

Legal Issues

Employees and Volunteers



Evangelical Lutheran Church in America
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What does my congregation need to know about laws affecting employees?

Application of State and Federal Employment Laws to Synods and Congregations

One of the fastest growing areas of litigation involves employment practices. Religious organizations are not immune from being sued, and must understand how the various state and federal laws regulating employment practices apply, or do not apply, to them. The purpose of this section is to provide a general overview of these laws and how they might apply to congregations and synods.

A. Federal Laws Prohibiting Employment Discrimination

Beginning in the 1960s, the federal government enacted a number of laws prohibiting various forms of employment discrimination - **Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967 (ADEA), and Title I of the Americans with Disabilities Act of 1990 (ADA)**. These laws have sought to ensure equal employment opportunities for all people regardless of their race, color, religion, sex, national origin, age, or disability.¹ These acts make it illegal to discriminate in any aspect of employment including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use a company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, disability leave; or
- other terms and conditions of employment.

As discussed below, in many instances, but not all, these laws do not apply to religious organizations. Nevertheless, congregations, synods, and other religious entities need to be aware of these laws to determine which, if any, apply and how to comply with these laws when applicable. The fact that some or all of these acts may not apply to a congregation or synod should not be construed as a license to engage in discriminatory employment practices. The ELCA is dedicated to the inclusion of all people in its membership and ministry regardless of race, color, sex, national origin, or disability.

The following discussion is not an exhaustive discussion of the acts and the practices prohibited. Rather, it is an analytical framework that can be used as a starting point to determine if a particular act applies given the facts and circumstances facing a particular congregation, synod, or other ELCA-related organizations.

1. Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §§ 2000e-1 et. seq.), prohibits employment discrimination based on race, color, religion, sex, or national origin. (42 U.S.C. §2000e-2). It generally applies to, employers who are engaged in industry affecting commerce and who have 15 or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year. (42 U.S.C. §§ 2000e-2, 2000e (b))². Most ELCA congregations and synods will not meet these jurisdictional requirements, if for no other reason than they do not have enough employees.

Even if a religious organization satisfies these basic requirements, Title VII exempts religious organizations, like synods and congregations, from the prohibition on religious discrimination. 42 U.S.C. § 2000e-1(a) provides in part:

This sub-chapter shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.³

(42 U.S.C. §2000e-1(a).) It is important to note that 42 U.S.C. §2000e-1 (a), only exempts religious organizations from the prohibition on religious discrimination; it does not exempt religious organizations from the prohibition on other types of discrimination. For example, if a congregation is subject to Title VII, it may discriminate against the church secretary because of his/her religion, but not because he/she is Irish. Violations of Title VII expose a covered employer to substantial civil penalties, liability, and injunctive relief, including punitive damages, attorneys' fees, expert witness fees, and court cost. (42 U.S.C. §2000e-5)

2. The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§621-634) protects individuals 40 years of age or older from employment discrimination because of their age. (29 U.S.C. §§621-634). It generally, applies to employers engaged in industry affecting commerce with 20 or more employees. (Id.) **Title I of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. 12111 et. seq.)** prohibits employment discrimination against qualified individuals with disabilities. It generally, applies to employers engaged in industry affecting commerce with 15 or more employees. Violating either of these acts subject an employer to significant civil penalties and liability. (29 U.S.C. §626; 42 U.S.C. §12117)

B. The Church Autonomy Doctrine and the Ministerial Exception Corollary

Even when a religious organization appears to be subject to these acts, its employment decisions regarding individuals performing ministerial or ecclesiastical

functions are not subject to judicial review or interference. This exception is commonly referred to as the "ministerial exception" and is derived from the broader concept of "church autonomy." The church autonomy doctrine is in turn derived from the religion clauses of the First Amendment of the United States Constitution.

Based on the religion clauses, the United States Supreme Court has consistently found that civil authorities, and in particular civil courts, are prohibited from intervening in ecclesiastical controversies whether involving ecclesiastical doctrine, polity, practice, or governance. Decisions by religious organizations regarding church membership, clergy selection, retention, discipline, or termination, and other decisions resolving ecclesiastical controversies are beyond the jurisdiction of and, therefore, may not be interfered with or reviewed by civil authorities.⁴

