

February 7, 2012

To: Chairman
Equal Opportunity Employment Commission
131 M Street, N.E.
Washington, D.C. 20507

From: Alan Phillips, Esq.
P.O. Box 3473
Chapel Hill, NC 27515-3473
919-960-5172
attorney@vaccinerights.com
N.C. State Bar No. 30436

Re: 29 C.F.R. § 1601.91 Request for Title VII Interpretation or Opinion

MEMORANDUM

Proposed Answers, Considerations, and Legal Precedent for the
Chairman's Evaluation of the Requestor's Questions

(The information required by 29 C.F.R. § 1601.92 is provided in the accompanying document.)

1. Does Title VII require hospitals to accommodate their employees' religious objections to the influenza and other vaccines? If 'yes' generally but not absolutely, when and under what conditions is employer accommodation of a qualifying employee clearly required, and when is it optional?

The majority of hospitals around the country that mandate flu vaccines for their employees appear to have policies that allow employees to refuse vaccines for religious reasons. Based on that evidence alone, all hospitals can clearly accommodate employees' religious objections to immunizations, at least generally. However, many hospitals categorically refuse to

accommodate any of their employees' religious objections to immunizations, while those that do impose strict, overreaching requirements that unlawfully restrict employee accommodation rights.

With regard to religious accommodation generally, EEOC regulations state: "After an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual's religious practices." 29 CFR § 1605.2(c)(1). With regard to flu shots specifically, the EEOC has stated: "[O]nce an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation..."¹ However, there appears to be no legal precedent concerning the application of Title VII to healthcare employees' objections to vaccines in the workplace specifically, so hospitals can and sometimes do seize this fact to accommodate or not their employees' religious objections to immunizations as they deem fit, and policies vary widely from institution to institution.

Hospitals may wish to deny accommodation requests for at least those employees who work with immune-compromised patients or whose job duties and non-vaccinated status may otherwise, arguably, pose a significant, demonstrable risk to patients and/or others such that accommodation would not be feasible. However, the CDC states that vaccines are effective in only 85% - 95% of vaccinated persons,² and typical non-medical vaccine exemp-

¹ The U.S. Equal Employment Opportunity Commission, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, III. B. 13., http://www.eeoc.gov/facts/pandemic_flu.html, citing Equal Employment Opportunity Comm'n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf>.

² Centers for Disease Control and Prevention, Vaccines and Immunizations, Misconception #2. The majority of people who get disease have been vaccinated, <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm>

tions rates range from about 1% - 2.5%,³ refusing to accommodate an employee on the basis that being unvaccinated employee poses a significant risk to patients, if not accompanied by a policy that prohibits non-immune, vaccinated employees from performing the same duties as well, would be inequitable and medically inconsistent. (A genuine risk to patients is not ameliorated by an employee's good-faith submission to vaccination if that employee is among the 5% - 15% of vaccinated persons who do not develop immunity from the vaccine.) Furthermore, since immunity can occur without vaccination, and even without symptoms of illness,⁴ refusing to accommodate an employee with religious objections to vaccines on the assumption that the accommodated employee is necessarily not immune would also be erroneous; such employees, if deemed to pose a risk under an appropriate, equitable policy, should be tested, or at least allowed an opportunity for testing, to determine the employee's immune status. Accommodation standards, then, must be equitable. They need to be based on sound, medical and scientific reasoning, and not biased, fear-based misunderstandings about the safety or risk of vaccinated and unvaccinated persons categorically.

With regard to the actual risks concerning seasonal flu and flu vaccines in particular, the medical evidence is at best conflicting. E.g., Tom Jefferson, a Cochrane Collaboration epidemiologist who "knows the flu vaccine literature better than anyone else on the planet" has stated the vast majority of flu studies favoring seasonal flu vaccines were deeply flawed: "*Rubbish* is not a scientific term, but I think it's the term that applies."⁵

³ Non-medical Exemptions to School Immunization Requirements, The Journal of the American Medical Association, <http://jama.ama-assn.org/content/296/14/1757.full>

⁴ See, e.g., Centers for Disease Control and Prevention, Vaccines and Immunizations, Glossary, "Asymptomatic infection: The presence of an infection without symptoms. Also known as inapparent or subclinical infection. <http://www.cdc.gov/vaccines/about/terms/glossary.htm>"

⁵ *Does the Vaccine Matter?*, <http://www.theatlantic.com/doc/200911/brownlee-h1n1/2>

