CLM 2016 Midwest Conference
June 23, 2016 in Omaha, NE

Risk Management and Defensive Strategies for Religious Employers

I. Applicable Employment Laws and Exclusions for Religious Employers

For those with responsibility for employee relations in religious organizations (or for dealing with the aftermath when things take a hellish direction), perhaps our professional paths were destined from the first moment we belted out this oldie, but goodie:

Refrain:
I am the church! You are the church!
We are the church together!
All who follow Jesus,
all around the world!
Yes, we're the church together!

1. The church is not a building;
the church is not a steeple;
the church is not a resting place;
the church is a people.

(Refrain)

2. We're many kinds of people,
with many kinds of faces,
all colors and all ages, too
from all times and places.

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Who knew that, from an early age, we already were learning about the many protected categories under Title VII and other federal, state, and local employment laws that may have existed then and certainly have been expanded since our days in Sunday School? If only managing the "people" of the Church was as easy and happy-go-lucky of a process as this song might suggest.

Religious employers, like other employers, are required to abide by a whole host of employment laws and regulations. Navigating the number of applicable laws can be tricky. Ideally, all employers would have trained human resources professionals on staff to help quell employee relations issues. But even having able HR professionals on staff can never eliminate entirely the risk that religious employers face when it comes to the possibility of employment-related litigation.

Religious employers and managers within religious organizations should understand both what employment laws apply to them and their obligations under the law. Identifying and tackling employee relations issues early is an employer's best bet in warding off employment litigation. If a religious employer does find itself with an employment claim and/or employment litigation, it also is important for those responsible for advising religious employers and defending against any employment claims, *i.e., the attorneys*, to understand how they can place their clients in the best defensive position possible. In particular, religious organizations have a number of defenses available to them that the non-religious employer does not. Failing to identify and assert those defenses will expose a religious employer – and their carrier – to unnecessarily elevated risk and expense.

a. Applicable Laws

i. Federal

The big federal employment laws are the ones that seem to get all of the attention: Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act (the "ADEA"), and the Americans with Disabilities Act, as amended by the Americans with Disabilities Act Amendments Act of 2008 (the "ADA"). Hopefully, these all are old news for religious employers and their risk managers when it comes to training and prevention, such that anyone reading this document already is well-versed in each of them.

For those who are new to employment laws and litigation, a quick run-down on what each law protects/proscribes:

> Title VII: prohibits employers from discriminating against employees on the basis of sex (including pregnancy, through the Pregnancy Discrimination Act, which Title VII was amended to incorporate in 1978), race, color, national origin, and religion. (Stay tuned for further discussion on the "religion" category.)
>
> The ADEA: prohibits employers from discriminating against employees on the basis of age (specifically, employees 40 years of age and older).
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> The ADA: prohibits employers from discriminating against employees on the basis of a known or perceived disability and requires employers to provide reasonable accommodations to employees with disabilities.

ii. State

Often, employers are so focused on the federal laws that they overlook state laws that can serve to increase the number of protected categories (such as sexual orientation), the entities/persons subject to the laws (think: individual liability), the accommodation requirements (pregnancy-related accommodations, for example) and the potential penalties associated with violations of such laws (e.g.,

"through the steeple" compensatory and/or punitive damages). Failure to be aware of the applicable state laws can result in not only unsound employment advice, but also a risk assessment that is very much off the mark. HR professionals and the attorneys for any religious organization must make a point to stay on top of state law developments to prevent either of those things from happening.

iii. Local

An additional level of regulation comes from the local level. While local laws are most often passed and implemented in larger cities and municipalities that is not always the case. Religious employers and their attorneys cannot let compliance with these laws slip through the cracks.

