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# TAX AND LAW UPDATE

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# BIOGRAPHICAL INFORMATION
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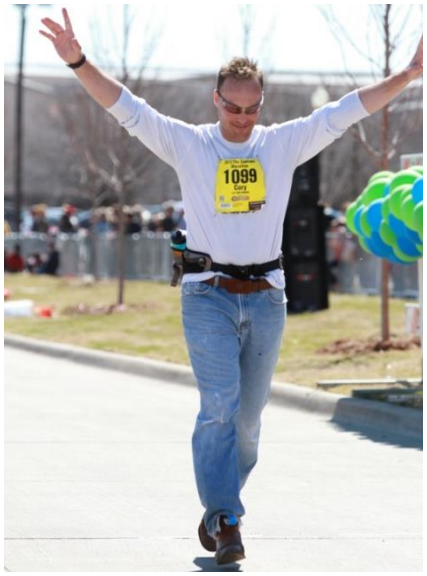
- Freeman Law, PLLC (Dec. 27, 2021-present) www.freemanlaw.com; Weycer, Kaplan, Pulaski & Zuber, PC (2008-Dec. 24, 2021); Hund & Harriger, LLP (2003-2007).
- Mr. Halliburton serves as outside general counsel to a diverse nonprofit / tax-exempt client base as well as for multi-state professional service companies. Results-oriented, with executive-level strategy and an understanding of the intersection of law and business judgment.
- Focus in Nonprofit Sector: formation, dissolution, governance, succession, employment law, contracts, intellectual property, tax / tax exemption issues, policy creation, mergers and other. Borrower's counsel for tax-exempt bond / loan transactions near $100 million aggregate.
- Focus for Professional Service Companies: drafting and counsel on significant service agreements, employment law matters, and protection of trade secrets.
- Texas Tech University School of Law, *magna cum laude* 2003.

Mr. Halliburton's upbringing and diverse experience allows him to apply a valuable perspective to many different business endeavors and legal challenges faced by those he serves. He has presented at tax, legal and business conferences throughout the country and on many legal and business topics affecting tax-exempt entities. He has written and published many professional articles.

Mr. Halliburton and his wife of 23 years, Dr. Jamie Halliburton, a principal in the Grapevine-Colleyville ISD, have three children, a large dog named Bear and one unnamed Red Sex Links chicken. Mr. Halliburton enjoys fly fishing and trekking the Llano River with his kids in a kayak or Old Town canoe. In 2013, he ran the Cowtown Marathon in cowboy boots and blue jeans, donning the ironical bib number 1099. In 2017, he "ran the year," logging 2,030 miles. In May 2021, he and a team of four finished 1st overall in a 50-mile weighted-carry event in Washington, D.C., and in November 2021, the team finished 10th in the GoRuck World Championship 50-mile weighted carry (30 lbs). He also achieved a 2,021-mile run/ruck (30 lbs) combo effort in 2021 (completed by September 23, 2021; roughly 8 miles per day). Since then, he has rested, mainly.



**This paper is for informational purposes only and is not professional legal or tax advice. Cory Halliburton and Freeman Law make no representations to the accuracy or application of any information in this paper.**

**Please inquire of your retained legal and tax professionals for specific legal or tax matters.**

**Thank you.**

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# TAX AND LAW UPDATE

## PREAMBLE

> One way to think about tax law is to view it as a series of general rules qualified by exceptions, and exceptions to those exceptions, and exceptions to those exceptions to those exceptions.

*Continuing Life Communities Thousand Oaks LLC v. Comm'r*, T.C. Memo. 2022-31 (April 6, 2022).

## TOPIC NO. 1 – GOD IS GOOD AND, WELL, SO IS TAX-EXEMPTION

1. **God is Good.**

God is good, all the time. All the time, God is good.

2. **The IRS is, Well . . . IYKYK . . .**

3. **IRS Priorities for Fiscal Year 2024.**

On October 4, 2023, the Tax Exempt and Governmental Entities division of the IRS issued its annual Tax Exempt & Government Entities (TE/GE) Fiscal Year 2024 Program Letter. The Letter allegedly lists the TE/GE priorities for the new fiscal year 2024. According to the two-page Letter, in 2024 the "TE/GE will adapt to view compliance through a [Internal Revenue] Service-wide lens that fully supports the IRS Strategic Operating Plan (SOP) and the agency's transformation. We are making this shift along with the other business units under the Deputy Commissioner for Services & Enforcement to bring about compliance that is more holistic, smarter, broader and stronger."

The TE/GE program letter may be viewed here: https://www.irs.gov/pub/irs-pdf/p5313.pdf

The IRS SOP may be viewed here: https://www.irs.gov/pub/irs-pdf/p3744.pdf

Frankly, the Letter fails to provide any real indication of initiatives the TE/GE intends to pursue in 2024, and the 150-page SOP mentions the word "exempt" only 4 times. On page 135 of the SOP, the IRS almost acknowledges that exempt organizations and charities are under-represented in the SOP:

> There is a wide variety of groups beyond the immediate tax community who have an interest in the IRS's transformation effort. These include charitable groups; small business organizations; community- and faith-based organizations; labor unions; climate, environmental, and other advocacy organizations; academic institutions and researchers; tribal organizations; and many other key partners. This Plan can be used as a benchmark for success as well as a basis to provide ongoing feedback on areas for growth.

### 4. Tax-Exemption is Good (but not like God is Good).

To be exempt as an organization described in section 501(c)(3), an organization must be **both organized and operated** exclusively for one or more of the purposes specified in section 501(c)(3) of the Code. *See* 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(a)(1). If an organization fails to meet either the organizational test or the operational test, the organization is not qualified for tax exemption under section 501(c)(3) of the Code.

#### A. The Organizational Test.

Section 1.501(c)(3)-(1) of the Treasury Regulations contains the organizational test:

> *Organizational test*—(1) *In general.* (i) An organization is organized exclusively for one or more exempt purposes only if its **articles of organization** (referred to in this section as its *articles*) as defined in subparagraph (2) of this paragraph: (A) Limit the purposes of such organization to one or more exempt purposes; and (B) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

26 C.F.R. § 1.501(c)(3)-1(b)(1) (emphasis added).

> An organization is **organized** exclusively for one or more exempt purposes **only if its articles of organization**: (A) Limit the purposes of such organization to one or more exempt purposes; and (B) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

*Id.* at § 1.501(c)(3)-1(b)(1)-(b)(1)(i)(B) (emphasis added).

> In **no case** shall an organization be considered to be organized exclusively for one or more exempt purposes, **if, by the terms of its articles**, the purposes for which such organization is created **are broader** than the purposes specified in section 501(c)(3).

*Id.* at § 1.501(c)(3)-1(b)(1)(iv) (emphasis added).

The term "articles of organization" or "articles" includes the corporate charter or any other written instrument "by which an organization is created." *See id.* at § 1.501(c)(3)-1(b)(2). The articles of organization do not include, for example, an organization's bylaws.

#### B. The Operations Test.

An organization will be regarded as operated exclusively for one or more exempt purposes **only if the organization engages primarily** in activities that accomplish one or more of the exempt purposes specified in section 501(c)(3). *See* 26 C.F.R. § 1.501(c)(3)-1(c). Under the Treasury Regulations applicable to tax-exempt public charities,

> [a]n organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, **if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business, as defined in section 513**. In determining the existence or nonexistence of such primary purpose, all the circumstances must be considered, including the size and extent of the trade or

> business and the size and extent of the activities which are in furtherance of one or more exempt purposes.

*See* 26 C.F.R. § 1.501(c)(3)-1(e) (emphasis added).

"'[T]he presence of a single nonexempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes.'" *Am. Ass'n of Christian Schools Voluntary Employees Beneficiary Ass'n Welfare Plan Trust v. United States,* 850 F.2d 1510, 1513 (11th Cir.1988) (quoting *Better Business Bureau v. United States,* 326 U.S. 279, 283, 66 S.Ct. 112, 114, 90 L.Ed. 67 (1945)).

### 5. TG 3-3 Exempt Purpose, Charitable IRC 501(c)(3) (March 20, 2023).

TG 3-3, a 59-page gem, provides guidance on, basically, the meaning of exempt purposes described in section 501(c)(3) of Title 26 of the Internal Revenue Code ("Code"). While instructive, TG 3-3 "is not an official pronouncement of the law or the position of the IRS and cannot be used, cited, or relied upon as such." See TG 3-3 here: https://www.irs.gov/pub/irs-pdf/p5781.pdf (noting, however, "This document is not an official pronouncement of the law or the position of the IRS and cannot be used, cited, or relied upon as such.").

TG 3-3 describes the IRS's position on and understanding of core and common tax-exempt terms such as "charitable," "needy," "low-income families," "very low-income families," "charitable class," and "charitable group." TG 3-3 addresses the organizational and operational tests prescribed by section 501(c)(3). TG 3-3 provides guidance on common programmatic areas within the tax-exempt space, such as assistance to the elderly, the sick, and handicapped.

TG 3-3 also addresses Treasury Regulation section 1.501(c)(3)-1(d)(2)'s exempt function of "advancement of religion," noting that an organization that advances religion within the meaning of the Treasury Regulation, the organization may also qualify under section 501(c)(3) as a charitable or educational organization.

**Importantly, TG 3-3 recognizes that "First Amendment considerations prevent Congress and the Service from establishing a concise or objective definition of the term religion." TG 3-3 notes, however, that two key attributes are considered: "a. That the particular religious beliefs of the organization are truly and sincerely held; and b. That the practices and rituals associated with the organization's religious beliefs or creed aren't illegal or contrary to clearly defined public policy."**

TG 3-3 does not mention or cite *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020). In *Bostock*, the Supreme Court held that Title VII's prohibition of discrimination in employment because of an employee's "sex" includes a prohibition of discrimination based on the employee's sexual orientation, including homosexuality or transgender. TG 3-3 provides no guidance as to whether a tax-exempt religious organization may jeopardize its tax exemption if it engages in religious-based sex discrimination based on sexual orientation in employment matters.

In part B.3.(2) of TG 3-3, the IRS refers to *Bob Jones University v. United States*, 461 U.S. 574 (1983) and *Goldsboro Christian Schools v. United States*, 461 U.S. 574 (1983). With reference to those two opinions, the IRS states that "The [United States Supreme] Court concluded that educational institutions, that practice racial discrimination based on religious beliefs, are not charitable in the generally accepted legal sense and thus do not qualify for federal tax exemption."

This IRS guidance dovetails with the current collision of individual rights and religious freedom illustrated in the article at the end of this handout regarding Title VII and *Bostock*.

TG 3-3 goes on to address other important characteristics of exempt functions described in section 501(c)(3), such as educational and scientific purposes, erecting public buildings or monuments, conservation, lessoning the burdens of government, and defending human and civil rights. The guidance also carefully mentions how advocacy may be considered educational and provides examples of advocacy efforts that may be qualifying and others that are non-qualifying.

TG 3-3 concludes with attributions for recognition of exemption and filing requirements.

## TOPIC NO. 2. DISQUALIFYING AND NON-EXEMPT ACTIVITIES, AND UNRELATED BUSINESS INCOME

TG 3-3 informed taxpayers what ***is*** an exempt purpose.

TG 3-10 (July 14, 2023) provides information to taxpayers about what ***is not*** an exempt purpose in the eyes of the IRS and the Code. *See* TG 3-10: Disqualifying and Non-Exempt Activities - Trade or Business Activities – IRC Section 501(c)(3) (July 14, 2023) at https://www.irs.gov/pub/irs-pdf/p5833.pdf ("This document is not an official pronouncement of the law or the position of the IRS and cannot be used, cited, or relied upon as such.").

TG 3-10 addresses the issue of section 501(c)(3) organizations engaging in trade or business activities and how those activities may affect an organization's tax-exempt status.

A tax-exempt organization's use of profits from an activity does not make the activity substantially related to the organization's exempt purpose or function. Rather, the determination of tax-exemption is activity based – "organized and **operated**" primarily for exempt purposes.

