MEMORANDUM

TO: IAFF Executive Board

FROM: Doug Steele, IAFF General Counsel

DATE: August 28, 2020

RE: Objections to Mandatory COVID-19 Testing and Vaccinations

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We have received inquiries from several District Vice Presidents concerning the related the issues of mandatory COVID-19 testing and mandatory COVID-19 vaccinations. As explained further below, although it is a developing area of the law as we learn more about testing techniques and efficacy, employers will generally be able require some form of COVID-19 testing for fire fighters and paramedics. With regard to vaccines, there are a host of state and federal legal considerations, but ultimately, it would be exceedingly difficult for a fire fighter to refuse to be vaccinated against COVID-19 once an approved vaccination is developed.

Please keep in mind that, to an extent, the outcome in any particular case will be determined by the facts of the case. Because of this, when these issues actually arise, a more individualized analysis may be needed.

COVID-19 TESTING

We have been asked whether an employer has a right to require employees to undergo COVID-19 testing before entering the workplace. The answer at this time is yes with respect to diagnostic testing, but no with respect to antibody testing.

The Food and Drug Administration has published an explanation of COVID-19 testing. Coronavirus Testing Basics (July 2020). Essentially, there are two types of tests: a diagnostic test and an antibody test. A diagnostic test determines whether a person has a current infection, while an antibody test determines whether a person had a past infection. There are two types of diagnostic tests: a molecular test and an antigen test. In a molecular test, the sample is taken, in most cases, with a nasal or throat swab, and in a few cases, by saliva. In an antigen test, the sample is taken with a nasal or throat swab. In an antibody test, the sample is taken with a finger stick or blood draw.

Discussion

The Americans with Disabilities Act ("ADA") allows an employer to require employees to undergo medical examinations if they are "job related and consistent with business necessity." 42 U.S.C. § 12113(a). An examination will meet this standard if an employee will "pose a direct threat to the health or safety of other individuals in the workplace." Id. § 12113(b). A "direct

threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Id. § 12111(3).

A. Diagnostic Testing

In recently issued guidance, the Equal Employment Opportunity Commission ("EEOC") opined that an employee with COVID-19 is a "direct threat," and thus an employer may require employees to undergo diagnostic testing before entering the workplace. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (June 17, 2020). The guidance states in relevant part:

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Although an employer has the right to require diagnostic testing, the guidance recognizes that an employee may have a right to request a reasonable accommodation in the form of an "alternative method of screening." The ADA and Title VII of the Civil Rights Act of 1964 require an employer to accommodate, respectively, employees' disabilities and religious beliefs, unless doing so would impose an undue hardship on its operations. If an employee requests a disability-related or religious accommodation with respect to a COVID-19 diagnostic test, the guidance directs the employer, under Item G.7., to "proceed as it would for any other request for accommodation." Whether an employee has legally sufficient grounds for a testing accommodation would depend on the facts of the specific case.

B. Antibody Testing

In the same guidance, the EEOC opined that an antibody test is not job related and consistent with business necessity, and thus an employer may not require employees to undergo antibody testing before entering the workplace. The guidance states in relevant part:

A.7. CDC said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to reenter the workplace?

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job

related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA.

Testing Conclusion

In sum, under current EEOC guidance, an employer has a right under the ADA to require employees to undergo COVID-19 diagnostic testing before entering the workplace, but not antibody testing.

VACCINATIONS

As explained below, fire departments will generally be able to mandate that fire fighters and paramedics receive vaccinations if they deem it necessary for public health and safety. Fire fighters that hold sincere religious objections to, or have bona fide medical reasons to avoid, vaccinations may be able to obtain an exemption or a reasonable accommodation from their departments. Should a dispute arise, fire fighters may be able to sue under the First Amendment's Free Exercise clause, Title VII of the Civil Rights Act, or the Americans with Disabilities Act. An exemption or preferred accommodation, however, may be difficult to obtain through a lawsuit as employers are only required to offer a reasonable (not preferred) accommodation and will have little difficulty demonstrating that providing an exemption to a COVID-19 vaccination would cause an undue hardship given that public health and safety are at risk.

