

California's Workplace Religious Freedom Act Lowers Bar for Employees in Religious Discrimination Cases

Date: 1.11.2013

Since both the California Department of Fair Employment and Housing and the federal Equal Employment Opportunity Commission have reported a significant rise in religious discrimination cases in 2011 and 2012, Assembly Bill 1964, otherwise known as the California Workplace Religious Freedom Act of 2012 ("WRFA"), amending the California Fair Employment and Housing Act ("FEHA"), has attracted much attention. The amendments went into effect on January 1, 2013. They prohibit discrimination on the basis of religion (or religious creed) and require accommodation of employees' religious practices and observances.

The WRFA:

- 1) Specifies that, for purposes of employment discrimination law (including accommodation), "religious belief or observance" includes religious dress and grooming practices.
- 2) Provides that an accommodation for religious practices is not reasonable if it requires segregation of an employee from customers or the general public.
- 3) Clarifies that "undue hardship" for purposes of religious and disability accommodation requires a more stringent showing than the often-used federal *de minimis* standard.

Overview of Religious Discrimination Law

The FEHA has long prohibited employers from discriminating against applicants or employees on the basis of religious creed. "Religion" and "religious creed" are broadly construed to encompass virtually all aspects of religious belief or religious practices. The protections of the FEHA apply not only to more traditional, commonly recognized religions, but also to less commonly observed belief systems as long as they are "sincerely held" by the adherent.

The FEHA also requires employers to make reasonable accommodation for applicants' or employees' religious practices, unless doing so would cause an undue burden on the employer.

Confusion Created by Federal Law

There are relatively few reported religious discrimination cases under the FEHA. Therefore, California employers and employment law practitioners have looked to federal cases under Title VII for guidance. The WRFA was enacted, in part, to address lower standards and perceived inconsistent rulings under federal law. Thus, federal religious discrimination cases will have only limited application in California, because the after WRFA, California law clearly is more protective of employee rights.

Expanding "Religious Belief or Observance"

The WRFA provides explicit clarification that religious dress and religious clothing are included within the definitions of "religious belief" and "religious observance." Employers should bear in mind the expansive protection

of religion and religious beliefs under the WRFA — “religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice, including religious dress and grooming practices.

The WRFA provides that religious dress should be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance of a religious creed. The WRFA also provides that religious grooming includes all forms of head, facial, and body hair that are part of the observance of a religious creed.

Accommodations Requiring Segregation are Not Reasonable

Reasonable accommodation may include job restructuring, reassignment, modification of work practices, or allowing time off to avoid a conflict with an employee’s religious observances. The WRFA is clear that an accommodation for an employee’s religious dress or grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public. For example, if an employee works in a position where he or she has regular interaction with the public, the employer may not force the employee to accept an accommodation for a religious dress or grooming practice that involves moving the employee to another position that prevents him or her from interacting with the public. This provision in the law responds directly to a 2002 case in which a Sikh man who wore a turban as required by his religious faith was segregated from public view. Under the WRFA, such a practice would be unlawful.

Clarifying Undue Burden Exception

Both the FEHA and Title VII provide that an employer does not have to accommodate an employee’s religious belief or observance if doing so would constitute an “undue burden.” Unlike the standard in disability accommodation cases, employers can meet the “undue burden” standard in federal religious discrimination cases by showing the accommodation would result in minimal additional costs or other *de minimis* burden on the employer. A 1997 California case suggested that the same *de minimis* standard would apply in religious accommodation cases under California law.

The WRFA raises California’s “undue burden” standard to where the action of accommodating the employee requires *significant* difficulty or expense, when considered in light of the following factors, among others:

- (1) the nature and cost of the accommodation needed;
- (2) the overall financial resources of the facilities involved, the number of persons employed at the facility, and the effect on expenses and resources or on the operation of the facility;
- (3) the overall financial resources of the company as a whole;
- (4) the type of operations of the company; or
- (5) the geographic separateness of the facility.

In other words, the WRFA applies the same standard for religious accommodation cases as in other types of accommodation cases under the FEHA.

Generally, an employer can meet the undue burden test more easily where the religious practice or the requested accommodation presents a legitimate safety concern. However, where the issue is related to appearance or dress standards, the undue burden standard will be more difficult to meet.

What It All Means for Employers

Stricter legal standards often result in increased litigation. Many expect the WRFA to result in an increase in religion-based employment claims. To help minimize the risk of such claims, employers should consider reviewing their policies and practices to ensure they comply with the WRFA. As with disability accommodations, once an

employer is placed on notice that an employee may need an accommodation, the burden is on the employer to make an individualized, fact-specific inquiry to determine whether a reasonable accommodation can be granted in the specific situation at issue.

Jackson Lewis attorneys are available to answer questions about this and other workplace developments. Please contact Partner Jamerson "Jamie" Allen in San Francisco, at (415) 394-9400 or AllenJ@jacksonlewis.com, Partner Cindy Filla in Los Angeles, at (213) 689-0404 or FillaC@jacksonlewis.com, Associate Jerry Deschler in Sacramento, at (916) 341-0404 or DeschleJ@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

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