

# **Workplace Religious Freedom Act of 2007**

## **Information Packet**

**ORGANIZATIONS SUPPORTING  
THE WORKPLACE RELIGIOUS FREEDOM  
ACT**

Agudath Israel of America  
American Jewish Committee  
American Jewish Congress  
Americans for Democratic Action  
Anti-Defamation League  
Baptist Joint Committee on Public Affairs  
Bible Sabbath Association  
B'nai B'rith International  
Central Conference of American Rabbis  
Christian Legal Society  
Church of Scientology International  
Council on Religious Freedom  
Family Research Council  
Friends Committee on National Legislation  
General Board of Church and Society,  
The United Methodist Church  
General Conference of  
Seventh-day Adventists  
Guru Gobind Singh Foundation  
Hadassah - WZOA  
Institute on Religion and Public Policy  
The Interfaith Alliance  
International Association of  
Jewish Lawyers and Jurists  
International Commission on Freedom of  
Conscience  
International Fellowship of  
Christians and Jews  
Islamic Supreme Council of America  
Jewish Council for Public Affairs

Jewish Policy Center  
NA'AMAT USA  
National Association of Evangelicals  
National Council of  
the Churches of Christ in the U.S.A.  
National Council of Jewish Women  
National Jewish Democratic Council  
National Sikh Center  
North American Council for  
Muslim Women  
North American Religious Liberty Assoc.  
Presbyterian Church (USA)  
Rabbinical Council of America  
Republican Jewish Coalition  
Sikh Council on Religion and Education  
Sikh American Legal Defense and Education Fund  
(SALDEF)  
Southern Baptist Convention,  
Ethics and Religious Liberty Commission  
Traditional Values Coalition  
Union of American Hebrew Congregations  
Union of Orthodox Jewish Congregations  
United Church of Christ  
Office for Church in Society  
U.S. Conference of Catholic Bishops  
United Synagogue of Conservative Judaism

# Coalition for Religious Freedom in the Workplace

1156 Fifteenth Street NW  
Suite 1201  
Washington DC 20005

Phone 202-785-4200  
Fax 202-785-4115

While many of America's employers respect the religious diversity of their workforce, and take reasonable steps to accommodate employees' religious practices, there are, unfortunately, exceptions. All too often, a supervisor refuses to take steps to accommodate employees' religious practices, even when it is well within his or her ability to do so. This paper contains seven brief examples of cases in which ordinary Americans have suffered in extraordinary ways because their employers refused to take simple steps to respect their religious faith.

## **Amric Singh Rathour, Traffic Enforcement Agent**

Mr. Amric Singh Rathour, a practicing Sikh, was sworn in as a new officer in the New York Police Department on June 18, 2001. During the eight-weeks of training that followed the swearing in, Mr. Rathour's supervisor requested that he shave his beard and remove his turban. When Mr. Rathour refused to compromise the tenets of his faith that require men to wear turbans and beards, he was fired. In contrast, the D.C. Metropolitan Police Department is not only willing to make the appropriate religious accommodation for Sikhs, but has actively encouraged Sikh Americans to become officers. Similarly, police forces in the United Kingdom, Canada and many other nations around the world accommodate Sikhs by permitting them to wear beards and turbans while serving as officers.

## **Teri Strickland, Personnel Manager**

Ms. Teri Strickland, a member of the Seventh-day Adventist Church, worked for a temporary personnel placement agency located in Oklahoma City. Her supervisor was aware that she, like all Seventh-day Adventists, kept the Sabbath by resting from non-humanitarian work from sundown Friday until sundown Saturday each week. One Saturday, her supervisor called and requested that she come in to work on a project. Ms. Strickland replied that she would be happy to come into work after sundown, but due to her religious convictions, she could not come in before that time. The supervisor became upset and informed Ms. Strickland that if she didn't come in, she would be fired. After being fired, Ms. Strickland struggled to find a new position. She did some part-time bookkeeping, and eventually turned to cleaning homes and selling her plasma to make ends meet. During this time, she completely depleted her savings and lost her home.

