

# FAITH

IN THE **WORKPLACE**

**LEGAL  
PROTECTIONS  
FOR  
CHRISTIANS WHO OWN  
OR LEAD A BUSINE**



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## Foreword

God has a track record of deploying His agents into foreign territory to advance His work. The Apostle Paul describes our assignment as being “ambassadors,” which are full-time representatives of a foreign sovereign who spend most of their time deployed. As our nation fumbles through an uncertain era, followers of Jesus would do well to recall that great heroes of our faith like, Joseph, Daniel, Nehemiah, Abraham, Isaac, and Esther, navigated faithfulness as expatriates under regimes far from friendly to the one true God. While the challenges are real, our era is not unique in history.

Jesus delighted in engaging His disciples in OJT (on the job training) – deploying them in groups of two to go across the [marketplace] sharing the Good News about the Kingdom of God – He prescribed two peculiar instructions. They were to take risks and yet be shrewd. Literally, in Matthew 10:16, “I am sending you out like sheep among wolves (encouraging pep talk!). Therefore, be as shrewd as snakes and as innocent as doves.”

Working with thousands of marketplace leaders every year through our various groups and events, we are constantly equipping and exhorting Christians to embrace their calling to steward God’s businesses for God’s purposes in God’s way. Our tagline is we are seeking to “build GREAT businesses for a GREATER purpose!”

If we operate with sloppy zeal and ignorance to realities or the methods available to us, the very mission will be jeopardized and many needlessly harmed. There are no bonus points for losing a business or resources due to ignorance. Likewise, we are without excuse if we fail to steward our Father’s resources out of fearful compromise. Jesus calls us to be shrewd and yet innocent. It is your stewardship obligation to know the laws of our land so as to navigate on mission with the greatest effectiveness as the Apostle Paul modeled for us in Acts 22:22-29 and 25:9-12.

The folks at Alliance Defending Freedom are outstanding allies in this mission. The brilliant minds and servant leaders they have assembled are at the tip of the spear for supporting Christians fulfilling the Great Commission globally. I am grateful for their partnership in bringing relevant guidance to marketplace leaders so that we might continue to fulfill our vision to “change the world by advancing the Gospel in the marketplace.”

Digest this resource, and share it with your leadership team and peers. Familiarize yourself with the ADF team, and let’s press on, running the race set before us (Hebrews 12:1-3)!

Grace & Peace,

Mike Sharrow  
CEO & President, The C12 Group ([www.C12Group.com](http://www.C12Group.com))

“...WHATEVER YOU  
DO, DO IT ALL  
FOR THE GLORY  
OF GOD.”

**1 Corinthians 10:31**



Running our business based on Christian principles is not negotiable for us. *Faith in the Workplace* is immeasurably valuable and applicable in a time when the government is trying to force Christian employers to provide benefits or participate in events that violate their faith. This resource not only helps Christian employers understand their legal rights to apply their faith to their work, but it encourages them to do so and to stand strong in their convictions.

**Steve Green**

President, Hobby Lobby Stores, Inc.

Jesus promised that “in this world you will have trouble,” and when sending His disciples out on mission He counseled them to be “gentle as doves, shrewd as serpents.” The call of God upon disciples of Jesus in the marketplace arena is breathtaking, dangerous, significant and sacred. The stakes are too high to lead with ignorance or negligence in regards to religious liberties, labor law, risk management and enterprise legacy. *Faith in the Workplace* is a must-read resource curated by the strategic legal team at Alliance Defending Freedom for faith-driven leaders for whom compromise and complacency are unacceptable. ADF is an ally in Gospel stewardship for everyone, and this resource is a tangible expression of their vital efforts.

**Mike Sharrow**

CEO, C12 Group

This is an outstanding and much-needed resource containing up-to-date guidelines for Christian business owners. It explains clearly what kinds of explicitly Christian actions and policies are legal and what kinds of policy statements business owners can adopt to help protect their businesses against possible future legal action.

**Wayne Grudem, PhD**

Research Professor of Theology and Biblical Studies, Phoenix Seminary, Phoenix, Arizona

Author, *Business for the Glory of God*



YOUR  
**Faith**

YOUR  
**Work**



Living out your faith extends far beyond the four walls of a church or of your home. As a Christian, your faith guides your everyday interactions at work and in the public square.

Alliance Defending Freedom (ADF) is an alliance-building legal organization advocating for your right to do so. ADF legally defends religious liberty, the sanctity of life, and marriage and family.



To learn more about ADF and our work, visit [ADFLegal.org](http://ADFLegal.org).

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**3,400**  
ALLIED ATTORNEYS



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WITH OVER  
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ALLIED  
ORGANIZATIONS

WITH A GOD-GRANTED  
SUCCESS RECORD



ADF HAS WON NEARLY  
**80%**  
OF ALL OUR CASES



AND PLAYED A  
ROLE IN  
**60**  
U.S. SUPREME  
COURT VICTORIES

“WE ARE COMMITTED TO:  
HONORING THE LORD IN  
ALL WE DO BY OPERATING  
THE COMPANY IN A  
MANNER CONSISTENT WITH  
BIBLICAL PRINCIPLES...”

| *Hobby Lobby*

## INTRODUCTION

People of faith have the right to live and work according to their sincerely held religious beliefs. This means that Christians may run their own businesses consistently with their core beliefs. In fact, this right is protected by the U.S. Constitution, as well as in many state and local laws. According to one study, faith-based businesses add about \$437 billion dollars per year to the economy.<sup>1</sup>

With recent significant cultural and legal changes in our society, we at Alliance Defending Freedom (ADF) recognize it is as important as ever for you to know how to navigate potential challenges to your business.

America has a rich history of business leaders running their companies consistently with their core beliefs. For example, Interstate Batteries decided they wanted to run a business that would ‘glorify God and enrich lives.’<sup>2</sup> Alternatively, Starbucks explicates their desire for “diversity” and “inclusivity”, and they create policies to implement those desires.<sup>3</sup> In both cases, the organizations or their representatives have taken stands for something they believed in, and operated their business according to that belief.

These companies are seeking to change the world through their work. As a Christian business leader, you can too!

That’s why we created this guide – to help you understand what the law says, and how to legally integrate your faith with your business. God has given you a wonderful responsibility, and as you are faithful, He can use you to bless and impact our world in ways you never imagined!

This guide provides best practices and steps business leaders can take to carry out your purpose to glorify God. But because each business and situation is unique, we recommend that you contact an attorney for specific advice. **If you have legal questions, please contact us at <https://www.adflegal.org/request-legal-help>, so our attorneys can evaluate whether we can provide pro bono legal service or refer you to an ADF allied attorney for assistance.**

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## TO GLORIFY GOD AND ENRICH LIVES AS WE DELIVER THE MOST TRUSTWORTHY SOURCE OF POWER TO THE WORLD.

We fulfill our purpose by doing business based on Biblical principles – such as honesty, humility, service, and care – in a way that is welcoming and loving to all. As a company contributor, you are free to interact with the purpose in whatever way is most meaningful to you. Our values, however, are unchanging, and we ask that our team members try their best to live them as they serve our key stakeholders: team members, customers, distributors and franchisees, suppliers and vendors, communities and shareholders. By creating a welcoming and caring environment, we hope to create a positive experience for our team members and everyone else whom Interstate touches, no matter their background or belief system.

| *Interstate Batteries*



AN  
EMPLOYER'S  
GUIDE TO

## General Workplace Policies

**Q** CAN I ADOPT A STATEMENT OF RELIGIOUS FAITH AND PURPOSE FOR MY BUSINESS?

**A** Yes. Courts have held that business leaders may affirm their faith in business objectives.<sup>4</sup> The law “does not, and could not, require individual employers to abandon their religion.”<sup>5</sup> In fact, in one case concerning the HHS contraceptive mandate, which included contraceptives that could function as abortifacients, the United States Supreme Court determined that family-owned corporations can base their health-care policy decisions on the religious convictions of the owners, and that the federal Religious Freedom Restoration Act (RFRA) protects this exercise of religion from interference by federal government officials.<sup>6</sup> The Court even cited the business owners’ written statements of religious faith and purpose in ruling in their favor.<sup>7</sup>

Additionally, some states have adopted state versions of RFRA, which may further protect Christian business leaders. Contact an attorney to advise you on your state’s laws. Christian business leaders could sometimes improve their chances of establishing a religious liberty defense if they include a statement of faith and religious purpose in their bylaws or business policies. Such statements not only express the leaders’ core religious beliefs, but also serve as clear evidence of those beliefs should they be questioned in a lawsuit. *A model “Statement of Faith and Religious Purpose” is provided in Appendix 1. A model “Statement on the Sanctity of Human Life” is also provided in Appendix 2, which may be helpful should future litigation occur.*

**Caution:** Employers must be careful not to condition employment, benefits, or advancement within the company on an employee’s agreement with or acquiescence in the religious beliefs of the employer (unless religion is a bona fide occupational qualification (BFOQ) for the position, see Section II: “Hiring, Firing and Religious Accommodations,” “Q: If I Own a Christian Service Business, Can I Ever Limit Particular Jobs to Christians?”). Employers can protect against religious discrimination claims in a number of ways. For instance, employment application forms should state that applicants are considered for all positions without regard to religion. This statement should also be included in orientation materials, employee handbooks, policy manuals, and employee evaluation forms. Of course, employers must be sure that this policy is actually followed by not discriminating on the basis of religion.

## Q CAN I SHARE THE GOSPEL WITH MY EMPLOYEES?

A | Employers may talk about their religious beliefs with employees as long as employees know that continued employment, benefits, and advancement within the company are not adversely affected by their rejection of the employer's religious beliefs. For instance, one court upheld a jury instruction that noted how an employer had "a [First Amendment] right to express his religious beliefs and practice his religion, provided he does not discriminate against his employees based on religion...."<sup>8</sup> Another court held that an employer's optional daily prayer sessions for employees, opening meetings with a brief prayer, and giving a book to an employee advocating conversion to Christianity was not illegal, finding that "(t)he Constitution prohibits Title VII [a federal anti-discrimination law], and other anti-discrimination laws, from restricting an individual's proselytizing, witnessing, or counseling, whether in the workplace or otherwise."<sup>9</sup> Although federal law does not mandate a workplace free from religion, an employer may violate federal law and create a hostile work environment if a workplace is permeated with the employer's religious beliefs and those who do not share the employer's religious beliefs are denigrated or required to participate in mandatory Bible studies or religious events after employees have expressed a desire not to participate.<sup>10</sup>

## Q CAN I GIVE MY EMPLOYEES RELIGIOUS INFORMATION OR POST RELIGIOUS LITERATURE IN THE WORKPLACE?

A | As with spoken religious speech, employers can share their religious beliefs with their employees in printed form – such as through pamphlets, books, and newsletters.<sup>11</sup> Employers must be careful, however, not to take any adverse employment action against an employee, or give employees the impression that they must agree with the employer's religious beliefs in order to keep their job, retain their benefits, or be promoted. In one case, a court ruled that a Jewish employee was wrongfully terminated for complaining about the printing of Bible verses on his paychecks and the religious content of a company newsletter.<sup>12</sup>

If an employer expresses his religious convictions to employees, and an employee disagrees or protests, no adverse action can be taken against the employee for disagreeing.<sup>13</sup> In expressing their own religious beliefs in the workplace, employers must be careful not to create a hostile working environment for employees who do not share the employer's religious convictions.