Indeed, reliance on the medical literature, generally, has been seriously called into question by highly reputable experts in recent years.⁶ Meanwhile, a 2010 review of the flu vaccine literature by the Cochrane Collaboration, an independent, international consortium of medical researchers, issued a WARNING stating that “reliable evidence on influenza vaccines is thin but there is evidence of widespread manipulation of conclusions...” The review also noted that “vaccine use did not affect . . . working days lost” and “had no effect on hospital admissions or complication rates.”⁷ In another example, a doctor’s critical review of a recently published flu study boasting 60% efficacy revealed that the 60% figure represented the “relative risk reduction” (rounded up), a substantially misleading figure given that the “actual risk reduction” was only 1.5%, and the study reported that 97.3% of study participants didn’t contract the flu despite their non-vaccinated status.⁸ In addition, the Association of American Physicians and Surgeons (AAPS) recently strongly criticized proposed mandatory flu vaccine laws and corresponding mask policies for healthcare workers.⁹ Nor do all federal agencies support mandatory flu vaccination of healthcare workers. In a September 2011 Position Statement, OSHA stated that it “believes there is insufficient scientific evidence for the federal government to promote mandatory influenza vaccination programs that do not have an option for the HCP to de-

⁶ E.g., Dr. Marcia Angell of Harvard Medical School has said: “It is simply no longer possible to believe much of the clinical research that is published, or to rely on the judgment of trusted physicians or authoritative medical guidelines. I take no pleasure in this conclusion, which I reached slowly and reluctantly over my two decades as an editor of the *New England Journal of Medicine*.” See also “Big Pharma, Bad Medicine, How corporate dollars corrupt research and education”, by Marcia Angell, M.D., at <http://bostonreview.net/BR35.3/angell.php>

⁷ Vaccines for preventing influenza in healthy adults, <http://www2.cochrane.org/reviews/en/ab001269.html>

⁸ Flu Shots, Fosamax and Pharmaceutical Fakery: The Common Use of Misleading Statistics in the Medical Literature, Gary G. Kohls, M.D., Dec. 3, 2011, <http://www.thepeoplesvoice.org/TPV3/Voices.php/2011/12/03/flu-shots-fosamax-and-pharmaceutical-fak?tempskin=basic>

⁹ Letter to Colorado Public Health Officials on Mandatory Influenza Vaccine for Healthcare Workers, AAPS, Dec. 14, 2011, http://www.aapsonline.org/index.php/site/article/colorado_influenza_letter/

cline for medical, religious and/or personal philosophical reasons.”¹⁰ The point here is not to determine absolutely whether or not flu vaccines work, but rather, to point out that to the extent that the utility of the flu vaccines is unclear or unsubstantiated, the ability of hospitals to accommodate their employees’ religious objections rises accordingly. And given the high rate of non-immune vaccinated people compared to typical exemption rates, the medical risk posed by those unvaccinated, accommodated employees is necessarily negligible, or else hospitals would be taking steps to identify the more numerous non-immune vaccinated employees and adjusting their job functions and duties accordingly. Therefore, accommodation guidelines and practice should be structured accordingly.

Some private hospital administrators believe that because they are private, they are free to craft a vaccine religious accommodation policy any way they wish. First, Title VII clearly applies to qualifying public and private employers. Second, federal courts have construed broadly the principle that private entities with ties to government may be considered “state actors” for purposes of application of the Constitution directly to those private entities. So even private hospitals, if they accept government funding such as Medicaid and Medicare, are arguably subject to Constitutional scrutiny.

2. What beliefs qualify for religious accommodation under Title VII in this context?

Agency rules address the religious nature of a belief.¹¹ The Religious Freedom Restoration Act of 1993 (RFRA) may provide additional guidance.

