

Opportunity to Comment on the proposed amendments to the federal contracting regulations to protect the religious staffing rights of religious employers

a note from Stanley Carlson-Thies, Institutional Religious Freedom Alliance
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In mid-August, the Trump administration announced a Notice of proposed rulemaking—a draft regulation or regulatory changes—and asked for comments. The proposed changes concern the religious exemption that permits religious staffing by religious organizations that contract or subcontract with the federal government. The protection provided by this religious exemption was cast into doubt after the Obama administration, in 2014, added to the contracting regulations a prohibition on employment discrimination on the bases of sexual orientation or gender identity. Rather than clarify that religious employers, because of the religious exemption, could decline to hire job applicants who, while claiming to share the employer’s religion, violated certain conduct standards of the religion, the Obama administration proposed that such a decision would violate the new nondiscrimination requirements. A congressional effort to clarify the scope of the religious exemption (the “Russell Amendment”) was ended when the new Trump administration promised to address the issue. This NPRM is the Trump administration effort to clarify the scope of the religious exemption in the context of federal contracting rules that prohibit employment discrimination on the bases of sexual orientation and gender identity.

The Trump administration proposes to clarify the scope of the religious exemption, and thus strengthen the protection of the religious staffing freedom of religious employers in federal contracting, by adding new definitions to the regulations and a new directive that religious exercise must be broadly protected. The actual proposed language is provided at the end of this note.

This is the proposal: Department of Labor, Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking, “[Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption](#),” 84 Fed Reg 41677 (Aug. 15, 2019)

Comments are due by September 16, 2019. Comment by going to www.regulations.gov and entering “RIN 1250-AA09” into the search box. When the page headed “Featured Result – RIN: 1250-AA09: Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” appears, click on the “comment now” button. You can type (or paste) a comment directly into the web form and/or upload a Word or pdf version of your comment.

For further background on the NPRM (Notice of proposed rulemaking), see Stanley Carlson-Thies, “[Trump Administration Proposes Rule Change for Federal Contracting to Clarify Religious Staffing Provision](#).”

Prudential considerations: As always, all comments submitted, including information about the commenters, are open to easy public view. This NPRM deals with a matter of great public controversy. As soon as the NPRM was announced, it was labeled as an effort by the Trump administration to promote a “license to discriminate” by federal contractors against LGBT people and unwed mothers. Recall the background: In 2014, when President Obama was

preparing to issue an Executive Order banning sexual-orientation and gender-identity employment discrimination in federal contracting, defenders of religious freedom urged him to strongly protect the religious staffing freedom. These pleas were strongly criticized as efforts to promote bigotry; notably, after President Michael Lindsay of Gordon College signed a letter to the President seeking clear religious protections—while not opposing LGBT protections—the College was subjected to a long-lasting and bitter storm of protest and a set of adverse actions (it persevered and [recovered](#)). A legislative effort to clarify the religious staffing freedom after the Obama Executive Order was issued—the “Russell Amendment”—sparked [additional criticism](#) of defenders of religious freedom.

Thus, commenters should be aware of the risk of controversy and reputational harm. Remember, though, that religious freedom shrinks when it is not defended. Note that, while this NPRM deals only with the rules for federal contracting, the positive precedent it will set if its changes are accepted will be important for other actions the federal government will need to take concerning the intersection between religious freedom and LGBT rights. That includes any action the administration may take to resolve problems created in HHS grant making by a regulation adopted very late in the Obama administration that applies a sweeping prohibition of discrimination based on religion, sexual orientation, and gender identity.

A religious freedom advocate once reminded me that, while speaking up on behalf of religious freedom can result in serious reputational harm, keeping silent may result in something much worse: government rules, backed by the government’s severe penalties, that limit by law the freedom a religious organization needs in order to be true to its convictions.

Talking points:

- + Introduce your organization: how it is inspired by faith to serve others, what it does.
- + Explain why your organization engages in religious staffing—why it is important to have a staff committed to your organization’s religious beliefs and faith-shaped conduct standards. If your organization serves people without regard to their religion, but does consider religion when selecting staff, explain the difference.
- + If your organization receives government funding (federal, state, or local), whether via contracts, grants, or other forms (scholarship income, vouchers, fees-for-service, etc.), note this funding and how important it is that your organization and other faith-based organizations not be required to sacrifice religious staffing in order to have access to the funds.
- + If your organization does not take government funds, you can still write something like this: Although we do not accept government funding, we believe that no organization should be excluded by the government from competing for contracts or other funds simply because it is a religious organization that takes seriously its religious identity and religious practices, such as religious staffing.
- + You might write: We know that the proposed changes to clarify the religious exemption that permits religious staffing concern only federal contracting, not the more common federal grants.

Yet this strong protection of religious staffing sets an important positive precedent for how the federal government should protect religious staffing when other forms of federal funding are involved.

+ You might write: The proposed changes rightly clarify that it is legal for a religious employer to assess not only an applicant's or employees' self-professed religion but whether or not the person agrees with the employer's religious beliefs and lives up to the employer's religion-based standards of conduct. We seek for our staff people who believe and act in accordance with our organization's religious mission and ethos—just checking off a denominational box proves nothing useful to us.

+ You might write: We agree with the NPRM that, to be considered a religious organization entitled to the religious exemption, a religious organization has to show that it is religious, but that it need not be controlled by or connected with a house of worship or denomination, and it does not have to be staffed or governed only by people of a single denomination or religion.

+ You might write: We agree that, to be eligible for the religious staffing exemption, an organization has to have and operate in accordance with a religious purpose and must hold itself out to the public as a religious organization. Our organization makes our religious identity clear to the public and our religious requirements clear to job applicants.

+ You might write: We agree that, to be accepted as legitimate, a religious employer must be sincere in making religious staffing decisions, and not use religion as a pretext for invidious discrimination. In our own employment practices, our organization has articulated the religious rationale for our religious employment policies and practices, including our insistence that employees follow our religiously based conduct expectations. We are committed to upholding our religion-based standards with every applicant and employee.

+ Consider writing: We acknowledge that, while the NPRM seeks to clarify the religious exemption and thus to safeguard religious staffing, it leaves untouched the general requirement that federal contractors and subcontractors must not discriminate in employment on the bases of sexual orientation and gender identity. Although some wish to eliminate those nondiscrimination requirements, we accept them if the religious exemption is clarified as proposed in this NPRM.

+ Consider writing: While we believe that some for-profit businesses are genuinely religious entities with a religious purpose and practices—for example, some religious broadcasters and kosher butchers—and thus should not be barred from using the religious exemption, we understand that some in the public are concerned that some big businesses may try to misuse the proposed changes in order to set forth a bogus religious pretext for biased employment practices. If such a misuse might actually be able to occur, we recommend appropriate changes to the definition of organizations eligible for the religious exemption in order to prevent such misuse.

+ You might write: Thank you for the careful work in this NPRM to clarify the religious exemption and thereby safeguard the important freedom for religious employers to consider religion in their employment decisions.

The new language that would be added to the federal contracting regulations:**New Definitions:**

Exercise of religion means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

Religion includes all aspects of religious observance and practice, as well as belief.

Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that is organized for a religious purpose; holds itself out to the public as carrying out a religious purpose; and engages in exercise of religion consistent with, and in furtherance of, a religious purpose. To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; be nonprofit; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

New requirement to broadly protect religious exercise:

Broad interpretation. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*