



Legalized Discrimination Or Safety From Government Interference?

WHAT MISSISSIPPI EMPLOYERS NEED TO KNOW ABOUT NEW RELIGIOUS FREEDOM LAW

Insights

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On April 5, 2016, Mississippi Governor Phil Bryant signed into law HB 1523, also known as the “Protecting Freedom of Conscience From Government Discrimination Act.” While proponents of the new law state that it simply protects individuals and organizations from legal consequences that would otherwise result from religiously motivated actions, opponents contend that the new law legalizes discrimination against LGBTQ individuals. Regardless of one’s personal opinion, one thing is for sure: the new law provides little protection to employers who base employment decisions on their religious beliefs.

The Basics: What Does The Law Say?

The new law, which will go into effect on July 1, 2016, states certain individuals and organizations will be shielded from legal consequence if they act on any of three sincerely held religious beliefs: (1) that marriage should be recognized as the union of one man and one woman; (2) that sexual relations are properly reserved for marriage; and (3) that an individual’s sex is determined by anatomy and genetics at birth.

The law protects religious organizations, persons, and public employees from any type of state government discrimination relating to these issues. While “religious organizations” naturally include houses of worship, the definition also includes religious groups, corporations, associations and schools, among other things. It also includes the owners or employees of those entities. However, what renders an entity to be considered “religious” is unclear at this time.

“Persons” are likewise broadly defined. The definition spans from natural persons to religious organizations, and includes companies and similar business entities that harbor any of the above-mentioned sincerely held religious beliefs.

Finally, a myriad of employment practices, including the refusal to hire or promote, force to resign, fire, demote, discipline, or materially alter the terms or conditions of employment, or retaliate or take other adverse action, can constitute “discriminatory action” by the state government.

Mississippi . . . Thou Shalt Not Discriminate

House Bill 1523 outlines specific actions (and inactions) in which certain persons or organizations

may engage without fear of state government reprisal. Many of these areas do not apply to the employment relationship, but several do.

For instance, under the new law, the state government may not take discriminatory action against:

- a religious organization that makes employment decisions based upon the defined sincerely held religious beliefs;
- a person who establishes sex-specific standards or policies concerning employee or student dress or grooming based on the defined sincerely held religious beliefs;
- a person who establishes policies concerning access to restrooms and similar facilities based upon the defined sincerely held religious beliefs;
- state employees who recuse themselves from authorizing or licensing same-sex marriages because of their sincerely held religious beliefs; and
- state employees who speak or engage in expressive conduct based upon their sincerely held religious beliefs.

What Does This Mean For Mississippi Employers?

Perhaps you, like many in the Deep South, are of the Christian faith. Perhaps you sincerely hold one of the three religious beliefs that the new law articulates. In the wake of HB 1523's passage, perhaps you are wondering whether one of those religious beliefs can legally motivate your employment decisions, and whether the new law will shield you from a discrimination claim. Perhaps you should keep reading...

Mississippi has very few state laws that apply to the employment relationship. The federal government, on the other hand, has enacted numerous laws and regulations that do.

Federal Government Still Offers Employee Protections

Therefore, if you take action against employees because of their sexual orientation or gender identity, or because of an employee's out-of-wedlock pregnancy, or if you mandate restroom use based on one's anatomy at birth, or make hiring decisions based on your religious tenets, it is not the state of Mississippi you should be worried about. The federal government – via Title VII, OSHA, Executive Orders and other statutory and regulatory vehicles – may make you regret making a decision in reliance of Mississippi's new law.

Title VII Offers Sexual Orientation Protections

The main federal antidiscrimination law is Title VII, which applies to you if you have 15 or more employees. This law prohibits discrimination on the basis of one's sex (among other things). Over the years, courts and the EEOC have interpreted the term "sex" to mean gender identity and to include any type of bias based on sex (including same sex). Just last month, the EEOC filed several

lawsuits against employers arguing that Title VII covers sexual orientation discrimination (read more [here](#)).

Therefore, basing employment decisions on one's sexual orientation or gender identity can place you in the EEOC's crosshairs, even if you are motivated by a sincerely held religious belief. Although Title VII exempts certain religious employers from parts of the non-discrimination provisions of the law, the exemption is narrow. It likely doesn't apply to your business, even if you believe you meet the definition of "religious organization" under HB 1523.

Recent OSHA Guidance Addresses Transgender Bathroom Usage

Also, before you mandate that your employees use the restroom that corresponds with their anatomy at birth instead of their gender identity, know that OSHA may assess fines against you for creating conditions that lead to health and safety problems, or otherwise make your employees feel unsafe (read more [here](#)).

Government Contractors Prohibited From Discriminating

Moreover, government contractors should be warned. A 2014 Executive Order extends antidiscrimination protection to members of the LGBTQ community and addresses no religious exemption (read more [here](#)).

Public Employers Stuck Between Rock And Hard Place?

Public employers may also find themselves in a quagmire. On the one hand, HB 1523 bars them from taking adverse employment action against employees for expressing their sincerely held religious beliefs in the workplace under certain circumstances. On the other hand, Title VII (which applies to state and local government employers) requires employers to maintain a workplace free from unlawful harassment.

This unlawful harassment may include the proselytizing that HB 1523 seems to encourage. Therefore, public employers may find themselves weighing the risk of disciplining or terminating an employee in violation of HB 1523 against the risk of creating a hostile work environment under Title VII.

Conclusion: Act Cautiously, Mississippi Employers

HB 1523 does not exist in a vacuum – it exists in a society where workforces are diverse and the federal government staunchly protects the participating employees. Thus, before you make an employment decision in reliance on Mississippi's new religious freedom law, you should evaluate whether your decision will result in recourse elsewhere. Know this: there is a good chance it will.

If you have any questions about HB 1523, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Gulfport office at 228.822.1440.

This Legal Alert provides an overview of a specific Mississippi law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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