

**NLWJC - Kagan**

**DPC - Box 055 - Folder-015**

**Religion - Workplace Religious  
Freedom Act**

## Clean Copy of Proposed Mark-up of S.1124

### SECTION 1. SHORT TITLE.

This Act may be cited as the "Workplace Religious Anti-Discrimination Act of 1997"

### SECTION 2. FINDINGS AND PURPOSE

(a) FINDINGS. The Congress finds that --

[Insert congressional findings of existence of religious discrimination in the workplace and its effect on interstate commerce]

(b) PURPOSE. It is the purpose of this Act --

- (1) to provide clear and comprehensive national standards to prevent and remedy discrimination in employment against individuals whose religious observances and practices conflict with work requirements;
- (2) to remove artificial, arbitrary, and unnecessary barriers to employment when such barriers operate invidiously to discriminate on the basis of religion or religious observance;
- (3) to provide for greater protection from discrimination to individuals whose religious observances and practices conflict with work requirements than that previously accorded pursuant to the Supreme Court's construction of Title VII in TWA v. Hardison, 432 U.S. 63 (1977);
- (4) to ensure that employer action that targets religious conduct for discriminatory treatment cannot be shielded by mere compliance with facially neutral work rules; and
- (5) [??] to invoke the sweep of congressional authority, including the power to enforce section 1 of the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by employees whose religious obligations and commitments conflict with their employment requirements. [??]

### SEC. 3. AMENDMENTS

(a) DEFINITIONS. -- Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended --

- (1) by inserting "(1)" after "(j)";

- (2) by inserting ",after engaging in an affirmative and bona fide effort," after "unable";
- (3) by striking "or prospective employee's";
- (4) by inserting "or on other employees" after "employer's business"; and
- (5) by adding at the end the following:

*Why include*

"(2) As used in this subsection, the term 'employee' includes a prospective employee.

"(3) As used in this subsection, the term 'employer' includes a labor organization and an employment agency.

"(4) An accommodation by the employer shall be deemed to be 'reasonable' if such accommodation removes the conflict between employment requirements and the religious observance or practice of the employee.

"(5) As used in this subsection, the term 'undue hardship' means a material interference with the conduct of the employer's business or a material burden on other employees.

"(A) An accommodation can require more than de minimis cost to the employer without constituting material interference. Among the factors to be considered in determining whether an accommodation materially interferes with the conduct of the employer's business are --

"(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another; ordinary administrative costs generally will not constitute a material interference with the conduct of the employer's business;

"(ii) the number of individuals who will need the particular accommodation; and

"(iii) the size and operating cost of the employer and, for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities.

"(B) An accommodation shall be considered to materially burden another employee if it adversely affects such employee's terms, conditions, or privileges of employment, such as by depriving such an employee of a shift or job preference that she or he otherwise would enjoy. Provided, however, that if an adversely affected employee

*make the same*

voluntarily agrees to the accommodation, the burden on such employee shall not be deemed material.

- (b) **EMPLOYMENT PRACTICES.** -- Section 703 of such Act (42 U.S.C. 2000e-2) is amended by adding at the end the following:

"(o) An employer shall not be required to pay premium wages to or confer premium benefits on an employee for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if work is performed during such hours only to accommodate religious requirements of that employee.

"(1) As used in this paragraph--

"(A) the term "premium benefit" means an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, an educational benefit, or a pension, that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee; and

"(B) the term "premium wages" includes overtime pay and compensatory time off (except such overtime pay and compensatory time off required by Section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, or otherwise required by Federal law), premium pay for night, weekend, or holiday work, and premium pay for standby or irregular duty.

#### SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

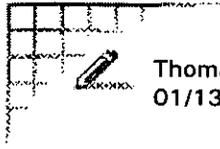
- (a) **EFFECTIVE DATE.** -- Except as provided in subsection (b), this Act and the amendments made by section 3 take effect on the date of enactment of the Act.
- (b) **APPLICATION OF AMENDMENTS.** -- The amendments made by section 3 do not apply with respect to conduct occurring before the date of enactment of this Act.

