

Religious holidays and accommodation

Accommodating different religions means sometimes being flexible with the work schedule

BY CURTIS ARMSTRONG

AS EMPLOYERS begin to think about holiday season scheduling, they should remember that there are many religious holidays that occur throughout the year, for which employees may require time off to observe or celebrate. Eid-al Adha, Diwali, Ashura, Hanukkah, Kwanzaa, the Lunar New Year, and varying dates for Christmas are only a few of the religious days employees may observe.

In Ontario, the obligation to accommodate observance of religious holidays is rooted in the Human Rights Code, which — like human rights legislation across Canada — protects an employee from discrimination on the basis of creed (religion). But what exactly does this mean as it relates to workplace scheduling? How far must an employer go to meet its legal obligation? With foresight, collaboration and planning, there are many scheduling options that can work for both the employer and employee.

What's discriminatory and what's not?

The code's creed-based protection has been interpreted to mean an employer must accommodate an employee's need for time off to observe religious holidays. In the past, employees have argued it was discriminatory to provide paid holidays for Christmas and Good Friday, but not for other religious holidays. However, today courts and arbitrators consider Christmas and Good Friday to be secular pause days — and, as a result, it not discriminatory that these days are paid holidays.

However, discrimination will exist where some employees are able to observe religious holidays without loss of pay, but other employees are not. The goal is to allow every employee the

opportunity to observe her religious holidays without penalty. This does not necessarily mean giving additional paid days off to those employees who request time off for religious observance. If that

ACCOMMODATION

were the case, those employees would receive a greater benefit than other employees. Generally, the way to achieve accommodation is to alter work schedules so employees receive the time off they require without loss of pay or pre-existing entitlement (such as vacation time).

Methods of accommodation

A common method of accommodating religious observance is to provide an employee with a menu of options for making changes to her work schedule. These options, which have consistently been held to be an appropriate method of accommodation, may include:

- Adjusting hours in the employee's schedule
- Allowing an employee to take an unscheduled shift to make up time off
- Adding hours to shifts to build up time off
- Shift swapping
- Allowing an employee to work on a paid public holiday when the workplace is in operation, subject to the provisions of the Employment Standards Act.

In addition, where an employment agreement or collective agreement provides an employee with special or discretionary days off, an employee may be entitled to use these days for religious purposes regardless how the employer would like them to be used. In a 2011 decision, *Koroll v. Automodular Corporation*, the Ontario Human Rights Tribunal held that where a mechanism exists by which an employee's religious observance might be accommodated, an employer is obligated to make that mechanism available to the employee.

Time taken off for religious obser-

vance cannot be counted against an employee when calculating benefits. In *Koroll*, the employer properly accommodated the employee's religious holiday by allowing the employee to work additional unscheduled hours throughout the year. However, the employer counted days off for religious observance against the employee in denying him a bonus for perfect attendance. The tribunal found that an employee's job benefits are protected in the same way as wages: They should be preserved by any means available to the point of undue hardship to the employer. The employer was ordered to pay the employee the attendance bonus.

Dialogue is the key

The tribunal has consistently emphasized accommodation is a process that requires dialogue between the employer and employee. There is nothing inappropriate about discussing options for accommodating an employee after she has requested time off to observe a religious holiday. An employer that maintains a dialogue with employees, supported by well drafted and consistently implemented attendance and accommodation policies, will be well prepared to handle religious observance requests all year round.



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