



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

September 24, 2008

Office of Public Health and Science  
Department of Health and Human Services  
Attention: Brenda Destro  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Room 728E  
Washington, D.C. 20201

Re: Provider Conscience Regulation

To Whom It May Concern:

As Legal Counsel of the U.S. Equal Employment Opportunity Commission (EEOC), I am writing in response to the Department of Health and Human Services' (HHS) Provider Conscience Regulation, which was proposed to ensure that HHS funds "do not support morally coercive or discriminatory practices or policies" by health care or research entities with respect to performing abortions, sterilizations and other lawful health services or research activities pursuant to the Church Amendments and related laws. 73 Fed. Reg. 50,274 (August 26, 2008). HHS Secretary Mike Leavitt explained in a press release that "[t]his proposed regulation is about the legal right of a health care professional to practice according to their conscience" and to be free of discrimination on those grounds.<sup>1</sup>

Background

The instant comment is offered in light of the EEOC's responsibility for enforcing Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq.* For over forty years, Title VII has applied to all but the smallest of American employers – including private companies, state and local government employers, and educational institutions – and has prohibited employment discrimination against applicants and employees based on religion.<sup>2</sup> The federal courts deciding Title VII complaints have broadly construed the meaning of "religion" and also have enforced a flexible right of reasonable accommodation for religious beliefs and practices. The Commission recently issued a comprehensive statement of Title VII law regarding religious discrimination and accommodation. *See* <http://www.eeoc.gov/policy/docs/religion.html>.

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<sup>1</sup> HHS Press Release, *Regulation Proposed to Help Protect Health Care Providers from Discrimination*, August 21, 2008.

<sup>2</sup> Title VII also prohibits employment discrimination on the bases of race, color, sex, and national origin. 42 U.S.C. § 2000e-2(a).

We recognize that the HHS Provider Conscience Regulation would regulate areas distinct from employment, such as federal and state health funding decisions,<sup>3</sup> and would protect non-employees, such as institutional health care providers and independent professionals, when HHS funds are involved.<sup>4</sup> Nonetheless, a central goal of the proposed regulation is to protect health care and research job applicants and employees from discrimination based on their religious or moral beliefs, when they are employed by a recipient or sub-recipient of HHS funds. The Provider Conscience Regulation therefore overlaps with Title VII because one of the proposed regulation's central goals is to prevent employment discrimination on the basis of "moral or ethical beliefs as to what is right and wrong."<sup>5</sup> Because of this overlap, the employment discrimination aspect of the proposed Provider Conscience Regulation is unnecessary for protection of employees and applicants, is potentially confusing to the regulated community, and will impose a burden on covered employers, particularly small employers.

### Title VII of the Civil Rights Act of 1964, As Amended

#### *Title VII Prohibits Discrimination in All Aspects of Employment*

Title VII prohibits employers from treating applicants or employees differently from others due to their professed religious beliefs, practices, or observances. An employer may not refuse to recruit, hire, or promote individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices. Therefore, Title VII prohibits health care employers from discriminating against any applicant or employee in hiring, promotion, termination, or any other term or condition of employment based on religious or moral beliefs.

The only exceptions to this broad prohibition are for religious organizations<sup>6</sup> and for ministerial functions.<sup>7</sup>

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<sup>3</sup> See proposed Provider Conscience Regulation at § 88.3 (Applicability) and § 88.4 (Requirements and Prohibitions).

<sup>4</sup> See *id.* at § 88.2 (defining "Individual;" "Workforce;" "Entity," and "Health Care Entity").

<sup>5</sup> See *EEOC Guidelines on Discrimination Because of Religion*, 45 Fed. Reg. 72,612 (Oct. 31, 1980), codified at 29 C.F.R. § 1605.1 (hereinafter *EEOC Religion Guidelines*).

<sup>6</sup> Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. See 42 U.S.C. § 2000e-1(a) and § 2000e-2(e)(2). See *EEOC Compliance Manual, Section 12: Religious Discrimination*, at 12-IC1 (July 22, 2008), available at [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359492](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359492) (hereinafter *EEOC Religion Compliance Manual*).

<sup>7</sup> Courts have held, based on First Amendment constitutional considerations, that clergy members cannot bring claims under the federal employment discrimination laws. See *EEOC Religion Compliance Manual, supra* note 6, at 12-IC2.

