Myths and Facts: The Proposed Religious Freedom Regulation for Federal Contracting
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August 23, 2019
Article for the late-August IRFA eNews for Faith-Based Organizations

The Trump administration published on August 15th a proposal to amend the federal contracting regulations in order to clarify the pre-existing right of religious employers to use religious criteria in making employment decisions. (Note that most federal funding that is awarded to private parties, including faith-based organizations, is awarded as a grant, certificate, voucher, or scholarship; the regulations that apply to these forms of federal financing differ from the regulations for contracting. Much federal funding first goes to a state or local government agency before being awarded to a private entity; that federal funding is usually grant funding and follows the federal regulations for grants, even if the state or local agency calls it a contract when it awards the money.) These contracting regulations concern only nondiscrimination in employment and do not cover how services are delivered nor who may access the services. Organizations that restrict employment in some way do not necessarily limit who they will serve; religious organizations that hire only people of the same religion typically serve people of any religion or no religion.

Uncertainty in federal contracting had been created for religious employers when the Obama administration in 2014 added a ban on sexual orientation and gender identity job discrimination to the contracting regulations. Much commentary on the Trump proposal suggests it will create a "license to discriminate" against LGBT employees and job seekers, and also pregnant unmarried women, in the hundreds of thousands of companies that contract or subcontract to provide goods and services to the federal government. Actually, the proposed changes basically just bring the federal contracting regulations for religious employers into line with the federal rules (Title VII) that apply to employment outside of federal contracting. Only a small percentage of federal contractors and subcontractors are religious employers; the changed rules will ensure that such organizations need not abandon their legally protected faith-based employment practices in order to compete for federal contracts.

Background of the proposed changes. The proposal to amend the federal contracting regulations, an NPRM or Notice of Proposed Rulemaking, was published in the *Federal Register* on August 15, 2019. The draft changes are intended to clarify how the freedom to consider religion in staffing decisions works for religious employers and which organizations are eligible for this exemption. Clarity is important both for faith-based organizations and for the federal government. A lack of clarity puts religious contractors at legal risk and has caused some potential and former religious contractors to avoid federal contracting. Excluding or discouraging religious organizations that should be eligible to contract with the federal government not only tramples on the organizations' freedom of religious exercise but may prevent the federal government from being able to contract with the best providers of certain goods and services.

The public policy framework. The basic federal law on employment discrimination is Title VII of the 1964 Civil Rights Act, as amended in 1972. It bans discrimination on multiple grounds but includes an exemption that permits religious organizations to employ only persons of "a

particular religion" for any and all positions within the organization. The U.S. Supreme Court upheld this right to choose every employee on a religious basis in a unanimous decision in 1987 (*Corporation of the Presiding Bishop* v. *Amos*). Other court decisions have ruled that it is the religious employer, not the applicant, who decides whether there is religious compatibility, and that the employer can assess adherence to faith-based conduct standards. However, federal contracting has long had its own set of rules, and has sometimes pioneered additional employment nondiscrimination requirements. To affirm that religious organizations are eligible to become federal contractors, in 2002, by Executive Order 13279, President George W. Bush added to the federal contracting rules the same religious staffing exemption that had for decades been part of Title VII.

In 2014, President Barack Obama issued Executive Order 13672, banning employment discrimination on the bases of sexual orientation and gender identity by federal contractors and subcontractors. The immediate question raised was this: How did these new antidiscrimination requirements interact with the religious staffing exemption? If a Catholic university that holds federal contracts to do biomedical research decides not to hire a new Catholic biology professor because she is in a same-sex marriage, thus violating Church teaching, has the university violated the ban on sexual orientation discrimination or is its action, because it is based on religious criteria, protected by the religious exemption?

Guidance provided by the Obama administration suggested that such a decision would be ruled illegal—that it would be treated as an exercise of forbidden discrimination and not as an exercise of protected religious decision-making. If so, then the university should be stripped of its federal contracts.

Yet such an interpretation makes a mockery out of the explicit right of religious employers to staff based on faith, a right secured in the religious exemption that is part of federal contracting law as well as Title VII.

In 2016, an effort was made by the Republican Congress, through the budget process, to require the broad understanding of the religious staffing freedom in federal contracting. But the Russell amendment, after passing the House, was set aside in the Senate when, following the presidential election, Vice President-elect Mike Pence provided assurances that the incoming Trump administration would itself act.

Faith-based organizational practices. What is important to a religious organization is the freedom to ensure that its staff align with and embody the religious beliefs that motivate and guide the organization. Every organization, in fact, needs to be able to hire just those applicants that will fulfill its mission and fit with its basic values. Religious employers must be free to assess the beliefs and conduct of applicants and not have to be satisfied if a job seeker simply asserts that he or she belongs to the employer's religion. That need exists whether or not the religious organization receives government funding.

Religious employers cannot be arbitrary, however. To utilize the religious staffing freedom, they must explicitly and consistently apply their professed faith-based employment criteria. For this, a religious organization needs to make its faith-based requirements clear to applicants throughout the employment process--in the job description, the interview process, the employee handbook,

and in its periodic evaluations. Only religious organizations can engage in religious staffing. So, for legal reasons--not to mention, in order to act with integrity and to be true to its mission--a religious employer needs to ensure that its employment policy is rooted in its professed religious mission and beliefs and that it holds itself out to job candidates as a religious organization and has made clear the religious qualifications for the job.

