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2024 Public Sector Conference

Emerging Issues in Religious Liberty in the Workplace

Friday, May 10, 2024
1:00 p.m. – 2:15 p.m.

Speakers:

James (Jim) Sonne

Conference Reference Materials

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Religious Liberty in the Workplace

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2024 Public Sector Conference - May 10, 2024

Presenters



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Agenda

- Federal, State, Local Laws & Rules
- Title VII/FEHA: “Undue Hardship” Standard
- *Groff v. DeJoy* (2023)
- Applications and Emerging Issues
- Special Employment Considerations
- Special Considerations for Attorneys
- Questions



Federal, State, Local Laws & Rules

- Title VII of the Civil Rights Act of 1964 (Title VII) and the California Fair Employment and Housing Act (FEHA) prohibit employment discrimination on the basis of religion.
 - 42 U.S.C. § 2000e-2
 - Cal. Gov. Code § 12940
- Under both laws, employers also have a duty to provide “reasonable accommodations” for employees whose religious beliefs or observances conflict with work duties, unless doing so would cause an “undue hardship” on the employer’s business.
- Local laws may be more restrictive.

Federal, State, Local Laws, & Rules (cont.)

- Unruh Civil Rights Act (Cal. Civ. Code § 51)
 - All persons in California are “free and equal” regardless of protected characteristics, including religion.
 - Guarantees a right to “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”



CA State Bar Rule 8.4.1

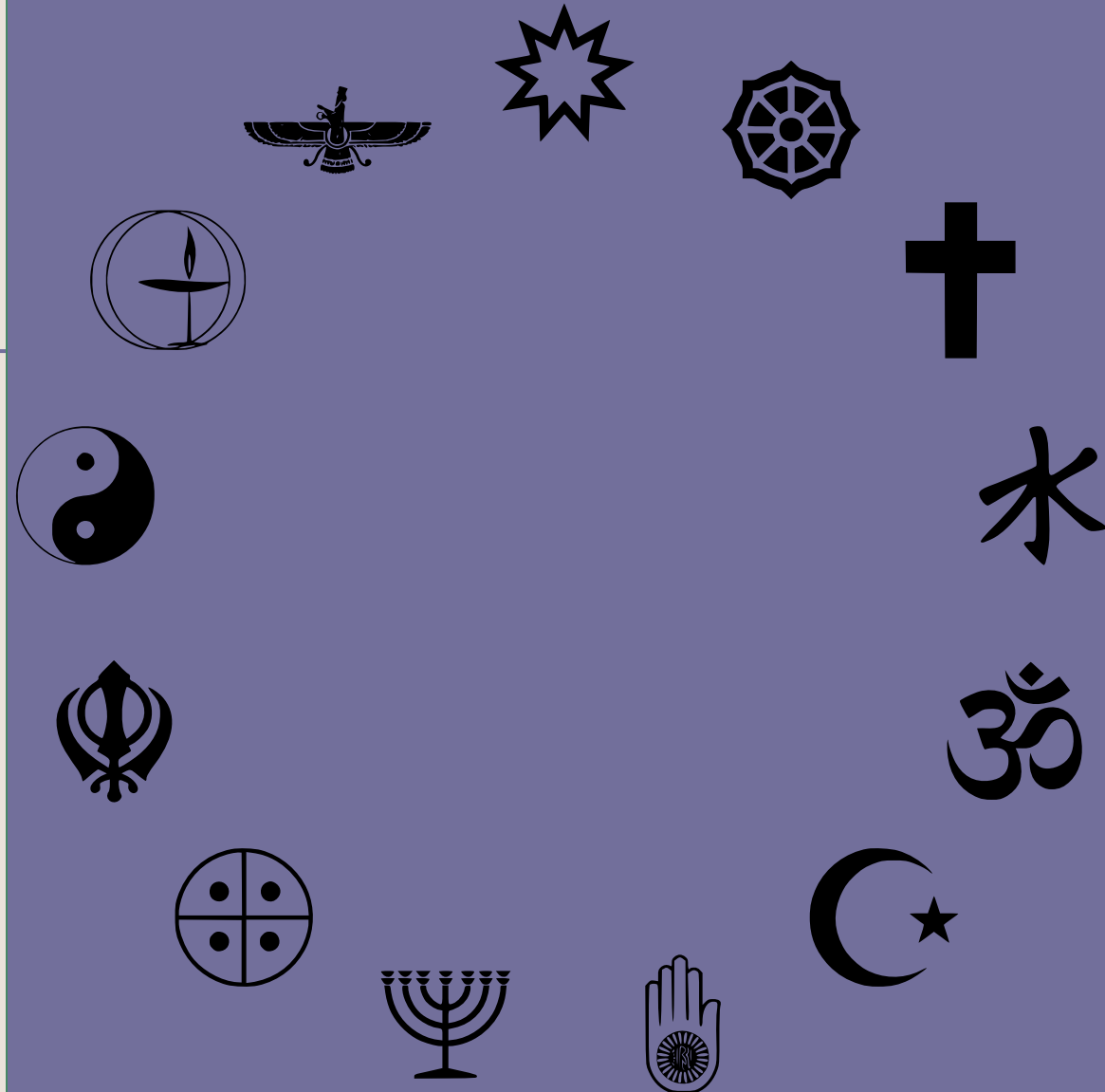
- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
 - (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or
 - (2) unlawfully retaliate against persons.
- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly permit unlawful discrimination;
 - (ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or
 - (iii) unlawfully refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
 - (2) unlawfully retaliate against persons.
- (c) For purposes of this rule, "protected characteristic" means... religious creed.

