

Jeffrey Mateer
May 1, 2024

RELIGIOUS LIBERTY IN THE MARKETPLACE: EXERCISING FAITH AT WORK

I. Overview

A. Summary

Facing woke culture and hostility to their beliefs and practices, more and more Christian employers and employees are under attack in the marketplace because of their religious beliefs. This workshop will examine both (1) how for-profit business leaders can exercise their faith in the workplace and (2) the legal rights of employees to practice their religious beliefs. Included in this session will be practical steps employers and employees can take to live out their religious faith in the workplace.

B. Introduction

1. First Liberty Institute

- a. FLI is a nationwide, nonprofit law firm dedicated to protecting religious freedom for all Americans, at no cost to our clients.
- b. We represent people of all faiths whose religious liberty rights are under attack.
- c. FLI has helped hundreds of employers and employees faced with challenges to living out their religious faith in the workplace.

2. Jeff Mateer

- a. I serve as First Liberty's Executive Vice President and Chief Legal Officer, where among by responsibilities, I oversee First Liberty's legal team.
- b. I am a litigator who has been practicing law for over 33 years in private practice at big Dallas law firm and then boutique litigations firms, government service, serving as First Assistant Attorney General of Texas, and non-profit, public interest law, First Liberty.

3. Disclaimer

- a. Today's workshop provides general guidance to assist employers and employees in responding to legal threats to their religious freedom in the workplace.
- b. It is not to be used as a substitute for legal advice from a licensed attorney.
- c. If you have a legal question or need legal advice, please contact an attorney. First Liberty Institute's attorneys may be contacted by requesting legal assistance at FirstLiberty.org.

II. The Current State of Religious Liberty America

A. What's the current state of religious liberty in America?

While the threats to our religious freedom have never been as numerous or intense, I truly believe our HOPE for victories preserving and advancing religious liberty has never been greater.

B. Stockdale Paradox: Reality of Threats BUT Tremendous Hope

1. The Paradox Explained - Jim Collins, *Good to Great* (2001)

- a. Jim Collins in his classic management book *Good to Great* details a concept known as the "Stockdale Paradox."
- b. The concept is named after Admiral Jim Stockdale, who was the highest-ranking U.S. military officer held in the "Hanoi Hilton" prisoner-of-war camp during the height of the Vietnam War.
- c. Admiral James Stockdale observed:

"You must never confuse faith that you will prevail in the end—which you can never afford to lose—with the discipline to confront the most brutal facts of your current reality, whatever they might be."

2. Concept Restated: Maintain Hope While Confronting the Brutal Facts of Current Reality

C. Current Legal Environment: Confronting the Brutal Facts of the Current Reality for Christian Employers and Employee

1. Suffice it to say, the threats to our religious freedom have never been as numerous or intense.
2. At First Liberty, the number of our marketplace cases, both representing religious employees and faith-based employers have risen in dramatic rates in the past few years.

D. Maintaining Hope

1. Overview

- a. While the threats to our religious freedom have never been as numerous or intense, I truly believe our HOPE for victories preserving and advancing religious liberty has never been greater.

2. Legal Protections in Place for Religious Freedom

- a. The First Amendment:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." US Const. amend. I.

b. Federal Law

(1) Religious Freedom Restoration Act ("RFRA") - 42 U.S.C. § 2000bb-1

- a) "The [federal] government may not substantially burden a person's free exercise of religion unless the application of the burden to the person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest."

(2) Religious Land Use and Institutionalized Person Act ("RLUIPA") - 42 U.S.C. Section 2000cc

- a) Applies broadly to land use regulations - 42 U.S.C. §2000cc-5(5)

b) Provides Four Key Protections

- i. No Substantial Burden on Religious Exercise (unless compelling interest and least restrictive means) - 42 U.S.C. Section 2000cc(a)(1)
- ii. Treats Religious Less than Equal Terms with Non-Religious - 42 U.S.C. Section 2000cc(b)(1)

- iii. No Discrimination on Basis of Religion - 42 U.S.C. Section 2000cc(b)(2)
- iv. Totally Excludes or Unreasonably Limits Religious Assemblies - 42 U.S.C. Section 2000cc(b)(3)

(3) Title VII of the Civil Rights Act of 1964 - 42 U.S.C. § 2000e

- a) Prohibiting employment discrimination based on religion (among other protected classes)
- b) See below for detailed protections.

c. State Law

(1) State Constitutions

(2) State Employment Laws

(3) State RFRA in 26 States have enacted versions of RFRA:

- Alabama - Ala. Const. Am. 622
- Arizona - Ariz. Rev. Stat. § 41-1493.01
- Arkansas - 2015 SB 975
- Connecticut - Conn. Gen. Stat. § 52-571b
- Florida - Fla. Stat. § 761.01, *et seq.*
- Idaho - Idaho Code § 73-402
- Illinois - 775 Ill. Comp. Stat. § 35/1, *et seq.*
- Iowa – SF 2095 (signed by Gov. Kim Reynolds on April 2, 2024)
- Indiana - 2015 SB 101, *enacted March 26, 2015*; 2015 SB 50, *enacted April 2, 2015*
- Kansas - Kan. Stat. Ann. § 60-5301, *et seq.*
- Kentucky - Ky. Rev. Stat. Ann. § 446.350
- Louisiana - La. Rev. Stat. § 13:5231, *et seq.*
- Mississippi - Miss. Code § 11-61-1
- Missouri - Mo. Rev. Stat. §1.302

- Montana - Mont. Code Ann. § 27-33-101, *et seq.*
- New Mexico - N.M. Stat. Ann. § 28-22-1, *et seq.*
- North Dakota – HB 1136 (passed in March 2023)
- Oklahoma - Okla. Stat. tit. 51, § 251, *et seq.*
- Pennsylvania - Pa. Stat. tit. 71, § 2403
- Rhode Island - R.I. Gen. Laws § 42-80.1-1, *et seq.*
- South Carolina - S.C. Code § 1-32-10, *et seq.*
- South Dakota - SB 124 (passed in March 2021)
- Tennessee - § Tenn. Code 4-1-407
- Texas - Tex. Civ. Prac. & Remedies Code § 110.001, *et seq.*
- Virginia - Va. Code § 57-2.02
- West Virginia – HB 3042 (passed in March 2023)

3. Recent Supreme Court Precedent Strongly Protecting Religious Freedom

a. Overview

- (1) It is one thing to have good laws – be it in our constitution or in statutory law. It’s another to have those laws actually enforced by judges.
- (2) The good news is that during the past six years there is a strong trend protecting religious freedom rights at all levels of the judiciary.
- (3) Since 2019, First Liberty has won five major cases at the U.S. Supreme Court protecting religious liberty.
- (4) Everyone is no doubt familiar with the Supreme Court’s 2022 decision in *Dobbs v. Jackson*, which overturned a fifty-year-old precedent established in *Roe v. Wade* but did you know that within the past two years – the Supreme Court has also overturned two major anti-religious freedom precedents and reaffirmed that the government cannot exclude people of faith from government benefits because of their religious beliefs– all 3 First Liberty cases.
 - a) In *Kennedy v. Bremerton School District* (2022), the Supreme Court overturned a fifty-one-year-old precedent, *Lemon v. Kurtzman* (1971), that had misinterpreted the Establishment

Clause, returning to analyzing alleged constitutional violations by considering history and tradition.

- b) In *Carson v. Makin* (2022), the Supreme Court held that Maine's exclusion of families that sent their children to religious schools from a tuition assistance program violated the Free Exercise Clause "when it excludes religious observers from otherwise available public benefits."
- c) In *Groff v. DeJoy* (2023), in a unanimous decision, the Supreme Court overturned a forty-six-year-old precedent, *TWA v. Hardison* (1977), rejecting a judicially created doctrine that ignored the statutory text of the employment discrimination laws. Further discussion on the importance of *Groff* below.

b. 11 Supreme Court Victories Protecting Religious Liberty Since 2018

- (1) *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018) (holding 7-2 that the Colorado Civil Rights Commission's actions against Christian Baker Jack Phillips who refused to bake a cake for a same-sex wedding violated the Free Exercise Clause).
- (2) *American Legion v. American Humanist Ass'n*, 588 U.S. ____ (2019) (holding 7-2 that the World War I veterans memorial Bladensburg Peace Cross does not violate the Establishment Clause)
- (3) *Espinoza v. Montana Department of Revenue*, 591 U.S. ____ (2020) (holding 5-4 that's the application Montana Constitution's no aid provision to prohibit tuition assistance to families who send their children to religious schools violated the Free Exercise Clause).
- (4) *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____ (2020) (holding 7-2 that the ministerial exception defense derived from the Religion Clauses of the First Amendment precluded adjudication of discrimination claims made by two Catholic school elementary teachers)
- (5) *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ____ (2020) (upholding 7-2 the constitutionality of the religious exemptions to Obamacare's contraception mandate).