Furthermore, employers should be ready to accommodate any employee's objections to the religious speech contained in publications distributed to employees. It may be a sufficient accommodation to provide the objecting employee with a publication that does not contain the religious content. If an accommodation is requested regarding the posting of religious materials, employers should attempt to post the materials in a place that can be avoided by the employee. However, as outlined above, the employer is not required to make an accommodation that would hinder their right to base legally permissible business goals and objectives on religious principles.

In order to counter any impression that job security and advancement are contingent upon faith, it is also highly recommended that publications with religious material state that the employer does not discriminate on the basis of religion for purposes of continued employment, employee benefits, or promotion. And, of course, the employer should not, in fact, treat an objecting employee any differently than a non-objecting employee with respect to employment benefits, security, or advancement.

## Q CAN I HOLD REGULAR PRAYER MEETINGS OR CHAPEL SERVICES FOR MY EMPLOYEES?

A | Employers can hold regular devotionals like prayer meetings or chapel services for employees, so long as attendance is voluntary.<sup>14</sup> In fact, businesses may even have chaplains. Moreover, management personnel may actively participate in services.<sup>15</sup> To ensure that employees understand that devotional meetings are voluntary, notice of the meetings should state that they are not mandatory and that an employee's attendance or non-attendance will not affect any aspect of the employee's employment in any way. It is best to hold these meetings before the work day begins, during breaks, or after work. And, of course, an employer may not take any adverse employment action against an employee on account of the employee's decision not to attend or participate in religious activities at work. For example, a court refused to dismiss an employee's religious discrimination claim where the employee was required to attend mandatory monthly meetings that included a religious discussion and prayer.<sup>16</sup>

## Q CAN I REQUIRE EMPLOYEES TO ATTEND TRAINING BASED ON BIBLICAL PRINCIPLES?

A | Employers can use training programs that are based on the Bible. For example, requiring an employee to attend a management seminar put on by the Institute of Basic Life Principles, which used scriptural passages to support the lessons it sought to promote, did not violate a Massachusetts civil rights law.<sup>17</sup> However, employees cannot be required to undergo religious training, participate in religious services, or engage in behavior that would violate their sincerely held religious beliefs.

## Q CAN I REGULATE EMPLOYEE SPEECH AND THE LITERATURE DISPLAYED ON AN EMPLOYEE'S DESK OR IN AN EMPLOYEE'S OFFICE?

A | As a general rule, employers are permitted to control their own business premises, including the image presented to the public. For example, an employer was not required to accommodate an employee's religious accommodation request to wear facial jewelry contrary to the employer's jewelry policy because the employer had a legitimate interest in its public image.<sup>18</sup> There is no constitutional right of free speech for private employees because the First Amendment to the United States Constitution applies only to governmental entities.<sup>19</sup> Accordingly, the employer can determine what literature and other expressive items can be displayed at desks and in offices that are frequented by and visible to customers and other members of the public without violating the U.S. Constitution. For example, a private employer can prohibit the display of a picture of a burning United States flag because the employer might reasonably believe that customers would think the picture represents the employer's views, and that it would reflect poorly on the business. Employers can also prohibit employees from saying things to customers that actually hurt business.<sup>20</sup>

However, under the federal employment anti-discrimination law, known as Title VII of the Civil Rights Act of 1964,<sup>21</sup> an employer may become subject to a religious discrimination claim if it discriminates against employees on the basis of religious expression. For example, an employer could probably prohibit employees from displaying any non-work-related items in their workspaces. However, if an employer allows employees to display non-work-related items and expression in their workspaces generally, it may constitute illegal religious discrimination under Title VII to ban religious items or expressions.

Employers can also restrict the posting of material that will affect the efficiency of the workplace. For example, employers do not have to permit signs disparaging coworkers or management. Also, Title VII has been found to protect an employee's religious belief that she must wear a picture of an unborn child at all times, even at work, but the employer could require her to keep the button covered because it was causing disruption with other employees.<sup>22</sup> Employers do not have to permit signs disparaging coworkers or management.

Furthermore, literature that constitutes sexual harassment (e.g., pornography)<sup>23</sup> or religious harassment (e.g., a sign saying Jews are "Christ Killers"<sup>24</sup>) can and should be prohibited. For example, an employer's dismissal of an argumentative atheist employee who proselytized on the job and switched off religious music at a Christmas party in favor of secular music did not violate Minnesota's version of Title VII. The court found that the case involved "aggressively offensive behavior exhibited by an outspoken advocate of atheism wholly intolerant of those foolish enough to admit to other views on the existence of a Deity. He was, indeed an argumentative, proselytizing polemicist."<sup>25</sup> Thus, the court determined that the employee was not terminated because of his religious beliefs, but because of "[his] offensive conduct in the office and in the field, his expressed attitude toward other workers, and his unproductive job performance."<sup>26</sup>

Of course, an employer must attempt to accommodate employees' requests to display items in their workspace pursuant to their religious beliefs. Employees should be allowed to display religious items and speak about their religious faith at work to the same extent as employees are allowed to express themselves generally in the workplace, as long as there is "no 'actual imposition on co-workers or disruption of the work routine.'"<sup>27</sup>

## Q CAN I SET STANDARDS REGARDING THE MUSIC PLAYED IN THE WORKPLACE?

A | Like the display of literature and religious items, an employer can regulate music that affects the image the company is attempting to convey to the public.<sup>28</sup> An upscale retail clothing establishment targeting women in their fifties and sixties does not have to allow the store manager to play alternative rock music. Music that is disruptive to the work environment can also be restricted, even if the public will not be exposed to it. Employers have no obligation to allow their employees to listen to music on the job.<sup>29</sup> However, if music is allowed, an employer cannot prohibit an employee from listening to religious music if that employee has a sincerely held religious belief to do so and it is not disruptive.<sup>30</sup>

## Q CAN I SET REASONABLE STANDARDS FOR EMPLOYEE GROOMING AND CLOTHING?

A | In light of *Bostock v. Clayton County*, it is unclear. For instance, an employer does not discriminate against an employee by requiring him to shave his long facial hair and refrain from wearing a turban, if both of these religious practices cause safety hazards by preventing a hardhat and respirator from being worn properly.<sup>31</sup>

However, employers must accommodate religious beliefs requiring an employee to dress or groom in a certain manner, unless the prohibition is justified by a business necessity or undue hardship. For example, the Equal Employment Opportunity Commission (EEOC) has ruled that a nurse whose faith required her to wear a scarf was unlawfully discharged for refusing to come to work without the scarf, because requiring the nurse to wear a cap instead of the scarf was “not so necessary to the operation of [the employer’s] business as to justify the effect that this policy has upon the employment opportunities of [plaintiff] and others of similar religious convictions.”<sup>32</sup> But generally, reasonable grooming policies do not per se violate an employer’s implied covenant of good faith and fair dealing toward its employee, since an employer has a prerogative to present itself to the public as it sees fit.<sup>33</sup>

However, the issue of a sex-specific dress code was not resolved in the *Bostock* decision; the Court specifically reserved that question for another day.<sup>34</sup>



# FAITH

## IN THE WORKPLACE

## THE HAHN FAMILY | CONESTOGA WOOD SPECIALTIES

You would think a family that has spent a half-century making drawers and cabinets would know a little something about compartmentalizing. That is, after all, why people buy and install drawers and cabinets—so that they can tuck away things they're not using ... store them out of mind and out of sight.

The Hahns understand that. They make their living carefully crafting oak and cherry, maple and pine creations so simple and beautiful that whatever may be stored within becomes almost an afterthought.

They're good at it—so good that their business, which began in the family garage in 1964, has grown from a two-man operation to more than a thousand employees and has earned a reputation for excellence.

The Hahns themselves speak little of any of these things; privacy is as fundamental to their character as faith is to their daily lives. But they are not ashamed of their convictions or of how those convictions shape their lives and work environment. Their beliefs may be personal, but they are not hidden away.

In 2012, the Hahns encountered a harsh reality. Many people view faith the same way they view the things in their cabinets: as something to be tucked away, out of mind, and out of sight.

Officials of the Obama administration's Department of Health and Human Services were among this group. The agency's 2012 abortion pill

mandate stunned Christian business leaders across America, including the Hahns. The government dictated that all employers must underwrite, as part of their employees' insurance benefits, early life-ending abortion drugs. Those who declined to provide coverage for abortion pills risked fines of \$100 a day, per employee.

In effect, the government decreed that business leaders—whatever their personal views on the sanctity of human life—must actively support abortion, or risk crippling fines. And for people like the Hahns, who have built their business as much on deep-seated beliefs as on finely crafted wood, those demands cut deeply against the grain.

But standing for their convictions put the Hahns on the horns of another dilemma: confronting their own government. The Hahns are Mennonites, and, as their attorney puts it, "Mennonites don't go to court."

This left the family with a harrowing choice: ignore the mandate, and face \$100,000 a day in fines... supplement abortion...or go to court. In the end, their commitment to life prevailed. In 2012, they filed suit against the government in federal court.

They lost. They appealed to the U.S. Court of Appeals for the 3rd Circuit and lost again. Finally, they asked the U.S. Supreme Court to review their case. The high court accepted their case in conjunction with that of another family-owned

business, Hobby Lobby, owned by the Green family of Oklahoma. In June 2014, the Supreme Court delivered a landmark victory for Hobby Lobby and Conestoga, protecting religious freedom by allowing both families to operate their businesses according to their convictions.

They may make drawers and cabinets, but people like the Hahns have no compartments in their hearts. They believe in holding true to their faith convictions ... not just in church, or at their own breakfast table, but on the floor of their factory, on the streets of their community, and—if need be—all the way to the steps of the Supreme Court.



**WATCH**

**The Hahn  
Family's Story**

[ALLN.CC/CONESTOGAWOOD](http://ALLN.CC/CONESTOGAWOOD)



AN  
EMPLOYER'S  
GUIDE TOHiring, Firing, and Religious  
Accommodations**Q** WHAT IS MY OBLIGATION TO EMPLOYEES WHO HAVE RELIGIOUS OBLIGATIONS OR OBJECTIONS TO CERTAIN WORK REQUIREMENTS?

