

The Ministerial Exception: How Catholic Non-Profits Can Safeguard Their Right to Choose Their Own Leaders

By *Kaytlin Roholt Lane**

Executive Summary

- The ministerial exception—which derives from the First Amendment to the U.S. Constitution—protects the right of religious organizations to decide who their “ministers” will be, thereby shielding them from liability under state and federal employment discrimination laws in connection with the hiring and firing of employees who fall within the exception.
- The term “minister” encompasses more than a church’s ordained clergy and ministers, but the precise contours of this term are not clearly defined.
- In general, whether a particular employment position qualifies as ministerial depends on: (1) the employee’s formal title; (2) the substance reflected in that title; (3) the employee’s use of that title; and (4) the important religious functions the employee performs.
- Religious organizations cannot claim the protection of the ministerial exception by merely designating a position as ministerial.
- Instead, Catholic non-profits should undertake an audit to determine which of their employees, if any, qualify as ministers.
- As part of this audit, Catholic non-profits should assess employment documents for every employment position—including written job descriptions, employment contracts, and performance review forms—to ensure that they accurately reflect the ministerial qualifications or religious responsibilities associated with each position.
- Because the question of whether a particular position is ministerial is inherently fact-specific, Catholic non-profits should consult with legal counsel to determine which of their employees they can properly designate as ministers for the purposes of the ministerial exception.
- Catholic non-profits should also be on the lookout for additional guidance on the scope of the ministerial exception, which the U.S. Supreme Court will likely provide later this year.

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Introduction

In general, state and federal law prohibit discrimination based on religion and immutable characteristics such as race, sex, color, and national origin. But under the ministerial exception, churches, religious schools, and other qualifying religious organizations are exempt from these laws in connection with the hiring and firing of their ministerial employees.

This protection applies only to employment decisions involving a distinct class of employees who are considered ministers. While the term “minister” encompasses more than just a church’s ordained clergy, the precise scope of the term is not clearly defined. There are, however, some guidelines that Catholic non-profits can follow to determine which of their employees might qualify as ministers.

To take advantage of the ministerial exception’s legal protections, Catholic non-profits should conduct an audit of their employment positions and all related employment documents and practices to ensure that they accurately reflect the ministerial nature of each position.

What is the Ministerial Exception?

The ministerial exception is an affirmative defense that “precludes application” of employment discrimination laws—*e.g.*, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, etc.—to legal claims concerning “the employment relationship between a religious institution and its ministers.”¹ In other words, the ministerial exception gives religious organizations autonomy to hire and fire key religious personnel and protects them from employment discrimination claims on the basis of religion, race, sex, disability, age, etc., in connection with those decisions.

The U.S. Supreme Court has recognized that the ministerial exception flows from the two core religious protections of the First Amendment: The Establishment Clause², which prevents the government from choosing religious ministers, and the Free Exercise Clause³, which prevents the government from interfering with a religious group’s freedom to select its own ministers.⁴ The

¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012).

² “Congress shall make no law respecting an establishment of religion[.]” U.S. Const. amend. I.

³ “Congress shall make no law . . . prohibiting the free exercise [of religion].” *Id.*

⁴ *Hosanna-Tabor*, 565 U.S. at 184.

purpose of the exception is to “ensure that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.”⁵

The ministerial exception provides religious organizations with broad protection against claims of discrimination, but the exception only applies if the employment position in question is “ministerial” in nature. Thus, before relying on the ministerial exception for protection from liability, Catholic non-profits should consult an attorney to assess whether particular positions can be validly deemed ministerial.

What Makes a Position Ministerial?

Although the precise scope of the ministerial exception is not clearly defined, the U.S. Supreme Court has provided some guidance for assessing whether a particular employment position is ministerial. In the important 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Supreme Court first recognized the ministerial exception—confirming forty years of lower court precedent—and held that employment discrimination laws did not apply to a Lutheran elementary school’s decision to terminate the contract of a teacher who performed certain religious responsibilities. The Court found it relevant that the teacher was commissioned by the Lutheran church and played a formative role in the spiritual lives of her students by teaching religion four days each week and leading the students in daily prayer.⁶

The Court did not explain precisely how extensive the ministerial exception is, but it made clear that the exception applies beyond the mere selection of clergy for church positions. In so holding, the Supreme Court articulated a test for assessing whether a particular employment position is ministerial. Four factors were relevant to the Court’s decision:

1. The formal title given to the employee by the church (*i.e.*, whether the employer holds out the employee as a minister);
2. The substance reflected in the employee’s title;
3. The employee’s own use of that title; and
4. The important religious functions the employee performs for the Church.⁷

Because the question of whether a particular employee qualifies as a minister is inherently fact-specific, it is not clear precisely how each of these four factors will apply in any given case. But Catholic non-

⁵ *Id.* at 194–95 (alterations and internal quotation marks omitted).

