



The Leadership Conference  
on Civil and Human Rights

December 17, 2020

Submitted via [www.regulations.gov](http://www.regulations.gov)

Bernadette B. Wilson  
Executive Officer, Executive Secretariat  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

**Re: RIN 3046-ZA01, Comment in Response to EEOC's Proposed Updated Compliance Manual on Religious Discrimination**

Dear Ms. Wilson:

The Leadership Conference on Civil and Human Rights, together with Human Rights Campaign, Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center, submit this comment in response to the Equal Employment Opportunity Commission's ("EEOC" or "Commission") Notice of Availability ("NOA"), RIN 3046-ZA01, Proposed Updated Compliance Manual on Religious Discrimination ("Proposed Update" or "PUCM"), published in the Federal Register on November 23, 2020, 85 Fed. Reg. 74719 (proposed Nov. 17, 2020).<sup>1</sup>

We strongly oppose several aspects of the Proposed Update for the reasons set forth below, and accordingly urge the EEOC to withdraw the Proposed Update as currently drafted.

As a preliminary matter, the lack of transparency and inclusiveness in EEOC's decision to pursue significant substantive changes to a key compliance manual undermines the Proposed Update's integrity. The EEOC recently disclosed for the first time that it held "dialogue sessions" before issuing the NOA—including "three days of tele-meetings" with unnamed "[r]eligious leaders, advocacy groups and faith-based nonprofits."<sup>2</sup> The EEOC never publicly disclosed the opportunity to participate in such "sessions" and chose not to conduct public hearings to take testimony with respect to the guidance. More expansive and timely engagement of a broad set of stakeholders would have ensured a more balanced diversity of viewpoints in advance of issuing the Proposed Update. This lack of transparency was also

---

<sup>1</sup> This comment was prepared by Justin Reinheimer and Yvonne Zhang of Quinn Emanuel Urquhart & Sullivan, LLP in consultation and collaboration with The Leadership Conference on Civil and Human Rights, Human Rights Campaign, Lawyers' Committee for Civil Rights Under Law, and the National Women's Law Center.

<sup>2</sup> *EEOC General Counsel Holds Dialogue Sessions on Religious Discrimination with Agency Stakeholders*, at <https://www.eeoc.gov/newsroom/eeoc-general-counsel-holds-dialogue-sessions-religious-discrimination-agency-stakeholders> (Nov. 19, 2020) (noting that the dialogue sessions had already been held "this week").

**Officers**

**Chair**

Judith L. Lichtman  
National Partnership for  
Women & Families

**Vice Chairs**

Thomas A. Saenz  
Mexican American Legal  
Defense and Educational Fund  
Hillary Shelton

**NAACP**

**Secretary/Treasurer**

Lee A. Saunders  
American Federation of State,  
County & Municipal Employees

**Board of Directors**

Kevin Allis  
National Congress of American Indians  
Kimberly Churches

**AAUW**

Kristen Clarke  
Lawyers' Committee for  
Civil Rights Under Law

**Alphonso B. David**

Human Rights Campaign

**Rory Gamble**

International Union, UAW

**Fatima Goss Graves**

National Women's Law Center

**Jonathan Greenblatt**

Anti-Defamation League

**Mary Kay Henry**

Service Employees International Union

**Sherrilyn Ifill**

NAACP Legal Defense and  
Educational Fund, Inc.

**David H. Inoue**

Japanese American Citizens League

**Benjamin Jealous**

People for the American Way

**Derrick Johnson**

**NAACP**

**Virginia Kase**

League of Women Voters of the  
United States

**Samer E. Khalaf**

American-Arab

Anti-Discrimination Committee

**Marc Morial**

National Urban League

**Janet Murguía**

UnidosUS

**Debra L. Ness**

National Partnership for  
Women & Families

**Christian F. Nunes**

National Organization for Women

**Rabbi Jonah Pesner**

Religious Action Center

Of Reform Judaism

**Rebecca Pringle**

National Education Association

**Lisa Rice**

National Fair Housing Alliance

**Anthony Romero**

American Civil Liberties Union

**Maria Town**

American Association of  
People with Disabilities

**Richard L. Trumka**

AFL-CIO

**Randi Weingarten**

American Federation of Teachers

**John C. Yang**

Asian Americans Advancing Justice |  
AAJC

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**AAJC**

**President & CEO**

Vanita Gupta

coupled with an apparent rush to release the Proposed Update without opportunity for complete input from all Commissioners and over their substantive concerns.<sup>3</sup> These failures raise serious concerns about the integrity of the Proposed Update and is inconsistent with the EEOC's historical role as a defender against workplace discrimination.

While the EEOC has represented that the modifications in the Proposed Update “make[] important updates to reflect ... legal developments” in the law since 2008,<sup>4</sup> many of the EEOC's modifications engender confusion rather than clarity upon the issues presented, and wrongly give undue influence to outlier decisions that defer to employers making religious objections to the application of civil rights laws, without explanation or balance. The Proposed Update's responses to Executive Orders 13891 (stating that the updated “document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies”), 13563 (stating that the “proposed guidance will maximize net benefits and reduce the burden on the public by clarifying the legal standards applicable to religious discrimination claims”) and 13771 (stating that the “proposed guidance would reduce the burden on the public by clarifying the standard legal standards the EEOC will apply to religious discrimination claims”)<sup>5</sup> are contrary to the substance of the Proposed Update, which presents a skewed version of the existing legal landscape and repeatedly creates uncertainty by presenting novel positions that lack legal foundation as the legitimate applicable standards.

