

# **RELIGIOUS EXEMPTIONS FROM COVID-19 TESTING**

September 3, 2021

# TITLE VII PROTECTIONS & REQUIREMENTS

## TITLE VII

- Requires that employers provide **reasonable accommodations** to an employee once notified that their **sincerely held religious belief, practice, or observance conflicts with a work requirement** (*here, testing and vaccination*), unless providing the accommodation would create an **undue hardship**.
- The accommodation requirement is “plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others.” EEOC (citing *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445, 454 (7th Cir. 1981))
- Per Commission, no independent adverse employment action required to be actionable. Requiring work without religious accommodation where a work rule conflicts with religious beliefs necessarily alters the terms and conditions of employment for the worse

# EEOC GUIDANCE ON ACCOMMODATIONS FOR SCREENING

## EEOC Technical Assistance Q&A (05.28.2021)

- **A.6 May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?**

. . . [E]mployers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. . . . Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

- **G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? (6/11/20)**

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. . . . Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

# RELIGIOUS ACCOMMODATION

## COMMON TYPES OF RELIGIOUS ACCOMMODATIONS

- Additional breaks for religious practices (e.g., prayer)
- Use of the work place for religious observance (e.g., prayer)
- Religious garb
- Facial hair
- Sabbath
- Union dues

## SINCERELY HELD RELIGIOUS BELIEF V. DISABILITY

	DISABILITY (ADA)	RELIGION (TITLE VII)
<b>Supporting Documents</b>	May request objective evidence, i.e., medical certification from the employee's health care provider	Must rely on employee's credibility; may request further information or documentation only if there is an objective basis to question the religious nature or sincerity of a belief
<b>Additional Support</b>	May request additional information from health care provider, even second opinions, to resolve questions regarding disabled status, effect of job requirement on ability to perform essential functions, and recommended accommodations	Employee may provide documentation from their religious institution and letters from their religious leader.  Employees have submitted religious objections provided or sold online
<b>Interactive Process</b>	May include health care provider	Limited to employee; religious leader need not be involved
<b>Presumption</b>	Certain per se conditions are considered covered disabilities; no other presumption of disability, although disability is defined broadly	Presumption employee holds a sincerely held religious belief
<b>Direct Threat</b>	May exclude employee who poses a direct threat that cannot be reduced via accommodations	No direct threat provision under Title VII
<b>Undue Hardship</b>	"Significant <u>difficulty</u> or expense"	More than " <i>de minimis</i> cost or burden"
<b>Policing</b>	Easier to police, but medical information (including vaccination and health screening information) must be treated as confidential	Difficult to police; can be gamed. No confidentiality requirement regarding religion, but vaccination and health screening information must be treated as confidential

# THIN LINE

## TITLE VII

- “Sincerely held religious beliefs” can be established only with employee say-so
- Asking for supporting information or documents can be deemed religious harassment
- Supreme Court protections for religious objectors

## HEALTH & SAFETY CONCERNS

- Recent issue with little guidance
- New information about COVID and protections offered by vaccination
- EEOC guidance last updated in May 2021
- Religious objections often based on misinformation or used to assert political/personal beliefs
- Religious objections may undermine health and safety policy behind vaccination and testing requirement

# RELIGIOUS ACCOMMODATIONS

## INTERACTIVE PROCESS

- Understand and verify the reason for requesting a religious exemption from COVID vaccination and testing
- Determine the employee's right to an accommodation
- Request limited additional information about the facts and circumstances supporting the request for accommodation
- Address any objective basis for questioning either the religious nature or the sincerity of the employee's belief, observance or practice
- Obtain further information or documents if there is a basis for doubting the employee's religious belief
- Explore and exchange suggestions regarding reasonable accommodations

## CAUTION

- **Religious Harassment:** "Employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment"
- **Retaliation, generally**
- Be respectful & courteous

