



DEPARTMENT OF LABOR

[Docket No. DOL-2021-0001]

Guidance Regarding Department of Labor Grants

AGENCY: Office of the Assistant Secretary for Administration & Management, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor publishes its “Guidance Regarding Department of Labor Grants” detailing the general rules regarding equal protection of faith-based organizations that govern the Department’s grant and financial assistance programs. This guidance is issued pursuant to Executive Order 13798, titled “Promoting Free Speech and Religious Liberty,” signed by the President on May 4, 2017, and the related Office of Management and Budget guidance issued on January 16, 2020. This guidance also reflects changes to the Department’s regulations recently made through the inter-agency rulemaking, “Equal Participation of Faith-Based Organizations in the Federal Agencies’ Programs and Activities,” published on December 17, 2020.

FOR FURTHER INFORMATION CONTACT: Carl Campbell, Office of the Senior Procurement Executive, Office of the Assistant Secretary for Administration and Management. Telephone: 1-202-693-7246. TTY/TDD callers may dial toll-free 1-800-877-8339 for further information.

SUPPLEMENTARY INFORMATION:

The Department publishes this guidance to protect religious liberty in the administration of its grant and financial assistance programs, in compliance with Federal law. The guidance details the ways in which the Department’s specific regulations protect the religious freedom of faith-based organizations that participate in these programs, and describes the process by which faith-based organizations can seek exemptions from

religious non-discrimination requirements in their employment practices. The guidance is provided in the Appendix of this notice.

Bryan Slater

Assistant Secretary for Administration and Management, Department of Labor.

Appendix—Guidance Regarding Department of Labor Grants¹

I. Purpose and Background

On May 4, 2017, the President signed *Executive Order 13798*, titled “Promoting Free Speech and Religious Liberty.”² Among other things, Executive Order 13798 establishes a policy of promoting religious liberty and directed the Attorney General to provide guidance to Federal agencies on the requirements of Federal laws and policies protecting religious liberty. Accordingly, on October 6, 2017, the Attorney General issued a memorandum advising agencies on such laws and policies, including how they apply to the award of grants (Attorney General Memorandum).³ Subsequently, the Office of Management and Budget (OMB) issued its own guidance on January 16, 2020 (OMB Memorandum), directing all grant-administering agencies “within 120 days of the date of this Memorandum... [to] publish policies detailing how they will administer Federal grants in compliance with E.O. 13798, the Attorney General memorandum, and this Memorandum.”⁴

The OMB and Attorney General Memoranda make clear that Federal law entitles religious organizations to compete on equal footing with secular organizations for Federal

¹ Other than the statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

² Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

³ Office of Att’y Gen., *Federal Law Protections for Religious Liberty*, Memorandum for All Executive Departments and Agencies (Oct. 6, 2017).

⁴ Office of Mgmt. & Budget, Exec. Office of the President, M-20-09, *Guidance Regarding Federal Grants and Executive Order 13798* (Jan. 16, 2020).

financial assistance.⁵ In line with these principles, the Department of Labor (DOL or Department) is committed to ensuring that DOL-supported social service programs are open to all qualified organizations, regardless of the organizations' religious character. In particular, any grant rule or policy that penalizes or disqualifies a religious organization from the right to compete for a grant or contract because of that organization's religious character could violate the Free Exercise Clause of the First Amendment to the Constitution, or governing DOL regulations. A rule or policy that imposes a substantial burden on an organization's exercise of religion may also, depending on the circumstances, violate the Religious Freedom Restoration Act (RFRA).

To ensure that all organizations are treated equally in the issuance of awards and sub-awards of Department grant funds, and that Federal law's protections for religious liberty are faithfully adhered to, the Department is issuing this guidance. The sections that follow detail the general rules regarding equal protection of faith-based organizations that govern DOL grant programs, and the process by which faith-based organizations can seek exemptions from religious non-discrimination requirements in their employment practices.

