



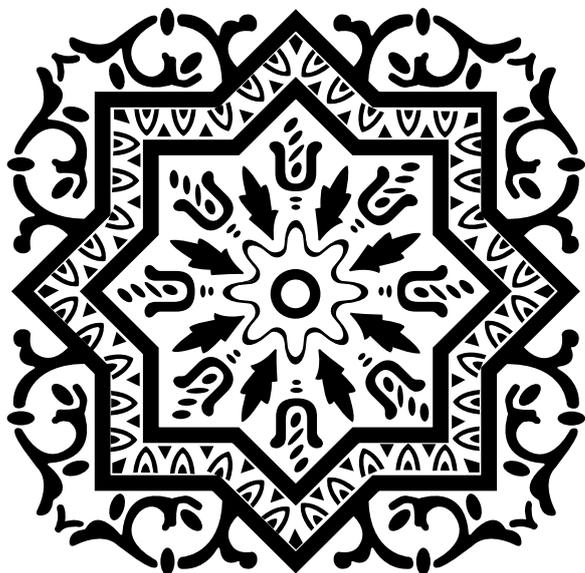
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Discrimination Law

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A look back at Vancouver

What a wonderful IBA Annual Conference we had in Vancouver! The hospitality of the city was overwhelming and the conference programme of sessions was more than worth the trip. The Discrimination Law Committee had a fair share in the event and I would like to thank all who contributed to its success. During the Conference there were sessions discussing health and safety in the workplace and employment and privacy issues in the hospitality industry. We also discussed how the application of human rights law in domestic courts took us to the heart of what we would like to achieve: how can we bring international human law standards work? The session about state-sanctioned crimes against lesbian, gay, bisexual and transgender (LGBT) persons strengthened over the firm belief that the IBA should continue to play a role in this area of great importance. The second meeting we had with the LGBT Working Group, under the leadership of Ramyar Moghadassi, was promising; the idea is to further strengthen this working group to create a stand-alone subcommittee in the near future. The LGBT party, held in the J-Lounge with late night drinks and music, is something special to remember; everyone had a wonderful evening, not just because we had a lively Lady Gaga tribute act! I would like to thank all the sponsors, and the great support of the IBA which made this possible. You will understand that it will be difficult to repeat such an expression of freedom at the 2011 IBA Annual Conference in Dubai, but at least we have this and other issues for debate. A final word on Vancouver; it was good to meet colleagues at the joint dinner with the Employment and Industrial Relations Law Committee. This event, in the wonderful Bridges Restaurant, reconfirmed the strong ties between our committees.

Both the Discrimination Law and Employment and Industrial Relations Law Committees are currently working on the stand-alone conference in Brussels, 14-15 April 2011: 'The changing world of work: responding to the challenges of the 21st century from a global and EU perspective.' The keynote speaker is Herman van Rompuy, President of the European Council. The full conference programme will be published shortly – we hope you will join us there.

I am proud to introduce this newsletter to you. Our newsletter editors, Donald Dowling and Iván Suárez, have done a superb job by bringing together so many interesting articles and topics. You will find, among others, an article about gender discrimination in Argentina; and sex discrimination in South Africa. But also don't miss the articles on freedom of religion in France and recruitment and the Equality Act in the UK.

Finally, I'm pleased to introduce two new officers to our committee from 1 January 2011. Phil Berkowitz has accepted the role of Newsletter Editor and Liaison Officer for the North American Regional Forum, and Anthony Hyams-Parish will become our new Membership Officer. We offer a warm welcome to them both. Among the other appointments, I would like to mention the following three. First of all, Ignacio Funes de Rioja will join Cherie Booth as a Senior Vice-Chair. Ignacio has been a driving and inspiring force within our committee for many years. David Lowe and Susan Stelzer will become the new Committee Co-Chairs. Both David and Susan are excellent lawyers and fine colleagues. They have done so much to strengthen the work of our Committee in recent years, that I am in no doubt the leadership of the Committee could not be in better hands. This means that my time has come to step down as Chair. Thank you all for your support.

Happy holidays and all the best for 2011. I hope to see you all in Brussels.

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Gender discrimination in Argentina

Legislation against gender discrimination

In Argentina there are extensive constitutional, conventional, legal and administrative regulations against gender discrimination in all areas, particularly in the workplace. Discrimination against women is illegal, but the reality does not always concur with legal theory.

The National Constitution, even prior to the 1994 reform, provided for ‘equal pay for equal work’ and that ‘all inhabitants are equal before the law and admissible to employment without any other requirement than their ability...’

After the 1994 reform, in Article 75 subsection 22, International Conventions signed by the Executive are given constitutional status and therefore take precedence over other laws. It specifically mentions the Convention on the Elimination of All Forms of Discrimination against Women. Article 75 subsection 23 stipulates that it is up to Congress ‘to legislate and promote positive action to ensure equality of opportunity and treatment, and the full enjoyment and exercise of the rights conferred by this Constitution and by international treaties on human rights, in particular towards children, women, the elderly and people with disabilities.’

Prior to the enactment of the Labour Contract Law No 20,744 issued in 1974, the principles of equal treatment between men and women and equal pay for equal work, already existed in the workplace. With the passing of the Labour Contracts Law (LCT), these principles have been incorporated into several articles, such as Article 172, which states that ‘women may enter into any employment contract, and no collective bargaining agreements or authorised regulations can introduce any type of employment discrimination based on sex or marital status, even if the marital status changes in the course of employment’. Collective agreements or wage rates negotiations developed must ensure the full observance of the principle of equal pay for work of equal value. Article 178 of the LCT was included to protect working women

by providing for aggravated compensation if a pregnant woman is dismissed.

Moreover, Argentina adopted the Convention No 100 of the ILO (International Labour Organisation) which stipulates in Article 2, that ‘1) every member shall, by means appropriate to the current methods for determining rates of remuneration, promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal pay between male and female workers for work of equal value.’

Law No 23,592 of 1988 established certain general principles against discrimination which also apply to the area of employment law, as set in Article 1: ‘Those who arbitrarily impede, obstruct, restrict or otherwise impair the full exercise on an equal footing of the rights and guarantees recognised in the Constitution, shall be obliged, upon request of the victim, to repeal the discriminatory act or cease the discriminatory action and to repair the moral and material damage caused. For the purposes of this Article *it shall be deemed particularly discriminatory acts or omissions based on certain grounds such as race, religion, nationality, ideology, political opinion or trade union affiliation, gender, economic status, social or physical characteristics.*’ (Emphasis added.)

