



# Religious Discrimination in the Workplace

# A lus Laboris Publication

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# Religious Discrimination in the Workplace





In today's global marketplace, businesses increasingly operate on a regional or international scale. Companies that coordinate their employees across multiple jurisdictions must comply with the rules and regulations governing employment, labour, pensions, and immigration law in each of those jurisdictions. As a result, retaining legal experts with knowledge and experience in both international and local Human Resources law is essential for businesses of all sizes.

**Ius Laboris** is an alliance of leading Human Resources law practitioners. We have more than 2,500 lawyers providing local expertise across the globe, with member firms in over 45 countries and coverage in more than 100 jurisdictions. Human Resources challenges require local expertise within a global framework. The complexities of national employment law demand it and the Ius Laboris members provide it.

Each of our members must be a top-ranking Human Resources or Pensions law firm in their respective locality to be invited to join Ius Laboris. We welcome into our Alliance only firms that possess focused expertise in all disciplines of labour, employment and pensions law. Our lawyers understand the issues and challenges associated with managing a workforce, wherever it is located.

The Alliance focuses on specific areas of expertise within our six International Practice Groups (IPGs). The IPGs bring together lawyers from across the Alliance with expertise in key areas of Human Resources law; including Individual Employment Rights, Discrimination, Restructuring and Labour Relations, Pensions, Employee Benefits and Tax, and Immigration.

In our experience, local expertise in these areas of law is crucial to developing coherent Human Resources strategies that work within a global framework. Our IPGs meet regularly and are well placed to coordinate regional and worldwide requests, drawing on each individual lawyer's wealth of experience. Clients can access the work of our IPGs, which complement our extensive portfolio of legal services.

The Discrimination IPG focuses on discrimination questions. The lawyers in this group meet regularly to study trends in types of claims, compliance methods, how claims are litigated or otherwise resolved, methods of alternative dispute resolution, and other comparative issues. Each lawyer in the Discrimination IPG is dedicated to providing the best assistance to employer clients in his or her jurisdiction with respect to discrimination avoidance and resolution of claims. Each country has unique prohibitions regarding discrimination. Enforcement mechanisms differ widely. Accordingly, lawyers with local knowledge and expertise are essential to good results.

The Discrimination IPG has published guides on discrimination issues in general, sexual harassment, sexual harassment prevention policies, and religious discrimination.

For additional information, please visit our website ([www.iuslaboris.com](http://www.iuslaboris.com)) or feel free to contact us:

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# Contents

INTRODUCTION	13
AUSTRIA	15
BELGIUM	23
CANADA	31
CZECH REPUBLIC	43
DENMARK	51
FINLAND	61
FRANCE	69
GERMANY	79
IRELAND	91
ITALY	99
LUXEMBOURG	107
MEXICO	117
NETHERLANDS	125
NORWAY	133
POLAND	141
PORTUGAL	149
RUSSIA	157
SLOVAK REPUBLIC	163
SPAIN	171
SWEDEN	179
TURKEY	187
UNITED KINGDOM	193
UNITED STATES OF AMERICA	201



# Introduction

Prohibitions against discrimination on the basis of religion are a fundamental legal principle in many countries, but the enforcement is a growing challenge. Immigration is changing the demographics of many European states, creating growing tensions between religious freedom and secularism, between religious identification and the idea of citizenship. Multiculturalism as an expression of religious tolerance may present a challenge to ideas of personal freedom defined in a country. In the United States and Canada the founding idea of ‘melting pot’ presumes a blending of difference that is at odds with the desires of certain religious communities. Evangelical Christianity may also vigorously test the boundaries of separation of church and state.

As broad and as complex as these issues are, they become a matter for daily decisions by employers. Should the employer provide special time off for religious observance? If so, how long, and at what inconvenience to the employer or others? Should the employer allow religious dress? How much discussion about religion should the employer allow in the workplace? This book attempts to provide basic principles for the 23 countries covered. These are countries where questions of religious accommodation are significant political issues and thus major workplace concerns. Each chapter is organised identically, to allow comparative research.

The authors of each chapter are Ius Laboris members in the country listed. For further information, the authors may be contacted, and their contact information is listed at the beginning of the book. Ius Laboris is an alliance of firms with labour and employment specialties. For further information about Ius Laboris, its member firms, and its other publications for employers, go to [www.iuslaboris.com](http://www.iuslaboris.com).

We hope that the book will be a useful start to understanding the duties of employers, and welcome the suggestions of readers for future editions. For any additional information or assistance we invite you to contact the following members of the Discrimination IPG.

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<b>A. THE LEGAL FRAMEWORK</b>	<b>17</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	17
2. DEFINITION OF RELIGION	17
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	18
4. ENFORCEMENT AND CLAIMS	18
<b>B. THE LAW IN CONTEXT</b>	<b>19</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	19
6. DRESS CODES	19
7. DISMISSAL ON RELIGIOUS GROUNDS	20
8. HARASSMENT ON RELIGIOUS GROUNDS	20

Austria





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

In the past, there were no specific laws in Austria concerning discrimination on grounds of religion in the workplace. The 'new' Equal Treatment Act (Gleichbehandlungsgesetz) came into effect July 2004 and prohibits direct or indirect discrimination against employees on the grounds of gender (including marital and family status), age, ethnicity, physical or mental disability, religious belief, world view or sexual orientation. The prohibition applies to employment and working conditions, pay, and conditions for access to employment, self-employment or occupation, such as selection criteria and recruitment conditions as well as termination of employment.

Within the scope of the Equal Treatment Act, direct discrimination is defined as occurring when one person is treated less favourably than another in a comparable situation on one of the grounds identified above. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put certain people at a particular disadvantage compared with others on one of the grounds mentioned above. Direct or indirect discrimination can be objectively justified by a legitimate aim if the means of achieving that aim are appropriate and necessary.

The Equal Treatment Act prohibits not only discriminatory behaviour by the employer but also by any of its representatives and employees. The employer must take the necessary measures to avoid unlawful discrimination. The employer is also obliged to protect its employees from the discriminatory behaviour of third parties in connection with the employment relationship.

Besides the Equal Treatment Act there are some existing general rules protecting the practice of religious belief. The Austrian Constitution forbids discrimination based on religion and guarantees freedom of religion and conscience.

### 2. DEFINITION OF RELIGION

Austrian law does not provide a definition of religion. As the Equal Treatment Act also protects world view (Weltanschauung), which can also be implicated in religion, the scope of protection can be quite broad. The legislative materials indicate that the term 'religion' is not linked to membership of

churches or other officially recognised religious communities. In order to define something as a 'religion' there must be at least a clear commitment, parameters for the way to live and a kind of cult. According to the legislative materials, 'world view' is a collective noun for all ideological, political or other ways of conceiving of life and the world. It does not only comprise large ideologies but also refers to concepts with a lower philosophical standard.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

Basically, there are no general provisions in Austrian law requiring an employer to accommodate an employee's religious beliefs. Some national holidays (stipulated in law), however, are religious ones and must be respected by the employer in any case (e.g. Christmas and Easter).

One provision in the White Collar Employees Act (Angestelltengesetz) could also be relevant with reference to religious beliefs. Section 8 para 3 of the White Collar Employees Act stipulates that the employee is entitled to leave work for a short period of time for important reasons without restriction or loss of his wage entitlement. Religious reasons (e.g. the baptism of a close family member or religious festivals) might be regarded as important reasons which can justify such an absence.

Most of the collective bargaining agreements stipulate a certain amount of free time for religious occasions such as weddings and funerals.

### 4. ENFORCEMENT AND CLAIMS

The Equal Treatment Act may be enforced through the ordinary courts, with special provisions regarding the burden of proof, which are in favour of the 'victims'. The employee may sue the employer for damages for both financial and non-financial loss. In some cases (e.g. the rejection of an application for discriminatory reasons), the law stipulates a minimum of compensation irrespective of the actual harm suffered. It is also possible for the employer to be ordered to eliminate the discrimination. The statutory periods of limitation depend on the substance of the claim, and range from 14 days (e.g. for a claim against a discriminatory termination) to three years (e.g. a claim based on unequal pay for equal work).

An employee may also appeal to the Equal Treatment Commission (Gleichbehandlungskommission). This authority may decide whether discrimination has occurred and request the employer to eliminate it. Its

decisions are not binding, but serve as good evidence if the matter later goes to court. Moreover, proceedings at the Equal Treatment Commission very often damage the reputation of the employer. These proceedings delay the running of the statutory periods of limitation mentioned above.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

As explained in section 3, there are no general obligations for an employer to accommodate an employee's religious beliefs (except national holidays which are religious). However, Section 8 para 3 of the White Collar Employees Act (see above) may create a legal entitlement for the employee to leave of absence with full compensation. A decision of the Labour Court Vienna (first instance) holds that the Muslim festivity 'Bayram' is an important reason which entitles an employee to be absent from work with full compensation for a short period of time. At present, there are no obligations for the employer to allow time off work for regular prayers.

The particular entitlements of employees and the obligations of the employer always depend on the circumstances of the individual case. Not every religious festival will be deemed an important reason with respect to the White Collar Employees Act. Time off work for religious observance also depends on operational circumstances. For example, it would be considered more reasonable to allow prayer breaks to a full-time employee with no fixed working hours than to an employee working only part-time with no fixed working hours.

### **6. DRESS CODES**

While they differ from business to business, dress codes are quite common in Austria. Some of them are very detailed whereas others, for example, only refer to wearing a tie. Dress codes may be implemented by the employer unilaterally as long as the works council does not demand a works agreement on the issue. If an agreement between the employer and the works council cannot be reached, both parties may appeal to the arbitration board for a binding decision.

If dress codes are very strict about hats or other headgear, beards, or hair cuts – which could be religiously motivated – there may be a discrimination issue. For example, if the dress code forbids a headdress, this must be justified by objective reasons (e.g. safety issues or clear business standards).

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

Under Austrian law an employee is entitled to appeal a dismissal based on religiously discriminatory grounds. The employee may seek reinstatement to his or her former position and claim lost wages. In practice, most such cases do not get as far as receiving a judgment, but are settled beforehand.

At present, there is no case law with reference to discriminatory dismissals based on religious grounds. The Equal Treatment Act is still quite new, and the overall number of discrimination cases is small. A general protection against termination existed (and still exists by Section 105 of the Labour Constitution Act) before the new equal treatment regulations became effective. An employee is always entitled to appeal a termination for inadmissible reasons, including religious belief. However, this kind of appeal is quite rare in Austria.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Harassment on religious grounds is considered to be a form of discrimination and is therefore prohibited. Any kind of behaviour that is based on religious grounds and offends another person's dignity at work, is unwanted, inappropriate or offensive and creates an intimidating, hostile or humiliating working environment is considered to be harassment on religious grounds. An employee has the right to make a harassment complaint. The employer must investigate a complaint of harassment and take adequate measures to avoid any further harassment.

An employee may also sue the harasser and/or the employer for damages. In addition, the employee may claim compensation for non-pecuniary loss (with minimum compensation of EUR 720 (Section 26 para 11 of the Equal Treatment Act)).



<b>A. THE LEGAL FRAMEWORK</b>	<b>25</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	25
2. DEFINITION OF RELIGION	26
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	26
4. ENFORCEMENT AND CLAIMS	26
<b>B. THE LAW IN CONTEXT</b>	<b>27</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	27
6. DRESS CODES	28
7. DISMISSAL ON RELIGIOUS GROUNDS	28
8. HARASSMENT ON RELIGIOUS GROUNDS	29

Belgium





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

The Act of 10 May 2007 against certain forms of discrimination prohibits religious discrimination in the workplace. The Act prohibits direct and indirect discrimination, based on age, sexual orientation, civil status, birth, fortune, religion or belief or philosophical conviction, political conviction, language, current and future health condition, disability, physical or genetic characteristics and social origin.

Direct discrimination consists in a direct 'distinction' that cannot be justified. Indirect discrimination consists in an indirect 'distinction' that cannot be justified. The definitions of a direct and indirect distinction read as follows:

- 'A direct distinction is the situation that occurs when a person is treated less favourably than another person in a comparable situation is, would be or was treated based on one of the protected criteria.'
- 'An indirect distinction is the situation that occurs where an apparently neutral provision, criterion or practice has harmful effects on a person protected by one of the criteria.'

Harassment is considered as a form of discrimination. An instruction to discriminate is also deemed to constitute discrimination in itself.

- 'Direct distinction' based on religion can only be justified if a characteristic constitutes an essential and determining professional requirement, due to the nature of the professional activity or the context in which it is performed, provided that the objective is legitimate and the requirement is proportionate to that objective.
- 'Indirect distinction' can be objectively justified by a legitimate aim if the means to achieve that aim are necessary and appropriate.

Positive discrimination can also justify a distinction based on religion.

Finally, a distinction that is based on legal grounds never constitutes discrimination.

The prohibition on discrimination applies throughout the employment relationship and covers areas such as recruitment, benefits, changing working conditions and dismissal.

The Collective Bargaining Agreement (CBA) no. 38 of 6 December 1983 on the selection and recruitment of employees is also relevant in this context.

According to this CBA, the employer is prohibited from treating candidates differently on the basis of a number of specific characteristics, including their political or philosophical convictions. However, there are no specific sanctions for discrimination.

## **2. DEFINITION OF RELIGION**

There is no legal definition of religion. However, because the Anti-Discrimination Act is applicable not only to discrimination based on religion but also to philosophical convictions, its scope of application is wide.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Belgian law does not specifically require the employer to accommodate an employee's religious beliefs. An employer is not obliged to change its rules or requirements in order to enable employees to observe their beliefs, unless this amounts to indirect discrimination (see the definition in section 1 above). If the rule or requirement (such as a dress code) applies to all employees in the same situation and is objectively and reasonably justified, the harmful effects on employees of a certain religion would not, in principle, constitute indirect discrimination.

## **4. ENFORCEMENT AND CLAIMS**

An employee who has suffered religious discrimination has three options for filing a complaint: i) at the company level by following the internal procedure; ii) with the Employment Law Inspection Services or the Centre for Equal Opportunities and Opposition to Racism; or iii) with the Labour Court.

Two civil sanctions apply to discrimination:

- First, all contractual provisions which are contrary to the principle of equal treatment are void. As a consequence, employees who are discriminated against may claim before the Labour Court the same advantages as employees who were treated more favourably.

- Second, the victim of discrimination can obtain an injunction from the President of the Labour Court to stop the discriminatory treatment. The injunction is obtained by a summary procedure, and it has the effect of halting the alleged discrimination. However, the victim may not recover damages; instead, if the claim is successful, the victim is entitled to claim equal treatment with the favoured employees from that point onwards.

The request for an injunction may be filed not only by the employee concerned, but also by a trade union or an institution with the statutory goal of defending human rights or combating discrimination.

The above does not preclude the claimant from bringing civil liability actions on the basis of these infringements. In principle, the victim has to prove the existence and the amount of his or her loss in order to claim damages. Otherwise, the Acts provide the possibility for the victim of discrimination to claim an indemnity equal to six months' salary. If the employer can prove that the unfavourable treatment (for instance a non-selection) would also have occurred on objective grounds, the indemnity is limited to three months' salary. Claims made to the Labour Court on the grounds of religious discrimination are not common. Recently, there have been some cases involving employees who were dismissed because they refused to refrain from wearing their headscarves at work.

There are also criminal sanctions for religious discrimination. Certain infringements constitute criminal offences and perpetrators may be fined or imprisoned. However, criminal sanctions are not common and when there is a conviction, the most common sanction is a fine, rather than imprisonment.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

In principle, the law does not require the employer to allow an employee to take time off work for religious reasons. However, some specific additional days off work are given to the employees for some events of a religious nature (e.g. the first communion of a child).

## 6. DRESS CODES

An employer may impose a dress code or a limitation that prevents employees of certain religions from dressing in accordance with their beliefs. It might be questioned whether a dress code or a rule of neutrality could constitute indirect religious discrimination, but at the time of writing case law accepts that employees may be asked not to wear religious dress or signs according to a dress code. However, there have only been a few cases on this and the law may change in response to cases currently going through the system, e.g. in relation to whether a dress code prohibiting religious signs would constitute direct discrimination in itself.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

An employer is prohibited from dismissing an employee based on the employee's religion (in accordance with the Anti-Discrimination Act). By that Act, an employee who has submitted a complaint against alleged discrimination benefits from a specific form of employment protection. This employment protection means that the employee concerned cannot be fired, unless for reasons unrelated to the complaint. The protection prevails regardless of whether the complaint is submitted at company level, at the Employment Law Inspection Services level or before the court. A twelve-month protection period starts from the moment a complaint is submitted. In the case of a claim in court, the protection period lasts for three months after a final judgment. In certain cases where a complaint is submitted at the Employment Law Inspection Services level, protection is created even if the employer has not yet been informed.

An employee who is dismissed in breach of the employment protection may ask for his or her reinstatement to the organisation. If the employer refuses reinstatement, it then will owe the employee a lump sum of six months' salary as damages or any other compensation for the actual harm suffered (here the employee must be able to prove the scale of the harm).

If a dismissed employee claims before a competent court that the dismissal was discriminatory, and if the employee establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proof that there has been no discrimination shifts to the employer.

The burden of proof that an employee was dismissed for reasons that are not connected with a complaint or court action based on the Anti-Discrimination

Act is on the employer. This is the case only within twelve months following the filing of a complaint, and within three months following the final judgment, against which no further recourse is available.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

The Anti-Discrimination Act considers harassment to be a form of discrimination. The general prohibition against discrimination includes religious harassment.

There is also a specific Act dealing with the prevention of and protection against harassment and sexual harassment at work, which dates from 10 January 2007. It targets physical or psychological violence, repeated harassment and sexual harassment at work. This Act may cover religious harassment. This specific Act on harassment prevails over the Anti-Discrimination Act.

Under this Act, the employer must draft a prevention plan in order to reduce and prevent harassment. It must also appoint a specific prevention advisor specialised in the psychological aspects of violence at work.

If harassment occurs, the worker may file a complaint:

- at company level with the prevention advisor who will try to reconcile those involved
- with the Occupation Health and Safety Inspection or
- with the public prosecutor.

The Act provides a specific protection against dismissal, as well as the requirement to pay an indemnity on top of the normal termination indemnities, in the event that the employer dismisses an employee because he or she filed a complaint or acted as a witness who testified in any of the complaint procedures. The level of the additional indemnity is set at six months' salary, or compensation for actual damage suffered (which must be proven by the victim).

<b>A. THE LEGAL FRAMEWORK</b>	<b>33</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	33
2. DEFINITION OF RELIGION	34
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	35
4. ENFORCEMENT AND CLAIMS	36
<b>B. THE LAW IN CONTEXT</b>	<b>37</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	37
6. DRESS CODES	38
7. DISMISSAL ON RELIGIOUS GROUNDS	39
8. HARASSMENT ON RELIGIOUS GROUNDS	40

Canada 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Freedom of religion is guaranteed not only by the Canadian Charter of Rights and Freedoms (the 'Charter'), which protects individuals against government actions, but also by federal and provincial human rights statutes, which protect individuals from discrimination by private persons, corporations and government. Human rights legislation is given a 'quasi-constitutional' status in Canada; all federal and provincial laws must comply with human rights legislation.

Human rights commissions and tribunals in all jurisdictions take the position that every person has the right to be free from discrimination and harassment based on his or her religion. This extends to situations where the individual who is the target of the discrimination or harassment has no religious beliefs whatsoever. Thus, atheists and agnostics may benefit from human rights protection on the basis of religion.

Human rights statutes in all jurisdictions prohibit discrimination in employment on the basis of religion. It is a discriminatory practice for an employer to refuse to employ (or refuse to continue to employ) a person or to differentiate adversely between employees on the basis of religion. Protection from discrimination on the basis of religion extends across all aspects of the employment relationship, including recruiting, application forms, interviews, promotions, workplace dress codes and shift schedules. Examples of discrimination on the basis of religion can include:

- refusing to permit individuals to observe periods of prayer at particular times during the day
- refusing to make an exception to dress codes to recognise religious dress requirements
- refusing to permit individuals to take time off to observe a religious holiday
- dismissing an individual because of his or her religious beliefs and/or observances.

As a general rule, attempting to obtain information concerning an applicant's religion or creed at the pre-interview stage of a recruitment process is unacceptable. Consequently, invitations to apply for employment and job application forms cannot contain:

- questions about availability for work that are asked in a manner that reveals the applicant's religion or creed
- questions designed to reveal that religious requirements may conflict with the prospective employer's work schedules or workplace routines or
- inquiries as to religious affiliation, places of worship that are attended, or customs observed.

Both direct and indirect discrimination are prohibited under Canadian law. Direct discrimination occurs when an employer adopts a rule, policy or practice, or makes a distinction that is prima facie discriminatory, for example, refusing to hire individuals who are Jewish. Conversely, indirect discrimination is prima facie neutral but, in effect, creates a disadvantage for members of a protected group. For example, a policy that all employees must work one Saturday a month could be considered discriminatory to the extent that it has an adverse impact on employees who observe the Sabbath on Saturdays. Such a general rule or policy may remain in effect. However, the employer would not be permitted to impose it rigidly unless it could prove that:

- it adopted the rule or policy in good faith based on legitimate business reasons
- the rule or policy is based on a bona fide occupational requirement (a 'BFOR') and
- it would be impossible to accommodate individual employees on the basis of their religious beliefs or practices without incurring undue hardship.

It is generally not a discriminatory practice to implement employment equity programmes and other programmes designed to prevent or eliminate disadvantages suffered by a particular group. To this end, human rights codes include various exceptions permitting special employment equity programmes to serve the needs of historically disadvantaged groups. Also, human rights legislation generally permits special service organisations of a religious, philanthropic, educational, fraternal or social nature to prefer to employ individuals who practice a particular religion if the organisation serves mostly the interests of that religious group.

## 2. DEFINITION OF RELIGION

By and large, references in Canadian human rights statutes to religion, religious beliefs, and creed are treated synonymously by courts and adjudicators. Individuals who bring a complaint on the grounds of religious discrimination bear the onus of proving that they have a sincerely held religious

belief, observance or worship. Traditional religions, including Buddhism, Christianity, Hinduism, Islam and Judaism are covered, as well as less common or newer theistic beliefs and practices and non-theistic beliefs. These are assessed on a case-by-case basis, and have included beliefs such as Wicca, the Falun Gong and the spiritual faiths and practices of aboriginal cultures. It is generally beyond the mandate of human rights tribunals to decide whether a specific practice or observance for which an employee seeks accommodation is mandatory under the strict tenets of the employee's religion. Adjudicators have accepted observances as religious practice, even though they are not required by strict tenets of a faith.

