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Session 403 | Emerging Covid-19 Employment Challenges: The Civil Rights Issues We Should Have Seen Coming

When the Covid-19 pandemic first hit the U.S., our healthcare workers became first responders whose health and safety was at risk daily. Hospitals and medical offices immediately jumped into “fight or flight” mode and imposed stringent policies based on CDC and OSHA guidelines requiring the wear of personal protective equipment (PPE), and stopped balancing the interests of their employees’ workplace rights. This most significantly impacted religious and racial minorities – predominantly of South Asian descent - who sometimes require accommodations due to facial hair to wear alternative PPE to the N95 respirators that are most prevalent. It also impacted women, who frequently cannot wear traditional N95’s due to their narrower face shapes. Often, employees seeking accommodations to wear alternative PPE were told they must comply with hospital policies to wear N95’s, or risk termination. Additionally, new employees were often denied employment when it became clear they would require an accommodation. The pandemic brought to light the pervasive implicit bias that shapes our employment policies and the interpretation of federal regulations, and this program will explore how we can remedy that by more fairly applying the law to protect vulnerable groups under Title VII of the Civil Rights Act. This panel will bring together lawyers and stakeholders who are focused on these emerging legal issues to knowledgeable the civil rights, regulatory and practical matters involved.

Moderator:

Amrith Kaur Aakre, Legal Director, The Sikh Coalition

Speakers:

Elizabeth Fox-Solomon, Office of the Chair, U.S. Equal Employment Opportunity Commission
Louise Betts, Counsel for Appellate Litigation, U.S. Department of Labor, SOL-OSH Division
Teresa Murray, Civil Rights Analyst, U.S. Department of Health and Human Service
Giselle Klapper, Senior Staff Attorney, The Sikh Coalition

SESSION NAME:

Emerging COVID-19

Employment Challenges:

The civil rights issues we should
have seen coming.





Speakers

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- **Amrith Kaur Aakre**, Legal Director, The Sikh Coalition.

Program Overview

When the COVID-19 pandemic hit the U.S., our healthcare workers and medical/dental students became first responders whose health and safety was at risk daily. Hospitals and medical offices immediately jumped into “fight or flight” mode and imposed stringent policies based on CDC and OSHA guidelines requiring the wear of personal protective equipment (PPE), and stopped balancing the interests of their employees’ workplace rights.

This most significantly impacted religious and racial minorities and those with medical and religious concerns requiring facial hair accommodations to wear alternative PPE to the N95 respirators that are most prevalent. This shift also impacted many women, who frequently cannot wear traditional N95’s due to their narrower face shapes.

Some employees seeking accommodations to wear alternative PPE were told they must comply with hospital policies to wear N95 respirators or risk termination. Additionally, new employees were sometimes denied employment when it became clear they would require an accommodation. The pandemic brought to light the pervasive implicit bias that shapes our employment policies and the interpretation of federal regulations, and this program will explore how we can remedy that by more fairly interpreting and applying the law to protect vulnerable groups under Title VII of the Civil Rights Act.

2021  NAPABA CONVENTION

together

Pursuant to the ABA Rules of Professional Responsibility & Ethics

Per Rule 2.1 of the American Bar Association's Rules of Professional Responsibility:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”

Thus, we must ask ourselves:

How can we, as legal professionals, ensure accurate interpretation and understanding of the intersection of law and policies in our client's cases? How do we ensure that the policies themselves are consistent with the law, and, if not, how do we ensure that the agencies responsible for those policies make adjustments that are consistent with the law? Finally, how do we consider the totality of the circumstances in evaluating whether the laws and policies are equitable and do not discriminate against our clients or others?

Program Objectives

Attendees will learn about:

1. Emerging COVID-19 pandemic related employment challenges primarily affecting minority groups subject to Title VII of the Civil Rights Act;
2. The intersection of governmental regulatory policies and civil rights protections, including how to interpret those policies in the most inclusive way possible; and
3. Best practices for compliance with both state and federally mandated regulations, as well as workplace obligations and protections for employers and employees.