**A** | The religious freedom of most employees is protected by Title VII or corresponding state laws.<sup>35</sup> Part of the purpose of this law is to protect employees from religious discrimination and harassment as well as to provide reasonable accommodations for their religious beliefs and practices. A specific provision of Title VII “was enacted with the stated purpose to protect Sabbath observers whose employers fail to adjust work schedules to fit their needs.”<sup>36</sup> The protection extends to “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.”<sup>37</sup>

To prove a Title VII claim for failure to accommodate religion, an employee must prove three things: (1) the observance or practice that conflicts with an employment requirement is religious in nature; (2) the employee called the religious observance or practice to the employer’s attention; and (3) the religious observance or practice was the basis for the employer’s discharge or other discriminatory treatment.<sup>38</sup>

**1. SINCERELY HELD RELIGIOUS BELIEF.**

The sincerity of religious belief is rarely at issue in Title VII cases. Although failure to consistently act on a religious belief may be considered evidence that the belief is not sincerely held,<sup>39</sup> the fact that the belief was only recently acquired does not render it an insincere one.<sup>40</sup>



The sincerity of a person's religious belief is a question of fact unique to each Title VII religious discrimination case. The employee's sincerity in espousing the religious practice is largely a matter of individual credibility.<sup>41</sup> Religion under Title VII is broadly defined as including "all aspects of religious observance and practice, as well as belief ..."<sup>42</sup> The EEOC – which is the federal agency that enforces Title VII – defines religious practice as including:

*"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 espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee ..."*<sup>43</sup>

In other words, the EEOC's test does not require that the employee's religious beliefs coincide with the tenets of his church: "Title VII protects more than the observance of Sabbath or practices specifically mandated by an employee's religion ...."<sup>44</sup> Religion under Title VII has been held to include the Black Muslim faith, the "old Catholic Religion," a "faith in humanity being," and atheism.<sup>45</sup> However, "religion" does not include membership in the Ku Klux Klan or the United Klans of America, or belief in the power of a certain cat food.<sup>46</sup>

The bottom line is that for purposes of a Title VII religious accommodation claim, an employer should assume that an employee's religious beliefs are sincerely held unless there is significant evidence to the contrary.

## **2. EMPLOYER WAS AWARE OF THE RELIGIOUS BELIEF.**

To be entitled to a religious accommodation, an employee must show that the employer was aware of the belief and that the employee requested an accommodation. Specifically, an employer must have "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."<sup>47</sup>

Notification in writing is not necessary if the employer is aware of the beliefs. However, an employee's claim will fail if he does not make his religious belief sufficiently clear so as to allow the employer to determine if an accommodation is necessary and, if so, how and whether an accommodation can be made without imposing an undue hardship on the employer.<sup>48</sup>

In *EEOC v. Abercrombie & Fitch*, the Supreme Court clarified that an employer's "actual knowledge" of a job applicant's need for a religious accommodation is not a prerequisite to bringing a successful Title VII claim.<sup>49</sup> Instead, the applicant "need only show that his need for an accommodation was a motivating factor in the employer's decision."<sup>50</sup> In *Abercrombie*, it was sufficient that the company "believed [the applicant] wore her headscarf because of her [Muslim] faith" and declined to hire her to avoid providing such an accommodation, even though the applicant never expressly raised the need for a religious accommodation.<sup>51</sup>



### 3. DISCRIMINATORY TREATMENT OF EMPLOYEE.

If an employee can show that the employer knew about a sincerely held religious belief, Title VII prohibits the employer from discriminating against the employee because of the belief. “Discrimination” includes demotion, layoff, transfer, failure to promote, discharge, harassment, intimidation, or the threat of these adverse employment actions.<sup>52</sup>

The employer is required to reasonably accommodate the employee’s religious beliefs unless such accommodation would result in undue hardship to the employer.<sup>53</sup> “An accommodation constitutes an ‘undue hardship’ if it would impose more than a *de minimis* cost on the employer,” and “[b]oth economic and non-economic costs can pose an undue hardship upon employers.”<sup>54</sup> An employer cannot hide behind a neutral employment policy to avoid its obligations to provide employees with religious accommodations.<sup>55</sup> In general, an employer is required to accommodate an employee’s adherence to the employee’s religion unless an accommodation will actually interfere with the operations of the employer. This principle would apply even to an atheist.<sup>56</sup>

## Q WHAT SHOULD I DO IF FACED WITH A DISCRIMINATION CLAIM?

A | All employers should have a written set of procedures for handling discrimination claims. These procedures should be created under the direction of an attorney and made available to all employees. Employers should also require mandatory training for all employees and supervisors on the types of discrimination prohibited. Following is a general checklist of initial steps to take when an employee claims that discrimination has occurred:

1. Contact an attorney who specializes in employment law. No notes or other documentation of the incident should be made until an attorney has been consulted and has advised the employer about the proper documentation of the matter. The employer should then take the steps outlined below under the direction and approval of the attorney retained.
2. If advised by an attorney to conduct the investigation in-house, two supervisors should interview the employee making the claim and obtain all of the facts and information surrounding the incident. The supervisors conducting the interview should be individuals who are not implicated in the charge of discrimination.
3. The claim should be investigated immediately (within a matter of days) by interviewing the parties involved. Any investigation and documentation of that investigation should be carefully supervised by an attorney.
4. If the discrimination is ongoing, the employee should be given the option of taking a paid leave of absence during the investigation.

5. If the claim of discrimination is found to have merit, appropriate action should be taken to eliminate the discrimination immediately. This may include placing the parties on administrative leave until the matter is resolved, and/or disciplining the appropriate parties. The employer should also consider, under the advice of an attorney, what training or policies need to be developed to prohibit future discrimination.

If the claim does not have merit, the extent of the investigation should be carefully documented under an attorney's direction, and the complaining employee should be given the option of bringing the matter to the attention of a more senior supervisor.

## **Q** IF I OWN A CHRISTIAN SERVICE BUSINESS, CAN I EVER LIMIT PARTICULAR JOBS TO CHRISTIANS?

**A** | Christian book distributors, bookstores, editing services, counseling services, and other businesses that primarily serve the Christian community may have a genuine need to employ Christians to serve the public. For example, a Christian bookstore may want employees who interact with customers to be able to give advice on Bible translations, Bible studies, Bible commentaries, authors, performers, and other matters. Business leaders may also want employees to be able to bear a Gospel witness to non-Christian customers. It would be difficult to meet these religious business objectives with non-Christian employees.

The general problem with a for-profit business limiting employment to Christians is that Title VII (with an exemption for religious organizations, described below) prohibits employment discrimination on the basis of religion.<sup>57</sup> That prohibition does not apply, however, "in those certain instances where religion ... is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that particular business or enterprise ...."<sup>58</sup> To attain this protection, business leaders must demonstrate that Christianity (or a particular sect, denomination, etc.) is a bona fide occupational qualification for all or some of the positions within the organization.

The Supreme Court has emphasized "that in order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to the 'central mission of the employer's business.'"<sup>59</sup> The Christian bookstore may be able to establish that giving customers good counsel on Bibles and other Christian materials, or effectively interacting with its overwhelmingly Christian customer base, or evangelizing non-Christian customers, relates to the essence or central mission of the business. That would be easier to do with a clear statement of religious business objectives and employee responsibility.

If you are considering making a religious classification as part of a bona fide occupational qualification, we recommend that you contact an attorney for specific advice before doing so.

## Q WHAT CHARACTERISTICS MAY I CONSIDER WHEN MAKING BUSINESS DECISIONS?

A Generally, employers may not consider race, color, religion, sex, national origin, ancestry, age, veteran status, marital status, or the existence of a non-job-related disability when making employment or personnel decisions. Recently, in *Bostock v. Clayton County*, the Supreme Court ruled that “discrimination...because of...sex” now also includes terminating an employee solely because of their sexual orientation or transgender status. Additionally, some states, cities, and municipalities have added sexual orientation and gender identity to the list of protected classes.<sup>60</sup> If an employer is uncertain as to whether an anti-discrimination law applies or whether consideration of a particular characteristic is illegal in the jurisdiction(s) in which it conducts business, he should contact a local attorney. ADF may be able to offer advice on this matter or recommend a local Christian attorney.

## Q MAY I CONSIDER SEXUAL ORIENTATION OR GENDER IDENTITY IN MAKING BUSINESS DECISIONS?

A In many cases, an employee's sexual orientation or gender identity is irrelevant to the job at issue. However, in *Bostock v. Clayton*, as detailed above, the Supreme Court changed the scope of Title VII of the 1964 Civil Rights Act. Now, an employer generally cannot make employment decisions strictly based solely on a person's sexual orientation or gender identity. Nevertheless, it is unclear if a company's particular values or mission (that is, a religious liberty claim), or the nature of a particular type of job, may allow sexual orientation or gender identity to be considered in business decisions. But the enactment of certain anti-discrimination laws (more on these types of laws available on p. 19) across the country purport to make an employer's consideration of sexual orientation or gender identity in the employment context illegal unless it is a bona fide occupational qualification.<sup>61</sup> Employers that confront a situation involving an employee's sexual orientation or gender identity should speak with an attorney for guidance.

Beyond federal law, at least 22 states and the District of Columbia also have laws addressing gender identity and/or sexual orientation; they include the following jurisdictions:

California

Colorado

Connecticut

Delaware

District of Columbia

Hawaii

Illinois

Iowa

Maine

Maryland

Massachusetts

Minnesota

Nevada

New Hampshire

New Jersey

New Mexico

New York

Oregon

Rhode Island

Utah

Vermont

Washington

Wisconsin<sup>62</sup>

If your business operates in any of these states, you may be prohibited from making employment decisions based on sexual orientation and/or gender identity.

Hundreds of cities and counties across the country have also enacted similar restrictions applicable to private employers. Employers should check with all municipalities and other governmental authorities where they are located and conduct business to determine whether there is a prohibition on private employers discriminating on the basis of sexual orientation or gender identity.<sup>63</sup> Some of these state statutes and municipal ordinances have exemptions for religious organizations, while others do not. In addition, they may define “religious organization” in different ways.

*See Appendix 7.*

## Q ARE FOR-PROFIT BUSINESSES TREATED DIFFERENTLY THAN NON-PROFIT RELIGIOUS ORGANIZATIONS?

A In some contexts, for-profit businesses are treated differently than non-profit religious organizations, but a proper interpretation of constitutional protections and most religious-freedom laws should not distinguish between the two. Indeed, as mentioned above, the United States Supreme Court has concluded that federal RFRA protects the rights of family-owned corporations to operate consistently with the religious convictions of the owners on issues like abortion, just as it protects the rights of non-profit religious organizations.<sup>64</sup>

Moreover, Title VII provides an exemption for “religious corporation[s]”—but it does not prohibit those entities from discriminating in hiring on the basis of religion.<sup>65</sup> An employer qualifies for this exemption if it “is primarily religious, . . . [taking into account] [a]ll significant religious and secular characteristics.”<sup>66</sup> While this exemption clearly applies to non-profit religious organizations, it is currently unclear whether it will also protect certain for-profit businesses, particularly those with religious services or products.<sup>67</sup>

Most states with nondiscrimination statutes also provide an exemption from the prohibition on religious discrimination for religious organizations. *See Appendix 7.* However, Michigan and West Virginia do not provide such an exemption. *See Appendix 7.* Local governments like cities and counties may also have anti-discrimination laws, and while some of them exempt religious organizations, others do not.

## Q ARE ALL EMPLOYERS SUBJECT TO ANTI-DISCRIMINATION LAWS?

A Most, but not all employers are subject to anti-discrimination laws. Under federal law, employers with 15 or more employees are prohibited from discriminating on the basis of race, color, sex, national origin, and religion.<sup>68</sup> Many states have lowered this number so that even very small businesses are restricted by state anti-discrimination laws. *See Appendix 8.* In addition, many states and municipalities have expanded the prohibition on discrimination to include other categories, such as sexual orientation and/or gender identity.



# FAITH

## IN THE WORKPLACE

## BARRONELLE STUTZMAN | ARLENE'S FLOWERS

Leonardo da Vinci had his paints; Michelangelo had his marble; Beethoven had his notes; and Barronelle Stutzman has flowers. Name the occasion – wedding, anniversary, birthday – and she can design a custom bouquet or arrangement to fit. For decades, she's been delighting the people of rural Richland, Washington, with her unique floral creations.

