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VIA FACSIMILE (202-225-3909) AND FIRST CLASS MAIL

Honorable Sam Johnson
Chairman, Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
1211 Longworth House Office Building
Washington, DC  20515-4303

Congressman Mark E. Souder
Member, Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC  20515-6100

Congressman Dale Kildee
Member, Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC  20515-6100

Re:  Workplace Religious Freedom Act of 2005

Dear Chairman Johnson, Congressman Souder, and Congressman Kildee:

I am writing on behalf of the United States Chamber of Commerce in response to your letter dated November 18, 2005. This letter addresses the Subcommittee’s specific request for the Chamber’s position with respect to New York’s Executive Law Section 296(10) which expanded New York’s prohibitions against religious discrimination in the workplace, and its comparability with the “Workplace Religious Freedom Act of 2005” (“WRFA”). As noted in your letter, at the recent hearing with respect to WRFA, it was represented to the Subcommittee that New York’s state law prohibiting religious discrimination in the workplace was “substantively identical to the federal legislation contemplated in H.R. 1445.” In this supplemental testimony the Chamber explains how New York’s law differs substantially, and indeed is very different from WRFA. Further, there are other reasons why the employer community’s experience to date with New York’s law does not provide the Subcommittee with relevant experience by which to judge the impact of WRFA on the employer-employee relationship.
In late November, 2002, New York’s Executive Law Section 296(10) became effective. It expanded the then-existing protections of New York’s employment discrimination law to include not only protections for employees who request an accommodation to observe their Sabbath or holy day, but also protections that would require an accommodation of other religious practices or beliefs as well that were not then protected under New York law. It also expanded the law by expanding the prohibitions against discrimination “in holding employment” to also include a prohibition in discrimination with respect to any terms and conditions of employment, including opportunities for promotion, advancement or transfers.

In short, New York’s law was expanded to include prohibitions against discrimination in employment with respect to a wide range of practices and beliefs that had previously not been protected under state law, including dress, hairstyles, beards and prayer requirements. In addition, it also provided certain specific guidance with respect to an employer’s obligation to reasonably accommodate an employee’s sincerely held religious beliefs, including a definition of undue hardship, and an express statement that undue hardship does not include any abridgement of the rights granted to employees through a seniority system, or require an employer pay premium wages to employees whose work accommodation may require that they work only certain hours to accommodate their sincerely held religious beliefs.

Specifically, the amendment to subdivision 10 of section 296 of New York’s Executive Law in relation to unlawful discriminatory practices can be summarized as follows:

- Paragraph (a) of subdivision 10 was amended to make it an unlawful discriminatory practice for an employer, employee or agent thereof, to impose upon a person as a condition of employment any circumstances that would require such person to violate or forego a sincerely held religious practice or observance;

- Paragraph (a) of subdivision 10 was also amended to provide for an exemption for an employer in situations, where after bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee’s observance or practice without undue hardship;

- Paragraph (a) of subdivision 10 was amended to establish that an employer is under no obligation to pay premium wages during hours when ordinarily required if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements;

- Paragraph (a) of subdivision 10 was amended to provide that nothing in an employer’s duty to accommodate sincerely held religious practices and observances shall alter or abridge seniority rights;

- Paragraph (c) of subdivision 10 was amended to add a new paragraph (c) to provide that it is an unlawful discriminatory practice for an employer to refuse an employee leave solely because the leave is being utilized for the employee’s sincerely held religious observance or practice;

- A new paragraph (d) was also added to subdivision 10 to define “undue hardship” as an accommodation requiring significant expense or difficulty and requiring the consideration of several factors, including, but not limited to, cost of the accommodation; the number of employees requesting accommodation; geographic separateness of facilities; and inability of the employee to perform essential job functions.
• Under the new paragraph (d), undue hardship was specifically defined to include any accommodation that "will result in the inability of an employee to perform the essential functions of the position in which he or she is employed."

It is important to note that today Title VII of the Civil Rights Act of 1964, as amended, provides employees with protections that require an employer to accommodate the wide range of religious observances and practices reflected in the 2002 amendments to New York's law, subsection 10, paragraphs a through c. For example, Title VII currently requires employers to reasonably accommodate an employee's religious observances and practices unless an accommodation would cause an undue hardship on an employer. Prior to November, 2002, these protections present under Title VII were not included within the protections of New York law. The definition of undue hardship included within the 2002 amendments to the New York law differs from Title VII's definition of undue hardship; however, as detailed below, New York's definition also differs from WRFA's definition of undue hardship.