Law No 24,515 of 1995 created the National Institute against Discrimination, Xenophobia and Racism (INADI). Its actions are aimed at those whose rights are affected by being discriminated against because of their ethnicity or nationality, their political views or religious beliefs, gender or sexual orientation, for having a disability or illness, age or physical appearance. Its functions are to ensure the same rights and guarantees for these people which are enjoyed by the society as a whole, that is, equal treatment.

Later in 1998 Law 25,013 was enacted, which in Article 11 contemplates specifically the figure of discriminatory dismissal, section which was repealed by Law 25,877.

Law 25,212 of 1999 governs labour violations and states that: ‘The following are very serious infringements: (a) The employer’s decisions involving any type of



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discrimination in employment or occupation on the grounds of race, colour, national origin, religion, sex, age, political opinion, social origin, trade union, residence or family responsibilities...’.

In 2009, Law 26,485, the Comprehensive Protection Act to prevent, punish and eradicate violence against women in areas in which they develop their interpersonal relationships, as a matter of public policy and implementation throughout the national territory is enacted. Its purpose is, inter alia, to ensure: ‘(a) The elimination of discrimination between women and men in all walks of life... (c) The conditions suitable to raise awareness and prevent, punish and eradicate discrimination and violence against women in all its forms and areas... (e) The removal of socio-cultural patterns that promote and sustain gender inequality and power relations on women...’. Furthermore, this law guarantees all the rights recognised by the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Prevention, Punishment and Eradication of Violence against Women, the Convention on the Rights of Children and Law 26,061 regarding Comprehensive Protection of the Rights of Children and Adolescents. The law expressly states that one of its objectives is to achieve real equality of rights, opportunities and treatment between men and women.

Practical applications of these laws in the Argentine system

The principles embodied in the various pieces of legislation mentioned have been applied in practice in the examples shown below:

Discrimination against women in the field of private activity

In the field of civil justice we highlight the National Civil Appeals Court ruling in the case of *Women in Equality Foundation and other v Freddo SA* about ‘amparo’, (amparo is a legal action to claim for the safeguard of a constitutional privilege) from 16 December 2002. It was shown that Freddo (an ice cream parlour and coffee shop chain) hired 638 men but only 18 women in 1998 and this pattern was repeated during the following year, when Freddo hired 297 men and only 33 women. The Appellate Court ruled that it is not enough to recognise the rights but it is also necessary to promote

and guarantee them to be effective. Part of this protection is to declare the nullity of the provisions which establish inequality. In this case it was determined that the employer cannot discriminate on the basis of gender in the workplace and that the concept of discrimination at work covers the pre-employment selection process, the employment relationship during and post-employment. It was proven that the company (Freddo SA), had acted discriminatorily, preventing the recruitment of women. For that reason it sentenced Freddo SA to hire only female staff in the future until the produced inequality is fairly and reasonably compensated. To this end the company is obligated to submit an annual report to monitor compliance with this condition.

Another significant and very recent decision on gender discrimination was dictated by the Supreme Court of Salta in the case *Sisnero Mirtha Graciela; Caliva Lía Verónica; Bustamante, Sandra y Women in Equality Foundation v. Tadelva SRL; Ahynarca SA; Alto Molino SRL and Others* – Salta Superior Tribunal, CSJ, 8 June 2010.

In the field of public transport, this sentence is very interesting when you consider that there is no concrete act of discrimination that should cease in the case presented by the individuals, but that there is certain behaviour that should be reviewed in order to prevent inflicting damage to the equal rights of women and to comply with the principles established by Law 26485 and international conventions. For that reason the Tribunal imposed an obligation on transport firms to submit information to the enforcement authority in order to study how the selection of drivers is made and to avoid discrimination. The Court said: ‘in the workplace in question, just go to any bus stop to view the lack of presence of women driving these buses. The defendants themselves accept this practice or, more strictly, the practice of non-admission of women to the ranks of the “bus drivers”, though, and worth repeating again, it has not been proved to be due to impairment by employers or lack of initiative to date of women themselves. But as from today, when advised of the possibility that they might be discriminated against even by purely practical factors, and considering the need for companies to adapt, for example, shifts in connection with maternity, among others, state authorities must assume the obligation to avoid any situation of discrimination.’

In conclusion, the sentence applies only

for preventive purposes, so that in future contracts, it will ensure that the nomination of women will be analysed by transport companies regardless of their gender, but based on the same requirements as those required to men.’

Discrimination against women in the field of sport

At the administrative level and within the claims that have been submitted to the INADI include Ruling No 032/09, which originated in the complaint filed by Ms F R R against the Argentine Football Association (AFA). In this case, the INADI considered that the conduct of the AFA fell within the terms of Law 23.592 and therefore was a discriminatory attitude. The conduct that the complainant said to be discriminatory is the existence of a set of constraints (linked to her gender) made by the defendant to her admission as a referee and access to promotion and the fact that she receives lower pay than the male referees of the same category.

The court therefore recommended a series of guidelines to the entity, such as:

- incorporating women candidates in a proportion of at least one third to organisations qualified for overseeing, sorting into ranks, promoting, downgrading or excluding referees;
- incorporating changing rooms and bathrooms for referees in all stadiums where matches are played and organised by the denounced entity;
- mitigating or easing requirements and conditions to become a staff member of the denounced institution;
- adjusting the set of physical requirements for referees to match the parameters currently set by FIFA (International Federation of Football Associations), should these impose less stringent requirements for women referees;
- paying women referees the same compensation or fee as that paid their male counterparts in the same rank, irrespective of whether the referee conducting the match is a man or a woman, until standards for quality assessment are adopted, thus ensuring transparency, objectivity and equal treatment; and
- carrying out on-going advertising and training events, aimed at achieving full respect, protection, and making sure that gender diversity is observed within Argentine football.

