Spring 2022

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THE NO CONTRACT DISCLAIMER IN EMPLOYEE HANDBOOKS: A REVIEW OF *HALL V. CITY OF PLAINVIEW*, 954 N.W.2D 254 (MINN. 2021)

Many employee handbooks have a general disclaimer that "nothing contained herein creates a contract" (hereinafter, the "No Contract Disclaimer"). In *Hall v. City of Plainview*, 954 N.W.2d 254 (Minn. 2021) the Minnesota Supreme Court evaluated this disclaimer and answered the following questions:

1. Does a No Contract Disclaimer prevent an employee handbook from ever being an enforceable contract between the employer and employee?

2. Does Minn. Stat. § 181.13(a) create a substantive right to payment for unused PTO irrespective of an employer's policy?

This article reviews the *Hall* court's answers to these questions and identifies key information employers should take from the case to improve their employee handbooks and termination practices.

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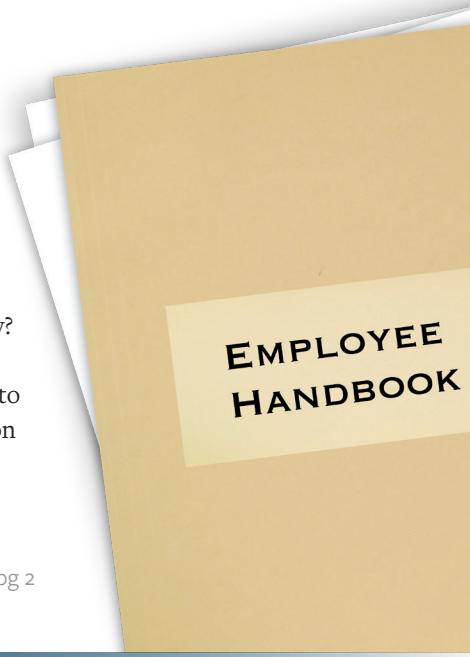

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THE NO CONTRACT DISCLAIMER IN EMPLOYEE HANDBOOKS:
A REVIEW OF *HALL V. CITY OF PLAINVIEW*, 954 N.W.2D 254 (MINN. 2021)

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Hall v. City of Plainview

Donald Hall was a 30-year employee with the City of Plainview. He had 1,778.73 hours of unused paid time off (PTO) when Plainview fired him. Following his termination, he made a written demand for payment of all unused PTO. Plainview rejected his demand, citing its PTO policy required 14-days' notice of resignation of employment to receive a PTO payout. Mr. Hall disagreed, arguing Plainview's Personnel Policies and Procedures Manual (hereinafter, "Handbook") was a valid contract that required payment. He sued the city for breach of contract and violation of Minn. Stat. § 181.13(a).[1] The district court dismissed these claims finding Plainview's Handbook contained a No Contract Disclaimer and Minn. Stat. § 181.13(a) was inapplicable. The Minnesota Court of Appeals affirmed. Mr. Hall appealed to the Minnesota Supreme Court.

A. Plainview's No Contract Disclaimer and PTO Policy.

Plainview's Handbook contained, in relevant part, the following No Contract Disclaimer in its introduction:

> The purpose of these policies is to establish a uniform and equitable system of personnel administration for employees of the City of Plainview. They should not be construed as contract terms. . . [and] is not intended to create an express or implied contract of employment between the City of Plainview and an employee. The Personnel Policies and Procedures Manual does contain language dealing with the grievance procedure, employee discipline or termination which the City may choose to follow in a particular instance. These provisions, however, are not intended to alter the relationship between the City as an employer, and an individual employee, as being one which is "at will", terminable by either at any time for any reason.

Hall, 954 N.W2d at 258. Plainview's PTO policy outlined accrual, use, and payment. Up to 500 hours of unused PTO would be paid upon termination of employment "for any reason . . . unless the employee did not give sufficient notice as required by the policy." *Id.* The policy did not specifically define "sufficient notice." But the Minnesota Supreme Court deduced the notice referred to the Handbook's policy that employees failing to submit at least 14-days' notice of resignation may be denied leave benefits. *Id.*

B. The Minnesota Supreme Court Answers "No."

1. No – A No Contract Disclaimer is Not Blanket Protection Against an Employee Handbook Forming an Employer-Employee Contract.