- (6) *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021) (holding 9-0 that Philadelphia’s refusal to contract with Catholic Social Services for foster care services unless it agreed to certify same-sex couples as foster parents violates the Free Exercise Clause).
- (7) *Shurtleff v. City of Boston*, 596 U.S. ____ (2022) (holding 9-0 that Boston’s refusal to allow a religious group to fly a Christian flag at city hall violated that group’s freedom of speech where it permitted non-religious groups to fly flags of their own choosing)
- (8) *Carson v. Makin*, 596 U.S. ____ (2022) (holding 6-3 that Maine’s exclusion of families that sent their children to religious schools from its tuition assistance program violated the Free Exercise Clause).
- (9) *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022) (holding 6-3 that the First Amendment’s Free Exercise and Free Speech clauses doubly protected a public school football coach’s post-game, midfield prayer and overruling a fifty-year-old anti-religious freedom precedent, *Lemon v. Kurtzman*, and its endorsement test, that courts relied upon in thousands of cases to prohibit public expressions of faith and government support of religion, replacing it with a history and tradition test).
- (10) *Groff v. DeJoy* (2023) (holding 9-0 that employer must demonstrate an “undue hardship” resulting in substantial costs to the business in order to deny an employee’s request for a religious accommodation).
- (11) *303 Creative v. Colorado* (2023) (holding 6-3 that web designer could not be compelled to provide services that violate her First Amendment Free Speech rights)

III. Rights of Christian Employers: How Business Leaders Can Exercise Their Faith at Work

A. Overview of Religious Liberty Rights at Faith-Based For Profit Organizations

1. Business leaders of faith at for-profit companies and organizations face unique challenges.
 - a. They can acknowledge faith in corporate culture, but they must ensure that all employees are treated equally.
 - b. While sometimes complicated, the law is actually the best approach — religious freedom for both employers and employees.

2. Generally, faith-based non-profit organizations (e.g., churches and religious ministries) have stronger religious liberty legal protections than for-profit organizations.
 - a. Churches and non-profit faith-based organizations generally have the right to work together in a community of people who share the same religion.
 - b. This means that churches can legally consider religion when hiring staff and making other employment decisions.
3. By contrast, unless certain narrow exceptions apply, for-profit businesses must be careful not to discriminate on the basis of religion or other any characteristic covered by state or federal law.
4. Still, owners of for-profit businesses do have religious liberty rights.
 - a. As a general matter, business leaders of faith may implement a business culture inspired by religious values.
 - b. Religious faith can inspire the name of a company and infuse its logo, its values, its mission statement, and its philanthropic goals.
 - c. Business leaders of faith may offer Bible studies, as long as attendance is voluntary. For instance, if an employer wants to start a Bible study at his or her place of work, it cannot be mandatory. See, e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988).
 - (1) It is a best practice for it to take place outside of working hours, such as on lunch break, before the work day begins, or after the work day ends.
 - d. Business leaders of faith can also hire chaplains to care for the needs of their employees.
 - e. Employers can allow Employee Resource Groups or affinity groups, including Christian and religious ones, as long as they do so on equal terms.
 - (1) Employers must be careful not to give preferential treatment to members of one affinity group over another.
5. In adopting faith-friendly policies and practices, leaders must remember that employers, managers, and supervisors may not discriminate against employees or members of the public on the basis of religion.

- a. Discrimination or penalizing employees or members of the public on the basis of their religion violates the law.
 6. Business leaders of faith in a supervisory role should be aware of federal and state employment laws, particularly employment discrimination law, so that they understand how to balance the infusion of faith into the workplace with legal obligations to avoid actual religious discrimination.
 7. Businesses should foster a culture that is respectful of employees of different faiths and of no faith in order to avoid allegations of religious discrimination.
 8. Businesses also should make every effort to work with employees to grant religious accommodations to employees.
- B. Employment Discrimination Law Primer
1. Federal Law: Title VII Applicability
 - a. Federal employment discrimination law applies to businesses that have 15 or more employees. 42 U.S.C. § 2000e(b).
 - b. Title VII of the Civil Rights Act of 1964, as amended, is the federal law that prohibits employment discrimination on the basis of sex, race, color, national origin, and religion. 42 U.S.C. § 2000e-2(a).
 - c. In addition, in 2020, the United States Supreme Court held that the prohibition on sex discrimination also includes a prohibition on sexual orientation and transgender status discrimination. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (holding “employers are prohibited from firing employees on the basis of homosexuality or transgender status”).
 - (1) While many argue that the statutory and constitutional religious liberty rights of religious business owners override attempts to apply this new holding to religious employers, there is no decision at the Supreme Court yet to determine the matter.
 - (2) The *Bostock* decision itself notes that there was no religious claim in that case, and, if there had been, those would be interests of the highest order. Religious freedom laws such as, the Religious Freedom Restoration Act, “might supersede Title VII’s commands in appropriate cases.” *Bostock*, 140 S. Ct. at 1754.

- d. Title VII provides protections for employees, rather than independent contractors. 42 U.S.C. § 2000e(f).

