

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #6

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FILED

APR 29 PM 2:52

STATE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED  
BY THE WEST VIRGINIA LEGISLATURE.**

AGENCY: West Virginia Human Rights Commission TITLE NUMBER: 77

AMENDMENT TO AN EXISTING RULE: YES\_\_\_, NO x

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Title 77, Series 3


TITLE OF RULE BEING PROPOSED: Rules Regarding Religious Discrimination

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 1

SECTION 64-5-8(d), PASSED ON March 14, 1992

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON  
THE FOLLOWING DATE: April 29, 1992

  
MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

3.10

TITLE 77  
LEGISLATIVE RULES  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

SERIES 3  
RULES REGARDING RELIGIOUS DISCRIMINATION

§77-3-1. General.

1.1. Scope -- The following legislative regulations of the West Virginia Human Rights Act (HRA), W. Va. Code § 5-11-1 et seq., set forth rules for complying with the Act's prohibition against discrimination on the basis of religion and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the HRA.

1.2. Authority -- These regulations are issued under authority of W. Va. Code § 5-11-8(h) and § 29A-3-1 et seq.

1.3. Filing Date -- These regulations are promulgated on the \_\_\_\_\_ day of \_\_\_\_\_, 1990, 19 and filed on the \_\_\_\_\_ day of \_\_\_\_\_, 1990, 19 in the Office of the Secretary of State.

1.4. Effective Date -- These regulations become effective on the \_\_\_\_\_ day of \_\_\_\_\_, 1990 19.

§77-3-2. Definitions.

2.1. "Religion" means and includes:

2.1.1. All aspects of religious observance and practice, as well as belief.

2.1.2. Moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. The fact that no religious group espouses such beliefs or that the religious group to which the individual professes to belong may not accept such belief will not conclusively determine whether the belief is a religious belief of the employee or prospective employee.

2.1.3. A religious practice or belief that is not absolutely mandated by a religious group but is a well established tradition among members of a faith.

2.2. "Religion" does not include:

2.2.1. Mere personal preferences or codes.

2.2.2. Social or political beliefs of a narrow, temporal character that are not intimately associated with religious convictions shared by an organized group.

2.3. "Reasonable accommodation" means reasonable modifications or adjustments and is determined on a case-by-case basis.

2.4. "Undue hardship" means that an accommodation would require more than a *de minimis* cost to the employer.

§77-3-3. Employment Discrimination Prohibited; Obligation to Make Reasonable Accommodations.

3.1. No employer shall, on the basis of religion, discriminate against an individual concerning the terms, conditions, or privileges of employment unless it can be shown that the employer cannot reasonably accommodate an employee's or a prospective employee's religious observance or practice without undue hardship on the conduct of its business.

3.2. The duty not to discriminate on religious grounds includes an obligation on the part of the employer, and/or a labor organization, if applicable, to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship to the conduct of the employer's business, provided that the employee or prospective employee has notified the employer or labor organization of his or her need for a religious accommodation or the employer or labor organization has otherwise obtained knowledge of the need for such an accommodation.

3.2.1. Because of the particularly sensitive nature of refusing to hire or discharging an individual on account of his/her religious beliefs, the burden of proof that the accommodations required by the individual's religious needs impose an undue hardship to the conduct of the employer's business, is on the employer. Resolution of such cases depends on specific factual circumstances and involves a delicate balancing of an applicant or employee's religious needs with the degree of disruption imposed on the employer's business operation.

3.3. It is an unlawful employment practice for an employer to refuse to hire an applicant for employment or to discharge an employee who regularly observes Friday evening and Saturday, or some other day of the week, as the Sabbath or who observes certain special religious holidays during the year and, as a consequence, does not work on such days, unless the employer can prove that there exists no reasonable accommodation of such

religious needs or that such accommodations can only be made at the price of undue hardship.

~~3.4. Reasonable accommodation includes, but is not limited to:~~

3.4. The following subsections contain several suggested alternatives that may be used in attempting to accommodate the religious practices of employees or prospective employees. These suggested alternatives are not intended to be all inclusive as different factual circumstances surrounding the need for religious accommodation may require different solutions.

