



Shifting Return to Work Issues: Challenges and Solutions For Midwest Employers

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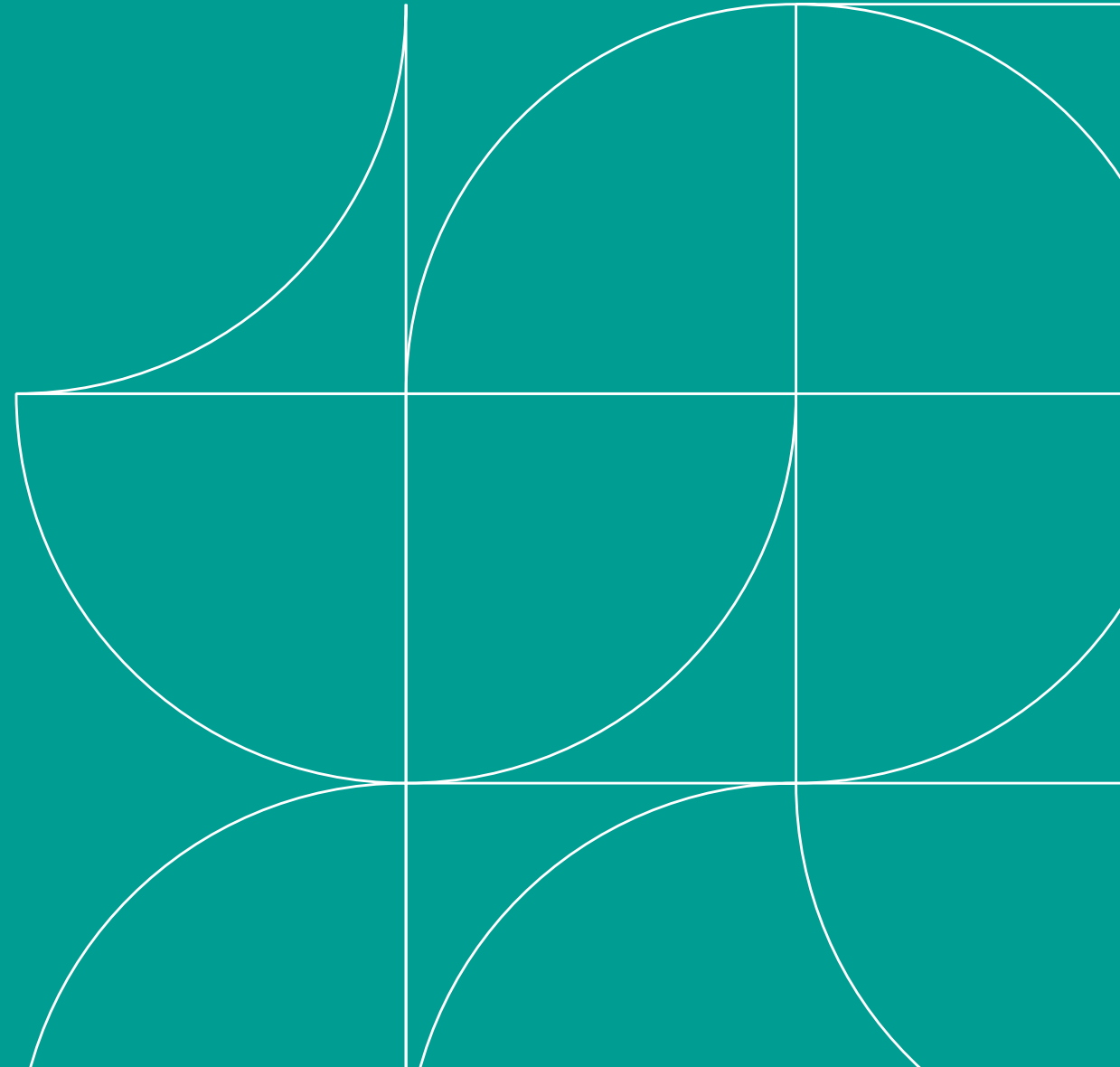
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Agenda

- 01** Biden Vaccine Plan / OSHA ETS
- 02** COVID-19 Mandatory Vaccine Exemption Accommodation Process and Requests
- 03** Employee Testing

BIDEN VACCINE PLAN

- Federal Contractor Mandate (Safer Federal Workforce Task Force)