Ultimately, the Proposed Update would prioritize religious rights over longstanding rights to be free from discrimination motivated or defended by reference to religion. Licensing discrimination in the name of religion, as the proposed revisions do, runs counter to decades of Title VII case law and the longstanding

---

<sup>3</sup> Meeting of November 9, 2020 - Discussion of an Update to the Compliance Manual Section on Religious Discrimination – Transcript (rough), at <https://www.eeoc.gov/meetings/meeting-november-9-2020-discussion-update-compliance-manual-section-religious/transcript> (Commissioner Burrows) (“Unfortunately, the document we consider today is not the product of bi-partisan collaboration. The proposed religious discrimination guidance was drafted and circulated to the Commission for review before a majority of the current Commissioners joined this body. My office painstakingly reviewed an earlier version of the document and prepared comments and proposed edits to share with our colleagues. But that version was substantially rewritten without notice to our input from my office and only provided to the full Commission on Friday, October 23rd, with a final vote scheduled for Thursday, October 29th. ... The draft also appears to embrace novel legal theories that are currently the subject of litigation in federal court. While the Commission is free to offer its own view of the law before that law is settled, we have a duty to carefully consider and discuss the implications of our proposals. ... There's no principled reason to rush this process and instead we should take the time needed to get it right.”); *id.* (Commissioner Samuels) (critiquing that she has “identified a number of both technical and substantive concerns with the guidance as currently written. As a general matter, for example, the guidance must be prudent in so far as it cites cases interpreting statutes other than the ones we enforce. It should acknowledge forthrightly, for instance, that those cases may provide relevant reasoning, but are not dispositive with regard to the employment discrimination laws. ... Along the same lines, the guidance must present a balanced analysis of the case law that does interpret our statutes. It should explain where and why we rely on the cases we do, particularly where there is contrary or scant authority on the relevant point. Moreover, the draft guidance cites to what I believe is an exceptional number of unpublished or district court cases in areas of the law that are very much evolving. Some of these decisions may or may not hold up under subsequent scrutiny and the crucible of additional litigation.”).

<sup>4</sup> Nov. 9, 2020 Tr. (Legal Counsel Maunz); see also *id.* (Vice-Chair Sonderling) (“The law and legal landscape have changed significantly since 2008, including recent United States Supreme Court precedents. As such, updating this guidance is about good governance.”).

<sup>5</sup> PUCM at 111-112.

practices of the EEOC and jeopardizes the civil rights and economic security of women, people of color, lesbian, gay, bisexual, transgender and queer (LGBTQ) workers, immigrant workers, workers of minority faiths or no faith, and those with multiple and intertwining identities.

For example, the Proposed Update would undermine the civil rights of women who may face discrimination because of their employer's religious beliefs about women's behavior or role in society, family structure, or reproductive health decisions, threatening individuals' ability to obtain and maintain employment. Religious beliefs about a woman's decisions related to her private life, including decisions about whether and how to start a family—such as becoming pregnant outside of marriage<sup>6</sup> or becoming pregnant while in a LGBTQ relationship, using in vitro fertilization to start a family, or having an abortion<sup>7</sup>—have motivated employment discrimination. Some employers may refuse to employ women altogether based on a religious belief that women, or mothers, should not work outside the home.<sup>8</sup> Women workers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society.<sup>9</sup>

The Proposed Update would also exacerbate already rampant discrimination against LGBTQ workers and threaten their economic security. It would allow employers to discriminate against LGBTQ employees, undermining Title VII's prohibition against sex discrimination, including discrimination based on sexual orientation and gender identity.<sup>10</sup> Already, 37 percent of lesbian and gay people and 47 percent of bisexual people report experiencing discrimination at work because of their sexual orientation, and 47 percent of transgender workers report experiencing an adverse job outcome because of their gender identity.<sup>11</sup> This discrimination has had devastatingly harmful effects, including disproportionate rates of poverty, homelessness, food insecurity, and negative health outcomes.

---

<sup>6</sup> See, e.g., *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998) (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was “clear evidence that she had engaged in coitus while unmarried”). See also Dana Liebelson and Molly Redden, “A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time,” Feb. 10, 2014, *Mother Jones*, <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>.

<sup>7</sup> NAT'L WOMEN'S LAW CTR., *Why You Can't Get Fired for Having an Abortion: The Latest Sex Discrimination Ruling From a Louisiana Federal Court*, <https://nwlc.org/blog/why-you-cant-get-fired-for-having-an-abortion-louisianas-latest-sex-discrimination-ruling/>.

<sup>8</sup> *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986) (religious school failed to renew pregnant employee's contract because of a belief that mothers should stay at home with young children).

<sup>9</sup> *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (religious school denied women health insurance by providing it only to the “head of household,” which it defined to be married men and single persons, based on its belief that a woman cannot be the “head of household”).

<sup>10</sup> See *Bostock v. Clayton County*, *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*, 590 U.S. \_\_\_\_ (2020).

