



Religion and the Workplace: Should the Two Ever Meet?

By Victoria L. Donati and Jason C. Kim

The US workplace is becoming increasingly prone to religious expression. More workers (and owners and managers) are expressing their religious views at or in connection with their work. The reasons for this are many and varied (and rather debatable). For example, we spend more time at work; the workplace has become more central to our lives and, in many instances, invaded our homes; and electronic systems and other communication tools have become more prevalent, expanding our reach and experience.



The growing presence of religion in the workplace has raised a number of legal questions for employers. Employers wonder whether and to what extent the presence of religion is appropriate and lawful, how and whether they must accommodate employees

with differing (and perhaps even extreme) religious beliefs, and what changes in workplace policies and procedures are necessary. The answers to these questions lie in decades-old legislation and a growing body of court decisions interpreting and applying that legislation.

The Fundamental Issues

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of a person's religion and requires employers to "reasonably accommodate" employees' religious beliefs. These protections mirror and expand on the basic religious freedoms guaranteed by the Constitution.

The First Amendment guarantees freedom of speech and expression, including the free exercise of religion — whatever religion a person chooses. It further guarantees that there will be no laws made against the establishment of religion.

Although the law is seemingly compatible with and rather inviting toward the free expression of religion in the workplace, a fundamental tension arises if you consider the universality of the law's application and protections. The law applies to all employees and all of the various religions and religious expressions. It guarantees equal rights to freedom of expression and nondiscrimination in the workplace and the reasonable accommodation of religious beliefs and expressions in the workplace to employees with vastly different and often incompatible religious beliefs.

This tension is at the root of the issues facing employers with regard to addressing religion in the workplace. As an employer, you must balance your and your employees' rights to express their religious beliefs and values while not subjecting other employees to harassment or discriminating against employees on the basis of different and perhaps contradictory religious beliefs.

What's a Protected Religion?

The first question is, What constitutes a "religion" in the eyes of the law? If the belief or practice at issue is not rooted in a covered religion, Title VII does not require accommodation of that belief or practice.

Title VII is quite broad in this respect. Title VII defines "religion" to include all aspects of religious observance, practice, and belief, whether formal or informal.

"Religion," in turn, generally is accepted by Title VII to be whatever a practicing individual claims it to be. The typical use of the term to include belief in a deity or the existence of an organized religious structure is not required per se. All that matters is that the individual professing or practicing the religion holds a sincere religious belief or moral or ethical belief with the strength of a religious conviction.

Your obligations under Title VII are similarly broad. Between the law and the Equal Employment Opportunity Commission's guidelines, employers are obligated under Title VII as follows:

- Employers may not treat individuals differently—whether more or less favorably — because of their religious beliefs.
- Employers may not force workers to participate in a particular religion or religious activity.
- Employers must allow employees to express themselves religiously in the same way they are allowed to



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- engage in other types of (nonreligious) expression.
- Employers must reasonably accommodate employees who choose to engage in religious expression (unless such accommodation would result in an undue hardship or trample the rights of other employees).
- Employers must protect employees from harassment on behalf of their religion or religious expression.

In theory, these obligations all flow from the uniform and basic principles put forth in Title VII and the First Amendment. They attempt to set forth a “live and let live” principle, with the employer at the helm, ensuring that all employees have an equal opportunity to espouse their religious beliefs and exercise their religious freedoms and, at the same time, that they are not coerced into listening to, participating in, and/or living by another employee’s (or the employer’s own) religious beliefs.

In practice, situations frequently arise that put these obligations at odds with one another. You must exercise constant vigilance to maintain an appropriate balance among employees and their various religions and religious expressions.

With the growing prevalence of religion in the workplace, courts have begun to work through various common scenarios and have offered some concrete guidance as to the dos and don’ts of addressing this issue.

Hiring and Promotion

Title VII protects employees and applicants from being discriminated against as a result of their religious beliefs in all employment decisions, specifically including selection decisions. This means you must ensure that you are not making hiring or promotion decisions with an employee’s religious beliefs in mind. Such beliefs should not be considered — favorably or unfavorably — except in the rare instances in which such beliefs are relevant to the job for which the individual is being considered (such as a chaplain, counselor for certain religious organizations, etc.).