- Private Business Mandate (OSHA)

Overview of Task Force Guidance

- Three Key Principles
- COVID-19 Vaccination of covered contractor employees
 - No testing option but does allow for accommodations for medical and religious reasons
- Compliance by individuals, including covered contractor employers and visitors, with masking and physical distancing requirements in covered contractor workplaces
- Designation by covered contractors of person(s) to coordinate COVID-19 workplace safety efforts

Overview of Task Force Guidance

- Important Definitions
- Covered contracts – any contractor or contract like instrument that incorporates the clause described in EO 14042
 - refers to definition of covered contract in DOL proposed rule on minimum wage for contractors
- Covered contractors – any prime or sub that is party to a covered contract
- Covered employees – any ee working on or in connection with a covered contract or working at a covered contractor workplace (which includes employees not themselves working on or in connection with a covered contract)
 - remote employees covered by vaccine requirement but not masking/physical distancing requirements
- Covered contractor workplace – any location controlled by a covered contractor at which any employee working on or in connection with a covered contract is likely to be present during the period of performance

Overview of Task Force Guidance

- Important dates
- **October 8** deadline for FAR Council to provide for inclusion of clause
- Applies to new contracts, solicitations, or renewals after **October 15**
- **December 8** deadline for vaccination

OSHA Rulemaking and Emergency Temporary Standards

- Traditional Rulemaking
 - OSHA is required to provide:
 - notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the Federal Register; and
 - the public a period of time to comment on the proposed rules
 - Average time between publication of the Notice of Proposed Rulemaking until promulgation of a standard is 3 years, 3 months
- Emergency Temporary Standard
 - ETS permitted under Section 6(c)(1) of the OSH Act when:
 - employees are exposed to “grave danger” from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
 - the emergency standard is necessary to protect employees from such danger
 - Permits OSHA to avoid traditional rule making process
 - Automatically expires after six months
- Potential Legal Challenges

