

The following article is located at: <https://www.churchlawandtax.com/web/2021/august/ministerial-exception.html>



Image: Image: Illustration by Vasil Nazar / Source Images: GettyImages / Flaticon

Part 1 of 4

Applying the Ministerial Exception to Church Employees

Understanding this key legal doctrine, how it works, and when it matters—or doesn't—for specific positions.



Frank Sommerville, Attorney, CPA  Bio

The ministerial exception is a valuable legal protection allowing churches to make internal employment decisions without the fear of government intervention or entanglement.

Yet this legal doctrine is often misunderstood, or worse, misused by churches.

This article aims to help leaders learn how the [ministerial exception](#) does—and does not—apply to employees and properly use it to maximize its effectiveness. Doing so requires developing a working knowledge of the legal doctrine as well as understanding key legal rulings where the exception has applied. Here are two examples that merit mentioning as we begin this article, along with this series, on employment law for churches:

- In January 2012, the United States Supreme Court unanimously decided a teacher could not sue her Christian school employer for violating the Americans with Disabilities Act because her employment met the ministerial exception to employment laws. [*Hosanna-Tabor Evangelical Lutheran Church & School, v. EEOC*, 565 U.S. 171 \(2012\)](#).
- In July 2020, the United States Supreme Court decided two teachers could not sue their Christian school for age discrimination under the Age Discrimination in Employment Act (in one instance) or disability discrimination under the Americans with Disabilities Act (in the other instance) because the teachers' employment met the ministerial exception to employment laws. [*Our Lady of Guadalupe School, v. Morrissey-Berru*, 140 S.Ct. 2049 \(2020\)](#).

Series Overview

This series of articles on church employment aims to give clarity, offer best practices, and encourage tax and labor law compliance in four key areas of church employment:

Part 1 Applying the Ministerial Exception to Church Employees

Part 2 Developing Strong Job Descriptions for Employees and Volunteers

Part 3 Internships: Blessings or Blind Spots?

Part 4 The Importance of a Legally Sound Employee Handbook

Additional Reading: Attorney Richard Hammar analyzes [notable court decisions](#) about common employment disputes.

These landmark decisions validated the concept of the ministerial exception, cementing the doctrine's role in church employment matters.

This first article in my four-part series begins by explaining the concept of religious autonomy and briefly discusses Supreme Court cases that form the basis of the ecclesiastical abstention doctrine, a pioneering legal doctrine supporting religious autonomy. From there, I explain how religious autonomy and the ecclesiastical abstention doctrine paved the way for the ministerial exception.

I then further explore the ministerial exception's scope, describing how courts determine if a job description fits within that scope. I conclude with practical ways to apply the ministerial exception to common departments or employment areas in the church.

My prayer is that church leaders become better educated about the ministerial exception and more readily equipped to use it appropriately for their employment decisions.

Religious autonomy and the ecclesiastical abstention doctrine

The historical concept of religious autonomy is well established in the United States. Referred to in the courts as the ecclesiastical abstention doctrine, this concept is the key to understanding the ministerial exception and its application to employment decisions involving religious organizations, including churches, and certain employees.

Based on the freedom of religion clauses of the First Amendment to the US Constitution, the ecclesiastical abstention doctrine prohibits the government from intruding into religious or spiritual decisions within a religious organization.

All Supreme Court decisions in this area employ a "totality of the circumstances" test to apply the ecclesiastical abstention doctrine rather than focus on a specific set of facts. When weighing whether to apply the doctrine to a church's employment decisions, courts use a specific version of this test called the ministerial exception. With this test, the court applies the totality of the circumstances related to the employment decision to determine whether the government's intrusion into that decision may violate the religious autonomy principle. This principle means that the government must abstain from ordering the church or other qualified religious employer to make a different employment decision with respect to a worker involved in religious or spiritual matters of the employer.

Court decisions paving the way for the ministerial exception

Understanding the history of judicial decisions forming the ecclesiastical abstention doctrine helps explain how the ministerial exception came into existence and has evolved through the present day. The first significant legal ruling establishing the ecclesiastical abstention doctrine dates back nearly 150 years.

In *Watson v. Jones*, 13 Wall. 679 (1872), the Supreme Court found that the government cannot intrude into a church's internal governance unless there is either an allegation of fraud or the court can apply a neutral law to resolve the dispute without considering the beliefs of the church.

