



STATE of WYOMING LEGISLATURE

Memorandum

DATE June 2, 2021

TO Joint Labor, Health & Social Services Interim Committee

FROM John Brodie, Staff Attorney

SUBJECT Employer vaccination requirements, the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964

This memorandum provides a basic background on the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964, and an explanation on how these pieces of law can interact with potential employer vaccination requirements. As discussed below, both impose certain obligations and restrictions on employers. However, neither explicitly prohibit employers from imposing mandatory vaccination requirements on their employees or job applicants.

The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) is a civil rights law that prohibits discrimination against people with disabilities. The ADA is modeled after the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.¹ "Disability" is defined in the ADA to mean "with respect to an individual a physical or mental impairment that substantially limits one or more major life activities[.]"² Under the ADA, discrimination against people based on disability in the areas of employment, public accommodation, public services, transportation and telecommunications is prohibited.³

Title I of the ADA protects the rights of both employees and those seeking employment.⁴ It requires private employers with fifteen (15) or more employees to provide equal opportunity to the full range of employment-related opportunities to anyone who can perform the essential functions of the job in question.⁵ To this end, the ADA requires employers to provide a "reasonable accommodation" to any person with a disability that is able to perform the job.⁶ A "reasonable accommodation may include

¹ "The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors." *A Guide to Disability Rights Laws*, U.S. Dept. of Justice, <https://www.ada.gov/cguide.htm#anchor65610> (last accessed May 17, 2021).

² 42 U.S.C. § 12102.

³ 42 U.S.C. §§ 12101-12213, Pub. L. No. 101-336 (1990).

⁴ 42 U.S.C. §§ 12111-12217.

⁵ 42 U.S.C. §§ 12111 and 12112 (Title I also applies to state and local government employers, employment agencies, and labor unions).

⁶ The ADA uses the term "qualified individual," which means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

making existing facilities used by employees readily accessible to and usable by persons with disabilities, job restructuring, modifying work schedules, reassignment to a vacant position and acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters."⁷ An "employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one" and an employer does not have to provide a reasonable accommodation if it imposes an "undue hardship" upon the employer.⁸ Undue hardship is defined under the ADA as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.⁹

Title I of the ADA also contains provisions regarding medical examinations and medical inquiries. Generally speaking, employers are prohibited from requiring medical examinations of employees or job applicants.¹⁰ Additionally, employers may not "make inquiries as to whether an [employee or job applicant] is an individual with a disability or as to the nature or severity of such disability."¹¹ While medical examinations and inquiries are generally prohibited, medical examinations and inquiries are specifically permitted under certain conditions.¹² The ADA does allow for mandatory medical inquiries relevant to an applicant's ability to perform job-related functions, with or without reasonable accommodation. It also allows for mandatory examinations or inquiries after an applicant has been offered employment but before his employment duties have begun, and the employer may condition the employment offer on the results of the examination or inquiry, if all entering employees in the same job category are subjected to such an examination or inquiry regardless of disability. The ADA also permits mandatory medical examinations or inquiries of employees that are job-related and consistent with business necessity. Moreover, and perhaps more relevant to potential vaccination requirements, the ADA permits employers to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."¹³ Under the ADA, a "direct threat" is one that poses a significant risk of substantial harm even with reasonable accommodation.¹⁴ "In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."¹⁵

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers with at least 15 employee—as well as employment agencies and unions—from discriminating in employment based on race, color, religion, sex and national origin.¹⁶ In regard to religion, Title VII defines this term quite broadly.¹⁷ "The term 'religion' includes all aspects of religious observance and practice, as well as belief" and includes not

⁷ Fact Sheet: Disability Discrimination, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination> (citing 29 CFR Part 1630) (last accessed May 24, 2021).

⁸ See footnote 7, *infra*.

⁹ 42 U.S. Code § 12111(10).

¹⁰ 29 CFR § 1630.13

¹¹ *Id.*

¹² 29 CFR § 1630.14

¹³ 42 U.S. Code § 12113(b).

¹⁴ 42 U.S.C. §§ 12111(3), (8); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

¹⁵ 29 C.F.R. §1639.2(r).

¹⁶ 42 U.S. Code § 2000e(b); 42 U.S. Code § 2000e-2.

¹⁷ 42 U.S. Code § 2000e(j).

only traditional, organized religions (e.g. Christianity, Judaism, Islam) but also religious beliefs that are uncommon, only subscribed to by a small number of people or that seem illogical or unreasonable to others.¹⁸ It is worth noting that "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs" protected by Title VII.¹⁹ "Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held."²⁰

Under Title VII, employers are required to reasonably accommodate employees whose sincerely held religious beliefs, practices or observances conflict with work requirements, unless the accommodation would create an "undue hardship."²¹ Unlike under the ADA, this term is not defined under Title VII but the U.S. Supreme Court has defined the term to require "more than a de minimis cost"—a lower standard for employers to satisfy than "undue hardship" under the ADA.²² "Factors to be considered include the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation."²³

Employer Vaccination Requirements

Under guidance issued by the U.S. Equal Employment Opportunity Commission (EEOC), an employer who seeks to have a mandatory vaccination policy in place is not acting in contravention of the ADA or Title VII.²⁴ Under the ADA, "if a particular employee cannot meet ... a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a 'direct threat' to the health or safety of the employee or others in the workplace."²⁵ Nonetheless, even if the particular employee would pose a direct threat, the employer must still consider "whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat."²⁶ Moreover, under Title VII an employer may be required to provide reasonable accommodations for employees who, because of a sincerely held religious belief, practice, or observance, refuse a vaccination unless providing a reasonable accommodation would pose an undue hardship on the operation of the employer's business. As stated, the analysis for undue hardship depends on whether the accommodation is being provided for a disability or for religion. However, absent a finding of undue hardship, employers are required to work with their employees or perspective

¹⁸ 29 CFR § 1605.1; *see* QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (last accessed June 1, 2021) ("Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.").

¹⁹ *See Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 492 (3d Cir. 2017) (employee's objection to flu vaccine did not qualify as a protected religious belief under Title VII because his beliefs that "one should not harm their own body and . . . that the flu vaccine may do more harm than good" did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature").

²⁰ QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (last accessed June 1, 2021).

²¹ 29 CFR § 1605.2

²² *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

²³ SECTION 12: RELIGIOUS DISCRIMINATION, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref248 (last accessed June 1, 2021).

²⁴ WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last accessed June 1, 2021).

²⁵ *Id.*

²⁶ *Id.*

employees under the ADA and Title VII to provide reasonable accommodations. In the context of individuals who are unvaccinated, such accommodations could include allowing for the use of face masks, creating workspaces at a social distance from coworkers or non-employees, working a modified shift, being given the opportunity to telework, or potentially reassignment.

Conclusion

Under the ADA, Title VII and related EEOC guidance, mandatory vaccine requirements are generally permissible, but employers do not have *carte blanche* authority to require vaccines of all employees under all circumstances. Whether or not a particular employee or job applicant can be required to adhere to a mandatory vaccination policy will depend on the facts of the specific circumstance. Generally speaking, such vaccination policies are not prohibited under the ADA or Title VII.