## **Zeinab Ali, Receptionist**

Ms. Zeinab Ali, a practicing Muslim, worked as a receptionist for Alamo Rent-A-Car. In accordance with her religious faith, Ms. Ali wore a headscarf. Ms. Ali was asked by her supervisor to remove the headscarf. Rather than removing the scarf altogether, Ms.

Ali replaced the scarf with a smaller head covering. After a protracted period of negotiations over the headscarf issue, Ms. Ali was laid off. Her efforts to gain legal redress have failed.

### **Peter Howard, Warehouseman**

Mr. Peter Howard worked in the warehouse of Haverty Furniture Companies. A number of years after he began his employment with Haverty, Mr. Howard was ordained as a Methodist minister. On two occasions, Mr. Howard was forced to miss work because of his ministerial duties. On the second occasion, one of Mr. Howard's parishioners died, and the funeral was set for a Saturday. Mr. Howard asked on Thursday to have the Saturday off so that he could perform the service, and was told to wait until Friday for a response. On Friday at 5:00 pm, the supervisor told Mr. Howard he could not take Saturday off to fulfill his religious duties. Mr. Howard went ahead and conducted the funeral, but when he returned to work he was fired.

### **Michael Escoffery, Delivery Van Driver**

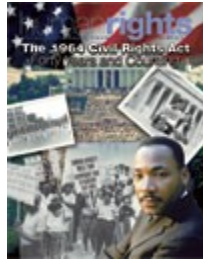
Mr. Michael Escoffery, a Rastafarian, worked as a driver for FedEx. As a Rastafarian, Mr. Escoffery wears his hair in dreadlocks. FedEx maintained a tight personal appearance policy that did not include exemptions applicable to the Rastafarian hairstyle. When Mr. Escoffery was asked to cut his dreadlocks, he refused. FedEx fired Mr. Escoffery in May of 2001.

### **Teresa George, Hardware Store Employee**

Ms. Teresa George, a Roman Catholic who is convicted that she should not work on Sundays, worked for Home Depot. She communicated her religious conviction to her supervisor. Her employer offered to permit Ms. George to have time off on Sundays to attend Mass, but refused to accommodate her need to spend all of Sunday in rest and spiritual reflection. When Ms. George remained steadfast in her religious conviction, Home Depot refused to explore possible accommodations and fired her.

### **Richard Katz, Repair Technician**

Mr. Richard Katz, an Orthodox Jew, applied to work as a repair technician with Sears. Mr. Katz received high marks on the employer's test, but was told he would not be hired because he would not work on his Sabbath. Mr. Katz offered to work on Sunday nights instead of Saturdays, but this offer was rebuffed. Sears consistently told Mr. Katz that the reason for its refusal to hire him was that Saturday was the busiest day for repair technicians. Later investigations established that in fact Saturday was not the busiest day.



## **Reconciling Faith and Livelihood**

### **Religion in the Workplace and Title VII**

By Richard T. Foltin and James D. Standish

Between 1992 and 2003, claims of employment discrimination based on religion jumped some 82 percent. To put this remarkable rise in perspective, during the same period, claims involving race dropped by 3.5 percent. This troubling trend in the treatment of faith in the American workplace deserves close examination.

Many employment discrimination claims based on religion involve instances in which employers refuse to provide an accommodation for an employee's religious practices. The three primary problem areas tend to arise out of conflicts between work requirements and holy day observance (weekly Sabbaths and annual holy days like Christmas, Easter, and Passover), religious garb requirements (turbans, scarves, and yarmulkes), and religious grooming requirements (beards, dreadlocks, and so on). Some claims arise, but with less frequency, out of conflicts between religious faith and a specific assigned duty.

It is not only members of small or poorly understood faiths who experience difficulties in the American workplace. Cases coming before the courts have included, among others, Roman Catholics denied time off on Christmas Day and Evangelical Christians denied time off to attend church on Sundays. Other cases have involved employers who require Sikh employees to remove their turbans, fire Jews and Seventh-day Adventist Christians for refusing to work on Saturdays, reassign Muslim women wearing headscarves to keep them out of sight of customers, and attempt to force Rastafarian employees to cut their dreadlocks.

