



What Employers Need to Know about Trump's Religious Liberty Executive Order

Insights

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President Trump signed an executive order on religious liberty yesterday to commemorate the National Day of Prayer. Like many before it, the exact contents of this order were hotly anticipated, fueled by White House leaks and presidential tweets, with many speculating that the order would greatly affect employment and other civil rights laws.

Once the text of the “Promoting Free Speech and Religious Liberty” executive order was revealed, however, some touted it as a conservative victory while others questioned whether it accomplished anything of notable significance. More importantly, from an employer’s perspective, the order doesn’t change much, as it leaves intact Obama-era protections for the LGBTQ community, despite wide speculation (both this week and earlier this year) to the contrary. What do employers need to know about this latest executive action?

Trump Promotes Free Speech, Religious Liberty

President Trump’s latest executive order has one central objective: to protect the freedom to engage in religious and political speech without fear of discrimination or retaliation by the federal government. To carry out this objective, the order directs all executive departments and agencies to “respect and protect” a person’s right to engage in religious or political speech, and directs Cabinet members to consider amending regulations addressing conscience-based objections to the Affordable Care Act’s (ACA’s) preventive-care mandate.

Specifically, the order indicates that the administration would like to see two developments to carry about this objective. First, President Trump would like churches and other houses of worship to be able to engage in political speech without fear of tax-related reprisal. Second, President Trump would like entities with a religious purpose to be excluded from the ACA provision requiring employers to cover certain contraceptive care.

At this point, it is not yet known how executive departments and agencies will act to carry out the order’s instruction to “respect and protect” a person or organization’s freedom to engage in religious or political speech. Further, one can only speculate about what constitutes “speech” and how broadly that term will be defined by those tasked with following the executive order. Attorney General Jeff Sessions has been tapped to issue guidance interpreting religious liberty protections under federal law, but until the Department of Justice issues a formal directive, this instruction seems to prompt more questions than it does to provide answers.

What Does This Mean For Employers?

Right now, an employer's best bet is to continue in a business-as-usual fashion. Regardless of whether your business has a religious purpose, citing a sincerely held religious belief is not guaranteed to immunize you from liability. That said, President Trump's latest executive order lays the foundation for future executive (and possibly legislative) action, and signals that there may be immediately decreased enforcement activity on matters concerning your – or your employees' – religious beliefs.

For instance, it is conceivable that the Equal Employment Opportunity Commission, the federal agency charged with enforcing many federal civil rights laws, could begin to take the position that "proselytizing" in the workplace does not create a hostile work environment. Additionally, it may mean that the religious exemption sometimes cited in the employment law context could be interpreted more broadly. But even if the federal government takes the position that no federal law has been violated, an executive order on its own cannot deprive an employee (or applicant) of the right to file a lawsuit.

In fact, because of the limited nature of executive power, President Trump can achieve none of the executive order's goals on his own with the simple stroke of a pen. He is counting on Congress, his Attorney General, and other Cabinet members to take the next steps. Given the current Republican majority in Washington D.C., and the president's campaign promises, it is likely that the notion of "religious liberty" will continue to expand. How this impacts your workplace remains to be seen. But one thing is certain: your Fisher Phillips attorney will continue to monitor these developments as they arise.

If you have any questions about these developments or how they may affect your business, contact the author at JWrigley@fisherphillips.com (228-822-1440) or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of recent executive action. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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