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THE LAW AND YOUR MISSION

As laws and culture change, how can your mission retain its unique identity and ministry?



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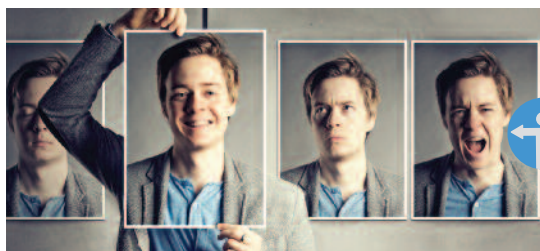


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RELIGIOUS IDENTITY

by Scott J. Ward and Stephen H. King

How to strengthen your mission's
religious identity—and why it matters.

America in the 21st century is in the midst of an “identity crisis,” with widespread cultural uncertainty about how individuals and organizations define and determine who they are. *Identity* has become a key watchword of the day, and issues of identity are increasingly on the cutting edge of the legal and practical challenges gospel rescue missions encounter. ▶



In terms of legal issues, in a recent informal poll of mission CEOs, 40 percent said that religious liberty/identity/freedom was their top legal concern. A related but more specific topic—sexual orientation and gender issues—was cited by 80 percent of leaders (those responding could list more than one topic to answer the open-ended question).

So religious identity is not simply a term legal experts are using. It's a real concern, including

WHY DOES RELIGIOUS IDENTITY MATTER?

Your mission's religious identity matters both practically and legally. It should be evident from both documents and practices that religious faith is at the heart of your mission's purpose and services.

Practically, understanding who you are, what you do, and why you do it enables your mission

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among mission leaders. In the face of growing cultural confusion and fluidity about identity, a gospel rescue mission must think and act clearly about its own religious identity. Rescue missions have used their well-established religious identities to defend against discrimination claims and other legal challenges. Strengthening your mission's religious identity is a powerful step you can take to maximize your legal defenses and better accomplish your mission.

WHAT IS RELIGIOUS IDENTITY?

Religious identity refers to your mission's organization and on-going operation as a legal entity that is intentionally and expressly religious (in general) and Christian (in particular); established to accomplish certain purposes that are religious; and committed to certain core religious beliefs that guide and control what it does, how it does it, and why it does it.

to more effectively accomplish its calling and serve its constituents and community.

Legally, your mission's religious identity is the indispensable foundation upon which most legal protections for its religious rights are built. Among these many important legal rights, the following stand out:

- ***Proving religious freedom defenses.*** Strongly establishing that your mission is a religious organization enables it to better defend against a lawsuit or investigation by invoking your rights and defenses under the First Amendment, the federal Religious Freedom Restoration Act ("RFRA"), and similar state constitutional provisions and laws. Proof of religious identity is necessary to demonstrate that your mission qualifies to assert a claim or defense under these legal protections for the free exercise of religion. And compelling

evidence of your mission's religious character and convictions is incredibly valuable practically in persuading a judge, jury, or investigator against possible preconceptions and prejudices of the essential role that religious convictions play in your mission's care for those in need.

- **Claiming religious exemptions.** Clearly articulating its religious identity enables your mission to invoke important religious exemptions from anti-discrimination laws. The most notable are the employment discrimination prohibitions under the primary federal civil rights law, Title VII of the Civil Rights Act of 1964 (Title VII). Title VII (which applies to private employers with 15 or more employees) prohibits discrimination in hiring, firing, compensation, and other "terms, conditions, or privileges" of employment based upon an employee's race,

color, religion, sex, or national origin. But there is an express exemption for religious organizations. Section 702 of Title VII states that the nondiscrimination requirements of Title VII "shall not apply" to "a religious corporation... with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation... of its activities." (Many, but not all, states have similar anti-discrimination laws and religious exemptions.)

