



# Defending Religious Organizations

*Employer Handbook*

## About Telios Law

Telios Law serves ministries, churches, and other religious institutions by giving legal advice on a variety of issues, and also representing them in litigation. We recognize the unique needs of religious organizations and our firm name and ethos reflects this understanding. To help churches, ministries, and other religious organizations achieve their visions more perfectly, Telios Law advises on legal and policy issues, with a special emphasis on First Amendment policies, international law, child protection policies and practices, and employment. We also coordinate legal audits and assist with internal investigations. Though we seek, with considerable success, to assist ministries in avoiding litigation, Telios Law also represents organizations in litigation defense, asserting constitutional defenses around religious free exercise, religious privilege, and other First Amendment issues in addition to normal business and employment law principles.

The word “telios” defines successful results in terms of being “whole” or “complete.”

At Telios Law, we understand that religious employers—for example, churches, missions, religiously-affiliated schools and child care facilities—face unique challenges when developing policies and procedures to govern their employees and volunteers. This self-assessment is designed to help your organization assess its policies or employee handbook and identify areas where you may want to focus any updates or redevelopment. We’ve also included links to some resources.

If you answer “no” to any of these questions, your policies (or lack thereof) may need revisiting, but your status quo may be sufficient. For instance, a tiny local church won’t need the same layers of policies as a large mission organization. If you are in doubt, review with an attorney well-versed in both employment law and the unique needs of religious organizations, to determine what policies are needed, and ensure your policies are adequate.

*This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice and should not be acted upon without specific legal advice based on the particular situation.*



Theresa Lynn Sidebotham, Esq.

[tls@telioslaw.com](mailto:tls@telioslaw.com)

19925 Monument Hill Rd. | Monument, CO 80132 | ph. 855-748-4201 | f. 775-248-8147



## Employer Policies Self-Assessment

*Is the organization's religious character clear from its policies and governing documents?*  Yes  No

First and foremost, determine if you are truly a religious organization. Religious institutions receive unique treatment in U.S. employment law, but this treatment generally applies only if the organization can demonstrate that it is religious. While most organizations will easily answer this question, others may have to consider whether a simple affiliation with a religious organization is sufficient, or whether the organization has moved beyond its religious roots. The more strongly the organization's religious character is displayed in its policies and governing documents, the more likely courts will permit the special treatment the First Amendment accords in various employment situations.

*Does the employee handbook contain an equal employment opportunity statement, modified as permitted for religious organizations?*  Yes  No

A common element of most secular employee handbook checklists is whether the organization has an equal opportunity employer statement. Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex, or national origin. The Americans with Disabilities Act (ADA) is a similar federal law that prevents discrimination on the basis of disability. The Age Discrimination in Employment Act (ADEA) is yet another that protects against discrimination on the basis of age. Some states expand protection to other classes such as marital status, sexual orientation, or gender identity, and Sexual Orientation and Gender Identity (SOGI) laws are becoming increasingly more important on a local, state, or national level.

Many secular organizations will contain a blanket statement that the organization is an equal opportunity employer and abides by these laws by not discriminating in hiring, promotions and the like on the basis of all these protected classes. Such a statement alone, however, is incomplete for religious organizations, because Title VII contains exemptions for religious organizations that allows discrimination on the basis of religion. This means that religious organizations are permitted to hire only those individuals who are of the same religion, as defined by the organization. This right is a very important one for most religious organizations. Further, the Supreme Court has recognized a "ministerial exception" that prohibits the application of federal anti-discrimination



laws to the relationship between a church and its pastor (or similar position). Failure to have a statement that reflects these exemptions may create an argument that the organization intended to give up its rights to employ individuals who align with its religious tenants. In addition, most federal anti-discrimination laws only apply to organizations with a certain number of employees, and many religious organizations are too small to come within the purview of the laws. Many states that have more expansive employment discrimination laws, like the Colorado Anti-Discrimination Act (which protects sexual orientation) have exemptions for religious organizations. So you should consider which laws and what possible exemptions actually apply to your organization.

#### Resources

---

- ▶ *Ministerial Exception Three Part Series*
- ▶ Find more resources related to the ministerial exception [HERE](#)

*Does the employee handbook contain an appropriate policy on disability accommodation that exempts ministers?*  Yes  No

Under the Americans with Disabilities Act, even religious organizations (as long as they have 15 or more employees) must not discriminate against disabled individuals. This includes providing reasonable accommodations for disabilities, unless doing so would cause an undue hardship. Organizations who qualify will want to develop sound disability accommodation policies. However, as previously noted, the ADA does not apply to the relationship between a religious organization and its ministerial employees. The organization's ADA accommodation policy should specify that the organization's ministers may be excluded.