If an exempt organization engages in *any* unrelated trade or business—even if not "substantial in nature"—the income derived from that trade or business may be subject to taxation. Under section 511 of the Code, a tax-exempt organization must pay income tax on unrelated business income. Generally, gross income from an unrelated trade or business, and the applicable deductions relating to that income, are computed the same way in which corporate income taxes are calculated. *See* 26 U.S.C. §§ 511(a) (corporate rates applicable to unrelated business income), 162 (trade or business expenses), 167 (depreciation). Under section 513, an unrelated trade or business is any trade or business the conduct of which is not substantially related to the organization's exempt purpose.

The Code contains several **exceptions** and about 20 **modifications** to the unrelated business income tax rules. For example, exclusions exist for passive investments, royalties, and rent from real property and personal property rented with real property, provided no more than an incidental amount of the rent payment is allocated to the rental of the personal property. These rules are complex, and the applicability of a particular exception or modification will depend on the numerous facts and circumstances of the income-driving activity in issue as well as exceptions to exceptions to exceptions.

Summarily, an activity is an unrelated business if the activity meets three requirements: **(1)** it is a trade or business, **(2)** it is regularly carried on, and **(3)** it is not substantially related to furthering the exempt purposes of the organization.

See 3-part series published by Cory Halliburton circa February 2022:

- **UBIT Part 1 – The Framework**

  https://freemanlaw.com/tax-exemption-and-unrelated-business-income-tax-ubit-the-framework-part-1-of-3/

- **UBIT Part 2 – Rules, Modifications, and Exceptions**

https://freemanlaw.com/tax-exemption-and-unrelated-business-income-tax-ubit-rules-modifications-and-exceptions-part-2-of-3/

- **UBIT Part 3 – "Substantially Related"**

  https://freemanlaw.com/tax-exemption-and-unrelated-business-income-rules-ubit-substantially-related-part-3-of-3/

## TOPIC NO. 3. EDUCATIONAL ASSISTANCE PROGRAM

This is an overview of a qualified educational assistance program authorized pursuant to 26 U.S.C. § 127 and corresponding Treasury Regulations, 26 C.F.R. § 1.127-1, *et. seq.*

Pursuant to Section 127 of the Internal Revenue Code and Treasury Regulations:

1. Gross income of an employee does not include amounts paid or expenses incurred by the employer for educational assistance to the employee if the assistance is furnished pursuant to a program which is described in section 127(b).
2. Section 127(b)(1) requires a separate written plan of the employer for the exclusive benefit of the employees to provide such employees with educational assistance.
3. The program must benefit employees who qualify under a classification not to be discriminatory in favor of employees who are officers, owners, or highly compensated, or their spouses and dependents who are themselves employees.
4. However, a program shall not be considered discriminatory because members of the prohibited group in fact utilize the program to a greater degree than eligible employees who are not within the prohibitive group; or, because with respect to a course of study for which benefits are otherwise available, successful completion of the course, attaining a particular course grade, or satisfying a reasonable condition subsequent (such as remaining employed for one year after completing the course) are required or considered in determining the availability of benefits.
5. Not more than 5% of the amounts paid or incurred by the employer for educational assistance during the year may be provided for the class of individuals who are shareholders or owners (or their spouses or dependents), each of whom (on any day of the year) owns more than 5% of the stock or of the capital or profits interest in the employer.
6. A qualified program must not provide eligible employees with a choice between educational assistance and other remuneration includible in gross income.
7. A qualified program is not required to be funded.
8. Reasonable notification of the availability and terms of the program must be provided to eligible employees.

See sample plan at the end of this white paper. Independent legal review is advisable.

## TOPIC NO. 4. EMPLOYEE RETENTION CREDIT UPDATE (briefly)

***IRS Shuts Door on New Pandemic Tax Credit Claims Until at Lease 2024*** **(Wall Street Journal, Sept. 14, 2023)**

> New claims for the employee retention credit, or ERC, won't be processed until at least 2024, the IRS announced Thursday. The tax agency also plans to give tougher scrutiny to an existing queue of more than 600,000 requests. The IRS will allow

> employers with pending claims to withdraw them and will let many repay their refunds if they no longer think they qualify.
>
> Congress created the credit in 2020 as an incentive for businesses to keep employees attached to their jobs during the pandemic, but the refunds accelerated after business closures ended. The ERC's cost has far exceeded the expectations of lawmakers and administration officials.
>
> The IRS is trying to disrupt a pop-up industry that encourages small businesses and nonprofits to claim the once-obscure credit and receive up to $26,000 per employee. The Wall Street Journal has reported that aggressive marketing by such firms is driving a flow of ERC refund claims that has overwhelmed the tax agency.

**IRS Informational Resources (Notice Update by IRS August 16, 2023):**

**Employee Retention Credit –** https://www.irs.gov/coronavirus/employee-retention-credit

**ERTC Eligibility Checklist:** https://www.irs.gov/pub/newsroom/erc-eligibility-if-then-chart.pdf

**FAQs About the ERTC:** https://www.irs.gov/coronavirus/frequently-asked-questions-about-the-employee-retention-credit -- **Addresses these areas:**

| | |
|---|---|
| **Eligibility** | **Qualified Wages** |
| **Qualified Government Orders** | **Supply Chain** |
| **Decline in Gross Receipts** | **Claiming the ERC** |
| **ERC Scams** | **Recordkeeping** |
| **Timing** | |

## TOPIC NO. 5. EXCESS BENEFIT TRANSACTIONS

**We did *What*?! Now What?**

This is an overview of the excess benefit transaction rules of 26 U.S.C. § 4958 and corresponding Treasury Regulations, 26 C.F.R. § 53.4958-1, *et. seq.*

**Excess Benefit Transaction.** An excess benefit is the amount by which the value of the economic benefit provided by a tax-exempt organization directly or indirectly to or for the use of a "disqualified person" (i.e., a control person) exceeds the value of the consideration, including the performance of services, received by the organization for providing such benefit. An excess benefit transaction can arise in many different situations – excess compensation, excess benefits in employer-provided plans, gifts, personal or unauthorized use of property, theft, embezzlement, and other.

**Taxes.** The Code imposes a tax equal to **25%** of the excess benefit on each excess benefit transaction. That tax "shall be paid by" the disqualified person. Also, the Code imposes a tax equal to **200%** of the excess benefit in any case in which the 25% tax is imposed, not timely paid, and the transaction is not corrected within the applicable taxable period. Thus, the amount of excess can trigger excise taxes assessed against the disqualified person up to **225%** of the excess involved.

**Taxes on Manager(s).** The organization's managers (i.e., those serving on the governing body or management who approve the transaction) who knowingly participate in the approval of, or who acquiesce by silence to such a transaction can be assessed with an excise tax of up to **10% (up to $20,000)** of the excess. The term "knowing" includes actual knowledge of and/or negligently failing to make reasonable attempts to ascertain whether the transaction is an excess benefit transaction, or the manager is in fact aware that it is such a transaction.

**Reasonable Cause.** The managers may avoid the excise taxes under section 4958 of the Code if their participation is due to "reasonable cause," meaning the manager exercised responsibility on behalf of the organization with ordinary business care and prudence.

**Liability.** If more than one "manager" is liable for a tax imposed under section 4958, all are jointly and severally liable for the taxes so imposed with respect to that excess benefit transaction.

**Correction.** An excess benefit transaction is (and should be) corrected by undoing the excess benefit to the extent possible. This is done by executing any measures necessary to place the applicable tax-exempt organization involved in the excess benefit transaction in a financial position not worse than that in which it would be if the disqualified person were dealing under the "highest fiduciary standards." Correction may include return of cash or property or modifying any contractual arrangement that created the excess benefit. And, the cash amount of correction should include interest in order to make the tax-exempt organization whole.

**IRS Reporting.** The transaction and taxes arising therefrom may be required by law to be reported to the IRS. The reporting process is through IRS Form 4720.

***Insights.*** Due care should be taken in not authorizing a transaction that constitutes an excess benefit transaction. If such a transaction is approved for the applicable tax-exempt organization, due care should be taken to identify, unravel, and report the transaction (as the circumstances require) to avoid the deeper tax, penalties, and interest consequences to the disqualified person in issue and those at the governing helm of the organization. The bold stand righteous like a lion, and it is best to face the federal income tax issues head-on so as to fortify the integrity of the organization and of those in leadership positions that drive the organization's mission forward. Competent legal and tax counsel is advisable in these situations because the price of U.S. tax poker in these situations can be extreme.

**IRS Guidance.** TG 65: Excise Taxes - Excess Benefit Transactions - IRC Section 4958 (July 14, 2023) https://www.irs.gov/pub/irs-pdf/p5835.pdf ("This document is not an official pronouncement of the law or the position of the IRS and cannot be used, cited, or relied upon as such.").

## TOPIC NO. 6. BENEVOLENCE

### Treat People With Kindness: The Confluence of Benevolence and Tax Law

When my eldest daughter entered her senior year of high school, she paid the high school's parking-space-paint-fee and used the opportunity to profess her life's mantra: ***Treat People with Kindness.***

Kindness – a term stemming from circa 1300, with origins of the religious act of benevolence.

"Benevolence" – the quality of being kind.

For tax-exempt public charities, benevolent acts must be considered within the guardrails of section 501(c)(3) of the Internal Revenue Code. To enjoy tax-exemption as an organization described in Section 501(c)(3), the organization must be organized and operated primarily to accomplish one or more of the exempt purposes specified in section 501(c)(3). *See* 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(c). To enjoy or maintain tax-exempt status, the charitable organization must avoid use of charitable assets for the substantial benefit of unqualified individuals or, for certain, control persons.

So, how do public charities, especially religious organizations, manage the confluence of benevolence (i.e., kindness) and tax regulations when seeking to tend to the poor, naked, infirmed, or hungry, i.e., those "in need"?

In a technical sense, the answer is, basically, identification of need and provision of sufficient resources that do not exceed that need—identify a life necessity that the beneficial recipient cannot meet with available resources.

Not a perfect science.

But, theoretical science should not unreasonably deter the objective of treating people with kindness.

For federal income tax purposes, the recipient of benevolence must, technically, lack the resources to meet the need. The test to be applied is usually focused on the type of need to be addressed and the resources given to address that need. A brief affirmation of resources (or lack thereof) could serve to support due diligence on the applicant's available resources. Some organizations request financial records of the prospective recipient in order to evaluate the lack of resources to meet the need in issue. Other organizations simply require the applicant to sign a statement, indicating that the recipient lacks the resources to pay for the need made the basis for the benevolence request. Again, there is no perfect science on the matter, but the more due diligence the better prepared the organization will be to combat any audit or inquiry by the taxing government.

For federal tax purposes, the public charity should—in a best-case scenario—reasonably document benevolent expenditures, recording that the expenditures meet or address the identified need of the recipient. The organization should document that the request for (for example) housing expenses, food, clothing, fuel, healthcare, travel, etc. represents an unmet necessity of the recipient.

An organization involved in routine benevolence should consider adopting a benevolence policy or written form to use for creation of a case-by-case record of requests and decision-making regarding acts of kindness. And, those records should be maintained for an appropriate amount of time in the event of audit or inquiry from the taxing authorities. Nothing too complicated because kindness must remain nimble to life. For example, a written form with schedules for input of information about the requestor, others that may be involved, their life situation, available resources, and the need to be addressed will serve as a record tool for use in the event of audit or inquiry.

Treat people with kindness (but don't forget about the Internal Revenue Code when doing so on a tax-exempt basis).

# TOPIC NO. 7. EMPLOYMENT LAW UPDATE

## FAIR LABOR STANDARDS ACT

### Coverage Under the FLSA

There are two methods whereby an employee may be covered by the FLSA: **Enterprise Coverage** and **Individual Coverage**.

Enterprise coverage exists for employers (i) who employ at least two employees engaged in interstate commerce and (ii) whose annual gross volume of sales made or business done is not less than $500,000, or are engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or individuals with intellectual disabilities who reside on the premises; a school for intellectually or physically disabled or gifted children; a preschool, elementary or secondary school, or an institution of higher education.

For individual coverage, an employee may be protected by the FLSA if the employee's individual work regularly involves interstate commerce, regardless of the amount of sales the employer may transact.

