



## Paid Time Off to Observe Religious Custom

Employers often struggle with the question "what steps must we take to accommodate an employee who is seeking paid time off to observe religious customs or practice?" In increasingly multicultural workplaces the answer to this question is relevant every day.

### Human Rights Legislation

Most Canadians are familiar with human rights legislation which protects individuals from discrimination on the basis of specific, prohibited grounds listed in the legislation. The grounds may vary across the jurisdictions. However, the intention of the legislation is consistent throughout Canada - to recognize and preserve the inherent dignity of every person and ensure the removal of barriers which may prevent individuals from participating in, and contributing to, the community.

In Ontario, the Human Rights Code (the "Code") includes "creed" as a prohibited ground. "Creed" is not specifically defined in the Code. However, the Ontario Human Rights Commission (the "Commission") has interpreted creed to mean "religious creed" or "religion" - in other words, a professed system and confession of faith, including beliefs and observance or worship. Significantly, a belief in God or gods, or a single supreme being or deity is not essential. As well, the Commission recognizes non-deistic bodies of faith, such as

the spiritual faiths/ practices of aboriginal cultures and newer religions which are bona fide. That said, "religion" does not include secular, moral or ethical beliefs or political convictions. As well, the Code does not extend protection to religions which incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.

### The Traditional View

Traditionally, courts have accepted the argument that the calendar used in Ontario is secular and as such not discriminatory - the reason being that the calendar is a schedule of work, with no direct, religious objective. As such, courts have traditionally held that the calendar is neutral and not discriminatory against non-Christians - this despite the fact that two Christian holy days - Christmas Day and Good Friday - are statutory holidays.

### The Contemporary View

The Commission - and some courts - has taken the analysis one step further. It has looked at the effect of the calendar, rather than merely its objective. The result has been recognition that while employees of the Christian faith are able, if they choose, to celebrate two Christian holy days without using vacation days, lieu days or taking unpaid leave, there is no equivalent statutory entitlement for non-Christians. In other words, while the objective of the calendar may not be directly discriminatory, the effect is.

### The Commission's Policy

The Commission has adopted its own policy on creed and the accommodation of religious observances (the "Policy"). The Policy attempts to level the playing field by requiring employers to provide two paid leave days to any non-Christian who requests time off to observe

religious custom or practice.

Significantly, this Policy is not legally enforceable. It merely represents the Commission's interpretation of the Code. Only the Code itself (and the way in which it has been interpreted by the Commission and the courts) can determine the rights and obligations of individuals and employers.

### What The Courts Say

The courts have not gone as far as the Policy in terms of granting employees an automatic right to two paid holidays for religious observance. Rather, the decisions reinforce that the obligation rests with the employer to accommodate an employee's request for leave for religious observance to the point of undue hardship.

The question is therefore, what is undue hardship? Not surprisingly, there is no single correct answer for all employers, nor for all employees. The one constant is that the employer must be flexible in its approach, taking reasonable steps to accommodate the employee, while at the same time take into consideration all of the circumstances of the workplace. Within this context, it is important to note that merely providing an employee with the opportunity to take two days unpaid leave for religious observance will not, except in the rarest of circumstances, satisfy the duty to accommodate to the point of undue hardship. Some of the factors the Commission and courts have considered when assessing what constitutes undue hardship include:

- Size of the employer's operation
- Financial cost
- Disruption of a collective agreement
- Impact on morale of other employees
- Inter-changeability of work force and facilities
- Flexibility of the workplace schedule
- Whether safety is at issue

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