Everybody enjoys creativity, but only a handful can really appreciate it ... bringing their own sixth sense of understanding to just how delicate or clever or masterfully crafted the work of the artist really is. That's why Barronelle and her customer Rob Ingersoll became fast friends. Rob wasn't just one of her best customers.

He really understood how much of herself Barronelle pours into the floral arrangements she creates so well.

Barronelle had designed all kinds of wonderful creations for the special events and occasions important to Rob. That made it all the more painful to her on the day he asked her to create something original for an occasion she could not, in good conscience, celebrate with him. Rob said he was marrying his partner, another man, and Barronelle's Christian faith is grounded in Scripture that teaches marriage is the union of one man and one woman.

She told him as gently and lovingly as she could, gave him a hug, and he said he understood. His partner, though, did not understand. He shared his outrage on Facebook, and his words drew attention from

those promoting same-sex marriage ... including the state's new attorney general, Bob Ferguson.

Ferguson determined to make an example of Barronelle. He filed a lawsuit against her, charging her with illegally discriminating against Rob based on his sexual orientation. It was an unusual course of action, given that neither Rob nor his partner had filed a formal complaint with the state. They easily found another place to create floral arrangements for their ceremony, so that was not a problem.

The state Human Rights Commission, charged with instigating action in such matters, hadn't pursued a claim either. But Ferguson made it a personal priority, not only filing the lawsuit but denouncing Barronelle from political stumps all over the state. (Taking his lead, Rob and his partner, along with the ACLU, subsequently filed their own lawsuit, which is now combined with the state's.)

The lawsuit came with a barrage of media coverage, and Barronelle's shop was deluged by phone calls and buried in hate mail. People who knew very little about what really happened between Barronelle and Rob angrily denounced her decision and mocked the faith that inspired it. But as the months went by, the angry calls and letters were replaced, more and more, by countless letters and cards and emails of support from people all over the world who read of her situation and admired her courage.

After losing at the Washington Supreme Court, the U.S. Supreme Court ordered it in 2018 to reconsider Barronelle's case in light of Masterpiece Cakeshop (see p. 23). But the Washington Supreme Court repeated much of its first decision, so Barronelle has appealed to the U.S. Supreme Court yet again.

In spring 2021, the Court is expected to issue an opinion concerning the religious freedom of a Catholic adoption center in Philadelphia, and it will likely decide whether to hear Barronelle's appeal shortly after that.

Despite these many challenges, Barronelle is drawing encouragement from fellow believers. And as her case proceeds, she will stand by her faith and trust in her Lord, no matter what the court rulings may be. Barronelle is a wonderful floral artist, but she'd be the first to tell you: in this life, no one promised her a rose garden.

 **WATCH**  
**Barronelle's Story**

[ALLN.CC/BARRONELLE](https://alln.cc/barronelle)



AN  
EMPLOYER'S  
GUIDE TO

## Company Benefits

**Q** DO I HAVE TO PROVIDE EMPLOYEES WITH HEALTH INSURANCE THAT COVERS MEDICATION AND PROCEDURES THAT I FIND OBJECTIONABLE?

**A** | Possibly not, depending on what coverage the employer objects to and what governmental entity is requiring it. The federal government requires many health plans to cover contraceptives, including some that can function as abortifacients. As of fall 2020, there is an exemption for those who have a religious or moral objection to contraceptives or abortifacients, though that exemption could be changed by a future administration or a future court decision. The Supreme Court has already determined that religious people who own closely held businesses cannot be forced by the federal government to pay for required items when doing so would violate their sincerely held religious beliefs. For example, *Conestoga Wood Specialties Corp.* and *Hobby Lobby Stores* are not required to pay for health insurance that covers, among other items, early abortion-causing drugs, such as the “morning after pill.”

The Supreme Court found the families that own these businesses are protected by federal RFRA, which ensures the right to freely exercise religion.<sup>69</sup> However, the federal government might be able to force objecting employers to comply with the mandate via the so-called “accommodation,” when plan beneficiaries receive objectionable items but not at the employer’s expense.

There are also federal laws prohibiting certain state law insurance mandates for coverage of activities like abortion or physician-assisted suicide drugs, though some states are attempting to challenge those protections.<sup>70</sup> About half the states require employers to include contraceptives in their health plans. Most of these state laws exempt at least some religious objectors, but the scope of these exemptions varies dramatically from state to state. Some states are also beginning to require employers to include sex reassignment (see the next point) in their health plans. Their power to do this – and the religious liberty limits on them – are in dispute. These matters might require additional litigation and could vary based on different state religious freedom laws. If an employer is uncertain whether the government is violating the employer’s religious freedom by requiring the employer to provide health coverage for morally objectionable items, the employer should contact ADF or a local attorney.



## Q DO I HAVE TO PROVIDE INSURANCE, HEALTH, AND RETIREMENT BENEFITS FOR SAME-SEX MARRIAGES?

A | The answer may depend on where you live, and laws are changing rapidly in this area since the Supreme Court struck down the federal definition of marriage in 2013 and found a constitutional right to same-sex marriage in 2015.<sup>71</sup> Whether your company is required to provide benefits to same-sex spouses of employees will depend on several factors, such as whether the company is self-insured, whether the benefit is federally required, and whether state law addresses the issue. Business leaders should consult with an attorney to get information on the current status of the law. ADF may also be able to refer employers to an ADF allied attorney for assistance.

## Q CAN I TAKE STEPS TO SUPPORT MARRIAGE AND FAMILY IN MY BUSINESS?

A | Business leaders can support marriage and family, as well as demonstrate allegiance to their statement of faith, by providing family-friendly employee benefits. But after the Supreme Court recognized a constitutional right to same-sex marriage, some businesses' benefit plans may be affected.<sup>72</sup> Even so, companies may sometimes distinguish between marriage and cohabitation and decline to provide benefits to cohabiting couples depending on what state law requires. Business leaders should consult with an attorney to get information on the current status of the law. ADF may also be able to offer guidance on this matter or refer employers to an ADF allied attorney for assistance.

## Q HOW CAN I PROMOTE STRONG AND HEALTHY MARRIAGES AND FAMILIES?

A | Offering generous employee benefits is a good starting point for putting faith into practice in one's business.<sup>73</sup> Although not focused directly on marriage, generous benefits support healthy marriages by reducing stress in the lives of all employees. Examples of such benefits include childcare, adoption subsidies, paid leave for adoptive parents, and expanded Family and Medical Leave Act benefits.

Employee Assistance Programs (EAPs) are an additional tool for promoting healthy marriages (which also leads to healthy families<sup>74</sup>). EAPs often offer counseling services, and there are numerous proposals for using EAPs to alleviate the financial stress experienced by employees going through a divorce.<sup>75</sup> While offering financial assistance may diminish the financial stress of a divorce, it would be far better to offer programs that could prevent the divorce.

There are a multitude of programs designed to help couples avoid divorce, from online assessment tools,<sup>76</sup> to couples' retreats,<sup>77</sup> to telephone counseling,<sup>78</sup> to sophisticated counseling programs.<sup>79</sup> Christian business leaders are free to offer programs that are biblically based, but they should also offer a menu of other options that any employee can choose. One such option is PREPARE/ENRICH, a program with a proven track record that can be facilitated by clergy, licensed counselors,

social workers, or lay counselors.<sup>80</sup> The PREPARE aspect of the program is for premarital counseling, and the ENRICH portion is for already-married couples.<sup>81</sup>

Perhaps the best way to support healthy marriages for employees is to make premarital counseling available.<sup>82</sup> Research shows that premarital counseling programs like PREPARE, which emphasizes relational skills, improve overall marital satisfaction and reduce the risk of divorce by 30 percent.<sup>83</sup> A church-based program called Marriage Savers that uses the PREPARE couple assessment has been highly effective.<sup>84</sup> Marriage Savers' founder, Michael J. McManus, tracked 288 couples from his church who received premarital counseling from a mentor couple over the first 10 years of the program. Eighteen percent of the couples dropped out or broke up before the marriage. But of the 229 who married, only seven divorced or separated – a divorce/separation rate of only 3.1 percent.<sup>85</sup> Since the average divorce rate after five years of marriage is 23 percent,<sup>86</sup> the pilot program reduced divorce by 86 percent!<sup>87</sup> Encouraging employees to participate in such a program prior to marriage not only promotes healthy marriages and families, but also benefits the employer by making workers more productive.<sup>88</sup>

Despite the well-established benefits of premarital counseling and the fact that many churches and synagogues provide it, less than one-third of engaged couples receive any premarital counseling at all.<sup>89</sup> Therefore, it may well be in an employer's best interest not only to pay for premarital counseling but to offer incentives for couples to complete a premarital program.

Business leaders should consult with an attorney to get information on the current status of the law. As mentioned above, if businesses offer some of these benefits, some jurisdictions may require those businesses to offer other benefits that could violate the business owner's beliefs. ADF may be able to offer guidance on this matter or refer employers to an ADF allied attorney for assistance.



“CONGRESS SHALL MAKE NO LAW  
RESPECTING AN ESTABLISHMENT  
OF RELIGION, OR PROHIBITING  
THE FREE EXERCISE THEREOF;  
OR ABRIDGING THE FREEDOM  
OF SPEECH, OR OF THE PRESS;  
OR THE RIGHT OF THE PEOPLE  
PEACEABLY TO ASSEMBLE, AND  
TO PETITION THE GOVERNMENT  
FOR A REDRESS OF GRIEVANCES.

| *First Amendment U.S. Constitution*



# FAITH

## IN THE WORKPLACE

## BLAINE ADAMSON | HANDS ON ORIGINALS

Blaine Adamson has a gift and an enthusiasm for helping others convey messages on shirts of all kinds – as well as hats, bags, blankets, bottles, cups, and mugs. Working alongside other people who share that enthusiasm, he has invested many years making Lexington-based Hands On Originals, Inc. a successful promotional printing company creating for clients across the country.

Blaine happily serves all people, but like any creative professional, he cannot promote all messages. For that reason, he sometimes has to tell customers that their message is not something his company will print or design. When he does that, Blaine always makes it a point to refer the potential customer to another local business that can provide the requested materials.

When the Gay and Lesbian Services Organization (GLSO) called him, though, they wouldn't take a polite "no, thank you" or a referral for an answer. The group wanted Hands On Originals to print shirts promoting its upcoming gay pride festival. When Blaine respectfully declined to create the shirts, the organization filed a complaint with the city's Human Rights Commission, alleging that the company engaged in illegal discrimination based on sexual orientation.

But Blaine has regularly printed, and will continue to print, materials for customers who identify as gay or lesbian. And over the years, he has hired – and developed great relationships with – a number of employees who identify as gay or lesbian. They'd be among the many in Lexington willing to tell you how honest, fair, and compassionate Blaine is.

Sadly, Blaine hasn't received that same kind of tolerance and understanding from certain activist groups. After the GLSO filed its complaint, its members widely publicized their version of the situation, and a campaign began encouraging people to boycott Blaine's business. That smear campaign resulted in his losing a number of longtime clients.

