

The Church Compliance Conference 2014

Religious Liberty Update: Key Cases You Should Know

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Religious Liberty Update

1. Religious Employment: *World Vision* & Title VII
2. Religious Employment: *Hosanna-Tabor* & Ministerial Exception
3. Religious Liberty and Same-Sex Marriage
4. Protecting Your Religious Rights
5. Religious Liberty and Political Activity

This material constitutes legal information, and is NOT legal advice. Because relevant laws may change from time to time, you should not rely upon this information, but rather should always consult legal counsel. https://www.youtube.com/watch?feature=player_embedded&v=p9BJ6bL0a-M

1. Religious Employment:

World Vision and Title VII

- Title VII prohibits discrimination in employment
 - Hiring and firing
 - “Terms, conditions, or privileges” of employment, such as salary, benefits, position, etc.
- On the basis of race, color, national origin, gender, and religion
- Discrimination = treating people differently

1. Religious Employment:

World Vision and Title VII

- Applies to ALL:
 - **Private employers** (employ 15 or more individuals)
 - State and local governments (employ 15 or more individuals)
 - Education institutions (employ 15 or more individuals)
 - Private and public employment agencies.
 - Labor organizations
 - Joint labor management committees controlling apprenticeship and training

1. Religious Employment:

World Vision and Title VII

- Employers have four legal duties regarding the religious beliefs and practices of employees:
 - *Prevent discrimination* in employment (hiring, firing, terms, conditions, & privileges) based on religion
 - *Prevent religious harassment* in the workplace
 - Reasonably *accommodate* the *religious exercise* of employees
 - *Prevent retaliation* against an employee or applicant who has engaged in protected activity

1. Religious Employment:

World Vision and Title VII

■ Examples:

- Refuse to recruit, hire, or promote persons of a particular religion
- Refuse to recruit, hire, or promote someone because they do not share your beliefs or practices
- Prefer one employee over another because of the employee's religious beliefs or practices
- Treat religious expression by employees differently (Bible on desk vs. Quran on desk)

1. Religious Employment:

World Vision and Title VII

- Title VII has two express exemptions that relate to the use of religion in employment decisions
 - **The § 702 Religious Entity exemption**
 - The Bona Fide Occupational Qualification (BFOQ) exemption

1. Religious Employment:

World Vision and Title VII

- Religious Entity Exemption: Section 702 of Title VII contains an **exemption** from its religious discrimination prohibitions for a “**religious**” employer
 - 42 U.S.C. §2000e-1(a). Inapplicability of subchapter to certain aliens and employees of religious entities
 - This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

1. Religious Employment:

World Vision and Title VII

- § 702 exemption is a limited exemption:
 - Applies only to religious organizations
 - Applies to employment decisions based on religion
 - Does NOT apply to employment decisions on any other prohibited basis, such as race, gender, age, etc.
 - This can cause problems for religious organizations when the basis for a decision is unclear or debatable

1. Religious Employment:

World Vision and Title VII

- § 702 exemption is a blanket exemption in terms of an organization's employees:
 - Applies to all “employment of individuals of a particular religion to perform work connected with the carrying on” by that organization of its activities

1. Religious Employment:

World Vision and Title VII

- Who qualifies for this entity-wide exemption?
 - Exemption applies to a "religious corporation, association, educational institution, or society...."
 - Churches = quintessential RELIGIOUS employer
 - Section 702 exemption has been upheld by the Supreme Court as applied to **all employees** of a not-for-profit church. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987)

1. Religious Employment:

World Vision and Title VII

- Who qualifies for this entity-wide exemption beyond churches?
 - In *Spencer v. World Vision*, 633 F. 3d 723 (9th Cir. 2010) the 9th Circuit upheld the Section 702 exemption as applied to all employees of a not-for-profit religious relief and development organization.
 - The Ninth Circuit articulated the test of whether the Section 702 exemption applies as “whether the general picture of an organization is primarily religious, taking into account all significant religious and secular characteristics.”

