

# Employee Freedoms in the Health Center Workplace

## I. INTRODUCTION<sup>1</sup>

It is often said that employees are the lifeblood of an organization. There is no greater example of this adage than in community health centers, where the strength of the relationship between the staff and community stakeholders is of paramount importance in sustaining the health center's ability to provide essential primary care and preventive health services to vulnerable and underserved populations and communities. Indeed, the foundation of a health center's core operations is an experienced, competent and well-regarded staff of clinical and non-clinical employees.

For this reason, health centers have increasingly prioritized human resources management (HRM) as an essential business function and commonly assign a human resources (HR) Director with the responsibility to carry out the HRM functions and act as a liaison between the health center Board of Directors, patients, and staff. HRM is the process of planning, directing, controlling and organizing people in furtherance of serving or achieving organizational goals. Specifically, HRM encompasses recruiting and hiring; compensation management; performance management; professional development and training; employee relations; worker health and safety; and compliance.

In carrying out HRM, the HR Director is charged with the formidable challenge of devising a framework of personnel policies that ensures, protects and clarifies the rights and obligations of the health center and its employees within the construct of a litany of federal laws and regulations. Inherently, a health center's personnel policies must be "one size fits all," as the policies must apply fairly and equitably to a diverse staff, which is comprised of professionals of different

racess, creeds, ages, genders, educations levels, and socioeconomic backgrounds.

This poses an interesting dilemma for health centers who, in recent years, have been plagued by rapid-fire changes to federal legislation and guidance, a growing shortage of healthcare employees, high turnover rates, and escalating operating expenses. CEOs, HR Directors, and other senior administrators must delicately balance the benefits of instituting policies that primarily serve the organization's business objectives (e.g., effectuating organizational goals, providing legal protection, establishing the conditions of employment, setting employee performance expectations, etc.) with policies that encourage and empower employees to exercise civil liberties, including the freedom to discuss religion and religious activities (such as those policies that are geared towards maintaining high employee morale and retention, improving working conditions, strengthening and embracing diversity, providing employees with opportunities for expression, etc.).

Whether a health center attempts to curb these individual freedoms – and the manner in which it chooses to do so – can have a significant impact on its ability to maintain the requisite staffing levels it needs to deliver affordable, high-quality services to underserved communities.

This Issue Brief:

1. Examines employee freedoms in the health care workplace;
2. Summarizes the relevant legal issues that health centers must consider when establishing policies relating to employee freedoms in the workplace; and

<sup>1</sup> This Issue Brief is only intended to serve as an informal guidance for health centers with respect to issues involving employee freedoms in the workplace. As such, it is not intended to constitute legal advice or a legal opinion. For questions or assistance pertaining to the legal matters raised in this Issue Brief, please consult with legal counsel.

3. Describes best practices for health centers in formulating legally compliant policies relating to individual employee freedoms.

## II. BACKGROUND

A brief timeline of key legislation, rules, and regulations provides the relevant context to understanding the challenges that health center's currently face with respect to employee freedoms.

- In 1791, the First Congress adopted the First Amendment as part of the Bill of Rights. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." This Amendment, which only applies to employees of public employers or governmental entities, is the basis of protection for the fundamental individual rights of freedom of religion and freedom of speech.<sup>2</sup>
- In 1935, Congress enacted the National Labor Relations Act (the "NLRA"). The NLRA protects the rights of employees to engage in "concerted activity," which is when two or more employees take action for their mutual aid or protection regarding the terms and conditions of employment.
- In 1964, Congress passed the Civil Rights Act, which included a provision that prohibits employment discrimination based on race, color, religion, sex and national origin ("Title VII").
- In the wake of the landmark Supreme Court decision in *Roe v. Wade*, Congress enacted, at various times during the 1970s, what is commonly referred to as the "Church Amendments." The Church Amendments, which consist of five

provisions codified as part of the Public Health Service Act,<sup>3</sup> protect the conscience rights of health care workers (and health center facilities) when it comes to performing, accommodating, or assisting with certain medical procedures that are contrary to their religious beliefs or moral convictions.<sup>4</sup>

In 2004, the Department of Health and Human Services ("HHS") issued regulations regarding the participation of religious and faith-based organizations in HHS programs. The regulation removed barriers that previously permitted HHS to exclude these health centers from competing for grant funds.

## III. GUIDANCE AND PARAMETERS ON EMPLOYEE FREEDOMS IN HEALTH CENTERS

Health centers must navigate the above-referenced laws and regulations when formulating policies that relate to employee freedoms.<sup>5</sup> This is an especially difficult endeavor for administrators, regardless of whether they aim to curb or promote individual employees' rights of speech and religious expression. Not only must they balance their business interests with the rights of employees to exercise their fundamental rights, they must do so in a manner that fully complies with the law.

