



TO: Businesses and Retailers

FROM: American Center for Law and Justice (ACLJ)

RE: Celebration of the Christmas Season – What You Can and Cannot Do

DATE: December 2010

The American Center for Law and Justice (ACLJ) wishes you a Merry Christmas and a Happy New Year. We are aware that celebrations of Christmas and other holidays by businesses may be hindered by questions of what is legally permitted or prohibited. The purpose of this memorandum is to provide guidance to employers concerning permissible holiday activities in the workplace as well as how the law protects employees' sincerely-held religious beliefs.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹

I. Overview of Applicable Law.

Holiday expression in the private workforce is not heavily regulated. The law does not prevent private employers from engaging in activities such as caroling or display of religious symbols, as long as these activities are not imposed on unwilling employees.²

The law governing private businesses as it concerns religious expression is different in key respects than the law applicable to government entities, giving private businesses more leeway to emphasize the religious aspects of the Christmas season. While the First Amendment

¹ See, e.g., *Pleasant Grove v. Summum*, 129 S. Ct. 1125 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously upholding the First Amendment rights of minors); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

² Laura Fleming, *Christmas Trees and Religious Accommodation*, 48 Orange County Lawyer 10, 13 (Dec. 2006).

to the United States Constitution limits the government's ability to promote a sectarian religious viewpoint, the First Amendment is not applicable to private businesses.³

As such, private businesses have a much freer hand to include religious-themed components of the Christmas season in displays, advertisements, etc. without having to be concerned about needing to off-set them with more secular aspects. For example, a business may include a Nativity scene or play Christmas music on its property without violating the law. In sum, the way in which a company goes about celebrating the holidays is primarily a business decision, not a legal one.

Federal, state, and local employment statutes provide the basic legal framework for private businesses. 42 U.S.C. § 2000a prohibits discrimination against potential customers on the basis of race, religion, and other characteristics.⁴ In addition, Title VII of the Civil Rights Act of 1964⁵ forbids discrimination against an employee or prospective employee in the terms of employment on the basis of, among other things, religion.⁶ This prohibits treating employees differently due to their religion as well as various forms of harassment based upon religion.⁷

As explained in the Equal Employment Opportunity Commission (EEOC)'s Guidelines on Discrimination Because of Religion, Title VII also requires employers to reasonably accommodate employee religious beliefs unless doing so would impose an undue hardship on the employer's business interests:

(b) Duty to accommodate.

(1) [Title VII] makes it an unlawful employment practice . . . for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption

³ In rare cases, businesses or other private actors can become "state actors" through their close partnership with the government on a particular project, or by assuming a function traditionally exercised by the government (such as operating a police force), which makes them subject to constitutional requirements.

⁴ For example, this would likely prohibit employers from giving discounts to customers for bringing in a program from a Christmas religious service that they attended.

⁵ 42 U.S.C. § 2000e *et seq.*

⁶ 42 U.S.C. § 2000e-2(a). Title VII applies to employers with 15 or more employees, 42 U.S.C. § 2000e(b), although state and local employment laws may have a different threshold. Title VII exempts religious employers "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a).

⁷ See generally *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.⁸

II. Common Questions.

The following section addresses common questions concerning holiday-related religious activities at private businesses.

A. May a business put up Christmas or holiday decorations or instruct employees to greet customers by saying “Merry Christmas”?

YES. The law does not prohibit references to Christmas or other holidays by name in the business context. The use of the word “Christmas” does not indicate an illegal discriminatory preference for only Christian customers or employees. If there are employees that have a religious objection to saying “Merry Christmas” or another greeting with religious content,⁹ or to participating in putting up Christmas or other religious-themed decorations,¹⁰ the employer must reasonably accommodate the employee’s religious beliefs unless doing so would impose an undue hardship.

B. May a business instruct employees to wear Christmas-themed clothing?

YES. Businesses do not violate Title VII by asking employees to wear Christmas-themed hats, shirts, or other clothing. The employer should provide a reasonable accommodation to employees who object to wearing Christmas-themed clothing on religious grounds,¹¹ or who request permission to wear clothing or a head covering required or encouraged by his or her faith,¹² unless doing so would impose an undue hardship on the business.

⁸ 29 CFR 1605.2.

⁹ In *Kentucky Comm’n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361 (Ky. Ct. App. 1987), the court held that an employer violated a state law similar to Title VII by firing an employee for failing to answer the phone with a “Merry Christmas” greeting. The employee was a Jehovah’s Witness who informed the employer that giving a Merry Christmas greeting would violate her religious beliefs, but the employer did not attempt to provide a reasonable accommodation. The court concluded that the employer could have accommodated the employee’s religious beliefs without any undue hardship by not requiring her to answer the phone during the Christmas season or by allowing her to answer with the greeting “Good Morning.” *Id.* at 363-64.