1. Religious Employment:

World Vision and Title VII

- Who qualifies for this entity-wide exemption?
 - Courts have not yet determined whether the Section 702 religious corporation exemption applies to a for-profit religious corporation, and, if so, whether such application is constitutional
 - Does *Hobby Lobby* shed light on this question? Note and save these questions for Brent Walker's Roundtable at 2:45 on How the *Hobby Lobby* Case Could Affect Your Church.

1. Religious Employment:

World Vision and Title VII

- BFOQ Exemption: Title VII also contains an **exemption** from its religious discrimination prohibitions when religion is a “**bona fide occupational qualification**” for the **specific position** at issue
 - 42 U.S.C. §2000e-2(e)(1). Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion
 - Notwithstanding any other provision of this subchapter, (1) it shall *not* be an unlawful employment practice *for an employer to hire and employ employees, ... on the basis of his religion, sex, or national origin* in those certain instances where religion, sex, or national origin is a bona fide occupational qualification *reasonably necessary to the normal operation* of that particular business or enterprise...

1. Religious Employment:

World Vision and Title VII

- The BFOQ exemption is a blanket exemption
 - It applies to all types of employers, not just **religious** employers
 - It applies not only to consideration of religion, but also to consideration of sex or national origin

1. Religious Employment:

World Vision and Title VII

- The BFOQ exemption is a limited exemption
 - It does **not** apply to all employees of an organization
 - It applies only to specific employment positions
 - It is always narrowly construed

2. Religious Employment:

Hosanna-Tabor and the Ministerial Exception

- First Amendment "ministerial exception"
 - Protects the right of churches to make employment decisions regarding their ministers free of governmental interference
 - Blanket exception: Applies to all aspects of employment and employment decisions related to ministers

2. Religious Employment:

Hosanna-Tabor and the Ministerial Exception

- Limited exception: Applies only to those properly considered "ministers" or who otherwise "speak for the church" (**not** a broad entity-wide exemption like the §702 religious entity exemption)

2. Religious Employment:

Hosanna-Tabor and the Ministerial Exception

- In *Hosanna-Tabor Evangelical Lutheran Church and School, v. Equal Employment Opportunity Commission*, 132 S.Ct. 694 (2012), the Supreme Court held that the ministerial exception is Constitutionally required:

“We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision....By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.”

2. Religious Employment:

Hosanna-Tabor and the Ministerial Exception

- Who is a “minister”?
- The *Hosanna-Tabor* opinion does not give a bright-line test of who qualifies as a minister:

“Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.”

2. Religious Employment:

Hosanna-Tabor and the Ministerial Exception

The Court concluded that the ministerial exception applied to a commissioned teacher called to the ministry of teaching at a Christian school:

“In light of.....the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”

3. Religious Liberty and Same-Sex Marriage or SSM

- ***Griswold v. Conn*** (1965) The case that started it all.
- ***Lawrence v. Texas*** (2003): The case that found the slippery slope.
- ***United States v. Windsor*** (2013)
 - What does this case say?
 - What does it not say?
- ***Hollingsworth v. Perry*** (2013)
 - What does this case say?
 - What does it not say?

3. Religious Liberty & SSM: *GRISWOLD*

- In 2005, Princeton Law Professor Robert P. George published “The Bad Decision That Started It All” arguing that *Griswold v. Connecticut* (1965) was wrongly decided.
- In *Griswold*, a state law that prohibited married couples from using contraceptives was overturned.
- Prof. George argues that the High Court got it wrong by failing to hold that laws prohibiting contraceptives certainly can have a definite social purpose, and so should be viewed as constitutional.
- In other words, Prof George argues that Connecticut did indeed have a purpose in defending that law: the state “sought to promote marital fidelity and stable families” by “discouraging attempts to avoid the possible consequences of non-marital sexual relations” via the use of contraceptives.

3. Religious Liberty & SSM: *LAWRENCE*

- In *Lawrence v. Texas* (2003), a majority (5-4) of the Supreme Court held that a statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violated the US Constitution.
- For the majority, Justice Kennedy wrote, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres.” *Bowers (1986)* was overruled.

