

THE SYRINGE THAT DRIPS MONEY: HOW TITLE VII AFFECTS EMPLOYER-MANDATED VACCINATIONS IN THE MANUFACTURING SECTOR

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I. INTRODUCTION

On December 31, 2019, as many around the world were celebrating the New Year, Chinese health officials were reporting to the World Health Organization (“WHO”) that approximately forty-one people had contracted a mysterious pneumonia from the Huanan Seafood Wholesale Market.¹ Within seven days, Chinese officials determined the virus was a novel Coronavirus, now known as SARS-CoV-2, which causes the COVID-19 illness.² The virus rapidly spread throughout the world, including the United States, and prompted all but eight states to issue statewide shutdown orders.³ These shutdowns, which had questionable effectiveness,⁴ closed businesses, hamstrung the supply chain, and are expected to play a role in shrinking the United States’ expected real gross domestic product (“GDP”) by \$7.9 trillion over the next decade.⁵ However, SARS-CoV-2 is not the first pandemic to cause a mass disruption. For instance, the 1918 H1N1 pandemic swept across the globe, prompting quarantines, shutdowns, social distancing, and mask use throughout the United States.⁶

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1. Sandip Sen, *How China Locked Down Internally for COVID-19, but Pushed Foreign Travel*, ECON. TIMES (Apr. 30, 2020, 10:55 AM), <https://economictimes.indiatimes.com/blogs/Whathappensif/how-china-locked-down-internally-for-covid-19-but-pushed-foreign-travel/> [<https://perma.cc/UZ3V-SFM3>].

2. *Id.*

3. Jiachuan Wu et al., *Stay-at-Home Orders Across the Country*, NBC NEWS, <https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736> [<https://perma.cc/Q7LN-UH37>] (last updated Apr. 29, 2020).

4. Donald L. Luskin, *The Failed Experiment of Covid Lockdowns*, WALL ST. J. (Sept. 1, 2020, 6:54 PM), <https://www.wsj.com/articles/the-failed-experiment-of-covid-lockdowns-11599000890> [<https://perma.cc/AZR4-MDVN>]. *But see* Marco Vinceti et al., *Lockdown Timing and Efficacy in Controlling COVID-19 Using Mobile Phone Tracking*, 25 *ECLINICALMEDICINE* 1, 7 (2020) (finding the Italian shutdown measures generally began to slow the spread of SARS-CoV-2 after 14-18 days).

5. Letter from Philip L. Swagel, Dir., Cong. Budget Off., to Hon. Charles E. Schumer, Democratic Leader, U.S. Senate (June 1, 2020), <https://www.cbo.gov/system/files/2020-06/56376-GDP.pdf> [<https://perma.cc/XDZ4-GWQQ>].

6. Richard J. Hatchett et al., *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Pandemic*, 104 *PROC. NAT’L ACAD. SCI. U.S. AM.* 7582, 7583 (2007) (providing a

While novel viruses such as SARS-CoV-2 and H1N1 have caused extreme economic hardships and widespread morbidity, communicable diseases have also been doing so for decades. Nevertheless, many private employers outside the healthcare industry have never implemented mandatory vaccination policies.⁷ While there are multiple reasons employers may refuse to enact such policies,⁸ fearing legal action under Title VII of the Civil Rights Act of 1964 (“Title VII”) is among the most prevalent.

This Note will analyze the legal ramifications Title VII has on employer mandated vaccination policies, specifically focusing on the manufacturing sector. Section II provides relevant background information for vaccine mandates in the industry. Section III analyzes Title VII, including the different claims employees have under the statute and certain affirmative defenses available to employers. Section IV then applies reasonable accommodation and undue hardship to the manufacturing sector. Section V provides certain factors manufacturers should consider when determining whether a vaccine mandate is the best option for their facility. Finally, Section VI concludes that, with guaranteed exceptions, Title VII poses little legal threat to mandatory vaccination policies in the manufacturing sector.

II. BACKGROUND INFORMATION

To best understand vaccine mandates and why this Note focuses on the manufacturing sector, this Section provides details on the industry’s economic importance, a brief history of government-mandated vaccine policies, the impact of vaccine preventable diseases (“VPDs”), and potential reasons people refuse vaccines.

A. The Importance of Manufacturing

As of June 2021, the United States manufacturing industry employs over

summary of mitigation techniques during the 1918 pandemic in Table 1); Nina Strohlic & Riley D. Champine, *How Some Cities ‘Flattened the Curve’ During the 1918 Flu Pandemic*, NAT’L GEOGRAPHIC (Mar. 27, 2020), <https://www.nationalgeographic.com/history/2020/03/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus/> [<https://perma.cc/E9E7-37LR>].

7. Cf. Tina Bellon, *U.S. Employers Could Mandate a COVID-19 Vaccine, But Are Unlikely to Do So—Experts*, REUTERS (Dec. 2, 2020, 11:30 AM), <https://www.reuters.com/article/us-health-coronavirus-vaccine-companies/u-s-employers-could-mandate-a-covid-19-vaccine-but-are-unlikely-to-do-so-experts-idUSKBN28C2LL> [<https://perma.cc/W9GG-6UA8>] (stating vaccine mandates are common in the healthcare industry). The article states vaccine mandates are common only in the healthcare industry, so readers can infer such mandates are uncommon in other private industries.

8. 42 U.S.C. § 2000e-2. Title VII is a federal statute that works to eliminate discrimination in the workplace. *See id.* While Title VII is the focus of this Note, comparisons to the Americans with Disabilities Act (“ADA”) and other considerations will be mentioned when appropriate. These other laws and considerations should be examined further in future research on employer-mandated vaccine policies.

twelve million people.⁹ Manufacturing is particularly important because it provides high wages for industry employees. Manufacturing industry wages range from an average of \$23.12 per hour for production and nonsupervisory positions, to an average of \$28.92 per hour for all positions.¹⁰ In contrast, the federal minimum wage is only \$7.25 per hour.¹¹ Additionally, a 2019 study found U.S. manufacturing accounted for approximately \$2.3 trillion in total output—11.39% of the United States' GDP.¹² Moreover, manufacturing accounted for approximately \$274 billion in total domestic research and development in 2018.¹³

B. State-Sponsored Vaccination Mandates within the United States

For over a century, the United States Supreme Court has held that, with few exceptions, states may use their police power to mandate vaccines in an effort to suppress and prevent the spread of communicable diseases.¹⁴ In *Jacobson v. Massachusetts*, the board of health for Cambridge, Massachusetts enacted a regulation requiring smallpox vaccinations for all inhabitants of the city.¹⁵ The *Jacobson* holding still plays out every day in the vaccination requirements of both public and private educational institutions.¹⁶

While the *Jacobson* holding was premised on the police power, the Court also rationalized its decision with the idea of a “social compact” that can limit the

9. *Databases, Tables & Calculators by Subject*, U.S. BUREAU LAB. STATS., <https://data.bls.gov/timeseries/CES3000000001> [<https://perma.cc/2L36-SKHB>] (last visited July 20, 2021).

10. *Id.*

11. *But see State Minimum Wage Laws*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/minimum-wage/state> [<https://perma.cc/Y8XH-WHYG>] (last visited Feb. 28, 2021) (showing 29 states provided higher minimum wages than the federal minimum wage). The wages listed are still lower than the manufacturing industry average. *See id.*

12. *2019 United States Manufacturing Facts*, NAT'L ASS'N MFRS, <https://www.nam.org/state-manufacturing-data/2019-united-states-manufacturing-facts/> [<https://perma.cc/NUQ6-V8FE>] (last visited Jan. 25, 2021).

13. Raymond M. Wolfe, *U.S. Businesses Reported \$441 Billion for R&D Performance in the United States During 2018, a 10.2% Increase from 2017*, NAT'L CTR. FOR SCI. & ENG'G STATS. (Aug. 26, 2020), <https://ncses.nsf.gov/pubs/nsf20316/> [<https://perma.cc/58CE-4M6Q>].

14. *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922) (upholding *Jacobson*). The constitutionality of state-sanctioned mandatory vaccination cases will be determined on the “necessities of the case.” *Jacobson*, 197 U.S. at 28.

15. *Cf. Jacobson*, 197 U.S. at 12 (holding there was an exception to the regulation for children who had a note from a physician stating they were unfit for vaccination).

16. *Jacobson*, 197 U.S. at 25-26; *Zucht*, 260 U.S. at 177 (upholding a state-mandated vaccine policy for a private school); *see* *Klaassen v. Trs. of Ind. Univ.*, No.1:21-CV-238 DRL, 2021 U.S. Dist. LEXIS 133300 (N.D. Ind. July 18, 2021), *aff'd*, No. 21-2326, 2021 U.S. App. LEXIS 22785 (7th Cir. Aug. 2, 2021), *inj. denied*, No. 21A15, 2021 U.S. LEXIS 3677 (Aug. 12, 2021) (upholding Indiana University's COVID-19 vaccine mandate); *see also* IND. CODE § 20-34-4-5 (2021) (requiring parents to provide the school a vaccination statement proving their child has been vaccinated for certain diseases).

freedom of some for the common good of all.¹⁷ For example, the Court stated:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.¹⁸

Continuing its discussion on liberty, the Court noted that, “[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.”¹⁹ Thus, the Court allows the intrusion into one’s liberty based on the safety and wellbeing of the general population.

Employers do not possess the police power, so they must look towards other authorities to mandate vaccines. For example, an employer may use its contractual authority. This authority is, however, limited by Title VII and other laws. Nevertheless, because employers must use other authorities to implement such mandates, this Note will not apply the *Jacobson* holding to its analysis. While *Jacobson* provides important historical context to vaccine mandates, its authority would not be persuasive in a private sector employment case.

C. Vaccine Preventable Diseases and Their Impact

VPDs are viral and bacterial diseases that spread among humans, but can be slowed or prevented by vaccination.²⁰ In 2021, the WHO listed twenty-five known VPDs that can be treated by vaccines available to the public.²¹ A few common examples of VPDs include influenza, tetanus, mumps, and polio.²² The WHO also considers SARS-CoV-2 a VPD.²³ The WHO estimates vaccines prevent millions of deaths each year, and yet VPDs continue to be the cause of death for approximately 1.5 million people annually due to inability or refusal to get vaccinated.²⁴

While morbidity caused by VPDs is striking, the diseases also have a significant impact on the economy. For example, one study has estimated

17. *Jacobson*, 197 U.S. at 27.

18. *Id.* at 26.

19. *Id.* at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

20. Samantha Vanderslott, *How is the World Doing in Its Fight Against Vaccine Preventable Diseases?*, GLOB. CHANGE DATA LAB (Apr. 24, 2018), <https://ourworldindata.org/vaccine-preventable-diseases> [<https://perma.cc/5YK8-WWHS>].