#### SEC. 5. STATUTORY CONSTRUCTION AND SEVERABILITY.

- (a) Administrative and judicial construction of terms contained within this Act shall not control the administrative or judicial construction of such terms in the Americans with Disabilities Act;

- (b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Workplace  
Religion - Religions & Freedom Act



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01/13/98 08:51:53 PM

Record Type: Record

To: Elena Kagan/OPD/EOP  
cc: Mary L. Smith/OPD/EOP, Laura Emmett/WHO/EOP  
Subject: Issues for Workplace Rel. Mtng.

**Agenda**  
**RELIGION IN THE WORKPLACE**  
1/14/98

**I. LEGISLATION**

- \* Status: DPC, WH Counsel, OPL, DOJ, EEOC, SBA, Labor, Commerce have met many times. DOJ/EEOC has produced draft legislation.
- \* Draft bill does not currently satisfy constituency group. (Marshall memo on outstanding issues.)

**II. STATUS: EXTERNAL VETTING**

- \* Have met with religious groups led by Folton. If we can work out issues with them, should vet with other non-coalition member groups. Including:
- \* Labor (some vetting required-- premium pay issue remains).
- \* Business (Chamber Commerce etc. have been alerted but complete vetting needed).
- \* Legislative (Leg. Affairs has waited to contact Coates/Kerry-- thinks they will be very interested if groups sign on.)

**III. OPTIONS**

- \* Get everyone to agree to Administration bill. (Best choice)
- \* Get close enough to endorse common principles with Senators and constituency

groups.

#### **IV. NEXT STEPS AND TIMING**

The following is a brief summary of the key outstanding issues regarding potential Administration support of the Workplace Religious Freedom Act.

**1. Statutory Model.** The Senate Bill is modeled after the Americans with Disabilities Act. The Administration proposal is based upon Title VII. Both approaches would accomplish essentially the same goal -- the ratcheting up of the protection currently afforded religious exercise under Title VII. There is a significant dispute, however, as to which approach would best accomplish that result. The religious groups' argument in favor of the ADA model is political. Although the ADA approach initially raised concerns within the small business community (because of compliance issues), the religious groups now represent that business supports the ADA model because it offers a familiar regulatory scheme. Similarly, the groups contend that business would oppose legislation that introduces a set of unfamiliar standards.

Administration objections to the ADA model are based upon a number of separate considerations. First, there is concern that the use of ADA language would lead to the watering down of ADA standards because courts would be reluctant to enforce religious accommodations to the same degree that they enforce accommodations for the disabled. Second, DOJ argues that ADA language may raise issues under the establishment clause because its emphasis on special accommodation suggests that it would create a preference for religion rather than merely redress discrimination against religion. Third, DOJ believes that, because the Administration's proposal is more clearly based on anti-discrimination concerns, it could more easily be enacted pursuant to Congress' Section V powers which would allow plaintiffs to collect damages from the states.

**2. Premium Pay.** Under the Senate Bill, private sector employers would be excused from their obligation under the FLSA to pay overtime to an employee for work in excess of 40 hours when that employee works those overtime hours to make up for time taken off for religious observance. The Department of Labor opposes this provision because it is inconsistent with the Administration's opposition to current Congressional proposals that would allow employees to opt for compensatory time in lieu of premium pay. The religious groups have countered that an existing federal statute (5 U.S.C § 5550a) requires that federal employees who take time off for religious observances are not entitled to overtime pay and that it would therefore not harm Administration policy to allow a similar rule to apply to the private sector for the limited purpose of accommodating religious observance. DOL argues, however, that the analogy is inappropriate because the regulation of federal overtime and private sector overtime raise distinct considerations. For example, other than that provided in section 5550a, the rights of federal employees to overtime pay are far greater than that allowed employees in the private sector.

**3. Effect on Seniority Rights.** The Senate Bill would allow for the accommodation of religious employees to supersede other employees' seniority rights in certain limited circumstances (i.e. when an employee with seniority rights voluntarily agrees to exchange shifts or jobs with the religious employee who would not otherwise be entitled to accede to the senior employees' shift or job.) The religious groups strongly support this provision believing that employers have consistently hidden behind collective bargaining agreements in denying religious accommodations. Labor objects on policy grounds and DOJ is concerned that to accommodate only religious employees in this context would raise establishment concerns.