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***Challenges to Religious Liberty:  
Practical Tips to Articulate Your Ministry's Identity and Purpose  
and to Strengthen Your Legal Rights<sup>1</sup>***

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Many religious organizations have been asking questions about how the *Obergefell* decision, holding that the U.S. Constitution requires states to license same sex marriages, will affect their ministries and how they can preserve their religious freedom rights. There are conflicting voices among the opinions. Justice Kennedy in the majority opinion wrote, "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths..." *Obergefell v. Hodges*, No. 14-556, 2015 U.S. LEXIS 4250, at \*48-49 (June 26, 2015). Conversely, Chief Justice Roberts in his dissent said, "Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." *Id.* at \*92 (Roberts, C.J., dissenting).

It is important to consider how this decision, and other recent developments, may affect your ministry's religious freedom rights. This article contains some practical tips to help your ministry strengthen and better express its religious identity and mission so that it will remain free to bring hope and healing to future generations of people in need. Many ministries have, over time, proactively implemented many of the tips below to address a broad range of legal, regulatory, liability, and funding issues. Gammon & Grange, P.C. has been advising religious nonprofits about protecting their religious liberty and promoting their ministry purposes for more than 35 years and will provide more extensive guidance. Please email [religiousfreedom@gg-law.com](mailto:religiousfreedom@gg-law.com) to join our email listserv.

Your ministry's religious identity – the understanding of the purposes for which it was established, what it does, and why it does it – is the foundation for its service to God and to others. An important part of maintaining that religious identity and the freedom to faithfully serve is making certain that the ministry clearly and consistently articulates how faith permeates its work. It should be evident from its documents and practices that religious faith is at the heart of its mission and services. How well your ministry does this may determine its ability to maintain its religious character and core values that motivate it to selflessly serve others.

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**Tip #1: Clearly articulate your organization’s religious identity and religious purposes in all important organizational documents.**

*How does your organization do this?* Review and appropriately revise:

Foundational and governing documents:

Denominational documents -- Books of Order, Canons, Discipline, etc.

Articles of Incorporation or Articles of Association.

Charters / Constitutions / Bylaws

Mission Statements and Vision Statements

Statements of Faith

Documentation provided to employees and volunteers:

Codes of Conduct

Policy Manuals

Employee Handbooks

Employer policies (esp. anti-harassment and religious accommodation)

Documentation accessible to the public:

Web site

IRS filings (e.g., Form 1023 and annual Form 990)

*Why should your organization do this?*

To establish a stronger basis for your organization to assert defenses under the Religion Clauses of the First Amendment and state constitutions and federal and state Religious Freedom Restoration Acts (“RFRA”) against lawsuits and claims.

To establish a stronger basis for your organization to claim the Section 702 religious entity exemption from the prohibitions on discrimination in employment based upon religion under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), 42 U.S.C. § 2000e-1.

- *Prohibition on employment discrimination.* Title VII (which applies to private employers with 15 or more employees) prohibits discrimination in employment – in hiring, firing, compensation, and other “terms, conditions, or privileges” of employment – based upon an employee’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).
- *Broad entity-wide exemption for religious employment decisions by religious organizations.* Section 702 states that the nondiscrimination requirements of Title VII “shall not apply” to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a).
- *Exemption for religious and secular activities.* This entity-wide religious organization exemption has been upheld by the U.S. Supreme Court as applied to both religious and secular activities of a nonprofit religious organization. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

- *Religion broadly defined.* Title VII defines the term “religion” very broadly to include “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000e(j).

**Tip #2: Recognize the advantages and disadvantages of how your organization is organized as a legal entity under state law and recognized as tax-exempt under federal law.**

*Nonprofit organizations can be established in a variety of legal forms, e.g.:*

Nonprofit corporation.

Unincorporated association.

Limited liability company (in some states and in some circumstances).