3. Religious Liberty & SSM: *WINDSOR*

- In *US v Windsor* (2013) (5-4) the Supreme Court held that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to heterosexual unions, by Section 3 of the Defense of Marriage Act (DOMA), is unconstitutional under the Due Process Clause of the Fifth Amendment, because doing so "disparage[s] and ... injure[s] those whom the State, by its marriage laws, sought to protect in personhood and dignity."

3. Religious Liberty & SSM: *PERRY*

- In *Hollingsworth v. Perry* (2013), the Supreme Court in effect allowed SSM in CA to resume.
- The Court held that the official sponsors of a ballot initiative measure did not have Article III standing to appeal an adverse federal court ruling when the state refused to do so. As a result of this ruling, the district court trial decision from 2010 stood, which found that the voter-approved CA. Prop. 8 had been unconstitutional. Thus SSM in CA could resume.

3. Religious Liberty: Increase in Laws re: Sexual Orientation and SSM

- Rising surge of sexual orientation anti-discrimination, and same-sex marriage laws.
 - Increasing recognition of same-sex marriage as on an equal footing with traditional marriage
 - Increasing anti-discrimination protections for sexual orientation and gender identity
 - Decreasing recognition of religion as an interest that can outweigh sexual identity and self-expression
 - What does this mean for churches and religious organizations?

3. Religious Liberty & SSM: Discrimination Laws

- Most sexual orientation discrimination laws are including an exception for religious organizations
 - Some exempt religious organizations **as entities**
 - Most **do not** exempt religious activities by individuals
 - Most **do not** apply to organizations that are not expressly religious
 - Some exempt religious organizations with regard to hiring of persons in religious functions or performing religious duties

3. Religious Liberty & SSM: Discrimination Laws

- *Harriet Bernstein & Luisa Paster v. Ocean Grove Camp Meeting Association* (2012 NJ AG).
- 2007 Complainants alleged that the Methodist Camp discriminated against them based on civil union status by denying their use of the Boardwalk Pavilion for their civil union ceremony.
- The NJ AG held that the Camp had violated the NJ Law Against Discrimination.

3. Religious Liberty & SSM: Discrimination Laws

- Ocean Grove Camp Meeting Association decision comes out of somewhat specific facts:
 - 1989 OG Camp applied for property tax exemption
 - Neptune Township opposed the application “because it was concerned that [the Camp] might impose religious restrictions that would limit public access.”
 - The Camp assured “that it would make the Pavilion available for public use without reservation.”
 - Tax exemption was granted on condition that the Pavilion was “open for public use on an equal basis...”
 - “Bad facts make bad law.”

3. Religious Liberty & SSM: How Shall We Now Live?

- How shall we live when SSM is the law of the nation?
- Now more than ever Christians must be grounded in both the holiness & love of God.
- We must honor marriage as God defines it: one man + one woman for one's life. Before we can legitimately export the biblical view of marriage, it must be authentically home-grown
- We must not water down the biblical sexuality ethic – i.e., abstinence apart from marriage as biblically defined, even though, scorned as “Puritanical” by our culture

3. Religious Liberty & SSM: How Shall We Now Live?

- Nor must we shrink from our biblical duty to love all neighbors, including our SSM neighbors, as our self.
- See Wesley Hill's *Washed and Waiting: Reflections on Christian Faithfulness and Homosexuality* which tells a bit of his story of orthodox Christian faith and sexuality and how he rediscovered the freedom of celibacy as his vocation and the call of Christ-centered friendships.
- Spiritual Friendship by Wesley Hill
<http://spiritualfriendship.org/author/wahill/>

4. Protect Your Religious Rights

- Review the advantages and disadvantages of how your organization is established as a legal entity and classified with the IRS
 - Is “religious corporation” status available under state law? If so, is it beneficial?

