

December 17, 2020

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Bernadette B. Wilson  
Executive Officer, Executive Secretariat  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

**Re: RIN 3046-ZA01, Comments in Response to EEOC’s Proposed Updated Compliance Manual on Religious Discrimination**

Dear Ms. Wilson:

The 44 undersigned organizations submit these comments in response to the Equal Employment Opportunity Commission’s (EEOC), Proposed Updated Compliance Manual on Religious Discrimination (“Proposed Update” or “PUCM”), published in the Federal Register on November 23, 2020, 85 Fed. Reg. 74719 (proposed Nov. 17, 2020) (RIN 3046-ZA01). We strongly oppose several aspects of the Proposed Update and urge the EEOC to withdraw it.

As a preliminary matter, the EEOC’s decision to undertake a significant rewrite of its compliance manual in the middle of a national pandemic, and to provide only 30 days for public comment instead of the customary 60 days, casts doubt on the integrity of the administrative process. The Notice of Availability (NOA) provides no explanation for why the EEOC needs to depart from the requirements of Executive Order 13563, that a comment period “should generally be at least 60 days.”<sup>1</sup>

The EEOC developed the Proposed Update with a notable lack of transparency, in sharp contrast to its lengthy public process and collaboration with a variety of stakeholders when it developed the current guidance 12 years ago. Two commissioners noted that they were only given five days to review the 100+ page document and footnotes before the vote to publish the NOA. Only after publishing notice of the Proposed Update did the EEOC disclose for the first time that it held nonpublic “dialogue sessions” with unnamed “[r]eligious leaders, advocacy groups and faith-based nonprofits”—without providing members of the public an opportunity to participate in such “sessions”.<sup>2</sup>

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<sup>1</sup> Exec. Order 13563, 76 Fed. Reg. 3821-22 (Jan. 21, 2011).

<sup>2</sup> *EEOC General Counsel Holds Dialogue Sessions on Religious Discrimination with Agency Stakeholders*, at <https://www.eeoc.gov/newsroom/eeoc-general-counsel-holds-dialogue-sessions-religious-discrimination-agency-stakeholders> (Nov. 19, 2020) (noting that the dialogue sessions had already been held “this week”).

The EEOC asserts that the proposed modifications are necessary to incorporate new developments in the law in the 12 years since the last update to the Compliance Manual. But the Proposed Update presents a skewed version of the existing legal landscape that engenders confusion rather than clarity, and wrongly gives undue influence to outlier decisions that defer to employers making religious objections to the application of civil rights laws, without explanation or balance. The proposed changes would prioritize religious rights over and above longstanding rights to be free from discrimination, counter to decades of Title VII case law and the longstanding practices of the EEOC.

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### **1. The Proposed Update Misstates and Improperly Endorses an Expanded Definition of “Religious Organization”**

The Proposed Update takes an expansive, unsupported view of the range of entities that qualify as a “religious organization.” This broad conception is contrary to legal precedent, would undermine the rights of those working for a broad range of employers, and would be especially detrimental to the employment rights of women, people of color, LGBTQ persons, persons who adhere to minority religions or are nonreligious, and those who range across multiple of these and other minority-population categories.

Contrary to the Proposed Update,<sup>3</sup> no federal appellate court nor the Supreme Court has ever held that a for-profit corporation can constitute a “religious organization” under Title VII, which likely explains why the Proposed Update cites no case reaching that conclusion. Moreover, the Proposed Update ignores the line of cases holding that the for-profit nature of an entity weighs against classification as a “religious organization.” Federal statutory religious-based exemptions for employers are limited to churches and other religious non-profit institutions.<sup>4</sup>

While secular activities may not automatically, categorically disqualify an entity from being deemed a “religious organization,” the Proposed Update conspicuously fails to note that under the law such activities weigh against such a finding. The Proposed Update’s suggestion that for-profit, secular entities qualify as “religious organizations” such that they may discriminate on the basis of religion is unfounded.

The Proposed Update also misapplies the line of cases limiting court inquiry into the “sincerity” of religious beliefs, improperly distorting a test meant to protect the religious exercise of employees into a test empowering employers to discriminate. This limitation is meant to protect the deeply held commitments of workers, but the

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<sup>3</sup> PUCM at 21 (“Whether a for-profit corporation can constitute a religious corporation under Title VII is an open question.”).