Discrimination against women in the field of public or political activity

In the action of ‘amparo’ (an amparo is a legal action to claim for the safeguard of a constitutional privilege), *Zigarán, María Inés, Sandoval, Patricia and others v State Provincial – JUJUY* Administrative Court, 27 May 2010, stated: ‘...the system of quota shares [the quota share system guarantees that every political party presents a percentage of women candidates at each election] brings in a mechanism of democracy to political participation on equal terms for men and women which guarantees and protects gender parity and the non-discrimination of women in political life... [thus] acknowledging those rights as “fundamental human rights”, the violation of which implies the infringement of a “collective right” ... Therefore, exposed to the action of “amparo” filed by the plaintiffs against the Provincial Government and ordered the executive and legislative branches of the Province to implement the constitutional mandate of Article 37 last paragraph, and second transitional provision of the National Constitution, to sanction and promulgate the regulatory law required thereby, within three months, under warning of penalty payments and legal costs to the Provincial Government which was defeated.’

The last paragraph of Article 37 of the National Constitution states that real equality of opportunity between men and women in access to elective and political party shall be warranted by affirmative action for the regulation of political parties and electoral systems.

Conclusion

The Argentine regulatory system embodies equality between men and women in all spheres, particularly in the workplace. The Argentine Judicial System guarantees equality and rejects gender discrimination, condemning discriminatory attitudes towards women and declaring null and void any discriminatory dismissal or forcing the perpetrators of discrimination to adopt behaviour consistent with the International conventions and laws approved by Argentina.

While in practice, complete equality between men and women at work has not been achieved, I believe that the necessary conditions and prerequisites for progress in this area are in place and this is supported by the legal and administrative precedents.



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Implementing CSR in an HR legal context

‘Lose money for the firm, I will be very understanding. Lose a shred of reputation of the firm, I will be ruthless.’

Warren Buffet when taking over as Chairman of Solomon Brothers (now City Group) in 1991.

Introduction

Corporate social responsibility (CSR) has become an integrated part of the strategy and business of multinational companies today.¹ In this respect, it has become increasingly relevant and a rising challenge for HR departments in MNCs (multinational corporations) to find out how to define and implement CSR in respect of its employees. The challenges involved are not only relating to communication and leadership but is also of a legal nature. Many jurisdictions, not least within the EU, have a detailed web of anti-discrimination laws and mandatory provisions around which HR departments have to manoeuvre when implementing CSR and facing sensitive issues, such as how to secure more diversity in the workplace.

This article will focus on outlining the areas that, at least from an EU perspective, have shown to be relevant for CSR-related initiatives, and some of the legal challenges implementing such initiatives that may give rise to an HR legal context. This article will take an EU-perspective with a relevant outline of experiences from my practice as a lawyer specialised in labour and employment law and on CSR-related issues in Denmark.

Possible CSR-activities in a HR legal context

Activities within CSR could be diverse and must be adapted to the cultural values and business strategy of the multinational company in question. In addition, CSR strategies in relation to employees must take into account the various – sometimes major – economical, social, cultural as well as legal differences between various jurisdictions. Adopting common cross-border CSR strategies in different countries is a challenge.

The relevant tool for implementing such strategies would, in most countries, be employee policies or codes of conduct. In this respect, there are a number of issues that in most jurisdictions could prove relevant as subject for such CSR-related policies, etc. These CSR-related issues concerning employees focus on the areas: equality and diversity, work life balance, working environment and welfare and pro bono and social work.

Below is a list of relevant issues for CSR-related policies. The list is not exhaustive and is only meant for inspiration and illustration of the various areas where HR departments may focus but also face challenges when implementing CSR strategies in the workplace.

Equality and diversity

- Policy on equality and diversity on the workplace;
- policy regarding registration and statistics on the number of employees with a different racial or ethnic origin, employees over a certain age, employees divided into gender with a view to implement equality and diversity in the workplace;
- policy regarding freedom of religion (prayer rooms, religious public holidays and policy on the use of religious symbols and clothing relating to the work in question);
- policy on handling of racism and difficulties relating to co-operation between employees based on lack of tolerance or understanding of differences relating to culture, racial or ethnic origin and religious beliefs;
- recruitment policy, encouraging the employment and promotion of persons of a different racial or ethnic origin and other minority groups;
- policy for the promotion of recruiting, employment and promotion of disabled employees and practical handling of the daily workplace and working life including measures that may assist the disabled to work on equal terms;
- promotion of ‘light jobs’ including possible

home-based workplaces in relation to employees with disabilities themselves or who have family members who are disabled;

- policy on promotion of employment of members from different minority groups on trial or special terms including examination of financial support from public authorities or funds for this purpose;
- specific targets as to the degree of diversity based on nationality, racial, ethnic origin, gender, age or disability in various parts of the company; and
- policy on staff over a certain age and agreements allowing to maintain senior staff and their know-how including by offering selected training classes, a decrease in working hours and guidance on the transition from work into retirement.

Work/life balance, working environment and welfare

- Policy on work/life balance;
- policy on health promotion and welfare, including policies on smoking in the workplace;
- policy to promote a healthy mental working environment, the handling of problems relating to bad mental working environment, harassment and bullying;
- policy to promote environmental friendly measures, focus on 'green' company and reduction of CO₂ in all respects of the workplace including in the production, administration, choice of building elements and recycling of materials; and
- promotion of consultation and information of employee regarding policies and decisions affecting the working environment and welfare and diversity of the workforce.

Pro bono and social work

- Policy regarding pro bono work including social or community-related work by employees including providing the freedom and necessary support to this.

Legal challenges with implementing CSR initiatives in an HR legal context

As mentioned in the introduction, there are, however, certain legal challenges when adopting and implementing CSR initiatives. In particular, in relation to the desire to attract and employ employees with a different ethnic origin and/or people with disabilities or from other minority groups, as it will raise a number of legal challenges.

One of the first general challenges is that in order to identify if and to what extent measures relating to diversity are needed, it is necessary to have an overview of the degree of diversity within the company in question. However, it is often very difficult to register and monitor the degree of diversity – for example in relation to racial or ethnic origin and the disabled in the workplace – without violating EU-based and national laws on anti-discrimination and laws of protection of personal data. These laws are specifically aimed at preventing registration and monitoring based on criteria such as racial or ethnic origin and disability such as EU Council Directive 2000/43/EF, 29 June 2000, on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

In Denmark, the Danish Ministry of Labour has tried to solve this problem by offering a service to all companies of employers furnishing personal registration numbers for all employees (this information is usually already exists for the purposes of tax reporting) to the Danish Statistics Agency (a public body). The Agency will then compare the personal registration numbers with information in the public registration files regarding state citizenship of the employee, registered birthplace and the state citizenship and birthplace of the parents (the so-called 'personal registration number-method').