What is driving the upsurge of religious discrimination in the workplace? Those working extensively in the field point to four trends:

- The movement toward a twenty-four-hours-a-day/seven-days-a-week economy, with consequent conflict with religious demands for rest and worship on Saturdays, Sundays, or holidays;
- Our nation's increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities;
- Latent animosity toward some religious traditions after the September 11 attacks, a phenomenon evidenced by significant recent upswings in cases involving Muslim Americans and Sikh Americans; and
- A growing emphasis on material values at the expense of spiritual ones, with employers indicating that workplace requirements take priority over religious practices.

U.S. civil rights laws protect people of faith in the workplace, but this protection—particularly when applied to guard against formal discrimination and to require a measure of accommodation of religious practice—has proven controversial from its inception, and inadequate in its application. This problem does not take place in a vacuum.

### **The Civil Rights Act of 1964**

In a 1963 message to Congress, President John F. Kennedy vowed to protect Americans from workplace discrimination on the basis of “race, creed or ancestry.” A year later, President Lyndon Johnson signed the omnibus Civil Rights Act (Act), in part as a legacy to his assassinated predecessor. The milestone legislation included Title VII, which prohibited discrimination in the workplace on the basis of race, color, religion, sex, or national origin.

It was clear that the prohibition on religious discrimination and the application of nondiscrimination principles to religious entities presented special issues. As originally drafted, the Act afforded a sweeping exemption for religious entities. By the time Congress completed its work on Title VII, however, that exemption was significantly narrower. Pursuant to section 702, religious entities were exempted from the provisions prohibiting hiring based on religion. In addition, section 703(e)(2) provided an exemption that allowed religious educational institutions to hire and employ employees of a particular religion. Yet like all other employers, they were subject to Title VII's prohibition on discrimination on the basis of race, color, sex, and national origin. The exemption was limited, moreover, to employee positions “connected with the carrying on . . . of [the entities'] religious activities.”

While dealing at least to some extent with the special concerns of religious organizations, the Civil Rights Act did not directly address the question of whether an employer has an

obligation to accommodate employees' religious practices or beliefs. The problems presented by this lacuna were evident almost from the start. An employer need not hang a sign in his window stating "no Jews need apply"; he merely needed to require work on Saturday to accomplish the same end.

The newly created Equal Employment Opportunity Commission (EEOC) was quick to issue regulations, in 1966, providing that employers must afford accommodation unless it would cause "a serious inconvenience to the conduct of business." In 1967 the EEOC refined the regulations to require accommodation unless it would incur "undue hardship on the conduct of the employer's business." Lawsuits quickly challenged the EEOC's authority to take this action. One such case—an appeal from a Sixth Circuit decision finding that the prohibition on religious discrimination should not be read to require accommodation—reached the U.S. Supreme Court, but it was split down the middle, resulting in an affirmance without national precedential authority. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), *affirming by an equally divided Court* 429 F.2d 324 (6th Cir. 1970).

In 1972, Congress reentered the fray, amending Title VII to add a new section 701(j), which required employers to "reasonably" accommodate the religious practices of their employees unless, by so doing, the employer would incur an "undue hardship on the conduct of the employer's business." The scant legislative history associated with this amendment gave little indication of precisely what Congress considered reasonable accommodation and what constituted undue hardship. This was left up to the courts. But, as Justice Thurgood Marshall would later observe in his dissent in *Trans World Airlines v. Hardison*, 432 U.S. 63, 89 (1977), the record demonstrated, at least, that section 701(j) was introduced by Senator Jennings Randolph (D-WV) explicitly "to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.'" Citing 118 CONG. REC. 705 (1972).

At the same time, Congress amended section 702 to conform with section 703(e)(2) to broaden the religious discrimination exemption, allowing religious organizations to make hiring decisions on the basis of religion with respect to all employee positions, not just with respect to work connected with "religious activities." As Professor Melissa Rogers has shown in her recent examination of the legislative history leading up to enactment of this latter amendment, the sponsoring senators—Sam Ervin (D-NC) and James Allen (D-AL)—"considered an institution-wide exemption for religious organizations from Title VII to be crucial to religious autonomy and freedom."