If the FLSA applies to a particular employee, and unless an FLSA-exemption applies, the FLSA requires employers to pay the employee covered by the act at least the federal minimum hourly wage (currently, $7.25 per hour) as well as overtime wages of at least one and one-half times the employee's regular rate of pay. **Some states have higher minimum wage requirements, and if so, the employee is entitled to the higher of the two wages.**

**Employees who are "ministers" for employment law purposes are exempt from FLSA minimum wage and compensation requirements. Also, "teachers," as defined by applicable law, may be exempt from FLSA minimum wage and compensation requirements. Be careful not to classify custodial, daycare-type employees as teachers if such a classification would run afoul of applicable FLSA and Department of Labor guidance and regulations.**

### Regular Rate of Pay

"**Regular rate**" of pay includes all remuneration for employment paid to, or on behalf of, the employee. The "regular rate" is a rate per hour. In a commission-based pay situation, it is necessary to compute the regular hourly rate of such employees during each workweek to determine the rate applicable for overtime calculation: **Dividing total remuneration for employment in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid.** When a commission is paid on a weekly basis, commission-based pay is added to the employee's other earnings for that workweek, and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek.

"Regular rate" does not include items of compensation such as:

- Sums paid as gifts or on special occasions;
- Payments made for occasions when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or similar cause;
- Reasonable traveling and other business expenses; and
- Contributions irrevocably made by an employer to a third person pursuant to a bona fide plan of insurance, retirement, etc.

**FLSA Executive, Professional, and Administrative Exemptions**

The **executive exemption** requires that the employee meet the following tests:

1. Compensated on a salary basis at a rate of not less than $684 a week;
2. Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
3. Who customarily and regularly directs the work of two or more other employees or their equivalent; and
4. Who has the authority to hire or fire other employees.

For item 3, directing volunteers is not the equivalent of employees.

The **professional exemption** requires that the employee meet the following tests:

1. The **primary duty** must be performing work that **requires advance knowledge**;
2. The advanced knowledge **must** be in a field of science or learning; and
3. The advanced knowledge **must** be customarily acquired by a prolonged course of specialized intellectual instruction.
4. Compensated on a salary or fee basis at a rate of not less than the federal minimum.

The phrase "**work requiring advanced knowledge**" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. **Advanced knowledge cannot be attained at the high school level.**

The **administrative exemption** requires that the worker meet the following tests:

1. The **primary duty** must be to perform office work or non-manual labor related to the management of the organization.
2. The primary duty must include the **exercise of discretion and independent judgment with respect to matters of significance to the organization**.
3. Compensated on a salary or fee basis at a rate of not less than $684 a week.

**Records Required for Non-Exempt Employees**

1. Name in full, as used for Social Security
2. Home address, including zip code
3. Date of birth, if under 19
4. Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.)
5. Time of day and day of week on which the employee's workweek begins. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice.

6. Regular hourly rate of pay for any workweek in which overtime pay is due: (a) Explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (b) the amount and nature of each payment which is excluded from the "regular rate"
7. Hours worked each workday and total hours worked each workweek
8. Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation
9. Total premium pay for overtime hours.
10. Total additions to or deductions from wages paid each pay period.
11. Total wages paid each pay period, and
12. Date of payment and the pay period covered by payment.

**Records Required for Bona Fide Executive, Administrative and Professional Employees**

For these exempt employees, the employer must maintain and preserve records containing all the information and data listed above, except paragraphs 6-10 and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.

**Records Retention**

The FLSA requires each employer to preserve payroll records for at least 3 years and the following records for at least 2 years:

1. *Basic employment and earnings records.* From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis when those amounts determine in whole or in part the pay period earnings or wages of those employees.
2. *Wage rate tables.* From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation.
3. Records of additions to or deductions from wages paid.

The records should be kept "safe" and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place of employment, such records must be made available within 72 hours following notice from the DOL.

**Posting of Notice**

Every employer employing any employees subject to the FLSA's minimum wage provisions must post and keep posted a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. The applicable posters may be found at the DOL website here: https://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

| **10 Commandments for Travel Time as Hours Worked (or Not)** |
|---|
| 1. **General Rule.** Normal travel from home to work and back is not worktime. |
| 2. **General Rule Elaborated.** Time spent in home-to-work travel by an employee in an employer-provided vehicle, or in activities performed by an employee that are incidental to the use of the vehicle for commuting, generally is not "hours worked" and, therefore, does not have to be paid. The general rule applies only if the travel is within the normal commuting area for the employer's business. An exception is where an employee travels home from work and then is called back to work for an emergency matter; that time in travel is compensable. |
| 3. **Travel During Work Hours.** Time spent traveling during normal work hours is considered compensable work time. |
| 4. **One-Day Assignment.** Travel from home to work on special one-day assignment in another city is compensable. Normal deductions for meal periods. |
| 5. **Travel is Principal Activity.** Time spent by an employee in travel as part of the employee's principal activity, such as travel from job site to job site during the workday, constitutes hours worked. |
| 6. **Travel to Meet or to Gather Tools/Work Equipment.** Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work and constitutes hours worked. |
| 7. **Travel from Another Job Site After Normal Workday.** If an employee normally finishes work on the premises at 5 p.m. and is sent to another job which the employee finishes at 8 p.m. and is required to return to the employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to the employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. |
| 8. **Overnight Travel and the Passenger Exception.** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is worktime when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. However, time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile may be disregarded from hours worked. |
| 9. **Mode of Transportation.** If an employee is offered public transportation but requests permission to drive a personal car instead, the employer may count as hours worked either the time spent driving the car or the time the employee would have had to count as hours worked during working hours if the employee had used the public conveyance. |
| 10. **Work While Traveling.** Any work which an employee is required to perform while traveling must be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer. |

## National Labor Relations Board Update

## Decision in *Stericycle, Inc. and Teamsters Local 628*

**Overview.** On August 2, 2023, the National Labor Relations Board issued its decision in *Stericycle, Inc. and Teamsters Local 628*, a collection of cases consolidated on the issue. The not-so-brief NLRB opinion is linked in the link below in this report.

In sum, the NLRB prescribed a new standard for evaluating whether an employer's workplace rules or policies tend to interfere with employees' exercise of rights under the NLRA Sections 7 and 8, being the National Labor Relations Act provisions that allows and encourages concerted conduct among employees in regard to work conditions, pay, and related matters.

**Review Standard for Workplace Rules / Policies.** Under the standard of *Stericycle*, if an employee could reasonably interpret a workplace rule or policy to be coercive (thus "chilling" the right to concerted action), then the burden shifts to the employer to justify the rule or policy. For the rebuttal, the employer must illustrate that the rule or policy advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a rule or policy that is more tailored.

Basically, through *Stericycle*, the NLRB states that the employer must "narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights." A workplace rule or policy remains overbroad when "it could be narrowed to lessen the infringement of employees' statutory rights while still advancing the employer's interest…" "They [employers] simply need to narrowly tailor those rules to significantly minimize, if not altogether eliminate, their coercive potential. If employers do so, their rules will be lawful to maintain."

**Employee's Perspective.** The *Stericycle* analysis is to be conducted from the employee's perspective: "[T]he Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in. The reasonable employee interprets rules as a layperson, not as a lawyer."

**Examples.** For those interested, footnote 46 of the opinion includes a long list of authorities and prior cases on the subject, including reference or allusion to policies that address employer policies that set an expectation of "**positivity**" or "**cooperation**" (for example) in the workplace, noting that such policies may be overbroad in that they are "not limited to conduct that would objectively be viewed as unprotected".

**Religious Organization Employer.** The employer in *Stericycle* was not a religious corporation. The NLRB's opinion in *Stericycle* provides no analysis of how to apply the new, so-called "chilling" rule to a religious organization employer's foundational faith-based tenets, nor does *Stericycle* explain how the Religious Freedom Restoration Act ("RFRA") or First Amendment may provide sanctuary for a religious organization employer for faith-based policy statements intended to advance sincerely held religious beliefs.

Generally, the RFRA, along with the First Amendment, arguably (if not indeed) provide both sword and shield for a religious organization employer's religious accommodation under the National Labor Relations Act. Briefly, the RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the burden furthers a "compelling

governmental interest" and is "the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(a)–(b). Additionally, the federal government "must accept the sincerely held . . . objections of religious entities." *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, – — U.S. ——, 140 S. Ct. 2367, 2383, 207 L.Ed.2d 819 (2020).

Determining where a religious organization employer's First Amendment rights end and an employee's NLRA rights control is not always a simple task and many times no bright-line or firm conclusion can be achieved, given the newness of the *Stericycle* decision and greyness of this area of law in the courts throughout the country.

**NLRB Blog / Report on *Stericycle*.** https://www.nlrb.gov/news-outreach/news-story/board-adopts-new-standard-for-assessing-lawfulness-of-work-rules

## TOPIC NO. 8. MINISTERS AND HOUSING ALLOWANCE

IRC section 107 sets forth a parsonage allowance for federal gross income tax purposes:

> In the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to the minister as part of compensation; or
>
> (2) the rental allowance paid to the minister as part of the minister's compensation, to the extent used by the minister to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

This gross income exclusion applies to "a minister of the gospel" and includes either the rental value of a home furnished to the minister or a comparable rental allowance.

The rental value of a parsonage or the rental allowance is excludable only for income tax purposes. The minister must include the amount of the rental value of a parsonage or the rental allowance for social security coverage purposes. The exclusion also does not apply to the computation of self-employment tax. However, in addition to the exclusion discussed above, a minister may still claim deductions for mortgage interest or real property taxes on a separate, personally-owned home.

Neither Section 107, nor the applicable Treasury Regulations, define the term "minister" for these federal income tax purposes. The United States Tax Court has repeatedly stressed this fact:

> There is no legislative definition in the statute of the phrase 'minister of the gospel' and the legislative history of the statute contains no clear statement as to the meaning ascribed to the term 'minister of the gospel.' The Commissioner's regulations under section 107 do not attempt to define the term 'minister of the gospel'.

*See Lawrence v. Comm'r*, 50 T.C. 494, 497 (1968) (emphasis added); *see also Congregation Ahavath Torah v. Englewood City*, 21 N.J.Tax 318 (2004), *Haimowitz v. Comm'r*, 73 T.C. Memo 1997-40 ("The regulations define only what a minister does, but not what a minister is.").

Whether an individual is "duly ordained, commissioned, or licensed" is a question on which government agencies must heavily defer to churches and church authority. "It is reasonably clear that the purpose of this reference in the regulations is to exclude self-appointed ministers…[b]ut there is in the regulations no test, or even a suggestion of it, that the ordination, commissioning, or licensing must come from some higher ecclesiastical authority." *See, e.g.*, *Salkov*, 46 T.C. at 196. "[M]inisterial authority can be conferred by the church or congregation itself. . . . If the statute and the regulations were so severely restrictive as to exclude ministers elected, designated, or appointed by a religious

congregation, there would be a serious question in our minds as to propriety of such an exclusion under the Constitution of the United States." *Id.*

The Internal Revenue Code and Treasury Regulations provide a series of activities that are considered "duties of a minister." Treasury Regulation § 1.107-1 provides that specific services the performance of which will be considered duties of a minister for purposes of section 107 include:

1. The performance of sacerdotal functions;
2. The conduct of religious worship;
3. The administration and maintenance of religious organizations and integral agencies; and
4. The performance of teaching and administrative duties at theological seminaries.

In the context of reviewing Treasury Regulation § 1.107-1, "the ministerial duties which qualify a minister for the allowance exclusion is [*sic*] very broad, thereby including most practicing ministers." *See Warnke v. U.S.*, 641 F.Supp. 1083, 1088 (E.D. KY 1986). Treasury Regulation § 1.107-1 also states that "the rules provided in § 1.1402(c)-5 will be applicable to [determining whether services are considered the duties of a minister of the gospel]." 26 C.F.R. § 1.107-1(a). The regulations provide a set of rules in this regard:

1. Whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of the particular religious body constituting his church or church denomination.
2. Whether services performed by a minister in the control, conduct, and maintenance of a religious organization relate to directing, managing, or promoting its activities.
3. If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

*See* 26 C.F.R. § 1.402(c)-5(b)(2).

These regulations were discussed at length by the Tax Court in *Wingo v. Commissioner*, 89 T.C. 64 (1987). The Tax Court summarized sections 1.107-1 and 1.402(c)-5 to create (basically) five factors:

1. Ministration of sacerdotal functions;
2. Conduct of religious worship;
3. Performing services in the control, conduct and maintenance of organizations within the congregation;
4. Whether the person is "duly ordained, commissioned, or licensed" (with only one of these being required); and
5. Whether the congregation itself considers the person to be a religious leader or minister (*i.e.*, whether the person is regarded as a spiritual official and leader in the faith).

