

Navigating religious expression and expanded workplace protections

Recently, the U.S. Equal Employment Opportunity Commission (EEOC) released new draft guidance on religious discrimination in the workplace. This update is long overdue – the first from the EEOC in 12 years, during which we have seen a multitude of legal developments and emerging issues. Unfortunately, while the 114-page guidance document addresses many situations, its lack of answers to some questions creates legal uncertainty. However, it is important to note that Oregon law clearly prohibits discrimination based on sexual orientation and gender identity, with only extremely limited exceptions for religious institutions.

Background

Title VII of the Civil Rights Act of 1964 (Title VII) generally prohibits employment discrimination on the basis of race, color, religion, sex and national origin. Last summer, the U.S. Supreme Court ruled in *Bostock v. Clayton County* that Title VII prohibits employment discrimination on the basis of sexual orientation or gender identity. The landmark decision consolidated three separate cases in which an employee was terminated after revealing he or she was gay or transgender. The court's decision was viewed as a major victory for LGBTQ+ rights, although the court left several unanswered questions about the intersection of religious expression and Title VII in the workplace.

Title VII and religious expression

The Supreme Court held that Title VII's prohibition against sex discrimination should now be read to also prohibit discrimination on the basis of sexual orientation and gender identity. The court reasoned that it is impossible to discriminate against a person for being gay or transgender without discriminating against them based on sex.

Notably, however, the court did not address whether an employer's sincerely held



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religious belief could shield it from having to comply. The court did not rule whether the Religious Freedom Restoration Act of 1993 (RFRA) could “supersede Title VII’s commands in appropriate cases.” This left open whether, in certain extremely limited circumstances, a private employer might be able to discriminate against employees based on LGBTQ+ status.

The court also did not address Title VII’s “religious organization exemption.” Title VII does not allow employers to discriminate based on race, color, sex or national origin, but it does allow religious organizations to give employment preference to individuals of the same religion.

EEOC proposed guidance

The EEOC’s recently issued proposed guidance discusses the rights religious employers have when it comes to antidiscrimination laws, but unfortunately left some of these questions open. The EEOC reiterates that Title VII does not allow for discrimination, but also noted that the prerogative of the religious organization exemption allows religious organizations to employ individuals “of a particular religion” and “has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.”

The EEOC’s proposed guidance also discusses when a reasonable accommodation for a religious belief imposes an undue burden on an employer. Title VII requires an employer to provide reasonable accommodations for an employee whose sincerely

held religious belief, practice or observance conflicts with a work requirement, unless doing so would create an undue hardship. Determining whether a religious accommodation imposes an undue burden on an employer requires a case-by-case inquiry.

However, the guidance merely states that there are “some instances” when Title VII cases might involve a defense based on First Amendment rights or the RFRA, and that these rights might be violated by compliance with Title VII. More specifically, the EEOC noted that “defining the exact parameters of the First Amendment or RFRA is beyond the scope of this document,” and stressed the importance of a “nuanced balancing of potential burdens.” Thus, it remains to be seen whether, under federal law, a religious belief about sexuality would allow an employer to discriminate in employment of an individual based on the person’s sexual orientation or sexual identity under the religious organization exemption.

Oregon law

Oregon law is more clear on these questions, although the outer limits have yet to be tested. Under Oregon law, it is explicitly illegal for an employer to discriminate against an employee based on sexual orientation or gender identity. This applies to nearly every employer, regardless of how many employees or how long the employee who is experiencing discrimination has worked for an employer.

The only exception under Oregon law is for “bona fide churches” and other religious institutions. This exemption

applies when an employment position is “directly related” to the operation of the religious institution or involves religious activities and is “closely connected with or related to” the primary purposes of the religious institution. It specifically includes a variety of religious institutions, including nonprofit religious schools, camps, day care centers, thrift stores, bookstores, radio stations and shelters.

Oregon courts have not seen many challenges to this exemption, so there is little case law to enunciate the full breadth of this exception.

Although Oregon law is largely clear on its protections against discrimination on the basis of sexual orientation and gender identity, the full extent of the religious institutions exception is not known. Further, and of importance for employers in states with less clear protections, there are still questions remaining for employers on how to properly navigate the intersection of religious expression and LGBTQ+ rights under federal law in light of *Bostock* and the EEOC’s proposed guidance. Employers should exercise extreme caution and consult with counsel if they believe they may qualify for a religious exemption.

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