



Retailers' Obligations to Accommodate Work Schedules that Conflict With an Employee's Religion

Insights

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Federal law's obligation to accommodate religious observances and practices has been in the spotlight recently because of employees seeking to be exempted from employer mandatory vaccination policies when the vaccine requirement conflicts with religious beliefs. But with the labor market still recovering from the pandemic and workforces often being shorthanded, a lesser-publicized issue is also becoming more common: employees asking for accommodations to their schedules to meet religious obligations.

In the past, many retail employers have been willing to juggle schedules around their employees' religious needs as it was not difficult to manage. But with fewer employees to cover the same number of shifts, granting these requests increases the burdens on co-employees. In some cases, it could leave a business unable to operate. It is therefore important to understand what you are obligated to accommodate and when an employer can say no – especially as we head into the busy holiday season.

The Basics

The accommodation obligation is found in Title VII's definition of "religion." Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Determining if a requested accommodation is required is a two-step analysis:

- First, it must be determined whether the employee has a sincerely held religious belief that conflicts with a requirement of employment.
- Second, it must be determined if an accommodation exists that would remove the conflict and not cause the employer an undue hardship.

Step One: Determining Religious Belief

Delving into an employee's religious beliefs is a difficult process and one that should be avoided if possible. Nevertheless, if you wish to deny an accommodation that could be reasonable and not pose

an undue hardship, it is a permissible exercise.

In making this assessment, the first step is to determine if the employee's belief is "religious." To be "religious," an employee's belief is not required to be a tenet of a formal religious organization, it can be religious-like. When faced with a non-formal recognized religious belief, courts require that the employee's belief be part of a comprehensive belief system involving questions of deep and imponderable matters that can be recognized by the presence of formal and external signs. If faced with an accommodation request based on such a non-formal religion, it is prudent to obtain counsel.

Many cases of scheduling issues arise from the practices and beliefs of common religions. In these cases, the tenets of the religion are usually available through publications and websites. Therefore, it is not difficult to determine that a Roman Catholic is obligated to attend Mass weekly. In these cases, the question is not about the religious belief, but rather whether it is sincerely held. According to the EEOC, if circumstances provide reason to question an employee's sincerity, you can ask for third-party verification of the employee's belief. This does not need to come from a minister but can come from anyone who is familiar with the employee and their beliefs.

Step Two: the Accommodation Process

If there is no issue with an employee's beliefs, you must consider an accommodation. Generally, an accommodation can take place in two fundamental ways:

- an employee can be accommodated in their current position by changing the working conditions, or
- you can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise.

If more than one possible accommodation exists, you are only required to offer one possibility and have no duty to provide the employee's preferred accommodation. Only if an employer refuses any accommodation does the question of "undue hardship" arise.

Undue Hardship as Outlined by the SCOTUS

The Supreme Court held an undue hardship exists when an employer bears a more than *de minimis* burden to grant an accommodation. This is a significantly lower threshold than the Americans with Disabilities Act's undue hardship concept. In that Supreme Court case, it is interesting that the accommodation at issue involved a request to not be scheduled to work during a particular time for religious reasons.

The plaintiff was a member of a religion who prohibited working from sunset Friday to sunset Saturday. The facility where he worked operated 24 hours a day, 365 days a year. Days of work and shifts were governed by a collective bargaining agreement based on employees' seniority. When the plaintiff changed work locations, he did not have sufficient seniority under the CBA to avoid being

plaintiff changed work locations, he did not have sufficient seniority under the CBA to avoid being scheduled for work conflicting with his religious obligations. He requested the employer make arrangements for him not to be scheduled which would necessarily have involved another employee being required to work his shift. The employer asked for volunteers to fill the shift, but none was found. The employer refused to require an employee to work in the plaintiff's place and discharged the plaintiff when he failed to appear for a Saturday shift.

The Supreme Court first concluded that any accommodation that would have required the employer to violate the collective bargaining agreement's seniority provisions was not required. It reasoned without an express statement from Congress that Title VII's religious accommodation obligation trumped the national labor policy embodied in collective bargaining agreements, Title VII could not trump the terms of the CBA. The employee had offered two alternatives that did not require violating the CBA. The first was to have the employer offer premium pay to entice a volunteer replacement. The second was to have a supervisory employee fill his place. The Court rejected both suggestions finding that both would involve costs to the employer in the form of either lost efficiency or higher wages and that these impacts had more than a *de minimis* cost.

Examining Scheduling Issues More Closely

Since that case, courts have almost uniformly rejected claims that an employer violated Title VII by refusing to provide an employee with a permanent schedule not conflicting with his religious beliefs. There are common facts existing across these cases.

- First, most religious conflicts with work schedules involve weekend days that are typically considered less desirable workdays for all employees. Courts have thus routinely found a proposed accommodation unreasonable if the requested schedule would result in co-employees being required to work more weekend days.
- Second, in most of the cases, there was either a seniority system in place or a scheduling practice that attempted to distribute weekend work evenly among employees. This brought the impact on co-employees to the fore. It is unclear whether a system that did not have these characteristics, but instead simply arbitrarily assigned work shifts, would be treated the same.
- Finally, in virtually all the cases, the employer allowed the employee to seek shift swaps with their co-employees whenever the scheduling resulted in a conflict with the employee's religious obligations. Allowing shift swaps is a reasonable accommodation. Courts have been clear, however, that an employer cannot be required to compel employees to make these swaps and an employee's inability to find swap partners did not make that accommodation unreasonable. One caveat should be emphasized. In some cases, an employee's belief against working a Sabbath Day includes a belief that asking others to work on the Sabbath is also wrong. In these cases, courts have concluded employers are obligated to undertake the burden of seeking volunteers for the shift swap. Employers' allowing employees to use available time off to miss conflicting shifts has also been concluded a sufficient accommodation.

The Final Word: the Interactive Process

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While these cases seem consistent, courts rarely miss the opportunity to note that each accommodation request is unique and must be considered individually. And there have been rare cases where a company's response to a request for a schedule change with an offer to allow an employee switch shifts was deemed potentially insufficient.

Thus, it remains important to conduct an interactive process each time a religious accommodation request is received. When considering a request for a schedule change for religious reasons, you should consider all the possibilities that would remove the conflict between the employee's schedule and the employee's religious observance. For example, if your store has set weekly schedules (i.e., some employees work Monday through Wednesday and others Thursday through Saturday), one of the schedules would allow the employee the requested time off, and there are open positions in that schedule, moving the employee to the other schedule might be the appropriate accommodation in that case.

It is also important to get the employee seeking the accommodation to submit proposed accommodations. While courts have made clear an employer may provide any reasonable accommodation if more than one exists, considering what an employee proffers is an important part of the process. Employers who thoroughly examine options are most likely to be found to have met their ultimate accommodation obligation.

Ultimately, the employer has the right to choose among the reasonable accommodations available and an employee who refuses such an accommodation and quits instead will not have a valid claim of failure to accommodate.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any member of our [Retail Industry Practice Group](#).

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