## TOPIC NO. 9. MINISTERS AND EMPLOYMENT LAW

All ministers of the gospel for federal income tax purposes are likely ministers for employment law purposes, but the reverse is not true.

In the employment arena, "ministers" include a wider array of positions within the church, including musicians, teachers, and others that are not "ministers of the gospel" for federal income tax purposes.

If an employee is a minister for employment law purposes, secular courts and agencies have no jurisdiction to enforce employment laws regarding the employment of that minister. As a general rule, employment laws do not apply to employees who qualify as a minister for employment law purposes.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the United States Supreme Court discussed, at length, the issue of who constitutes a "minister" for employment law purposes. In *Hosanna*, the issue before the Court was whether a teacher at a religious school constituted a "minister" for purposes of determining whether she could bring an employment discrimination case. The Court acknowledged the existence of the so-called "ministerial exception", which is grounded in the Religion Clauses First Amendment and generally provides that ministers do not have the right to bring wrongful termination cases based on the church's right to determine who can act as a minister.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Religion Clauses protect the right of churches to decide matters of faith and doctrine without government intrusion. State interference in that sphere violates the free exercise of religion. Any attempt by government to dictate or influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion. *Our Lady of Guadalupe Sch. V. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020).

These rules protect a church's autonomy with respect to internal management decisions that are essential to the institution's central mission. *Id.* Under the "ministerial exception," courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious organizations. "Not all pre-*Hosanna-Tabor* decisions applying the exception involved 'ministers' or even members of the clergy." *Id.*

In sum, the ministerial exception helps preserve a church's independent authority in employment matters which is far different than a church and pastor's prerogatives for federal income tax purposes.

## TOPIC NO. 10. VOLUNTEERS

**Volunteer.** Pursuant to DOL regulations, a volunteer is basically an individual who performs service for civic, charitable, or humanitarian reasons, **without promise, expectation, or receipt of compensation for services rendered.** *See* 29 C.F.R. § 553.101 (definition for public agency volunteers). Other similar state and federal law definitions exist, mainly from court opinions. As a general rule, volunteers should not displace employees, and their service should be less than full-time.

**Avoid Gift Cards to Volunteers.** Gift cards are viewed as cash and, if given to a volunteer for services rendered, the organization may well transform a volunteer arrangement into an employment arrangement such that the value of the gift card must be recorded on IRS Form W-2 and other applicable employment withholding issues are triggered. By transforming a volunteer to an employee, the organization may then trigger violations of the minimum wage requirements of the Fair Labor Standards Act. The only situation that might receive a head-nod for a gift card is where the organization may provide a gift card to a volunteer as a gift at a "volunteer appreciation" or similar celebratory event. Even then, however, the same federal income tax issues can be triggered. Gift cards should not be given at or near the time the services are rendered or in exchange for services.

**No Performance Schedule for Incentive Consideration.** An organization is wise to not create an incentive system for providing volunteers anything of monetary value in exchange for a certain amount of services rendered. Such programs are (or will likely be) viewed as "disguised compensation." If an incentive program is desired, consider ways that the organization can honor the service without giving things of more than *de minimus* monetary value (and not cash or gift cards). For example, public recognition, in the form of a feature or other article, announcement, or social media post about the

person(s) and their volunteerism and faithful service for the ministry, volunteer-of-the-week/month/etc., specially-named awards, a volunteer recognition celebration/outing, networking event for volunteers, holiday gift basket or flowers.

## TOPIC NO. 11. AMERICANS WITH DISABILITIES ACT (briefly)

**ADA Prohibitions, Generally.**

Under the ADA, , it is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual in regard to:

1. demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
2. Rates of pay or any other form of compensation and changes in compensation;
3. Job assignments or position descriptions;
4. Leaves of absence, sick leave, or any other leave;
5. Fringe benefits available by virtue of employment;
6. Any other term, condition, or privilege of employment.

**Religious Entities.**

A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, on the basis of his or her disability. 29 C.F.R. § 1630.16.

## TOPIC NO. 12. RELIGIOUS ACCOMMODATION IN THE WORKPLACE

### A Win for Evangelical Christians and Other Faithful Employees in the Workplace – Title VII and Religious Accommodation

On June 29, 2023, the U.S. Supreme Court issued its unanimous opinion in the case of *Groff v. Dejoy*, No. 22-174, 600 U.S. __ (2023) (slip opinion linked here https://www.supremecourt.gov/opinions/22pdf/22-174_k536.pdf).

**Facts, Briefly.** Gerald Groff, an Evangelical Christian and a Rural Carrier Associate employed by the U.S. Postal Service, believed for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the transportation of worldly items. During his employment, the USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and USPS signed a memorandum of understanding with the National Rural Letter Carriers' Association (a union) that set out how Sunday and holiday parcel delivery would be handled, including by Rural Carrier Associates.

Mr. Groff refused to work on Sundays, and he was disciplined for it. He eventually resigned and soon thereafter sued the USPS under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice without undue hardship on the conduct of USPS's business. *See* 42 U. S. C. §2000e(j) (defining "religion" under Title VII).

The federal district court granted summary judgment to, and ruled in favor of USPS. The Third Circuit Court of Appeals affirmed, basing its decision on the U.S. Supreme Court opinion of *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63, 84 (1977) and finding that "undue hardship," as used in Title VII, meant "that requiring an employer 'to bear more than a *de minimis* cost' to provide a religious

accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18; *see also* 29 C.F.R. § 1605.2(e) ("An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours **if the employer can demonstrate that the accommodation would require 'more than a *de minimis* cost'**") (emphasis added).

The U.S. Supreme Court granted Mr. Groff's petition for writ of certiorari.

**Issue.** Under 42 U. S. C. § 2000e(j), is an "undue hardship" established when an employer shows that it bears more than a *de minimis* cost to provide a religious accommodation, or is a higher burden required for an employer to lawfully refuse to accommodate a religious belief of an employee?

**Primary Holding.** "Undue hardship," as used in 42 U. S. C. § 2000e(j), is shown when a burden is substantial in the overall context of an employer's business. "More than a *de minimis* cost" does not suffice to establish "undue hardship" under Title VII.

**Key Points of Law.**

**Title VII.** Title VII makes it an unlawful employment practice for an employer to fail or refuse to hire or terminate any individual, or otherwise discriminate against any individual, because of the individual's race, color, **religion**, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1). Title VII applies to, among other classes of employers, private-sector employers with 15 or more employees.

**Religion.** The term "**religion**," as used in Title VII, "includes all aspects of religious observance and practice, as well as belief, **unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.**" *Id.* at § 2000e(j) (emphasis added). Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations.

**Employer's Burden.** "[A]n employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. . . . [A]n employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff*, 600 U.S. __ (2023) (slip opinion pg. 18).

**Judicial Application.** Courts must apply the test in a manner that takes into account all relevant factors, such as the particular accommodations at issue and their practical impact on the employer, other workers, and operations, all in light of the nature, size and operating cost of an employer. "[C]ourts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test." *Id.* at pg. 19.

**Considerations of "Undue Burden."** An accommodation's effect on co-workers may have ramifications for the conduct of the employer's business. "An employer who fails to provide an accommodation has a defense only if the hardship is 'undue,' and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered 'undue.' If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Id.* at pg. 20.

**Insights.** The holding in *Groff* is a victory for employees with sincerely held religious beliefs who request that their employer reasonably accommodate the practice of those beliefs. Following the *Groff* decision, employers will be wise to employ a careful analysis of how an employee's request for religious

accommodation will impact the employer, other workers, and operations, all in light of the nature, size and operating cost of an employer. The Supreme Court concluded its unanimous opinion as shown below, which illustrates that the lower courts, including the lower court in *Groff*, will be tasked with establishing, on a case-by-case basis, the exterior confines of the high Court's holding:

> Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test. . ., and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

## TOPIC NO. 13. MINUTES MATTER

**Minutes Matter**

1. Minutes should be a self-contained document that evidence actions taken at a properly noticed and valid meeting of the group, board, or committee.

2. Minutes should include information that a meeting was properly called and noticed, that a quorum existed, and that all decisions were approved by the required number of qualified voters attending the meeting, in person, or, if permitted, by proxy or electronic means.

3. Generally, every meeting must be called by one authorized to call the meeting and in accordance with the bylaws or applicable authority (statute, board directed, or other as applicable).

4. The minutes should contain everything necessary to prove that the decisions were made at a properly called and noticed meeting, along with the action taken. Items to include:

   a. Identify organization
   b. Name and kind of meeting – annual, regular, special, committee, etc.
   c. Date and place of the meeting (location or electronic), and the time the meeting began.
   d. Who called the meeting.
   e. Identify the chair and the individual serving as secretary, or their substitutes.
   f. The secretary of the meeting generally may provide an affirmation that a quorum exists, including the number of voters present (in person or by proxy or on call, if permitted) at the meeting and the total number of voters entitled to vote.
   g. A copy or description of the notice given for the meeting; the notice should be maintained in the corporate records, if not attached to the minutes.
   h. Names of voting members attending (such as "All of those attending were entitled to vote, unless otherwise stated."), and confirm whether a quorum was present.
   i. Names of guests and their subject matter.
   j. Note the presiding officer's or chair's call to order.
   k. Record event of disclosure of legal considerations and any legal instructions that may be prescribed and in place for meetings.

l. Whether minutes from previous meeting(s) were approved/corrected, note corrections.

m. For Motions or Resolutions, note:

1. Fairly precise statement of resolution or motion presented, plus any amendments.
2. Identify who made the motion and any amendment.
3. Identify any abstentions to appropriately evidence management of conflicts or other situation where an abstention is appropriate.
4. The result of the vote, though not the number of for/against. A member may request that his/her dissent be recorded in the minutes, and, if so, record it.

n. Reports:

1. Record the name of the report (e.g., Financial, Audit, Marketing, etc.).
2. Identify the name of the individual(s) providing the report.
3. Record any action taken on the report (e.g., motions to accept financials for audit).
4. If the report is in writing, attach it to the minutes, or indicate in the minutes where the report will be maintained. Oral reports should be summarized briefly.

o. If applicable, identify names of nominees for elected offices, and results of votes.

p. Other actions, assignments, deadlines, and recommendations are briefly recorded.

q. Appropriately recording discussion points is an art and is very helpful and important for the institutional memory of the organization and for those not in attendance. Discussion summaries should be brief but sufficient for future reference to understand the topic and the general direction desired by the organization on the issue. Competing viewpoints should be included but generally not individual viewpoints or opinions.

r. Adjournment, including time adjourned and/or time for reconvening the meeting.

s. Secretary's signature (may be electronic), after the minutes are approved.

5. Minutes should not include:

a. Opinion or judgments – Examples: "well done report" or "heated discussion."

b. Criticism or accolades: Criticism of members, good or bad, should not be included unless it takes the form of an official motion. Thanks or expression of appreciation should only be included if there was a clear consensus of meeting participants.

c. Individual viewpoints or opinions.

d. Extended rehash of reports. The reports speak for themselves.

e. Identity of how any one member voted, unless a participant asks that his/her vote/abstention be recorded.

f. Executive Session Discussion - The minutes should reflect that the members went into and out of executive session. Executive sessions topics include discussion about personnel matters, legal issues, claims, litigation, and other on case-by-case basis.

**TEMPLATE (EXAMPLE ONLY)**

**Minutes of _____, 20__ Board of Directors [Elders, Trustees, etc.] Meeting held at ____ [location or electronic means identification], per Notice**

**BOARD MEMBERS PRESENT:**

**BOARD MEMBERS ABSENT:**

**STAFF/GUEST ATTENDEES (None of whom voted on any matters):**

1. **Call to Order.** The meeting was called to order at _____ __.m. by _____, who served as Chair of the meeting. After a roll call, it was determined that a quorum was present and, accordingly, the meeting proceeded to business.
2. **Approval of Minutes.** The minutes of the _____, 20__ Board Meeting were presented for approval. Motion by _____ to approve the minutes as presented. Motion was seconded. After time for discussion, the Board voted unanimously [change vote as needed] to approve the minutes as presented.
3. **Program Committee.** The Program Committee report was presented by _____. In connection with this report, the following items were reviewed or discussed: _____.
4. **Finance Committee.** _____ of the Finance Committee, presented the financial report. In connection with this report, the following items were presented: the _____ 20____ and Year-To-Date Financials, a Cash Flow Projection. Upon motion duly made by _____ and a second, and after discussion, the financials and report were unanimously [change vote as needed] accepted as presented.
5. **Other Committee Updates.**
6. **Executive Director Report.** The Executive Director's report was presented by _____. The following items were reviewed: _____ [or attach list]
7. **Other Board Resolutions (as needed).** _____ motioned that the Org's _____ (i.e., identify officer, agent or representatives) is/are hereby authorized and directed to take such further action as may be necessary and appropriate to effect the foregoing resolutions. Upon Motion duly made, seconded, and after discussion, the motion was approved unanimously.