I. State Law

While many state health agencies and the Centers for Disease Control and Prevention (CDC) highly recommend a variety of vaccinations for fire fighters and other first responders, state law generally does not mandate vaccinations for public employees. For example, while Pennsylvania and Virginia encourage all healthcare personnel to immunize against a host of vaccine-preventable diseases, no state law mandates vaccination for any hospital or ambulatory care employees. Thus, vaccination requirements tend to be in the sole discretion of fire departments and local governments.[1]

Occasionally state law will limit that discretion and provide exceptions to immunization requirements. Indiana, for example, seeks to maximize consent to immunization. *See, e.g.*, Burns Ind. Code Ann. § 16-28-14.5-2 ("Subject to obtaining an employee's consent, a health facility shall annually administer or make available to be administered immunizations against the influenza virus to the employee of the health facility."). Indiana's statutes therefore regularly

[1] State law varies, of course, and some states do mandate vaccines for particular types of workers. The District of Columbia requires immunizations, for example, for its hospital employees who "routinely come in contact with patients or patient areas." 22 DCMR B2017.10.

provide for religious and medical exemptions. *See id.* 16-28-14.5-5(2) (health care workers are not required to be vaccinated if "the immunization is medically contraindicated for the employee"); *id.* § 16-28-14.5-5(3) (health care workers are not required to be vaccinated if "receiving the immunization is against the employee's religious beliefs"); *id.* § 10-14-3-23 (Indiana's emergency management and disaster relief laws shall not be construed to compel a person to submit to "immunization if the person . . . relies in good faith on spiritual means or prayer to prevent or cure disease or suffering and objects to the treatment in writing").

Therefore, challenges to a mandatory vaccination policy will generally be limited to religious or medical objections, and these objections will yield to the health and safety requirements of fire departments. As discussed below, although the specific burdens on the employee and employer will depend on the type of claim pursued, it generally will be difficult for an employee to prove that their rights have been violated if the employer has offered any sort of accommodation.

II. Objections to Vaccinations Under Federal Law

a. ADA

A fire fighter that suffers adverse medical consequences—such as an allergic reaction—to vaccinations may be entitled to a reasonable accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* The ADA requires that employers to provide a reasonable accommodation for an employee's disability. Such disability may include an inability to be vaccinated due to contraindication if the vaccination would substantially or materially limit the ability to perform major life activities. *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018). The employee must first put their employer on notice and request accommodation to begin an interactive process. *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 39 (3d Cir. 2018). In addition, employees must put forward medical documentation to substantiate their claim of a disability affecting a major life activity. Moderate reactions to vaccines will not be legally sufficient. For example, in *Hustvet*, the Eighth Circuit affirmed a judgment against an employee who had "never been hospitalized due to an allergic or chemical reaction [from a vaccine], never seen an allergy specialist, . . . [or] ever sought any significant medical attention when experiencing a chemical sensitivity, taken prescription medication because of a serious reaction, or had to leave work early because of a reaction." 910 F.3d at 411; *see also Chmura v. Monongalia Health Sys.*, No. 1:17CV222, 2019 U.S. Dist. LEXIS 134373, at *19 (N.D. W.Va. Aug. 9, 2019) (granting summary judgment for employer where plaintiff provided "no documentation supporting [her] purported history of a previous reaction to the influenza vaccine . . . any documented allergy testing indicating that [she] had experienced an immediate hypersensitivity reaction to the vaccine or one of its components"). Therefore, this claim will only be available to fire fighters who suffer serious medical consequences from being vaccinated.

b. Free Exercise Clause

The First Amendment provides that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The First Amendment, and its Free Exercise Clause, applies to the states through the Fourteenth Amendment. *See* U.S. Const. amend XIV, sec. 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]").