Read More

Explore cases [recognizing the ministerial exception](#) and [cases not recognizing the ministerial exception](#) in

Stated another way, churches have the right to govern themselves and make decisions without governmental interference into religious polity. The government cannot become involved in the church's internal decisions because doing so violates the First Amendment.

attorney Richard R. Hammar's *Pastor Church & Law*.

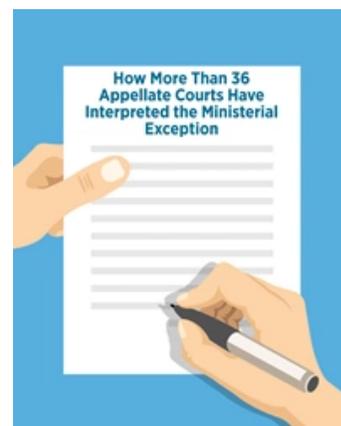
A little more than 100 years later, the Supreme Court reaffirmed this First Amendment principle in *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevic*, 426 U.S. 696 (1976), a case involving a dispute over control of the American-Canadian Diocese of the Serbian Orthodox Church, including its property and assets. Both federal and state courts frequently cite this ruling and *Watson v. Jones* to find that the government cannot intrude into a church's internal decision-making.

These decisions play a crucial role when one considers what unfolded during the 20th century. The federal government began regulating the relationship between an employer and its employees. These employment laws and regulations extend to all employers, including religious employers. By the middle of the century, the courts, out of concern for potential violations of the First Amendment, started applying the First Amendment to employment cases involving religious organizations.

The courts based these decisions on the ecclesiastical abstention doctrine. In 1972, using *Watson v. Jones* as its basis, the Fifth Circuit Court of Appeals applied the ecclesiastical abstention doctrine to prevent the court from considering a claim filed by a minister against her church under Title VII of the federal Civil Rights Act of 1964. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Frequently cited as the beginning of the "ministerial exception" cases in employment law, the court observed:

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

In the nearly 50 years since *McClure*, over 200 lower courts and over 35 appellate courts have considered the ministerial exception when an employee claims a religious organization violated an employment statute. The lower courts have applied the ministerial exception well beyond churches and beyond church-recognized clergy. They have applied the ministerial exception to many positions and virtually every employment law in existence. See the [chart](#) for key details of 36 appellate cases.



Appellate Court Decisions PDF

Scope of the ministerial exception

Frequent errors made by churches

Based on the way courts have shaped the ecclesiastical abstention doctrine, and along with it, the ministerial exception, churches possess broad latitude regarding how they handle their affairs, especially in the realm of

employment. But common errors made by both churches and their professional advisors, including legal counsel, often result in a limited application of the ministerial exception.

Understanding the ministerial exception's true scope can help ensure it retains its effectiveness. And while many advisors worry about the potential over-application of the principles, it is equally (if not more) essential *not* to limit the principles' application. Doing so works only to the detriment of churches.

One of the most common errors involves too narrowly defining who falls under the exception. Churches frequently limit the ministerial exception's application by incorrectly limiting the ministerial exception only to their clergy or recognized ministers. This error arises because church management is already conditioned to treat clergy differently for tax purposes. Those who follow this train of thought do a disservice to the church.

Only licensed, ordained, or commissioned ministers qualify for treatment as ministers for tax purposes, so it seems natural and logical to apply this requirement to the ministerial exception. But the tax law test for treatment as a minister differs from the employment law test. The employment law concept is much broader than the tax concept. No ministerial credential is required for the application of the ministerial exception.

Additionally, the tax law concept is concerned with *the time spent on religious duties*. The employment law concept is more concerned about *the importance of the religious duties*. The ministerial exception may apply to positions throughout the church involved with delivering and disseminating the church's faith and message.

Another common error made by churches involves a mistaken belief that the ministerial exception only applies to specific employment laws. Ministerial exception prevents the application of *all* federal and state employment statutes. No exceptions exist to this rule.

Caution. The ministerial exception does not bar all civil lawsuits against a church by employees who fall under the ministerial exception. All courts have refused to apply the ministerial exception to torts and similar causes of action, enabling them to proceed through the judicial process.

Also, some courts have allowed sexual harassment claims to go forward because they create issues mixed between Title VII (sex discrimination) and torts (invasion of privacy, defamation, intentional infliction of emotional distress, bullying). Also, some courts have allowed claims under Title VII for a hostile work environment despite qualifying for the ministerial exception. The courts have also allowed suits based on sexual misconduct that are brought by employees who, for employment law purposes, would likely qualify for the ministerial exception.

However, it is also worth noting that some courts have applied the ministerial exception to certain breach-of-employment-contract claims because the reason for the breach involves the employee violating the church's religious beliefs. In those situations, the lawsuits are not allowed to proceed.