Questions Presented:

1. What were the initial employment challenges brought about by the COVID-19 pandemic that affected religious and racial minority groups?
2. What are the relevant authoritative agencies and the regulations at issue?
3. Are the regulatory policies themselves bias, or did bias contribute to a lack of adequate understanding and application of those policy regulations and guidelines?
4. What steps are being taken now by those agencies to address the COVID-19 pandemic, and will those measures be temporary remain in place indefinitely?

Question 1

What were the initial employment challenges brought about by the COVID-19 pandemic that affected minority groups?

COVID-19 Timeline: 2020-2021 Challenges Emerging

January 2020
Amid thousands of new cases in China, W.H.O. declares COVID-19 a “public health emergency of international concern”

March 2020
OSHA and CDC release temporary guidance regarding sealed respirators for healthcare workers, which adversely affects individuals with beards

May 2020
Two Montreal based Sikh doctors shaved their beards to treat Covid-19 patients, causing an uproar in the U.S. on the provision of alternative accommodations

June 2020
States and localities continue to pass their own PPE bills. With nearly 200 bills across the U.S., very few required employers to provide employees with PPE.

January 2021
President Biden directs the OSHA to release new guidance to employers on protecting workers from Covid-19. Soon after, OSHA releases its first set of guidance.

June 2021
OSHA releases updated guidance that recognizes the need for medical and religious accommodations.

February 2020
Seattle patient dies in what was believed to be the first coronavirus death in the United States

April 2020
Maryland: 25 police officers who refused to shave their beards, citing a skin condition, and are put on leave

May 2020
Sikh public health workers continue to create innovative solutions, including the thattha method for passing the seal test requirement

October 2020
UK Thattha method study published in Journal of Hospital Infection.

March 2020
Sikh Coalition receives first inquiry from Sikh healthcare worker seeking help in obtaining religious accommodation. Numerous similar intakes followed, resulting in the release of a memo to Sikh healthcare workers advising them of their rights under Title VII.

July 2020
Hospital asked third year medical student doing clinical rotations to shave his beard to wear an N95. Sikh Coalition represented the individual and advocated on his behalf, filed a complaint with the US Dept. of Health and Human Services and pushed hospital to provide an accommodation so that he could use a PAPR.

April 2021
U.S. Equal Employment Opportunity Commission hosts testimony by employment discrimination experts to raise awareness regarding how OSHA and CDC policies are impacting workers.

Applicable Respiratory Protection Systems



Filtering Facepiece Respirator (FFR)

- Disposable
- Covers the nose and mouth
- Filters out particles such as dust, mist, and fumes
 - Select from N, R, P series and 95, 99, 100 efficiency level
 - Does NOT provide protection against gases and vapors
- Fit testing required

Elastomeric Half Facepiece Respirator

- Reusable facepiece and replaceable cartridges or filters
- Can be used to protect against gases, vapors, or particles, if equipped with the appropriate cartridge or filter
- Covers the nose and mouth
- Fit testing required



Elastomeric Full Facepiece Respirator

- Reusable facepiece and replaceable canisters, cartridges, or filters
- Can be used to protect against gases, vapors, or particles, if equipped with the appropriate cartridge, canister, or filter
- Provides eye protection
- More effective face seal than FFRs or elastomeric half-facepiece respirators
- Fit testing required

Powered Air-Purifying Respirator (PAPR)

- Reusable components and replaceable filters or cartridges
- Can be used to protect against gases, vapors, or particles, if equipped with the appropriate cartridge, canister, or filter
- Battery-powered with blower that pulls air through attached filters or cartridges
- Provides eye protection
- Low breathing resistance
- Loose-fitting PAPR does NOT require fit testing and can be used with facial hair
- Tight-fitting PAPR requires fit testing



