

EEOC Releases Updated Guidance on Religious Discrimination

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On July 22, 2008, the Equal Employment Opportunity Commission (EEOC) adopted a new compliance manual section on religious discrimination in response to the fact that religious discrimination claims have increased by 100% between 1992 to 2007. The comprehensive 94-page document, which took the EEOC six years to draft, replaces Section 628 of the agency's compliance manual, titled *Religious Accommodation*, along with several appendices. According to a spokesperson for the agency, the newly released document does not change existing EEOC policies or regulations pertaining to religious discrimination but is intended to update and consolidate the EEOC's statement of position regarding religious discrimination and accommodation issues, which had previously been scattered among a handful of different agency policies.

The new section, titled *Religious Discrimination*, is considerably more expansive than the section it replaces. Aside from addressing the various issues that arise with respect to religious accommodation requests, the new section also discusses employment decisions (hiring, discipline, compensation and other conditions of employment), harassment, and even related forms of discrimination (national origin, race, and retaliation). Along with the new section, the EEOC has released an eight-page fact sheet, titled *Questions and Answers: Religious Discrimination in the Workplace*, and a four-page booklet, titled *Best Practices for Eradicating Religious Discrimination in the Workplace*.

The fact sheet tracks the contents of the new section, in effect reducing the 94 pages to a readable eight pages, while the text of the best practices booklet is drawn verbatim from the new section. Employers and their supervisors should review these documents and keep them on hand in order to understand the EEOC's position with respect to certain accommodation issues. Both of these documents are available on the EEOC's website at http://www.eeoc.gov/policy/docs/qanda_religion.html (fact sheet) and http://www.eeoc.gov/policy/docs/best_practices_religion.html (best practices booklet).

For those who handle religious accommodation requests and other matters concerning religious discrimination (attorneys, human resource managers, etc.), the EEOC's new section offers the EEOC's interpretation regarding current religious discrimination and accommodation law. It includes an exhaustive compilation of current case law, as well as numerous fact patterns, which the EEOC created to illustrate the principles it emphasizes in the guidance. Many of these examples are based on fact patterns from actual cases that plaintiffs have filed in federal court. The new section also points out those instances in which the EEOC's position on religious discrimination or accommodation differs from court precedent or where the EEOC has taken a position on an issue but the courts have not yet done so.

Although in terms of actual numbers religious discrimination cases only represent a fraction of the number of EEOC claims filed each year — in FY 2007, there were 2,880 religious discrimination claims filed (3.5%) compared to 30,510 (37%) race and 24,826 (30%) sex claims

— the trend of increasing religious discrimination claims is likely to continue in the short term due to a confluence of factors. While an EEOC spokesperson attributed the increase in religious discrimination claims to the rise in religious diversity in the workplace, other factors that have contributed to the increased number include the backlash experienced by employees perceived to be Muslim or non-Christian following the events of September 11 and, more recently, the increasingly heated debate surrounding immigration policies and whether illegal immigrants are taking jobs from U.S. citizens and/or depressing wages in those industries historically believed to rely on illegal aliens to fill their jobs. In 2007, foreign-born workers (defined as having been born in another country to parents who were not U.S. citizens) made up 15.7% of the civilian labor force, up nearly 5% from 1996. It should come as no surprise that the number of national origin claims also has been on the rise. In FY 2007, there were 9,396 (11.4%) national origin claims filed with the EEOC. Often plaintiffs file religious and national origin discrimination claims simultaneously.

The new compliance guidance also highlights the difficulties employers face (i) trying to balance the interests of employees who wish to proselytize in the workplace against those employees and customers who may feel harassed by such conduct, (ii) managing employees who believe that certain aspects of their job run afoul of their religious beliefs and want to be relieved of such duties (e.g., pharmacists who do not want to dispense the “morning after” pill or contraceptives), or (iii) managing employees whose religions require that they dress a certain way or wear facial hair (e.g., a beard) contrary to the employer’s grooming or dress code policies.

The EEOC provides the following list of its “employer best practices”:

- If confronted with customer bias (i.e., an adverse reaction to being served by someone in religious garb), the employer should consider taking the opportunity to educate the customer regarding any misperceptions he or she may have;
- Allow religious expression among employees to the same extent as other types of personal expression, provided that such expression is neither harassing nor disruptive;
- Employers should promptly intervene when they become aware of conduct that is objectively abusive or insulting, even in the absence of a formal complaint;
- Supervisors and managers should be trained to recognize when employees are seeking a religious accommodation and consider developing internal procedures for processing such requests;
- Respond promptly to an employee’s reasonable accommodation request; in the event an accommodation cannot be promptly administered, consider providing a temporary accommodation and keep the employee apprised of implementing a permanent accommodation;
- Employers should not automatically reject an accommodation request because it will interfere with an existing seniority system or collective bargaining agreement (CBA), since they can seek a voluntary modification to the CBA;
- Employers should work with employees seeking an adjustment in their work schedules to accommodate religious practices and adopt policies that enable employees to voluntarily swap shifts by providing a central file, bulletin board or other means to help an employee find a volunteer to substitute or swap shifts;

- Employers should make efforts to accommodate an employee's need to wear religious garb and should train managers and employees not to engage in stereotyping based on religious dress and grooming practices;
- Employers should be sensitive to the risk of unintentionally pressuring or coercing an employee to attend social gatherings after an employee requests that he or she not be required to attend for religious reasons; and
- Employers should have an anti-harassment policy that covers religious harassment and any anti-harassment workplace training should include a discussion of religious expression and the need for employees to be sensitive to the beliefs *and* non-beliefs of others.

While many of these suggestions seem practical and reasonable in most situations, each request for religious accommodation arises under unique circumstances, and employers should keep in mind that there is no patented response that works in every situation.

In recent years, members of Congress have repeatedly sought to amend Title VII in order to expand religious protections in the workplace, particularly as it relates to an employer's obligation to reasonably accommodate an employee's religious beliefs or practices. The bill that Congress is currently considering, called the Workplace Religious Freedom Act of 2008 (H.R. 1431), would make it much more difficult for an employer to show that it would suffer an "undue hardship" if required to accommodate an employee's religious beliefs or practices. Members of Congress have introduced various versions of this bill since 1996. Currently, in order to avoid making a religious accommodation, an employer need only show that the requested accommodation would create more than a *de minimis* cost to the employer. Courts have historically applied this *de minimis* rule in a manner that has been favorable to employers since the U.S. Supreme Court first defined undue hardship in the religious accommodation context in its ruling entitled *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). We will keep you apprised of the Workplace Religious Freedom Act's status in our future Management Alerts.