~~3.4.1. Voluntary substitutes or swaps where a substitute with substantially similar qualifications is possible. The obligation to accommodate requires that an employer take affirmative steps to attempt to secure substitutes and swaps.~~

3.4.1. One possible means of reasonable accommodation without undue hardship is through voluntary swapping or substitution where a voluntary substitute with substantially similar qualifications is available. The individual seeking accommodation is responsible to facilitate the securing of a voluntary substitute when he or she knows of someone with substantially similar qualifications who is willing to substitute or swap positions. The duty to reasonably accommodate the religious practices of employees or prospective employees requires that the employer or labor organization facilitate the securing of a voluntary substitute with substantially similar qualifications as the individual requiring accommodation. Employers and labor organizations may consider some of the following means to facilitate the securing of such a voluntary substitute:

3.4.1.A. To publicize policies regarding accommodations and voluntary substitution;

3.4.1.B. To promote an atmosphere in which substitutions are favorably regarded;

3.4.1.C. To provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed;

3.4.1.D. The obligation to accommodate requires that the employer take affirmative steps to attempt to secure substitutions and swaps.

~~3.4.2. Flexible work schedules such as flexible arrival and departure times; optional holidays; use of lunchtime in exchange for early departure; staggered work hours; use of~~

~~accumulated compensatory time for time lost due to observance of religious practices.~~

3.4.2. Employers and labor organizations may also consider creating a flexible work schedule for those individuals requiring religious accommodation. Some of the areas in which flexibility in work scheduling might be utilized are as follows:

3.4.2.A. Flexible arrival and departure times;

3.4.2.B. Floating or optional holidays;

3.4.2.C. Flexible work breaks;

3.4.2.D. Use of lunch time in exchange for early departure;

3.4.2.E. Staggered work hours; and

3.4.2.F. Use of accumulated compensatory time for time lost due to an observance of religious practices.

~~3.4.3. A lateral transfer and change of job assignment.~~

3.4.3. When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer. As with voluntary substitutes or swaps, the availability of someone with substantially similar job-related qualifications may affect an employer's or labor organization's ability to allow such transfer or change in job assignment.

~~3.4.4. When applicable, initiation of a discussion with a union regarding an exception to a collective bargaining agreement.~~

3.4.4. As a means of accommodating the religious practices of employees or prospective employees and when applicable, the Commission encourages employers and labor organizations to engage in discussions regarding exceptions to collective bargaining agreement provisions and any such discussions or agreement following such discussions may be considered as evidence of an attempt at reasonable accommodation.

3.5. A refusal to accommodate is justified only when an employer or labor organization, when applicable, can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. The employer or labor organization, when applicable, shall have the burden of showing

that it took affirmative steps to attempt to reasonably accommodate an employee or prospective employees.

3.6. When more than one means of accommodation would not cause undue hardship, the employer must offer the alternative that least disadvantages the employee with respect to his/her employment opportunities. The employer or labor organization satisfies its duty to an employee or prospective employee once it offers all reasonable means of accommodation without undue hardship. An employee who fails to cooperate or accept accommodation may subject himself or herself to adverse or disciplinary action by the employer or labor organization where all reasonable accommodation without undue hardship has been offered.

3.7. The Commission will determine what constitutes more than a *de minimis* cost with due regard given to the identifiable cost in relation to the size and operating cost of the employer and the number of individuals who will require a particular accommodation. Generally, a regular cost, such as the continual payment of a premium wage to a substitute, will constitute undue hardship. However, the infrequent or temporary payment of premium wages to a substitute while a more permanent arrangement is being sought are costs that the employer will usually be required to bear. Administrative costs of rearranging schedules or duty rosters will generally not constitute more than *de minimis* costs.

3.8. A mere assumption that many more people, with the same or similar religious practices as the person being accommodated, may also need accommodation, is not evidence of undue hardship.

3.9. Undue hardship may be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices and doing so would deny another employee his or her job or shift preference guaranteed by that system. Arrangements for voluntary substitutes and swaps do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in these rules precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

3.10. An employer must accommodate an employee who refuses to perform certain tasks because of his/her religion unless those tasks are an essential function of the employee's position or cannot be reasonably reassigned to another employee.

