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This memorandum of law has been prepared by Liberty Counsel in order to offer guidance to private employers regarding the rights of employees to religious expression, particularly during the upcoming holidays. Liberty Counsel is a national public interest law firm specializing in constitutional law, particularly in free speech, religious freedom and church-state matters. We have presented many briefs before the United States Supreme Court, and we have argued before the High Court and in state and federal courts throughout the nation. Liberty Counsel has offices in Florida and Virginia. We have hundreds of affiliate attorneys in all 50 states.

Title VII of the Civil Rights Act of 1964

Federal law, commonly referred to as Title VII¹ of the Civil Rights Act of 1964, prohibits most employers² and unions³ from discriminating against their employees on the basis of religion.⁴ Title VII applies to any employer having fifteen or more employees for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year.⁵ Other state or local

¹ 42 U.S.C. §2000e *et seq.*

² 42 U.S.C. §2000e-2(a)(1)&(2).

³ 42 U.S.C. §2000e-2(c)(1),(2)&(3).

⁴ Religious organizations are exempt from Title VII's religious discrimination requirement. Thus, a religious organization, such as a church, may discriminate on the basis of religion. A Baptist church may hire only Baptists, and a Catholic church may hire only Catholics. *See Corporation of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). Title VII does not apply to the United States and corporations owned by the United States, Indian tribes, or certain employees of the District of Columbia, and furthermore does not apply to tax-exempt, private clubs.

⁵ 42 U.S.C. §2000e-2. Part-time employees may be counted as constituting the fifteen employees. *See Pedreya v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979); *but see Richardson v. Bedford Place Housing Phase I Assoc.*, 855 F. Supp. 366 (N.D. Ga. 1994); *see also Bonomo v. National Duck Pin Bowling Congress, Inc.*, 465 F. Supp. 936 (D. Colo. 1979) (federal courts are without jurisdiction to consider a Title VII claim if the employer has fewer than fifteen employees).

laws may also prevent discrimination on the basis of religion, and such laws may apply to employers with less than fifteen employees.

The relevant text of Title VII regarding the protected employment categories states as follows:

It shall be an unlawful employment practice for an employer –

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁶

Title VII then defines “religion” to include *all* aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.⁷

Three Aspects of a Title VII Claim

The three aspects of a Title VII claim involve the employee’s sincerely held religious belief, the employer’s accommodation of that belief, and the employer’s defense that it cannot accommodate the belief because the accommodation would result in an undue hardship.

Sincerely Held Religious Belief

Title VII prohibits discrimination based upon an employee’s religious belief. This discrimination applies not only to hiring and firing but to all terms, conditions, and privileges of employment. Under Title VII the term “religion” is broadly defined to include “all aspects such as religious observance and practice, as well as belief.”⁸ The Equal Employment Opportunity Commission (“EEOC”) defines religious practice to include “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . The fact that no religious group establishes such beliefs or the fact that the religious group to which the

⁶ 42 U.S.C. §2000e-2(a)(1)&(2).

⁷ 42 U.S.C. §2000e(j).

⁸ 42 U.S.C. §2000z(j). The courts and the EEOC have interpreted this provision liberally. Donald P. Kramer, *Validity, Construction, and Application of the Provisions of Title VII of the Civil Rights Act of 1964* (42 U.S.C. §2000z et seq.) and *Implementing Regulations, Making Religious Discrimination in Employment Unlawful*, 22 A.L.R. FED. 580, 602 (1975).

individual professes to belong may not set the beliefs, will not determine whether the belief is a religious belief of the employee. . .”⁹ Title VII protects individual religious practices even though the practice is not mandated by the religious institution to which the employee belongs.¹⁰

The employee should apprise the employer of this sincerely held religious belief. For example, if the employer requires the employee to work on the Sabbath or Sunday, and if the employee has a sincerely held religious belief to attend church and worship with fellow believers on that day, then the employee should advise the employer of this belief. The employee should state the belief both verbally and in writing and should refer to any biblical or religious-based references that form the basis of this belief. The employee should also advise the employer as to why this belief conflicts with the employer’s practice. An employee cannot claim religious discrimination if the employer is unaware that the belief is or will be violated.