*Legal form or structure is generally an issue of state laws, which vary from state to state.*

E.g., Virginia has only a single type of nonprofit (nonstock) corporation.

E.g., California has three types: Religious, Charitable, and Public Benefit.

Some states (e.g., New York, Maryland, etc.) have denomination-specific statutes for incorporating churches, accompanied by a generic “catch-all” church incorporation law.

*Carefully consider the advantages and disadvantages of each available approach.*

**Risk:** *If your organization claims to be religious, but is incorporated as a non-religious nonprofit corporation in a state that offers a religious nonprofit corporation option, that fact may be used to attack your claimed religious identity.*

*But the legal form must satisfy federal requirements for tax-exempt status (see below).*

*Carefully consider the basis for your organization’s federal tax-exempt status.*

Consider qualifying based upon your organization’s status as:

- (1) a church,
- (2) a convention or association of churches, or
- (3) an integrated auxiliary of a convention or association of churches.

Possible advantages:

- Automatic tax-exempt status under Internal Revenue Code § 501(c)(3).
- Exempt from filing IRS Form 1023 to be recognized as tax exempt.
- Exempt from requirement to file annual IRS Form 990 information return.
- Some federal and state government agencies seem more willing to recognize religious liberty of these types of organizations than of non-church religious organizations. (E.g., the religious *exemption* from HHS contraceptive mandate under the Affordable Care Act.).

**Corollary/Tip #2-A: Recognize the advantages and disadvantages of how related/affiliated organizations are established as legal entities and connected to your organization.**

- *Religious hiring rights and exemptions (e.g., Section 702 exemption).*
- *Tax-exempt status and filing requirements – certain religious organizations (e.g., churches and conventions or association of churches and their integrated auxiliaries) are not required to obtain IRS recognition of tax-exempt status.*
- *Eligibility to receive public funds – there may be limits on the degree to which certain religious organizations can receive and use government funds and use of a separate entity to receive, hold, and administer such funds may be helpful in some circumstances.*
- *Isolating potential legal liability in a separate entity (e.g., owning real property, conducting higher risk activities, etc.).*

**Tip #3: Clearly articulate the specific religious character of and basis for your organization’s positions on foundational and other important issues.**

*Identify what your organization considers to be foundational or central issues, such as:*

Marriage, the family, and human sexuality.

Conduct – on-the-job (definitely) and off-the-job (possibly, with care).

Others?

*Explicitly base these positions on Scripture and other expressly religious norms.*

“Go deep” – good and thoughtful theology is also helpful legally.

This helps set up important First Amendment defenses.

*Make the direct connection between*

(1) commitment to these beliefs and

(2) accomplishment of your ministry’s specific tax-exempt ministry purposes.

*Requirements for employees of religious organization generally should involve either belief (e.g., assent to the organization’s statement of faith and other theological positions) or actual conduct, rather than status, orientation, identity, etc.*

**Tip #4: Clearly articulate the religious character of and basis for all of your organization’s specific ministries and ministry activities.**

*Especially for activities some consider secular, e.g., rescue missions, soup kitchens, etc.*

*Some (including potential plaintiffs) would like to disconnect the significant charitable and public goods that such ministries provide from their underlying religious origins.*

*Example: Spencer v. World Vision – Plaintiffs were former employees terminated for rejecting the deity of Jesus Christ. In litigation, plaintiffs contended that World Vision is NOT a religious organization for purposes of the Section 702 religious organization exemption because it engages in humanitarian activities – even though it does so for expressly religious reasons. World Vision prevailed, but only after much litigation.*

**Tip #5: Clearly articulate the specific religious character and requirements of specific employment positions.**

*In each written job description, and other relevant documents about the position, clearly identify any religious requirements and qualifications (such as ordination / religious education) that are needed to carry out that particular position.*

**Ministerial Exception:** The Supreme Court has recognized a “ministerial exception” which bars suits brought by ministers claiming violation of employment discrimination laws. The scope of this exception will likely be the subject of future cases.

