Deconstructing the Religious Exemption to Covid Vaccination

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Introduction.

Each day brings a new headline about another employer requiring its employees to become vaccinated as a condition of continued employment. Some of these announced policies have no exceptions, at least at the public level. Some note that employees with bona fide medical or religious reasons precluding vaccination may be subject to accommodation, but rarely tell us what that accommodation looks like. Some announce financial penalties for employees who are able to be vaccinated, but refuse to do so.[2]

A common but under-explored issue in each of these approaches is the question of whether, or to what extent, a bona fide medical condition or religious belief preventing vaccination can, or should, allow the applicant relief from mandatory vaccination rules, especially in group settings, and the subsidiary question of just how an employer should go about assessing the bona fides of those claimed exemptions.

In recent weeks the internet has been on fire with information openly advising vaccination opponents on how to frame and obtain a religious exemption.[3] Granted, someone following these guides may indeed have a qualifying belief, but the odds are that a significant portion may not. This paper will assume that employers have the power to require vaccinations of their employees[4] and will isolate and focus on choices

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[2] See, e.g., Delta's recent announcement that its unvaccinated employees will be subject to a $200 per month surcharge for medical insurance. Megan Cerullo, *Delta Air Lines to Charge Unvaccinated Workers $200 a Month*, CBS News (August 25, 2021), https://www.cbsnews.com/news/delta-air-lines-unvaccinated-employees-200-dollar-monthly-fee/.

[3] See infra, sec. 5.

[4] This issue is not in serious doubt after recent EEOC and DOJ pronouncements laid to rest arguments that the lack of final FDA approval prevented employers from mandating employee vaccination. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, EEOC (May 28, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. Dawn Johnsen, *Whether Section 564 of the*

and strategies for evaluating both the bona fides of religious exemption claims, and the overriding and perhaps countervailing policies behind the "undue hardship" and "danger to self or others" exception to the duty to accommodate.

In our analysis we will use a few hypotheticals that typify current requests. Consider the cases of an employee who seeks a religious accommodation to exempt the employee from a mandatory vaccine requirement, citing:

1. Case One: The employee asserts that a particular religious view bars the employee from receiving any vaccine that was made or developed using embryonic stem cells. We will call this employee, "Employee A."

2. Case Two: To avoid entanglement with any contrary established church doctrine, the employee asserts that the employee's own personal religious convictions view God the Healer as the source of all healing, and bar interference with His work by third parties. We will call this employee, "Employee B."

I. The Power of Employers to Require Employee Vaccination, In Brief.

By now the majority of agencies tasked with issuing rules have opined that an employer requiring employees to be vaccinated as a condition of employment does not violate the relevant employment statute, so long as any accommodation duties are observed. For a period of time in the Spring of 2021, some employers held back on issuing such a rule, pending final approval of the most widely used vaccines for personal, rather than experimental, use. Some employee advocates argued that so long as the vaccines had been approved only for conditional or emergency use, they had not been declared unconditionally safe for human consumption, and, thus, that an employer's act of forcing an employee to ingest something that had not yet been rated as unconditionally safe for consumption violated a common law doctrine forbidding employers from making such orders. They also argued that a mandate deprived employees of choice, and that the approval was for "voluntary" use only. Most employment lawyers and most judges confronted with this claim found it lacked merit. In any event, the recent determinations of final approval have further and, I suggest fatally, undermined this argument.

As of this writing, employers who have announced mandatory vaccine requirements of one sort or another include many of the nation's leading enterprises.[5] Thus, for the

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Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, DOJ (July 6, 2021), https://www.justice.gov/olc/file/1415446. (As of the day of this writing, President Biden has announced he will introduce a rule requiring that employers of one hundred or more employees mandate vaccines for their employees.) See, e.g., https://*myfox8.com*/news/president-*biden*-to*... .*

[5] Both private and public companies and institutions have implemented mandatory vaccine requirements. Haley Messenger, *From McDonald's to Goldman Sachs, Here Are the Companies Mandating Vaccines for All or Some Employees*, NBC News

most part the debate has moved from whether such policies are lawful to the question of how, if at all, the duty to accommodate should operate in the implementation of such policies.

II. The Religious Exemption in Brief.

California's Fair Employment and Housing Act ("FEHA") and Title VII broadly prohibit any employment rule or practice that discriminates based on, inter alia, religious belief or creed. Unlike other kinds of discrimination, the rules on religious discrimination also require that employers make reasonable accommodations based on sincerely held religious beliefs. *See* Cal. Gov't Code § 12940(a) (protecting employees from discrimination based on "religious creed"); *id.* at subd. (l) ("Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice . . . ."); Cal. Gov't Code § 12926(q) ("'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice, including religious dress and grooming practices.").