II. Equal Treatment in Department of Labor Programs for Faith-Based Organizations

a. Equal Participation of Faith-Based Organizations

Faith-based organizations are eligible, on the same basis as any other organization, to seek DOL support or participate in DOL programs for which they are otherwise eligible. DOL and DOL social service intermediary providers, as well as State and local governments administering DOL support, must not discriminate for or against an organization on the basis of the organization's religious character, affiliation, or exercise. DOL, DOL social service providers, and State and local governments administering DOL

⁵ In addition, the Supreme Court recently reaffirmed that the Constitution guarantees the full participation of faith-based organizations in publicly funded programs. See *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246 (2020).

support are not precluded from accommodating religion in a constitutionally permissible manner.⁶

i. Grant Applications and Awards

Faith-based organizations must be eligible to apply for or receive Federal financial assistance under and participate in any DOL social service program for which the organizations are otherwise eligible, on the same basis as any other organization. This means that an organization must not be discriminated for or against on the basis of the organization's religious character, affiliation, or exercise. At the same time, all applicable limitations on the use of Federal assistance must be met, including that direct financial support must not be used for explicitly religious activities.⁷

For example, organizations that apply for and are qualified to become or remain eligible training providers (ETPs), or other types of service providers, must not be excluded from being recognized as an available provider on account of their religious character or affiliation, and must be included on program lists provided to participants. Approvals and denials of applications to become ETPs or other providers, and removals of providers from such lists, must be documented in accordance with the procedures established under 20 C.F.R. part 690, subpart D (*e.g.*, 20 C.F.R. § 690.480) in order to facilitate the Department's monitoring efforts related to this provision.

Decisions about awards of Federal financial assistance must be free from political interference, and the appearance of such interference. Award decisions must be made on the basis of merit, not on the basis of the religious affiliation of a recipient organization or

⁶ See 29 C.F.R. § 2.32(a) (as amended January 19, 2021). On December 17, 2020, the Department published in the Federal Register amendments to its regulations at 29 C.F.R. part 2 subpart D, 29 C.F.R. §§ 2.30 to 2.39, with an effective date of January 19, 2021. See 85 Fed. Reg. 82,037, 82,140-42 (Dec. 17, 2020). All citations to part 2 subpart D are to the newly amended version of the Code of Federal Regulations.

⁷ See 29 C.F.R. § 2.32.

lack thereof.⁸ DOL will ensure that decisions are made fairly based on the substance of the proposals.

ii. Ongoing Operations

Faith-based organizations that receive DOL financial assistance retain their programmatic independence from Federal, State, and local governments and may continue to carry out their missions and maintain their religious character. This autonomy includes, among other things, the right to use the organizations' facilities to provide DOL-supported social services without removing or altering religious art, icons, scriptures or other religious symbols, and the right to govern themselves and to select board members and employees on the basis of their acceptance of or adherence to the religious requirements or standards of the organization. Faith-based organizations, like all organizations receiving DOL financial assistance, must not use direct DOL financial assistance to support any explicitly religious activities and must further comply with appropriate costs rules related to grants. Explicitly religious activities include, for example, worship, religious instruction, and proselytization.⁹

b. Responsibilities of DOL, DOL social service providers, and State and local governments administering DOL support

DOL, DOL social service providers, and State and local governments administering DOL support must not discriminate against a program beneficiary or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice. Program providers must not impermissibly restrict program beneficiaries' rights to exercise religious freedom. DOL,

⁸ See 29 C.F.R. § 2.39.

⁹ See 29 C.F.R. § 2.32.