A corollary to the doctrine of church autonomy, is the ministerial exception. The ministerial exception provides that civil courts, and arguably administrative agencies, have no jurisdiction to adjudicate employment disputes between religious organizations and individuals that perform ministerial or ecclesiastical functions. This is true even when it is alleged that the religious organization has violated an individual's property or civil rights and/or state or federal law.^{5 6} It is for this reason that some denominations can continue to refuse to ordain women as clergy. As one court explained, such cases involve "...the fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court." *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). As another court explained, it lacks jurisdiction in such cases because, "[T]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Music v. United Methodist Church*, 864 S.W.2d 286 (1993). "Controversies of a doctrinal or theological nature and disciplinary measures affecting individual membership, the selection of the congregation's pastor and church officers... and all such kindred matters, lie solely and exclusively with the jurisdiction of the... church itself...." *Cabinet for Human Resources Kentucky Health Facilities v. Provincial Covenant of Good Shepherd, Inc.*, 701 S.W.2d 137 (1986). Therefore, even when an ELCA congregation or synod is seemingly subject to Title VII, the ADA or the ADEA, a pastor's claim that she or he has been discriminated against in violation of all or any of these acts should be dismissed for lack of jurisdiction.⁷

C. Other Federal Laws Regulating Employment Practices

In addition to the acts discussed above, there are number of other federal laws that may regulate the employment practices of a religious organization.

1. The Fair Labor Standards Act of 1938 as amended by **the Equal Pay Act of 1963**, (collectively, the "FLSA") established the minimum wage rate and regulates overtime pay and child labor. (29 U.S.C. §§201-219.) Specifically, the FLSA requires covered employers to provide covered employees with a minimum wage rate, overtime pay for hours work in excess of 40 hours per work week, equal pay regardless of an

employee's sex and restricts child labor. (29 U.S.C. §§203, 206, 207, and 212.) The FLSA also requires employers to make, keep, and preserve records concerning their employees' wages, hours worked and other conditions and practices of employment. (29 U.S.C. §211; 29 CFR Part 516.) Records must be retained for three years. (Id.)

The rules governing who is a covered employer and who is a covered employee are complex and beyond the scope of this summary. (See: 29 U.S.C. §203.) When making an employment decision regarding the subjects covered by the FLSA, religious organizations must first determine the applicability of the act to the particular situation. In general, if a religious organization is a covered employer, its employees are usually covered by the act, except to the extent an employee is exempt. (29 U.S.C. §213.) There are many exemptions discussed in the act. (Id.) Most apply to specific industries and are not applicable to religious organizations. (Id.) However, the exemption for executives, administrators, and professionals often does apply to religious organization employees. (Id.) For example, almost all pastors fall under this exemption. Whether a specific employee for a particular religious organization falls within an exemption can only be determined after reviewing the specific facts and circumstances in light of the specific requirements of the act. It must be noted however, that the ministerial exception, discussed above, prevents the application and enforcement of the FLSA by employees performing ministerial and ecclesiastical functions. Thus, even if a congregation were subject to the FLSA, its pastor could not bring an action to enforce the wage and overtime provisions.

2. The Family Medical Leave Act of 1993 (FMLA) (29 U.S.C. §2601 et. seq.; 29 CFR Part 825.) provides eligible employees with up to 12 work-weeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if an employee continued to work instead of take leave. (29 U.S.C. §§2601-2615.) FMLA applies to all covered employers. A covered employer is private sector employer who employs 50 or more employees for at least 20 workweeks in the current or preceding calendar year. (29 U.S.C. §2611(4)(A).) In order to be eligible for FMLA leave, an employee must work for a covered employer and:

- have worked for that employer for at least 12 months;
- have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
- work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

(29 U.S.C. §2611(2)(A)-(B).)

A covered employee must grant an eligible employee up to a total of 12 work-weeks of unpaid leave in a 12 month period for one or more of the following reasons:

- the birth of a son or daughter, and to care for the newborn child;
- the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;

- to care for an immediate family member (spouse, child, or parent – but not a parent "in-law") with a serious health condition; and
- when the employee is unable to work because of a serious health condition.

(29 U.S.C. §§2612(a)(1)(A)-(B).) The term "serious medical condition" is defined as an illness, injury, impairment, or physical or mental condition that involves:

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a healthcare provider.

(29 U.S.C. §2611(11).)

There is no express exemption in the act for religious organizations; however, most ELCA congregations and synods will not be affected by the FMLA because they do not have 50 employees. Even when a religious organization is subject to the FMLA, the ministerial exception most likely will prevent the enforcement of the act by employees who perform ministerial or ecclesiastical functions.

3. The Immigration Reform and Control Act 1986 (IRCA) (8 U.S.C. §1324.) applies to all employers, including religious organizations. It requires employers to attest that they verified an employee is not an unauthorized alien. Specifically, the act requires employers to certify that they have done the following:

- had all employees complete section 1 of Form I-9 within 3 days of the date of employment;
- checked original documents establishing every new employee's identity and employment eligibility (For a list of acceptable documents see the Instructions for Form I-9);
- certified on the employee's Form I-9, that the employer inspected the original documents and verified the employee's identity and employment eligibility;
- retained an employee's Form I-9 for at least three years from the date of hire or one year after an employee's employment is terminated, whichever is later.
- upon the request of an INS or Department of Labor officer, present an employee's I-9 for inspection.

