

TO: Air Marshal Association Membership

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DATE: September 30, 2021

CLIENT
MATTER: LEOS – 67411-383052

SUBJECT: Continuing Development of the Federal Vaccine Mandate and Implications for Exemption from Vaccination.

The Federal Government is continuing its rollout and issuance of guidance regarding mandatory COVID-19 vaccination for all federal employees, including all members of the Transportation Security Administration. On September 24, 2021, the Biden administration issued its latest vaccine guidance that covered federal contractors and subcontractors. Pursuant to that guidance, covered contractor employees must be fully vaccinated no later than December 8, 2021.

Also on September 24, 2021, Administrator David Pekoske issued a workforce communication regarding the FAM Service compliance with the Biden vaccination mandates. In that communication, Administrator Pekoske indicated that members of the FAM Service must be fully vaccinated on or before November 22, 2021. This includes all employees having received both doses of the Moderna or Pfizer vaccines, or the single dose Johnson & Johnson vaccine by November 8, 2021. The Administrator's memorandum acknowledged that in certain circumstances members of the FAMS may request a reasonable accommodation relating to the vaccine mandate due to a physical disability as defined by the Americans with Disabilities Act and/or requesting an accommodation based on a "sincerely held religious belief." Accommodations and vaccine exemptions based upon a disability are set forth in the regulations implementing the Americans with Disabilities Act. Typical physical conditions allowing certain exemptions from mandates are cancer, multiple sclerosis, muscular dystrophy and schizophrenia. The majority of active employees of the FAM Service are not eligible for physical disability exemptions based upon the conditions of their employment.

With respect to the religious exemption from vaccination, the steps which the TSA must adhere to are uniform and entail the following:

1. The employer must determine whether requests for religious exemption from COVID 19 vaccination is in compliance with existing policies regarding religious exemptions for other issues.
2. The employee who requests exemption from vaccination must have that application reviewed by the employer to determine if it should consider the accommodation. A request for exemption simply due to personal preference not to receive the vaccination is not protected by law, and the employer can reject such applications unless they implicate sincere religious beliefs or physical disabilities.

3. The employee need not use particular verbiage when requesting an accommodation. Managers and supervisors should understand how to recognize a request for accommodation and who to relay the information to within the agency. The Air Marshal Association has prepared the attached template for Request For Religious Exemption from COVID-19 vaccination form for members of the Air Marshal Association for your use.

4. After receiving a request for exemption, the employer must engage in a process in which the employee, his or her health care provider or religious leader, and the employer share information about the nature of the disability or religious belief and the limitations on receiving an employer-required vaccination. This requires a good faith effort by the employer and the employee to discuss the particular request. The review process entails review of any accommodation requests, written statements provided by the employee or medical personnel/religious advisors, and other information submitted.

5. For religious accommodations, the employee should be prepared to provide an explanation of his or her sincerely held religious beliefs and, if necessary, corroborating documentation from his or her religious leaders regarding the religious belief that conflicts with the mandate.

6. The law requires employers to accommodate only religious beliefs that are "sincerely held." Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincere belief. If, however, the employer determines that the employer has an objective basis for questioning the religious nature or the sincerity of the particular belief, the employer may be justified in seeking additional supporting information.

7. Even if the employer determines that the religious exemption request is sincere, the ADA still allows employers to deny such requests if it imposes a direct threat to the health and safety of others. Decisions based on undue hardship to the agency are scrutinized and may result in additional claims or administrative action. The EEOC has issued guidance which states that "if an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean that the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state and local authorities." There is no clear guidance or instruction from the government to date as to whether a religious exemption from COVID-19 vaccination would be justification for removal from the federal service or termination of employment.

8. Upon a full review of the petition for exemption, the agency must notify the employee in writing that the accommodation has been approved for denied.

All members of the FAMS should undertake deliberate consideration before seeking a religious exemption from the COVID-19 vaccination. Religious exemptions, as a general matter, have a long history in this country that values religious freedom. A test is, plainly, only the sincerity of the religious belief. Even if the religious claim makes little sense or is not the actual teaching of a recognized religious group or denomination, what matters is the individual's sincerely held belief.

To determine the validity of a religious exemption petition, the EEOC has identified four factors for an employer to consider when evaluating the sincerity of an employee's religious exemption claim:

1. Whether the employee has acted in a way that is inconsistent with the claimed beliefs;
2. Whether the employee is seeking a benefit or an exception that is likely to be sought for non-religious reasons;
3. Whether the timing of the request is questionable; and
4. Whether the employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

It is difficult to identify dishonesty among those who may fabricate religion to avoid vaccination. However, most major religious denominations in the United States do not oppose the vaccine. That alone does not preclude an individual's personal, subjective faith-based belief against taking the vaccine.

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