DOL social service providers, and State and local governments administering DOL support are not precluded from accommodating religion in a constitutionally permissible manner.¹⁰

DOL, DOL social service providers, and State and local governments administering DOL support must ensure that no direct DOL financial assistance is used for explicitly religious activities. The restriction against using financial assistance for explicitly religious activities does not apply when the assistance is indirect, meaning that the beneficiary chooses the service provider and the cost of the service is paid through a voucher, certificate, or other similar means of government-funded payment.¹¹

If an organization conducts explicitly religious activities using non-DOL funds and also offers social service programs using direct DOL support, then that organization must offer the explicitly religious activities at a time or in a place that is separate from the programs receiving direct DOL support. For example, if directly-supported training activities are offered in a certain room in an organization's facility, inherently religious activities must not occur in that room at the same time as the training. Explicitly religious activities may occur in another room at the facility at the same time as directly-supported training, or in the same room if offered at a different time from the directly-supported training. The organization must also ensure that participation in any explicitly religious activities is purely voluntary, and not compulsory, for beneficiaries of these DOL-supported programs.¹²

Organizations whose programs are funded only by indirect DOL financial support need not modify their program activities to accommodate a beneficiary of DOL support who chooses to enroll in the organization's program and may require attendance at all activities that are fundamental to the program.¹³

¹⁰ See 29 C.F.R. § 2.33.

¹¹ See 29 C.F.R. § 2.33(b).

¹² See *id.*

¹³ See 29 C.F.R. § 2.33(a).

c. Application to State and Local Funds

State or local governments that voluntarily contribute their own funds to supplement funds provided by DOL to support social service programs may either segregate the Federal funds or commingle them. All commingled funds are subject to the same requirements as those applying to the DOL assistance. Required matching funds and program income are treated in the same manner as commingled funds, whether or not such funds are actually commingled.¹⁴

d. Effect of DOL support on Title VII employment non-discrimination requirements and on other existing statutes

A faith-based organization does not forfeit its exemption from the Federal prohibition on employment discrimination on the basis of religion when the organization receives direct or indirect DOL support.¹⁵ Some DOL programs, however, were established through Federal statutes containing independent statutory provisions that require that recipients refrain from discriminating in employment on the basis of religion. Further information on exemptions from non-discrimination requirements is provided in the next section of this guidance.

III. The Effect of the Religious Freedom Restoration Act on Recipients of DOL Financial Assistance

a. Background

One of the many important provisions of the Department's regulations on equal treatment of faith-based organizations provides that, absent statutory authority to the contrary, "[a] religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, is not forfeited when the organization receives direct or

¹⁴ See 29 C.F.R. § 2.36.

¹⁵ Civil Rights Act of 1964 § 702(a), 42 U.S.C. § 2000e-1; see 29 C.F.R. § 2.37.

indirect DOL support.”¹⁶ An organization qualifying for such exemption may make its employment decisions on the basis of an applicant’s or employee’s acceptance of or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic. As noted above, however, some DOL programs were established through Federal statutes containing independent statutory provisions requiring that recipients refrain from discriminating in employment on the basis of religion. Recipients and potential recipients of DOL support are therefore instructed to consult with DOL program officials, or the Civil Rights Center, to determine the scope of any such requirements, including in light of any additional constitutional or statutory protections for employment decisions that may apply.¹⁷

Following the adoption of the Department’s regulations on equal treatment of faith-based organizations, questions from the public arose regarding whether the Religious Freedom Restoration Act (RFRA) exempts recipients of Federal financial assistance from provisions of authorizing statutes and implementing regulations of programs that require all recipients of Federal financial assistance under those statutes or programs to agree not to consider religion when making employment decisions for positions connected with the Federally-financed program or activity. The Department of Labor has developed the exemption process described below to effectuate a controlling opinion and guidance of the U.S. Department of Justice concerning how RFRA applies to laws restricting recipients of Federal financial assistance from making employment decisions based on religion.¹⁸

b. RFRA Exemption Process

¹⁶ 29 C.F.R. § 2.37.

¹⁷ Civil Rights Center, U.S. Department of Labor, 200 Constitution Ave NW, Room N-4123, Washington, DC 20210, 202-693-6500. Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

¹⁸ See Attorney General Memorandum at 5a; *Memorandum Opinion for the General Counsel, Office of Justice Programs, Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 26, 2007) available at www.justice.gov/olc/opinions.htm.

