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CITY AND COUNTY OF SAN FRANCISCO, ET AL.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SAN FRANCISCO

14 UNLIMITED JURISDICTION

15 UNITED SF FREEDOM ALLIANCE,
16 BHANU VIKRAM, CARSON R.
17 SCHILLING, CHRISTA L. FESTA,
18 CHRISTIANNE T. CROTTY, DENNIS M.
CALLAHAN, JR., FAIHING CHEUNG,
and JESSICA KWOK-BO LINDSEY,

19 Plaintiffs,

20 vs.

21 CITY AND COUNTY OF SAN
22 FRANCISCO, a municipal corporation and
administrative division of the State of
23 California, et al., and Does 1 through 100,
inclusive,

24 Defendants.

Case No. CGC-22-597428

**EXHIBIT J, PART 5 TO REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
DEFENDANTS CITY AND COUNTY OF SAN
FRANCISCO, ET AL.'S DEMURRER TO
THE SECOND AMENDED COMPLAINT
FOR VIOLATION OF CIVIL RIGHTS AND
DECLARATORY AND INJUNCTIVE RELIEF**

Hearing Date: June 21, 2022
Hearing Judge: Judge Richard B. Ulmer
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: January 4, 2022
Trial Date: None set

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(Updated 10/13/21)*

CDC recommends (<https://emergency.cdc.gov/han/2021/han00453.asp>)

COVID-19 vaccinations for everyone aged 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or planning to become pregnant in the future. Despite these recommendations, some pregnant employees may seek job adjustments or may request exemption from a COVID-19 vaccination requirement.

If an employee seeks an exemption from a vaccination requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as “family medical history”) and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? *(Updated 5/28/21)*

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee’s genetic information, such as asking about the employee’s family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC’s Pre-vaccination Checklist (<https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf>)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee’s genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of

GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a health care provider *that is not affiliated with their employer* (such as from the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a health care provider unaffiliated with the employer, such as the employee’s personal physician or other health care provider, a pharmacy, or a public health department, is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee’s *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Does the ADA limit the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination from a health care provider *that is not affiliated with their employer* (such as the employee’s personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. The ADA does not limit the incentives an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine *is not the employer or its agent*. By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination *administered by the employer or its agent*, the ADA’s rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive. See K.17.

As noted in K.4., the employer is required to keep vaccination information confidential under the ADA.

K.17. Under the ADA, are there limits on the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination administered by the employer or its agent? *(Updated 10/13/21)*

Yes. When the employer or its agent administers a COVID-19 vaccine, the value of the incentive (which includes both rewards and penalties) may not be so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information to their employers or their agents. As explained in K.16., however, this incentive limit does not apply if an employer offers an incentive to encourage employees to be voluntarily vaccinated by a health care provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Does GINA limit the value of the incentive employers may offer employees if employees or their family members get a COVID-19 vaccination from a health care provider *that is not affiliated with the employer* (such as the employee's personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. GINA does not limit the incentives an employer may offer to employees to encourage them or their family members to get a COVID-19 vaccine or provide confirmation of vaccination if the health care provider administering the vaccine is not the employer or its agent. If an employer asks an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as "family medical history" under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent?

(5/28/21)

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent? (5/28/21)

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? (5/28/21)

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure

that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about the family member's medical conditions. If these requirements are met, GINA permits the collection of genetic information.

L. Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on religion. This includes a right for job applicants and employees to request an exception, called a religious or reasonable accommodation, from an employer requirement that conflicts with their sincerely held religious beliefs, practices, or observances. If an employer shows that it cannot reasonably accommodate an employee's religious beliefs, practices, or observances without undue hardship on its operations, the employer is not required to grant the accommodation. See generally **Section 12: Religious Discrimination** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452); EEOC **Guidelines on Discrimination Because of Religion** (<https://www.govinfo.gov/content/pkg/CFR-2016-title29-vol4/xml/CFR-2016-title29-vol4-part1605.xml>). Although other laws, such as the Religious Freedom Restoration Act, also may protect religious freedom in some circumstances, this technical assistance only describes employment rights and obligations under Title VII.