The concept that an employee handbook *can* create an enforceable unilateral employment contract is not new. A unilateral contract requires an offer to provide something of value for the performance of act(s) and the acceptance of that offer by the other party performing all or some of those acts.[2] In 1983, the Minnesota Supreme Court explained in *Pine River State Bank v. Mettille* that a handbook policy constitutes an offer when it contains definite terms promising something of value in exchange for the employee's work.[3] Acceptance of and consideration in exchange for the offer, thereby forming an enforceable contract, occurs when the employee performs the work, relying on the employer's promise.

Because Plainview's policy outlined PTO accrual, use, and payment clear enough for the court to discern the city's promise to its employees and identify when the promise was breached, it constituted an offer. Thereafter, Mr. Hall's continued performance of work to accrue PTO was his acceptance of and consideration for the PTO. Thus, an enforceable contract regarding PTO was formed despite the No Contract Disclaimer. The court found the disclaimer was too general to apply to the detailed PTO policy. Rather, the disclaimer only disclaimed the formation of a contract altering employment status given references to grievance, termination, and discipline policies in the disclaimer. Finding the existence of an enforceable contract, the Minnesota Supreme Court reversed the dismissal of Mr. Hall's breach of contract claim and remanded the claim to district court for determination of whether Mr. Hall was entitled to payment for unused PTO under the contract.

2. No – Minn. Stat. 181.13(a) Did Not Create Substantive Rights to Accrued PTO.

Mr. Hall's claim regarding Minn. Stat. § 181.13(a) was based on

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[2] *See Cederstrand v. Lutheran Brotherhood*, 117 N.W.2d 213, 220-21 (Minn. 1962).
[3] 333 N.W.2d 622, 626-27 (Minn. 1983).

his belief that irrespective of the formation of a contract, paid leave benefits are compensation that constitute wages under the statute. The court's rejection of this argument is consistent with its decision in *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117 (Minn. 2007). There the court stated the statute "does not itself create a substantive right to vacation pay," rather it determines the time period for which any payment must occur following a demand. *Id*. Currently, no statute or Minnesota law or case requires an employer to provide paid leave. Thus, a right to compensation for the vacation or in lieu of the taking vacation can only be created by contract.

Applying this precedent to Mr. Hall's case, the court explained Minn. Stat. § 181.13(a) is only applicable to Mr. Hall's demand if he met the conditions under the PTO policy (the contract) entitling him to payment. The Minnesota Supreme Court reversed the lower courts' dismissal of and remanded the claim to district court for determination. If on remand the district court finds Mr. Hall had a right to payment for any of his unused PTO hours, Plainview will be liable for payment of the PTO hours, penalties under Minn. Stat. § 181.13(a), and Mr. Hall's attorney's fees and costs.

Considerations for Minnesota Employers

1. Use Specific Disclaimers in Employee Handbooks.

The *Hall* decision should remind employers not to rely on general No Contract Disclaimers. Question whether any policy in the handbook amounts to more than a general statement. Does the policy contain definite terms from which a court can identify the employer's promise to the employee and determine whether that promise was fulfilled? If yes, the employer should consider whether the policy should be revised or accompanied by a more-detailed disclaimer of what happens upon termination or disciplinary action.

2. Paid Leave Policies Should Identify All Conditions for Payment.

Plainview's PTO policy limited the amount of unused PTO hours that could be paid out and the requirements for an employee to be eligible for payment. These conditions will help minimize liability in some instances. Employers should consider including similar limitations and conditions in their policies, such as the following: (a) stating unused PTO has no cash value and employees are not entitled to any payment in lieu of taking time off; (b) limiting payment to employees providing written notice of termination, without mandating such notice;[4] and (c) stating the circumstances under which unused PTO is forfeited (e.g. annually, upon termination).

3. Do Not Forget Unused PTO When Responding to Minn. Stat. § 181.13(a) Demands.

Before responding to a Minn. Stat. § 181.13(a) demand for wages, employers should review their paid leave policies to determine if the employee has a right to payment for unused PTO. If a right exists, payment should be made in the time required by the statute.

This information is general in nature and should not be construed for tax or legal advice.