3.11. An employer must accommodate an employee who refuses to comply with a dress or appearance code for religious reasons unless it can demonstrate that this refusal would violate an established health or safety code. A need of the employer to

maintain a certain public image will not amount to undue hardship unless the employer can show that accommodation would have a detrimental impact on its business.

#### §77-3-4. Religious Harassment.

4.1. Harassment in the workplace on the basis of religion is an unlawful employment practice. Unwelcome comments, jokes, acts and other verbal or physical conduct may constitute religious harassment when:

4.1.1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

4.1.2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

4.1.3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

4.2. An employer is responsible for its acts and those of its officers, agents and supervisory employees with respect to religious harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or reasonably should have known of their occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his or her employment.

4.3. With respect to persons other than those mentioned in 4.2. above, an employer is responsible for acts of religious harassment in the workplace where the employer, or its agents or supervisory employees, knew knew or reasonably should have known of the conduct or expressly or impliedly authorized or ratified such conduct. An employer may rebut apparent liability for such acts by showing that it took timely and appropriate corrective action.

#### §77-3-5. Selection Practices.

5.1. The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably

accommodate the applicant's religious practices without undue hardship.

5.2. It is an unlawful employment practice for any person to elicit or attempt to elicit any information directly or indirectly pertaining to the religion of applicants for employment. Examples of such a practice include the use of the following inquiries:

5.2.1. Requesting applicant's religious denomination, affiliation, church, parish, pastor, or religious holidays observed; representing to applicants that an employer is of a predominant or particular religious orientation.

5.2.2. Inquiry asking specifically for the religious affiliation of schools attended by the applicant.

5.2.3. Requirement of submission of a religious reference.

5.2.4. Any inquiry into willingness to work any particular religious holiday.

5.2.5. Requesting a list of all clubs, social fraternities, societies, lodges, or organizations to which the applicant belongs, other than trade, professional or service organizations.

5.3. The use of pre-selection inquiries which determine an applicant's availability may be considered to violate the West Virginia Human Rights Act unless the employer can show such inquiries:

5.3.1. Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for religious practices; or

5.3.2. Were otherwise justified by business necessity.

5.4. Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest, but which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered particular available position is announced to an applicant, but before the

applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these rules, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

5.5. The Commission may infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification, and after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

5.6. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these rules apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

5.7. Nothing in this regulation prohibits an applicant from voluntarily providing a potential employer with information which would aid in the employer's compliance with any statute, state or federal, or affirmative action plan.

5.8. Pre-employment inquiries which are made in conformance with the instructions from, or the requirements of, an agency or agencies of the local, state or federal government in connection with the administration of a fair employment practices program will not constitute evidence of unlawful employment discrimination.

**§77-3-6. Application to Labor Organizations, Employment Agencies, and Apprentice Training Programs.**

6.1. In addition to employers, the rules set forth in this series shall also apply, when relevant, to labor organizations, employment agencies, and joint labor-management committees controlling apprentice training programs.

6.2. When a collective bargaining agreement includes a requirement that employees join a labor organization or pay a sum equivalent to its dues, the organization must accommodate an

employee whose religious beliefs do not permit compliance by permitting him/her to donate a sum equivalent to dues to a charitable organization.

6.3. An employment agency that receives a job order containing an unlawful request based on religion will share responsibility with the employer placing the job order if the agency fills the order knowing that the religion specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of a bona fide occupational qualification.

#### §77-3-7. Exceptions.

7.1. W. Va. Code § 5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based on a bona fide occupational qualification (BFOQ). The Commission construes the BFOQ provision very narrowly and the burden of proving the existence of a BFOQ is on the employer.

7.2. When a certain religious orientation is reasonably necessary to the normal operation of a business or enterprise, an employer may require that applicants for the position in question ascribe to that religion.

7.3. The employment discrimination provisions in these rules do not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious and religion-related activities. This exemption does not protect those activities of a religious institution that are for all practical purposes devoid of religious content and meaning.

#### §77-3-8. Public Accommodations.

8.1. These regulations apply to any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodations as defined by W. Va. Code § 5-11-2(j).

8.2. It shall be unlawful to refuse, withhold from, or deny, either directly or indirectly, to any individual because of religion, any of the accommodations, advantages, facilities, privileges, or services of such place of accommodation.