¹⁰ National Vaccine Advisory Committee Meeting Minutes, September 13-14, 2011, APPENDIX B: OSHA Position Statement, as submitted by Mr. Borwegen, representative of the Service Employees International Union, <http://www.nvic.org/CMSPages/GetFile.aspx?nodeguid=da4b451c-b83e-4eb4-9b64-5c210aad1ec3>

¹¹ 29 C.F.R. § 1605.1. "Religious" nature of a practice or belief

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This

The RFRA prohibits government (including any “branch, department, [or] agency . . . of the United States,” 42 U.S.C. § 2000bb-2(1)) from burdening a person’s exercise of religion unless the government is doing so in furtherance of a compelling government interest, and the means by which that compelling interest is achieved is the least restrictive means available. 42 U.S.C. § 200bb et seq. For RFRA purposes, “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” § 2000cc-5(7)(A). Finally, legal precedent concerning vaccine religious exemptions for school children, which is part of a larger body of legal precedent that the USCIS used to develop its vaccine waiver policy, may also be helpful in this context, and includes the following cases:

- a. Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 98 (E.D.N.Y., 1987), which held that the exemption should be offered to all who “sincerely hold religious beliefs.”
- b. Farina v. The Board of Education, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) (citing Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 91 (E.D.N.Y., 1987)), which held that “[t]he beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization.”
- c. Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2nd Cir. 1988) (quoting United States v. Seeger, 380 U.S. 163, 166, 85 S.Ct. 850, 854),

standard was developed in *United States v. Seeger*, 380 U.S. 163(1965) and *Welsh v. United States*, 398 U.S. 333(1970). The Commission has consistently applied this standard in its decisions.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. The phrase “religious practice” as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 20003(j). ¹ See CD 76-104 (1976), CCH ¶6500; CD 71-2620 (1971), CCH ¶6283; CD 71-779 (1970), CCH ¶6180.

which held that “[i]t is sufficient if the belief ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’”

- d. Lewis v. Sobel, 710 F. Supp. 506 (S.D.N.Y. 1989), which held that the defendant had “violated [the plaintiff’s] First Amendment right to free exercise of religion by denying the exemption,” id. at 507, and “awarded [money] damages . . . [for the] violation of their First Amendment right to free exercise of their religion.” Id. at 517.
- e. Lewis at 515 (quoting Allanson v. Clinton Cent. School Dist., No. 84-174, slip. op. at 15 (N.D.N.Y. May 7, 1984)), holding that “the court . . . need only determine that a sincere religious belief underlies their present claims.”
- f. Berg v. Glen Cove City School Dist., 853 F. Supp. 651, 654 (E.D.N.Y. 1994) (quoting Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976)), which held that “[t]he loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”

Clearly, the scope of qualifying beliefs is broad. There are limits, of course. E.g., philosophical objections may not qualify for religious accommodation. But many hospitals are requiring applicants to belong to a religious organization with tenets opposed to immunization and/or requiring support from a religious leader, and denying accommodation to employees with sincerely held religious beliefs who do not meet these unlawful requirements. So, there is a need for clarification of the qualifying criteria in this context.

3. May hospitals scrutinize their employees’ beliefs to determine whether or not the beliefs qualify for religious accommodation under Title VII? If so, what is the proper criteria and appropriate procedure?

In the Requestor’s experience, virtually all of the hospitals with a policy that allows accommodation of employees’ religious objections to immunizations scrutinize the applicant’s beliefs to determine whether or not the applicant qualifies for accommodation. Hospitals appear to design their own qualification criteria, with seemingly little or no regard for applicable legal boundaries, but in any event, with great variation among hospitals nationally. However, at least three federal government sources suggest that scrutiny is not allowed:

- a. As noted above, 29 CFR § 1605.2 (c)(1), requires that employers accommodate the employee “[a]fter an employee or prospective employee notifies the employer”;
- b. The EEOC has stated that “once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation...”¹², and
- c. The Department of Health and Human Service’s flu.gov website states: “Once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than *de minimis* cost” to the operation of the employer’s business...)”.¹³

¹² The U.S. Equal Employment Opportunity Commission, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, III. B. 13., http://www.eeoc.gov/facts/pandemic_flu.html, citing Equal Employment Opportunity Comm’n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf>.

¹³ *May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?*, FLU.GOV, <http://answers.flu.gov/questions/4766>

