

The Religious Hiring Freedom [✓ = religious hiring permitted]

- ✓ From the start of the nation, faith-based organizations have been free to staff with those of like-minded faith.
 - 1964 Civil Rights Act, Title VII (amended in 1972): it is legal for a religious organization to staff on a religious basis (Sec. 702(a) religious hiring exemption). Note: this does not extend to race, color, sex, or national origin.
 - This freedom applies to all positions within the religious organization.
 - U.S. Supreme Court was unanimous that this freedom is constitutional (*Corporation of the Presiding Bishop v. Amos*, 1987).
 - Title VII only applies to employers with 15 or more FTE.
 - States and many cities have their own human rights codes, most with a similar exemption.

- ✓ Government funds: the religious staffing freedom is not waived simply because the religious organization receives government funds.
 - 1964 Civil Rights Act, Title VI, prohibits job discrimination in federally funded programs but does not specify religion as a prohibited basis, showing that Congress regarded religious selection as morally different than racial discrimination (see also *Lown v. Salvation Army*, 2005, federal district court for S.D.N.Y.: racial discrimination has no constitutional value but religious selectivity is a liberty often safeguarded by the First Amendment).
 - U.S. Supreme Court decisions hold that a religious group does not become a governmental actor subject to the restrictions placed on government merely by accepting government funds.
 - *Lown v. Salvation Army* explicitly held that religious hiring in government-funded programs neither waived the Title VII exemption nor violated the Establishment Clause.
 - *Dodge v. Salvation Army*, 1989, S.D. Miss., is an outlier that was noted but not followed by the federal court in *Lown*.

However, rules that apply in specific programs or jurisdictions may condition the religious staffing freedom in those programs or jurisdictions.

A. If a federal social service grant is received from a federal agency:

1. A few programs include a requirement of no job discrimination, including on the basis of religion (e.g. Head Start, Workforce Investment Act, Juvenile Justice Programs).
 - ✓ The religious organization may appeal to to the Religious Freedom Restoration Act (RFRA) for relief from this substantial burden on its religious exercise.
2. ✓ A few programs include Charitable Choice language, explicitly preserving the religious staffing freedom despite the receipt of federal funds (TANF, CSBG, SAMHSA).
3. ✓ Most federal programs are silent about employment requirements, thus preserving the religious staffing freedom.

B. If the federal social service money goes first to a state or local government, which then awards the money to a private organization:

1. Some states and cities require grantees or contractors (e.g., with 4 or more FTEs) to agree not to staff according to religion (and other criteria).
 - [✓] Arguably, the language protecting religious staffing in Charitable Choice overrides this restriction (Virginia and Texas, among others, revised state procurement language to permit religious staffing when the money is covered by Charitable Choice).
 - ✓ Thirteen states have their own state-level RFRA's.
2. ✓ Most states and cities do not have their own rule that adds a restriction on religious staffing when the federal funds have no such restriction.

C. ✓ Federal contracting (supplying goods and services such as submarines, research, and mops to the federal government): the job discrimination rules were originally created by Executive Order 11246; a Bush Executive Order (13279, Dec. 12, 2002) amended the rules so that faith-based organizations that staff on a religious basis (e.g., religious colleges, research centers, prison chaplains) can be federal contractors.