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## The Workplace Religious Freedom Act: Higher Standards in 2013

By Catherine E. Wise

The religious practices and beliefs of California residents are as varied as the state's ever-changing landscapes and climates. According to one survey, almost half of California's residents say that religion is "very important" to them.<sup>1</sup> And, although Californians generally are known for their tolerance, that acceptance of differences may not come so easily when it concerns religious practices.

In 2011 and 2012, the California Department of Fair Employment and Housing (DFEH) and the federal Equal Employment Opportunity Commission (EEOC) reported a significant rise in the filing of administrative charges for religious discrimination. Many of these religious discrimination claims included complaints that the employer failed to fulfill its duty to reasonably accommodate an employee's religious belief, practice, or observance. As a result of these complaints and a growing concern about religious freedom, the state legislature passed the California Workplace Religious Freedom Act (WRFA), which went into effect on January 1, 2013.

### CONFUSION CREATED BY FEDERAL LAW

Even before the WRFA was enacted, the Fair Employment and Housing Act (FEHA) protected an individual's right to enjoy employment without suffering discrimination because of his or her religious creed. However, since relatively few religious discrimination cases under FEHA appear in the official reports, California employers

and employment law practitioners looked to federal cases for guidance. Unfortunately, the federal cases sometimes produced conflicting results.

The most common religious accommodation requests involve dress and/or grooming standards, work schedules, and religious practice or expression at work. Both 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 could meet the "undue burden" standard in federal religious discrimination cases by showing the accommodation would result in minimal additional costs or other *de minimis* burdens on the employer.

For example, in 2009, the United States Court of Appeals for the Third Circuit held that the City of Philadelphia established it would pose an undue hardship to accommodate the wearing of a traditional religious headpiece by a Muslim police officer while in uniform, in contravention of the department's dress code policy.<sup>2</sup> However, a U.S. district court in Illinois came to the opposite conclusion concerning an airline's dress code policy. In that case, the airline's dress code prohibited its passenger service agents from wearing hijabs<sup>3</sup> for the reason that customers might fear the agent was sympathetic to terrorists. The court found that the perceived customer "fears" did not amount to an undue hardship under Title VII. Thus, the airline was required to accommodate

the agent by allowing her to wear a hijab.<sup>4</sup>

Because practitioners often cited to federal case law in their pleadings and briefs, California courts tended to apply the federal court's *de minimis* standard to FEHA's religious discrimination section, instead of the "significant difficulty or expense" standard set forth in the California statute.<sup>5</sup>

### THE WRFA

The WRFA was enacted, in part, to address the difference in accommodation standards between federal and state law, and perceived inconsistent rulings under federal law. The WRFA prohibits discrimination on the basis of religion (or religious creed) and requires accommodation of employees' religious practices and observances.

### EXPANDING "RELIGIOUS BELIEF OR OBSERVANCE" AND "RELIGIOUS DRESS"

The WRFA provides express clarification that religious dress and religious clothing are included within the definitions of "religious belief" and "religious observance."<sup>6</sup> 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.

Under the WRFA, "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.

**REASONABLE  
ACCOMMODATION  
REQUIRED; SEGREGATION  
IS NOT A REASONABLE  
ACCOMMODATION**

The WRFA requires employers to make reasonable accommodations in relation to employees' religious beliefs and observances, including job restructuring, reassignment, modification of work practices, or allowing time off to avoid a conflict with an employee's religious observances.<sup>7</sup> If the accommodation requires segregation of the individual from other employees or the public, it is not reasonable. 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, absent proof of undue burden.

**CLARIFICATION OF THE UNDUE  
BURDEN EXCEPTION**

Under the WRFA, California employers must demonstrate "significant difficulty or expense" for an undue burden to exist<sup>8</sup>—a standard identical to the undue burden requirements in disability accommodation disputes under the FEHA. Whether an undue burden exists is 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,

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- 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; and
- (5) the geographic separateness of the facility.

Because of the WRFA, which is more protective of employee rights than federal law, federal religious discrimination cases will have only limited application in California going forward.

**WHAT IT MEANS FOR  
EMPLOYERS**

An employer in California generally can meet the undue burden test if the religious practice or the requested accommodation presents a safety concern. However, if the issue is related to appearance or dress, the undue burden standard will be more difficult to meet.

Stricter legal standards often result in increased litigation. Many expect the WRFA to result in an increase in religion-based employment discrimination 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. ☞

**ENDNOTES**

1. Helfand, Duke, "State has a relaxed view on religion – Survey finds Californians are less certain about the existence of God than others in the U.S." The Los Angeles Times (June 24, 2008).
2. *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009).
3. A veil covering the head often worn by Muslim women.
4. *EEOC v. American Airlines*, Civil Action No. 02-C-6172 (N.D. Ill.) (Order of Resolution filed September 3, 2002).
5. *Soldinger v. Northwest Airlines, Inc.*, 51 Cal. App. 4th 345, 371-73 (1996).
6. Cal. Gov't Code § 12926(p).
7. Cal. Gov't Code § 12926(o).
8. Cal. Gov't Code § 12926(t).