PPE Requirements & the COVID-19 Pandemic

- COVID-19's highly transmissible nature requires healthcare professionals to wear higher levels of PPE beyond just surgical masks to avoid getting or spreading the virus.
- CDC, NIOSH & OSHA regulations recommend the wear of PPE such as the N95 respirator *or something greater* to avoid that risk, such as a Powered Air-Purifying Systems (PAPR).
- N95s became the most readily available and cheapest PPE to meet the safety requirements.
- Both CDC and OSHA regulations require certain employees to be fitted for N95 respirators prior to being able to wear them in the workplace.
- Current regulations do **not** allow employees to sit for the N95 fit test if they have *any* amount of facial hair.
- Many employers view OSHA & CDC guidelines as absolute compelling safety interests, and not subject to constitutional or statutory laws.
- Throughout the pandemic, many employers instituted policies more stringent than the agency regulations, including:
 - Requiring ALL staff to be clean-shaven regardless of religious or medical accommodation requests to meet the requirements to wear the N95.
 - Refusing to expand their respirator programs to include PAPRs or other full coverage PPE that meet agency regulations.
 - Instituting shaving requirement that disproportionately impact many Sikh, Jewish, Muslim and other minority. faith healthcare workers, students, paramedics and other first responders who maintain beards consistent with their religious beliefs.
 - These requirements also impact many Black and Latino employees with the Pseudofolliculitis Barbae (PFB) medical condition prohibiting shaving, and some women who cannot pass fit tests due to smaller face shape.

Sikhs are disproportionately being effected

Since the beginning of the pandemic, the Sikh Coalition has received over 25 PPE-related inquiries

Of those, 20 were U.S. based Sikh public health workers, ranging from doctors, to medical/dental students to ambulance workers

These inquiries came from across the U.S., including New York, Illinois, California, North Carolina, Massachusetts, and Tennessee

Ripped From The Headlines!

Two Sikh doctor brothers shaved their beards so they can safely treat coronavirus patients

Advocating for Better PPE for Sikhs

EXCLUSIVE: Religious Workers Sacked or Shamed for Refusing to Shave Beards Off

Muslim MTA subway worker forced to shave beard: lawsuit

The false choice presented to Sikh doctors serving COVID patients

A Solution for Sikh Medical Students, Physicians Caught Between Their Religion and Their Profession

Muslim workers forced to trim beards at Mount Sinai Hospital for masks: suit

Your Hair or Your Service: An Issue of Faith for Sikh Healthcare Professionals During the COVID-19 Pandemic

Background on Sikhi and Historical Patterns of Religious Discrimination

- 5th largest religion in the world, originating in South Asia, with approximately 26 million practicing Sikhs worldwide and over 500,000 within the United States.
- Observant religious practice includes wearing five articles of faith comprised of maintaining **kesh** (uncut hair - including facial hair) and covered by a **dastaar** (turban); carrying a **kanga** (small wooden comb); wearing a **kachera** (long cotton undershorts); wearing a **kara** (steel bracelet), and carrying a **kirpan** (article of faith resembling a knife).
- Most recent FBI statistics from 2019 show Sikhs are among the top 5 groups experiencing anti-religious hate crimes and have seen an upward trend of victimization by an average annual increase of 102% between 2015 to 2019.
- Studies show Sikhs are disproportionately subject to workplace discrimination; namely, observant Sikhs are often targeted for employment discrimination because of their actual or perceived race, ethnicity, national origin, and religion - specifically due to accents or race (leading to segregation and/or failure to hire), derogatory name calling and other acts of hostile work environments, and failure to accommodate religious articles of faith.
 - Since the COVID-19 pandemic, highest volume of employment discrimination stems from Title VII, First Amendment and other statutory violations for Sikh healthcare workers due to failure to accommodate PPE

Examples of impacted Sikhs

1

An observant Sikh emergency medical technician (“EMT”) in Connecticut requested a religious accommodation to maintain his religiously-mandated beard and wear a Powered Air-Purifying Respirator (“PAPR”) in place of an N95 respirator. The employer, a national medical transportation company with tens of thousands of employees, denied his request and terminated him in late fall of 2020 on the basis of an alleged company-wide policy against the use of PAPRs. When the Sikh Coalition intervened, the company doubled down on its refusal to provide a religious accommodation arguing that it did not consider use of a PAPR to be a reasonable accommodation. The employer’s purported primary objection was remaining safety concerns in relation to air exhaled from a PAPR. After exhaustive discussions, the employer’s position did not change. The Sikh Coalition filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (“EEOC”) in May of 2021; the agency is currently investigating the charge.

