

**Same-Sex Marriage, Sexual Conduct, and Gender Identity:
Legal Implications for Religious Organizations in Light of Recent Court Decisions**

October 8, 2013

Outline for ECFA & CLS members-only webinar presented by:

- Kimberlee Wood Colby, Christian Legal Society (kcolby@clsnet.org)
- Stuart J. Lark, Bryan Cave (stuart.lark@bryancave.com)
- Steven T. McFarland, World Vision (SMcFarla@worldvision.org)

I. Introduction

The Context: Diverging Social Views

<u>Issue</u>	<u>Conventional Christian View</u>	<u>Emerging Cultural View</u>
Gender Identity	Biological sex at birth	Chosen throughout life
Marriage	One man and one woman for life	Any couple for a mutually-agreed duration
Sexual Conduct	Exclusively within marriage	Consenting adults (and teens)
Sexual Orientation	Distinguished from conduct	Inseparable from conduct

As views on same-sex marriage, sexual conduct, and gender identity begin to shift in American culture, leaders of Christ-centered organizations should consider the important legal implications. This webinar outline summarizes some of the developments in this emerging area of the law at the federal, state, and local levels and provides churches and ministries with key strategic planning steps to consider.

II. Recent Legal Developments for Same-Sex Marriage, Sexual Orientation/Conduct, and Gender Identity

- A. Legal Mandate for Same-Sex Marriage – In *United States v. Windsor*, 570 U.S. ____ (2013), the U.S. Supreme Court declared unconstitutional the Federal Defense of Marriage Act (DOMA) by a 5-4 majority. The decision overturned the law adopted by Congress in 1996, which had defined marriage for federal law purposes as a legal union between one man and one woman. The Court majority’s rationale reflected the view that opposition to same-sex marriage can only be animus.

For the time being, states may still choose to limit marriages to heterosexual couples for state law purposes, but the *Windsor* decision has laid the groundwork for future court challenges that may require states to recognize same-sex marriages valid in other states or eventually require all states to recognize same-sex marriage as a constitutional right.

- B. Sexual Orientation – The New Mexico Supreme Court recently held in *Elane Photography, LLC v. Willock*, 2013-NMSC-040, that a photography company had engaged in sexual orientation discrimination prohibited by state law when it declined on religious grounds to photograph a same-sex commitment ceremony. The court reasoned that a photography business is a place of public accommodation (commercial services) and that the law does not infringe the photographer’s free speech or free exercise rights.
- C. Gender Identity Developments – Discrimination based on an individual’s choice of gender is increasingly prohibited in various states. Prohibitions against gender-identity discrimination are most commonly arising in the areas of employment practices and gender-designated facilities and/or activities. For instance in 2012, the U.S. Equal Employment Opportunity Commission (EEOC) held that discrimination against an individual because that person is transgender (gender identity discrimination) is tantamount to sex discrimination and therefore covered under Title VII. (*Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012)).
- D. Tax-Exempt Status – Tax exemption for religious and charitable organizations is sometimes conditioned on conformity to non-discrimination requirements established by the government. If the trend continues of laws prohibiting discrimination on the basis of sexual orientation, gender identity, etc., tax exemption for organizations with conventional Christian views on sexuality and marriage may be at risk.

For example, a bill was proposed in the State of California (Senate Bill 323) that would end state sales tax exemptions for nonprofit youth organizations which discriminate on the basis of gender identity and sexual orientation. Similar threats may arise in the future related to income and property tax exemptions. LGBTQ advocacy groups will likely cite the precedent established by the U.S. Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574 (1983), which denied the university its federal tax-exempt status based on practices that it found were contravening prevailing public policy (racial discrimination).

III. Impact on Employment Practices

Examples of Potentially Unlawful Actions:

- *Marital Status or Sexual Orientation*: Ministry coffee shop fires a female employee after she marries another female.
- *Gender*: Ministry community center refuses to hire an individual as a custodian who identifies with the opposite gender of the individual’s biological sex at birth.
- *Gender*: Ministry community center requires employees to use restrooms designated based on biological sex at birth.

- A. Expanded Nondiscrimination Requirements – Federal, state, and local laws prohibit various types of discrimination based on protected classes such as religion, sex/gender, sexual orientation, and marital status. More jurisdictions are starting to adopt statutes prohibiting discrimination on the basis of sexual orientation and gender identity. Allegations of unlawful discrimination are also on the rise, particularly in the areas of employment disputes and the refusal of businesses and other groups to provide services that would violate their moral or religious convictions.