To guard against claims that religion played a role in a hiring or promotion decision, steer clear of interview questions and conversations that touch on an employee’s religion or religious beliefs. It is not appropriate, for example, to ask an individual in an interview setting about the religious origin of his headwear or prayer practices, even if he is open about those topics or has discussed them in the past. An interview is not the time or place to engage in a conversation about faith in any respect. The sole focus of an interview must

be on the individual’s qualifications for the particular job in question.

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Workplace Dress

Some religions prescribe their practitioners’ dress and appearance. This may include head coverings, robes, veils, beards, particular hairstyles, body piercings, and similar conventions. Employers are required to modify dress codes, uniform standards, and other rules, as appropriate, to accommodate such religious wear. If there are health and/or safety requirements, employees may be required to use proper coverings, such as hair nets or face masks, or to modify dress to accommodate protective gear. You also may require employees to wear modified clothing or robes or to adhere to certain requirements of fabric, color, and style consistent with a company image or uniform standard.

Prayer

The extent to which you can or must accommodate prayer in the workplace depends on the nature of the prayer. There are two basic types of prayer to consider: optional prayer said at the discretion of a religion’s members and mandatory prayer required by a particular religion.

Optional prayer is permissible in the workplace as long as it is not mandatory — i.e., such that participation (or lack of participation) is not a factor in any employment decision and is not limited to a particular religion.

You can organize voluntary prayer meetings, but to avoid coercion (real or perceived), hold such meetings before or after the workday or during recognized break times. This will minimize pressure on employees who do not wish to join in or who do not share the same beliefs. In addition, clearly state that participation in such prayer is optional and that declining to participate will not result in adverse treatment or otherwise affect employment. This is particularly important if the prayer occurs during a training session, workplace meeting, or other mandatory work activity.

You also must recognize that not all employees hold the same beliefs. If employees who hold different beliefs want to have prayer sessions of their own, they must be given an equal opportunity to do so with the same access to prayer sites, same time away from work (paid or unpaid) to pray, and same breaks or other accommodations.

Mandatory prayer is not a matter of choice but a requirement



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of a particular religion. Muslims, for example, must pray five times per day at specified times in accordance with the sun's cycle and engage in specified washing rituals before each prayer. You are required to provide scheduling considerations to such employees and accommodate the break times necessary to perform these prayers as long as such accommodation does not pose an undue hardship or undue disruption to company operations.

Difficulty with mandatory prayer often arises when a number of employees belong to the same religion and seek to engage in prayer at the same times, often causing a disruption in business operations. When this occurs, the law is clear that employees have an obligation to work with their employers to appropriately schedule such breaks to minimize disruption. This may include staggering breaks, beginning or ending the workday at varying times, or splitting up longer breaks during the day. The key is to engage employees in a dialogue that seeks to understand and accommodate their needs while communicating business and operational needs.

Religious Holidays

You also must provide scheduling consideration for employees who require time off for certain religious holidays, holy days, and other observances. You specifically should address this contingency in time-off policies (such as floating holiday, vacation, personal and other time-off policies), acknowledging the need for some employees to schedule time off for religious observances and providing scheduling priority as necessary and appropriate to accommodate such needs.

You also should provide scheduling flexibility to employees who need to have certain workdays off on a regular basis, such as for observance of designated Sabbath days. For example, certain Jewish employees will be unable to work from sundown on Friday until sundown on Saturday, and certain Seventh Day Adventists will be unable to work on Sundays. Unless you objectively can establish that granting the time off would create an undue hardship, adjust such employees' schedules to accommodate the need for religious observances.

Workplace Chaplains

A growing trend in the workplace is to employ a chaplain or other religious leader. Such individuals fulfill a number of roles, from conducting voluntary prayer sessions to visiting employees in times of need (such as when sick or in the hospital or following the death of a loved one) to providing

religious counseling and insight for employees. Some chaplains even meet with employees' family members from time to time and perform other religious services, such as weddings, baptisms, and funerals.

There is nothing unlawful about employing a workplace chaplain or making such an individual available to employees and their families. However, the key lies in the strictly voluntary nature of their presence and services. Employees must be free to use or not use the chaplain's services, and the chaplain must be careful only to provide services that are welcomed by the employees receiving them. The chaplain also must be sensitive to the fact that there may be employees who do not share his faith and must not pressure them to change their religious beliefs or engage in practices that contradict their beliefs.