Several points about this "Section 702 exemption" bear emphasis. First, it applies to the entire organization, not just specific positions. Second, it applies to both religious *and secular* activities of a nonprofit religious organization. And third, the term "religion" is defined very broadly to include "all aspects of religious observance and practice, ▶





The religious identity audit is a targeted legal audit that focuses on materials and practices **particularly relevant to carrying out your mission's religious purposes and asserting its religious freedom rights and defenses.**

as well as belief.” These three points can help establish that mission activities such as feeding and providing shelter and services to those in need are in fact *religious* practices and, in any event, come within the exemption.

HOW CAN A MISSION STRENGTHEN ITS RELIGIOUS IDENTITY?

We suggest that missions conduct a religious identity audit to bolster their ability to assert important legal protections. Like an annual financial audit, a legal audit allows your mission's leadership and legal counsel to carefully review your organization's records, policies, and practices, and on that basis

to assess its legal health, diagnose potential legal problems, prescribe legal remedies, and otherwise provide prudent risk-management measures.

The religious identity audit is a targeted legal audit that focuses on materials and practices particularly relevant to carrying out your mission's religious purposes and asserting its religious freedom rights and defenses. The following specific steps in the religious identity audit process provide a useful checklist of some practical measures your mission can take to better protect itself:

1. Strengthen Your Mission's Religious Identity in Foundational Documents

The first step is to review all of your mission's governing and other foundational documents to

ensure that they clearly and sufficiently articulate your religious identity. This begins with the articles of incorporation and bylaws or constitution, but also encompasses your statement of faith, mission statement, vision statements, business plans, and even outward-facing documents such as the IRS Form 1023 and annual Form 990. Make certain that your mission, in appropriate places, has clearly articulated

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the Christian religious purposes it was created to serve and the core religious beliefs that control the what, how, and why of mission activities.

2. Strengthen Your Mission's Religious Identity in Employment Documentation

One of the greatest areas of potential legal claims involves employment. (In AGRM's informal poll, nearly one in three mission CEOs identified HR and hiring practices as a legal concern for their missions.) Allegations of employment discrimination and harassment are a primary area of

position in proposed regulations and are strategically pursuing litigation and enforcement actions to establish this position legally.

At the state level, legislation has been adopted or introduced in almost every state to add SOGI to state employment and other anti-discrimination laws, which traditionally have covered primarily race, sex, religion, national origin, and ethnicity. Previously, such laws normally included express exemptions to allow religious ministries to favor people who completely share the same religious convictions. Such faith commitments are usually

At the federal level, in the waning days of the current Administration, executive agencies are taking the position that the word “sex” in existing employment discrimination laws and regulations—which historically has been understood to refer only to the binary biological male/female distinction—should also encompass sexual orientation and gender identity (SOGI).

litigation for nonprofits. In addition, there are increasing efforts at the federal level and in virtually every state to expand the categories covered by employment discrimination laws and to limit or reduce the protections for religious employers.

At the federal level, in the waning days of the current Administration, executive agencies are taking the position that the word “sex” in existing employment discrimination laws and regulations—which historically has been understood to refer only to the binary biological male/female distinction—should also encompass sexual orientation and gender identity (SOGI). The federal Department of Housing and Urban Development (HUD), Department of Education, and Equal Employment Opportunity Commission have all taken this

essential to ensure that employees share and will advance a religious organization's religious purposes. But these religious exemptions are increasingly under attack legally and even in the media.

To better prepare for these risks, missions must review and strengthen employment-related documentation. This should be done across the board, but several areas are particularly urgent.

Employee Handbooks and Codes of Conduct. Among other things, your mission's Employee Handbook and any Employee Codes of Conduct should:

- Note your religious identity and purposes (from your foundational documents).



- Reference your statement of faith and state whether employees must affirm it.
- Expressly invoke your legal rights as a religious organization.
- Include a religious accommodation policy that satisfies the Title VII obligation to “reasonably accommodate” the religious exercise of employees, unless doing so would cause an “undue hardship.”
- Articulate the scriptural/theological basis for employee conduct requirements.