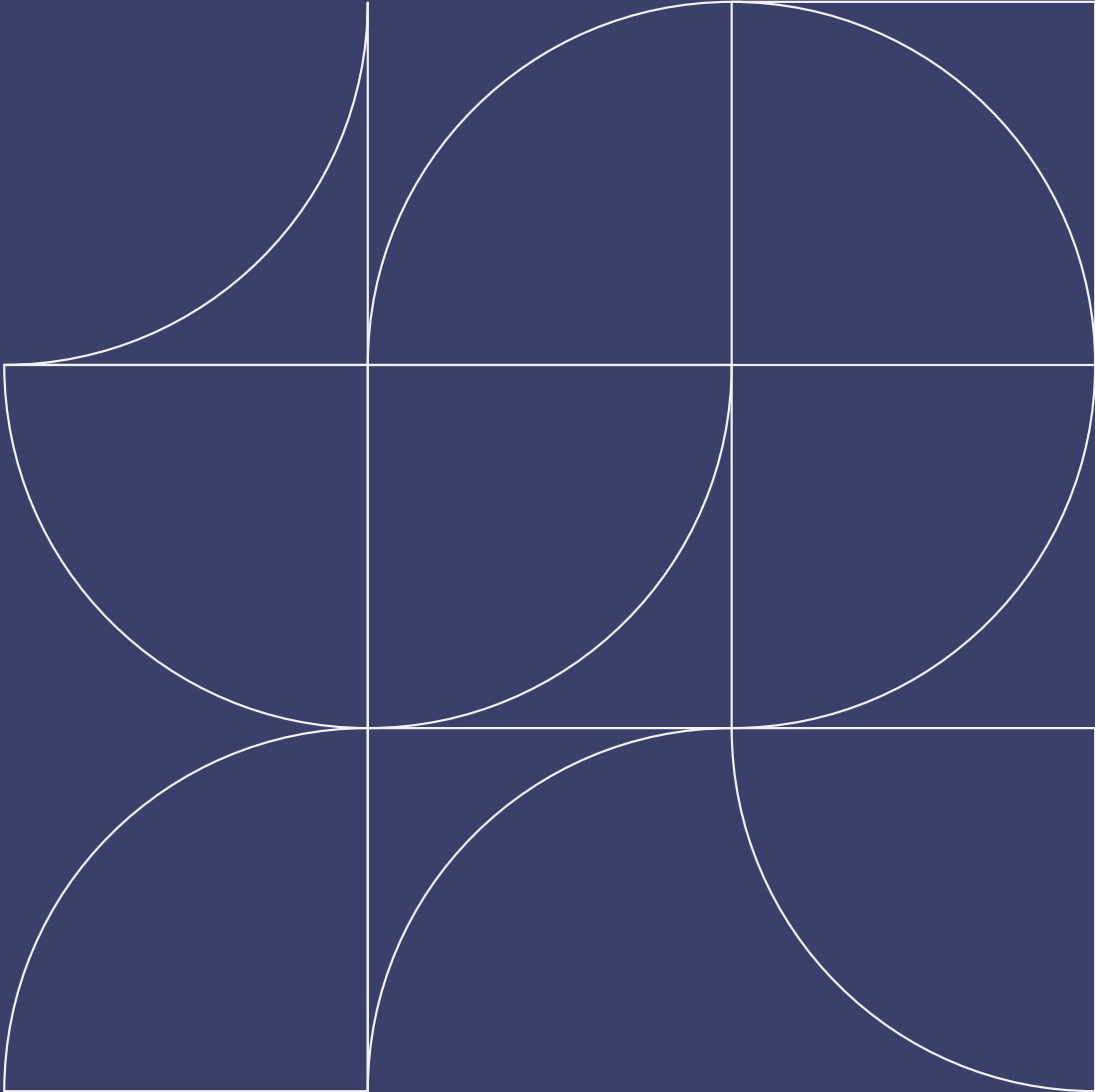
Overview of Proposed ETS

- All employers with 100 or more employees will have to require workers:
 - Are vaccinated; or
 - Undergo weekly COVID-19 testing
- Employers have option to require vaccinations with no testing option
 - except for accommodations
- Employers / employees covered
 - “100 or more employees” will be counted company-wide, not by worksite
 - Will likely include seasonal employees (employer should count peak employment during prior year)
 - The ETS will not apply to employees who never come in to work (i.e., fully remote)
 - Will apply to employees who come into work (even once) or who work outside the office with others
- Proof of vaccination will likely be met with attestation
- Employers will have to provide paid time off for vaccination

What's Next

- ETS will be issued in the “coming weeks”
 - Healthcare ETS took six months from announcement to becoming effective
 - Office of Information and Regulatory Affairs held over 40 stakeholder meetings prior to OSHA issuing its healthcare ETS
- Unanswered questions:
 - Compliance dates
 - Logistics and costs associated with weekly COVID-19 testing
 - Enforcement