### EMPLOYEE FREE SPEECH IN PUBLIC HEALTH CENTERS

The primary parameters of free speech policies in health centers depends on whether the health center is considered to be a public or private entity. If a health center is a public entity, then it must comply with the First Amendment protections for individual speech.

2 Unfortunately, the First Amendment does not protect employees of private health centers or organizations.

3 The Church Amendments is codified at 42 U.S.C. § 300a-7.

4 Since enacting the Church Amendments, Congress has passed multiple variations and modifications of the initial legislation; however, the principal tenets generally remain intact.

5 This Issue Brief does not cover every law or regulation pertaining to employee freedoms in a health center workplace. For example, it does not cover employee free speech in connection with whistleblowing. Nor does it discuss any state laws or regulations that may expand or limit employee freedoms regarding speech or religious expression.

However, employees' First Amendment rights are not unfettered. A health center can lawfully discipline or terminate an employee for their speech in the following instances:

- The employee is speaking on behalf of the health center (*i.e.*, as part of the employee's job responsibilities), as opposed to speaking as a private citizen;
- The employee's speech does not pertain to a matter of public concern, meaning the speech holds minimal interest and value to the public; or
- The health center's interests in promoting efficiency and minimizing disruption in the workplace outweigh the employee's interest as a citizen in commenting on a public matter.<sup>6</sup>

### EMPLOYEE FREE SPEECH IN PRIVATE HEALTH CENTERS

The First Amendment does not protect the speech of employees of private health centers; so, in general, a health center can take disciplinary action against an employee because of what the employee has said regardless of the form of the speech or whether the speech was made at the health center or on the employee's own time. Nonetheless, health centers should make sure their policies and decisions on this issue are made in a consistent, uniform and non-discriminatory fashion.

Health centers should take note that, despite their general ability to subject employees to their rules, they still cannot discipline employees for speech if the speech is protected by another statute. A primary example of such a statute is the NLRA, which prohibits health centers from terminating, threatening or disciplining an employee for engaging in concerted activity regarding the terms and conditions of employment. For example, the NLRA will protect two employees who are discussing issues related to a health center's pay, shortage of staff, safety, or COVID protection measures.<sup>7</sup>

### EMPLOYEE FREEDOM OF RELIGIOUS EXPRESSION OR BELIEFS IN HEALTH CENTERS

Title VII provides health center employees with the following protections relating to religious expression in the workplace:

- Title VII prohibits a health center from discriminating against staff for their religious beliefs with respect to hiring, promotion, discharge, compensation, and other terms and conditions of employment. Under Title VII, religion is broadly defined to include "all aspects of religious observance and practice, as well as belief."
- Title VII also requires a health center to reasonably accommodate the religious beliefs or practices of employees or applicants, unless doing so would impose an "undue hardship" on the health center. Although Title VII does not define what constitutes an "undue hardship," the U.S. Supreme Court has defined it as meaning "more than a de minimis cost."<sup>8</sup> This means that a health center does not have to accommodate an employee's religious beliefs or practices if, for example, the accommodation would be costly to the health center; compromise workplace safety; decrease workplace efficiency; infringe on the rights of other employees; or require other employees to do more than their share of potentially hazardous or burdensome work.
- Lastly, Title VII protects health center employees from harassment because of their religion. Religious harassment generally occurs in two forms: (i) when an employee is pressured or coerced to abandon, alter, or adopt a religious practice as a condition of employment; or, (ii) when an employee is subject to a hostile work environment. A hostile work environment based on religion can consist of *physical or verbal* harassment, which includes unwelcome imposition of beliefs or practices. It is created "[w]hen the workplace is "permeated with discriminatory intimidation, ridicule, and insult

<sup>6</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>7</sup> The NLRA applies to both unionized and union-free workplaces.

<sup>8</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Health centers can proactively mitigate the risk of violating Title VII with respect to employees' exercise of their religious freedoms by incorporating one of several best practices into their policies, such as:

- Adopting an anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation.
- Encouraging managers to immediately intervene when they become aware of objectively abusive or insulting statements or conduct before such statements or conduct escalates to a violation of Title VII.
- Conducting impartial and thorough investigations and taking prompt and appropriate corrective action upon becoming aware of a statement or conduct that may constitute religious harassment or discrimination.
- If disciplining or taking a performance-related action against an employee, health centers should accurately and timely record the underlying business reasons culminating in the discipline or action.
- Upon learning that an employee objects to a religious statement or religious conduct that is directed at them, the health center should take steps to end such alleged unwelcome behavior because even if the health center does not regard the alleged unwelcome behavior as abusive or insulting, the behavior can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.
- Training managers and supervisors to be aware of their obligations under Title VII, to understand how their actions may constitute retaliation, and to recognize requests for religious accommodation from staff.