There being no further business to become before the Board, a motion to adjourn was presented and Chair _____ adjourned the meeting at approximately __:__ _.m.

Respectfully Submitted,

_____

Secretary

# TOPIC NO. 14. CHURCH AUDITS

## Church Inquiries and Examinations by the IRS – A look at Section 7611 and *God's Storehouse Topeka Church*

**IRS Inquiries and Examinations, Generally – Sections 6201 and 7604.** Generally, the IRS is authorized and required by 26 U.S.C. § 6201(a) "to make the inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code.

To executed on that requirement, Congress has granted the IRS broad latitude to issue summonses "'[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax ..., or collecting any such liability.'" *United States v. Clarke*, 573 U.S. 248, 250 (2014) (quoting 26 U.S.C. § 7602(a)). The IRS has the authority to issue summonses to the subject taxpayer and to third parties who may have relevant information. *See* 26 U.S.C. § 7602(a)(2); *Standing Akimbo, LLC v. United States*, 955 F.3d 1146, 1154 (10th Cir. 2020). If a person or entity fails to comply with a summons, the IRS can bring an enforcement proceeding in a district court. 26 U.S.C. § 7604.

The IRS must have a good faith basis for issuing a summons under section 6201. To determine if a good faith basis exists, the courts evaluate these four factors: (1) whether the investigation will be conducted pursuant to a legitimate purpose, (2) whether the inquiry may be relevant to the purpose, (3) whether the information sought is not already within the IRS's possession, and (4) whether the administrative steps required by the Internal Revenue Code have been followed. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964).

**Church Inquiries and Examinations, Section 7611.** Section 7611 of the Code provides restrictions on IRS inquiries and examinations of churches, including the IRS's ability to examine "church records." *See* 26 U.S.C. § 7611(a), (h) (defining "church records" as "all corporate and financial records regularly kept by a church, including corporate minute books and lists of members and contributors."). Under section 7611, the IRS may begin a church tax inquiry only if: (A) reasonable belief requirements and (B) specific notice requirements have been met.

**Reasonable Belief Requirements.** The "reasonable belief" requirements are met "if an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church—(A) may not be exempt, by reason of its status as a church, from tax under section 501(a), or (B) may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation under this title." *Id.* at § 7611(a)(2)-(a)(2)(B).

**Inquiry Notice Requirements.** The notice requirements are met if, before beginning such inquiry, the IRS provides written notice to the church of the beginning of such inquiry. The notice must contain: an explanation of the concerns which gave rise to such inquiry, the general subject matter of such inquiry, and a general explanation of "the applicable administrative and constitutional provisions with respect to such inquiry (including the right to a conference with the Secretary before any examination of church records), and provisions of this title which authorize such inquiry or which may be otherwise involved in such inquiry." *Id.* at § 7611(a)(3)-(a)(3)(B)(ii)(II).

**Restrictions on Examination.** Section 7611 also contains restrictions on the scope of the examination. The examinations may be made "only (A) in the case of church records, **to the extent necessary** to determine the liability for, and the amount of, any tax imposed by this title, and (B) in the case of religious activities, to the extent necessary to determine whether an organization claiming to be a church is a church for any period." *Id.* at § 7611(b)(1)-(1)(B) (emphasis added). At least 15 days before the beginning of a church examination, the IRS must provide the required notice to both the

church and the appropriate regional counsel of the IRS, and the church must be given a "reasonable time" to participate in a conference, but only if the church requests such a conference before the beginning of the examination. *Id.* at § 7611(b)(2)(B); *see id.* at § 7611(b)(3) (contents of examination notice), (d) (limitations on revocation of tax-exempt status of a church).

**Exceptions for Church Examinations.** Section 7611 is made expressly inapplicable to five categories of inquiries or examinations. The procedures section 7611 shall not apply to:

(1) any criminal investigation,

(2) any inquiry or examination relating to the tax liability of any person other than a church,

(3) any assessment under section 6851 (relating to termination assessments of income tax), section 6852 (relating to termination assessments in case of flagrant political expenditures of section 501(c)(3) organizations), or section 6861 (relating to jeopardy assessments of income taxes, etc.),

(4) any willful attempt to defeat or evade any tax imposed by this title, or

(5) any knowing failure to file a return of tax imposed by this title.

*Id.* at § 7611(i)-(i)(5); *God's Storehouse Topeka Church v. United States*, No. 22-CV-04014-DDC-TJJ, 2022 WL 17830849, at *10 (D. Kan. Oct. 7, 2022) (finding that "political campaign intervention is a legitimate purpose for an IRS investigation pursuant to section 7611 and the church's bank records in the matter were deemed relevant to that purpose."); *St. German of Alaska E. Orthodox Cath. Church v. United States*, 653 F. Supp. 1342, 1349 (S.D.N.Y. 1987), *aff'd,* 840 F.2d 1087 (2d Cir. 1988).

***St. German of Alaska E. Orthodox Catholic Church v. United States.*** In *St. German*, the IRS investigation involved a criminal and civil investigation of a reverend in the St. German church and abbot of a monastery, to determine his correct income tax liabilities and to inquire whether he committed any offenses under the Internal Revenue laws with respect to certain real estate transactions and the reverend's potential aiding and abetting in the preparation of false tax returns of donors due to inflated charitable contribution deductions. *See St. German of Alaska E. Orthodox Cath. Church v. United States*, 653 F. Supp. 1342, 1345 (S.D.N.Y. 1987), *aff'd,* 840 F.2d 1087 (2d Cir. 1988).

Leaning on section 7611, the church, the monastery, and their wholly-owned real estate corporation sought to quash "third-party recordkeeper" summonses served on them. The court denied their requests, stating, "Not only does the section [7611] not apply to an investigation of a person other than a church, it does not apply to any criminal investigation or any inquiry into a willful attempt to evade a tax or a knowing failure to file an income tax return under title 26." *Id.* at 1349 (stating that the investigation was to determine whether the reverend "knowingly and willfully failed to file income tax returns, attempted to evade the payment of income taxes, or aided and abetted others in the preparation of false income tax returns.").

***God's Storehouse Topeka Church v. United States.*** In *God's Storehouse*, God's Storehouse Topeka Church (the "Church") was founded in 2009 by Richard Kloos and his wife, Pennie Kloos, and it was incorporated as a Kansas not-for-profit corporation in 2010 by Mr. Kloos and two other individuals. Mr. Kloos was President of the Church and a member of the Board of Directors. The Church self-declared as a church rather than filing an Application for Recognition of Exemption Under section 501(c)(3) of the Internal Revenue Code (IRS Form 1023). *God's Storehouse Topeka Church v. United States*, No. 22-CV-04014-DDC-TJJ, 2022 WL 17830849, at *1.

The Church operated a thrift store that accepted donated goods and sells them to the public. In the thrift store is a space set up as a coffee shop where the Church sold coffee at cost. The Church's website did not reveal any information about church services, a list of ministers, statements of creed, religious publications, or religious education.

Mr. Kloos is a pastor of the Church, and both Mr. and Mrs. Kloos were paid gross wages in 2019 and 2020. The Church filed multiple Forms W-2 and Forms 941 indicating it withheld employment taxes from wages paid to other employees but did not withhold any employment taxes from the gross wages of Mr. and Mrs. Kloos in 2019 and 2020. Also, Mr. Kloos campaigned for and was elected to the Kansas State Senate in November 2020. His campaign purchased and displayed yard signs that read "Rick Kloos Kansas Senate" above the words "Founder of God's Storehouse." Mr. Kloos swore the Church did not create or in any way contribute to any campaign yard signs. *Id.* at *1-2.

The IRS assigned an agent to determine whether the Church may have, among other things, engaged in political campaign intervention and if a church tax inquiry was warranted. The Commissioner, Tax Exempt and Government Entities Division, approved the inquiry, and the agent issued a Notice of Church Tax Inquiry ("NCTI"). It informed the Church that the IRS was issuing the notice because of concerns that the Church was operating as a thrift shop rather than as a church, may have engaged in prohibited political campaign intervention in 2020, may be liable for unrelated business income tax ("UBIT") from the operation of a coffee shop, and may be liable for additional Form 941 employment taxes for wages paid to Mr. and Mrs. Kloos. The NCTI included a list of questions to which the IRS requested the Church's response, but did not request any documents. The Church responded to the NCTI with answers to the questions, as well as copies of various documents.

After reviewing the Church's response to the NCTI, the agent sought approval to begin a tax church examination, which was approved. The agent issued a Notice of Church Tax Examination ("NCTE") to the Church. When a pre-examination conference did not resolve the IRS's concerns, the IRS moved forward with the examination. An Information Document Request ("IDR") was issued to the Church, which sought copies of the Church's bank statements. The Church objected to producing the bank statements, stating the request was overly broad.

The IRS sent IRS Letter 3164-E to the Church advising of the IRS's intent to contact third parties and informing the Church of its right to request a list of people contacted. The IRS sent a letter to the Church advising that the documents requested in the IDR, including bank statements, were delinquent, and issued a second IDR seeking the Church's bank statements. During the course of the IRS's church tax inquiry and examination, the Church did not produce its 2019 and 2020 bank statements, but the Church voluntarily provided nineteen categories of documents and information to the IRS.

The IRS issued a third-party administrative summons served upon the Church's bank, directing the bank to produce fourteen categories of records pertaining to all bank accounts in the Church's name. The Church sought to quash the summons.

The court found that the third-party recordkeeper summons fell within the section 7611(h)(4)(B)(i) statutory exception to "church records," and therefore must be analyzed under the "*Powell* factors" and not the heightened "to the extent necessary" relevancy standard provided in section 7611(b)(1)(A). *See Powell*, 379 U.S. at 57-58 (mentioned above). The *God's Storehouse* court held that the IRS made *a prima facie* showing of compliance with the four *Powell* factors, and the Church failed to meet its burden to refute the IRS's showing under any of the *Powell* factors, or establish an affirmative defense to enforcement of the third-party summons. *God's Storehouse Topeka Church*, 2022 WL 17830849, at *5-10 (finding that "political campaign intervention is a legitimate purpose for

an IRS investigation pursuant to section 7611 and the church's bank records in the matter were deemed relevant to that purpose.").

**Insights.** Churches are not above the law, especially tax laws, even though "paying income taxes" is not likely within the statement of faith or mission statement of most church entities. The IRS's obligation to enforce tax laws and the broad authority given by Congress to the IRS in order for it to execute on that legal duty should give all churches pause, if not extra incentive (if needed), to ensure that the church's organization and operation are within the scope of that which is permitted for exemption from federal income tax under section 501(c)(3) of the Code.

# TOPIC NO. 15. TITLE VII PROHIBITIONS & RELIGIOUS FREEDOM

## I. INTRODUCTION.

The contents below were presented at the State Bar of Texas' 21st Annual Governance of Nonprofit Organizations (August 31-September 1, 2023). Freeman Law attorney, Cory Halliburton, served as Course Director for the program and presented this topic for continuing legal education and ethics credits. The content is also available at https://freemanlaw.com/the-righteous-stand-bold-like-a-lion-bostock-religious-organization-employers-and-title-vii/.

This paper addresses the aftermath of the monumental U.S. Supreme Court opinion of *Bostock v. Clayton County*, —— U.S. ——, 140 S.Ct. 1731 (June 15, 2020), the ongoing collision of religious freedom enjoyed (or not) by religious organization employers, and the protections afforded individual employees pursuant to Title VII of the Civil Rights Act of 1964.