2

A hospital-employer in California segregated an observant Sikh occupational therapist from patients testing positive or showing symptoms of COVID-19 because he objected to shaving his religiously-mandated beard to use an N95. When he requested a religious accommodation, his hospital refused to provide the employee with a PAPR (purportedly due to the cost), causing him to worry that his hours may be reduced. Ultimately, the Sikh Coalition was able to provide him with support and a PAPR (which had been donated to our organization), which resolved the matter

3

A Sikh medical student in New York City was temporarily suspended from Staten Island University Hospital (“SIUH”) even after he had passed the hospital’s mandatory N95 respirator fit test with his religiously-mandated beard. At the start of the COVID-19 pandemic, SIUH informed the medical student that he would need to shave his beard. Prior to the pandemic, the medical student passed the fit test by placing a beard gown underneath a N95 respirator. However, after the pandemic began the hospital advised the medical student that he needed to shave and take another fit test before being allowed to return. The medical student feared that his refusal to shave would impede his ability to complete his studies and become a doctor. The Sikh Coalition intervened, informed the hospital of the student’s constitutionally and statutorily protected rights, and filed a complaint with the Office for Civil Rights (“OCR”) at the U.S. Department of Health and Human Services (“HHS”). The agency provided SIUH with technical assistance , enabling them to provide the medical student with a PAPR which resolved the matter.

And this isn't just a Sikh issue...

Maryland Police Officers:

- Law enforcement agency placed 25 officer-employees on paid leave as a medical accommodation during the early days of the pandemic because they could not shave to wear N95s due to a condition called Pseudofolliculitis Barbae (PFB).

Muslim Cleaning Crew in NY Hospital:

- Three observant Muslim men who worked as part of a cleaning crew in a New York hospital were told to shave their beards to wear N95s and denied religious accommodations to wear PAPRs in place of N95s.
- The hospital claimed that PAPRs do not provide the same level of protection as N95s (i.e., that the wearer's exhaled air could potentially cause contamination), and questioned the sincerity of the men's religious beliefs.
- Hospital-employer offered all three men alternative positions, but only one of the men accepted. The other two men were terminated.
- Employees sued under Title VII failure to accommodate a religious request.



The image is a screenshot of a CNN news article. At the top, the CNN logo is on the left, and navigation links for 'US', 'Crime + Justice', 'Energy + Environment', 'Extreme Weather', and 'Space + Science' are in the center. On the right, there are links for 'LIVE TV', 'Edition', and a search icon. The main headline reads '25 officers who refused to shave their beards put on leave until the pandemic ends'. Below the headline, it says 'By Evan Simko-Bednarski and Anna Sturla, CNN' and 'Updated 1:55 PM ET, Thu April 30, 2020'. The main image shows a white and blue Prince George's County Police Recruiter car. To the right of the main image, there is a 'More from CNN' section with two video thumbnails: one for Rep. Crenshaw on Afghanistan and one for Chris Cuomo addressing his brother's resignation. Below that is a 'Paid Content' section by Outbrain.

Background on Patterns of Racial, Gender-Based and Medical Discrimination

- Over 60% of Black men, as well as some Asian, Hispanic, and Middle Eastern men, suffer from Pseudofolliculitis barbae (PSB), which results in painful razor bumps. The problem results when highly curved hairs grow back into the skin causing inflammation and a foreign body reaction. Over time, this can cause scarring which looks like hard bumps of the beard area and neck. Shaving sharpens the ends of the hairs like a spear, which then curve back into the skin causing significant pain.
 - The only effective treatment is to let the hair grow out so it does not curve into the skin.
- Women were at risk: PPE's unisex design is geared to fit men, whose faces are shaped vastly different than women's faces.
 - Per U.S. Department of Labor's respirator fit test criteria:
 - Chin must be properly placed with adequate strap tension
 - Respirator must fit across nose bridge
 - Respirator must have proper size to space distance from nose to chin and it may not have a tendency to slip
 - Employee should have access to self-observation in mirror to evaluate fit and position.
 - If the respirator doesn't fit properly, contaminated air can leak into the facepiece and potentially cause the wearer to breathe in hazardous substances

PPE Based Religious Discrimination & the COVID-19 Pandemic

- Hospitals enforced the N95 wear and fit test requirements as a matter of safety, insisting employees must either sit for and pass the fit test for an N95 or be terminated.
- Some employers insisted religiously observant employees obtain a “dispensation” in order to shave for safety reasons.
- Many employers failed to educate themselves on alternative PPE to learn about PAPRs or other workable alternatives.
- Some employers failed to hire healthcare employees, and/or place students who required religious accommodations to avoid the issue, or segregated them after denying their accommodation request.