Fire fighters claiming that a mandatory COVID-19 inoculation policy violates their free exercise rights could bring a constitutional challenge under § 1983 of the United States Code. *See* 42 U.S.C. § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." *Id.* The Supreme Court has clarified that municipalities and "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

Such a constitutional challenge, however, would almost certainly fail. Generally, a policy which substantially burdens an employee's free exercise rights would violate the constitution. *Rowe v. Ind. Dep't of Corr.*, No. 1:11-cv-00524-JMS-MJD, 2014 U.S. Dist. LEXIS 27060, at *6 (S.D. Ind. Mar. 3, 2014). A substantial burden would exist, for example, if the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *see Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997) ("Public employment may not be conditioned on one's willingness to subscribe to particular religious principles or to any religious belief at all."). But "the religious freedom guaranteed by the Free Exercise Clause of the First Amendment does not require religious exemptions from facially neutral laws of general applicability." *Korte v. Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013) (citing *Employment Division v. Smith*, 494 U.S. 872, 883-90 (1990) (*Smith*)). "[I]f a law incidentally burdens the exercise of religion, the Constitution does not require an exemption." *Id.*

Whether the law is neutral will depend on its object. "A law is not neutral if 'the object of the law is to infringe upon or restrict practices because of their religious motivation.'" *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007) (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)). If there is no intent to restrict religious practices, the rule is neutral and will "survive[] a constitutional challenge if it is at least 'rationally related to a legitimate government interest.'" *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) (quoting *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232 (10th Cir. 2009)).

Undoubtedly here, any future COVID-19 vaccination requirement would constitute of neutral law of general applicability. Therefore, it will be easy for fire departments to show that an incidental restriction to religious practice is justified by the government's interest in containing the spread of an infectious disease amongst first responders and the general public with whom they interact. Moreover, the First Amendment "does not require the accommodation of religious practice: states may enforce neutral rules." *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006). Thus, it is highly unlikely that the constitution would protect a fire fighter from a mandatory vaccine requirement.

As will be discussed in detail below, other statutory rights provide employees greater protection than the "neutral law of general applicability" standard set forth by the Supreme Court in *Smith* and may require an employer provide a reasonable accommodation. Therefore, as a practical matter, employers will likely offer some form of accommodation in the face of a sincere religious objection. If an employer offers such an accommodation, it will almost certainly cut off any potential First Amendment liability.

For example, a fire fighter working for the City of Leander, Texas, recently lost a free exercise challenge to a mandatory TDAP vaccine requirement. *See Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020). The fire fighter, an ordained Baptist minister, requested an exemption to the city's TDAP vaccine requirement on religious grounds. *Id.* at 790. In response, the city offered him a choice of two accommodations: (1) reassignment to the position of "code enforcement officer," which did not require a vaccine and offered the same salary and benefits; or (2) wear personal protective equipment, "including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature." *Id.* After the fire fighter declined both offers of accommodation,[2] the city terminated his employment and the fire fighter sued. *Id.* at 791.

In ruling for the city, the Fifth Circuit acknowledged that the fire fighter had "a constitutional right to exercise his religion by refusing the TDAP vaccine because it conflicts with his sincerely held religious beliefs." *Id.* at 793. However, the court rejected the idea that the city's offered accommodations would infringe on the fire fighter's free exercise rights. The court explained "he is able to exercise his religious beliefs while working for the City—either by remaining a firefighter and wearing a respirator or working as a code enforcement officer." *Id.* In fact, the court did not rely on the "neutral law of general applicability" standard from *Smith* to rule in favor of the city. Rather, the court concluded that, due to the offered accommodations, the fire fighter was not burdened "at all." *Id.* at 794 n.7.

c. Religious Freedom Restoration Act

Another free exercise claim arises from the Religious Freedom Restoration Act (RFRA). Through RFRA, Congress rejected the "neutral law of general applicability" standard set forth by the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990) and provided a new

[2] The fire fighter suggested altering the accommodations so that he would not have to wear the respirator at all times, but the city rejected this counteroffer.

cause of action for governmental restrictions on religious exercise.[3] *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705-19 (2014) (for-profit closely held corporations can, via the RFRA, challenge the contraceptive mandate under the Affordable Care Act). Section 2000bb-1 of RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). Under the RFRA, "the burden of establishing that the government has substantially burdened the right of free exercise of religion rests with the religious adherent." *Harless by Harless v. Darr*, 937 F. Supp. 1339, 1346-47 (S.D. Ind. 1996) (school did not burden a student's right to free exercise by cabining his distribution of religious pamphlets because he was "free to distribute [the religious pamphlets] on the school premises at designated times and off the school premises at any time").