The ADA can come into play in a variety of contexts, and in unique ways for religious organizations. For example, many mission organizations may perform pre-field screenings that could identify disabilities that need to be accommodated. Your organization needs to have a clear statement of whether the ADA applies, clear guidelines for screenings, and a good accommodation policy in place.

#### Resources

---

- ▶ *The Rock and the Hard Place: Accommodation Issues Blog Series*



*Do pre-field screenings or other employment screening procedures comply with the Americans with Disabilities Act?*

Yes  No

Many mission organizations conduct pre-field screenings to ensure that the candidate is well-suited for work in the field. Some pre-employment screenings can run afoul of the ADA if not done properly. Again, the ministerial exception—which likely covers many missionaries—may prevent from succeeding any lawsuits based on ADA violations. But not all employees who are given pre-employment screenings will be subject to the ministerial exception, and even test litigation is expensive.

Resources

- ▶ *The Rock and the Hard Place: Assessments and Legal and Ethical Psychology in Missions – Part 4: Legal Issues Related to Assessments*

*Are policies governing wages and work hours compliant with the Fair Labor Standards Act, where applicable?*

Yes  No

The Fair Labor Standards Act (FLSA) is the main U.S. law that governs minimum wage and excessive work hours. It mandates a 40-hour-work-week, with time and a half paid for hours worked over 40. The FLSA applies to religious organizations just as it applies to secular ones. Determine whether the organization or the individual employee is covered by FLSA’s requirements. Schools, preschools, hospitals and nursing homes, regardless of their religious character, are subject to FLSA. The FLSA is unique in that either the employee’s position or the organization may be covered, so blanket policies should be carefully reviewed.

Though the FLSA has no exemptions for religious organizations, guidance from the Department of Labor notes that the FLSA does not apply to clergy or religious workers. This “exception” is unofficial, and is not contained in the law or its regulations. But it has been interpreted by some courts as justifying application of the ministerial exception to FLSA. The FLSA also contains provisions on equal pay among the genders and restrictions on child labor. Remember, there is no “religious employer” exemption from the FLSA, and policies must be drafted with care.

Resources

- ▶ *Job Descriptions – Part 2: Do Your Missionaries Get Time-and-a-Half?*



Theresa Lynn Sidebotham, Esq.  
[tls@telioslaw.com](mailto:tls@telioslaw.com)

19925 Monument Hill Rd. | Monument, CO 80132 | ph. 855-748-4201 | f. 775-248-8147



*Is information about the Family Medical Leave Act appropriately included?*  Yes  No

The Family Medical Leave Act (FMLA) is a federal law that provides job-protected, unpaid leave for up to 12 weeks for certain specific reasons, such as the birth of a child or care of a sick parent. Not all organizations are subject to the FMLA, and not all employees qualify. Because the threshold number of employees is rather high (50), many churches and religious organizations will be exempt from the FMLA simply by virtue of not meeting its requirements. There is no religious employer exemption from the FMLA. Employers can voluntarily submit to the FMLA by offering job protection to their employees. Some courts have held that referring to the FMLA or to similar leave offered in an employee handbook may subject the organization to having to provide those benefits, when it otherwise would not have had to. Consider first whether the FMLA applies, and then what leave you want to offer.

*Does the employee handbook address standards of conduct with reference to religious doctrine or scriptural authority?*  Yes  No

*For example:*

- Use of alcohol
- Dress code
- Pornography
- Illegal and legal drugs
- Sexual harassment
- Compliance with child safety code
- Violent behavior
- Dishonest or fraudulent behavior
- Insubordination

Religious organizations are in the strongest position when their limitations on conduct and requirements of adherence to moral requirements are doctrinally based. Many states have off-duty conduct laws that prohibit employers from disciplining employees for lawful off-duty conduct. In Colorado, for example, it is illegal for an employer to fire someone for engaging in certain lawful off-duty conduct. Many prohibitions that religious employers may want to make conditions of



employment (but that are technically lawful activities, such as extra-marital sexual relations) may be subject to this type of law. In Colorado, religious organizations or associations (except those that are supported by taxation or public borrowing) are not included in the definition of an “employer” and are thus exempt from this law. Each jurisdiction may be different, but exemption for religious organizations is common in states with such laws.

Written codes of conduct in an employment policy demonstrate that an employee has voluntarily agreed to abide by them as a condition of employment, and was on notice that failure to do so could result in disciplinary action up to termination, particularly if the employee is asked to sign an agreement to that effect. It is also important that the organization specify unacceptable behavior and the doctrinal reason it is unacceptable, especially for behavior that is otherwise legal. Courts are not impressed when employees have to “guess” or “know.” This clarity, along with consistent application of the policies, can assist a religious organization against legal action.