<sup>4</sup> See 42 U.S.C. § 2000e-1(a)

Proposed Update weaponizes this concept to insulate employers and block investigation into the challenged employer actions.<sup>5</sup> The Proposed Update would severely undermine the undisputed rule that religious organizations may only lawfully discriminate on the basis of religion. The proposed guidance could empower religious organizations to demand specific doctrinal adherence even if the employer has chosen to hire employees of another religion or no religion.

Rather than providing clarity and adhering to the weight of precedent, the Proposed Update repeatedly muddies the waters by hazarding guesses about future legal developments and novel interpretations of recent cases. For example, the Proposed Update opines about the import of cherry-picked dicta in *Hobby Lobby* and goes out of its way to disagree with a position taken by the U.S. Department of Health and Human Services' (HHS).<sup>6</sup>

## **2. The Proposed Update Unjustifiably Endorses the Abuse and Expansion of the Ministerial Exception at the Expense Of Employees' Civil Rights**

The Proposed Update outlines applications of the ministerial exception that are far removed from the doctrine's principal purpose of protecting vital internal church functions from state interference. The exceptional breadth given to the ministerial exception in the Proposed Update would be contrary to worker protections across many areas of law and not aligned with the four-part analysis required by the Supreme Court.

The Proposed Update would do what federal courts have repeatedly declined to—stretch the ministerial exemption beyond teachers in religious schools and church leaders to include a wide variety of employees at religious organizations. For example, the Proposed Update cites the importance of a religious employer's description of an employees' role in determining whether the employee is a "minister"<sup>7</sup> without any consideration of how that factor is one-sided in favor of the employer. The EEOC appears to support taking employers at their word rather than applying the factors that courts have successfully employed to determine the application of the exemption. The EEOC should not depart from this precedent by giving complete deference to employers and should make clear that the exception is

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<sup>5</sup> See PUCM at 23-24 ("The religious organization exemption is not limited to employment in the specifically religious activities of the organization. Rather, 'the explicit exemptions to Title VII ... enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'").

<sup>6</sup> PUCM at 21 n.63.

<sup>7</sup> See PUCM at 29.

limited only to context of hiring and firing and does not reach areas as diverse as wage discrimination and sex or other harassment.

### **3. The Proposed Update Improperly Speculates About Employer Uses of The Religious Freedom Restoration Act**

The EEOC's discussion of the Religious Freedom Restoration Act (RFRA) in the Proposed Update dangerously injects uncertainty into this area of the law, all without the EEOC asserting that preventing and remedying discrimination is a compelling governmental interest. The absolute deference to religious employees embodied in the Proposed Update's RFRA discussion is contrary to established precedent interpreting Title VII, which provides for reasonable accommodation of an employee's religious observance, practice, and belief unless an employer can show "undue hardship."<sup>8</sup> RFRA was not intended to change this settled understanding of appropriate "religious accommodation" under Title VII.<sup>9</sup> Also absent from the RFRA discussion is the proper balancing and burden shifting analysis that applies to a RFRA defense, including the recognized circumstances in which the compelling interest in prohibiting discrimination outweighs deference to religious exercise.<sup>10</sup> In this way, the Proposed Update misleadingly encourages deference to RFRA claims without acknowledging that the party asserting the exemption must show that the law would substantially burden a sincere religious exercise, and if this showing is made, the burden shifts to the government to demonstrate that the burden is imposed in furtherance of a compelling interest and is the least restrictive means of furthering that interest.<sup>11</sup>

As written, the Proposed Update would essentially endorse the use of RFRA to avoid the obligations of Title VII, which it both was not intended to do and has not been used to do. The EEOC has recognized that RFRA is inapplicable where an employer fails to show that non-discrimination imposes a "substantial burden" on the company's "exercise of religion." See *EEOC v. Harris Funeral Home*.<sup>12</sup> Remarkably, the EEOC fails to highlight the compelling interest of preventing and remedying discrimination in this Proposed Guidance, even though that is the Commission's entire mission.

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<sup>8</sup> 42 U.S.C. § 2000e(j), *Trans World Airlines, Inc. v. Hardison* ("TWA"), 432 U.S. 63, 73-74 (1977).

<sup>9</sup> See also *TWA*, 432 U.S. at 81 (reasonable accommodation cannot come "at the expense" of other employees); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (and noting that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (religious accommodation without regard to the burden imposed on the employer or other employees violated the Establishment Clause).