On this basis, the Agency will prepare a schedule outlining the number of employees who are of a Danish/Western and non-Western origin. The Agency will maintain anonymity and secure that no person-specific information may be derived from the schedule but that it will provide the company with a useful overview of the degree of diversity without violating the anti-discrimination laws and data protection laws.

Another general challenge is the job application and interview process. Promoting diversity may require the recruitment of staff based on their ethnic origin or disability, and may run counter to EU-based and national laws on anti-discrimination and laws of protection of personal data. For example, this means that job applications must avoid any references to ethnic origin or disability. One disadvantage to this is that job vacancy adverts in the general media may not attract the target minority groups.

One way of solving this dilemma may be to choose a more suitable media for the job application by providing the job application

in an electronic format, on a webpage or in a magazine that is known to be read by and will be relevant to the relevant target group. This procedure could be relevant if, for example, the attempt is to attract disabled people to a particular post. Another possibility is to adopt the job application in more than one language thereby enhancing the likelihood of attracting people of various ethnic origins.

A third general legal challenge is related to the fact that the ordinary line of work and general policies in a company may run counter to the use of certain religiously required or recommended clothing, such as headscarves, headwear or jewellery. In recent times a number of cases have been raised and tried in local jurisdictions – as well as before the Human Rights Tribunal – relating to, for example, the legality of a ban on headscarves for certain job functions. In most jurisdictions, the issue in these cases revolves around the fact that although the policy adopted by the company in question is not directly discriminatory, it may well be indirectly discriminatory. In such cases the company must prove a valid and objectively justifiable reason for the policy.

The clash between an employers' need to issue policies and directions in the workplace to fit the business needs, and the anti-discrimination laws and principles including the freedom to express an religious belief,

will undoubtedly continue to create cases and issues for lawyers and courts to solve.

In Denmark, 2005, a Supreme Court Judgment ruled in favour of a shopping mall chain who had issued a ban on the use of headscarves for employees sitting at counters with direct contact to customers. The Court found the ban to be indirectly discriminatory against Muslim women but also found that the shopping mall chain had provided a justified, objective reason for the ban. The judgment lead to peaceful actions where Muslim woman employees wore a headscarf with the logo of their employer showing that they maintained their religious symbol and that they were understanding of the commercial interests and business needs of their employer.

Perhaps creativity and different thinking like this may help to solve some of the issues relating to implementing CSR-related measures in an HR legal context.

Note

- 1 In the *10/20 Survey: Looking to the Key Human Resources Legal Issues of the Next Decade*, prepared by the IBA Global Employment Institute, September 2010 'Balance of professional and personal life of employees' and 'CSR in a post-crisis context' came in 2nd and 7th place in the list of issues regarded as most critical HR legal issues and challenges facing MNC's over the next decade.

Is equal treatment regarding religion possible in the workplace in France?



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Due to international mobility, globalisation and immigration between various continents, the workplace increasingly reflects the multiculturalism of employees, and religion is entering the workplace more visibly than ever.

In France, a law passed on 11 October 2010 prohibiting the wearing of any face-covering in public spaces (this includes burkas and other full-length veils). Although this law will only become applicable in April 2011, and mostly to employees working in public areas, it has raised various questions about the expression of religion in French workplaces.

Religion does not have a legal definition in France, but the Constitution (preamble of 27 October 1946) guarantees the freedom of religion.

Other principles can also apply to protect religion: the freedom of expression or thought (Article 9 of the European Convention of Human Rights applicable to all employees) and the principle of non-discrimination (sanctioned by the French Labour Law Code and by the French penal code).

Indeed in France, religious beliefs are considered to be part of an individual's freedom of expression or thought and an employer is prohibited from taking religion into account in the way that it treats job applicants and employees regarding their working conditions.

In the past, Roman Catholicism was recognised as the faith of the majority of French citizens. Judaism and the Lutheran and Reformed Churches were also named as being officially recognised by the state, but none of them were given the status as a religion of the state.

A law of 1905 established a strict separation between the church and the state, prohibiting the state from recognising or promoting any religion ('the Republic does not recognise any religion').

The French Constitution states that France is a 'secular republic' ('*république laïque*'). As a

result, public authorities and civil servants are expected to stay neutral with respect to politics or religion when they carry out their duties.

State education was the first sector to be concerned by religious issues in France; religious manifestations are considered undesirable in state primary and secondary schools which are supposed to be neutral spaces where children should learn without any political or religious pressures.

Religious symbols were officially banned from all public buildings (for example, schools, government offices, hospital) by a law dates September 2004. This law has been considered by the European Court of Human Rights as compatible with the principle of all religious freedom (*Court's decisions of 4 December 2008, No 2705805*).

The European Court considered that the principle of secularism had the rank of constitutional right in France.

Since 13 April 2011, employees in France who are working in a public space could be banned from wearing any piece of clothing that will hide their face. This law is only applicable to public spaces, defined as public ways, any building opened to the public or any government related building.

Companies whose activity is exercised in a public space

The 11 October 2010 law imposes a fine of €150 and/or a citizenship course for wearing a face-covering veil or any piece of extensive clothing and also penalises anyone who forces another person to wear face-coverings with a fine of €30,000 and a year's imprisonment.

These prohibitions concern employees who:

- work in a public space (streets, roads or any passage or place opened to the public – parks, cafes, public transport, shops), or places dedicated to a public service (town hall, schools, hospitals); and
- wear clothing which hide the eyes, nose and mouth of the person.

On the basis of this law, the employer could ban an employee from covering his/her face *without* having to demonstrate that this piece of clothing is not compatible with health rules or with public order.

There are some exceptions to these prohibitions if covering the face is prescribed or authorised by legislation or regulations for professional reasons. This would be the case for work involving welding or cleaning asbestos (Article R 4534-131 and R 4412-128 of the labour code). The protection of the face for professional reasons can also be founded on a collective bargaining agreement, internal rules of the company, employment contract or at the simple request of the employer (Article L.3121-3 of the labour code).

