

Concurrent Session

Top Ten Things – Employment Law Update

Frank Sommerville, JD, CPA, Shareholder

Weycer, Kaplan, Pulaski, & Zuber

Top Ten HR Updates

Frank Sommerville, JD, CPA
Weycer, Kaplan, Pulaski & Zuber, P.C.
1-877-537-4360
fsommerville@wkpz.com

I. Title VII

Bostock v. Clayton County, GA, 590 U.S. ____ (2020). When Title VII uses the term “sex,” the term encompasses gender, biological sex, sexual orientation, sexual identity, and transgender. In one case, a for-profit employer’s sincerely held religious beliefs were not an excuse for the discrimination. The opinion specifically reserves addressing whether the decision applies to religious organizations.

Religious employers need to decide how they will address this decision. Potentially, it applies to all nonministerial positions in a church. Some churches will change their employee handbook and policies to accommodate this decision if they had not done so earlier. Other churches require that all employees adhere to their sincerely held religious beliefs and believe that this decision infringes on the church’s First Amendment right to Free Exercise of their religion. Besides, churches are allowed to discriminate based on religion.

If the church falls into the latter class, the church should adopt a statement of faith or beliefs. All applicants should be required to agree with it before applying for a job. The church should also require an annual affirmation from all employees. This process will isolate the First Amendment issue if the church becomes the subject of a test case.

II. Ministerial Exception

No statute exempts explicitly religious employees from the application of the employment law. So the courts created the ministerial exception to avoid violations of the church’s First Amendment right to Free Exercise of its faith. The ministerial exception holds that no employment statute applies to the relationship between a church and its employees involved in the practice of its faith. The Department of Labor recognizes the ministerial exception in its new regulations. “To estimate the number of workers covered . . . the Department excluded workers who are not protected by the FLSA or are not subject to the Department’s regulations . . . These workers include: . . . clergy and other religious workers . . .” It further states: “Religious workers were excluded from the analysis after being identified by their occupation codes: ‘clergy’ (Census occupational code 2040), ‘directors, religious activities and education’ (2050), and ‘religious workers, all other’ (2060).”

Historically, the courts have exempted ministers from FLSA because of legislative history. During a Congressional debate, the overtime bill sponsor told Congress that overtime rules did not apply to ministers because they were not considered employees. This DOL position was also the position of the Internal Revenue Service (IRS) at that time. The courts created the minister exception to prevent the Department of Labor from applying the overtime regulations to ministers.

Although there is no rigid formula in determining whether the ministerial exception applies, the courts consider various factors related to the nature of the employee's duties and the importance of these duties to the church and its religious functions. Such factors include:

1. The level of religious training required for the position.
2. The formal title given the employee by the Church.
3. Whether the employee must perform job duties according to the theological beliefs and standards of the church.
4. Whether the employee's job duties reflect a role in conveying the Church's message and carrying out its mission.
5. Whether the employee selects or creates religious content.
6. Whether the employee is charged with leading others towards maturity in their faith and teaching the Word of God.
7. Whether the Church periodically reviews the employee's skills of ministry and ministerial responsibilities.
8. Whether the Church requires the employee to participate in continuing religious education, to support their ministry of the gospel.

In recent decisions, the courts have applied the ministerial exception to a former music director who played music during mass, monitored the sound system, and even performed some custodial work. The law was applied to an individual who held the title as a "spiritual director" and helped others cultivate "intimacy with God" even though the spiritual director did not hold herself out to the public as an ambassador of the faith or receive rigorous religious training. Frequently, the courts will defer the church's determination of who qualifies as subject to the ministerial exception. To qualify for the ministerial exception, the employee needs no formal form of ministerial credential.

III. 2021 Cases Involving Churches

- a. Our Lady of the Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020). The ministerial exception includes teachers with spiritual duties, even if they are not a part of the same faith as the sponsoring school.
- b. Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021). The en banc decision holds that the ministerial exception bars all state and federal employment related claims by a music director.
- c. Starkey v. Roman Catholic Diocese of Indianapolis, Inc.*, 2021 WL 3669050 (S.D. Ind. 2021), on appeal to the 7th Circuit. High school guidance counselor at Christian

high school is subject to the ministerial exception. Her claims of state and federal discrimination because of her same-sex marriage are barred by the ministerial exception.

