

Accommodation: How-To

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Overview

- Legal Framework
- General Process and Examples
- Resources for Guidance

Legal Framework

Legal Framework – Title VII

- Employers with 15 or more employees
- Prohibits discrimination on the basis of religion
- Requires employers to reasonably accommodate an employee's sincerely held religious belief, practice, or observance, unless it would cause an undue hardship on the employer's business

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Legal Framework – Title VII

- Sincerely held religious belief
- Religion
 - Broad definition
 - Protects beliefs, practices, and observances with which employers may be unfamiliar

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Legal Framework - ADA

- Employers with 15 or more employees
- Prohibits discrimination on the basis of disability, record of disability, or being regarded as disabled
- Requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship

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Legal Framework - ADA

- Definition of disability
- All employees must be “qualified person with a disability”
 - Able to perform the essential functions of the job with or without reasonable accommodation

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The Process

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General Process

- Create a process / policy
- Request Form
- Provide contact information for management representative who will handle requests
- Assess on case-by-case basis
- Do not rely on assumptions, stereotypes, or past practices regarding particular religious belief or disability/perceived disability

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General Process

- How to recognize an accommodation request?
 - Specific verbiage is not required
 - In writing is not required
 - What is required from EE
 - Title VII: EE must put ER on notice of conflict between sincerely held religious belief, practice, or observance with work requirement (such as vaccine)
 - ADA: EEOC position and Eighth Circuit position

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General Process – Title VII

- Undue hardship
 - Having more than a minimal cost or burden on the employer
 - USSCT: requiring ER to bear more than a "de minimis" cost to accommodate an EE's religious belief is an undue hardship
 - Direct monetary costs
 - Burden on conduct of ER's business (i.e., risk of spread of COVID-19 to EEs/public)

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General Process – Title VII

- Undue Hardship examples:
 - Where workplace safety is impaired
 - Diminish efficiency in other jobs
 - Cause coworkers to carry accommodated EE's share of potentially hazardous or burdensome work

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Example #1

- *Harrell v. Donahue* (8th Cir. 2011)
 - USPS employee claimed failure to reasonably accommodate religious beliefs
 - Requested every Saturday off as member of Seventh-day Adventist Church
 - Violation of CBA
 - Impose actual, real imposition on co-workers – more than a de minimis impact
 - Violation of seniority system

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Example #2

- *EEOC v. Abercrombie* (USSCT 2015)
 - Failure to hire, failure to accommodate wearing headscarf
 - Headscarf violated the “Look” policy
 - Applicant’s religious practice or prospective accommodation may not be motivating factor in employer’s decision

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General Process - ADA

- Interactive process
 - Employer must engage in the process
 - Protects employers from damages
- Undue hardship
 - “individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense”

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General Process - ADA

- Direct threat:
 - someone who, if permitted to work, presents “a significant risk of substantial harm to the health or safety of other that cannot be eliminated by reasonable accommodation”

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General Process ADA

- Accommodations that are unreasonable:
 - Eliminate or reassign an essential function of an employee's job
 - Lower performance standards
 - Unlimited leave
- Discuss alternative accommodations

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Example #1

EEOC v. ISS Facility Services, Inc. (N.D. Ga. 2021):

- Pending case
- Employees worked remotely for part of pandemic
- Employer reopened
- Employee with heart condition made accommodation request to continue remote work
- Employer terminated (citing performance issues)

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Example #2

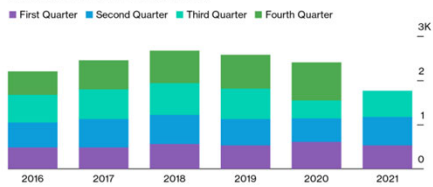
Edelman v. Aristocrat Plastic Surgery P.C. (E.D.N.Y. 2021)

- Pending case
- Alleged he developed long-haul COVID and suffered effects
- Alleged he kept employer updated but was terminated
- Employee does not specifically point to requested accommodation but says that no one engaged in any form of interactive process with him to discuss possible accommodations

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ADA Cases Filed in Federal Court



Source: Bloomberg Law Dockets search by Nature of Suit (Civil Rights: Americans with Disabilities - Employment 445) over U.S. District Court dockets. Bloomberg Law

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Percentage of EEOC Charges That Include ADA Claims



Source: EEOC Charge Statistics, available at <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020>. Does not include charges filed with state or local Fair Employment Practices Agencies. Bloomberg Law

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Nebraska LB 906

- Legislature passed Feb 25
- Governor signed Feb 28
 - Effective now
- Applies to public and private employers
 - Who require applicants and EEs to be vaccinate
- Employers must grant religious or medical exemption request

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- NE DHHS Form to complete
- Don't have to require form
- Religious exemption:
 - Individual declares that receiving the vaccine would conflict with sincerely held religious belief, practice or observance

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Department of Health and Human Services
COVID-19 Vaccine Exemption Form NEBRASKA
Good Life. Great Nation.

Request for Exemption

I, _____, declare that I am claiming an exemption from receiving the COVID-19 Vaccine based on the following reason (check one):

- A health care provider has provided a signed written statement that, in the health care provider's best professional judgment, the individual is not eligible for the vaccine due to a medical condition.
- A health care provider has provided a signed written statement that, in the health care provider's best professional judgment, the individual is not eligible for the vaccine due to a sincerely held religious belief, practice, or observation.

 (Signature of Individual Claiming an Exemption) (Date) _____

Exemption Decision

Exemption Granted
 Exemption Denied

 (Printed Name of Deciding Official) (Date) _____

 (Signature of Deciding Official)

Nebraska Health Care Public Law 111-111-111 PG. 1

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- <https://dhhs.ne.gov/Documents/COVID-19-Vaccine-Exemption-Form.pdf>
- An Employer may:
 - Require testing at Employer's expense
 - Require Employer-provided PPE
- Acknowledges CMS vaccine mandate supersedes NE law so follow CMS rules if applicable

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Resources for Guidance

- EEOC Guidance – Revised October 2021 and again March 1, 2022
- EEOC – Religious accommodation request form
- NE DHHS Form:
 - <https://dhhs.ne.gov/Documents/COVID-19-Vaccine-Exemption-Form.pdf>

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Questions?

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