8.3. It shall be unlawful to refuse to make reasonable accommodations necessary to make any public accommodation available to persons otherwise excluded because of their religion, provided that such accommodations do not impose an undue hardship. The principles of reasonable accommodation and undue hardship, as set forth in §77-3-3, shall be used as guidelines in determining whether a person has been unlawfully discriminated against on the basis of religion by a place of public accommodations.

Bill Human Rights, Religious 77-3

H. B. 400

(By Delegate Grubb)

(Introduced January 27, 1992; referred to the  
Committee on the Judiciary)

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10 A BILL to amend and reenact section eight, article five, chapter  
11 sixty-four of the code of West Virginia, one thousand nine  
12 hundred thirty-one, as amended, relating to authorizing the  
13 human rights commission to promulgate legislative rules  
14 relating to religious discrimination.

15 Be it enacted by the Legislature of West Virginia:

16 That section eight, article five, chapter sixty-four of the  
17 code of West Virginia, one thousand nine hundred thirty-one, as  
18 amended, be amended and reenacted, to read as follows:

19 ARTICLE 5. AUTHORIZATION FOR DEPARTMENT OF HEALTH AND HUMAN  
20 RESOURCES TO PROMULGATE LEGISLATIVE RULES.

21 §64-5-8. Human rights commission.

22 (a) The legislative rules filed in the state register on the  
23 tenth day of August, one thousand nine hundred ninety, modified  
24 by the human rights commission to meet the objections of the

1 legislative rule-making review committee and refiled in the state  
2 register on the twelfth day of December, one thousand nine  
3 hundred ninety, relating to the human rights commission  
4 (discrimination against the handicapped), are authorized.

5 (b) The legislative rules filed in the state register on the  
6 twenty-second day of March, one thousand nine hundred ninety-one,  
7 modified by the human rights commission to meet the objections of  
8 the legislative rule-making review committee and refiled in the  
9 state register on the eighteenth day of November, one thousand  
10 nine hundred ninety-one, relating to the human rights commission  
11 (religious discrimination), are authorized.

12  
13 NOTE: The purpose of this bill is to authorize the Human  
14 Rights Commission to promulgate legislative rules relating to the  
15 religious discrimination.

16  
17 Strike-throughs indicate language that would be stricken from  
18 the present law, and underscoring indicates new language that  
19 would be added.



MARIO J. PALUMBO  
ATTORNEY GENERAL  
RICHARD L. GOTTLIEB  
CHIEF DEPUTY ATTORNEY GENERAL

STATE OF WEST VIRGINIA  
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Protection Division  
(304) 348-8888

Civil Rights Division  
(304) 348-0546

Preneed Funeral Services  
(304) 348-0303

Consumer Hotline  
(304) 348-8808

October 30, 1991

The Honorable Ken Hechler  
Secretary of State  
Suite 157-K, State Capitol  
Charleston, West Virginia 25305

Re: West Virginia Human Rights Commission  
Rules Regarding Religious Discrimination

Dear Mr. Hechler:

Enclosed please find Form #4 and accompanying modified Rules of the West Virginia Human Rights Commission Regarding Religious Discrimination which were reviewed and approved by the Legislative Rule-Making Review Committee at its September 10 meeting. I have enclosed an extra copy which I would appreciate your causing to be stamped as "filed" or "received" and returned to my office.

Please let me know if you have any questions or if we have failed to attach any required documents. Thank you for your assistance in this matter.

Sincerely,

MARY CATHERINE BUCHMELTER  
DEPUTY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

MCB/jm

Enclosures

cc: Legislative Rule-Making  
Review Committee



KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

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WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

(Plus all the volunteer  
help we can get)

RECEIVED  
DEC 15 1992  
ATTORNEY GENERAL  
CIVIL RIGHTS DIV.

TO: Mary Kay Buchmelter

AGENCY: Human Rights Commission

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: December 11, 1992

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 3 TITLE: 77 Human Rights Commission

\* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: \_\_\_\_\_

TITLE OF PERSON SIGNING: \_\_\_\_\_

DATE: \_\_\_\_\_

\*\*\*\*\*

\* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: [Signature]

TITLE OF PERSON SIGNING: Legal Secretary

DATE: 12-30-92

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.