The discriminatory impact of these policies is even more concerning given the CDC’s recent declaration that racism (including lack of access to employment for minorities) is a serious public health crisis:

- CDC acknowledged that both interpersonal and structural racism in its regulations negatively affect “the mental and physical health of millions of people, preventing them from attaining their highest level of health, and consequently, affect[s] the health of our nation.”
- CDC further acknowledged that, “racism also deprives our nation and the scientific and medical community of the full breadth of talent, expertise, and perspectives needed to best address racial and ethnic health disparities. To build a healthier America for all, we must confront the systems and policies that have resulted in the generational injustice that has given rise to racial and ethnic health inequities.”
- Structural racism and disparate impact of CDC and OSHA policies (and their interpretations) are part of the public health crisis for racial and religious minorities who have inequitable access to employment in the healthcare industry.
- Result is growing systemic issues within workplaces and healthcare industry as result of current policies and their interpretation.

Question 2

What are the relevant authoritative agencies and the regulations at issue?

Relevant Agencies and their Roles

- **Centers for Disease Control & Prevention (CDC)**
 - *Purpose:* Protect against disease related health, safety, and security threats within the U.S. and abroad, conduct critical scientific research and provide health information that protects the U.S. against expensive and dangerous health threats, and respond when those threats arise.
- **National Institute for Occupational Safety and Health (NIOSH)**
 - *Purpose:* A research focused subsidiary of the CDC that facilitates the research of new advancements in worker health and safety conditions, certifies safety equipment and regulates its practical implementation in the field. Partners with industry, workers, government, scientists and professionals
- **Occupational Safety and Health Administration (OSHA)**
 - *Purpose:* Ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance.
- **Equal Employment Opportunity Commission (EEOC)**
 - *Purpose:* Responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of their race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age disability or genetic information.

Applicable CDC Regulations Pre-COVID-19 Vaccine & Post

- **Pre-COVID-19 Vaccine Availability:**
 - Recommended routine infection prevention and control (IPC) measures in place, including:
 - Visual alerts (signs, posters) alerting employees to IPC protocols
 - Test individuals for COVID-19 prior to admittance into hospital or conducting any procedures/surgeries
 - Minors may have one parent; no visitors initially for adult patients.
 - All employees routinely tested for COVID-19 pursuant to the PCR method
 - Source Control - all employees, visitors, and patients must wear respirators of well fitting masks to cover mouth and nose
 - Face cover must be a NIOSH approved N95 equivalent or higher level respirator
 - Follow all OSHA guidelines to maintain worker safety and healthy work environment
 - Physical distancing when possible
 - Emergency guidance “Strategies for Optimizing the Supply of Facemasks” - set out relaxed standards in situations wherein healthcare facilities had limited or no facemasks, including extended use of facemasks, using facemasks beyond manufacturer-designated shelf life, limited reuse of facemasks, use of NIOSH-approved alternatives to the N95 respirator (including surgical masks), use of face shields, and use of handmade facemasks.
- **Post-COVID-19 Vaccine Availability:**
 - Recommend that all employees be vaccinated against COVID-19
 - Those who are not vaccinated continue following above Source Control protocol
 - Unvaccinated employees must adhere to weekly testing for COVID-19
 - Those who are vaccinated but are high risk or have at risk individuals in their household continue following Source Control protocol
 - General IPC measures stay in place
 - Patients who are admitted and test negative for COVID-19 may have one declared visitor for the entire time of admission. Minors may have two parents accompanying them.
 - Follow all OSHA guidelines to maintain worker safety and healthy work environment