What is Protected?

- **Religion**
 - “Religion” includes all aspects of religious observance and practice, as well as belief. (42 U.S.C. § 2000e(j))
 - “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. (Gov. Code § 12926(q))
 - “Religious dress practice” includes the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed.
 - “Religious grooming practice” includes all forms of head, facial, and body hair that are part of an individual observing a religious creed.
 - “Religious belief or observance” includes observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance. (Gov. Code § 12940(I)(1))
- **Adverse Action, Including Need for Accommodation**
 - *EEOC v. Abercrombie & Fitch Stores* (2015) 575 U.S. 768 – Employees/applicants protected against adverse action “because of” religion, including the need for religious accommodation - and regardless of actual knowledge. (Also, disparate impact theory.)

What is Protected? (Continued)

- Employee's belief must be **sincerely held**.
- Encompasses traditionally recognized religions, beliefs beyond traditional religions (and, in certain cases, no religion at all).
 - Whether a practice is religious is typically not at issue.
 - “[I]n those cases in which the issue does exist, the [EEOC] will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” (29 C.F.R. § 1605.1)
 - “[B]eliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.” (2 CCR § 11060)



Accommodation Requirements - Employer

When an employee advises an employer of a **sincerely held religious belief** that conflicts with a job requirement, the employer must:

- engage in an **interactive process** with the employee to explore reasonable accommodations;
- either provide a **reasonable accommodation** or be able to show that it cannot do so without **undue hardship** to its business;
- avoid discriminating against the employee based on religion or retaliating against the employee for requesting an accommodation.
 - Accommodation request is protected, “regardless of whether the request was granted.” (Gov. Code § 12940(l)(4))

“Undue Hardship” Standard

- Religious accommodation required unless employer establishes an **undue hardship**.
 - Title VII does not define undue hardship
 - FEHA defines undue hardship for religious accommodation the same as an undue hardship for disability-related accommodation, meaning the action causes significant difficulty or expense. (Gov. Code § 12926(u)).
- Before *Groff v. DeJoy* (2023) 600 U.S. 447, Title VII cases were evaluated against the *de minimis* burden test:
 - In *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, SCOTUS held that an accommodation creates an undue hardship if it causes “**more than a *de minimis***” burden on the employer’s business.
 - But nearly 50 years later...

***Groff v. DeJoy* – “Clarified” Standard**

- USPS employee requested not to work on Sundays for religious reasons.
- USPS required Sunday workers to deliver Amazon packages.
- “Clarified” that the *de minimis* standard was incorrect, and undue hardship means substantial burden in the overall context of an employer’s business.
- Hardship is “something hard to bear,” and “more severe than a mere burden.”
- May consider impacts on coworkers, however, such impacts are “relevant only to the extent those impacts go on to affect the conduct of the business.”





We hold that showing “more than a *de minimis* cost,” as that phrase is used in common parlance, does not suffice to establish “undue hardship” under Title VII. *Hardison* cannot be reduced to that one phrase . . . We therefore, like the parties, understand *Hardison* to mean that “undue hardship” is shown when a burden is substantial in the overall context of an employer's business.