The above statements suggest that hospitals do not have the right to scrutinize employees' religious beliefs as a condition of accommodation, but that interpretation is not explicit. It is, however, supported by the Constitutional concerns inherent in the act of hospital scrutiny. E.g., it is not realistic to presume that hospitals throughout the country will, absent further direction, necessarily apply proper legal criteria at all, but even if they do, it is unlikely that collectively they would be able to apply that criteria consistently and equitably. Furthermore, achieving the highest possible consistency would probably require clear guidelines, training and oversight for the scrutinizers. This is probably why many state vaccine religious exemption laws are worded so as to preclude the state from scrutinizing exemption applicants' claims at all. See, e.g., Department of Health v. Curry, 722 So.2d 874 (Fla.App. 1 Dist. 1998), and LePage v. State, 2001 WY 26, 18 P.3d 1177 (2001) (Departments of Health held to have exceeded their authority by scrutinizing vaccine religious exemption applicants' religious beliefs). Laws worded to prohibit governmental scrutiny of exemption applicants' religious beliefs are likely intended to avoid potential problems with the First Amendment's "free exercise" and "establishment" clauses, and the 14th Amendment's "equal protection" clause, to avoid the risk of violating the separation of church and state, and the fair and equal treatment of all exemption applicants. Accordingly, employers should also refrain from scrutinizing vaccine accommodation applicant's religious beliefs.

This makes sense practically as well. For hospitals to insist that every accommodation applicant be subjected to scrutiny is to assume that a significant number of hospital employee-applicants are dishonest or insincere. This is an offensive and unwarranted assumption. While lack of scrutiny of applicants' beliefs would likely result in the accommodation of a few disinge-

nuous applicants, to suggest that this would necessarily be a sufficiently high percentage of hospital employees to warrant scrutiny of all applicants is to call into question the integrity of the entire healthcare profession generally, as well as the employer's ability to adequately screen job applicants, generally. If healthcare employees can be trusted with responsibility over the lives and wellbeing of ill patients, surely they can be trusted to be honest about their religious beliefs. In addition, hospital scrutiny presumes that hospitals are objective, disinterested parties, when in fact most are adamant about maximizing employee immunization rates, regardless of the impact on individuals whose religious beliefs are compromised in the process. So, if scrutiny is to occur, hospital employers are not the proper entities to conduct it.

This is not to say that hospitals have no legitimate interest in the vaccination rates and status of their employees. But if sufficiently high numbers of healthcare workers request accommodation such that the total potentially non-immune workers, accommodated and vaccinated alike, raises serious medical concerns, the employer should probably scrutinize the underlying vaccine policy rather than the accommodation applicants; for who is better to judge the effectiveness of healthcare policies than the healthcare workers themselves?

But hospital interests needn't go unaddressed. For example, many states require unvaccinated children to stay home from school during a local outbreak, for the incubation period of the outbreak disease. Indeed, state laws can even require exempt persons to be vaccinated in declared emergencies. While the stay-home-from-school policies don't hold up to scrutiny (the 5% - 15% of non-immune, vaccinated children do not have to stay home, while the 1% to 2.5% of exempt children do; where there are religious exemptions involved, this raises a potential religious discrimination con-

cern), it is, nonetheless, common practice currently. Thus, if lack of immunity truly poses a significant health risk (or creates a severely high enough fear level in misinformed hospital personnel and/or patients), healthcare institutions could potentially implement policies similar to those in place for exempt school children, so long as such policies are applied fairly and objectively.

If the EEOC should ultimately determine that scrutiny of exemption applicants' religious beliefs in this context is necessary despite the above-cited concerns, such scrutiny should be centralized as much as practicable and be performed by properly trained persons, with oversight, to ensure the greatest possible fairness to employees and consistency for all concerned. Toward this end, the task should not be delegated to hospitals staff, to avoid the conflict of interest between employee rights and hospital goals of maximizing the immunization rates of their employees.

Whether or not employee religious beliefs are scrutinized, consistency in the application of Title VII law may be enhanced by the creation of a form for this specific accommodation context. If scrutiny is deemed necessary, a detailed procedure may facilitate consistency as well.

4. May hospitals require employee-applicants to have the support of a religious official?

No. Federal precedent in vaccine religious exemption cases provides for First Amendment protection of any sincerely held, religious belief opposed to immunizations, regardless of whether or not the holder is a member of an organized religion. See, e.g., Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 99 (E.D.N.Y., 1987), "...limitation of the availability of a religiously-based exemption from immunization to 'bona fide members of a recognized religious organization'

whose doctrines oppose such vaccinations violates both the establishment and free exercise clauses of the First Amendment to the United States Constitution”; Mason v. General Brown Cent. School Dist., 851 F.2d 47, 51 (2nd Cir. 1988), (quoting United States v. Seeger, 380 U.S. 163, 166, 85 S.Ct. 850, 854), “it is sufficient if the belief ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’”; and Farina v. The Board of Education, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) (citing Sherr, 672 F. Supp. at 91), holding that the “beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization.”