(8 U.S.C. §1324(a).) In the Appendix to this chapter is a sample Form I-9.

At least one court has found that churches must comply with the act even if doing so would violate the religious tenants of the church. *American Friends Service Committee v. Thornburgh*, 718 F. Supp 820 (C.D. Cal. 1989). In addition, employers must comply with the requirements of the act for all employees; it is a violation of the act to seek verification only from employees whom the employer believes are more likely to be illegal aliens. Failure to comply with the act exposes employers to potential civil and criminal penalties.

4. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (42 U.S.C. §§653 – 653a.) among other things, requires employers to report all new hires to designated state agencies. (42 U.S.C. §653a(a).) The act is designed to help states

track down parents that fail to fulfill their child support obligations. (42 U.S.C. §653a.) The act requires employers to report every new employee's name, address, and social security number, as well as the employer's name, address and Federal Employer Identification Number. (42 U.S.C. §653a(b).)⁷ A state may fine an employer up to \$25.00 for failing to file a report, and up to \$500 for conspiring with an employee not to file a report. (42 U.S.C. §653a.(d).) Religious employers are not exempted from this act.

D. State Laws Regulating Employment

In addition to the federal laws discussed above, many states have enacted laws regulating employment. In some instances, state laws mirror federal laws, but have stricter requirements. Some municipalities have even broader regulations than those of the states where they are located. For example, a congregation with 25 employees may not be subject to the FMLA, but may be subject to a state version that provides the act is applicable to employers with only 20 employees. A detailed analysis of each state's employment laws is beyond the scope of this summary. However, whenever a religious organization makes employment decision it must do so with a clear understanding of federal and state, and sometimes local, legal requirements.

E. Resources

Some of the best resources covering these laws are available from the Federal Government over the Internet. For information on the FLSA and FMLA see www.dol.gov For information on Title VII, the ADA, and the ADEA see www.eeoc.gov For information on the IRCA see www.uscis.gov For an excellent overview of the issues discussed above see: *Pastor, Church & Law*, by Richard R. Hammar. This can be ordered at <https://store.churchlawandtax.com/pastor-church-law/>.

¹See: The Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

²For a detailed discussion of how to determine the number employees and whether an employer is engaged in an industry affecting interstate commerce see Hammar, R., *Pastor, Church & Law*, at 523- 533 (3d. Ed. 2000). (Hereafter "Hammar")

³This exception was originally limited to employees involved in "religious activities." In 1972, Congress amended the act deleting the word "religious" before "activities". This amendment allowed religious organizations to discriminate based on religion for all its employment decisions. In *Corporation of the Presiding Bishop of the Church Jesus Christ of Latter- Day Saints v. Amos*, 43 U.S. 327 (1987), the Supreme Court held that the 1972 amendment did not violate the First Amendment of United States Constitution, and in particular the Establishment Clause. In *Amos*, a janitor that worked in a Mormon church gymnasium was fired for failing to comply with various Mormon ecclesiastical rules. The janitor sued the church for violating Title VII. Pursuant to 42 U.S.C. § 2000e-1 (a) as amended; the defendant moved to dismiss the janitor's complaint. In response, the janitor argued that the provision, as amended, advanced religion and therefore violated the Establishment Clause of the First Amendment. The U.S. Supreme Court unanimously rejected the janitor's argument, holding that the 1972 amendment did not violate the First Amendment.

⁴Courts have no jurisdiction to review or resolve questions of church discipline, faith, ecclesiastical governance, ecclesiastical rules, doctrine or law. *Watson v. Jones*, 80 U.S. 679 (1871). Courts have no power to decide or review decisions regarding acts of church discipline and excommunication of members. *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872). Courts are prohibited from reviewing ecclesiastical decisions regarding who will serve as the clergy for a religious denomination, even when such decisions affect an individual's civil rights. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1928). Civil courts have no jurisdiction to decide issues related to discipline, faith,

ecclesiastical rules or law. Religious organizations have the right decide for themselves free from state interference, matters of church governance, faith and doctrine, including who shall serve as its clergy. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Note: *Kedroff* and *Gonzalez* are significant because they confirm that civil courts have no jurisdiction in ecclesiastical matters even when clergy allege their property and civil rights have been violated. (See *Hammar* at 62.) Courts have no authority or jurisdiction to intervene or review cases of ecclesiastical discipline even where a bishop claims to have been expelled in violation of church doctrine. *Serbian Eastern Orthodox diocese v. Milivojevich*, (1976). Civil courts have no authority to intervene in or review questions of church membership and, in particular, the decision by a religious organization to excommunicate a member. *Jones v. Wolf*, 443 U.S. 595 (1979).