As stated above, atheists and agnostics may benefit from the protection of human rights legislation. However, the definition of religion has not generally been extended to include secular, moral or ethical beliefs or political convictions. Likewise, protection on the basis of religion does not extend to beliefs or practices that incite hatred or violence against other individuals or groups, or to practices that contravene criminal law or international human rights law, even though they may purport to have a religious basis.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Human rights legislation in all Canadian jurisdictions places a duty on employers to accommodate an employee's religious beliefs and practices. An accommodation measure will be acceptable if it meets the needs of the individual, to the greatest extent possible, to the point of undue hardship.

Satisfying the undue hardship standard is onerous. In general, costs and health and safety requirements are the only factors that can be considered in assessing whether an accommodation would cause an employer undue hardship. Costs includes the actual financial cost of providing the accommodation, as well as any reasonably foreseeable future costs in continuing the accommodation. In assessing health and safety requirements, it is relevant to consider concerns for the health and safety of the employee requesting the accommodation, as well as the health and safety of other employees and the public. The undue hardship factors are generally assessed in light of the size of the organisation, the nature of its business, and its financial capabilities.

Accommodation involves a joint effort between an employer, the employee seeking the accommodation and the union, if any. Collective agreements and other contractual terms may not act as a bar to providing accommodation and

must give way to the requirements of human rights law. Both the employer and the union may be parties to a discrimination complaint if, through the collective bargaining process, a rule is formulated that has discriminatory effects. Also, a union may not interfere with accommodation of an employee by insisting on the strict enforcement of collective agreement provisions. It is the responsibility of all workplace parties to devise an appropriate accommodation strategy.

#### **4. ENFORCEMENT AND CLAIMS**

An employee alleging religious discrimination may file a complaint with the human rights commission or tribunal in the applicable jurisdiction. The statutory limitation period for filing a complaint varies by jurisdiction, but is generally between six to twelve months. The commission or tribunal, as the case may be, will often provide the parties with an opportunity to mediate the complaint. If the parties refuse to mediate (or if mediation is unsuccessful), then the complaint will generally proceed to a hearing before a tribunal. In some jurisdictions, notably Ontario, complainants may receive free legal assistance and representation at all stages of the complaint process.

The goal of human rights legislation is remedial, rather than punitive. In promoting settlement or ordering remedies, commissions and tribunals will strive to make the complainant whole and reform the employer rather than punish the offending party.

Human rights tribunals have broad authority to inquire into complaints and to impose a wide range of remedies for a workplace human rights violation. These can include ordering reinstatement and monetary compensation for loss arising out of the infringement, including damages for injury to the complainant's dignity, feelings and self respect, and legal costs. A human rights tribunal may also direct the offending party to do anything that, in the tribunal's opinion, is necessary to achieve compliance with the applicable statute, both in respect of the particular complaint and in respect of future practices. This can include requiring an employer to provide a written apology to the complainant, implementing an affirmative action, hiring or promotion programme, and offering educational information and training programmes to supervisors and managers.

In some jurisdictions, including Ontario and the federal jurisdiction, an employer found to have contravened its statutory human rights obligations or a tribunal order is considered guilty of an offence and, upon conviction, may be liable to a fine (up to \$25,000 in Ontario and up to \$50,000 in the federal jurisdiction).

Such prosecutions cannot be instituted except with the consent of the Attorney General in the jurisdiction.

The right of individuals, including employees, to launch private lawsuits alleging discrimination is restricted. The Supreme Court of Canada has confirmed that if the applicable human rights statute provides general discrimination protection and does not expressly permit resort to the civil courts, then the complainant is barred from bringing a case before the courts. There are limited exceptions to this rule. For example, an employee leaving a hostile work environment because of religious discrimination may commence a civil action for wrongful or constrictive dismissal rather than filing a human rights complaint. The basic rule is clear, however; a civil action that simply alleges discriminatory treatment is not available as an alternative remedy to a human rights complaint.

All rights and obligations under the applicable federal or provincial human rights statute are deemed to be incorporated into collective agreements, and alleged human rights violations are alleged violations of the collective agreement. The Supreme Court of Canada has confirmed that grievance arbitrators must implement and enforce the substantive rights and obligations under human rights statutes and other employment-related statutes as if they were part of the collective agreement. Thus, in a collective bargaining relationship, an aggrieved employee will generally be required to seek redress through the grievance arbitration procedure, rather than through the statutory human rights complaint process.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Employees may request time off work for religious observances, such as pilgrimages, religious festivals, prayer times and fasting. Under human rights law in every Canadian jurisdiction, the employer has an obligation to accommodate such religious observances to the point of undue hardship. In such circumstances, the employer must consider all reasonable accommodation options, which may include:

- alternate arrival and departure times on appropriate days

- other flexible scheduling initiatives, such as staggered hours or use of lunch times in exchange for early departure
- modified break schedules
- use of 'floating' days off or
- unpaid leave of absence.

Faced with an accommodation request for prayer time, an employer must consider not only giving the employee time off work for prayer, but also providing a private area for devotions, unless in doing so it would incur undue hardship. The employer must also be mindful of the fact that, although some employees may wish to engage in prayer at work, the needs of employees who, as a matter of sincerely held belief, do not wish to participate in prayer must be respected and accommodated.

## **6. DRESS CODES**

Unlawful discrimination on the basis of religion can arise when a workplace dress code conflicts with a religious dress requirement. When dealing with dress codes, the employer must consider: the exact nature of the religious observance; the reason for the workplace dress code; whether there are health or safety factors involved; and, if so, whether they involve the health or safety of the employee alone or have consequences for other employees and/or the general public.

A dress code established for reasons related to health and safety may constitute a BFOR (see section 1 above) and provide a defence for employers to refuse an accommodation request to wear religious dress. However, to establish this defence, the employer must satisfy the following two-part test enunciated by the Supreme Court of Canada:

- subjectively, the employer must have enacted the dress code in good faith and with the sincerely held belief that is necessary for the adequate performance of the work involved with all reasonable dispatch, safety and economy and
- objectively, the dress code requirement must be reasonably necessary to assure the efficient and economical performance of the work without endangering the employees, co-workers and the general public.

Even if the employer can establish the dress code is a BFOR, it must still consider whether it can accommodate an individual employee's religious dress request without incurring undue hardship. This would involve determining whether the clothing or gear required under the workplace rule can be

modified to permit the employee to wear the religious dress safely (subject to the undue hardship test) and, if modified dress is not possible, examining whether the employee can be transferred to another job that may be available in the organisation that does not require the clothing or gear.

In the past, two high profile cases have concerned dress requirements for members of the Sikh religion. In a 1991 Ontario case, a school board's 'zero tolerance' for weapons in its schools was found to have an adverse impact on Sikh men who are required by their religion to carry a ceremonial dagger known as a kirpan. The school board argued unsuccessfully before the Human Rights Commission and ultimately the Divisional Court that permitting the complainant, a teacher, to wear a kirpan was a threat to public safety. Both the Commission and the Court found in favour of the complainant, on the basis that the threat to public safety from Sikhs wearing kirpans was minimal and the discriminatory impact of the ruling on this religious group was significant. In 2006, the Supreme Court of Canada ruled that Sikh children may wear a kirpan to school based on the freedom of religion guarantee in the Charter.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

Dismissing an employee based on religious grounds will constitute unlawful discrimination, unless the employer can establish that it could not continue to employ the individual and meet his or her accommodation request(s) without incurring undue hardship. For example, in one British Columbia case, a retail employee refused to help put up Christmas decorations in the store because doing so would be contrary to his religious beliefs. The employer terminated him, essentially for insubordination, and he filed a human rights complaint. The tribunal found that there was no reason the employer could not have accommodated the employee without incurring undue hardship, for example, by simply giving him alternative work while co-workers decorated the store. Accordingly, the employer was found to have discriminated against the employee on the basis of religion.

As stated above, human rights protection on the basis of religion does not extend to practices or conduct that incite hatred or violence against other individuals or groups. Further, employees who do not wish to participate in religious practices or celebrations or discussions about religion at work are also afforded protection under human rights legislation. Thus, an employer would be within its rights to dismiss an employee for proselytising or otherwise using his or her religious beliefs to harass or discriminate against others in the workplace.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

Harassment is considered a form of discrimination under Canadian human rights law. It can generally be defined as conduct that is known or ought reasonably to be known as unwelcome. One of the most significant effects of harassment is the creation of an intimidating, hostile or 'poisoned' work environment. A single incident of harassment may create a poisoned environment if it is substantial or significant enough.

Harassment on the basis of religion can take the form of abusive, offensive or unwelcome conduct or comments made directly or indirectly, including: jokes about religion or religious figures; derogatory comments about religious attire, custom or upbringing; and shunning of co-workers who practice a particular religion. It can also involve a tangible employment action against employees because of their religious beliefs; for example, denying promotion or pay increases, or targeting members of certain religions for dismissal.

Under human rights legislation, employers have a statutory obligation to control the work environment to ensure that such conduct is not tolerated or fostered in any form. The employer will be liable for harassment by any employee who is considered to be a 'directing mind' of the organisation. In addition, the employer will be held vicariously liable for harassment by other managers, supervisors and co-workers and even non-employees (including contractors and customers), if it knew or should have known about the harassment, and failed to take prompt and appropriate corrective action to control the harasser(s) and protect the affected employee(s).



<b>A. THE LEGAL FRAMEWORK</b>	<b>45</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	45
2. DEFINITION OF RELIGION	45
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	46
4. ENFORCEMENT AND CLAIMS	46
<b>B. THE LAW IN CONTEXT</b>	<b>47</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	47
6. DRESS CODES	48
7. DISMISSAL ON RELIGIOUS GROUNDS	48
8. HARASSMENT ON RELIGIOUS GROUNDS	48

Czech Republic 



## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

The Czech Labour Code prohibits discrimination in labour relations (i.e. all employer-employee relations), and the prohibition of discrimination against job applicants during the recruitment process is stipulated in the Act on Employment. However, only the Act on Employment implements the relevant EU Directives concerning the prohibition of discrimination. The Labour Code contains only a general prohibition against discrimination and refers to a new Anti-Discrimination Act.

The new Anti-Discrimination Act was approved on 17 June 2009 after lingering in Parliament for nearly two years. The Act governs the right to equal treatment and protection against discrimination in various common situations. It applies not only to employment but also, in particular, to independent business activity, professional training, access to employment and membership within organisations consisting of employers and employees. The Act sets out grounds for discrimination on which basis it is forbidden to distinguish between individual persons; these grounds include religious belief or faith, or world view.

With regard to the recruitment process, the Act on Employment prohibits direct or indirect discrimination against job applicants on the grounds of their religious beliefs.

By way of background, the Czech Republic is among the countries with the lowest numbers of believers of any faith, and no regulations on the practice of religion in the workplace have ever been adopted.

### **2. DEFINITION OF RELIGION**

Czech labour laws do not define religion. Even the Czech Freedom of Belief Act – which states that everyone has the right to express their religion or faith as an individual or with others, in private or in public, by means of worship, education, religious acts and ceremonies – does not provide a definition of religion.

The Anti-Discrimination Act recognises religious beliefs or faith and world view as grounds of discrimination. Employers must ensure the equal treatment of all

employees in their working conditions, including pay and other emoluments in cash or in kind for their work, conditions for their vocational training and opportunities for career development (promotion).

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

There are no requirements to accommodate an employee's religious beliefs under Czech law. An employer is obliged to treat its employees equally. This obligation includes the prohibition of both less favourable as well as more favourable treatment of an employee or employees over others. If an employer accommodates one employee's religious beliefs, it could be considered as more favourable treatment towards that employee, thus violating the prohibition against discrimination.

### **4. ENFORCEMENT AND CLAIMS**

According to the Labour Code, the ordinary courts must consider and rule on disputes between an employer and an employee over entitlements arising from an employment relationship. In court disputes over discrimination the burden of proof lies with the employer when the grounds at issue are religion, other personal beliefs, or world view.

If an employee suffers damage in connection with practising his or her religious faith in the workplace, only general liability, as stipulated by the Labour Code, applies. This means that an employer would be liable to an employee only for harm which occurs while the employee is performing work-related tasks, or which occurs in direct connection with such tasks, owing either to the employer's violation of statutory obligations or to its wilful conduct contrary to 'good manners'. What constitutes 'good manners' is a matter of interpretation for the courts.

According to this regulation, an individual is entitled to demand that the person discriminating desist from any discriminatory behaviour that violates the prohibitions against discrimination. In addition, the individual can ask for the consequences of the discrimination to be removed and for appropriate satisfaction. If the individual's dignity or esteem (i.e. reputation) are substantially harmed, he or she may claim monetary compensation.

According to the Work Inspection Act, discriminating against an employee on grounds of religion can be an offence. The employer may be fined up to CZK

400,000 (EUR 14,000) if it is found to discriminate in labour relations against employees on grounds of religious belief.

According to the Act on Employment, breach of the obligation not to discriminate against job applicants may result in a fine against the employer of up to CZK 1,000,000 (EUR 35,000).

At present there have been no reports of claims made on grounds of religious discrimination. This is explained in particular by the fact that Czech anti-discrimination legislation was enacted relatively recently (the final amendment was enacted in 2004). Moreover, in 2007 the anti-discrimination legislation was removed from the Labour Code in order to be regulated separately by a special act, which, however, was only approved recently on 17 June 2009. Also, as mentioned below, the Czech Republic has a very low number of believers of any faith. A future increase in claims of religious discrimination seems unlikely.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Czech law places no requirement on the employer to allow an employee to take time off work during the working day for prayer, nor to agree to requests by employees to take holidays to coincide with religious festivals.

When determining a request for time off work for religious reasons, the employer is only obliged to take into account the justified interests of the employee but it is not obliged to satisfy them. Czech law stipulates the circumstances in which an employer must allow time off work for employees, and in other cases – including where religious reasons apply – employees have no entitlement to time off work.

In respect of a request for annual leave, the employer determines when annual leave may be taken and has the right to refuse a request. Here however, the employer must deal with requests in accordance with the principle of equal treatment. If it allows one employee to take annual leave but refuses another employee's request solely because of that individual's religion, then it may be in breach of the law.

## 6. DRESS CODES

An employer may impose a dress code and will not violate its obligations under Czech law even if the dress code prevents an employee from dressing in accordance with his or her beliefs. The dress code should, however, be based on justifiable reasons, for example reasons of hygiene or reasons related to the nature of the employee's activity. If an employer prevents an employee from dressing in accordance with his or her beliefs without a justifiable reason, then it could violate the principle of equal treatment.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

An employer may give notice of dismissal only for reasons stipulated in the Labour Code. None of these reasons refer to an employee's religion. Furthermore, the general prohibition on discrimination in labour relations, although not stipulated expressly, appears also to cover the dismissal of an employee on religious grounds. Dismissal on religious grounds is therefore prohibited by Czech law.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

The Anti-Discrimination Act considers harassment as discrimination and it is therefore prohibited. In the case of harassment the above-mentioned grounds for discrimination apply.

According to the Anti-Discrimination Act, harassment is considered to be unwanted conduct related to any of the grounds of discrimination which (i) takes place with the purpose or effect of degrading the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment, or (ii) may be legitimately perceived as a factor in a decision affecting the exercise of rights and duties ensuing from legal relations.

Further, the Act on Employment defines harassment as conduct that is justifiably regarded by the job applicant as unwanted, inappropriate or offensive, and which has the purpose or effective violating the dignity of that applicant or creating a hostile, degrading or offensive environment in the workplace. Harassment on religious grounds is considered to be discrimination and is therefore prohibited under Czech law.



<b>A. THE LEGAL FRAMEWORK</b>	<b>53</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	53
2. DEFINITION OF RELIGION	53
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	53
4. ENFORCEMENT AND CLAIMS	54
<b>B. THE LAW IN CONTEXT</b>	<b>55</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	55
6. DRESS CODES	56
7. DISMISSAL ON RELIGIOUS GROUNDS	57
8. HARASSMENT ON RELIGIOUS GROUNDS	57

Denmark





## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

In Denmark, the Act on Prohibition against Discrimination in respect of Employment etc. prohibits employers from discriminating against employees in connection with recruitment, dismissal, transfer and promotion or with regard to pay and working conditions. Furthermore, the Act prohibits employers from discriminating against employees with respect to access to vocational guidance, vocational training, advanced vocational training and retraining. The Act defines the term 'discrimination' as any direct or indirect discrimination on the basis of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

According to the Act, the prohibition against discrimination on the basis of political opinion, religion or belief does not apply to an employer whose activities have the express objective of promoting a particular political or religious opinion or a certain religious persuasion, provided that the individual's political opinion, religious conviction or religious persuasion is regarded as being of importance for the employer.

### **2. DEFINITION OF RELIGION**

Religion is not defined in the Act. However, the Act also prohibits discrimination on grounds of belief, which covers a wider set of beliefs than that of religion, and would include, for example, confessions to a non-recognised religious organisation. Although there is currently no case law on the definition of religion and belief, it probably also covers spiritual and philosophical beliefs which do not relate to the existence of a deity, as well as lack of belief such as atheism.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

The Act does not directly grant an employee the right to practice his or her religion in the workplace, nor directly require the employer to accommodate an employee's beliefs.

However, an employer's refusal to accommodate an employee's religious beliefs may constitute indirect discrimination, which may be unlawful. Indirect

discrimination occurs where a provision, criterion or practice which appears to be neutral, places a person (in a protected group, e.g. a person of a certain religion) in a less favourable position, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In Denmark, there have been only five court cases where judgments have been given on the issue of whether a specific practice in the workplace may be considered to constitute unlawful indirect discrimination. Three have concerned the wearing of religious headgear. This particular issue is discussed in detail in section 6 below. One of the court cases concerned the refusal to participate in a birthday reception and the last one was about the refusal to eat during Ramadan.

The case law has established that an employer may meet the requirements of the 'indirect discrimination test' if it proves that the specific requirement or prohibition it has imposed on employees is objectively justified by a legitimate aim, and that the means of achieving that aim are appropriate and necessary.

Thus, any requirements or prohibitions in an employment relationship affecting the religion or the beliefs of employees must be scrutinised in order to establish whether they are necessary and objectively motivated by the specific situation of the employer in question. Some examples are considered in Part B below.

Note that if an employer chooses to accommodate a particular employee's religion or beliefs, it cannot discriminate against other employees who have a different religion or beliefs. For example, an employer who prohibited Muslim employees from wearing traditional Muslim headscarves but permitted other employees to wear traditional Jewish or Sikh headgear would be in violation of the law.

#### **4. ENFORCEMENT AND CLAIMS**

An employee who claims religious discrimination must file a claim directly to the ordinary courts. Starting on 1 January 2009, a new administrative board, the Danish Equality Board, was established. From that date employees who claim religious discrimination may bring a claim before the Board free of charge. The Board has been given the power to award compensation, and the Board's decisions may be challenged in the ordinary courts.

A plaintiff who establishes that his or her rights have been violated may obtain an award of compensation which is not subject to any cap. The compensation is awarded to cover the non-pecuniary damages the individual has suffered whereas any pecuniary loss is traditionally not recoverable in Danish employment law cases.

Only limited case law exists on discrimination against employees or job applicants on the basis of religion or belief, and it is therefore still difficult to predict the level of compensation that may be awarded in a particular case. A High Court judgment from 2000 awarded compensation equivalent to 3 months' salary to an employee who was dismissed because of his religious belief (the employee was a Jehovah's Witness). However, the employee had been employed for less than 6 months, and this fact undoubtedly influenced the amount of compensation awarded. Under another High Court judgment from 2008 compensation equivalent to just above 1 month's salary was awarded to an employee who was dismissed because of her religious belief. In this case it should be noted that the employee was a temporary worker and that the actual period of employment was very short.

Even though the Danish Supreme Court judgment on the wearing of Muslim headscarves attracted considerable attention in the Danish media, it does not seem to have led to any increase (or decrease) in cases regarding individuals seeking to exercise their religious faith in the workplace. Based on the number of court decisions to date, it seems that only one claim is brought to court in every two years. The number of claims may increase now that the Danish Equality Board has been established.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

As explained in section 3 above, Danish law does not directly require the employer to accommodate an employee's religious beliefs – for example to permit employees to take time off during the working day for prayer or to observe religious holidays. However, a refusal by the employer to permit such time off may constitute indirect discrimination. For example, a requirement by the employer that employees do not take holiday at certain times of the year could amount to a provision which, although it appears neutral, actually puts employees of a certain religion in a less favourable position because they are prevented from taking time off work to observe their religious holiday.

To avoid breaching the law, the employer would therefore have to show that the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. As case law has mostly dealt with the right to wear religious clothing, it is difficult to predict the result of cases dealing with other issues within this area. However, it is likely that an employer who had specific operational reasons for refusing requests for time off work or holiday, and who refused all requests regardless of the reason for them, would be able to satisfy the test of indirect discrimination. In a judgment from 2007, the High Court decided that an employer was entitled to refuse a request from an employee not to participate in a birthday reception (the employee was a Jehovah's Witness), but in the case from 2008 (see section 4 above), the employer was not entitled to dismiss an employee because the employee refused to eat during Ramadan, even though the importance of eating together with the children at the institution was stressed in a pamphlet describing the institution.

## 6. DRESS CODES

As mentioned in section 3 above, there have been three court cases in Denmark dealing with the issue of whether an employee was entitled to wear a traditional Muslim headscarf at work.

In January 2005, the Danish Supreme Court rendered judgment in the latest of these cases. The employee was employed in a supermarket where she was under an obligation to wear a uniform, and in accordance with the dress code of the supermarket she was not allowed to wear headgear. This rule applied to all employees with direct contact with customers. After three years' employment, the employee informed the employer that she intended to wear the Muslim headscarf, and she was summarily dismissed. The Danish Supreme Court rendered judgment in favour of the employer and stated that enforcement of the dress code could not be considered to constitute a contravention of the prohibition against discrimination.

