



# In The Trenches

By Matthew F. McNulty, III and Timothy S. McCoy

## Practical Answers to Your HR Questions

**Q** Is “religion” an acceptable reason for a religious organization<sup>1</sup> to deny employment?

**A** Yes. Under Title VII of the Civil Rights Act of 1964, religious organizations are allowed to discriminate in “hiring” decisions on religious grounds in at least some of their secular employment activities. Most importantly, a religious organization is allowed to discriminate in hiring on the basis of religion against an employee who performs religious activities, such as a minister or other clergy. However, Title VII also permits a religious organization’s discrimination as to hiring decisions on religious grounds against an employee who performs strictly secular activities, such as a receptionist or janitor.

The rationale advanced by the courts to allow for this exemption is that forbidding a religious organization from discriminating on the basis of religion, even as applied to secular non-religious activities, could easily trigger concerns and challenges as to the Free Exercise and Establishment clauses of the First Amendment to the United States Constitution. Thus, Congress and subsequent judicial interpretations have made it possible for religious organizations to require individual prospective employees to adhere to the religious beliefs of the employing organization (current employees can also be required to adhere to religious beliefs in order to keep their jobs).

Note that the religious exemption is limited and must be cautiously applied with careful recordkeeping and application in a fair and forthright manner. Religious organizations are allowed to discriminate on the basis of religion, but are not allowed to use religion as a pretext to discriminate on non-religious grounds, such as sex, race, and national origin.

**Q** Are there other employment laws with exceptions for religious organizations?

**A** Most employment-related statutes do not specifically provide an exception for religious entities such as the one contained in Title VII. However, courts across the country have at times, in fact-specific cases, refused to

apply other federal employment laws to churches and religious organizations.

For example, the Age Discrimination in Employment Act (the “ADEA”) does not contain specific exemption language similar to that provided for religious entities by Title VII. However, some courts have held that application of the ADEA to a church or a church-related school would necessarily involve excessive government entanglement with religion in violation of the First Amendment. These cases generally involve ministers or other employees engaged in “religious activities.” Several federal courts have held that the ADEA may apply, on a case-by-case basis, to suits by “secular activity” employees against religious entities (such as teachers, although not necessarily maintenance personnel) at church-supported schools.

The Supreme Court has held that church-operated schools are exempt from the National Labor Relations Act (the “NLRA”). The Supreme Court declined to read the NLRA in a manner that could “call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”

In summary, if a religious organization can show a valid argument or basis that the application of anti-discrimination laws or rules may lead to or create an improper “entanglement” between the government and the religious purposes and/or the practices of the religious organization, a court may refuse to review the decision of the employer. Because of the fact-sensitive nature of hiring practices involving religious organizations, it is best to talk to a lawyer as to individual employment decisions. ■

#### (Footnotes)

<sup>1</sup> For purposes of this article, “religious organization” includes a church, church-based school, and church-based charity.

*In the Trenches* is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month jointly by Matthew F. McNulty, III, Vice-President and a member of the Board of Directors of the firm, and Timothy S. McCoy, both of whom are members of Van Cott’s Labor and Employment Law Group. You can reach either Mr. McNulty or Mr. McCoy at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to [pamgunnell@plwi.net](mailto:pamgunnell@plwi.net)