Title VII is the federal equivalent of the FEHA; it likewise defines religion broadly. *See, e.g.*, 42 U.S.C. § 2000e-2(a); *id.* at § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . .").

Here, in Hypothetical One an employee seeks an exemption from a mandatory vaccination policy based on an alleged sincerely held religious belief that Employee A asserts requires Employee A to abstain from receiving a vaccine that was made or developed with embryonic stem cells. In the second, Employee B does not cite to a creed or doctrine held by others, but rather to a "religion of one." These two situations pose the question of whether the beliefs are sincere, valid, or religious.

III. The Prerequisite Elements of the Duty to Accommodate Religious Belief under Title VII.

A. Sincerity.

Under the FEHA, a religious belief "is presumed as a matter of law" to be "sincerely held." *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 69 (2002). However, this presumption is not conclusive; it can be rebutted by the employer. *See, e.g.*, *California Fair Emp't & Hous. Comm'n v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 1013 (2004) ("The relevant inquiry is the sincerity, not the verity of the

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(August 3, 2021), https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808. Chris Burt, *State-by-State Look at Colleges Requiring COVID-19 Vaccines*, University Business (September 3, 2021), https://universitybusiness.com/state-by-state-look-at-colleges-requiring-vaccines/.

employee's religious beliefs."). In contrast, under Title VII, "it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity of someone's religious beliefs." *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 137 (3d Cir. 1986) (citation omitted); *see also Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985).

For example, courts may assess whether a religious belief is sincerely held by looking at whether the employee has made similar previous accommodation requests in similar circumstances. For instance, in *E.E.O.C. v. Consol Energy, Inc.*, the employee believed that using a hand scanner violated his religious beliefs. 860 F.3d 131, 136–37 (4th Cir. 2017); *see also id.* at 137 ("[Employee's] understanding of the biblical Book of Revelation is that the Mark of the Beast brands followers of the Antichrist."). The court noted the employee had previously made a similar accommodation request one year earlier. *Id.* at 138, fn.1 ("Indeed, this is not the first time that [the employee] has requested an exemption from a scanner system. In 2011, [the employee] sought to exclude his grandchildren from a new finger-scanning system for school lunches, given his concerns about the Mark of the Beast."). In part because of this consistency, the Fourth Circuit concluded the employee's belief was "sincere." *Id.* at 138.

The converse of the rule seems to be valid as well: An employer can consider whether the employee has *not* acted consistently with his currently articulated belief. For instance, a quick google search shows at least several other types of vaccines (e.g., for chickenpox, rubella, hepatitis A, and rabies) are also made using fetal cells. If an employee has himself been vaccinated with those substances, particularly recently, or if the employee has allowed his children to be so vaccinated, these acts could suggest that an assertion of a moral imperative not to be vaccinated is not sincere. Similarly, if the employee asserts that his denomination requires that he not be vaccinated, public statements of doctrine by the denomination might suggest the employee's claims are not sincere. Such statements are readily available online.[6] However, absent some specific evidence impeaching the employee's assertion, a court would likely accept the belief as sincerely held, especially in California. We understand some significant employers—particularly public entities with heightened duties to tolerate religious freedom—have made a decision not to challenge assertions of belief on the basis of sincerity or validity, perhaps reasoning that a probative personal inquiry would be hard on morale or invite accusations of religious intolerance. Still, the ability to make such a challenge does exist in theory.

B. Religiosity/Validity.

1. The statutes. As a general rule and point of departure, courts will usually not consider the validity of a religious belief, no matter how peculiar the belief seems. However, courts will consider whether the belief is in fact religious, as opposed

[6] See infra, Appendix A. Dale Kasler, *California Mega-Church Offers COVID Vaccine 'Religious Exemption' in Public Instagram Post*, The Sacramento Bee (August 15, 2021), https://www.sacbee.com/news/coronavirus/article253485334.html.

to merely moral, philosophical, or political. Under the FEHA, courts use three objective guidelines to determine if something is a "religion." "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." *Friedman*, 102 Cal. App. 4th 39, 69. "Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching." *Id.* "Third, a religion often can be recognized by the presence of certain formal and external signs." *Id.* Courts generally apply the same analysis under Title VII. *See, e.g.*, *Fallon v. Mercy Catholic Med. Ctr. of S.E. Penn.*, 877 F.3d 487, 490–93.

