

## Christmas and the First Amendment

Some employees have raised concerns that the County of Tulare's policies regarding Christmas may be impacting upon their first amendment rights. Because expressions relating to Christmas may be an exercise of religious expression relating to the certain Christian denominations, the County must address them. While County Counsel analyzes each instance on a case by case basis, the rule under the Establishment Clause is that the County of Tulare cannot "favor" any religion, therefore any act undertaken on behalf of the County, or by its employees in the workplace cannot create the reasonable impression that the County is sponsoring, endorsing or inhibiting a religion generally, or favoring or disfavoring a particular religion. It may help to conceptualize that it is "County speech" that must be addressed, in addition to concerns regarding general workplace efficiency, including advocating an environment of courtesy and respect among co-workers, free from harassment and discrimination.

Employees do have certain free speech rights within the workplace, and the County will not limit those speech rights based on the fact the speech is religious in content, just as it would not limit "political" speech based on content. The County's concern is impact on the workplace, regardless of the content of the speech.

The basic concepts of the free speech right to religious expression in the workplace also apply to expressions related to Christmas and those are that the County of Tulare permits small expressions of religious devotion or expression by employees in the workplace, so long as the County's interests do not outweigh that, or so that the expression does not intrude on the legitimate rights of other employees.

**Private Work Areas Not Open to the General Public:** County Counsel has instructed in Sexual Harassment & Discrimination training in both Supervisory Academy and in mandatory AB 1825 harassment and discrimination training that employees may exercise small expressions of religion in their private workspace. Thus the topic has been widely addressed with employees, and the general rules need only to be applied in the specific context of Christmas. If the County wanted to restrict religious expression in the workplace, it would need to restrict other non-religious office decoration, because the County cannot favor or disfavor religion.

- For example, employees may hang a cross, have a bible openly displayed (but not reading it on work time), and some agencies tolerate screen saver religious messages.
- Regarding Christmas expressions in private workspaces, the County would allow small Christmas trees or a crèche (nativity scene) just as it would allow other religious displays such as a menorah.

**Religious Expression in Dress and Grooming:** Some religions require persons to dress or groom themselves in a particular way. The County would not interfere with such religious expression. Although not required by their religion, some persons may choose to engage in religious expression at work.

- For example, an employee may choose to wear religious items such as a cross necklace which would not interfere with the person's job duties.

- Regarding Christmas, an employee may choose to wear a Christmas sweater, a Christmas tie, a Christmas tree pin or the like, and a county employee wearing such “religious” dress or decoration could wait on a member of the general public without there being much risk that the public would view this as the County’s endorsement of a particular religion. In fact, an employee could be wearing such seasonal dress without intending an expression of religion.

**Among Co-Workers:** Employees can engage in religious expression among each other to the same extent they can talk about other non-religious things, subject to reasonable work restrictions, meaning the expression cannot interfere with their work, including work efficiency. The concept of “among” implies everyone in the group is consenting to the religious expression. If we wanted to restrict such religious speech, we would need to restrict all other non-religious private expressions or we would be disfavoring religion.

- For example, we allow prayer groups in break rooms so long as the expression does not unreasonably intrude on others entitled to use the same space.
- Regarding Christmas, a group of employees could continue its annual tradition of Christmas Caroling so long as it is non-obtrusive and non-religious.

**Directed At Co-Workers:** When the religious speech is not among consenting co-workers, the speech could be unwelcome or offensive to others, and if it is, then the employer may restrict it. County Counsel should be consulted on such matters, particularly if they involve an employee who is 1) proselytizing and claiming their faith requires it, 2) when the speaker is a direct line supervisor or 3) when the speech, because of time, place or manner, may amount to harassment.

We encourage employees to advise the other person in a polite manner that the conduct is unwelcome. Once the speaker is so advised, or even if it should be reasonably clear that the other person does not welcome the religious speech even if they don’t object, the employee is “on notice” that the speech is unwelcome, and thus may not continue in the speech. This is both consistent with law and county policy regarding courtesy and respect to other co-workers in the office.

The County of Tulare is committed to providing a work environment free from harassment and discrimination. Once the employee is “on notice,” if he or she then continues the unwelcome religious speech, the employee may be engaging in illegal harassment or discrimination. A religious hostile work environment is one where an employee is subjected to unwelcome religious expression that is “severe or pervasive.” Whether religious expression by one employee creates a hostile work environment for another depends on many factors including frequency, duration of time over which it happens, and the severity conduct. Even if the unwelcome speech does not rise to the level of illegal religious harassment or discrimination, however, the County may deem the conduct to be a violation of Personnel Rule No. 12, Rude & Discourteous treatment subjecting the speaker to discipline. Thus, employees should take care to assure their expressions of religion are personal and private expressions, or if within the context of a group, among consenting co-workers, to avoid impinging upon the rights of others.

