



September 16, 2019

Harvey D. Fort
Acting Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs, Room C-3325
200 Constitution Avenue NW
Washington, DC 20210

RE: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption RIN 1250-AA09/ Docket ID OFCCP-2019-0003

Dear Mr. Fort:

The Baptist Joint Committee for Religious Liberty (BJC) submits these comments in opposition to the proposed rule, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published on August 15, 2019.

BJC's history of engagement

BJC is an 83-year-old agency dedicated to legal and policy matters relating to religious liberty. Our mission is to defend and extend God-given religious liberty for all, bringing a uniquely Baptist witness to the principle that religion must be freely exercised, neither advanced nor inhibited by the government.

BJC has a consistent record of supporting both of the First Amendment's religion clauses—No Establishment and Free Exercise. Our commitment stems from the historical experiences of early Baptists, who suffered the pain of persecution from religious fervor coupled with the coercive power of the state and who fought for religious liberty for themselves and others.

Our work has long included monitoring the boundaries of church-state separation in the context of government-funded social services. We support the important role religious organizations play in society, and the particular ways they partner with government within constitutional boundaries. Specifically, we recognize the way some religious institutions are involved in providing vital services in the context of federal contracts and the careful way such partnerships must be structured to avoid the unconstitutional funding of religion.

We have been actively involved in the policy developments and debates that were brought to greater public attention during the administration of President George W. Bush when he launched what was known as “the faith-based initiative.” We met with the administration and advocated for the importance of religious liberty safeguards as the Bush administration focused on expanding opportunities for social service programs sponsored by religious organizations funded by federal grants and contracts. Since that time, many issues about how best to engage religious organizations within constitutional boundaries have been addressed with bipartisan regulations. Some administrative changes remain controversial. In particular, the Bush administration authorized religious organizations that receive federal funding to hire and fire on religious grounds. The Obama administration did not change that regulation but enhanced religious liberty protections for beneficiaries and providers to ensure the separation of government-funded services and explicitly religious activities, while also adding to the federal contracting regulation to prevent LGBTQ discrimination.

Current Rule

Legal prohibitions on employment discrimination serve valuable public policy interests that promote diversity in the workplace and protect workers. Exemptions to such rules should be narrowly construed. In many contexts, including in federal employment law, some religious entities are exempt from the prohibition on religious discrimination. This permissible accommodation of religion often serves to preserve the religious nature and activities of a religious organization. While some religious organizations may indeed hire staff according to religion, that accommodation of religion should not be applied broadly to employment under federal contracts. In general, federal contracts are not provided to advance religious ends or provide explicitly religious services. The First Amendment’s Religion Clauses protect religious liberty by ensuring a separation between the institutions of religion and government; private-public partnerships must be carefully designed within constitutional boundaries.

BJC opposes allowing federal contractors to discriminate based on religion and other protected categories in government-funded positions. We recognize that religion is protected in different ways in different contexts. The accommodation for religious hiring that exists for religious organizations in current law is not warranted in the context of federally funded contracts.

August 2019 Department of Labor NPRM

The proposed rule cannot be properly said to “implement legal requirements” regarding the religious exemption in Title VII. Instead, the proposed rule stretches an exemption beyond any reasonable need for accommodation in a context that turns the federal contracting rule on its head. Prohibitions on religious discrimination and narrowly crafted exemptions for religious organizations promote religious freedom. In the context of federally funded services, however, arguments in favor of religious exemptions for employers have less force. Avoiding government sponsorship of religion and government-funded religious activities is a constitutional boundary that is rarely questioned. It is that boundary that provides the basis for strong opposition to the current regulation and its proposed expansion.

Not only are the proposed changes at odds with maintaining nondiscrimination in government-funded contracts, they distort how religious liberty protections should be crafted to balance interests of religious institutions and individuals they employ. Specifically, the proposed rule would make it easier for organizations to discriminate based on other protected categories, such as race, color, sex, and sexual orientation under the guise of religion.

While religious exemptions, such as exemptions from prohibitions on religious discrimination, have long played a part in our country’s protections for religious liberty, they are not justified in the context of government-funded jobs to provide government-funded services that must be provided without regard to religion.

The proposed rule fails to acknowledge important distinctions about protecting religious liberty in different contexts. It ignores the vital distinctions between protecting religious liberty in the context of religious organizations that provide social services with private donations versus those that seek government funding to provide them consistent with government needs under a federal contract. Worse, the proposed rule expands the exemption beyond foreseeable funding of social services by non-profit religiously affiliated entities and offers an exemption from religious discrimination to any for-profit contractor.

This change indicates an aggressive move from OFCCP's focus on nondiscrimination for workers in federal contracts toward creating expansive rights of employers to discriminate with government funding.

None of the U.S. Supreme Court cases cited support the proposed NPRM.

Conclusion

The proposed rule is a harmful and unnecessary expansion of the existing religious exemption. It should not be finalized. Indeed, Executive Order 11246 should be amended to strike the religious exemption altogether.

Respectfully,



K. Hollyn Hollman
BJC General Counsel and Associate Executive Director



Jennifer L. Hawks
BJC Associate General Counsel