Lastly, churches also frequently err because they impose higher involvement in religious duties than the law requires. In *Hosanna-Tabor*, the Supreme Court rejected the view that the worker must perform religious duties most of their work time. Instead, churches should focus on the significance of an employee's religious duties. The teacher in the *Hosanna-Tabor* case lead a 15-minute devotion out of a 6-hour instruction day. But she also incorporated the church's teachings into each subject when appropriate. This level of religious activity was sufficient to support the application of the ministerial exception to her.

The “totality of the circumstances” test

Although there is no rigid formula in determining whether the ministerial exception applies to an employee, the courts consider the totality of circumstances by relating the employee’s duties to the church’s religious functions. The courts focus on four areas of inquiry:

1. the employee’s formal title;
2. education or training;
3. the employee’s use of the title; and
4. the “important religious functions” the employee performed. The last factor is the most important.

Frequently, the courts defer to the church’s determination of who qualifies for the ministerial exception. As a result, churches must classify positions as subject to the ministerial exception in their internal documents, such as job descriptions. The courts and government regulators rely on job descriptions as one of the most critical documents in determining whether a position qualifies for the ministerial exception.

A job description must accurately reflect an employee’s position

The church’s definition and explanation of an employee’s role in the life of the church’s activities are important. Job descriptions must accurately reflect the spiritual or religious nature of the position.

Caution. Often, a church copies job descriptions from a secular source, resulting in job descriptions that fail to reflect a position’s spiritual or religious nature. The secular title may not reflect the religious significance of the position, and the educational requirements may not reflect the religious training needed for the job. The job description also will not describe how the position accomplishes the church’s religious mission.

If the job description fails to address the ministerial exception factors, the position, as described, will not qualify for the exception, and the religious employer may be forced to try to prove the ministerial exception applies to the employee by other means or evidence.

Job descriptions and employment contracts should require employees to carry out the church’s religious mission and specify their work evaluations include evaluating their spiritual responsibilities. The church must view the position as playing a vital role in carrying out the church’s mission and state as much in the job descriptions and contracts.

Explicitly stated duties should include assisting others in participating in religious activities, praying with others, and attending church services, as applicable. A job description should also require the individual to perform all duties and conduct their personal lives according to the church’s teachings and practices. Additionally, in most ministerial exception positions, the employee should be leading others to live according to the church’s teachings and practices.

Job descriptions should address the following factors.

The level of religious training required for the position

The courts do not look for a seminary degree. Instead, they focus on what religious education is required for the position. The church may have different educational requirements for different positions.

A youth minister position might require Bible school courses, while the church might require a childcare worker to complete a workbook and Bible class that reflects the church's teachings. The church might believe that completing particular Bible study courses at the church is sufficient.

In other cases, regular attendance at the church over an extended time frame might suffice for the religious training. A new employee orientation class including teachings on the church's beliefs and practices might be appropriate sometimes.

The key concept here is that the job description includes details about the religious training needed for this position and any additional training to maintain the position.

The church's formal title for the employee and the title the employee uses to describe his or her job

The courts and the US Department of Labor (DOL) caution placing too much importance on the title. At the same time, titles frequently play a role in determining whether the ministerial exception applies.

A job title should reflect the position's spiritual responsibilities, and if appropriate, churches should use "Pastor" or "Minister" in the title.

Suppose the employee writes communications to members about the church's activities, beliefs, and practices. An appropriate title might be "Spiritual Communications Director" instead of "Communications Director."

However, the church should also avoid over-spiritualizing position titles. Naming the facilities' employees "Levites" as keepers of the "temple" will not qualify them for the ministerial exception.

Job titles should reflect the position's spiritual or religious duties and responsibilities and reflect how congregants view the position.

Whether the employee must perform job duties according to the church's theological beliefs and standards

Workers carrying out the church's mission should perform their duties consistent with the church's theological beliefs and standards.

For example, suppose the position involves leading a parenting class. In that case, the job description should require the worker to teach the parenting class consistent with the church's theological beliefs and standards. The job description should require the worker to follow biblical standards in parenting his or her children as well.

Since the worker represents the church to the world at large, a church should also require the worker to abide by its teachings on a 24/7 basis. The key concept is that the church's written policies and procedures require the employee to perform duties and to live in agreement with the church's teachings.

Whether the employee's job duties reflect a role in conveying the church's message and carrying out its mission

The job description should describe how the position fits within accomplishing the church's religious mission. It should also include how the position communicates the church's message to its members and those outside the church.