L.1. Do employees who have a religious objection to receiving a COVID-19 vaccination need to tell their employer? If so, is there specific language that must be used under Title VII? (3/1/22)

Employees must tell their employer if they are requesting an exception to a COVID-19 vaccination requirement because of a conflict between that requirement and their sincerely held religious beliefs, practices, or observances. Under Title VII, this is called a request for a “religious accommodation” or a “reasonable accommodation.”

When making the request, employees do not need to use any “magic words,” such

as “religious accommodation” or “Title VII.” However, they need to explain the conflict and the religious basis for it.

The same principles apply if employees have a religious conflict with getting a particular vaccine and wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to them. See Introduction to Section K, above.

As a best practice, an employer should provide employees and applicants with information about whom to contact and the proper procedures for requesting a religious accommodation.

*As an example, here is how **EEOC designed its own form for its own workplace** (<https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf>). Although the EEOC’s internal forms typically are not made public, it is included here given the extraordinary circumstances facing employers and employees due to the COVID-19 pandemic. (Note: Individuals not employed by the EEOC should not submit this form to the EEOC to request a religious accommodation.)*

L.2. Does an employer have to accept an employee’s assertion of a religious objection to a COVID-19 vaccination at face value? May the employer ask for additional information? (3/1/22)

Generally, under Title VII, an employer should proceed on the assumption that a request for religious accommodation is based on sincerely held religious beliefs, practices, or observances. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. An employee who fails to cooperate with an employer’s reasonable requests for verification of the sincerity or religious nature of a professed belief, practice, or observance risks losing any subsequent claim that the employer improperly denied an accommodation. See generally **Section 12-IV.A.2: Religious Discrimination** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_79076346735821610749860135).

The **definition of “religion”** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_9593682596821610748647076) under Title VII protects both traditional and nontraditional religious beliefs, practices, or observances, including those that may be unfamiliar to employers. While the

employer should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs, practices, or observances, employees may be asked to explain the religious nature of their belief, practice, or observance and should not assume that the employer already knows or understands it.

Title VII does not protect social, political, or economic views or personal preferences. Thus, objections to a COVID-19 vaccination requirement that are purely based on social, political, or economic views or personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs, practices, or observances under Title VII. However, overlap between a religious and political view does not place it outside the scope of Title VII's religious protections, as long as the view is part of a comprehensive religious belief system and is not simply an isolated teaching. *See generally* **Section 12-I.A.1: Religious Discrimination (definition of religion)** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref18); *see also* discussion of “sincerity” below.

The **sincerity** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_9546543277761610748655186) of an employee's stated religious beliefs, practices, or observances is usually not in dispute. The employee's sincerity in holding a religious belief is “largely a matter of individual credibility.”

Section 12-I.A.2: Religious Discrimination (credibility and sincerity) (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref42). Factors that—either alone or in combination—might undermine an employee's credibility include: whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance); whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons; whether the timing of the request renders it suspect (for example, it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The employer **may ask for an explanation** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_79076346735821610749860135) of how the employee's religious beliefs, practices, or observances conflict with the employer's COVID-19 vaccination requirement. Although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs—or degree of

adherence—may change over time and, therefore, an employee’s newly adopted or inconsistently observed practices may nevertheless be sincerely held. An employer should not assume that an employee is insincere simply because some of the employee’s practices deviate from the commonly followed tenets of the employee’s religion, or because the employee adheres to some common practices but not others. No one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

If an employee’s objection to a COVID-19 vaccination requirement is not religious in nature, or is not sincerely held, Title VII does not require the employer to provide an exception to the vaccination requirement as a religious accommodation.

L.3. How does an employer show that it would be an “undue hardship” to accommodate an employee’s request for religious accommodation? (3/1/22)

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodations for unvaccinated employees, see K.2, K.6, and K.12, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances without imposing an undue hardship.

