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Promoting Employee Faithfulness in the Face of Increasing Employment Regulation and an Increasingly Hostile Culture

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Prepared for

Cardinal Newman Society Institutions

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A Guide for Cardinal Newman Society Institutions

INTRODUCTION

The Cardinal Newman Society seeks to promote and defend faithful Catholic education. This mission is particularly urgent at a time when Catholic and other religious educators face increasing challenges to remain faithful to their beliefs. Changes in employment law present a fundamental threat to a religious institution's ability to require faithfulness of its leaders, faculty, and employees. After roughly 50 years of tension regarding government regulation of employment at Catholic schools and other religious employers, focused primarily on the proper boundaries of Church autonomy, the law has taken a more directly hostile turn as sexual orientation and gender identity ("SOGI") issues have become paramount in the modern pantheon.

On June 15, 2020, in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court found that sexual orientation and gender identity discrimination were encompassed by "sex" discrimination in Title VII of the Civil Rights Act of 1964 ("Title VII"). Within the first 18 months after the *Bostock* decision:

- federal judges in Indiana and North Carolina allowed Catholic schools to be sued for sexual orientation discrimination under Title VII even though it was undisputed: (1) Title VII allows religious schools to discriminate on the basis of religion; (2) both plaintiffs were fired for sexual behavior that violated Catholic teaching; and (3) both plaintiffs were aware their jobs depended on living in a manner consistent with the Catholic faith;[1]

- a three-judge panel of the Seventh Circuit Court of Appeals found that a Catholic parish's music director was a ministerial employee, but he could still sue the Church for hostile work environment claims based on sexual orientation and disabilities;[2] and

- the Massachusetts Supreme Court found even though a professor testified that she was required to live, teach, and engage in scholarship consistent with and integrating the Christian faith, she was not a ministerial employee because she did not teach theology or "take students to religious services" and "[s]he never viewed herself or held herself out as a minister . . . ."[3]

Of course, hope is not lost and God is not mocked. The Church has survived and thrived amid earthly persecution by the Roman empire and communist China. Even in the short-term, several

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[1] *See Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc*., 496 F.Supp.3d 1195 (S.D. Ind. 2020); *Billard v. Charlotte Catholic High School*, No. 3:17-cv-00011, 2021 WL 4037431, at *1 (W.D.N.C. Sept. 3, 2021).

[2] *See Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 973 F.3d 718 (7th Cir. 2020) *rev'd en banc* 3 F.4th 968 (7th Cir. 2021).

[3] *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002 (Mass. 2021).

decisions have already been reversed and others are pending on appeal. However, Catholic schools—whether elementary, secondary, or postsecondary institutions—must remain shrewd as serpents and simple as doves in the face of increasingly hostile regulation of employment.

While *Bostock* was important, thirty-two states and the District of Columbia had adopted statutes protecting SOGI rights before the Supreme Court's decision. And it does not appear that the dominant culture's movement away from the Church will soon abate. These dramatic shifts, adopted at lightning speed compared to the laws' ordinary pace of change, have created new questions and ambiguities that necessitate care and preparation by all institutions that seek to remain faithful.

All of these factors present unique challenges to educational institutions that exist to integrate their Catholic faith and beliefs in all aspects of education and student formation, from academics to activities and relationships outside the classroom. The objective of this Guide is to provide Catholic institutions with a better understanding of the current statutory and regulatory frameworks that may impact their right to hire and fire employees based on faith, and practical tools and strategies to avoid lawsuits and government investigations and to extricate themselves quickly in the event an employment dispute arises.[4]

The Guide proceeds in three parts. Part I sets out the pertinent federal equal employment statutes and exemptions and discusses state and local employment law and retaliation statutes. Part II describes the exceptions from discrimination statutes mandated by the U.S. Constitution. Part III provides strategies and best practices to strengthen faithfulness within an institution in order to minimize legal risk.[5]

PART I

EQUAL EMPLOYMENT STATUTES, EXEMPTIONS, AND OTHER RELEVANT LAW

For today's religious primary, secondary and postsecondary schools, the leading edge of the conflict between employment statutes and autonomous religious organizations is federal and state prohibitions on religious discrimination. Title VII of the Civil Rights Act of 1964 ("**Title VII**") was the first federal statute prohibiting discrimination in employment. Recent judicially mandated amendments to Title VII and state equal employment opportunities ("**EEO**") laws have increasingly imposed regulation that is no longer limited to religious discrimination, but also discrimination on the basis of a broad, extra-statutory reading of "sex" that, as discussed below, conflicts with faithful orthodox Christian beliefs.

[4] The Guide is focused on employee issues related to hiring, retention, and termination and does not address penumbral issues to religious employment, such as tax issues related to housing allowance or social security elections, employee benefits, or joint employment issues.

[5] It is important to note that this Guide attempts to provide helpful suggestions regarding certain, limited legal issues. However, its brief length and general nature should prevent any reader from relying on these suggestions for legal advice concerning any specific facts or circumstances. Readers should consult an attorney from CrossCastle or another qualified lawyer concerning specific legal questions and issues that arise.

A. Title VII and Its Exemptions

1. Text and Interpretation of Title VII

Title VII is the primary federal EEO statute and is administered by the federal Equal Employment Opportunity Commission (**"EEOC"**). The statute prohibits employment discrimination on the basis of race, color, religion, sex, or national origin by employers with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. The statute's operative language prohibiting discrimination states:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

"Religion"—one of the five characteristics protected by the statute—is further defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).[6]

While later-adopted federal statutes protect other characteristics, such as the Americans with Disabilities Act's prohibition of discrimination on the basis of "disability," Title VII's five listed characteristics—race, color, religion, sex, and national origin—have not changed since 1964. However, the Supreme Court's 2020 decision in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1746 (2020), demonstrates that the courts, as much as Congress or state legislatures, may amend statutes in ways that create serious conflicts for religious employers. From the statute's adoption in 1964 until 2020, Title VII's prohibition of "sex" discrimination has been read to forbid employers from "discriminat[ing] against individuals because of their sex," meaning "the entire spectrum of ***disparate treatment of men and women*** . . ." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978) (emphasis added); *see also Meritor Sav. Bank, FSB v. Vinso*n, 477 U.S. 57, 64 (1986) (quoting *Manhart*); *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 80 (1998) (finding that Title VII's text demonstrates that the "critical issue [in prohibited sex discrimination] is whether members of one sex are exposed to disadvantageous

[6] Title VII also further defines "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions," but it does "not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . ." 42 U.S.C. § 2000e(k).

terms or conditions of employment ***to which members of the other sex are not exposed*.**" (emphasis added)).

In 2020, the text of Title VII had not changed. The text prohibited adverse employment actions undertaken "because of [an] individual's . . . sex." Nonetheless, the Supreme Court found that

> By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, ***even if it never learns any applicant's sex***.

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1746 (2020) (emphasis added). Despite numerous previous opportunities to do so, federal courts had not previously read "sex" in Title VII to mean anything other than the sex of the individual, whether male or female. Setting aside the manner of the change, through this decision one court transformed a proposition on which faithful Christians agree—that secular employment decisions should be made without regard to whether an individual was born male or female—into a far more complicated theological and practical question. Whether we like it or not, unless Congress unequivocally reverses the Supreme Court (which is doubtful), employers must read the prohibition against discrimination on the basis of "sex" in Title VII to prohibit discrimination on the basis of "sexual orientation," "gender," "gender identity," "being gay," "being . . . transgender," and "an individual's homosexuality or transgender status," in addition to "sex." *Bostock*, 140 S. Ct. at 1731-54. The Court recognized the conflict it created for the faithful:

> complying with Title VII's [newfound] requirement . . . may require some employers to violate their religious convictions[and threatens] the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. . . .
>
> But how . . . doctrines protecting religious liberty interact with [the new meaning of] Title VII are questions for future cases . . . .

