Employees are increasingly refusing, because of their personal beliefs, to follow private employers' policies, carry out supervisors' instructions or perform normal job tasks. For example, they have refused to serve gay customers, fill prescriptions for morning-after pills, sing "Happy Birthday" to restaurant guests, raise the American flag at the factory and even work on videogame software believed to be "too violent." Such refusals sometimes are based on overtly religious beliefs and other times on asserted feelings about the "rightness" or "morality" of the policies/instructions/tasks.

Given that private employers are forced with increasing frequency to deal with workplace "conscientious objectors," this alert reviews the most commonly applicable federal law as well as employers' legal obligations under it. It also considers various practical strategies for dealing with workplace "matters of conscience."

Applicable Laws

Numerous federal and state laws address "conscientious objection" in the workplace. Although some are applicable to governments and their agents (such as the Religious Freedom Restoration Act of 1993), and some only to certain occupations or in certain states (the federal Abortion Non-Discrimination Act; the Florida Civil Rights Act; the Illinois Health Care Right of Conscience Act), it is federal Title VII of the Civil Rights Act of 1964 that is applicable to most private employers in these situations. Most employers are generally familiar with Title VII, but the statute's applicability to "matters of conscience" may be less well-known and understood.

Title VII prohibits discrimination in all aspects of employment with respect to job applicants and employees because of their religious beliefs and practices — or because they do not have religious beliefs/practices. The law has been interpreted to require employers to provide reasonable accommodation for sincerely held religious beliefs in order to eliminate the conflict between religion and work unless such accommodation would cause undue hardship.¹

Employers may be sued for "religious discrimination" violating Title VII. Plaintiffs/employees must prove that they had bona fide ("sincerely held") religious beliefs that conflicted with an employment requirement, that they informed the employer (or it knew) of the beliefs and either (1) plaintiffs suffered adverse employment action because they failed to comply with the conflicting requirement, or (2) the company failed to remove conflicts between its requirements and plaintiffs' religious beliefs and practices. Employers typically resist such claims by showing that their actions were unrelated to "religion" or that accommodation was offered but refused or that it simply was not possible without undue hardship.²

Title VII’s requirements are simply stated. However, questions frequently arise as to what is "religious," what accommodations are "reasonable" or cause "undue hardship," what policies employers should implement and what should be the response to a refusal to work.

What Are "Religious" Beliefs and Practices?

"Religion" has been interpreted very broadly in the Title VII context. The courts, the Equal Employment Opportunity Commission (EEOC, the federal agency charged with enforcing Title VII) and state EEO agencies repeatedly have held that protected religious beliefs/practices include those arising not only from traditional organized religions (e.g., Christianity, Judaism, Islam and Buddhism) but also from faiths that are new, uncommon, have few adherents or have beliefs and practices generally thought to be illogical, unreasonable or "extreme." In deciding whether beliefs are "religious," employers cannot discriminate among workers who are theistic (those who believe in a God), nontheistic (those who hold ethical beliefs not related to a God) or atheistic (those who do not have or who reject religious beliefs). Nontheistic moral or ethical beliefs about "what is right and wrong" can be "religious" — and protected by Title VII — if sincerely held with the strength of traditional religious views. However, mere sincerity or strength of belief is insufficient if there is no "religious" component: beliefs are not "religious" if they...
simply are political or social or economic in nature, are personal preferences ("lifestyle choices") or are parental or social obligations.

Protected religious practices can include worship services, private prayer, wearing particular clothing or symbols or objects, proselytizing and/or performing or refraining from certain activities. A practice generally is found to be "religious" depending on motivation: the same practice (for example, wearing certain clothing, beards or tattoos or following particular dietary restrictions) may be followed by one employee for religious reasons and another for purely secular reasons.

Employers have the right to question whether an employee’s claimed practices or beliefs are truly "religious" and "sincerely held" (so as to require accommodation, discussed below). Most often there is no basis for doubt. However, if the employee acts in a manner significantly inconsistent with a professed belief or the accommodation being sought is particularly desirable for non-religious reasons or the "religious" request for accommodation follows closely the employer’s refusal of a similar request for reasons not then claimed to be "religious," an employer can reasonably be suspicious. Employers should be careful, though, because individuals’ beliefs may change over time (including their degree of adherence to such beliefs) and employees are not necessarily "insincere" because their personal practices deviate somewhat from normal doctrines of the professed faith.