Title VII is the federal equivalent of the FEHA; it likewise defines religion broadly. *See* 42 U.S.C. § 2000e-2(a); *id.* at § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . .").

2. Ties to a religious group. Under the FEHA, a religious belief need not be popular or held by a particular religious group. *See Friedman*, 102 Cal. App. 4th at 56 ("[T]he fact that no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee . . . .") (citation omitted); *see also Gemini Aluminum Corp.*, 122 Cal. App. 4th at 1013 ("There is nothing in the language of the statute that obligates an employer to accommodate only those religious practices that are required by the tenets of the employee's religion, or that amount to a 'temporal mandate' of the religion.").

Yet, this protection only extends to *religious* belief systems. Under the FEHA, a religious "belief system occupies in a person like a place *parallel* to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individuals life." *Friedman*, 102 Cal. App. 4th at 49. In construing the FEHA, California courts will often "turn to federal decisions defining religion. *Id.* ("Notably, in considering the concept of religion, California courts have consistently looked to federal authority.") Thus, when considering whether a belief is religious in the context of the FEHA, courts will consider the following three "guidelines":

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Friedman, 102 Cal. App. 4th at 69 (holding that veganism is not a religious belief because while moral and ethical, it fails the three prong test of what constitutes a religion).

This inquiry is highly factual. *Id.* at 69–70 ("[W]e disregard conclusory allegations"). For instance, when examining the first guideline, the *Friedman* court considered whether the employee's belief system "that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals . . . [spoke] to: the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith." *Id.* at 70. After

examination, the court concluded that, "While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy." *Id.* Likewise, for the second guideline, a belief-system that is "wide-ranging" may still not be worthy of protection under the FEHA when the "belief system [does not] derive from a power or being or faith to which all else is subordinate or upon which all else depends." *Id.* Finally, in scrutinizing the third guideline, "though not determinative," the court concluded the employee's "belief" had "no formal or external signs of a religion"—no "teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays." *Id.* Thus, the court ultimately concluded that the employee's veganism was not a religious belief under the FEHA:

> "Absent a broader, more comprehensive scope, extending to ultimate questions, it cannot be said that plaintiff's veganism falls within the scope of [the FEHA]. Rather, plaintiff's veganism is a personal philosophy, albeit shared by many others, and a way of life."

Id.; *see also Copple v. Cal. Dep't of Corrections & Rehab.*, Civ. No. G050690, 2015 WL 1383578, at *6 (Cal. App. Mar. 24. 2015) (declining to find "Sun Worshipping Atheism" to be a religion because it was merely about "living a healthy lifestyle").

Hence, an employer could consider whether the employee presents her belief as to the vaccines as a comprehensive approach to ultimate questions about life, or, whether the employee presents her belief about vaccinations as a moral, philosophical, or political way of life. The employer may also consider the likelihood that this belief "derives from a power or being or faith to which all else is subordinate or upon which all else depends." *Friedman*, 102 Cal. App. 4th at 70. Finally, while not dispositive, the employer should consider whether the employee or the employee's religious sect that espouses this belief is formally organized, such as having biblical meetings on this specific topic or organizing sermons or prayers on this topic.

3. Whether a Religious Belief Must Be Reasonable or Based on a Particular Religious Doctrine under Title VII. Under Title VII, religion includes organized religions, unorganized religions, and less common systems of belief. See, e.g., 29 C.F.R. § 1605.1 ("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 or prospective employee."). Although the U.S. Supreme Court has not defined religion for purposes of Title VII, it has defined religion in a constitutional case as a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God." *United States v. Seeger*, 380 U.S. 163, 176 (1965). For instance, the Fourth Circuit has confirmed that, "It is not [Defendant's] place as an employer, nor ours as a court, to question the correctness or even the plausibility of [an employee's] religious understandings." *Consol Energy, Inc.*, 860 F.3d at 142. The Fourth Circuit even disregarded that the employee's "pastor [did] not share" the employee's belief. *Id.*

However, Title VII does not protect all beliefs that are deeply held; instead, those beliefs must be *religious*. For example, when the Third Circuit was tasked with "determin[ing] whether a nontraditional faith requires the protections of the First Amendment and/or of Title VII," the court concluded that a request to be exempted from a mandatory influenza vaccination policy was simply not based on religious beliefs for three reasons. *Fallon*, 877 F.3d at 490, 491–93 (3d Cir. 2017). First, the employee's beliefs that the vaccine would "do more harm than good" was "a medical belief, not a religious one." *Id.* at 492. Second, the court found this was just "one moral commandment," or an "isolated moral teaching," rather than a "comprehensive system of beliefs about fundamental or ultimate matters." *Id.* Third, the employee's beliefs about vaccination were "not manifested in formal and external signs, such as 'formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions." *Id.*; *see also Brown v. Children's Hospital of Philadelphia*, 794 F. App'x 226, 226–28 (3d. Cir. 2020) (relying on *Fallon* to conclude request for exemption from vaccination policy was not based on a sincerely-held religious belief).