- d. *Trotter v. United Lutheran Seminary*, 2021 WL 3271233 (E.D. Pa. 2021). Ordained Lutheran minister serving as Vice President of Student Services and Enrollment is not subject to ministerial exception because she had no spiritual duties and responsibilities.
- e. *Simon v. Saint Dominic Academy*, 2021 WL 1660851 (D. N.J. 2021). Chairperson of the Religion Department and Campus Minister at Catholic school qualifies for the ministerial exception. She barred from federal (FMLA, AGEA) and state (nondiscrimination, workers' compensation, state FMLA, breach of employee manual, and breach of good faith and fair dealing) laws.
- f. *Koenke v. Saint Joseph's University*, 2021 WL 75778 (E.D. Penn. 2021). Assistant Director for Music and Worship is subject to ministerial exception. The ministerial exception applies to all employment laws, not just "tangible" violations.
- g. *Brandenberg v. Greek Orthodox Diocese of North America*, 2021 WL 2206486 (S.D. N.Y. 2021). Since the lawyers for the Diocese waived the ministerial exception by not requesting its application to a hostile work environment claim, the hostile work environment case brought by nuns survived a motion to dismiss. The ministerial exception barred the claims for sex discrimination and retaliation.

IV. FLSA – Increased DOL Enforcement

- a. **Exempt Employee Test** - New minimum salary level for exempt employees. Effective 1/1/2020, the minimum weekly salary is \$684, or \$35,568.00 annually.
- b. **Nonexempt Misclassification.** The statute includes executive, administrative and professional exemptions ("EAP Exemptions") from overtime. Many churches abuse employees by classifying workers as exempt when they are nonexempt. Most of those misclassified workers are lower level and administrative employees.

Administrative exemption

The administrative exemption requires that the worker meet the following tests:

- Their primary duty must be to perform office work or non-manual labor related to the management of the organization, and they must meet the minimum salary requirement.
- The primary duty must include the exercise of discretion and independent judgment concerning matters of significance to the organization.

This exemption will apply to workers with decision-making authority but do not have the same amount of worker supervision the executive exemption requires. The

administrative exemption would typically apply to a worker who supervises many volunteers and their activities.

V. Failing to Adopt and Update Job Descriptions¹

While an often neglected tool, well-crafted job descriptions support the church's mission, enhance ministry effectiveness and the effectiveness of those who do ministry, assist in legal and tax compliance areas, and so much more. Besides summarizing essential job responsibilities, the type of work performed, qualifications, and skills for a position, good job descriptions may include information about the church's culture, mission, and benefits. In fact, a well-crafted job description functions a lot like DNA.

When God created the human race, he wrote detailed instructions into the body through DNA. DNA instructs each cell as it is formed about how it should function. Those written instructions organize the formation, growth, and function of the body. These instructions tell one cell to form a fingernail while directing another cell to become a bone. A functioning human is created when all cells are working together by following the correct instructions. The Bible describes the church as the Body of Christ, a "body" of individuals working together to accomplish God's purposes. Just as God provided instructions in human DNA, job descriptions provide instructions to the Body of Christ.

In writing to the Corinthians, Paul desired the church to understand it would take people with diverse gifts and talents organized well to perform different jobs accomplishing God's purposes. He used the human body to illustrate how to organize a church, even naming a few distinct parts (1 Cor. 12:12-31). Paul was addressing a church in Corinth that included people from all over the world (different races and cultures) and those with different occupations and economic statuses. This diverse group had never worked together for a common purpose. Yet Paul knew that if the church could work together like a human body, it could accomplish God's purposes in Corinth.

Today's church is no different. If the church hopes to accomplish God's purposes, its members and staff must work together as one body. Job descriptions can be viewed as the DNA or the set of instructions guiding the church to accomplish God's purposes through the church's diverse staff and volunteers.

VI. Failing to Maintain an Employee Handbook²

Employee handbooks, sometimes called employee manuals or employee policies, often represent the Achilles' heel of church legal compliance.

Employee lawsuits frequently appear near the top of all types of lawsuits against churches. Employee handbooks may assist in avoiding these lawsuits, but this critical

¹ Excerpt from Church Law & Tax Report Copyright 2021.

² Excerpt from Church Law & Tax Report Copyright 2021.

documentation is often neglected or copied from secular sources that neglect the unique nature of churches and other religious organizations.

In the employment arena, an employee handbook (handbook) plays the same role in employee relations as the Bible does to a Christian's everyday life.