In 2014, the commission ruled that Blaine had to print messages that violate his conscience. But Alliance Defending Freedom attorneys representing Blaine appealed that ruling to the Fayette Circuit Court, which in April 2015 reversed the commission's decision.

Hands On Originals and Blaine "have a constitutional right to refrain from speaking, just as much as they enjoy the constitutional right to speak freely," the court said. "It is their constitutional right to... not be compelled to be part of the advocacy

of messages opposed to their sincerely held Christian beliefs."

In 2017, the Kentucky Court of Appeals upheld the trial court's decision. The appeals court ruled that Blaine is free to decline to print messages that conflict with his religious beliefs. And in 2019, the Kentucky Supreme Court delivered a final victory for Blaine by dismissing the GLSO's complaint.

This win was crucial. But even better – amid the turmoil – Blaine says he truly experienced what the fellowship of Christ is about, as members of his church came around him to encourage him in his stand. Blaine has been deeply blessed to know that they would give him the shirt off their backs.

 **WATCH**

**Blaine's  
Story**

[ALLN.CC/HOOCASE](https://alln.cc/HOOCASE)



## AN EMPLOYER'S GUIDE TO

# Businesses Whose Products or Services Are Expressive in Nature

### Q WHAT DO YOU MEAN BY “EXPRESSIVE IN NATURE”?

A | An expressive product or service would include any type of work in which you create artistic expression, print or disseminate messages on signs, shirts, or other products, publish a newspaper, or provide any other product or service that is expressive. Would you paint a nude portrait? Print messages on signs or t-shirts promoting Planned Parenthood? Design and create an artistic product that celebrates atheism? Create or publish an advertisement for a local X-rated video store? Most likely not. And the First Amendment protects your right to decline to create, promote, and disseminate expression to which you object. This is called the right to be free from compelled speech. It protects individuals and businesses from being forced to engage in expression that is contrary to their beliefs. (For an explanation of compelled speech protections, see the answer to “Q: What Can I Do to Structure My Expressive Business to Support a Free Speech Defense?” p. 21.)

### Q WHAT ARE SEXUAL ORIENTATION, GENDER IDENTITY (SOGI) LAWS?

A | You may not meet much resistance if you exercise your freedom of conscience in the above scenarios. But you can expect far more resistance – and maybe even legal challenges – if you decline to create, promote or disseminate expression that conflicts with your religious beliefs concerning marriage and sexual morality. If your state or local government has adopted a sexual orientation and gender identity (SOGI) law, you could be at risk. Left-leaning social activists often use SOGI laws to attempt to compel Christians, under threat of penalties, to communicate ideas and messages celebrating same-sex marriage, gender transitions, and other related messages in violation of their religious beliefs.

SOGIs elevate sexual preferences over our cherished fundamental freedoms, especially religious freedom. These ordinances place terms like “sexual orientation” or “gender identity” in the same category as race or religion.

In the *Bostock v. Clayton County* decision, the Supreme Court determined that a federal law barring employment discrimination because of ‘sex’ also extended to bar termination of an employee merely because of their sexual orientation or gender identity.

But they are not designed for the innocent purpose of ensuring all people receive basic services. Rather, their primary effect is to legally compel people of faith to accept, endorse, and even promote messages, ideas, and events that violate their faith - and their constitutional rights.

Those promoting these ordinances use public sympathy – gained through misleading rhetoric about “discrimination” – to silence dissenting voices.

A SOGI law may already apply to your business. Twenty-two states currently have some variation of these laws and hundreds of cities and counties across the nation have enacted them as well. Further, following the Supreme Court’s same-sex marriage decision in 2015, activists have committed their time, money, and influence to pressure states and localities without SOGI laws to adopt them. So even if no SOGI law currently applies to your business, you could find yourself subject to one in the near future.

## **Q** CAN SOGI LAWS FORCE ME TO USE MY BUSINESS TO ENGAGE IN EXPRESSION THAT CONFLICTS WITH MY FAITH?

**A** | Over the past few years, activists have increasingly been trying to use SOGI laws to coerce Christian business leaders to speak or act in ways that conflict with their faith regarding marriage and sexual morality. A quick look at the stories of ADF clients confirms this. Constitutional protection should be strongest for business activities that indisputably involve speech and should apply broadly to businesses whose products or services are expressive in nature. Such businesses should be protected by the First Amendment from the imposition of SOGI penalties for deciding not to create, promote, or disseminate expression that violates their beliefs. Nevertheless, some courts have declined to recognize the First Amendment as a defense in the SOGI context. Business leaders may also find protection against SOGI enforcement in a federal or state RFRA statute, as well as through state constitutional protections or state judicial decisions. This is still a rapidly evolving area of the law, and currently there are no ironclad protections for businesses. Yet, there are many advisable steps business leaders can take to increase the likelihood of success, several of which are discussed below.

## Q WHAT CAN I DO TO STRUCTURE MY EXPRESSIVE BUSINESS TO SUPPORT A FREE SPEECH DEFENSE?

A Businesses whose services involve expression should be, by application of proper constitutional principles, protected from being compelled to communicate a message against their will.<sup>90</sup> The constitutional right to free speech, under the First Amendment, “includes both the right to speak freely and the right to refrain from speaking.”<sup>91</sup> The United States Supreme Court has upheld the right not to communicate an objectionable message even in the context of sexual orientation nondiscrimination laws.<sup>92</sup> It has repeatedly affirmed that the right against compelled speech is “enjoyed by business corporations generally.”<sup>93</sup>

Given these well-established principles, businesses whose products or services are expressive in nature (such as writers, printers, photographers, painters, floral artists, cake artists, and many more) should need no special policies to defeat a SOGI discrimination claim, assuming that the discrimination claim is based on the business’s refusal to engage in or create objectionable expression. However, as described above, a few wedding-related businesses have fared poorly in SOGI-based lawsuits because courts concluded that they were offering services or merchandise rather than engaging in expression.

For example, the New Mexico Supreme Court ruled that a law could compel a photographer to create photographs promoting an event the photographer disagreed with.<sup>94</sup> Also, the Washington Supreme Court ruled that a law could compel a floral artist to create flower arrangements that promoted an event the artist disagreed. And other SOGI claims have been brought against other business leaders.

On the positive side, though, the growing and more recent trend is for courts to protect expressive businesses from SOGI laws. For example, the Arizona Supreme Court in 2019 affirmed the free-speech and religious-freedom rights of Christian artists Joanna Duka and Breanna Koski, who were could have been forced by the City of Phoenix to create custom wedding invitations celebrating same-sex weddings. The same year, the Eighth Circuit Court of Appeals delivered a ruling in favor of filmmakers Carl and Angel Larsen. And in 2020, a federal court in Kentucky protected the First Amendment rights of wedding photographer and blogger Chelsey Nelson, adding the government can’t force people to “create an artistic expression that celebrates[] a marriage that their conscience doesn’t condone.” Similar cases continue to be litigated, and eventually one or more of them may reach the United States Supreme Court, which will hopefully provide clearer guidance and greater protection in this area.



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While there is no way to guarantee victory against a SOGI lawsuit if you decline to create, promote, or disseminate expression that violates your beliefs, the following are five steps you can take now that may help you assess your risk and may strengthen your ability to invoke your First Amendment rights:

1. Find out if there are SOGI laws in the state, county, or city where your business is located and where you solicit and conduct business.
2. Include a statement of faith and religious purpose in your bylaws or corporate policies. This provides clear evidence that you operate your business in accordance with your religious beliefs if that fact is ever questioned in court.
3. Adopt a policy statement on company expression that states that your business engages in its own expression through the services it provides. This policy should state that your business creates, promotes, or disseminates messages that are consistent with your Christian faith and that you reserve the right to decline to engage in expression and activities that violate your beliefs.
4. On your company website, include language that describes the expressive nature of the services your company provides (e.g., a photographer could refer to her services as “the art of storytelling” and explain that she uses photography to tell her client’s stories).
5. Implement a personnel policy that requires employees to review and understand your statement of faith, religious purpose, and statement on company expression. This policy should require employees to refer to you any request that might involve expressing a message contrary to your faith.

Model policy statements and personnel policies that you can adapt to meet your business’ needs are provided in Appendices 1 and 3-6. A model “Statement Of Faith And Religious Purpose” is provided in Appendix 1; a model “General Policy Statement on Company Expression” is provided in Appendix 3; a model personnel policy for how to treat all customers is provided in Appendix 4; and a model personnel policy for customer relations in an expressive business is provided in Appendix 5.

**Before relying upon any of these policies, please call ADF at 1-800-835-5233. ADF attorneys may be able to help you determine if these steps would be helpful, or refer you to an ADF allied attorney.**



# FAITH

## IN THE WORKPLACE

## JACK PHILLIPS | MASTERPIECE CAKESHOP

Jack Phillips has a passion for designing beautiful cakes. He is a cake artist, who uses his talents to create beautiful cakes that celebrate important events in people's lives. Like so many of ADF's clients, he will serve all people, but cannot celebrate all events or express all messages through his cake art.

Jack's faith guides all that he does in his business. For example, he will not use his artistic talents to create cakes with racist or obscene messages, messages that celebrate Halloween, or messages that disparage anyone.

When two customers came to his Lakewood, Colorado shop in July 2012 to ask for a wedding cake celebrating a same-sex marriage, Jack politely declined. He indicated he would gladly sell them anything else in the shop or create a cake for them for a different

occasion. But as a Christian, Jack believes that marriage reflects the relationship of Christ and his Church. He could not create a cake celebrating this event without violating his faith.

The customer filed a complaint against Jack with the state civil rights commission, accusing Jack of violating a state law against discrimination. That commission began a legal proceeding against him, eventually ordering Jack to create wedding cakes celebrating a view of marriage that violated his faith. Faced with this order, his only option was to stop creating wedding cakes altogether, which made up about 40 percent of his business.

But as his case moved through the court system, Jack received an unforeseen blessing when many people from around the world wrote to encourage him, and even stopped by

his shop to shake his hand. The case went against Jack at every stage in the Colorado state court system.

Attorneys at ADF tried their last option for Jack – a request to the United States Supreme Court, which agreed to hear the matter. In 2018, the Supreme Court ruled in Jack's favor in a 7-2 decision, saying the State of Colorado had shown hostility toward Jack because of his religious beliefs. The crucial victory applied religious protection to both Jack personally and to his business.

Jack would tell you this ordeal was not easy, but he will never regret standing firm for his faith and doing his part to secure an important victory for freedom from government coercion.



**WATCH**  
**Jack's Story**

[WWW.ADFLEGAL.ORG/JACK](http://WWW.ADFLEGAL.ORG/JACK)



# FAITH

## IN THE WORKPLACE

### CONCLUSION

Given the rapidly changing moral climate in our country, God's people are uniquely positioned to make a profound impact as faithful witnesses to His love and truth. The freedom to live out and exercise our faith allows us to engage a hostile social and political culture in ways that offer clear light and enduring hope amid spiritual darkness.

That's what this guide is all about – giving you confidence as you run your business for the glory of God, and knowing that Alliance Defending Freedom is here to help if you have any questions or encounter a situation along the way.

Adopting the action steps in this guide cannot insulate your business from all attacks, or guarantee victory in legal challenges that may come. But acting upon this content will provide stronger support for constitutional and religious freedom defenses should your business face a lawsuit.