The premise on which sections 702 and 703 (e)(2) were based—that protecting the autonomy of religious institutions is a necessary corollary of the Constitution's protection of the free exercise of religion—has not been subject to serious debate. Indeed, the courts have read a constitutionally mandated "ministerial exception" into Title VII pursuant to which religious institutions may discriminate *on any basis*, not just with respect to religion, when it comes to employment decisions involving clergy. Rather, debate has focused on the extent to which exemptions for religious organizations should be carved

out so as to protect the groups' autonomy. Thus cases questioned the constitutionality of the 1972 expansion of the section 702 exemption. The Supreme Court upheld the exemption in 1987. Other cases, with varying results but generally protective of religious institutions, have examined the question of just how "religious" a religious institution has to be to qualify for a section 702 or section 703(e)(2) exemption, as well as whether given employment decisions were made on the basis of sex or pregnancy, as opposed to religion—and would therefore, at least with respect to nonministerial employees, not fall under the exemption.

Most recently, as a result of the push for "charitable choice" and faith-based initiatives, there has been extensive debate as to whether the exemptions afforded under sections 702 and 703(e)(2) apply to social services programs provided by religious institutions when federal funds are involved. Some have argued that the exemption applies nevertheless; others have argued that Congress never intended the exemption to cover other than privately funded positions or projects—and that, in any event, to practice such discrimination with public funds is constitutionally problematic.

Others have noted that there is nothing in the text of the statute to suggest that it was Congress's intent to limit the exemption to entities that do not receive federal funding.

### **Hardison and Its Aftermath**

If the meaning of sections 702 and 703(e)(2) remains unsettled, the courts have been more clear in their reading of section 701(j). Unfortunately, the decisions have not always viewed religious accommodation in the workplace as a serious civil rights issue.

The seminal Supreme Court case in this area is *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Larry Hardison was a member of the Worldwide Church of God and believed it was his religious duty to rest from secular work on Saturdays (his Sabbath). Trans World Airlines discharged Hardison because he refused to work on Saturdays in a position as a clerk that required staffing twenty-four hours per day, 365 days per year. In ruling for TWA, the Court determined—in a 7-2 decision—that anything more than a de minimis cost to an employer constituted an "undue hardship" for purposes of section 701(j), and found that accommodations proposed by Hardison would have imposed such a cost because they "involved costs to TWA, either in the form of lost efficiency in other jobs or higher wages." The Court also found that TWA had made reasonable efforts at accommodation.

In a dissent joined by Justice William Brennan, Justice Thurgood Marshall argued that the Court's reading of section 701(j) reflected the belief that Congress, in drafting the 1964 Civil Rights Act to require employers to make reasonable accommodations for religious practice, did "not really mean what it [said]." Marshall and Brennan also argued that the Court's reading of section 701(j), in particular the de minimis interpretation of "undue burden," so vitiated the obligation to reasonably accommodate as to result in "effectively nullifying it."

The history of religious accommodation litigation since 1977 bears out Justice Marshall's concerns. It would be an overstatement to say that employees seeking a reasonable accommodation of their religious practices never prevail in court. Many cases never reach litigation because employees and employers work out an accommodation amicably. But for the most part, to borrow the title of one law review article on the subject, the courts have concluded that "heaven can wait."

Turning to the specifics of section 701(j), one might expect a "reasonable accommodation" to remove the conflict with religious practice, with employers then required to show an "undue hardship" before being relieved of the obligation to provide such an accommodation. But this is often not the case. Perhaps most remarkably, some courts have suggested—beginning with *Hardison*—that employees' rights under collective bargaining agreements are, in of themselves, reasonable accommodations even when those agreements make absolutely no provision for employee religious practices that may come into conflict with the requirements of the workplace.

It is the *Hardison* Court's interpretation and application of "undue hardship" that has most often affected religiously observant employees. Frequently, even in the absence of substantial economic cost, the courts have found that the provision of a reasonable accommodation amounts to an undue hardship. Sometimes the "hardship" is no more than the administrative task of adjusting schedules.