The Danish Supreme Court recognised that the dress code in this regard placed individuals in a protected group (namely individuals who shared the employee's religious beliefs) in a less favourable position, but at the same time the Danish Supreme Court decided that the employer's dress code was objectively justified by a legitimate aim (the wish to signal to customers that the employer was a politically and religiously neutral company), and that the means of achieving that aim (prohibiting all employees from wearing any headgear – religious or non-religious – as well as any other religious signs) were appropriate and necessary.

Further, the Danish Supreme Court stated that based on existing case law from the European Court of Justice, there was no basis for finding the enforcement of the prohibition to be in contravention of Article 9 of the European Convention on Human Rights.

Based on this case law, it must be concluded that an employer may prohibit an employee from wearing religious clothing at work if such prohibition is objectively justified by a legitimate aim; if a precise and unambiguous dress code has been applied to all employees regardless of religious beliefs; and if this dress code is enforced consistently and without discriminating against any specific religion or religious belief.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

A Danish employer is prohibited from dismissing an employee on grounds of religion or belief or one of the other protected grounds mentioned in section 1 above.

According to the Act, a split burden of proof applies. This means that if the employee presents facts before court from which it may be presumed that the dismissal was motivated by one of the protected grounds, the employer must prove that it was not the case. If the court finds that the employer has dismissed an employee based on religion or belief, the employee may be awarded compensation. Although case law is still limited, a High Court judgment from 2000 awarded compensation equivalent to 3 months' salary to an employee who was dismissed because of his religious beliefs. Under another High Court judgment from 2008 compensation equivalent to just above one month's salary was awarded (see sections 4 and 5 above).

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Harassment on religious grounds is prohibited. The Act contains a general prohibition against harassment based on one of the protected grounds mentioned in section 1. An employee who has been harassed based on his or her religion or beliefs may claim compensation (see section 4 above). However, the employer will not be liable for religious harassment inflicted by its employees unless it was aware that the harassment was taking place and did not take any steps to prevent it from continuing. An instruction to harass is also prohibited.

Individual employees who inflict religious harassment may also be held liable to pay compensation for injury to a person's feelings or reputation in accordance with the Danish Liability for Damages Act.

So far there has only been one case dealing with harassment on the grounds of religion. In a judgment from 2008 the Copenhagen Maritime and Commercial Court stated that an employee's demeaning and humiliating remarks about a colleague's headscarf were to be considered thoughtless behaviour rather than harassment. In consequence, the behaviour did not constitute legitimate grounds for dismissal.



<b>A. THE LEGAL FRAMEWORK</b>	<b>63</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	63
2. DEFINITION OF RELIGION	63
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	63
4. ENFORCEMENT AND CLAIMS	64
<b>B. THE LAW IN CONTEXT</b>	<b>65</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	65
6. DRESS CODES	65
7. DISMISSAL ON RELIGIOUS GROUNDS	66
8. HARASSMENT ON RELIGIOUS GROUNDS	66

Finland





## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

In Finland the freedom of religion and persuasion is protected by the Finnish Constitution (731/1999, as amended) and the Act on Freedom of Religion (453/2003, as amended). Discrimination based on religion, persuasion and opinion is prohibited in the Non-Discrimination Act (21/2004, as amended) and, as regards employees specifically, in the Employment Contracts Act (55/2001, as amended). The prohibition covers direct and indirect discrimination as well as harassment. The prohibition is applicable to employees as well as candidates for recruitment.

### **2. DEFINITION OF RELIGION**

There is no definition of religion in law. Since the prohibition of discrimination has a wide scope and includes persuasion in addition to religion, there is little need for an actual definition of religion. A persuasion can be, besides religious, also political, ethical or ideological (including, for example, atheistic and agnostic beliefs).

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Finnish legislation does not require the employer to accommodate an employee's religious beliefs. The employer is required to act in a non-discriminatory and consistent manner in relation to all employees in comparable situations, meaning that the employer may not treat an employee less favourably simply because of the employee's religion. On the contrary, an employee is not, as a rule, entitled to refuse work duties for religious or persuasion-based reasons.

There is no case law suggesting that an employer's refusal to accommodate an employee's religious beliefs should be considered indirect discrimination. Indirect discrimination is defined as a prima facie unbiased measure which in reality places a certain person in an inferior position in comparison with other persons in comparable situations.

#### 4. ENFORCEMENT AND CLAIMS

If the employer violates the prohibition against discrimination provided in the Non-Discrimination Act, the employer can be ordered to pay the person affected compensation of up to EUR 15,560. The compensation liability does not require wilfulness or negligence, but the employer's action is nonetheless required to be conscious. In practice, the compensation varies depending on the severity of the violation and other related circumstances. The maximum compensation level may be exceeded if this is justified by the duration and severity of the discrimination and the other circumstances of the case.

As a rule, the compensation must be claimed within two years from when the discrimination occurred, or, if it was on-going, from when it stopped.

Discrimination during recruitment must be challenged within one year from when the person discriminated against learned of the employer's recruitment decision. In addition, payment of compensation does not preclude the person affected from claiming damages under the Damages Act (412/1974, as amended) or other relevant legislation (for example the Employment Contracts Act).

According to the Employment Contracts Act, if an employer wilfully or negligently breaches the obligations arising from the employment relationship or the Employment Contracts Act, including any breach of the prohibition of discrimination, the employer is liable for damage caused to the employee. Under the Employment Contracts Act, damages claims for discrimination in an on-going employment relationship must be brought within five years of the breach. If the employment relationship has expired, damages must be claimed within two years from the end of the employment.

Further, the Finnish Penal Code (39/1889, as amended) is applicable to discrimination in the field of employment. An employer or employer's representative can be fined or imprisoned for up to six months, if the employer discriminates against an employee or a jobseeker without important and justifiable reasons. A person affected by discrimination may bring a civil claim and/or bring criminal charges against the employer in the district court.

In addition, the occupational health and safety authorities are charged with ensuring that employers observe all mandatory employment-related legislation. Upon discovering potential discrimination, the authorities can, depending on the case, turn the matter over to the National Discrimination Tribunal of Finland or the public prosecutor.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Employers are not specifically required to accommodate the religious beliefs of their employees. If an employee's religious beliefs and the impact thereof on the employee's work are not taken into account in the employment contract or otherwise agreed between the employer and the employee, the employer is not, as a rule, required to accommodate such religious requirements.

The employer is not obliged to give employees time off for prayer. However, if employees in general are allowed to take short breaks during the day, the employer cannot prohibit or limit the employees from using these breaks for prayer, unless the employer has a justified reason to do so. These reasons could include, for example, general order and safety at the work place.

As regards time off for religious holidays, under Finnish law, the employer determines the timing of the employees' annual holiday at its sole discretion. The fact that an employee wishes to use his or her holiday to celebrate a religious festival must not affect the employer's decision. On the other hand, an employee is not entitled to any additional holiday for religious festivals and he or she has no right as such to holiday for a religious festival.

If the employer in practice allows employees to determine the timing of their own holidays and an employee is denied holiday during a religious festival, the employee could argue that this denial discriminates against his or her religious beliefs. The employer would then need to prove that there were justified reasons for not granting the employee's request for holiday. Such reasons could include, for example, the work load during the requested holiday period.

### **6. DRESS CODES**

The employer's instructions regarding clothing can potentially infringe on the religious beliefs of an employee and these instructions could be deemed to be indirect discrimination. However, if the instructions are appropriate and necessary in order to achieve a justifiable goal, they will generally not be deemed discriminatory. In addition, according to the Non-Discrimination Act, measures taken by an employer which are based on a genuine and determining requirement relating to work duties and their performance, are

not considered discriminatory provided that the measures are justifiable and appropriate.

Justifiable reasons for the employer's dress codes may include, for example, the need of customers to be able to identify employees from their uniforms (in occupations relating to customer services or security services) or the requirements of protective clothing (industrial safety reasons).

If the dress code is applied to all employees in a similar manner and it has a justifiable and appropriate non-discriminatory reason, it is likely to be permissible under Finnish law.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

The prohibition against discrimination also applies to termination of employment. If the termination of employment is based on an employee's religion, persuasion or opinion, it would be deemed discriminatory. As regards collective redundancies, an employee may not be selected for redundancy on the basis of his or her religion. If an employee argues in court that he or she has been dismissed on discriminatory grounds, the employer must prove that the applied grounds were non-discriminatory.

If an employee refuses work on religious grounds or if he or she refuses to observe the employer's instructions regarding clothing, this may constitute valid grounds for termination of employment, subject to general rules regarding dismissals.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Under the Non-Discrimination Act, harassment is a form of discrimination.

According to the Act, harassment includes wilful or actual violation of the employee's dignity and integrity by the creation of a frightening, hostile, degrading, humiliating or aggressive environment.

Harassment can be perpetrated by the employer, other employees or by customers. Even if the employer does not engage in the harassment it could be deemed responsible if it does not take appropriate measures to stop the harassment and protect the harassed employee.



<b>A. THE LEGAL FRAMEWORK</b>	<b>71</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	71
2. DEFINITION OF RELIGION	72
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	72
4. ENFORCEMENT AND CLAIMS	73
<b>B. THE LAW IN CONTEXT</b>	<b>75</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	75
6. DRESS CODES	75
7. DISMISSAL ON RELIGIOUS GROUNDS	76
8. HARASSMENT ON RELIGIOUS GROUNDS	77

France





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Under the French Labour Code, no employee may be required to suffer direct or indirect discrimination in connection with a number of specific characteristics, including religious beliefs (Articles L.1132-1 and L.1321-3 of the Labour Code). The effect of these provisions is that an employer is prohibited from taking religion into account in the way that it treats job applicants and employees regarding their working conditions. Therefore no person may be turned down from a recruitment process, an internship or an in-company training programme on grounds of religion. No employee may be sanctioned, dismissed or discriminated against as a consequence of his or her religion, notably in respect of pay, training, redeployment, posting, qualifications, job classification, promotion, transfer from one place to another and renewal of the employment contract.

In addition to this prohibition on discrimination, the French Labour Code also protects the religious beliefs of employees by stipulating that restrictions on the rights of individuals and on individual and collective freedoms are unlawful if they are not justified by the nature of the task to be accomplished, and proportionate to the aim sought (Articles L.1121-1 and L.1132-1 of the Labour Code). The Law of 15 May 2008, transposing European Directives into national law, also for the first time prohibits indirect discrimination based on religion.

There is now a specific definition in French law of direct and indirect discrimination, similar to that contained in the European Directives and covering all types of discrimination, including discrimination based on religion:

- Direct discrimination implies treating an individual less favourably than another in a comparable situation
- Indirect discrimination concerns all measures, criteria or practices which may appear neutral but may confer a disadvantage on an individual compared to others, except if these measures, criteria or practices are objectively justified by a legitimate purpose and if the means used to achieve that purpose are necessary and appropriate.

Within those limits, an employer is, however, allowed to restrict religious-oriented behaviours. For example, an employee may be required to undergo a medical examination for safety reasons and the organisation's

brand image may justify employees' being required to wear special clothes or being banned from wearing religious headwear.

In France, the domain of work is generally considered as a neutral place. Nonetheless, in some special cases, 'entreprises de tendance', (churches and private schools, for instance, whose aim is more or less to defend or promote a doctrine), religious belief may be considered a part of the employment contract.

## **2. DEFINITION OF RELIGION**

There is no legal definition of religion in France. This is linked to the fact that the French Republic was built on secular foundations: according to Article 2 of the 1905 Law, 'the Republic does not recognise any religion'. In the name of equality of all citizens, each individual is free to choose his or her own personal religious beliefs.

Fundamentally, French labour law does not provide for any special protection of religious beliefs as they are considered a part of an individual's freedom of thought. Therefore, an employee does not have to prove that his or her behaviour is related to a given religion, since this is included in the exercise of his or her freedom of thought.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

French labour laws do not oblige the employer to take steps to accommodate employees' religious beliefs, such as allowing them to take time out of the working day for prayer. Part B below considers a number of practical issues which arise in this context.

As mentioned in section 1 above, the employer may impose restrictions on the exercise of individual freedoms, including religious-related behaviour (Article L.1121-1 of the Labour Code). However, the employer's ability to impose restrictions is limited by the need to demonstrate that the restrictions are both justified and proportionate. The restrictions imposed by the employer must correspond with the nature of the task to be accomplished, and be proportionate to the aim sought.

In practice, most questions concerning the conflict between an employer's actions and an employee's religious beliefs have arisen in respect of Muslim practices, notably the wearing of a headscarf. This is considered further in Part B below.

#### 4. ENFORCEMENT AND CLAIMS

Conflicts between employee and employer are judged by a special tribunal (Conseil de prud'hommes). This tribunal is composed of elected representatives of employees and employers within a defined geographical area.

Employees or job applicants who feel that they have been discriminated against must present the Conseil de prud'hommes with evidence to show that direct or indirect discrimination has taken place. In the light of this evidence, it is up to the employer to prove that the decision taken was justifiable according to objective facts unconnected with any form of discrimination. If deemed necessary, the judge may order preliminary investigations prior to reaching a conclusion (Article L.1134-2 of the French Labour Code).

If the judge concludes that an employee has suffered discrimination on grounds of religion, he or she will declare the discriminatory measure void and make an award of compensatory damages to the employee. The damages will be based on the prejudice suffered by the employee and will also depend on his or her personal situation (age, length of service, remuneration, etc.). There is no limit to the amount of damages that can be awarded.

Any breach of the prohibition on discrimination is also a punishable criminal offence. The court can impose fines (of up to EUR 45,000) and a prison sentence (of up to 3 years) on individuals found guilty of acts of discrimination during recruitment. Companies, as legal persons, can be declared guilty in cases where they have refused to recruit an individual or to accept him or her for a course or appointment (Article L.225-2 of the French Criminal Code).

It should be noted that the French Criminal Code also created individual criminal responsibility for legal entities and, in these circumstances, legal entities are also covered by the prohibition and sanctioning of discrimination. In such cases, a company may be sentenced to a fine of EUR 225,000 and possibly also to the following additional sanctions: the dissolution of the legal entity, publication of the judgment, a ban on the exercise of a given professional activity and closure of the company's entities.

Third parties also have the right to bring a court case for discrimination. Trade unions may act for an employee claiming to be the victim of discrimination without having to have a mandate to do so from that person, as long as he or she has been given written notification and has not opposed the action within 15 days (Statute dated 16 November 2001 – Article L.1134-2 of the

French Labour Code). Non-governmental organisations working in the anti-discrimination field may also act for an employee with his or her written consent (Article L.1134-2 of the French Labour Code)

The Labour Inspector has the authority to monitor compliance with the prohibition on discrimination. The Labour Inspector may request any document or item of information. In the case of failure to supply any such document or item, the Labour Inspector may issue a writ, which is deemed valid until proven otherwise, and pursue the relevant party before the courts (Articles L.8112-2 and L.8113-4 of the French Labour Code).

Discrimination against any institution representing an employee and/or towards trade unions or their representatives constitutes the offence of obstruction and is punishable by criminal sanctions (fines of up to EUR 3,750 and/or a prison sentence of up to one year, doubled in the case of a second or subsequent offence: Article L.2146-2 of the French Labour Code). The offence sanctioned by Article L.2141-5 (trade union discrimination) assumes that union activity was intentionally taken into account. The Labour Inspector also has authority to issue a writ (Articles L.8113-7 and following of the French Labour Code). An employer which obstructs the Labour Inspector or Labour Supervisor in his or her duties, particularly where these are being exercised in relation to the prohibition on discrimination, is guilty of the offence of obstruction, which is punishable by the same criminal sanctions (Article L.8114-1 of the French Labour Code).

An independent administrative authority was created in December 2004 (the High Authority for Anti-Discrimination Measures and Equality – HALDE) to oppose discrimination, to provide necessary information to victims and to promote equality. The fields covered by the HALDE are not limited to employment, but also cover access to public housing, etc. The HALDE has extensive powers within its scope, and may undertake investigations in office premises, hear any person capable of giving information, make recommendations and, since March 2006, the HALDE has the power to fine up to EUR 15,000, if this is within the scope of a settlement agreement with the organisation concerned. Acts of discrimination are also punishable by penalties of up to three years' imprisonment and a EUR 45,000 fine (Article L.225-2 of the Criminal Code).

Although official statistics are unavailable, it appears that litigation against organisations suspected of discriminatory behaviour (on any grounds) have increased over the last few years. Most cases concern discrimination by trade unions.

## B. THE LAW IN CONTEXT

### 5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS

As explained in section 3 above, French labour laws do not impose any specific obligation on the employer to accommodate religious holidays, or to permit employees to take time off work for prayer. Any employee who wishes to take time off work, whether for religious reasons or not, must ask for the employer's authorisation in advance. The employer is entitled to refuse if the absence would disrupt the normal working of the company. However, the employer cannot base its refusal on religious reasons. An employer who, for example, systematically refuses paid leave during religious holidays may face liability for indirect discrimination before the Conseil de prud'hommes.

The case law in this area depends closely on the facts of the situation. Two examples follow.

An employer refused to authorise an employee to take a day off work to celebrate Aïd el-Kebir. Despite this, the employee did not attend work on that day, and thus obstructed an important delivery for the company. The employee was dismissed. The judges took the obstruction into account and held that the dismissal was valid (Cour de Cassation, Chambre Sociale, 16 December 1981).

For religious reasons, an employee left his job every Friday before the end of his normal working hours. The dismissal of this employee was considered valid as he refused the employer's proposal to change his work schedule to take into account his religious duties (Cour d'appel de Paris, 10 January 1989).

It is worth noting that some collective bargaining agreements take religion into account, and contain specific clauses concerning religious holidays.

### 6. DRESS CODES

As mentioned in section 3, most questions arise about Muslim practices, notably the wearing of a headscarf. This issue was considered by the Conseil de prud'hommes on the basis of Article L.1121-1 of the Labour Code, which allows restrictions on individual freedoms within certain limits. In essence, an employer may impose restrictions such as a dress code, even if this prevents an employee from dressing in accordance with his or her beliefs, provided that the restriction can be justified and is proportionate to the aim sought.

A refusal to allow an employee to wear a headscarf will meet this test if the employee has face to face contact with clients or customers or has to represent the organisation's brand image, for example when the employee works in a clothing shop. In one case, the judges accepted that a restriction could be placed on the freedom to wear a Muslim headscarf, because the employee worked as a salesperson in a commercial compound 'whose concept, designed for a wide range of clients with various beliefs, imposes neutrality or discretion in the expression of their personal beliefs to those who work in it' (Cour d'appel de Paris, 16 March 2001). This can be compared to the situation of an employee whose only contact with clients was by telephone hotline: here, the employer was not allowed to ban the wearing of a headscarf (Cour d'appel de Paris, 19 June 2003).

The test of justification and proportionality is also met if the activity of the employer's business requires a high level of hygiene or security. For example, an employee may be prevented from wearing traditional religious headgear because the activity necessitates wearing a hairnet or a helmet.

The case law is consistent on one point. Wearing a headscarf is an aspect of individual freedom of dress, so an employer may not dismiss an employee solely on the grounds that wearing a headscarf causes trouble with other employees.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

Dismissing an employee on religious grounds is prohibited by the Labour Code (Article L.1132-1). In such a case, the Conseil de prud'hommes will declare the dismissal to be void. This gives the employee two options. The employee may request to be reinstated in the same job in the organisation and to receive compensation for loss of earnings between the dismissal and the reinstatement. Alternatively, if the employee considers that relations have irretrievably broken down, he or she may ask for damages amounting to a minimum of six months' wages.

This protection against dismissal also applies to any employee who may have witnessed or reported a prohibited act of discrimination, as well as any employee who has properly exercised his or her right to strike (Articles L.1132-2 and L.2141-2 of the French Labour Code).

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

French labour law contains no particular protection against religious harassment. However, religious-related harassment is covered by the broad prohibition in the Labour Code on psychological harassment (Article L.1152-1): 'No employee shall be subjected to repeated acts of psychological harassment which are designed to cause or in fact bring about a worsening of working conditions which are likely to be detrimental to their rights and dignity, affect their physical or mental health, or harm their career prospects'.

This prohibition applies throughout the employment relationship.

Moreover, from a preventative perspective, the Labour Code states that the employer must act to prevent psychological harassment as part of its general duty to safeguard physical and mental health (Article L.1152-5 of the French Labour Code).

Once the employer has been informed of a risk of harassment, it must immediately carry out an investigation and take all necessary steps to stop the harassment. A mediation procedure is available to the parties.

<b>A. THE LEGAL FRAMEWORK</b>	<b>81</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	81
2. DEFINITION OF RELIGION	83
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	84
4. ENFORCEMENT AND CLAIMS	84
<b>B. THE LAW IN CONTEXT</b>	<b>85</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	85
6. DRESS CODES	87
7. DISMISSAL ON RELIGIOUS GROUNDS	88
8. HARASSMENT ON RELIGIOUS GROUNDS	88

Germany 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

EU directive 2000/78/EC of 27 November 2000 committed the German government to implement effective protection against discrimination, including discrimination on religious grounds. To implement the directive, the German government passed the Federal Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz or AGG), which came into effect in August 2006. Existing German law which is in breach of the directive requires constant reinterpretation in line with the directive, or if this is impossible, it is invalid.

The German Constitution (Grundgesetz or GG) enacted in 1949, protected the practice of religious faith before the AGG came into force in 2006. Article 4 of the GG provides for the freedom of religion and philosophy of life as well as the unhindered practice of religious faith. In general, constitutional rights are intended only to bind the government. Nevertheless, they must also be respected in German Civil and Labour law. This commits employers to find a balance between the employees' constitutionally protected right to perform their religious beliefs and the employer's constitutionally protected right of unrestricted commercial activities. For example, employers must allow their employees to wear an Islamic headscarf if it does not affect their work in a negative way (Bundesarbeitsgericht, 10 October 2002 – 2 AZR 472/01).

In Germany the Federal Equal Treatment Act, enacted on 18 August 2006, protects employees from discrimination on grounds of religion. The AGG prohibits direct or indirect discrimination against employees on different grounds, including religion. The criteria are stated in Section 1 of the AGG.

These criteria are:

- race
- ethnic origin
- gender
- religion or philosophy of life (Weltanschauung),
- disability
- age or
- sexual orientation (homosexuality) or identity (transsexuality).

