

LEGAL UPDATES

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## Update on Clergy Housing Allowance

### Background

### Service

Nonprofit  
Organizations &  
Religious Institutions

### Professionals

BRUCE G. ARNOLD  
MILWAUKEE:  
414.978.5501  
BRUCE.ARNOLD@  
HUSCHBLACKWELL.COM

JORDAN T. AULT  
JEFFERSON CITY:  
573.761.1123  
JORDAN.AULT@  
HUSCHBLACKWELL.COM

On October 6, 2017, Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin issued an order declaring that the tax-free housing allowance for ministers violates the U.S. Constitution. The order declared that 26 U.S.C. § 107(2), which excludes from the gross income of a “minister of the gospel” a “rental allowance paid to him as part of his compensation,” violates the establishment clause of the First Amendment to the U.S. Constitution. Despite the statutory language, the IRS has interpreted the term “minister of the gospel” to encompass religious leaders outside of the Christian context.

The Freedom From Religion Foundation Inc., along with some of its officers, brought the lawsuit to challenge Section 107(2) on the ground that it discriminates against secular employees and violates both the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. The plaintiffs also challenged Section 107(1), which excludes from a minister’s gross income “the rental value of a home furnished to him as part of his compensation,” but the court dismissed this challenge for lack of standing.

For a more thorough analysis of the earlier Order, see our analysis [here](#).

### Judge Crabb’s Final Order

Following supplemental briefing by the parties, Judge Crabb issued a final order on December 13, 2017. Judge Crabb agreed with the parties and declined to issue an injunction expanding the scope of Section 107(2) or directing the IRS to do so, reasoning “there are multiple ways that the statute could be rewritten and that task should generally be left for Congress.” The court also agreed that the earlier Order does not require the court to invalidate Section 107(1).

Judge Crabb agreed with all parties that an injunction nullifying Section 107(2) is an appropriate remedy, and that such injunction should be stayed pending resolution of any appeals. Plaintiffs argued that the injunction should be enforced immediately upon resolution of any appeals, while defendants and intervenors asked that injunctive relief be stayed for 180 days after the resolution of any appeals. The court sided with defendants: “[I]n light of the substantial changes to tax policy and administration that will occur upon enforcement of the injunction, it is appropriate to stay injunctive relief until 180 days after the final resolution of all appeals. The additional time will allow Congress, the IRS and affected individuals and organizations to adjust to the substantial change.”

The final order declares that Section 107(2) violates the establishment clause of the First Amendment and enjoins defendants from enforcing Section 107(2). “The injunction shall take effect 180 days after the conclusion of any appeals filed by defendants or intervenor-defendants or the expiration of defendants’ or intervenor-defendants’ deadline for filing an appeal, whichever is later.” Notably, the injunction is not limited to the State of Wisconsin; it appears that Judge Crabb intends for her order to have a national reach.

### **What This Means to You**

For now, religious institutions that provide a housing allowance pursuant to Section 107(2) will see no change. Judge Crabb’s order will be appealed, and a decision by the Court of Appeals for the Seventh Circuit is not expected for several months. It is unclear whether the Seventh Circuit will consider the substance of Judge Crabb’s decision or again vacate the judgment on procedural grounds. Should the Seventh Circuit rule on the substance of Judge Crabb’s decision, there is a strong chance the case will be appealed to the U.S. Supreme Court, meaning a final decision could be years in the future.

Religious leaders and administrators would be wise to be alert to further developments, both with the pending litigation and, if Judge Crabb’s ruling is upheld, on the legislative front. The December 13 order offers some breathing room, allowing administrators 180 days following appeals to, in Judge Crabb’s words, “adjust to the substantial change.” Because Judge Crabb rejected the challenge to Section 107(1), this Order has no effect on religious leaders who receive a parsonage.