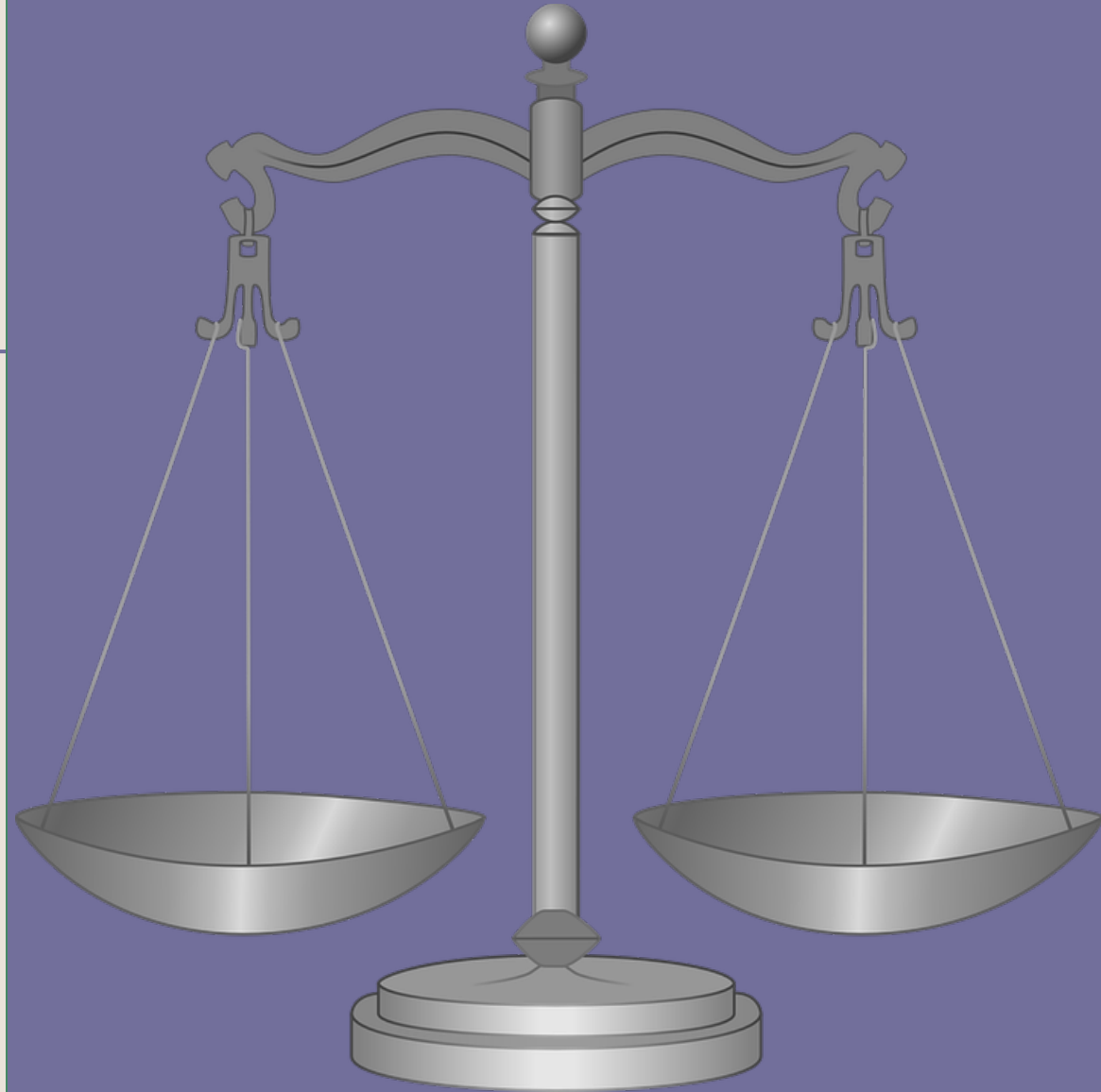
. . . .

Courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.