Public positioning. The freedom to apply a religious test in employment is controversial to many. Yet, as religious freedom scholar Douglas Laycock has observed, even secular political organizations and policy organizations need to be free "to insist that their employees not undermine the organization's fundamental commitments." As he writes, an employee of the Democratic National Committee would not last long if she, though claiming to be a Democrat, gave campaign help to Republicans; environmental organizations, even if they hold federal contracts, may "insist that their employees support their agenda and not claim that climate change is a hoax."

What the proposed changes would not do and would do. The proposed Trump amendments to the federal contracting regulations do not eliminate or modify the sexual orientation and gender identity nondiscrimination requirement, they make no changes pertinent to the vast array of secular federal contractors, and they create no new rights for religious employers. They will not authorize a tsunami of firings of gay and transgender employees nor of unmarried pregnant staff.

But the proposed changes will, if they become law, give religious organizations the assurance they need to engage in the complex and rule-bound process of federal contracting. The NPRM cites Title VII law and court decisions interpreting the religious staffing freedom. And it cites a series of US Supreme Court decisions protecting religious exercise by organizations: the right of religious organizations to select their key ("ministerial") employees without interference by government (*Hosanna-Tabor* v. *EEOC*, 2012); no exclusion from government grants simply because the applicant organization is religious (*Trinity Lutheran Church* v. *Comer*, 2017); some decisions of some businesses are protected as religious exercise (*Burwell* v. *Hobby Lobby*, 2014); governments must respect religious identity and exercise in the context of LGBT rights (*Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, 2018). It also cites former Attorney General Session's extensive 2017 Department of Justice memo setting out the religious freedoms that the federal government is required to respect.

The NPRM proposes adding to the federal contracting regulations a requirement that the religious staffing exemption be interpreted "in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law," including the Religious Freedom Restoration Act. That is, the religious rights in the contracting regulations should be fully respected, just as must be all of the other requirements and freedoms. (This rule of interpretation might be stated too broadly in the draft changes.)

For the rest, new certainty about the scope and meaning of the religious staffing right is to be provided by adding to the regulations a set of definitions. One definition confirms that an employer entitled to the religious exemption is any organization with a publicly displayed religious purpose that shapes its practices—the organization need not be connected with a church or mosque, be identified with or supported by only a single denomination or religion, nor be a

nonprofit (for a business to fit within the definition, it has to have a religious purpose that it makes clear to the public and that guides how it operates). Catholic Charities, National Religious Broadcasters, Jewish Social Service Agency, and Brigham Young University clearly fit the definition; Lockheed Martin, Mathematica Research, Inc., and Harvard clearly do not.

Other definitions, borrowed from other parts of federal law, state that "religion" encompasses all aspects of religious observance and not only belief, and that "exercise of religion" includes every exercise of religion, not only acts thought to be required by or central to a system of beliefs. Further, for a religious staffing decision to be protected by law, it only has to be made as a "sincere" act of faith, whether or not the decision is regarded as logical or legitimate by a federal contracting official or a job seeker. However, religious employers may not discriminate against an applicant or employee on the basis of sex, sexual orientation, age, or other protected characteristic and then make up some religious justification as a pretext.

A note about federal grants. The religious staffing freedom for religious organizations is protected when the federal dollars are grant funds; a small proportion of federal grant programs ban various forms of employment discrimination, including religious job discrimination, but a religious employer can appeal to the Religious Freedom Restoration Act (RFRA) against this restriction on religious staffing. An Obama administration regulation that applies to US Department of Health and Human Services grants prohibits employment (and service) discrimination on multiple grounds, including religion, sexual orientation, and gender identity. Religious organizations applying for HHS grants can reference RFRA and seek an exemption from this regulatory requirement.

Small effect but large principle. The bitter controversy about religious staffing and the rights of LGBT workers in federal contracting constitutes a huge conflagration about a small set of organizations, because only a very small percentage of federal contractors and subcontractors are religious. And, yet, the principle is important. Under our federal and state constitutions and laws, religious organizations have the right to maintain a religious identity and, within limits, to act consistently with their religious convictions. When the law seeks to protect LGBT people, that purpose, too, should be carried out. But not by abrogating the protected religious rights.

The only solution in our diverse country is to accept that private organizations will, and should be free to, embody distinctive views and practices. Some of those organizations are committed to some particular religion vision and need to be able to assert religion-based employment requirements. To deem their religion-based job decisions to be discriminatory and make them illegal may satisfy some abstract notion of equal treatment but will deeply undercut the legitimate effort of those religious organizations to operate consistently with their motivating beliefs. The law should embody pluralism. Neither religious nor secular employers should be excluded, simply because of their religious or secular character, from eligibility for federal contracts.

Opportunity to comment. The NPRM announced proposed changes to the federal contracting regulations. As part of the normal federal rulemaking process, we, the public, now have an opportunity to comment on the proposed changes and on the reasoning offered. Comments may be technical and legal or simply the expression of a view about the rightness or wrongness of the

proposed action. Officials must pay attention to all comments that are submitted, although they need not change what they have proposed.

The easiest way to comment is to go to www.regulations.gov and enter "RIN 1250-AA09" into the Search box. When the page headed "Featured Result - RIN: 1250-AA09: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" appears, click on the Comment Now button. The deadline for commenting is September 16, 2019. Note that the comment portal can get bogged down near the deadline.