Indiana Religious Freedom Restoration Act Will Not Be Used as a Tool for Discrimination

By Jane Ann Himsel

On April 2, 2015, the Indiana General Assembly passed, and the Governor signed, an amendment to the controversial new Indiana Religious Freedom Restoration Act (“Indiana RFRA”) that explicitly prevents the statute from being used as a tool for discrimination. The Indiana RFRA, as amended, will become effective on July 1, 2015.¹

What is the Indiana RFRA and why was it Amended?

Indiana Governor Mike Pence signed the Indiana RFRA on March 26, 2015, with the stated purpose of protecting the rights of Indiana citizens to freely exercise their religion without government interference. However, the breadth of the legislation, coupled with commentary from some of those involved in the legislative process, led to nationwide concern that the statute’s actual purpose was to discriminate against the Lesbian, Gay, Bisexual, and Transgender (LGBT) community. In response, numerous Indiana business executives and a wide spectrum of community leaders worked cooperatively with legislators from both political parties to formulate an amendment that would make it clear Indiana welcomes and values everyone.

The amendment to the Indiana RFRA states, in pertinent part:

This chapter does not:

(1) authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service;

(2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service;

¹ The Indiana RFRA is currently available as Senate Enrolled Act No. 101. The amendment is currently available as Conference Committee Report Digest for ESB 50. The statute will be codified at Ind. Code §34-13-9 et. seq. The cites in this article are to the statute as it will be codified.
negate any rights available under the Constitution of the State of Indiana. The amendment defines “provider” as “one or more individuals, partnerships, associations, organizations, limited liability companies, corporations, and other organized groups of persons.” In accord with the religious organization exemptions from federal and state civil right laws, the amendment’s definition of “provider” explicitly excludes churches and other non-profit religious organizations or societies (including affiliated schools). “Provider” also explicitly excludes “a rabbi, priest, preacher, minister, pastor, or designee of a church or other nonprofit religious organization or society when the individual is engaged in a religious or affiliated educational function of the church or other nonprofit religious organization or society.”

What is the Expected Impact of the Amendment?

This amendment means the Indiana RFRA should not have any significant impact on how Indiana employers interact with their employees or recruit new talent to the state. The Indiana RFRA has been restored to its highest and best use: to provide recourse for persons of faith when they come to believe that the State of Indiana or a local government has placed a substantial burden on their right to exercise their religion freely.

A bit of background is useful in attempting to understand the Indiana RFRA. In 1993, Congress enacted the Federal Religious Freedom Restoration Act (“federal RFRA”) in response to the Supreme Court’s decision in Employment Division v. Smith, which involved the use of peyote by Native Americans in religious rituals. Prior to Smith, courts evaluated whether the government had violated a person’s rights under the Free Exercise Clause of the First Amendment to the U.S. Constitution by first asking whether government action placed a substantial burden on conduct motivated by a sincerely held religious belief. If so, the government action could be sustained as constitutional only if the government proved it acted to further a “compelling state interest” and pursued that interest in the manner that least restricted the exercise of religion. Smith eviscerated the “compelling state interest test” by determining the government does not burden an individual’s right to exercise his or her religion freely when it imposes a neutral law of general applicability. A person’s rights under the Free Exercise Clause may be burdened only if government action targets religious beliefs.

Congress enacted federal RFRA to restore statutorily the compelling state interest test. In 1997, the Supreme Court in City of Boerne v. Flores struck down RFRA as applied to state laws. Since then, 21 states have adopted state-level RFRA’s in order to provide protection from state or local governmental infringement on individuals’ rights freely to exercise their religion.

The Indiana RFRA, like the federal RFRA, prevents the government from “substantially burdening a person’s exercise of religion” unless the government is able to demonstrate that application of the burden to the person “is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.” Like the federal RFRA, the Indiana RFRA may be used as either a claim or a defense in an administrative or judicial action to which the government is a party. It may also be used as a claim or

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2 Ind. Code § 34-13-9-0.7.
3 Ind. Code § 34-13-9-7.5.
5 Ind. Code § 34-13-9-7.5(2).
11 Indiana RFRA’s definition of “person” is appears to be crafted to follow the U.S. Supreme Court’s decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Hobby Lobby). In Hobby Lobby, the Court determined that, for purposes of the federal RFRA, the term “person” included for-profit, closely held corporations. The Indiana RFRA specifically defines “person” to include corporations and other entities that “exercise practices that are compelled by or limited to a system of religious belief held by an individual or individuals who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.” Ind. Code § 34-13-9-7.
defense in an action between private parties. If a party raises the Indiana RFRA as a claim or defense in litigation to which the government is not a party, then the government has “an unconditional right to intervene in order to respond to the person’s invocation” of the RFRA. Most important, only the government—not a private party—may be liable for compensatory damages and attorney’s fees.

It is particularly important for employers to know that the Indiana RFRA absolutely will not have any impact on private-sector employment claims. The statute states: “[t]his chapter is not intended to, and shall not be construed or interpreted to, create a claim or private cause of action against any private employer by any applicant, employee, or former employee.”

Local ordinances in Indianapolis/Marion County, Bloomington/Monroe County, Evansville, Fort Wayne, Lafayette, Michigan City, Terre Haute, South Bend, New Albany, and Tippecanoe County currently prohibit discrimination on the basis of sexual orientation in employment, public accommodations, and housing. Indianapolis, Bloomington, Evansville, South Bend, and New Albany also prohibit employment, public accommodation, and housing discrimination on the basis of gender identity. The April 2, 2015, Indiana RFRA amendment ensures that these ordinances will continue to be fully enforceable.

The Indiana Civil Rights Law does not yet prohibit discrimination in employment, public accommodations, or housing on the basis of sexual orientation or gender identity. However, the recognition of sexual orientation and gender identity as protected classes in the April 2, 2015, amendment may be viewed as a step in the direction of more inclusive state-wide civil rights legislation. All Indiana employers seeking to engage in “best practices” should unquestionably continue to include both sexual orientation and gender identity in their non-discrimination policies.

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14 Id.
15 Id.