⁵*Singleton v. Christ the Servant Evangelical Lutheran Church et al*, 541 N.W.2d 606 (Minn.App., Jan 09, 1996), cert. denied 117 S.Ct. 184 (1996). The Court affirmed the dismissal of an ELCA pastor's claims for breach of contract, wrongful discharge, promissory estoppel, breach of the implied covenant of good faith and fair dealing, and tortious interference on the grounds of the First Amendment of the United States Constitution. *Gellington v. Christian Methodist Episcopal Church*, 200 WL 192100 (11th Cir. Feb. 17, 2000) (citing the Establishment Clause of the First Amendment, court dismissed minister's claim that he had been retaliated against and constructively discharged in violation of Title VII, by his former congregation); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (Choir director brought action against church and pastor under the ADA and Louisiana employment law. Court held that "ministerial exception," prohibiting undue interference with the personnel decisions of churches and religious leaders encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission. Further, a religious organization is not required to advance a theological or religious explanation regarding its allegedly illegal employment actions); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (Court dismissed nun's claim that a university's decision to deny her tenure as a canon law professor discriminated against her based on her sex in violation Title VII. The court held that, "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary function serve its spiritual and pastoral mission."); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (court dismissed black female's claims that she had been discriminated against based on her sex and race, when she was not made a member of the clergy); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (sex and age discrimination claim dismissed under the Free Exercise Clause of the First Amendment); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) (age discrimination and wrongful discharge claims dismissed under Establishment Clause); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (sex and age discrimination claims dismissed under Establishment and Free Exercise clauses); *Mclure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (claim by woman that Salvation Army violated Title VII by paying women less than men for the same work was under the First Amendment).

⁶See also: *Smith v. Calvary Christian Church*, Docket # 48909 (Mich. S. Ct. July 25, 2000) (court dismissed former church member's claim for invasion of privacy on the grounds that he consented to church discipline when he became and continued to be an active member of the congregation.)

⁷But see: *Gallo v. Salesian Society, Inc.*, 676 A.2d 580 (N.J. Super. 1996) (Court held that civil rights laws cannot be applied to employees performing ecclesiastical or ministerial functions; however, civil rights laws can be applied in cases where employees are performing purely secular functions in a religious setting. In this case, a female history English teacher at a Catholic school brought a claim for sex discrimination). In *Bollard v. The California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) (A former novice brought a Title VII claim against an order of priests and individual priests alleging that he was sexually harrassed while he trained to become a priest. The court found that Title VII applies without an exception compelled by the First Amendment where defendant church neither exercise its constitutional prerogative to choose its ministers nor embraced the behavior at issue as a constitutionally protected religious practice.) Note: The holding in *Bollard* is inconsistent with the overwhelming weight of authority as discussed above.

⁸For more information regarding the filing requirements and procedures for each state contact: Alabama 334-353-8491; Alaska 907-269-6685; Arizona 602-252-4045; Arkansas 501-682-3087; California 916-657-0529; Colorado 303-297-2849; Connecticut 860-424-5044; Delaware 302-369-2160; District of Columbia 888-689-6088; Florida 904-922-9590; Georgia 888-541-0469; Hawaii 808-586-894; Idaho 800-627-3880; Illinois- 800-327-4473; Indiana 800-437-9136; Iowa 515-281-5331; Kansas 888-219-7801; Kentucky 800-817-2262; Louisiana 888-223-1461; Maine 207-287-2886; Maryland 888-634-4737; Massachusetts-617-577-7200; Michigan 800-524-9846; Minnesota 800-672-4473; Mississippi 800-866-4461; Missouri 800-859-7999; Montana 888-866-0327; North Carolina 888-504-4568; North Dakota 800-755-8530; Nebraska 888-256-0293; New Hampshire 888-803-448; New Jersey 609-588-2355; New Mexico 888-878-1607; New York 800-972-1233; Nevada 888-639-7241; Oklahoma 800-317-3785; Oregon 503-986-6053; Pennsylvania 888-724-4737; Rhode Island 888-870-6461; South Carolina 800-768-5858; South Dakota 888-827-6078; Tennessee 888-827-2280; Texas 888-839-4473; Utah 801-526-4361; Vermont 802-241-2194; Virginia 800-979-9014; Washington 800-562-0479; West Virginia 800-835-4683; Wisconsin 888-300-4473; Wyoming 800-970-9258. Source: *Hammar* at 619-620.

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