Applicable NIOSH Regulations for Healthcare Workers

- **Respirators and Face Mask Requirements:**
 - General purpose in healthcare setting:
 - Respirators:
 - Removing contaminants from the air by filtering out airborne particles (worn to protect the wearer and reduce their exposure from contaminated air)
 - Must be tight-fitting or provide additional full-coverage protection in order to filter out contaminants
 - Masks:
 - Intended for medical purposes (i.e. FDA-cleared surgical masks including those labeled as procedure masks)
 - “Gas masks” which filter out chemicals and gases.
 - Must be tight-fitting or provide additional full-coverage protection in order to filter out contaminants
 - All equipment must be approved by NIOSH and certified as appropriate level of coverage
 - All respiratory equipment must be fit tested. Standards require no amount of facial hair to sit for a fit test.
 - Exhalation valves are permitted outside of surgical settings (where additional face shield or surgical N95 may be required to avoid potential fluid exposure).
 - In cases where the exhalation valves release unfiltered air (i.e. elastomeric respirators), surgical masks may be worn to protect against contaminated air escaping the respirator.
 - Maintain all PPE equipment in a clean and hygienic manner. May wear the same equipment through out shifts unless change is required due to a specific contamination.
 - Employees should follow CDC Source Control and ICP measures, and OSHA guidelines to maintain a safe and healthy work environment.
 - NIOSH will continue reviewing industry driven advancements and improvements to PPE research and development

Applicable OSHA Regulations for Healthcare Workers

- **29 CFR 1910.134 - Respirator Protection Standard**
 - Requires employers to provide respirators for employees which are suitable for the environment and intended purpose
 - Requires employers to establish a respiratory protection program (RPP) for maintenance of respirators and training employees on their use.
 - Requires N95 respirator fit test by some employees prior to wearing them in the workplace
 - Does NOT allow fit tests for bearded people
 - Requires maintenance of certain air quality controls to avoid contamination
 - Requires respirators to be NIOSH-certified and complaint
 - Does not require religious or medical accommodations to be made within the language of the standard
- **29 C.F.R. § 1910.502 - Emergency Temporary Standards for COVID-19 (released June 2021)**
 - Incorporates guidance within 29 CFR 1910.134
 - Allows for vaccine and facemask wearing exemptions for employees due to medical and religious reasons, provided other Source Control and worker safety measures exist
 - Requires employers to provide N95s or an alternative respirator providing higher levels of protection as necessary
 - Requires respirator specific RPP in place for employees who require a certain type of respirator
 - Requires use of elastomeric respirators or PAPRS when conducting aerosol generating procedures on those suspected of having or confirmed COVID-19
- **29 C.F.R. § 1910.504 - Mini Respirator Protection Program, Emergency Temporary Standards for COVID-19 (released June 2021)**
 - Where employers provide certain respirators to employees, they must also provide training on the inspection, appropriate usage, cleaning, and limitations of it.
 - Where employees use their own respirators, employers are required to provide notice that respirators are effective when worn properly, kept clean, and maintained accordingly.

Applicable EEOC Enforcement Guidelines & Relevant Law

- **Enforces Title VII of the Civil Right Act of 1964:**
 - Prohibits discrimination against someone on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity) or religion. Prohibits retaliation against a person because they complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
 - Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex. Requires employers to make accommodations absent an undue burden in doing so.
- **Enforces U.S. Constitutional protections, including First Amendment Free Exercise Clause:**
 - Allows for an individualized religious practice and freedom to practice religion (or non) of your choice
- **Enforcement abilities not limited by Religious Freedom and Restoration Act (RFRA):**
 - RFRA prohibits government from enforcing laws that are religiously neutral but which tend to “substantially burden” an individual’s religious exercise, and are not the least restrictive way to further a compelling government interest. RFRA applies only in the context of government action so does not provide a defense for employers in a civil suit brought by a private plaintiff. Does *NOT* limit EEOC’s ability to enforce Title VII against private defendants who invoke RFRA as a defense.
- **Guidance: Section 12, Religious Discrimination Manual (released January 2021)**
 - Identifies EEOC best practices in investigating matters where employers discriminate against employees on religious grounds, including in the provision of religious accommodations during COVID-19 pandemic
- **Americans with Disabilities Act**
- Prohibits discrimination on the basis of disability in employment, state and local government programs, public accommodations, commercial facilities, transportation, and telecommunications.
- **Rehabilitation Act:**
 - Prohibits discrimination on the basis of disability in employment by employers receiving federal funding

Question 3

Are the regulatory policies themselves bias, or did bias contribute to a lack of adequate understanding and application of those policy regulations and guidelines?

