

Representing Faith-Based Nonprofits: Analyzing the Impacts of State Laws

AN OVERVIEW AND SURVEY OF THE LAWS
AFFECTING FAITH-BASED NONPROFITS IN PENNSYLVANIA AND
THROUGHOUT THE NATION

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Speakers

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Scope of CLE Material

This CLE focuses on the impact of state laws on religious organizations with 501(c)(3) tax-exempt status. For-profit religious organizations and non-profits are not the focus of this material.

This CLE analyzes state laws (primarily state constitutions and statutes). This CLE generally does not analyze state regulations, although occasionally regulations are relied on to clarify an ambiguity in a statute.

This CLE does not analyze federal or local laws.

This CLE does not analyze states' political cultures of friendliness or hostility to religious organizations. While such things are important, they are subjective analyses that go beyond this CLE's task of evaluating the practical impact of state laws as written.

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Structure of CLE

FAITH & FREEDOM INDEX
— A PROJECT OF NAPA LEGAL —

Overall Score

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The Impact of State Law on Faith-Based Nonprofits

A state's constitutional provisions, nondiscrimination laws, state of emergency laws, nonprofit corporation laws, charitable fundraising laws, and income, sales, and property tax laws can make a state an extremely effective or extremely difficult environment for a religious organization.

Attorneys representing faith-based organizations must be familiar with these laws to help religious organizations make decisions regarding where they operate, how they fundraise, and what steps they take toward legal compliance.

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303 Creative LLC v. Elenis



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Yeshiva University v. YU Pride Alliance



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The Takeaway?

Sometimes, when representing a faith-based individual or organization, the laws are hostile to the beliefs and intended actions of the faith tradition in question. In that case, knowing the law means knowing the inevitable risk of a legal issue. This was the case in *303 Creative*.

At other times, knowing the law can avoid a conflict in the first place. This was the case in the *Yeshiva* case: taking careful advantage of the exemption could have prevented the ensuing litigation entirely.

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Religious Freedom

Constitutional Protection of Free Exercise	Religious Freedom Restoration Act	Religious Freedom for Nonprofits with Public Programming
Religious Freedom for Faith-Based Employers	Protections for Religious Exercise During a State of Emergency	Blaine Amendments

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Religious Freedom Restoration Acts

Religious Freedom for Faith-Based Employers

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State Religious Freedom Restoration Act

-  *Employment Division of Oregon v. Smith*, 494 U.S. 872, 289 (1990)
-  *City of Boerne v. Flores*, 521 U.S. 507 (1997)
-  State's Response

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Strongest Possible State RFRA



- Ala. Const. amend. 622, § V
 - (a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
 - (b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:
 - (1) Is in furtherance of a compelling governmental interest; and
 - (2) Is the least restrictive means of furthering that compelling governmental interest.

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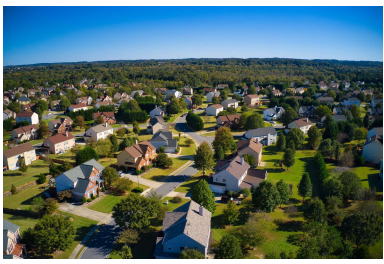
RFRA in practice

If a state does not have a RFRA, then any law that is neutrally applied to both religious and secular persons and organizations can cause a significant burden to religious organizations in that state.

If a state has a RFRA, however, the government has the burden to show that the law burdening religious exercise serves a compelling interest and is narrowly tailored to accomplish that interest.

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Pennsylvania's RFRA

71 Pa. Stat. § 2404
"[A]n agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability. An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:
(1) In furtherance of a compelling interest of the agency.
The least restrictive means of furthering the compelling interest."

In practice, this looks just like other state RFRA's. The difference is the "preponderance of the evidence" qualifier.

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Religious Freedom for Faith-Based Employers

Many faith-based employers seek to consider faith commitment in hiring criteria. This can run afoul of some state laws, so caution and diligence in key to ensure compliance in this area.

Most states have laws related to employment, prohibiting discrimination in hiring, retention, termination, etc. based on a number of factors, such as "an individual's age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence." See N.Y. Exec Law § 296 (2012).

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Types of Exemptions

- 1) Broad, general exemptions/exclusions
- 2) Co-religionist exemptions and sexual orientation/gender identity exemptions.
- 3) Only the "co-religionist" exemption
- 4) No meaningful exemptions at all.

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Religious Employers' Obligations Under State Law – Exclusions of Religious Employers




◦ Mont. Code Ann. § 49-2-101(11) (2021):
"Employer" means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis."

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Moderate Exemptions for Employers



Texas (narrow co-religionist exemption)


◦ Tex. Lab. Code Ann. § 21.109

- (a) A religious corporation, association, society, or educational institution or an educational organization operated, supervised, or controlled in whole or in substantial part by a religious corporation, association, or society does not commit an unlawful employment practice by limiting employment or giving a preference to members of the same religion.
- (b) subchapter B does not apply to the employment of an individual of a particular religion by a religious corporation, association, or society to perform work connected with the performance of religious activities by the corporation, association, or society.