Nondiscrimination (particularly with respect to employment) based on protected classes is also commonly a condition to accessing certain government benefits such as use of government buildings (*Christian Legal Society v. Martinez*, 561 U.S. ____ (2010)), federal/state charitable campaigns, and tax-exempt financing. Similar conditions may be contained in grants from foundations and donors.

- B. Potential Religious Exemptions – The scope of applicable religious exemptions written into statutes may not be sufficient. The religious employer exemption may only apply to religious discrimination. It is unclear, for instance, whether it would apply to same-sex marriage discrimination based on religious belief.

Also, the definition of “religious employer” may be narrow. In 18 states, there is no exemption for organizations supported by tax funds. Courts have also considered substantial sales of goods and services to be a factor indicating that an employer should not be classified as religious (*Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011)).

The scope of protection provided by the First Amendment/Religious Freedom Restoration Acts is uncertain. Critical issues are currently being addressed in the many cases challenging the “contraceptive mandate” under the Affordable Care Act. (Does the “neutral and generally applicable” standard only apply to laws that target a religious practice because it is religious?; What constitutes a substantial burden?; What persons exercise religion?).

There is stronger protection, though, for actions involving employees who are considered to be “ministers.” In *Hosanna-Tabor v. EEOC*, 565 U.S. ____ (2012), the U.S. Supreme Court unanimously recognized the “ministerial exception,” which provides an exemption from all protected classes for employees who are considered to be “ministers.” In the case, the Court found a fourth grade teacher at a church school could be considered a “minister.” This was established by how she and the school/church held her out (as a “commissioned” minister) and was supported by her special training and calling and job duties involving conveying the church’s religious message. Her ministerial status was not undermined by substantial “secular” duties or the fact that non-ministers performed the same duties.

- C. Employment Taxes and Employee Benefits – Government recognition of same-sex marriage will have a tremendous impact on employment taxes and employee benefits. Just some of these areas include broader definitions of “spouse” in health and retirement benefit plans, joint tax filings, and the Family and Medical Leave Act. There are no specific religious exemptions for same-sex marriages.

IV. **Impact on Ministry Activities**

Examples of Potentially Unlawful Actions:

- *Marital Status or Sexual Orientation*: Ministry coffee shop refuses to cater a same-sex wedding.
 - *Marital Status or Sexual Orientation*: Ministry’s marriage counseling program excludes same-sex couples.
 - *Gender Identity*: Ministry’s men’s and women’s retreats exclude transgendered individuals.
 - *Gender Identity*: Ministry community center requires use of restrooms based on biological sex at birth.
- A. Participants in Programs and Uses of Facilities – Federal and/or state laws generally prohibit discrimination in “public accommodations” on the basis of sex/gender, sexual orientation, religion, and marital status. The definition of public accommodations is expanding from “essential services” (enumerated list under federal law limited to motels, restaurants, etc.) to “all activities in commercial and civic law” (certain state laws). A wide range of services (coffee shops, camping programs, counseling) and facilities (wedding chapels and conference centers) may be encompassed under the expanded definition.
- B. Potential Religious Exemptions - While the definition of places of public accommodations is expanding, a range of possible religious exemptions could exist. In some jurisdictions, the exemption might include all facilities and activities of churches (and other religious organizations). But it also might be limited only to religious discrimination, or only for related activities, or only for non-commercial activities and facilities.

With respect to same-sex marriage, current statutes protect clergy from being required to perform wedding ceremonies that would violate their moral or religious convictions. There may be a threat, however, of hosting same-sex marriage weddings under the theory of sexual orientation discrimination, particularly if facilities are available for other uses and if market fees are charged.

- C. Other Sources of Restrictions – Other sources of restrictions on ministry activities may include licensing/accreditation standards (counseling, foster care/adoption, education); government and private contract conditions (social services); and housing laws (homeless or transitional facilities, schools or group facilities).

V. Strategic Planning for Ministry Opportunities

As religious organizations pursue current and new ministry opportunities (including “business as mission” activities), they should consider the following steps in response to the foregoing legal developments.

A. Clarify Religious Beliefs and Required Policies

1. Carefully consider and articulate your religious beliefs on human sexuality.
 - Include religious beliefs regarding appropriate *sexual orientation, conduct, marriage, and gender identity*.
 - Consider affirming theological distinction between status/human nature and conduct (and even in this sense affirm nondiscrimination based on *sexual orientation*).
2. Determine how your religious beliefs must be reflected in your employment and program policies.
 - Distinguish between essential conviction for representatives (e.g., employees) and preferences for outsiders.
 - Emphasize that policy is based on religious conviction and desire for consistency of the organization’s message.
 - Think hard about actual ministry impact of various requirements (and ministry opportunities).
 - Carefully consider whether and how to permit exceptions.

