

EEOC's Proposed Revision of its Guidance Manual on Religious Discrimination

By Paul Patten, Michelle E. Phillips and Caitlin L. O'Fallon

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The U.S. Equal Employment Opportunity Commission (EEOC) has announced that it is seeking public input on its updated Compliance Manual on Religious Discrimination.

The compliance manual has not been revised since July 2008. Since then, the U.S. Supreme Court has issued opinions such as *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018), and *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 679 (2019), and the EEOC believes that these and several others cases have altered protections for employees against religious discrimination in the workplace and enhanced protections for religious employers under Title VII of the Civil Rights Act. The [proposed EEOC Compliance Manual on Religious Discrimination](#) (Guidance), available for public input until December 17, 2020, reflects these changes.

Background

The EEOC Guidance does not have the force of law nor does it rise to the level of EEOC regulations. However, the Guidance provides insight on the EEOC's enforcement priorities. The Guidance also serves as a summary of existing law as interpreted by the courts and the EEOC. It is a valuable resource for companies or attorneys facing a religious accommodation issue.

Title VII prohibits employers from discriminating against employees or applicants because of their religion. The Guidance reiterates that religion is broadly defined under Title VII. An individual is protected under Title VII if their religious beliefs, practices, or observances are "sincerely held."

The Guidance states, "It is irrelevant that the employer does not view the work requirement as implicating a religious belief or that most people of the applicant/employee's faith would not; it is the applicant's or employee's own religious beliefs that are relevant." Social, political, or economic philosophies, as well as mere personal preferences, however, are not religious beliefs for purposes of Title VII. Overlap between a religious and political view does not place the belief or practice outside the ambit of Title VII, as long as the view is part of a comprehensive belief system and not simply an isolated teaching. For example, a belief that one should not harm their own body and that the flu vaccine may do more harm than good, without more, was not found to be protected under Title VII.

Reasonable Accommodations

An employer can reasonably accommodate an employee by flexible scheduling (such as permitting prayer breaks), voluntary swaps of shifts, or lateral transfers to enable religious observance. In addition, an employer can modify workplace practices, policies, or procedures. For example, if a pharmacist has a religious objection to dispensing contraceptives, the pharmacist could be allowed to signal a coworker to assist customers who seek to make those purchases. However, the pharmacist should not be transferred as it is generally recommended that employees be accommodated in their current position. In addition, employers cannot rely on a "broad rubric of image" to deny a requested religious accommodation involving workplace grooming or dress code policies as this could lead to a disparate treatment claim. The Guidance states that doing so would be "tantamount to reliance on a customer religious bias (so-called 'customer preference') in violation of Title VII."

Undue Hardship Analysis

Under Title VII, employers must make reasonable accommodations for an employee's religious beliefs so long as the accommodation does not pose an undue hardship on the employer. Under the Guidance, factors to be considered 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." Courts "have found undue hardship where the accommodation diminishes

Meet the Authors



[Paul Patten](#)

Principal
Chicago 312-803-2570
Email



[Michelle E. Phillips](#)

Principal
New York Metro
White Plains 914-872-6899
Email



[Caitlin L. O'Fallon](#)

Associate
New York Metro
White Plains 914-872-8060
Email

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efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.”

The Supreme Court has defined “undue hardship” for purposes of Title VII as imposing “more than a *de minimis* cost” on the operation of the employer's business. Deciding whether an accommodation would cause undue hardship is fact-specific and employers should make decisions on a case-by-case basis. The Guidance states that while an employee, for example, would not be expected to wear a work uniform supporting LBGTQ rights if it conflicted with the employee's religious beliefs, that same employee would be expected to attend mandatory workplace trainings that emphasized respect for others including those who are members of the LBGTQ community. While allowing the employee to wear a different shirt would not cause an undue hardship for purposes of Title VII, the Guidance notes that employers have the right to conduct workplace trainings that foster diversity and respect for others.

The Guidance suggests that, in deciding whether an accommodation would be reasonable, the employer should engage in an interactive dialogue with the employee. This dialogue typically involves the employer and the employee “mutually sharing information necessary to process the accommodation request.” The employer also should consider what other accommodations, if any, would allow the employee to hold true to their religious beliefs while not causing an undue hardship on the business. While a failure to confer with the employee is not an independent violation of Title VII, it will be more difficult for an employer to meet the burden of proving undue hardship if it has not done so.

