



On A Collision Course? How Religious Entities Should Address The Legal Expansions Of Gay Marriage And Gender Identity Protections

Insights

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By now you are no doubt aware that the U.S. Supreme Court's 2014 decision in *Obergefell v. Hodges* legalized same-sex marriage across the country. The decision has caused religious institutions and schools to ask about their rights and obligations when it comes to making religious-based decisions about employees that might conflict with expanding gay and transgender legal rights. And, as in many areas of law, the answer to this complicated question is: "it depends." Hold on to your seats as we examine a small portion of the law and give you a flavor of the complications facing your institution today.

Legal Impact Of *Obergefell* On Religious Institutions And Schools

There's at least one easy answer to begin the analysis: *Obergefell* has no direct impact on religious institutions and schools. It does not require a religious institution or school to do or to refrain from doing anything. The Supreme Court decision only directly impacts the government. In that regard, *Obergefell* requires that the government not pass or enforce laws that impinge on the rights of same-sex couples to marry.

Indirect Impact Of *Obergefell* On Religious Institutions And Schools

However, there certainly is an indirect impact on religious institutions and schools by both *Obergefell* and other legal expansions, not to mention widespread societal changes, relating to both same-sex relationships and gender identity. Religious institutions and schools will be faced with more situations in which gay or transgender employees, parents, and students will seek employment with and/or admission to their institutions.

Other gay or transgender individuals who may already be a part of the community may decide to disclose their sexual identities and seek accommodations or engage in behaviors that may violate the institution's religious beliefs. In addition, gay and transgender advocacy groups may seek to rent or use the institution's facilities for activities that are inconsistent with the institution's religious principles.

Do Religious Institutions Have The Right To Say No?

The big question, then, is whether you can legally say "no" when any of these issues land on your desk. Unfortunately, there is no easy answer to this question. The answer depends on "how religious" your institution is, where your institution is located, and the nature of the decision you

want to make. This is because there are layers of federal, state, and local laws that must be analyzed to determine your institution's rights.

When looking at the employment relationship, there are several federal laws that require employers with 15 (and in some cases 20) employees not to discriminate in employment decisions. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, pregnancy, national origin, and religion. Other laws prohibit disability and age discrimination.

Over the years, the term "sex" in Title VII has been interpreted by the courts to include "gender," which recent cases have expanded to mean "gender identity." Moreover, "sex" also has been broadly interpreted by courts and the EEOC to include any type of bias based on sex (including same sex). Thus, the government and private plaintiffs have sued employers, including religious entities, claiming that the refusal to hire or a decision to terminate based on an applicant's or employee's gender identity or sexual orientation violates Title VII.

Religious institutions and schools are certainly covered by and must comply with the nondiscrimination provisions of Title VII. There's some good news for religious employers, however. In recognition of the religious freedom rights under the First Amendment to the United States Constitution, Title VII contains exemptions to the nondiscrimination provisions which permit religious corporations, societies, and educational institutions to prefer to employ persons of the institution's own religion for the carrying on of its functions.

Another provision permits a school to prefer to employ persons of its own religion if the school is owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society. These exemptions, unfortunately, are not interpreted by the courts as broadly as you may believe. In addition, unless the institution is a church, synagogue, or other traditionally recognized religious institution, it must be "religious enough" to qualify for even these limited exemptions.

What Religious Institutions Are "Religious Enough" To Qualify For The Title VII Exemptions?

Certainly churches, synagogues, and other traditional religious institutions meet the test as being "religious enough" to qualify for the Title VII exemptions. The institutions at greatest risk for legal exposure are those schools that are affiliated with a religious institution, or those that are stand-alone schools with a religious function.

For these latter institutions, courts require an analysis of numerous factors that bear on the institution's establishment, religious purpose, relationship with or funding from religious institutions, governance by members of the affiliated religious institution, and religiosity in its daily operations (including devotionals, prayer, and infusion of religion into non-religious subjects), among others.

If the institution is deemed "religious enough," the institution may require that all persons hired and employed by the institution be of the institution's religion and follow its religious principles. It can

employed by the institution be of the institution's religion and follow its religious principles. It can even require the employee to sign an agreement to abide by the institution's beliefs and lifestyle commitments.

What if the individual does not commit to or violates any of these principles? One would think that the institution could terminate the employee on that basis. Unfortunately, this is another area where the law is somewhat confusing and not as broad as employers would hope.

Limitations On Religious Institutions

Another recent Supreme Court decision, *Hosanna Tabor Evangelical Lutheran School v. EEOC*, is instructive in this area. In this 2012 decision, the Court made clear that, under the First Amendment to the U.S. Constitution, churches and religious schools must be free to make employment decisions regarding their "ministers." However, the Court also made very clear that even religious employers may be limited in their right to make decisions not to hire or to terminate an employee based on religion for their non-ministerial employees if those decisions collide with the employee's or applicant's other nondiscrimination rights.

For example, if it would violate the institution's religious principles for a female employee to have sexual relations out of wedlock, it would seem that the institution could terminate a non-married, pregnant employee based on the employee's violation of the institution's religious principles. However, if the employee sued the institution based on *pregnancy* discrimination (a different protected status), a court would probably not dismiss the case right away.

Instead, the institution would have to assert a defense to the claim that the institution terminated the employee's employment based on a violation of the institution's religious tenets and that it was entitled to do so because the employee was a functional minister of the institution. This was the defense recognized in the *Hosanna* case.

Moreover, the institution would have to prove that the employee qualified as a "minister" by producing evidence of the employee's education, training, and the carrying out of religious functions for the institution. Although the institution would likely be able to provide the appropriate evidence for a religious studies teacher, it may be very difficult to prove that a janitor or bus driver is a minister of the institution. In such a case, the institution may be faced with substantial damages, not to mention the attorneys' fees expended for defending the case.

This same analysis would apply if a religious institution or school terminated an employee (or failed to hire an applicant) on the basis that the individual's status as a gay or transgendered person is inconsistent with the institution's religious principles. The individual could claim that the institution is violating its nondiscrimination rights based on gender under Title VII.

For these reasons, due to the expanded laws in these areas, you would be well-advised to obtain advice on how to both strengthen your position and to analyze the potential separation of individuals where the decision may collide with other nondiscrimination rights of the individual.

State And Local Laws

The above synopsis is focused only on some of the federal employment laws that apply to your religious institution and school. To fully understand your institution's obligations under all of the various laws, however, you will also need to analyze the growing number of state and local laws (ordinances) protecting the rights of gay and transgender individuals. Many of these laws impact both employment obligations and your rights and obligations regarding the admission of students who may be gay or transgendered (under the "public accommodation" provisions of state/local laws).

Recommended Steps

Religious institutions and schools should work with counsel to analyze whether the institution is "religious enough" to claim the Title VII exemptions and to shore up those areas in question as quickly as possible. In addition, you should evaluate your job descriptions, contracts, policies, bylaws, articles of incorporation, facilities agreements, website, and other documents communicating both your religious character and an individual employee's religious responsibilities.

This will allow you to both assess whether an individual employee or applicant may qualify as a "minister," and to determine whether any additional steps should be put in place to solidify the ministerial exception if any of your employment or admissions decisions are challenged.

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