- For example, during break, a Christian approaches a Muslim co-worker politely inviting the person to attend religious services at her Church, and perhaps politely discussing why the Muslim employee should explore or embrace Christianity. While done in a polite

manner, the Christian may be offending the Muslim and if so told, or if a reasonable person would be able to tell by the Muslim's response that the overture is unwelcome, then the Christian should not extend this invitation a second time.

- Regarding Christmas, an employee could say "Merry Christmas" to another co-worker. If, however, the other person objects or appears to not welcome this holiday expression, the employee should not repeat the greeting to that person.

**Expression in Areas Open to the General Public:** The "County of Tulare" cannot endorse or disfavor religion, so in other words, the County's expressions must be religion-neutral. The County is not a person, so it only acts by the acts of its employees. Therefore, employees may not engage in private expressions of religion which the general public would not reasonably understand is not a County endorsement of a particular religion or religious point of view.

- For example, if an employee's workspace was an area open to the general public, religious expression would be prohibited or curtailed, depending on the circumstances.
- A Christmas tree decorated in a non-religious manner may be placed in the public reception area of a particular office. As an example, however, of the interplay between religious expression versus religious tolerance, some offices have broken their tradition of having a Christmas tree upon learning their staff included a person whose religion prevented such celebrations. Note that if a department allows a Christmas tree, however, it must also allow artifacts relating to other religions to be displayed, so that one religion is not favored.
- Regarding "Merry Christmas", it has been County practice to avoid having statements in County documents, fliers, newsletters, referencing "Christmas" or referencing other circumstances which had religious connotations as such was offensive to some persons. Therefore, employees cannot post a banner in the lobby stating "Merry Christmas" nor include such greetings in a GroupWise email message or on their voice mail. We do note, however, that the County refers to the December 24<sup>th</sup> holiday as Christmas Eve and the December 25<sup>th</sup> holiday as Christmas Day.

**Supervisors:** In engaging in religious expression, supervisors may not do so in a manner in which it appears that they are requiring subordinates to engage in, or refrain from engaging in certain activity. Just as in the area of sexual harassment, a person with supervisor authority may not, either implicitly or explicitly make an employee engage in a religious activity, or refrain from doing so, as a term or condition of employment. Thus, Supervisors may engage in religious expression but it must be clear it is a purely personal expression, consistent with the foregoing.

**Holiday Gatherings:** Many departments schedule holiday parties at this time of year. (The following does not address funding.)

**Department Christmas Party:** A department may not sponsor an official "Christmas" party because this singles out some employees (certain Christian denominations) for differential treatment to the exclusion of others (religious discrimination) and may create the impression that the County is endorsing Christianity (violating the Establishment Clause of the U.S. Constitution). Thus such a party should be an inclusive "winter holiday party" to survive scrutiny.

Individual Employees Christmas Party: There is not a strict prohibition against individual employees gathering together and having a Christmas party in acceptable areas of the workplace unrelated to any official office party. Just as a group of consenting employees can have a prayer group, a group of individual employees may have a Christmas party on work premises, on their personal time. Legal issues only arise if the individual employees' Christmas party is planned or occurs in a manner which may infer it is a department or county-sponsored party. Such a party must be clearly separated from the County.

Specifically, there are many factors to consider including but not limited to things such as venue (where the event will be held), whether any party organization is done on county time, and how people are invited. GroupWise sent invites, or invitations drafted on County equipment, printed on and copied on County purchased paper, disseminated to employees who are working, or hung in areas other than the "office bulletin board" would all be impermissible. Another factor to consider is office coverage and whether that would fall to a non-Christian being the one person not attending. If the office requires phone coverage, it may be argued that the employer is discriminating based on religion.

Of course, the other issue involved in a Christmas party is the fact it will exclude co-workers and that may have carry-over impact on the workplace. While the laws regarding harassment and discrimination address issues such as being inclusive and practicing tolerance of others in the course and scope of employment, these laws do not address off duty conduct such as an individually-organized Christmas party. Realistically, however, if rather than having a group holiday party, individual employees break off to have a Christmas party, the off-duty impact may be the exclusion of a very few or perhaps even one co-worker. Upon returning to work, these sentiments may give rise to conduct that may be argued to be retaliation based on religion even though the triggering factor (the Christmas party) occurred off duty.

If you have any question, please contact County Counsel at 636-4950.