<sup>11</sup> See James, S. E., et al., NATIONAL CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 148 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. An aggregation of a number of studies found that found that 16 to 68 percent of lesbian, gay or bisexual respondents reported experiencing abuse or had their workplace vandalized as a result of their sexual orientation. Badgett, M.V.L., et al., THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>

People of color also continue to experience widespread discrimination in employment. One-third of all charges filed with the EEOC in FY 2019, for example, raised race discrimination claims,<sup>12</sup> and a recent study found that more than 55 percent of African-Americans, more than 30 percent of Latinos and Native Americans, and more than 25 percent of Asian Americans indicated that they had been discriminated against in hiring, pay or promotion.<sup>13</sup> The impact of race discrimination is severe. Systemic inequality in healthcare and education, discriminatory financial practices, and mass incarceration have created significant wealth gaps for certain communities of color. When a person of color unfairly loses a job, receives less pay or is passed up for a promotion, then, they are less likely to have the resources and networks to help meet basic needs.

LGBTQ people of color have been particularly affected by discrimination and are therefore especially in need of strong civil rights protections. For example, a 2017 study found that 20 percent of LGBTQ respondents reported experiencing slurs or insensitive comments about their LGBT status during the job application process, but 32 percent of such respondents were people of color while just 13 percent were white.<sup>14</sup> Transgender workers of color report higher rates of job loss and employment discrimination than white transgender workers.<sup>15</sup> Even since the COVID-19 outbreak, a greater proportion of LGBT people of color have had their work hours reduced (38%) as compared to either white LGBT people (29%) or non-LGBT people of color (29%).<sup>16</sup>

Given the importance of protecting the rights of all people to be free from discrimination, we urge the Commission to withdraw this Proposed Update. This comment focuses on the following areas:

- I. **The flawed guidance on the scope of coverage**, including: (1) the expanded definition of “religious organization”; (2) the incorrect interpretation of the scope of the ministerial exception; and (3) the lack of proper guidance on the limited scope of the Religious Freedom Restoration Act (RFRA), including that it has no effect on private parties. The multiple errors in this “guidance” has profound practical effects—as just one example, the Proposed Update is phrased in a way that validates an employer’s position that any form of discrimination may be

---

<sup>12</sup> See U.S. Equal Emp’t Opportunity Comm’n, Charge Statistics FY1997 Through FY2019, <https://bit.ly/2W0tdPR> (last visited March 9, 2020).

<sup>13</sup> See Nat’l Public Radio et al, *Discrimination in America: Experiences and Views of African Americans 1* (Oct. 2017), <https://n.pr/2TS3jve>.

<sup>14</sup> See, e.g., NAT’L PUB. RADIO, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. PUB. HEALTH, *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 11* (Nov. 2017) (“DISCRIMINATION IN AMERICA”), <https://tinyurl.com/DiscInAm>.

<sup>15</sup> CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT PEOPLE OF COLOR 10* (June 2015) (“UNFAIR PRICE”), <https://tinyurl.com/UnfairPr>. For example, just within the last decade, the unemployment rate for black transgender people has been twice the rate of the overall transgender population, and over four times the unemployment rate of the general population. New Analysis Shows Startling Levels of Discrimination Against Black Transgender People, NAT’L LGBTQ TASK FORCE (Sept. 16, 2011), <https://tinyurl.com/TF-Disc>.

<sup>16</sup> HUM. RTS. CAMPAIGN FOUND., *THE IMPACT OF COVID-19 ON LGBT COMMUNITIES OF COLOR 2* (2020), <https://tinyurl.com/HRC-Covid19>.

defended on religious grounds, and thus beyond reach of the law—a position antithetical to the EEOC’s mission to defend employees against discrimination.

- II. **The lack of clarification that religious employers cannot use religious objections to engage in discriminatory behavior.**
- III. **The need for more, not less, clarity regarding the prevention of employee harassment.** Specifically, that it is unhelpful and incorrect to assert that employers are powerless to stop harassment in the form of proselytizing until it rises to an “undue hardship” in the workplace.
- IV. **Distortion of the law regarding reasonable accommodations**, including: (1) the EEOC’s subverting of the standard that an accommodation is not reasonable if it imposes more than a *de minimis* cost on the employer; and (2) the Proposed Update’s suggestion that federal refusal-of-care laws do not incorporate Title VII’s well-established balancing framework.

While the Proposed Update includes some beneficial guidance, such as reaffirming the importance of training managers and employees to “reduce the risk of discriminatory decisions,”<sup>17</sup> on balance the Update sows confusion and harm and is inconsistent with the EEOC’s mission as a defender against workplace discrimination.

## I. **THE PROPOSED UPDATE’S GUIDANCE ON THE SCOPE OF COVERAGE IS FLAWED**

The Proposed Update takes an expansive, unsupported view of the range of entities that qualify as “religious organizations.” This broad conception is contrary to legal precedent and would undermine the rights of those working for a broad range of employers. Expanding the scope of “religious organization,” as the Proposed Update does, is contrary to the mandate of the EEOC and the consequences would be especially detrimental to the employment rights of women, people of color, LGBTQ persons, persons who adhere to minority religious or non-religious faiths, and those who range across multiple of these and other minority-population categories.

