

Managing Potential Religious Restrictions in CARES Act Loans

CLS Teleforum

April 9, 2020

Stuart J. Lark
Sherman & Howard L.L.C.
slark@shermanhoward.com
(719) 448-4036

SHERMAN & HOWARD

Managing Potential Religious Restrictions in CARES Act Programs

Overview

- ▶ **How we got here**
- ▶ **Where we are now**
- ▶ **What can we do**

How We Got Here

General Nondiscrimination Laws

- ▶ Type of Activities
 - ▶ Employment
 - ▶ Activities: Goods, Services, Public Accommodations
- ▶ Protected Classes
 - ▶ Race
 - ▶ Religion
 - ▶ Sex
 - ▶ Other
- ▶ Religious Exemptions
 - ▶ From “religious activities” to all activities
 - ▶ Only on the basis of religion
 - ▶ May be limited if receiving government funds, such as in Colorado

How We Got Here

Government Funding

- ▶ **Church/State Separation Cases**
- ▶ **Statutes, Regulations, and Executive Orders (“Oh My”)**
 - ▶ **Broad religious restrictions on activities**
 - ▶ **Nondiscrimination in employment and provision of goods/services**
- ▶ **The Pendulum Swings**
 - ▶ **Church/State separation cases reversed**
 - ▶ **Charitable Choice protects hiring rights and permits religious activity**
 - ▶ **Government cannot exclude religious organizations or impose certain restrictions burdening religious exercise**

How We Got Here

The CARES Act

- ▶ Provides PPP/EIDL loans through the SBA
 - ▶ Disaster Response/Relief
 - ▶ No religious restrictions
- ▶ Other Features (CARES Act plus)
 - ▶ Loans to larger employers
 - ▶ Unemployment benefits and paid leave
 - ▶ Employer tax payment deferrals/credits
 - ▶ Charitable contribution incentives
 - ▶ Access to retirement plans

How We Got Here

SBA Loan Regulations

- ▶ No religious activities:

An applicant is ineligible if it is “principally engaged in teaching, instructing, indoctrinating or counseling religion or religious beliefs, whether in a religious or secular setting.” 13 CFR 120.110(k)

How We Got Here

SBA Loan Regulations

- ▶ No employment discrimination:

No recipient shall “[w]ith regard to **employment practices** within the aided business or other enterprise, whether or not operated for profit; fail or refuse, because of race, color, **religion, sex** or national origin of a person, to seek or retain the person’s services, or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee’s services and abilities”

- ▶ Limited religious exemption

“Nothing in [SBA nondiscrimination regulations] shall apply to a religious corporation, association, educational institution or society **with respect to the membership or the employment of individuals** of a particular religion **to perform work connected with** the carrying on by such corporation, association, educational institution or society of **its religious activities.**”

How We Got Here

SBA Loan Regulations

- ▶ No discrimination in activities:

“Discriminate with regard to **goods, services, or accommodations** offered or provided by the aided business or other enterprise, whether or not operated for profit, because of race, color, religion, sex, handicap, or national origin of a person, or fail or refuse to accept a person on a nonsegregated basis as a patient, student, visitor, guest, customer, passenger, or patron”

- ▶ Affiliation rules for employee count

Where We Are Now

SBA Guidance

- ▶ IFR's and FAQs ("Oh My")
- ▶ No enforcement of restriction on **religious activities** (or secular service requirement)
- ▶ A religious borrower retains its "autonomy with respect to **membership or employment** decisions connected to its religious exercise."
- ▶ The nondiscrimination restrictions on **goods, services or accommodations** do not apply to an organization's "ministry activities within its own faith community."
 - ▶ They do apply to activities "offered generally to the public"

Where We Are Now

SBA Guidance

- ▶ Once the loan is paid or forgiven, the nondiscrimination obligations will no longer apply.
- ▶ Organizational affiliations do not count if they are “based on a religious teaching or belief or otherwise constitute a part of the exercise of religion.”
 - ▶ Adopted as a new regulatory section!

Where We Are Now

SBA Loan Application Form

- ▶ Certification:

“I will comply, whenever applicable, with the civil rights and other limitations in this form”

- ▶ Civil Rights Definition:

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Where We Are Now

Other Legal Considerations

- ▶ General statutes: race, national origin, disability, age
- ▶ State law limitations, such as Colorado
- ▶ Religious exercise/expression protections
- ▶ Legal implications of certification on claiming exemptions

What Can We Do Now

Strategic and Management Considerations

- ▶ Determine your organization's disposition (theological or otherwise) toward government support:
 - ▶ would you accept government funds even if there were no strings attached, or regardless of any such strings?
- ▶ Determine your organization's risk tolerance regarding potential legal implications for your religious exercise.

What Can We Do Now

Strategic and Management Considerations

- ▶ Articulate your standards for your members and your employees (i.e., your faith community), and for your activities, describing these standards as means by which you exercise and express your beliefs.
- ▶ Affirmatively clarify in your application or other communication that your certification is based on your interpretation that, e.g., the SBA civil rights regulations add nothing to general civil rights laws that otherwise apply lawfully.

What Can We Do Now

I Peter 3:14-15

- ▶ But even if you should suffer for what is right, you are blessed. “Do not fear their threats; do not be frightened.” But in your hearts revere Christ as Lord. Always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have. But do this with gentleness and respect.

SHERMAN&HOWARD
