

The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance

I. Background

This guidance is part of the Department of Labor's efforts to fulfill its responsibilities under the Religious Freedom Restoration Act (RFRA) of 1993 and two Executive Orders. The first Executive Order, Executive Order 13198, created Centers for Faith-Based and Community Initiatives in five cabinet Departments, including the Department of Labor, and directed these Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the equal participation of faith-based and community organizations in the provision of social services by their Departments. The second Executive Order, Executive Order 13279, charged executive branch agencies to give equal treatment to faith-based and community organizations that apply for Federal financial assistance to meet social needs in America's communities.

On July 12, 2004, consistent with Executive Order 13279, the Department of Labor published regulations entitled Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries at 29 C.F.R. Part 2, Subpart D. 69 Fed. Reg. 41,882. These regulations were an effort on the part of the Department to effectuate the President's Faith-Based and Community Initiative and the principle that all organizations should be able to compete on an equal footing for Federal financial assistance and to participate as partners in Federal programs. One of the many important provisions of these regulations provides that, absent statutory authority to the contrary, "[a] religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, is not forfeited when the organization receives direct or indirect DOL support."¹ 29 C.F.R. 2.35. The provision noted, however, that some DOL programs were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating on the basis of religion. Recipients and potential recipients of DOL support were instructed, therefore, to consult with DOL program officials or the Civil Rights Center to determine the scope of any such requirements. *See id.*

Since the adoption of the Equal Treatment Regulations, questions from the public have arisen regarding whether the Religious Freedom Restoration Act exempts recipients of Federal financial assistance from provisions of authorizing statutes and implementing regulations of programs that require all recipients of Federal financial assistance under

¹ Title VII provides that a religious organization may, without violating Title VII, hire employees who share its religious beliefs. This provision protects the religious liberty of communities of faith. It helps enable faith-based organizations to promote common values, a sense of community and unity of purpose, and shared experiences through service – all of which can contribute to a religious organization's effectiveness. This guidance reflects the recognition that a recipient of DOL financial assistance may determine that, in order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions.

those statutes or programs to agree not to consider religion when making employment decisions regarding positions connected with the Federally-financed program or activity. This guidance effectuates a controlling opinion of the U.S. Department of Justice concerning how RFRA applies to laws restricting recipients of Federal financial assistance from making employment decisions based on religion, *see* Memorandum Opinion for the General Counsel, Office of Justice Programs, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 26, 2007), available at www.usdoj.gov/olc/opinions./htm, and establishes procedures for implementing the requirements of RFRA within DOL.

II. RFRA Exemption Process

In 1993, Congress enacted RFRA in response to the Supreme Court decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which held that a law that is religion-neutral and generally applicable need not be justified under applicable constitutional provisions by a compelling governmental interest, even if such law incidentally affects religious practice. 494 U.S. at 878-79. In Congress's opinion, this decision "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. 2000bb(a)(4). By enacting RFRA, Congress sought to re-impose the requirement that government justify substantial burdens on religious exercise. Under RFRA, "[g]overnment shall not substantially burden [an organization's] exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. 2000bb-1(a), unless the Government "demonstrates that application of the burden to the [organization] – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at 2000bb-1(b). Congress expressly made RFRA applicable to all Federal law whether adopted before or after the enactment of RFRA, *see* 42 U.S.C. 2000bb-3; it therefore applies to all laws governing DOL programs.

Where a law enforced by DOL prohibits religious discrimination in employment by recipients of DOL financial assistance,² such prohibition will be displaced by RFRA and thus will not apply to a recipient with respect to the employment of individuals of a particular religious belief to perform work connected with the carrying on by such recipient of its activities, provided that (i) such recipient can demonstrate that its religious exercise would be substantially burdened by application of the religious non-discrimination requirement to its employment practices in the program or activity at issue, and (ii) DOL is unable to demonstrate that applying the non-discrimination

² The Workforce Investment Act is the only law currently enforced by DOL that prohibits religious discrimination in employment by recipients of DOL financial assistance. Pub. L. No. 105-220, § 188(a)(2), 112 Stat. 936 (1998), codified at 29 U.S.C. § 2938(a)(2) ("No individual shall be . . . denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.)), national origin, age, disability, or political affiliation or belief.").

provision to this recipient both would further a compelling government interest and would be the least restrictive means of furthering that interest. A determination whether a recipient of DOL financial assistance qualifies under RFRA for an exemption from a religious non-discrimination requirement in an authorizing statute or regulation will be made on a case by case basis upon request of the recipient.