2. State Employment Discrimination Laws

- a. Most states have employment discrimination laws that parallel federal law, and some states have more restrictive laws.
- b. For instance, in a few states, employers with as few as one employee are regulated under the state's employment discrimination law. *See, e.g.,* Haw. Rev. Stat. Ann. § 378-1.
- c. Some states protect a more expansive list of protected classes. California's analogous law, for instance, covers the following protected classes: "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status." Cal. Gov't Code § 12940(a).
- d. Title VII should be understood as the "floor," with some states choosing to impose more regulations.

3. Religious Discrimination

- a. If Title VII applies to a business, it must not engage in religious discrimination (or discrimination based on other protected characteristics). 42 U.S.C. § 2000e-2(a).
 - (1) This means that the business cannot consider religion or any aspect of religious belief, practice, or observance when making employment decisions.
 - (2) Religion cannot be a motivating factor when it comes to hiring, firing, promotion, demotions, transfers, and the like.
 - (3) Businesses should be careful to avoid even the appearance of discriminatory preferences or differential treatment based upon religion. That can often be avoided by simply stating publicly that the company does not provide preferences on the basis of religion.
- b. Businesses should also be careful not to create a hostile work environment on the basis of religion.

- c. Title VII prohibits religious harassment that is severe or pervasive.
- d. Employers also have an affirmative obligation to grant reasonable religious accommodations to their employees unless doing so would pose an undue hardship on the business. 42 U.S.C. § 2000e(j).
 - (1) It is a best practice to proactively engage in dialogue with any employee seeking a religious accommodation to come up with a mutually beneficial solution that resolves the conflict between the employee's faith and the work requirement.
 - (2) See discussion below requirements for evaluating religious accommodation requests.

4. Sex, Sexual Orientation, and Transgender Status Discrimination

- a. In 2020, in *Bostock v. Clayton County*, the Supreme Court held that the prohibition on sex discrimination also implies a prohibition on sexual orientation discrimination and "transgender status" discrimination. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).
 - (1) That decision concluded that employers generally cannot make an adverse employment decision against employees because they identify as gay or transgender.
 - (2) The decision left many questions unanswered. For instance, the opinion does not come to any conclusions about pronoun usage, dress codes, or bathroom policies. These issues remain unclear, and many cases raising these issues are working their way through the courts.
- b. The EEOC currently aggressively interprets the *Bostock* decision taking the position that:
 - (1) "intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment,"
 - (2) "[p]rohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination," and
 - (3) "employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender

identity.” See Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, EEOC, OLC Control No. NVTA-2021-1 (Issued June 15, 2021), available at <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.

- c. At least one court has limited the applicability of this guidance documents in some states. *Tennessee v. U.S. Dep’t Educ.*, No. 3:21-cv-308 (E.D. Tenn., July 15, 2022).

5. RFRA Defense

- a. Businesses with only a few owners, like sole-proprietorships or closely-held businesses, where the owners are people of faith may be able to assert a RFRA defense if the law requires them to operate their business in a way that violates their religious beliefs.
- b. The Supreme Court noted that RFRA “might supersede Title VII’s commands in appropriate cases.” *Bostock*, 140 S. Ct. at 1754.
- c. RFRA prohibits the federal government from imposing a substantial burden on religious exercise unless it can demonstrate a compelling reason for its action that is narrowly tailored to be the least restrictive means of achieving its goals. 42 U.S.C. §2000bb-1.

C. Faith-Inspired Business Culture

1. Many small businesses and for-profit companies maintain a faith-inspired culture.
 - a. This can manifest in mission statements, values statements, logos, company names, and philanthropic giving.
 - b. Many for-profit companies maintain faith-inspired mission or values statements. For example:
 - (1) Hobby Lobby: “We are committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles. . . . Providing a return on the family’s investment, sharing the Lord’s blessings with our employees, and investing in our community.”

- (2) Chick-fil-A: “To glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence on all who come into contact with Chick-fil-A.”
- (3) Interstate Batteries: “To glorify God and enrich lives as we deliver the most trustworthy source of power to the world. We fulfill our purpose by doing business based on biblical principles – such as honesty, humility, service and care – in a way that is welcoming and loving to all. As a company contributor, you are free to interact with the purpose in whatever way is most meaningful to you. Our values, however, are unchanging, and we ask that our team members try their best to live them as they serve our key stakeholders: team members, customers, distributors and franchisees, suppliers and vendors, communities and shareholders. By creating a welcoming and caring environment, we hope to create a positive experience for our team members and everyone else whom Interstate touches, no matter their background or belief system.”