Groff v. DeJoy, 600 U.S. at pp. 468-470

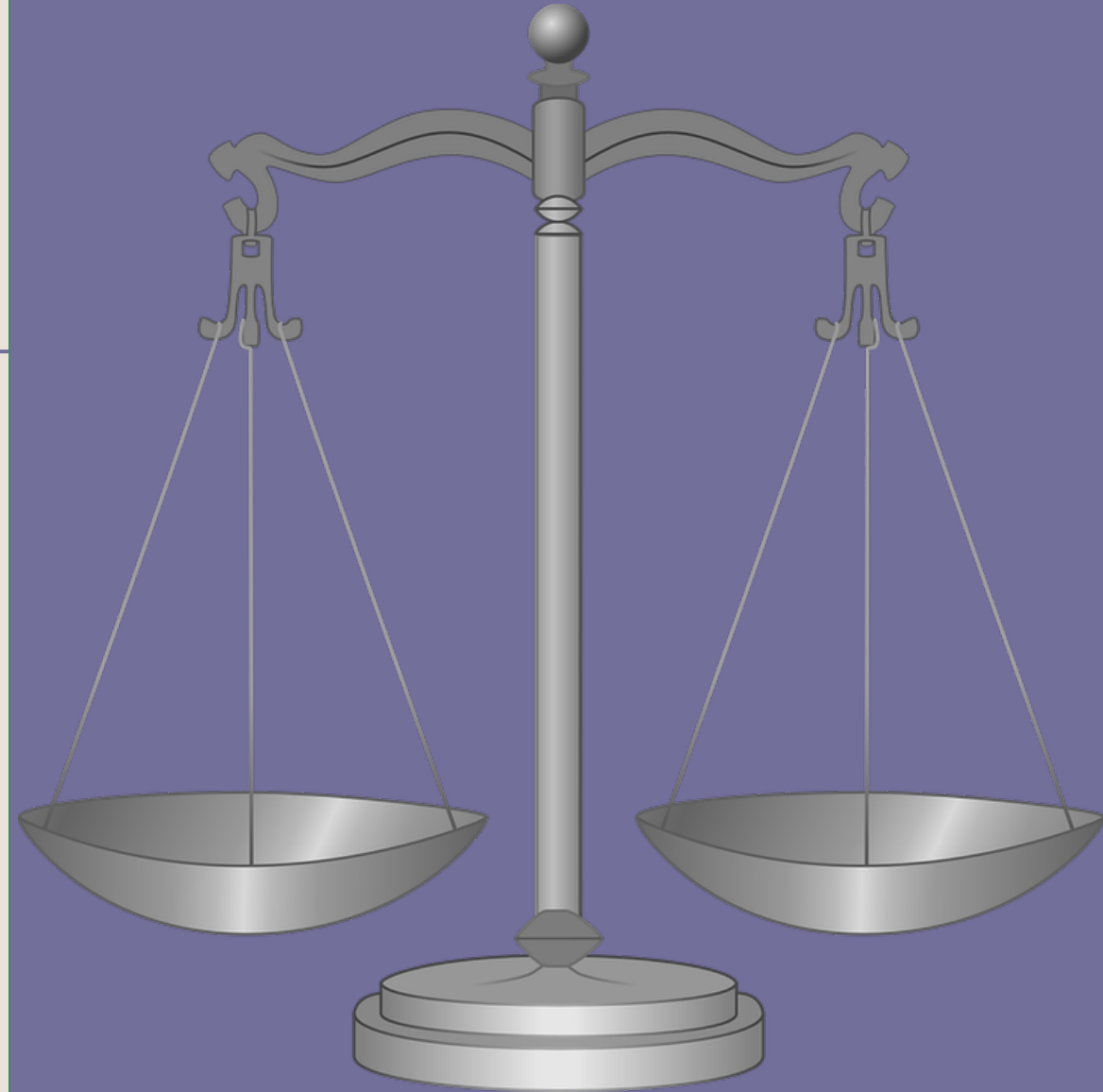
Applications

- Sabbath and other observances
- Prayer breaks / spaces
- Religious dress / grooming
 - Articles of clothing
 - Uniform modifications
 - Grooming practices
- Union dues