b. Exclusions/Exceptions

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Employment attorneys for private employers often think that their constitutional law days are long behind them. But if they want to effectively represent their private *religious* employers, they need to dust off their Con Law books and turn to the section on the First Amendment. The First Amendment has been out front and center in recent years when it comes to litigation by and against religious organizations and, in particular, with respect to litigation involving religious employers. A complete understanding of how a religious organization can effectively take advantage of the protections offered by the First Amendment is necessary for employment attorneys to properly advise their religious clients with respect to employment issues and to place their religious entity clients in the best defensive position possible in the event of employment litigation.

i. Ministerial Exception

Attorneys who represent religious organizations have been living under a rock (*and we're not talking about Peter*) if they have not heard about *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. ___ (2012). In that case, the United States Supreme Court took head on the question whether the "Ministerial Exception" prevents the application of federal discrimination laws to claims brought against religious employers by ministers. The Supreme Court *unanimously* (*just to be clear, a 9-0 TKO of the EEOC's claims on behalf of the employee*) held that "the Establishment Clause prevents [the Government] from appointing ministers, and the Free Exercise Clause prevents [the Government] from interfering with the freedom of religious groups to select their own [ministers]." (At the time the Supreme Court took the case, many lower federal courts already had come to this conclusion based on their interpretation of the language of the First Amendment set forth above. This was the first time, however, that the Supreme Court had opined on the issue so as to make it the supreme law of the land.)

An important component of the Supreme Court's decision in *Hosanna-Tabor* was the conclusion that the Respondent-employee was a "minister" subject to the "Ministerial Exception." The employee was not a collar-wearing priest or pastor (who would clearly fall within the "ministerial" exception); she was an elementary school teacher. In concluding that the school teacher was a "minister" for the purposes of the application of the Ministerial Exception (and the resulting dismissal of her claims), the Court examined a number of factors, including the extent of her religious training, how she was selected for her job, her title, whether there were any restrictions on the termination of her employment,

whether the employee held herself out as a minister to the public, and the role that the employee had in carrying out the Church's mission. In short, a highly-factual analysis.

This sets up a scenario that makes it all the more important for attorneys who represent religious organizations to limit the number of discrimination claims that can successfully be brought against their religious clients through the application and enforcement of the Ministerial Exception. (See Best Practices, below.)

ii. Religious Corporations/Educational Institutions

As suggested above, corporations and educational institutions whose purpose and character are primarily religious are excluded (albeit a narrow exclusion) from the application of another component of federal discrimination laws: religious discrimination. This means that religious organizations have the right to give employment preference to individuals of a particular religion. To be clear, this is a much more limited exception than the ministerial exception. Importantly, it does not give religious organizations the right to mask other discriminatory behavior as a component of their religious belief.

At a minimum, for employment lawyers who represent religious institutions and HR professionals who are responsible for day-to-day employment relations, a light bulb definitely should go off if an employee claims religious discrimination. Religious organizations and educational institutions *can* discriminate on the basis of religion.

c. Employment Contract Laws

Religious employers should not construe *Hosanna-Tabor* to mean that they are free and clear of all claims brought by ministers. Indeed, the Supreme Court explicitly stated in *Hosanna-Tabor*: "[w]e express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct." Thus, depending on the circumstances, breach of contract claims by ministers against their religious employers still are fair game. Religious employers and their attorneys must therefore be wary of unwittingly entering into a "contract" with an employee. (See Best Practices, below.)

II. Hot Litigation/Enforcement Areas for Religious Employers

Those who stay up-to-date on the news as it relates to religious organizations will certainly have seen much publicity in the past couple of years regarding various claims, litigations, and PR implications resulting from the application of certain religious precepts to employees of religious organizations. The vast majority of these matters arise when adverse employment actions are taken against school teachers for failure to abide by important Church teachings. The most controversial (at least in the sense of the media attention it seems to garner) topics of recent are terminations for: (1) out-of-wedlock pregnancy; (2) artificial insemination/fertility treatment; and (3) the discovery that an employee is a member of the LGBT community.