The legislation applies to employment and working conditions, pay, and conditions for access to employment, self-employment or occupation, such as selection criteria and recruitment conditions.

According to EU directive 2000/78/EC, the AGG prohibits direct and indirect discrimination. Direct discrimination occurs when a person in a comparable situation is treated less favourably than another. Indirect discrimination occurs when an apparently neutral practice would put certain people at a particular disadvantage compared with others, unless that practice is objectively justified by a legitimate aim.

Section 12 para 1 of the AGG provides that employers must take all measures necessary to protect their employees from discriminatory behaviour by any of the other employees, the employer's representatives or a third party. This also includes preventive measures like training for employees.

According to Section 9 para 1 of the AGG it is acceptable that institutions of accepted religious groups only employ employees of the corresponding religious belief as long as this is justified by appropriate means. Nevertheless, this does not necessarily allow religious groups to discriminate against members of other religious groups in general. It is always important to find a balance between the rights of the employer and the rights of the employee.

For example, a German labour court recently ruled in favour of a Muslim who applied for a job as a teacher for a project to support the integration of migrants at an institution of the Christian church and was rejected as non-Christian (Arbeitsgericht Hamburg, 4 December 2007 – 20 Ca 105/07). The court found that there was no reason to employ only Christians, especially when the aim of the project was to integrate migrants. The court stated that any exceptions to different treatment must be within ambit of directive 2000/78/EC.

Section 9 para 2 of the AGG states that a religious group is also allowed to demand loyal and honest behaviour of its employees according to the rules of the religious group. However, this does not justify discrimination for other reasons.

The European Commission (Europäische Kommission) recently decided that the exceptions to different treatment stated in Section 9 para 1 of the AGG are too wide. Instead, different treatment is only justifiable if it is important for the kind of work in question because of its specific requirements. The Commission has now commenced the first level of an action for breach of contract against the German government. Section 9 para 1 of the AGG will probably soon be changed for this reason.

According to the German Constitution, state and church must be kept strictly separate. Therefore public officials are more restricted in religious practices at work than private sector employees, because they represent the state. This means they have to be neutral in respect of religious affairs, at least during their work time. Section 24 of the AGG states that the AGG also applies to public officials. However, their special status must be respected.

Recently there has been a lot of case law regarding teachers wearing Muslim headscarves while working. The most famous decision is the 'headscarf decision' of the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) in 2003 (Bundesverfassungsgericht, 24 September 2003 – 2 BvR 1436/02). After that decision the federal states (Bundesländer) passed a law prohibiting public officials and especially teachers from wearing a headscarf or other obvious religious symbols. In all of the following cases it was decided that wearing headscarves is a violation of the principle of separation between state and church (Verwaltungsgericht Düsseldorf, 14 August 2007 – 2 K 1752/07). This principle of separation has been accepted as a legitimate and appropriate aim that justifies discrimination (Section 8 para 1, AGG). A recent decision stated that even wearing a beret as a teacher at a public school is restricted because it violates this constitutional principle (Arbeitsgericht Düsseldorf, 29 June 2007 – 12 Ca 175/07).

## 2. DEFINITION OF RELIGION

Religion is not defined in German statute or in the German Constitution. Nevertheless, the freedom of religion and philosophy of life is provided by Article 4 of the GG and defined by case law. To be accepted as a religion or philosophy of life there has to be a system of thought that contains an interpretation of the world and the position of mankind within this system as well as ideas about the meaning of life. A religion, in this case, is based on the belief in a higher being or beings, whereas a philosophy of life has a different basis. The protection in Article 4 of the GG covers the belief in, the practice of and the commitment to a certain religion or philosophy of life. It also contains the right not to have a religion or philosophy of life. Thus, the scope of protection is relatively wide in Germany.

However, groups whose major goal is gaining profit are not accepted as a religion if their spiritual rules are only used as camouflage. The exceptions in the AGG for different treatment (in Section 9, AGG) do not apply in such cases.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

German law does not specifically require employers to accommodate an employee's religious beliefs. There are nevertheless legal provisions that become relevant in this matter.

First of all, the AGG prohibits indirect and direct discrimination on religious grounds. This, of course, does not necessarily mean that employers must accept religiously motivated behaviour by their employees if this has a negative effect on work flow. Religious actions which interfere with the employee's duty to work may be prohibited by employers as long as the prohibition is objectively justified, appropriate and necessary. This is stated in Section 8 para 1 of the AGG.

On the other hand, employees performing religious actions without a negative effect on work flow may have a claim for full contractual payment as this behaviour might fall within the scope of Section 616 of the German Civil Code (Bürgerliches Gesetzbuch, or BGB). Part B, below, discusses practical issues and case law. Employees refusing to work because certain religious rules prohibit this (e.g. no work on Sundays) or requesting to perform religious actions at the workplace (e.g. praying during work time), may lose their claim for contractual salary. They may also be dismissed under certain circumstances if they are not able to perform their work for religious reasons. The validity of such a dismissal is always dependent on the circumstances of the individual case. This is considered further in section 7 below.

### 4. ENFORCEMENT AND CLAIMS

In Germany, employees who have been discriminated against on grounds of religion may bring an action against their employers at a German lower Labour Court (Arbeitsgericht or ArbG). According to Section 22 of the AGG, they must present evidence that leads to the conclusion that direct or indirect discrimination may have taken place. If employees are able to present such evidence, employers must then prove that no discrimination occurred.

Employees must assert their rights within two months of becoming aware of the discrimination.

Employees may claim damages for financial loss (Section 15 para 1 of the AGG) as well as compensation for pain and suffering (Section 15 para 2 of the AGG). Generally the amount of compensation that may be recovered is not limited. There is a limit for discrimination during recruitment, however.

Candidates who have been rejected because of their religious beliefs or on other grounds stated in Section 1 of the AGG are limited to an amount of three months' salary. The only exception applies to candidates who have been discriminated against but who would have been rejected in any event even if there had been no discrimination.

In legal actions for discrimination, employees may be supported by anti-discrimination associations (Antidiskriminierungsverbände), by virtue of Section 23 of the AGG.

The AGG allows works councils to take a legal action on their own behalf where there has been a 'gross violation' of an employer's anti-discrimination duties. Such a legal action is directed at ordering the employer to take the necessary measures to stop the violation. The same right exists for trade unions which have at least one member among the employees. However, works councils and trade unions are limited to bringing claims for injunctions to cease the discriminatory behaviour or to act in a non-discriminatory way.

Under the AGG the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes) has been established by the German government. This institution gives information and advice to employees who regard themselves as victims of discrimination.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Many German bank holidays have a Christian origin. On these days employees receive full contractual paid leave. The German bank holidays with a Christian origin are:

- Easter (Good Friday and Easter Monday)
- Ascension Day
- Christmas
- Whit Monday
- Epiphany (only in 3 of the 16 federal states)
- Feast of Corpus Christi (only in 6 federal states)
- Assumption Day (only in 1 federal state)
- Reformation Day (only in 5 federal states)
- All Hallows (only in 5 federal states)
- Penance Day (only in 1 federal state)

Compared to this, there are only three non-religious bank holidays in Germany.

Christian tradition in Germany understands Sunday as a day for prayer and rest (in contrast to Jewish people for example, who pray and rest on Saturdays).

Based on this tradition, the Federal Labour Time Regulation Act (Arbeitszeitgesetz or ArbZG) permits working on Sundays in Section 9 para 1 of the ArbZG, though there are many exceptions. In this regard Christians are favoured by the legislation compared to adherents to other religious beliefs especially because their religious festivals are often holidays.

German law does not specifically oblige an employer to accommodate an employee's religious beliefs. However, Section 616 of the German Civil Code states that an employee does not lose his entitlement to contractual salary if he or she is hindered, through no fault of his or her own, from performing services for a comparatively insignificant period of time for personal reasons. This justifies paid absence for exceptional important religious events, such as the christening of the employee's own child.

There is some case law concerning annual leave for festivals and time off work for prayer, but the decisions do not provide general principles because of the special circumstances of each case. Nevertheless it can be said that time off work for prayer or leave for religious festivals may be accepted by the German Labour Courts if it does not affect work flow in a negative way.

For example, it was decided that prayer breaks for Muslims during their regular working hours must be accepted by the employer as long as they have no negative effects on the work flow. If this qualification is fulfilled, prayer breaks fall within the scope of the Section 616 of the BGB, which means that the wage of the employee is not reduced.

There is no legislation that entitles employees to unpaid leave. Instead it is part of the employer's duty of good faith (a basic principle of German Labour Law) towards the employee to be considerate towards the employee's religious beliefs.

The Labour Court of Appeals Hamm/Westfalia decided a case in 2007 in favour of an employee who refused to work on Sundays because of his religion and who was dismissed for that reason. The Court decided that a dismissal in such a case was only acceptable as a last resort. Instead the employee could have been given a shift on any day except Sunday (Landesarbeitsgericht Hamm/Westfalen, 8 December 2007 – 16 Sa 271/07).

Employers therefore must consider individual circumstances. A business with flexible working times should usually allow time off work for prayers, whereas a time-delimited business could justify a prohibition of time off work for prayers.

## 6. DRESS CODES

Generally, German employers are limited in their options to implement a dress code. They are only allowed to do so if the dress code is necessary because of the nature of the job or to meet the legal requirements of a protective law, for example a law concerning hygiene.

If the employer wants to implement a dress code for other reasons it may not do this unilaterally. Where a works council (Betriebsrat) exists, dress codes may only be implemented with the works council's agreement. If there is no agreement between the works council and employer, a conciliation board (Einigungsstelle) will decide.

The possible consequence of a dress code is that it could prevent employees of certain religions from dressing in accordance with their beliefs. The AGG tries to find a balance between the rights of the employer and the employee.

Broadly, the AGG does not permit the implementation of a dress code that conflicts with the religious beliefs of an employee. On the other hand, by Section 8 para 1 of the AGG, the implementation of such a dress code can be justified by specific work requirements as long as that is appropriate. Considering these requirements it is possible to implement a dress code that prohibits wearing a headscarf in a factory for security reasons, for example.

There was a famous decision from the German Federal Labour Court (Bundesarbeitsgericht or BAG) regarding headscarves in October 2002 (BAG 10 October 2002 – 2 AZR 472/01). The case concerned a Muslim saleswoman working at a large department store who was dismissed because she wore an Islamic headscarf at work. The Court decided that the dismissal was void as the Islamic headscarf did not have a significant negative effect on the work flow.

The ruling was later upheld by the Federal Constitutional Court (Bundesverfassungsgericht or BVerfG).

## 7. DISMISSAL ON RELIGIOUS GROUNDS

It is still controversial as to whether the AGG of 2006 applies to dismissals or not. Supposedly other German law, such as the provisions of the Protection against Unfair Dismissal Act (Kündigungsschutzgesetz or KSchG) might apply but it would need to be interpreted in a way which is consistent with the AGG. According to this interpretation, a dismissal based solely on religious beliefs is void. An employee may nevertheless be subject to a dismissal based on his or her behaviour, which may include religious practices.

The validity of a dismissal is always dependent on the circumstances of the individual case. Further, dismissal may only be used as a last resort by the employer. This means that an employee may only be dismissed if the employer has no reasonable opportunity of employing the employee at a workplace where his religious practices do not affect the work flow in a negative way. Assuming that in the Islamic headscarf case the headscarf in fact had a negative effect on the work flow at the department store, the employer would first have been obliged to check whether there was a workplace where the headscarf would not have affected the work flow negatively. Only if there was no reasonable opportunity of employing the Muslim saleswoman, for example in administration, would a dismissal have been valid.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

Before the enactment of the AGG in 2006, there was no legal prohibition on religious harassment or any general statutory provision which covered religious harassment.

The AGG prohibits any harassment on the grounds listed in section 1 above, including religion. Section 3 para 3 of the AGG defines harassment as any behaviour related to one of the protected characteristics (such as religion) either intended to offend or in fact offending another person's dignity and creating an environment characterised by intimidation, hostility, humiliation, debasement or defamation. In this context employers are liable for their own behaviour and for the behaviour of their representatives and employees.

They must take all measures necessary to protect their employees from discrimination and harassment. According to Section 12 para 2 of the AGG, employers are obliged to train their employees in a way which is adequate to enable them to know how to react in cases of harassment or discrimination

and how harassment can be prevented. Training one's employees is considered to fulfil the obligations stated in Section 12 para 1 of the AGG. Failure to take all measures leads to a shift of the burden of proof. Thus, if an employee later claims harassment, the employer must prove that it took all measures necessary to protect the employee from harassment.

Since the AGG regards harassment as a special form of discrimination, the remedies described in section 4 above are also available to victims of harassment on religious grounds. Additionally, by Section 14 of the AGG the harassed employee is entitled to suspend work on full contractual pay if the employer takes no measures or only obviously unsuitable ones to end the harassment. However, there is a high risk for employees who make use of this right. The suspension may be considered a refusal of work by the employee and may result in a dismissal. Such dismissal is effective, unless the employee proves that he or she was subject to harassment.

<b>A. THE LEGAL FRAMEWORK</b>	<b>93</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	93
2. DEFINITION OF RELIGION	93
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	94
4. ENFORCEMENT AND CLAIMS	94
<b>B. THE LAW IN CONTEXT</b>	<b>94</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	94
6. DRESS CODES	95
7. DISMISSAL ON RELIGIOUS GROUNDS	96
8. HARASSMENT ON RELIGIOUS GROUNDS	96

Ireland





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Article 44.2.3 of the Irish Constitution provides that ‘the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status’. Breaches of the Constitution may be pleaded in legal actions.

In addition, the Employment Equality Acts 1998 – 2008 (the Acts) outlaw discriminatory practices in relation to and within employment.

The Acts specifically prohibit discrimination and victimisation, occurring either directly or indirectly, in employment on the following nine grounds: gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the traveller community. The prohibition applies to access to and conditions of employment, training and experience, promotion and re-grading and the classification of posts.

Section 6(1) of the 1998 Act states that direct discrimination on the grounds of religious belief shall be deemed to occur where, as a result of a person’s religious belief or absence of religious belief, that person is treated less favourably than another is, had been or would be treated.

Indirect Discrimination occurs when a practice or policy, that may not appear to discriminate against one group more than another, actually does discriminate or where a requirement of a job adversely affects a particular group or class of individuals. If the practice, policy or requirement is such that the proportion of employees who are disadvantaged by it is substantially higher in the case of one group or class of individuals compared to another group or class of individuals, then indirect discrimination exists.

### 2. DEFINITION OF RELIGION

The Acts refer to ‘religious belief’ rather than to ‘religion’. The 1998 Act provides that ‘religious belief’ includes religious background or outlook. Moreover, discrimination on grounds of religious belief includes not only a difference in treatment between two people of different religions, but also a difference in treatment because one person has a religious belief and the other has not (Section 6(2)(e) of the 1998 Act). This means that discrimination on grounds of a person’s non-belief is covered by the law.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

The Acts do not expressly require employers to accommodate religious beliefs. This may be explained by the fact that historically the majority of Irish citizens have been Roman Catholic. However, in practice, employers generally accommodate their employees and seek to avoid allegations of religious discrimination. An agreement by an employer to facilitate an employee with a particular religious belief and a refusal to facilitate another employee with a different religious belief may amount to direct discrimination. It could also be argued that a refusal to accommodate religious beliefs may constitute indirect discrimination. These issues are considered further in section B below.

### 4. ENFORCEMENT AND CLAIMS

The Equality Tribunal deals with complaints of alleged discrimination on the grounds of religion under the Acts. It is independent and quasi-judicial in nature. Its decisions and mediated settlements are legally binding on the parties.

An employee (the complainant) who makes a successful complaint of religious discrimination before the Equality Tribunal is entitled to damages. The Equality Tribunal may order one or more of the following:

- an order for equal treatment
- an order for equal pay (plus arrears where appropriate)
- an order for compensation of up to 2 years pay (up to EUR 12,700 for someone who is not an employee of the respondent, i.e. a job applicant)
- an order for a specified person to take a specified action.

## B. THE LAW IN CONTEXT

### 5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS

Irish law does not impose any specific obligations on employers to accommodate the religious beliefs of their employees, for example by allowing time off for prayer during the working day. All employees are afforded the same statutory rights regardless of religious belief. An employee seeking to take time off for prayer or annual leave to coincide with a religious holiday would need to comply with the terms and conditions of their contract

of employment and/or staff handbook in relation to time off work and annual leave entitlements.

As mentioned above, the majority of Irish citizens are Roman Catholic. The Organisation of Working Time Act 1997 makes provision for nine national public holidays, four of which are Roman Catholic holy days.

## 6. DRESS CODES

There are no specific legal provisions in Ireland relating to dress codes. Dress codes at work are usually set by the employer and are either contained in an employee's contract of employment or a staff handbook. If all employees are required to wear similar clothing in the workplace then it would be difficult for an employee to allege direct discrimination.

However, if an item of clothing peculiar to a particular religious group were to be excluded by an employer from the workplace, then depending on the circumstances this could give rise to a claim of indirect discrimination.

In 2007 there was a considerable amount of media coverage on the issue of a Sikh recruit to the Irish Garda Reserve who was informed that he would not be allowed to wear his turban whilst on duty. Male Sikhs are required by their religion to cover their hair at all times with a turban and the Sikh Community of Ireland therefore alleged that An Garda Síochána's decision was in breach of the Acts. Prohibiting the display of religious symbols may be deemed to be indirect discrimination by placing a particular group of people at a particular disadvantage when complying with the rule. However a rule prohibiting the wearing of certain items would be permitted if it is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. Accordingly, the burden of proof rests with the employer to demonstrate that the restriction is reasonable and not discriminatory.

A spokesperson for An Garda Síochána defended the decision on the grounds that all members are required to wear the standard-issue uniform whilst on operational duties. He further stated that 'accommodating variations to our standard uniform and dress, including those with religious symbolism, may well affect that traditional stance and give an image of An Garda Síochána which the Commissioner feels the public would not want'. He further stated that 'An Garda Síochána are not advocating one religious belief over another, nor are we, in any way, being racist. We are attempting to firmly retain an image of impartiality while providing a state service to all citizens'. It remains

to be seen whether the Equality Tribunal and the Courts would agree with this stance.

There is no case law in Ireland on the display of religious symbols, but the subject has received more attention in the United Kingdom.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

Section 6(1) of the Employment Equality Act 1998 states that direct discrimination on the grounds of religious belief shall be deemed to occur where, as a result of a person's religious belief or absence of religious belief, that person is treated less favourably than another is, had been or would be treated. Less favourable treatment would include dismissal of an employee on the grounds of his or her religious belief or absence of religious belief. Irish law therefore prohibits dismissal on religious grounds.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Section 32 of the 1998 Act prohibits harassment. Harassment is considered as a form of discrimination and includes any act or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material that is unwelcome and could reasonably be regarded as offensive, humiliating or intimidating.



<b>A. THE LEGAL FRAMEWORK</b>	<b>101</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	101
2. DEFINITION OF RELIGION	102
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	102
4. ENFORCEMENT AND CLAIMS	102
<b>B. THE LAW IN CONTEXT</b>	<b>103</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	103
6. DRESS CODES	104
7. DISMISSAL ON RELIGIOUS GROUNDS	104
8. HARASSMENT ON RELIGIOUS GROUNDS	104

Italy 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Article 3 of the Italian Constitution sets out a general principle of equality: 'All citizens have equal social dignity and are equal under the law, without distinction of sex, race, language, religion, political opinions or of personal or social conditions.' Article 19 of the Constitution provides that all citizens have the right to practice their religion freely in any individual or collective form and to promote it privately or publicly, respecting the ethical principles regarded as binding by the generality of people in a particular environment and time.

These constitutional principles have been enacted through ordinary law in the specific context of the employment relationship by Articles 1, 8 and 15 of Law no. 300 of 20 May 1970. This law was modified by a Legislative Decree no. 216 of 9 July 2003 which implements the EU anti-discrimination Directive 2000/78/EC. These legal provisions, while confirming the freedom for employees to express their religious beliefs in the workplace, prohibit the employer from investigating employees' religious opinions and forbid any discriminatory behaviour based on religion during both recruitment and the employment relationship.

In addition, Article 46 of Legislative Decree no. 286 of 1998 provides for a similar notion of discrimination by specifying that every behaviour that has the goal of destroying and jeopardising the granting and exercise of human rights and fundamental freedoms in every sector, constitutes discrimination. Further, it provides that the employer bears specific responsibility if it acts in a way which even indirectly discriminates against workers because of their religious beliefs by adopting criteria or requirements not related to the performance of their work. Both direct and indirect discrimination are forbidden.

Direct discrimination occurs when a person is, has been or would be treated less favourably for reasons that include religion. Indirect discrimination occurs when an apparently neutral requirement, criterion or general rule places a person at a particular disadvantage or in a less favourable position for reasons that include religion, unless the requirement, criterion or general rule is objectively justified by a legitimate aim and uses methods that are appropriate and necessary. An instruction to discriminate against a person will be deemed to be discrimination as well.

The concept of discrimination excludes any 'differences of treatment based on the practice of a particular religion or belief, where such differences occur within religious organisations or other public or private organisations, and because of the nature of their professional activities or the context in which they are carried out, the differences of treatment constitute a genuine and determining requirement for carrying out the activities'.

## **2. DEFINITION OF RELIGION**

Italian law does not provide a definition of religion, but it is worth noting that Legislative Decree no. 216 of 2003 prohibits discrimination on the grounds either of religion or of beliefs of other kinds, significantly widening the scope of the protection.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Italian law does not specifically require the employer to accommodate an employee's religious beliefs. An employer is not obliged to change its rules or requirements in order to enable employees to observe their beliefs. However, if an employer's rule is not justified, this could be considered indirectly discriminatory (see the definition of indirect discrimination set out in section 1 above).

A general limit on the freedom of worship is provided for those expressions which may be contrary to a mandatory law of the state or in breach of public order (e.g. some controversial issues have arisen with regard to the veil worn by Muslim women or the ceremonial dagger carried by Sikhs).

Recently, the Supreme Court held that Rastafarians are permitted to possess more marijuana for personal use than the general limit provided by law.