Bostock, 140 S. Ct. at 1753–54. Cases assessing the interplay between a religious institution's free exercise of religion and the expanded federal and state discrimination prohibitions are beginning to work through the courts, as described in the Introduction.

2. Statutory Exemptions in the Text of Title VII

As noted by the Supreme Court in *Bostock*, concerns regarding "how Title VII may intersect with religious liberties" are not new and such concerns "even predate the statute's passage." *Bostock*, 140 S.Ct. at 1754. Congress incorporated several important exemptions into Title VII's text in 1964 to clarify that a religious organization *may* discriminate on the basis of religion in order to employ individuals who share the institution's beliefs:

Exemption for Religious Organizations

> [Title VII] shall not apply to an employer with respect . . . to a ***religious corporation, association, educational institution, or society with respect to the employment of <u>individuals of a particular religion</u>*** to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a) (emphasis added). Notably, the exemption permits a religious organization to discriminate on the basis of religion, but does not exclude the organization from complying with the other listed discrimination prohibitions with respect to race, color, sex, or national origin.

Congress provided an additional exemption specifically for educational institutions to hire employees of a particular religion:

Religious School Exemption

> Notwithstanding any other provision of this subchapter . . . (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C.A. § 2000e-2(e).[7]

The EEOC interprets these exemptions to only allow discrimination by religious organizations on the basis of religion in hiring and discharge, but not exempt them from discrimination related

[7] Note that Title VII provides an additional exception allowing employers "to hire and employ employees . . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 42 U.S.C.A. § 2000e-2(e). As explained by the EEOC, this "exception, called the bona fide occupational qualification (BFOQ), recognizes that in some extremely rare instances a person's sex, religion, or national origin may be reasonably necessary to carrying out a particular job function in the normal operation of an employer's business or enterprise. The protected class of race is not included in the statutory exception and clearly cannot, under any circumstances, be considered a BFOQ for any job." EEOC, *CM-625 Bona Fide Occupational Qualifications* available here (as of Jan. 14, 2022); *see also Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980); *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980), cert. denied, 449 U.S. 891 (1980). *See* https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications. The BFOQ exemption can be important for certain non-ministerial positions at single-sex schools or camps. Importantly, it will be important to watch how the *Bostock* decision will impact how future courts construe Title VII's BFOQ exception for sex. Although the *Bostock* decision did not address how its reasoning might affect the BFOQ exception, its holding regarding transgender employees may eliminate some of the exception's utility.

to other terms and conditions of employment.[8] Courts and the EEOC have allowed the exemption when an organization's "purpose and character are primarily religious" as determined by weighing various religious and secular characteristics.[9]

The ability of an organization to employ individuals "of a particular religion" has been consistently interpreted to permit organizations to hire individuals whose conduct or religious beliefs are consistent with the institution's, and to terminate employees under circumstances where the employer learns that an employee's conduct or religious beliefs conflict.[10] As described further below, adverse employment actions whether based on belief, teaching, ***or conduct*** that is inconsistent with the doctrine and teachings of the Church and Scripture is ***religious*** discrimination and not discrimination on the basis of sex, sexual orientation, gender identity or any other protected characteristic.

In recent decades, courts have more aggressively weighed whether an organization, including an educational institution, qualifies as "religious" for purposes of applying these exemptions, rather than simply accepting the organization's assertion.[11] The organization bears the burden of proving it is exempt under one or more of the statutory provisions; it is not enough to simply claim an exemption. Some courts have construed the statutory exemptions narrowly and declined to apply the exemption, even where an institution had required hiring individuals of a particular religion.[12]

As recent cases have shown, religious schools should expect that courts and agencies will construe religious exemptions narrowly and will seek to avoid their application. It is important, then, for institutions to ensure their founding and governing documents, including statements of faith and

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[8] EEOC Compliance Manual, https://www.eeoc.gov/laws/guidance/section-2-threshold-issues; *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (application of exemption to nonprofit, secular activities does not violate the Establishment Clause).

[9] *EEOC v. Townley Eng. & Mfg. Co*., 859 F.2d 610, 618 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989); *id.* at 619 (finding that exemption did not apply to manufacturer of mining equipment that operated for profit and was not affiliated or supported by a church, even though the company enclosed Gospel tracts in outgoing mail, printed Bible verses on its commercial documents, financially supported religious organizations, and conducted a weekly devotional service); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 199-200 (11th Cir. 1997) (exemption applied to educational institution that was founded as theological institution, received seven percent of its annual budget from Baptist denomination/convention, and was recognized by IRS and Department of Education as a religious educational institution); *EEOC v. Kamehameha Sch.*, 990 F.2d 458, 461-63 (9th Cir.) (significant characteristics of ownership and affiliation, purpose, faculty, student body, student activities, and curriculum reflected primarily secular orientation of schools), *cert. denied*, 510 U.S. 963 (1993).

[10] *See, e.g.*, *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (college operated by religious corporation was entitled to the exemption under § 2000e-2(e), and student services specialist terminated for assuming a leadership position in a church that publicly supported homosexual lifestyles, in conflict with the college's religious beliefs and mission, was not based on the religious nature of her church position and therefore did not constitute a valid religious discrimination claim).

[11] *See, e.g.*, *Jing Zhang v. Jenzabar, Inc*., 2015 WL 1475793 (E.D.N.Y. 2015) (court could not tell from the factual record whether the organization was religious, prompting additional discovery).

[12] *See EEOC v. Kamehameha Sch.*, 990 F.2d at 460 (Ninth Circuit construed the Title VII exemptions narrowly, finding schools were primarily secular, unaffiliated with a religious organization, and therefore not exempt even though teachers were required to be Protestant); *see Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (setting out factors for courts to consider in assessing organizations to which exemptions apply, and finding the religious exemption applied to World Vision).

conduct expectations, describe the religious purpose and beliefs of the organization and their application to employee relationships. In addition, in the event of a dispute, it is important to properly frame issues as arising under the organization's religious beliefs, and to raise all possible defenses and exceptions for a court to consider. For example, a court refused to apply the Title VII statutory religious organization exemption in a lawsuit when the organization did not raise the defense in its initial answer to the complaint. *See Garcia v. Salvation Army*, 918 F.3d 997, 1006 (9th Cir. 2019). (See Part III, below, for additional discussion and application.)

B. State and Local EEO Statutes and Exemptions

Most states and some cities and counties have adopted EEO laws similar to federal statutes. Among these, there is significant variation in the characteristics protected, the employee threshold for coverage, and exemptions allowed. For example, Alabama's statute only prohibits age discrimination. In contrast, the District of Columbia prohibits discrimination on the bases of:

> actual or perceived: race, color, religion, national origin, sex, age [protecting age discrimination against individuals 18 or older], marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information

DC Code § 2-1402.11.

Different jurisdictions also have varying exemptions. Many have exemptions similar to Title VII's religious organization and BFOQ exemptions, however, some jurisdictions have no exemptions at all other than those imposed by the U.S. Constitution. Normally, the number of protected characteristics and exemptions will roughly correspond to the relative conservative or liberal/progressive voting history of the jurisdiction. For example, while few conservative cities regulate employment, Madison, Wisconsin prohibits employment discrimination based on:

> sex, race, religion or atheism, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record, conviction record, credit history, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partner status, receipt of rental assistance, the fact that the person declines to disclose their social security number, homelessness or unemployment status . . . .