21. *Immunization, Vaccines and Biologicals*, WORLD HEALTH ORG., <https://www.who.int/teams/immunization-vaccines-and-biologicals/diseases> [<https://perma.cc/FL9B-YXEJ>] (last visited July 20, 2021).

22. *Id.*

23. *Id.*

24. Vanderslott, *supra* note 20.

employees miss approximately 3.5 workdays upon onset of influenza symptoms.²⁵ Another study found seasonal influenza has a total economic burden of approximately \$11.2 billion, 71.3% of which comes from “indirect costs” such as loss of productivity due to work absenteeism and death.²⁶ Additionally, SARS-CoV-2 will have long-term effects on the U.S. economy, shrinking it by an estimated \$7.9 trillion throughout the next decade.²⁷ Manufacturers, especially those of nonmedical and nondurable goods, were severely impacted due to a decline in consumer need throughout the SARS-CoV-2 pandemic.²⁸ However, certain manufacturers had the opposite issue. For instance, soda and beer companies saw unprecedented demand for canned and bottled beverages, forcing them to slow or cease production of certain products due to shortages of aluminum.²⁹

D. Why People Refuse Vaccines

People refuse vaccines for innumerable reasons; thus, this Section only focuses on legally relevant explanations.³⁰ Religious beliefs are generally among the most prevalent reasons for refusal.³¹ Other reasons include philosophical

25. Jeffrey J. Van Wormer et al., *Influenza and Workplace Productivity Loss in Working Adults*, 59 J. OCCUPATIONAL & ENV'T MED. 1135, 1138 (2017). These missed days amounted to approximately \$7 billion in lost wages. Patricia Curran, *The Economic Effect of Influenza on Businesses*, SOC'Y HUM. RES. MGMT. (Dec. 13, 2012), <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/economic-effect-influenza-businesses.aspx> [<https://perma.cc/N46U-67RD>]. Along with incurring sick-time costs for approximately two-thirds of the missed workdays, it is also estimated employers lose around \$10 billion in productivity each year because of the flu. *Id.*

26. Wayan Putri et al., *Economic Burden of Seasonal Influenza in the United States*, 36 VACCINE 3960, 3964 (2018). The total economic burden ranges from \$6.3-\$25.3 billion. *Id.* at 3965.

27. Letter from Philip L. Swagel to Hon. Charles E. Schumer, *supra* note 5.

28. *Coronavirus Update: Industry Fast Facts*, IBISWORLD (June 1, 2020), <https://www.ibisworld.com/industry-insider/coronavirus-insights/coronavirus-update-industry-fast-facts/#Manufacturing> [<https://perma.cc/68WT-2C6L>].

29. Nathan Bomey, *Another Shortage! Beer, Soda Makers Struggle with Aluminum Can Supply, Plan to Limit Niche Drinks*, USA TODAY, <https://www.usatoday.com/story/money/2020/07/15/aluminum-can-shortage-beer-soda-coca-cola-pepsico-covid-19/5443308002/> [<https://perma.cc/EM3S-WCRW>] (last updated July 16, 2020). *But cf.* Sanjoy Kumar Paul & Priyabrata Chowdhury, *A Production Recovery Plan in Manufacturing Supply Chains for a High-Demand Item During COVID-19*, 51 INT'L J. PHYSICAL DISTRIBUTION & LOGISTICS MGMT. 104 (providing analysis on how manufacturers can recover after unprecedented demand of certain products).

30. This Section recognizes disability as an inability to obtain a vaccine as opposed to a refusal, and thus it is not considered for purposes of this Note.

31. Chephra McKee & Kristin Bohannon, *Exploring the Reasons Behind Parental Refusal of Vaccines*, 21 J. PEDIATRIC PHARMACOLOGY & THERAPEUTICS 104, 106-07 (2016) (arguing religion goes to the core of a person, making it difficult to change that belief).

and/or personal beliefs, including general anti-vaccination sentiments.³² Some individuals are also concerned with the safety of vaccinations.³³ Finally, some refuse vaccines simply due to a want for more information.³⁴ People refusing vaccinations for lack of information is important for many reasons, especially because employers may be able to persuade employees to get vaccinated by supplying medical advice through local healthcare providers. Although it can be time-consuming and costly, persuasion tends to lead to better results over time when compared to coercive techniques such as vaccine mandates.³⁵

Based on how courts have defined religion,³⁶ those within the anti-vaccination movement may be able to successfully argue to a court that their beliefs are religious in nature. To many, this proposition seems preposterous due to its link to personal, non-religious beliefs.³⁷ Theories of the anti-vaccination campaign have been overwhelmingly disproven by science.³⁸ Nevertheless, the anti-vaccination campaign, which is predominately the product of social media use,³⁹ may become an issue for employers when applying a court's definition of

32. *Id.* at 107.

33. *Id.* at 107-08. See Julia Ries, *You're More Likely to Be Hit by Lightning Than to Have Severe Vaccine Allergy*, HEALTHLINE (Apr. 8, 2019), <https://www.healthline.com/health-news/youre-probably-not-allergic-to-vaccines> [<https://perma.cc/N5ZA-PTYP>] (citing Derek K. Chu & Zainab Abdurrahman, *Vaccine Allergy*, 191 CAN. MED. ASS'N J. E395 (2019)) (arguing safety concerns are generally misguided). Some people, though very few, are known to have severe, adverse reactions to certain vaccines which could present ADA issues. See 42 U.S.C. § 12112.

34. McKee & Bohannon, *supra* note 31, at 108.

35. Daniel G. Orenstein & Y. Tony Yang, *From Beginning to End: The Importance of Evidence-Based Policymaking in Vaccination Mandates*, 43 J. L. MED. & ETHICS 99, 99 (2015). It is presumed persuasion can only be more effective than coercion if the party receiving the information is open to logical, scientific reasoning. Nevertheless, the proposition that persuasion can be more effective than coercion will be an important reminder for employers moving forward. See *infra* Section V.

36. See *infra* text accompanying notes 45-50.

37. See McKee & Bohannon, *supra* note 31, at 107 (providing arguments generally used by the anti-vaccine campaign).

38. Cf. *Autism and Vaccines*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccinesafety/concerns/autism.html> [<https://perma.cc/S24G-PF74>] (last visited Mar. 19, 2021) (arguing vaccines do not cause autism); see generally Julie A. Boom et al., *Vaccine Myths: Setting the Record Straight*, 18 J. FAM. STRENGTHS 1 (2018).

39. Elvira Ortiz-Snchez et. al., *Analysis of the Anti-Vaccine Movement in Social Networks: A Systematic Review*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 5394 (2020), at 10. But cf. Lauren Dunn & Linda Carroll, *Some Doctors Helping Anti-Vaccine Parents Get Medical Exemptions*, NBC NEWS (Jan. 27, 2019, 4:01 PM), <https://www.nbcnews.com/health/kids-health/some-doctors-helping-anti-vaccine-parents-get-medical-exemptions-n963011> [<https://perma.cc/E3AS-ERLL>] (providing some U.S. doctors are unethically advancing this campaign); Barbara Maria Kollataj et al., *Anti-Vaccine Movements – Health Care, Ignorance or a Diversion Aimed at Destabilizing the Health Situation? Part 2. Contemporary Conditions for the Functioning and Development of Anti-Vaccination Movements*, 27 ANNALS AGRIC. & ENV'T MED. 553, 555-56 (2020) (providing Polish

religion.⁴⁰

III. TITLE VII

Title VII is a federal statute that applies to employers with at least fifteen employees for at least twenty calendar weeks in a year.⁴¹ Courts have expressed Congress's objective in Title VII is clear from the language of the statute—to remove barriers that have created unequal employment opportunities throughout history.⁴² Title VII prohibits employers from discriminating against employees because of their race, color, sex, national origin, or religion.⁴³ While a vaccine mandate could create a discrimination claim under any of the protected classes, a religious discrimination claim is the most conceivable challenge to such a mandate.⁴⁴ Thus, to best explain religious discrimination under Title VII, this Section will be broken into five Subsections that define religion, analyze the sincerity needed for a religious belief, describe the potential legal claims afforded to employees, discuss the principle of reasonable accommodation, and explain undue hardship.

A. Defining Religion

Defining religion is a consequential step in a Title VII religious discrimination claim, and one that could provide arguments to those with sincerely held personal beliefs.⁴⁵ Title VII broadly defines religion as “all aspects of religious observance and practice, as well as belief.”⁴⁶ The United States

examples of doctors promoting the anti-vaccination movement).

40. *But see* Fallon v. Mercy Catholic Med. Ctr., 877 F.3d 487 (3d Cir. 2017) (finding anti-vaccine belief was medical rather than religious in nature); Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 51 (2d Cir. 1988) (upholding that the anti-vaccine belief was not based “on religious grounds, but on scientific and secular theories”); Brown v. Children’s Hosp. of Phila., 794 Fed. Appx. 226 (3d Cir. 2020) (finding anti-vaccine belief was not religious).

41. 42 U.S.C. § 2000e(b). This Note presumes most manufacturers will meet the basic requirements of Title VII and be subject to its provisions.

42. *See* Griggs v. Duke Power Co., 401 US. 424, 429-31 (1970) (explaining the overarching goal of Title VII, but specifically applying Title VII to a racial discrimination case).

43. 42 U.S.C. § 2000e-2(b).

44. *Cf.* Dylan J. Yépez, *Healthcare Employers: Exercise Caution When Enforcing Mandatory Vaccination Policies*, NAT’L L. REV. (July 5, 2019), <https://www.natlawreview.com/article/healthcare-employers-exercise-caution-when-enforcing-mandatory-vaccination-policies> [<https://perma.cc/LFD2-ZA9B>].

45. *See generally* Joshua T.B. Williams et al., *Religious Vaccine Exemptions in Kindergartners: 2011-2018*, 144 PEDIATRICS 1, 3-4 (2019) (finding states with vaccine exemptions for religious and personal beliefs “had significantly lower mean proportions of kindergartners with religious exemptions [. . .] compared with states with religious exemptions only”). The researchers suggest those with personal beliefs are likely disguising such as religious beliefs when the state only provides a religious exemption for school children. *Id.*

46. 42 U.S.C. § 2000e(j).

Supreme Court has adopted this definition;⁴⁷ however other courts have expanded the scope, allowing its reach to be virtually unlimited by including any conduct that is motivated by religion—meaning “all forms and aspects of religion, however eccentric.”⁴⁸ In fact, the United States District Court for the Southern District of Ohio recently observed that “religious practices [. . .] include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of religious views.”⁴⁹ With this broad definition of religion, the court allowed the plaintiff to prevail over a motion to dismiss because it was “plausible that [p]laintiff could subscribe to veganism with a sincerity equating that of traditional religious views.”⁵⁰ Some may brush off this opinion as extreme and unlikely to have weight in other jurisdictions, but it provides an example of how courts may define religion and subsequently force employers to seriously consider any belief, no matter how unique.