Here, in the first hypothetical, Employee A's concern stems from the use of embryonic stem cells during the development or production of the vaccines. (Apparently, the Pfizer, Moderna, and J&J vaccines all used fetal cell lines to perform confirmation tests, during development, and/or in production. But fetal cell lines are not the same as fetal tissue. Fetal cell lines are grown in a laboratory. They are not fetal tissue. At most they descend from elective abortions that were performed in the 1970s and 1980s.[7])

However, even if an employee wrongly believes that fetal material was used in the making of Covid vaccines, the law is generally not concerned with whether a would-be religious belief is accurate, or widely held, for purposes of the FEHA and Title VII; the inquiry is into whether it is *religious*. Under Title VII, the employer should consider whether the employee's concern is something other than religious—i.e., medical, moral, etc. The employer should also consider whether this belief about vaccinations is merely an "isolated" belief or whether it is a "comprehensive system of beliefs about fundamental or ultimate matters." Finally, the employer should consider whether this part of her religion is formalized in any way, such as whether it is a topic she has learned from a sermon or by attending a scriptural study, or the like. In this regard, the official doctrinal position of the church in which the employee is a participant is relevant, though not always dispositive. It is relevant to show that the employee's belief may in fact be contrary to the church's position (for example, most Catholic Dioceses and spokespersons exhort parishioners to become vaccinated as did the Pope, saying it is the moral thing to do.) But it is not dispositive, since a parishioner may still have a sincere religious belief even if it is contrary to church dogma. *See supra* Section III.B.2.

[7] *You Asked, We Answered: Do the COVID-19 Vaccines Contain Aborted Fetal Cells?*, Nebraska Medicine (August 18, 2021), https://www.nebraskamed.com/COVID/you-asked-we-answered-do-the-covid-19-vaccines-contain-aborted-fetal-cells.

IV. If the Employer Determines (or Accepts) that the Belief is Both Religious and Sincere, Must the Employer Automatically Allow the Accommodation Sought by the Applicant?

A. The Duty to Accommodate.

1. In General. The duty to accommodate is historically a doctrine created in religious discrimination cases to map out a template for an employer dealing with an employee's assertion that the normal tasks and rules of the employer interfere with behaviors and obligations imposed by the religious faith to which the employee subscribes. In such cases the duty requires that the employer seek to find a solution that eliminates or minimizes interference with an employee's religious tenets, while still accomplishing the employer's legitimate work objectives. Common examples include allowing an employee to switch days off for religious observances; adjusting policies that unreasonably interfere with religious beliefs, and the like. However, there are limits on the duty: The requested accommodation must be *reasonable and not involve significant real or potential cost*. An important early ruling held that if the proposed accommodation would cost more than a *de minimis*, or relatively small, amount, the employer need not grant it. *TWA v. Hardison*, 432 U.S. 63, 84 (1977).

2. The ADA. In addition to religion the only other type of discrimination that requires accommodation is disability discrimination. As part of the 1990 Americans with Disabilities Act ("ADA"), an employer is required not only not to discriminate, but to accommodate the known disabilities of its employees. This law spells out in much greater detail the types of accommodations that are deemed reasonable, and also removes the "*de minimis*" exception for disability accommodation cases. But there are limits: an employer need not accommodate an employee if to do so would (1) cause an undue hardship, or (2) present a risk of danger to the employee or others. *See, e.g.*, *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441, 1446 (11th Cir. 1998) ("Once a district court has made the necessary medical findings, it must weigh the statutory goal of ending disability-based discrimination against any legitimate concerns regarding 'significant health and safety risks.'" (citation omitted)). These two exceptions have significant technical meanings. *See, e.g.*, *id.* While these two ADA concepts are unique to disability discrimination law, they often inform evaluations of what is reasonable under Title VII religious discrimination law in areas in which the laws do not have separate meanings.