5. May hospitals refuse to accommodate an employee’s religious objections to immunizations if, in addition to presenting qualifying religious objections to immunizations, the employee also submits non-religious, “anti-vaccine” information?

This question essentially asks whether or not an otherwise qualifying religious objection is automatically disqualified if it is accompanied by non-qualifying objections to immunizations. In the Requestor’s experience, many healthcare employees have independently researched the safety and efficacy of flu shots and have found what they believe to be credible information weighing against the implementation of mandatory influenza vaccine policies. Some employees have shared this information with their employers, hoping to engage the employer in an open policy discussion, only to have the employer reject their simultaneously- or subsequently-submitted religious accommodation request. These rejections imply bias on the employer’s part, an assumption that being “anti-vaccine” means that one’s religious objections are, necessarily, insincere. However, this conclusion is misplaced. One could just as easily infer that insofar as an applicant believes that there

is credible research opposed to immunizations, such research, taken together with a religious belief that is opposed to immunizations, simply proves that “God is right.” The point is that hospitals, having a contrary agenda, are predisposed to finding reasons to reject an employees’ accommodation request. Therefore, not only should hospitals not engage in the practice of scrutinizing employees’ religious beliefs, but if an employees’ beliefs are to be scrutinized by a third party, an employee’s “anti-vaccine” position should neither add to nor detract from the assessor’s scrutiny. An employee either has qualifying religious beliefs or not. Other information is immaterial unless it clearly and directly contradicts the religious belief assertions.

Healthcare employees consistently report that their employers give them no direction as to the employer’s criteria for religious accommodation. So, if the Chairman deems that scrutiny is necessary and appropriate, the creation of a form and/or drafting of detailed procedure information could be very helpful to all concerned.

6. May employers require non-vaccinated employees, whose non-vaccinated status is due to the employee’s religious objections to immunizations, to wear masks? Are there boundaries beyond which such mask policies are discriminatory?

Many of the Requestor’s healthcare worker clients report that their employers require non-vaccinated employees to wear a mask during flu season, and often in ways that are both highly inconvenient to the non-vaccinated employees and well beyond federal agency recommendations. In some instances, masks substantially interfere with employee job functions and duties. Some employees report that they are required to wear a mask throughout their entire shift for up to eight consecutive months, throughout the (employer’s definition of the) entire flu season. Such overreaching poli-

cies appear to be deliberately punitive and coercive in nature and intent. As such, they raise legitimate discrimination concerns where such policies are requirements imposed on accommodated employees.

The DHHS and CDC have said, regarding healthcare professionals (HCP): “If symptoms such as cough and sneezing are still present [following influenza infection], HCP should wear a facemask during patient-care activities,”¹⁴ and “[w]hile a facemask may be effective in blocking splashes and large-particle droplets, a facemask, by design, does not filter or block very small particles in the air that may be transmitted by coughs, sneezes or certain medical procedures.”¹⁵ Accordingly, a face mask requirement for any situation other than direct patient contact may be excessive. In fact, some experts find no merit in face masks requirements at all. The Director of the AAPS recently stated: “Those who are vaccinated could transmit influenza or other infectious disease just [as] an unvaccinated person could. The mask requirement seems to be nothing more than a punitive retaliation against those who decline the vaccine. The mask requirement should be dropped.”¹⁶ Accordingly, the more extreme mask policies, if not all mask policies, raise discrimination concerns, and some direction for the industry needed accordingly.

7. Must hospitals accommodate a pregnant employee’s request to refuse vaccines during the employee’s pregnancy under Title VII?

Requestor clients reported that hospitals refusing pregnant employees’ requests for temporary exclusion to flu shots due to the uncertain affect of

¹⁴ Federal Register/Vol. 75, No. 119/Tuesday, June 22, 2010/Notices, p. 35500

¹⁵ Federal Register/Vol. 75, No. 119/Tuesday, June 22, 2010/Notices, p. 35503

¹⁶ Same as Note 9, supra: Letter to Colorado Public Health Officials on Mandatory Influenza Vaccine for Healthcare Workers, AAPS, Dec. 14, 2011, http://www.aapsonline.org/index.php/site/article/colorado_influenza_letter/

vaccines on unborn fetuses. Flu vaccine package inserts point out the lack of “adequate and well-controlled studies in pregnant women”¹⁷ and that it is unknown whether or not the vaccine will cause fetal harm or affect reproductive capacity. In addition, the CDC recommends that pregnant women generally not be vaccinated.¹⁸ So, if this situation is one that potentially qualifies as a Title VII sexual discrimination concern, or one that otherwise may fall within the EEOC’s jurisdiction, EEOC guidelines in support of pregnant women and their unborn children could help avoid unnecessary, potentially tragic harm to unborn children and/or pregnant mothers (in the worst case scenario, should such harm actually occur), and expectant mothers’ corresponding, severe distress about that possibility (in the best case scenario, where such harm does not actually manifest); and the job loss resulting from those instances in which pregnant women choose to put the safety of their unborn children above the myopic vaccination demands of their employers.

