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New DOL Rule Expands Religious Employers' Exemption From Federal Contracting Anti-Discrimination Requirement

For-profit federal contractors may now be able to qualify for religious exemptions in the same way as churches, mosques, temples, synagogues and other "religion-exercising organizations" do. The DOL issued a final rule (Final Rule) on December 7, 2020, expanding the types of religious organizations qualifying for religious exemptions as well as attempting to clarify the scope of certain other definitions within the federal regulations. The Final Rule takes effect on January 8, 2021.

On August 15, 2019, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a notice of proposed rulemaking to clarify the scope and application of Executive Order 11246's religious exemption to make it consistent with recent legal developments.

While Executive Order 11246 requires contracts and subcontracts with covered contractors and subcontractors to refrain from discrimination and to engage in affirmative steps to ensure that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, sexual orientation, gender identity and national origin, contracts with certain religious entities are not subject to this requirement. Under the original rule, this exemption for religious institutions included religious corporations, associations, educational institutions and societies.

The Final Rule is a "deregulatory" action that aims to reduce compliance costs and potentially the cost of litigation for regulated entities by revising the definitions to key terms related to religious exemptions. The Final Rule defines *religion* broadly to include "all aspects of religious observance and practice, as well as belief." The Final Rule also defines *particular religion* as the "religion of a particular individual … or [entity], including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer." By such definition, the Final Rule allows a contractor not only to make employment decisions on a religious basis but also to condition such employment on "acceptance of or adherence to *sincere* religious tenets as understood by the employer."

The Final Rule also adds illustrative examples within the definitions of *religious corporation, association, educational institution or society* to better illustrate which organizations qualify for the religious exemptions. Finally, the rule provides a severability provision and expands the religious exemption itself to the maximum extent of the law.

The Final Rule expands the religious exemption to apply to "employers that are organized for religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in activity consistent with and in furtherance of that religious purpose." This includes corporations, associations, educational institutions, societies, schools, colleges, universities or institutions of learning. Previously, to qualify for a religious exemption, entities were required to show that they were organized for a religious purpose, they held themselves out to the public as carrying out a religious purpose, they engaged in activity consistent with and in furtherance of that religious purpose, and they operated as not-for-profit entities or provided evidence that their purpose is "substantially religious." The Final Rule now allows organizations that do "not operate on a not-for-profit basis" to show that they have a substantial religious purpose in order to qualify for the religious exemption.

An organization's "own sincere understanding of its religious tenets" determines whether an organization's engagement is consistent with and in furtherance of its religious purpose. Examples of covered organizations include:

- A nonprofit organization entering government contracts to provide chaplaincy services to military and federal law-enforcement organizations around the country.

- A small catering company providing kosher meals primarily to synagogues and for various events in the Jewish community but sometimes contracting with federal agencies to provide meals for conferences and other events.

Examples of organizations to which this rule will likely not apply include a closely held for-profit candlesticks manufacturer, with churches and synagogues as a majority of its customers, and a for-profit collector business selling a variety of items, including religious ones, with private individuals or museums as a majority of its customers. Both of these hypothetical organizations have a nonreligious mission statement and purpose.

The Final Rule adopts the judicial application of *sincere* belief and defines the term "under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief." Like courts, the OFCCP looks at "whether a sincerely held religious belief actually motivated the institution's actions." The Final Rule notes that the "sincerity of religious exercise is often undisputed or stipulated." Based on this understanding, the Supreme Court and other courts have applied the "sincerely held" standard "when evaluating religious discrimination claims in the Title VII context."

Further, the Final Rule provides that even if a U.S. court invalidates a provision of the relevant section, the other sections will not be affected.

The Final Rule provides clarity on the scope and application of the religious exemption and expands the employment rights available to federal contractors and subcontractors. The OFCCP stated that the rule is "intended to correct any misperception that religious organizations are disfavored in government contracting by setting forth appropriate protections for their autonomy to hire employees who will further their religious missions." Additionally, the OFCCP "believes that clarifying the law for current contractors is a valuable goal in itself, regardless of whether more religious organizations would participate as federal contractors or subcontractors."

Potential federal contractors and subcontractors that have a religious purpose should review the Final Rule and consult employment counsel to discuss whether the updates to the religious exemptions apply to them. However, they should be aware that the changes do not permit discrimination on the basis of other protected categories.

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