You, too, must reinforce the message that the chaplain is available but his services are not mandatory.

Workplace Affinity Groups

Workplace affinity groups also have become more common, particularly in larger workplaces. Traditionally, these groups have been organized around commonalities such as gender, parental status, hobbies, and social interests. But recently, some employees have formed (or attempted to form) such groups around their religious beliefs.

Generally speaking, affinity groups organized around religion are permissible. However, you must recognize that by allowing one such group, you open the door for a range of such groups organized around a variety of religions and religious beliefs. You are prohibited from treating one group differently or less favorably based on its religious beliefs.

Therefore, if you agree to permit an affinity group for Christian employees, you also must permit affinity groups for Muslim or Jewish employees or employees of other religions and provide the same financial, administrative, and other support and resources for those groups.

An exception arises when a particular religious group discriminates, demeans, or harasses others on the basis of a protected characteristic. An affinity group that has members of white supremacist groups, for instance, may and indeed should be denied formation and employer support based on the fact that the group's putative "religious" beliefs are discriminatory toward others on the basis of race.



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Proselytizing

Proselytizing and faith affirmation at work are dangerous because they often cross the line to become workplace harassment. It is lawful for you or your employees to profess faith, display religious symbols, and even talk to others about faith in the workplace. But such actions can become unlawful harassment if submission to such religious conversation is required as a condition of employment or if the content of the conversation is insulting or demeaning to another individual's religion or other protected characteristics.

You should be sensitive to the fact that proselytizing and faith affirmations are more apt to be considered harassing or coercive if supervisors or owners are involved. Such individuals should be diligent and ensure that their comments and conduct are welcome and do not exclude or demean others.

Workplace Harassment

Claims of religious harassment should be treated as any other claims of workplace harassment. You should have policies that prohibit harassment on the basis of religion or religious beliefs and activities and take seriously any complaints received under such policies.

Harassment can take many forms. The most obvious would be derogatory comments, gestures, or graphic depictions making fun of or insulting a particular religion or religious activity, such as referring to Muslims as terrorists or Jews as stingy. Courts have held that seemingly innocuous comments, such as referring to certain individuals as "one of them" or as "those people," can be harassment if, in context, such comments are understood to be aimed at a particular religious group. Liability also has been found where one religion is elevated above another in a derogatory or demeaning manner.

Other behaviors courts have suggested could constitute unlawful religious harassment if the behavior is unwelcome include:

- Offering to pray for and "lay hands" on sick coworkers
- Sending religious letters about personal topics to coworkers, encouraging them to "save" themselves by declaring a belief in Jesus Christ
- Inviting others to church or handing out religious materials
- Wearing or displaying religious-based materials with graphic depictions or messages aimed at individuals in a protected class

- Asking about absences from particular religious services
- Condemning others' sexual orientation on religious grounds
- Labeling employees by their religious groups

Similar to other harassment claims, the potential for liability will increase when a supervisor is involved in the harassment, whether as a perpetrator or witness. Therefore, it is important that you ensure harassing comments and conduct are eliminated from the workplace, with extra care taken when it is a supervisor involved in the questionable conduct or comments.

Protecting Yourself

In addition to being aware of the issues surrounding religion in the workplace, make sure you have updated policies and procedures to address such issues as they arise. At a minimum, you should:

- Ensure updated equal employment opportunity and harassment policies are in place, prohibiting discrimination and harassment on the basis of religion and including specific examples of prohibited religious harassment
- Train supervisors and employees about the terms of the harassment policy, including reporting requirements and examples of prohibited religious harassment
- Train supervisors about the dangers of proselytizing and the need to identify potentially harassing behaviors
- Take action when an employee objects to a religious activity, bearing in mind the objection can take the form of a nonverbal expression of discomfort
- Ask employees who seem uncomfortable with a religious activity to air their concerns, providing a safe forum for doing so
- Continue to be sensitive to the issues relating to religion in the workplace and the balance that must be struck between competing rights and obligations of free expression

One way or another, religion is creeping into the workplace. The challenge for you is to find a way to guard against the potential liabilities that follow, which could include auditing practices, responding to complaints, enacting appropriate policies and procedures, and being sensitive to issues as they arise. Smart employers recognize and rise to this challenge, acting now to avoid bigger problems in the future.



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