### A. **The Proposed Update Misstates and Improperly Endorses an Expanded Definition of “Religious Organization”**

The Proposed Update wrongly treats as an “open question” whether a for-profit corporation can constitute a “religious organization” under Title VII.<sup>18</sup> The Proposed Update cites no case reaching that conclusion. Rather, as discussed below, the Proposed Update merely offers a “*cf.*” cite to *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which never applied Title VII.<sup>19</sup> Moreover, the Proposed Update

---

<sup>17</sup> See PUCM at 43 (advising to “reduce the risk of discriminatory decisions by providing training to inexperienced managers and encouraging them to consult with more experienced managers or human resources personnel when addressing difficult issues”); PUCM at 102 (employee need not be excused from training problem that “discusses and reinforces laws and conduct requiring employees not to discriminate against or harass other employees”).

<sup>18</sup> PUCM at 21 (“Whether a for-profit corporation can constitute a religious corporation under Title VII is an open question.”).

<sup>19</sup> PUCM at 21 n.63 (referring to *Hobby Lobby’s* application to the RFRA, not Title VII).

ignores the line of cases holding that the for-profit nature of an entity weighs *against* classification as a “religious organization.”<sup>20</sup> There is no “open question” under current jurisprudence about whether a for-profit corporation can constitute a “religious organization” under Title VII, as our research has found no court that ever found a for-profit corporation to be a “religious organization” under Title VII.

Similarly, the Proposed Update treats an entity’s significant engagement in secular activities as if they were no impediment to qualification as a “religious organization.”<sup>21</sup> While secular activities may not automatically, categorically disqualify an entity from being deemed a “religious organization,” the Proposed Update conspicuously fails to note that under the law such activities *weigh against* such a finding.<sup>22</sup>

The Proposed Update also misapplies the line of cases limiting court inquiry into the sincerity of religious beliefs, improperly distorting a test meant to protect the religious exercise of employees into a test empowering employers to discriminate. This limitation is meant to protect the deeply held commitments of workers, but the Proposed Update weaponizes this concept to insulate employers, allowing them to block legitimate investigations.<sup>23</sup> This “guidance” is phrased in a way that pays lip service to the enduring validity of Title VII’s non-discrimination provisions on all bases other than religion even for religious organizations, but in practice undermines this established principle by supporting that any form of discrimination may be argued to be religious, and thus beyond reach of the law.<sup>24</sup> The EEOC should unmistakably reinforce that the religious organization exemption is in fact a narrow one that cannot broadly shield an employer from inquiry into its alleged discrimination by merely incanting that the discrimination was based on religion.

The Proposed Update similarly credits the argument that a religious organization’s self-determination that its acts are protected by Title VII’s religious organization exemption cannot be investigated or questioned

---

<sup>20</sup> See, e.g., *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988); see also, e.g., *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 227 (3d Cir. 2007) (relevant factor includes “whether the entity operates for a profit”); cf. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O’Connor, J., concurring) (“inquiry “raises different questions as it is applied to profit and nonprofit organizations”).

<sup>21</sup> PUCM at 20.

<sup>22</sup> See also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir.), Doc. #22 at 32-33 (Appellant EEOC Opening Brief) (“The ‘religious organization’ exception is inapplicable because the Funeral Home is not a religious organization: it is a for-profit corporation unaffiliated with any church, its articles of incorporation do not avow any religious purpose, it serves clients of every religion, and it employs individuals from different religions (or no religion).”).

<sup>23</sup> See PUCM at 23-24 (“The religious organization exemption is not limited to employment in the specifically religious activities of the organization. Rather, ‘the explicit exemptions to Title VII ... enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization’s ‘religious activities.’”).

<sup>24</sup> See PUCM at 21-22. The sole case that the Proposed Update cites for the proposition, *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991), PUCM at 24 nn.74-75, is an outlier and does not accurately capture the state of the law. See, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-66 (9th Cir. 1986) (rejecting argument that religious organization exemption “extends beyond hiring practices and encompasses all other employment practices” as the language and legislative history of Title VII “indicate that the statute exempts religious institutions only to a narrow extent”).

by the EEOC.<sup>25</sup> Such a rule would lead to a radically broadened exemption, is inconsistent with the traditional interpretation of Title VII, and would invite pretext-based discrimination against women, people of color, LGBTQ persons and others, but incapable of review by the EEOC. The authority relied upon by the Proposed Update does not support this overbroad proposition.<sup>26</sup>

Rather than providing clarity and adhering to the weight of precedent, the Proposed Update repeatedly muddies the waters by hazarding guesses about future legal developments and novel interpretations of recent cases. For example, the Proposed Update appears to credit cherry-picked dicta in *Hobby Lobby* and goes out of its way to disagree with a position taken by the U.S. Department of Health and Human Services (HHS) on a subject that the Supreme Court has yet to address.<sup>27</sup> Such speculation is contrary to the purpose of the Proposed Update to “provide clarity to the public regarding existing requirements under the law or agency policies.”<sup>28</sup>

#### **B. The Proposed Update Unjustifiably Endorses the Abuse and Expansion of the Ministerial Exception at the Expense of Employees’ Civil Rights**

The Proposed Update outlines applications of the ministerial exception that are far removed from the doctrine’s principal purpose of protecting vital internal church functions from state interference. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (ministerial exception “protect[s religious institutions] autonomy with respect to internal management decisions that are essential to the institution’s central mission”). The extraordinary breadth given to the ministerial exception in the Proposed Update would be contrary to worker protections across many areas of law and not aligned with the four-part analysis required by the Supreme Court.