## “SINCERELY HELD”

### “SINCERELY HELD”

- Supported by the employee’s statements in form describing their beliefs and practices, and how they adhere to such beliefs
- Factors undermining an employee’s credibility include:
  - Evidence tending to show that the employee acted in a manner inconsistent with their professed religious belief
  - Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons
  - Suspicious timing of the request (e.g., it follows an earlier request by the employee for secular reasons)
  - Employee recently adopted the belief system in response to the vaccine and testing mandate
  - The employee acquired or purchased a religious form certification online
  - Other reasons to believe the accommodation is not sought for religious reasons

**None of these factors is dispositive.**



## “SINCERELY HELD”

### CAUTION

- **Prior inconsistent conduct is relevant to sincerity, but an individual’s beliefs and adherence to their tenets may change over time**
  - “[A]n employee who temporarily gives up his [or her] religious practice to submit to employment requirements [does not] waive[] his [or her] discrimination claim”
  - An individual may have foregone their religious practice and not revealed their beliefs until later in employment.
  - An individual may practice a belief at certain times, but not others (e.g., only on religious holidays)
  - “Religious rights not forfeited merely because not scrupulous in observance”
- **Sincerity of belief rarely at issue, and is generally presumed or easily established**
  - “Largely a matter of individual credibility”
  - Difficult to challenge absent employee’s admission that their belief is based on a reason other than a sincerely held religious belief, or actual evidence that the employee’s claim is fraudulent

### TAKEAWAY

- If there is no objective basis for questioning the religious nature or sincerity of a belief, observance or practice, presume the request for religious accommodation is sincere

## “RELIGIOUS BELIEF”

### ***Religion broadly includes:***

- All aspects of religious observance and practice, not just those mandated or prohibited by a tenet of the belief
- Affiliation with a religious group that does not espouse or recognize the employee’s individual belief, observance, or practice
- Non-traditional or non-parochial concepts of religion and religions outside of organized religions
- New or uncommon beliefs that are not part of a formal church or sect, or are only subscribed to by a small number of people
- Theistic or non-theistic, moral, and ethical beliefs as to what is right and wrong, which are sincerely held with the strength of religious views
- Beliefs that are not acceptable, logical, consistent, reasonable or comprehensible to others, or that are incorrect or incomprehensible to others

### ***Religion does NOT include:***

- Social, political, or philosophical beliefs, or personal preferences

## “RELIGIOUS BELIEF”

### CAUTION

- “Title VII protects more than . . . practices specifically mandated by an employee’s religion”
- An individual’s beliefs may deviate from commonly followed tenets

### TAKEAWAY

- Courts generally resolve doubts about particular beliefs in favor of finding that they are religious

## RELIGIOUS OBJECTIONS

### COMMON OBJECTIONS TO THE COVID VACCINE OR TESTING

#### Non-Religious

- Anti-vaccination beliefs motivated by fear or suspicion of health effects of or science behind vaccine or that COVID is a hoax
- Testing (nasopharyngeal swab) is uncomfortable
- Anti-testing/vaccination motivated by political or personal preferences (e.g., “individual freedom”)

#### Religious

- Vaccines developed or tested using stem cell line
  - Pfizer and Moderna: used cell lines from aborted fetal tissue in testing but not in development
  - J&J: used lab-replicated fetal cells during production; vaccine does not contain fetal cells
- Vaccines contain gelatin from pigs
- Immunization contrary to religion
- Bodies = Temples
  - Testing uses foreign objects (but utensils, Q-tips, toothbrush?)
  - Testing uses bodily fluids (but blood/urine testing?)

## RELIGIOUS OBJECTIONS – RESOURCES

- **Catholicism**

- <https://www.catholichawaii.org/news-events/news-articles/2021/august/813-covid-19-update-for-august-2021/>

- **LDS**

- <https://newsroom.churchofjesuschrist.org/article/first-presidency-message-covid-19-august-2021>
- <https://www.sltrib.com/religion/2021/08/12/wear-masks-get-vaccine/>

- **Evangelical**

- <https://www.christiansandthevaccine.com/about;>
- [https://www.washingtonpost.com/religion/2021/02/24/evangelicals-covid-vaccine-russell-moore-walter-kim/;](https://www.washingtonpost.com/religion/2021/02/24/evangelicals-covid-vaccine-russell-moore-walter-kim/)
- <https://religionnews.com/2021/05/17/franklin-graham-urges-evangelicals-to-get-vaccinated-before-its-too-late/>

