

EEOC Issues Updated Guidance Regarding Religious Discrimination Under Title VII

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The Equal Employment Opportunity Commission (the “EEOC”) estimates that only 3.7% of the Title VII discrimination claims it received in 2019 pertain to religious discrimination, but that percentage has nearly doubled from 2.1% in 1997. Accordingly, on January 15, 2021, the Commission voted 3 to 2, along party lines, to approve an [update to its Enforcement Guidance on Religious Discrimination](#), which was last updated in 2008.

The EEOC emphasized that its Guidance is intended only to provide clarity to the public based on court decisions that have issued since the last update with respect to the balance between employees’ and employers’ rights and obligations regarding religious discrimination. The EEOC stated that the Guidance does not have the force of law and does not bind the public in any way.

The most notable updates relate to:

- coverage exemptions and affirmative defenses available to religious organizations;
- the interplay between Title VII and other constitutional and statutory provisions;
- the scope of employers’ vicarious liability;
- employers’ obligations with respect to reasonable accommodations; and
- employers’ responsibility for avoiding retaliation against individuals who engage in protected activity.

The new Guidance explains that religious organizations and religious educational institutions whose “purpose and character are primarily religious,” even if they are for-profit and engage in some secular activities, are exempt from some religious discrimination provisions of Title VII requiring them to carry out their activities in a manner that does not discriminate on the basis of religion. Stated differently, religious organizations and educational institutions are permitted to hire and employ individuals of a particular religion.

Relatedly, the Guidance explains the ministerial exception available to religious organizations. Unlike the exemption, which renders Title VII’s provisions inapplicable to some employment decisions of religious organizations and educational institutions, the ministerial exception is an affirmative defense, rooted in the First Amendment, that religious organizations may assert when defending against an otherwise cognizable claim. Relying on the Supreme Court’s holding in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, that a religious organization must be free from governmental interference in selecting those who “personify its beliefs,” “shape its own faith and mission,” or “minister to the faithful,” the Guidance clarifies that the defense applies not only in relation to those who hold formal titles of “ministers” or “clergy members,” but to those who hold “key roles” within the organization, as examined on a case-by-case basis.

Another principal focus of the revisions to the Guidance is on the interplay between Title VII, the First Amendment, and the Religious Freedom Restoration Act (RFRA). Although the EEOC provides examples of situations in which a conflict might arise between Title VII and the First Amendment and/or RFRA, based on public comments, the EEOC directs EEOC personnel to seek the advice of EEOC legal counsel in such situations.

The revised Guidance's treatment of harassment based on religion warns employers that they may be liable for religious harassment by (1) an agent if "the agent's high rank in the company makes him or her the employer's alter ego," or (2) by a complaining party's coworker if the employer unreasonably fails to prevent the harassment.

Title VII requires employers to provide reasonable accommodations for employees' sincerely held religious beliefs unless providing an accommodation would create an "undue hardship," which has been defined by the United States Supreme Court as posing more than a de minimis cost or burden. Employers are required to provide reasonable accommodations, even absent request by an applicant or employee, if the employer is on notice that a religious practice or observance conflicts with a work policy. Similarly, an employer may be held liable under Title VII if it takes adverse action against an applicant or employee based on a belief that the applicant or employee might need a reasonable religious accommodation. The updated Guidance advises employers of the EEOC's position that "the denial of reasonable religious accommodation absent undue hardship 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. . . . because . . . where a work rule conflicts with [an employee's] religious beliefs [it] necessarily alters the terms and conditions of [] employment for the worse." Although the EEOC sets forth its position, it acknowledges that courts are split on this issue.

To comply with the EEOC's new Guidance regarding reasonable accommodation, an employer must seek information necessary to understand the applicant or employee's religious practice and the manner in which it conflicts with a work requirement. If an employer is able to offer a reasonable accommodation without undue hardship which completely eliminates the conflict, it must do so. It is reasonable to offer an accommodation that only lessens, rather than eliminates, the conflict only if all accommodations that completely eliminate the conflict would impose an undue hardship on the employer. If voluntary substitutions or shift swaps can satisfy the reasonable accommodation requirement without undue hardship, then employers should take steps to facilitate such substitutions and "promote an atmosphere in which such substitutions are favorably regarded."

Finally, Title VII prohibits employers from retaliating against individuals who engage in protected activity relating to religious discrimination. The EEOC's updated Guidance sets forth the EEOC's position that requesting a religious accommodation is a protected activity under Title VII.

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