⁶ *Id.* at 192.

⁷ *Id.*

profits should consider these factors when assessing whether a particular employee can validly be considered a minister.

How Catholic Non-Profits Can Safeguard Their Rights Under the Ministerial Exception

While a Catholic non-profit might be tempted to designate all employees as ministers in order to shield itself from liability under employment discrimination laws, merely declaring that a position is ministerial is not enough to bring that position within the protection of the ministerial exception. Instead, whether a particular employee qualifies as a minister depends on the substance of the employment position.

To determine whether the ministerial exception covers hiring and firing decisions related to any of their employees, Catholic non-profits should conduct an audit of each employment position to assess whether it can be validly considered ministerial. As part of these audits, Catholic non-profits should evaluate whether written job descriptions, employment contracts, performance review forms, and other relevant employment documents adequately convey the ministerial duties associated with each employment position. In particular, Catholic non-profits should evaluate each position's (1) title; (2) responsibilities; and (3) prerequisites to ensure that they accurately reflect the ministerial nature of the role.

- 1. Assess Titles for Each Position.** The way in which a religious organization “holds out” an employee is an important factor in assessing whether that employee is a minister. Catholic non-profits should therefore assess the official title for all positions within their organization to determine whether any of them can be validly modified to convey the ministerial nature of the position. Although every position within a Catholic non-profit might seem to further the organization's religious mission, for legal purposes, the link between a particular position and the organization's mission should be clearly articulated.

For example, a Catholic non-profit might consider changing the title of its “Vice President for External Relations” to “Vice President for Catholic Outreach and Messaging.” This change would be appropriate if the position required the employee to, for example, convey the organization's Catholic faith and mission to outside organizations.

Catholic non-profits should also explicitly identify employment positions as “ministers” where appropriate. If possible, they should provide, in writing, any biblical basis or basis in Church history for why these jobs are ministerial. In doing so, Catholic non-profits may find it helpful to reference papal encyclicals or other Church documents (*e.g.*, *Ex corde Ecclesiae*) where relevant.

In addition to amending a position's formal title to reflect its ministerial nature, Catholic non-profits should be diligent about using an employee's ministerial title in all communications, both internal and external. For example, staff listings on the organization's website, newsletters, and other written and spoken communications making reference to staff should include employees' ministerial titles.

Catholic non-profits should also consider amending job applications, employee handbooks, training materials, and any other employee onboarding documents to identify which employees the organization considers to be ministers. These documents might also explain the differences between ministerial and non-ministerial employment relationships and the legal implications of being considered a minister.

2. ***Assess Responsibilities for Each Position.*** Catholic non-profits should ensure that every employment position within their organization has a written job description. This written description will ensure that all current and prospective employees have notice of the ministerial qualifications or religious responsibilities, if any, of their positions.

In general, employment positions that require an employee to perform an organization's religious rituals or teach and communicate the organization's religious beliefs and mission qualify as ministerial. Some examples of important religious responsibilities or functions include:

- Leading worship, devotions, or prayer
- Instructing the faithful in matters of Church doctrine
- Advising clients or customers on Catholic teaching
- Leading or planning Mass, spiritual retreats, or other devotional services
- Implementing and protecting the organization's Catholic mission
- Communicating the organization's Catholic faith to donors or other outside organizations
- Modeling the organization's Catholic faith and mission within the organization and to the public

If an employee performs one or more of these tasks as part of his or her job, a Catholic non-profit should consider adding these tasks to the written job description for that employee's position. For example, if a receptionist is required to answer questions about the organization's Catholic faith and mission or pray with callers, these responsibilities should be included in the receptionist's written job description.