More than that, preparing yourselves legally will give your company greater freedom to honor God in your everyday work – and that freedom could make an eternal difference for lost and hurting souls all around you.



# APPENDICES

Please consult an attorney before relying upon any of the policies contained in these Appendices. Each business is unique, and decisions about whether and how to implement these policies should not be made without seeking appropriate professional advice. To contact ADF, call 1-800-835-5233, email [Business@ADFlegal.org](mailto:Business@ADFlegal.org), or complete the legal help form at [www.ADFlegal.org](http://www.ADFlegal.org).

## Appendix 1

### Statement of Faith and Religious Purpose

1. The owners of \_\_\_\_\_ are [State here the theological belief or church with which you identify. This could be a general reference such as Roman Catholic, a denomination such as Southern Baptist, or if preferred, general language that describes your faith, such as “followers of Jesus Christ.”].
2. The owners believe that Jesus Christ requires [or “church teachings” require] that all His followers strive to live their lives in a manner that is consistent with the precepts and doctrines of their faith, [which are grounded solely in the Bible] [as taught by the (applicable church or denomination)].
3. The owners therefore seek to operate \_\_\_\_\_ in accordance with the principles of their faith and strive to make all business decisions according to [biblical principles] [the teaching of the (applicable church or denomination)].
4. In light of the owners’ faith, \_\_\_\_\_ exists to bring glory to God and share His truth with its employees, customers, and community by serving them according to principles that honor and glorify Him.
5. To this end, \_\_\_\_\_ seeks always to fulfill Jesus’ command to love our neighbors as ourselves and to do unto others as we would have done unto us by serving our customers with love and excellence.
6. \_\_\_\_\_ wants its service to the community to bear witness to its owners’ faith in Christ, and also to Christ’s Lordship over its owners’ lives. [For expressive businesses add:  
Therefore, as \_\_\_\_\_ engages in expression, it intentionally communicates messages that promote aspects of its owners’ beliefs, or at least messages that do not violate those beliefs.  
For this reason, \_\_\_\_\_ reserves the right to decline a request for services that would require it to engage in or host expression that violates its owners’ religious beliefs.] [For Christian service businesses add:  
Therefore, while \_\_\_\_\_’s primary function is to deliver excellent biblical {resources} {counseling} {editing} to the Christian community, it also seeks to evangelize non-believers who desire its {products} {services}.]
7. The owners of \_\_\_\_\_ will [the board of \_\_\_\_\_ is authorized to] prioritize the above religious, ethical, and moral principles regardless of the impact on profit.

## Appendix 2

### STATEMENT ON THE SANCTITY OF HUMAN LIFE

We believe that all human life is sacred and created by God in His image. Human life is of inestimable worth in all its dimensions, including babies in the womb, the aged, the physically or mentally challenged, and every other stage or condition from conception through natural death. We are therefore called to defend, protect, and value all human life (Psalm 139).

## Appendix 3

### GENERAL POLICY STATEMENT ON COMPANY EXPRESSION

\_\_\_\_\_ engages in its own expression through many of the services it provides.

In so doing, \_\_\_\_\_ intentionally expresses messages that promote aspects of its owners' Christian faith, or views consistent with that faith. For this reason, \_\_\_\_\_ reserves the right to decline requests for services that would require it to express messages [or otherwise celebrate events] that violates its owners' religious beliefs.

## Appendix 4

### GENERAL CUSTOMER RELATIONS POLICY

The owners of \_\_\_\_\_ operate the business according to the principles of their faith. In keeping with those principles, employees must treat every person with compassion, kindness, respect, and dignity while at work. Each employee must verify in writing that they have reviewed this policy and agree to follow it.

## Appendix 5

### CUSTOMER RELATIONS POLICY FOR EXPRESSIVE BUSINESSES

The owners of \_\_\_\_\_ operate the business according to the principles of their faith. Each employee must review and understand the owners' Statement of Faith and Religious Purpose. In keeping with those principles, employees must treat every person with compassion, kindness, respect, and dignity while at work.

In the event a customer requests a service that would or might involve expressing a message contrary to the owners' statement of faith, the employee must politely defer an answer until he or she has consulted with the owners or their designee. If instructed to decline the service, the employee must explain that the requested service would communicate a message that \_\_\_\_\_ is unwilling to express.

[For owners who do not object to providing a referral: The employee should also offer to refer the customer to one or more businesses that are willing to provide the expressive service.] [For owners who do not object to providing a facilitated referral: The employee should also offer to directly connect the customer to one or more businesses that are willing to provide the expressive service.]

Each employee must verify in writing that they have reviewed this policy and agree to follow it.

## Appendix 6

### QUICK REFERENCE GUIDE TO RELIGIOUS EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS, BY STATE

(This area of the law is rapidly changing. This material is provided as a starting point for research only.)

STATE	CODE SECTION	TYPE OF EXCEPTION
<i>Alabama</i>	Ala. Code § 25-1-20 (age discrimination only)	None
<i>Alaska</i>	Alaska Stat. § 18.80.300(5)	Religious org. / non-profit
<i>Arizona</i>	Ariz. Rev. Stat. Ann § 41-1462	Religious org. / edu. institution
<i>Arkansas</i>	Ark. Code Ann. § 16-123-103(a)	Religious org.
<i>California</i>	Cal. Gov't Code § 12940(j)(4)(A) Cal. Gov't Code § 12926(d) Cal. Gov't Code § 12926.2	Religious org. / non-profit
<i>Colorado</i>	Colo. Rev. Stat. § 24-34-401(3)	Religious org.
<i>Connecticut</i>	Conn. Gen. Stat. Ann. § 46a-81p	Religious org. / edu. institution
<i>Delaware</i>	Del. Code Ann. tit. 19 § 710(7)	Religious org.
<i>Dist. Columbia</i>	D.C. Code Ann. § 2-1401.03	Religious org. / charitable / non-profit
<i>Florida</i>	Fla. Stat. Ann. § 760.10(9)	Religious org. / edu. institution
<i>Georgia</i>	Ga. Code Ann. § 45-19-22(5) (only applies to state gov. employers)	None
<i>Hawaii</i>	Haw. Rev. Stat. § 378-3	Religious org. / edu. institution
<i>Idaho</i>	Idaho Code § 67-5910	Religious org. / edu. institution
<i>Illinois</i>	775 Ill. Comp. Stat. 5/2-101(B)(2)	Religious org. / edu. institution
<i>Indiana</i>	Ind. Code Ann. § 22-9-1-3(h)	Religious org. / edu. institution
<i>Iowa</i>	Iowa Code Ann. § 216.6(6)(d)	Religious org. / edu. institution
<i>Kansas</i>	Kan. Stat. Ann. § 44-1002(b) & 44-1002(h)	Non-profit fraternal / religious org. / social assoc. or corp.
<i>Kentucky</i>	Ky. Rev. Stat. Ann. § 344.090	Religious org. / edu. institution
<i>Louisiana</i>	La. Stat. Ann. § 23:302(2)(b) & 23:332(H)(2)	Religious org. / non-profit / edu. institution
<i>Maine</i>	Me. Rev. Stat. Ann. tit. 5 §§ 4553(4) & 4573-A(2)	Religious org. / edu. institution / fraternal org.
<i>Maryland</i>	Md. Code Ann., State Gov't § 20-604	Religious org. / edu. institution
<i>Massachusetts</i>	Mass. Gen. Laws Ann. ch. 151B §§ 1(5) & 4(18)	Religious org. / edu. institution
<i>Michigan</i>	Mich. Comp. Laws § 37.2208 & 37.2403	May apply for exemption for bona fide occupational qualification; some protections for religious educational institutions

<b>STATE</b>	<b>CODE SECTION</b>	<b>TYPE OF EXCEPTION</b>
<i>Minnesota</i>	Minn. Stat. Ann. § 363A.20	Religious org. / service org. / fraternal corp.
<i>Mississippi</i>	Miss. Code Ann. § 25-9-149 (only applies to gov. employers) Miss. Code Ann. § 11-62-5	None needed. Prohibits state government from discriminatory action against a religious org.
<i>Missouri</i>	Mo. Stat. Ann. § 213.010(8)	Religious org.
<i>Montana</i>	Mont. Code Ann. § 49-2-101(11)	Religious org. / non-profit / fraternal org.
<i>Nebraska</i>	Neb. Rev. Stat. Ann. § 48-1103(1) & 48-1108(2)	Religious org. / edu. institution
<i>Nevada</i>	Nev. Rev. Stat. §§ 613.320(1)(b) & 613.350(4)	Religious org. / edu. institution
<i>New Hampshire</i>	N.H. Rev. Stat. Ann. § 354-A:2(VII)	Religious org. / fraternal org.
<i>New Jersey</i>	N.J. Stat. Ann. § 10:5-12(11)(a)	Religious org.
<i>New Mexico</i>	N.M. Stat. Ann. § 28-1-9(B)-(C)	Religious org.
<i>New York</i>	N.Y. Exec. Law § 296(11)	Religious org. / edu. institution
<i>North Carolina</i>	N.C. Gen. Stat. § 143-422.2 (no state remedies apart from Title VII)	Title VII exemption applies
<i>North Dakota</i>	N.D. Cent. Code § 14-02.4-08	Exemption for bona fide occupational qualification
<i>Ohio</i>	Ohio Rev. Code Ann. § 4112.02(P)	Religious org. / edu. institution
<i>Oklahoma</i>	Okla. Stat. tit. 25, §§ 1307-1308	Religious org. / edu. institution
<i>Oregon</i>	Or. Rev. Stat. § 659A.006	Religious org. / edu. institution
<i>Pennsylvania</i>	43 Pa. Cons. Stat. Ann. § 954(b) 43 Pa. Cons. Stat. Ann. § 955(a) & (h)(10)	Religious org. / fraternal org.
<i>Rhode Island</i>	28 R.I Gen. Laws § 28-5-6(8)(ii)	Religious org. / edu. institution
<i>South Carolina</i>	S.C. Code Ann. § 1-13-80(l)(5)	Religious org. / edu. institution
<i>South Dakota</i>	S.D. Codified Laws § 20-13-18	Religious org.
<i>Tennessee</i>	Tenn. Code Ann. § 4-21-405	Religious org. / edu. institution
<i>Texas</i>	Tex. Lab. Code Ann. § 21.109	Religious org. / edu. institution
<i>Utah</i>	Utah Code Ann. § 34A-5-102(1)(i)(ii)	Religious org. / edu. institution
<i>Vermont</i>	Vt. Stat. Ann. tit. 21 § 495(e)	Religious org.
<i>Virginia</i>	Va. Code Ann. § 2.2-3900	Religious org.
<i>Washington</i>	Wash. Rev. Code § 49.60.040(11)	Religious org. / non-profit
<i>West Virginia</i>	W. Va. Code § 5-11-9	Exemption for bona fide occupational qualification
<i>Wisconsin</i>	Wis. Stat. Ann. § 111.337	Religious org. / non-profit
<i>Wyoming</i>	Wyo. Stat. Ann. § 27-9-102	Religious org.

## Appendix 7

### QUICK REFERENCE GUIDE TO STATES WITH LOWERED NUMBER OF EMPLOYEE REQUIREMENTS

(This area of the law is rapidly changing. This material is provided as a starting point for research only.)

