



THREE POLICIES ALL CHURCHES SHOULD HAVE

Proactively Protecting the Church's Right to Be the Church

Legal threats abound to the ability of churches to minister to their communities. Those threats can come in the form of a request to use the church's facilities in ways that violate the church's religious beliefs, lawsuits or threats of lawsuits from disgruntled or former employees, and unfortunately, legal fallout from sexual abuse of minors. It is important for every church to cover some basic areas by crafting and adopting policies to protect the church's right to minister in the face of these potential legal threats.

There is no "magic language" that is legally required in any of these policies. Nor is there a "one-size-fits-all" policy for all churches. What is most important is to create a policy that covers these situations in light of the uniqueness of your church's ministry. Take the time to craft a specific policy on each of these areas for your church. Doing so is an important step in protecting your church's right to minister freely without being hindered by unnecessary legal challenges.

#1: FACILITIES USAGE POLICY

Many churches fear that they will be forced by the government to allow use of their church buildings for things like same-sex "wedding" ceremonies, or other uses that are violations of their religious beliefs. Some jurisdictions have considered attempting to define church facilities as places of public accommodation that are required to abide by non-discrimination laws and regulations.

However, church buildings are private property and are used primarily for the exercise of religion. As such, the use of church buildings is cloaked with First Amendment protection both under the Free Exercise Clause and the Free Speech Clause. If the government attempts to force a church to use its private property in ways that are inconsistent with its religious beliefs, the government would violate the church's First Amendment rights.

Put simply, a church has a right to only allow uses of its facilities that are consistent with its religious beliefs and to deny all other uses. No church should ever feel compelled to open its buildings for use in a same-sex "wedding" ceremony or for any other use that conflicts with their religious beliefs.

The best way to protect your church is to adopt a facility usage policy that outlines the religious nature of the church buildings and restricts usage of the facility to uses that are consistent with the church's biblical beliefs. It is always best to adopt a policy governing the use of the facility because a policy is powerful evidence of the church's beliefs and practice regarding use of its buildings. And if your church adopts a policy, it should follow that policy consistently.

Alliance Defending Freedom has prepared a sample facilities usage policy for churches that is attached to this Memo. This policy is crafted to allow churches to make the decision as to what uses they will allow and to ensure that the church has the ability to approve uses consistent with its biblical beliefs and to deny all other requests to use the church buildings.



#2: JOB DESCRIPTIONS AND RELIGIOUS GROUNDS FOR LIMITING EMPLOYMENT OPPORTUNITIES

Federal law prohibits discrimination in employment on the basis of race, color, religion, sex, national origin, or age.¹ State non-discrimination laws are similar, but some also ban discrimination on the basis of sexual orientation.²

The government is very protective of church autonomy and generally does not interfere with church hiring practices. Federal law exempts religious organizations and allows them to consider an applicant's religious beliefs in hiring for all positions.³ For hiring ministers, none of the federal non-discrimination regulations apply.⁴ And under most state laws, religious non-profit organizations are entirely exempt from these regulations.⁵

But, should a dispute arise, churches can best protect themselves from discrimination claims if they create job descriptions for every paid position in the church. These job descriptions will obviously be unique for each employee but all of them should contain an explanation in the job description how the position furthers the religious mission of the church. For example, if a receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the church's religious faith, provide direction on the church's available religious resources, or to, in appropriate circumstances, pray or counsel callers. These activities directly further the religious mission of the church.

Any position where the church considers the employee as a minister should be clear from its job title, and any religious duties, responsibilities, or activities should be explicit in the position

¹ See 42 U.S.C. § 2000e-2; 29 U.S.C. § 621 et seq.