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No Exemptions for Religious Employers




West Virginia

- W. Va. Code § 5-11-3 (2022): "The term 'discriminate' or 'discrimination' means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate."
- While W. Va. Code § 5-11-9 (2022) excludes from discriminatory practices those "based upon a bona fide occupational qualification," this is vague and offers no specific meaningful protection to religious organizations in employment matters.

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Pennsylvania's Exemption



43 Pa. Cons. Stat. § 954:
"The term 'employer' . . . except as hereinafter provided, does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations. The term "employer" with respect to discriminatory practices based on race, color, age, sex, national origin or non-job related handicap or disability, includes religious, fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth."

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Regulatory Freedom

Corporate Law Factors

- Nonprofit Religious Corporation Law
- Standards of Conduct for Directors

Charitable Fundraising Factors

- Charitable Registration Law
- Audit Requirements Pursuant to Charitable Registration

Tax Law Factors

- Corporate Income Tax and Exemptions
- Sales and Use Tax and Exemptions – Nonprofit Sales
- Sales and Use Tax and Exemptions – Nonprofit Purchases
- Property Tax and Exemptions

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Charitable
Registration/Audit
Requirements

Tax Exemptions

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Charitable
Registration
Laws and Audit
Requirements

Charitable registration laws require an organization to register and be approved before the organization can fundraise in the state.

As a condition of maintaining charitable registration, some states require organizations to submit financial statements audited or reviewed by an accountant, which can be an expensive burden.

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Charitable
Registration

No registration requirements

Registration requirements

- Exemption available? Automatic?
- Annual registration dates and documents


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Audit Requirements


States with audit or review requirements, especially those that subject smaller religious organizations to those requirements, can force these organizations to **divert donor funds** from their mission to fulfilling these **burdensome regulatory requirements**.



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Pennsylvania's Charitable Registration Laws



Pennsylvania


"Prior to soliciting donations, charities with more the \$25k in donations per year are required by 10 Pa. Stat. § 162.5 file a registration statement, financial report and required fees (based on annual solicitation amount and ranging from \$15-\$250), unless exempted by 10 Pa. Stat. § 162.6."



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Pennsylvania's Audit Requirements




Pennsylvania
10 Pa. Stat. § 162.5

"With each registration statement filed under this section, a charitable organization must file a financial report for the immediately preceding fiscal year . . . The financial report of every charitable organization which receives annual contributions of \$750,000 or more shall be audited by an independent certified public accountant or public accountant. Every charitable organization which receives annual contributions of at least \$250,000, but less than \$750,000, shall be required to have a review or audit of their financial statements performed by an independent certified public accountant or public accountant."



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Income, Sales, and Property Tax Exemptions

- automatic tax exemptions
- exemptions only upon application
- fragmentary exemptions (or no meaningful exemptions at all)

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Income Tax Exemptions




Pennsylvania
72 Pa. Stat. § 7401 automatically exempts nonprofits as defined under § 501 of the Internal Revenue Code from state corporate income tax as long as it does not have unrelated business income.

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Role of Sales Tax Exemptions


Faith-based nonprofit organizations do not earn income the way a for-profit business does. Since these organizations receive their funds from donors or grants, **many states treat sales and purchases differently than commercial activity.**



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Sales Tax Exemptions



Pennsylvania has a broad tax exemption available for purchases made by religious organizations under 72 Pa. Stat. § 7204. Note that an application is required; the exemption is not automatic for faith-based nonprofit organizations.

Note, however, that the broad exemption covers only purchases by the organization, not sales by the organization.




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Tax Exemptions - Considerations



- automatic tax exemptions
- exemptions only upon application
- fragmentary exemptions (or no meaningful exemptions at all)



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Tax Exemptions - Considerations (Cont.)

- automatic tax exemptions
-  exemptions only upon application
-  fragmentary exemptions (or no meaningful exemptions at all)

NOTE: There is a distinction between exemptions based on 501(c)(3) status and those based on an organization's religious status.

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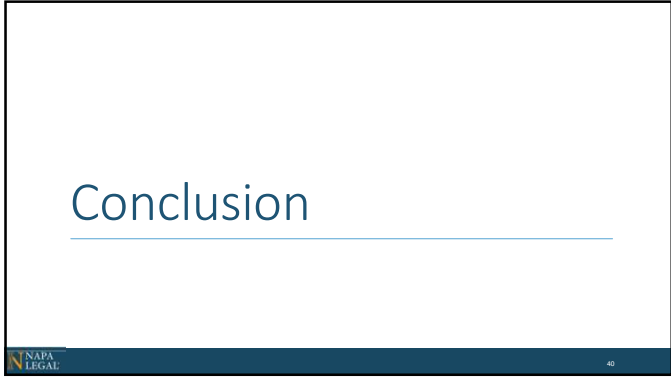
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Question & Answer

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