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REPLY TO FLORIDA

September 9, 2021

VIA EMAIL

Donnie King
President & Chief Executive Officer
Tyson Foods, Inc.
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Springdale, AR 72762

Johanna Soderstrom
Vice President and Chief Human Resources Officer
Tyson Foods, Inc.
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Amy Tu
Executive Vice President and General Counsel
Tyson Foods, Inc.
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RE: Mandating Extended Unpaid Leave as “Accommodations” from
Tyson’s Mandatory COVID-19 Vaccine Policy Violates Title VII

Dear President and CEO King, Vice President Soderstrom, and Ms. Tu:

Liberty Counsel is a national non-profit litigation, education and public policy organization with an emphasis on First Amendment liberties, and a particular focus on religious freedom and the sanctity of human life. Liberty Counsel has engaged in extensive litigation in the last year regarding civil rights violations ostensibly justified by “COVID-19,” and has had great success holding both government entities and private actors accountable. *See, e.g., Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (permanent injunction granted and \$1,350,000 in attorney’s fees awarded in *Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-06414, C.D. Cal., May 17, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

I write on behalf of numerous Liberty Counsel clients who are employees of Tyson Foods, Inc. (“Tyson”), who have been forced to choose between the exercise of their sincerely held religious beliefs and feeding their families. No individual in America should be forced into such an unconscionable decision, particularly by a company that holds itself out as being “honorable

and operat[ing] with integrity” and “**faith friendly and inclusive.**” See Tyson Foods, *Who We Are: Purpose and Values*, <https://www.tysonfoods.com/who-we-are/our-story/purpose-values> (emphasis added). Informing Tyson employees that they must either accept a vaccine that violates their sincerely held religious beliefs or take a year-long, unpaid leave of absence is hardly faith friendly, inclusive, or honorable. I write to request that Tyson foods immediately remove this unconscionable “accommodation” requirement that is merely an accommodation in name only.

On August 3, 2021, Tyson announced its Mandatory COVID-19 Vaccination Policy, stating that Tyson “is requiring its team members at U.S. office locations to be fully vaccinated by October 1, 2021.” Tyson Foods, Inc., *Tyson Foods to Require COVID-19 Vaccinations for its U.S. Workforce* (Aug. 3, 2021), <https://www.tysonfoods.com/news/news-releases/2021/8/tyson-foods-require-covid-19-vaccinations-its-us-workforce> (last visited Aug. 20, 2021). Tyson also informed all other employees that they must be vaccinated by November 1, 2021, subject to ongoing discussions with locations represented by unions.” *Id.* Admirably, Tyson also noted in its Mandatory COVID-19 Vaccination Policy that “[e]xceptions to the vaccination mandate will involve workers who seeks medical or religious accommodations.” *Id.*

Despite these laudable statements, we have been contacted by numerous Tyson employees (from states such as Arkansas, Illinois, Georgia, Kansas, Kentucky, Maine, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, Washington and Wisconsin), where Tyson is purporting to grant religious accommodations and exemptions for those employees with sincerely held religious objections to the Mandatory COVID-19 Vaccination Policy. However, as a condition of receiving an exemption and accommodation from the policy, Tyson employees are being told that the accommodation for their religious beliefs will be to **take a one-year, unpaid leave of absence from the company**. This is neither reasonable nor an accommodation.

Each employee’s facts vary depending on the position – some employees are on a production line, some are in offices, some are maintenance/janitorial and fully capable of working alone, and some have been working at home. In sum – accommodations vary widely, but virtually all can be easily accommodated. Possible accommodations include self-monitoring for symptoms, temperature checks, regular testing, and masking as appropriate.

Of the numerous employees who have reached out to us, some are under a deadline by HR to notify HR of their intentions to be vaccinated (TODAY, September 9) and face threats of immediate termination.

We ask that you advise us and all Tyson employees by close of business on Friday, September 10, 2021, that Tyson will honor all federal protections and entitlements to accommodation for sincerely held religious beliefs, among which will not be the current one-year, unpaid leave of absence as a purported “accommodation.” Your failure to timely and positively provide this assurance will indicate to us that Tyson is, in fact, continuing in its attempt to provide accommodations in name only while discriminating against religious objectors.

A. Demanding Tyson Employees with a Religious Exemption to the Mandatory COVID-19 Vaccination Policy Take an Entire Year of Unpaid Leave Is Neither Reasonable Nor an Accommodation under Title VII.

As you are undoubtedly aware, Title VII of the Civil Rights Act prohibits Tyson from discriminating against its employees on the basis of their sincerely held religious beliefs. *See* 42 U.S.C. §2000e-2(a) (“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin”). *See also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (same). Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. §2000e(j). Put simply, an employer violates Title VII if it makes employment decisions related to an employee based solely upon that individual’s sincerely held religious beliefs. *Abercrombie & Fitch*, 575 U.S. at 773 (“**An employer may not make an applicant’s religious practices, confirmed or otherwise, a factor in employment decisions.**” (emphasis added)).