² 21 states and the District of Columbia prohibit discrimination in employment based on sexual orientation or gender identity: California - Cal Gov Code § 12920; Colorado - Col. Rev. Stat. 24-34-402; Connecticut - Conn. Gen. Stat. § 46a-81c-m; Delaware - 19 Del. Code §711; District of Columbia - D.C. Code §2-1402.11; Hawaii - Haw. Rev. Stat. §378-2; Illinois - 775 ILCS 5/1-102; Iowa - Iowa Code §216.6; Maryland - Md. Code §20-606; Massachusetts - Mass. Gen. Laws 151B §4; Maine - 5 Mass. Rev. Stat. §4572; Minnesota - Minn. Stat. §363A.08; New Hampshire - N.H. Rev. Stat. §354-A:7; New Jersey - N.J. Stat. §10:5-4; New Mexico - N.M. Stat. §28-1-7; New York - N.Y. Exec. Law §296; Nevada - Nev. Rev. Stat. §233.010; Oregon - O.R.S. §659A.030; Rhode Island - R.I. Gen. Laws §28-5-7; Vermont - 21 V.S.A. §495; Washington - Wa. St. §49.60.180; Wisconsin - Wis. Stat. §111.36.

³ See 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 2000e-2(e)(2); see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

⁴ *McClure*, 460 F.2d at 558-61; *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991).

⁵ See, e.g., Cal. Gov't Code § 12926(d); Col. Rev. St. §24-34-401(3); Conn. Gen. Stat. §46a-81p; D.C. Code §2-1401.03; Hi. Rev. Stat. 378-3(5); 775 Ill. Comp. Stat. 5/2-101(B)(2); Iowa Code §216.6(6)(d); 5 Me Rev. Stat. §§ 4553(4) & 4573-A; 49-B Md. Code §18; 151B Mass. Gen. Laws §4; Minn. Stat. §363A.20; Nev. Rev. Stat. §613.320 & 613.350; N.J. Stat §10:5-12; N.H. Rev. Stat. §354A:7; N.M. Stat. §28-1-9(B); N.Y. Exec. Law 296(11); Or. Rev. Stat. §659A.006; R.I. Gen. Laws §28-5-6(7)(ii); 21 Vt. Stat. §495; Wash. Code §49.60.040(3); Wis. Stat. §111.337.



descriptions. These position descriptions should also include the religious grounds for limiting employment opportunities – especially if the limitations involve any of the categories protected by law, such as religion or sex. For example, if the church’s beliefs require that only certain positions be held by men, this should be stated in the job description with support from Scripture. This firmly establishes that there is a religious basis for the church’s limitation on employment, and is unlikely to be questioned by a judge.

Additionally, churches should ensure that they are consistently following their employment rules to protect themselves from claims of employment discrimination. Churches must handle similar cases similarly and cannot use religion to treat a protected class of people more favorably than others. For example, churches might be vulnerable if they terminate an unmarried, pregnant female employee on religious grounds, but do not terminate a male pastor guilty of extramarital sexual relations. Consistency in employment decisions will protect the church from employment discrimination claims.

#3: DUE DILIGENCE REQUIREMENTS, POLICIES, AND TRAINING FOR ALL VOLUNTEERS AND STAFF WHO WORK WITH CHILDREN

The sexual abuse of minors is consistently one of the top reasons churches end up in court year after year. This is because courts generally hold that churches have a legal obligation to help protect the children in their care. As one court put it: “[C]hurches and the adult church workers who assume responsibility for the spiritual well being of children of the congregation, whether as paid clergy or as volunteers, have a special relationship with those children that gives rise to a duty to protect them from reasonably foreseeable risk of harm from those members of the congregation whom the church places in positions of responsibility and authority over them.”⁶

Policies differ and there is no “one size fits all” policy that applies to every church’s situation. Your church should check with its liability insurance provider to see if they have a recommended policy for their insured churches. If not, denominations or fellow churches may provide examples of policies they have adopted on this issue. At a minimum, a church policy on this issue should include the following:

- Due diligence efforts when selecting staff and volunteers to work with children. This could include conducting background checks and requesting references.
- Requirements that staff members or volunteers avoid situations where adults are alone with children.

⁶ *Funkbouser v. Wilson*, 950 P.2d 501, 509 (Wash.App. Div. 1 1998); accord *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828, 843 (1992).



It is also important to conduct training of staff members or volunteers who work with children and to periodically update that training to ensure that everyone is aware of all policies and requirements for working with children.

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