<sup>10</sup> See 42 U.S.C. §§ 2000bb-1(a),(b).

<sup>11</sup> See *Michigan Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014).

<sup>12</sup> See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir.), Doc. #22 at 18 (Appellant EEOC Opening Brief).

Instead of actual guidance informed by the law, the Proposed Update references potential uses of RFRA and the First Amendment to avoid antidiscrimination law, but does not provide any guidance about the countervailing interests of employees, third parties, or the State in eradicating discrimination. The Proposed Update attempts to create the false impression that the question of RFRA’s inapplicability to private sector employers is more contested than it in fact is. That RFRA, like the First Amendment, is expressly a restriction on government conduct is buried in footnote 115 and treated by the Proposed Update as if it were reasonably disputed.<sup>13</sup>

The Proposed Update also outlines a radically expanded conception of “government” under RFRA and speculates that such a theory “might allow a court to find sufficient government involvement in lawsuits between private parties to allow for a RFRA defense to apply.”<sup>14</sup> This endorsement of a speculative and far-fetched theory, which would undermine the rights of employees, is inappropriate in a document that is supposed to provide meaningful clarity and guidance. Likewise, the Proposed Update vaguely references potential First Amendment defenses to Title VII,<sup>15</sup> yet fails to acknowledge that courts have consistently rejected efforts to defend workplace discrimination by framing it as protected speech.<sup>16</sup>

#### **4. The Proposed Update Does Not Include Guidance That Employers May Not Use Religious Objections as a License to Discriminate.**

The Proposed Update indicates that religious employers have discretion in restricting its hiring and firing decisions to prefer co-religionists in appropriate circumstances.<sup>17</sup> The Proposed Update, however, omits important parameters around that right. Religious employers are not justified in discriminating against applicants based on religious beliefs outside of a preference for co-religionists.

For example, a religious employer may not discriminate against female employees or LGBTQ employees. An employer cannot decide to take no action against workplace harassment directed at LGBTQ employees, to pay female employees less than male

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<sup>13</sup> See *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (RFRA defense not available as defense in action between private parties); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010) (RFRA not a defense in suit between private parties); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999).

<sup>14</sup> PUCM at 32 n.116.

<sup>15</sup> PUCM at 31-34.

<sup>16</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (First Amendment objections “do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 572 (1995) (non-discrimination statutes “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”).

<sup>17</sup> PUCM at 21-22, 29, 42.

employees for similar work, or to structure health coverage benefits for prenatal care to be limited to married female employees and exclude all other pregnant employees. Such decisions, which go beyond the decision to employ or not employ a co-religionist, are inconsistent with Title VII and should find no safe harbor here.

#### **5. The Proposed Update Underplays the Impact that Unwelcome Religious Proselytizing Visits Upon Coworkers, Customers and Third Parties**

The guidance provided in the Proposed Update encourages permitting an employee to subject coworkers and customers to harassment when it takes the form of proselytizing. For example, the Proposed Update suggests that a showing that the employer need not accommodate an employee's proselytizing "requires more than proof that some coworkers complained or are offended by an unpopular religious view; a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work."<sup>18</sup> This is not the proper standard; the EEOC effectively instructs employers that harassment couched in the language of proselytizing must give way to religious accommodations in all but the most egregious circumstances.

Thus, coworkers are expected to bear and internalize any disturbance short of unlawful harassment as part of accommodating the religious needs of individual employees. In addition, there is no play in the joints for employers seeking to manage their workplace, as there is no space between their legal obligation to accommodate religious employees and their legal obligation to prevent harassment under EEOC's reading. The Commission should refrain from favoring the needs of certain employees on one particular basis at the cost of other employees. Similarly, the Proposed Update overlooks the potential impact of its guidance on customers and third parties. When a religious employee is exempted from providing service to certain groups of customers, clients, or patients, it is often the customers, clients and patients who are directly implicated and harmed by the refusal of service. This danger is particularly grave when the job tasks involve essential services such as health care.

#### **6. The Proposed Update Undermines Title VII and Supreme Court Precedent by Altering the *De Minimis* Standard for Religious Accommodation**

Title VII requires an employer to make reasonable accommodation to an employee's religious needs upon notice, provided that the accommodation would not impose any "undue hardship" on the employer.<sup>19</sup> The statutory term "undue hardship" has been defined by the Supreme Court to mean no more than a *de minimis* cost on the

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<sup>18</sup> PUCM at 81.