It often is the case that the PR implications can be worse than the legal risk/ramifications (particularly in the case of sexual orientation discrimination – the "jury" is still out on whether these laws can lawfully be applied to religious organizations for which homosexuality is inherently violative of Church teaching). It is therefore important that the religious employer is properly advised by their attorneys and risk managers to determine the best way to handle all aspects of these situations.

III. Coverage Perspectives and Considerations

For attorneys, risk managers, and claims professionals who advise both religious and non-religious employers, it is important to understand your client and their "business." Religious employers are a unique subset of employer and require special considerations when providing counsel and advice. This often involves finding a balance between what a religious organization *can* and *cannot* do under the law and what they *should* and *should not* do in order to be true to the religious, compassionate, and Godly mission that they, their employees, and parishioners identify with. The answer is not always as simple as "no" or "yes." (Although, who are we kidding . . . employment issues almost always are more gray than black and white!)

It is also important for risk managers and employers to understand what their EPLI policy does and does not cover. Certain types of claims, such as discrimination, harassment, and retaliation, often are covered. There may, however, be specific exclusions for a number of other claims and remedies, such as allegations involving unpaid wages, intentional torts, and punitive damages. Employers should work with their risk managers and attorneys to identify the areas for litigation risk and determine the most appropriate coverage under the circumstances.

IV. Best Practices

In light of the foregoing, there are a number of best practices that a religious employer should consider to place themselves in the best possible position to prevent (as much as one can) and defend against claims and litigations brought by employees.

a. Review and Revise Bylaws, Employee Handbooks, Employee Contracts, and Job Descriptions

If there is one lesson to be learned by religious employers from *Hosanna-Tabor*, it is to ensure that the religious character and mission of the organization is as obvious as possible so that there is no question that the Ministerial Exception and religious discrimination exemption is appropriately applied to the organization as a *religious* organization. This may involve the review and modification of the organization's bylaws and mission statements.

Additionally, and perhaps even more importantly, in order to take full advantage of the Ministerial Exception, it is important for religious employers to review and, as necessary, modify documents that describe the job functions of employees and ensure that they fully and accurately capture all religious and religious mission-oriented functions that the employee has. While these documents are not likely to be dispositive on the issue of whether the Ministerial Exception applies, it is an additional factor that a court will take into consideration in making that determination.

b. Draft Policy Statements Regarding Religious Doctrine

In a number of the cases involving school teachers (who were not found to be "ministers"), one of the objections that has been raised by the plaintiff-employees is that they were unaware that the activity which the employer contended led to their termination was violative of any Church tenets. This is more often than not the case when the religious organization hires individuals from outside the faith of the organization.

It may not be possible or advisable to attempt to prepare and compile draft statements on every Church doctrine that an employee could violate (and be fired for). Not to mention that such an undertaking, if completed, could result in a pretty hefty policy book. Religious employers should work to identify those important religious doctrines that are perhaps less obvious and most likely to be violated by certain categories of employees and draft policy statements on those issues for dissemination to their employees. That way, employees cannot claim ignorance and twist what otherwise might be the straightforward application of religious doctrine into a discriminatory basis for termination.

c. Consistency

Although consistency is reserved for the end of this document, it should by no means be considered the least important recommendation for religious employers. More often than not, a lack of consistency has been the "devil" that has gotten religious organizations in hot water.

This has been particularly true in situations where the enforcement of Church doctrine, for example the doctrine prohibiting premarital sex (and the resulting out-of-wedlock pregnancy), has resulted in adverse employment actions against women only and not men. While it is far easier to prove that female employees have engaged in pre-marital sex, a religious employer cannot rely solely on the observation of a resulting pregnancy to enforce that doctrine. This has led to more than one jury verdict adverse to the religious employer finding sex/pregnancy discrimination.

Juries, in particular, do not like inconsistency. Even if there is no question that Church doctrine prohibits certain conduct, juries are more likely to find that inconsistent application of Church doctrine across protected categories is an act of discrimination. The moral of this story: be consistent!