The definition of “religious employer” should not be expanded.<sup>29</sup> The Proposed Update would do what the Supreme Court repeatedly has not—stretch the ministerial exemption beyond church leaders or teachers at religious schools to include different positions at other religious organizations. The lack of authority cited by the Proposed Update for these expansions is telling, and the EEOC should not abdicate its role as enforcer of civil rights laws by advocating for the expansion of an exception to anti-discrimination protections in a manner not required or supported by precedent.

The Proposed Update contains unclear guidance about how the ministerial exception should operate after *Hosanna-Tabor* and *Our Lady of Guadalupe*. For example, the Proposed Update cites the importance of a religious employer’s description of an employees’ role in determining whether the employee is a

---

<sup>25</sup> PUCM at 23.

<sup>26</sup> Indeed, some of the cases arguably relate not to the Title VII religious organization exemption, but rather to the ministerial exemption. For example, *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997), concerns a claim by a thoroughly religious institution (a divinity school) to employ as teachers “only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities.” *Id.* at 200. The question, limited to the transmittal of religious doctrine to those whose religious beliefs align with the religious employer, is different than the question of the scope of the “religious exception” to Title VII.

<sup>27</sup> PUCM at 21 n.62.

<sup>28</sup> PUCM at 111.

<sup>29</sup> *See* PUCM at 27-30.

“minister”<sup>30</sup> without any consideration of how that factor is one-sided in favor of the employer. The EEOC appears to support taking employers at their word rather than applying the factors that courts have successfully employed to determine the application of the exemption. The EEOC should not depart from this precedent by granting complete deference to employers.

The Proposed Update is also inappropriately vague about whether the ministerial exception strips covered employees of legal protections against workplace harassment, including sexual harassment. The EEOC should make clear that the ministerial exception is limited only to the context of hiring and firing. Lack of clarity could encourage employers to abuse the exception, unjustifiably trampling on employees’ civil rights.

The Proposed Update further takes incompatible positions that: (1) the ministerial exception applies to lay employees who do not belong to or practice the relevant faith; and (2) the exception applies to employees who perform vital, and core religious functions.<sup>31</sup> In practice, the former swallows the latter, as the Proposed Update encourages employers to describe virtually any employee as “vital” to its religious mission. In this manner, the language of the Proposed Update around the ministerial exception is expansive and repeatedly mentions limitations that do *not* exist (*e.g.*, not limited to the head of a congregation, etc.) without identifying what limitations *do* exist. For the Proposed Update to satisfy its purported compliance with executive orders 13891, 13563, and 13771, it should not invite boundless claims to immunity under the ministerial exception.

The recitation of cases in which the ministerial exception has been invoked—far from its recognized and intended purposes—to shield abusers without helpful guidance or commentary about the impact of such uses on employees is an abdication of the EEOC’s critically important role in rooting out systemic workplace discrimination and effectively enforcing Title VII.

### **C. The Proposed Update Fails to Account for the Compelling Governmental Interest In Eradicating Discrimination Against Expansive Uses of the Religious Freedom Restoration Act**

The EEOC’s statement that the Proposed Update should “provide clarity” and “reduce the burden on the public” is dramatically contradicted by the section on the Religious Freedom Restoration Act (RFRA), which only serves to inject uncertainty into this area of the law, clouding understanding and thereby increasing the burden on the public. The content of the new section on RFRA provides no actual guidance, but rather serves only to lend credence to various novel applications of RFRA.

---

<sup>30</sup> See PUCM at 29.

<sup>31</sup> See PUCM at 29-30 (“The ministerial exception applies to employees who perform ‘vital religious duties’ at the core of the mission of the religious institution. ... The exception is not limited to the head of a religious congregation, leaders, ministers, or members of the clergy, and can apply to ‘lay’ employees and even non-‘co-religionists’ or those not ‘practicing’ the faith.”).



Critically, the EEOC does not fully contextualize its discussion of RFRA by stating that preventing and remedying workplace discrimination is a compelling governmental interest.<sup>32</sup> The RFRA section lacks a discussion of the proper balancing and burden shifting analysis that applies to a RFRA defense, including the recognized circumstances in which the compelling interest in prohibiting discrimination outweighs deference to religious exercise. *See* 42 U.S.C. §§ 2000bb-1(a),(b) (government shall not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except” where the government “demonstrates that application of the burden to the person” furthers “a compelling governmental interest” and “is the least restrictive means” of furthering the interest). In this way, the Proposed Update misleadingly encourages deference to RFRA claims without acknowledging that the party asserting the exemption must show that the law would substantially burden a sincere religious exercise, and if this showing is made, the burden shifts to the government to demonstrate that the burden is imposed in furtherance of a compelling interest and is the least restrictive means of furthering that interest.<sup>33</sup> But rather than provide such necessary guidance, the Proposed Update mostly discounts this information as “beyond the scope of this document,” leaving any further discussion to footnotes.<sup>34</sup>

As written, the Proposed Update would essentially endorse the use of RFRA to avoid the obligations of Title VII. The “nuanced balancing” that the Proposed Update gives lip service to<sup>35</sup> is not illustrated or fleshed out, notwithstanding the EEOC’s repeated recognition that the interest in eradicating discrimination can outweigh RFRA. For example, in *EEOC v. Harris Funeral Home*, the EEOC recently argued that: (1) RFRA is inapplicable where an employer fails to show that non-discrimination imposes a “substantial burden” on the company’s “exercise of religion”; and (2) “eradication of sex-based employment discrimination is a compelling governmental interest.”<sup>36</sup> In short, the EEOC fails to highlight the compelling interest of preventing and remedying discrimination in this Proposed Update, even though that is the EEOC’s mission.