When confronted with an employee who has sincerely held religious beliefs that preclude her from complying with Tyson’s Mandatory COVID-19 Vaccination Policy, the company is obligated to provide a reasonable accommodation to that employee to account for their constitutionally protected exercise of religious beliefs. *See Abercrombie*, 575 U.S. at 776 (“An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual’s religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.” (Alito, J., concurring)). And, any accommodation provided to the employee must – by definition – be reasonable.

As a matter of black letter law, demanding that Tyson employees take a year-long leave of absence without pay is not a reasonable accommodation of their sincerely held religious beliefs. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006) (“**Many reasonable employees would find a month without a paycheck to be a serious hardship . . .** A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the latter.”); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees to accept substandard conditions.” (emphasis added)); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987) (holding that employer violates Title VII by mandating an employee take unpaid leave as an accommodation); *Arizanovskav. Wal-Mart Stores, Inc.*, 682 F.3d 698, 704 (7th Cir. 2012) (“**Being forced to take an unpaid leave of absence certainly falls into the first category of material adverse employment actions.**” (emphasis added)); *Kaiser v. Trace, Inc.*, 72 F. Supp. 3d 1126, 1133 (D. Id. 2014) (holding that forcing employee to chose between quitting and accepting a leave of absence against her will is an adverse employment action); *Jamil v. Sessions*, No. 14-CV-2355(PKC)(RLM), 2017 WL 913601, *8 (E.D.N.Y. Mar. 6, 2017) (“requiring an employee to take *approved* unpaid leave of absence can constitute an adverse employment action for purposes of failure to accommodate claim”); *Arias v. Marriot Int’l, Inc.*, 217 F. Supp. 3d 189, 195 (D.D.C. 2016) (“Unpaid leave for even a month may constitute a materially adverse employment action.”); *Hughes v. City of Rochester*, No. 12-CV-

6112, 2016 WL 4742321, *6 (W.D.N.Y. Sept. 12, 2016) (noting that the adverse employment actions here include “unpaid leave”); *Horsham v. Fresh Direct*, 136 F. Supp. 3d 253, 264 (E.D.N.Y. 2015) (“Placing an employee on unpaid leave can constitute an adverse employment action.”)

Thus, while we applaud Tyson for at least taking the first step in considering its employees’ requests for exemptions and accommodations, the failure to provide a reasonable accommodation to its employees violates Title VII’s demands. In fact, mandating that an employee go on an indefinite or unreasonably lengthy unpaid leave of absence constitutes a constructive discharge. *See, e.g., O’Donnell v. Univ. Hosp. Cleveland Med. Ctr.*, 833 F. App’x 605, 618 (6th Cir. 2020); *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, (5th Cir. 1997) (noting that “the most compelling evidence of constructive discharge” was the fact that employer demanded employee go on “indefinite unpaid leave”); *Ruggles v. Greco*, No. 14-1021, 2015 WL 1538803, * (E.D. La. Apr. 7, 2015) (same).

Tyson should not invite liability against itself in discouraging or refusing to provide actual, non-discriminatory religious exemptions beyond “unpaid leave.” Indeed, hospitals and even nursing homes have been sued and lost over forced influenza vaccines. *See, e.g. EEOC v. Mission Hosp., Inc.*, No. 1:16-cv-118-MOC-DLH, 2017 WL 3392783 (W.D.N.C. Aug. 7, 2017) (resulting in permanent injunction against Mission Hospital from improperly denying religious exemptions from mandatory vaccinations and requiring the hospital to pay \$89,000 in damages); *United States v. Ozaukee Cnty.*, No 18-cv-343-pp (E.D. Wis. 2018) (resulting in a permanent injunction against the county for failure to grant religious exemptions from compulsory vaccinations and ordering county to pay \$18,000 in damages to the employee).

Liberty Counsel will provide pro-bono representation to Tyson’s employees aggrieved by this egregious “accommodation,” and Tyson will be held legally to account for its actions, if it does not change course.

B. Demanding Tyson Employees with a Religious Exemption Take an Entire Year of Unpaid Leave Is Neither Reasonable Nor an Accommodation under the Arkansas Civil Rights Act.

For those Tyson employees located in Arkansas, Section 16–123–107(a) of the Arkansas Civil Rights Act of 1993 (“ACRA”) provides in pertinent part:

The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

- (1) The right to obtain and hold employment without discrimination[.]