Although this statute places a higher burden on the government, RFRA claims will not be viable to fire fighters who argue that their employer violated their free exercise rights. Title VII claims (discussed below) preempt religious discrimination claims brought by employees. *Harrell v. Potter*, No. 08-0625-CV-W-DW, 2010 U.S. Dist. LEXIS 151330, at *16 (W.D. Mo. Mar. 8, 2010) ("Title VII is the only remedy available to a federal employee for an employment discrimination claim based on the government's failure to accommodate a religious practice."); *Tagore v. United States*, No. H-09-0027, 2009 U.S. Dist. LEXIS 74235, at *19 (S.D. Tex. Aug. 21, 2009) ("[A] plaintiff may not seek relief for the violation of religious rights protected by Title VII through the more general remedy afforded by RFRA."). Therefore, individual fire fighters will likely not be able to sue under this statute.

d. Title VII

Fire fighters with sincerely held religious objections to vaccines may also seek a religious accommodation to a vaccination requirement under Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Title VII has applied to state and local employers since 1972. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 25 (2018); 42 U.S.C. § 2000e(a), (b). "Religion" includes "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." 42 U.S.C. § 2000e(j) (emphasis added). Thus, an employer is obligated to try to reasonably accommodate an employee's religious beliefs to the extent it does not cause an undue hardship on the business, and failure to do so violates Title VII.

[3] Indiana has an analogous state RFRA statute that was enacted in 2015. *See* Burns Ind. Code Ann. § 34-13-9-1. The statute is almost identical to the federal RFRA and would likely also be preempted by Title VII.

Should the employer fail to provide an accommodation and the fire fighter be disciplined for failing to comply with the policy, they could bring a lawsuit for religious discrimination. Claims of discrimination are subject to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, to establish a "prima facie" case of discrimination, the employee must show that "(1) the observance or practice conflicting with an employment requirement is religious in nature; (2) the employee called the religious observance or practice to the employer's attention; and (3) the religious observance or practice was the basis for the employee's discharge or other discriminatory treatment." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013) (internal quotes, alterations, and citations omitted). "Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship." *Porter v. City of Chi.*, 700 F.3d 944, 951 (7th Cir. 2012).

Accordingly, a fire fighter who wishes to challenge a mandatory vaccine policy under Title VII will face two primary hurdles: (1) proving their objection to the vaccine is, in fact, religious, and (2) rebutting the employer's claim that it offered a reasonable accommodation or that any reasonable accommodation would create an undue hardship.

i. Sincere Religious Belief

Objections to vaccinations that arise from traditional religious beliefs will not be difficult to substantiate. *See, e.g.*, *Musterd v. R.I. Dep't of Health*, 2017 U.S. Dist. LEXIS 198422, at *7-8 (D.R.I. Aug. 29, 2017) ("I assume the sincerity of Plaintiff's religious abhorrence of an injection containing animal by-products. Nor is there any question that one of the chicken-pox vaccine ingredients that can be found on the link on the DOH website, gelatin, is an ingredient that is recognized as potentially causing issues for persons of Muslim or Jewish faith."). The sincerity of religious objections to vaccines that do not arise from a traditional religious belief—but perhaps a combination of moral or political beliefs—will be more difficult to prove in the Title VII context.