Madison, Wis. Code § 39.03(8). Meanwhile, the ordinance includes no exemption for religious organizations and extends to "religious organizations or entities controlled by religious organizations, including places of worship, [unless] requiring compliance would violate state or federal law." Madison, Wis. Code § 39.03(6)(h).

Note that schools should carefully review the specific wording of state exemptions. For example, California Corporation's Fair Employment and Housing Act ("FEHA") exempts nonprofit "religious corporations" (defined as those formed under the state's corporate statute primarily used by churches) from the entire FEHA, but limits its exemptions for nonprofit religious schools to

"nonprofit public benefit corporation formed by, or affiliated with, a particular religion" and only allows them to "restrict employment, including promotion, in any or all employment categories to individuals of a particular religion." Cal. Gov't Code §§ 12926(d), 12926.2.

A chart showing characteristics protected under various state EEO statutes and their exemptions potentially relevant to religious organizations is attached in the Appendix.

C. Retaliation and Whistleblower Protections

In addition to prohibiting discrimination based on its five listed characteristics, Title VII also prohibits certain retaliatory conduct. Specifically, Title VII's retaliation provision states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3. Most state and local EEO statutes contain similar retaliation protections. Many jurisdictions also have standalone "whistleblower" statutes that prohibit retaliation against an employee who questioned or opposed an alleged violation of law by their employer.

Often, employees are mistaken. Employees may also raise an issue in bad faith, or at least without any reasonable basis for the allegation. However, retaliation protections generally do not depend on whether the initial accusation was accurate or realistic. And while lying and bad-faith accusations are generally not protected, it is very difficult to prove an employee is lying. The distinction between a mistake, a difference of opinion, and an intentional lie is often in the eye of the beholder.

Retaliation and whistleblower protections may also enable employees to recharacterize appropriate work-related discussions as opposition to illegal conduct. The recent Massachusetts Supreme Court decision in *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000 (Mass. 2021) illustrates the risks from retaliation provisions. The plaintiff, a sociology professor, alleged that she had opposed Gordon College's allegedly "discriminatory policies and practices relating to LGBTQ+ issues and advocating for the rights of LGBTQ+ individuals at Gordon College." When she was later denied a promotion, she filed a lawsuit claiming, among other allegations, that the College's failure to promote her was retaliation for her advocacy opposing sexual orientation and gender identity discrimination. *Id*. at 1003.

The fact that the school had not terminated the plaintiff based on her earlier statements regarding SOGI issues seems to have worked against the school. This highlights perverse incentives for schools that would otherwise be inclined to allow more academic freedom, dialogue, and debate on SOGI and other theological/cultural issues. Decisions such as *DeWeese-Boyd* create an incentive for schools to draw harder lines and preemptively eliminate faculty with modestly theologically divergent positions on SOGI or cultural issues that may conflict with the school's faith. If they address a divergent position early, the school is able to more clearly frame the discipline or termination as religious. If they wait, courts or agencies may use their tolerance and

delay against the school, by alleging that there is no religious conflict based on a failure to address the issue when it first arose.

PART II

EXCEPTIONS FROM DISCRIMINATION STATUTES MANDATED BY THE U.S. CONSTITUTION

A. *Boy Scouts vs. Dale* and Exception for Expressive Associations

The 2000 Supreme Court case of *Boy Scouts v. Dale*, 530 U.S. 640 (2000) addressed the conflict between New Jersey's prohibition of discrimination by organizations serving the public (public accommodations) and Boy Scouts' First Amendment rights to freedom of speech and association. New Jersey's EEO statute prohibited, among other things, discrimination on the basis of sexual orientation. When an assistant scoutmaster announced he was gay, the local Boy Scouts chapter revoked his membership and leadership position.

Despite admittedly violating New Jersey's statute, the Supreme Court found that:

> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.
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> * * *
>
> States have a compelling interest in eliminating discrimination . . . . [However,] a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Boy Scouts, 530 U.S. at 648, 657-59 (citations and quotations omitted).

The *Boy Scouts* decision was important because it affirmed the ability of an expressive organization—religious or not—to associate freely with individuals who align with its beliefs, and to remove an individual who detrimentally impacts the organization's ability to operate consistently in accordance with its views.

Other cases have reached a different outcome based on different factual circumstances. The Supreme Court in *Roberts v. U.S. Jaycees* held that the Minnesota Human Rights Act's prohibition against discrimination on the basis of sex in places of public accommodation did not limit male members' freedom of expressive association, primarily because several features of the Jaycees

placed it outside "the category of highly personal relationships entitled to constitutional protection" against state interference.[13] The Supreme Court denied hearing an appeal of *Evans v. City of Berkeley*, in which the California Supreme Court held that the city had not violated the constitutional rights of the Sea Scouts, an affiliate of the Boy Scouts of America, by requiring written assurance that the group would not discriminate against homosexuals or atheists who wanted to participate in the Sea Scouts in order to qualify for free use of berths in the city's marina.[14] The court determined the city did not prohibit the Sea Scouts from operating in a discriminatory manner or from associating with the Boy Scouts who held the same policy, but simply declined to fund the group's activities.

These cases highlight a few key points for Catholic institutions to keep in mind. First, religious schools should ensure that foundational and descriptive documents clearly articulate their evangelical and expressive purposes, in addition to functional mission. Religious schools often focus on teaching the faith to students but omit describing the overriding mission of demonstrating and living out the faith within the broader community while preparing students to do the same. In addition, institutions should ensure they consistently follow the conduct expectations set out for their community and the link between those expectations and the institution's mission and beliefs. Finally, be aware that some state and local governments may provide certain financial benefits or services only upon adherence to a full range of nondiscrimination requirements, without providing a religious exemption or recognizing a constitutional right to claim one. While this is likely unconstitutional, depending on the benefit at issue, the costs and benefits of seeking such government benefits should be carefully weighed.

Lower courts have attempted to distinguish the *Boy Scouts* decision by noting that it applied in the context of a public accommodation, as opposed to employment.[15] However, other court decisions have applied the holding in *Boy Scouts* to employment and organizational leadership.[16]

B. <u>The "Ministerial Exception"</u>

The "ministerial exception" is a judicially created exemption, arising from the First Amendment's religion clauses, that prohibits government interference with religious organization's selection, supervision, or termination of clergy and other "ministerial" employees. As summarized by the Supreme Court, "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select [, manage, and terminate] their own."[17]

To understand the breadth and utility of this exception, it is helpful to revisit exemptions provided in the text of Title VII and other EEO statutes. Title VII exempts religious organizations from the

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[13] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

[14] *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006), cert. denied, 127 S. Ct. 434, 166 L. Ed. 2d 330 (U.S. 2006).

[15] *See, e.g.*, *Starkey*, 496 F.Supp.3d at 1209; *Billard*, 2021 WL 4037431 at *23.

[16] *Our Lady's Inn v. City of St. Louis*, 349 F.Supp.3d 805, 821 (E.D.Mo. 2018); *Wiley Mission v. New Jersey*, 2011 WL 3841437, at *1 (D.N.J. 2011).

[17] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 184 (2012) ("*Hosanna-Tabor*").

statute's provision forbidding religious discrimination, but does not exempt such employers from Title VII's provisions prohibiting other categories of discrimination. These exemptions are further limited by the EEOC's and courts' narrow interpretation of their text. In contrast, the ministerial exception is far more robust providing substantial autonomy regarding hiring, managing, and firing a broad category of employees, free from coercive government regulation.