4. Protect Your Religious Rights

- Review the advantages and disadvantages of how your organization is classified with the IRS
 - Is classification by the IRS as a “church” or “integrated auxiliary” of a church feasible? If so, is it beneficial?

4. Protect Your Religious Rights

- **Clearly articulate your organization's religious identity in all important organization documents**
 - Articles of Incorporation
 - Bylaws
 - Mission and Vision Statements
 - Employee Handbooks
 - Codes of Conduct
 - Employment Advertisements/Applications
 - Website
 - Form 990

4. Protect Your Religious Rights

- Articulate the religious basis for the organization's position on any foundational moral issues
 - Marriage and human sexuality
 - Other on-the-job and off-the-job conduct requirements

4. Protect Your Religious Rights

- Articulate the religious character of and basis for all of the organization's activities
- Articulate the specific religious character and requirements of specific employment positions
- Apply the organization's religious policies/standards with ruthless consistency

4. Protect Your Religious Rights

- Beware of compromising religious employment rights in the organization's policies
 - Anti-harassment policies
- Beware of compromising religious employment rights in governmental filings
 - State campaign applications

4. Protect Your Religious Rights

- Carefully review government funding requirements for any potential impact on religious employment rights

5. Religious Liberty and Political Activity

Freedom From Religion Foundation v. Koskinen

(U.S. Dist. Ct., W.D. Wisc.)

- FFRF brought lawsuit against IRS alleging that the IRS was not enforcing the prohibition against political campaign activity by tax-exempt churches.
- June 2014 FFRF requested that case to be dismissed upon claiming that it had received adequate assurances from the IRS that procedures are in place for investigations of prohibited political campaign activity.

5. Religious Liberty and Political Activity

■ Excerpt from FFRF's memo requesting dismissal:

“The I.R.S. has recently, in the context of this litigation, tried to assure FFRF that procedures are now in place for enforcement of the electioneering restrictions of § 501(c)(3), including a procedure to initiate investigations/examinations of churches for possible violations..... FFRF's counsel subsequently discussed the I.R.S.'s current policy and practices with Department of Justice counsel, and as a result, FFRF is satisfied that the I.R.S. does **no**w have a current policy of non-enforcement against churches. Information received from D.O.J. counsel on June 27, 2014, further indicated that the I.R.S. has a procedure in place for “signature authority” to initiate church tax investigations/examinations. Information relating to procedures for processing alleged violations of the political intervention prohibition of § 501(c)(3) was also provided on June 27, 2014.”

5. Religious Liberty and Political Activity

■ Excerpt from the IRS's June 27, 2014 letter:

“In response to your request for information in the above referenced case, I advise on two points:

1. Subsequent to the publication of proposed regulations on section 7611 of the Internal Revenue Code on August 5, 2009, the IRS has processed several cases involving churches using procedures designed to ensure that the protections afforded to churches by the Church Audit Procedures Act are adhered to in all enforcement interaction between the IRS and churches. The procedures require the reasonable belief determination under section 7611(a) to be made by the Commissioner, TEGE, either directly or as concurrence to the determination made by the Director, Exempt Organizations.
2. Our written procedures for our Dual Track process for information items (a.k.a. referrals) alleging violation of the political intervention prohibition of section 501(c)(3) require evaluation of the information item by our Review of Operations (“ROD”) unit and then the Political Activities Referral Committee (“PARC”). With regard to these referrals that concern violations by churches, the PARC has determined that as of June 23, 2014, 99 churches merit a high priority examination. Of these 99 churches, the number of churches alleged to have violated the prohibition during 2010 is 15, during 2011 is 18, during 2012 is 65, and during 2013 is one.”

5. Religious Liberty and Political Activity

- Current Law: Political Campaign Intervention Prohibited for 501(c)(3) organizations, including churches.
- Proposed regulations relating to political campaign intervention is on the IRS priority list.
- Best current IRS guidance on political activity: Revenue Ruling 2007-41.
- Does the prohibition on political campaign intervention violate First Amendment Constitutional rights?

Religious Liberty Update

Q&A

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