Companies whose activity is not carried out in a public space

Employees will not be concerned by this law. This will be the majority as most workplaces are private spaces. In this context, the employer cannot ban face-covering on the basis of the law of 11 October 2010.

French labour laws do not require the employer to take steps to accommodate employees religious beliefs, such as allowing them to take time out of the working day for prayer.

The employer may restrict the exercise of religious freedoms at work, based on case law and guidelines from the Halde (High Authority for Anti-Discrimination Measures and Equality) on two grounds:

- if the freedom of expression/thought has been abused notably with insults, defamation, proselytism which can put at risk the rights and freedom of other citizens/employees. The wearing of a headscarf is not an act of proselytism in itself, outside any other circumstances or pressure (*Supreme Administrative Court, 27 November 1996*); or
- if there are objective, relevant and justified criteria. However, in such cases, the restrictions imposed by the employer must be compatible with the nature of the task to be accomplished and be in proportion to the aim sought. In practice, the criteria revolve around health and safety for the employee and/or his/her colleagues and contacts with the public/clients but in the latter case, only in specific circumstances due to the nature of the job.

Simple contact with a client is not enough to justify a restriction to the right to wear some

piece of clothing showing the employee's religious beliefs.

The employer would need to prove that the ban is not discriminatory, is well proportioned and justified with regard to the task to be carried out in these circumstances.

If an employer in France wants to apply strict equality regarding religion in France, he can restrict the expression of religion either by using the internal rules (a general document for all employees on hygiene, safety and discipline) or by invoking the principle of 'good faith' which is an implicit obligation for both parties to an individual employment contract.

The internal rules cannot set out a general ban on religious expression at work (Administrative Supreme Court, 25 January 1989); they need to specify precisely the restrictions and narrow them to certain specific job positions. Also, a guideline from the HALDE of 6 April 2009 recommends that before any disciplinary action is taken, the employer and the employee should discuss the conditions of the religious restrictions. In brief, since it is a case-by-case assessment, internal rules are not a very satisfactory tool to restrict religious expression at work.

The employer can argue that the employee must carry out his/her duties in good faith, as it results from the employment contract – for instance, a butcher cannot later refuse to work, arguing that the meat he is obliged to handle does not comply with his new religious beliefs.

In this regard, the employer can base its case on various aspects of the employment relationship, listed below.

Medical examinations at work

These regular examinations are compulsory, whatever the religious beliefs of the employees are (Supreme Court, 29 May 1986).

Strict observance of the working hours and of the date of holidays agreed with the employer

A Muslim teacher, for example, cannot demand to be dispensed from working on Friday, in order to pray, and an employer can refuse some requests for leave or absence, provided the refusal is objectively justified by the functioning of the company and not by any discrimination based on religion, according to the HALDE.

Dress code

The actual workplace plays an important role and the nature of the employee's tasks will determine if the employee can 'show their religion' through the clothing he/she wears. In a clothing shop, a Muslim worker who insisted on wearing a religious headscarf was dismissed with cause as the employer argued that it was not consistent with respecting the clients' various religious convictions. This argument did not however prevail in the case of a call centre where the contacts with the clients were limited to a telephone hotline or when there was no need to represent the company's brand image.

In practice, some companies in France take a more pragmatic view, especially when the majority of staff have some religious requirements (eg, Muslims in the automotive industry). In this case companies try to adapt by granting days of leave during religious festivals; and some breaks during the working day to let some employees pray.

The limit should be that religious practices cannot interfere with the normal functioning of the company, that is, the individual and collective performances as the team must work efficiently, irrespective of individual beliefs.

Religious tolerance and constitutional rights in Germany exemplified by the headscarf ban in state schools

A recent decision made by the German Federal Labour Court has caught the public's attention and revived much discussion among Germany's legal experts about whether public officials have the right to wear headscarves. The court had ruled that a woollen hat which fully covers the hair and ears worn by Muslim women while teaching in a public school must be considered as an Islamic symbol and could be banned from state schools on the basis of a corresponding statute.

The issue raises difficult questions about religious tolerance and constitutional rights in Germany. This matter has become a major controversy following a decision by Germany's highest court, the Federal Constitutional Court ('*Bundesverfassungsgericht*') in 2003.¹ The judges ruled in favour of a teacher of Afghan origin, who was denied a job in the state school system because she wore a headscarf. Although the court ruled that the decision to deny the teacher employment as a teacher was unconstitutional because she wore a headscarf, it did not question the constitutional ability of states to enact laws imposing such restrictions per se. Since education in Germany is the responsibility of the individual states of the Federal German Republic, which each has its own education ministry, the German Federal

Constitutional Court also ruled that each individual state could ban the wearing of Islamic headscarves by women teachers, and that this would not infringe the constitutional protection of freedom of religion. The headscarf ban is defended mainly by citing the religious freedom of the pupils. In combination with the parents' personal right of education, a school education which is neutral in religious matters must be guaranteed in German state schools. This neutrality is aimed at preventing religious influence by authorities, in this instance the teachers, from which children cannot escape during school hours and which can have a more serious impact, the younger the pupils are.

However, according to the Federal Constitutional Court, a ban could only be implemented by state law and not by administrative decisions.

As a consequence, eight of Germany's 16 states – Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia and Saarland – issued restrictions on wearing the Islamic headscarves by amending the respective State School Acts. Under the amended school acts, teachers at state schools are not allowed 'to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the state towards



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pupils or parents or the political, religious or ideological peace of the school.’ The Act deems as ‘particularly illegitimate’ any ‘behaviour that can appear to pupils or parents to be a teacher’s demonstration against human dignity, gender equality according to Article 3 [of the Constitution], the rights of freedom or the free and democratic order of the constitution.’

The Islamic headscarf is not mentioned explicitly in the laws, but has arisen in explanatory documents or parliamentary debates in all eight states, and all the legal challenges to its ban that have gone before the courts until now have concerned the headscarf.² This attitude is even more apparent in the states of Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia, where the relevant section of the School Act which bans religious symbols goes on to say that ‘the display of Christian and Western religious and cultural traditions and values will continue to be admissible’. By enacting this law, it was assumed that the states intended to prohibit state school teachers from wearing the Islamic headscarf, while permitting teachers to continue to wear Christian religious clothing and symbols such as the nun’s habit. Consequently, the courts in these states were faced with several lawsuits involving individual challenges to the prohibitions. The courts of appeal have so far issued rulings upholding or clarifying the bans.