B. The Accommodation Dialogue.

Both the ADA and the religious discrimination portions of Title VII contemplate that when an employee raises a question of potential accommodation, the employer will engage in a good faith dialogue with the employee. This obligation is well-developed under the ADA, and those rules likely bleed over into court interpretations of the duty to accommodate religious beliefs. In general the duty means considering the proposed accommodation, responding to it, offering reasons if it is not accepted, proposing other ideas, and continuing this process until an accommodation is reached or the process has become futile. But if no *reasonable* accommodation presents itself, the employer

need not talk endlessly. *See, e.g.*, *Snapp v. United Trans. Union*, 889 F.3d 1088, 1100 n.2 (9th Cir. 2018) ("An employer is not required to engage in a futile interactive process. If no reasonable accommodation exists that would allow an employee to do his job, an employer cannot be liable for failure to engage in the interactive process.").

C. Acquiring Information to Evaluate Eligibility for an Exemption.

The ADA has well-developed rules that allow the employer to inquire into aspects of the claimed disability far enough to determine whether a disability exists, and to assess whether certain proposed work rule changes would enable the employee to perform the essential functions of the job with an accommodation in place.

Title VII's rules are less well-developed, but caselaw suggests that an employer is entitled to evaluate sincerity and religiosity, and may make reasonable inquiries to get information to enable it to discharge its duties. However, some religious rights advocates take the position that the very act of asking questions about an employee's religious beliefs violates the religious rights of the employee, arguing that the right to keep private one's belief trumps the ability to make inquiry. While there is no definitive caselaw on the subject, I am of the view that by making a request for a religious accommodation the employee waives, in part, the ability to not discuss religious issues, much like a plaintiff in a car crash lawsuit waives in some important ways his right not to discuss personal injury. This practical rule suggests that if one tenders the issue for evaluation, one cannot refuse to provide information concerning it.

D. The Defenses of Undue Hardship and Direct Threat.

Under the ADA, employers may be able to deny accommodation requests or defend against legal claims of failure to accommodate by citing recognized defenses. The ADA and its implementing regulations recognize many defenses, but the most relevant to the question of accommodation are undue hardship and direct threat. Title VII religious accommodation exceptions do not use the same language, but in general track the same concept: A requested accommodation need not be granted if it requires compromise of important rights of others, exposure to undue expense, or presents a heightened danger to fellow employees. We will use the ADA concepts to illustrate these ideas.

1. Undue Hardship. Under the ADA, an employer is exempted from making accommodations that would impose an undue hardship on the employer, assessed by a multi-factor test that weighs the nature and cost of the accommodation, the size and financial resources of the entity, and specific issues at the facility in question. This analysis specifically requires the employer to consider, among other factors, the impact of the accommodation on the operation of the facility, including the facility's ability to conduct business. (42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2).)

In Title VII religious cases the same limits can be found. For example, if a requested accommodation would require an employer to violate the terms of a collective bargaining agreement, the leading cases suggest it has no obligation to do so.

Hardison, 432 U.S. at 78–83. See also *EEOC v. Firestone Fibers and Textiles Co*., 515 F.3d 307, 317 (5th Cir. 2000), where the Fifth Circuit held that an employer is not required to adversely impact the rights of other employees when accommodating religious observance cases:

> Therefore, when determining the reasonableness of a possible accommodation, it is perfectly permissible for an employer to consider the impact it would have on a seniority-based scheduling system as well as on other employees. *Id*.[8]

The 2019 novel coronavirus (COVID-19) pandemic raises serious questions about whether some commonly requested accommodations, like working as an unvaccinated person among others, may poses an undue hardship on an employer, or threatens the health and safety of others. The pandemic is a special circumstance: The EEOC recognizes that in some instances, an accommodation that would not have imposed an undue hardship before the pandemic may pose one during the pandemic. Among the recognized potential hardships that can be considered is the risk of sudden loss of some or all of the employer's income if the accommodation threatens fiscal stability in a non-trivial way. *EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EQUAL EMP'T OPP. COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Sept. 7, 2021).

2. Direct Threat. Some disabilities and diseases may pose a direct threat to the health and safety of individuals in the workplace. Where there is no reasonable accommodation available to negate that threat, employers may cite the direct threat defense. The statute authorizes the defense in circumstances under which an individual poses a threat to the health or safety of "other individuals." *See, e.g.*,42 U.S.C. § 12113(b). The regulations define the term more broadly to include a threat to the health or safety of the individual in question *and* others. *See, e.g.*, 29 C.F.R. § 1630.2(r).

