

FAUX RELIGIOUS PROTECTIONS IN HB300

KEY POINTS:

- No statutory provisions are necessary for religious liberty protections to apply, so the addition of § 5.4 accomplishes nothing. The faux religious liberty section:
- Provides no protections for bodily privacy, women's shelters, or women's athletic opportunities.
- Provides no religious or conscience protections for public accommodations.
- Would not permit religious organizations to hire all their employees based on whether they believe and live consistent with their teachings on human sexuality.
- Provides no housing protections, and would not allow schools to maintain dormitories on the basis of biological sex.

Bills like HB300 purport to provide "protection" for religious liberty, but they do nothing of the sort. Proposed section 5.4 references religious liberty protections already in state law. But that's little comfort if you've been sued for violating HB300 and must spend years and hundreds of thousands of dollars defending yourself.

First, no new statutory provisions are necessary to use religious liberty as a defense. The problem is that once you pass a law that's been used elsewhere to punish good people doing reasonable things, it's likely to punish the same kinds of people in Pennsylvania. If the legislature wants a different result, it must be specific as to what behaviors the law is allowing and what it is forbidding.

Second, religious liberty principles protect against government action; it's unclear whether the protections of section 5.4 help individuals or religious entities in disputes involving claims of discrimination *by private parties*. If not, section 5.4 would not protect religious organizations' ability to hire based on shared religious beliefs and practices related to sexuality and marriage.

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Third, the advocates for adding sexual orientation and gender identity claim that broad religious protections in employment, housing, and public accommodations already exist. On the contrary, there are no religious or conscience protections for public accommodations, like the faith-based adoption agencies or religious wedding service providers. There are no protections for medical professionals who cannot in good conscience give puberty blockers or cross-sex hormones to children, or engage in surgeries to remove healthy body parts to make someone appear more like the opposite sex.

The state supreme courts in both New Mexico and Washington held that the Free Speech and Free Exercise clauses do not protect photographers (Elane Photography) or florists (Baronelle Stutzman). The US Court of Appeals for the Third Circuit held that religious liberty protections would not protect Catholic Charities from being forced out of the foster/adoption care business after laws like this were passed in Philadelphia. (Catholic Charities was forced to take their case all the way to the US Supreme

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Court before their rights were vindicated.)

Unfortunately, laws like Pennsylvania's Religious Freedom Protection Act, 71 P.S. § 2401, *et seq.*, have proven ineffective in protecting those who have been charged with violating non-discrimination laws. Religious freedom laws merely require the government to have a *compelling interest* behind its action. Once a law deems an act to be discriminatory, courts regularly conclude that no religious accommodation should be provided.

See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (finding New Mexico's RFRA inapplicable to a discrimination claim between private parties).

Moreover, Pennsylvania's religious freedom law does not protect corporations, like most businesses involved in the wedding industry. *See* 71 P.S. 2403 (defining a person protected by this act as "[a]n individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation").

Nor do the faux religious liberty protections provide any protections in the area of housing, such as the ability to maintain dormitories in schools or women's shelters based on biological sex.

In the area of employment, HB300 specifically removes protections by adding "sexual orientation, gender identity or expression" to the section of the law that applies to religious organizations' employment practices.

Our nondiscrimination law currently defines "employer" as follows:

The term "employer" includes ... any person employing four or more persons ..., but 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. (emphasis added).

What this ultimately means is that the law is inapplicable *only* to religious groups that *both* receive no government funds *and* have fewer than four employees. Religious organizations with more than three employees are still currently permitted to hire all of their employees based on whether they believe and live according to their shared religious beliefs. However, HB300 would make it illegal for churches, ministries, and schools to hire people who actually believe and live according to the religious organization's teaching on human sexuality and marriage because it adds the terms "sexual orientation, gender identity or expression" into the very section of the bill that applies to religious organizations.