Deep Dive into the Issues: Did Bias Contribute?

- The COVID-19 pandemic pushed employers to more stringently review Agency policies under the umbrella of worker safety measures.
- Employers used OSHA's General Duty Clause and the Respiratory Protections codified in 29 FR 1910.134 to assert mandatory compliance, not subject to Title VII or other statutory or constitutional employee protections:
 - The **General Duty Clause** requires employers to provide workers "employment and a place of employment ... free from recognized hazards that are causing or likely to cause death or serious physical harm," to reduce employee exposure.
 - **OSHA regulations regarding respiratory protection** are applicable in a COVID impacted workplace environment as respirator use is worn as a means to protect employees "from exposure to air contaminants above an exposure limit...[and is] necessary to protect employee health." It requires employers to "written respiratory protection program" which details various procedures, including respirator selection, use, fit testing, and cleaning, maintenance, and repair.
- Many agency policies included several different rules that had to be read in concert to understand the full extent of exceptions permitted to basic health and safety expectations
- Agency rules generally did not explicitly state they would be subject to existing constitutional and statutory requirements and protections in place (i.e. Title VII, First Amendment, etc...)
- Administrators, HR staff, and General Counsels issued and enforced more stringent policies in accordance with OSHA, CDC and NIOSH requirements, without considering the equal employment opportunity repercussions of mandating that employees shave beards to wear N95s or whether employees could be accommodated with alternatives that allowed them to safely work while maintaining their religiously-mandated facial hair - primarily affecting minority religious groups (Sikhs, Muslims, Jews), Blacks (most affected by PSB), and women (smaller face shapes)

Deep Dive into the Issues: Did Bias Contribute?

- January 21, 2021 - President Biden issued an Executive Order declaring that ensuring the health and safety of workers is a national priority and a moral imperative, and directing all federal agencies and their subsidiaries to “address systemic barriers to underrepresented communities...includ[ing] members of religious minorities.”
- Order directed OSHA to take action to reduce the risk that workers may contract COVID-19 in the workplace, resulting in OSHA’s **Emergency Temporary Standard (ETS)** to address this hazard.
- ETS provided critically important guidance for healthcare industry in promoting workplace safety while also protecting the civil rights of employees.
- **Specifically, §1910.504(d)(2) of the proposed ETS contains a note advising that: “When employees are required to wear a respirator and a problem with the seal check arises due to interference with the seal by an employee’s facial hair, employers may provide a different type of respirator to accommodate employees who cannot trim or cut facial hair due to religious belief.”**

The Role of Bias: Real or Not?

- **CDC/NIOSH Regulations:**
- Did not previously push for worker safety equipment that would benefit underserved populations (i.e. religious minorities, Blacks, women).
- Actively pursued research and development of equipment that met requirements for European face shapes and skin that could be shaved.
- **OSHA Regulations:**
- Required compliance with safety regulations including the wear of appropriate PPE, but did not specifically indicate (prior to ETS) that its standards were subject to constitutional and statutory requirements and protections for employees (i.e. Title VII).

Why is this important?

During the COVID-19 pandemic, many employers took the lack of plain language on the face of the regulations requiring employers to provide N95 respiratory protection or NIOSH-approved alternatives *with higher levels* of protection to supercede their obligations to protect employees' rights and provide accommodations. They often cited a compelling safety interest as their reasons, and refused to move to a "de minimis cost" or "undue burden" balancing test as required by Title VII.

Many of the affected employees are minorities and from underserved communities, without the background and information to assert their rights. Thus, the majority of them were forced to violate their religious beliefs or medical requirements, or risk being terminated. This perpetuates a cycle of religious and racial minorities being forced to conform to policies that did not take them into account when they were created.

Question 4

What steps are being taken now by those agencies to address the COVID-19 pandemic, and will those measures be temporary remain in place indefinitely?