B. Sincerity of the Religious Belief

The next step in a Title VII analysis is determining whether the employee sincerely holds the claimed religious belief. As previously stated, religion includes both traditional religious beliefs and moral and ethical beliefs that are “sincerely held [with] the strength of [religion].”⁵¹ Thus, the employee’s sincerity in their specific belief is determinative.⁵² Sincerity is subjective, often making it difficult for employers to disprove the sincerity of an employee’s belief.⁵³ In fact,

47. *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 71-72 (1977).

48. *Redmond v. GAF Corp.*, 574 F.2d 897, 900-01 (7th Cir. 1978) (citing *Cooper v. General Dynamics*, 533 F.2d 163, 168 (5th Cir. 1976)). While courts are willing to protect eccentric, religious behavior, this behavior is also, in part, defined by societal norms. For example, while generally not an issue within employment law, polygamy is outlawed in all 50 states—presumably because of societal norms—even though it has been and continues to be practiced by various denominations of the Mormon Church. *E.g.*, IND. CODE § 35-46-1-2 (2021). While still illegal, Utah has effectively decriminalized polygamy by changing its penalty to an infraction. *See* UTAH CODE ANN. § 76-7-101 (West 2021).

49. *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (citing 29 C.F.R. § 1605.1 (2012)). Defining religion as such is parallel to some states allowing philosophical or personal belief vaccine exemptions for students. *E.g.*, COLO. REV. STAT. ANN. § 25-4-903(2)(b)(I) (West 2020).

50. *Chenzira*, 2012 WL 6721098, at *4. *But see* *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 685-86 (Cal. Ct. App. 2002) (holding veganism does not constitute a religious belief under California’s Fair Employment and Housing Act, which provides protections similar to Title VII).

51. *Chenzira*, 2012 WL 6721098, at *4.

52. *See* *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 12 (D. Mass. 2006) (citing *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 270 F.3d 49, 56 (1st Cir. 2002)).

53. *See generally* *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (alleging the validity of someone’s religious sincerity cannot be questioned). Anglo-Saxon

the Seventh Circuit has gone so far as to implicitly hold that while theologians may be tempted to examine the sincerity of an employee's belief, the Government is prohibited from making such inquiries.⁵⁴

Nonetheless, disproving sincerity is possible. In *Fallon*, the Third Circuit held an employee's belief was medical in nature and thereby not protected as a religious belief under Title VII.⁵⁵ There, a hospital employee objected to a vaccination policy, stating he believed vaccines did more harm than good to the body.⁵⁶ The employee argued this stance was accompanied by a sincerely held belief that one should not harm their own body.⁵⁷ The court found in favor of the employer, reasoning because the belief was isolated and not accompanied with any other religious teaching, the belief was not sincerely held at a level akin to that of a religious belief.⁵⁸ While the *Fallon* decision shows disproving sincerity is possible, employers are more likely to prevail on other defenses, such as undue hardship.

jurisprudence generally requires the proponent of an allegation, here the employee, to carry the burden of proving part of the case, here the sincerity of their religion. However, Title VII places the burden on the employer to disprove such sincerity. Courts may reject the general evidentiary principle because of the heightened protections for religion or for various other reasons not explored in this Note. Some employers, like Conway Regional Health System, have even asked employees requesting religious exemptions from COVID-19 vaccination mandates to sign an attestation. These statements provide that the undersigned employee does not and will not use common medications developed from fetal cells, and ultimately help ensure the employee's claim is actually a sincerely held religious belief. Parris Kane, *Conway Regional CEO Says COVID-19 Religious Exemption Isn't an Attempt to Shame Employees*, KATV (Sept. 14, 2021), <https://katv.com/news/local/conway-regional-ceo-says-covid-19-religious-exemption-isnt-an-attempt-to-shame-employees> [<https://perma.cc/W3E8-9XDE>]. The list includes, but is not limited to: Tylenol, Tums, Motrin, Ibuprofen, Benadryl, Sudafed, Claritin, and many others. *Id.* Many courts' refusals to question sincerity and religious objections are pliable, so it is undetermined whether this approach provides the employer any additional support or if it will hold up to scrutiny if judicially tested.

54. See *Adeyeye*, 721 F.3d at 448-52 (citing *United States v. Seeger*, 380 U.S. 163, 184 (1965)); see also *Tagore v. U.S.*, 735 F.3d 324, 328 (5th Cir. 2013) (citing *Moussazadeh v. Tex. Dep't of Crim. Justice*, 703 F.3d 781, 790-92 (5th Cir. 2012)) (reasoning while the sincerity component is important, courts must use "judicial shyness" when completing the inquiry).

55. See *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 492 (3d Cir. 2017).

56. *Id.*

57. *Id.*

58. See *id.* The court focused on the fact that the belief was isolated and not accompanied by any other teaching, that it did not deal with imponderable matters like most religions, and that there were no formal signs of a religious belief. *Id.* (citing *Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1032 (3d Cir. 1981)). This framework of questions was not used in previous cases cited within this Note, as the courts were virtually unwilling to question the sincerity at all. See *Adeyeye*, 721 F.3d at 448.

C. Legal Claims

Title VII offers employees two theories to bring discrimination claims: disparate treatment and disparate impact.⁵⁹ These subsections briefly provide explanations of the prima facie elements of each claim.

1. Disparate Treatment

Title VII prohibits employers from taking adverse employment actions against any individual because of their race, color, sex, national origin, or religion.⁶⁰ Disparate treatment requires a showing of intent.⁶¹ To demonstrate religious discrimination under a theory of disparate treatment, the employee carries the initial burden of presenting a prima facie showing of religious discrimination.⁶² The employee must show he or she (1) is in a protected class, (2) was otherwise qualified for the job, (3) was rejected from the position, and (4) either an employee outside of the protected class was selected for the job, or the employer continued searching for employees for the job.⁶³ If the employee meets these elements, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the action.⁶⁴ The employee may rebut the employer's given reason by showing it is pretextual.⁶⁵

2. Disparate Impact

Disparate impact is the second type of claim an employee may bring to show discrimination under Title VII.⁶⁶ “[D]isparate-impact discrimination occurs when an employer uses facially neutral policies or practices that have a

59. 42 U.S.C. § 2000e-2(a); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

60. 42 U.S.C. § 2000e-2(a); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

61. See 42 U.S.C. § 2000e-2(a); see also McDonnell, 411 U.S. at 804.

62. See McDonnell, 411 U.S. at 802 (providing a prima facie case for racial discrimination).

63. See *id.* at 802. A showing under the disparate treatment theory is available for both prospective and current employees. Element three of the prima facie case generally means an adverse employment action was taken against the employee. However, the McDonnell prima facie framework is flexible. It can be used for claims related to hiring, firing, or other actions, and is even used for other statutes, such as the ADA. For example, the Tenth Circuit reworded the framework to conform to the facts of a wrongful termination case, stating the employee must show: “(1) he belongs to a racial minority; (2) that he was qualified for his job; (3) that, despite his qualifications, he was discharged; and (4) that after his discharge the job remained available.” Lujan v. N.M. Health & Soc. Servs., 624 F.2d 968, 970 (10th Cir. 1980) (citing McDonnell, 411 U.S. at 802).

64. McDonnell, 411 U.S. at 802.

65. *Id.* at 804.

66. 42 U.S.C. § 2000e-2(a)(2); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

disproportionately adverse effect on protected groups.”⁶⁷ Disparate impact discrimination does not require a showing of intent.⁶⁸ The employee need only show the employment practice has a disparate impact on a protected class.⁶⁹ Disparate impact discrimination is generally shown through statistical evidence.⁷⁰ However, an employee can also make a prima facie case by demonstrating that a reasonable jury could infer a similarly-situated employee not in the protected class would not be adversely impacted by the neutral policy, but they, as an employee of the protected class, are adversely affected.⁷¹ Once an employee has shown the employment policy creates a disparate impact, the employee may move in one of two ways. First, an employee may show the employer uses an employment practice that causes a disparate impact, and the employer has failed to show the practice is “job related for the position in question and consistent with business necessity.”⁷² Otherwise, an employee may demonstrate they provided the employer with a reasonable alternative to the neutral policy and the employer failed to adopt that alternative.⁷³

D. Reasonable Accommodation

After providing the different types of legal claims an employee may bring under Title VII, it is vital to consider reasonable accommodation. Unlike other protected classes in Title VII, reasonable accommodation claims are available for both disparate impact and disparate treatment religious discrimination cases.⁷⁴

67. *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 485 (E.D. N.Y. 2014) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009)).

68. *Id.* (citing *U.S. v. Brennan*, 650 F.3d 65, 90 (2d Cir. 2011)).

69. 42 U.S.C. § 2000e-2(k)(1).

70. *Ricci*, 557 U.S. at 587 (citing *Conn. v. Teal*, 457 U.S. 440, 446 (1982)); *Muhammad*, 52 F. Supp. 3d at 486 (citing *Lewis v. N.Y.C. Transit Auth.*, No. 04-cv-2331 (SLT) (MDG), 2014 U.S. Dist. Lexis 46471 (E.D. N.Y. Mar. 31, 2014)); see *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977).

71. *Muhammad*, 52 F. Supp. 3d at 486 (citing *Lewis*, 2014 U.S. Dist. Lexis 46471).

72. 42 U.S.C. § 2000e-2(k)(1)(A)(i). See Note, *Business Necessity Under Title VII of the Civil Rights Acts of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) (providing analysis on the theories of disparate impact and business necessity). The business necessity defense is an important step in analyzing Title VII and other anti-discrimination statutes; however, because it is believed most claims arising from vaccination policies will arise under claims that are alleging the employer failed to provide reasonable accommodation, this Note looks to focus its analysis solely on reasonable accommodation. Further analysis of the business necessity defense is warranted for future notes.

73. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

74. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (citing 42 U.S.C. § 2000e(j) (2012)); see also Amina Musa, Note, ‘A Motivating Factor’ – *The Impact of EEOC v. Abercrombie & Fitch Stores, Inc. on Title VII Religious Discrimination Claims*, 61 ST. LOUIS L. J. 143, 155 n.87 (2016) (noting Title VII religious accommodation claims have seemingly merged with disparate treatment claims). The job necessity defense is only available for disparate

Once an employee shows religious discrimination, and absent a showing of an undue hardship by the employer, the employer is obligated to provide reasonable accommodation to the policy.⁷⁵

Reasonable accommodation eliminates the conflict between the employee's religious practice and the employment policy.⁷⁶ An employee may establish a prima facie case of failure to reasonably accommodate by demonstrating that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined for failure to comply with the conflicting employment requirement."⁷⁷

Determining whether an accommodation is reasonable is a question of fact that should be determined based on the totality of circumstances.⁷⁸ To determine an accommodation, both the employer and employee should work cooperatively and in good faith.⁷⁹ Nevertheless, the duty to cooperate in good faith does not require the employer to grant the employee's preferred accommodation, but rather only those that are reasonable.⁸⁰

It is important to note that while reasonable accommodation and undue hardship are distinct elements, reasonable accommodation is inherently determined in relation to undue hardship.⁸¹ For example, the Second Circuit stated that "the defendant's burden of persuading the factfinder that the plaintiff's

impact discrimination. *See also* 42 U.S.C. § 2000e-2(k)(2).

