

religious organization may continue to select its own staff in a manner that takes into account its faith, without violating Title VII.

The Charitable Choice provision at section 104(f) of PRWORA as amended (42 U.S.C. 604a(f)) expressly guarantees that a religious organization's Title VII exemption shall not be affected by its participation in or receipt of TANF funds, whether the State or local government directly or indirectly uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to pay for the services.

Comment: One commenter believes that all organizations receiving government funds to provide social services must be subject to consistent levels of government oversight so that standards and regulations pertaining to safety, performance, non-proselytization, quality of care, and financial management are followed.

Response: States are subject to an audit of their TANF programs in accordance with Office of Management and Budget (OMB) Circular A-133 (Audits of States, Local Governments, and Non-Profit Organizations). The audit examines use of Federal TANF and State MOE funds in accordance with applicable cost accounting and financial principles, as well as programmatic principles. The State is responsible for the appropriate use of its Federal TANF and State MOE funds. Therefore, any organization that receives Federal TANF or State MOE funds needs to be able to show to the State and the auditor that it used the funds, whether provided directly or indirectly, for the purpose intended by the State. These requirements are also addressed in our response to comments in Section X below, "Fiscal Accountability."

This is in keeping with the TANF Charitable Choice provision at section 104(h) of PRWORA as amended (42 U.S.C. 604a(h)) and this regulation in § 260.34(h), in which we stipulate that religious organizations receiving Federal TANF or State MOE funds will be subject to audit, just like any other non-governmental organization receiving such funds. Thus, all organizations receiving government funds to provide social services are subject to consistent levels of government oversight.

VII. Employment Practices

Background

In language similar to that in the statute, the proposed rule at § 260.34(d) (now § 260.34(e)) specified that the receipt of TANF or MOE funds does not

affect a participating religious organization's exemption provided under 42 U.S.C. 2000e regarding employment practices. Title VII of the Federal Civil Rights Act of 1964 permits a religious organization to hire employees who share its religious beliefs. This helps enable faith-based groups to promote common values, a unity of purpose, and shared service—thus protecting the religious liberty of communities of faith.

Comment: Several commenters agreed that the proposed rule reflects a proper understanding of civil rights law. When a faith-based organization receives government funding and hires staff on a religious basis, the law is not violated.

Response: We agree with these commenters and have retained the identical language in the final rule. This statutory and regulatory provision of Charitable Choice does not change the status quo; it simply clarifies the applicability of the exemption to the TANF program.

Comment: Several commenters believed that the proposed rule allows employment discrimination in violation of constitutional prohibitions and court decisions that have struck down government-funded discrimination. One commenter explicitly stated that this provision runs afoul of the "no-religious-tests clause" of the Constitution under which "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Response: We do not agree with these commenters. The Equal Employment Opportunity Act of 1972 broadened Title VII of the Civil Rights Act of 1964 to free religious organizations from charges of religious discrimination, regardless of the nature of the job. In 1987, the Supreme Court addressed and unanimously upheld the constitutionality of the 1972 amendment or exemption for religious organizations. In addition, it is well settled that the receipt of government funds does not convert the employment decisions of private institutions into "state action" that is subject to constitutional restrictions such as the "no religious test" clause of the Constitution.

Comment: A number of commenters stated that the exemption from Title VII of the Civil Rights Act was never intended to permit a religious organization to favor co-religionists in hiring when using Federal funds to pay the salaries and wages of employees who are carrying out governmentally-funded social service programs.

Response: We do not agree that these comments accurately portray the law.

Title VII of the Civil Rights Act, which applies to organizations regardless of whether they receive Federal funds, contains an explicit exemption for religious organizations, which allows them to hire, promote, and fire staff on a basis that takes into consideration the organization's religious beliefs and practices without violating Title VII. That exemption is not lost when a faith-based organization receives Federal TANF funds or State MOE funds to provide a secular service. Also, we would note that section 702(a) of the Civil Rights Act of 1964 is permissive. It allows religious staffing, but does not require it. And, religious organizations are subject to Federal civil rights laws that prohibit employment discrimination on the basis of race, color, national origin, sex, age, and disability.

Comment: Several commenters noted that State and local governments have contracting laws that prohibit employment discrimination, beyond the Civil Rights Act of 1964. These commenters asked that the final rule clarify that nothing in the rule is intended to modify or affect any State law or regulation that relates to discrimination in employment.

Response: The Charitable Choice provision at section 104(f) of PRWORA as amended (42 U.S.C. 604a(f)) expressly guarantees that a religious organization's Title VII exemption shall not be affected by its participation in or receipt of TANF funds. Hence, Charitable Choice applies whenever a State or local government uses Federal TANF funds or expends State or local funds claimed to meet the State's MOE requirement to procure services and benefits from non-governmental organizations, or provides clients with certificates, vouchers, or other forms of disbursement that can be redeemed for services in connection with the TANF program. When State or local funds are used to meet the State's MOE requirement, the provisions apply irrespective of whether the State or local funds are commingled with Federal funds, segregated, or expended in separate State programs.

The only exception is found in section 104(k) of PRWORA as amended (42 U.S.C. 604a(k)), which clarifies that the Charitable Choice requirements do not preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations. We do not believe that this "preemption" provision can be interpreted to cover State or local employment discrimination laws. (For a more detailed analysis of the