

## Religious Discrimination Hazards on the Rise

By [Kate McGovern Tornone](#), Editor

[Religious discrimination](#) hasn't been a major concern for employers in recent years. There's little case law on the subject and religious-based complaints rank low in the government's charge statistics. But recent trends call for a renewed look at the issues surrounding religion in the workplace, one expert says.



Two main factors are at play, Jonathan A. Segal told attendees at the Society for Human Resource Management's recent employment law and legislative conference in Washington, D.C. First, employers are increasingly adopting flexibility benefits aimed at helping employees achieve their desired work/life balance. Second, the recent election has created a divisive atmosphere that has spilled into the workplace.

Segal, a partner at Duane Morris, also noted that employers have experienced an increase in religious discrimination claims in recent years. In the late 1990s, such claims made up only about 2% of the U.S. Equal Employment Opportunity Commission's charge receipts. After a gradual climb, they're now at 4% and Segal says he expects the upward trend to continue.

### Work/Life Flexibility and Religious Accommodations

Flexibility in the workplace is on the rise, with the adoption of telework, flexible scheduling, and other similar benefits. But when employers offer those arrangements, it has an effect on religious accommodation requests.

"The more flexible we are in areas other than religion, the more difficult it will be to argue undue hardship for religious requests," Segal explained. For example, how could you show that you can accommodate an employee leaving work early to pick up his son, but not to attend church?

The same goes for paid-time-off days. If you allow an employee to use those days for any number of reasons, it would be difficult to argue that you can't allow an employee to use that time for a religious reason. "The broader you are with work/life balance, the riskier it is with religious accommodation," Segal said.

To ensure that all requests are properly evaluated, employers should train front-line managers to bring all accommodation requests to HR, Segal recommended. Managers shouldn't attempt to engage in the law's "sincerely held religious belief" analysis or approve or deny requests. Even if a supervisor is sure that a request ultimately will be denied, the law requires an interactive dialogue, much like that required for disability accommodations. Employers must go through that process, Segal said.

## **A Tense Political Climate and Religious Harassment**

Another trend involves political activity in the workplace. Individuals have strong feelings about the recent election and the president's actions and they're bringing those feelings to work, Segal said. "We're living in a time when religion is discussed more openly, sometimes detrimentally."

If discussion devolves into harassment, employers may find themselves facing a religious discrimination claim, even if the harasser was a coworker or customer. Even nicknames related to an employee's religion (or any other protected class, for that matter) can be unlawful harassment, Segal said.

Again, training is key. Employers need to educate managers so that no retaliation occurs when an employee complains about harassment. Supervisors need to be prepared with a script for their "in the moment" response; Segal said he suggests something like "Thank you for bringing your concerns to me."

After that, the manager should bring the concern to HR so it can investigate and take any necessary corrective action in a prompt and proportionate manner.

## **What's Next**

Employers can expect to see the number of religious discrimination claims increase in the coming years, Segal predicted. To ensure they're not on the receiving end of these claims, companies should consider the above issues and also take note of the following emerging trends.

**Idiosyncratic beliefs.** It is well-settled that the law protects employee's "sincerely held" religious beliefs, regardless of whether they stem from a well-known religion. But employers may not know that a belief is protected even if it conflicts with the employee's own church. For example, an employer could have to accommodate an employee who can't work on Sundays because of his religious beliefs, even if his church and pastor hold no such belief.

"This is an area where plaintiffs' lawyers are focusing," Segal warned. Instead of getting tangled up the "sincerely held" analysis—and trying to obtain documentation that just doesn't exist—go right to accommodation, Segal said. Ask the employee to provide a statement and then just determine whether you can accommodate them.

**"Clash" of rights.** When one employee's rights conflict with another's, employers may have to make some tough decisions. Segal offered a few examples:

- **A male employee asks for a new boss because his religion prevents him from working for a woman.** He likely is not entitled to such an accommodation, Segal said. But what about a man who cannot shake hands with a woman? Instead of permitting him to refuse to shake hands with only female clients, ask that he refrain from shaking hands all together, Segal suggested.
- **An employee refuses to process same-sex spousal benefits because of her religion.** Whether you choose to accommodate her request probably depends on how many employees you have available to process benefits. On the other hand, you might

not want to open that door, Segal said. What happens when another employee won't process benefits paperwork for employees' children born outside of a marriage? Especially if the employees work solely in benefits, this is one situation where you probably could say that's an essential function, he said.

- **An employee refuses to participate in diversity training that includes LGBTQ information.** You probably don't need to accommodate this, Segal said, but here's the critical message to that employee: "We are not asking you to value differences in religion, sexual orientation, etc., but we are asking you to respect them." Employers can require that employees respect each other. Companies can make clear that workers don't have to agree with the intent of training, but that they must behave in a certain way, he said.

**Increasingly creative "religions."**When faced with increasingly suspect religious requests, you'll have to draw the line somewhere, Segal said. If you have an objective reason to believe that the person's belief is not sincere, there are a few circumstances under which you can push back.

The first is if the employee is behaving inconsistently (but remember, says Segal, beliefs can change). The second is if the employee previously made the request for a secular reason (but remember, perhaps they made a mistake the first time or erroneously thought you'd be more open to the request if it wasn't for a religious reason). The third reason is if the request is something people generally want.

When an employee requests Sunday afternoons off because he subscribes to the "church of the NFL" or is an "Ellen Enthusiast," the law probably doesn't require the employer to accommodate, Segal said. But it doesn't mean you won't still have to defend that lawsuit, Segal warned. You may end up fighting some of these charges, he said, but "you're going to have to draw some lines that create some legal risks or every employee is going to come up with some [status] and then *you'll* have a new status: bankrupt."

**"Brown bag" lunches.** Brown bag lunches are used in workplaces for many reasons: to advertise available benefits, chat with the CEO, meet a new coworker, or teach a new skill. Segal suggests allowing workers to host these lunches to educate their coworkers. A general invite is appropriate, he said, for example: "If you feel it would be helpful for others in the workplace to know more about your faith, religious practices, etc., let us know."

**IF YOU WOULD LIKE HELP CRAFTING YOUR COMPANY'S HR POLICIES,**

**CONTACT eESI at 888-495-1171, x 152. Ask for Corey.**