Instead of actual guidance informed by the law, the Proposed Update references potential uses of RFRA and the First Amendment to avoid antidiscrimination law—but does not provide any guidance about the countervailing interests of employees, third parties, or the State in eradicating discrimination. Indeed, the Proposed Update only acknowledges deep in footnotes that eliminating discrimination is a compelling

---

<sup>32</sup> As the EEOC’s own decades of litigation have substantiated, there is a “compelling interest in eradicating discrimination in all forms.” *EEOC v. Mississippi Coll.*, 626 F.2d 477, 489 (5th Cir. 1980); *see also, e.g., Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing “the State’s compelling interest in eliminating discrimination”); *cf. Burwell*, 573 U.S. at 733 (race: “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (sex: State has “compelling interest in eradicating discrimination”).

<sup>33</sup> *See Michigan Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014).

<sup>34</sup> PUCM at 34. The Proposed Update acknowledges in a footnote that RFRA cannot override a compelling government interest, *id.* at 34 n.121, but it presents the issue as equivocal.

<sup>35</sup> PUCM at 34 and n.121.

<sup>36</sup> *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir.), Doc. #22 at 18 (Appellant EEOC Opening Brief).

interest, *sub rosa* sabotaging the RFRA balancing analysis in favor of employers and against victims of discrimination.<sup>37</sup>

The Proposed Update also attempts to create the false impression that the question of RFRA’s inapplicability to private sector employers is more contested than it in fact is, devoting significant attention to what “a private sector employer might argue” under RFRA,<sup>38</sup> without appropriately clarifying that such arguments lack substantial legal basis, as Title VII is principally enforced by individuals through the private right of action. That RFRA, like the First Amendment, is expressly a restriction on **government** conduct is buried in a footnote treated by the Proposed Update as if it were reasonably disputed.<sup>39</sup>

Further absent from the discussion is the legislative history of RFRA, which makes clear that it was intended only to respond to *Employment Division v. Smith*, 494 U.S. 872 (1990), and not intended to “unsettle other areas of law.”<sup>40</sup> The absolute deference to religious employers embodied in the Proposed Update’s RFRA discussion is contrary to established precedent interpreting Title VII, which provides, for example, for reasonable accommodation of an employee’s religious observance, practice, and belief unless an employer can show “undue hardship.” 42 U.S.C. § 2000e(j), *Trans World Airlines, Inc. v. Hardison* (“TWA”), 432 U.S. 63, 73-74 (1977). RFRA was not intended to change this settled understanding of appropriate “religious accommodation” under Title VII.<sup>41</sup> The Proposed Update ignores this settled understanding in favor of notions of how RFRA may be used as a sword against employees.

Because prohibiting discrimination is a compelling interest, religious exemptions such as RFRA must be construed narrowly so as to avoid enabling discrimination or undermining efforts to eliminate it. As the agency charged with enforcing the civil rights enshrined in Title VII, the EEOC should strongly support the notion that prohibiting discrimination is paramount.

## **II. THE PROPOSED UPDATE LACKS GUIDANCE THAT EMPLOYERS MAY NOT USE RELIGIOUS OBJECTIONS AS A LICENSE TO DISCRIMINATE**

The Proposed Update indicates that religious employers have discretion in restricting its hiring and firing decisions to prefer co-religionists in appropriate circumstances.<sup>42</sup> The Proposed Update, however, omits

---

<sup>37</sup> See, e.g., PUCM at 34 n.121.

<sup>38</sup> PUCM at 32.

<sup>39</sup> PUCM at 31-32 & 115. See *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (RFRA defense not available as defense in action between private parties); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010) (RFRA not a defense in suit between private parties); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999).

<sup>40</sup> See Sen. Rep. No. 111, 103d Cong., 1st Sess. (1993) at 12; HR. Rep. No. 103-88, at 9 (1993) (“[n]othing in this bill shall be construed as affecting Title VII of the Civil Rights Act of 1964.”).

<sup>41</sup> *Id.* at 13. See also *TWA*, 432 U.S. at 81 (reasonable accommodation cannot come “at the expense” of other employees); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (and noting that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-11 (1985) (religious accommodation without regard to the burden imposed on the employer or other employees violated the Establishment Clause).

<sup>42</sup> PUCM at 21-22, 29, 42.

important parameters around that narrow exemption, including that a preference for hiring co-religionists does not justify acts of discrimination outside of that limited instance.