Beginning with *Hardison* itself, the existence of a seniority provision in a collective bargaining agreement has been invoked as a basis for undue hardship because, for instance, to allow an employee his Sabbath off would violate the seniority rights of another employee. To be sure, section 703(h) of Title VII expressly provides that "the routine application of a bona fide seniority system [i.e., without intention to discriminate because of race, color, religion, sex, or national origin]" is not unlawful. But all too often, this conclusion is reached without further inquiry as to whether the bargaining representative might have been enlisted in a search for voluntary swaps or whether an exemption might be sought to technical violations of the collective bargaining agreement that stand in the way of an amicable arrangement.

These constrictive readings of section 701(j) are inconsistent with the principle that religious discrimination should be treated as seriously as any other form of discrimination. The civil rights of religious minorities should be protected by interpreting the religious accommodation provision of Title VII in a fashion consistent with other protections against discrimination. Since these constrictive readings turn on judicial interpretation of legislation, rather than constitutional doctrine, they are susceptible to correction by the U.S. Congress. Legislation now pending in Congress would do exactly that.

### **The Workplace Religious Freedom Act**

The Workplace Religious Freedom Act (WRFA) redefines what constitutes an "undue hardship" on an employer for purposes of the Title VII accommodation provision. It

replaces the current standard that holds that anything above a de minimis cost or inconvenience is an undue hardship, with the definition that an undue hardship is an action requiring significant difficulty or expense. When making the determination of whether an employer has incurred a significant difficulty or expense, the WRFA requires that the cost of accommodation be quantified and considered in relation to the size of the employer. In this respect, it resembles the definition of undue hardship set forth in the Americans with Disabilities Act.

Crucially, the WRFA requires that to qualify as a reasonable accommodation an arrangement must actually remove the conflict. This ends the notion that a collective bargaining agreement, any other neutral arrangement, or an “attempt to accommodate” that fails to accommodate a religious practice could itself be viewed as a “reasonable accommodation.” The accommodation might, of course, still constitute an undue hardship.

The WRFA also makes it clear that an employer has an affirmative and ongoing obligation to reasonably accommodate an employee’s religious practice and observance. This provision does not in and of itself alter the standard for what is a reasonable accommodation or an undue hardship. It does, however, require that all to whom section 701(j) applies bear the responsibility of making actual, palpable efforts to arrive at an accommodation.

Some observers have claimed that the WRFA will somehow empower employees to act in ways that hurt others in the workplace or cause third parties to be denied needed services. These claims are not based on a fair reading of the bill. First, the WRFA will not empower people to come to work each day and berate their coworkers for being gay or Mormon or agnostic. Actions that create a hostile work environment for others, in most cases in violation of long-standing prohibitions on harassment, would clearly impose a significant burden on the employer. Changing the definition of undue hardship will not unleash a wave of harassment.

Second, the courts may well find (as one federal appellate court has already held under current law) that the WRFA does not justify the refusal of essential personnel, like police officers or fire fighters, to protect individuals or entities with whom they have moral differences. But, even to the extent that a court may find that a task-based accommodation is in order in a particular case, such accommodation could not, by any stretch, be required if it meant that the services in question were no longer available to the public. Otherwise, the employer would patently be faced with an undue hardship.

The WRFA is supported by a broad range of groups across the religious and political spectrum, many of which are fully as committed to fighting discrimination on the basis of sexual orientation and to protecting reproductive rights as are those who have raised the foregoing concerns. But WRFA supporters are also committed, left and right alike, to a fundamental premise of our Constitution and our society: that it is not up to the government to prescribe orthodoxies of belief or practice, and that the religious beliefs and practices of those with whom they disagree on these (and other) fundamental matters

should be accommodated if this can be done without harm to others.

Focus on an improbable parade of harmful outcomes gives far too short shrift to the problem that the WRFA aims to address—the discriminatory treatment of employees—which goes to the very heart of employee rights.

## **Conclusion**

The steady rise in religious discrimination claims registered with the EEOC is alarming. In six of the eleven years following 1992, the increase in claims was over 5 percent per annum. The largest jump in claims came in 2002, the year following the September 11 attacks, when claims rose by 21 percent over the previous year. The number of claims in 2003 only dropped by 1.5 percent over 2002, leaving claims up 82 percent as compared to 1992.