## II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

It is an unlawful employment practice for a covered employer to fail or refuse to hire or terminate any individual, or otherwise discriminate against any individual, because of the individual's race, color, **religion**, **sex**, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1).

With limited exceptions, a covered employer means a private sector "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person[.]" *See id.* at § 2000e(b).

Either the EEOC or an affected employee (if the EEOC declines to act) is statutorily authorized to bring an enforcement action. *Id.* § 2000e-5(f)(1).

## III. BOSTOCK V. CLAYTON COUNTY, IN BRIEF.

In *Bostock*, the Supreme Court addressed the legal issue of whether "sex," as that term is used in 42 U.S.C. § 2000e-2(a)(1), includes an employee's sexual orientation. Justice Neil Gorsuch began the *Bostock* opinion as follows:

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress out-lawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

*Bostock*, 140 S.Ct. at 1737.

In line with Justice Gorsuch's eloquent introduction, a majority of the Court agreed that Title VII's prohibition of discrimination in employment because of an employee's "sex" includes a prohibition of discrimination based on the employee's sexual orientation, including homosexuality or transgender.

"'Title VII protects every American, regardless of sexual orientation or transgender status. It simply requires proof of sex discrimination.' That was true before *Bostock*, and it remains true after *Bostock*. Under *Bostock*, transgender discrimination is a form of sex discrimination under Title VII. But a plaintiff claiming transgender discrimination under *Bostock* must plead and prove just that—discrimination." *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 603 (5th Cir. May 14, 2021), *cert. denied,* 211 L. Ed. 2d 401, 142 S. Ct. 713 (2021) (quoting *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring)).

The Court in *Bostock* did not, however, address how or when Title VII and the holding of *Bostock* may be applied to religious organizations.

## IV. TITLE VII'S EXCEPTIONS FOR RELIGIOUS ORGANIZATIONS.

The term "**religion**," as used in Title VII, "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *See* 42 U.S.C. § 2000e(j).

Notably, no "religious corporation" employer was involved in *Bostock*.

However, the First Amendment of the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. 1. And, Title VII recognizes the religious rights afforded by the First Amendment, and so as not to infringe on that fundamental right, Title VII contains exceptions applicable to religious organizations:

> [Title VII's anti-discrimination provisions] . . . **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.

42 U.S.C. § 2000e-1(a) (emphasis added).

Similarly, Title VII provides religious educational institutions an exemption from faith-based employment decisions:

> [I]t **shall not** be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning **to hire and employ employees of a**

> **particular religion if** such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, **or** other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e)(2) (emphasis added).

In *Bostock*, the Supreme Court was not faced with the opportunity to address the statutory exception for religious organizations, but the Court noted as follows:

> Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. **We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.** But worries about how Title VII **may** intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers. . . .
>
> **So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.**"

*Bostock*, 140 S.Ct. at 1753-54 (quoting *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012)) (emphasis added).

Since Bostock, the Supreme Court has not had the occasion to address the "other employers in other cases" that the Court alluded to in Bostock. Those cases, to the extent they exist, remain in lower courts, and the scope of religious freedom pursuant to section 2000e-1(a) of Title VII remains unsettled.

## V. AFTERMATH OF *BOSTOCK* – EEOC GUIDANCE.

Following Bostock, the Equal Employment Opportunity Commission published its Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, which was in supplement to the EEOC's earlier-promulgated guidance document, Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Workers (Apr. 29, 2014) (https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender).

As of July 5, 2023 the Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity guidance was available at https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.

The EEOC guidance directs employers to recognize same-sex marriage on the same terms as opposite-sex marriage. See U.S. Equal Emp. Opportunity Comm'n, Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Workers (Apr. 29, 2014) (https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender) (note, as of July 5, 2023, the website includes the following disclaimer: "As a

result of the Supreme Court's decision in Bostock v. Clayton County, we are currently working on updating this webpage."). That EEOC guidance document also requires that employers allow employees into restrooms that correspond to the employees' gender identity, no matter the individual's biological sex, whether the individual has had a sex-change operation, or whether other employees have raised objections or privacy concerns.

In the Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity guidance, the EEOC provides the following with respect to the collision of Bostock and religious freedom:

> Title VII allows "religious organizations" and "religious educational institutions" . . . to hire and employ people who share their own religion (in other words, it is not unlawful religious discrimination for a qualifying employer to limit hiring in this way). Courts also apply a "ministerial exception" that bars certain employment discrimination claims by the employees of religious institutions because those employees perform vital religious duties at the core of the mission of the religious institution. **Courts and the EEOC consider and apply, on a case by case basis, any religious defenses to discrimination claims, under Title VII and other applicable laws.** For more information on those defenses and other issues related to religious organizations and discrimination based on religion, see EEOC Compliance Manual, Section 12: Religious Discrimination.

The EEOC Compliance Manual, Section 12: Religious Discrimination (as of July 5, 2023 was available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination) provides that the "religious organization" exemption to Title VII's prohibition to religious discrimination "applies only to those organizations whose 'purpose and character are primarily religious,' but to determine whether this statutory exemption applies, courts have looked at 'all the facts,' considering and weighing 'the religious and secular characteristics' of the entity." *Id.* at § C.1 (citing *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *Garcia v. Salvation Army*, 918 F.3d 997, 1003 (9th Cir. 2019); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007); *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997)) (emphasis added).

While the EEOC guidance remains available and online, the EEOC "guidance" website for Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity expressly states: "In October 2022, a federal district court vacated this document in Texas v. EEOC et al., 2:21-CV-194-Z (N.D. Tex.)." *See Texas v. Equal Emp. Opportunity Comm'n*, No. 2:21-CV-194-Z, 2022 WL 4835346, at *1 (N.D. Tex. Oct. 1, 2022) (vacating the EEOC guidance).

## VI. AFTERMATH OF *BOSTOCK* – JUDICIAL OPINIONS.

> **"The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning."**

*Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) (emphasis added).

Indeed, Justice Alito's foreshadowing proved true.

Following *Bostock*, "[c]ourts do not agree on the scope of this [Title VII] exemption or on the entities it covers." *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571, 590 (N.D. Tex. 2021), *affirmed in part, reversed in part, and remanded by Braidwood Management, Inc. v. EEOC*, No. 22-10145, 2023 WL 4073826 (5th Cir. June 20, 2023); *see also Olivarez v. T-mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. May 14, 2021), *cert. denied,* 211 L. Ed. 2d 401, 142 S. Ct. 713 (2021) (relying on *Bostock* and noting that "a plaintiff who alleges transgender discrimination is entitled to the same benefits—but also subject to the same burdens—as any other plaintiff who claims sex discrimination under Title VII.").

Some state courts have expressly rejected the holding in *Bostock* when applied to state law governing discrimination in employment based on transgender or sexual orientation. Other courts are firm to maintain the confines of Title VII's laundry list of protected classes. *See Stollings v. Texas Tech Univ.*, No. 5:20-CV-250-H, 2021 WL 3748964, at *11 (N.D. Tex. Aug. 25, 2021) (concluding that the plaintiff "is protected on the basis of sex, which includes sexual orientation in light of *Bostock*, but sexual orientation does not constitute a distinct class").

In March 2023, a Louisiana court of appeals refused to apply *Bostock's* holding to a claim of sexual orientation brought pursuant to Louisiana's anti-discrimination-in-employment statute. *See Gauthreaux v. City of Gretna*, 2023 WL 2674191, No. 22-CA-424 (La. App. 5th Cir. March 29, 2023). In *Gauthreax*, the court found:

> [A]lthough persuasive, our state courts are not bound by *Bostock's* interpretation of Title VII in interpreting La. R.S. 23:332. As there is no binding federal or state law or jurisprudence on point, and because the legislature has not seen fit to amend La. R.S. 23:332 to specifically include protection from employment discrimination because of a person's sexual orientation, we decline to extend *Bostock's* reasoning to La. R.S. 23:332 to find that it allows for protection from employment discrimination because of a person's sexual orientation.

*Gauthreaux*, 2023 WL 2674191, at *4-5.

In *Vroegh v. Iowa Department of Corrections*, 972 N.W.2d 686 (Iowa 2022), the plaintiff asserted both sex discrimination and gender identity discrimination for denying plaintiff (born a female and transitioning to male) use of the men's restrooms and locker rooms and for denying certain healthcare benefit coverage that were provided to non-transgender employees. 972 N.W.2d at 694. The case worked its way to the Iowa Supreme Court, and that court considered whether a lower court erred by submitting a "sex discrimination" instruction to a jury in a case.

The Iowa Civil Rights Act in question prohibited discrimination in employment based on ten specific characteristics, including "sex, sexual orientation, [and] gender identity[.]" IOWA CODE § 216.6(1)(a). The Iowa Civil Rights Act did not define "sex," but it did define "gender identity" as the "gender-related identity of a person, regardless of the person's assigned sex at birth." *Id.* § 216.2(10). Thus, similar to the Supreme Court in *Bostock*, the Iowa Supreme Court was faced with the question of *Does discrimination on the basis of "sex" include discrimination based on a person's transgender status?*

The Iowa Supreme Court answered in the negative. In doing so, the court found *Bostock* as merely persuasive and expressly rejected its majority opinion:

> **We disagree with the *Bostock* majority on this issue and thus reject [plaintiff's] argument advancing it.** Discrimination based on an individual's gender identity does not equate to discrimination based on the individual's male or female anatomical characteristics at the time of birth (the definition of "sex"). An employer could discriminate against transgender individuals without even knowing the sex of the individuals adversely affected. But that employer, lacking knowledge of the male or female anatomical characteristics of any of the effected employees, would not (and could not) be engaging in unlawful discrimination based on the individual's "sex." We see no reason to jettison the interpretive analysis in [prior Iowa Supreme Court precedent] construing "sex" according to its common usage and to include "transgender" status or other characteristics similarly attenuated from an individual's male or female anatomical characteristics, particularly considering that the Iowa Civil Rights Act provides separate protections based on gender identity. . . . We effectuate the statute's "purposes" by giving a fair interpretation to the language the legislature chose; nothing more,

> nothing less. "Sex" doesn't expand to "gender identity" (or anything other than "sex") simply because the statute contains an instruction that it be "construed broadly." **We may not through the judicial metamorphosis of words declare a Hulk where the legislature placed merely Bruce Banner.**

*Vroegh*, 972 N.W.2d at 702 (emphasis added); *see also Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425, at *8 (N.D. Tex. Nov. 11, 2022) (refusing to apply *Bostock's* holding to a claim brought pursuant to Title IX (42 U.S.C. § 18116(a)) and noting, Title IX is not Title VII, and "on the basis of sex" is not "because of sex."); *Mykland v. CommonSpirit Health*, No. 3:21-CV-05061-RAJ, 2021 WL 4209429, at *8-9 (W.D. Wash. Sept. 16, 2021) (refusing to apply *Bostock* to the state of Washington's Law Against Discrimination due to the state statute's mutually exclusive definitions of "sex" and "sexual orientation"). *But see Maner v. Dignity Health*, 9 F.4th 1114, 1122 (9th Cir. 2021), *cert. denied*, 211 L. Ed. 2d 606, 142 S. Ct. 899 (2022) (refusing to expand the meaning of "sex," as used in Title VII, to include sexual activity, and finding that a plaintiff's contention that "sex" means his having sex with a paramour contradicts canons of statutory construction).

Four months after the *Bostock* opinion was issued, a federal district court in Indiana (which is within the Seventh Circuit Court of Appeals) addressed—in a motion to dismiss procedure (Fed. R. Civ. P. 12(b)(6))—whether a religious school's decision to not renew an employee's contract because of her marriage to another woman was actionable under Title VII, Title IX, and Indiana state law, or whether the employer school was exempt from the claims pursuant to 42 U.S.C. § 2000e-1(a). *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1198 (S.D. Ind. 2020).

The school asserted that the same-sex marriage violated the school's religious beliefs. The district court found that, based on the pleadings, the employee could maintain the claims because she asserted a claim for sex discrimination, being a distinct protected class from religion-based discrimination. The religious employer immediately appealed, but the Seventh Circuit Court of Appeals dismissed the appeal for lack of jurisdiction. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, No. 20-3265, 2021 WL 9181051 (7th Cir. July 22, 2021). In a later appeal, the Seventh Circuit held that, as a matter of law, the employee in issue was a "minister" for employment law purposes and thus, pursuant to *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), the secular courts lacked jurisdiction to adjudicate the employment-related claims. *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931 (7th Cir. 2022).