<sup>19</sup> 42 U.S.C. § 2000 e(j)

employer,<sup>20</sup> including monetary costs<sup>21</sup> and negative impact on the employer's business and coworkers.<sup>22</sup> The *de minimis* cost test is consistent with the Establishment Clause and the goal of Title VII to ensure equal employment opportunity at the workplace regardless of an employee's race, color, sex, national origin, or religion.

The Proposed Update, however, stretches the *de minimis* test beyond recognition by imposing substantial duties on employers—effectively replacing the *de minimis* test with a religious privilege that can only be overcome if the religious exercise will likely constitute unlawful conduct. This is out of sync with how requests for accommodation are analyzed and compromises the legal right of the other employees under Title VII.

More broadly, the freedom of religion “do[es] not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”<sup>23</sup> But the Proposed Update ignores these main caveats in applicable laws and appears to make an individual employee's refusal of service to a customer, client or patient for religious reasons a legally protected norm.

### **7. The Proposed Update Muddies the Scope of Employer Obligations to Offer Reasonable Accommodations, particularly Surrounding the Interaction Between Title VII and “Refusal of Care” Laws**

EEOC's Title VII guidance is supposed to clarify the extent of an employer's obligation to offer reasonable religious accommodation. Instead, the Proposed Update muddies the definition of “undue hardship,” distorts the balance between guarding against religious discrimination and essential rights of third parties, and creates loopholes for discrimination and other forms of harassment.

Specifically, the Proposed Update improperly suggests that federal “refusal of care” laws (the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment) may conflict with Title VII.<sup>24</sup> The Proposed Update should confirm that refusal of care laws have stood in harmony with Title VII for years and incorporate Title VII's balancing framework. Congress passed the Church Amendment only a year after codifying the reasonable accommodation/undue hardship framework in Title VII, and there is no indication from the text or history of that or the other refusal statutes that Congress intended to override the carefully constructed balancing in

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<sup>20</sup> *TWA*, 432 U.S. at 84.

<sup>21</sup> *Id.* (premium overtime pay incurred from accommodation an undue hardship).

<sup>22</sup> *See Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (“An employer may prove that an employee's proposal would involve undue hardship by showing that either its impact on coworkers or its cost would be more than *de minimis*.”).

<sup>23</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

<sup>24</sup> PUCM at 74-75 & n.235.

Title VII. Just last year, a federal court affirmed this reading,<sup>25</sup> rejecting the contention that “Congress silently intended effectively to override [the Title VII reasonable accommodation/undue hardship] framework in the context of the health care industry” when it passed the Church Amendments.<sup>26</sup> The court also noted the lack of “any evidence” that Congress intended any of the refusal statutes to jettison the Title VII balancing framework.<sup>27</sup>

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For the foregoing reasons, we strongly oppose the Proposed Update and urge the EEOC to withdraw it.

Sincerely,

Advocates for Youth  
American Atheists  
Autistic Self Advocacy Network  
Bayard Rustin Liberation Initiative  
CenterLink: The Community of LGBT Centers  
Clearinghouse on Women's Issues  
Council for Global Equality  
Equal Pay Today  
Equality California  
Feminist Majority Foundation  
FORGE, Inc.  
Futures Without Violence  
Guttmacher Institute  
Human Rights Campaign  
Institute for Women's Policy Research  
Lawyers' Committee for Civil Rights Under Law  
The Leadership Conference on Civil and Human Rights  
Legal Momentum, The Women's Legal Defense and Education Fund  
Movement Advancement Project  
NAACP  
NARAL Pro-Choice America  
National Center for Law and Economic Justice  
National Center for Transgender Equality

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<sup>25</sup> 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88).

<sup>26</sup> *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 524 (S.D.N.Y. 2019); *see also id.* at 536.

<sup>27</sup> *Id.*

National Council of Jewish Women  
National Employment Law Project  
National Employment Lawyers Association  
National Equality Action Team (NEAT)  
National LGBTQ Task Force  
National Organization for Women  
National Partnership for Women & Families  
National Women's Law Center  
Out & Equal  
PFLAG National  
Public Justice  
ROCUNITED  
Silver State Equality-Nevada  
The Trevor Project  
Tradeswomen Inc.  
True Colors United  
Union for Reform Judaism  
URGE: Unite for Reproductive & Gender Equity  
Women Employed  
Women's Law Project  
Workplace Fairness