A ruling of a Regional Labour Court in 2007³ received widespread public attention. It concerned a social worker specialising in education who had worn a headscarf for some years while working in a state school, replacing it with a rose-coloured woollen hat which fully covered her hair and ears, following the new School Act. The court judged that the function of the hat was the same as that of a headscarf and as such must be banned from the school. In April 2008, the State Labour Court⁴ affirmed the lower court’s ruling in the case. According to the State Labour Court, the social worker expressed her religious belief by wearing the woollen hat, thereby violating neutrality and the ‘negative’ religious freedom of pupils. Recently, the German Federal Labour Court (*‘Bundesarbeitsgericht’*) upheld the decision given by the State Labour Court.⁵ The Federal Labour Court applied the prohibition on the headscarf for teachers in such a way that also included substitutes that cover hair, shoulders and ears like an Islamic headscarf, and considered such substitutes as a religious symbol.

It is worth noting that in those states where no exemption is made for Christian or Western cultural symbols, no case law has occurred. The same applies to those states which banned all religious symbols in public institutions, including the Christian crucifix and the Jewish yarmulke. Those states are actually consistent with a precedent from 1995 where the traditionally Roman Catholic Bavaria battled for the right to display crucifixes in the classroom. In its ruling, the Federal Constitutional Court⁶ prohibited such display by ruling that crucifixes were religious symbols and therefore by their nature negated the obligation of neutral state school education. Despite this ruling, some states have exempted Christian clothing and symbols from their bans. To support their position, they argue that such exception does not privilege Christianity, because such clothing and symbols are in line with and preserve values expressed in their state constitutions, themselves influenced by Christianity. They claim that Christian clothing and symbols do not therefore risk compromising the neutrality or peace of the school. Nevertheless, it is not debatable that these states are facing several lawsuits challenging the law as discriminatory and accusing them of hypocrisy. It may very well take a ruling of the Federal Constitutional Court to create a clearer picture of religious tolerance and especially equality of religions in Germany – even if it results in an across the board ban of religious symbols in state schools.

Notes

- 1 Federal Constitutional Court, 24 September 2003, 2 BvR 1436/02, www.bundesverfassungsgericht.de/entscheidungen/rs20030924_2bvr143602.html, last accessed 14 May 2010.
- 2 See, for instance, explanatory comments in the Bavarian government draft law, *Gesetzesentwurf der Staatsregierung zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen*, first reading of draft law in state parliament of North Rhine-Westphalia, minutes of plenary proceedings 14/12, p 1018, 9 November 2005; second reading of the draft law amending the school law in the state parliament of Saarland, minutes of plenary proceedings 12/69, 12th election period, 69th session, 23 June 2004, p 3684, www.landtag-saar.de/dms/Land069.pdf, last accessed 14 May 2010; and debates in the state parliament in Baden-Württemberg at the first reading of the draft law amending the school act on 4 February 2004, plenary proceedings, 13/62, 13th election period, 62nd session, www.landtagbw.de/Wp13/Plp/13_0062_04022004.pdf, last accessed 14 May 2010.
- 3 Labour Court of Düsseldorf, 29 June 2007, 12 Ca 175/05.
- 4 State Labour Court, 10 April 2008, 5 Sa 1836/07, www.lag-duesseldorf.nrw.de/beh_static/entscheidungen/entscheidungen/sa/1836-07.pdf, last accessed 14 May 2010.
- 5 Federal Labour Court, August 20, 2009, 2 AZR 499/08, <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2009&anz=82&pos=0&nr=14046&linked=urt>, last accessed 14 May 2010.
- 6 Federal Constitutional Court, 16 May 1995, 1 BvR 1087/91, <http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintVersion&Name=bv093001>, last accessed 14 May 2010.

It doesn't matter whether you are employing a man or a woman – protection for transgender employees



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The Labour Court in South Africa recently pronounced for the first time on transgender issues affecting applicants for employment, and in so doing reaffirmed the protection accorded to such persons by the South African Constitution and specific labour legislation.

Datacentrix (Pty) Ltd interviewed a Mr Atkins for a position as an IT technician. They were impressed with his credentials and offered him the job. While he was still working out his notice with his old employer, Atkins advised Datacentrix that he was planning to undergo a sex change operation, after which he would be a woman. The company withdrew its offer of employment claiming that Atkins should have disclosed this information to them at his pre-employment interview. In effect he had been dishonest and this, said the company, was the reason for the dismissal (nothing to do with his plans to change his sex).

Mr Atkins took the case to the Labour Court claiming automatically unfair dismissal (on the basis that the company had discriminated against him on the basis of gender) and the Labour Court gave judgment in this case in December last year. It accepted that Atkins was transsexual which is a recognised psychological condition where people perceive themselves as members of

the opposite sex imprisoned in the wrong body. The remedy is surgery which aligns the person's body with the psychological gender.

The judge did not accept the company's argument that it dismissed Atkins for dishonesty. It was clear that the only reason for the dismissal was his disclosure that he was going to undergo a sex change. This, said the court, was clearly discrimination on the basis of gender. Such discrimination is prohibited by both the Labour Relations Act and the Employment Equity Act. More importantly perhaps was that the company's argument presupposed that Atkins was under an obligation to disclose his proposed sex change when attending an interview. The judge said he was under no such duty.

The judge wanted to award Atkins substantial damages to teach employers that they can no longer live in the Dark Ages, but because Atkins had remained employed by his old company he had not suffered much loss. He was therefore awarded five months' pay as compensation. If he had been able to prove further losses he may have received more. Employers in South Africa need to be aware that employees are protected by the Constitution against unfair discrimination on any listed or arbitrary ground. Ignoring this can lead to serious damages claims.



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Sex workers win some unfair dismissal rights from South African Labour Appeal Court

The Labour Appeal Court in South Africa recently handed down judgment in the case of a sex worker (referred to as Kylie) who was unfairly dismissed by the brothel employing her.¹ The judgment represents a step forward in the rights of sex workers in South Africa. It overturned the previous judgment of the Labour Court to the effect that, although a sex worker employed by a brothel was an employee for purposes of the South African Labour Relations Act, such a worker would not be entitled to protection against unfair dismissal.