Just as the Bible includes rules for relationships and how we should conduct our lives, a handbook includes the rules, policies, and procedures governing and establishing expectations for the relationship between the church and its employees.

A carefully created handbook should include the church's history, culture, core values, and mission. It should guide the church and its employees' lives together and address employer and employee expectations arising from the relationship.

VII. Failing to Properly Classify Interns³

Many churches believe that part of their mission is to train the next generation of ministers and lay leaders. While Bible schools and seminaries provide information and knowledge, most individuals need hands-on experience to apply what they have learned.

In a tradition that goes back to Joshua serving and learning from Moses, churches open their doors to qualified individuals seeking hands-on experience. Churches frequently use the term "intern" to describe these workers.

Interns benefit from the work experience, résumé enhancement, career exploration, networking opportunities, and, sometimes, the potential for a job offer from the church. Unfortunately, the term "intern" does not have a statutory definition, so each church defines the term to suit its purposes. While the meaning of "intern" varies among churches, churches often believe that using the term allows them to escape all employment rules. Every intern that receives compensation and is not subject to the ministerial exception is likely an employee under either the FLSA or applicable state law despite common misconceptions held by many churches.

VIII. Remote Work Issues

- a. All employment laws apply to remote working arrangements.
- b. The state where the employee works determines applicable employment and tax laws.
- c. The home "office" becomes a worksite, and the employer is responsible for the health and safety of employees at that worksite.
- d. Confirm that your church's workers' compensation covers worksites in each state.

³ Excerpt from Church Law & Tax Report Copyright 2021.

- e. FLSA applies to all non-exempt employees, and they must be paid for standby time.
- f. Adopt a remote work policy.
- g. Require a written remote work agreement.
- h. Require pictures of the work area to address issues, such as safety and confidentiality.

IX. Payroll & Fringe Benefits

- a. **HRA Changes for 2021** – Final regulations issued allowing health reimbursement accounts to be integrated with individual health insurance plans. Effective for plan years beginning on or after January 1, 2020, an HRA can be integrated with individual ACA compliant health plans if group health plans are not offered. There are rules to be followed, and most important, employees must be notified at least 90 days before the beginning of the plan year.
- b. **Dependent Care Limit for 2021** – Dependent care limit is \$10,500 for 2021. The limit returns to \$5,250 in 2022.
- c. ***Congregation Bais Yakoof v. Commissioner***, T.C. Summ. Op. 2020-21. Church liable for payroll tax and penalties for unpaid payroll taxes. IRS Appeal Officer's decision not to abate penalties affirmed because the Congregation failed to establish reasonable cause for the nonpayment.
- d. ***Kuma v. Greater New York Conference of the Seventh Day Adventist Church***, 2020 WL 5096003 (S.D. N.Y. 2020). Minister discovers upon retirement that he is not eligible for Social Security and Medicare benefits because his employer did not withhold FICA and Medicare taxes from his pay. Minister sues church because it failed to withhold FICA and Medicare taxes from his pay. Suit dismissed because the church complied with the law regarding FICA and Medicare withholding applicable to ministers.

X. COVID-19

- a. **Employee Vaccination** – DOL recommends that employers encourage employees to receive the vaccination but not mandate it. OSHA considering rule to mandate vaccination for all employers with 100 or more employees, or implement weekly testing for all unvaccinated employees.
- b. **Employee Testing** – Employers may require employees be tested after they have been exposed to COVID and before they can return to work after being ill. Employers may require employees to have a negative test for COVID if they report to work with any symptoms related to COVID.
- c. **Employee Safety** – Current OSHA rules mandate that all employers provide personal protective equipment (masks, disinfectants) and maintain social

distancing (6 feet) for all workplaces. Employers must regularly disinfect common areas in the workplace.

APPENDIX: REMOTE WORK POLICY

1. Policy Statement

The Church will actively support remote work for employees where it is reasonable and practical to do so and where operational needs will not be adversely affected.

2. Definition of Remote Work

Remote work is defined as working at home or other off-site locations linked electronically (via computer, Internet, etc.) to Church's offices. Remote work is a cooperative arrangement between the Church and an employee, based upon the job, workgroup, and Church needs. This policy does not apply to situations where a supervisor occasionally allows an employee to work at home on a temporary, irregular basis.

3. Aims and Objectives

The Church is committed to equality of opportunity for all its staff regardless of the number of hours worked. The Church may create working arrangements, following managerial interests, whereby it can widen its recruitment pool and retain existing employees' valuable skills.

