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Religious Organizations *May* Have a Defense to LGBTQ Employment Discrimination Lawsuits Despite *Bostock* Ruling

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On July 8, 2020, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the United States Supreme Court reaffirmed its stance on the application of ministerial exception to employment discrimination cases as established in earlier rulings. In doing so, the Court simultaneously raised an unanswered issue under Title VII: does the ministerial exception for religious employers allow those organizations to discriminate against employees or candidates based on their LGBTQ status?

Background

When discrimination in the workplace is based on gender it violates the law in America, and, as detailed in our prior [Baker Alert](#), on June 15, 2020, the United States Supreme Court expanded the longstanding scope of that protection in a 6-3 historic [decision](#) that sexual orientation and gender identity are also protected under Title VII of the Civil Rights Act. Title VII prohibits discrimination based on race, color, national origin, religion, sex, and creed, but sexual orientation and gender identity are not explicitly mentioned in Title VII's statutory language like these other protected classifications. Proponents argued that such classes should be included because Title VII prohibits discrimination "because of sex," and the Court agreed. Specifically, the Court held that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Notwithstanding its ruling, the Court recognized that the First Amendment could bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers "also known as the "ministerial exception." See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171, 188 (2012).

In *Morrissey-Berru*, the Court reiterated the "ministerial exception" outlined in the *Hosanna-Tabor* ruling. There, the Court identified four relevant circumstances in its application of the ministerial exception in that case including: (1) the title of the employee; (2) whether the position reflects a significant degree of religious training followed by a formal process of commissioning; (3) whether the employee holds herself out as a minister of the Church; and (4) whether the job duties reflect a role in conveying the Church's message and carrying out its mission. Although the *Hosanna-Tabor* Court identified these factors, it did not adopt a rigid formula for deciding when an employee qualifies as a minister to invoke the ministerial exception.

Although the *Morrissey-Berru* Court recognized the *Hosanna-Tabor* factors, it ultimately concluded that "what matters is what an employee does." The Court concluded that the employees in these cases both performed vital religious duties, such as educating their students in the Catholic faith and guiding their students to live their lives in accordance with that faith. The Court noted that while their titles did not include the term "minister" and they did not have formal religious training, their core responsibilities involved religious obligations towards the school and the students. The Court also noted that their schools expressly saw their teachers as playing a vital role in carrying out the church's mission.

The Court further concluded that the Ninth Circuit mistakenly treated the factors identified in the *Hosanna-Tabor* decision as a checklist of items to be assessed and weighed against each other. The Court recognized that such an application of a rigid test produced a distorted analysis. First, it invested undue significance in the fact that these employees did not have clerical titles. Second, it assigned too much weight to the fact that these employees had less formal religious schooling. Third, it suggested that an employee could never come within the *Hosanna-Tabor* exception unless the employee is a "practicing" member of the religion with which the employer is associated. Yet, deciding such questions risks judicial entanglement in religious issues. Based on the Ninth Circuit's misapplication of the factors identified in *Hosanna-Tabor*, the Court ultimately found that the employees were ministers. Accordingly, the ministerial exception applied, and the Court found in favor of the religious institutions.

It's unclear at this point how the Court's ruling in *Our Lady of Guadalupe School v. Morrissey-Berru* may impact the LGBTQ employees of religious employers, but religious organizations and employers should recognize that the ministerial exception does not apply to every position within their organizations. Rather, it is limited to those employees who truly perform religious duties. For example, the position of a school janitor who is only present in the building outside of school hours and is not responsible for transmitting the faith would likely not be considered ministerial in nature. If you have any questions on this issue, please contact the authors or any member of Baker Donelson's [Labor & Employment Practice](#) Group for more information or assistance.