Efforts to ensure that people of faith are treated fairly in the American workplace have met with mixed success over the last four decades. While the passage of Title VII of the Civil Rights Act represented a major milestone, its full promise has yet to be realized. Even after the amendments to Title VII in 1972 and the litigation of numerous cases, people of faith remain dangerously vulnerable to the arbitrary refusal of employers to accommodate their religious practices. In a country founded by those fleeing religious intolerance, and in which religious freedom is enshrined in our most basic law, it is not too much to hope that we will soon achieve another milestone in civil rights, this time by assuring that Americans of all creeds are accorded respect by employers, able to remain true to their faith and participate as full partners in the workplace.

*Richard T. Foltin is legislative director and counsel in the American Jewish Committee's Office of Government and International Affairs in Washington, D.C. He serves as co-chair of the Committee on First Amendment Rights for the ABA's Section on Individual Rights and Responsibilities. James D. Standish is director of legislative affairs for the world headquarters of the Seventh-day Adventist Church. Mr. Foltin and Mr. Standish co-chair a broad coalition that has been formed to promote passage of the Workplace Religious Freedom Act.*

**WORKPLACE RELIGIOUS FREEDOM ACT**  
**(S. 677; H.R. 1445)**  
**Some Questions and Answers**

1. Is “WRFA” seeking to introduce a new concept to federal law?

No. WRFA seeks to restore to Title VII of the Civil Rights Act of 1964 (as amended in 1972) the original congressional intent that required employers to “reasonably accommodate” the religious practices of employees insofar as doing so did not impose an “undue hardship” upon the employer. A series of federal court opinions have, essentially, read this protection out of the law. Thus, too many Americans have been forced to choose between their career and their conscience.

2. Is this a real problem?

Yes. While most employers are accommodating of their employees’ religious needs, some are not. In recent years, this problem has affected Americans of many faiths. Examples include Catholics who were fired when they declined to work on Christmas; Muslim women who have were fired for not removing their head-scarf and Sabbath observant Jews and Seventh-day Adventists have been fired for not working Saturdays. The U.S. Equal Employment Opportunity Commission reports that claims of religious discrimination rose an alarming 82% between 1993 and 2003. A 1999 report from the Tannenbaum Center for Inter-religious Understanding found that 66% of respondents to a nationwide survey were concerned about a lack of religious accommodation in the workplace and that 20% of respondents had either personally experienced or witnessed religion-based job discrimination.

3. How does WRFA balance the religious accommodation needs of employees with the need for employers to have a productive workplace?

WRFA does not give employees a “blank check” to demand any accommodation in the name of religion and receive it. Rather, it restores the standard that an employer should reasonably accommodate an employee’s religious needs so long as that accommodation does not impose a significant difficulty or expense upon the employer. Thus, if allowing an employee to alter his/her regular work hours to accommodate a holy day observance or to wear religious clothing at work will not interfere with the employee’s performance of his/her essential functions, the employer would be required to provide the accommodation. If the accommodation would impose a difficulty or expense on the employer, it would not be required to provide the accommodation.

4. Won’t it be harder for some employers to provide accommodation?

WRFA does not apply to employers of less than 15 full time employees. Moreover, it sets forth several factors for determining what is an “undue hardship” that are designed to make the determination context specific so that a relatively small employer – of say 100 employees, will have a different requirement than a larger employer of 1,000.

5. Will WRFA Interfere with Civil Rights or Health Services?

No. WRFA is a carefully crafted bill whose core mechanisms are designed to ensure that while an individual employee’s religious conscience will be accommodated, this will not

adversely affect third parties. WRFA's requirement that an accommodation only be granted when it will not impose a significant difficulty or expense on the employer ensures that employers must be able to deliver their services and products to their customers and clients. WRFA's requirement that an employee cannot receive an accommodation which interferes with the performance of a job's "essential functions" also protects third parties against adverse affects, especially in the health services context.

6. Will WRFA lead to more litigation?

No. In fact, it is expected that WRFA will reduce litigation over these workplace issues. Prior to the court decisions eviscerating the undue hardship standard, there were many fewer lawsuits over religious accommodation in the workplace. This is because the law prodded employers and employees to work out these arrangements amicably. Now, employees who take their faith seriously are faced with the choice of violating their faith or losing their job; they have no recourse other than to bring a lawsuit if they feel aggrieved.