c. Other Spiritual Expressions

- (1) Some companies have printed Bible verses on their products, such as In-N-Out Burger’s cups. See Brett Molina, *In-N-Out Owner Explains Why Fast-food Chain Prints Bible Verses on Food Packaging*, USA TODAY (Oct. 8, 2019, 9:59 AM), <https://www.usatoday.com/story/money/2019/10/08/in-n-out-owner-lynsi-snyder-interview-bible-verses/3906363002/>.
- (2) Tyson Foods employs 98 chaplains and calls its culture “faith-friendly.” See TYSON FOODS, <https://www.tysonfoods.com/who-we-are/our-story/purpose-values>.
- (3) Marriott includes the Bible and Book of Mormon in its hotel rooms. See Haley Britzky, *Marriott to Require Bibles and Books of Mormons in Newly Acquired Hotels*, AXIOS (Aug. 25, 2018), <https://www.axios.com/2018/08/25/marriott-to-require-bibles-and-books-of-mormon-in-hotels>.
- (4) Some Companies have corporate philosophies that are inspired by the founders’ spiritual beliefs, such as Whole Foods’ environmentalist philosophy. See Isaac Chotiner, *The Whole Foods C.E.O John Mackey’s “Conscious Capitalism,”* THE NEW YORKER (Feb. 22, 2021), <https://www.newyorker.com/news/q-and-a/whole-foods-ceo-john-mackey-conscious-capitalism>.

2. The Supreme Court has, at least once, cited for-profit companies' use of faith-inspired mission statements favorably. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
 - a. In *Hobby Lobby*, the Court recited the faith-based mission statements of the two for-profit companies at issue as evidence that the closely-held companies held sincere religious beliefs for the purpose of the Religious Freedom Restoration Act.
 - b. For instance, the Court quoted *Hobby Lobby's* statement of purpose that "commits the Greens [the owners] to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.'" *Id.* at 711 n. 3.
 - c. For the other company, *Conestoga Wood Specialties*, its mission was to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." *Id.* at 701.
 - d. These statements provided key evidence of the sincerity of the owners' religious beliefs and were helpful to these companies in the case.
3. Summary: Faith-based mission statements and company values do not violate Title VII.
 - a. To constitute a Title VII violation, a company's actions would need to rise to the level of religious discrimination or a hostile work environment.
 - b. Religious discrimination means taking an adverse action against an employee (such as firing, demoting, refusing to promote) motivated at least in part by religion.
 - c. For a hostile work environment claim, religious harassment would need to be either severe or pervasive to constitute a claim.
 - (1) A continuous pattern of small instances of harassment could constitute a claim.
 - d. But a faith-based mission or values statement in and of itself is unlikely to violate either of these standards.

D. Voluntary Bible Studies and Chaplains

1. Employers may offer Bible studies and chaplains for their employees, as long as it is on a voluntary basis. *But see EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir. 1988) (closely-held manufacturing business could not require its employees to attend mandatory religious devotional services at work that included prayer, singing, and scripture reading)
2. Practical Suggestions
 - a. To avoid being seen as mandatory, it is recommended for any such meetings such as Bible studies to take place outside of working hours, such as on lunch break.
 - b. Participation or lack of participation should not be used as a factor in any employment decision such as project assignments, promotions, or evaluations.
 - c. Employees of other faiths should be free to start their own similar groups on the same terms.

E. Religious Conflicts with Local, State, or Federal Mandates

1. As government continues to expand its reach, the likelihood of conflicts with religious beliefs in the workplace increases. There are many areas of law in which we could see government regulations infringing on religious beliefs in the workplace, including with respect to insurance and other employee benefits.
2. In 2021, the federal government sought to use an administrative agency, the Occupational Safety and Health Administration (“OSHA”), to force employers with over 100 employees to implement a COVID-19 vaccine-or-testing mandate.
 - a. Many organizations and businesses brought legal challenges to the mandate as unlawful government overreach.
 - b. First Liberty Institute also challenged OSHA’s mandate as unlawful under RFRA because it imposed a substantial burden on the religious beliefs and practices of some religious organizations.
 - c. The Supreme Court struck down the mandate. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022).

3. Every law should be evaluated individually based on its impact on the faith-based practices of business leaders.
 - a. Attorneys can assess whether any particular law was properly created using the proper processes.
 - b. It is possible some government mandates could be challenged as federal government overreach or improperly put in place.
 - c. In some cases, it may be possible to bring a lawsuit before the law takes effect or is enforced against a particular business.

