

WHAT EMPLOYERS AND EDUCATIONAL INSTITUTIONS NEED TO KNOW ABOUT EEOC'S PROPOSED GUIDANCE ON RELIGIOUS DISCRIMINATION

Insights
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The EEOC recently released a draft of its updated guidance on religious discrimination, which – if adopted and finalized – could alter the legal standards applied in workplace disputes for the nation's employers generally and educational institutions specifically. While the November 17 release will not be finalized and adopted until a public comment period expires in mid-December and the commissioners have an opportunity to address specific concerns, the upcoming changes at the White House will not necessarily slow down the process. What do employers need to know about this development?

RELIGIOUS EXPRESSION V. LGBTQ RIGHTS: NO CLEAR DECISION ANNOUNCED

Many had been anticipating the EEOC's formal pronouncement about how the agency would interpret the legal standards that exist around the inherent tension between religious rights in the workplace and the rights of LGBTQ workers under Title VII. That's because [the Supreme Court recently expanded the rights of LGBTQ employees](#) by pronouncing sexual orientation and gender identity as being covered by federal antidiscrimination laws. But if you had been expecting to get clear-cut answers on this critical question, you'd be left disappointed by the agency's proposed guidance, as it mostly dances around the critical question and leaves much room for interpretation.

The proposed guidance is conspicuously devoid of substantive discussion about the Supreme Court's *Bostock*

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ruling from earlier this year that conferred upon LGBTQ employees broad antidiscrimination rights under Title VII. In some ways, this is a curious absence, as the agency is leaving employers to twist in the wind somewhat when it comes to determining how to resolve differences between religious beliefs and LGBTQ rights.

On the other hand, this absence is somewhat to be expected, as it may be too difficult for the agency to draw bright line rules around a field of law with so many nuances and intricacies. In fact, the agency notes several times in the guidance that answers to questions in this area will be dependent on the fact-specific situation at hand. Which religion is at play? What specific beliefs are implicated? How do they run against LGBTQ rights in the workplace? What hardships arise because of the workplace conflicts? These and many similar questions need to be examined to determine the interplay between freedom of religion and the rights of LGBTQ employees.

RELIGIOUS EMPLOYER EXEMPTION DISCUSSED

The EEOC spends some time trying to articulate the specific rights that religious employers have when it comes to antidiscrimination law. As most religious employers know, a Title VII exemption permits them to prefer members of their own religion when it comes to workplace choices. While some courts have interpreted this exemption broadly, and others narrowly, all seem to agree on one defining principle: you cannot use this exemption to discriminate against employees based on other protected characteristics unrelated to religion.

While employers had been anticipating how the EEOC would apply this rule in light of the Supreme Court's *Bostock* decision, the agency ignored the specific question related to LGBTQ rights and simply pronounced a broad application of the standard. The EEOC cited favorably to an appeals court case from 2000 that indicated that "the prerogative of a religious organization to employ individuals 'of a particular religion' has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."

The key takeaway from this pronouncement is that the EEOC seems to be trying to underscore the rights of religious employers in the face of the Supreme Court's *Bostock*

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opinion. The agency is not necessarily contradicting the Supreme Court by doing so, but could be seen as opening the door for those employers to circumvent its holding. While it remains to be seen how the EEOC will decide in such a specific case – and how a court may ultimately rule in such a conflict – it appears the agency is proposing a policy that may lead to further conflicts down the road.

RELIGIOUS ACCOMMODATIONS ALSO DISCUSSED

Once again, the agency sidestepped a discussion about LGBTQ rights when it comes to religious accommodations, but seems to be signaling to employers that they will need to bend far in order to accommodate the religious beliefs of their workers. The agency cited favorably to a case it is currently litigating on behalf of workers who claimed they were punished unfairly by their employer after refusing to wear Pride pins because of claimed religious beliefs. The EEOC says that these workers were not properly accommodated under Title VII and continues to champion their cause on account of their right to religious expression. The clear position taken by the agency in this proposal: to the extent there is an infringement on an employee's expression of their religious rights, the agency is going to take a pretty aggressive stance.