75. *See* *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 66 (1977) (citing 42 U.S.C. § 2000e(j) (1970)); *see also* 42 U.S.C. § 2000e(j) (2018). Unlike the ADA, reasonable accommodation is not its own claim under Title VII; rather, reasonable accommodation is best understood as a way to move under disparate treatment or disparate impact discrimination. *See Abercrombie*, 135 S. Ct. at 2032.

76. *Muhammad*, 52 F. Supp. 3d at 483.

77. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)). As expressed, an employee must notify their employer that the policy conflicts with their religion before the employee can claim the employer failed to make a reasonable accommodation.

78. *Robinson v. Children's Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255, at *6 (D. Mass. Apr. 5, 2016) (citing *E.E.O.C. v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56-57 (1st Cir. 2002)).

79. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 131 (1st Cir. 2004) (citing *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190, 199 (D. Mass. 2004)).

80. *Patterson v. Walgreen Co.*, 727 F. App'x 581, 587 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (2020); *Horvath v. City of Leander*, 946 F.3d 787, 792 (5th Cir. 2020) (citing *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001)); Dorit R. Reiss & Veena B. Dubal, *Influenza Mandates and Religious Accommodation: Avoiding Legal Pitfalls*, 46 J.L. MED. & ETHICS 756, 757 (2018).

81. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 11-13 (1996). This article looks specifically at the ADA; however, the proposition that reasonable accommodation and undue hardship are distinct is applicable to Title VII.

proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship.⁸²

E. Undue Hardship

Undue hardship is a bedrock principle for many Equal Employment Opportunity (“EEO”) laws. This Note considers undue hardship in relation to safety and cost—which inherently includes efficiency. Once accommodations are proposed, if the parties are unable to reach an agreement, the employer must show the proposed accommodations would cause an undue hardship.⁸³ Under Title VII, undue hardship is determined using a *de minimis* standard.⁸⁴ That is, if the proposed accommodation would have greater than a *de minimis* impact on the employer, the accommodation is considered unduly burdensome.⁸⁵

1. Safety Considerations

A safe work environment may be the most important reason to implement a vaccine mandate. When considering Title VII’s *de minimis* impact standard,

82. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131,138 (2d Cir. 1995). *But see Vande Zande v. State of Wis. Dep’t. of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (stating proposed accommodations that do not pose an undue hardship may still be found unreasonable in certain circumstances). Both cases are ADA cases but can be compared to Title VII.

83. *See Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 66 (1977) (citing 42 U.S.C. § 2000e(j) (1970); *see also* 42 U.S.C. § 2000e(j) (2018)). Reasonable accommodation and undue hardship are distinct elements; however, it is difficult to think of any situation where a court would find a reasonable accommodation also causes an undue hardship. *See also* Karlan & Rutherglen, *supra* note 81, at 6-8.

84. *Trans World Airlines Inc.*, 432 U.S. at 84. There has been some indication that a few justices on the United States Supreme Court are willing to reconsider the *de minimis* standard; but all petitions for certiorari have been denied. *See Patterson*, 727 F. App’x at 587; *see also* *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (2021); *Dalberiste v. GLE Assocs., Inc.*, 814 Fed. App’x. 495 (11th Cir. 2020), *cert. denied*, 2021 U.S. Lexis 1773 (2021). This Note does not look to analyze whether the *de minimis* standard is an appropriate way to balance an employer’s interests against an employee’s religious freedom. *See generally* Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745 (1998) (providing an analysis of whether the *de minimis* standard is appropriate for Title VII religious accommodation). *De minimis* is defined as “[t]rifling; negligible.” *De Minimis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

85. *Trans World Airlines Inc.*, 432 U.S. at 84. As previously stated, it is possible a court could determine an accommodation is both reasonable and unduly burdensome; however, this possibility is negligible, and if the court were to find this, it would be obligated to rule in favor of the employer due to its finding of undue hardship. *See* Karlan & Rutherglen, *supra* note 81, at 6-8 (making a similar argument for the ADA).

“safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer’s business.”⁸⁶ Courts generally seem to consider the safety of the employee seeking a specific accommodation and their fellow coworkers;⁸⁷ however, courts have also been willing to allow safety concerns to encompass the public in the healthcare industry.⁸⁸

Virtually no privately implemented vaccine mandates outside of the healthcare industry have been tried in court.⁸⁹ Thus, while this Note is focused on manufacturing, it is important to explain how the healthcare industry has dealt with such mandates. In *Robinson*, a healthcare employee refused to obtain the influenza vaccine because it contained pork byproduct, which her Islamic faith prohibited her from consuming.⁹⁰ Her employer attempted to reasonably accommodate her by offering an influenza vaccine without pork byproduct, but the employee refused.⁹¹ The court found an assessment of public risk would presumably be included in an undue hardship analysis for healthcare workers.⁹² The court held that retaining the unvaccinated employee would cause an undue hardship because medical evidence not only showed vaccines were the most effective means of preventing the transmission of influenza, but also because the employee would increase the risk of infecting an already vulnerable patient population.⁹³

While there are other hospital-related mandates, many cases challenging such

86. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975).

87. *See Bhatia v. Chevron U.S.A. Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam); *see also E.E.O.C. v. Oak-Rite Mfg. Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156, at *13 (S.D. Ind. Aug. 27, 2001) (citing *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 748 (E.D. N.Y. 1998)).

88. *See Robinson v. Children’s Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255, at *6 (D. Mass. Apr. 5, 2016) (citing *EEOC Informal Discussion Letter*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250> [<https://perma.cc/ENJ4-JDLY>] (last updated Apr. 6, 2012) (considering the patient population in its analysis).

89. *See generally* Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885; Brian D. Abramson, *Vaccine Law in the Health Care Workplace*, 12 J. HEALTH & LIFE SCI. L. 22 (2019); Daria Koscielniak, Note, *Broadening Healthcare Personnel’s Exemptions to Vaccination: Will Patients Pay the Ultimate Price?*, 25 TEMP. POL. & CIV. RTS. L. REV. 171 (2016). The articles cited within this footnote are only to provide a few examples of journals discussing mandatory vaccine policies within the healthcare industry.

90. *Robinson*, 2016 WL 1337255, at *3. The employee later confirmed in her deposition that she learned of her religion’s moratorium on all vaccinations the same month she met with hospital officials. *Id.* at *8.

91. *Id.* at *3-4. The employer offered to provide the employee with a pork-free vaccination and a list of all ingredients in the vaccine; however, the employee did not seek to obtain this information. *Id.* at *3.

92. *Id.* at *6 (citing *EEOC Informal Discussion Letter*, *supra* note 88).

93. *Id.* at *9.

mandates have either settled or are still within the discovery stage.⁹⁴ It is thus necessary to provide other examples of safety considerations outside of vaccine mandates. In *Bhatia*, the employer implemented a policy stating any employee who worked around toxic gases and had facial hair that prevented a gas-tight face seal would need to shave their face and wear a fitted, gas-tight respirator.⁹⁵ However, one employee's religious beliefs prohibited the shaving of body hair.⁹⁶ The court eventually found in favor of the employer, stating undue hardship could be established in two ways: (1) by showing that allowing the employee to work without a gas-tight respirator would increase the possibility that the employer would face lawsuits for violating California Occupational Safety and Health Administration standards;⁹⁷ or (2) that assigning the employee only to projects that did not involve toxic gases would require the employer to make unnecessary predictions and force the employee's coworkers to assume his share of the work for projects involving such gases.⁹⁸ The court rationalized its argument, stating that "[a]n employer may prove that an employee's proposal would involve undue hardship by showing that either its impact on coworkers or its cost would be more than *de minimis*."⁹⁹

Furthermore, in *Kalsi*, the employer implemented a policy requiring all employees to wear hard hats at all times while inside maintenance facilities, which conflicted with one employee's religious belief that required him to wear a turban.¹⁰⁰ The court granted summary judgment in favor of the employer, initially stating "[w]here, as here, the proposed accommodation threatens to compromise the safety in the workplace, the employer's burden of establishing an undue burden is light indeed."¹⁰¹ The court reasoned that by wearing the turban

94. See Douglas J. Opel et al., *Vaccination Without Litigation—Addressing Religious Objections to Hospital Influenza-Vaccination Mandates*, 378 NEW ENG. J. MED. 785, 786 (2018) (providing a table of some cases involving vaccine mandates in the healthcare industry).

95. *Bhatia v. Chevron U.S.A. Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (per curiam).

96. *Id.*

97. *Id.* at 1384.

98. *Id.*

99. *Id.* (citing *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904, 908 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980)). This rule seems to suggest the court is not so much concerned with the health of the individual employee refusing to adhere to the questioned policy as it is with the costs associated with the potential negative health effects.

100. *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 748-49 (E.D. N.Y. 1998). This policy arose when most employees began wearing "bump caps" instead of hard hats because they felt the bump caps were more comfortable. *Id.* at 749. Nevertheless, the Transit Authority found the protection afforded by the bump caps were at best questionable and decided implementing a requirement for hard hats was necessary to better promote the safety of its employees. *Id.*

101. *Id.* at 758. The court seems to make the proposition that safety considerations lessen the already low *de minimis* burden and premise this implicit statement on the *Draper v. U.S. Pipe & Foundry Co.* argument that safety considerations are relevant to undue hardship; however, *Draper* never states safety considerations lessen the *de minimis* requirement, nor has any case made this proposition. See *id.* (citing *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975)).

instead of the hard hat, the plaintiff was at a higher risk of catching fire and electrocution, which would potentially require coworkers to save him and consequently face safety risks of their own.¹⁰² Thus, *Kalsi* provides employers an example of where *potential* litigation expenses and *potential* safety risks to coworkers can cause an undue hardship.¹⁰³

Moreover, in *Oak-Rite* the employer required all employees working on the riveting machine to wear full-length pants as a safety precaution;¹⁰⁴ however, a prospective employee informed the employer her religion forbid her from wearing attire associated with men and she was required to wear a skirt.¹⁰⁵ When the employee sued for religious discrimination, the court found in favor of the employer, stating that there is “an undue hardship (a burden that is more than *de minimis*) if the proposed accommodation would create any significant safety or legal risks.”¹⁰⁶ Thus, employers need not show any type of actual injury, but instead only that there is an increased risk of injury if the proposed accommodation were adopted.¹⁰⁷

While undue hardship for safety matters is generally not difficult for employers to show, not all employers meet the burden. For example, in *Draper* the employer stated the employee’s proposed accommodations to not work certain Saturdays constituted an undue hardship because it would cause the employee’s coworkers to work over eight hours—causing fatigue and increasing the potential risk of injury.¹⁰⁸ The court reasoned, however, there was no undue hardship because the employer was a party to a collective bargaining agreement that permitted employees to work over twelve-hour days.¹⁰⁹ Thus, while the *de minimis* standard is a low bar for employers to meet, *Draper* shows employers cannot meet their burden simply by invoking potential safety hazards, but rather must have some reasonable basis for refusing the accommodation to meet the *de minimis* standard.¹¹⁰

Safety considerations are relevant and can help show an undue hardship; however, they do not lessen the *de minimis* standard.