STATE	# OF EMPLOYEES	CODE SECTION
<i>Alabama</i>	20	Ala. Code § 25-1-20(2) (age discrimination only)
<i>Alaska</i>	1	Alaska Stat. § 18.80.300(5)
<i>Arizona</i>	15 1 (sex harassment only)	Ariz. Rev. Stat. Ann. § 41-1461(6)(a)
<i>Arkansas</i>	9	Ark. Code Ann. § 16-123-102(5)
<i>California</i>	5 1 (harassment)	Cal. Gov't Code § 12926(d) Cal. Gov't Code § 12940(j)(4)(A)
<i>Colorado</i>	1	Colo. Rev. Stat. § 24-34-401(3)
<i>Connecticut</i>	3	Conn. Gen. Stat. Ann. § 46a-51(10)
<i>Delaware</i>	4	Del. Code Ann. tit. 19 § 710(7)
<i>Dist. Columbia</i>	1	D.C. Code Ann. § 2-1401.02(10)
<i>Florida</i>	15	Fla. Stat. Ann. § 760.02(7)
<i>Georgia</i>	15	Ga. Code Ann. § 45-19-22(5) (only applies to gov. employers)
<i>Hawaii</i>	1	Haw. Rev. Stat. § 378-1
<i>Idaho</i>	5	Idaho Code § 67-5902 (6)
<i>Illinois</i>	15 (1 in limited circumstances)	775 Ill. Comp. Stat. 5/2-101(B)(1)(a) & 2-100(B)(1)(b)
<i>Indiana</i>	6	Ind. Code § 22-9-1-3(h)
<i>Iowa</i>	4	Iowa Code § 216.6(6)(a)
<i>Kansas</i>	4	Kan. Stat. Ann. § 44-1002(b)
<i>Kentucky</i>	8 (15 for disability)	Ky. Rev. Stat. Ann. § 344.030(2)
<i>Louisiana</i>	20	La. Rev. Stat. Ann. § 23:302(2)
<i>Maine</i>	1	Me. Rev. Stat. Ann. tit. 5 § 4553(4)
<i>Maryland</i>	15 1 (harassment)	Md. Code Ann., State Gov't § 20-601(d)(1)(i) (2); but see, but see <i>Molesworth v. Brandon</i> , 341 Md. 621, 672 A.2d 608 (1996) (subject to wrongful discharge claim based on public policy only, not enforcement provisions of Md. Ann. Code 49B @ 14, et seq.)
<i>Massachusetts</i>	6	Mass. Gen. Laws ch. 151B, § 1(5)

<b>STATE</b>	<b># OF EMPLOYEES</b>	<b>CODE SECTION</b>
<i>Michigan</i>	1	Mich. Comp. Laws § 37.2201(a)
<i>Minnesota</i>	1	Minn. Stat. § 363A.03(16)
<i>Mississippi</i>	n/a	Miss. Code Ann. § 25-9-149 (only applies to gov. employers)
<i>Missouri</i>	6	Mo. Stat. Ann. § 213.010(8)
<i>Montana</i>	1	Mont. Code Ann. § 49-2-101(11)
<i>Nebraska</i>	15	Neb. Rev. Stat. Ann. § 48-1102(2)
<i>Nevada</i>	15	Nev. Rev. Stat. § 613.310(2)
<i>New Hampshire</i>	6	N.H. Rev. Stat. Ann. § 354-A:2(VII)
<i>New Jersey</i>	1	N.J. Stat. Ann. § 10:5-5
<i>New Mexico</i>	4	N.M. Stat. Ann. § 28-1-2(B)
<i>New York</i>	4	N.Y. Exec. Law § 292(5)
<i>North Carolina</i>	15	N.C. Gen. Stat. § 143-422.2(a)
<i>North Dakota</i>	1	N.D. Cent. Code § 14-02.4-02(8)
<i>Ohio</i>	4	Ohio Rev. Code Ann. § 4112.01(A)(2)
<i>Oklahoma</i>	1	Okla. Stat. Ann. tit. 25, § 1301(1)
<i>Oregon</i>	1	Or. Rev. Stat. § 659A.001(4)(a)
<i>Pennsylvania</i>	4	43 Pa. Cons. Stat. § 954(b)
<i>Rhode Island</i>	4	28 R.I. Gen. Laws § 28-5-6(8)
<i>South Carolina</i>	15	S.C. Code Ann. § 1-13-30(e)
<i>South Dakota</i>	1	S.D. Codified Laws § 20-13-1(7)
<i>Tennessee</i>	8	Tenn. Code Ann. § 4-21-102(5)
<i>Texas</i>	15	Tex. Lab. Code Ann. § 21.002(8)(A)
<i>Utah</i>	15	Utah Code Ann. § 34A-5-102(1)(i)(i)(D)
<i>Vermont</i>	1	Vt. Stat. Ann. tit. 21, § 495d(1)
<i>Virginia</i>	1	Va. Code Ann. § 65.2-101
<i>Washington</i>	8	Wash. Rev. Code Ann. § 49.60.040(11)
<i>West Virginia</i>	12	W. Va. Code § 5-11-3(d)
<i>Wisconsin</i>	1	Wis. Stat. § 111.32(6)(a)
<i>Wyoming</i>	2	Wyo. Stat. Ann. § 27-9-102(b)



## END NOTES

- 1 <https://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us> (last visited Aug. 4, 2020)
- 2 <https://www.interstatebatteries.com/about/our-culture> (last visited Nov. 25, 2020)
- 3 <https://www.starbucks.com/careers/working-at-starbucks/culture-and-values> (last visited Nov. 25, 2020)
- 4 *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
- 5 *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988).
- 6 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
- 7 *Id.* at 2766.
- 8 *Salemi v. Gloria's Tribeca Inc.*, 115 A.D. 3d 569 (2014).
- 9 *Chemers v. Minar Ford, Inc.*, 2001 WL 951366, at 5\* (D. Minn. 2001). *See also Townley*, 859 F.2d at 621.
- 10 *Garcimonde-Fisher v. Area203 Marketing, LLC*, 105 F. Supp 3d 825 (E.D. Tenn. 2015); *see also Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (employer was justified in firing supervisor for telling homosexual subordinate that homosexuality is a sin, praying with her to receive salvation, and inviting her to church).
- 11 *Chemers*, 2001 WL 951366.
- 12 *Brown Transp. Corp. v. Pa. Human Relations Comm'n*, 578 A.2d 555 (Pa. Commw. Ct. 1990).
- 13 *Id.*
- 14 *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975).
- 15 *Brown v. Polk County*, 61 F.3d 650, 656-57 (8th Cir. 1995).
- 16 *Yochum v. FJW Inv., Inc.*, 2016 WL1255289 (W.D. Pa. 2016).
- 17 *Kolodziej v. Smith*, 588 N.E.2d 634, 638 (Mass. 1992).
- 18 *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004); *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981) (restaurant could require all employees to shave beards to protect its public image); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (employer not required to accommodate employees' religious beliefs that they evangelize clients).
- 19 Private employers should be aware that employee statements regarding illegal activity of employers may be protected under "Whistle Blower" statutes. *See, e.g., Fla. Stat. Ann. § 448.102* (2018).
- 20 *See supra* note 17. The fact that the speech to customers actually adversely affects business is vital. A company could not prevent its employees from saying "God Bless You" and "Praise the Lord" to its foodservice customers because there was no evidence that it had actually caused business to be affected. *Banks v. Serv. Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996).
- 21 Title VII is codified at 42 U.S.C §§ 2000e et seq. (2018).
- 22 *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337 (8th Cir. 1995). *But see Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (termination of employee for posting Bible passages in his workspace condemning homosexuality was not religious discrimination under Title VII).
- 23 *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).
- 24 *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984). *See also Abramson v. William Paterson College of N.J.*, 260 F.3d 265 (3d Cir. 2001) (supervisor's criticism of Orthodox Jewish belief not to work on Sabbath could create hostile work environment); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir 1996) (employer did not have to accommodate employee's letter to coworker stating that he needed to repent of his sin).
- 25 *Minn. Dep't of Highways v. Minn. Dep't of Human Rights*, 241 N.W.2d 310, 313 (Minn. 1976), *cert. denied*, 429 U.S. 863 (1976).
- 26 *Id.*
- 27 *Brown v. Polk County*, 61 F.3d at 657 (quoting *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert denied*, 439 U.S. 1072 (1979)). *See also EEOC Dec. No. 76-98, EEOC Dec. ¶ 6674* (1976) (a prison's decision to terminate an Orthodox Muslim because he "cannot be persuaded to tone down his religious practices on the job and continually gets wrapped up in conversations with the inmates" was unlawful because there was no evidence that the employee's conduct had made him unable to perform his duties or hampered the efficient operation of the workplace).
- 28 *See supra* note 17.
- 29 *Gunning v. Runyon*, 3 F. Supp. 2d 1423, 1428-29 (S.D. Fla. 1998).

- 30 See *infra* Section II, *Hiring, Firing, and Religious Accommodations*, What Is an Employer's Obligation to Employees Who Have Religious Obligations or Objections to Certain Work Requirements?
- 31 EEOC Dec. No. 82-1, 28 Fair Empl. Prac. Cas. (BNA) 1840 (1982). See also *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984); *Sambo's*, 530 F. Supp. 86 (restaurant could require all employees to shave beards to protect its public image).
- 32 EEOC Dec. No. 71-779, 3 Fair Empl. Prac. Cas. (BNA) 172 (1970). See also EEOC Dec. No. 71-2620, 4 Fair Empl. Prac. Cas. (BNA) 23 (1971) (where an employer could not fire employee for wearing traditional Islam garb because there was no evidence that requiring employees to wear traditional office attire was "necessary to the safe and efficient operation of [the] business"); *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993) (employer could not demonstrate that beard imposed safety risk, so there was no undue burden); EEOC Dec. 81-20, 27 Fair Empl. Prac. Cas. (BNA) 1809 (1981) (employer required to permit employee to wear skirt instead of pants, as required by her religious beliefs).
- 33 See *Miller v. Safeway, Inc.*, 170 P.3d 655 (Alaska 2007) (allowing reasonable grooming policies).
- 34 *Bostock v. Clayton County* 590 U. S. \_\_\_\_ (2020)
- 35 As previously mentioned, Title VII is codified at 42 U.S.C. §§ 2000e *et seq.* (2018). It applies to virtually all employers with fifteen or more employees.
- 36 *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 118 (4th Cir. 1988); see also *Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018). Title VII requires that an employee, short of undue hardship, make reasonable accommodations to the religious needs of its employees. Accommodation means allowing the employee to engage in his or her religious practice despite the employer's normal rules to the contrary.
- 37 42 U.S.C. § 2000e(j) (2018).
- 38 *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2018); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Turpen v. Ma.-Kan.-Tex. R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).
- 39 *EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55-56 (1st Cir. 2002). *C.f. Miss. Emp't Sec. Comm'n v. McGlothlin*, 556 So. 2d 324 (Miss. 1990) (employee's belief was sincerely held even though she was not an active member of her religious group and wore her head wrap only occasionally).
- 40 *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1378-79 (6th Cir. 1994).
- 41 *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014).
- 42 42 U.S.C. 2000e(j). The courts and the EEOC have interpreted this provision very liberally. Donald T. Kramer, Annotation, *Validity, Construction, and Application of Provisions of Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e *et seq.*) and *Implementing Regulations, Making Religious Discrimination in Employment Unlawful*, 22 A.L.R. Fed. 580 § 4[a] (1975).
- 43 EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1.
- 44 *Heller*, 8 F.3d at 1438-39 (summarizing authorities); see also *Redmond v. GAF Corp.*, 574 F.2d 897, 900-01 (7th Cir. 1978); 22 A.L.R. Fed. at 601-03.
- 45 EEOC Dec. No. 71-2620, 4 Fair Empl. Prac. Cas. (BNA) 23 (1971); EEOC Dec. No. 71-779, 3 Fair Empl. Prac. Cas. (BNA) 172 (1970); EEOC Dec. No. 72-1301, 4 Fair Empl. Prac. Cas. (BNA) 715 (1972); *Young*, 509 F.2d 140.
- 46 EEOC Dec. No. 79-6, 26 Fair Empl. Prac. Cas. (BNA) 1758 (1978); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff'd*, 589 F.2d 1113 (5th Cir. 1979). But a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as religion under Title VII. See *Adeyeye*, 721 F.3d at 448.
- 47 *Heller*, 8 F.3d at 1439.
- 48 *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285-86 (8th Cir. 1977); *Chalmers*, 101 F.3d 1012.
- 49 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).
- 50 *Id.*
- 51 *Id.* at 2031.
- 52 Ralph Gerstein & Lois Gerstein, *Prosecution or Defense of Action Alleging Employment Discrimination on Basis of Religion*, 135 Am. Jur. Proof of Facts 3d 183 (2013); *Townley*, 859 F.2d at 614 n.5.
- 53 *Harrell v. Donahue*, 638 F.3d, 975 (8th Cir. 2011); *EEOC v. READS, Inc.*, 759 F. Supp. 1150, 1155 (E.D. Pa. 1991); EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(c).
- 54 *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009).
- 55 *Tabura*, 880 F.3d at 554.
- 56 *Young*, 509 F.2d 140; *Minn. Dep't of Highways*, 241 N.W.2d at 313.
- 57 42 U.S.C. § 2000e-2(a) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin).
- 58 42 U.S.C. § 2000e-2(e).