B. Strengthen Religious Exemption Claims

1. Document your Christian character and mission.
 - Document how your **policies** and **activities** express and exercise your religious beliefs.
 - Affirm your religious exercise and expression of these beliefs in all activities.
 - Expressly state requirements for employees and others.
 - Explain how the association of your employees and volunteers is necessary to the expression and exercise of religious beliefs.
 - Adopt these policies at the board level.
 - Authorize senior management to adopt more specific implementing policies.
2. Consider church and/or minister status.
 - Church status:

- accomplish mission through congregational focus
 - some type of ministers
 - association of churches is an option
 - Minister status
 - Job descriptions/title/employee handbook
 - Training/education
 - Calling
 - Commissioning ceremony
3. Focus your operations on your mission.
- The more connected to your religious mission, on paper and in practice, the stronger the protection.
 - Provide clear public notice to prospective participants of faith-based policies.
 - Avoids indignity of being lured in then excluded
 - Distinguish sales of goods/services (and facility use) from commercial operations in ways related to mission.
 - Distinguish between reaching the public as religious mission and being indiscriminately open to public.
4. Adopt a complete policy regarding facility uses.
- Connect permitted uses to mission (perhaps including community impact/service)
 - Consider prohibiting uses by others that convey support by your organization for contrary views.
 - State that whether any particular use would violate this rule requires spiritual discernment; reserve determination to your organization.
 - Consider possible disclaimers or other restrictions (e.g., prohibiting groups that hold views contrary to your beliefs).
 - Administrative Issues:
 - a. Hours/Scheduling
 - b. Space
 - c. Costs/Fees
 - d. Liability/Insurance
 - e. Security
 - f. Clean up
 - g. Food/Beverage
 - h. Leader Contacts

C. Advocacy

1. Pray that God will change the culture through the Gospel.
2. Consider whether to take a position on applicable legislative initiatives:
 - laws reflecting cultural trends
 - broad religious exemptions

3. Consider litigation options and implications:
 - “amicus” briefs in key cases
 - as a plaintiff or as a defendant

VI. Reference Links

- [CLS Statement to the United States Commission on Civil Rights](#)
- [CLS Amicus Brief in the HHS Mandate Cases](#)
- [Kim Colby CLS Bio](#)
- [Hosanna-Tabor v. EEOC Amicus Brief](#)
- [Christian Legal Society v. Martinez Amicus Brief](#)
- [Comments Submitted on the Contraceptive Mandate Religious Exemption](#)
- [Stuart Lark Firm Bio](#)

Appendix: Same-Sex Marriage throughout the States

States in which Same-Sex Marriage Is Legal (13 plus District of Columbia):

Judicially imposed:

- California (*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013))
- Iowa (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009))
- Massachusetts (*Goodridge v. Dep't. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003))

Legislature enacted (or referendum):

- Connecticut (An Act Implementing the Guarantee of equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09-13)
- Delaware (An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013))
- District of Columbia (Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Dec. 18, 2009))
- Maine (Citizen Initiative, Same-sex Marriage, Question 1 (Me. 2012))
- Maryland (Md. Fam. Law Code Ann. § 2-201 (Lexis 2012))
- Minnesota (An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74)
- New Hampshire (N.H. Rev. Stat. Ann. § 457:1-a (West Supp.2012))
- New York (N.Y. Dom. Rel. Law Ann. § 10-a (West Supp. 2013))
- Rhode Island (An Act Relating to Domestic Relations – Persons Eligible to Marry, 2013 R.I. Laws ch. 4)
- Vermont (Vt. Stat. Ann., Tit. 15, § 8 (2010))
- Washington State (Wash. Rev. Code § 26.04.010 (2012))

States with Court Challenges Pending (21):

- Arkansas
- Hawaii (Ninth Circuit)
- Illinois
- Kentucky
- Louisiana
- Michigan
- Missouri
- Montana
- Nevada (Ninth Circuit)

- New Jersey
- New Mexico
- North Carolina
- Ohio
- Oklahoma
- Pennsylvania
- South Carolina
- Tennessee
- Texas
- Utah
- Virginia
- West Virginia

States with Known Current Legislative Efforts (4 but 3 also have court challenges):

- Hawaii
- Illinois
- Ohio
- Oregon

No Activity or Unknown (15):

- Alabama
- Alaska
- Arizona
- Colorado
- Florida
- Georgia
- Idaho
- Indiana*¹
- Kansas
- Mississippi
- Nebraska
- North Dakota
- South Dakota
- Wisconsin*
- Wyoming

¹ An asterisk indicates that an active court challenge involving marriage exists in that particular state but does not seem aimed at achieving the legalization of "same-sex marriage."