

The Coalition Against Religious Discrimination

December 17, 2020

Janet Dhillon, Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: Proposed Updated Compliance Manual on Religious Discrimination, RIN Number 3046-ZA01 / Document Number 2020-25736

Dear Chair Dhillon:

We, the undersigned 36 members and allies of the Coalition Against Religious Discrimination (CARD), submit the following comments to the proposed revisions to the Compliance Manual on Religious Discrimination, which the Commission released on November 17, 2020.

Our comments are limited to the proposed manual's section on the exceptions to Title VII coverage, which asserts that religious organizations have broad exemptions to Title VII. The proposed manual would expand the existing, narrow religious exemption in Title VII that allows religiously affiliated federal contractors to employ only workers who share their faith. It would enlarge the pool of entities that qualify for the exemption—extending it even to for-profit corporations. And it would widen the scope of the exemption, subjecting countless additional workers to employment discrimination in the name of religion.

The Commission should revise the proposed manual to accurately reflect the law and uphold its mission to protect employees against discrimination in the workplace.

CARD

CARD, which comprises a broad and diverse group of national organizations, formed in the 1990s in response to proposed legislative and regulatory changes impacting government partnerships with religiously affiliated non-profit organizations. In particular, CARD opposed and continues to oppose policies that would sanction government-funded religious discrimination.

Our coalition members appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation's most pressing social needs, as a complement to government-funded programs; indeed, many members of CARD are directly involved in this work. We also recognize that the separation of church and state is the linchpin of religious freedom. In our view, effective government collaboration with faith-based entities does not require government-supported discrimination.

During his presidency, President George W. Bush sought to dramatically change the way the federal government partnered with religiously affiliated organizations. In particular, he sought to allow federally funded religiously affiliated organizations to discriminate in employment even when accepting taxpayer dollars. Repeatedly rejected by Congress, President Bush instead signed a series of Executive Orders and adopted regulations in order to advance his faith-based initiative.¹ As a result, faith-based nonprofits that accept federal grants to deliver social services

¹ Each time it was considered, legislation containing such a provision was either left in the House of Representatives without a vote from the Senate or left out of the conference committee report. See, e.g.,

have been allowed to take the Title VII religious exemption and discriminate in employment for jobs paid for with taxpayer dollars.

CARD strongly opposes this highly controversial and bad policy. Government-funded employers should not be allowed to impose a religious test on their applicants or employees—no one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

The Proposed Manual

The mission of the EEOC is to “prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.”² The proposed manual, however, defies this obligation by adopting an expansive view of the Title VII religious exemption.

“[T]here is no denying that . . . [the Title VII religious exemption] should be construed ‘narrowly,’”³ yet the proposed manual cherry picks case law in order to expand the EEOC’s interpretation of the existing religious exemption. This, in turn, would subject even more workers to discrimination. The proposed manual does so without concern for the impact it will have on the employees and applicants who face discrimination,⁴ which undermines the principle of religious freedom.

Given the short 30 day time frame for public comment, our comments will be limited to three flaws in the proposed manual’s section on exceptions.

First, the proposed manual significantly changes the section that explains which entities qualify for the Title VII religious exemption. The proposed manual no longer makes clear that the goal of the multi-factor test applied by the courts is to determine whether the corporation is “primarily religious,”⁵ and it relegates the factors used in the leading cases to the footnotes. It also misrepresents the factors and how they are applied, suggesting the exemption is broad and even extends to for-profit corporations, without citing a single case in which a court has applied the religious exemption to a for-profit corporation. We are concerned that the proposed manual is unclear and could be read to allow significantly more employers to discriminate.

Second, the proposed manual suggests the scope of the Title VII exemption is broader than it is. On the one hand, the proposed manual properly states that the exemption *does not* allow

CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://www.congress.gov/bill/107th-congress/house-bill/7>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://www.congress.gov/bill/108th-congress/house-bill/2210>.

² U.S. Equal Employment Opportunity Commission (EEOC), Overview, available at <https://www.eeoc.gov/overview> (last visited Dec. 11, 2020).

³ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011) (O’Scannlain, J., concurring).

⁴ See *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005) (when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries and ensure it is “measured so that it does not override other significant interests.”); *Tex. Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985) (the Establishment Clause forbids religious exemptions that fail to take account of other state interests); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014).

⁵ See e.g., *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019); *Spencer*, at 729 (citing *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (quoting *Townley*).

religious organizations to discriminate in employment on the basis of race, color, sex,⁶ or national origin, while on the other, it sows confusion about whether this holds true in practice. It also makes it more difficult for employees to challenge discrimination where religion is used as a pretext for discrimination on another protected basis.

Finally, we are concerned about the implications of suggesting the Religious Freedom Restoration Act (RFRA) could serve as a defense to claims of employment discrimination. Some of us were members of the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact RFRA; yet, we all agree that RFRA was meant to be a shield to protect religious freedom, not a sword to authorize discrimination against others. The government should only grant religious exemptions when they are necessary to protect religious exercise and are not part of a scheme to deny rights to others.

Conclusion

The proposed manual effectively expands the Title VII religious exemption for employers to the detriment of the employees the EEOC is supposed to protect. Moreover, the proposed manual often provides more confusion than clarity, and thus, is not a “practical resource” for employers, employees, practitioners, and EEOC enforcement staff. It should not be approved without revision. The EEOC should work to limit discrimination faced by employees in the workplace, especially when the jobs are funded by taxpayer-dollars.

Sincerely,

Advocates for Youth
American Atheists
American Federation of State, County & Municipal Employees (AFSCME)
American Humanist Association
Americans United for Separation of Church and State
Anti-Defamation League
Autistic Self Advocacy Network
Baptist Joint Committee for Religious Liberty (BJC)
Bend the Arc: Jewish Action
Catholics for Choice
Center for Inquiry
CenterLink: The Community of LGBT Centers
DignityUSA
Disciples Center for Public Witness
Disciples Justice Action Network
Equal Partners in Faith
Freedom From Religion Foundation
Global Justice Institute
GLSEN
Impact Fund
Interfaith Alliance
Jewish Women International
Lambda Legal
NAACP

⁶ In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court confirmed that Title VII’s bar on sex discrimination also bars discrimination on the basis of sexual orientation and gender identity. The guidance should consistently reflect this throughout.

NARAL Pro-Choice America
National Association of Social Workers
National Center for Lesbian Rights
National Center on Adoption and Permanency
National Council of Jewish Women
National Education Association
People For the American Way
Secular Coalition for America
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries
Women's Alliance for Theology, Ethics, and Ritual (WATER)
Workplace Fairness