Agency Specific Steps Forward

- **OSHA:**
 - Issued updated guidance in the form of the ETS, which clarifies safety protection standards, employer obligations, and explicitly states that employers should provide religious and medical accommodations where warranted
 - Makes clear that their regulations specific to healthcare workers are subject to Title VII requirements
 - Asked for Public Comments to address the needs of underserved communities which are not being met by current policies.
- **CDC:**
 - Declared racism as a major public health crisis, including unequal access to medical treatment AND to the barriers that make it more difficult for minorities to work in the healthcare industry. Lack of diversity in medical, hospital administrative, and well funded scientific research roles leads to a lack of cultural and religious awareness when assessing patients, advancing technology, and creating fair policies.
- **NIOSH:**
 - Committed to encouraging innovative development that identifies and addresses issues to help underserved communities wear safety equipment without compromising their religious practices or medical needs.
 - Asked for Public Comments to address the needs of underserved communities which are not being met by current policies.
- **EEOC:**
 - Hosting stakeholder meetings and educating its investigators on appropriate and continued interpretation and enforcement of relevant legal standards to protect employees' rights

Innovative Solutions on the Horizon: Thattha Method

Report background:

- In the midst of the first Covid-19 peak in the UK, a transplant surgeon from Manchester, Dr Rajinder Pal Singh, came up with a novel idea of using an under-mask beard cover called 'Thattha' to allow him to wear an FFP3 respirator mask which ended up passing the NHS qualitative Fit Test.
- Wear includes a smooth, tight fitting elastic strap (similar to a resistance band) tied around the face, beard, and chin, with the N95 placed on top. The N95 seals to the smooth elastic, which is sealed to the face.

Report findings:

- The study showed that **25 out of 27 bearded Sikh dentists had been able to pass** the qualitative Fit Test using the under-mask beard cover.



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Short Report

Under-mask beard cover (*Singh Thattha* technique) for donning respirator masks in COVID-19 patient care

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SUMMARY

Tight-fitting filtering facepiece (FFP3) face masks are essential respiratory protective equipment during aerosol-generating procedures in the coronavirus disease 2019 (COVID-19) environment, and require a fit test to assess mask–face seal competency. Facial hair is considered to be an impediment for achieving a competent seal. We describe an under-mask beard cover called the *Singh Thattha* technique, which obtained a pass rate of 25/27 (92.6%) by qualitative and 5/5 (100%) by quantitative fit test in full-bearded individuals. Sturdier versions of FFP3 were more effective. For individuals for whom shaving is not possible, the *Singh Thattha* technique could offer an effective solution to safely don respirator masks.

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Key Takeaways

- ***One-Size fits all PPE standards does not remedy the issue***

Protective standards need to have flexibility to ensure frontline workers are not sidelined in the battle for our nation's public health. This can include modification of available respirators to pass fit-seal testing, or the allocation of positive air pressure masks like the PAPR.

- ***PPE standards must respect civil rights and liberties***

All frontline workers must be provided with flexibility to use PPE that adequately accommodate the employee's immutable needs. Policies that mandate the use and distribution of PPE must guide employers to provide accommodations where traditional PPE is not feasible for an employee, including employer obligations pursuant to all relevant constitutional and statutory criteria.

- ***Promote access to alternative PPE needs***

Federal and State Governments play a critical role in the distribution of alternative PPE such as the PAPR to ensure that *all* frontline workers have the necessary safety equipment. Employers cannot be expected to reasonably absorb the cost of alternative PPE in a time of public health crisis. To ensure reasonable accommodations are provided for frontline workers with medical and religious needs, the government's stockpile and/or financial assistance will be pivotal.

- ***Prioritize the allocation of alternative PPE***

Alternative PPE (like PAPR) not immediately utilized for ultra-hazardous responses in a public crisis, should be made readily available to employees who cannot wear N95 respirators due to religious observances or medical conditions.

- ***Prevent Retaliation for PPE accommodations***

Employees should be given the right to explore reasonable PPE accommodations without repercussions. Promoting workplace environments that balance safety while respecting civil rights will allow employers to stay focused on addressing the health and safety needs of their employees, and promote a safe environment for all their employees.



Questions?

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