[4] Employers are encouraged to consult with an attorney when implementing such a policy to ensure they are not altering the employment at will-status by mandating advance notice of termination.

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SCHEDULE

Noon – Lunch

12:15 – Dealing with—AND WINNING—Regulatory Investigations: Cory Genelin
What to do when faced with an investigation from the State or Federal EEOCs, Department of Labor, or other regulatory bodies

1:15 – Presenting Employer's Case at Arbitration: Brittany King-Asamoa
Discuss best practices for evaluating employee grievances, preparing, and presenting your case at arbitration

2:15 – Short Break

2:30 – Case Law Update for Employers: Jonathan Janssen

3:30 – Wrap up and final thoughts

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NON-COMPETE AGREEMENTS: GROWING HOSTILITY AND SUSPICION

The field of employee non-compete agreements ("NCA") is changing, broadly reflecting a growing concern about the adverse effects of NCAs on employee labor prospects and market competition. Employers must stay abreast of the legal status of NCAs in Minnesota as well as the general trends on NCAs throughout the nation to plan their employment contracts accordingly.

The Law of Non-Compete Agreements in Minnesota and the U.S.

NCAs are provisions in employment contracts or separation agreements in which the employee agrees not to compete with the employer or work for a competitor after termination of the employment relationship. Typically, the non-compete term begins upon employment and extends for a specific period of time after the employee's separation. The NCA normally sets out the duration of the non-compete period, its geographic limitation, and the areas or fields in which the employee may not compete.

The enforceability of NCAs has historically been subject to state common law and contract law. In Minnesota, NCAs have traditionally been "looked upon with disfavor, cautiously considered, and carefully scrutinized" by courts, recognizing the employer's economic advantage over employees and the potentially negative impact of NCAs on competition in the marketplace. Since NCAs are disfavored, such non-compete restrictions will be read narrowly by courts, and ambiguities will be construed against the employer that drafted the contract.

However, despite the policy factors weighing against the enforcement of NCAs, courts have long recognized that many NCAs are necessary to protect two legitimate business interests of the employer: the employer's good will and confidential information such as trade secrets. In particular, the employer's good will was originally at issue during the sale of a business – the new business owner expected to receive the business's "good will," which would be greatly diminished if the old business owner could poach back the business's customers. Over time, this argument was applied to other scenarios, such as, upon separation, a physician being prohibited from practicing medicine within a certain number of miles of the city of his or her employer. Without the NCA, the employer's patients would no-doubt follow the employee, robbing the employer of its hard-earned good will in the community.

Because of these competing policy concerns, the enforceability of NCAs has historically been subject to multifactor tests created by state courts. Minnesota is no exception: under the *Bennett* test, Minnesota courts will consider whether the NCA strikes a reasonable balance between the legitimate business interests of the employer and employee's right to work. In particular, if a legitimate business interest is found, the next question will be whether the NCA has imposed upon the employee "any greater restraint than is reasonably necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends."

Some states take more hardline approaches. For instance, New York courts do not employ a balancing test, and will instead enforce all NCAs against the employee as long as the employee "has been afforded the choice between not competing (and thereby preserving some benefit) or competing (and thereby risking forfeiture of that benefit)." On the other end of the spectrum, a few states, such as California, have banned NCAs altogether.

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NON-COMPETE AGREEMENTS: GROWING HOSTILITY AND SUSPICION

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Updates and Trends in Non-Compete Agreement Legislation

The biggest signal of waning NCA popularity comes from the Biden Administration. On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy in which he accused "[p]owerful companies" of "requir[ing] workers to sign non-compete agreements that restrict their ability to change jobs." He further ordered the FTC to consider exercising its statutory rulemaking authority "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." In a related Fact Sheet, the President clarified that his Executive Order was encouraging the FTC to "ban or limit non-compete agreements." While the business community has voiced major opposition to this proposal and the FTC has yet to issue any new rulemaking, the President continues to push this agenda, stating as recently as January 24, 2022 that curtailing NCAs was a "priority" for his office.