The EEOC also spent time talking about what an accommodation needs to accomplish in order for an employer to satisfy its rights under the law. Rather than simply lessen a conflict between an employee's rights to religious expression, a reasonable accommodation needs to eliminate the conflict absent an undue hardship. This is a fairly bold statement from the agency, and one that could exacerbate workplace conflicts and confusion.

One area certain to be implicated: workplace bathroom usage. What if a certain employee feels that their religious expression does not permit them to use a bathroom with a transgender employee who currently identifies as a member of the same sex as them but was born as a different gendered individual? While there is no specific pronouncement about this situation in the proposed guidance, it is not hard to see the EEOC requiring an employer to make an accommodation to support the religious employees' beliefs or values.

MINISTERIAL EXCEPTION WOULD BE SIGNIFICANTLY BROADENED

The EEOC's recently updated proposed guidance on religious discrimination also expands the interpretation of when the ministerial exception will apply, to what positions, and when it should be assessed by the courts. If the guidance is finalized without substantive revision to this area, employers would enjoy much greater freedom to apply the ministerial exception to their workforce.

EEOC'S 2008 GUIDANCE APPLIES EXCEPTION NARROWLY

The EEOC last updated its guidance in 2008. In that document, the agency cautions that the ministerial exception is limited to "only to those employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction." In its new proposed guidance, the EEOC's Republican commissioners have indicated an intent to align with the Supreme Court's more recent decisions in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission* and [Our Lady of Guadalupe vs. Morrissey-Berru](#), recognizing that courts should not draw bright lines for the ministerial exception.

The EEOC noted that a "religious institution" entitled to take advantage of this exception must be "religious enough" to meet Title VII's religious exemption provisions pursuant to Title VII under 702(a) or 703(e)(2), discussed below. The EEOC confirmed that, if the ministerial exception applies, it applies regardless of whether the employment decision was made for "religious" reasons, unlike the application of the Section 702(a) and 703(e)(2) exemptions.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In its 2012 decision in *Hosanna-Tabor*, the Supreme Court unanimously barred a teacher's discrimination and retaliation claims under the ministerial exception, after analyzing four factors that led the Court to determine that the teacher was a functional minister of the organization: (1) the teacher's formal title; (2) education and training; (3) the employee's own use of the title; and (4) the "important religious functions" the employee performed.

In its proposed guidance, the EEOC stresses that the Court noted that neither titles nor academic background were dispositive. The agency says that judges should not second-guess a religious institution's qualification of the individual or impose their own credentialing requirements. The Court also said the exception should not be applied only to those employees performing exclusively religious functions and cautioned courts about placing too much emphasis on the employee's performance of secular functions.

OUR LADY OF GUADALUPE SCHOOL V. MORRISEY-BERRU

This July, the Supreme Court continued to navigate the fine line between religion and workplace laws in [*Our Lady of Guadalupe School v. Morrisey-Berru*](#), barring lower courts from adjudicating employment discrimination claims brought by employees who perform certain religious tasks for religious employers. Readdressing the ministerial exception, the Court insisted that a variety of factors should be evaluated in determining whether the employee should be deemed a minister, including such things as the employee's job description, contract, policies, and day-to-day responsibilities in imparting religious knowledge.

Notably, the Court specifically said that courts should consider the religious employer's views of the worker's duties. The Court was less concerned with the employee's title or academic background, making clear that "what matters, at bottom, is what an employee does." In doing so, the Court specifically rejected the proposal that courts employ a rigid formula when determining whether the ministerial exception applies.