### *Broad Definition of Religion*

Title VII defines religion broadly. It protects religious beliefs, practices, and observances, including those that are traditionally theistic<sup>8</sup> in nature as well as “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>9</sup> We believe this broad definition of religion under Title VII encompasses the religious beliefs or moral and ethical convictions that are the subject of the proposed Provider Conscience Regulation, because objections to the practices addressed by HHS’s proposed rule are often based on beliefs that fall within Title VII’s definition of religion. That is, the objections are often based on “a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by ... God,” or “concern[] ‘ultimate ideas’ about ‘life, purpose, and death.’”<sup>10</sup>

### *Reasonable Accommodation under Title VII*

Title VII requires employers to reasonably accommodate the sincerely-held religious beliefs, observances, and practices of its applicants and employees, when requested, unless the accommodation would impose an undue hardship on business operations, which is defined as more than a *de minimis* cost. The concern that motivated the proposed Provider Conscience Regulation with respect to employment – that health care employers deny certain religious accommodations and thereby infringe on the employee’s ability to practice religion – is already addressed by Title VII and the law developed under it.<sup>11</sup>

### Discussion

Title VII provides the legal framework under which complaints of employment discrimination based on religion, including denial of reasonable accommodation, have been judged for over forty years. Title VII’s religious accommodation requirement, which incorporates a defense of undue hardship, has consistently been approved by the courts. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (to require an employer to bear more than a *de minimis* cost to accommodate an employee’s religious practice would be an undue hardship as it involves unequal treatment of employees on the basis of their religion); *see also EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988) (en banc) (religious accommodation under Title VII does not violate First Amendment establishment clause); *International Ass’n of Machinists and Aerospace Workers, Lodge 751 v. Boeing Co.* 833 F.2d 165, 171 (9th Cir. 1987) (same); *McDaniel v. Essex Int’l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982) (same); *Tooley v. Martin Marietta*

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<sup>8</sup> “Theistic” is defined as “believing in a god or gods.” *The American Heritage Dictionary of the English Language, Fourth Ed*, Houghton Mifflin Co. (2004), available at <http://dictionary.reference.com/browse/theistic> (last visited July 2, 2008).

<sup>9</sup> *See EEOC Religion Guidelines, supra* note 5.

<sup>10</sup> *See EEOC Religion Compliance Manual, supra* note 6, at 12-IA (discussing Title VII’s broad definition of religion).

<sup>11</sup> *See generally EEOC Religion Compliance Manual; supra* note 6; *EEOC Religion Guidelines, supra* note 5, at § 1605.2.


*Corp.*, 648 F.2d 1239, 1244-46 (9th Cir.), *cert. denied* 454 U.S. 1098 (1981) (same). Introducing another standard under the Provider Conscience Regulation for some workplace discrimination and accommodation complaints would disrupt this judicially-approved balance and raise challenging questions about the proper scope of workplace accommodation for religious, moral or ethical beliefs.<sup>12</sup>

As a practical matter, introducing another standard under the Provider Conscience Regulation threatens to create confusion for health care employers, who would still be subject to Title VII standards for these as well as all other requests for religious accommodation. This confusion would be particularly acute for smaller employers that have fewer resources and employees, such as doctors' offices and smaller pharmacies. By HHS's own estimate, approximately half of the more than 580,000 entities that will be affected by the proposed regulation are doctors' offices and pharmacies.<sup>13</sup>

Given these legal and practical concerns, Title VII should continue to provide the legal standards for deciding all workplace religious accommodation complaints. HHS's mandate to protect the conscience rights of health care professionals could be met through coordination between EEOC and HHS's Office for Civil Rights, which have had a process for coordinating religious discrimination complaints under Title VII for over 25 years. *See* 29 C.F.R. part 1691, 48 FR 3574 (Jan. 25, 1983)(as amended) (*Procedures for Complaints of Employment Discrimination filed against Recipients of Federal Financial Assistance*).

Thank you for the opportunity to provide these comments and please feel free to contact me at (202) 663-4610.

Sincerely,



Reed L. Russell  
Legal Counsel

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<sup>12</sup> For a discussion of the constitutionality of the duty to accommodate under Title VII as well as the constitutionality of broader accommodation requirements, *see* Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law*, 368 - 369 (C. Geoffrey Weirich ed., BNA Books 2007) (1976).

<sup>13</sup> *See* 73 Fed. Reg. at 50,280 (estimating that of the 584,294 entities affected by the proposed rule, 234,200 will be physicians' offices and 58,109 will be pharmacies (chain and independent)).