- Informing employees that they will make reasonable efforts to accommodate the employees' religious practices and by developing procedures for processing religious accommodation requests.

In addition to Title VII, health centers must recognize that their staff have the right to rely on their religious beliefs when it comes to performing certain medical procedures. Under the Church Amendments and related state and federal legislation, a health center cannot discriminate against an employee – with respect to his or her employment – who declines to perform or assist in performing certain medical procedures because of their religious beliefs or moral convictions.

### **IMPACT OF EMPLOYEE FREEDOM OF INHERENTLY RELIGIOUS ACTIVITIES ON A HEALTH CENTER**

In accordance with HHS' 2004 regulation (the "2004 Rule"), religious and faith-based health centers (collectively, "FBOs") can compete for grants and otherwise take part in HHS programs. The stated purpose of the 2004 Rule was "to implement executive branch policy that, within the framework of constitutional church-state guidelines," allowed FBOs "to compete on an equal footing with other organizations for the Department's funding without impairing the religious character of such organizations."

However, the 2004 Rule further provided that, to the extent an FBO (or any organization receiving grant funds from the Department of Health and Human Services (HHS), including federally-funded health centers) engaged in "inherently religious activities, such as worship, religious instruction, or proselytization," it must offer the activities separately from the programs or services funded with HHS assistance; and, it must make participation in the activities voluntary for the beneficiaries of the HHS-funded programs or services. In other words, pursuant to the 2004 Rule, a HHS grantee "retains its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the Department" for inherently religious activities.

Because of the implications of failing to comply with the 2004 Rule – namely, potentially losing the ability to partake in HHS-funded programs, grantees may have to adopt policies that curtail their employees' exercise of religious expression in the workplace. To this end, grantees must clearly communicate to staff the parameters of the 2004 Rule by adopting policies that incorporate the following guidelines:

- Federal funds cannot be used for inherently religious activities;
- Inherently religious activities must be offered separately in time and location from government-funded services;
- Grantees can use space in their facilities to provide government-funded services without removing religious art, icons, scriptures, or other religious symbols; and
- Grantees that participate in HHS-funded programs cannot discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

## IV. CONCLUSION

Hiring and maintaining qualified, competent and reliable staff is of the utmost importance to a health center's ability to provide much-needed health services to underserved communities. As such, health centers must be especially mindful of the latitude they provide to their staff to engage in the exercise of individual freedoms such as speech and religious expression. However, health centers must also ensure that their policies relating to such individual freedoms comply with the applicable federal and state laws and regulations. Accordingly, health centers must regularly and proactively review their policies and take the necessary steps to cultivate an environment where their organizational goals and performance expectations are balanced with their employees' fundamental individual freedoms, while remaining cognizant of the parameters placed upon them by the law.

## V. REFERENCES

In addition to this Issue Brief, the following websites provide additional technical assistance and guidance on the issue of employee freedoms in the health center workplace.

*U.S. Constitution*

<https://www.archives.gov/founding-docs/constitution-transcript>

*HHS Guidance on Nondiscrimination Protections under the Church Amendments*

<https://www.hhs.gov/conscience/conscience-protections/guidance-church-amendments-protections/index.html>

*42 U.S.C. § 300a-7 (The Church Amendment)*

<https://www.law.cornell.edu/uscode/text/42/300a-7>

69 Fed. Reg. 42586 (July 16, 2004) (the 2004 HHS Final Rule)

<https://www.federalregister.gov/documents/2004/07/16/04-16130/participation-in-department-of-health-and-human-services-programs-by-religious-organizations>

*Title VII of the 1964 Civil Rights Act*

<https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/statutes/title-vii-civil-rights-act-of-1964>

*U.S. Equal Employment Opportunity Commission's Guidance on Religious Discrimination*

[https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#\\_ftn157](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftn157)

*U.S. Equal Employment Opportunity Commission's Best Practices for Eradicating Religious Discrimination in the Workplace*

<https://www.eeoc.gov/laws/guidance/best-practices-eradicating-religious-discrimination-workplace>

*The National Labor Relations Board's Guidance on Interfering with Employee Rights*

<https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1>

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