The assessment of whether an individual poses a direct threat is based on reasonable medical judgment that may be based on current medical knowledge or the best available objective evidence. 29 C.F.R. § 1630.2(r). Factors considered in assessing whether an individual poses a direct threat 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) how soon the potential harm may occur. *Id.*

[8] See also *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1054 (9th Cir. 1999), where the court found that an undue hardship could exist if an accommodation would cause more than a *de minimis* impact on coworkers, such as causing co-workers to be exposed to a greater degree of workplace hazard.

The EEOC has declared that the COVID-19 pandemic meets the direct threat standard, implicitly endorsing the idea that a person at risk to spread Covid poses a direct threat. In early rulings the EEOC noted that an individual *diagnosed with or who has symptoms of COVID-19* poses a direct threat to the health and safety of other employees and may be excluded from the workplace. Note that someone may pose a direct threat under this logic even though he or she does not have the disease, but is merely more demonstrating a heightened risk because he or she has symptoms.

Another way in which Covid changed the rules was the realization that individuals who have a disability that puts them at higher risk for complications related to COVID-19 may request a reasonable accommodation (such as telecommuting) to reduce their chances of infection during the pandemic. *See EEOC: Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EQUAL EMP'T OPP. COMM'N, https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (last visited Sept. 7, 2021). Thus, a heightened risk of *catching* the virus or having serious consequences is an important factor to be assessed in looking at direct threats.

Currently the EEOC has ruled that an employer may require a COVID-19 vaccination for all employees entering the workplace (if vaccination is a qualification standard applied to all employees) but *may* need to provide a reasonable accommodation for employees who do not or cannot get a vaccine because of a disability. *See EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* (Questions K.5 and K.6). Importantly to this paper, it has not yet considered whether the direct threat defense might be available under circumstances where the traditional accommodations of telecommuting are not available, and the requested accommodation is being seated amidst and among other workers, especially in confined spaces.

V. Legitimate Religious Exemptions v. Disguised Anti-Vaccination Mimicry.

As noted above, courts often grant a great deal of flexibility in the way in which an employee holds, and articulates, a bona fide religious objection. Of course, an adherent to non-traditional religious tenets might qualify as having a religious belief. But there is growing concern that anti-vaccination political and social forces are "gaming" the system by encouraging opponents to claim a religious exemption when, in truth, the claimant would normally not qualify based on the measures of sincerity and religiosity noted above.

Here is an example of hundreds of stories on the internet:

> In May, Greg Locke, the right-wing evangelical head pastor of Tennessee's Baptist Global Vision Bible Church, told a cheering congregation that "elites" were trying to push an unsafe vaccine on the public while injecting themselves with sugar water. "I know some of you, like, 'My goodness! What am I gonna—my boss told me that if I don't get the vaccination that I'm gonna lose my job,'" he

> said. “I can write you a religious exemption, and we will sue their stinkin’ pants off!” Molly Olmstead, *How Do Religious Vaccine Exemptions Really Work?*, Slate (August 21, 2021), https://slate.com/human-interest/2021/08/covid-vaccines-religious-exemptions.html.

Locke is reportedly not the only faith leader promoting anti-vax objections in the guise of religious concerns. According to Olmstead,

> A pastor in Riverside County, California, told his congregation in the spring that the vaccine was “unclean” and directed them to a downloadable form Christians could use to claim religious exemptions. Some Catholic clergy and groups have made such resources available, despite the pope’s very clear position on the matter; the Colorado Catholic Conference even published a template for Catholics seeking religious exemptions. Other churches have offered the same. (Id.)

Websites offering easy guides to claiming exemptions abound.[9] Of note, many of these sites counsel that employees NOT reference an existing religious order or belief. This is not surprising, since almost every mainstream American religious order has not only not forbidden its adherents from becoming vaccinated, but often advised in official and unofficial pronouncements that the moral thing to do is to become vaccinated as an act of human concern for others. (See listing of religious orders and their positions on vaccination, Appendix A.)