Two recent Supreme Court decisions—*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) ("*Hosanna-Tabor*") and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020) ("*Our Lady*")—demonstrate the exception's breadth. In both cases, the Supreme Court considered the application of the ministerial exception to claims brought by elementary school teachers under the Americans with Disabilities Act ("ADA"). In both cases, the Court found that religious elementary school defendants—Missouri Synod Lutheran and Catholic, respectively—could not be sued by ministerial employees (elementary school teachers) even though neither school argued that religious belief or doctrine was relevant to or conflicted with claims under the ADA or people with disabilities. [18]

As summarized by Justice Alito in *Our Lady*, the exception does not depend on a church or organization's religious doctrine or beliefs, but "what an employee does" and the Supreme Court's "recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[19] For many teachers and other employees who teach, lead worship, or personify a religious institution's beliefs, the First Amendment prohibits any form of discrimination claim as well as application of other employment laws, such as the federal Fair Labor Standards Act.[20]

For purposes of the ministerial exception, a "religious institution" is one whose mission and character are primarily religious, rather than secular, "marked by clear or obvious religious characteristics."[21] Such organizations are entitled to decide which employees it will assign ministerial duties and thereby exclude these employees from the application of state and federal employment discrimination laws. Such duties must be genuine, but when applicable it provides a dispositive defense that may generally be asserted at or near the outset of litigation.[22]

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[18] *Our Lady* involved two plaintiffs one who asserted a claim under the ADA and one asserting a claim for age discrimination under the Federal Age Discrimination in Employment Act ("ADEA"). The Court applied the same reasoning to that age discrimination claim.

[19] *Our Lady*, 140 S.Ct. at 2064.

[20] *See id.*; *Hosanna-Tabor*, 565 U.S. at 196*; McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.1972) (the first case to recognize ministerial exception, holding that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister"); Jan. 8, 2021, Wage and Hour Opinion Letter FLSA2021-2; *see also* discussion of Title VII exemptions, above, Section I.A.2.

[21] *See* Section 12: Religious Discrimination | U.S. Equal Employment Opportunity Commission (eeoc.gov) ("EEOC Guidance") at Section 12-I.C.2, *citing Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004).

[22] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) ("[T]his circuit and a number of others have long held that the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them.").

There has been some confusion regarding the exceptions and use of the terms "minister" or "ministerial." The exception clearly applies to ordained priests, ministers, and clergy leading worship, preaching, and similar functions, but also applies to a broader category of non-clerical employees who perform "vital religious duties" that advance an organization's religious mission.[23] The Supreme Court has explained that no precise title or quantum of religious duties are required.[24] Rather, courts consider all relevant circumstances to determine whether a specific position "implicate[s] the fundamental purpose" of the ministerial exception to preserve a religious organization's ability to select individuals who lead the religious organization, conduct its worship services or important religious ceremonies or rituals, or otherwise "serve[] as a messenger or teacher of its faith."[25]

In light of this, courts reviewing whether an employee qualifies as ministerial engage in a fact-specific inquiry regarding the employee's core responsibilities. In *Hosanna-Tabor* the Supreme Court noted four considerations used to evaluate whether an employee may be considered a minister, namely: (1) the employee's formal title with the religious organization; (2) the substance reflected in the employee's title, including education and training; (3) the employee's use of the title; and (4) the important religious functions the employee performs for the religious organization.[26] Eight years later, the Court revisited this standard, explaining that these four factors were not a rigid formula, nor was each factor a necessary component.[27] For example, as to an employee's title, the Court found that "simply giving an employee the title of 'minister' is not enough to justify the exception. And by the same token, since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement."[28]

C. <u>Duties Relevant to the Ministerial Exception</u>

Courts consider numerous facts in assessing whether the ministerial exception applies, in line with the four broad factors discussed above. Specific details the Supreme Court noted in these two recent ministerial exception cases are instructive in showing how courts may evaluate an employee's duties, the institution's characterization of the employee's position, and the faith and behavioral requirements pertaining to it.

In *Hosanna-Tabor*, Justice Roberts highlighted the following facts supporting the Supreme Court's conclusion that the Lutheran elementary school teacher was a minister:

- The school "held the teacher out as a minister, with a role distinct from that of most of its members."

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[23] *Our Lady*, 140 S.Ct. at 2066.

[24] *Hosanna-Tabor*, 565 U.S. at 190; *Our Lady*, 140 S.Ct. at 2055, 2062.

[25] *Our Lady*, 140 S.Ct. at 2067.

[26] *Hosanna-Tabor,* 565 U.S. 171. Importantly, while *Hosanna-Tabor* involved a "called" Lutheran minister, she was not serving as a minister in the ordinary sense of the term, meaning an ordained worship leader or preacher. Instead, the plaintiff was simply teaching a fourth grade elementary school class.

[27] *Our Lady,* 140 S.Ct. 2049.

[28] *Id.* at 2063–64.

- The teacher was a "called" teacher within the Lutheran Church—Missouri Synod, having completed "certain academic requirements," including "eight courses of theological study" and "pass[ing] an oral examination by a faculty committee at a Lutheran college."
- The school, in extending a call to the teacher, issued a "diploma of vocation" and accorded her the title "Minister of Religion, Commissioned." "She was tasked with performing that office 'according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures.'"
- The church congregation "undertook to periodically review [the teacher's] 'skills of ministry' and 'ministerial responsibilities,' and to provide for her 'continuing education as a professional person in the ministry of the Gospel.'"
- The teacher "held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms" and by claiming "a special housing allowance on her taxes that was available only to employees earning their compensation 'in the exercise of the ministry.'"
- The school "expressly charged her with 'lead[ing] others toward Christian maturity' and 'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'"
- The teacher taught a religion class, led students in daily prayer and devotional exercises, and took them to a weekly school-wide chapel service, in addition to teaching secular subjects. She also "took her turn leading" the chapel service about twice a year.

Based on these facts, the Supreme Court concluded that, "[a]s a source of religious instruction, [the teacher] performed an important role in transmitting the Lutheran faith to the next generation."[29]

As the more recent decision, *Our Lady*'s holding and clarifications are particularly instructive. In finding her position to be ministerial, Justice Alito's opinion noted the following facts regarding the Catholic elementary school and its teacher:

- The teacher signed "an employment agreement" stating the "school's mission was 'to develop and promote a Catholic School Faith Community'" and that "all [of her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment."
- She was informed through this "agreement explained that the school's hiring and retention decisions would be guided by [the school's] Catholic mission" and that all "teachers were expected to 'model and promote' Catholic 'faith and morals.'"
- "Under the agreement, [the teacher] was required to participate in "[the s]chool liturgical activities, as requested[.]"

[29] *Hosanna-Tabor*, 565 U.S. at 177-78, 191-92.