4. For challenges to federal laws that substantially burden the religious beliefs of a closely-held business's owners, RFRA also may provide a possible claim or defense. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
 - a. In *Burwell v. Hobby Lobby Stores*, the U.S. Supreme Court held that the federal Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq.) protected a closely-held corporation from being forced to violate its owners' religious beliefs.
 - b. If a business is facing a government mandate that violates the religious beliefs of its owners, faith-based businesses should be able to use the federal RFRA law, as well as the Constitution and other state laws to assert your rights.

NOTE: It is possible that this claim or defense may not be available for publicly-traded corporations due to the likelihood that corporate shareholders will hold a variety of different beliefs. No cases have ruled on this issue yet for publicly traded corporations.

F. Religious Conflicts with Public Accommodation Laws

1. Public accommodation laws have an honorable purpose and history.
 - a. The federal public accommodation statute was enacted primarily to ensure equal access to hotels and restaurants regardless of race. 42 U.S.C. §2000a.

2. Some states have chosen to wield their state public accommodations laws to impose their preferred beliefs, in conflict with religious beliefs, on businesses open to the public.

- a. This threat is primarily in the context of wedding-related businesses.
- b. States such as Colorado and Oregon have targeted bakeries who refuse to create custom cakes for same-sex weddings. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S.Ct. 1719 (2018); *Klein v. Bureau of Lab. & Indus.*, 143 S.Ct.2686 (2023).
- c. This past year, the Supreme Court held that a public accommodation law violated the free speech clause of the First Amendment where it sought to compel a web designer to provide services. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).
- d. States, such as Massachusetts, issue guidance arguing that businesses, and even churches, open to the public would have to use speech, pronouns, and bathroom policies preferred by the state on issues related to gender identity. See *Horizon Christian Fellowship v. Williamson*, No. 1:16-cv-12034 (D. Mass, filed Oct. 11, 2016).

G. First Liberty Employer Case Examples

1. *Kleins v. Bureau of Labor and Industries* (Oregon Court of Appeals)
 - a. Following two trips to U.S. Supreme Court and two remands, the case of small family bakery, who was charged and fined for declining to create a custom wedding cake for a same-sex wedding, returns to state court.
2. *Bernier v. Turbo am International* (D.NH)
 - a. Transgender employee sued Christian-owned manufacturing company seeking insurance coverage for gender dysphoria-related medical services.

H. Actions to Take to Better Protect Your Business

1. Put your religious values in your mission and values statements.
 - a. Businesses seeking to implement a faith-based culture should clearly articulate their religious perspective in their documents.
 - (1) This is especially important for small or closely-held businesses.

- b. If a business owner's religious beliefs come into conflict with a government mandate, this can be helpful evidence that a business is run from a religious perspective.
 - c. For instance, in *Hobby Lobby*, the Supreme Court held that the company's Christian values statement provided evidence that the company was entitled to assert a religious liberty defense under the Religious Freedom Restoration Act.
2. Consistently run business in accordance with religious beliefs.
 - a. Consistency is key to a strong religious liberty defense.
 3. Adopt a non-discrimination employment policy that respects religious liberty for all employees.
 - a. This policy should include a Religious Accommodation policy.
 4. Call First Liberty Institute (or another religious Liberty practitioner) if questions or concerns.

IV. Rights of Christian Employees: How Employees Can Exercise Their Faith at Work

A. Key Questions for Religious Employees in Today's Work Environment

1. What can I do if my employer requires me to violate my religious beliefs on the job?
2. Can I be required to attend diversity training if the content violates my religious beliefs?
3. Can I be required to use words, such as pronouns, in ways that violate my religious beliefs?

B. Summary of Legal Rights as an Employee

1. Federal employment discrimination law, Title VII of the Civil Rights Act of 1964 ("Title VII"), prohibits employers with 15 or more employees from discriminating on the basis of religion. 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e(b).
 - a. Some states also provide similar protections applicable to employers with fewer than 15 employees. *See above.*

2. The law also provides that employers may not create a hostile work environment on the basis of religion, which means that employers cannot tolerate severe or pervasive harassment on the basis of religion. *See* 42 U.S.C. § 2000e-2(a)(1); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 376–77 (1st Cir. 2004).
3. Another important protection for religious employees in the workplace is the right to request a religious accommodation.
 - a. Title VII requires that employers grant reasonable religious accommodation requests unless doing so would cause an undue hardship on the business. 42 U.S.C. § 2000e(j); EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(b).
 - b. Undue hardship is defined as substantial increased costs in the overall context of an employer’s business. *Groff v. DeJoy*, 600 U.S. 447, 470 (2023).
 - c. Employees have the right to ask for a religious accommodation when they may be called to do something on the job that violates their sincerely-held religious beliefs.
 - d. Traditionally, religious accommodation requests have been used for religious employees who cannot work on one day of the week in order to observe Sabbath or Shabbat or who require a modification to a grooming policy in order to wear a yarmulke or hijab. *See, e.g., E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (headscarf); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (beards).
 - e. Some employers mistakenly believe that religious accommodations only include these kinds of requests. However, Title VII defines “religion” broadly to include all aspects of religious observance and belief. 42 U.S.C. § 2000e(j).
 - f. Religious accommodations have been provided in a variety of circumstances. For instance, pharmacies have accommodated Christian/Catholic pharmacists who objected to dispensing abortifacient drugs by rearranging shifts. *See Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007).