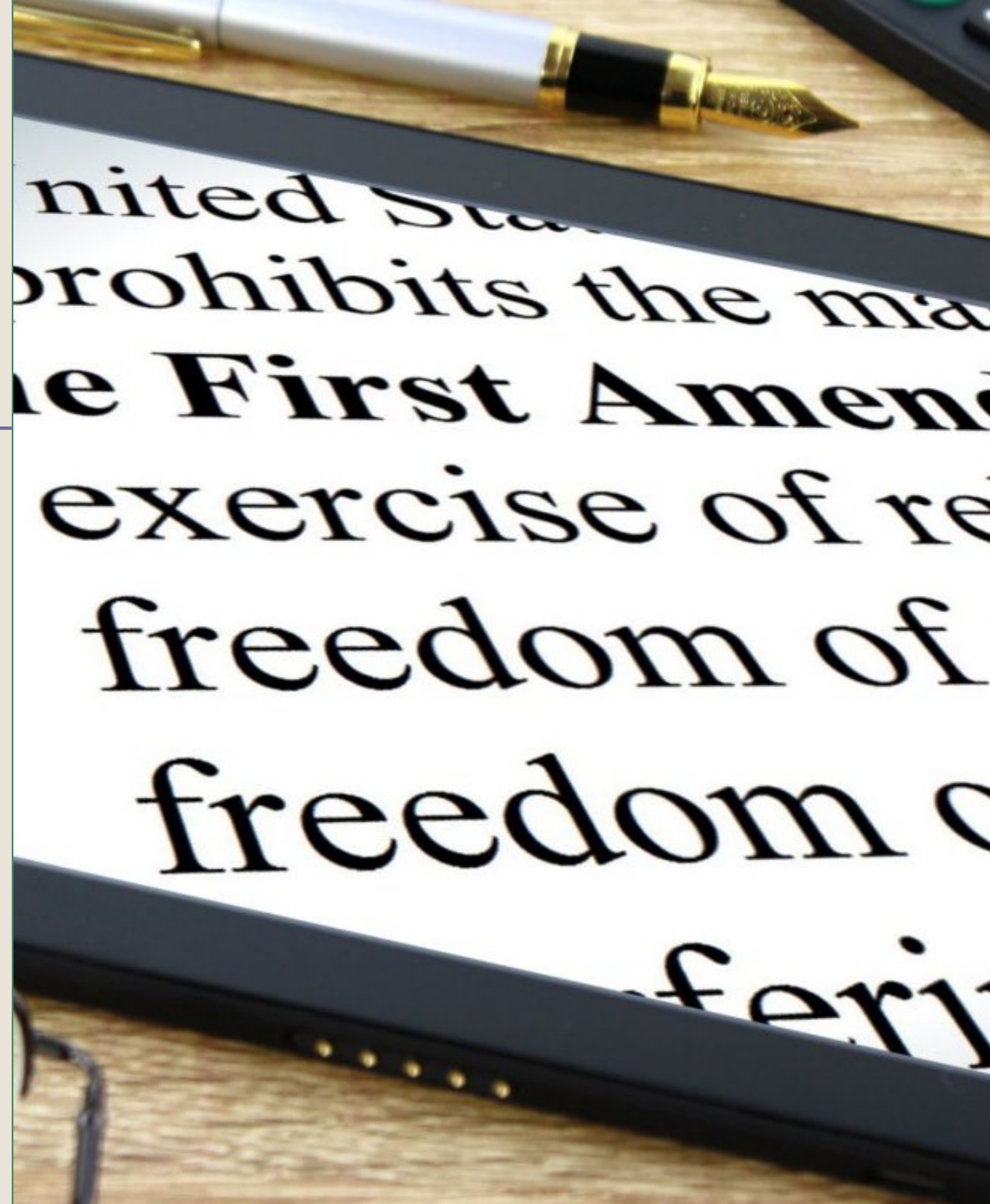
Emerging Issues

- Vaccine exemptions
- Inclusivity / DEI training
- Speech and expression
- Objection to job requirements
- “Bright lines”
 - Collective-bargaining agreements
 - Co-worker harassment?



Special Employment Considerations

- **Public employment**
 - First Amendment Considerations
 - Free Exercise, Establishment, Speech
 - *Smith* (1990)
 - *Kennedy v. Bremerton* (2022)
- **Religious employment**
 - Constitutional dimensions: “ministerial exception” and “church autonomy”
 - Title VII religious-employer exception
 - Religious Freedom Restoration Act



Special Considerations for Attorneys

- CA Ethics Rule 8.4.1: Prohibits discrimination, harassment, and retaliation in representing clients and law firm operations.
- Impacts on Bias:
 - In the Legal Workplace – employee / employer
 - In the Practice of Law – attorney / client Relations
 - In the Courts – Judges / court staff & participants



Questions?