8. Does a healthcare employee’s receipt of vaccines in the past, in and of itself, relieve the employer of the obligation to accommodate the employee’s present request for religious accommodation?

No. Some of the Requestor’s clients’ requests for accommodation of their religious objections to immunizations have been denied due to the employees’ receipt of vaccinations previously. However, Lewis v. Sobel, 710 F. Supp. 506, 515 (S.D.N.Y. 1989) (quoting Allanson v. Clinton Cent. School Dist., No. 84-174, slip. op. at 15 (N.D.N.Y. May 7, 1984), held: “It is not for the court to determine how devout a follower [an exemption applicant] is;

¹⁷ Package Inserts and Manufacturers for some U.S. Licensed Vaccines and Immunoglobulins, http://www.vaccinesafety.edu/package_inserts.htm

¹⁸ Guide to Vaccine Contraindication and Precautions, CDC, <http://www.cdc.gov/vaccines/recs/vac-admin/downloads/contraindications-guide-508.pdf>

rather, it need only determine that a sincere religious belief underlies their present claims. [sic]” Individuals may have been vaccinated in the past despite religious objections if they felt pressured into it at the time or were not aware that they had a legal right to refuse the vaccine. (The latter of these appears to occur often in the Requestor’s experience.) Additionally, people’s religious beliefs can and often do change over time as well. While consistent application of one’s beliefs over time *may* be an indication of sincerity of the beliefs, it would be inappropriate to *require* consistency over time, as this necessarily would exclude a qualifying present belief of any employee who was recently vaccinated. Besides, at what point after one’s last vaccine could one’s subsequent objection to vaccines be deemed to be sincere—and according to what criteria? What matters, legally, is whether or not the applicant has, *at the time the application is made*, the requisite, sincerely held religious belief(s) or practice opposed to immunizations, and not what the applicant’s beliefs or practices were in the past, or how well the applicant adhered to his or her beliefs or practices in the past.

9. Does an employer’s Title VII obligation to accommodate employees’ religious objections to immunizations apply to contract employees, hospital salespeople, pharmacists, and other employees in the healthcare field who are also increasingly being required to be vaccinated?

Yes. The Requestor has encountered at least one instance where a contract employee was denied a religious accommodation due to the employee’s status as “contract employee.” Whether or not Title VII makes a distinction between contract and non-contract employees, this raises a potential 14th Amendment equal protection concern, as functionally, there may be no significant difference between contract and non-contract employees working in the same hospital, or between an internal hospital employee and

a visiting salesperson with regard to the health concerns involved. A potentially confusing question arises, however, when, e.g., a hospital salesperson's employer's accrediting agency, and not the salesperson's employer directly, requires vaccines. However, since the result is the same—that the employee is required to be vaccinated to set foot in a hospital—such employees are similarly situated to “regular” hospital employees, and should have the same Title VII rights accordingly. Regardless, clarification of the scope of Title VII as it pertains to the variety of healthcare and healthcare-related employment contexts could go a long way to supporting consistent and lawful application of Title VII accordingly. Indeed, an Opinion on these issues would be beneficial to potentially many millions of employees outside of the healthcare industry if it also referred, explicitly, to the application of Title VII to non-healthcare industry employees, too, as vaccines are likely to be increasingly required of more and more employees in many different fields. Probable upcoming employment categories include teachers, daycare providers, store clerks—anyone who has regular contact with children or the general public. While perhaps not justifiable scientifically, the market potential is enormous, and increasing vaccine requirements is, in any event, a decades-long trend in American policy and law.

10. Does an employer's Title VII obligation to accommodate employees' religious objections to immunizations apply to college students doing clinical work in local hospitals as part of a college healthcare curriculum?