## **4. ENFORCEMENT AND CLAIMS**

The victim may apply to the Court of the place of his or her residence to obtain an injunction to cease the discriminatory activity as well as damages (including for non-pecuniary losses).

Trials follow the special procedure described in Article 44 of Legislative Decree no. 286 of 25 July 1998, which is quicker and less formal than the ordinary

one, and with regard to the burden of proof, provides a more favourable rule for the victim.

In terms of sanctions, the Court may order the employer to pay damages to the victim, including damages for both financial and non-financial loss. No ceiling has been imposed on the level of compensation, but in quantifying this the Court will consider whether the discrimination by the employer was in response to a previous court action brought by the employee, or an unfair reaction to a previous case to enforce compliance with the principle of equal opportunities.

The Court may also order the employer to stop the discriminatory behaviour, to develop a plan to cease the discriminatory practices, or it may order that the decision be published in a national newspaper. Furthermore, the employer could be deprived of any financial public benefits given by the State or by the Regions or be excluded for a maximum of 2 years from any public financial help or public contracts for public works, services or the delivery of goods.

In cases of special urgency, the judge may issue an interim order, the violation of which is a criminal offence (in the same way as that of the order issued in the final decision).

In the coming years, the number of discrimination cases, including those concerning religious discrimination, is expected to increase.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Italian law does not impose any specific obligations on employers to accommodate the religious belief of their employees, such as allowing time off work for prayer. In this context, it is worth noting that the majority of Italian citizens are Roman Catholics and that the national holidays defined by the law and by the collective bargaining agreements establish several national public holidays that are also celebrated by the Roman Catholic religion (such as, for instance, Christmas Day, Easter, 8 December, Patron Saints' days etc.).

## 6. DRESS CODES

There are no specific rules concerning dress code. Applying the general rules outlined in section 1 above concerning direct and indirect discrimination, it could be argued that if a particular dress code rule that discriminates against religion is reasonably justified or essential for the performance of the job in religious entities or other public or private organisations, it will not be considered to constitute direct or indirect discrimination.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

Under Italian law, dismissal based on religious discrimination is void (Article 4 of Law no. 604 of 15 July 1996 together with Article 3 of Law no. 108 of 11 May 1990 and Article 15 of Law no. 300 of 20 May 1970). In such cases, according to Article 18 of Law no. 300 of 1970, the employer must reinstate the employee in his or her former position and pay an indemnity equal to the salary payable between the date of the unfair dismissal and the date of the effective reinstatement with a minimum of five months, plus social security contributions. The employee has the right to choose, in lieu of reinstatement, the payment of an indemnity equal to 15 monthly payments. These provisions also apply to executives and workers of small companies, who are not normally entitled to this kind of protection.

The rule of reinstatement does not apply to 'ideological organisations' (organisations – such as churches, but also parties and trade unions – in which a certain consistency between the opinions and behaviour of the worker and the 'ideology' of the organisation is required).

## 8. HARASSMENT ON RELIGIOUS GROUNDS

Harassment is considered by Legislative Decree no. 216 of 2003 to be a form of discrimination as well and is therefore prohibited. Harassment is defined as any unwanted conduct, including conduct related to religion, which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment. The same sanctions described in section 4 above would apply.



<b>A. THE LEGAL FRAMEWORK</b>	<b>109</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	109
2. DEFINITION OF RELIGION	111
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	111
4. ENFORCEMENT AND CLAIMS	112
<b>B. THE LAW IN CONTEXT</b>	<b>113</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	113
6. DRESS CODES	113
7. DISMISSAL ON RELIGIOUS GROUNDS	113
8. HARASSMENT ON RELIGIOUS GROUNDS	114

Luxembourg





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

In Luxembourg, provisions against discrimination on religious grounds can be found in the Constitution, the Penal Code, the Law of 27 July 1993, and the Labour Code.

Article 10 of the Luxembourg Constitution protects the freedom of religion, including the right to practice a religion, as well as the right to express religious opinions. However, although freedom of religion is protected, the protection does not cover criminal offences that may be committed while practicing a religion, or while expressing religious opinions.

According to the Constitutional Court, the principle of equality 'cannot be construed in an absolute sense, but requires all those who are in the same situation in fact and in law to be treated in the same way'. Moreover, 'the legislature may subject certain categories of people to different legal regimes without breaching the constitutional principle of equality, provided that the differences introduced derive from objective disparities, and that they are rationally justified, suitable and proportionate to their aim'. The principle of equality can be enforced against any public or private body, if the constitutional provision is sufficiently clear and not too wide.

Under the Penal Code (Articles 454 to 457-4), employers are expressly prohibited from discriminating against employees on the basis of their religion (actual or alleged).

An employer faces penalties, which range from eight days to two years' imprisonment or a EUR 251 to EUR 25,000 penalty, in the following cases:

- refusal to hire an applicant based on religious grounds
- punishment of an employee based on religious grounds
- dismissal of an employee based on religious grounds
- job advertisement containing a condition based on religion
- professional training conditional on religion and
- working conditions linked to a condition based on religion.

Further, employees' organisations are also prohibited from discriminating on the basis of religion, and may face penalties for doing so.

Article 3 of the Law of 27 July 1993 on the integration of aliens in Luxembourg forbids any discrimination based on religion: 'any discrimination of a person, group of people or community on the grounds of race, colour, national origin or ethnical and religious origin is forbidden'.

Directive 2000/43/EC of 29 June 2000 on Equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 on a general framework for equal treatment in employment and occupation have been implemented in Luxembourg by the modified Law of 28 November 2006. This Law introduced a new Title V, 'Equality of treatment in employment and occupation', in Book 2 of the Labour Code (Articles L.251-1 to L.254-1).

Further, Directive 76/207/EEC on the principle of Equal treatment between men and women modified by Directive 2002/73/EC of 23 September 2002 has been implemented in Luxembourg by the Law of 13 May 2008.

Title V applies to all workers and employees in the following matters:

- conditions of access to employment, including the criteria for a selection process, recruitment conditions, and matters of promotion within the employer's undertaking
- access to career advice and to professional training
- working conditions, including dismissal and pay conditions and
- affiliation with and involvement in an employee organisation.

Article L.251-1 of the Labour Code prohibits any direct or indirect discrimination on the grounds of religion or belief, incapacity, age or sexual orientation, or actual or supposed membership or non-membership of an ethnic group or a race. Article L.251-1 (4) of the Labour Code also defines as discrimination the act of encouraging a person to discriminate against people on the grounds of religion or belief.

Articles L.252-1, L.252-2 and L.252-3 of the Labour Code provides for exceptions to the principle of non-discrimination. Article L.252-1 (2) applies to professional activities, which have an ethic based on religion or convictions.

When the religion or the convictions constitute an essential professional requirement which is legitimate and justified in view of the organisation's ethic, a difference of treatment based on this religion or belief is not considered to be illegal discrimination.

## **2. DEFINITION OF RELIGION**

Religion is not defined in the Luxembourg Constitution, the Penal Code or the Labour Code.

However, as mentioned above, the offences defined in the Penal Code and the Labour Code not only prohibit discrimination on grounds of an employee's actual religion, but also discrimination based on an employee's alleged or perceived religion.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

There are no specific legal provisions in Luxembourg requiring employers to accommodate the religious beliefs of their employees.

Since Article L.251-1 of the Labour Code contains a prohibition against indirect discrimination, it could be argued that an employer might commit indirect discrimination if he applies a rule, such as a dress code, which puts employees of a certain religion at a disadvantage, because they would not be allowed to wear traditional religious clothing. The courts decide this issue on a case-by-case basis. This issue is further considered in Part B below.

An employer who refuses to accommodate an employee's religious beliefs at work might commit moral harassment against the employee. In fact, under certain circumstances, the act of preventing an employee from practicing his religion at work might be considered as moral harassment by the employer if the religious activity does not prejudice the employee's work performance.

Damages would then be granted by a judge to this employee.

Luxembourg case law allows for the possibility for the employee to recover damages, based on Article 1134 of the Civil Code. This article provides that agreements lawfully entered into must be performed in good faith (Tribunal du travail de Luxembourg, 12 February 2004, n°735/04 and Cour Supérieure de Justice, 22 June 2007, n°30994). In the 12 February 2004 and the 22 June 2007 cases, the court referred to French and Belgian legal definitions of bullying (see also section 8 below).

#### 4. ENFORCEMENT AND CLAIMS

Breaches of the Penal Code are dealt with by the Tribunal d'arrondissement, Chambre correctionnelle.

As far as the employment relationship is concerned, the Employment Court (Tribunal du travail) is the competent court for complaints. Associations and trade unions are allowed, under certain conditions, to sue the employer together with or instead of the victim of discrimination (Articles L.253-2 and L.253-4 of the Labour Code).

During the employment contract, the employee is entitled to ask for the nullification of a discriminatory clause (Article L.253-3 of the Labour Code). The employee may also request nullification of a disciplinary measure based on religious grounds (Article L.253-1 of the Labour Code). It is also possible for an employee who has been punished by his employer for having testified about discriminatory behaviour or for having recounted it, to bring a claim in the Employment Court (Article L.253-1 of the Labour Code).

In the Employment Court, the employee must establish facts, which give rise to a presumption of the existence of direct or indirect discrimination. Then it is for the employer to prove that there has been no breach of the equal treatment principle (Article L.253-2 of the Labour Code).

Although there is currently no case law on this point, an employee may argue that religious discrimination amounted to a breach of the employer's contractual obligations or moral harassment, and may seek an award of damages. The amount of compensation will depend on the facts and the extent of the real damage suffered by the employee.

When there is a discriminatory dismissal, such as a dismissal on religious grounds, Article L.253-1 of the Labour Code provides only for the reinstatement of the employee. It does not provide for other forms of compensation. This is explained further in section 7 below.

In addition to enforcement by claims to the Tribunal du travail, a 'Centre for equal treatment' (Centre pour l'égalité de traitement) has been created by the Law of 28 November 2006. The Centre promotes research and monitors equal treatment. It may also advise any person needing support in this area. However, it cannot intervene in legal proceedings (Articles 8 to 17).

Case law on religious discrimination remains very rare in Luxembourg.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Luxembourg law does not impose any specific obligations on employers to accommodate the religious beliefs of their employees, for example by allowing time off work for prayer during the working day. However, an employee may argue that the employer has committed moral harassment by refusing to allow time off for religious reasons, if this would not have been prejudicial to the employee's work or to the employer's operations (see section 3 above). The court decides these types of claims on a case-by-case basis.

### **6. DRESS CODES**

There are no specific legal provisions concerning dress codes. An employer which enforces a dress code preventing an employee from dressing according to his or her beliefs might commit moral harassment or indirect discrimination. The court decides such claims on a case-by-case basis.

### **7. DISMISSAL ON RELIGIOUS GROUNDS**

According to Article L.253-1 of the Labour Code, a dismissal based on discrimination prohibited by law will be considered void. Consequently, an employee will be entitled to sue his or her employer for reinstatement, but the employee will not be able, in principle, to ask for damages. This is similar to the way in which case law interprets analogous procedures in other areas (such as those for staff delegations and pregnant workers).

A dismissal on religious grounds will not be automatically declared void. The employee will need to follow a special summary procedure before the President of the Employment Court. If the President declares the dismissal void, the employer will be obliged to reinstate the employee at the employee's request.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

Article L.251-1 (3) of the Labour Code forbids any harassment, including harassment based on religious grounds. Nevertheless, it imposes no special additional obligations or liabilities on employers. According to Article L.251-1 (3), moral harassment may be considered as discrimination when a behaviour linked to religion has for its object or effect to undermine someone's dignity and to create an intimidating, hostile, degrading, humiliating or offensive environment. Consequently, an employee may recover damages based on this section of the Labour Code.



<b>A. THE LEGAL FRAMEWORK</b>	<b>119</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	119
2. DEFINITION OF RELIGION	120
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	120
4. ENFORCEMENT AND CLAIMS	120
<b>B. THE LAW IN CONTEXT</b>	<b>122</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	122
6. DRESS CODES	122
7. DISMISSAL ON RELIGIOUS GROUNDS	122
8. HARASSMENT ON RELIGIOUS GROUNDS	123

Mexico





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

In Mexico, the following legal framework deals with discrimination in general:

- In an amendment made in 2001, Article 1 of the Mexican Federal Constitution provides for the freedom to choose and exercise one's religious beliefs, and briefly touches on discrimination in general terms.
- Article 3 of The Federal Labour Law ('FLL'), expressly prohibits discrimination in the workplace, stating that no distinction can be made among workers for reasons of race, sex, age, religious beliefs, political orientation or social condition.

The Federal Law to Prevent and Eradicate Discrimination ('FLPED') defines the role the State has in suppressing discrimination in Mexico. Article 4 characterises discrimination as any distinction, exclusion, or restriction based on a number of particular distinctions, among them religion, whose effect is to impair or nullify the recognition or exercise of one's rights or of equal opportunity.

The scope of this law applies to private and public (governmental) relationships. Relating to employment, discriminatory conduct is defined as:

- prohibiting the free choice of employment or restricting job opportunities in relation to the acceptance or preservation of an existing position, or promotion to a new position
- establishing differences in compensation, benefits and/or equal working conditions and
- limiting access to occupational and professional training programmes.

The FLPED is important primarily for its legal and moral principles, rather than as a source of regulatory provisions. It sets out the measures to be taken in order to prevent discrimination and to attain equal opportunity. In addition, the FLPED has established a Commission called 'CONAPRED' (the National Commission for the Prevention and Eradication of Discrimination) whose purpose is to receive complaints regarding discrimination. The FLPED also describes the procedure to be followed in these cases (see section 4 below).

Other relevant rules are contained in State criminal codes, some of which deal with discrimination. For example, the Criminal Code for Mexico City prohibits discrimination in the workplace (although its reach is not clear). However, at present this offence is rarely prosecuted.

## **2. DEFINITION OF RELIGION**

Mexican law does not specifically define religion. The Religious Associations and Public Worship Law states that churches and religious groups must be legally constituted as 'religious associations' and be registered before the Department of the Interior (Secretaría de Gobernación). It also states that religious associations are to be governed by their own internal rules, which in turn are based on their own religious principles. Religious associations must designate their representatives and establish the internal structure under which they operate.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Mexican laws do not require employers to accommodate an employee's religious beliefs. It is important to bear in mind that, according to the National Statistics, Geography and Information Institute in Mexico, around 90% of the population is Catholic.

Aside from statutory days off work (see section 5 below), there are no legal provisions that entitle employees to receive special treatment based on religion while in the workplace.

## **4. ENFORCEMENT AND CLAIMS**

The National Commission to Prevent Discrimination and the Department of Population, Migration and Religious Affairs, both of which are part of the Department of the Interior, enforce discrimination laws. An employee who is discriminated against based on his or her religious affiliation or beliefs may file for conciliation proceedings in accordance with the FLPED. If the discrimination was committed by a private employer, the employer's participation in the conciliation process is voluntary. However, if the discrimination was committed by the federal government or one of its agencies, the conciliation process is then mandatory.

The conciliation process mainly tries to reach an agreement to stop the discrimination. It does not allow an employee who has suffered the discrimination to obtain monetary damages.

The process is initiated when a complaint is filed with a body known as the 'Council', which is followed by a conciliation stage. Any settlement signed by the parties and approved by the Council will be considered for all legal purposes as *res judicata* and may be enforced as such. If conciliation is not accepted or no settlement is reached, then an investigation will take place, during which evidence is requested and reviewed in order for a ruling to be issued on the matter.

At the conclusion of the investigation, if it appears that no discriminatory acts were committed, the Council will issue a 'No-Discrimination Agreement' ruling. If the investigation shows that discrimination did take place, the Council has the power to impose a number of administrative measures set out in the FLPED.

These include publishing the ruling or requiring the offender to attend equal opportunity courses. The Council may then verify that the offender has complied with these measures to ensure that the discrimination in its establishment has been effectively eliminated.

Based on the most recent reports regarding religious intolerance, 54 claims were filed in 1999, although not necessarily due to religious discrimination in the workplace. Unfortunately, statistics regarding claims have not been updated since then. As a result, however, and also due to an increase in religious minorities in Mexico, the first national commission to specifically address discrimination claims was founded in 2003 (the 'CONAPRED').

Based on the information provided by the CONAPRED, it is likely that claims based on religious discrimination in Mexico have increased since 1999. In the '2005 National Survey Regarding Discrimination in Mexico' carried out by the CONAPRED and the Department of Social Development, 31.4% of people who belong to a religious minority group declared that they have less opportunity to find a job than the rest of the population. In the same survey, the workplace was declared to be the place where religious minorities are most discriminated against.

If a criminal complaint is filed pursuant to the Criminal Code for Mexico City, it will be heard by a criminal court. The penalty for discrimination in the workplace is either a) from one to three years' imprisonment or b) a fine from between 25 and 100 days of the minimum salary (approximately EUR 2.7 per day).

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Mexican law does not impose any specific obligations on employers regarding permission for employee leave based on religious beliefs, prayer, or religious festivals.

Moreover, the holidays recognised by the FLL (statutory holidays) are not based upon religious holidays, except for 25 December. Nevertheless, in practice, and due to requests by trade unions, some companies grant some Catholic holidays to their employees, such as 12 December (the celebration of the Virgin of Guadalupe), Maundy Thursday and Good Friday.

### **6. DRESS CODES**

Mexican law does not specifically regulate proper dress in the workplace or establish any specific employee rights or obligations in this respect.

In practice, some employers issue employee handbooks or codes of conduct which indicate proper dress for employees while in the workplace. For such provisions to be enforceable the rules must be included in the company's 'Internal Labour Regulations', which the FLL defines as a compendium of internal guidelines addressing all internal work-related matters and processes, such as work schedules, employee lateness and employee sanctions. The FLL also states that the Internal Labour Regulations must be drafted by a commission composed of both employer and employee representatives. Once the commission has agreed upon the regulations to be implemented, they must be registered with the competent Labour Conciliation and Arbitration Board in order to be effective.

### **7. DISMISSAL ON RELIGIOUS GROUNDS**

Mexican law does not contain any specific prohibitions regarding termination based on religious beliefs. In general however, such a termination is prohibited by the FLPED, since it would restrict a person's right to employment based upon a discriminatory action.

Article 47 of the FLL identifies all specific grounds on which an employer can terminate an employment relationship without liability. If an employer dismisses

an employee for any other reason, the employer would have to indemnify the employee. Religion is not included as a specific ground in the FLL.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

At present, no legislation exists that specifically deals with religious harassment in the workplace. Both the FLPED and the Criminal Code for Mexico City contain a provision that prohibits harassment in general, but there is no specific Article relating to harassment based on religious grounds.

<b>A. THE LEGAL FRAMEWORK</b>	<b>127</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	127
2. DEFINITION OF RELIGION	128
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	128
4. ENFORCEMENT AND CLAIMS	128
<b>B. THE LAW IN CONTEXT</b>	<b>129</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	129
6. DRESS CODES	129
7. DISMISSAL ON RELIGIOUS GROUNDS	129
8. HARASSMENT ON RELIGIOUS GROUNDS	130

Netherlands





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Article 1 of the Dutch Constitution states that every person who is trespassing or staying in The Netherlands should be treated equally. This article prohibits discrimination based on religion, belief or philosophical conviction, political affinity, race, sex, or any other reason. Based on this section of the Constitution, the Dutch Equal Treatment Act ('Algemene Wet Gelijke Behandeling', AWGB) prohibits direct or indirect 'distinction', meaning unequal treatment (as defined – see below) based, among other things, on religion. Regarding the workplace specifically, according to Article 5 of the AWGB 'distinction', i.e. unequal treatment, is prohibited in relation to the following:

- during an employment offer and actions with regard to the filling of an outstanding vacancy
- during the employment application process
- during the entering into and termination of an employment agreement
- the terms of employment
- education prior to or during the employment
- promotion
- working conditions.

The prohibition against indirect unequal treatment is not applicable if it is objectively justifiable. This means that:

- the unequal treatment should have a purpose that is weighty enough
- the unequal treatment is appropriate
- there is no other way of serving the purpose other than by unequal treatment.

The prohibition against direct unequal treatment is not applicable if the Act itself explicitly names an exception.

The term 'unequal treatment' is defined in the AWGB and means that there is a different approach towards people based on:

- direct unequal treatment: their religion, philosophical or political convictions, race, sex, nationality, sexual orientation or civil status; or

- indirect unequal treatment: this has same result as direct unequal treatment (e.g. not offering a job to an applicant because of wearing a headscarf can be marked as unlawful indirect unequal treatment based on sex or religion).

## **2. DEFINITION OF RELIGION**

There is no legal definition of 'religion' in the Dutch Civil Code. However, because the Dutch constitutional prohibition against discrimination applies not only to discrimination based on religion but also to discrimination based on 'any philosophy of life,' its scope is wide.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

There are no specific provisions in Dutch labour law requiring an employer to accommodate an employee's religious beliefs. However, whether an employer is required to do so may depend on a combination of general legal provisions (for example, good employment practice) and freedom of religion and equal treatment laws.

Based on the abovementioned provisions, an employer is obliged, within reasonable limits, to enable an employee to exercise his or her religious belief, for example, by giving the employee the opportunity to pray, or providing halal food in the canteen. These obligations will be limited by health and safety requirements, for example.

The legal principles of good practice for both employers and employees are laid down in the Dutch Civil Code. Based on these principles, the employer and the employee must behave in a fitting manner in the course of employment.

The Dutch Civil Code does not define the exact content of the obligations but case law specifies that employers and employees should follow general principles of reasonableness and fairness.

## **4. ENFORCEMENT AND CLAIMS**

Pursuant to the AWGB, employees who feel that they have been discriminated against may appeal (in writing) on the principle of equality.

Conflicts concerning equal treatment may be brought before the Dutch Equal Treatment Commission.

The decision of the Equal Treatment Commission has no force of law. A victim of unequal treatment should go to court for the enforcement of a decision on religious discrimination. Although the court is not bound by the decision of the Commission, it tends to follow their view in most cases. If the Equal Treatment Commission judges, for example, that an employer acted in breach of the AWGB because of unequal treatment based on religion, the Commission may assert in a legal action that the discriminatory act was unlawful, or order the employer to remedy the consequences of the discriminatory conduct.