**COVID-19 Vaccine
Requests for
Accommodation**



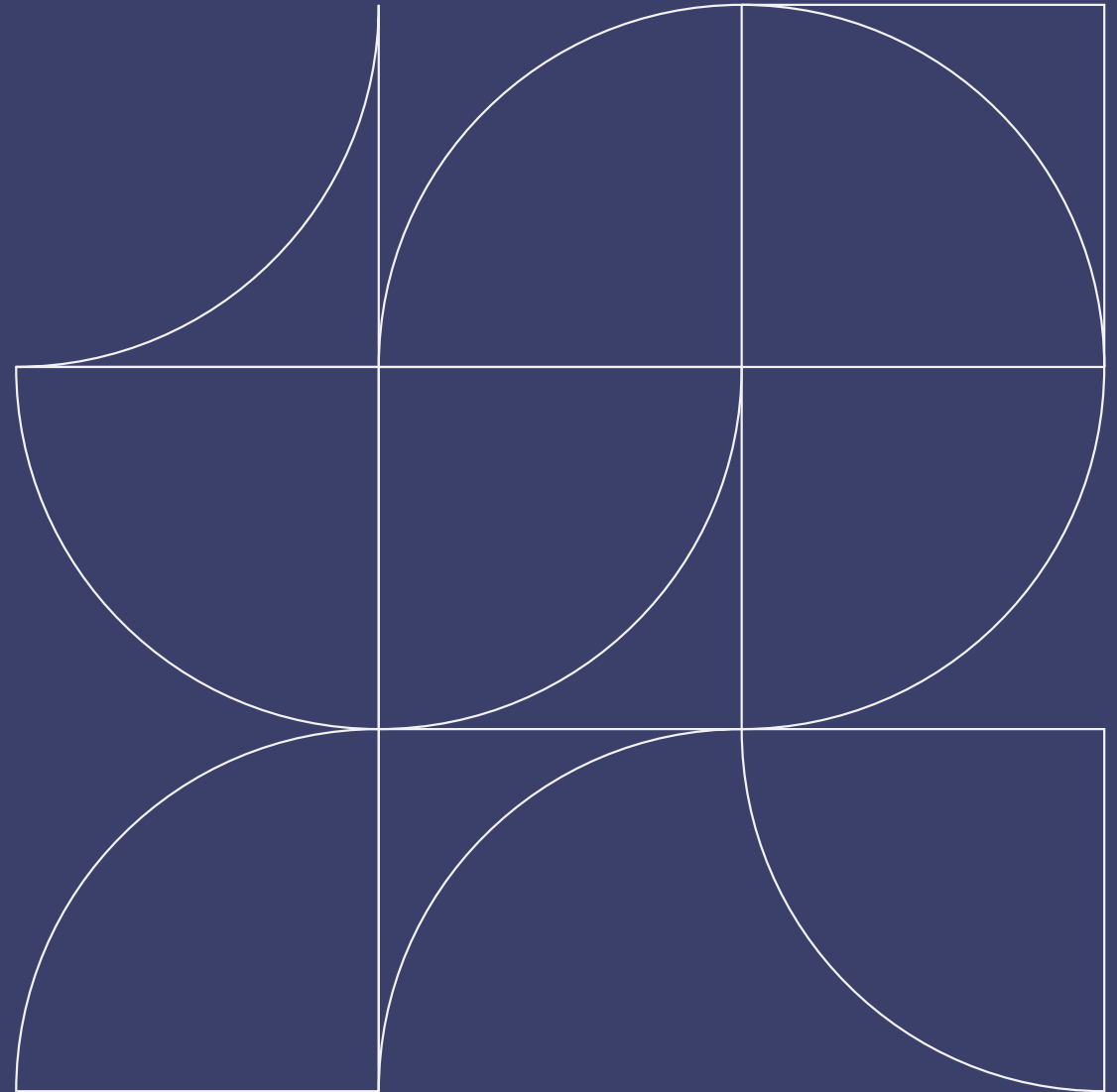
Vaccine Exemption Accommodation

- Mandatory COVID-19 vaccination policy allows employees to submit an accommodation request based on a disability or sincerely held religious belief.
- Those with disability-based requests should also be required to submit a completed COVID-19 vaccine-specific certification form from their medical provider
- Review request form to ensure it is complete. If information is missing, ask the employee to complete it. Once complete, share the form with the designated review team.

Vaccine Exemption Accommodation

- The reviewer(s) determine(s) if clarifying information/documentation is needed from the employee. If so, follow-up with the employee.
- If the review team has sufficient information, it approves or denies the exemption request.