VI. Strategies for Separating Legitimate Exemption Cases from Claims Based on Political or Social Beliefs.

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[9] Olmstead reports: Outside of religious institutions, a network has emerged to help those seeking to manipulate the system. Facebook groups and blogs offer advice on how to fake claims. Some more ambitious anti-vaxxers offer workshops. Louisiana’s attorney general sent his employees an email telling them how to use religious exemptions to get their children out of potential school mask and vaccine mandates. “There is anecdotal and survey evidence that most claims to religious motivation for refusing vaccination are false,” said a prominent researcher. Molly Olmstead, *How Do Religious Vaccine Exemptions Really Work?*, Slate (August 21, 2021), https://slate.com/human-interest/2021/08/covid-vaccines-religious-exemptions.html. See also Dorit Reiss, *Religious Exemptions to Vaccines and the Anti-Vax Movement*, Health Law Policy, Petrie-Flom Center (July 16, 2021). *Template for Religious Exemption From COVID-19 Vaccines*, Colorado Catholic Conference (last visited September 7, 2021), https://cocatholicconference.org/template-for-religious-exemption-from-covid-19-vaccines/. *Religious Exemptions for Vaccines (and Masks/Tests)*, The Healthy American (last visited September 9, 2021), https://www.thehealthyamerican.org/religious-exemption-letter.

Now to the heart of the current conundrum faced by many employers: How to separate the seemingly reasonable rare legitimate religious objection to vaccination from the reportedly widespread invocation of religious grounds by people whose primary concerns are political, or sociological, or for reasons other than adherence to a religious belief that forbids vaccination?

The task is to do what one researcher suggested many American employers are doing, and that is appropriately scrutinizing vague "religious-sounding" accommodation exemption requests, and making an effort to detect the legitimate from the fraudulent. This is a process in which the employer normally does not want to dig deeply into the religious ideas of its employees, but must do so to make this determination. Here are several suggestions on how to do this.

A. Know Where the Line is Drawn.

First, look at the way the few reported cases have parsed the difference between a truly religious belief and a social belief disguised as a religious belief. The cases cited above are a good point of reference.

B. Think Outside the Box.

Second, consider engaging an experienced employment neutral to act as a confidential forum in which the employee can disclose to the mediator, in confidence, the details of the claim and religious basis for it. In that forum the mediator, presented with the facts and the appropriate caselaw, can probe the bona fides, and at the end the mediator can make what is akin to an arbitrator's assessment, either validating the claim or suggesting that it did not ring true in various particulars. Using a neutral is the essence of the accommodation dialogue: Why not use it for this delicate task, as well?

VII. Do Not Consider Requests in a Vacuum—Consider the Overall Impact on Your Workforce.

The duty to accommodate, as we have seen, is to provide a reasonable accommodation, not merely the accommodation the employee desires. In determining what is reasonable the rights and interests of your other employees must also be taken into account.

If it is determined that the applicant has made out a bona fide request, however, that is not the end of the inquiry. The employer must now assess what accommodation is appropriate. Here the outcome will vary from workplace to workplace. Where working from home is easy and accepted, that is often a safe accommodation. But what of the workforce that, of necessity, involves actual working with fellow employees in close proximity for prolonged periods of time?

In such cases, how does one assess the incremental danger of having unvaccinated persons sitting cheek by jowl with vaccinated people, some of whom have children or elderly parents, and worry that despite being vaccinated they might contract and carry the infection to these vulnerable populations? In these cases it is important to be

guided by the best available medical information, including rates of transmissibility, community infection rates, concentrations, and the like. Note also that if the only decision to be made is to seat one employee in a bullpen of 100, the risks might be minimized, especially if social distancing, daily tests, and mask mandates can be enforced. But what if the percentage of applicants seeking to remain unvaccinated but still be seated among vaccinated workers is higher? In addition to ventilation, spacing and other environmental metrics, here are three disease-related factors to consider:

A. Rate of Transmissibility ("Shed Rate").

Data shows that when a vaccinated person and an unvaccinated person contract the Covid virus, the amount of virus they shed to others is about equal at the moment at which they contract the virus. But in succeeding days the shed rate—a measurement of how infectious they are—drops dramatically for vaccinated persons as their immunities kick in and kill the virus. In simple terms, unvaccinated people are orders of magnitude more infectious than vaccinated people, and over time will shed much larger quantities of the virus. Since infectivity is a numbers game (the more virus around, the more likely there is an infection), they thus present a greater danger to themselves and others around them.

B. Community Spread Rate.

Another relevant statistic is the amount of infection in a given community, sometimes called the community spread rate, and often measured by the percentage of tests in a given community that are positive. When the test rate is high, that is, in the mid to upper single digits, this means that unvaccinated people are at greater risk of contracting Covid. This is essentially what is happening in the South and pockets in the West at the time of this writing.

