 vaccine



LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Example: Identifying a Conflict

Employee Althea requests an exemption from the employer's vaccination requirement because "my body is a temple of the Holy Spirit."

Althea's employer is on notice that Althea has a conflict due to religious reasons, but it cannot identify the exact conflict based on Althea's response.

The employer may ask questions that help identify where the conflict exists, such as:

- "We understand the vaccination may conflict with your religious beliefs. How does the requirement create a conflict so that we may attempt resolve it?"
- Question: What other types of questions might the employer ask in order to ascertain whether Althea has a religious belief and whether such belief precludes vaccination?



LIEBERT CASSIDY WHITMORE

Nature and Sincerity Example: More Info Needed to Identify a Conflict

Bertha refuses to seek vaccination because, "I am a naturalist."

Bertha's employer replies, "I understand the COVID-19 vaccination requirement may conflict with your religious beliefs. How does the requirement create a conflict so that we may resolve it?"

Bertha replies, "I have studied the physical sciences and believe the numbers of infection rates supporting the 'pandemic' have been manipulated to suit certain agendas. I cannot in good conscience accept the COVID-19 vaccine."

Has Bertha provided enough information to identify a religious conflict?



LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying Insincere Conduct

- Establishing insincere conduct and an objective basis to question the sincerity of the employee's beliefs
 - Employee's observed/known conduct contradicts or conflicts with the professed belief;
 - Accommodation sought is particularly desirable, likely to be sought for secular reasons;
 - Timing of request is suspect;
- Employer *may* request additional info going toward employee's sincerity where there is an objective basis to question
- May request, but may not require, specific form of additional info:
 - Third-party verification (clergy, fellow practitioner, etc.)
 - Written materials or employee's own explanation
- Unreasonable requests for verification (*i.e.*, unnecessary or excessive) may be considered wrongly denying the accommodation request or a form of harassment



LIEBERT CASSIDY WHITMORE

Nature and Sincerity: Identifying Insincere Conduct

- Scenario: Employee requests a religious accommodation because religious belief prevents the employee from using products developed or tested on fetal cells.
- Potential questions to evaluate sincerity:
 - Please describe your religious beliefs regarding the use of medicines developed using or tested on fetal cell lines.
 - How long have you held this belief?
 - Have you used any products tested on a fetal cell line?
 - If so, how do your religious beliefs allow you to use other medicines, but not the COVID-19 vaccine?

 LIEBERT CASSIDY WHITMORE

Nature and Sincerity Example: Objective Reason to Doubt Sincerity

Employee Cassidy claims he cannot become vaccinated because the vaccines were developed using or tested on fetal cell lines obtained from an aborted fetus.

Cassidy explains that his religion recognizes that life begins at conception and that all life is sacred and that therefore he cannot be vaccinated with the currently available vaccines.

Cassidy's employer does not know if this belief is sincere.

Question: Can Cassidy's employer ask questions about other vaccines that Cassidy may have received or medications that he may have used that were also without question the sincerity of Cassidy's religious belief preventing him from seeking vaccination against COVID-19?

Question: Does such a question call into question Cassidy's religious beliefs or the sincerity with which he holds them?

 LIEBERT CASSIDY WHITMORE

Nature and Sincerity: What to Avoid - General

- Do not assume a request is invalid because:
 - The belief is not related to a major world religion or a recognized
 - The belief is not observed by the religion/religious organization with which the employee identifies (e.g., Catholic Church position on vaccines)
 - There is no clergy or congregant to attest to the employee's belief
 - The employer is not familiar with the specific religious belief, observance, or practice

Nature and Sincerity: What to Avoid

- Do not ask for more information if the employee's request both:
 - Identifies the conflict between employer policy and employee's religious belief; and
 - Contextualizes the conflict in terms of a comprehensive religious belief system
- Do not question the sincerity of the employee's belief if there is not an objective basis to do so

COVID-19 Vaccination Requirements and Religious Accommodations

Public Agency Risk Managers Association (PARMA) Webinar | October 13, 2021

Presented by: Alexander Volberding & Daniel Seitz

Questions and Answers



Thank you!

Alexander Volberding
Associate | Los Angeles

310.981.2021 |
avolberding@lcwlegal.com
www.lcwlegal.com/our-people/alexander-volberding

Daniel Seitz
Associate | Los Angeles

310.981.2316 |
dseitz@lcwlegal.com
<https://www.lcwlegal.com/people/daniel-seitz/>