102. *Id.* at 760. This court also seemed to recognize they are not concerned with the wellbeing of the plaintiff if they are harmed by refusing to conform with the policy, but rather with the cost of potential litigation that could ensue from the injury and the wellbeing of the employee’s coworkers. *See id.*

103. *See id.*

104. *E.E.O.C. v. Oak-Rite Mfg. Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156, at *5-6 (S.D. Ind. Aug. 27, 2001). The employer’s expert witness observed wearing a dress would increase the possibility of entanglement in moving parts and cuts to exposed skin; however, the expert stated his observation also depended in part on fit and material of the skirt. *Id.* at *12.

105. *Id.* at *6-7.

106. *Id.* at *12.

107. *See id.* at *13.

108. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 517-21 (6th Cir. 1975).

109. *Id.* at 521-22.

110. *Id.* at 521-23.

2. Economic Costs

In its leading case defining the *de minimis* standard, the United States Supreme Court showed just how easy it is for an employer to establish undue hardship. In *Trans World Airlines, Inc.*, an employee informed his employer of his religious observance of the Sabbath and asked that the employer not schedule him on Saturdays.¹¹¹ The employer refused to grant the request, stating it would either have to employ someone not regularly scheduled to work on Saturdays and pay premium wages or fill the employee's position with a supervisor or other employee, consequently unmanning a separate operation.¹¹² The Supreme Court found in favor of the employer, stating the accommodations would either lead to a loss in efficiency or higher wages, both of which would require the employer to bear more than a *de minimis* cost.¹¹³ Interestingly, the dissent pointed out the record was devoid of any efficiency loss the employer may face, and the only costs the employer would have incurred were three \$150 payments over a period of three months.¹¹⁴

The Seventh Circuit implicitly echoed the United States Supreme Court, stating their Circuit decisions allow the "most modest burdens on employers" to overcome the *de minimis* standard.¹¹⁵ The Seventh Circuit also found transferring an employee to a new city and incurring costs to retrain that employee for a new position would constitute an undue hardship.¹¹⁶ In contrast, the Sixth Circuit held a shift change allowing an employee to observe the Sabbath did not cause an undue hardship on the employer, even though the employer would have to reschedule disgruntled employees.¹¹⁷ The Sixth Circuit reasoned that "an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive to the operating routine."¹¹⁸ Thus, while the *de minimis* standard is a low bar for employers, the Sixth Circuit has shown the fact sensitive nature of Title VII cases can cause

111. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 67-68 (1977).

112. *Id.* at 68-69. It should also be noted the employer indicated it would have granted the accommodation if not for a collective bargaining agreement that prohibited such an accommodation due to seniority protocols.

113. *Id.* at 84. *Cf.* 29 C.F.R. § 1605.2 (2021) (providing the E.E.O.C.'s interpretation of premium wages in conjunction with the *de minimis* standard).

114. *Trans World Airlines, Inc.*, 432 U.S. at 92 n.6 (Marshall, J., dissenting). When adjusted for inflation, \$150 from 1970 would amount to approximately \$1,000 in 2021.

115. *See* E.E.O.C. v. Oak-Rite Mfg. Corp., No. IP99-1962-C-H/G, 2001 WL 1168156, at *5-6 (S.D. Ind. Aug. 27, 2001) (citing *Ryan v. U.S. Dep't. of Justice*, 950 F.2d 458, 461-62 (7th Cir. 1991)).

116. *Ryan*, 950 F.2d at 462.

117. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520-23 (6th Cir. 1976). Notably, the employer in *Draper* was also subject to a collective bargaining agreement; however, the agreement allowed the employer to assign employee shifts without regard to seniority. *Id.* at 518.

118. *Id.* at 520 (citing *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551 (6th Cir. 1975)) (finding objections from coworkers alone do not constitute an undue hardship).

different results for cases alleging similar facts and undue hardships.

As previously stated, an employer can show an undue hardship simply by arguing the proposed accommodation *may*, but not necessarily *will*, lead to a safety hazard.¹¹⁹ This principle also extends to economic costs and inefficiencies. For example, the Ninth Circuit held that potential costs, specifically potential legal costs caused from a potential violation of California Occupational Safety and Health Administration standards, was enough to cause an undue hardship.¹²⁰ Furthermore, in *Kalsi*, the court held that potential workers' compensation claims resulting from a possible catastrophic safety hazard constituted an undue hardship.¹²¹ Thus, both trivial and potential costs can trigger a finding of undue hardship.

Finally, cost is directly related to efficiency. As previously stated, the United States Supreme Court held a loss of efficiency and three minor payments constituted an undue hardship.¹²² The Fifth Circuit seemingly expanded the Supreme Court's holding, finding an accommodation that creates a burden on efficiency, whether or not the accommodation would bear any monetary costs, can constitute an undue hardship.¹²³ However, the Ninth Circuit has stated that complete harmony among employees is not Title VII's objective, implicitly holding animosity alone does not constitute an undue hardship.¹²⁴ Nonetheless, if the accommodation causes employees to become so hostile as to cause greater than a *de minimis* inefficiency, the accommodation would almost certainly cause an undue hardship.¹²⁵

IV. APPLYING REASONABLE ACCOMMODATION AND UNDUE HARDSHIP TO THE MANUFACTURING SECTOR

Before a court undertakes an undue hardship analysis, the following must occur: (1) a manufacturing facility implements a vaccine mandate; (2) an employee refuses to adhere to the vaccine mandate on religious grounds; (3) both parties undergo an interactive process to determine a potential reasonable

119. *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 760 (E.D. N.Y. 1998).

120. *See Bhatia v. Chevron U.S.A. Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam).

121. *Kalsi*, 62 F. Supp. 2d at 760. The court furthered its analysis, stating the potential for incurred costs associated with a less than catastrophic injury could also constitute an undue hardship in certain circumstances. *Id.* So long as the potential, less than catastrophic injury could lead to a greater than *de minimis* cost, an undue hardship would exist. *Accord Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

122. *Trans World Airlines Inc.*, 432 U.S. at 84.

123. *Howard v. Haverly Furniture Cos.*, 615 F.2d 203, 206 (5th Cir. 1980) (citing *Trans World Airlines Inc.*, 432 U.S. at 84).

124. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607-08 (9th Cir. 2004) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976)); *see also Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1976) (citing *Cummins v. Parker Seal Co.*, 516 F.2d 544, 550 (6th Cir. 1975)) (finding objections from coworkers alone does not constitute an undue hardship).

125. *Draper*, 527 F.2d at 520 (citing *Cummins*, 516 F.2d at 551).

accommodation; and (4) the parties fail to agree on a reasonable accommodation. Reasonable accommodation and undue hardship are fact sensitive, so this Section discusses potential accommodations that may be considered by the manufacturing industry while also focusing its analysis on multiple factors that may tempt a court to find an undue hardship. Thus, this Section analyzes a few potential accommodations, the transmission of the virus, vaccine safety and effectiveness, economic burdens, coworker considerations, and the type of product the manufacturer produces.

A. Potential Accommodations

The general consensus among the scientific community is that masks work as a physical barrier to the spread of many communicable diseases and thus are the best option to limit disease transmission, second only to vaccination.¹²⁶ Social distancing, or the act of remaining a certain number of feet away from one another, has also been used as a mitigation technique in previous pandemics.¹²⁷ Finally, the use of protective clothing other than masks may be a potential accommodation for manufacturers who produce certain dangerous objects. Nevertheless, while these accommodations may seem reasonable, they all succumb to similar flaws.

When analyzing social distancing and protective clothing, practical complications arise in the manufacturing setting. For example, most manufacturing employees work on an assembly line, making it almost impossible for employers to properly distance employees without measures that would lead to greater than a *de minimis* cost.¹²⁸ Even if the manufacturer could ensure social distancing on the assembly line, it would be nearly impossible to implement the measures during the lunch hours or when employees are simply moving throughout the rest of the building.¹²⁹ Additionally, protective clothing that would

126. Cf. Robert C. Reiner Jr. et al., *Modeling COVID-19 Scenarios for the United States*, 27 NATURE MED. 94 (2021) (analyzing how universal mask use on the national level could save hundreds of thousands of lives in the United States).

127. Hatchett et al., *supra* note 6, at 7582.

128. *Social Distancing for Manufacturers: Is it Possible?*, GLOB. ELEC. SERV., INC., <https://gesrepair.com/social-distancing-for-manufacturers-is-it-possible/> [<https://perma.cc/PHU9-JDZ6>] (last visited Feb. 1, 2021).

129. Evidence from the CDC on SARS-CoV-2 suggests if an unvaccinated individual has close contact with an infected person for a total of fifteen minutes in a twenty-four-hour period, whether in continuous or interval periods, they could contract the virus and should self-isolate. *Coronavirus Disease 2019 (COVID-19): Appendices*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html#contact> [<https://perma.cc/G8P6-PYGA>] (last visited July 21, 2021). This time may differ between each communicable disease. Those who are considered fully vaccinated or who have tested positive for COVID-19 in the past three months need not self-isolate after a SARS-CoV-2 exposure unless they develop symptoms. *When You've Been Fully Vaccinated*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully->

reduce or eliminate the risk of puncture wounds or cuts, including gloves, long pants, and other similar clothing, may create additional safety hazards or inefficiencies. For example, if the proposed protective clothing has an increased probability of getting caught in a machine, an employer could show the accommodation is not reasonable.¹³⁰ Protective clothing may also reduce mobility for some workers, thereby slowing production and creating inefficiencies.¹³¹ It is also unclear how much this type of clothing would cost. Simple cotton products are unlikely to provide protection against major puncture wounds, making it likely that the manufacturer would need to purchase more durable clothing, which could itself lead to a greater than *de minimis* cost.