In 1993, Congress enacted RFRA in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that a law that is religion-neutral and generally applicable need not be justified by a compelling governmental interest, even if such law incidentally affects religious practice.¹⁹ By enacting RFRA, Congress sought to ensure that the government justify substantial burdens on religious exercise. Under RFRA, “[g]overnment shall not substantially burden [an organization’s] exercise of religion even if the burden results from a rule of general applicability,”²⁰ unless the Government “demonstrates that application of the burden to the [organization] — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”²¹ RFRA thus mandates strict scrutiny of any federal law that substantially burdens the exercise of religion, even if the burden is incidental to the application of a religion-neutral rule. Congress expressly applied RFRA to all Federal law whether adopted before or after the enactment of RFRA; it therefore applies to all laws governing DOL programs.²²

Under RFRA, the term “exercise of religion” does not require that a burdened religious practice be compelled by, or central to, an organization’s system of religious belief to be protected.²³ Relatedly, RFRA does not permit the government to assess the reasonableness of a religious belief, including the adherent’s assessment of the religious connection between a belief asserted and what the government forbids, requires, or prevents.²⁴ However, where a law enforced by DOL infringes on a religious practice that an organization itself regards as unimportant or inconsequential, no substantial burden has been imposed for purposes of RFRA.²⁵

¹⁹ 494 U.S. 872, 878-79 (1990).

²⁰ 42 U.S.C. § 2000bb-1(a).

²¹ *Id.* § 2000bb-1(b).

²² *See id.* § 2000bb-3.

²³ *See* 42 U.S.C. § 2000bb-2(4).

²⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

²⁵ Attorney General Memorandum at 5a.

Where a law enforced by DOL prohibits religious discrimination in employment by recipients of DOL financial assistance, such prohibition will be displaced by RFRA and thus will not apply to a recipient with respect to employing individuals of a particular religious belief to perform work connected with carrying on the recipient's activities, provided that (i) such recipient can demonstrate that its religious exercise would be substantially burdened by applying the religious non-discrimination requirement to its employment practices in the program or activity at issue, and (ii) DOL is unable to demonstrate that applying the non-discrimination provision to this recipient both would further a compelling government interest and would be the least restrictive means of furthering that interest.

Under RFRA, a law substantially burdens religious exercise if it “bans an aspect of the adherent’s religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice.”²⁶ And in identifying a compelling government interest, “broadly formulated interests justifying the general applicability of government mandates” are insufficient.²⁷

Once selected as a grantee, a recipient that seeks an exemption from the application of a religious non-discrimination provision must submit a certification of its eligibility for an exemption to the Assistant Secretary or relevant Agency Head charged with issuing or administering the grant or his/her designee attesting that: (1) receiving the grant is important to the recipient; (2) employing individuals of a particular religion is important to the religious identity, autonomy, or communal religious exercise of the recipient; and (3) conditioning receipt of the grant on compliance with the non-discrimination provision substantially burdens its religious exercise. The Assistant Secretary or relevant Agency Head will approve exemptions, in consultation with the Office of the Solicitor, on a case-

²⁶ *Id.* at 5a.

²⁷ *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006).

by-case basis, and no later than 14 calendar days from the date the certification was submitted, for recipients that make the above attestations, unless there is good reason to question the certification. If the Assistant Secretary or relevant Agency Head takes no action by the close of the 14 calendar day period, the certification will be deemed approved.

Recipients exempted from the religious non-discrimination requirements at issue will not be exempted or excused, by virtue of that particular exemption, from complying with other requirements contained in the law or regulation at issue. In addition, any exemption may be voided at any time by the Assistant Secretary or relevant Agency Head charged with issuing or administering the grant or his/her designee, in consultation with the Office of the Solicitor of the U.S. Department of Labor, upon a determination that the certification was untruthful or a material change in circumstances indicates that reassessment of the exemption is in order. Following such determination, the Assistant Secretary or relevant Agency Head, or his/her designee will notify the recipient of the invalidation, the reasons for the invalidation, and the name, title, telephone number and/or email address of the person to contact for further information.

Signed at Washington, DC, this 12th day of January, 2021.

Bryan Slater,

Assistant Secretary for Administration and Management.

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