- "[T]he agreement specified that she could be terminated 'for cause' for failing to carry out these duties or for 'conduct that brings discredit upon the School or the Roman Catholic Church.'"
- "The agreement required compliance with the faculty handbook, which sets out similar expectations."
- "The pastor of the parish, a Catholic priest, had to approve [the teacher]'s hiring each year."
- The school "reviewed [the teacher]'s performance under religious standards" including "evaluat[ing] whether Catholic values were 'infused through all subject areas' and whether there were religious signs and displays in the classroom."
- And finally, that the teacher "testified that she tried to instruct her students 'in a manner consistent with the teachings of the Church,'" and was "committed to teaching children 'Catholic values' and providing a 'faith-based education.'"[30]

The decision found these facts were clearly sufficient to prevent federal courts from considering the teacher's ADA claim under the ministerial exception. Importantly, it was of no consequence to the Court that the teacher asserted "she was not 'a practicing Catholic[.]'" The Court reasoned:

> acceptance of that argument would require courts to delve into the sensitive question of what it means to be a "practicing" member of a faith, and religious employers would be put in an impossible position. [The teacher]'s employment agreements required her to attest to "good standing" with the church. Beyond insisting on such an attestation, it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job. Was [the school] supposed to interrogate [the teacher] to confirm that she attended Mass every Sunday? . . .
>
> [W]e declined to adopt a "rigid formula" in *Hosanna-Tabor* . . . . When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.[31]

D. <u>Ongoing Developments</u>

Courts have at times reached differing conclusions when applying the ministerial exception to specific cases before them. For example, the Massachusetts Supreme Court's ruling in *DeWeese-Boyd v. Gordon College*, as discussed above, is a significant departure from the Court's unequivocal application of the ministerial exception to clergy and non-clergy charged with performing "vital religious duties," as articulated in *Hosanna-Tabor* and *Our Lady*. The Massachusetts court addressed application of the ministerial exception in the post-secondary education context and determined it did not apply to sociology professor DeWeese-Boyd, even

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[30] *Our Lady*, 140 S.Ct. at 2056-58.

[31] *Id.* at 2069.

though the professor testified that she was required to live, teach, and engage in scholarship consistent with the Christian faith as directed by the College and integrate her faith into her teaching.[32]

Gordon College petitioned the U.S. Supreme Court to grant certiorari to decide whether professors at religious colleges perform ministerial functions and whether courts must defer to a religious organization's good-faith characterization of that function.[33] On February 28, 2022, the Supreme Court declined to hear the appeal in light of the preliminary procedural posture of the litigation.[34] While a disappointing outcome, Justice Alito penned a statement respecting the denial of certiorari, joined by Justices Thomas, Kavanaugh, and Barrett, that provides a view of how these justices would assess such a case should one come before the Court. In his statement, Justice Alito acknowledged that DeWeese-Boyd was required to live, teach, integrate, and engage in scholarship consistent with the Christian faith during her employment at Gordon College and emphasized Gordon College's distinctively Christian mission. He reiterated that in *Our Lady*, the Court "explained that the ministerial exception protects the autonomy of churches and other religious institutions in the selection of the employees who play certain key roles."[35] Analyzing the state court's rationale "that DeWeese-Boyd was not a religious educator because she did not 'teach religion, the Bible, or religious doctrine,'" Justice Alito found the state court's "conclusion reflects a troubling and narrow view of religious education."[36] His statement indicates a hopeful signal that the Court's future application of the ministerial exception to the Gordon College case, or another similar matter, may be favorable to religious post-secondary institutions.

PART III

STRATEGIES TO PROMOTE FAITHFULNESS AND REDUCE LEGAL RISK

A. A Lesson from Labor Law

This Guide focuses primarily on minimizing risks arising from federal and state EEO statutes prohibiting discrimination employment statutes. However, it is helpful to consider the give and take between the Church, the Courts, and application of the federal labor law to Church-operated schools to obtain a more nuanced understanding of government attempts to regulate religious schools and measures necessary to protect religious schools from government intrusion.

The modern regulatory state and the virtually comprehensive government regulation of employment began when Congress passed the National Labor Relations Act in 1935 ("NLRA"). This statute—providing employees the right to unionize and collectively bargain regarding the

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[32] *DeWeese-Boyd*, 163 N.E.3d at 1012.

[33] *Gordon Coll. v. DeWeese-Boyd*, 163 N.E.3d 1000 (Mass. 2021), *petition for cert. filed* (U.S. Aug. 3, 2021) (No. 21-145).

[34] *Gordon Coll. v. DeWeese-Boyd,* 163 N.E.3d 1000 (Mass. 2021), *cert. denied*, 142 S. Ct. 952 (U.S. Feb. 28, 2022) (No. 21-145).

[35] *Id.* (citations and quotations omitted).

[36] *Id.*

terms and conditions of their employment—is not inconsistent with Christian beliefs, and the passage of the NLRA was supported by the Catholic Church. [37] Despite this, the potential application of these laws to allow the National Labor Relations Board (the "NLRB" or the "Board") to regulate religious employment at Church-operated schools raised serious questions regarding the autonomy and separation of the Church from the state.

It took more than 40 years for the Supreme Court to consider the "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" if federal labor law could regulate the employment relationships of religious schools. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). The NLRB had not attempted to assert authority over religious schools until the mid-1970s. When it did, the Board sought to balance its alleged "*minimal intrusion* on religious conduct" against its need to achieve the NLRA's objectives. *Id.* at 499 (emphasis in original).

The Supreme Court's seminal 1979 decision in *NLRB v. Catholic Bishop of Chicago* ("*Catholic Bishop*") rejected the NLRB's proposed balancing and affirmed the importance of Church autonomy under the First Amendment. The opinion found that the Board's proposed balancing, together with the fact-finding inquiry necessary to determine what facts to balance, would likely "impinge on rights guaranteed by the Religion Clauses" of the First Amendment. *Id.* at 502. To avoid these problematic questions, the Supreme Court simply found there was not "a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board" and, as such, it would not construe the NLRA to regulate employment at church-operated schools. *Id*. at 507.

Despite this bright-line rule, the NLRB repeatedly attempted to assert jurisdiction over religious schools after the *Catholic Bishop* decision. Most recently, in 2014, the Board found the NLRA authorized faculty at a Lutheran university faculty to unionize by applying a new two-part test. First, the Board considered whether "the university or college demonstrate[d] . . . that it holds itself out as providing a religious educational environment." *Pacific Lutheran University*, 361 NLRB 1404, 1408 (2014). The Board noted "evidence to assess this requirement could include, but would not be limited to, job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students." *Id*. at 1412.

If the University made a threshold showing of its religious character, the Board found its authority to mandate union election and require other NLRA rights depended on "whether the university holds out [the] faculty [at issue] as performing a specific role in creating and maintaining" the school's "religious educational environment." *Id*. at 1410. Similar to its threshold issue, the religious role of faculty turned on "communications to current or potential students and faculty members, and the community at large," and faculty "job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies" showing faculty "performing a specific role

[37] *See, e.g.*, Deuteronomy 24:15; Lev. 19:13; *but see* Matthew 20: 1–16. As recognized later by the Supreme Court, there are, of course, significant differences between bargaining regarding wages, hours, and similar issues in secular employment compared to religious employment. These include two levels of concern. First, whether a government agency can assert control over a religious organization to mandate a union representation election. And second, once a union is recognized, is the union allowed to share control of, and bargain regarding, matters related to or dependent on theology and Church governance, such as the authority of the organization to decide what belief and conduct is required of employees and what are the consequences for employees' failure to fulfill those standards.

in creating or maintaining the university's religious purpose or mission." *Id.* at 1411-122. If this evidence revealed that "faculty members are not expected to play . . . a role in effectuating the university's religious mission and are not under religious control or discipline," the Board determined it had regulatory authority. *Id*.