Members of Congress have also introduced bills that would significantly prohibit the use of NCAs in many contexts, such as in the Workforce Mobility Act, introduced in February 2021. Among other things, the Workforce Mobility Act would restrict the use of NCAs to the sale of a business or the hiring of senior executives. It would also require employers to explicitly inform their employees of the limitations NCAs impose. The business community has also criticized this Act, particularly in its attempt to federalize an area of law traditionally reserved to the states.

However, states have been trending against NCAs in the recent years as well. In 2019, Maryland, Maine, New Hampshire, and Rhode Island all passed legislation prohibiting NCAs for low-wage workers and/or requiring a stronger notice to employees regarding these NCAs. In 2020, Virginia and Nevada banned most NCAs for low-wage employees. In 2021, Oregon amended its non-compete statute to erode the enforceability of NCAs, and Nevada further amended its laws to provide penalties for employers that attempted to enforce NCAs prohibited by earlier laws. Also in 2021, Illinois jumped on the bandwagon and banned NCAs for employees making less than $75,000 per year, and the District of Columbia simply banned NCAs outright in nearly all circumstances.

While Minnesota did not see such sweeping changes, two companion Bills have been introduced in Minnesota that would completely prohibit NCAs in certain contexts.

The first companion Bill – HF 1917 and SF 2130 – would unilaterally render "void and unenforceable" any NCA contained in a partnership or employment contract regarding any licensed physician. HF 1917 was introduced on March 4, 2021 and has been referred to the House Health Finance and Policy Committee. SF 2130 was introduced on March 17, 2021 and was has been referred to the Senate Health and Human Services

Finance and Policy Committee. The Bill also appears to be a reintroduction of a Bill from the previous legislative session which was returned to the Committee at the adjournment of the regular session.

The second companion Bill – HF 3009 and SF 2837 – would also make any NCA between a child care provider and its employees "void and unenforceable." HF 3009 and SF 2837 were introduced on February 3, 2022 and were referred to the House Labor, Industry, Veterans and Military Affairs Finance and Policy Committee and the Jobs and Economic Growth Finance and Policy Committee, respectively.

At this time, the House and Senate committees have not held hearings on either of these recent Bills, but their introduction broadly reflects the trend against NCAs throughout the United States.

Employer Takeaways

In addition to monitoring updates in non-compete law and legislation, employers should also take care to make sure that their NCAs are no broader than necessary and should not assume that courts will automatically enforce their NCAs. Accordingly, any NCAs should closely contemplate and narrowly tailor the nature and character of employment being restricted, the duration of the restriction, and the territorial extent to which the restriction applies. Furthermore, if applicable, NCAs should clearly state their purpose as protecting the employer's good will or confidentiality of trade secrets.

Following the trends in other states, employers should also start factoring in the different wage levels of their employees when deciding whether an NCA would be appropriate.

Lastly, employers may still be able to protect their good will and trade secrets in other ways. For example, properly tailored customer non-solicitation agreements or employee non-disclosure agreements may be enforceable where NCAs are not. Employers should also use data security protection procedures, employee security training, and consistent enforcement of security and confidentiality policies to properly protect trade secrets and other confidential information.

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HR AUDITS: HELPING YOU PLAN A SMOOTH JOURNEY IN 2022 AND BEYOND

I find myself doing a lot of thinking on my drives home from the office, pondering over how the day went, challenges I've faced, and conversations I've had. It's a route I know like the back of my hand, so I turn my blinker on almost automatically and my foot knows instinctively when to gently squeeze the brake pedal. To some extent I've switched onto auto-pilot, judging my route based on all the thousands of times I've taken it. That is, until the unexpected happens.

On a typical Thursday afternoon in February of 2018, I was making my way eastbound towards an intersection I drive through often multiple times a day. The light at the intersection was green and I was replaying my day in my head when my thoughts were suddenly jolted to halt. Out of nowhere, I experienced a fierce impact as I collided with a vehicle traveling northbound. I learned later that the other vehicle had blown through a red light. In an instant, I found myself looking at my airbag that had just deployed, facing a different direction then I had been traveling, smoke is coming from near my feet, and I'm not sure what just happened or whether I'm ok. Fast forward, my car was totalled and as of today, I've had one shoulder surgery and may need to have another one in the near future.