Yes. In the Requestor's experience, colleges, universities and healthcare institutions have been particularly resistant to allowing students doing clinical work in hospitals as part of their school curriculum requirements to refuse hospital-required vaccines for religious reasons, and virtually always reject students' request for accommodation in the Requestor's experience,

even when an attorney is involved. However, Title VII makes it unlawful for employers “controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his . . . religion . . . in admission to, or employment in, any program established to provide apprenticeship or other training.” 42 U.S.C. § 2000e-2(d). So, hospitals must accommodate students in this context just as they must accommodate employees. This specific situation desperately needs authoritative direction, and the Chairman’s support via a published Opinion could help reduce the categorical, widespread, unlawful discrimination of college students in this context.

11. Does an employer’s Title VII obligation to accommodate employees’ religious objections to immunizations apply to both state-mandated vaccines and employer-required vaccines?

A few states mandate some vaccines for healthcare workers, but there are few state vaccine exemptions laws for healthcare workers. Current exemption laws may address only state-mandated vaccines. However, since federal law supersedes state law, a worker’s Title VII rights arguably apply to state-mandated vaccines as well as employer-required vaccines.

CONCLUSION

In summary, the Requestor requests and proposes that the Chairman issue a published Opinion stating that healthcare employers (and where applicable, non-healthcare employers):

1. Must accommodate their employees’ religious objections to immunizations (unless it would pose an undue hardship as defined by Title VII); or, if the Chairman determines that such accommodation requirement is not absolute, clarification as to when such accommodation is required by the em-

ployer, and when such accommodation is optional, as it pertains to potential health risks of non-immune employees. Such policy recommendations should be equitable, taking into account the concerns addressed hereinabove; and that Title VII accommodation applies to both public and private health-care employers, with clarification as and if needed as to the applicability of Title VII to each;

2. Must accommodate any qualifying religious belief, and that qualifying beliefs include any sincerely held, religious belief, regardless of whether or not the belief or believer is affiliated with any organized religion;

3. May not scrutinize their employees' religious beliefs; or, in the event that the Chairman finds that scrutiny of employees' religious objections to immunizations is necessary and appropriate, a statement identifying necessary and appropriate scrutiny criteria and procedure for such scrutiny that addresses the above-cited concerns, such as the consistent and lawful application of scrutiny criteria;

4. Or any scrutinizing third party, may not lawfully require employees with religious objections to immunizations to provide support from a religious official or leader to qualify for accommodation, or reject an accommodation request based solely on the lack thereof;

5. Or any scrutinizing third party, may not reject any otherwise qualifying employee accommodation application on the basis of the employees' anti-vaccine beliefs, or due to the employee's otherwise providing non-qualifying information;

6. May not impose a mask requirement for accommodated employees; or, if the Chairman finds that a mask policy is appropriate, may not exceed DHHS and CDC guidelines and recommendations, or such other guidelines and recommendations as the Chairman may deem necessary and appropriate;

7. Must accommodate a pregnant employee's request for accommodation of her medically-based objections to immunizations during pregnancy, for the duration of the employee's pregnancy;
8. May not reject an otherwise qualifying employee accommodation request based solely on a requesting employee's receipt of past vaccines;
9. Must accommodate qualifying religious objections to immunizations of similarly situated contract employees, hospital salespersons, pharmacists, and other similarly situated healthcare workers, regardless of whether or not they are traditional employees or employed directly by the hospital(s), accrediting agencies, or other entities imposing the vaccine requirement; or, if the Chairman finds otherwise, clarification as to which healthcare employees' religious objections to immunizations must or may not be accommodated;
10. Must accommodate college students doing clinical work in local healthcare institutions a part of a college healthcare program or curriculum the same as they must accommodate employees;
11. Must accommodate employees' qualifying religious objections to state-mandated vaccines the same as employer-mandated vaccines.

The Requestor further requests that the Chairman consider supporting the creation of a Vaccine Accommodation Request Form; a detailed plan or recommendation for the centralization of the scrutiny of accommodation requests, if scrutiny is deemed necessary and appropriate; and/or any further measures the Chairman may deem necessary and appropriate to address the concerns and questions set forth hereinabove, or any other relevant concerns.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Alan Phillips". The signature is written in dark ink on a light-colored, slightly textured background.

Alan G. Phillips, Esq.
P.O. Box 3473
Chapel Hill, NC 27515-3473
North Carolina State Bar No. 30436
919-960-5172
attorney@vaccinerights.com