*Does the organization address who has final authority over the interpretation of doctrine or scriptural authority with reference to polices and codes of conduct?*

Yes  No

To avoid argument as to the interpretation of what moral requirements are expected, final authority for interpreting the doctrine and policies should be vested with the Board or other similar governing body of the organization. This body should have final authority over the interpretation of religious doctrine, as reflected in the conduct policies.

*If the organization’s employees or volunteers interact with children, does the handbook contain or reference a child protection policy?*

Yes  No

Religious organizations that work with children are exposed to additional risk. To protect both itself and the children it serves, a thorough child protection policy is a crucial part of any employee or volunteer policy handbook for religious organizations in particular.

#### Resources

- ▶ *Five Considerations for a Good Child Protection Policy*
- ▶ Find more child safety policies blogs and resources [HERE](#) and [HERE](#)



Theresa Lynn Sidebotham, Esq.  
[tls@telioslaw.com](mailto:tls@telioslaw.com)

19925 Monument Hill Rd. | Monument, CO 80132 | ph. 855-748-4201 | f. 775-248-8147



*If applicable, are the organization's policies in compliance with the latest guidance from the National Labor Relations Board (NLRB)?*  Yes  No

Some religious organizations—mainly those that engage in substantial commercial activities that resemble a secular organization (such as a church affiliated hospital or child care facility, for example)—are going to be subject to the National Labor Relations Act (NLRA). When under NLRB jurisdiction, employers must be careful their employment policies do not unduly restrict employee rights under the Act. The NLRA is well-known for applying to union activity and collective bargaining, but its actual application is much wider. Generally, the NLRA prohibits an employer from restricting its employees' ability to openly and publicly complain about their terms and conditions of employment. In the last several years, guidance from the NLRB has criticized employer policies on everything from confidentiality to use of work email to social media participation. Its interpretation of the Act has been increasingly in favor of broad rights for employees.

While the NLRB itself claims to possess jurisdiction over all religious organizations, it declines to assert jurisdiction over religious organizations that are not engaged in substantial commercial activities. For example, the NLRB has stated that it will not assert jurisdiction over employees of a religious organization if they are effectuating the religious purpose of the organization. This would include pastors, or teachers in a church-operated school. For instance, the NLRB would assert jurisdiction over a religiously-affiliated health care institution. The application of the NLRA to religious organizations is an emerging issue that should be watched carefully, and it may be safer to have compliant policies to begin with.

#### Resources

- ▶ *Labor Unions at Christian Colleges? NLRB Thinks So*
- ▶ *Social Networking – Part 9: Protecting the Organization's Social Media Presence*

It may be illegal for an employer to fire someone for engaging in certain lawful off-duty conduct.



Theresa Lynn Sidebotham, Esq.  
[tls@telioslaw.com](mailto:tls@telioslaw.com)

19925 Monument Hill Rd. | Monument, CO 80132 | ph. 855-748-4201 | f. 775-248-8147





*Does the employee handbook contain a binding alternative dispute resolution process, including requiring arbitration or mediation to resolve disputes?*  Yes  No

Alternative dispute resolution clauses can limit the organization's exposure to lawsuits. A religious organization can require Christian mediation or arbitration, such as that provided by Peacemaker Ministries, for both practical and doctrinal reasons. Employees should specifically agree to these provisions. In addition, some religious organizations may have their own internal judicial processes to deal with conflict, which can be applied to the employment context.

#### Resources

---

- ▶ *What is Christian Mediation? Should it Be in Your Contract?*
- ▶ *Peacemaker Ministries*

*Does the organization have policies for investigating, disciplining, and reporting employee or volunteer misconduct?*  Yes  No

Many religious organizations—particularly churches—use spiritual or church discipline for their employees and volunteers who engage in misconduct. With a strong mechanism in place to do so, and where employees and volunteers agree at the outset to be subject to church discipline, an organization's preferred way to deal with misconduct is more likely to be recognized and disputes about it are kept out of civil courts.

Religious organizations are also often uniquely in the position of reporting misconduct of their employees or volunteers—either among their members or to outside groups where appropriate. For example: dismissing a pastor for an affair may involve the indiscretion being announced to members in order to inform a voting process, or a religious child care facility may need to ensure that a worker dismissed for abusing children is not placed in another position where abuse could continue. If the organization believes it has this spiritual responsibility, this should be stated in the handbook so that employees have agreed to that process.