The shock of this freak event on my regular route struck me hard. And as I still reflect on it today, one of the many things the accident left me wondering is how often do we as business owners and leaders go about our operations, not thinking about HR and employment regulations, and not giving the HR road ahead much thought. That is, until something happens - someone questions a policy, files a charge, or whatever, and like the danger ahead of me then, these employment-related events suddenly present a real and immediate risk.

It's Always Worth Checking the Road Ahead

Like the driving routes we know so well, it's wise to step back and just see how we're doing with our HR policies and procedures from time to time. This reflection offers us a way to ensure that the journey is as efficient and safe as it can be and that any risks are reviewed and mitigated before they have a chance to cause major problems. We call this an HR audit, and it could be the smartest decision you make this year, saving you delays, costs and even pain, later down the line.

Right now might be as good a time as any for companies to consider getting their HR ducks in a row. With people returning to the office and some semblance of normalcy after two years of COVID-19, we need to make sure our HR workplace policies and procedures are in good working order, fit for purpose and can be relied on to accurately guide your employees and leaders alike. In my experience, as small businesses grow, it's not uncommon to find that HR practices have aged and no longer comply with various federal and state laws. Lots has also changed over the pandemic and what we are coming back to may not the same as it was. The roads now may look very different and like my green traffic light, we cannot assume it's safe to continue to operate as we have been for years.

Planning the Route Ahead

HR audits provide an in-depth look at your current HR policies, practices, and procedures to identify your strengths, opportunities, and areas of risk that may not have sufficient protection from legal liability. From there, you can begin to create an action plan for what needs to change and when,

providing you with a clear road ahead, or at least knowledge of where the bumps in the road might be.

The audit looks at the full scope of HR and what all goes into managing people: from company policies, job descriptions, wage and hour matters, how you make hiring decisions and offers, onboarding processes and paperwork, performance reviews and corrective action, leadership training, employee classifications, time-off policies and procedures, rewards and recognition, terminations, etc, etc. It's necessarily thorough, and in my opinion, should be completed once every two to three years.

Those Bumps in the Road

There are a number of common bumps in the road that my clients face, and most of them are easily avoided by ensuring that their HR house is in order. The issues I see the most include:

- Lack of sufficient documentation and inadequate documenting of performance.
- Inflating performance reviews to keep the peace.
- Misclassification of salaried employees who are truly nonexempt and eligible for overtime.
- Wage and hour practices leading to FLSA violations with nonexempt employees, such as accurately recording start/stop times, compensation issues related to working during breaks or lunch, and off-shift activities (e.g. checking work emails in the evening).
- Practices that do not align with what's written in the respective policies.
- Lack of leadership training on key HR topics and that would minimize risk to the business.
- Incorrectly assuming an employee has been placed on FMLA leave, however, due to issues with the required paperwork, timing or process, the leave was actually never designated as such.
- Overlooking that the root of many employee relations issues can be attributed to the importance of human connection.
- Outdated job application forms that ask for information that is no longer legally permissible.
- Issues or errors on the I-9 forms.

Enjoy A Safer Journey

It really is important to make sure your HR journey is a safe one, and that you're taking into account an ever-changing environment. An effective HR audit requires objectiveness, the ability to challenge assumptions, and a willingness to accept that the company may not have done things right in the past. This can be hard. To help move through the trickiness of doing this difficult work internally, we would be happy to help you get the job done smoothly and effectively. Gislason and Hunter and I have teamed up to offer outside professional HR consultancy coupled with legal oversight. So, if you're looking for support and want to make sure 2022 and beyond is a safe drive, we're here to help.

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AN EMPLOYER'S OBLIGATION TO REASONABLY ACCOMMODATE SINCERELY HELD RELIGIOUS BELIEFS

On March 1, 2022, the Equal Employment Opportunity Commission (EEOC) updated guidance regarding reasonable accommodations for sincerely held religious beliefs. This update answers important questions raised by employers following the publication of federal and state COVID-19 vaccination and testing emergency standards. The Occupational Safety and Health Administration emergency temporary standard, which Minnesota adopted but has since withdrawn alongside OSHA, both recognized employer's obligation to accommodate sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964 (Title VII). This article provides a brief outline of the private[1] employer's obligations whenever an employee requests a reasonable accommodation for a religious belief, practice, or observance.