If an employer demonstrates that it is unable to reasonably accommodate an employee’s religious belief, practice, or observance without an “undue hardship” on its operations, then Title VII does not require the employer to provide the accommodation. 42 U.S.C. § 2000e(j). The Supreme Court has held that requiring an employer to bear more than a “de minimis,” or a minimal, cost to accommodate an employee’s religious belief is an undue hardship. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer’s business—including, in this instance, the risk of the spread of COVID-19 to other employees or to the public.

Courts have found Title VII undue hardship where, for example, the religious accommodation would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work. For a more detailed discussion, see **Section 12-IV.B: Religious Discrimination (discussing undue hardship)** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_12929403436951610749878556)..

An employer will need to assess undue hardship by considering the particular facts of each situation and will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer cannot rely on speculative or hypothetical hardship when faced with an employee's religious objection but, rather, should rely on objective information. Certain common and relevant considerations during the COVID-19 pandemic include, for example, whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation, i.e., the cumulative cost or burden on the employer. See K.12 for additional considerations relevant to the undue hardship analysis.

L.4. If an employer grants some employees a religious accommodation from a COVID-19 vaccination requirement because of sincerely held religious beliefs, practices, or observances, does it have to grant all such requests? (3/1/22)

No. The determination of whether a particular proposed accommodation imposes an undue hardship on the conduct of the employer's business depends on its specific factual context. When an employer is assessing whether exempting employees from getting a vaccination would impair workplace safety, it may consider, for example, the type of workplace, the nature of the employees' duties, the location in which the employees must or can perform their duties, the number of employees who are fully vaccinated, how many employees and nonemployees physically enter the workplace, and the number of employees who will in fact need a particular accommodation. A mere assumption that many more employees might seek a religious accommodation—or the same accommodation—to the vaccination requirement in the future is not evidence of undue hardship, but the employer may consider the cumulative cost or burden of granting accommodations to other employees.

L.5. Must an employer provide the religious accommodation preferred by an employee if there are other possible accommodations that also are effective in eliminating the religious conflict and do not cause an undue hardship under Title VII? (3/1/22)

If there is more than one reasonable accommodation that would resolve the conflict between the vaccination requirement and the sincerely held religious belief,

practice, or observance without causing an undue hardship under Title VII, the employer may choose which accommodation to offer. If more than one accommodation would be effective in eliminating the religious conflict, the employer should consider the employee's preference but is not obligated to provide the reasonable accommodation preferred by the employee. However, an employer's proposed accommodation will not be "reasonable" if the accommodation requires the employee to accept a reduction in pay or some other loss of a benefit or privilege of employment (for example, if unpaid leave is the employer's proposed accommodation) and there is a reasonable alternative accommodation that does not require that and would not impose undue hardship on the employer's business. See **Section 12-IV.A.3: Religious Discrimination (reasonable accommodation)** (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_25500674536391610749867844). If the employer denies the employee's proposed accommodation, the employer should explain to the employee why the preferred accommodation is not being granted.

An employer should consider all possible alternatives to determine whether exempting an employee from a vaccination requirement would impose an undue hardship. See, e.g., K.2. Employers may rely on **CDC recommendations** (<https://www.cdc.gov/coronavirus/2019-ncov/>) when deciding whether an effective accommodation is available that would not pose an undue hardship.

L.6. If an employer grants a religious accommodation to an employee, can the employer later reconsider it? (3/1/22)

The obligation to provide religious accommodations absent undue hardship is a continuing obligation that allows for changing circumstances. Employees' sincerely held religious beliefs, practices, or observances may evolve or change over time and may result in requests for additional or different religious accommodations.

Similarly, an employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances. Employers must consider whether there are alternative accommodations that would not impose an undue hardship. As a best practice, an employer should discuss with the employee any concerns it has about continuing a religious accommodation before revoking it.