What Accommodations Are Required?

The courts and the EEOC have interpreted Title VII to require employers to provide accommodations not only to eliminate conflicts between work and religion but also to allow religious expression in the workplace unless, of course, such accommodation would create "undue hardship."

An employee must notify the employer of a need for religious accommodation and must indicate that it is needed because of a conflict between religion and work. The EEOC has recognized that employees cannot simply assume the employer will know of or understand such requests, so the workers must be prepared to explain the belief/practices, to respond to questions and to cooperate in a search for an accommodation "reasonable" under the circumstances. In requesting accommodation, an employee need not use any particular words or phrases ("magic language") but only put the employer on notice. If an accommodation is not obvious, the employer must talk to employees about options and workers must provide additional information reasonably necessary to allow the employer to address the requests.

The employer is entitled to select the "reasonable accommodation." It need not agree to any particular accommodation proposed by employees, need not evaluate each accommodation proposed by them and need not give them a choice among several accommodations. To comply with Title VII, the employer only need offer one effective accommodation whether or not it was proposed or preferred by the employee. An accommodation generally is not considered "effective" if it does not eliminate the conflict between the employment requirement and religion: a partial accommodation — reducing but not eliminating the conflict — is insufficient if full accommodation would not create an undue hardship. For example, allowing an employee to be absent for alternate Friday night Sabbaths is not acceptable if allowing her to be absent every Friday night would not create an undue hardship. It is permissible for accommodations to result in some incremental cost or inconvenience for the employee if there are no alternative accommodations without such burdens. For example, courts have upheld religious accommodations in which job transfers resulted in lower pay or fewer benefits for the affected workers if there were no viable alternatives.

There are a variety of potential "reasonable accommodations," depending on the circumstances. The EEOC and courts have required (or approved) many different employer strategies for addressing employees’ religious beliefs but, in every case, the specific accommodation was chosen (or approved) based on the particular facts in order to eliminate the conflict between company requirements and religious beliefs. Depending on the circumstances, changing employees’ schedules or job assignments, allowing schedule swapping or lateral transfers, permitting use of vacation, sick and "comp" days to cover Sabbath absences, waiving dress/grooming requirements or workplace policies and procedures and permitting prayer and other religious expression in the workplace (including in designated, set-aside areas) can be effective "reasonable accommodations."

Title VII requires an employer to permit workplace employee proselytizing (advocating religious beliefs) to the extent that the employer allows other forms of personal expression that are not harassing or disruptive. However, proselytizing need not be permitted if it might result in potentially unlawful religious harassment of co-workers who find it unwelcome or if it otherwise unduly interferes with business operations.
When Does Accommodation Create “Undue Hardship”?

Title VII does not specify what “undue hardship” in religious accommodation will excuse an employer from implementing it. However, the EEOC and the courts have recognized that, unlike the “reasonable accommodation” required by certain discrimination laws, the hardship arising from a religious accommodation must be only “more than de minimis” — more than inconsequential or insignificant — before it is “undue” and thus not required of the company. (In contrast, the Americans with Disabilities Act’s “undue hardship” standard requires that an accommodation must cause “significant difficulty or expense” before the employer need not implement it.)

The employer can legitimately consider the requested accommodation’s burden on the business in deciding whether it creates “undue hardship.” The company may consider the size and nature of the workplace, the nature of the employee’s duties in light of the requested accommodation, the identifiable costs and disruptions in making the accommodation in light of the employer’s size and operating costs, the number of employees who will need similar accommodation and the number of employees affected by the accommodation.

Unfortunately, there is no bright line between “hardship” and “undue hardship,” because “de minimis” is yet another term not delineated in Title VII. However, the courts have found “more than de minimis” hardship in an accommodation (thus excusing the company from implementing it) if it affected the efficiency of the requesting employee’s or others’ jobs, infringed on others’ jobs or benefits or safety or resulted in others picking up the accommodated employee’s share of potentially dangerous or unpleasant work. The law is relatively clear as to any conflicts between proposed religious accommodations and seniority systems or union collective bargaining agreements: “undue hardship” has repeatedly been found where the accommodation would deprive other employees of job or shift preferences or other benefits guaranteed by a bona fide seniority system or collective bargaining agreement.