Next, when considering all the potential accommodations, each could be considered unduly burdensome on employers. While each option may be somewhat effective in preventing the spread of disease, vaccines offer the greatest protection. As stated, mask use is an effective measure, but the medical consensus is that masks are second best to vaccines. Nevertheless, with the give-and-take nature of reasonable accommodation, there is an argument that, although not the *most* effective, mask use and other similar accommodations would provide *enough* protection and thus should be upheld. However, courts have held that forcing an employer to test a hypothesis as to whether an accommodation is reasonable in light of the employer's policy can cause an undue hardship.¹³² In other words, a court is unlikely to test, or unwilling to force an employer to test, whether a specific accommodation provides enough protection when medical studies show vaccines are the most effective.¹³³ Thus, if a vaccine is approved and recommended by the FDA and CDC, under the *de minimis* standard it is likely anything less than vaccination would create an undue hardship so long as factors discussed later in the Note are met.¹³⁴

Nonetheless, manufactures cannot automatically discard all requested accommodations. Take, for example, a hypothetical disease that can be treated by two totally different vaccines. One vaccine contains a pork byproduct, prohibited by the Islamic and Jewish faiths, or cloned fetal cells, prohibited by the Christian faith, while the other vaccine does not contain either of the potentially

vaccinated.html [<https://perma.cc/YJ4U-E7FY>] (last visited July 27, 2021).

130. See *E.E.O.C. v. Oak-Rite Mfg. Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156, at *13 (S.D. Ind. Aug. 27, 2001).

131. See Anna-Katrina Shedletsy, *The COVID-19 Problems That Will Force Manufacturing to Innovate*, FORBES (May 5, 2020, 2:38 PM), <https://www.forbes.com/sites/annashedletsy/2020/05/05/the-covid-19-problems-that-will-force-manufacturing-to-innovate/?sh=3782445130d0> [<https://perma.cc/LQ8Y-U3ML>] (noting gloves may reduce finger dexterity for electronic manufacturing employees).

132. *Bhatia v. Chevron U.S.A, Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam); *Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *14.

133. See *Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *14; see also *Robinson v. Children's Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255, at *9 (D. Mass. Apr. 5, 2016) (providing an example where the court looked towards medical evidence to help reach its conclusion).

134. See *infra* text accompanying notes 137-78.

objectionable materials. With certain exceptions, it is almost unquestionable that an employee requesting a religious accommodation to receive the vaccine that does not contain the pork byproduct or cloned fetal cells would be considered reasonable. The employee is not asking to remain unvaccinated; rather, they are agreeing to adhere to the precise employment policy in exchange for a specific vaccine. Thus, this accommodation should lean in favor of the employee because they will remain vaccinated.

Of course, the previous argument relies on many factors to be discussed later in this Note.¹³⁵ If the employer discovers the alternative vaccine is significantly less effective or costlier, an employer may be able to show this request would cause an undue hardship, although they should still be inclined to grant the accommodation. The fact that the vaccine is available means the FDA and CDC authorized or approved and recommended its use; thereby allowing the employee, employer, and court to infer its effectiveness in preventing the specific disease.¹³⁶ This alone should allow the accommodation to lean in favor of the employee because in the end, the employee is still getting a vaccine. Therefore, even if the other vaccine is less effective or costlier, the employer must question whether the expense of litigation is worth denying an employee seeking a good faith accommodation and continuing to adhere to the employment policy.

B. Transmission of the Virus

Before evaluating how cost and safety will impact a manufacturer's undue hardship analysis, the employer must evaluate the disease's transmission.¹³⁷ Two components of transmission should be considered: the mode and the rate. When considering the mode of transmission, compare influenza or SARS-CoV-2 to hepatitis B. Both influenza and SARS-CoV-2 spread in similar manners: (1) through droplets containing the respective virus that are inhaled or land in the nose or mouth, (2) through human contact, and (3) by touching surfaces that contain a live virus.¹³⁸ In contrast, hepatitis B is spread through bodily fluids such as blood and semen, generally by sexual contact, sharing injection equipment, or during childbirth.¹³⁹

Rate of transmission is also relevant. One method to determine the rate of transmission is through the disease's R_0 , which represents the average number of

135. *See infra* text accompanying notes 137-78.

136. This statement presumes the vaccine was approved rather than provided Emergency Use Authorization.

137. This Section only considers person-to-person transmission.

138. *Similarities and Differences Between Flu and COVID-19*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm#:~:text=Both%20COVID%202021%20and%2020flu,Fever%20or%20feeling%20feverish%20chills> [https://perma.cc/9EVG-VGX5] (last visited Jan. 30, 2021).

139. *Hepatitis B*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/hbv/index.htm#:~:text=Hepatitis%20B%20is%20spread%20when,mother%20to%20baby%20at%20birth> [https://perma.cc/WJ7J-TSAE] (last visited Oct. 29, 2020).

additional people infected by each infected person.¹⁴⁰ Compare influenza and SARS-CoV-2 to measles. The median R_0 of seasonal influenza is estimated to be 1.28.¹⁴¹ The average R_0 of SARS-CoV-2 is approximately 3.28.¹⁴² In contrast, the R_0 of measles is generally cited at 12 to 18.¹⁴³ From the provided values, measles is clearly spread much easier than both influenza and SARS-CoV-2.

Nevertheless, simply stating the VPD spreads easily is not enough. The employer will need to explain how the mode and rate of transmission of the VPD will impact their workplace. Specifically, the employer must show how the VPD would spread among employees while acting within the scope of employment.¹⁴⁴

When considering how a specific VPD is transmitted, it is unlikely a manufacturer could mandate that employees obtain a hepatitis B vaccine. As hepatitis B spreads through bodily fluids,¹⁴⁵ it is highly unlikely any activity among manufacturing employees acting within the scope of their employment would cause VPD transmission. In contrast, influenza and SARS-CoV-2 spread through droplets containing live virus, human contact, and touching a surface with live virus.¹⁴⁶ A simple cough or sneeze could transmit the VPDs to fellow coworkers. Thus, it is much more likely that a manufacturer could move onto economic and safety arguments to show an undue hardship for influenza and SARS-CoV-2 as compared to hepatitis B due to the modes of transmission.

The rate of transmission has a similar analysis. Measles spreads much quicker when compared to influenza and SARS-CoV-2. However, measles may spread quicker, but the number of reported cases among the VPDs are just the opposite.¹⁴⁷ This is because the vast majority of Americans are vaccinated against

140. R_0 is pronounced “R naught” and is a mathematical term that gauges how easily the specific disease spreads. Vanessa Bates Ramirez, *What Is “R-naught”? Gauging Contagious Infections*, HEALTHLINE, <https://www.healthline.com/health/r-naught-reproduction-number> [<https://perma.cc/JP4B-UXF5>] (last updated Apr. 20, 2020). For example, if the R_0 is 4, one infected person will, on average, infect four other people. *See id.*

141. Matthew Biggerstaff et al., *Estimates of the Reproduction Number for Seasonal, Pandemic, and Zoonotic Influenza: A Systematic Review of the Literature*, 14 BMC INFECTIOUS DISEASES, Sept. 2014, at 1, 10.

142. Ying Liu et al., *The Reproductive Number of COVID-19 is Higher Compared to SARS Coronavirus*, 27 J. TRAVEL MED., Mar. 2020, at 1, 1. The Delta variant, also known as the B.1.617.2 variant, is estimated to have an R_0 of 6 to 7. Talha Khan Burki, *Lifting of COVID-19 Restrictions in the UK and the Delta Variant*, 9 LANCET RESPIRATORY MED. e85, e85 (2021).

143. Paul L. Delamater et al., *Complexity of the Basic Reproduction Number (R_0)*, 25 EMERGING INFECTIOUS DISEASES, Jan. 2019, at 1, 3. *But see* Fiona M. Guerra et al., *The Basic Reproduction Number (R_0) of Measles: A Systematic Review*, 17 LANCET INFECTIOUS DISEASES e420, e424 (2017) (finding the measles R_0 could range from 3.7-203.3).

144. *See generally* Arguello v. Conoco, Inc., 207 F.3d 803 (5th Cir. 2000); *see also* Wilson v. Joma, Inc., 537 A.2d 187, 189 (Del. 1988); Hurlow v. Managing Partners, Inc., 755 N.E.2d 1158 (Ind. Ct. App. 2001). All cases cited provide an example of how to determine scope of employment.

145. *Hepatitis B*, *supra* note 139.

146. *Similarities and Differences Between Flu and COVID-19*, *supra* note 138.

147. *See Measles Cases and Outbreaks*, CTR. DISEASE CONTROL & PREVENTION,

measles as children, which has allowed society to reach herd immunity.¹⁴⁸ In contrast, estimates for adult vaccination coverage was 48.4% for influenza during the 2019-2020 flu season and is at 59.4% of the total population for full protection against SARS-CoV-2, neither of which are enough to achieve herd immunity.¹⁴⁹ Thus, even though measles spreads easier, influenza or SARS-CoV-2 would impact a manufacturer at greater levels because immunity levels are much less, thereby making it reasonable for them to implement vaccine mandates for influenza and SARS-CoV-2 but not for measles.

Both the mode and rate of transmission arguments will be premised on an evaluation as to what percentage of the employees are requesting an accommodation to the vaccine policy and how many employees are already vaccinated. For example, if 95% of the workforce is already vaccinated for influenza or SARS-CoV-2, it will be much more difficult for an employer to show the 5% of employees who are requesting certain accommodations pose any reasonable threat to burdening the employer with greater than a *de minimis* cost. Nonetheless, because manufacturers, lawyers, and courts are generally not medical experts, and because an evaluation into what percentage of the workforce needs to be vaccinated against a specific disease to prevent substantial harm is highly scientific, this evaluation will likely need to be considered by immunologists, other medical professionals, or through other expert testimony in court.

The mode and rate of transmission are the most important considerations in undue hardship analysis. If the VPD is unlikely to spread among employees, other practical considerations, such as not granting an accommodation, are unreasonable. Of course, the employer may still mandate a vaccine, but because the VPD is unlikely to spread, the employer will have a difficult time arguing it cannot grant a reasonable accommodation. While courts are willing to find

<https://www.cdc.gov/measles/cases-outbreaks.html> [<https://perma.cc/6M9Q-DQ3B>] (last visited Oct. 30, 2020); *see also Disease Burden of Influenza*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/about/burden/index.html#:~:text=While%20the%20impact%20of%20flu,61%2C000%20deaths%20annually%20since%202010> [<https://perma.cc/24XM-LN5M>] (last visited Oct. 30, 2020). These statistics are not meant to reflect the importance of one vaccine over the other. In fact, recent outbreaks of measles reiterate the importance of continuing vaccination against the disease. *See* Michael Gold & Tyler Pager, *New York Suburb Declares Measles Emergency, Barring Unvaccinated Children from Public*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/nyregion/measles-outbreak-rockland-county.html> [<https://perma.cc/5BN7-L2TP>].

148. *Measles, Mumps, and Rubella*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/measles.htm> [<https://perma.cc/M26B-V4PW>] (last visited Jan. 30, 2021).