The Guidance acknowledges that some religious beliefs might require proselytizing — even in the workplace. Conduct that is disruptive to the workplace, even if it does not rise to the level of harassment under Title VII, may still cause an undue hardship on the operation of a business. The Guidance explains that an employer should balance the employee's religious practice (proselytizing, in this case) with other employees' right not to be harassed for their own religious beliefs or lack thereof. Proselytizing that is directed in a way that is facially abusive (*e.g.*, demeans people of other religions) or, even if it is not abusive, persists even though coworkers have made clear it is unwelcome can constitute harassment. Not only are employees protected under Title VII for their religious beliefs, but they are also protected from having religion imposed on them if they themselves are not religious.

Traditionally, the EEOC guidance is a statement of current law. However, the updated Guidance goes further and notes Justice Samuel Alito's comments that the Supreme Court should reconsider the employer-friendly Title VII undue hardship standard (which requires an employer show only more than a *de minimis* burden). The Guidance does not advocate making the Title VII undue hardship standard a higher hurdle similar to what is required under the Americans with Disabilities Act. However, the reference to Alito's position indicates the EEOC is open to the Supreme Court making Title VII's undue hardship defense more challenging for employers.

Exemption from EEO Laws

The Guidance explains that religious institutions are exempt from Title VII's general prohibition against discrimination because of religion. Under Title VII, a religious corporation, association, educational institution, or society, in fact, is permitted to discriminate against employees or applicants because of their religion. Not only are churches considered religious institutions, but religious schools, hospitals, and charities also have been found to be protected under this exception. Whether or not an organization is a religious institution requires a fact-specific analysis. While no single factor is outcome determinative, the Guidance notes that courts will consider the following: (1) whether the entity operates for profit; (2) whether it produces a secular product; (3) whether the organization's articles of incorporation or other important documents state a religious purpose; (4) whether it holds itself out to the public as being secular or sectarian; and (5) whether the organization regularly includes prayer or other forms of worship in its practices — just to name a few.

The EEOC Guidance also has been updated to reflect the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012). According to the Guidance, this case established that the First Amendment safeguards the right of religious organizations to select those who best “personify its beliefs,” “shape its faith and mission,” or “best minister to the faithful.” While this rule was originally coined as “the ministerial exception,” the Supreme Court's holding in *Our Lady of Guadalupe* made clear the exception applies to more than ministers at religious organizations. The ministerial exception applies to employees who play “certain clear roles” in the organization — like the Catholic school teachers in *Our Lady of Guadalupe*. While religious institutions generally are exempt from religious discrimination suits, the ministerial exception acts as a defense from claims arising under Title VII, the Americans with Disabilities Act, Equal Pay Act, and Age Discrimination in Employment Act. The Guidance explains that, while qualified religious institutions generally are exempt from suit under Title VII for religious discrimination, qualified institutions are exempt from suit under all federal anti-discrimination employment laws when making determinations about key employees that perform vital religious duties. The Supreme Court's holding in *Our Lady of Guadalupe*

expanded the scope of protection afforded to religious institutions under the First Amendment.

Implications of Proposed Guidance

While the Guidance is not final, it serves as a reminder of potential Title VII liability for religious discrimination and failure to accommodate. To minimize the likelihood of claims of religious discrimination, employers should consider maintaining written anti-discrimination and anti-harassment policies. These policies should (1) cover religious discrimination and accommodation and (2) provide effective procedures for reporting, investigating, and correcting religious-based harassing conduct. In addition, employers should provide supervisor training on what constitutes a religion, how best to engage in the religious accommodation process, and how to prevent and stop religious discrimination. While most Human Resources professionals and in-house counsel are familiar with the religious accommodation process, many supervisors are not. Through training, it is critical that supervisors become more familiar with accommodating employee requests for religious accommodations and preventing any discriminatory conduct. Employers also should consider allowing religious expression amongst employees to the same extent that they allow other types of personal expression that are not harassing or discriminatory and avoiding any religious expression that, because of the employer's supervisory authority, reasonably might be perceived as coercive even though it may not be intended that way.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

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