An employer considering the denial of requested religious accommodation because of “undue hardship” need not actually undertake the accommodation in order to show that its burdens are “undue,” but the company must be prepared to provide objective evidence in support of that contention. Simply asserting potential, hypothetical or “it could happen” costs/disruptions likely will be insufficient. For example, the EEOC has said that an employer cannot merely assume that other workers with the same religious beliefs may also seek the accommodation and thereby cause “hardship.” And an employer claiming “undue hardship” because the accommodation conflicts with “seniority” must be able to show that allowing co-worker volunteers to swap shifts with the employee seeking accommodation — a common “work around” routinely required by the EEOC — is not feasible. Further, co-worker complaints about accommodations being given to others are insufficient to prove “undue hardship”: the employer generally must show that granting the accommodation actually will affect the complainers’ rights or otherwise cause actual disruption of their work.3

The EEOC has said that employers must bear the normal administrative costs of implementing a religious accommodation. For example, the inconvenience and minor clerical costs of rearranging schedules to permit shift swapping likely are not “more than de minimis.” The EEOC has recognized that regular payment of overtime or the hiring of additional personnel to implement the accommodation is “undue.”

Employers can insist on compliance with reasonable, non-discriminatory policies and procedures, despite employee objections based on “religion” or “conscience” if accommodations are impossible or would create unwarranted hardship. If accommodation is not warranted or feasible, the employer may discipline (including discharging) the conscientious objector if it would punish non-religious refusals or disobedience in a similar fashion.

How Do Courts Apply Title VII Principles?

A recent decision by the U.S. Court of Appeals for the Eleventh Circuit illustrates the application of these principles in a workplace. In Walden v. Centers for Disease Control and Prevention, the court addressed claims of religious discrimination brought by a former counselor for an employee assistance program (EAP).

In that case, plaintiff/employee Marcia Walden had refused to counsel EAP clients engaged in same-sex relationships because she was a devout Christian who believed that such relationships were immoral. Ms. Walden also believed she could not lie to such clients by telling them “I don’t have the necessary experience and must refer you to another counselor.” As a result of her refusals, she was laid off —
not fired — but was encouraged to seek other jobs inside the company. Ms. Walden sued and asserted various claims, including religious discrimination in violation of Title VII. The lower court granted summary judgment for the employer and the Eleventh Circuit affirmed.

The appellate court found that Ms. Walden had proven her bona fide religious belief that she could not provide relationship counseling to individuals in same-sex relationships and that EAP counselors were required to counsel all employees on all issues. However, the court also found that the EAP had offered reasonable accommodation by encouraging her to obtain other employment inside the company. The court rejected Ms. Walden’s claim that she was not offered “the most obvious accommodation” — transfer to a non-counseling position — because the employer was obligated only to offer a reasonable accommodation (the opportunity to seek an open counselor position) and not to offer Ms. Walden’s preferred accommodation. (Interestingly, the appellate court also found that plaintiff Walden failed in her duty to make a good-faith attempt to accommodate her own needs by choosing not to apply for an open position.)

**How Can Employers Reduce the Risk of Religious Discrimination Claims?**

A sensible employer will not wait to implement appropriate policies and protocols until there is an actual faith-based refusal to work. It will:

- ensure that personnel policies and employee handbooks expressly state that religious discrimination and harassment are prohibited and that employees’ religious beliefs and practices will be reasonably accommodated unless such accommodations would cause undue hardship

- develop human resources protocols for responding to requests for “religious” accommodations and for addressing conscience-based refusals to work, follow company policies or obey supervisor’s instructions, including protocols providing for (1) prompt and supportive interactions with employees to understand the reasons for their requests/actions and, if apparently premised on sincerely held religious beliefs, to explore possible accommodations to eliminate work-faith conflicts, and (2) prompt investigation and resolution of claims of “religious harassment”

- train managers and supervisors about protected religious activities in the workplace and the company’s obligation to accommodate sincerely-held religious beliefs, including training about the breadth of “religion” under the law and about (1) avoiding assumptions and stereotypes about what are (or are not) protected religious beliefs, (2) responding to employee and customer biases about religion, and (3) recognizing and responding to employees’ religious accommodation requests or refusals to work/abide by company policies

- unless the employer is a religious institution entitled to Title VII’s limited exception for religious preferences, ensure that “religion” is not any factor in decisions affecting hiring, compensation/benefits, discipline/discharge, employee worklife, etc.