149. *Flu Vaccination Coverage, United States, 2019-20 Influenza Season*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/fluview/coverage-1920estimates.htm> [<https://perma.cc/Y2JV-G5RA>] (last visited Jan. 30, 2021); *COVID-19 Vaccinations in the United States*, CTR. DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-onedose-pop-5yr [<https://perma.cc/UA88-UHUZ>] (last visited Dec. 2, 2021).

potential costs and safety hazards to be an undue hardship, the line must be drawn at some point. Thus, even if the potential costs or safety hazards of a specific VPD outbreak may be enormous, a court should not find an undue hardship when a VPD is unlikely to spread among employees while acting within the scope of employment.

C. Vaccine Safety and Effectiveness

After determining whether the VPD is likely to spread among employees while acting within the scope of employment, it is necessary to consider the vaccines overall safety and effectiveness. However, because it is unlikely that manufacturers would have any expertise in immunology, they should make this consideration based on FDA approval and CDC recommendation.¹⁵⁰ Potential vaccines are put through intense clinical trials that analyze the vaccine's safety and efficacy or effectiveness.¹⁵¹ The results from these trials guide the FDA's decision on whether to approve the vaccine. Presumably, if the vaccine is shown to be unsafe or ineffective, the FDA would not approve the vaccine. However, this analysis may change in the case of vaccines given an Emergency Use Authorization ("EUA"). An EUA vaccine is not approved by the FDA, but rather is authorized for use due to exigent circumstances, such as lack of other adequate treatments for the disease.¹⁵² The FDA is required by statute, with limited exception, to ensure recipients of an EUA vaccine are "informed of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks."¹⁵³ Notably, only providers, recipients, and the Department of Health and Human Services are explicitly addressed—not private employers.¹⁵⁴ Little judicial guidance is given on this statute;¹⁵⁵ however, in the absence of presidential waiver, one court allowed the Department of Defense to only administer an EUA vaccine on a *voluntary*

150. From a purely economic standpoint, it seems that even if an employee were to suffer some type of adverse reaction to a vaccine, the employer could be exonerated from liability under the National Vaccine Injury Compensation Program. 42 U.S.C. §§ 300aa-10 *et seq.* Such analysis goes beyond the scope of this Note and further research is warranted.

151. Vaccine efficacy is a figure that is determined in controlled clinical trials, while vaccine effectiveness is determined once the vaccine has been approved and is available to the general public. *Efficacy and Effectiveness*, IMMUNISATION ADVISORY CTR., <https://www.immune.org.nz/vaccines/efficiency-effectiveness#:~:text=Vaccine%20efficacy%20and%20effectiveness%20are,use%20in%20the%20general%20population> [https://perma.cc/BY2K-C5KZ] (last updated Jan. 2020).

152. 21 U.S.C. § 360bbb-3(b)-(c).

153. *Id.* at § 360bbb-3(e)(1)(A)(i)(III).

154. *See id.*

155. *But see* Complaint, *Legaretta v. Macias*, No. 2:21-cv-00179 (D. N.M. Feb. 28, 2021) (providing an example of a recent challenge of a mandated EUA vaccine).

basis.¹⁵⁶

Since the FDA presumably only approves vaccines that data shows to be safe and effective, manufacturers should not weigh this consideration too heavily. Nonetheless, a court may question what rate of effectiveness is necessary for the employer to mandate such a policy. For example, if a vaccine is only 40% effective, is the employer's intrusion justified? Interestingly, the influenza vaccine only prevents 40%-60% of flu related illnesses and is considered one of the least effective vaccines on the market.¹⁵⁷ Despite this, the CDC continues to recommend that everyone, except in extreme circumstances, receive the influenza vaccine each year because studies estimate the vaccine annually prevents millions of influenza-related illnesses, medical visits, hospitalizations, and deaths.¹⁵⁸

If a specific vaccine prevents medical visits, illnesses, hospitalizations, and deaths, it can be reasoned that a high rate of vaccination among employees would, at minimum, slow the spread or lessen the impact of the VPD. If the spread of the disease is slowed, it could reduce disease-related costs and inefficiencies. In contrast, low levels of vaccination among employees could force employers to bear more than a *de minimis* cost, pushing the court to rule in favor of undue hardship.¹⁵⁹

D. Economic Consequences of the Questioned Disease

Once the employer has shown the specific VPD is reasonably likely to spread among employees, they can then turn to other important factors such as cost. One study has found employees who contract influenza and experience symptoms will miss approximately 3.5 workdays in a given week.¹⁶⁰ This not only costs employers in paid sick leave, but also leads to a decrease in efficiency and approximately \$11.2 billion in total economic burden.¹⁶¹ Moreover, SARS-CoV-2

156. *Doe v. Rumsfeld*, No. 03-707 (EGS), 2005 U.S. Dist. Lexis 5573, at *2-3 (D. D.C. April 6, 2005). See 10 U.S.C. § 1107a(a) (providing the President the ability to waive the choice requirement only (1) for those in the armed forces and (2) in specific circumstances).

157. *Vaccine Effectiveness: How Well Do the Flu Vaccines Work?*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm> [<https://perma.cc/SJ3D-TFY7>] (last visited Nov. 4, 2020). The percentages are only correct when the flu vaccine is well-matched to the flu strand circulating that year. *Id.* While the influenza vaccine is not highly effective in preventing illness, it does reduce severity if infected. See Robert G. Deiss et al., *Vaccine-Associated Reduction in Symptom Severity Among Patients with Influenza A/H3N2 Disease*, 33 *VACCINE* 7160, 7166 (2015) (providing analysis only on the A/H3N2 influenza strain).

158. *Vaccine Effectiveness: How Well Do the Flu Vaccines Work?*, *supra* note 157.

159. See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam); see also *Howard v. Haverty Furniture Cos., Inc.*, 615 F.2d 203, 206 (5th Cir. 1980) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)) (noting inefficiencies without monetary burdens can cause an undue hardship).

160. Van Warmer et al., *supra* note 25. These missed days amount to approximately 20.1 million days in lost productivity. Putri et al., *supra* note 26.

161. Putri et al., *supra* note 26.

is expected to shrink the United States economy by approximately \$7.9 trillion over the next decade.¹⁶² While not every VPD ravages the economy on an annual basis, these figures show just how devastating certain VPDs can be for employers.

The above figures do not reflect how VPDs impact manufacturers directly, but when considering the *de minimis* standard, it seems a court examining these astounding costs would find in favor of the employer. For example, the United States Supreme Court found that three \$150 payments constituted an undue hardship.¹⁶³ Furthermore, the Fifth Circuit went as far to say that an inefficiency, even without any monetary costs, can cause an undue hardship.¹⁶⁴ Both of these holdings must also be read in conjunction with the fact that most courts find potential costs, both from litigation and everyday losses in productivity, can cause an undue hardship.¹⁶⁵

It seems without question that potential costs or inefficiencies associated with paid sick leave, short-term disability, or even shutting down the manufacturing plant, alongside a slew of other costs should point towards an undue hardship. Employers can also show vaccine mandates in the healthcare setting have decreased absenteeism of employees,¹⁶⁶ providing employers a valuable efficiency argument. Of course, a mandatory vaccine policy will not eliminate all costs or inefficiencies, but it will at least be a step towards seeing a great reduction.¹⁶⁷

E. Coworker Considerations

The assembly line is a key function of the manufacturing industry, but it is not conducive to social distancing.¹⁶⁸ Employees are constantly near one another, making it easier to spread many communicable diseases. While close proximity alone may not constitute an undue hardship, one court has noted where “the proposed accommodation threatens to compromise the safety in the workplace, the employer’s burden of establishing an undue burden is light indeed.”¹⁶⁹ Therefore, any other showing, such as the fact that the close proximity leads to a higher chance of disease transmission, thus leading to higher costs and inefficiencies, will likely allow the employer to meet its burden.

162. Letter from Philip L. Swagel to Hon. Charles E. Schumer, *supra* note 5.

163. *Trans World Airlines Inc.*, 432 U.S. at 92 n.6 (Marshall, J., dissenting).

164. *Howard*, 615 F.2d at 206, (citing *Trans World Airlines Inc.*, 432 U.S. at 84).

165. *See Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam).

166. John Frederick et al., *Protecting Healthcare Personnel in Outpatient Settings: The Influence of Mandatory Versus Nonmandatory Influenza Vaccination Policies on Workplace Absenteeism During Multiple Respiratory Virus Seasons*, 39 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 452, 457 (2018).

167. *See id.*

168. *See supra* text accompanying notes 128-29.

169. *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 758 (E.D. N.Y. 1998). *But see* discussion *supra* note 101.

It could also be argued the close proximity makes manufacturing employees vulnerable to contracting diseases, thus constituting an undue hardship.¹⁷⁰ For instance, Tyson Foods is being sued because of the alarming spread of SARS-CoV-2 among employees on the assembly line, forcing the company to shut down plants to help slow the spread of the disease and prevent further deaths of employees who contracted the disease at work.¹⁷¹ The tragedy at Tyson Foods indicates how vulnerable assembly line employees are to contracting and spreading communicable diseases. This vulnerability—a consideration of the *Robinson* court—should also be considered by manufacturers. Of course, there is an argument that because *Robinson* focused its analysis on the patient population rather than the employee’s coworkers or the employee herself,¹⁷² the case is not applicable to the manufacturing sector. The previous proposition does have merit; however, this Note focuses specifically on the use of the word “vulnerable.”¹⁷³ The lack of social distancing within assembly line facilities likely increases viral transmission among employees. Thus, when analyzing vulnerability, employers and courts should find in favor of vaccine mandates within manufacturing facilities.

An employer may also need to consider animosity among coworkers that could arise if a group of employees view the vaccine exemption as a threat to their wellbeing. As previously stated, courts have long held employee objections to a coworker’s accommodation alone do not constitute an undue hardship.¹⁷⁴ Thus, the employer would need to show the coworker’s objection to the accommodation could lead to an inefficiency causing an undue hardship. For example, the Fifth Circuit held a decline in morale by depriving coworkers of a shift preference because of an employee’s requested accommodation constituted an undue hardship.¹⁷⁵ While employee animosity can be used to show undue hardship, it is unnecessary for the employer to meet its burden. Employers should be able to show safety hazards, other practical inefficiencies, and potentially enormous costs, and thus should only examine coworker considerations in the rarest of circumstances.

170. See *Robinson v. Children’s Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255, at *9 (D. Mass. Apr. 5, 2016).

171. *Families of 3 Dead Workers Sue Tyson Foods Over Coronavirus Outbreak*, FORTUNE (June 26, 2020, 5:27 AM), <https://fortune.com/2020/06/26/tyson-foods-coronavirus-lawsuit/> [<https://perma.cc/H5BZ-LPAW>].

172. *Robinson*, 2016 WL 1337255, at *9.

173. *Id.*

174. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607-08 (9th Cir. 2004) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976)); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1976) (citing *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551 (6th Cir. 1975)).

175. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146-147 (5th Cir. 1982). *But see* *Opuku-Boateng v. Cal.*, 95 F.3d 1461, 1473-74 (9th Cir. 1996) (coming to a different result on similar facts). An in-depth analysis regarding coworker morale is beyond the scope of this Note. *But see generally* Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1011-22 (1997).