Accommodation

Once the employee advises the employer of the sincerely held religious belief the burden shifts to the employer to accommodate that belief. The employee should suggest accommodation alternatives. In the example of working on the Sabbath or Sunday noted above, the employee can offer to work on an alternative day or suggest other employees who may work the Sabbath or Sunday shift.

The EEOC brought suit in federal court against Dillard Department Stores because of its so-called “no excuses” policy.¹¹ This national department chain apparently had a policy wherein it would accept no excuse from any employee for not working at least one Sunday per month. One employee objected to working on Sunday because of sincerely held religious beliefs, but the store would not accept the excuse and, therefore, terminated the employee. The employee filed a complaint with the EEOC and, after reviewing the case, the EEOC itself filed suit against the department store. This policy has now been changed. This was a blatant violation of federal law prohibiting discrimination based on religion. An employer must at least attempt accommodation of the employee’s sincerely held religious belief, but this department store refused to accept any excuses.

The employer must undertake reasonable efforts to accommodate the employee’s religious belief. An employer cannot establish a zero tolerance policy against accommodating religious belief and practice; it must take seriously its obligation to accommodate the belief.

Undue Hardship

Once apprized of the employee’s sincerely held religious belief, an employer is required to accommodate the belief, unless to do so would cause an undue hardship on the employer’s business. An undue hardship means more than mere inconvenience. An employer cannot claim that employee morale, as a result of the accommodation, is itself undue hardship. Minimal expense is not undue

⁹ *Guidelines on Discrimination Because of Religion*, 29 C.F.R. §1605.1.

¹⁰ *Heller v. EBB Co.*, F.3d 1433, 1438-39 (9th Cir. 1993); *see also Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1998); 22 A.L.R. FED. at 601-03.

¹¹ *EEOC v. Dillard Dep’t Stores*, No. 4:93-CV-1771 CAS., 1994 WL 738971 (E.D. Mo. Nov. 2, 1994).

hardship. Undue hardship is determined case by case. The employer must undertake serious attempts to accommodate the employee's belief.

Proper Accommodation of Religious Beliefs for the December Holidays

Pursuant to Title VII, private employers must make reasonable efforts to accommodate the sincerely held religious beliefs of their employees, unless the accommodation would cause undue hardship. Under certain circumstances, employers violate Title VII when they require their employees to say "Seasons Greetings," or "Happy Holidays," or prohibit their employees from saying "Merry Christmas." For example, an employer must make reasonable efforts to accommodate an employee if an employee informs the employer that (1) the employee has a sincerely held religious belief concerning the true meaning of Christmas – that it is a celebration of the birth of Jesus Christ – and (2) it violates the employee's sincerely held religious beliefs to either acknowledge other December holidays that directly conflict with the employee's religious beliefs, or conceal the true purpose for celebrating in December.

An employer's mandate that employees only tell customers "Happy Holidays" will most likely collide with the sincerely held religious beliefs of many employees. After all, December 25 is a state and national holiday, and that holiday is called "Christmas." It is not reasonable for an employer to mandate "Happy Holidays" when the state and national holiday is Christmas. Employers would look foolish to tell employees to greet customers with "Happy 4th" on Memorial Day or Labor Day. Thus, employers should accommodate any employee who wants to greet customers with "Merry Christmas" rather than "Happy Holidays." An employer would almost certainly not be able to justify banning its employees from saying "Merry Christmas" in the very month where we celebrate Christmas. Our local, state and federal government offices are closed on December 25 (or the Friday before or the Monday after) for Christmas. Our retailers advertise "after Christmas" specials. What came before the "after Christmas" specials was Christmas. When private employers forbid employees from saying "Merry Christmas," they violate the rights of the employees. When public employers forbid employees from saying "Merry Christmas," they not only violate the employees' rights under federal law but also under the First Amendment to the United States Constitution.

If you would like additional information or representation, please do not hesitate to contact us. Liberty Counsel offers its representation free of charge.

Sincerely,

Liberty Counsel