Congress had not made any material changes to the NLRA between 1979 and 2014. And in 2020, a Republican-majority Board reversed *Pacific Lutheran*, which had been issued by a Democrat-majority Board. Democrat politicians and Presidential appointees are, on balance, less inclined to respect the autonomy of the Church than Republicans. This is one example of regulatory requirements that may occur from one federal government administration to the next without Congress implementing actual changes to the governing statute. It also helps illustrate that excessive focus on partisan politics distracts from broader cultural issues that must be understood to safeguard a religious institution's right to promote and require faithfulness of its leaders, faculty, and employees.

Religious institutions must be mindful of the practical and cultural realities that impact the legislative, regulatory, and judicial systems. Judges and government leaders are members of a broader culture. As a result, they are now less likely to attend church or otherwise prioritize religion in their lives than previous generations. Personal priorities influence one's understanding and prioritization of constitutional and statutory rights. Today, many Americans are far more familiar with the basic requirements of employment statutes than the tenets and practices of even the most mainstream religious groups. And even if they generally understand the theoretical priority of religion under the First Amendment, good-faith attempts to apply precedent may founder because of their ignorance of religion, religious terms, and religious practices.

Additionally, the application of bright-line constitutional rules—such as the Supreme Court's holding in *Catholic Bishop*—are complicated by the secularization of many formerly religious schools. While the Supreme Court was rightly concerned that intrusive government fact-finding may violate a religious institution's First Amendment rights, there must be some threshold means by which courts determine whether an historically religious school has retained a sufficient religious character to allow application of these rights.

This same context applies regardless of the employment law at issue. Lawsuits and government investigations inevitably involve expense, distraction, and negative publicity. And winning can often feel like losing. An important goal of the following guidance is to help schools adopt measures that enable courts, government agencies, and fact-finders to quickly and easily determine that a school is religious and entitled to statutory and constitutional exemptions.

B. Documenting a School's Mission and Foundation of Faith

Schools must clearly document the foundational elements of their religious mission and beliefs if they wish to take advantage of religious exemptions allowed under various statutes and the First Amendment. Simply describing an institution as "Catholic" or having been founded in the "Catholic tradition" no longer adequately defines a school as religious. In today's legal environment and modern culture, a school must distinguish itself from schools that are nominally Catholic and document its faith underpinnings through one or more foundational policy documents. Schools can accomplish this through policy documents that describe the institution's

foundation in faith, the source of its religious beliefs and doctrine, and how that faith impacts and guides the school's educational mission.

The following describe important elements to consider in preparing or updating a statement of faith or similar policy document:

1. Statement Should Clearly Explain Theological Foundation and Requirements

The statement of faith should clearly explain the school's theological foundation and what that foundation requires for members of an expressly Catholic community. The statement should describe how the school's beliefs impact teaching, scholarship, employees, teachers, and students. Further, the statement should also describe how the school's foundational beliefs guide not only teaching and learning, but all functions, operations, and actions of the school, including its policies, rules of conduct and athletic programs, and even living and working within the community (particularly in a residential college or university setting) and in the broader culture. The statement of faith should be consistent with and more substantive and thorough than a school's mission or vision statement. Schools should not violate their beliefs or contradict other controlling Church teaching. Although the depth and complexity of the Catechism, *Ex Corde* Ecclesiae, or Canon Law cannot be replicated in a one or two page statement of faith, the statement can and should provide a brief summary of the most important concepts regarding the mission, operation, and community of a Catholic school in contrast to the dominant culture.

2. Statement Should Use Clear Accessible Language

There are at least three audiences for a statement of faith and other foundational religious documents: (1) employees/applicants; (2) students and parents; and (3) government regulators, judges, and other officials (e.g., accreditation boards). The statement should be designed to provide clear evidence of a school's religious beliefs should questions arise in a lawsuit or through a government investigation. Because government personnel, judges, and other relevant fact-finders are often ignorant of religion generally or the Catholic faith particularly, when possible it is helpful to provide plain-English explanations of Catholic terms or concepts so the statement is more immediately accessible to non-Catholics.

Most importantly, this plain-English explanation should indicate that the school's faith "informs the life of the community and takes expression in all its programs." The statement should avoid generic references to "Catholic tradition," "Catholic school," or "the Church."The mere label of "Catholic" without more is insufficient to demonstrate that the institution meaningfully applies and lives out the teaching and doctrine of the Church.

3. Statement of Faith and Fidelity to Church Teaching on Marriage, Sex and Sexuality, Gender/Gender Identity, and Sanctity of Life

The statement of faith should reference Catholic theology and practice regarding those specific issues that are most likely to conflict with secular culture and to be targeted by hostile organizations and regulators. The issues may be sufficiently addressed in a statement of faith, separate documents regarding specific issues, or broader faith and conduct or Catholic/Christian community statements discussed below. Issues that should be covered include: homosexual behavior and other sexual immorality/sexual activity outside of Holy Matrimony between one man

and one woman; gender identity/dysphoria; contraception, sterilization, and in vitro fertilization; and abortion and other sanctity of life issues. These statements may be relatively brief, or a statement of faith may cross-reference more detailed statements on the subjects most likely to conflict with faith. Such a document, rooted in Church teaching and Scripture, can be useful for faculty and staff who may be approached by or otherwise engage in appropriate discussions with students and others, and for teaching regarding the institution's position in the face of secular world views. Wherever they are addressed, it is helpful to reference specific passages of Scripture, the Catechism, or other authoritative teaching to demonstrate that the institution's positions are genuinely matters of faith and Christian doctrine, and not bigotry.

4. Statement Should Designate or Cross Reference School Authority for Decisions Regarding Faith and Conduct

A statement of faith or a cross-referenced policy document should designate who, and how, school leaders will make decisions regarding employment matters related to religious belief or inconsistent conduct. This may be a board, a subcommittee of the board of trustees, or another faithful committee within the school with the requisite authority. If practical to do so without unnecessary complication, the committee and process may incorporate appropriate local Church clergy (such as any who are members of the organization's board) or the process may be expressly condoned by a Bishop or the leadership of a religious order, even if such leaders do not participate in the process. However, specific clerical involvement is not essential.

Institutions have a practical need to hire, fire, and manage their employees, including regarding issues that involve faith and practice of members of their community, relying on and consistent with the teachings and doctrine of the Church. Regardless of the specific designated decisionmaker regarding matters of faith, it is important to follow the designated procedures outlined by the school. It is also helpful if the same designated committee is also involved in the board's creation and adoption of policies and considerations of the best approach for addressing evolving issues in which the broader culture may conflict with Catholic faith and doctrine.

5. Statement May Provide for Alternative Levels of Commitment

A school may require different levels of religious commitment for different positions or roles. For example, a school may require faculty to accept and affirm a more detailed and complex commitment to faith while holding other employees to a different standard. Deciding which employees might be required to make this commitment should be decided based on each school's faith and desired Christian community. Whatever is chosen, however, the school should draft its statement of faith or other governing documents to accurately reflect the standard it selects, and then consistently follow them.

Schools should be aware that for employees who would not qualify as ministers, the law is not yet clear. Title VII and many state laws allow schools to discriminate on the basis of religious beliefs and practices. However, it will be important to determine whether higher courts will allow artificial distinctions between sexual orientation discrimination and religious discrimination.

6. Statement or Theological Foundation Should be Referenced in Articles, Bylaws, and Board Requirements and Regularly Reaffirmed

A Catholic school's foundational legal documents—such as its corporate articles and bylaws—should reference the school's religious affiliation and its essential religious character. The documents should also clearly identify the body (such as the board of trustees) invested with final authority to uphold the institution's religious mission.[38] Ideally, the documents will incorporate or cross-reference the school's statement of faith. This may necessitate amendments to existing organizational documents if they do not clearly reference the importance and particular religious tenets of the school's faith and religious mission.