## **B. THE LAW IN THE CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Aside from certain exceptions, an employer must organise the employment in such a way that employees are not obliged to work on Sundays. Furthermore, Dutch law does not contain any specific obligations on an employer to accommodate the religious belief of its employees except that if an employee refuses to work on Sundays, an employer is not permitted to terminate the contract if the employee refuses to work on a given Sunday.

### **6. DRESS CODES**

The Dutch Civil Code states that an employer has the right to impose certain procedural rules that employees must obey regarding the carrying out of their work. In making these rules, the employer must act within the boundaries of the general principle of reasonableness and fairness. A dress code policy is a typical example of such a rule: the imposing of dress codes may trigger an (in)direct unequal treatment based on religion.

### **7. DISMISSAL ON RELIGIOUS GROUNDS**

Pursuant to the AWGB, any discrimination at the workplace is prohibited. This prohibition extends to the termination of an employment agreement. Therefore, a dismissal based on religion is prohibited. If an employee refuses to work on Sundays, an employer is, apart from certain exceptions, not

permitted to terminate the contract because the employee refuses to work that day.

Dutch law explicitly states that a person who files a complaint based on discrimination is protected against dismissal.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

In The Netherlands the AWGB prohibits direct or indirect unequal treatment based, among other things, on religion. This prohibition includes every form of harassment and therefore prohibits harassment based on religion.

Pursuant to Dutch law, as soon as an employer receives a complaint about harassment, it should immediately investigate whether or not the complaint is justified. Based on Dutch published case law, an employer who has not handled the complaint of the employee in a careful and correct manner may be required to pay damages to the employee.



<b>A. THE LEGAL FRAMEWORK</b>	<b>135</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	135
2. DEFINITION OF RELIGION	135
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	135
4. ENFORCEMENT AND CLAIMS	136
<b>B. THE LAW IN CONTEXT</b>	<b>137</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	137
6. DRESS CODES	137
7. DISMISSAL ON RELIGIOUS GROUNDS	138
8. HARASSMENT ON RELIGIOUS GROUNDS	138

Norway





## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

In Norway, the Anti-Discrimination Act of 3 June 2005 No. 42 states in Section 4 that discrimination (both direct and indirect) based on religion is prohibited.

The Anti-Discrimination Act applies in the workplace, and covers job applicants as well as employees. The Act also applies in all other areas of society, with the exception of family life and personal relationships.

### **2. DEFINITION OF RELIGION**

There is no definition of religion in the law. However, the term 'religion' is discussed in the legislative history of the Anti-Discrimination Act. The term includes any form of philosophy of life, and therefore religious, atheistic and agnostic beliefs are intended to be included.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

The Anti-Discrimination Act does not specifically require the employer to accommodate an employee's religious beliefs. However, if an employer does not make an accommodation then it might be acting in contravention of Section 4 of the Act. This is because a failure to accommodate an employee's religious beliefs might amount to indirect discrimination.

The definition of indirect discrimination in the Anti-Discrimination Act is wide, and only practice will show how the law is to be interpreted. The Act came into force 1 January 2006. It is a task for the courts, the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (see section 4 below) to further interpret the law. Yet there have been few examples where a failure to accommodate religious beliefs has amounted to indirect discrimination.

The Equality and Anti-Discrimination Ombud made a statement on 24 April 2009 regarding a school's practice of granting unpaid leave. A Muslim woman had sought unpaid leave for three weeks for a pilgrimage to Saudi Arabia. The school granted her no more than two weeks based on the regulations of the school. The Equality and Anti-Discrimination Ombud concluded that the

school had acted in contravention of Section 4 of the Anti-Discrimination Act, because of the school's practice of enforcing its regulations in granting leave and the lack of individual evaluation of the employee's application for leave of absence.

#### 4. ENFORCEMENT AND CLAIMS

The Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal are responsible for enforcing the Anti-Discrimination Act. This institutional mechanism was established 1 January 2006, and it functions as joint machinery against all forms of discrimination, including discrimination on the grounds of religion.

However, if the employee is seeking redress and damages (under Section 14 of the Act), or a penalty for gross violations that have been committed jointly by several persons (Section 15), then he or she must bring the claim before the ordinary courts of law.

Section 14 of the Act allows employees to recover compensation and damages if they win their claims. An employee may demand compensation without regard to the fault of the employer. Employers have strict liability under the Act. The employee may demand compensation regardless of who perpetrated the discrimination, if the discrimination occurred during work.

The employer is liable for discrimination perpetrated by others, such as employees, customers, or clients (in these cases, the ordinary rules governing legal remedies will determine whether the employer can demand that the perpetrator is held responsible).

The level of damages is assessed by reference to the amount that is found to be reasonable in light of the circumstances of the parties and other facts of the case. The fault of the employer is taken into account in setting the level of damages. An employee may claim compensation for financial loss because of a breach of the Act under the ordinary rules governing damages.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

There are no specific obligations on employers to accommodate the religious beliefs of their employees, for example an obligation to allow time off work for prayer during the working day. The Anti-Discrimination Act does not require employers to give positive special treatment to employees with regard to their religion. The question is whether refusing an employee breaks at times for prayer, or annual leave to coincide with a religious holiday, can be prohibited as indirect discrimination.

This question is not easy to answer, as the law is still developing. The employer is not obliged to give employees time off work for prayer. However, if the circumstances allow employees to take short breaks during the day, the employer may not refuse to allow the employee to use these breaks for praying, without having a just reason to do so. With regard to time off work for religious holidays, if the circumstances allow the employee to take this time off, the employer cannot refuse it.

### **6. DRESS CODES**

According to Norwegian law, an employer may instruct its employees to wear uniforms or to dress in a certain way. The instructions from the employer have to be for business reasons, and must take into consideration the employees' dignity.

Instructions with regard to clothes may be in conflict with an employee's religious beliefs. It is assumed that provisions concerning dress codes may involve indirect discrimination. A prohibition on wearing a hijab (the Muslim headscarf), for example, may constitute discrimination based on religion and also on the basis of gender. It is assumed therefore that the employer must adjust its demands with regard to dress codes so that wearing a hijab is possible.

The Equality and Anti-Discrimination Ombud made a statement on 16 July 2007, in a case whereby a bus company did not accept a male busman wearing the traditional turban that is used by Sikhs. The Ombud stated that the bus company had acted in contravention of Section 4 of the Anti-Discrimination Act, by refusing to allow the employee to wear the traditional turban.

However, a prohibition against wearing headgear and other religious symbols may be lawful in some situations, as long as the employer gives a fair reason for the prohibition. For example, police are not allowed to wear hijab. Security reasons also may lead to restrictions with regard to headgear.

Whether dress code restrictions are indirect discrimination has not yet been addressed by the Norwegian courts.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

The Anti-Discrimination Act also applies to termination of employment. In addition to the provisions of this Act, the Working Environment Act contains rules about grounds for dismissal. A dismissal must be fair. If an employee is terminated on grounds of religious beliefs, this will not be deemed fair.

The Equality and Anti-Discrimination Ombud made a statement on 12 June 2007 in which the Ombud concluded that an employer had breached Section 4 of the Anti-Discrimination Act because the employer had terminated an employment agreement based on the employee's wearing a hijab.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Religious harassment is prohibited by Section 5 of the Anti-Discrimination Act.

The term harassment is defined to include any actions, failures to act or statements that are mortifying, frightening, hostile, degrading or humiliating. If an employee is harassed, he or she may demand compensation from the employer, in accordance with the principles explained in section 4 above.



<b>A. THE LEGAL FRAMEWORK</b>	<b>143</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	143
2. DEFINITION OF RELIGION	143
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	144
4. ENFORCEMENT AND CLAIMS	144
<b>B. THE LAW IN CONTEXT</b>	<b>145</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	145
6. DRESS CODES	145
7. DISMISSAL ON RELIGIOUS GROUNDS	145
8. HARASSMENT ON RELIGIOUS GROUNDS	146

Poland





## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

The Polish Labour Code prohibits discrimination on the grounds of religion and belief. Employees and job applicants are protected from direct and indirect discrimination, harassment and victimisation. Incitement to discriminate is also banned.

In addition, an employee who is discriminated against may directly invoke Article 32 of the Polish Constitution, which is a general equal treatment provision, in conjunction with Article 53 of the Constitution, which refers specifically to freedom of religion and belief.

It should be pointed out that differences in treatment based on religion or belief in the employment sphere are permitted by law in some exceptional cases. Thus it will not amount to a breach of the equal treatment principle if the employee's religion or denomination constitutes a material, reasonable and justified professional qualification in relation to the type and character of activities conducted within the scope of churches or other religious societies, as well as organisations whose objective is directly related to religion or a religious denomination.

### **2. DEFINITION OF RELIGION**

There is no definition of religion in the Labour Code and there is no case law defining the notions of religion or belief in the workplace context.

However, by Article 53 of the Constitution, freedom of religion includes the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching. The Constitution also states that freedom of religion includes the possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

Subject to Part B section 5 below, Polish law contains no specific provisions requiring an employer to accommodate an employee's religious beliefs, and there is no case law on this matter.

Any rules in this respect would have to be inferred from the principle of equal treatment. It is possible that an employer will not breach the law if it refuses to accommodate religious beliefs, provided that the refusal is 'across the board', i.e., that the employer accommodates the beliefs of no religions. If the employer makes concessions to one religious group, it should make similar concessions to others. These issues are considered further in Part B below.

### 4. ENFORCEMENT AND CLAIMS

Employees suffering from discrimination on the grounds of religion or belief may lodge claims directly to the labour court.

Under Article 183d of the Labour Code, an employee may seek compensation for discrimination on religious grounds. Compensation covers not only financial loss suffered by the employee, but also non-pecuniary damages, which may include, for example, damages for distress or psychiatric injury. There is no maximum limit on the amount of compensation that can be awarded: the law provides only for the minimum amount, which is the statutory minimum monthly wage (approximately EUR 305).

The employee may also claim that his personal interests were infringed and thus claim compensation and an apology based on the Civil Code.

In addition, an employee may request the State Labour Inspection to audit the employer's compliance with the laws on equal treatment. In certain cases, the inspectors are entitled to impose fines on employers for breach of labour law.

They may also issue orders for payment of employment related benefits that are due to employees. This applies also to benefits denied to employees on a discriminatory basis.

The great majority of people in Poland are Catholics, so at present there are no reasons to expect any significant number of claims based on religious discrimination.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Statutory holidays in Poland are scheduled to coincide with Catholic holidays.

Non-Catholic employees whose religious festivals fall on days other than Sundays and statutory holidays (including Catholic holidays) should – upon their request – be released from work for the time necessary to celebrate those festivals. The employer may make such release conditional upon the employee's consent to work on a different date. The request should be made not later than seven days before the planned date of release. This, however, should not apply to the religious holidays which fall on specific days of each week. In such a case, upon the employee's request, the employer is obliged to set an individualised schedule for the employee.

### **6. DRESS CODES**

There are no specific legal provisions on dress codes. Some organisations apply dress codes under internal regulations. The question of dress codes and religious discrimination has never been raised in Poland. It is possible that if an employer's dress code treats employees unequally, e.g. where this is not problematic for Catholic beliefs but conflicts with the clothing requirements of other religions, then employees belonging to those other religions will be discriminated against and could make claims.

### **7. DISMISSAL ON RELIGIOUS GROUNDS**

The employer is obliged to treat its employees equally with respect to termination of employment, regardless of their beliefs and religion. Employees may not be subjected to unfavourable treatment, in particular, dismissal, because they made claims of religious discrimination or supported another employee who was discriminated against. There are no more specific provisions in that respect.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

According to Polish law, harassment is understood as constituting discrimination. As such it is generally prohibited. The definition of harassment is very broad and covers harassment based on religion.



<b>A. THE LEGAL FRAMEWORK</b>	<b>151</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	151
2. DEFINITION OF RELIGION	151
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	151
4. ENFORCEMENT AND CLAIMS	152
<b>B. THE LAW IN CONTEXT</b>	<b>153</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	153
6. DRESS CODES	153
7. DISMISSAL ON RELIGIOUS GROUNDS	154
8. HARASSMENT ON RELIGIOUS GROUNDS	154

Portugal 



## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

The Portuguese Constitution (Articles 13 and 41) as well as the Portuguese Labour Code (Articles 24 and 25) prohibit employers from discriminating against an employee or job applicant on the basis of religion. The law prohibits employers from treating individuals differently because of their religion.

In addition, Law no. 16/2001 of 22 June governs the freedom of religion. Article 14 of this law provides that employees are entitled to suspend their work on days of rest, festivities and during periods determined by the religion to which they adhere. This is considered further in section 5 below.

### **2. DEFINITION OF RELIGION**

Portuguese law does not provide any definition of religion. However, some Portuguese authors consider that a belief in a supernatural entity is inherent to the concept of 'religion'. It can therefore be concluded that, for the purposes of Portuguese law, 'religion' must include belief systems focused on the existence of a god or gods.

The number of believers is not a decisive criterion to ascertain or to define a religion.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

There are no legal provisions in Portuguese law which specifically require the employer to provide an employee with reasonable accommodation for his or her religious beliefs. The Labour Code only contains provisions regarding non-discrimination on the basis of religion.

However, Law no. 16/2001 (mentioned in section 1 above) could be seen as creating a form of requirement on the employer to allow employees to take time off during working hours in accordance with their religious beliefs.

#### 4. ENFORCEMENT AND CLAIMS

The Authority for Labour and Employment Conditions ('ACT') is the public authority charged with enforcing labour law, including compliance with the non-discrimination provisions of the Labour Code as well as the labour provisions of Law no. 16/2001.

The ACT may take action either on the basis of an employee's claim (which happens in the majority of cases) or at its sole discretion. The ACT may impose fines for non-compliance with labour law, including non-compliance with the non-discrimination provisions.

In addition to making a claim to the ACT, an employee is entitled to bring a case against the employer for discrimination based on religion or breaches of the employee's rights under Law no. 16/2001. Any compensation due to the employee may be granted solely by the court, and the ACT cannot intervene in such a procedure.

If the claim succeeds, the employee is entitled to recover damages. Article 323 of the Labour Code provides that if one of the parties (employer or employee) breaches its duties, it becomes liable towards the other party for all harm caused. Thus damages will be payable for non-pecuniary loss such as distress (moral damages).

At present in Portugal, there are no particular issues regarding the individual aspects of the exercise of freedom of religion from a labour law perspective. It is worth bearing in mind that the Roman Catholic religion is dominant in Portugal and other religions have very small numbers of believers in comparison to the number of Catholic believers. There is currently no case law regarding this matter, nor any statistics concerning claims before any public entity.

Currently, immigrant workers in Portugal (notably Brazilian, African, Russian and Ukrainian citizens) are not raising any particular issues concerning freedom of religion. Most of the Brazilian and African citizens (the latter mainly from the former Portuguese colonies – Mozambique, Angola and Cape Verde) who work in Portugal are Roman Catholic. The Russian and the Ukrainian citizens are mainly Orthodox Catholics. For these reasons, and taking into consideration Portuguese culture and habits, it seems unlikely that religious discrimination in the employment context will be an issue in the future.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

As mentioned in section 1 above, Law no. 16/2001 entitles an employee to suspend work on days of rest, festivities or other periods determined by the religion he or she adheres to. The employee must make a request to the employer in order to exercise this right, although there is no specified format for the request. The law requires the church or religious organisation to which the employee belongs to send to the competent Portuguese government department in the preceding year, a list of such days and periods in the coming year.

Provided that these conditions are met, the employer is bound to grant requests. The employee is also obliged to work flexibly and to fully make up the absence in question.

Most public holidays in Portugal are linked to Catholic festivities and there have been no significant cases of breach of Law no. 16/2001 regarding employees taking leave of absence from work in accordance with their Catholic beliefs.

In terms of other religions, the entitlement to take time off work is equally provided for under Law no. 16/2001. There have been no known instances of employers failing to comply with these legal provisions when duly requested by their employees.

Law no. 16/2001 applies to any form of absence (suspension of work for any period determined by the religion as described above).

### **6. DRESS CODES**

The issue of religious discrimination and dress codes has not been raised in Portugal. Any analysis of legal consequences regarding dress codes should be made on a case by case basis in order to assess if there is or is not discrimination.

Generally, freedom of religion also includes the individual's right to express his or her religious beliefs externally (notably in what concerns his or her appearance – including manner of dress). However, this right is not absolute,

i.e. it can be limited vis-à-vis other rights which are also set forth in the Constitution and in ordinary law.

In terms of labour organisation (notably regarding the workplace and work guidelines), the legitimacy of imposing dress codes is recognised when this is linked to specific work performance. Indeed, in cases where:

- safety, hygiene and public health issues are involved
- the interests and rights of the employer (and of the employee's colleagues) in connection with the regular functioning of the organisation or the achievement of work performance targets (bearing in mind the nature of the activity and the context of its performance) need to be guaranteed, it is legitimate to impose dress codes since there is an objective reason for this, which is the decisive criterion for limiting the individual freedom to dress in accordance with religious beliefs.

On this basis, for example, it is not discriminatory to impose a dress code for airline flight attendants, mechanics, restaurant waitresses, cooks, bus drivers, police officers or firemen, but it could be considered discriminatory to impose a dress code for people who perform administrative tasks (for example, in a law office).

### 7. DISMISSAL ON RELIGIOUS GROUNDS

There are no specific prohibitions against termination of employment by reason of an employee's religion. Termination of employment is subject to very strict requirements in Portugal and the employer is only entitled to dismiss an employee either with fair cause or for objective reasons (e.g. collective dismissal or dismissal owing to job termination).

If the employer dismisses an employee because of his or her religion, the employee is entitled to challenge the dismissal based on breach of discrimination provisions and to claim compensation or reinstatement.

### 8. HARASSMENT ON RELIGIOUS GROUNDS

There is a general principle concerning prohibition of religious harassment set forth in the Portuguese Constitution (Articles 13 and 41), as well as in the Portuguese Labour Code (Articles 24 and 25). The latter refers to the prohibition of discrimination against an employee or job applicant on the basis of religion.

In addition, Article 2 of Law no. 16/2001 stipulates that an individual cannot be persecuted by reason of his or her religious beliefs.

Taking into consideration these principles, employers are prevented from harassing employees based on their religion. Religious harassment constitutes a breach of the employment contract and entitles the employee to claim compensation for damages from the employer.

<b>A. THE LEGAL FRAMEWORK</b>	<b>159</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	159
2. DEFINITION OF RELIGION	159
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	160
4. ENFORCEMENT AND CLAIMS	160
<b>B. THE LAW IN CONTEXT</b>	<b>160</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	160
6. DRESS CODES	161
7. DISMISSAL ON RELIGIOUS GROUNDS	161
8. HARASSMENT ON RELIGIOUS GROUNDS	161

Russia





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Article 3 of the Labour Code of the Russian Federation prohibits employers from discriminating against employees on the basis of their religion. The Labour Code states that irrespective of religious beliefs, no one can be constrained in their labour rights and freedoms, nor benefit from any advantages in relation to others.

The Federal Law on Freedom of Conscience and Religious Associations is also relevant here. According to Section 6 of Article 3 of this Law, the obstruction of a person's right to freedom of conscience and freedom of faith is prohibited and will be prosecuted in accordance with federal law. Freedom of conscience and freedom of faith include a right to accept any religion individually or together with other people, or not to accept any religion, to freely choose and change, to have and disseminate religious and other beliefs, and to act in accordance with them.

In addition, Article 86 of the Labour Code stipulates that employers have no right to receive and process personal information (i.e. information required by employers for employment relations which refers to specific employees) about the religious convictions of employees. However, employers may receive and process personal information in cases where this is relevant to the employment relationship and where they have received the employee's written permission.

### 2. DEFINITION OF RELIGION

There is no definition of religion in the laws of the Russian Federation.

However, according to both Article 28 of the Constitution of the Russian Federation and to the Federal Law on Freedom of Conscience and Religious Associations, freedom of conscience and freedom of faith include a right to accept any religion individually or together with other people, or not to accept any religion. The scope of the legislation is therefore very wide: it is not limited to recognised religions and it covers lack of belief as well as adherence to a belief system.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

There are no specific legal provisions requiring an employer to accommodate employees' religious beliefs.

It should be noted that a refusal to allow an employee to take time off work for prayer, may be considered to be discriminatory towards the employee on the basis of religion and therefore may violate the Labour Code. However, this is not a matter that has been widely raised in the Russian Federation.

### **4. ENFORCEMENT AND CLAIMS**

Employees who believe that they have been discriminated against on the basis of their religion are entitled to apply to the court (Article 3 of the Labour Code) to make good the breach of their rights and compensate any material and/or moral damage.

An employee who does so may apply for the restoration of his or her violated rights, for compensation for any material or moral damage caused by the discrimination. There is no limit to the amount of compensation that may be recovered. 'Moral damage' is defined as the moral or physical sufferings of the victim, and this can include distress and psychiatric injury. To date, awards of compensation for moral damage have been quite low.

In the Russian Federation, religious discrimination claims still make up a very small percentage of the total number of claims filed. The majority of claims related to freedom of faith are connected with the activities of religious organisations and associations.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Russian law does not impose any specific obligations on employers to allow time off for prayer during the working day or annual leave for religious holidays. Although the Labour Code prohibits discrimination against an employee on the basis of his or her religion, in the absence of any case law it is not possible to determine whether such a refusal could breach the Labour Code.

## 6. DRESS CODES

As a general rule, the requirements concerning dress code are established by the 'local normative act' adopted by the company. (A local normative act is an internal document adopted by the company that contains provisions governing the relationship between the employer and its employees, such as rules on discipline and dress codes). If a local normative act infringes the rights of employees as specified by the Labour Code, by any collective contract or the employment agreement, then it will be considered to be void.

As explained in section 1 above, the Labour Code prohibits employers from discriminating against employees on the basis of religion. Consequently, the local normative acts cannot contain requirements with regard to dress code that discriminate against the employee on the basis of his or her religious convictions. However, since there is currently no case law on this point, it is difficult to predict what may or may not constitute discrimination in breach of the Labour Code in this context.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

Under Russian law, an employer may not terminate the employment of the employee by reason of the employee's religion. The employment may be terminated on the initiative of the employer only on the basis of specific grounds identified in the Labour Code. The Labour Code does not contain any ground allowing the employer to dismiss the employee for reasons of religion.