Employee Requests a Religious Accommodation.

Most importantly, employers are not expected to (and should not) guess an employee's sincerely held religious beliefs, practices, and observances (collectively, "religious belief"). The onus is on the employee to tell employer about the sincerely held religious belief that conflicts with an employment duty or requirement. The EEOC reminds employers, however, that there are no magic words the employee needs to use to request an accommodation. Employers' obligation to accommodate religious beliefs is triggered simply when an employee says he or she has a religious belief in conflict with an employment duty or requirement.

Religious Beliefs are Defined by Law, Not the Employer.

Title VII requires employers with 15 or more employees to reasonably accommodate applicants and employees' religious beliefs. Federal law broadly defines religious beliefs. There is no obligation to become an encyclopedia of all religions or moral belief systems.

Protected religious beliefs include "moral or ethical beliefs as to what is right and wrong" that "are sincerely held with the strength of traditional religious views."[2] The belief does not have to be adopted by a religious group or even be theistic. Any "sincere and meaningful belief that occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" is a religious belief protected by Title VII.[3] But passionate feelings, personal preferences, and political beliefs alone are insufficient. The distinction between passionate feelings and protected religious beliefs can be difficult to identify. But employers should not inquire about the moral or theological merits of an asserted religious belief or test the logic or accuracy of that belief. Instead, employers should assume the asserted

[1] Public employers cannot infringe upon an employee's right to engage in religious expression, practice, or observance provided by the First Amendment of the U.S. Constitution. The same prohibition does not apply to private employers.
[2] 29 C.F.R. § 1605.1.
[3] *U.S. v. Seeger*, 380 U.S. 163, 165-66 (1965); *see also Section 12: Religious Discrimination,* EEOC at A(1) (Jan. 15, 2021), *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref21 (hereinafter, "*EEOC Religious Discrimination*").

religious belief is sincerely held unless specific circumstances cause the employer to doubt the sincerity or religious nature of the asserted belief.

Conduct a Limited Inquiry into the Nature and/or Sincerity of the Religious Belief.

Employers may inquire about the sincerity or religious nature of an asserted belief. Considering the following questions can assist employers complete this inquiry:

- Has the employee behaved in a manner markedly inconsistent with the asserted belief?
- Is the timing of the request or asserted belief suspicious?
- Are there any facts or circumstances that undermine the individual's credibility?
- Is the accommodation requested a desirable benefit likely to be sought for non-religious reasons?[4]

Religious beliefs protected by Title VII are broad and can be *individual* to each applicant or employee. The updated EEOC guidance also reminds employers that an employee's beliefs may change over time. A best practice is to have the employee complete a reasonable accommodation request form to provide the following information:

- Specific description the religious belief, practice, or observance with specificity
- Timeline of how long the employee held the religious belief
- Listing of the employment task(s) that conflict with the religious belief
- Outline of potential accommodations requested
- Affirm the religious belief is sincerely held

Employers should discuss this information and any questionable observations or conduct undermining the employee's credibility with the employee. This practice is similar to the interactive process required when an accommodation is requested by a qualified disabled person. Access to the religious accommodation form utilized by the EEOC is available in the updated guidance. While employers are not required to use this form, it may be a helpful tool to review when a religious accommodation is requested.

Provide a Reasonable Accommodation

Sincerely held religious beliefs must be reasonably accommodated, unless the accommodation poses an undue hardship on the employer. An undue hardship is presented when the accommodation has more than a *de minimis* cost (financial or figurative) on the employer's business operations. Beyond monetary costs, safety, job efficiency, legal requirements, and infringement on other employees' rights can constitute an undue hardship. Employers must engage in a careful evaluation of the impact proposed accommodations will have on their business and deny only those that present an actual and articulable undue hardship.

Utilize EEOC Resources and Seek Legal Counsel

The EEOC updated guidance on religious accommodations during the COVID-19 pandemic. Those resources include the following:

- *Section 12: Religious Discrimination,* EEOC Compliance Manual (updated Jan. 15, 2021)

- *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated March 1, 2022)

Employers are encouraged to review this guidance and consult with legal counsel to ensure best practices are used.

[4] *EEOC Religious Discrimination* at A(2).

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