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In two previous articles under this rubric, we examined some issues in employment law relating to discrimination claims as they protect individuals from religious discrimination and as our schools and churches can be affected by claims of discrimination. We also looked at some recent United States Supreme Court rulings that apply to religious organizations that act as employers. In this issue, we will look at the factors that impact such cases and the measures that can be taken to preserve religious freedom in this area.

We have looked at three ways the law protects our religious freedoms. First, individuals as employees have freedom from discrimination based on religious beliefs. Second, religious organizations have the freedom to hire employees of their own religion if the “purpose and character of the organization are primarily religious.” Finally, the ministerial exception allows religious organizations freedom from government interference in employment decisions for employees who instruct in religious doctrines. In order to use these legal protections, a person or organization needs to be able to provide evidence that they are entitled to such protection. We will look at each type of protection and the evidence that can be used.

First, an individual claiming protection against religious discrimination must be able to show that his claim is based on a “sincerely held” belief. Obviously, whether a person sincerely holds a belief is a somewhat subjective inquiry. However, a person’s beliefs are easier to demonstrate if he is a member of a church that clearly holds a position. Let’s use the example of Sabbath Day observance. It is easier to demonstrate that an employee believes that Sunday is a day of rest if that is the clear position of the church where he has his membership. The church’s position may

be evident from published writings, but will be even more firmly established by statements of official positions and decisions of ecclesiastical assemblies such as a classis or synod. If the employee's church holds firmly to a position, the employee can use that as evidence of his sincerely held belief.

This does not mean we should start making declarations or decisions by our ecclesiastical assemblies just for the purpose of establishing our positions for use in legal matters. The rule with our ecclesiastical assemblies has generally been that they address issues only when there is a current case in controversy. This is a wise rule, and the appellate courts of our land generally follow the same rule. When there is a genuine case in controversy, all aspects of the issue are more fully presented, and it is less likely that a decision is rendered that is overbroad or that inadvertently affects other cases. However, we should be clear and unequivocal in addressing issues when given the opportunity. This is obviously true for doctrinal reasons, but it also affects individual members and our organizations as well.

To illustrate, let's look at the example of a church that does not take a firm stand for the truth. Let's say this church does not discipline members who violate the Sabbath Day. Maybe cases even go to ecclesiastical assemblies but no disciplinary action is taken. If an individual member of that church objects to working on the Sabbath Day, he may still be able to argue that it is his own personal sincerely held religious belief, but he certainly cannot point to the practice of his church and fellow members. Allowing one member of the church to work on Sunday could adversely impact another member's ability to refuse to work on Sunday, especially if "sincerely held beliefs" are scrutinized more closely in the future. As individuals, we bear in mind that what we do may affect our fellow members.

The legal difficulty is even more pronounced under other legal protections, such as the religious organization exception. Under this exception, a religious organization can discriminate and hire only those who have the same religious beliefs, or fire employees who do not.¹ However, this becomes difficult if religious beliefs are not clearly stated. For example, a small Christian school could have a local constituency that holds firmly to a six-day creation, but a teacher begins teaching evolution. If the school is affiliated with a denomination that refuses to condemn the teaching of evolution or discipline those that teach evolution, the school would have a difficult time terminating the teacher for his teaching under the religious organization exemption.

As stated previously, the religious organization exemption applies if the "purpose and character of the organization are primarily religious." Our schools can arguably come under this exemption because our primary purpose in creating them is to incorporate our religious beliefs into every aspect of teaching, and the teachers stand in place of the parents in this regard. To avail ourselves of this protection, we should make this purpose clear in the legal documents that govern our schools, such as the Articles of Incorporation and Bylaws or Constitution. The courts have established a four-part test to determine whether an organization is a "religious organization": 1) Do the Articles of Incorporation state a religious purpose? 2) Is the day-to-day operation religious? 3) Is it a non-profit organization? and 4) Is it affiliated with a church or other religious organization?

The Articles of Incorporation, rather than simply stating a purpose to educate our children, can state our purpose to educate our children in our doctrines by incorporating our religious beliefs into every subject taught. Incorporating the denominational name in the Articles can also help to

show the affiliation with the church. Often these Articles simply recite the language required by the Internal Revenue Service for recognition as a tax-exempt charitable entity, but care should be used to expand them to state fully the real purpose. If not in the Articles, this purpose should at least be stated in the Bylaws.

With regard to the issue of whether our schools are affiliated with our churches, we often shy away from the concept of affiliation because we want to stress that our schools are parental, rather than parochial schools controlled by the churches. While that may be true, they are still affiliated with our churches in the legal sense. The churches and schools have overlapping constituencies, the schools are supported by the churches, and the schools are established so that the instruction students receive is in agreement with, and a continuation of, the doctrine of those churches. The Bylaws or Constitution of the school can establish this legal affiliation by requiring that the same religious doctrines of the society member parents be incorporated into the school and every subject taught in the school.

Finally, as discussed in the last article in this series, the United States Supreme Court recently extended the “ministerial exception” to a teacher in a Lutheran school.² This exception traditionally applied only to ministers and is based on the principle that courts will not interfere in the decisions of churches or religious organizations in employing individuals to give religious instruction. The majority opinion made much of the fact that the teacher in this case was considered a “minister” who was called by the church to teach. However, the concurring opinions suggested that the decision should not be limited to ministers in the traditional sense.

While we do not know whether the court would apply the same exception to a teacher in our covenant schools, it could be argued that the exception is even more applicable to our teachers. The court in the *Hosanna-Tabor* case discussed the fact that the teacher taught religious subjects in addition to what the school considered “secular” subjects. In our schools, we ask that our teachers incorporate our beliefs into every subject. Even a “secular” subject like math is taught from the perspective that God is an orderly God who created all things and incorporated that order into His creation.

The court in the *Hosanna-Tabor* case relied extensively on the documentation produced to determine the legal clarification of the teacher, including the school’s policy manuals and handbooks, and even the tax forms used by the teacher in filing her tax returns. We should also take care that our documentation confirms that our churches and schools are institutions where our religious doctrines are taught. The Bylaws of the school should incorporate the idea that the teacher is standing in the place of the parent in providing religious instruction to the children in all subject areas. The Bylaws or other policy documents should also clarify that we do not believe that any subject is untouched by our religious beliefs.

Incidentally, it does make a difference which document such ideas are incorporated into. In the law there is something of a hierarchy of documents, depending on which documents are most easily adopted and amended. Because of this, Articles of Incorporation generally carry more weight than Bylaws, Bylaws carry more weight than Board policy manuals, and so forth.

Obviously, space is too limited in this article to give an exhaustive list of the topics that could be included in governing legal documents to increase the protection for religious liberty to our churches and other organizations. In this article we have examined the need to have clear,

consistent practices as well as clear documentation of our beliefs and the role our schools have in teaching those doctrines. As the times change, the world around us seeks more and more to restrict our speech regarding our beliefs. Our condemnation of sin in the world around us is seen as intolerant and hateful. The focus of this article has been the context of employment discrimination, but in the future, just to use the Freedom of Religion embodied in the Constitution, we may need to show that what we teach is our “sincerely held” belief. This includes having clearly articulated statements of our beliefs, and having practices consistent with those statements. Article 28 of the Church Order requires that legal measures be taken so that the church can claim the protection of the authorities. As shown above, both our churches and schools benefit when our governing documents reference our beliefs and the methods we use to teach them.

1 See, e.g., *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

2 *Hosanna - Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694 (2012).

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