For example, a religious employer may not discriminate against female or LGBTQ applicants or employees based solely on the employer's religious beliefs. Such an employer cannot decide to ignore workplace harassment only directed at LGBTQ employees, to pay female employees less than male employees for similar work, or to structure health coverage benefits for prenatal care to be limited to married female employees to the exclusion of all other pregnant employees. Such decisions, which go beyond the decision to employ or not employ a co-religionist, are inconsistent with Title VII and should find no safe harbor here.<sup>43</sup>

### **III. THE PROPOSED UPDATE UNDERPLAYS THE IMPACT THAT UNWELCOME RELIGIOUS PROSELYTIZING VISITS UPON COWORKERS, CUSTOMERS AND THIRD PARTIES**

The Proposed Update encourages permitting an employee to subject coworkers and customers to harassment when it takes the form of proselytizing. For example, the Proposed Update suggests that a showing that the employer need not accommodate an employee's proselytizing "requires more than proof that some coworkers complained or are offended by an unpopular religious view; a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work."<sup>44</sup> This is not the proper standard for assessing the right of coworkers to be free from proselytization—it effectively instructs employers that harassment couched in the language of proselytizing must give way to religious accommodations in all but the most egregious circumstances.

Contrary to the Proposed Update, such harassment may be unacceptable even where it does not rise to the level of interfering with "coworkers' abilities to perform their duties or subjecting coworkers to a hostile work environment."<sup>45</sup> For example, the Proposed Update: (1) suggests that religious expression at workplaces creates undue hardship *only* when it rises to the level of a "hostile work environment" or "illegal harassment";<sup>46</sup> and (2) fails to give any guidance as to when harassment, even if not unlawful, may still be unacceptable and will not be accommodated. Thus, coworkers are expected to bear and internalize any disturbance short of unlawful harassment as part of accommodating the religious needs of individual employees. In addition, there is no play in the joints for employers seeking to manage their workplace, as Proposed Update provides no space between their legal obligation to accommodate religious employees and their legal obligation to prevent harassment under the EEOC's reading. The core

---

<sup>43</sup> The Proposed Update suggests as much, in the back of a hypothetical example that proposing that a female employee at a Catholic college who agreed to adhere to Catholic doctrine but was terminated for signing a pro-choice advertisement cannot bring a sex discrimination claim unless "a male professor at the school signed the same advertisement and was not terminated." PUCM at 23-24 & nn.78-79. This example, however, is in the "religious organization" section of the PUCM.

<sup>44</sup> PUCM at 81.

<sup>45</sup> PUCM at 81.

<sup>46</sup> See PUCM at 96 ("Since an employer has a duty under Title VII to protect employees from religious harassment, it would be an undue hardship to accommodate such expression that rises to the level of illegal harassment or could likely rise to that level.").

mission of EEOC is to ensure equal employment treatment towards all employees, and the Commission should refrain from favoring the needs of certain employees on one particular basis at the cost of other employees except in the most egregious circumstances. The EEOC should have provided examples of how harassment should not be accommodated even in instances where unwelcome expression has not yet risen to the level of an actionable “hostile work environment” or “illegal harassment.”<sup>47</sup>

The Proposed Update also posits that “an employer would not violate Title VII if it required an employee to participate in a workplace activity that conflicts with the employee’s sincerely held religious belief if the employee does not request to be excused or if the employer demonstrates that accommodating the employee’s request to be excused would pose an undue hardship.”<sup>48</sup> This position, however, ignores the inherent power imbalance faced by an employee who must “request to be excused” from such an activity. The Proposed Update therefore should have provided more fact-sensitive guidelines to assist employers in navigating such power dynamics.

The Proposed Update further overlooks the potential impact of its guidance on customers and third parties. The EEOC’s proposed approach of a “fact-specific inquiry” is limited to the circumstances of the employer-employee binary relationship;<sup>49</sup> however, in real-world transactions, when a religious employee is exempted from providing service to certain groups of customers, clients or patients, it is often those customers, clients and patients who are directly implicated and harmed by the refusal of service. This danger is particularly grave when the job tasks involve assistance to essential needs such as health care. The EEOC should therefore incorporate into its guidance such factors for the employer’s consideration.

#### **IV. THE PROPOSED GUIDANCE DISTORTS THE LAW REGARDING REASONABLE ACCOMMODATION**

##### **A. The Proposed Update Undermines Title VII and Supreme Court Precedent by Altering the *De Minimis* Standard for Religious Accommodation**

Title VII requires an employer to make reasonable accommodation to an employee’s religious needs upon notice, provided that the accommodation would not impose any “undue hardship” on the employer.<sup>50</sup> The statutory term “undue hardship” has been defined by the Supreme Court to mean no more than a *de minimis* cost on the employer,<sup>51</sup> including monetary costs<sup>52</sup> and negative impact on the employer’s

---

<sup>47</sup> See, e.g., Select Task Force on the Study of Harassment in the Workplace (June 2016) at <https://www.eeoc.gov/june-2016-report-co-chairs-select-task-force-study-harassment-workplace> (EEOC “focused on prevention of unwelcome conduct based on characteristics protected under our employment civil rights laws, even before such conduct might rise to the level of illegal harassment”); *id.* (“Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.”).

<sup>48</sup> PUCM at 45.

<sup>49</sup> See, e.g., PUCM at 97 (limiting analysis of accommodation to whether it imposes an undue burden upon an employer, without reference to effects on rights of customers and third parties).