- Include a good Harassment Policy.

Harassment Policies. The Harassment Policy is an area of hidden legal risk. The absence of a Harassment Policy by itself can establish legal liability for your mission if harassment occurs. Unfortunately, too many religious ministries merely adopt an “off-the-shelf” Harassment Policy designed for secular employers and fail to recognize that these policies do not properly fit a religious organization. Among other things, a religious organization’s Harassment Policy should recognize that religion is special and ▶



Your mission should have written job descriptions for each position in the organization that clearly identify both the essential functions and responsibilities of, and the essential and the desirable requirements for, the position. **The descriptions should expressly include any justifiable religious functions, responsibilities, and requirements.**

different from other protected categories in important ways; define prohibited harassment carefully to *exclude* free exercise of religion and religious speech; and expressly invoke legal rights as a religious organization. By the way, extra care is needed to determine whether and how best to address SOGI-related harassment in light of relevant state laws and federal guidance.

Position Descriptions. Your mission should have written job descriptions for each position in the organization that clearly identify both the essential functions and responsibilities of, and the essential and the desirable requirements for, the position. The descriptions should expressly include any justifiable religious functions, responsibilities, and requirements. Such descriptions provide an important basis for properly applying religious criteria in the hiring and termination processes, in evaluating job performance, and in asserting that religious criteria are “bona fide occupational qualifications” for the position.

Employment Applications. Employment applications should make clear that your mission is a religious organization and, as allowed by law, uses religious criteria in employment decisions.

Employee Benefits Documentation. Docu-

mentation related to employee benefits plans should be carefully reviewed to ensure that benefits are consistent with your mission’s religious convictions. In addition, review overtime policies and classification of employees as exempt or non-exempt in light of the recently revised FLSA regulations.

3. Strengthen Your Mission’s Religious Identity in Key Policies

Your mission should also review other key policies. For example, if your mission makes its facilities available for use by outside organizations and individuals, the facilities may be considered “public accommodations” under state or local laws. This could restrict your ability to refuse to allow certain groups or individuals to use the facilities on the same basis. One way to help manage this risk is to implement a good Facilities Use Policy that articulates the basis for, and specific limitations upon, the use of mission facilities by outsiders.

As another example, any policies regarding intake and assignment of individuals to specific shelters or programs—particularly on the basis of sex and/or gender—should be reviewed in light of potentially applicable federal, state, and local laws and regulations. Among the most significant considerations is the recently revised HUD



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“equal access” rule, which applies to shelters receiving a range of HUD-related funds and that prohibits assigning persons on the basis of actual or perceived sexual orientation or gender identity. If triggered, the new HUD rule requires deference to the individual’s stated gender identity and makes it difficult (and risky) to apply security, safety, and privacy considerations in making assignments.

4. Strengthen Your Mission’s Religious Identity by Reviewing All Government Contracts, Grants, Sub-grants, and Other Possible Sources of Government Funds

The HUD equal access rule is just one reason that it is critical to review your mission’s contracts, grants, and other sources of government funds (directly or as a sub-recipient). Receipt of certain HUD-administered funds could trigger the HUD “equal access” rule.

Similarly, entering into a contract with the government—or into a subcontract with a government contractor—could trigger the SOGI non-discrimination requirements that President Obama’s 2015 Executive Order 13672 made applicable to all federal government contractors. If so, your mission needs to determine whether a longstanding religious exemption (which mirrors the Section 702 exemption) provides protection. All such government contracts should also be reviewed to ensure that they do not undermine your mission’s legal rights as a religious organization. Provisions waiving such rights sometimes lurk hidden in a government contract or in the (often extensive) attachments.

By taking these steps and others comprised in a religious identity audit, your mission can safeguard its legal rights, better achieve its God-given purposes, and avoid creating its own “identity crisis.” ◀