The Labour Appeal Court held that the constitutional right to fair labour practices is expressed in the South African Constitution as vesting in ‘everyone’, which was wide enough to include a person employed in an illegal activity, such as a sex worker. It pointed out that, just because the work performed by a sex worker is illegal, this should not deny the sex worker of rights to be treated with respect and dignity by others, such as the police and the sex worker’s customers. By logical extension, it found that this also meant that the employer of a sex worker had similar obligations to the sex worker, including the obligation to observe fair labour practice in the employment relationship.

That said, the Labour Appeal Court did not go as far as holding that unfairly dismissed sex workers could obtain reinstatement orders when they had been unfairly dismissed. It found that an order of reinstatement in favour of a sex worker would manifestly be in violation of the provisions of the Sexual Offences Act, which criminalises sex work in South Africa. Similarly, the Labour Appeal Court indicated that compensation for substantive unfairness (ie, where there was no fair reason to dismiss) would amount to the monetary equivalent of reinstatement for the loss of employment, and it would probably be inappropriate for this to be awarded to the sex worker given that the nature of their services rendered are illegal.

If the Labour Appeal Court had stopped the above findings, Kylie’s victory would have been a largely Pyrrhic one as she would have been left with no practical and effective remedy against the brothel that unfairly dismissed her. However, the Labour Appeal Court went on to find that an unfairly dismissed sex worker like Kylie could well be entitled to monetary compensation if her dismissal was procedurally unfair, because such compensation is for the loss by an employee of her right to a fair procedure, and not compensation for rendering illegal services. Awarding compensation for the infringement of the right to fair procedure would not offend the Sexual Offences Act, and as such would be appropriate.

Unless one of the parties appeals against this judgment, Kylie must now return to the statutory dispute resolution body that declined jurisdiction to deal with the dismissal claim in the first place, namely the Commission for Conciliation, Mediation and Arbitration (CCMA), and seek an award of compensation for the procedural unfairness in her dismissal. How much a CCMA arbitrator is prepared to award to her for this, remains to be seen. The maximum possible award is 12 months’ remuneration.

For the brothel owners in South Africa, it seems that they need not be worried about whether they have a fair reason to dismiss their sex workers – they must just make sure that they follow a fair procedure in doing so.

Note

¹ *Kylie v CCMA and Others*, unreported case No CA10/08, 28 May 2010.

Recruitment issues for UK-based employers



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Given the scope and extent of new employment legislation in the UK, employers face a myriad of complex rules and regulations which govern the recruitment process. This article examines a number of these in particular various codes and practices under the Equality Act 2010, the Data Protection Act 1998 and immigration procedure.

The recruitment process

During the recruitment process, private information is likely to be obtained at every stage of the process. At the initial application stage an employer might request criminal records, medical or equal opportunities information (in which sensitive personal information such as race or ethnic origin, sexual orientation, disabilities or religious beliefs might be revealed).

The interview stage might discuss disabilities (for example if adjustments are necessary to enable the candidate to carry out the role); a candidate's home life (for example if relevant to the requirements of the job); or religious beliefs (for example if specific prayer or holiday periods need to be observed). During the shortlist/offer stage, checks on criminal record, credit rating or qualifications might be carried out.

A requirement in an advert that the candidate must be 'mature' may exclude younger candidates. In *Beck v Canadian Imperial Bank of Commerce ET/2328832/08* a tribunal held that an employee, who was dismissed ostensibly for redundancy while the bank was actively seeking to recruit a replacement with a 'younger, entrepreneurial profile', was unfairly dismissed and subjected to age discrimination.

Equality and Human Rights Commission Code

To avoid claims that a job description unlawfully discriminates against people who have any of the protected characteristics, the Equality and Human Rights Commission (EHRC) Code states that employers should

ensure that a job description is written in plain language and:

- contains the title and the aim of the job;
- sets out the specific duties and responsibilities of the post;
- is concise and does not overstate a duty or the responsibilities attached to it;
- does not include unnecessary requirements, criteria or conditions; and
- indicates whether the job can be performed under a range of flexible working options.

The EHRC Code also suggests that every selection decision, from shortlisting to appointment, is equally important and recommends that employers keep records that will allow them to justify each decision, and the process by which it was reached. These records should also demonstrate that a selection decision was based on objective evidence of the candidate's ability to do the job satisfactorily, and not on assumptions or prejudices about the capabilities of certain groups of people sharing protected characteristics. Employers must balance this with their obligations under the Data Protection Act 1998 to keep personal data for no longer than is necessary.

The Code recommends that, in addition to keeping relevant recruitment records, employers should retain any monitoring information requested for equality purposes as general statistical data. This can be used to monitor short and long-term trends in the employer's recruitment process and, provided it does not directly or indirectly identify individuals, there should be no data protection issues in keeping and using this data.

Data protection issues

Despite these rules, an employer must have a justifiable need for requesting sensitive personal information, and must obtain and use the information in accordance with the data protection rules. Recruitment information must be relevant to, and not excessive for, the particular role and the particular recruitment stage. For example, detailed medical information or vetting

checks should normally be obtained only at the offer stage.

Information should also be obtained in the least intrusive way. Similarly, verifying information supplied by the candidate intrudes less than carrying out independent vetting checks. Data should not be used for other purposes without the candidate's knowledge (and, usually, consent). It should also be shared only with those who need to know.

Health issues

Pre-employment enquiries about health issues are thought to be one of the main reasons why disabled job applicants often fail to reach the interview stage. Section 60 of the Equality Act provides that an employer must not ask about a job applicant's health (including any disability) before offering him or her work or, where the employer is not in a position to offer work immediately, before including the applicant in a pool of persons to whom he intends to offer work in the future. This could include a request for a reference. The EHRC has power to enforce this provision. An employer does not commit an act of disability discrimination merely by asking about a job applicant's health, but the employer's conduct in reliance on information given in response may lead a tribunal to conclude that the employer has committed a discriminatory act. In these circumstances, the burden of proof will shift to the employer to show that no discrimination took place.

This is not quite a blanket ban on pre-employment health enquiries, however. Section 60 does not apply to questions that are necessary to establish whether the job applicant will be able to comply with a requirement to undergo an assessment (such as an interview or selection test); whether a duty to make reasonable adjustments will arise in connection with any such assessment; or whether the applicant will be able to carry out a function that is intrinsic to the work concerned for example scaffolders. The employer is also entitled to ask questions necessary to monitor diversity in the range of job applicants; to enable him to take positive action; or to establish whether the applicant has a particular disability, where having that disability is an occupational requirement. These exceptions suggest that the restriction upon health questions is not likely to be too onerous for employers.