<sup>50</sup> 42 U.S.C. § 2000 e(j).

<sup>51</sup> *TWA*, 432 U.S. at 84.

<sup>52</sup> *Id.* (premium overtime pay incurred from accommodation an undue hardship).

business and coworkers.<sup>53</sup> The *de minimis* cost test is consistent with the Establishment Clause and the goal of Title VII to ensure equal employment opportunity at the workplace regardless of an employee's race color, sex, national origin or religion.

The Proposed Update, however, stretches the *de minimis* test beyond recognition by imposing substantial duties on employers. For example, it asks an employer to show that the religious accommodation sought, if allowed, would amount to unlawful harassment or likely rise to that level.<sup>54</sup> Such a duty effectively replaces the *de minimis* test with a religious privilege that can only be overcome if the religious exercise will likely constitute unlawful conduct. This is out of sync with how requests for accommodation are analyzed and compromises other employees' legal rights under Title VII.

By expanding the definition of what amounts to more than a *de minimis* cost, EEOC also risks entering the territory of governmental entanglement with religion. Title VII imposes various duties on private employers in order to achieve the compelling governmental interest in eliminating undue discrimination in the workplace. But when safeguarding against religious discrimination reaches the level of promoting religious accommodation even when such accommodation imposes meaningful harm on employees and third parties, there is a risk of violation of the Establishment Clause. The Supreme Court has recognized this risk particularly in the Title VII context.<sup>55</sup> EEOC should be wary of overreaching by creating Title VII obligations beyond a *de minimis* cost to protect religious interests in the workplace.

#### **B. The Proposed Update Muddies the Scope of Employer Obligations to Offer Reasonable Accommodations, Particularly Surrounding the Interaction Between Title VII and “Refusal of Care” Laws**

The EEOC's Title VII guidance is supposed to clarify the extent of an employer's obligation to offer reasonable religious accommodation. Instead, the Proposed Update muddies the definition of “undue hardship,” distorts the balance between guarding against religious discrimination and essential rights of third parties, and creates loopholes for discrimination and harassment. These guidelines, as drafted, thus do not accomplish their goals.

---

<sup>53</sup> See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (“An employer may prove that an employee's proposal would involve undue hardship by showing that either its impact on coworkers or its cost would be more than *de minimis*.”).

<sup>54</sup> The Proposed Update's discussion of effect on coworkers “focuses on conduct that rises to the level of unlawful harassment” and suggests that accommodation for religious expression is mandated unless it would deprive coworkers of their legal rights and force employers to breach their duty under Title VII. See PUCM at 95-96 (“Since an employer has a duty under Title VII to protect employees from religious harassment, it would be an undue hardship to accommodate such expression that rises to the level of illegal harassment or could likely rise to that level.”); see also PUCM at 81 (“a showing of undue hardship based on coworker interests generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption for work”). Such expansive interpretation of “undue hardship” is in direct contradiction to the holding in *TWA*.

<sup>55</sup> See *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring) (“Since Title VII calls for reasonable rather than absolute accommodation ... I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.”); *TWA*, 432 U.S. at 70 (because it agreed that employer did not violate Title VII under *de minimis* cost standard, the Court did not need to address constitutional challenge of “reasonable accommodation” requirement).

Specifically, the Proposed Update improperly suggests that federal “refusal of care” laws (the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment) may conflict with Title VII.<sup>56</sup> The Proposed Update should confirm that refusal of care laws have stood in harmony with Title VII for years and incorporate Title VII’s balancing framework. Congress passed the Church Amendments only a year after codifying the reasonable accommodation/undue hardship framework in Title VII, and there is no indication from the text or history of that or the other refusal statutes that Congress intended to override the carefully constructed balancing in Title VII.<sup>57</sup> Just last year, a federal court affirmed this reading, rejecting the contention that “Congress silently intended effectively to override [the Title VII reasonable accommodation/undue hardship] framework in the context of the health care industry” when it passed the Church Amendments.<sup>58</sup> The court also noted the lack of “any evidence” that Congress intended any of the refusal statutes to jettison the Title VII balancing framework.<sup>59</sup>

\* \* \*

We strongly oppose the Proposed Update and urge the EEOC to withdraw it. The EEOC and the courts have long recognized the need to balance religious expression and non-discrimination protections (including on the basis of religion) in the workplace. Providing additional support to those making religious objections without calculating the harms to employees or third parties, as numerous of the proposed revisions do, severely undermines Title VII and betrays the EEOC’s mission of furthering the compelling government interest of addressing and preventing workplace discrimination.<sup>60</sup>

Sincerely,

The Leadership Conference on Civil and Human Rights  
Human Rights Campaign  
Lawyers’ Committee for Civil Rights Under Law  
National Women’s Law Center

---

<sup>56</sup> PUCM at 74-75 & n.235.

<sup>57</sup> 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88).

<sup>58</sup> *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 524 (S.D.N.Y. 2019); *see also id.* at 536.

<sup>59</sup> *Id.* at 536, 557.

<sup>60</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Title VII a lawful exercise of Congress’s remedial powers under § 5 of Fourteenth Amendment to abrogate sovereign immunity in light of compelling evidence of discrimination).