Disability-based Vaccine Exemption Requests



Medical/ Disability-based Exemption Request

Evaluate whether Employee Has A Disability That Could Prevent Vaccination

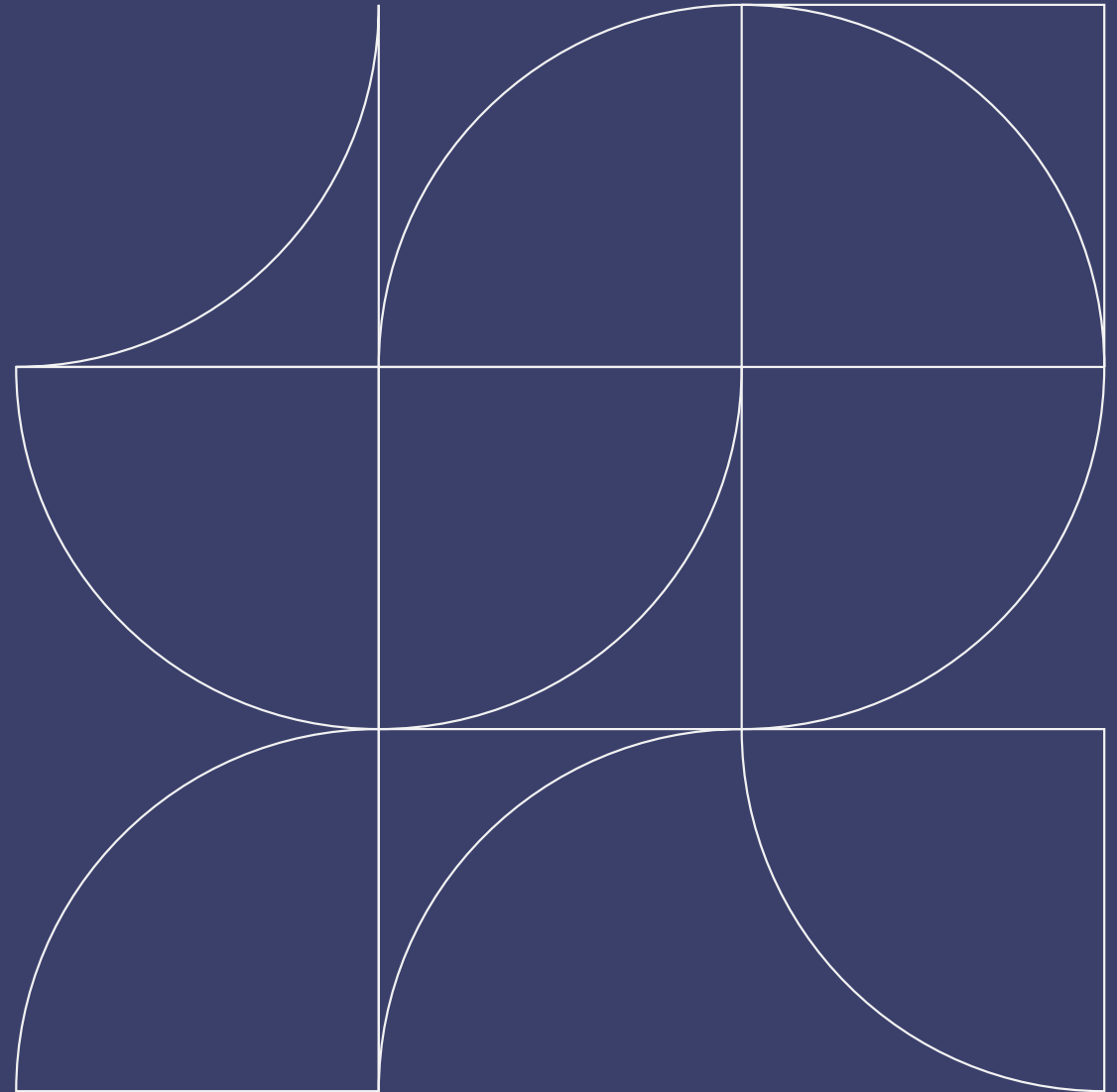
- **Anxiety** (not generalized fear; supported by medical certification)
- **Allergic reaction** (to a component of vaccine or prior vaccines where reaction was severe enough to cause anaphylaxis or hospitalization)
- Certain **autoimmune disorders**
- **Pregnancy/breastfeeding**
 - CDC says vaccine is safe for pregnant and breastfeeding individuals
 - Still, medical professionals differ

Medical/ Disability-based Accommodation

Consider Reasonable Accommodations

- Consider whether the Company can reasonably accommodate employee without undue hardship
- Undue Hardship:
 - Means significant difficulty or expense comparing the resources and circumstances of the particular employer with the cost or difficulty of providing a specific accommodation

Religious-based Vaccine Exemption Requests



Religious Accommodation Requests

- A religious accommodation is an adjustment to the work environment that will allow the employee to comply with his or her ***sincerely held religious beliefs***.
- An employer need not provide a reasonable accommodation if doing so would cause ***undue hardship*** on the conduct of the employer's business.
 - Under Title VII, this means an accommodation that would require the employer to bear more than a *de minimis* cost or burden
- Duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion.

“Sincerely Held Religious Belief”

Evaluate Whether Employee Has A (1) Sincerely Held; (2) Religious Belief

- Individualized, fact-specific inquiry
 - can be complex, difficult, not possible to generalize
 - the organized religions whose teachings even arguably conflict is very small. <https://www.vumc.org/health-wellness/news-resource-articles/immunizations-and-religion>
- Need not be organized. May be unfamiliar.
- **Consider whether employee’s belief, practice or observance prevents them from receiving vaccine** as distinguished from personal/secular beliefs
- **If doubt creeps in, what’s next:**
 - must have objective basis for questioning religious nature or sincerity in order to ask follow up Qs or request additional supporting information
- Consider reasonable accommodation using *iterative, interactive* process including *undue hardship* analysis
 - more than *de minimis* cost or burden to employer
 - lower burden than ADA