For example, in *Fallon v. Mercy Catholic Med. Ctr.*, the Third Circuit addressed the sincerity of a Pennsylvania employee's religious objection to receiving a flu vaccine as a condition of his employment as a crisis intake worker for a medical center. 877 F.3d 487, 489 (3d Cir. 2017). The medical center had permitted other employees with religious objections to wear a face mask instead of receiving the inoculation. The plaintiff, however, did not belong to any religious organization and objected simply on grounds of strong personal beliefs. Specifically, the plaintiff believed that "if he yielded to coercion and consented to the hospital mandatory policy, he would violate his conscience as to what is right and what is wrong." *Id.* at 492. He also believed that taking the vaccine would "do more harm than good" to him physically. *Id.* As such, the medical center rejected his request for an accommodation. The Third Circuit agreed that the medical center did not violate Title VII by failing to provide the plaintiff an accommodation. The court relied on the following definition of "religion":

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Id. at 491 (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)).[4] Applying this standard, the court found plaintiff's strongly held beliefs were not sufficient because his mere moral objections did not touch on "fundamental and ultimate questions" and—to the extent the plaintiff believed the vaccine would "do more harm than good"—expressed medical, not religious, opinions. Finally, the court observed that the plaintiff's beliefs lacked "formal and external signs such as services, ceremonies, religious holidays, and other religious structures. *Id.* at 492; *see also Brown v. Children's Hosp. of Phila.*, 794 F. App'x 226, 227 (3d Cir. 2020) ("Nothing in Brown's second amended complaint suggests that her opposition to the flu vaccine was religious.").

The Seventh Circuit has not adopted the same definition of religion set forth in *Africa*, but considers many of the same elements when evaluating the sincerity of a religious belief. "A religion need not be based on a belief in the existence of a supreme being. . . nor must it be a mainstream faith." *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005) (observing atheism is considered a religion for First Amendment purposes). "The test 'is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.'" *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (quoting *United States v. Seeger*, 380 U.S. 163, 165-66 (1965)). Therefore, "a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as religion under Title VII." *Id.*

In sum, objections which are merely political, moral, medical, or otherwise not contained within a larger recognized belief-system by the fire fighter will not be sustained under Title VII.[5]

ii. Reasonable Accommodation and Undue Hardship

Second, assuming the employee establishes a sincere religious objection to being vaccinated, the employee would need to rebut the employer's assertion that it offered a reasonable accommodation or that any reasonable accommodation would cause an undue hardship on the employer. 42 U.S.C. § 2000e(j). Importantly, "any reasonable accommodation

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[4] This definition of religion has been accepted by many state and federal courts, although none in the Seventh Circuit. *See Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 60-61, 69 (2002) (applying definition and listing cases from Fourth, Eighth, Ninth, and Tenth Circuits; district courts in the First, Second, and Eleventh Circuits; and state courts in Massachusetts and Oregon).

[5] The Equal Employment Opportunity Commission, in slightly broader terms, defines "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." 29 CFR 1605.1.

by the employer is sufficient to meet its legal obligation." *Robinson v. Children's Hosp. Bos.*, 2016 U.S. Dist. LEXIS 46024, at *19 (D. Mass. Apr. 5, 2016) (internal quotes omitted). Thus, "once the employer has reasonably accommodated the employee's religious needs, the inquiry is over." *Id.*

The Fifth Circuit recently evaluated the reasonableness of an offered accommodation in response to a vaccine objection in *Horvath*. As noted above, the city had offered the fire fighter reassignment to the position of "code enforcement officer," which did not require a vaccine and offered the same salary and benefits. The fire fighter objected, noting that the "code enforcement officer position is the least desirable position in the department because of its duties and hours" and that the position was "unreasonable because the schedule would prevent his continuing his secondary employment running a construction company, which would reduce his total income by half." 946 F.3d at 792. The court rejected both arguments, observing that an employer is not required to offer an employee his or her preferred accommodation. Rather, the accommodation offered simply must be reasonable. *See Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) ("Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee"). And in this case, the court found that altered hours and reduced outside income were not enough to demonstrate that the offered accommodation was unreasonable.

In *Robinson*, another vaccine case from Massachusetts, a district court found that a hospital provided a reasonable accommodation to an objecting employee where it (1) allowed the employee to seek a temporary medical exemption, (2) provided her reemployment resources, (3) granted her time to secure new employment and (4) preserved her ability to return to the hospital by classifying her termination as a voluntary resignation. *Robinson*, 2016 U.S. Dist. LEXIS 46024, at *25. The employee argued that these actions were not sufficient, and that the hospital should have done more to help her find a new position. The court rejected this argument, explaining that employers "are not obligated to create a position to accommodate an employee's religious beliefs" and that the employee also has a duty to cooperate. *Id.* at *23-24.