4. Eligibility

To be eligible for consideration of a remote work arrangement, an employee must have no record of performance problems or disciplinary actions within the preceding two (2) years. In the case of a new hire, the Church will conduct a thorough reference check with past employers to determine whether he/she meets the requirement.

Criteria for consideration of Remote Work Arrangement

Is the employee the right candidate for remote working?

Proven ability to perform;
No disciplinary action;
High job knowledge;
Ability to establish clear objectives;
Flexibility;
Ability to work independently; and
Dependability.

Does the nature of the work lend itself to remote work?

Jobs that entail working alone or with equipment that can be kept at the alternate worksite
Clearly defined tasks and objectives;
Little face-to-face communication needed; and
Measurable work activities.

5. Job Responsibilities

Employee job responsibilities will not change due to remote working. Professionalism in terms of job responsibilities, work output, and customer orientation will follow the Church's standards. The amount of time an employee is expected to work will not change due to remote work. Employee work hours will be mutually agreed upon by the supervisor and the employee. If business conditions require the employee's presence at the Church's office for a meeting or other event, the employee is expected to report to the Church's offices, even if such occurs during typically scheduled home-work area hours.

6. Contact With the Central Work Location

Once a remote work arrangement has been approved, the employee is responsible for maintaining regular contact with their supervisor. The Supervisor shall be the remote work employee's primary contact within the Church. It is expected that the Supervisor and the remote worker will act together to keep each other apprised of events or information obtained during the working day.

7. Alternate Work Area

The Church provides workers' compensation and liability protection as obligated by State statutes for the employee while employed within the agreed-upon location and defined work schedule. The Church assumes no responsibility for any activity, damages, or injury, which is not directly associated or resulting from the official job duties for which the Church cannot exercise control. The Church assumes no responsibility for the employee's personal property.

Also, the following must be adhered to:

- a) A designated workspace should be maintained by the employee in a clean, professional, and safe condition.
- b) Any change in the approved job assignment, location, or defined work schedule must be reviewed and approved by the supervisor in advance.
- c) As liability may extend to accidents that could occur in the alternative work location, the Church retains the right to make on-site inspections of this work area mutually agreed upon time, to ensure that safe work conditions exist.
- d) Employee tax implications related to alternate work locations are the responsibility of the employee.

e) Employee expenses not explicitly covered in this policy will be dealt with on a case-by-case basis between the employee and his/her supervisor.

f) Employees who work at home will manage dependent care and personal responsibilities to allow them to meet job responsibilities successfully.

8. Equipment

a) Any hardware or software purchased by the Church remains the property of the Church and will be returned to the Church should the alternative work arrangement be terminated.

b) Software owned by the Church may not be duplicated except as formally authorized by policy.

c) Employees using the Church software must adhere to the manufacturer's licensing agreements.

d) Restricted access materials (such as payroll, personnel files, etc.) may not be taken out of the office, copied, or compromised in any way. Employees working at alternate sites will take all precautions necessary to secure sensitive information and prevent unauthorized access to the Church.

e) Church equipment located at an alternative work location may not be used for personal activities.

APPENDIX: REMOTE WORK AGREEMENT

This Agreement clarifies the remote work program sponsored by the Church for some of its employees. Because remote work is new, some policies will need to change. Also, new conditions arise that were never intended to be covered by the Church policies.

Please read this carefully and discuss it with your manager or your Human Resources representative if you have questions, and also, perhaps, with your spouse if applicable.

1. The remote work program at the Church is an experiment to see how well the work-at-home concept works for the Church and its employees. We expect to continue with remote work as long as we believe the results are satisfactory, and there is no definite ending date set at this time.

2. You are volunteering for this program after receiving thorough information about the program and the pros and cons of remote work. You, like the Church, have every reason to believe it will work out. However, if you find that remote work is not to your liking and want to return to your office work location, you can notify your manager. If, however, you or your manager find that there are serious personal or work problems arising, you certainly will be able to return to your job full-time in the office sooner.

3. While we expect this program to continue, it is possible that it may be terminated at the Church's management discretion. If it is terminated, you will be asked to return to your job at the Church's offices. If your work performance suffers and your manager decides it will be in your best long-term interest to return to the office full-time, you will be expected to return to the office. If you choose not to return on the expected date, this will be considered voluntary resignation and will be treated as such under our standard policies.