Religious Accommodation Requests

- If the employer reasonably needs more information, the employer and the individual should discuss the request.
 - The individual may need to explain the religious nature of the belief, observance, or practice at issue.
 - The employer should not assume that a request is invalid simply because it is based on religious beliefs or practices with which the employer is unfamiliar.
 - The employer should ask the individual to explain the religious nature of the practice and the way in which it conflicts with a work requirement.
- In determining if a conflict exists, it is irrelevant that the employer does not view the work requirement as implicating a religious belief, or that most people of the individual's faith would not; it is the individual's own religious beliefs that are relevant.

Religious Accommodation Requests

- Where request does not provide enough information to enable employer to make a determination, and employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.
- When requesting additional information, employees should provide information that addresses the employer's reasonable doubts.
 - That information need not, however, take any specific form; e.g. written materials or the employee's own first-hand explanation may be sufficient to alleviate employer's doubts about the sincerity or religious nature of the professed belief such that third-party verification is unnecessary.
 - Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested, it does not have to come from a clergy member or fellow congregant.
 - Rather, it could be provided by others who are aware of the employee's religious practice or belief.

Objective Basis to doubt:

- (1) Sincerely Held
or
- (2) Religious

Objective Basis Could Result from (among others):

- Employee’s admission they’re making it up
- **Maybe**: conflicting behavior (e.g. prior flu vaccine); prior statements denouncing religious affiliation; bought or printed certification off internet
- **Examples:**
 - Cannot undergo medical testing / procedures
 - Body as holy temple
 - “You can’t make medical decisions for me”
 - “My religion prevents me from wearing masks made in China”

Process Workflow: Follow-up

Potential Follow-Up Questions

One size does not fit all

- Tell me more
- Any additional information regarding your beliefs/observances/practices that support your request
- I respect what you believe but I need to better understand
- Why are other safety protocols (social distancing, masking, handwashing, testing) consistent with your religion but vaccination is not
- What is it about your religious beliefs or practices that prevents (vaccination, testing, masking)
- Where and how do you adhere to these beliefs/observances
- Have your beliefs have strengthened/diminished, when, why
- How does the policy/procedure conflict with your beliefs/practices
- Do you have a spiritual leader; did they address the issue for which you are requesting accommodation