Immigration issues

An employer is liable to a civil penalty if it negligently employs someone who does not have permission to work in the UK. There is a statutory defence if the employer checks certain documents before the employment starts and (in some cases) at least every 12 months during employment. In addition, an employer commits a criminal offence if it knowingly employs someone who does not have permission to work in the UK.

Guidance provided by the UK Border Agency (UKBA) states that on occasions when an employee is unable to produce a document from list A (those with indefinite leave to remain) or list B (those with limited leave to remain), the employer should use the Employer Checking Service (ECS) at the UKBA to verify whether the employee continues to enjoy the right to work in the UK. The employer should warn the employee in question that it intends to do this.

Employers should keep a full record of any conversation with the ECS as it is most likely that the employer (and not the ECS) will be held accountable if it mistakenly dismisses an employee with outstanding leave to remain.

Employers should carry out the above checks on all applicants, not merely those who appear to be of non-British descent, in order to avoid race discrimination. To help employers, the Home Office has issued a code of practice on avoiding race discrimination in recruitment. Failure to observe the code is not in itself unlawful, but may be taken into account by an Employment Tribunal in deciding whether there has been discrimination.

Extracts from the code

'All job selections should be on the basis of suitability for the post. You should ensure that no prospective job applicants are discouraged or excluded, either directly or indirectly, because of their personal appearance or accent. You should not make assumptions about a person's right to work or immigration status on the basis of their colour, race, nationality, or ethnic or national origins, or the length of time they have been resident in the UK.'

'You should only ask questions about an applicant's or employee's immigration status, where necessary, to determine whether their status imposes limitations on the number of hours they are entitled to work each week, or on the length of

time they are permitted to work within their overall period or type of leave given.’

Conclusion

Employers, their HR managers and in-house counsel therefore need to take account of all these codes and practices so as not to fall

foul of them and risk discrimination claims or action by the EHRC and/or the Information Commissioner under the Data Protection Act 1998. Policies and procedures which incorporate the various codes not only assist the compliance process but along with training of staff are relevant to liability should any claims be made or investigations undertaken.

The UK Equality Act – an update

As readers of this newsletter will be aware, the majority of the provisions of the Equality Act 2010 came into force in the UK on 1 October 2010. The Equality Act extends to areas beyond employment law but for the purposes of this article we will focus only on the changes relevant to employment law.

For a time, employment lawyers in the UK were not entirely agreed whether this new piece of legislation was in fact groundbreaking or merely a consolidating piece of legislation. The consensus now seems to be that while the Equality Act is, in part, a consolidation of nine separate pieces of discrimination and equal pay legislation into a single document; it does also introduce new responsibilities for employers.

The Equality Act was the brainchild of the former Labour administration. However, following the May 2010 UK general election, a Conservative-Liberal Democrat coalition came to power and government policy on some of the suggested statutory provisions of the Equality Act shifted, in particular those which actively sought to support equality within society. Accordingly, there was some confusion in the run up to 1 October as to which provisions of the Equality Act would come into force, and the impact that these would have on businesses and their employees.

Implementation – 1 October 2010

Overall, the Equality Act seeks to harmonise many aspects of protection against direct and indirect discrimination, victimisation and harassment concerning sex (including marriage and civil partnership, gender reassignment, pregnancy and maternity),

race, disability, sexual orientation, religion or belief and age (the protected characteristics).

Examples of significant areas of change from 1 October 2010 include:

- confirmation of protection for people who have been discriminated against because they are associated with someone who has a protected characteristic (eg, a carer of a disabled person), or because they are perceived to have a protected characteristic (eg someone who is discriminated against because others believe they are gay, even if they are not);
- the new concept of ‘detriment arising from disability’ offers further protection to workers who can show that they have experienced less favourable treatment because of something connected with their disability (without the need to establish that their treatment is less favourable than that afforded to other non-disabled employees);
- the extension of employer liability for third party harassment (eg, by a customer or client) to all protected characteristics, except marriage and civil partnership, pregnancy and maternity;
- at the recruitment stage, the Equality Act has limited the circumstances in which pre-employment health questionnaires can be used. This will potentially make it more difficult for employers to unfairly screen out disabled applicants for jobs;
- pay secrecy clauses will no longer be enforceable in certain circumstances, and any action taken against an employee in this regard will amount to victimisation; and
- the introduction of new powers for employment tribunals to make recommendations which benefit not just the claimant but the workforce as a whole.



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Additional changes yet to be implemented

Certain provisions of the Equality Act have not yet come into force, as they remain under consideration by the new government as to how or even if they should be implemented. These include:

- potential dual discrimination claims (relating to direct discrimination concerning age, disability, gender reassignment, race, religion or belief, sex or sexual orientation);
- introduction of the concept of voluntary 'positive action', meaning that employers will be entitled to choose to recruit or promote those from a disproportionately underrepresented group, so long as that person is 'as qualified' as the other candidate. This will not, however, permit a general policy of treating people with a protected characteristic more favourably in the workplace than those who do not share that protected characteristic (other than those with a disability, who may currently be treated more favourably than a non-disabled individual);
- the requirement for employers with 250 or more employees to disclose information regarding the differences in pay between genders; and
- the introduction of a socio-economic duty on public authorities.

Amendments to employment documentation

It is important that HR professionals and their advisers in particular are aware of those changes which should be reflected in their company policies, procedures and employment documentation.

It is recommended that an audit of all existing employment policies be carried out to identify any areas in which non-compliance is a possibility. For example, a review of a company's staff handbook will be necessary in relation to certain of its policies, such as those on equality and diversity, anti-discrimination, anti-harassment and bullying and equal opportunities. Standard employment contracts should also be reviewed in light of the implementation of the Equality Act.

As always, the true impact of the Equality Act in terms of changing the employment law landscape and rights of employees will become more apparent once cases make their way through the tribunal system. The first cases to be decided will make for interested reading.

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Who should attend?

Employment lawyers, human resources professionals, lawyers working for government organisations and in-house counsel.



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