**BFOQ:** There is a position-by-position exemption under Title VII that allows the employer to consider religion in employment decisions where religion is a “bona fide occupational qualification” or “BFOQ” for the specific position.

This BFOQ exception is in addition to the entity-wide Section 702 exemption.

This BFOQ exemption is very narrowly construed.

Example: helicopter pilots must be Islamic if flying over Mecca.

Caution: Some states have entity exemptions but do not have BFOQ exemptions.

*Additional practical considerations:*

Don't overreach – only claim BFOQ where you can in good faith justify doing so.

Be consistent – don't claim BFOQ for a position at one time and ignore it at another time or for only some employees in the same position.

**Tip #6: Apply your organization's standards and invoke these exemptions (Section 702 and BFOQ) with ruthless consistency.**

*“Always treat like cases alike.”*

If your organization will “look the other way” and not apply a BFOQ requirement to avoid losing a very good employee, then it is not a true BFOQ.

*“Use it or lose it.” – If your organization applies religious hiring requirements inconsistently, it strengthens the counter-arguments ...*

That you have waived those rights.

That those are not the real reasons for your employment decisions.

That you are discriminating on another basis outside these exemptions.

*“Is this the hill we want to die on?”*

Corollary: Be thoughtful and prayerful about when and why your organization decides to invoke its rights and exemptions.

“Hard cases make bad law.”

*“A chain is only as strong as its weakest link.” – Train your supervisors and staff well.*

Your employees – and especially your management employees – can provide evidence that undermines your claims if they initially respond incorrectly to employee requests about religious accommodations, exemptions, etc.

**Tip #7: Adopt a GOOD anti-harassment policy that recognizes religion is special.**

*A BAD anti-harassment policy treats religion just like everything else (race, sex, etc.).*

Many organizations have implemented “one size fits all” policies without recognized that religion is different when the employer is a *religious* organization.

This can lead to the argument that your organization has waived or relinquished, as a matter of policy or contract, its legal rights.

*A GOOD anti-harassment policy thoughtfully articulates the basis for full respect of ALL religious rights, including those of the organization and of all employees and volunteers.*

Recognize the bases for treating religion differently:

Religion Clause(s) of the First Amendment to the U.S. Constitution.

Free Speech Clause of the First Amendment to the U.S. Constitution.

Free exercise of religion and free speech provisions of state constitutions.

Federal Religious Freedom Restoration Act (“RFRA”) and state RFRA’s.

Section 702 exemption under Title VII.

Expressly articulate and claim your organization’s constitutional and legal rights.

Articulate how religion is different from other suspect classifications.

Be very careful how the policy defines “harassment.” Some definitions could result in polite sharing of one’s faith being considered harassment.

Explain that some activities, such as evangelism and other religious speech,

- constitute core free exercise of religion,

- do not create a hostile working environment.

Respond quickly and wisely to all claims of harassment.

Encourage employees to be polite and respectful at all times.

Apply the Golden Rule – do unto others as you would have them do unto you.

**Tip #8: Be careful about your organization’s gracious sharing of its facilities.**

*Problem: Providing unlimited or ad hoc availability of your organization’s facilities:*

Can convert the facility into a “public accommodation” or

Can otherwise reduce your organization’s right to deny use to persons for practices inconsistent with your organization’s beliefs.

*Solution: Implement and consistently follow a good Facilities Use Policy that ...*

Articulates the religious nature of and purposes for your organization’s property.

That invokes your organization’s religious rights under applicable laws.

That imposes religious requirements for the use of your organization’s property. (Use usually need not be limited only to your own members.)

That establishes a clear and reasonable approval process for any outside use of your organization’s facilities and other property.