C. Religious Accommodations & Diversity Training

1. Overview

- a. Many workplaces require employees to attend diversity training, sometimes called anti-harassment, DEI, or Title VII training.
- b. These trainings may describe the legal requirement of employers not to discriminate on the basis of a variety of protected classes, including sexual orientation and gender identity.
- c. In *Bostock v. Clayton County*, the Supreme Court held that Title VII prevents employers from discriminating on the basis of sexual orientation or transgender status. *Bostock v. Clayton Cty*, 140 S. Ct. 1731 (2020).
- d. The Supreme Court has not yet addressed specific questions regarding gender identity with respect to bathroom policies, grooming policies, and pronoun usage.
- e. This is an evolving and fact-specific area of law. We would caution that not all diversity trainings accurately portray the law, especially with respect to protections for religious employees who hold different religious beliefs about gender and sexuality.

2. Employee Mandatory Attendance at DEI Training?

- a. Issue: Is an employee required to attend or participate in diversity training where the trainings include statements that contradicts the employee's religious beliefs.
- b. Most religious individuals do not have a sincerely-held religious belief that they cannot hear perspectives that differ from their own.
- c. If an employee is required to attend a training session and answer questions about the state of the law or company policy, it is unlikely that the religious employee will be able to argue that he or she is being called upon to violate his or her sincerely-held religious beliefs by attending.
- d. However, if an employee is being called to personally affirm agreement with a statement that violates his or her religious beliefs, then that employee may be able to ask for a religious accommodation.

3. Religious Accommodations & Pronoun Usage

- a. Increasingly, workplaces are creating policies that require or imply that employees are expected to use pronouns in accordance with a transgender individual's preference.
- b. Some employees hold the sincere religious belief that sex is an immutable characteristic and they cannot knowingly use pronouns that do not accord with an individual's biological sex.
- c. If an employee is in a situation where the employee is being asked to agree to use pronouns in violation of sincerely held religious beliefs, the employee may be able to request a religious accommodation.
- d. In the employee's religious accommodation request or in discussions with the employer, it is best to let the employer know specifically what the employee does and does not object to. A narrower request may be easier to accommodate.

D. Requesting a Religious Accommodation

1. Making the Request

- a. Only request a religious accommodation if necessary.
- b. Make religious accommodation requests in writing, such as an emailed request, and retain a copy.
- c. Clearly and concisely explain your religious beliefs and the accommodation that you are seeking. If there is more than one way for the employer to accommodate you, it is helpful to highlight some different options.
- d. The narrower the religious accommodation request, the stronger the employee's position that the employer could accommodate the employee without incurring substantial increased costs.

(1) The employee should work with the employer to try to come up with a win-win solution. Ask for a meeting to discuss possible options.

- e. Be polite and respectful at all times.

2. What Happens After the Request for a Religious Accommodation?

- a. The religious accommodation request should spark a dialogue between employer and employee to find a mutually agreeable solution.

- b. If the company's initial proposal is insufficient or too vague, the employee may consider asking for a meeting or responding with a counterproposal that is more specific or more tailored to the employee's request.
- c. Companies cannot terminate an employee or refuse to hire an employee because they think they might have to grant a reasonable religious accommodation request. *Abercrombie & Fitch*, 575 U.S. at 774-75.
- d. Title VII also prohibits retaliation against an employee who "oppose[s] any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a).
 - (1) The "EEOC has taken the position that requesting religious accommodation is protected activity" covered by the anti-retaliation provision. Questions and Answers: Religious Discrimination in the Workplace, EEOC (last accessed June 8, 2021), available at <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.
 - (2) However, at least one federal appellate court has held that employees can only allege retaliation if they were retaliated against for opposing the unlawful denial of a religious accommodation, not if they were retaliated against for making the accommodation request itself. *E.E.O.C. v. N. Mem'l Health Care*, 908 F.3d 1098, 1102 (8th Cir. 2018).

CAUTION: Although the law does protect an employee from retaliation, it is still possible that the employer will take adverse action against the employee or will respond to the accommodation request by becoming overly critical of other aspects of an employee's job performance to the point that the employee is fired for other alleged offenses.