Suppose the position includes drafting messages for the church's social media accounts. In that case, the job description should include how social media communicates the gospel on behalf of the church. It should require the worker to be familiar with the church's doctrine and its practical application. It should require that all posts agree with the church's theological beliefs. It might also require the worker to draft messages that seek to reach the unchurched or those who have drifted from the church.

Whether the employee selects or creates religious content

The job descriptions should provide detailed guidelines for workers who select or author content. The worker need not create content as a preaching pastor does. But the worker might select a religious class curriculum or select content from the pastor's sermons for newsletters or social media, for instance. Such types of creation and selection should be specifically noted and described to demonstrate the responsibilities and requirements intertwined with religious functions.

Caution. Simply selecting content from the pastor's sermons might not be enough to qualify for a ministerial exception. See "Media and communications" below.

Whether the employee is charged with leading others toward maturity in their faith and teaching the church's religious beliefs

If the position involves educating others about the faith or leading others in discipleship training, the job description should explain how the position educates or trains others about the religion. While this factor applies to teachers, it also covers anyone who plays a role in helping other believers understand the church's faith and religious practices. This factor also covers those whose jobs include praying for and with others.

Whether the church periodically reviews the employee's required religious skills and responsibilities

Measuring spiritual tasks can be challenging. Finding ways to measure spiritual tasks objectively can be even more challenging. But the job description should include objective standards for the position's spiritual duties.

The job description should identify the worker's supervisor and the religious skills and performance expected for the position. For example, perhaps the worker must post to social media at least 40 times per day, and at least half of those posts must include a religious value of the church. Or, for example, a director of pastoral care might include a specific number of home visits per week.

Whether the church educates the employee to support its ministry of the gospel

If the church values the worker's religious duties, the church should also find continuing education to improve those religious duties. Nothing prevents the church from creating and hosting continuing religious education classes.

Most churches already require continuing religious education for their pastors. The challenge comes in finding appropriate continuing religious education for positions outside of pastors. For example, the church might require childcare workers to complete an annual course on how to relate the gospel to preschool children.

The bottom line: Minimum continuing education requirements should always be reflected in job descriptions.

Applying the ministerial exception

Churches must intentionally seek to understand and apply the ministerial exception. Since an employee's duties are the core of the analysis, it helps to understand how the concepts may be applied in various church areas and departments.

Administrative support

Administrative support positions would likely not qualify for the ministerial exception. These positions usually do not have independent spiritual duties.

Benevolence

The person in charge of the benevolence ministry can usually qualify for the ministerial exception. Employees who meet and pray with applicants for assistance also usually qualify for the ministerial exception. Those employees with administrative or clerical support functions, however, rarely qualify for the ministerial exception.

Children or youth

The person in charge of children or youth ministries likely qualifies for the ministerial exception since they will be charged with the department's overall spiritual direction.

Department leaders will be directly involved in disseminating a church's religious messages and/or indirectly involved through the selection, creation, or approval of the department's materials and programs.

Other workers may also qualify if they are actively involved in training children or youth in the faith.

Counseling

If counselors must follow the church's teachings and doctrine, they likely qualify for the ministerial exception.

Custodial

Custodial caretakers would likely not qualify. These positions usually do not have independent spiritual duties.

Facilities

The courts have yet to approve a position with only duties related to facilities management. One court approved a position that has facilities responsibilities *in addition to* ministerial responsibilities.

Finance

Digging Deeper

Part 2 in this series takes a deeper look at the topic of [job descriptions](#), creating a framework for analyzing specific positions and helping church leaders explore changes they can make to affect the outcome.

The courts have yet to approve a ministerial exception position in the finance area. It is unlikely a business administrator qualifies for the ministerial exception unless they have religious duties outside the business office.

There may be instances when a finance-related role encompasses duties triggering the ministerial exception. Suppose, for instance, the Pastor of Administration has religious duties, such as teaching a religious class or regularly serving in the pastoral care rotation as a part of the mandated duties. In this case, the position comes closer to qualifying for the ministerial exception.

Again, special circumstances likely must be present with finance-related positions. Any application of the ministerial exception in finance and administration areas should be carefully considered and may require the input of professional advice.

Interns

Interns may qualify for the ministerial exception if they have spiritual duties and responsibilities. If the intern's primary goal is to observe others conducting ministry, he or she likely does not qualify for the exception. If the intern's primary duties support a department, he or she likely does not qualify for the ministerial exception. But if the position has ministerial duties and responsibilities under the supervision of a minister, then the position might qualify for the ministerial exception. For example, the intern who is required to teach specific religious classes or participate in spiritual counseling or pastoral calls may qualify for the ministerial exception.