- **\*\*\*\*\*Vanderbilt University Medical Center\*\*\*\*\***

<https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion>

## UNDUE HARDSHIP

**IF THE EMPLOYEE HAS A SINCERELY HELD RELIGIOUS BELIEF, DETERMINE THE UNDUE HARDSHIP POSED BY THE ACCOMMODATION:**

- **Case-by-case:** Consider factual context and basis for accommodation request
  - **Disability:** “significant **difficulty** or expense”
  - **Religion:** “more than a *de minimis*” cost or burden. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 65 (1977)
- *Hardison*: where employee sought accommodations related to the Sabbath, holding it would be an undue hardship for the employer to provide:
  - 4-day week, which left employer short-handed on the shift they did not work
  - Replacing employee either with supervisory personnel or with qualified personnel from other departments
  - Replacing employee with other available employees through the payment of premium wages

## UNDUE HARDSHIP

### CAUTION

- Not required to provide the employee's preferred accommodation
- Consistent analysis and treatment (employees who are liked vs. disliked)
- Document each proposed accommodation and its undue hardship; do not rely on hypothetical hardships
- Do not assume coworkers will object to accommodations affecting their employment
- Revisit accommodations if they turn out to be unworkable

### TAKEAWAY

For religious accommodations, employers are more likely to prevail on a claim by asserting the undue hardship defense rather than by challenging the employee's sincerely held religious belief.

## PROCEDURE

### 1. Require employee to complete an Exemption Request form

- Separate forms for *Sincerely Held Religious Belief vs. Disability, Vaccination vs. Testing*

### 2. While the Request is being reviewed and processed

- Prohibit employee from entering campus
- Place employee on the same type of leave used for other accommodation requests

### 3. Review the Request to determine:

- Whether the request is based on a sincerely held religious belief
- If disability, whether the unvaccinated + untested employee at the workplace poses a direct threat to the health/safety of themselves and others
- Whether there are any reasonable accommodations that can be provided that do not present an undue hardship on the University

#### Automatic NO:

- **Current teleworkers:** Vaccination and testing policy does not apply to employees who are teleworking until and unless they are required to come to the campus.
- **Masking:** No religious exemption; medical and other approved exceptions subject to face shield requirement



## PROCEDURE

- a. Is there is an **objective basis for questioning the employee's stated sincerely held religious belief**
- **Not religious:**
    - Is request based on personal or political beliefs or philosophies?
    - Is request based on misinformation about COVID, vaccination or testing?
  - **Not sincere:**
    - Evidence of inconsistent behavior (prior vaccinations, credible information from third parties, or social media\*)
    - Form language purchased or obtained online
    - Other indicia that the employee's request is not credible
- \* Be careful of uncovering details about employees that employers are prohibited from considering, such as disabilities, pregnancy status, and sexual orientation*
- b. If there is an objective basis for questioning the employee's stated beliefs, consider the **additional documentation and information** you will require from the employee and talking points for the meeting

## PROCEDURE

4. **Meet with the employee** (consider meeting with a witness present)
  - a. **As applicable, discuss basis for objections and counterpoints without harassing the employee**
    1. If basis is COVID misinformation, provide correct COVID-related information and resources
    2. If basis is a position contradicted by the religious institution, provide resources for religious positions
    3. Request additional information/documentation if there is an objective basis for doubting that the employee's request is based on a sincerely held religious belief
  - b. **Notify the employee of any preliminary decision regarding the accommodation request and the accommodations offered (as applicable)**
  - c. **Request the employee's input and accommodation suggestions**
  - d. **If it is determined that the employee has no sincerely held religious belief but refuses to come to work on campus vaccinated or tested, discipline.**