Thus, a review of these vaccine cases shows that while "employers must engage in a dialogue with an employee seeking an accommodation," Porter, 700 F.3d at 953, (1) employees are not entitled to their preferred accommodations and (2) employers have a number of straightforward reasonable accommodations that will cut off Title VII liability in the vaccine context.

Finally, although it is unlikely that a fire department will offer *no* accommodation to a vaccine objection based on sincerely held religious beliefs, should this occur, objecting employees may find it difficult to show that the employer would not suffer an undue hardship in the vaccine context. Proving an "undue hardship" is generally not burdensome. *See, e.g.*, *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 585 (7th Cir. 2007) (finding requiring Wal-Mart to rearrange staffing and have other employees pick up work to accommodate an inflexible employee would create an undue hardship); *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977) (finding requiring an employer to find a substitute employee so that another employee can

observe a religious day of rest would cause an undue hardship).[6] Undue hardship exists when a religious accommodation would cause "more than minimal hardship to the employer or other employees." *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir. 2003). "The issue of undue hardship will depend on close attention to the specific circumstances of the job." *Adeyeye*, 721 F.3d at 455 (finding three weeks of unpaid leave would not necessarily create an undue hardship where employer generally had high employee turnover); *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 489 (5th Cir. 2014) ("Because Fort Bend does not argue that permitting Davis's arranged substitute to work in place of Davis would impose an undue hardship, there exists a genuine dispute of material fact whether Fort Bend would have suffered undue hardship in accommodating Davis's religious observance.").

In the context of a potential COVID-19 vaccine, the pandemic-level risks of COVID-19 may make it easy for an employer to demonstrate an undue hardship. Courts generally have found an undue hardship where proposed accommodations could "either cause or increase safety risks or the risk of legal liability for the employer." *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 U.S. Dist. LEXIS 15621, 2001 WL 1168156, at *10, 36 (S.D. Ind. Aug. 27, 2001) (religious accommodations to "pants-only" uniform policy would cause safety risks in the manufacturing context and thus an undue hardship on the employer). In an informal discussion letter, the EEOC's Office of Legal Counsel wrote that "[f]acts relevant to undue hardship" for a health care worker's request for an exemption from employer-mandated vaccinations "would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation." U.S. Equal Emp. Opportunity Comm'n, Informal Discussion Letter (Mar. 5, 2012). And in *Robinson*, the court agreed that requiring the employer to offer a vaccination accommodation to a health care employee would cause an undue hardship "because it would have increased the risk of transmitting influenza to its already vulnerable patient population." *Robinson*, 2016 U.S. Dist. LEXIS 46024, at *28.

Therefore, even if the employer does not offer an accommodation, safety concerns in the COVID-19 context may make it difficult for fire fighters to overcome a claim that any accommodation would cause an undue hardship on the employer.

Vaccination Conclusion

As explained above, fire departments will generally be able to mandate that fire fighters receive vaccinations if they deem it necessary for public health and safety. Fire fighters that hold sincere religious objections to vaccinations may be able to obtain an exemption or a reasonable

[6] *Hardison* also stands for the proposition that Title VII does not require an employer to provide an accommodation if it would impose more than a *de minimis* burden on the employer. *Id.* at 84. While this is technically still good law, the Supreme Court has indicated it may be willing to overrule *Hardison* as an incorrect interpretation of the "undue hardship" standard. *See e.g.*, *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in the denial of certiorari) ("I thus agree with the Solicitor General that we should grant review in an appropriate case to consider whether *Hardison's* interpretation [of 'undue hardship'] should be overruled."); *see also Adeyeye*, 721 F.3d at 456 (limiting *Hardison's de minimis* rule to the specific application of that case).

accommodation from their departments. However, an exemption or preferred accommodation may be difficult to obtain through a lawsuit as employers are only required to offer a reasonable (not preferred) accommodation and will have little difficulty demonstrating that providing an exemption to a vaccination would cause an undue hardship.