In addition to protecting sincerely-held religious beliefs like those generally submitted to Tyson by our clients, ACRA also protects employees from discrimination based on a “disability.” A “**disability**” under ACRA includes “**a physical or mental impairment that substantially limits a major life function,**” with limited exceptions irrelevant here. In order to prevail on an

Arkansas Civil Rights Act (ACRA) disability discrimination claim for failure to rehire, employee was required to demonstrate that he (1) had a disability within the meaning of the ACRA, (2) was able to perform the essential functions of the job, with or without reasonable accommodation, and (3) was not rehired as a result of the disability. *See Jackson v. City of Hot Springs*, 751 F.3d 855 (8th Cir. 2014)

One Arkansas Tyson employee's summary of the situation (if litigation becomes necessary) would likely prove dispositive as to both religious discrimination and disability claims for failure to accommodate:

[HR] had two meetings prior to this stating that religious exceptions would be an option when in fact it really isn't. We have worked without vaccines the entire time since the pandemic began. We never shut down for anytime during the pandemic. I work alone for the most part and the one person I do work with in my department also requested a religious exemption. I do not work with any outside vendors. I follow company guidelines on wearing a mask and keeping my distance with others so I would not pose a threat to anyone else in the building. I would also accept taking a weekly covid test per company guidelines but I will not accept this vaccine mandate.

C. Demanding Tyson Employees with a Religious Exemption Take an Entire Year of Unpaid Leave Is Neither Reasonable Nor an Accommodation under Illinois Law.

Illinois law also dictates that employees at all of Tyson's Illinois locations have the fundamental right to determine what medical care to accept and refuse. A person's right to refuse or accept medical care is not one to be interfered with lightly. As Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1095 (1995) (quoting *Schloendorff v. Society of New York Hospital* (1914), 211 N.Y. 125).

The **Illinois Health Care Right of Conscience Act**, 745 ILCS § 70/1 *et seq*, applies to Tyson employees, and expressly prohibits public **and private** entities like Tyson from taking adverse employment action against anyone who declines a COVID injection on the basis of religious belief:

Findings and policy. The General Assembly finds and declares that **people and organizations hold different beliefs about whether certain health care services are morally acceptable**. It is the public policy of the State of Illinois to **respect and protect the right of conscience of all persons who refuse to obtain, receive or accept...health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to**

their conscience or conscientious convictions in...refusing to obtain, receive, accept, ...health care services and medical care.

745 ILCS 70/2. (Emphasis added). The General Assembly has accordingly prohibited:

Discrimination. It shall be unlawful for **any person, public or private institution,** or public official to discriminate **against any person in any manner,** including but not limited to, licensing, **hiring, promotion,** transfer, staff appointment, hospital, managed care entity, **or any other privileges, because of such person's conscientious refusal to receive, obtain, accept,** perform, assist, counsel, suggest, recommend, refer or participate in any way in **any particular form of health care services contrary to his or her conscience.**

745 ILCS 70/5. (Emphasis added). In addition to this broad non-discrimination provision that expressly applies here, the Illinois Legislature has also specifically outlawed employment discrimination as well:

Discrimination by employers or institutions. It shall be **unlawful for any public or private employer,** entity, agency, institution, official or person...to deny admission because of, to place any reference in its application form concerning, to orally question about, **to impose any burdens in terms or conditions of employment on, or to otherwise discriminate against,** any applicant, in terms of employment, admission to or participation in any programs for which the applicant is eligible, **or to discriminate in relation thereto, in any other manner, on account of the applicant's refusal to receive, obtain, accept,** perform, counsel, suggest, recommend, refer, assist or participate in any way in **any forms of health care services contrary to his or her conscience.**

745 ILCS 70/7. (Emphasis added). Further, Section 3(a) of the Act defines "Health care" broadly as:

any phase of patient care, including but not limited to [essentially anything]... in connection with the use or procurement of contraceptives and sterilization or abortion procedures...**or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons...**

745 ILCS 70/3(a). (Emphasis added). Vaccines are rendered by "paraprofessionals" and other persons within the contemplation of the Act.

Section 3(e) of the Act defines "Conscience" as a "sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." 745 ILCS 70/3(e). The Act supersedes "all other Acts or parts of Acts to the extent that any Acts or parts of Acts are inconsistent with the terms or operation of this Act." 745 ILCS 70/14.

Notably, the Act provides a private cause of action against offending entities, such as Tyson. 745 ILCS 70/12. Indeed, demonstrating the reprehensibility of discrimination based on health care decisions, the Act imposes liability for “**threefold the actual damages ... the costs of suit and reasonable attorney’s fees,**” *id.* (emphasis added), “**but in no case shall recovery be less than \$2,500 for each violation in addition to costs of the suit and reasonable attorney’s fees.**” *Id.* (emphasis added).