**Tip #9: Beware governments bearing gifts.**

*IF you are interested in receiving government funds,  
be VERY careful about the details regarding receipt and use of such funds.*

*BEFORE accepting any funds from any federal, state, or local government entity (or from any private organization that itself may be a recipient of such government funds) have legal counsel carefully review:*

- All applicable statutes under which funds are being provided.
- All federal or state agency regulations regarding receipt/provision of funds.
- Relevant Executive Orders – e.g., recently amended Executive Order 11246, which governs nondiscrimination requirements for federal contractors.
- The specific government contract regarding the grant or activity – INCLUDING any and all documents attached or referenced in the contract.
- Other potentially applicable federal and state laws.
- The origin of all public (and possibly private) funds that your organization would receive – and any related laws and regulations that may apply.
- All of the above in combination.

*AFTER deciding to receive funds, carefully comply with all applicable requirements.*

- Separately track and account for all such funds and their use.
- Segregate public funds for use only for program’s recognized secular good.
- Consider whether it is necessary and/or prudent to establish a separate legal entity to receive, hold, administer, and account for such funds.

**Tip #10: Recognize how not only your religious liberty rights but also your other constitutional and legal rights are impacted.**

*Consider how best to set up possible “hybrid” constitutional claims – the U.S. Supreme Court in Smith v. Employment Division made a distinction between “hybrid rights” claims and “pure” free exercise of religion claims:*

“Hybrid rights” claims involve religious freedom in combination with another constitutional right.

“Hybrid claims” receive “strict scrutiny” – the highest level of constitutional review – while “pure” religious freedom claims receive only the much lower “rational basis” scrutiny.

*Recognize all possible “hybrid” rights that might apply, including (but not limited to):*

Free Speech / Free Press / Free Association / Equal Protection / Others

*In articulating your organization’s religious freedom rights, also articulate any other potentially applicable rights in addition to free exercise of religion.*

E.g., the communal nature of your organization—involves freedom of association.

E.g., your organization’s beliefs, evangelism, etc., involve freedom of speech.

**Tip #11: Carefully identify, articulate, and document all of the “burdens” on your free religious exercise that result from the government’s actions.**

*Avoid being limited to “complicity” claims and “dignitary” injuries.*

*Identify all of the specific harms that result from the challenged governmental action.*

*Consistently use language that identifies and expresses the true and full nature of the harms created by the governmental burdens on religious exercise.*

*An employee or opposing party in litigation may argue that the government’s actions do not substantially burden your free exercise of religion under the First Amendment and RFRA and/or that any burdens are less than or equivalent to the burdens on the opponent’s asserted legal rights (such as nondiscrimination rights under Title VII).*

**Tip #12: Use RFRA to the fullest, but be aware of limits and vulnerabilities.**

*The 2014 Hobby Lobby decision is a RFRA decision, not a First Amendment decision.*

*RFRA applies only to governmental burdens and actions, not private actions.*

*Current conflict in decision of U.S. Courts of Appeals over RFRA as a defense to a private cause of action (a private lawsuit against an organization).*

*RFRA, like any other statute, may be amended by the legislature at any time.*

**Tip #13: Be vigilant and guard your flanks.**

*Watch for efforts to pass or amend federal laws and regulations.*

*Watch for attempts to promulgate new agency regulations or guidance, especially during the closing months of an administration.*

*Guard your supply lines. E.g., tax reform proposals that would undermine charitable contribution deductions, such as the Tax Reform Act of 2014.*

*Watch for efforts at the state level.*

*State Constitutions and RFRAs are invaluable in protecting religious liberty.*

*(But escalating efforts to block new RFRAs and amend existing RFRAs.)*

*Public accommodations and facilities laws are primarily state laws.*

*States have their own employment discrimination laws and sometimes address religious exemptions and BFOQs differently than federal laws (if at all).*

*Originally municipal ordinances and now increasingly state laws govern the more cutting edge issues in antidiscrimination, public accommodations, marriage, etc.*

*Support the work of the “watchmen on the walls”.*

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