- 3. Are Employers Required to Grant Religious Accommodation Requests?
 - a. Whether an employer is legally required to grant a religious accommodation request is a fact-specific question. The answer will depend on how much of a hardship accommodating the employee's request places on the employer.
 - b. Before First Liberty's 2023 Supreme Court victory in *Groff v. DeJoy*, courts typically allowed employers to avoid granting religious accommodations if they could point to any minimal or "de minimis" cost to the business. This interpretation was based on a poorly-written 1977 Supreme Court decision, *TWA v. Hardison*, 432 U.S. 63 (1977).

- c. In a 2023 landmark decision, *Groff v. DeJoy*, however, the Supreme Court clarified the law that gives much more protections for religious employees.
 - (1) The Court reexamined the “undue hardship” standard and unanimously concluded that federal law requires workplaces to accommodate religious employees unless the employer can “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. at 470.
 - (2) This standard takes into account “all relevant factors ... including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of [an] employer.” *Id.* at 471.
 - (3) The Supreme Court explained that, in general, temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs will not impose an “undue hardship.” *Id.*
 - (4) Additionally, a co-worker’s dislike of a religious practice, religious expression, or the accommodation itself should not factor into the calculus of the undue burden; only coworker impacts that affect the conduct of the business should be taken into account. *Id.* at 472.
 - (5) Finally, that an employer cannot simply assess the reasonableness of a particular possible accommodation; instead, it must consider other options. *Id.* at 473 (an employer must not “merely ... assess the reasonableness of a particular possible accommodation or accommodation”; rather “[c]onsideration fo other options ... would also be necessary”).
- d. The *Groff* decision means that more employers will be legally required to respect their religious employees by granting them accommodations.
- e. The Supreme Court is attuned to protecting the rights of religious people with respect to their beliefs on issues of gender and sexuality.
 - (1) In *Obergefell v. Hodges*, the Court recognized that many traditional beliefs about issues of marriage and sexuality are based on “decent and honorable religious or philosophical premises[.]” 576 U.S. 644, 672 (2015).
 - (2) In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court went a step further and held that it was unconstitutional discrimination for the state agency to disparage such religious beliefs

or fail to display respectful consideration for people who hold traditional religious beliefs on such matters. 138 S. Ct. 1719, 1729, 1731 (2018). We would argue that it would likewise violate Title VII for a company to engage in similar disparagement of employees based upon their religious beliefs.

4. What If I Am Denied a Religious Accommodation?

- a. If an employee's request is denied, the employee should consider whether to file a charge of religious discrimination with the EEOC or the appropriate state agency.
- b. Employees have a limited timeframe after the accommodation is denied in which to do so, so employees should contact an attorney to ensure that the charge is filed on time.
- c. It is typically safest to file a charge of discrimination within 180 days of the alleged discrimination. Federal employees have shorter deadlines and typically should contact an EEO Counselor for the appropriate agency within 45 days of the alleged discrimination.
- d. After the agency investigates the situation, either it will take up the case itself, or more likely, it will send the employee a right to sue letter which enables the employee to bring a lawsuit.

E. First Liberty Employee Case Examples

1. *Brown & Smith v. Alaska Airlines* (W.D. WA)
 - a. Airline fired flight attendants for questioning support of Equality Act.
2. *Hittle v. City of Stockton* (9th Circuit)
 - a. City fired fire chief for attending leadership training at church.
3. *Kloosterman v. University of Michigan Health West* (W.D. MI)
 - a. University fired physician assistant for failing to affirm transgender ideology.
4. *Kristofersdottir v. CVS* (S.D. FL) & *Strader v. CVS* (N.D. TX)
 - a. CVS refused to provide religious accommodations to nurse practitioners who objected to providing contraceptives.

V. Conclusion: Walking in Freedom

A. The Current Reality

1. We are faced with real and present threats but employers and employees have the legal protection to do what God has called them to do.
2. Like God's grace – present for everyone but before receiving it, you have to recognize it's available to you. Once recognized, you must receive and walk in it.
3. Bottom line: We have religious freedom. We simply need to walk in the freedom God has provided.

B. Window of Opportunity

1. Despite the reality of threats, the Lord has provided us with a window of opportunity to walk boldly in the exercise of religious freedom.
2. Encouraged by Paul's closing lines in his First Letter to the Church at Corinth: ". . . a door of great opportunity stands wide open for me, but there are many opponents." (16:9)
3. So Paul tells them (and perhaps us too): "Stay alert, stand firm in the faith, show courage, be strong. Everything you do should be done in love."

C. Thank you for the opportunity to be with you today.

1. At First Liberty, we are committed to assisting you.
2. For more information, you may go to firstliberty.org.

D. Questions and Answers