Specific religious requirements regarding faith and conduct should be applied to board members through the school's foundational documents or through specific board policies carrying out general statements in the school's foundational documents. Board members must faithfully lead the organization consistent with the Catholic faith and must faithfully apply the institution's governing documents and religious distinctives consistently in both policy and application. Like employees and faculty, board members should be required to regularly (at least annually) reaffirm their agreement with, and commitment to publicly and privately apply the institution's statement of faith and religious beliefs described in the school's governing documents. And board members must be ready to hold other board members accountable for failures to do so.

7. Statement Should Reference Any Affiliation with a Diocese or Religious Order

To assist in shoring up its religious identity, institutions should make clear in their governing documents that the board retains oversight of its religious mission and final authority to ensure policies and practices remain consistent with that mission, particularly where the Church does not have legal control. And where the Church does not have legal authority, it is best to specifically affiliate with the Church in a manner that provides demonstrable influence over the school, such as through representation by Catholic clergy on the school's board and activities. A school that is independent of legal Church control should be able to show that it is nevertheless "controlled" by religious faith, and ensuring that board members are faithful Catholics committed to the school's mission could be persuasive to courts.[39]

C. Hiring and Managing Employees with Faith Requirements

Employees who lead and teach must do so consistent with the school's beliefs, and they must act in a manner that does not contradict the schools' Catholic mission. Communicating expectations in advance is an essential component of fairness. And thoughtfully supervising and holding

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[38] *See Maxon , et. al*, *v. Fuller Seminary*, No. 20-56156, slip op. at 3 (9th Cir. Dec. 13, 2021) (reaffirming that religious exemptions apply to educational institutions "that are controlled by their own religiously affiliated boards of trustees" rather than a specific external organization).

[39] Note that Title IX, which applies to schools that receive direct or indirect federal financial assistance, also provides an exemption from certain statutory nondiscrimination requirements for schools that are under "religious control." While a fulsome Title IX discussion is beyond the scope of this Guide, the importance of defining a school or college as a foundationally religious organization has potential implications and defenses beyond employment law issues.

employees accountable are important for any employer. But basic elements of fairness and common-sense management are particularly important for religious employers who must fulfill the specific requirements of narrow legal exceptions to advance beliefs that are contrary to the prevailing culture.

Good management practices also can help avert employment actions from escalating unnecessarily into disputes. Angry resignations and even lawsuits regularly arise from perceptions of unfairness, rather than actual legal violations. Government agencies, such as the EEOC, have limited resources and will focus on cases that they perceive to be most unfair. Judges too, consider the fairness and equity of an employment decision even when the outcome of a lawsuit should technically depend only on the law. The following sections provide points to consider in preparing and utilizing common employment tools within a religious academic setting.

1. Job Descriptions

Job descriptions can be important tools for hiring and managing employees. They are critically important for employees who are required to hold specific religious beliefs and to live consistent with their faith. For both practical and legally significant reasons, Catholic schools should maintain accurate, up-to-date job descriptions that describe a position's connection to the school's religious mission and any related requirements of faith and conduct specific to that position.

Job descriptions inform new and existing employees of what is expected to successfully perform. Position descriptions also serve as a foundation for supportive and proactive management within the organization. Supervisors can use job descriptions to gauge each employee's strengths and areas where training or improvement may be necessary. Job descriptions are an important tool to document and educate not only employees, but also outsiders on a position's faith and conduct requirements and the position's connection to the school's particular religious mission. Specific religious requirements should be described in the context of the position, including why any requirement is important or helpful to the position's specific functions. Employees should be informed of these requirements, at least as part of an annual review and signoff process described below.

2. Performance Management and Annual Acknowledgment

Thoughtful, properly documented job duties and descriptions are only meaningful if employees perform as required. It is essential to supervise employees on an ongoing basis and intentionally guide and manage employee performance. For example, if a teacher is required to incorporate Catholic teaching in each subject, a supervisor can help the teacher plan lessons or provide examples of how to incorporate God and faith into particular subjects. More senior or particularly gifted teachers can share this burden by training others and mentoring.

In addition, it is important to periodically require employees to acknowledge their understanding of and commitment to fulfill a position's requirements. Properly done, these efforts will support and enable employee performance and prevent problems. They also demonstrate to others that job requirements are genuine and important, increasing their legal effectiveness. Employees should participate in a thoughtful annual evaluation process that includes matters related to faith and conduct that apply to their position. Requiring an employee's self-evaluation of their own work, including matters of faith or other issues touching on the school's religious mission, is helpful for

management to understand and evaluate the employee's understanding of these issues, and creates a written record in the event an employee seeks to reimagine the past after a dispute arises. The annual review process should include an acknowledgement and reaffirmation of the employee's commitment to fulfill the requirements of their position, including requirements regarding faith and conduct.

3. Contracts

Some employers use annual or longer-term contracts to document certain aspect of employment, including regarding matters of faith. Annual contracts can provide an opportunity for employees to reiterate and affirm their commitment to matters of faith. Such matters need not be incorporated into a binding contract, however. And if contracts are used, they should be carefully drafted.

Contracts should not be used as a substitute for job descriptions, a school's statement of faith or other broader policies or foundational documents applicable to all employees in the same position or to the entire school. Contract format does not lend itself to the longer-form explanation necessary to describe a position's connection to the school's religious mission or a description of the school's faith and sources of authoritative teaching. Instead, any contract should cross-reference and affirm commitment on these issues by referring to the school's foundational governing documents.

These same concerns should be applied when considering tenure policies or similar contractual commitments. While job security can help attract and retain talented professors and teachers, it should not be allowed to supplant a school's right to determine matters of faith or conduct consistent with faith. The school's foundational documents should identify the governing body that has authority to oversee and determine such matters, as discussed in Part III.B.4. In sum, any binding contractual commitment should be drafted with care and subordinated as required to fulfill a school's religious mission.

4. Facility Use and Student Groups

Catholic institutions must carefully establish policies and procedures to govern use of facilities or services by groups or individuals outside of the school or university community. In addition, Catholic schools must establish policies and procedures for recognizing and funding student groups and consistently follow them. Courts will generally assess whether providing certain benefits to groups whose views may conflict with the organization's beliefs imposes a burden on the religious organization's free exercise of its beliefs. For example, the D.C. Circuit Court of Appeals required a private Catholic university to provide gay and lesbian student groups with the same tangible benefits accorded to other student groups, such as mailing and computer labeling services, concluding that doing so imposed a relatively slight burden on the university's religious practice.[40] The court noted that the university had already provided certain tangible benefits to these student groups and had not objected to them meeting on campus.

[40] *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 44 Ed. Law Rep. 309 (D.C. 1987). The court required the university to provide the same tangible benefits to the student groups, but without the intangible "endorsement" of official university recognition.