Media and communications

Departments encompassing media and communications may present some of the most challenging worker classifications for the ministerial exception.

The test looks at the totality of the responsibilities, not only specific tasks. If a position requires the creation or review of media that communicates the church's message, the position likely qualifies for the ministerial exception. If the position repeats a spiritual message created by others, then the position likely does not qualify.

For example, a position that only creates presentation materials to accompany the sermon likely does not qualify. Also, a position that only posts snippets from a sermon on social media likely does not qualify. But a position that selects the snippets from a sermon that best illustrates the church's message and expounds on ways the information furthers the church's message might qualify.

Music and worship

Music is considered a significant avenue through which a church's spiritual goals are accomplished. The person in charge of the music ministry generally qualifies for the ministerial exception because of his or her significant influence over this crucial church programming area.

Individuals in charge of selecting music included in worship services will also likely qualify since music selection constitutes a spiritual message.

Worship leaders also likely qualify for the ministerial exception since they are influential in the spiritual direction of worshipers and the services they attend.

Digging deeper

Part 3 in this series [delves further](#) into the topic of interns and internships.

Vocalists and musicians may not qualify unless they have responsibilities related to content selection. Simply following the leading of a worship leader or choir director does not create a spiritual duty. Likewise, the administrative support positions associated with music and worship rarely qualify for the ministerial exception.

Pastors or ministers

Every person possessing a ministerial credential and conducting typical ministry responsibilities will likely qualify for the ministerial exception. Even if a position does not have a formal minister credential, it will likely qualify if a credentialed minister typically fills it. Typical ministry responsibilities include preaching and teaching, creating spiritual messages, and the congregation's pastoral care.

The church usually looks at the executive pastor as one of its spiritual leaders, frequently requiring a ministerial credential. But some executive pastors only have management or operational duties. If so, the church should carefully scrutinize the job description to include any actual or expected religious duties. Frequently, executive pastors act as a pastor to the staff, so their spiritual responsibilities lie toward the staff instead of the members. The job description should reflect that responsibility.

Schools and daycares

The person in charge of the church-operated school or daycare usually qualifies for the ministerial exception, provided they are responsible for the school's spiritual direction and involved in selecting and/or approving the weaving of the spiritual teaching into the educational instruction.

Teachers with mandatory spiritual duties and responsibilities also usually qualify. Teachers who teach only secular subjects and have no responsibility to train the students spiritually rarely qualify.

School guidance counselors usually qualify if required or expected to include a spiritual component to their counseling duties. Administrative or clerical support positions rarely qualify for the ministerial exception, though.

Never underestimate the importance of applying the ministerial exception

The ministerial exception is available to every religious organization and likely applies to some positions in every church.

While this article describes some of the analysis, each church should engage a knowledgeable human resources professional or employment law attorney to correctly classify positions that do not easily fit within the exception.

Every church should engage an employment law attorney if any employee files a complaint with a state or federal employment regulatory agency.

If a DOL examiner asks to audit a church's compliance with employment laws, the church should engage a competent employment law attorney to represent it.

The bottom line: The ministerial exception offers important legal protections to churches. Its well-developed history, starting with the First Amendment of the Constitution and continuing through numerous decisions made by the Supreme Court and federal courts, reinforces the doctrine's validity and value. Churches do well to

understand its unique history and its comprehensive scope, and then use it effectively for positions carrying spiritual functions and responsibilities.

Reviewing the ministerial exception's applications is a church's first line of defense in any complaint lodged by an employee or a regulatory agency. It should be done long before any sign of trouble ever arises.

Through careful assessments of positions, titles, and job descriptions, leaders can avoid common errors, limit legal vulnerabilities, and maximize protections their churches are rightly entitled to receive.

The author thanks CPA [Elaine Sommerville](#) for her useful comments and edits to this article.

Return to [series](#) home page.

Frank Sommerville is an attorney and shareholder in the law firm of Weycer, Kaplan, Pulaski & Zuber, P. C. in Houston and Dallas, Texas, and an Editorial Advisor for Church Law & Tax.

This content is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. "From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations." Due to the nature of the U.S. legal system, laws and regulations constantly change. The editors encourage readers to carefully search the site for all content related to the topic of interest and consult qualified local counsel to verify the status of specific statutes, laws, regulations, and precedential court holdings.