¹⁰ In *Pruitt v. Metcalf & Eddy, Inc.*, 2006 U.S. Dist. LEXIS 293 (S.D.N.Y. 2006), the court rejected a Title VII claim of an employee who had been required to assemble and decorate an office Christmas tree. After the employee filed a grievance due to his religious objection to taking part in Christmas celebrations, he received a reasonable accommodation when the employer agreed to not ask him to be involved in Christmas decorations in future years.

¹¹ In *Velez-Sotomayor v. Progreso Cash & Carry, Inc.*, 279 F. Supp. 2d 65 (D.P.R. 2003), a Jehovah’s Witness cashier was sent home and eventually fired because she refused to wear a Santa hat in celebration of Christmas. The court allowed the claim to proceed because there was a factual dispute over whether the employee’s beliefs were sincerely held and whether the employer’s act of sending her home was an adverse employment decision.

¹² See, e.g., *Wilson v. U.S. West Commc’ns*, 58 F.3d 1337 (8th Cir. 1995).

C. May employees invite other employees to religious holiday events, display religious-themed holiday items in their personal workspace, or otherwise share their faith with other employees?

YES. “An employee’s reasonable request to display religious items in his or her personal work area should be accommodated, unless the items plainly violate the company’s anti-harassment policy or otherwise cause disruption in the workplace.”¹³ Similarly, employees should be permitted to hand out invitations to religious-themed holiday events to co-workers, or post them on a common bulletin-board, to the same extent that employees are permitted to invite co-workers to non-religious holiday events. The employer retains the authority to prevent an employee from aggressively or consistently sharing his or her religious beliefs with another employee to the point that it becomes harassment or creates a hostile work environment.

D. What are an employer’s obligations concerning requests for time off due to religious holiday observances?

The EEOC’s Guidelines on Discrimination Because of Religion explain:

(d) Alternatives for accommodating religious practices.

(1) The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate

(i) Voluntary Substitutes and “Swaps”.

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. . . . The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

¹³ Fleming, *supra* note 2, at 11; *see generally* Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995).

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.¹⁴

In other words, Title VII does not declare that all employees are guaranteed time off to observe all religious holidays related to their faith, but it does require employers to attempt to accommodate such requests when doing so would not impose an undue hardship.¹⁵ Also, employers must not be more favorable in granting the requests of members of certain faiths than members of other faiths.¹⁶

E. To what extent may a business owner or supervisor share his or her religious faith with employees that work for him or her during the holiday season?

An employer may talk about his or her religious beliefs with employees as long as they know that continued employment or advancement within the company is not conditioned upon acceptance of the employer's religious beliefs. For instance, courts have held that an employer does not discriminate against an employee by sharing the gospel with him and inviting him to church, or by handing him a religious booklet, at least where the employee has not previously objected.¹⁷ Employers must be careful, however, not to persist in sharing their religious beliefs if the employee objects, or to give employees the impression that agreeing with the employer's religious beliefs will help their prospects for a promotion.¹⁸

Conclusion

It is our hope that this memorandum has helped to clarify the ability of businesses to recognize the religious aspects of the holiday season within the confines of the law. Please feel free to share this memorandum with other business leaders or your employees.

¹⁴ 29 CFR 1605.2.

¹⁵ See, e.g., *Willey v. Maben Mfg. Co., Inc.*, 479 F. Supp. 634 (N.D. Miss. 1979) (holding that an employer violated Title VII by firing two employees who missed work due to a religious holiday; the evidence showed that the employees notified the employer of their desire to have those holidays off every year at the time they were hired, the employer was reminded of this obligation two weeks in advance of the dates in question, and accommodating the request would not have imposed an undue hardship).

¹⁶ In *Siddiqi v. New York City Health & Hosps. Corp.*, 572 F. Supp. 2d 353 (S.D.N.Y. 2008), a Muslim medical technologist claimed that a hospital violated Title VII by granting requests for time off for religious holidays more frequently for non-Muslim employees than for Muslim employees. The court allowed the claim to proceed because, if the plaintiff could prove that the employer favored non-Muslims over Muslims in the granting of time off for religious holidays, he would have a valid Title VII claim.

¹⁷ *Taylor v. Nat'l Group of Co.'s*, 729 F. Supp. 575 (N.D. Ohio 1989); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995).

¹⁸ *Brown Transport Corp. v. Human Relations Comm'n.*, 578 A.2d 555 (Pa. Commw. Ct. 1990).