C. The Concentration Percentage in the Work Unit.

A third important statistic is the number of unvaccinated persons arguing to be seated within a given closed work environment. In simple terms the larger the percentage of accommodated unvaccinated workers, the greater danger the compliment of workers becomes to others and their parents and unvaccinated children.

When, in a closed environment, the shed rate, community infection rate, and concentration percentages are all high, the risk to the health of others is substantially increased. This, in turn, substantially raises the risk of other baleful consequences, like disease, hospitalization, death, cessation of operations, loss of public confidence, and the like.

At what point can we say that these risks, collectively, trigger the "undue hardship" exception or become "unreasonable" (the Title VII analog)? That must be evaluated by looking at the consequences of a spreader event in the workplace. For some workplaces, where a quarantine simply means work can be done from home, the consequences, though disruptive, may not be severe. But for others, like an orchestra,

acting company, indoor gymnasium, airplane, or the like, a spreader event could cause a shutdown with drastic loss of revenue and customer confidence.[10]

Similarly, at what point does the "danger to self or others" doctrine come into play? While the exact limits of this doctrine as it applies to Covid transmission are not yet clear, what is clear is that an employer should—indeed must—take into account the health and safety of the entire compliment of his workers in determining whether an *en masse* grant of exemptions on religious grounds is a risk that is appropriate for its business.

Conclusion.

The purpose of this essay is to tease out and give some definition to a growing problem in America, and lay out the tools that should be considered in forging a strategy that respects legitimate rights on all sides of the issue. Clearly the right choice will vary from place to place, but two things are evident: The presence of what seems to be universally acknowledged as a growing percentage on non-bona fide religious exemption applications has the potential to create a heightened danger to self and others, and the rights and needs of fellow employees must be taken into account in determining the proper course of action.

[10] One employer with a closed space challenge, United Airlines, announced on September 9th that it would strictly scrutinize religious exemption requests, and even if legitimate, would accommodate religious exemption employees only by placing them on unpaid leave rather than placing them in the cockpit. This follows Delta Airlines decision to surcharge non-vaccinated employees for additional healthcare costs because of their enhanced likelihood of contracting Covid.

Appendix A.

According to a report from Vanderbilt University's School of Public Health, here is a summary of the current position on Covid vaccination taken by some of the more common religious faiths:

Buddhism - Buddhism has no central authority that determines doctrine. Vaccination is widely accepted in predominantly Buddhist countries.

Christianity - The following Christian denominations have no general opposition to vaccination: Roman Catholicism, Eastern Orthodox, Oriental Orthodox, Amish, Anglican, Baptist, The Church of Jesus Christ of Latter-Day Saints (Mormon), Congregational, Episcopalian, Jehovah's Witness, Lutheran, Mennonite, Methodist (including African Methodist Episcopal), Quaker, Pentecostal, Presbyterian, Seventh-Day Adventist, Unitarian-Universalist.

A very small number of denominations with a very small percentage of overall adherents do have a theological objection to vaccination: Dutch Reformed Congregations (mixed), Faith Tabernacle (and related small groups), and Church of Christ, Scientist – While believing that illness can be cured by prayer and faith, there are not strict rules against vaccination and members can receive required vaccinations.

Hinduism - Hinduism has no prohibition against vaccines. While Hindus venerate cows, trace bovine components of certain vaccines have not been identified as a theological concern.

Islam - Islam has no prohibition to vaccination. There have been several gatherings of Muslim leaders, scholars, and philosophers to address the theological implications of ingredients in food and drugs, including vaccination. The Organization of Islamic Conference and 15th annual conference of the International Fiqh Council both concluded that vaccination is acceptable under Islam. The Islamic Organization for Medical Sciences concluded that porcine gelatin used in vaccines is acceptable. Some muftis (experts in Islamic law) hold that immunization is obligatory (wajib) when the disease risk is high and the vaccine has benefits that far outweigh its risk.

Jainism - Jains follow a path of non-violence toward all living beings including microscopic organisms. Jains do allow cooking, the use of soap and antibiotics, and vaccination, because this destruction of microorganisms, even though regretted, is necessary to protect other lives.

Judaism - Judaism supports vaccination as an action to maintain health, and also as a parental responsibility to protect children against future infection. In Judaism the concept of *Pikuakh nefesh,* acting to save one's own or another's life, is a primary value. While some vaccines containing porcine derived gelatin, Jewish scholars, agree that porcine gelatin in injectable form is acceptable.

Scientology: in an interview for BeliefNet, Rev. John Carmichael of the Church of Scientology stated that there are no precepts or strictures about vaccinations within Scientology.