An employee who is dismissed on religious grounds is entitled to apply to the court. The court may consider the dismissal to be unlawful, in which case the employer will be obliged to reinstate the employee in his or her position, and to reimburse unpaid wages for the period of the unlawful dismissal. The court may also require the employer to compensate the employee for any moral damage caused by the dismissal.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

The legislation of the Russian Federation does not contain any provisions directly prohibiting religious harassment of employees, and there is no case law on this matter.

<b>A. THE LEGAL FRAMEWORK</b>	<b>165</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	165
2. DEFINITION OF RELIGION	166
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	166
4. ENFORCEMENT AND CLAIMS	166
<b>B. THE LAW IN CONTEXT</b>	<b>167</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	167
6. DRESS CODES	167
7. DISMISSAL ON RELIGIOUS GROUNDS	168
8. HARASSMENT ON RELIGIOUS GROUNDS	168

Slovak Republic





## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

The relevant EU legislation was implemented in several acts, primarily the Labour Code (Act No 311/2001 Coll.), the Anti-Discrimination Act (Act No 365/2004 Coll.), the Act on Services in Employment (Act No 5/2004 Coll.) and certain other laws.

The Labour Code ensures the right to work and to free choice of profession as well as the right to fair and satisfactory working conditions. These rights belong to an individual without any restrictions and without direct or indirect discrimination, including discrimination based on religion or belief.

In addition to the Labour Code, the Anti-Discrimination Act prohibits discrimination in labour relationships and relationships connected with labour law relationships. The prohibition also covers discrimination based on religion and belief.

The term 'labour relationships and relationships connected with labour law relationships' is interpreted very broadly and covers all relationships and all facets of the employment relationship, including working conditions, vocational training, remuneration, promotion, and dismissal. Discrimination is also prohibited before the employment relationship forms, during the recruitment process.

There is much debate about religion in the workplace in the Slovak Republic. The primary reason is the relatively big influence of churches in the Slovak Republic and the high number of believers. A concordat was signed with the Holy See (published in the Collection of laws as No. 326/2001). This concordat ensures the right of Catholic believers to claim an 'objection of conscience'.

The concordat presumes that the Slovak Republic and the Holy See will conclude a separate agreement on objection of conscience that will stipulate the extent and conditions of the objection. Based on this agreement, believers should be entitled to invoke an objection of conscience that is in accordance with the doctrine of the Catholic Church. For example medical doctors could refuse to perform abortions, or employees could object to working on Sundays.

Similar agreements reproducing the provisions of the concordat have already been concluded with other registered churches in the Slovak Republic.

## 2. DEFINITION OF RELIGION

Slovak labour law does not define the term religion. Neither is the term defined by the Act on Freedom of Religious Belief and the Status of Churches and Religious Societies (Act No 308/1991 Coll.) which stipulates that each individual has the right to free expression of religion or belief as an individual or jointly with others, in private or in public, by means of worship, education and religious acts and ceremonies. Legal practice usually relies on the interpretation of religion found in the case law of the European Court of Justice and the European Court of Human Rights and Fundamental Freedoms.

## 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

Employers are not obliged to accommodate an employee's religious beliefs. On the other hand, employers cannot discriminate against employees for practising their religion or belief. Therefore, if an employer accommodates one employee's religion or belief, this could be discriminatory towards other employees who are of another religion or belief, as the employer's action could be considered as a preference for one religion or set of beliefs, and a violation of the principle of equal treatment.

## 4. ENFORCEMENT AND CLAIMS

Disputes between an employer and an employee are heard by the ordinary courts. The Labour Code stipulates that an employee may appeal to a court and require protection against discrimination based on the Anti-Discrimination Act.

According to the Anti-Discrimination Act the employee is entitled to demand: (i) that the employer desist from discrimination, (ii) stops acting unlawfully and eliminates any unlawful consequences of its illegal actions, or (iii) provide adequate non-monetary remedial action. The employee will be entitled to financial compensation if the dignity of the employee has been seriously harmed.

If an employee suffers harm in connection with practising his or her religious faith in the workplace, only general liability, as stipulated by the Labour Code, applies. This means that an employer would be liable to an employee only for harm which occurs while the employee is performing work-related tasks, or which occurs in direct connection with those tasks, as a result of the

employer's violation of statutory obligations or the employer's wilful conduct contrary to the rules of good manners and civil co-existence.

In addition, according to the Act on Work Inspection (Act No. 125/2006 Coll.), the Working Inspectorate may impose a general fine on the employer of up to EUR 33,193.92 for breaching the labour law regulations, including the regulations on prohibition of discrimination.

The Act on Services in Employment also prohibits discrimination in employment relationships. It forbids employers from publishing discriminatory advertisements, including advertisements discriminating against candidates based on their religion or beliefs. A fine of up to EUR 33,193.92 may be imposed on the employer for violating this Act.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

The Labour Code does not expressly address the possibility of an employee taking time off work for prayer during working time, so an employer is not obliged to satisfy an employee's request in this regard. Similarly, the Labour Code does not regulate taking annual leave for religious festivals. The customary rules regarding leave apply, so the employer can determine annual leave according to its needs, as long as it respects the employee's legitimate interests. The employer is thus entitled to refuse an employee's request for annual leave at a specific time.

### **6. DRESS CODES**

Neither the Labour Code nor any other laws regulate dress codes. It is generally accepted that employers may impose certain standards and requirements relating to the clothing of their employees. However, these standards must be reasonably justified by the employee's work position. Thus, a dress code may prevent an employee from dressing in accordance with his or her religion or belief provided that it is reasonably justified, such as for reasons of hygiene. The employer may also require specific kinds of clothing, as well as impose specific requirements on the employee's appearance and professional conduct. Employees are obliged to observe any requirements that are adequate and dignified (e.g. to properly represent the employer towards customers and clients, etc.).

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

The Labour Code stipulates that an employer may only dismiss an employee based on grounds stipulated in the Labour Code. Religious grounds are not a reason for dismissal in the Slovak Republic and so dismissal for religious reasons would be contrary to law and thus invalid.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

The Anti-Discrimination Act considers harassment to be conduct which creates or may create an intimidating, hostile, shameful, humiliating, degrading, disrespectful or offensive environment and whose intention or consequence is or may be the violation of a person's freedom or human dignity. Harassment on religious grounds is also considered to be discrimination, and is therefore prohibited.



<b>A. THE LEGAL FRAMEWORK</b>	<b>173</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	173
2. DEFINITION OF RELIGION	173
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	173
4. ENFORCEMENT AND CLAIMS	175
<b>B. THE LAW IN CONTEXT</b>	<b>176</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	176
6. DRESS CODES	176
7. DISMISSAL ON RELIGIOUS GROUNDS	177
8. HARASSMENT ON RELIGIOUS GROUNDS	177

Spain 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Article 14 of the Spanish Constitution prohibits any discrimination on the grounds of religion. This prohibition has been set out in Article 4 of the Workers' Statute (Estatuto de los Trabajadores) and in Article 1 of Organic Act 7/1980, the Freedom of Religion Act (Ley Orgánica de libertad religiosa). This includes the prohibition of direct and indirect discrimination, and covers both employees and job applicants.

However, Spain, unlike in times past, does not pay too much attention to religion as a circumstance affecting employment relations.

### 2. DEFINITION OF RELIGION

Despite the fact that the term 'religion' is included in both the Spanish Constitution and the Workers' Statute, there is no specific definition in the law. However, religion is deemed to be the set of beliefs professed by individuals. This very broad definition of religion includes protection against discrimination on the grounds of religion not only for the main religions but also for any other rite that is based on the sincere beliefs of an individual.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

By regulation, employees may not be compelled to declare their religious beliefs or to reveal their convictions, and the employer is prohibited from conducting any inquiry regarding the employees' religious opinions.

When the employer knows of an employee's religious beliefs, the employer is obliged to take reasonable steps to accommodate the religious beliefs of an employee or potential employee, unless doing so imposes an onerous burden on the employer. The employee concerned must provide the employer with sufficient information to put the employer on notice that the employee needs an accommodation in the workplace for his religious beliefs.

The employer must give careful consideration to each request for accommodation and analyse whether it is possible to meet it. According to the Constitutional Court's interpretation of the Organic Act 7/1980, an employer

may refuse to grant the employee's request if it is expensive, has a negative effect on efficiency, reduces the safety of the workplace or has a negative effect on the rights of other employees.

In the event that there is an employment dispute as a result of discrimination on religious grounds, two competing rights are usually weighed in the balance. On the one hand there is the right of the employer to direct employment activity (Article 20.1 of the Workers' Statute) and on the other hand the employee's fundamental right to freedom of religion (Article 16.1 of the Spanish Constitution, and the Organic Act 7/1980).

The Spanish commentaries and case law are unanimous on the point that there is no such thing as an unlimited right, and the restrictions on fundamental rights must be construed in the way that is most favourable to the efficacy and essence of such rights.

In the case of the right to freedom of religion, there is an internal dimension – an intimate set of beliefs – and an external dimension, which consists of the manifestation of such beliefs. The internal freedom is always unlimited, but the external manifestation of beliefs by the individual can be the subject of restrictions.

In this sense Article 16.1 of the Spanish Constitution provides as the only legitimate restriction 'such restriction as is necessary in order to maintain the public order that is protected by the law'. In addition, Article 3.1 of the Organic Act 7/1980 provides that 'the exercise of the rights emanating from the freedom of religion and belief has as its only restriction the protection of the right of others to exercise their public freedoms and fundamental rights, along with the safeguarding of safety, health and public morality, elements which constitute the public order that is protected by the law in the context of a democratic society'.

Case law in Spain follows the guidelines of the European Court of Justice and looks at whether there has been an infringement of the proportionality principle from the perspective of the right to freedom of religion and the legally recognised right that has restricted its exercise. There will always be a conflict between the two rights, which must be resolved by reference to the particular circumstances of each case, evaluating whether the employee's religious practices are innocuous as far as the company's interests are concerned, or whether instead they are incompatible with the company's interests.

#### 4. ENFORCEMENT AND CLAIMS

In Spain, a person with a claim of discrimination on the grounds of religion or belief may file a claim with the appropriate employment court (Juzgado de lo Social). However, before filing the claim with the court, it is advisable for the employee to exhaust the company's internal conciliation procedure. The general time limit for filing a claim is one year from the date of the act which gives rise to the discrimination. If the employee is dismissed as a result of discrimination on the grounds of his or her religious beliefs, the employee is required to file a claim within 20 days of being notified of the dismissal.

The person claiming discrimination on the basis of religious belief, may claim damages for the breach of his or her fundamental right to freedom of religion. However, the claimant must prove entitlement to compensation, and quantify the amount of compensation owed. The person affected must prove entitlement to compensation on the basis of pain and suffering (including pecuniary losses such as lost earnings) and the amount of damage caused to them as a result of the discrimination to which they have been subjected. This means proving in court that he or she has actually suffered the harm claimed. There is no limitation on the amount of compensation that can be recovered.

Most of the cases on religious discrimination have involved a refusal by the individual to carry out a task that was not permitted by his or her religious beliefs. For example, the refusal to carry out legal abortions may be a conscientious objection with possible labour implications in the case of the employment relationship between a doctor and his or her employer. Even though this is not specifically set out in the Spanish legislation, conscientious objection on the basis of religion is a part of the fundamental right to freedom of religion according to the Constitutional Court Judgment (53/1985).

There have been other factual situations where conscientious objection has labour implications, and the citizen's rights are linked to the regulation of fundamental rights, e.g. the right to conscientious objection contained in Article 20.1d of the Spanish Constitution or the refusal of a doctor to carry out legal abortions recognised by Constitutional Court Judgement 53/1985.

However, cases are starting to arise from different issues, such as the right to wear clothes at work that accord with the religion that the individual practises (see section 6 below) or dismissals for religious reasons. These problems, which in themselves are quite complex, may be more common in the future as a result of the growth in immigration.

The geographical proximity of Spain to Muslim countries means that there is a very significant migratory flow from these countries. As the immigrants are integrated into the Spanish workplace, it is likely that many more conflicts over the accommodation of religious beliefs in the workplace will arise.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

As explained in section 3 above, an employer is obliged to take reasonable steps to accommodate the religious beliefs of an employee or potential employee, unless doing so imposes an onerous burden on the employer.

Therefore, the employer should give careful consideration to requests by employees to take time off during the working day for prayer, or to take a holiday for religious festivals. The employer may refuse the request if, for example, it would have a negative effect on efficiency or on the rights of other employees.

With respect to employees who practice the Jewish, Protestant or Muslim faiths, Constitutional Court Judgment 19/1985 accepts that it is possible for employees of these faiths to include a clause in their contract of employment allowing them to take time off work in accordance with their beliefs and to have certain dates recognised as religious holidays, provided that this is compatible with the organisation of the work in question.

### **6. DRESS CODES**

The employer cannot prevent an employee from dressing in accordance with his or her beliefs unless the employer has very strong objective business reasons to require a uniform or specific clothing (Article 20 of the Workers' Statute).

For example, a ruling of Social Court no. 2, of Palma de Mallorca 791/2001, gave an employee of the Municipal Transport Company the right to wear a head-covering during working time, without discipline, for religious reasons.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

If an employer dismisses an employee by reason of his or her religion, the dismissal will be considered void for breach of a fundamental right protected in Spanish constitutional law (Article 56 of the Workers' Statute). In this case, the judge will grant to the employee immediate reinstatement and back pay from the date of the dismissal. Moreover, depending on the circumstances, an additional award may be granted to the employee covering other losses and damage suffered. An example is the ruling of the High Court of Andalucía, Granada, on 26 March 2008 (AS 2008/2112), which declared void the dismissal of a teacher of a Catholic School based on the fact that he did not fit the ideological profile of the school.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Religious harassment is prohibited by Spanish law by a general right of the employee not to be harassed based on his or her personal beliefs (Article 4 of the Workers' Statute).

If such harassment occurs, the employee may make a claim against the employer for an award for losses and damage suffered. Where there is a serious breach of the employer's obligations, the employee may claim termination of the employment contract and obtain a severance payment of 45 days' salary per year of service, with a maximum of 42 months' payments (Article 50 of the Workers' Statute).

<b>A. THE LEGAL FRAMEWORK</b>	<b>181</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	181
2. DEFINITION OF RELIGION	181
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	182
4. ENFORCEMENT AND CLAIMS	182
<b>B. THE LAW IN CONTEXT</b>	<b>183</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	183
6. DRESS CODES	184
7. DISMISSAL ON RELIGIOUS GROUNDS	184
8. HARASSMENT ON RELIGIOUS GROUNDS	185

Sweden 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

In Sweden the Discrimination Act (2008:567) (the 'Act') prohibits ethnic discrimination and discrimination on grounds of religion or other belief in the workplace. In accordance with Directive 2000/78/EC, the Act prohibits both direct and indirect discrimination. The Act contains provisions against discrimination on grounds of religion or other belief as well as provisions against discrimination based on grounds of sex, transgender identity or expression, ethnicity, disability, sexual orientation and age.

An employer may not discriminate against a person who, with respect to the employer,

- is an employee
- is enquiring about or applying for work
- is applying for or carrying out a traineeship or
- is available to perform work or is performing work as temporary or borrowed labour.

The prohibition against discrimination covers all situations that may arise between an employer and the above-mentioned persons e.g. when entering into an employment agreement, terminating employment, applying pay or other terms and conditions of employment etc.

### 2. DEFINITION OF RELIGION

There is no legal definition of religion or other belief. However, according to the legislative history, 'belief' must be read in conjunction with religion, which means that ethical, philosophical and political values with no close connection to religion fall outside the definition of 'religion'. Atheism, Buddhism and agnosticism are examples of beliefs falling under the definition 'belief' in the context of the Act.

### 3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS

There is no particular statute or case law requiring accommodation of religious practice or traditions. An employer is not required to change its rules or requirements in order to allow an employee to practice his or her religion in the workplace. However, according to the Act the employer is obliged to conduct goal-oriented work actively to promote equal rights and opportunities, irrespective of ethnicity, religion or other belief.

The employer must also implement such measures that, having regard to the employer's resources and circumstances generally, may be required to ensure that the work situation is appropriate for all employees irrespective of ethnicity, religion or other belief, meaning that an employer may not simply refuse to accommodate religious practice or traditions. If the employer claims that accommodation is not feasible as it would result in undue hardship, the employer must demonstrate the effects the accommodation would have on the business. In other words, the employer must prove undue hardship in order to avoid breaking the law.

Accommodation of religious practice or tradition is regulated in detail in many Collective Bargaining Agreements ('CBA') on the Swedish labour market.

### 4. ENFORCEMENT AND CLAIMS

A job applicant or an employee has four options in filing a claim based on discrimination on grounds of religion or belief:

- to file a complaint with the Equality Ombudsman (the 'DO')
- to file a complaint directly to a district court
- to have his or her trade union file a complaint to a district court or the Labour Court or
- to have a not-for-profit organisation whose constitution states that it must look after the interests of its members to file a complaint to a district court.

A prerequisite for the organisation to bring an action is that it has sufficient funds for a court proceeding.

If the job applicant or the employee is a member of a trade union the Equality Ombudsman or the not-for-profit organisation may only bring an action if the individual's trade union does not do so.

Three civil sanctions apply to an employer who discriminates, harasses or exposes a person to reprisals in a way that is prohibited under the Act:

- Provisions in individual contracts, CBAs, employer rules or the termination of a contract or an agreement, which includes discrimination prohibited under the Act, may be declared invalid or amended if the employee so requests;
- An employer who violates the prohibitions against discrimination or reprisals or who fails to fulfill the obligations to investigate and take measures against harassment or sexual harassment under the Act must pay damages to the person discriminated against for injury to feelings (non-material damages) and if necessary for the financial loss arising as a consequence of the discrimination (pecuniary damages). If an employee discriminates against another employee or exposes someone to reprisals, the damages must be paid by the employer of the discriminating employee; or
- Failure to take active measures against discrimination does not constitute grounds for damages. Instead, the employer may be ordered, subject to a default fine, to comply with his or her obligations according to the Act.

The EU anti-discrimination legislation has been implemented in Swedish legislation, but with little impact on the Swedish legal system. Swedish employment legislation still focuses heavily on employment protection, and therefore the anti-discrimination laws are, in practice, primarily a complement to the current employment protection statutes (see section 7 below). Non-material damages, e.g. for injury to feelings, are generally low in employment law cases and would amount to a maximum of SEK 120,000 (approximately EUR 11,000).

According to the legislative history of the Act, damages for discrimination, irrespective of the grounds on which the discrimination is based, are expected to increase markedly under the 2008 Act.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

As explained in section 3 above, the employer may not simply refuse to accommodate religious practice or traditions. This includes time off work for prayer and annual leave for religious festivals. Only if the employer can prove

that the leave would result in undue hardship is he entitled to refuse the request. When assessing whether there is undue hardship, the employee's interest in taking leave must be balanced against the employer's burden of finding a substitute, the cost of the substitute and how the work is organised at the workplace. Many CBAs regulate these matters, allowing employees to swap annual leave on Christian holidays to other religious holidays.

## 6. DRESS CODES

Very few cases are brought before Swedish courts concerning the right to wear religious clothing at work. However, the right to wear religious clothing is protected by the freedom of religion. In order to justify restrictions on this right, the clothing must prevent the employee from carrying out his or her work. Limitations on clothing must be in accordance with the Act (see sections 1 and 3 above), and not directly or indirectly discriminate on the basis of religion.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

In order for a Swedish employer to dismiss an employee, there must be just cause for the dismissal in accordance with the Employment Protection Act (1982:80). The prohibitions against discrimination serve to complement the fundamental principle of just cause.

If a dismissal is found to be based on any of the grounds of discrimination mentioned in section 1 above and without just cause, the dismissal may be declared void upon the request of the dismissed employee. The employee further has the right to claim both pecuniary and non-material damages (e.g. for injury to feelings). According to established case law from the Labour Court, dismissal without just cause could render non-material damages of about SEK 120,000 (approximately EUR 11,000). Pecuniary damages for dismissal without just cause are determined according to the employee's total length of service with the employer at the time of dissolution of the employment relationship and range from between 6 to 32 months' pay.

As mentioned in section 4 above, the level of non-material damages is expected to increase under the 2008 Act.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Harassment based on ethnic origin, religion or other belief is considered as a form of discrimination and is prohibited by the Act. Harassment is defined as conduct related to ethnic origin, religion or other belief which violates the integrity of a person. An employee who has been harassed in accordance with the definition in the Act may claim compensation (see section 4 above).

According to the Act, an employer who becomes aware that an employee considers himself or herself to have been exposed to harassment by another employee must investigate the circumstances surrounding the alleged harassment, and if it finds it to have occurred, implement measures to prevent its continuing. Failure to do so will create liability to pay damages to the employee for the breach caused by the omission.

<b>A. THE LEGAL FRAMEWORK</b>	<b>189</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	189
2. DEFINITION OF RELIGION	189
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	189
4. ENFORCEMENT AND CLAIMS	190
<b>B. THE LAW IN CONTEXT</b>	<b>190</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	190
6. DRESS CODES	191
7. DISMISSAL ON RELIGIOUS GROUNDS	191
8. HARASSMENT ON RELIGIOUS GROUNDS	191

Turkey 



## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

Article 5 of Turkish Labour Law No. 4857 prohibits employers from discriminating against employees on the basis of their religion, sect or any similar reason. The effect of the law is that an employer may not treat an employee differently from the way it treats other employees because of that individual's religion.

Turkey is also party to the Discrimination Convention No.111 (Employment and Occupation) and the Employment Policy Convention No.122 of the International Labour Organisation (ILO). Turkey, through these conventions, pursues a national policy to promote equal opportunity and treatment for employment and occupation, with a view to eliminating discrimination including that based on religion and to procure, for each worker, freedom of choice of employment irrespective of his or her religion.

### **2. DEFINITION OF RELIGION**

As a result of laicism in Turkey, the law contains no particular definition of 'religion'. Article 5 of Labour Law No. 4857 states that 'in an employment relationship, no discrimination may be made on the basis of language, race, sex, political opinion, philosophical belief, religion and sect, or any such reasons'.

