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Religious Freedom in the Workplace and Beyond

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I. INTRODUCTION

Attorneys who advise or litigate on issues involving religious practices in the workplace quickly discover a complex matrix of constitutional principles, federal and state laws, judicial opinions, and administrative regulations and guidance that support multiple – and sometimes conflicting – public policy goals. Most people can readily accept the core principle that government should not unreasonably interfere with the religious beliefs and expressions of an individual or a group, and most will also agree that a person's religion should not be a factor in their employment absent special circumstances. But consistently throughout the history of American jurisprudence – and with increasing zeal in recent years – both lawmakers and litigants have tested the boundaries and expanded the scope of these core principles. The result today is a legal landscape that is challenging to navigate, with many important questions still not fully developed.

The relationship between religion and the civil law has been a dynamic and enduring element of American life going back to the earliest days of our nation.[3] The First Amendment to the United States Constitution contains two parameters defining the relationship between government and religion – the Free Exercise Clause and the Establishment Clause – each of which has been a source of many vigorous workplace disputes when the government acts either as an employer or the provider of public benefits or restrictions. In more recent years, Title VII of the 1964 Civil Rights Act extended the legal protection of religious beliefs and practices to the private sector workplace by prohibiting discrimination in employment based on religion, and extending that protection to include an affirmative duty on employers to accommodate employees' religious beliefs and practices. Most recently, both Congress and state legislatures have enacted laws intended to protect the free exercise of religious beliefs of both employees and employers from any government interference absent a showing that the restriction furthered a compelling governmental interest. The interplay of these multiple sources of law often makes for challenging legal analysis of issues that touch on religion in the current American workplace.

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[1] Division Chief, City of Austin Law Department. This paper also includes information and case references taken from many excellent secondary sources. Three sources of note for those wishing to read more on this topic are: Brown & Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 Amer. Business Law J. 55 (Spring 2019; Nahmod, *The Establishment Clause, the Free Exercise Clause, RFRA and RLUIPA,* New Mexico State Bar Convention (August 2017); and Wolanek & Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases,* 78 Mont. L. Rev. 275 (2017).

[2] Employment Law Practice Group Chair, Lloyd Gosselink Rochelle & Townsend, P.C.

[3] For an excellent discussion of the role that religion has played in the founding and development of American society and culture, see Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of America* (Random House, LLC 2006).

This paper highlights the sources of law protecting or concerning religious freedom in the workplace and discusses significant judicial opinions particularly relevant to practitioners in the Fifth Circuit that have defined the scope and parameters of these laws. Specifically, Part II of this paper describes the evolution of First Amendment religious protection jurisprudence focusing on cases involving workplace issues. Part III discusses prohibited employment discrimination based on religion and the duty to reasonably accommodate an employee's religious beliefs and practices under Title VII and Texas Labor Code Chapter 21. Part IV describes the development of federal and state laws that create statutory (but not Constitutional) prohibitions on government actions that impinge on the religious beliefs and expression of employees and employers.

II. THE UNITED STATES CONSTITUTION AND RELIGION IN THE WORKPLACE

A. Free Exercise Clause Cases

The First Amendment guarantees, among other things, both the right of free exercise of religion (the Free Exercise Clause) and the right to be free from government establishment of religion (the Establishment Clause). Historically the Free Exercise Clause has been the primary source of Constitutional protection for individuals to practice their faith without government interference.[4] However, like all Constitutional rights, the Free Exercise Clause has always had parameters. In an early case testing whether laws criminalizing polygamy could be applied to a person whose religious beliefs compelled it, the Supreme Court held that excusing that person from compliance with laws on the basis of their religious beliefs would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145 (1878). This core principle – that all persons must comply with laws of general applicability, regardless of their personal religious beliefs – remained the governing Constitutional principle for the next 85 years.

The Free Exercise Clause has been applied in many employment-related cases. In 1963 the Supreme Court shifted the legal analysis for Free Exercise cases in *Sherbert v. Verner*, 374 U.S. 398 (1963), an unemployment compensation benefits case, from a focus on the general applicability of the law in question to a test based on the Constitutional strict scrutiny standard. In that case the Court overturned a denial of unemployment benefits to an employee who was fired when she refused to work on a Saturday, which was her Sabbath day. Although the state statute disqualifying the employee from benefits was neutral on its face and applied equally to everyone, the Court used the case to articulate a new standard for evaluating Free Exercise cases. The standard asked whether the burden imposed by the government action on the claimant's religious freedom advanced a compelling state interest in the least restrictive manner. *Id.* at 403, 406-07. While the Court did occasionally reconfirm the importance of uniform laws of general application in the years that followed, see, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (rejecting claim by Amish employers that their religion forbade them from paying social security taxes), this compelling interest standard remained the test for Free Exercise cases for the next quarter century

[4] The Free Exercise Clause, which is part of the First Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." The First Amendment is, of course, applicable to the States through the Fourteenth Amendment. See, e.g., *Cantwell v. Conn.,* 310 U.S. 296 (1940).

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