

## Protecting the religious hiring freedom legislatively when government funds are involved

### *What to do:*

- 1) **Do not add an employment nondiscrimination provision** to the bill. This leaves intact the religious hiring freedom as provided in Title VII of the 1964 Civil Rights Act.
- 2) **Explicitly state that a religious organization does not lose its religious hiring freedom** when it receives funds through this program.

Example. The TANF Charitable Choice provision (Sec. 604a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“welfare reform”) includes this subsection:

(f) EMPLOYMENT PRACTICES.—A religious organization’s exemption provided under section 2000e-1 of this title [i.e., the Title VII religious hiring exemption] regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.

- 3) **Limit a religious nondiscrimination requirement to the treatment of beneficiaries.**

Example. For the 2013 Violence Against Women Act reauthorization (S. 47), the House Republican substitute bill proposed the following language in place of the bill’s overly broad nondiscrimination provision:

(13) CIVIL RIGHTS.— (A) NONDISCRIMINATION.—No person in any State shall on the basis of actual or perceived race, color, religion, national origin, sex, or disability be denied the assistance of, or excluded from receiving services from, a grantee under any program or activity funded in whole or in part with funds made available . . .

### *What not to do:*

- 1) **Explicitly ban** religious hiring by all grantees, including religious organizations.

Example. The Workforce Investment Act (29 USC 2938 (a)(2)).

PROHIBITION OF DISCRIMINATION REGARDING PARTICIPATION, BENEFITS, AND EMPLOYMENT.—No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under title IX of the Education Amendments of 1972), national origin, age, disability, or political affiliation or belief.

- 2) **Extend a current limited ban** more broadly, while also **eliminating religious organizations’ recourse** to the Religious Freedom Restoration Act

Example. (2010) HR 5466, SAMHSA modernization bill (P. Kennedy, D-RI, and G. Green, D-TX), proposed to add to the rules governing SAMHSA funding this phrase:

CONSIDERATION OF RELIGION IN EMPLOYMENT DECISIONS.—With respect to any activity to be funded (in whole or in part) through an award of a grant, cooperative agreement, or contract under this title or any other statutory authority of the Administration, the Administrator, or the Director of the Center involved, as the case may be, may not make such an award unless the applicant agrees to refrain from considering religion or any profession of faith when making any employment decision regarding an individual who is or will be assigned to carry out any portion of the activity. This paragraph applies notwithstanding any other provision of Federal law, including any exemption otherwise applicable to a religious corporation, association, educational institution, or society.

The bill died without action. However, this language would have (a) extended to all SAMHSA programs a current limited religious hiring ban while also (b) eliminating the RFRA remedy.

### **3) Include in legislation an overly broad nondiscrimination requirement.**

Example. (2013) Violence Against Women's Act reauthorization, S. 47, adopted by the House and Senate, included this provision:

(13) CIVIL RIGHTS.— (A) NONDISCRIMINATION.—No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code) . . . , sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available . . .

Such broad language has been construed by the courts to ban religious discrimination not only in the provision of services but also in the employment decisions made by organizations that receive the funds.

#### **Resources**

Carl Esbeck, Stanley Carlson-Thies, and Ron Sider. *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Washington, DC, Center for Public Justice, 2004). [<http://www.cpjustice.org/files/religiousstaffing.pdf>]

White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* (2003, 2005). [<http://georgewbush-whitehouse.archives.gov/government/fbci/religious-hiring-booklet-2005.pdf>]

Cynthia Brougher, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, CRS Report for Congress, RS22745 (Jan. 20, 2011).