A year after the *Bostock* opinion was issued, a federal district court in North Carolina denied a Catholic school's motion for summary judgment assertion of First Amendment privileges in terminating the employment of what the court described as a "gay," male drama teacher. The court noted:

> In this case, Charlotte Catholic High School seeks a variety of First Amendment and statutory protections to enable the school to terminate the employment of a substitute drama teacher—Mr. Lonnie Billard ("Plaintiff"). The school claims that he was fired for his support of gay marriage—something the Catholic Church opposes. Plaintiff claims he was fired, or at least suffered a more severe employment action, because of who he is as a gay man. The Court respects the sincerity of the Catholic Church's opposition to Plaintiff's actions. **With a slightly different set of facts, the Court may have been compelled to protect the church's employment decision. However, where as here, Plaintiff lost his job because of sex discrimination and where he was working as a substitute teacher of secular subjects without any responsibility for providing religious education to students, the Court must protect Plaintiff's civil and employment rights.**

*Billard v. Charlotte Cath. High Sch.*, No. 3:17-CV-00011, 2021 WL 4037431, at *1 (W.D.N.C. Sept. 3, 2021) (emphasis added). As of June 16, 2023, the *Billard* district court decision was pending on appeal in the Fourth Circuit Court of Appeals.

In August 2022, a federal district court in Maryland issued an opinion in the case of *Doe v. Catholic Relief Services*, 618 F.Supp.3d 244 (D. Md. Aug. 3, 2022), *on reconsideration in part*, No. CV CCB-20-1815, 2023 WL 155243 (D. Md. Jan. 11, 2023). There, Catholic Relief Services asserted that, as a matter of law, its decision to terminate spousal health insurance benefits to an employee was protected by 42 U.S.C. § 2000e-1(a) because the employee was "a gay man married to another man" and that conduct was forbidden by the Catholic faith. In denying Catholic Relief Services request for relief, the court noted:

> A plain reading of § 702(a) [42 U.S.C. § 2000e-1(a)] reveals Congress's intent to protect religious organizations seeking to employ co-religionists, but the reading urged by CRS would cause a relatively narrowly written exception to swallow all of Title VII, effectively exempting religious organizations wholesale. Had Congress wished to exempt religious organizations in this manner, it could have done so, but it "plainly did not." Accordingly, Title VII § 702(a) does not apply in this case.

*Catholic Relief Services*, 618 F.Supp.3d at 253.

More recently is the case of *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2021), *affirmed in part, reversed in part, and remanded by Braidwood Management, Inc. v. EEOC*, No. 22-10145, 2023 WL 4073826 (5th Cir. June 20, 2023). There, two Texas employers—Braidwood Management, Inc. ("Braidwood") and Bear Creek Bible Church ("Bear Creek")—asserted that Title VII, as interpreted in the EEOC's guidance and *Bostock*, prevented Braidwood and Bear Creek from operating their places of employment in a way compatible with their Christian beliefs.

Braidwood was a management company controlled and owned, essentially, by an individual: Steven Hotze ("Hotze"). Hotze operated his companies as "Christian" businesses. Hotze did not permit his companies to employ individuals who engage in behavior Hotze considered sexually immoral or gender non-conforming, nor did he allow the company to recognize homosexual marriage. Braidwood enforced a sex-specific dress code applied to "biological" men and women. "Cross-dressing" was strictly forbidden. *See Bear Creek*, 571 F. Supp. 3d at 588-89.

Bear Creek was a nondenominational church whose bylaws state that "marriage is exclusively the union of one genetic male and one genetic female." Bear Creek required its employees to live according to its professed views on Biblical teaching, and the church refuses to hire individuals who are "practicing homosexuals, bisexuals, crossdressers, or transgender or gender non-conforming individuals." *See id.* at 587-88.

Braidwood and Bear Creek asked the court to certify a class of similarly-situated "church-type" employers and "religious-type employers" and to declare those employers' ability to require their employees to live by the teachings of the Bible on matters of sexuality and gender. 571 F. Supp. 3d 571. The plaintiffs requested a religious exemption from, and a declaration that they do not violate, the anti-discrimination provisions of Title VII and the EEOC's guidance on same so the employer-plaintiffs may make employment decisions in accordance with sincerely held religious beliefs and employment policies.

Braidwood and Bear Creek asserted the following:

1. The Religious Freedom Restoration Act (42 U.S.C. § 2000bb-1*, et. seq.*) compels exemptions to *Bostock*'s interpretation of Title VII ("RFRA claim");

[Note: The RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the burden furthers a "compelling governmental interest" and is "the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(a)–(b). Additionally, the federal government "must accept the sincerely held . . . objections of religious entities." *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, —— U.S. ——, 140 S. Ct. 2367, 2383, 207 L.Ed.2d 819 (2020).]

2. The Free-Exercise Clause of the First Amendment compels exemptions to *Bostock*'s interpretation of Title VII ("free exercise claim");
3. The First Amendment right of expressive association compels exemptions to *Bostock*'s interpretation of Title VII ("expressive association claim");
4. Title VII, as interpreted in *Bostock*, does not prohibit discrimination against bisexual employees ("bisexual orientation claim"); and
5. Title VII, as interpreted in *Bostock*, does not prohibit employers from establishing sex-neutral rules of conduct that exclude practicing homosexuals and transgender people from employment ("sex-neutral rules of conduct claim").

The EEOC and party-plaintiffs' moved for summary judgment on various grounds, including standing, ripeness, class-certification, and on the merits.

The district court granted summary judgment in favor of the religious-business-type employer class for claims 1–3, finding that the class was protected under RFRA and the First Amendment. For the RFRA claim, the district court determined that Title VII substantially burdened the class members and that the EEOC did not have a compelling interest in failing to provide a religious exemption to all class members. For the free exercise claim, the district court ruled that strict scrutiny applied and that the EEOC had not shown a compelling interest in light of Title VII's exemptions or, in the alternative, that Title VII was not sufficiently narrowly tailored. *See Bear Creek*, 571 F. Supp. 3d at 589-94.

The district court ruled that the members of the religious-business-type-employers class engaged in expressive association and therefore had a right not to associate with persons engaging in homosexual or transgender conduct. The court determined, as a matter of law, that the sex-neutral policies of both classes pertaining to sexual conduct, dress codes, and bathrooms did not violate Title VII. *See id.* at 607-12.

The court granted summary judgment in the EEOC's favor on the entirety of claim 4 regarding bisexual orientation and employer policies regulating sex-reassignment surgery and hormone treatment for claim 5.

In its opinion, the district court noted:

> **The text of the exemption does not provide religious employers a blanket exemption to Title VII's prohibitions. If it did, the text would simply say it does not apply to religious employers.** Instead, it exempts those religious employers who hire employees to perform work connected with the carrying on of its activities or mission. Importantly, the Title VII exemption defines the term "religion" to include "all aspects of religious observance and practice, as well as belief." Read plainly then, Title VII does not apply to religious employers when they employ individuals based on religious observance, practice, or belief. The plain text of this exemption, therefore, is not limited to religious discrimination claims; rather, it also exempts religious employers from other forms of discrimination under

> Title VII, so long as the employment decision was rooted in religious belief. **In other words, Title VII's prohibition "shall not apply" to religious employers who desire to "employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." Thus, a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief.**

*Bear Creek Bible Church*, 571 F. Supp. 3d at 590-91 (internal citations omitted; emphasis added). The district court basically held that Braidwood and Bear Creek established a sufficient justiciable interest or "credible fear" of EEOC enforcement, conferring standing, and found that the issues were ripe for adjudication.

Braidwood, Bear Creek, and the EEOC appealed.

On June 20, 2023, the Fifth Circuit Court of Appeals issued its opinion in the case. *See Braidwood Management, Inc. v. EEOC*, No. 22-10145, 2023 WL 4073826 (5th Cir. June 20, 2023). The Fifth Circuit court affirmed "in large part," reversed in part, and remanded. The court found that Braidwood and Bear Creek had standing to seek a declaration of Title VII as applied to the party-plaintiffs, despite no enforcement actions being asserted by the EEOC or any individual affected by the undisputed employment practices. The Fifth Circuit affirmed the district court's refusal to certify a class of "church-type employers," but the Fifth Circuit reversed the lower district court's "religious-business type employers" class certification. *See id.* at *7-18.

As to the merits, the Fifth Circuit held that RFRA requires that Braidwood be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden Braidwood's ability to operate per its religious beliefs about homosexual and transgender conduct. The EEOC failed to show a compelling interest in its application of its Guidance and *Bostock*. The court stated as follows:

> Because sincerity is not at issue, Braidwood must show that applying Title VII substantially burdens its ability to practice its religious faith. Braidwood maintains that it has sincere and deeply held religious beliefs that heterosexual marriage is the only form of marriage sanctioned by God, pre-marital sex is wrong, and "men and women are to dress and behave in accordance with distinct and God-ordained, biological sexual identity." To that end, the EEOC guidance almost assuredly burdens the exercise of Braidwood's religious practice. …
>
> As the district court succinctly put it, "[E]mployers are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions." We see no reason why that formulation is incorrect. Being forced to employ someone to represent the company who behaves in a manner directly violative of the company's convictions is a substantial burden and inhibits the practice of Braidwood's beliefs. . . .
>
> Per EEOC guidance, Braidwood, to comply, must violate its beliefs: No money needs to exchange hands; instead, Braidwood's employment policies must broadly change, and it must tacitly endorse homosexual and transgender behavior. The EEOC's euphemistic phrasing that "the only action that Braidwood is required to take under Title VII is to refrain from taking adverse employment actions" is tantamount to saying the only action Braidwood needs to take is to comply wholeheartedly with the guidance it sees as sinful. That is precisely what RFRA is designed to prevent. . . . [The EEOC] does not show a compelling interest in denying Braidwood, individually, an exemption. The agency does not even attempt to argue

> the point outside of gesturing to a generalized interest in prohibiting all forms of sex discrimination in every potential case. Moreover, even if we accepted the EEOC's formulation of its compelling interest, refusing to exempt Braidwood, and forcing it to hire and endorse the views of employees with opposing religious and moral views is not the least restrictive means of promoting that interest. We affirm the summary judgment he

*Braidwood Management, Inc.*, 2023 WL 4073826 at *19; *see Bostock*, 140 S. Ct. at 1754 (noting that RFRA "might supersede Title VII's commands in appropriate cases.").

## VII. DETERMINING "RELIGIOUS ORGANIZATION" STATUS FOR TITLE VII.

As a general rule, it does not violate the First Amendment to apply federal employment discrimination laws to churches and other religious employers. *Ference v. Roman Cath. Diocese of Greensburg*, No. 2:22-CV-797-NR-MPK, 2023 WL 3300499, at *2 (W.D. Pa. May 8, 2023). Churches, for example, are not generally exempt from federal employment discrimination laws as applied to their non-ministerial employees. *But see Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. at 196 (finding that the First Amendment prohibits courts from adjudicating employment-related claims asserted by a "minister" as defined by judicial opinions for employment law purposes).

Ministers aside (and circling back to the statute), Title VII's anti-discrimination provisions "**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 with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation of its activities." 42 U.S.C. § 2000e-1(a) (emphasis added). As noted above, certain religious educational institutions enjoy similar exception from Title VII's anti-discrimination prescriptions. *See id.* at § 2000e-2(e)(2).

The pivotal questions in cases where *Bostock* and a Title VII religious organization exception may be applicable are, essentially:

1. **Is the employer a religious corporation, association, educational institution, or society?**
2. **Is the employment connected with the carrying on the religious activities of by such corporation, association, educational institution, or society?**
3. **And, for religious educational institutions, is the institution, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious organization, or is the curriculum directed toward the propagation of a particular religion?**

So, the question remains: *What is a religious organization for these statutory exceptions?*

As in most matters that touch on First Amendment principles, Title VII provides no definition of "religious corporation, association, or society," although the statute provides a definition for "religion". *See* 42 U.S.C. § 2000e(j) (defining "religion").

