

EEOC Revises Guidance on Religious Discrimination in the Workplace

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The Equal Employment Opportunity Commission (EEOC) has approved revisions to its [Compliance Manual Section on Religious Discrimination](#) (Guidance). The revised Guidance, approved on January 15, 2021, draws upon several U.S. Supreme Court opinions issued since the agency's last significant update to its guidelines in 2008.

The 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 and 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. (For an in-depth analysis of the Guidance, see our article, [EEOC's Proposed Revision of its Guidance Manual on Religious Discrimination](#).)

The Guidance

Under Title VII of the Civil Rights Act, 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. The Guidance makes clear that the EEOC will continue to [broadly define religion under Title VII](#), so an individual is protected if their religious beliefs, practices, or observances are sincerely held and it would not create an undue burden to accommodate the employee's sincerely held beliefs or practices. Further, this [protection applies regardless of whether the employer views the work requirement in question as implicating a religious belief](#).

The Guidance addresses reasonable accommodation. Under the Guidance, 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.

The Guidance provides undue hardship analysis. According to the Guidance, courts "have found undue hardship where the accommodation diminishes 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 U.S. 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. Under the Guidance, factors to be considered when assessing hardship 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."

By way of example, the Guidance states that an employee would not be expected to wear a work uniform supporting LGBTQ rights if it conflicted with the employee's religious beliefs, however, that same employee would be expected to attend mandatory workplace trainings that emphasized respect for others, including those who are members of the LGBTQ 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 encourages interactive dialogue. In deciding whether an accommodation would be reasonable, the Guidance encourages employers to engage in an interactive dialogue with the employee and 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.

Addressing one of the more challenging issues faced by employers, 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.

For additional discussion of the Guidance, reasonable accommodations, undue hardship, the interactive process, religious organizations' exemption from Title VII, and recent Supreme Court decisions expanding the "ministerial exception," see our article, [EEOC's Proposed Revision of its Guidance Manual on Religious Discrimination](#).

Looking Ahead: The Biden Administration

The EEOC and other federal agencies likely will continue to closely scrutinize alleged encroachments on religious liberty. However, the areas of focus are expected to change as agencies and departments evolve during the presidency of Joseph Biden. There will be more willingness to investigate discrimination by religious-based organizations. Not surprisingly, the EEOC's two Democratic Commissioners voted against the Guidance.

Under the Biden administration, there is a real question as to whether the federal agencies will abide by the November 3, 2020, [Memorandum of Understanding](#) (MOU) between the EEOC, the U.S. Department of Labor, Office of Federal Contract Compliance Programs, and Department of Justice. Under the MOU, the federal agencies were expected to be guided by the Attorney General's October 6, 2017, memorandum on federal protections for religious liberty. The Attorney General's October 6, 2017, memorandum is expected to have a limited shelf life. The Attorney General's memorandum questions the federal government's enforcement of the anti-discrimination laws against religious organizations when religious organizations assert "associational" interests. Although there is broad agreement that the ministerial exemption allows a religious employer to make decisions on the employment of faith leaders without regard to Title VII and that Title VII permits a religious employer to discriminate on the basis of religion, there is no consensus that a religious employer can avoid the federal government's enforcement of race and gender discrimination mandates in other circumstances.

Please contact a Jackson Lewis attorney with any questions.

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