Illinois courts have held that the Health Care Right of Conscience Act’s non-discrimination provisions protect **all** “persons,” **not just employees in the healthcare field.** *See e.g., Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1057 (C.D. Ill. 2007) (“Wal-Mart also argues that the Right of Conscience Act is also limited to ‘health care personnel’ as defined in the statute. However, **the anti-discrimination provisions are not limited to health care personnel.** ... the Right of Conscience Act prohibits **discrimination against any ‘person.’**” (emphasis added)). *See also Cohen v. Smith*, 269 Ill.App.3d 1087, 1096 (1995) (no evidence “the Cohens’ beliefs are **less than sincere or that they do not have some relation to their belief in God**” and trial court erred in dismissing Right of Conscience Act count.) (Emphasis added).

By mandating that Tyson employees submit to one of the COVID-19 vaccines, or take a “one-year unpaid leave of absence,” Tyson runs roughshod over this basic protection. If these employees decide for themselves that they desire to abstain from forcible injection of a COVID-19 vaccine that violates their sincerely held religious beliefs, that is their basic right. Put simply, “[t]he forcible injection of medication into a nonconsenting person’s body represents a **substantial interference with that person’s liberty.**” *Washington v. Harper*, 494 U.S. 210, 229 (1990) (emphasis added).

D. Tyson’s Vaccine Mandate Ignores Scientific Data and Natural Immunity

On August 6, 2021, CDC Director Rochelle Walensky, in an interview with CNN’s Wolf Blitzer, said the vaccines **will not prevent the spread** of Covid-19: “Our vaccines are working exceptionally well, they continue to work well for delta with regard to severe illness and death, they prevent it, but what they can’t do anymore is prevent transmission.” Because the vaccines do not prevent transmission of Covid-19, Tyson’s vaccine mandate not rationally related to the objective of slowing the spread of Covid-19.

According to the manufacturers of the vaccines, Moderna and Pfizer, the vaccines have waning efficacy to prevent serious illness and death:

August 9, 2021 | Topic: Health | Region: Americas | Blog Brand: Politics | Tags: Coronavirus, Pandemic, Vaccination, Moderna, Delta Variant

Third Coronavirus Vaccine Shot Needed By Winter, Moderna Says

CORONAVIRUS

Pfizer Vaccine's Efficacy Against Delta Variant Drops After Three Months: Study

By Josh Nathan-Kazis Aug. 19, 2021 9:14 am ET

In contrast to vaccine-induced immunity, which wanes after a few months and requires continuing boosters, natural immunity acquired through recovery from Covid-19 is durable and long-lasting:

Natural Immunity After COVID-19 Found Durable and Robust



Fact checked by Robert Carlson, MD + 1
Published July 26, 2021
Fact checked August 2, 2021

Most recovered COVID-19 patients mount broad, durable immunity after coronavirus infection

1

> medRxiv. 2021 Jun 18;2021.04.19.21255739. doi: 10.1101/2021.04.19.21255739. Preprint

Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells

2

No point vaccinating those who've had COVID-19: Cleveland Clinic study suggests

3

NIH RESEARCH MATTERS

January 26, 2021

Lasting immunity found after recovery from COVID-19

4

CONCLUSION

In light of these developments, unvaccinated Tyson employees have the right to make a personal health decision that affects only themselves, free from employer coercion and

¹ <https://www.precisionvaccinations.com/natural-immunity-after-covid-19-found-durable-and-robust>;

[https://www.cell.com/cell-reports-medicine/fulltext/S2666-3791\(21\)00203-2?s=03#secsectitle0020](https://www.cell.com/cell-reports-medicine/fulltext/S2666-3791(21)00203-2?s=03#secsectitle0020)

² <https://www.medrxiv.org/content/10.1101/2021.04.19.21255739v1>

³ <https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v2>

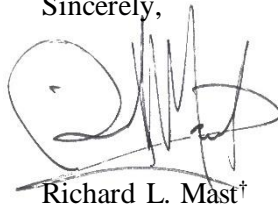
⁴ <https://www.nih.gov/news-events/nih-research-matters/lasting-immunity-found-after-recovery-covid-19>

discrimination. We are aware of no other major U.S. corporation with such an absurd “accommodation” policy for religious accommodation requests. Reportedly, medical exemptions have been granted by Tyson, and these employees have not been subject to the “one-year leave of absence.” Finally, in requiring only unvaccinated to take precautions and go on a “leave of absence,” the Tyson policy irrationally discriminates between those who have received a COVID shot, and those who have not.

We await your prompt confirmation, on or before close of business on this Friday, September 10, 2021, that Tyson will honor all federal and state protections and entitlements to accommodation for sincerely held religious beliefs, and that Tyson will no longer force employees to choose unpaid leave of absence as an “accommodation.”

Your failure to timely and positively provide this assurance will indicate to us that Tyson is, in fact, continuing in its attempt to provide accommodations in name only while discriminating against religious objectors, and we will take further action without additional notice to prevent irreparable harm.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard L. Mast', with a horizontal line underneath the name.

Richard L. Mast[†]

CC

Via Email

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