4. Remote work is not an employee benefit intended to be available to everyone. As such, no employee is entitled to or guaranteed the opportunity to work remotely.

5. Your salary, job responsibilities, and benefits will not change because of your involvement in the program, except as they might have changed had you stayed in the office full-time, *e.g.*, regular salary reviews will occur as scheduled. You will be entitled to any company-wide benefits changes that may be implemented. You agree to comply with all existing job requirements as they now are in effect.

6. Your total number of work hours is not expected to change during the program. You will be responsible for providing information for the weekly timesheet according to standard Church policy. If you expect to work more than the standard number of hours, this must be discussed and approved in advance by your manager, just as any overtime scheduling would typically have to be approved.

7. Your daily work schedule for remote working is subject to your manager's approval. If your job duties allow it, and your manager feels a change would not impair your ability to contact co-workers, you are free to vary your hours to suit your preference. Your manager may require that you work certain "core hours" and to be accessible by telephone during those hours.

8. There may be times when you will be requested to come into the office on a day you might have planned to spend at home. The Church and your manager will try to minimize these unplanned office visits, but we ask that you recognize the need for them and agree to come in when requested. Similarly, there may be weeks when you have to spend more time than planned (up to the full five days) in the office when the nature of the workload requires it. It will be your responsibility to come into the office as requested during these times.

10. The Church will provide the necessary computer, wireless network equipment, software, and other equipment needed to do your job. All of these items remain the property of the Church and must be returned to the Church upon request. If your employment is suspended or terminated or the program ends, you must return them to the Church. When they are to be returned, you agree to return them yourself or allow the Church to arrange to pick them up from your home.

11. The Church will reimburse you for the cost of installation and monthly service for Internet access to be installed for your use during the program. You can use the Internet for reasonable personal purposes as long as these do not create any conflict of interest with your job.

12. Office supplies as needed will be provided by the Church; your out-of-pocket expenses for other supplies will not be reimbursed unless by prior approval of your manager. The Church will not reimburse you for travel expenses to and from the office on days when you come into the office, nor for any home-related expenses such as construction, renovations, heating/air conditioning, lighting, or electricity.

13. The computer, wireless network equipment, software, and any other equipment or supplies provided by the Church are provided primarily for use on the Church's assignments. However, you can use these items for reasonable personal purposes as long as they do not create any conflict of interest with your job. The equipment and software should not be used by other household members or anyone else. Church-owned software may not be duplicated except as formally authorized.

14. The security of the Church property and data in your home is as essential as it is in the office. You are expected to take reasonable precautions to protect the equipment and church confidential data from theft, damage, or misuse. You are required to contact your homeowner's insurance carrier to determine to what extent this property is covered under your homeowner's policy. If the Church property is NOT covered, you agree to notify your manager and, if requested, take out additional coverage at the Church's expense to cover the property.

15. Any Church materials taken home should be kept in your designated work area at home and not be made accessible to others. In no case will you take proprietary or confidential materials home except with the approval of your manager.

16. The Church is interested in your health and safety while working at home, just as it is when you work in the office. For this reason, you are required to maintain a separate, designated work area at home. The Church has the right to visit your home work area to see if it meets company safety standards; such visits will be scheduled with at least 24 hours' advance notice. Any equipment provided should be placed where it is adequately supported, and there is no danger of it falling. It should be connected to a properly grounded electrical outlet, and all wires kept out of walkways. If you have any questions about the adequacy/safety of your home work area, the Church will help you in this regard.

17. The Church will be responsible for any work-related injuries under our state's Workers Compensation laws. Still, this liability is limited to injuries resulting directly from your work, and only if the injury occurs in your designated work area. Any claims will be handled according to the standard procedure for Worker's Compensation claims.

18. Remote work is not to be viewed as a substitute for dependent care. The Church expects that you will make arrangements for someone to care for your children or other dependents (if applicable) if needed. The company recognizes that one advantage of working at home is your ability to have more time with your dependents. Still, it is your responsibility to ensure that you are fully able to complete your work assignments on time.

19. It will be your responsibility to determine any income tax implications of maintaining a home office area. The Church will not provide tax guidance, nor will the company assume any additional tax liabilities. You are encouraged to consult with a qualified tax professional to discuss income tax implications.

I have read and understand this agreement and accept its conditions.

EMPLOYEE SIGNATURE _____

DATE: _____