7. How Do We Know WRFA Will Operate So Well?

Many states have, either through legislation or court decisions, varying degrees of religious accommodation protections. New York State revised its law to track the provisions contained in WRFA some years ago. Since its enactment, in the words of State Attorney General Eliot Spitzer: "New York's law has not resulted in the infringement of the rights of others, or in the additional litigation that the [critics] predict will occur if WRFA is enacted. Nor has it been burdensome on business. Rather, it strikes the correct balance between accommodating individual liberty and the needs of businesses and the delivery of services."

8. Who supports WRFA?

This legislation enjoys bipartisan support in Congress and the support of a broad coalition of 45 American religious organizations including: American Jewish Committee, Baptist Joint Committee, Christian Legal Society, General Conference of Seventh-day Adventists, Gobind Sikh Society, National Association of Evangelicals, National Council of Churches, Southern Baptist Convention, U.S. Conference of Catholic Bishops and the Union of Orthodox Jewish Congregations of America.

9. Why should Congress enact WRFA now?

Forty years ago Congress passed Title VII of the U.S. Civil Rights Act with the promise that people of faith would no longer arbitrarily be forced between keeping their following their faith and keeping their jobs. The courts interpreted this promise so narrowly that it has never become a reality. Justice and our fundamental values require that we can't wait for one more person of faith to be arbitrarily forced out of their jobs. Now is the time to enact WRFA.

**Questions Regarding  
the Workplace Religious Freedom Act (WRFA) (S. 677, H.R. 1445)**

**1. Does WRFA apply to federal government employees or to the military?**

No. WRFA amends Title VII of the U.S. Civil Rights Act of 1964, but does not impact the scope of the Act. The definition of the employers covered by the Act specifically excludes the U.S. Government as follows:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term *does not* include (1) *the United States, a corporation wholly owned by the Government of the United States*, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 [of the United States Code])... Definitional Section, Title VII of the U.S. Civil Rights Act of 1964 (emphasis added).

The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace have governed the accommodation of religious practices of Federal employees since 1997. The section covering the accommodation of employees in the Federal Guidelines provides more protection to Federal workers than the protection for the private sector employees proposed in the Workplace Religious Freedom Act. The standard reads as follows:

In the Federal Government workplace, if neutral workplace rules -- that is, rules that do not single out religious or religiously motivated conduct for disparate treatment -- impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act *requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest.* 42 U.S.C. 2000bb-1. The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, § E (emphasis added).

**2. What happens when someone's religious accommodations would require a violation of a union agreement?**

Where a religious accommodation would be inconsistent with the seniority rights of a fellow employee under a collective bargaining agreement, the seniority rights prevail. This is because, as an amendment to Title VII, WRFA is subject to that title's provision that the routine application of a bona fide seniority system is not to be considered unlawful.

**3. Will WRFA reduce litigation, and if so, how?**

### WRFA will reduce litigation.

Between 1993 and 2003, the U.S. Equal Employment Opportunity Commission reports claims involving religious discrimination in the workplace rose a staggering 82%. During the same period, for comparison, claims involving racial discrimination declined slightly.

Experts in the area agree that one of the contributing factors to this dramatic rise in claims is the weakness of the accommodation provisions as currently written. Under the current law there is little incentive for a recalcitrant employer to accommodate the religious beliefs of their employees. This does not deter people of faith in the workplace asserting their rights, however, because many of them are unwilling to compromise their conscience no matter what the legal ramifications might be.

WRFA provides an incentive to both employers and employees to work out an accommodation if it is possible. The vast majority of America's employers value the religious diversity of their workforce and already do this. WRFA will provide an added incentive to recalcitrant employers to do the right thing before a case results in litigation. In addition, WRFA is written to provide additional clarity and thereby reduce misunderstandings. Finally, as discussed in the next section of this paper, the economics of bringing religious accommodation cases discourage litigation.

#### **4. How is “religion” defined under WRFA and what protections are there to ensure that employees don’t make sham religious claims?**

WRFA is an amendment to Title VII of the U.S. Civil Rights Act of 1964; it does not amend the definition of religion in the Act. In the definitional section of Title VII, religion is defined as follows: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief...”