Similarly, Catholic non-profits should ensure that an employee is reviewed and assessed based on his or her ministerial duties. For example, the receptionist who is required to pray with callers and answer questions about the organization's Catholic faith should be reviewed explicitly on his or her competence in these two areas. Catholic non-profits should therefore revise all written performance review forms to explicitly require supervisors to assess how well an employee has performed his or her religious responsibilities. Catholic non-profits should also ensure that they keep accurate records of these performance evaluations.

In both the application process and the employee onboarding process, Catholic non-profits should clearly communicate to prospective employees that any religious responsibilities associated with a particular employment position are central to the role.

- 3. *Assess Prerequisites for Each Position.*** When assessing whether a particular employment position is ministerial, courts consider any religious training or educational prerequisites associated with that position. Catholic non-profits should therefore assess their written job descriptions and employment contracts to ensure that they appropriately reflect any religious training or education that might be required for particular positions.

Where an employee has been “commissioned” by the Church, and that commission is a prerequisite of employment, the organization should make this prerequisite clear in the position's written job description and any other employment documents. Examples of “commissioned” employees might include a priest, a deacon, a religious brother or sister, or a lay member of a religious order.

Other examples of training that might help to qualify a particular employee as a minister include:

- Catechist certification
- Training or higher education in Catholic theology, Catholic social teaching, etc.
- Training or higher education in Catholic sacred music
- Spiritual director certification

To the extent that any employment positions require this kind of training, Catholic non-profits should add the training as a prerequisite to the written job description, employment contract, and any other relevant employment documents. They should also communicate to the prospective employee that they consider these religious training or educational prerequisites to be necessary to the position.

In addition, Catholic non-profits should take care to abide by these prerequisites when making hiring decisions. For example, if a particular position requires that an employee have a Master of Theological Studies from a Catholic institution, a Catholic non-profit should ensure that any person hired for that position satisfies this prerequisite.

If a Catholic non-profit provides an employee with opportunities for continuing education and training for his or her ministerial responsibilities (*e.g.*, advanced theological degrees, catechist certifications, etc.), the organization should document how these opportunities enhance the ministerial role of the employee.

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The audit outlined above is an important first step for any Catholic non-profit seeking to safeguard its rights under the ministerial exception. But because the question of whether a particular position is ministerial is inherently fact-specific, Catholic non-profits should seek the advice of legal counsel to assess whom among their employees can validly be considered a minister.

Looking Ahead

Catholic non-profits should also be on the lookout for forthcoming guidance from the U.S. Supreme Court that will likely provide further clarification of the ministerial exception. There are currently two cases pending before the Supreme Court, *Our Lady of Guadalupe School v. Morrissey-Berru*,⁸ and *St. James School v. Biel*,⁹ that ask the Court to clarify the proper scope of the ministerial exception. Both of these cases involve teachers at Catholic parish schools in the Archdiocese of Los Angeles whose teaching contracts were not renewed. The teachers sued their respective employers, alleging employment discrimination, and the schools asserted that the ministerial exception shielded them from liability because the teachers were ministers.

The Supreme Court is now considering whether these teachers qualified as ministers and thus whether the schools' decisions not to renew their contracts were protected by the ministerial exception. The Supreme Court heard oral argument in both of these cases on May 11, 2020, and a decision is expected this summer. The Court's decision in these cases will likely provide further guidance on the kind of religious duties an employee must perform in order to qualify as a minister.

After the Court issues its decision, Catholic non-profits should consult an attorney to help them assess how the Court's decision impacts the ministerial status of their own employees.

⁸ No. 19-267.

⁹ No. 19-348.

Conclusion

Although the precise contours of the ministerial exception are not clearly defined, there are affirmative steps Catholic non-profits can take to increase the likelihood that their hiring and firing decisions will be protected by the ministerial exception. Any Catholic non-profit seeking to protect itself from employment discrimination lawsuits should consult a licensed attorney who can conduct a case-by-case analysis of each employment position and advise how the organization can enhance and communicate each position's ministerial qualifications. Performing such an audit with the guidance of an attorney will help safeguard a Catholic non-profit's right "to choose those who will guide it on its way."¹⁰

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¹⁰ *Hosanna-Tabor*, 565 U.S. at 196.