Appendix

State Equal Employment Opportunity Statutes and Relevant Religious Exemptions

Relevant State Statute(s)	Protected Characteristics Most Likely to Conflict with Catholic Faith and Doctrine	Statutory Exemption for Religious Corporations or Religious Associations
California Fair Employ-ment and Housing Act ("FEHA")	FEHA prohibits discrimination because of: • "religious creed" including "all aspects of religious belief, observance, and practice, including religious dress and grooming practices" • "marital status" • "pregnancy" and "childbirth" • "sex" • "gender" • "gender identity[and] gender expression," further defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth" and • "sexual orientation" defined as "heterosexuality, homosexuality, and bisexuality." Cal. Gov't Code §§ 12926, 12940.	A "religious association or corporation not organized for private profit" is excluded from the definition of an "employer" under the FEHA. Cal. Gov't Code §§ 12926(d). A "[r]eligious corporation" is "any corporation formed under, or otherwise subject to, Part 4" of the California Corporations Code, governing nonprofit religious corporations. Cal. Gov't Code §§ 12926.2(a). Nonprofit public benefit corporations "formed by, or affiliated with, a particular religion and that operates an educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion." This is qualified by the restriction that such nonprofit public benefit corporations "shall be subject to the provisions of [the nondiscrimination statute] in all other respects, including, but not limited to, the prohibitions against discrimination made unlawful employment practices by this part." Cal. Gov't Code § 12926.2(f).

Connecticut	Race, creed, religion, color, national origin, ancestry, age, ***gender, gender identity or expression***, marital status**,** ***civil union status, domestic partnership status***, ***sexual orientation***, genetic information, military service, past or present disability, perceived disability, pregnancy, physical or mental handicap**,** ***sexual orientation***, witnesses to, or victims of, crime, registration as a qualifying patient or status as a caregiver of a qualifying patient under the Palliative Use of Marijuana Act, smoker status, filer of workers' compensation recipient or who otherwise exercises those rights, or service on a jury. Conn. Gen. Stat. Ann. §§ 46a-51 to 46a-104	"The provisions of sections 4a-60a and 46a-81a to 46a-81*o*, inclusive, shall not apply to a religious … educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such …educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such…educational institution or society." Conn. Gen. Stat. Ann. § 46a-81p
District of Columbia	Age (18 and older), race, color, religion, national origin, sex (specifically including pregnancy, childbirth, breastfeeding, and related medical conditions), marital status, personal appearance (including style of dress and personal grooming), ***sexual orientation, gender identity or expression,*** family responsibilities (including being the subject of proceedings for child support payments), matriculation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, political affiliation, genetic information, disability, credit information, and unemployment status. D.C. Code §§ 2-1401.01 to 2-1411.06	No statutory exemption for religious corporations or religious associations.

Florida	Race, color, religion, sex, national origin, age, handicap, marital status, actual or perceived infection with acquired immune deficiency syndrome (AIDS), an AIDS-related complex or human immunodeficiency virus (HIV), membership or non-membership in a labor union or organization, or possession of a sickle-cell trait. §§ 760.01 to 760.11, Fla. Stat. Florida practitioners in Miami-Dade County should note additional protected classes. ***Many are problematic***. *See* Section 11A-2(8) of the Code of Ordinances of Miami-Dade County.	"This section shall not apply to any religious …educational institution…which conditions opportunities in the area of employment…to members of that religious …educational institution…or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious…educational institution…from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such…educational institutions, or societies of its various activities." § 760.10(8), (9), Fla. Stat.
Kansas	Race, color, religion, national origin, ancestry, sex, age, disability, genetic information, military status, victims of domestic violence, victims of sexual assault. K.S.A. 44-1001 to 44-1044	This term shall not apply to a religious or private fraternal and benevolent association or corporation. K.S.A. 44-1002(b)
Massachusetts	Age, race, color, religious creed, national origin, ancestry, disability, ***gender, gender identity, sexual orientation,*** genetic information, pregnancy, or military and veteran status. M.G.L. c. § 151B	A religious organization may also be exempt in certain faith-based actions if it limits membership, enrollment, admission, or participation to members of that religion. M.G.L. c. 151B, § 1(5)
New Hampshire	Race, color, national origin, sex, ***gender identity***, religion, age, ***sexual orientation***, pregnancy, marital status, and physical and mental disability. N.H. RSA §§ 354-A:1 to 354-A:28 *Note*: Gender identity was added in 2018.	The following are **not** covered employers if they are not organized for private profit: Exclusively social clubs; Fraternal or religious associations or corporations. N.H. RSA § 354-A:2(VII)

North Carolina	Race, religion, color, national origin, age, sex, handicap, possession of sickle cell or hemoglobin C trait, genetic testing and information, HIV or AIDS status, lawful use of lawful products, testimony or assistance with hazardous chemicals proceedings or investigations, jury service, National Guard service, engaging in activities protected by the North Carolina Retaliatory Employment Discrimination Act. N.C.G.S. §§ 143-422.1 to 143-422.3	No statutory exemption for religious corporations or religious associations in employment. Religious exemption to Fair Housing Act, N.C.G.S.A. § 41A-6
North Dakota	Race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, for good faith reports of violation or suspected violation of law, ordinance, or regulation, or participation in a lawful activity off the employer's premises during nonworking hours. N.D.C.C. §§ 14-02.4-01 to 14-02.4-23	"Notwithstanding sections 14-02.4-03 through 14-02.4-06, it is not a discriminatory practice for an employer to fail or refuse to hire and employ an individual for a position, to discharge an individual from a position…on the basis of religion, sex, national origin, physical or mental disability, or marital status in those circumstances where religion, sex, national origin, physical or mental disability, or marital status is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise…." N.D.C.C. § 14-02.4-08

Ohio	Race, color, religion, sex, military status, national origin, disability, age, and ancestry. R.C. 4112.02(A) *et seq.*	"This section does not apply to a religious corporation, association, educational institution, or society with respect to the employment of an individual of a particular religion to perform work connected with the carrying on by that religious corporation, association, educational institution, or society of its activities." R.C. § 4112.02(O) Employers can also obtain a bona fide occupational qualification (BFOQ) by the Ohio Civil Rights Commission (OCRC) in advance in order to discriminate for various reasons including religion. *See* Ohio Adm. Code 4112-3-15(A)
Tennessee	Race, color, religion, creed, sex or gender, national origin, age, disability. T. C. A. § 4-21-102(3) and (4). "Sex" means and refers only to the designation of an individual person as male or female as indicated on the individual's birth certificate. T. C. A. § 4-21-102(20)	"This chapter shall not apply to religious corporations, associations, educational institutions, or societies, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by the corporation, association, educational institution, or society, of its religious activities." T. C. A. § 4-21-405

Texas	Race, color, national origin, ethnicity**,** ***sexual orientation (under certain city ordinances)***, age, religion, disability, genetic information, military service, and sex, including on the basis of pregnancy, childbirth, or related medical conditions. V.T.C.A., Labor Code § 21.051	"(a) A religious …educational institution … does not commit an unlawful employment practice by limiting employment or giving a preference to members of the same religion. (b) Subchapter B1 does not apply to the employment of an individual of a particular religion by a religious corporation, association, or society to perform work connected with the performance of religious activities by the corporation, association, or society." V.T.C.A., Labor Code § 21.109
Virginia	Race, color, religion, national origin, sex, pregnancy, childbirth, or a related medical condition, age, marital status, ***sexual orientation, gender identity***, military status, or disability. Va. Code Ann. §§ 2.2-3900 to 2.2-3903 and 2.2-3905(B)	"Notwithstanding any other provision of this chapter, it is not an unlawful discriminatory practice: 2. For an elementary or secondary school or institution of higher education to hire and employ employees of a particular religion if such elementary or secondary school or institution of higher education is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of such elementary or secondary school or institution of higher education is directed toward the propagation of a particular religion…." VA Code Ann. § 2.2-3905(C)(2)

Wyoming	Race, color, creed, sex, ancestry, national origin, age, pregnancy, or disability. Wyo. Stat. Ann. §§ 27-9-101 to 27-9-108	This law does not apply to religious organizations or associations. Wyo. Stat. Ann. § 27-9-102(b)