As the Subcommittee noted in its request for supplemental testimony, WRFA has been represented by its proponents as substantively identical to New York law. In fact, as described below, there are significant differences between New York's law and WRFA.

• Subparagraph (2)(B) of WRFA provides a definition of the term 'perform the essential functions' of a job that is not contained anywhere in the New York law. Of concern is the definition's elimination from the consideration of an essential function of any job "carrying out practices relating to clothing and practices relating to taking time off, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the practices described in this subparagraph restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice." If practices relating to clothing and taking time off cannot be considered as an essential function of any job, under Title VII, an employer may not engage in the interactive process of determining whether or not a reasonable accommodation exists that will accommodate the religious practice, without undue hardship, but must simply grant the employee's request regardless of its impact in the workplace. Again, no such similar requirement is imposed upon employers under New York's law. In fact, New York's law, to the contrary, requires employers "to reasonably accommodate an employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business." New York's law does not require a blanket requirement that an employer exempt from an employee's job any restriction on the ability to wear religious clothing, take time off for a holy day or to participate in a religious observance or practice.

• Subparagraph (3) of WRFA defines the term 'undue hardship' differently than it is defined under New York's law. In pertinent part, New York's law definition of undue hardship § 296(10) provides as follows, with that text that is bolded in New York's law completely absent from WRFA:

Article 1. "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:
Section 1.01 the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

Section 1.02 the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

Section 1.03 for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

In short, absent from WRFA’s definition of “undue hardship” is any reference to consideration of an employer’s ability to: run a “safe and efficient operation,” implement and enforce a “bona fide seniority system,” or the number of employees requiring an accommodation for religious reasons. Equally important is the absence in WRFA of New York’s absolute requirement that an accommodation shall be considered to constitute an undue hardship if it will result in an employee’s inability to perform the essential functions of the position in which he or she was employed.

- WRFA amends Section 703 of Title VII by adding in subsection (o) (2) a definition of unlawful employment practice that includes failing to provide a reasonable accommodation to a religious observance or practice that does not “remove the conflict between the employment requirements and the religious observance or practice of the employee”. No such language, definition or similar requirement is present in New York’s law.

- Similarly, as noted above, whereas New York’s law expressly includes guidance with respect to an employee not being entitled to premium wages or benefits in connection with performing work during certain hours to accommodate his or her religious requirements, as well as expressly preserving an employee’s seniority rights and affirming that those shall not be altered as a result of the reasonable accommodation obligations set forth in the New York law, no such similar language appears in WRFA.

For all of the reasons set forth above, the Chamber submits that New York’s law is not substantially identical to WRFA. In fact, the language of the two laws is substantially different and not comparable. As such, the experience of employers under New York’s law does not provide guidance on the manner in which WRFA’s obligations would impact the workplace.

Moreover, in the relatively short period of time since the passage of the New York’s law, approximately three years, the Chamber understands that New York employers have not experienced enforcement of its obligations in a way that differs from enforcement of the existing obligations of those New York employers under Title VII of the Civil Rights Act of 1964. In addition, there are no publicly available administrative rulings of New York’s Human Rights Department interpreting the law, nor any reported court decisions. Where as here, New York’s judiciary has not answered questions concerning the scope and nature of the protections afforded under New York’s amended law, commentators have opined
that "the cycle of legislation is never complete until the courts have interpreted and applied the legislative language to actual litigants". Law Summary, Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience, 69 Mo. L. Rev. 853, 863 (2004). As such, the Chamber submits that New York’s law should not guide the Subcommittee’s consideration of WRFA’s obligations.

In conclusion, the Chamber’s position is that New York’s law is substantially different from the Workplace Religious Freedom Act and offers no appreciable guidance as to the impact of the passage of the Workplace Religious Freedom Act in the workplace. Mr. Chairman and members of the Subcommittee, thank you for the opportunity to provide this supplemental testimony. Please do not hesitate to contact me or the Chamber’s Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

Respectfully submitted,

SEYFARTH SHAW LLP

Camille A. Olson

CAO:kdg
ce: Mr. Randel Johnson