

EEOC Revises Enforcement Guidance on Religious Discrimination

The Equal Employment Opportunity Commission ("EEOC") recently updated its [Compliance Manual Section on Religious Discrimination](#), seeking to clarify how Title VII of the Civil Rights Act of 1964 ("Title VII") protects individuals from religious discrimination in the workplace. The enforcement guidance also discusses the legal protections available to religious employers, which have been bolstered in recent years.

Title VII protects workers from employment discrimination based on their religion, among other things. The statute requires employers to accommodate religious beliefs, practices and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer's business.

Notable Updates

The EEOC's prior guidance on this topic was issued in 2008. In [announcing](#) the new guidance on January 15, 2021, the EEOC explained that the revisions are intended to reflect recent legal developments and emerging issues, and underscored that several U.S. Supreme Court and lower court decisions have "altered the legal landscape."

Defenses that May Be Available to Religious Employers: The Religious-Organization Exemption and the Ministerial Exception

One of the most significant additions to the guidance is the EEOC's expansive view of certain exceptions to Title VII coverage for religious organizations.

Under Title VII, religious organizations are permitted to hire and employ individuals "of a particular religion." A qualifying religious organization may assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.

This "religious organization" exemption applies only to those organizations whose "purpose and character are primarily religious."¹ According to the EEOC, the Commission will consider the facts on a case-by-case basis; no one factor is dispositive in determining if a covered entity is a religious organization under the exemption. Moreover, the guidance leaves open the possibility that some for-profit organizations may qualify for the exemption. In response, several public groups voiced strong opposition to the EEOC's characterization of the exemption, arguing, among other things, that the extension of the exemption to for-profit businesses would give them "[license to discriminate](#)" against women and LGBTQ+ individuals.

¹ The EEOC explains that courts have articulated different factors to determine whether an entity is a religious organization, including: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up of coreligionists.

Another broad limitation on employment discrimination claims brought against religious organizations is the “ministerial exception.” This rule was established by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), which held that the First Amendment safeguards the right of a religious organization, free from interference from civil authorities, to select those who will “personify its beliefs,” “shape its own faith and mission,” or “minister to the faithful.” This affirmative defense applies to discrimination claims involving selection, supervision, and removal against a religious institution by employees who “play certain key roles.”² Unlike the statutory religious organization exemption, the ministerial exception applies regardless of whether the challenged employment decision was for “religious” reasons.

Definition of Religion

According to the EEOC, religion is “very broadly defined”: an employee’s beliefs are protected by Title VII if they are, in the individual’s “own scheme of things, religious.” Furthermore, in response to concerns voiced during the public comment period, the EEOC repeatedly stated that Title VII also protects against discrimination based on a lack of religious faith. The guidance now makes clear that the statute “protect[s] employees who do not possess religious beliefs or engage in religious practice.”

Reasonable Accommodation of Religious Beliefs and Practices

The EEOC’s revisions also provide a more detailed discussion of religious accommodations. A religious accommodation is an adjustment to the work environment that will allow the employee to comply with his or her religious beliefs. An accommodation’s “reasonableness” is a fact-specific determination that reflects the unique circumstances of the individual employer-employee relationship. The guidance incorporates the 2015 Supreme Court case *EEOC v. Abercrombie & Fitch*, which held that an employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice.

In addition, the Commission’s position—which was included in the 2008 version of the guidance—is that the denial of reasonable religious accommodation is actionable even if the employee has not separately suffered an independent adverse employment action, such as being disciplined, demoted, or discharged as a consequence of being denied accommodation. The EEOC guidance notes, however, that courts are split on this question and that several commenters opposed the Committee’s position. While the Second Circuit has not squarely addressed the issue, “[t]he vast majority of courts in this circuit have held that a threat [of discipline or termination] alone does not constitute an adverse employment action.”³

The EEOC’s guidance also discusses several typical accommodation scenarios that may arise. According to the EEOC, the most common methods of accommodation in the workplace include: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfers or changes in job assignment; and (4) modifying workplace practices, policies, or procedures. Relevant workplace practices, policies, or procedures may include: dress and grooming standards; rules regarding the use of employer facilities; tests and other selection procedures; and employer identification procedures. Other methods of accommodation include: excusing union dues or agency fees;

² The Supreme Court subsequently clarified, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that the ministerial exception is not limited to “ministers” or members of the clergy, but rather applies to any employee who performs “vital religious duties” at the core of the mission of the religious institution. For instance, in *Our Lady of Guadalupe*, the Court held that the ministerial exception barred employment discrimination claims by two elementary school teachers in Roman Catholic schools. The Court explained that for a private religious school, “educating and forming students in the faith,” “inculcating its teachings, and training [students] to live their faith are responsibilities that lie at the very core of the mission” and “the selection and supervision of the teachers” who do this work are necessarily core elements of achieving the mission.