- 59 *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (internal citations omitted).
- 60 See table on page 11 for a list of states that prohibit sexual orientation discrimination by employers.
- 61 See discussion of BFOQs above.
- 62 Cal. Gov't Code §§ 12920, 12940; Colo. Rev. Stat. Ann. § 24-34-402; Conn. Gen. Stat. § 46A-81C; D.C. Code Ann. § 2-1402.11; Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 378-2; 775 Ill. Comp. Stat. Ann. 5/1-102; Iowa Code Ann. § 216.6; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws Ch. 151B, §§ 3, 4; Minn. Stat. § 363A.08; Nev. Rev. Stat. Ann. § 613.330; N.H. Rev. Stat. Ann. § 354-A:6, 354-A:7; N.J. Stat. Ann. § 10:5-4, 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. Ann. § 659A.030; 28 R.I. Gen. Laws § 28-5-7; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code Ann. § 49.60.010, 49.60.030; Wis. Stat. § 111.36. Eleven other states have executive orders prohibiting government employers from discriminating based on sexual orientation (Alaska, Arizona, Indiana, Kentucky, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania, and Virginia).
- 63 Some organizations publish online lists of municipalities that prohibit sexual orientation discrimination by private employers. However, mistakes are frequently found in these lists and citations sometimes cannot be confirmed because of the difficulty of obtaining copies of each municipality's code. Employers should always check the code of each municipality and state where they have business operations and rely on published lists (including those in this publication) only as a starting point for research.
- 64 *Hobby Lobby*, 134 S. Ct. 2751 (2014).
- 65 42 U.S.C. § 2000e-1.
- 66 *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011) (internal quotation marks omitted).
- 67 See *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 119 n.13 (D.D.C. 2012) (for-profit Bible publishing company that donates its profits to charity might qualify as a "religious corporation" under Title VII); see also Judge Kleinfeld's test in *Spencer*, which does not require an organization to be non-profit to be a religious corporation. *Spencer*, 633 F.3d at 748 (Kleinfeld, J., concurring).
- 68 42 U.S.C. § 2000e-2 & 2000e(b).
- 69 *Hobby Lobby*, 134 S. Ct. 2751.
- 70 See, e.g., Consolidated Appropriations Act, Pub L. No 113-76, 128 Stat. 5, Div. H, § 507 (Jan. 17, 2014) (states may not receive certain federal funding if they require abortion coverage in health insurance); 42 U.S.C. § 18113(a) (governments may not require assistance in or coverage of doctor-assisted suicide or euthanasia).
- 71 *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).
- 72 Government-recognized relationships include marriages, civil unions, and domestic partnerships.
- 73 See *Hercules Industries Receives Top Company Award*, the NEWS (Sept. 25, 2014), <https://www.achrnews.com/articles/138209-hercules-industries-receives-top-company-award>. (honored as 2014 Top Company in Manufacturing by Colorado Biz Magazine). (last visited Aug. 7, 2020)
- 74 Marriage has been shown to reduce depression and other health problems that EAPs can assist with. See, e.g., Timothy J. Bilbray & Greg Gottainer, *Family Structure and Children's Success: A Comparison of Widowed and Divorced Single-Mother Families*, 62 J. of Marriage & Fam. No. 2, 533, 534 (May 2000); Ronald L. Simons, et al., *Explaining the Higher Incidence of Adjustment Problems of Children of Divorce*, 61 J. of Marriage & Fam. 1020, 1028 (Nov. 1999); Andrew Cherlin, et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 Am. Soc. Rev. 239 (1998); Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Age of Family Upheaval* 219-224 (2000); Susan S. Lang, *Children from Divorced Families Less Likely to Attend Selective Colleges*, 24 Hum. Ecology No. 3, 2 (1996); Ollie Lundberg, *The Impact of Childhood Living Conditions on Illness and Mortality in Adulthood*, 36 Soc. Sci. & Med. 1047 (1993); Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 J. of Marriage & Fam. 171, 175 & Table 2 (1990).
- 75 See, e.g., Rosemary Frank, *Employee Productivity Program for Employers*, Dollars of Divorce, [http://www.dollarsofdivorce.com/Services/Employee\\_Productivity/Productivity\\_Program\\_for\\_Employers/](http://www.dollarsofdivorce.com/Services/Employee_Productivity/Productivity_Program_for_Employers/) (last visited Nov. 1, 2018) (recommending training on financial information and insight); Wirtz & Williams, *supra* note 81 (recommending giving "employees a bonus for completing their divorce within an alternative dispute methodology like collaborative divorce because it will save the employer money.").
- 76 See *Couple Checkup*, [www.couplecheckup.com](http://www.couplecheckup.com) (last visited Aug. 7, 2020).
- 77 See *Worldwide Marriage Encounter*, <http://www.wmwe.org/> (last visited Aug. 7, 2020); *Weekend to Remember*, <https://www.familylife.com/weekend-to-remember/> (last visited Nov. 1, 2018).
- 78 See *Divorce Busting*, [www.divorcebusting.com](http://www.divorcebusting.com) (last visited Aug. 7, 2020).
- 79 See *Prepare-Enrich*, [www.prepare-enrich.com](http://www.prepare-enrich.com) (last visited Aug. 7, 2020).
- 80 *Id.*
- 81 David H. Olson, Amy K. Olson, Peter J. Larson, *PREPARE-ENRICH Program: Overview and New Discoveries about Couples*, 25 J. of Family & Community Ministries 30 (2012), [www.prepare-enrich.com/pe/pdf/research/newdiscoveries.pdf](http://www.prepare-enrich.com/pe/pdf/research/newdiscoveries.pdf) (last visited Aug. 7, 2020).
- 82 Melinda S. Forthofer, et al., *Associations Between Marital Distress and Work Loss in a National Sample*, 58 J. of Marriage & Family No. 3, 597, 602 (1996). Because the biggest impact of marital distress in the workplace occurs in the first ten years, offering premarital counseling also has a positive impact on work productivity. Olson, et al., *supra* note 81.

- <sup>83</sup> David H. Olson, Peter J. Larson, & Amy Olson-Sigg, *Couple Checkup: Tuning Up Relationships*, 8 *Journal of Couple & Relationship Therapy* 129, 130 (2009), [https://www.prepare-enrich.com/pe/pdf/research/2011/couplecheckup\\_tuningup.pdf](https://www.prepare-enrich.com/pe/pdf/research/2011/couplecheckup_tuningup.pdf) (last visited Aug. 7, 2020).
- <sup>84</sup> Marriage Savers, [www.marriagesavers.org](http://www.marriagesavers.org) (last visited Aug. 7, 2020).
- <sup>85</sup> Catherine Latimer & Michael J. McManus, *How to Give Marriage Insurance to Premarital Couples*, 10 (2002), [www.marriagesavers.org/sites/Resources/Articles/Art005MarriageInsurance.htm](http://www.marriagesavers.org/sites/Resources/Articles/Art005MarriageInsurance.htm) (last visited Aug. 7, 2020). The authors concluded that “any church which does not have a rigorous premarital program prompting 10% to 20% of couples to break up, is not offering meaningful marriage preparation.”
- <sup>86</sup> Maria Blackburn, *The Marriage-Go-Round*, *John Hopkins University Arts & Sciences Magazine* (Fall 2009) (Stats from *The Merry-Go-Round* by Andrew J. Cherlin), [krieger2.jhu.edu/magazine/f09/f1.html](http://krieger2.jhu.edu/magazine/f09/f1.html) (last visited Aug. 7, 2020).
- <sup>87</sup> The program has had similar or even better success in other churches. Latimer & McManus, *supra* note 85, at 10; see also *Churches Virtually Eliminate Divorce*, [www.marriagesavers.org/sites/Resources/Articles/Art004ChurchesEliminateDivorce.htm](http://www.marriagesavers.org/sites/Resources/Articles/Art004ChurchesEliminateDivorce.htm) (last visited Aug. 7, 2020). The church programs appear to be far more effective than the Community Marriage Policy programs that Marriage Savers has established nationally. “So far, more than 200 cities and towns in 43 states have created Community Marriage Policies and divorce rates have fallen an average of 17.5%, and cohabitation by a third.” Marriage Savers, [www.marriagesavers.org](http://www.marriagesavers.org) (last visited Aug. 7, 2020).
- <sup>88</sup> Forthofer, et al., *supra* note 82, at 603-04.
- <sup>89</sup> Olson, Larson, & Olson-Sigg, *supra* note 83, at 130.
- <sup>90</sup> *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party's writings in its editorial page); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality) (government may not require a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government may not require citizens to display state motto on license plate).
- <sup>91</sup> *Wooley*, 430 U.S. at 714; see also *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).
- <sup>92</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (government may not require a public-accommodations parade organization to facilitate the message of a GLBT-advocacy group). See also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (government may not apply a public-accommodations law to force the Boy Scouts to accept a scoutmaster who identifies as gay and expresses messages about human sexuality that conflict with the organization's views).
- <sup>93</sup> *Hurley*, 515 U.S. at 574; see also *Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (collecting cases).
- <sup>94</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 64-65 (N.M. 2013).

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