Once selected as a grantee, and preferably within five business days of receipt of that selection, a recipient that wishes to request an exemption from the application of a religious non-discrimination provision must submit a request for exemption to the Assistant Secretary charged with issuing or administering the grant or his/her designee certifying that: (1) providing the services to be funded by the grant is an exercise of the recipient's religious beliefs; (2) receiving the grant is important to the recipient, in the sense that providing the services is demonstrably tied to the recipient's religious beliefs, and without the grant the recipient's ability to provide the services in question would be substantially diminished; (3) employing individuals of a particular religious belief is important to the religious identity, autonomy, or communal religious exercise of the recipient; and (4) conditioning receipt of the grant on compliance with the non-discrimination provision creates substantial pressure for the recipient, in providing the services in question, to abandon its belief that hiring based on religion is important to its religious exercise. The recipient must further certify that it will comply with the requirements of 29 CFR part 2, subpart D, Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.

Within 30 calendar days of receipt of the request for exemption, the Assistant Secretary or his/her designee, in consultation with the Office of the Solicitor of the U.S. Department of Labor, will determine whether the recipient is entitled to an exemption from the religious non-discrimination provision at issue and will notify such recipient of the Assistant Secretary's or his/her designee's determination. As part of his/her review, if there is good cause to question the certification, the Assistant Secretary or his/her designee may require that the recipient provide additional documentation in support of the certification. If the request for exemption is denied, in addition to notifying the recipient of this fact, the Assistant Secretary or his/her designee will also provide the reasons for the denial, and the name, title, telephone number and/or email address of the person to contact for further information.

Recipients exempted from the religious non-discrimination requirements at issue will not be exempted or excused, by virtue of the exemption, from complying with other requirements contained in the law or regulation at issue. In addition, any exemption granted may be revoked at any time by the Assistant Secretary charged with issuing or administering the grant or his/her designee, in consultation with the Office of the Solicitor of the U.S. Department of Labor, upon determination that the certification was untruthful or a material change in circumstances has rendered it invalid. Following such determination, the Assistant Secretary or his/her designee will notify the recipient of the revocation, the reasons for the revocation, and the name, title, telephone number and/or email address of the person to contact for further information.

III. Contact Information

ETA Grants: For organizations that are awarded grants by the Employment and Training Administration, requests for an exemption should be submitted to the Grant Officer who oversees the recipient's grant award. Questions regarding this guidance and the RFRA exemption process should be directed to:

Office of the Assistant Secretary for Employment and Training
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-2700

OASAM Grants: For organizations that are awarded grants by the Office of the Assistant Secretary for Management, requests for an exemption should be submitted to the Grant Officer who oversees the recipient's grant award. Questions regarding this guidance and the RFRA exemption process should be directed to:

Office of the Assistant Secretary for Administration and Management
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-4040

Additional Contact Information: Questions regarding this guidance and the RFRA exemption process also may be directed to:

Civil Rights Center
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-6500

Individuals with speech or hearing impairments may access the telephone numbers listed above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

Download a [sample request for exemption](#).

REQUEST FOR EXEMPTION

By signing and submitting this Request for Exemption, the undersigned authorized official certifies to the following:

- The recipient of DOL financial assistance will comply with the requirements of 29 CFR part 2, subpart D, Equal Treatment in Department of Labor Programs for Religious Organizations; Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.
- (1) Providing the services to be funded by the grant is an exercise of the recipient's religious beliefs; (2) receiving the grant is important to the recipient, in the sense that providing the services is demonstrably tied to the recipient's religious beliefs, and without the grant the recipient's ability to provide the services in question would be substantially diminished; (3) employing individuals of a particular religious belief is important to the religious identity, autonomy, or communal religious exercise of the recipient; and (4) conditioning receipt of the grant on compliance with the non-discrimination provision creates substantial pressure for the recipient, in providing the services in question, to abandon its belief that hiring based on religion is important to its religious exercise.

Name of certifying official

Title/position

Signature of certifying official

Date

An exemption granted pursuant to the Religious Freedom Restoration Act may be revoked at any time by the Assistant Secretary charged with issuing or administering the grant or his/her designee, in consultation with the Office of the Solicitor of the U.S. Department of Labor, upon determination that the certification was untruthful or a material change in circumstances has rendered it invalid. Should such determination be made, the Assistant Secretary or his/her designee will notify the recipient of the revocation, the reasons for the revocation, and the name, title, telephone number and/or e-mail address of the person to contact for further information.