



PRACTICAL STEPS that Religious Institutions Should Consider in the Post-Obergefell World

BY KIM COLBY

In the wake of the Supreme Court's decision in *Obergefell v. Hodges*, the Christian Legal Society prepared three guidance documents and presented three webinars to help religious institutions consider minimizing their legal exposure with the advent of same-sex marriage, the expansion of non-discrimination laws to include protections for gender identity and sexual orientation (commonly referred to as "SOGI" laws, an acronym for "Sexual Orientation, Gender Identity"), and the existence of some limited religious liberty protections. The first webinar provided guidance for churches, the second for schools and colleges, and the third for other religious non-profit institutions. An article that gives a broad overview of the current legal landscape regarding same-sex marriage and SOGI law is found in the accompanying *Journal of Christian Legal Thought* and should be read in tandem with this article.

Substantial overlap exists as to the guidance given the three types of religious institutions, which is distilled in the practical

steps below. While the guidance is general in nature and cannot address the specific legal needs of a specific institution – and therefore legal advice should be sought for the specific situation that a particular religious institution faces – there are some basic practical steps that can be taken by any religious institution that is concerned about its legal exposure regarding same-sex marriage and SOGI laws. The practical steps are also useful considerations for legal problems that religious institutions face outside that particular context.

These practical steps are offered because many of the readers of this article are attorneys who serve on the boards of religious non-profit institutions and may be looked to for guidance on these matters. The webinars and guidance documents remain available for viewing on the website at religiouslibertyguidance.org or through the CLS website. Sample policies are also available on the websites.

Five Basic Actions

To optimize their religious liberty protections, religious non-profit institutions need to take at least the following five basic actions:

1. **Adopt** thoughtful, detailed theological statements regarding the following basic religious doctrines:
 - **Theological beliefs** -- what the church, school, college, or other religious nonprofit institution believes regarding marriage, human sexuality (sexual conduct outside of marriage including, but certainly not limited to homosexual conduct), and gender identity;
 - **Where spiritual authority resides** -- the person or entity within the institution who has the ultimate say as to what the institution's doctrine is on these issues and how the doctrine is applied in specific contexts (*e.g.*, employment, student conduct, housing, facilities use);
 - **Christian dispute resolution** -- the institution's belief that Christians should not take one another to court, as well as the alternative dispute resolution mechanism to be used; and
 - **Explaining grace** -- the essential Christian concepts of sin, grace, repentance, and restoration are increasingly foreign concepts to judges, political leaders, and reporters, who may mistake the extension of grace in one instance as evidence of inconsistency in applying doctrine or even of discrimination among employees or students;
2. **State** clearly in organizational documents the religious nature of the institution, including a concise statement of the institution's biblical philosophy of Christian education that emphasizes the integration of biblical principles and Scripture into every subject, if it is a school, or its biblical philosophy of Christian ministry to the underprivileged if it is a religious non-profit, or its biblical philosophy of Christian marriage ceremonies if it is a church that performs marriages;
3. **Train** staff and volunteers, so that those who apply the policies are trained in the institution's theological understanding underpinning its governing documents, policies, and ministries, and the proper application of those

policies, including who makes the final decisions to determine how the policies apply in particular contexts;

4. **Apply** the policies consistently, because even solid policies will appear weak if they are not applied consistently, with their specific applications documented in writing, particularly if an application involves the extension of grace or acknowledgement of repentance; and
5. **Get** legal advice from a lawyer who is familiar with the applicable laws in the state and local jurisdiction in which the school, church, or non-profit operates. Because state and local laws vary widely, any guidance must by nature be very general and not sufficiently specific to a religious institution's situation. Good legal counsel is a wise investment.

Checklist for upgrading a religious non-profit's documentation, policies and practices

1. Check the corporate charter and bylaws and modify as needed

A key starting place is an institution's governing documents. An institution's articles of incorporation, constitution, bylaws, and written policies should contain not only the institution's purpose, but also should integrate that purpose into an overall religious purpose statement. Detailed statements of faith should use doctrinal language to explain at least four main doctrinal issues.

First, the institution should adopt a detailed, thoughtful statement reflecting biblical standards for human sexuality in all of its dimensions, including not just homosexual conduct, but also marriage, sexual conduct outside of marriage, and gender identity. The theological statement should be rooted in the Bible with specific Scripture references. The statement should also incorporate historical Church documents on these topics, including specific applicable denominational documents. If appropriate, consult contemporary books and documents outlining basic Christian doctrine on these matters.

Second, the governing documents should also be clear as to where the spiritual authority to make decisions on different issues resides. A well-written statement about where the spiritual authority to determine *what* the institution's doctrine is and *how* that doctrine applies in specific contexts should be adopted. Again, the statement should draw on denominational or

historical materials that explain why the spiritual authority resides in a particular person (e.g., the church pastor or the school headmaster) or in a governing body (e.g., the church board or school board). As a general rule, courts are not supposed to second-guess religious institutions' spiritual decision-making, so it is important to make clear who has the spiritual authority on an issue. The spiritual authority for making decisions may vary within the same institution depending on the particular issue, but the policies should be clear as to where the final spiritual authority on a particular issue is within the institution.