³ *Tompkins v. Allied Barton Sec. Servs.*, No. 09 CIV 1954 RMB JLC, 2010 WL 3582627, at *5 n.6 (S.D.N.Y. Aug. 2, 2010), *aff’d*, 424 F. App’x 42 (2d Cir. 2011).

permitting prayer, proselytizing, and other forms of religious expression; and excusing an employee from employer-sponsored religious programs. To further guide employers in practical terms, the EEOC's manual provides illustrative examples for many of these scenarios.

Undue Hardship

Title VII's undue hardship defense to providing religious accommodation has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses "more than a *de minimis*" cost or burden. As with the reasonable accommodation determination, the determination of whether a particular proposed accommodation imposes an undue hardship "must be made by considering the particular factual context of each case." The EEOC explains that factors informing whether a hardship is undue include "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation."

The EEOC notes, for example, a proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement. By contrast, the general disgruntlement, resentment, or jealousy of co-workers will not constitute undue hardship. A showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.

Religious Harassment

In addition to discrimination claims regarding an employee's compensation, terms, conditions, or privileges of employment, Title VII covers "environmental claims" as well, including "harassment leading to noneconomic injury." To present a viable claim, the conduct must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."

The EEOC's guidance includes a discussion of special considerations for employers when they are balancing anti-harassment and reasonable-accommodation requirements regarding religious expression. These two requirements may come into tension when an employee feels a religious obligation to proselytize, or an employer wishes to express their religious views, but some employees may perceive proselytizing or other religious expression as unwelcome based on their own religious beliefs and observances, or lack thereof.

The EEOC advises that while Title VII requires employers to accommodate an employee's sincerely held religious belief in engaging in religious expression (*e.g.*, proselytizing) in the workplace, an employer does not have to allow such expression if it imposes an undue hardship on the operation of the business. According to the EEOC, employers should consider the potential disruption, if any, that will be posed by permitting the expression of religious belief. For example, if an employee's proselytizing had adverse effects on employee morale or workplace productivity, then it would be an undue hardship for an employer to accommodate such proselytizing.

Applicability of the Enforcement Guidance

The EEOC's guidance does not have the force and effect of law and "is not meant to bind the public in any way." It is issued "to provide clarity to the public on existing requirements under the law and how the Commission will analyze these matters in performing its duties."

The EEOC approved the revisions by a [3-2 vote](#) along party lines. On the day the guidance was finalized, the EEOC's two Democratic commissioners, Charlotte Burrows and Jocelyn Samuels, issued a joint statement expressing "substantial concerns" about the revisions and the expedited process used to finalize the document "without sufficient public input." In fact, over 50 organizations [wrote to the EEOC expressing concerns](#) with the lack of transparency and inclusiveness in the process.

In explaining why they did not vote in favor of the update, Commissioners Burrows and Samuels stated that the guidance "does not always strike the proper balance" between religious freedom and equal treatment under the law. This suggests, [along with earlier comments](#), that they view the guidance as prioritizing religious liberties over other important civil rights. Under the Biden administration, they said, "we will engage with *all* stakeholders" (emphasis in original).

On January 21, President Biden named Commissioner Charlotte Burrows as Chair of the EEOC and Jocelyn Samuels as Vice Chair. The panel's Republican members—Janet Dhillon, Keith Sonderling and Andrea Lucas—will continue to serve as commissioners.

Any shifts in the Biden administration's approach to discrimination policies may have limited reach. Absent an early departure, it is expected that Republicans will maintain a majority at the agency until at least July 1, 2022, when Dhillon's term expires.

Implications for Employers

The Compliance Manual serves as a useful point of reference and contains best practices for reducing the risk of religious discrimination claims. Employers should keep the EEOC's guidance in mind when considering employee accommodation requests. Employers should also consider whether any trainings or policies on religious accommodation and nondiscrimination adequately reflect the EEOC's current enforcement positions.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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