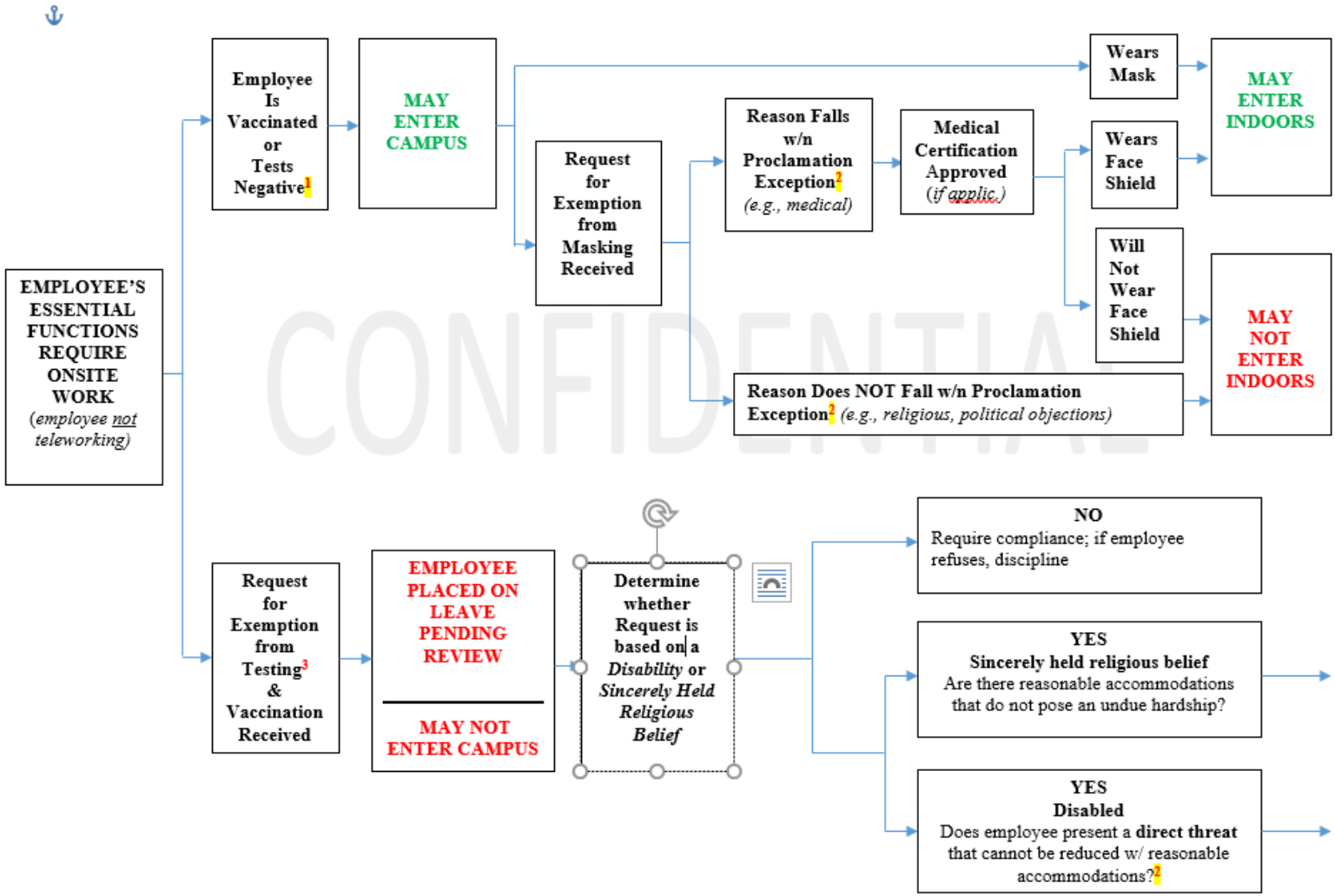
## **PROCEDURE**

**DOCUMENT DOCUMENT DOCUMENT !!!!!!!!!!!!!!!**

**DOCUMENT EACH STEP AND ALL INTERACTIONS WITH EMPLOYEE**

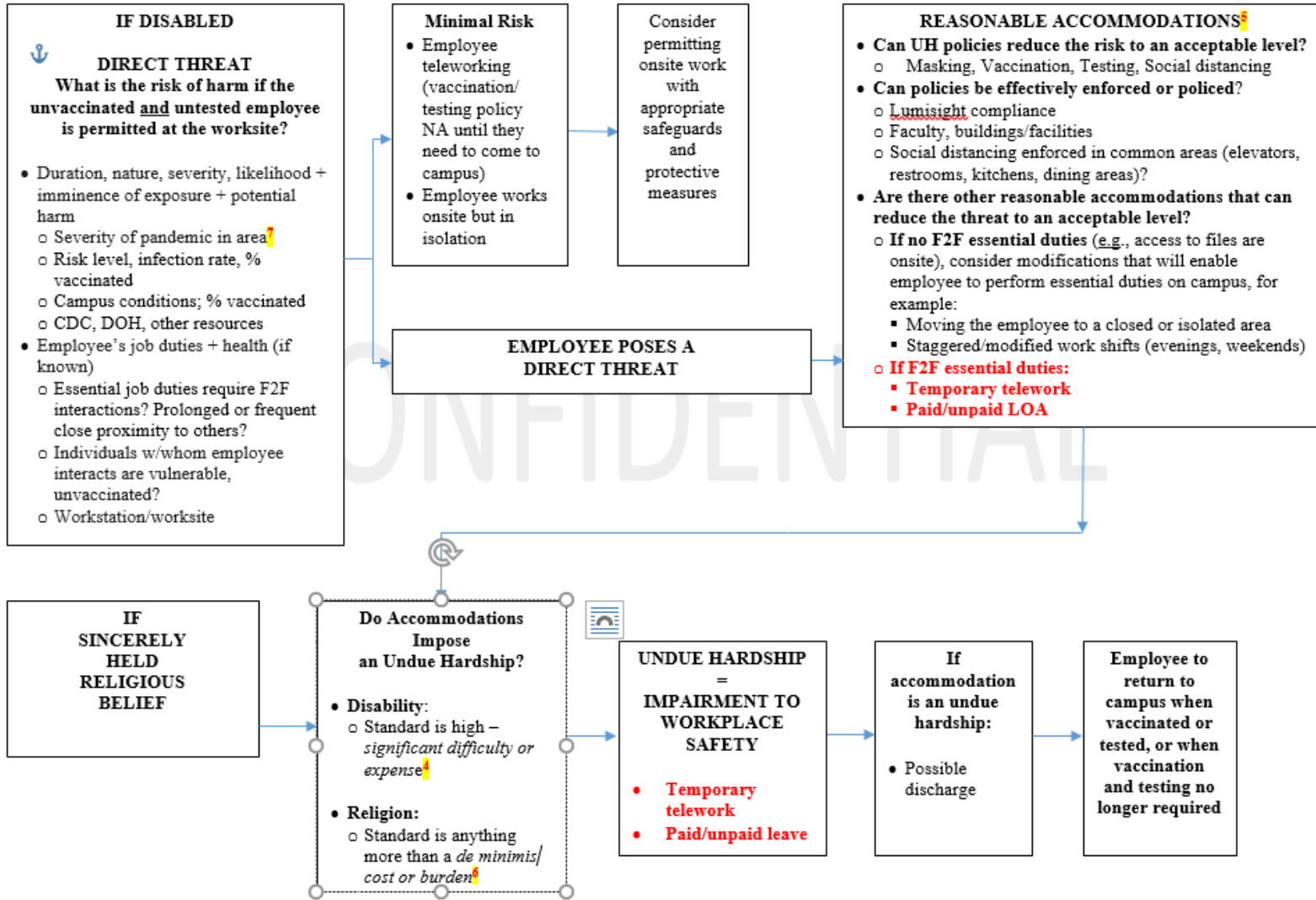
- Accommodations suggested by employee and the University
- Accommodations offered and denied
- If accommodation denied, the reasons therefor, including the undue hardship, essential functions, etc.

### VACCINATION OR TESTING + MASKING REQUIREMENTS FALL 2021 ONLY



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## ADDITIONAL RESOURCES

- EEOC, *Compliance Manual on Religious Discrimination* (01.05. 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>
- EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>
- EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (05.28.2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>