There are two barriers to employee’s making sham religious claims.

The first barrier is that there are significant financial disincentives to bringing religious accommodation cases. Damages in accommodation cases tend to consist of lost wages, which are frequently modest amounts because the workers involved are typically on the low end of the wage scale. As a result, finding attorneys willing to bring these cases can be difficult, and it is very unlikely an attorney would be willing to invest the time and effort to bring a case involving a sham claim.

Secondly, while courts do not examine the validity of religious beliefs themselves, they do examine the sincerity of the individual’s claim. Although there have been approximately a thousand reported cases under the accommodation provisions of Title VII of the U.S. Civil Rights Act and state collieries over the last three decades, until this point, opponents of the Workplace Religious Freedom Act have not identified a single case in which a sham religious claim prevailed.

In conclusion, for practical financial reasons it is difficult to find an attorney to litigate religious accommodation claims, let alone claims for sham claimants, and courts are empowered to enquire into the sincerity of plaintiff's religious claims and have effectively done so for three decades.

**5. Who ultimately makes the decision about what constitutes “undue hardship” on an employer?**

The reason that WRFA is necessary is because the courts defined the term “undue hardship” in the U.S. Civil Rights Act so narrowly as to eviscerate the protections promised by the Act. The drafters of WRFA were therefore particularly concerned about the power of the judiciary to either over or under interpret the law. As a result, the team of legal experts who drafted the bill defined “undue hardship” in careful legal terms. It is impossible to legislate out judicial review for an act of Congress for any bill, and WRFA is no exception. There is nothing in WRFA, however, that makes it uniquely susceptible to court interpretation, indeed the bill is drafted as tightly as possible to avoid judicial ambiguity.

**6. Under WRFA, the definition of the ability to “perform the essential functions” of the job excludes dress and time off. Does this mean that employers must accommodate these religious practices?**

No. There are two protections for employers in WRFA. The first employer protection is the definition of “undue hardship.” Under WRFA, employers must accommodate the religious practices of their employees only if the accommodation would not result a “significant difficulty or expense” to the employer. This standard applies to *all* religious accommodation claims, including religious clothing and holy day requirements. Thus, if accommodating an employee's holy day requirements, clothing requirements, or any other religious practice would result in a significant cost or difficulty, the employer does *not* have to provide accommodation.

The second protection overlaps with the first. It states that the employer doesn't have to accommodate an employee who is unable to perform an “essential function” of the job in question. This language was inserted into the bill to make clear that employers are not required to accommodate employees who refuse to perform the core requirements of their job. Religious garb and holy day accommodations were excluded from the definition of “essential function” in order to ensure courts do not over-interpret this provision to exclude claims involving these religious practices – claims that go to how an employee performs his or her job, but not whether they are willing to perform core elements of it.

In conclusion, if accommodating an employee's religious clothing, holy days or any other religious practice, results in a significant difficulty or expense to the employer, the employer does not have to accommodate the practice.

## 7. How can we be sure WRFA will not result in the abuse of employers?

WRFA is not a novel concept in the law. New York has a state statute that tracks the standard in WRFA and the Guidelines of Religious Exercise & Religious Expression in the Federal Workplace exceed the protections found in WRFA. These provisions have worked well. They have not resulted in an explosion of litigation, sham religious claims or crippling compliance costs.

As this bill is debated, it is important for all involved to keep a firm grip on reality. There are those on both sides of the political spectrum who have dreamed up cataclysmic scenarios if WRFA is passed. *These scenarios bear no relation to reality.* We cannot let those who play on our worst fears succeed in preventing us from passing this vital legislation.

America is, at its heart, a nation of liberty. Core to understanding of liberty, is the right to worship God according to the dictates of our conscience. We can all agree that no American should be forced arbitrarily to choose between their faith and their job. WRFA is will make our national reality a little closer to this national aspiration. There are always reasons not to do the right thing, but the reasons for doing what is right are far more compelling. We must have the courage to stand up for our most fundamental value by passing this modest, balance bill that is a vital step in the right direction.