

February 5, 2021

EEOC Updates Its Compliance Manual on Discrimination



David Michael

Human Resources & Employment

Agency updates religious discrimination for first time in over a decade

The Equal Employment Opportunity Commission (EEOC) has updated the section of its Compliance Manual on religious discrimination in the workplace. The updated section on religious discrimination was published in January 2021 after a short review period and a 3-2 vote along party lines by the commissioners (with Republicans in favor of the proposal, and Democrats in opposition). Published just days before President Biden took office and named one of the Democratic members as chair of the agency, it remains to be seen if the EEOC will modify this or other sections of the Compliance Manual.

What Is in the Compliance Manual?

First, it is important to note that the document is merely a guide, not the law. As the EEOC states, the “document does not have the force and effect of law and is not meant to bind the public in any way. It is intended to provide clarity to the public on existing requirements under the law and how the Commission will analyze these matters in performing its duties.”

The Compliance Manual addresses the changing legal landscape surrounding religion in the workplace since the Compliance Manual was last updated in 2008. It also provides updated best practices for both employers and employees, as well as updated fact patterns that employers may find useful when training human resources professionals and those in supervisory positions.

An ADA-like Interactive Dialogue for Religious Accommodations

The Compliance Manual addresses the process for handling a request for an accommodation based upon a religious belief, practice or observance. The EEOC states that while an employer is not required by Title VII to conduct a discussion with an employee before making a determination as to whether an accommodation request is an undue burden, “as a practical matter it can be important to do so. Both the employer and the employee have roles to play in resolving an accommodation request.”

Although failure to confer with the employee is not an independent violation of Title VII, the EEOC states, “as a practical matter, such failure can have adverse legal consequences. For example, in some cases where an employer has made no effort to act on an accommodation request, courts have found that the employer lacked the evidence needed to meet its burden of proof to establish that the plaintiff’s proposed accommodation would actually have posed an undue hardship.”

The Ministerial Exception Update

The Compliance Manual discusses the right of religious organizations to make employment decisions based on the personal belief systems of individuals who play certain key roles – a rule known as the ministerial exception and set forth in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012).

The EEOC states that the *Hosanna-Tabor* decision permits organizations “to select those who best “personify its beliefs,” “shape its faith and mission” or “best minister to the faithful.” In 2020, the U.S. Supreme Court decided a ministerial exemption case: *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). That decision was probably the single most significant reason for the EEOC’s update of the Compliance Manual.

The Compliance Manual states that the *Our Lady of Guadalupe* decision broadened the applicability of the ministerial exception to include those employees who perform “vital religious duties” at the core of the mission of the religious institution, even if they do not hold a certain title or a degree in divinity. The EEOC notes that the Supreme Court in *Our Lady of Guadalupe* reviewed the totality of the circumstances in finding that two Catholic teachers were barred from bringing employment claims under the ministerial exception. The EEOC notes that the Supreme Court found that the teachers – whose employment contracts required them to carry out the schools’ religious mission and specified “that their work would be evaluated to ensure that they were fulfilling that responsibility” – performed vital religious duties, including teaching all subjects (including religion), preparing their students for participation in religious activities, praying with them and attending Mass with them. The EEOC also noted that the Supreme Court found the teachers were the staff members “entrusted most directly with the responsibility of educating their students in the faith,” including teaching them about the Catholic faith and guiding them “by word and deed, toward the goal of living their lives in accordance with the faith.”

For purposes of invoking the ministerial exception, the Compliance Manual states that religious institutions are not limited to churches and other houses of worship, and include any organization whose “mission is marked by clear or obvious religious characteristics.” Critics argue that the exception is meant only to apply to nonprofit organizations, while the Compliance Manual suggests that the ministerial exception can be used by employers in a for-profit setting.

The Compliance Manual affirms that the interaction between Title VII and the “First Amendment of Religious Freedom Restoration Act (RFRA) is an evolving area of law.” The two Democratic commissioners dissented, in part, out of concern that the updated Compliance Manual will allow religious employers in the for-profit setting to discriminate against LGBTQ employees. Indeed, the EEOC cites *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020), which held that Title VII’s prohibition on discrimination based on sex applied to sexual orientation and transgender status, but also noted that Title VII might be superseded by RFRA.

Does the Manual Address COVID-19?

[As we recently wrote about](#), the EEOC has said that the COVID-19 vaccine may be mandated by employers, but not without exception for both disability and sincerely held religious beliefs.

While the updated Compliance Manual does not mention COVID-19, it should be read alongside the EEOC’s December 16, 2020, guidance on vaccinations. However, the Compliance Manual does discuss religious accommodations in the context of the flu vaccine, highlighting the import of analyzing what is a “sincerely held belief” when faced with requests for exemptions on religious grounds. For example, where a Christian Scientist refused to be vaccinated due to the “health effects of the flu,” rather than on religious grounds, a district court held that the employee’s objection to the vaccine did not qualify as a religious belief protected by Title VII. *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 492 (3d Cir. 2017). In contrast, where a vegan employee opposed vaccination because it was animal tested and contained animal byproducts, and the employee “subscribe[d] to veganism with a sincerity equating that of traditional religious views,” a district court held that Title VII could apply. *Chenzira v. Cincinnati Child’s Hosp. Med. Ctr.*, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012).

Employer Considerations

While the Compliance Manual update isn’t particularly groundbreaking, it is a good reminder that employers need to make an adjustment to the work environment that will allow an employee to comply with their religious beliefs unless doing so would cause undue hardship on the conduct of the employer’s business (which has been interpreted to mean an accommodation that would require the employer to bear more than a *de minimis* cost or burden).

As the EEOC states in the Compliance Manual, an “employer’s duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion. Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work.”

If you have questions regarding such an accommodation request, or any of the other issues discussed in this article, please contact any of the attorneys in the [Human Resources and Employment Law Practice](#) at Gould & Ratner for further guidance.