OTHER IMPORTANT CLARIFICATIONS

The EEOC's proposed updated guidance also makes clear that many other courts have held that the ministerial exception applies to a variety of employees who perform "vital religious duties" and is not limited to "heads of religious congregations, leaders, ministers or members of the clergy." Instead, the exception can apply to lay employees, non-coreligionists and even those not practicing the faith.

This view is a clear departure from its 2008 stance and relies on many lower court determinations which may not withstand the test of time, a criticism expressed by the

EEOC's Democratic commissioners. However, if it stands, the scope of employees to which the ministerial exception could apply would be substantially increased. For example, the existing EEOC guidance limited the ministerial exception in religious schools to religious leaders such as the school's chaplain, religion teachers, and others similarly cloaked with the primary responsibility for promulgating the faith. Under this new guidance, it could apply to a variety of lay school employees.

Another important point expressed in the proposed guidance is that although the *Hosanna-Tabor* decision made clear that the ministerial exception is an affirmative defense, the EEOC's draft guidance states that "the ministerial exception is not waivable and is a threshold issue, which should be resolved at the earliest possible stage before reaching the underlying discrimination claim." If the guidance is finalized in this form, this early determination process will be a welcome change for religious institutions, including religious schools.

A DIFFERENT ANALYSIS THAN TITLE VII'S "RELIGIOUS ENOUGH" EXEMPTION

Employers should note that, separately from the Supreme Court's ministerial exception, which focuses primarily on the individual *employee* of a religious institution, Title VII exempts certain "religious organizations" and "religious educational institutions" from religious discrimination provisions. It also permits them to give employment preference to members of their own religion. Although the EEOC's proposed update cites several cases discussing sections 702(a) and 703(e)(2) and the factors courts have analyzed to determine which organizations will be considered "religious enough" to qualify for the exemptions, the EEOC does not provide any guidance or specify the important factors that it will rely upon to find employers exempt, leaving this issue for individual case-by-case determination. The EEOC does note, however, that Title VII's religious organization exemptions apply not only to churches and other houses of worship but also to "religious schools, hospitals, and charities."

The EEOC also notes that some courts have held that "engaging in secular activities" does not disqualify an employer from being a "religious organization" within the meaning of the exemption. The EEOC makes clear, however,

that it is not taking a position on whether the exemption extends to for-profit entities, stating that the issue of “whether a for-profit corporation can constitute a religious corporation under Title VII is an open question.”

The EEOC also makes clear that the scope of Section 702 exemption relates only to *religious* discrimination. Thus, while an employer that is “religious enough” may require that its employees be of its religion or comply with its religious principles, the employer is not exempt from claims of other forms of discrimination such as sex, race, national origin, etc. Thus, in a case in which an employee claims discrimination on the basis of sex, race, national origin, etc., the EEOC will analyze whether the religious employer’s reason for termination is not only valid from a religious standpoint (without delving too deeply into the claimed religious position), but may need to analyze whether other persons in other protected categories were treated the same for the same type of behavior.

WHAT EMPLOYERS SHOULD DO NEXT

As we have recommended in the past, it would behoove religious schools and organizations to consult with their Fisher Phillips lawyer to be sure your organization is well positioned with respect to the Title VII ministerial exception. This is particularly true given the lack of clarity around the factors that a court will consider. We also recommend that both religious and non-religious employers consult with your Fisher Phillips lawyer before taking any action with respect to any conflict between LGBTQ rights and religious rights. This is an area fraught with danger and uncertainty, and one wrong move could lead to disastrous consequences.

The EEOC’s proposed guidance on the updated proposed religious discrimination guidance is open for public comment until December 17, so employers should keep an eye out for finalized guidance in late December or early 2021. And while the incoming Biden administration may disagree with portions of this guidance, it doesn’t appear that the EEOC will transform quickly enough for the new president to alter this trajectory. In fact, the Republican appointees will most likely remain in the majority at the five-person agency leadership team through July 2022, when the term of Chair Janet Dhillon expires. Therefore, it is more likely than not that some version of this guidance will take effect in due course.

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