Third, the governing documents or policy manual should contain a clear exposition of the religious doctrine of Christian dispute resolution, if the school sincerely holds such a doctrine. The religious basis for the belief that Christians should not go to court against one another, based on *Matthew 18* and *I Corinthians 6*, should be explained. Historical and current documents, as well as denominational documents, that explain the doctrine should be incorporated into the statement. It is important that this be more than a requirement that alternative dispute resolution be used; the theological basis for the requirement must be explained and followed. This was an important factor in a church's and its school's defense against

a claim of discrimination in the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

Fourth, in particular, the governing documents should explain the doctrines of sin, grace, repentance, and restoration. While these doctrines are at the heart of the Christian faith and govern Christian actions, they are increasingly foreign concepts in our society. A judge or jury is much more likely to find that a religious institution engaged in unlawful discrimination if policies are applied inconsistently. The inconsistency can be used to argue that the institution is not sincere in its claims as to what its sincerely held religious beliefs are regarding marriage and sexuality. Or the institution's actions may appear discriminatory if it seems to punish one employee for a particular action but does not punish another employee for the same action. The institution must explain its beliefs regarding sin, grace, repentance, and restoration in its written documents if it hopes to explain to a judge or jury that what looks like inconsistency is actually the legitimate application of basic Christian doctrine. Careful written documentation of each situation and its resolution is critical. Balancing the need to avoid legalism with the need for consistency is a delicate, but crucial, goal.

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2. Develop a facility-use policy, along with written use agreements

An institution should have a written facility-use policy that includes a requirement that its facility may be used **only** for purposes and in ways consistent with its doctrinal beliefs as reflected in the Bible and its governing documents. Permitted uses need not necessarily all be religious instruction or related activity, but they should at least be in furtherance of the institution's educational and religious mission. The policy should include specific statements about how the institution understands the Bible's teachings on specific issues that might arise, with references to the Bible and specific governing documents.

In addition, an institution should have a written agreement with each user of its facility that includes language reflecting how such facility use ties into the institution's mission and understanding of biblical teachings. A practice of charging fees may have implications regarding "public accommodation" and property tax exemption issues that need to be carefully evaluated by experienced legal counsel.

3. Update employment policies and practices to clearly reflect the religious institution's religious identity, especially on marriage and sexual issues

Religious non-profit employers should reflect their religious nature in their employment documents and practice. Potential options include identifying religious aspects in written job descriptions, inserting statements of faith or other doctrinal language in employee handbooks, using written codes of conduct requiring all staff to serve as a Christian role model and defining what this means biblically, and emphasizing regular prayer time at staff meetings, prayer with and spiritual mentoring of others, integration of faith and learning, and other religious expressions on a daily basis. Contracts, where used with staff, should require agreement with the Statement of Faith and serving as a Christian role model. Specifically, written explanations of each position's religious significance, the religious requirements of the job, and the religious standards of conduct for the employee should be written into job notices, applications, job descriptions, employee contracts, employee handbooks, employee reviews, and termination documents. Employees should be required to sign documents on an annual basis indicating that they agree with the institution's beliefs, standards of conduct, and all religious requirements of their position, and

that they understand that violation of such standards constitutes cause for termination of their employment.

Biblical standards regarding sexual behavior (not just related to homosexual behavior) should be expected and followed for all employees, with appropriate accompanying staff training regarding the expectation that employees will live according to these biblical standards of conduct. In addition, employees should be required to submit to the institution's disciplinary protocols as a condition of employment, such as using Christian mediation and arbitration for all disputes.

When appropriate, staff members should be identified as "ministers" to the degree appropriate. Some religious leaders may be reluctant to identify staff positions as "ministers," but the term has an important legal meaning that should not be lightly forfeited. All positions that legitimately fit the ministerial exception's legal definition of "minister" should be thoughtfully and carefully identified as such.

Employment documents should describe in detail the substantial religious dimensions of job duties (e.g., daily class devotions, occasional chapel devotions, Bible teaching, prayer, spiritual discipleship of students, incorporation of biblical teaching into the curriculum, etc.) and should provide the biblical basis for the religious institution's understanding of the ministerial role the employee performs. The religious training required to be a staff member should be described and met by employees and evaluated by employers.

The above safeguards may be particularly helpful because a "ministerial" position is generally exempt from federal and state anti-discrimination prohibitions. Further lessons from the Supreme Court's *Hosanna-Tabor* decision for qualifying a position as "ministerial" are as follows: (1) include an objective rationale (e.g., per Scripture and/or church history) in written job descriptions; (2) use job titles that incorporate "ministerial" aspects; (3) use job descriptions and performance criteria that support a "ministerial" designation; (4) reflect ministerial criteria in job evaluations and disciplinary standards; (5) require an employee to affirm in writing (e.g., in contract, annually) his or her agreement with the religious institution's religious doctrine and willingness to abide by the institution's standards of conduct as a condition of employment; and (6) require such employee (as well as all other employees) to affirm in writing his or her agreement to abide by the alternative dispute resolution mechanism that the institution requires and the biblical basis for the requirement.

4. Tax-exempt status

At the *Obergefell* oral argument, Justice Alito asked Solicitor General Verrilli whether religious schools may lose their tax exempt status if they prohibit same-sex conduct among their students. Senator Verrilli responded that might well be an issue. While the IRS Commissioner recently claimed that religious schools' tax exempt status would not be questioned for at least 2-3 years, it is nevertheless important for all religious institutions to monitor legislation, particularly legislation regarding tax exemption at the state and local levels.

5. Monitor government actions

Our elected leaders are people, too, and they need to hear from their constituents. Consequently, Christians should consider contacting their legislators about moral aspects of pending legislation. When voting for political candidates, believers should seriously consider those candidates who affirm and protect religious liberties. Religious institutions, of course, must be careful about political campaign prohibitions and lobbying restrictions for nonprofits. Political campaign activity may be done in a personal capacity, but is absolutely prohibited when done as a paid employee on duty on behalf of a specific nonprofit. Lobbying may be done corporately but only to a limited extent.

6. Seek legal counsel

This legal guidance can only be provided on a general level. Accordingly, Christian non-profit institutions are encouraged to seek out attorneys who are knowledgeable and experienced in these legal areas, for specific application within their own jurisdictions and suited to their own organizational structure, programs, and concerns.



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