#### Resources

---

- ▶ *Seven Ways to Clarify Spiritual Discipline: Process for Handling Misconduct Within the Church*
- ▶ *Handling an Allegation of Leadership Misconduct*
- ▶ *The Rock and the Hard Place: Employee Discipline and Termination Blogs*



*If your organization's employees or volunteers work in high-risk countries, do you have a hostage and crisis management plan?*  Yes  No

Mission organizations must be proactive in developing policies and procedures for what will happen if missionaries are ever kidnapped in a foreign field, or are caught up in political unrest or a natural disaster. Without policies in place prior to any misfortunes, missions and missionaries can be left unprepared for the situation. Policies can help prepare for worst-case scenarios. In addition, organizations managing high risk should consider waivers and releases.

In the hostage context, for example, without proactive steps taken prior to any actual crisis, the aims of the mission (and the missionary) may become secondary to the wishes of others. Under the latest guidance from the United States Government on U.S. Citizen hostage situations, a hostage's family is the primary point of contact (and input) for the U.S. Government's action in the hostage situation. A missionary's family may or may not have the same perspective as the missionary himself or the sending organization. This means the missionary's voice may not be represented. Current guidance is to develop legal ways to allow the organization to participate in the process.

#### Resources

- ▶ *The Rock and the Hard Place: Risk and Vulnerability Seven Part Blog Series*
- ▶ *The Rock and the Hard Place: Rituals of Missionary Consent to Risk*
- ▶ *The Blood of the Martyrs*

Many religious organizations — particularly churches — use spiritual or church discipline for employees and volunteers who engage in misconduct.



Theresa Lynn Sidebotham, Esq.  
[tls@telioslaw.com](mailto:tls@telioslaw.com)

19925 Monument Hill Rd. | Monument, CO 80132 | ph. 855-748-4201 | f. 775-248-8147



## General employment law issues

*In addition to these special issues, religious organizations also face many of the same issues as secular organizations when developing employee policies and procedures. When reviewing your organization's employee handbook or policies and procedures, consider the following questions.*

- Yes    No   Does the handbook indicate that the current version replaces previous editions?
- Yes    No   Is there a disclaimer that nothing in the handbook is intended to create a contract of continued employment, or employment for a specified term, and does it contain a provision about the at-will employment relationship?
- Yes    No   Is there a disclaimer that nothing in the handbook is intended to create any contractual or legally-binding obligation on the part of the organization?
- Yes    No   May the organization unilaterally modify or cancel the information or policies described in the handbook?
- Yes    No   Must the employee or volunteer acknowledge that he or she has received a copy of the employee handbook and understands his or her responsibility to read and understand the policies contained in it?
- Yes    No   Do particularly important or sensitive policies require separate signatures?
- Yes    No   Does the handbook inform the employee that the organization relies on the accuracy of information contained in the employment application?
- Yes    No   Does the handbook comply with the Immigration Reform and Control Act of 1986?
- Yes    No   If employees are permitted to use their own electronic devices (cell phones, tablets, etc.) for work purposes, is there a clear "Bring Your Own Device" (BYOD) policy?



- Yes    No   Does the handbook contain a social media and internet use policy?
- Yes    No   Does the handbook contain a confidentiality policy?
- Yes    No   Does the handbook address personal matters at work, such as personal use of company phone, email, or other systems, or personal visits at work?
- Yes    No   Is there a conflicts of interest policy?
- Yes    No   Is there a defined policy for how to handle harassment or other grievances in the workplace? Is there a clearly explained process?
- Yes    No   Does the handbook address unemployment insurance? (While religious organizations may not be required to carry unemployment insurance, and may choose not to, this should be explained to employees.)
- Yes    No   Does the handbook explain how performance reviews and communications about performance are handled?
- Yes    No   Is there an employee/volunteer disciplinary process that provides the organization flexibility to deal appropriately with matters?
- Yes    No   Does the handbook contain the following items, or address the following areas?
- |   |  |
|---|--|
| <input type="checkbox"/> Organizational Flow Chart      | <input type="checkbox"/> Classifications of employees (regular, temporary, full-time, part-time, etc.) |
| <input type="checkbox"/> Personnel records              | <input type="checkbox"/> Facility closure  |
| <input type="checkbox"/> Attendance and punctuality     | <input type="checkbox"/> Searches/inspections of property  |
| <input type="checkbox"/> Information systems            | <input type="checkbox"/> Media inquiries   |
| <input type="checkbox"/> Pay days                       | <input type="checkbox"/> Clocking/tracking hours   |
| <input type="checkbox"/> Work schedules                 | <input type="checkbox"/> Employee breaks   |
| <input type="checkbox"/> Business expense reimbursement | <input type="checkbox"/> Benefits eligibility  |
| <input type="checkbox"/> Employee assistance program    | <input type="checkbox"/> Time off (paid and unpaid)  |
| <input type="checkbox"/> Military leave under USERRA    |  |