In *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3D 618 (6th Cir. 2000), the court applied a wholistic review of the educational institution employer in question, including its "atmosphere" that "permeated with religious overtones." In upholding a lower district court's finding that the institution in issue was entitled to the exception from Title VII's religious discrimination prohibition, the Sixth Circuit Court of Appeals stated: "The decision to employ individuals 'of a particular religion' under § 2000e-1(a) . . . has been interpreted to include the decision to terminate an employee whose conduct

or religious beliefs are inconsistent with those of its employer." *Id.* at 625. *But see O'Connor v. Lampo Group, LLC*, No. 3:20-cv-00628, 2021 WL 4942869, *7 n.8 (M.D. Tenn. Oct. 22, 2021) (noting that the verbiage quoted above from *Hall* is "regrettably phrased so as to render its meaning obscure.").

The courts within the Fifth Circuit Court of Appeals likewise offer no specific framework in regard to the exemptions set forth in 42 U.S.C. § 2000e-1(a). *See Aguillard v. La. Coll.*, 341 F. Supp. 3d 642 (W.D. La. 2018) (stating "With regard to the Title VII exemptions, the Fifth Circuit has not offered specific guidance."). On the whole, however, the courts consider a non-exclusive number of factors in determining whether an employer entity is a religious organization within section 2000e-1(a) or a religious educational institution within section 2000e-2(e)(2):

(1) whether the entity is supported and controlled by a religious corporation;

(2) whether the entity was founded by sectarian persons or entities;

(3) the atmosphere of the entity;

(4) the nature of the entity;

(5) whether the entity's facilities are decorated with religious images;

(6) whether regular religious ceremonies and practice are observed;

(7) whether the entity operates for a profit;

(8) whether the entity produces a secular product;

(9) whether the entity's governing documents state a religious purpose;

(10) whether the entity holds itself out to the public as secular or sectarian.

*See EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192- 94 (4th Cir. 2011); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3rd Cir. 2007) (holding that "LJCC was entitled to the protection of [42 U.S.C. § 2000e-1(a)] during the period under scrutiny because its structure and purpose were primarily religious."); *Hall*, 215 F.3d at 624 (stating that the court must look at all the facts to decide whether the institution is a religious corporation or educational institution); *Ference*, 2023 WL 3300499, at *2; *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d at 591; *Saeemodarae v. Mercy Health Services-Iowa Corp.*, 456 F.Supp.2d 1021, 1034-35 (N.D. Iowa 2006).

## VIII. SUMMATION.

The consequences of the *Bostock* decision were not unexpected. In fact, Justice Alito's dissenting opinion in *Bostock* alluded to the struggles that the lower courts would face. *See Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting). The lower courts are still grappling with the confines of *Bostock* and its application (if any) to the varying state anti-discrimination statutes and in other statutory regimes that reference "sex" as a protected characteristic, class, or qualifier.

Employers who believe they qualify for a religious organization exemption from Title VII's prohibition of religious discrimination or exemption as permitted by the RFRA should carefully consider application of the statutory exceptions and *Bostock* and its progeny. Religious organizations should carefully craft, adopt, evaluate, and honor statements of faith, governing documents, employment policies, employee acknowledgements, job descriptions, mission statements, and other matters that form the foundation of a religious organization's ability to stand bold behind the exception to Title VII's prohibition against discrimination based on religion and to exercise, freely, the religious freedom guaranteed by the U.S. Constitution.

# SAMPLE SECTION 127 EDUCATION ASSISTANCE PLAN

## ORGANIZATION ABC
## SECTION 127 EDUCATIONAL ASSISTANCE PLAN

The Board of Directors (the "Directors") of Organization ABC, a _____ nonprofit corporation ("ABC"), pursuant to the laws of the State of _____ and ABC's Governing Documents, approved and adopted the following Section 127 Educational Assistance Plan, and have directed that a copy be filed with the minutes of the proceedings of the Board of Directors.

### ARTICLE I: Establishment and Purpose of the Plan.

a) Establishment of Plan: ABC, by this instrument hereby establishes this Educational Assistance Plan under Section 127 (the "Plan") of the Internal Revenue Code of 1986, as amended (the "Code"), effective for the calendar year beginning January ___, 20__. Section 127 of the Code provides, in general, that gross income of an employee does not include the first $5,250 of amounts paid or expense incurred by his or her employer during a calendar year for educational assistance furnished to the employee by his or her employer pursuant to a qualified written educational assistance program. This Plan may be referred to or known as the "ABC Section 127 Educational Assistance Plan."

b) Purpose of Plan: The Plan applies only to "Educational Assistance", as defined in Article IV below. ABC intends for the Plan to qualify as a qualified educational assistance program under Section 127(b)(1) of the Code, and that the value of all such qualified educational assistance to its employees under the Plan be eligible for exclusion from the participating employees' taxable income under Section 127(a) of the Code up to the maximum exclusion amount allowed in each calendar year. By this Plan, ABC seeks to provide an affordable program for its employees to further their education as a fringe benefit in connection with their employment with ABC, separate from any other fringe benefit provided by ABC. Courses of instruction chosen by ABC employees in connection with this program are not required to be job-related or part of a degree program.

c) Right to Amend or Terminate: ABC reserves the right to modify or terminate the Plan at any time without prior notice to its employees; although there may be no amendment or termination which affects the right of any employee to complete courses of instruction for which the employee was enrolled in an on-going quarter prior to such amendment or termination.

### ARTICLE II: Persons Eligible to Participate in the Plan.

a) Exclusive Benefit: This Plan will provide Educational Assistance for the exclusive benefit of eligible employees of ABC ("Participants"). The spouses and family members of an eligible employee do not qualify to participate in this Plan; however, nothing herein shall prevent ABC from providing other benefits to spouses or family members of employees outside the terms of this Plan.

b) Eligible Employees: All full-time employees of ABC qualify to participate in the Plan. Part-time employees who work at the rate of _____ hours or more per calendar year also qualify to participate in the Plan. No other person is covered by the Plan. ABC does not generally provide time off for Participants during normal working hours to complete education courses, and ABC reserves the right to decline any requested time off to complete education courses.

c) Termination of Employment: A Participant who resigns or is separated from employment from ABC, or who otherwise ceases to be eligible to participate in the Plan, but who is at that time enrolled in any on-going Educational Assistance under the Plan, will remain eligible to participate in the Plan in regard only to such courses in which the Participant is then enrolled until the end of the education quarter in which eligibility otherwise terminates but shall not be qualified to begin any new course during such period.

### ARTICLE III: Educational Assistance, Covered Costs and Plan Benefits

a) The term "Educational Assistance" means as follows:

(1) the payment or reimbursement, by ABC, of expenses incurred by or on behalf of a Participant for any course of educational instruction or training that improves or develops the capabilities of a Participant [The IRC and Treasury Regs allow for a very broad definition here. The organization can narrow this definition to specific types of courses or even a specific university with which the organization may have an arrangement.] including but not limited to tuition, fees, and similar payments, books, supplies, and equipment, but not including i) tools or supplies which may be retained by the Participant after completion of a course of instruction, ii) meals, lodging, or transportation, or iii) any payment for, or the provision of any benefits with respect to, any course or other education involving sports, games, or hobbies; and

(2) in the case of payments made before January 1, 2026, the payment or reimbursement by ABC, whether paid to the Participant or to a lender, of principal or interest on any qualified education loan (as defined in Code Section 221(d)(1)) incurred by the Participant for education of the Participant.

b) Plan Year/Exclusion from Income: The Plan Year is the calendar year. In any Plan Year, a Participant shall be eligible to exclude from his or her taxable income up to an amount of $5,250.00, or such greater or lesser amount as may be later permitted under Code Section 127.

c) Prohibited Choices of Plan Participation Availability: Benefits for educational assistance receivable by a Participant under this Plan shall not be in lieu of any cash or any other taxable compensation that the Participant might otherwise be entitled to receive from ABC. That is, the Participant does not have any right or obligation to choose between the benefits provided by this Plan and any other alternate possible benefits from ABC.

d) Prohibited Participation: While ABC has no owners, members, or shareholders as of the time of the adoption of this Plan, ABC intends that, notwithstanding the above provisions, the Plan shall not provide in any one Plan Year more than 5% of the amounts incurred by ABC for Educational Assistance benefits on behalf of the class of individuals who are corporate members, shareholders, or owners of ABC (or their spouses or dependents), each of who on any one day of the Plan Year owns more than 5% of the equity, stock, capital or profits interest in ABC. In addition, the Plan is intended to not discriminate in favor of highly compensated employees (as defined in Code Section 414(q)) as to eligibility to participate in the Plan or receive Benefits from the Plan, and in furtherance of ABC's intent the Plan will in all respects comply with the requirements of Code Sections 127(b)(2) and (3) and the related Treasury regulations. If, in the judgment of the Plan Administrator, the operation of the Plan in the Plan Year would result in such discrimination, the Plan Administrator shall select and exclude from participation in the Plan such Participants as shall be necessary to ensure that, in the judgment of the Plan Administrator, the Plan does not discriminate.

e) Substantiation: A Participant receiving payments under this Plan must provide adequate documentation showing that i) he or she paid for the qualified educational expenses and ii) it is reasonable to believe that payments or reimbursements made under the Plan constitute Educational Assistance within the meaning of paragraph (a) of this section.

**ARTICLE IV: Tax Consequences.**

a) Excess Benefits: To the extent that any Participant receives from ABC under this Plan any Educational Assistance benefits that in total exceed in value $5,250 (or such other maximum amount allowable for exclusion under Code Section 127(a)) in any calendar year, including any such excess determined as a result of an audit of the tax consequences of benefits received under the Plan, such excess benefits shall be subject to federal income tax and payroll tax withholding in accordance with federal and state law.

b) Participant Responsibility for Any Taxes: Each Participant shall be responsible for any income tax and/or payroll tax liability (payable by employees applicable under law in regard to wage income) arising from his or her receipt of Educational Assistance under this Plan, whether or not ABC withheld such tax or taxes on those benefits.

**ARTICLE V: Plan Administrator.**

a) Identification of Administrator: The Plan Administrator shall be ABC, and those individuals to whom ABC has delegated authority to administer the Plan.

b) Authority: The Plan Administrator shall have authority and responsibility to take any reasonable actions necessary to control and manager the operation and administration of the Plan under rules applied on a uniform and non-discriminatory basis to all Participants.

c) Notification to Employees: ABC shall reasonably notify all employees of ABC of the identity of those persons to whom ABC has delegated authority to administer the Plan.

**ARTICLE VI: Notification of Eligible Employees**

a) ABC, by the Plan Administrator or otherwise, shall provide each employee eligible to participate in the Plan with reasonable notice of the terms and availability of the Educational Assistance available to the employee under the Plan. An employee eligible to participate in the program provided by the Plan shall be entitled to receive a paper copy of this Plan document upon written request by the employee to the Plan Administrator.

**ARTICLE VII: Miscellaneous**

a) Funding: This Plan is not a funded plan. ABC will pay out of its general assets the cost of providing the Educational Assistance available without charge to the Participants, including the costs of tuition, fees and course books, and all costs of administration of the Plan.

b) Plan Not a Contract: Absent express and separate written agreement to the contrary, this Plan shall not be deemed to constitute a contract between ABC and any Participant or any other employee eligible to participate in the Plan or to be in consideration or an inducement for the employment of any such person. Nothing contained in this Plan shall be deemed to give any such Participant or other employee of ABC the right to be retained in the service of ABC or to interfere with the right of ABC to discharge any employee at any time regardless of the effect that such discharge shall have upon him or her as a Participant in the Plan.

c) Applicable Law: The terms of the Plan shall be construed and enforced according to the laws of the State of _____, other than its laws respecting choice of laws, to the extent not preempted by any federal law.

d) Entire Plan: This document sets forth the entire Plan. Except as provided in this Plan, no other employee benefit plan provided by ABC, which is, or may hereafter be, maintained by ABC shall constitute a part of this Plan.

**CERTIFICATE OF SECRETARY**

I hereby certify that I am duly acting Secretary of ORGANIZATION ABC and that the foregoing ABC Section 127 Educational Assistance Plan was adopted by at least a majority of the directors serving on the Board of Directors of ORGANIZATION ABC at a duly noticed meeting held on _____ and at which a quorum was present, and that the ABC Section 127 Educational Assistance Plan was approved in the manner required by the governing documents of ORGANIZATION ABC.

Sign:_____

Name: _____

Secretary of ORGANIZATION ABC

Date:_____