F. Products the Manufacturer Produces

Another factor that a court may use to determine whether an undue hardship exists in the manufacturing sector is the type of products produced within a specific manufacturing plant. Take, for example, two manufacturers: Manufacturer A produces plastic and cardboard widgets and Manufacturer B produces sharp, metal widgets. Now consider the outcomes of two separate religious discrimination lawsuits that follow when both manufactures implement a new vaccination policy requiring all employees to obtain the Tdap vaccine which, among other things, protects against tetanus.¹⁷⁶

Potential safety hazards and increased costs, including litigation or productivity costs, can cause an undue hardship.¹⁷⁷ If an employee were to be injured while acting within the scope of employment and contract tetanus, an employer's liability could be enormous. For example, the court may find the employer liable for medical costs. One study found medical costs associated with tetanus could range from \$22,229 to \$1,024,672.¹⁷⁸ This potential cost would almost certainly cause an undue hardship. Nevertheless, the associated costs may only cause an undue hardship for one of the hypothetical manufacturers. While puncture wounds may be likely for employees working for Manufacturer B because of its production of sharp, metal widgets, they are unlikely for employees working for Manufacturer A because of its production of plastic and cardboard widgets. Since puncture wounds would be unlikely for Manufacturer A's employees, contracting tetanus while acting within the scope of employment would also be unlikely. Therefore, because contracting tetanus while working for Manufacturer A is unlikely, a court should find Manufacturer A's *de minimis* cost analysis is too far-fetched to serve any legitimate business interest. The same court should rule in favor of Manufacturer B because of the reasonable possibility that an employee could contract tetanus and incur major medical costs.

An evaluation into the types of products the manufacturer produces will only be necessary for certain diseases. For example, it would be unreasonable to enter

176. *Tdap (Tetanus, Diphtheria, Pertussis) VIS*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/hcp/vis/vis-statements/tdap.html> [<https://perma.cc/ZT4R-84AR>] (last visited October 28, 2020). Tetanus is caused by a toxin created by bacterial spores called *Clostridium tetani*—found in soil, dust, and animal feces—which can enter the body through puncture wounds and other cuts. *Tetanus*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/tetanus/symptoms-causes/syc-20351625> [<https://perma.cc/XH3A-N7MM>] (last visited October 28, 2020). Tetanus vaccines can be obtained within a specified period after the injury, but this hypothetical does not recognize this as a limiting factor because (1) the religious objection would still be an obstacle after the injury occurred and (2) some similar disease in the future may only be prevented from a vaccine injected before the injury.

177. See *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 760 (E.D. N.Y. 1998).

178. See Cynthia Yen et al., *Missed Opportunities for Tetanus Postexposure Prophylaxis—California, January 2008–March 2014*, 64 *MORBIDITY & MORTALITY WKLY. REP.* 243 (2015) (providing an analysis of fifteen patients who contracted tetanus).

this analysis for a disease such as influenza because the disease predominately spreads through person-to-person transmission. Nonetheless, the comparison between Manufacturers A and B is an important reminder of why Title VII lawsuits must be considered on a case-by-case basis.

V. BEST STEPS MOVING FORWARD

At minimum, manufacturers should consider vaccine mandates for certain VPDs. Manufacturers are unquestionably key to a healthy economy. Without manufacturers being able to make products, truckers are unable to carry out shipments, retailers cannot make sales, hospitals are unable to acquire supplies, and consumers are unable to purchase certain goods. These economic tolls indirectly lead to psychological phenomena. For example, at the beginning of the SARS-CoV-2 pandemic, the United States, Japan, and Australia saw panic buying of toilet paper, and the United Kingdom, France, and China saw the same occur with face masks—depleting and straining the supply chain.¹⁷⁹ These stresses were in part fueled by manufacturing closures because of viral spread within facilities. Thus, while *Jacobson* will not persuade a court to act in favor of a manufacturer, the Court’s idea of the “social compact” between citizens provides manufacturers a moral argument to at least consider implementing such a mandate.¹⁸⁰

Nevertheless, even with the likelihood of success in Title VII challenges to vaccine mandates, employers may still approach the subject with hesitancy. This hesitancy may arise for different reasons, but the ever-increasing cost of litigation will undoubtedly be at the forefront of the employer’s mind. Thus, before implementing a vaccine mandate, employers may consider the art of persuasion to achieve high levels of vaccination among employees. Employers could persuade employees to obtain a vaccine by sponsoring seminars featuring local health professionals to discuss the importance of vaccines, providing free vaccines for employees if insurance or the government does not cover the costs, and offering on-site vaccines as doses are made available. Another interesting option may be to incentivize employees to obtain a vaccine by offering a small stipend or paid time off upon proof of a final dose.¹⁸¹ However, the E.E.O.C.

179. Ross Adkin, *Panic Buying Follows Coronavirus Across the Globe*, MEDICAL XPRESS (Mar. 5, 2020), <https://medicalxpress.com/news/2020-03-panic-coronavirus-globe.html> [<https://perma.cc/93W8-VWBJ>]. Cf. Janni Leung et al., *Anxiety and Panic Buying Behaviour During COVID-19 Pandemic—A Qualitative Analysis of Toilet Paper Hoarding Contents on Twitter*, 18 INT’L J. ENV’T RES. & PUB. HEALTH 1 (2021) (analyzing the impact of social media on panic buying).

180. See generally *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905).

181. Requiring an employee to provide proof of vaccination would be considered a medical inquiry and potentially violate the ADA, unless the employer could show the inquiry is “job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4). The standard to determine the inquiry will differ depending on whether it is for a current, prospective, or other employee. See *id.* at (d). The “final dose” will be different for each vaccine. Paid time off is likely only needed for vaccines with harsher side effects such as the SARS-CoV-2 vaccine.

requires that these incentives not be “so substantial as to be coercive.”¹⁸²

While offering free vaccines, vaccine education, and on-site administration should be used whether manufactures implement a vaccine mandate or not, incentives may be too costly in the long run. Furthermore, it may be necessary to implement a mandatory vaccine policy where persuasion efforts do not lead to high levels of vaccination among employees. Even more concerning, some manufactures may be forced to implement some type of mandate due to an increasing number of lawsuits alleging OSHA-related violations and workers’ compensation claims.¹⁸³ To help counteract this, many states have already enacted protections for employers providing some level of immunity from lawsuits involving employees alleging they were exposed to SARS-CoV-2 while acting within the scope of their employment.¹⁸⁴ Additionally, if a vaccine mandate is implemented, other practical considerations, such as the staggering of employee vaccinations, must also be examined. Employers should also consider other EEO laws when implementing such a mandate.

182. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/R2YE-HJ4R>] (last visited July 22, 2021). This guidance is specifically related to the ADA. *See id.* The guidance also only applies to employers who require proof of vaccination. *Id.* The incentive limitation does not apply to employers who offer incentives to employees who voluntarily provide proof of vaccination so long as those who administered the vaccine to the employee were not the employer or the employer’s agent. *Id.*

183. *But see* Paul Davidson & Nicholas Wu, *Workers Face ‘Uphill Battle’ Proving Firms Liable if They Catch COVID-19 as Economy Reopens*, USA TODAY (Apr. 28, 2020, 3:54 PM), <https://www.usatoday.com/story/money/2020/04/28/coronavirus-can-you-sue-if-you-get-covid-19-work/3035422001/> [<https://perma.cc/YP4Y-YTF7>]; *see also* Mark H. Hyman et al., *Evaluating COVID-19 Injury Claims with a Focus on Workers’ Compensation*, 62 J. OCCUPATIONAL AND ENV’T MED. 692, 692-95 (2020) (noting it may be difficult to classify COVID-19 as an occupational illness but that some states have provided broader protections for certain industries). *Cf. Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP’T LAB., <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/ANK3-FVXS>] (last visited Feb. 8, 2021) (providing guidance to help limit the spread of SARS-CoV-2 within the workplace). President Biden has directed OSHA to write a rule requiring employers with 100 or more employees to mandate employees get vaccinated or undergo weekly testing. *Path Out of the Pandemic: President Biden’s COVID-19 Action Plan*, WHITE HOUSE, <https://www.whitehouse.gov/covidplan/> [<https://perma.cc/5E2X-SUL3>] (last visited Sept. 9, 2021) (the constitutionality of the President’s proposed OSHA rule is still unknown). *Cf.* Mark A. Rothstein et al., *Employer-Mandated Vaccination for COVID-19*, 111 AM. J. PUB. HEALTH 1061, 1063 (2021) (providing potential legal arguments against an OSHA vaccine mandate). Analysis into OSHA and workers’ compensation claims goes beyond the scope of this Note.

184. *Accord* Ind. Code § 34-30-32 *et seq.* (2021) (providing employers immunity from tort liability in certain actions dealing with SARS-CoV-2). Governor Eric Holcomb signed this bill into law on February 18, 2021. The bill is retroactive to March 1, 2020, and is extended until December 31, 2024. *Id.* These state actions do not protect employers against OSHA-related violations.

All of this is premised on whether the specific vaccine is approved by the FDA or only authorized through EUA. As previously stated, the EUA statute does not explicitly discuss employers.¹⁸⁵ Thus, a plain reading of the statute could indicate employers may mandate vaccines under EUA if they continue to follow Title VII and other EEO laws. Nonetheless, if the vaccine is only authorized through EUA, an employer should consider delaying their vaccine mandate.

Finally, and perhaps most important, the manufacturing community, and employers at-large, should reach out to religious communities and explain the importance of vaccines. Some may throw this proposition out as ludicrous and better suited for the healthcare industry; however, industries should work together to achieve common goals. Nevertheless, these criticisms may be correct, as it would be a lofty and uncomfortable step for private employers to take, but it could make a world of difference. Religion, no matter the denomination, is founded on principles that stress coming together for a better purpose and to better a community. Therefore, showing a religious community the detrimental impact of a VPD spreading through a single manufacturing plant, let alone an entire community, could make an impact. Of course, there is no legal obligation to take this step, but it is a low-cost act that could help persuade hesitant employees.

VI. CONCLUSION

Title VII's fact-sensitive nature prohibits a conclusory statement that all manufacturing employers can implement a vaccine mandate and subsequently show an undue hardship whenever an employee seeks a religious accommodation. Nevertheless, because of the enormous costs, inefficiencies, and safety hazards associated with a VPD spreading through the assembly line, many manufactures should be able to show allowing employees to remain unvaccinated against certain VPDs would create greater than a *de minimis* cost. Therefore, with guaranteed exceptions, Title VII is unlikely to legally impede a manufacturer from implementing a mandatory vaccine policy for VPDs that are reasonably likely to spread among employees while acting within the scope of employment.

185. See 21 U.S.C. § 360bbb-3.