Process Workflow: Follow-Up

Potential Follow-Up Questions

One size does not fit all

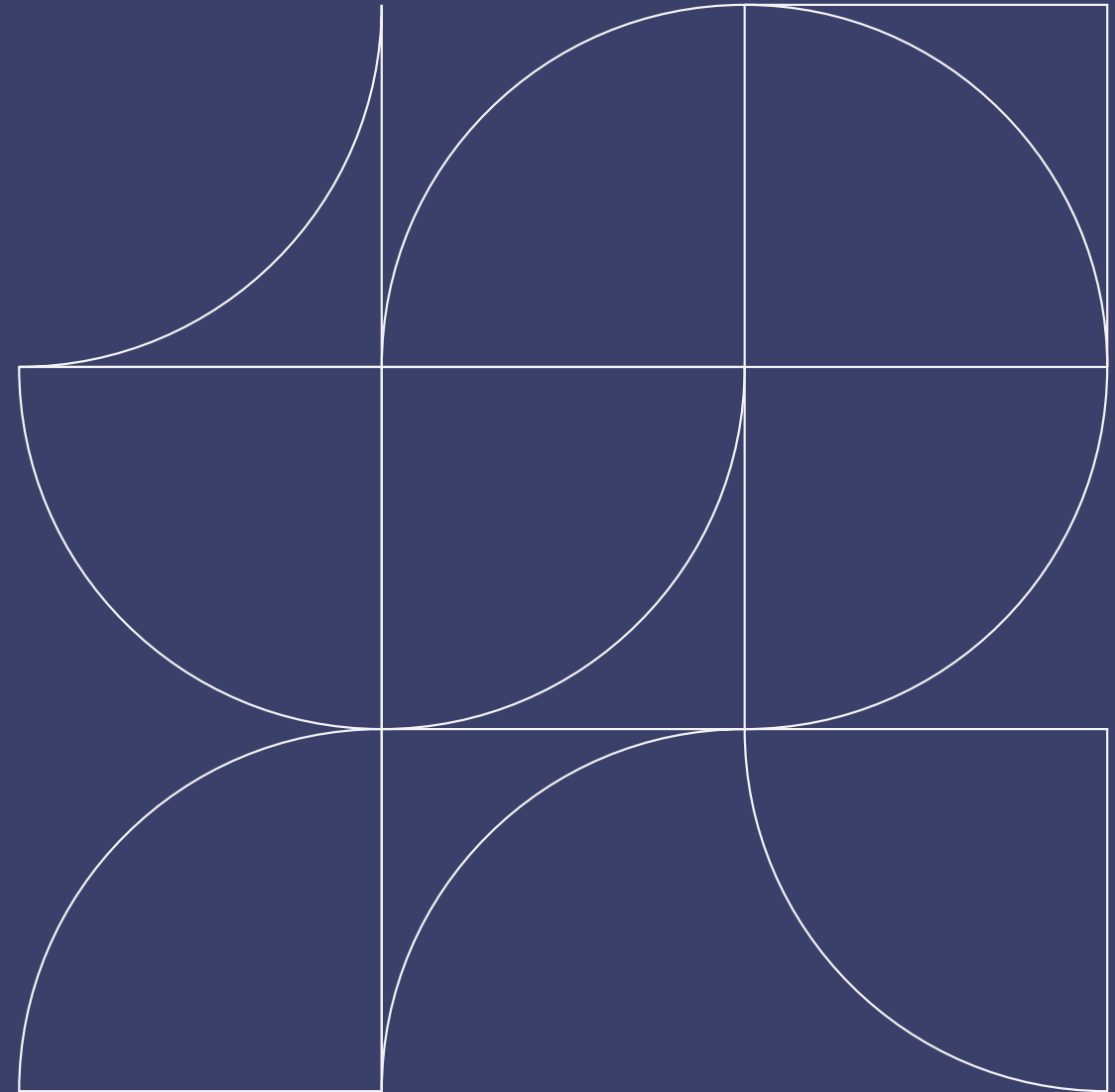
- Have you been vaccinated before, when, what's the difference
- Do your religious beliefs prevent you from vaccinating for the sake of helping others avoid COVID-19
- Are you aware that the COVID-19 vaccines are not prohibited by [the religion], which views getting the vaccine as an act of charity
- Taking into account that vaccination is not treatment for the virus, does vaccination still interfere with your beliefs
- Do your religious beliefs prevent you from being tested (which is not treatment, and only a test involving a nasal swab with no injection or skin piercing)
- If requested, could you provide documentation from a third person with whom you have no familial/close relationship in support of your request

Process Workflow: Decision – Common Issues

ONCE ALL THE INFORMATION IS IN HAND:

1. If employee says their religion is X, which prevents them from being vaccinated, and if you can show beyond doubt that religion X does not oppose vaccination?
 - IF that's the WHOLE RECORD with no other information, you probably can deny accommodation request.
2. But if employee presents support from someone with apparent authority on the teachings of X that says that religion opposes vaccination, or that religion respects an individual's interpretation that they can't be vaccinated due to certain tenets of religion X despite the general position of religion X?
 - You likely must accept. The employee does not need to present authority from a pastor or priest or someone else, but if they do that would be another piece of supporting evidence, and the employer should accept it.
3. Or if recognize letter as template sold on the internet?
 - That undermines the employee's credibility and therefore the sincerity of their beliefs. Absent any other information, you have a basis for denying the request. But, other information may support accepting as sincerely held religious belief.

Deciding Reasonable Accommodation for Those Meeting Exemption Criteria



Accommodation Decisions

- If employee meets the criteria for medical or religious exemption, you will then decide whether and how the Company can reasonably accommodate the employee without an undue burden to the Company.
- If employee does not meet the criteria for exemption, or you determine the Company cannot reasonably accommodate safely without undue hardship, what are the consequences for the employee?
 - Termination of employment?
 - Unpaid leave indefinitely?
 - Other?



Employee Testing

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Issues

- Compensability of testing time
- Reimbursement of costs of testing
 - expense reimbursement laws
 - medical exam laws
 - COVID specific guidance
- How often?
- Testing as an accommodation
- Test or Be Vaccinated Policy

**thank
you**

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