**What Are Appropriate Responses to “Conscientious Objection”?**

Title VII theories and EEOC/judges’ opinions are informative but they do not always provide answers in a crisis. Employers facing “conscientious objection” need a plan. If an employee refuses a task or assignment, refuses to adhere to company policies or procedures or refuses to obey a supervisor’s request with comments like “it’s against my religion” or “I don’t believe in it,” the plan might be as follows:

1. Gather information from the employee. Ask about the reasons for the refusal, including “Why are you refusing to ____?” and, if assertedly faith-based, “What is it about your beliefs that won’t permit you to ____?” Ask for the employee’s thoughts about alternatives to the task/policy/request that was refused, including whether the employee would be willing to perform the task or obey the policy/instruction in a different manner. Ask what the employee wants the company to do.

2. Assess the stated reasons for the employee’s refusal. Does it appear to be faith-based, recognizing that there are many forms of “religion” and that protected beliefs can include not only those based on organized religion/church doctrines but also on the employee’s concepts of “morality” and “what is right and wrong”? (A functional, rather than content-based analysis, often is useful in making the “religion or not religion” determination if the employee’s actions are based upon beliefs of “right and wrong”; in other words, the company does not assess the “truth” (or not) of those beliefs but, rather, whether they are the functional equivalent in everyday life of beliefs/prayer/religious
observances in "traditional" faiths.) Next, does it appear that the beliefs are sincerely-held (i.e., held with the strength of traditional religious views and not significantly inconsistent with the employee’s prior acts and statements)? Is there any reason to believe that the employee’s conduct was prompted by secular motivation in order to “work the system,” such as evidence that he is trying to avoid unpleasant or lower-paying tasks, work on certain days/shifts, work for (or to avoid) certain supervisors, etc.? (Of course, the dialogue with the employee can be resumed if thinking about his answers during the initial interview prompts more questions.) Then weigh the consequences of rejecting the employee’s claim that his actions were faith-based: it often is prudent to concede that the beliefs are “religious” and “sincerely held” and move to the next step of the plan.

3. Assess possible accommodations if it appears the employee’s refusal was based on “religious” beliefs protected by Title VII. Is it possible without undue expense or disruption to modify the task that was refused or assign it to a different worker? Is it possible to waive compliance with company policies without incurring significant disruption, expense or safety/security issues? If multiple accommodations seem feasible, which one can be promptly implemented with the least company disruption/expense but will completely eliminate the work-religion conflict?

4. Prepare for the consequences of insisting on the employee’s compliance with company policy and/or the supervisor’s instructions despite the claim of “religion.” If the employee continues to refuse, will he/she be disciplined or discharged? If so, is there persuasive and documented evidence of (1) the importance of the policy disobeyed or task/instruction refused, (2) a warning to the employee about the consequences of continued refusal, (3) the company’s discipline/discharge of other employees for non-religious failures to follow policy or obey supervisors, (4) the employer’s interactive communications with the worker about the claimed “religious” basis for the refusal and about possible accommodations, and (5) the employer’s “what to do?” deliberations (such as a short “memo to file” outlining why the employer concluded that the employee’s actions would not (or could not) be accommodated)? Refusing to accommodate claimed “religious” beliefs may lead to EEO investigations or litigation, so it is important to properly document the events as they occur, thereby creating the employer’s exhibits for subsequent presentation to the EEOC or to the court.

Conclusion

Faith-based “conscientious objections” in the workplace are becoming more common. Although often initially puzzling and seemingly difficult, such situations often can be resolved without discrimination charges or litigation if the employer is knowledgeable about the applicable law and has developed and implemented thoughtful policies and action plans.