Therefore, the scope of the prohibition is wide. It protects employees against any discrimination on the basis of their beliefs, whether those beliefs are religious, philosophical or spiritual.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Turkish law does not impose a requirement on employers to accommodate an employee's religious beliefs. This means that employers are not obliged to permit employees to wear traditional religious clothing at the workplace, nor to take time off work for prayer or worship. Further examples are considered in Part B.

#### 4. ENFORCEMENT AND CLAIMS

Labour Law No. 4857 is enforced by the Labour Courts.

Where an employer has failed to comply with Article 5 of Labour Law No. 4857, the employee may bring a claim before the Labour Courts and seek reasonable compensation, in an amount of up to four months' salary. The employee can also demand the rights of which he or she has been deprived.

An employee may also bring a claim before the Labour Courts where the employer has failed to comply with Article 18 of Labour Law No. 4857 asserting that he or she was terminated because of his or her religion. Article 18 requires that termination of the employment contract be based on a bona fide reason (see section 7 below). If the Labour Court decides in favour of the employee, the employer must re-employ the employee within a month. If the employer fails to re-employ the employee, then it will be held liable to pay compensation equal to a minimum of four months' salary and a maximum of eight months' salary.

Furthermore, the employee must be paid his or her salary and compensated for other rights which he or she would have received for the period during which he or she could not work until the final Court decision (note: this period is limited to four months). In addition, if the employee was not given notice of termination, then the employer must also pay salary for the notice period.

At present there have been no published religious discrimination court cases on the basis of Labour Law No. 4857 (adopted in 2003). The main impetus and objective of the discrimination prohibition in Article 5 is to ensure harmonisation of Turkish legislation with European Union law, rather than the actual needs of employees for protection. For these reasons, claims made to the Labour Courts under Article 5 are expected to be very rare.

#### B. THE LAW IN CONTEXT

##### 5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS

Under Turkish law, employees must comply with the working hours set by the employer. The employer may grant permission to the employee to take time off work for prayer, but this is at the employer's sole discretion. A refusal to

give permission to the employee to take time off work for prayer is not contrary to the law.

The Muslim religious holidays are official public holidays in Turkey. For other religions, the employer may grant permission to employees to take leave in order to observe their religious holidays, but once again, this is at the employer's sole discretion.

## **6. DRESS CODES**

Employees must comply with the rules of clothing or dress codes, provided that these rules are either (i) written in the employment contract, (ii) printed in material which is attached to the employment contract, such as a code of conduct, (iii) contained in a document included in written material provided for employees, or (iv) a common practice of the workplace.

Provided that the rules of clothing meet one of these requirements, the employer may impose them on the employee even if these rules prevent the employee from dressing in accordance with his or her religious beliefs.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

As discussed above, dismissal on religious grounds is prohibited under Turkish law. Article 18 of Labour Law No. 4857 stipulates that termination of the employment contract must be based on a bona fide reason, and that the religion of the employee does not constitute a bona fide reason. An employee who alleges that his or her employment contract was terminated without a bona fide reason may bring an action against the employer before the Labour Court. See section 4 above for the consequences of a successful claim.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Turkish law contains no specific prohibition on religious harassment nor any general prohibition which would cover religious harassment.

<b>A. THE LEGAL FRAMEWORK</b>	<b>195</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	195
2. DEFINITION OF RELIGION	195
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	196
4. ENFORCEMENT AND CLAIMS	196
<b>B. THE LAW IN CONTEXT</b>	<b>197</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	197
6. DRESS CODES	198
7. DISMISSAL ON RELIGIOUS GROUNDS	198
8. HARASSMENT ON RELIGIOUS GROUNDS	198

United Kingdom 



## **A. THE LEGAL FRAMEWORK**

### **1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION**

The Employment Equality (Religion or Belief) Regulations 2003 prohibit discrimination on the grounds of religion or belief in the field of employment and vocational training.

The prohibition is against both direct discrimination (treating someone less favourably on grounds of religion or belief) and indirect discrimination.

Indirect discrimination is defined as occurring where an employer applies to an employee a provision, criterion or practice which is applied equally to persons not of the same religion or belief as that employee, but which puts or would put persons of the employee's same religion or belief at a particular disadvantage when compared with other persons, and which puts the employee himself at that disadvantage. However, the employer will not act unlawfully if it can show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

It also protects people who are perceived to hold a certain religion or belief (even if this perception is erroneous) and people who associate with people of a religion or belief (even if they do not share it). The Regulations also cover discrimination on grounds of lack of religion or belief, for example discrimination against a Jew or an atheist.

Victimisation and harassment on the grounds of religion or belief are also prohibited.

Certain religions (such as the Jewish and Sikh faiths) are also protected by the Race Relations Act 1976 where there is a close connection between the religion and a certain race or ethnic or national group which is well established.

### **2. DEFINITION OF RELIGION**

Pursuant to the Regulations, 'religion or belief' means any religion, religious belief, or philosophical belief. This definition therefore includes such religions as Druidism, the Church of Scientology, the Divine Light Zentrum and non-religious beliefs such as vegetarianism and veganism.

The Regulations were amended in 2006 to remove the word 'similar' in relation to philosophical beliefs. This potentially extends protection to a wider category of philosophical beliefs and could even include political ones. The extent to which political beliefs are covered still needs to be decided by the courts.

### **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Although there is no specific provision in the Regulations that requires an employer to accommodate an employee's religious beliefs, a refusal to accommodate could amount to unlawful indirect discrimination. So, if an employer refused to allow someone to take a religious holiday (by applying a practice that the employees must work on Fridays, for example), it would have to show that this practice was a proportionate means of achieving a legitimate aim.

A wide variety of aims may be considered to be legitimate. Economic, organisational, operational, health and safety or market forces may all be seen to be a proportionate means of achieving a legitimate aim in some circumstances. However, aims which are related to the discriminatory effects of a practice cannot be seen to be legitimate. For example, the employer who dislikes people with religious beliefs and who wants to encourage them to examine their beliefs critically cannot use that as its aim to defend a practice of denying people time off on Sundays to enable them to go to church.

The concept of proportionality is well established in European law and the general rule arising from European cases is that if the provision, criterion or practice is a necessary and appropriate means of achieving a legitimate aim then it will be proportionate. As part of the assessment of proportionality, courts and tribunals will weigh up the discriminatory effect of the provision, criterion or practice on the employee against the needs of the employer.

### **4. ENFORCEMENT AND CLAIMS**

Employees who believe their rights under the Regulations have been breached may bring a claim before an Employment Tribunal. The Employment Tribunal consists of three members; a chairman, who is legally qualified, and two lay members, one from an employer's organisation and one from an employee organisation (such as a trade union).

If the claim is successful, unlimited damages are recoverable by reference to actual pecuniary loss (so, if someone is dismissed as a result of discrimination against them, they can recover past and future loss of earnings) and by reference to injury to feelings.

The injury to feelings awards will usually fall between £600 for a very minor breach and £30,000 for a serious breach of the Regulations. Aggravated damages will sometimes also be available (where the effect of the discrimination is aggravated by further egregious acts, such as a very oppressive defence of a claim). The sums of such aggravated damages awards tend to be between £5,000 to £25,000.

If an act of discrimination causes a personal injury (usually psychiatric trauma) the injury to feelings award can reflect that injury on ordinary personal injury principles (save that no foreseeability has to be proven).

Although the legislation is still quite new and so there are limited statistics, the number of religious discrimination claims appears to be on the increase. The Employment Tribunals Service statistics show that the number of claims has risen from 486 in 2005/06 to 709 in 2007/08. It is likely that the number of claims will continue to rise as public awareness of the Regulations increases.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

Although the Regulations do not specifically require the employer to allow employees to take time off work for prayer or to observe religious festivals, the prohibition on indirect discrimination effectively prohibits the employer from refusing such requests without justification.

For example, if the employer refused to allow a Muslim employee time off work for prayer at midday because it applied a practice that employees could only take a break between 10 and 11am, then the employer would have to show that this practice was justified because it was a proportionate means of achieving a legitimate aim. In the context of refusing time off work or holidays, legitimate aims could include the need to ensure productivity or to maintain staffing levels.

## 6. DRESS CODES

Similarly, dress codes which prevent employees from dressing in accordance with their religious beliefs may be indirectly discriminatory unless the employer can justify them. If the rules of a dress code place employees of a certain religion at a disadvantage, for example because the code prohibits head wear, then the employer will need to establish that the rules correspond to a real business need (such as health and safety) and are a proportionate means of meeting this need.

## 7. DISMISSAL ON RELIGIOUS GROUNDS

If an employer dismisses an employee on the grounds of religion or belief, or for a reason that was indirectly discriminatory or the employee resigns because of discriminatory treatment (amounting to a constructive dismissal), the employee will be able to claim that the dismissal was discriminatory. If the employee has one or more years' continuous employment with the employer, he or she would also be able to claim unfair dismissal although the employee would not be able to recover twice for losses of income arising out of the dismissal.

As explained in section 4 above, there is no limit to the compensation that may be awarded for a discriminatory dismissal. In addition, any compensation awarded for a discriminatory dismissal could be increased by the Tribunal by up to 25% if the ACAS Code on dismissal procedures was not followed by the employer.

## 8. HARASSMENT ON RELIGIOUS GROUNDS

The Regulations specifically prohibit harassment. Harassment is defined as unwanted conduct on grounds of religion or belief (which may be the victim's belief or may be the beliefs of others) and which has the purpose of violating an individual's dignity or the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This definition therefore covers 'environmental harassment', arising from a general atmosphere or workplace culture, as well as harassment which specifically targets one or more individuals. In general, an employer is liable for the harassment committed by its employees or agents in respect of another employee, and to avoid liability it will need to establish that it took all

reasonably practicable steps to prevent the harassment from occurring. This aspect of the Regulations makes it important for employers to implement equality policies which deal with religious harassment, and to train their staff so that harassment can be recognised and eradicated.

<b>A. THE LEGAL FRAMEWORK</b>	<b>203</b>
1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION	203
2. DEFINITION OF RELIGION	204
3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS	204
4. ENFORCEMENT AND CLAIMS	206
<b>B. THE LAW IN CONTEXT</b>	<b>207</b>
5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS	207
6. DRESS CODES	207
7. DISMISSAL ON RELIGIOUS GROUNDS	208
8. HARASSMENT ON RELIGIOUS GROUNDS	208

USA 



## A. THE LEGAL FRAMEWORK

### 1. LEGAL PROTECTION OF EMPLOYEES FROM DISCRIMINATION ON GROUNDS OF RELIGION

Freedom of religion is guaranteed by the First Amendment to the United States Constitution. This prohibits religious discrimination through state action, but not by private entities. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion in employment, and applies to employers with at least 15 employees, employment agencies, and to unions (42 USC Section 2000e-2(a)). Thus, the following are prohibited by Title VII:

- treating applicants or employees differently based on their religious beliefs or practices (including the absence of these) with respect to such actions as recruitment, hiring, assignment, compensation, discipline, promotion, or benefits
- harassing employees because of their religious beliefs or practices (or the absence of these)
- different treatment, including harassment, based on the religious beliefs or practices (or the absence of these) of persons the employee associates with (such as family or friends)
- denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices (or the absence of these), if the accommodation will not impose more than a de minimis cost or burden on business operations
- retaliating against an applicant or employee who has opposed discrimination, complained about discrimination, or participated as a witness in an investigation or proceeding regarding discrimination.

There are exceptions. Religious organisations may give preference in employment to members of their own religion, if the purpose and character of the organisation is 'primarily religious'. Further, to protect the separation of religion from the state under the First Amendment, members of the clergy generally cannot bring claims of discrimination under federal law. This exception only applies to employees with essentially religious functions, such as those whose primary duties are church governance, supervision of a religious order, or conducting religious ritual, worship, or instruction. They need not be ordained clergy, but may fulfil clergy-like roles by conducting services or providing pastoral counselling. There is also a very narrow exception, almost never used, where religion is a bona fide occupational qualification (e.g. only a Muslim pilot may fly to Mecca).

In addition to the protections of federal law under Title VII, many states also prohibit discrimination on the basis of religion under state law. These state laws also usually include a requirement for reasonable accommodation and prohibit retaliation.

## **2. DEFINITION OF RELIGION**

Title VII does not define religion, so the courts have defined it broadly. Thus, traditional organised religions, such as Christianity, Islam, Judaism, Buddhism, Hinduism, Mormonism, and Baha'i are clearly covered, but so are less common religious beliefs, that may not be part of a formal church or sect, or may only have a small following. Religious beliefs include theistic beliefs (believing in god or gods), as well as non-theistic moral or ethical beliefs. The courts have held that religion usually concerns 'ultimate ideas' about 'life, purpose, and death'.

The legal protection also extends to those who either are discriminated against or need reasonable accommodation because they profess no religious beliefs.

The burden is on the applicant or employee claiming failure to accommodate to prove that he or she holds sincerely religious beliefs. The courts tend to resolve doubts in favour of finding that beliefs are religious. However, it is not enough that beliefs be strongly held. Thus, social, political or economic philosophies are not religious beliefs protected by Title VII. Whether the employee's engagement in a particular practice is religious depends on the employee's motivation, rather than the nature of the activity.

Cases have recognised a variety of religious beliefs as protected, such as Jehovah's Witnesses, Seventh Day Adventists, Wicca, Kemetic religion (based on ancient Egyptian beliefs), Native American spirituality, Secular Humanism, and atheism.

## **3. ACCOMMODATION BY THE EMPLOYER OF AN EMPLOYEE'S RELIGIOUS BELIEFS**

Title VII requires that the employer provide reasonable accommodation for an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless the accommodation would create an undue hardship. Many state laws have a similar requirement.

A reasonable accommodation may be any adjustment to the work environment which will enable the applicant or employee to comply with his

or her religious beliefs. It usually involves some special exception to a particular work requirement.

The duty to provide an accommodation is separate from the duty to avoid discrimination, which simply requires that employees be treated equally. The duty to accommodate is intended to relieve individuals from the burden of choosing between their jobs and their religious convictions, where the relief will not unduly burden others.

Generally, the accommodation process begins when an employee requests an accommodation. The employee must explain the religious nature of the belief or practice, and cannot assume that the employer already knows or understands it. Similarly, the employer cannot assume the belief is not sincerely held because the employer is unfamiliar with the belief, does not understand it, does not agree with it, or considers it irrational. The employee need not use 'magic words', but must give enough information to the employer to put the employer on notice that an accommodation for religious belief or practice is being requested.

The employer and employee are supposed to discuss the accommodation before the employer denies the request. While a failure to confer is not a 'per se violation' of Title VII (it might be of some state laws), the employer's failure to hold a discussion may mean that the employer cannot meet its burden to prove that the accommodation requested and refused was an undue hardship. In order to determine if an accommodation is needed or can be provided, the employer may ask for information about the religious observance. Where the employer has a good faith doubt about the employee's sincerity in holding a religious belief, it may ask for some more information about the religious belief, but may not be overly intrusive or require third party verification in restricted forms.

A reasonable accommodation is one that does not unnecessarily disadvantage the employee's terms, conditions, or privileges of employment. When there is more than one accommodation that would be effective and would not pose an undue hardship, the employer may select an accommodation other than that preferred by the employee. If an employer cannot accommodate an employee in his or her current position, the employer should consider whether the employee could be transferred to an existing open position for which he or she is qualified in which he or she could be accommodated.

Under Title VII an employer may refuse accommodations that are an undue hardship. 'Undue hardship' has a very different meaning than it has under the Americans with Disabilities Act. It only means that the accommodation

imposes a 'more than de minimis cost on the operation of the business'. The burden of proof of undue hardship always rests with the employer. Certain factors are taken into account in determining undue hardship, such as: the cost in relation to the size and operating costs of the employer, the number of persons who need a particular accommodation, the costs of rearranging schedules, the cost of additional overtime pay, diminished efficiency, the infringement on the job rights or benefits of others, impact on workplace safety, conflicts with seniority rights under a collective bargaining agreement, conflicts with other laws, or conflicts with legally mandated security requirements.

#### 4. ENFORCEMENT AND CLAIMS

Under Title VII an applicant or employee must file a charge of discrimination with the US Equal Employment Opportunity Commission (EEOC) before filing suit for religious discrimination. Most state anti-discrimination laws also require that an employee first file an administrative charge with a state agency. The purpose of these requirements to first exhaust administrative remedies is to create an opportunity for the quick and inexpensive resolution of claims.

Religious discrimination claims have been rising in the United States. There was a spike in claims following the events of 11 September 2001.

After exhausting administrative remedies the injured applicant or employee may file suit in the United States District Court (or, depending on the circumstances, in a state court) seeking damages for back pay, future pay, compensatory damages, such as emotional distress, punitive damages to punish the employer, and attorneys' fees and costs. Claims under Title VII are subject to statutory limits on damages depending on the size of the employer, under the Civil Rights Act of 1991, which amended Title VII. These limits are:

Up to 100 employees:	\$ 50,000
101-200 employees:	\$ 100,000
201-500 employees:	\$ 200,000
500+ employees:	\$ 300,000

If suit is brought under state law, the employee may usually claim the same kinds of damages, but state laws usually do not limit the amount of damages that may be awarded. As a result, employees are more likely to use state laws to pursue claims in states where these laws exist.

## **B. THE LAW IN CONTEXT**

### **5. TIME OFF WORK FOR PRAYER/ANNUAL LEAVE FOR RELIGIOUS FESTIVALS**

The duty to provide reasonable accommodations for religious belief and practice is frequently involved in requests for time off work for prayer, days off for observation of the Sabbath, or for leave to participate in a religious holiday, festival or pilgrimage. Thus, there have been many cases involving requests by employees that they be given adjusted schedules to attend prayer services on Fridays or Saturdays, be given breaks or a place to observe the Muslim duty of prayer during the work day, or that employees be allowed to schedule time off to coincide with religious festivals or pilgrimages. Generally, employers do not have a duty to give additional time off work (beyond that required by law for medical, family leave, or military leave) for religious observance, but an employer which offers personal leave of absence to employees may be required to allow it to be used for religious reasons.

Similarly, employees are entitled to accommodations to be free from unwelcome participation in prayers at work. Employers may engage in prayer at work, but must accommodate the needs of employees who do not wish to participate, as a matter of sincerely held belief, in prayers at work.

Employers should also be open to accepting employee-initiated 'swaps' of schedules or days off, when not an undue hardship, to allow accommodation of prayer and participation in religious festivals. The tests are whether the accommodation requested is reasonable, and whether providing either the accommodation requested or a comparable accommodation is an undue hardship.

### **6. DRESS CODES**

US employers find that the adoption of dress codes or the enforcement of uniform policies may be a source of pressure to allow exceptions for religious dress or symbols. For example, requests from Muslim women to wear headscarves, from Sikh employees to wear the kirpan (ceremonial dagger), the wearing of a bindi (Hindu religious forehead mark), and wearing yarmulkes, turbans, crosses, long hair or beards have all figured in various cases. The employee has the burden to demonstrate that the aspect of dress is part of a sincerely held religious belief. The employer and employee should engage in a discussion of what accommodations may be reasonable. If accommodation is

an undue hardship, the employer may decline to allow the change in dress. Thus, a correctional officer in a prison might be refused the ability to wear a kirpan; a worker who must wear a respirator at work to comply with safety and health laws may be required to be beardless, so that a respirator achieves a good seal. Employers with uniform requirements may be able to enforce these requirements if they demonstrate the importance of maintaining strict adherence to the policy. The accommodation of religious dress is very much on a case-by-case basis.

## **7. DISMISSAL ON RELIGIOUS GROUNDS**

Generally, Title VII and state laws prohibiting religious discrimination forbid dismissal of an employee based on religion. However, an employee may be dismissed if he uses his religion to harass other employees, or if the employee refuses to perform job functions on the basis of religion and there is no reasonable accommodation available. Thus, in one case, an employee was terminated for displaying anti-homosexual Bible messages in the workplace and refusing to remove them, as his personal response to the employer's display of diversity posters, one of which featured a same-sex couple. In another case, a nurse, for religious reasons would not work in an obstetrical position where abortions were done. The employer was not obliged to stop performing abortions, and the employee was properly accommodated by a transfer to a neonatal nursery position. Had no other position been available, the nurse could have been dismissed.

Title VII and most state laws prohibiting religious discrimination also prohibit retaliation for seeking an accommodation, opposing discrimination, complaining about discrimination, or participating in an investigation or proceeding involving discrimination. Thus, an employee may make a claim for retaliatory dismissal, which is separate from a claim for dismissal based on religion.

## **8. HARASSMENT ON RELIGIOUS GROUNDS**

Harassment based on religion is deemed to be a form of discrimination based on religion under Title VII. Some state laws explicitly prohibit harassment based on religion. Many of the claims of religious discrimination filed with the EEOC involve claims of harassment based on religion.

Generally speaking, religious harassment occurs when an employee is (1) required or coerced to abandon, alter, or adopt a religious practice as a condition of employment, or (2) subjected to unwelcome statements or conduct that is based on religion and is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive, and there is a basis for holding the employer responsible. Conduct is 'unwelcome' when the employee did not solicit or incite it, and it is both subjectively and objectively offensive. An important fact is whether the recipient objected to the behaviour. Another important fact is whether the behaviour is directed at the employee who is complaining about it.

These factors are important because the law recognises that employees may discuss religion at work, and that the existence of different strongly held beliefs must be accommodated at work. In the private workplace, however, there is no First Amendment right of expression. As a result, the employer does not have to accommodate expression of religious belief in the workplace where the accommodation would potentially constitute harassment of co-workers. As a practical matter, the need to balance accommodation with harassment results in limitations on religious proselytising at work. Isolated statements usually will not rise to the level of 'severe or pervasive', and the courts have repeatedly said that Title VII is not a civility code.

Harassment by supervisors that involves a tangible employment action, such as denial of pay increases, promotion, demotion, constructive discharge, or discharge, creates liability for employers. If there is no tangible employment action against the employee, the employer may have an affirmative defence to liability for harassment under Title VII if the employer proves that it had taken reasonable steps to prevent and correct any harassing behaviour, and the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer, or to otherwise avoid harm.

The employer is liable for harassment by co-workers when the employer knew or should have known about the harassment, and failed to take prompt and appropriate corrective action. The employer can also be liable for harassment by non-employees where it knew or should have known about the harassment, had the means to control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action.

















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