



**Ontario
Human Rights Commission**
Commission ontarienne des
droits de la personne

Policy on creed and the accommodation of religious observances

ISBN – 0-7778-6518-1

Approved by the Commission: October 20, 1996

(Please note: minor revisions were made in December 2009 to address legislative amendments resulting from the *Human Rights Code Amendment Act, 2006*, which came into effect on June 30, 2008.)

Also available on the Internet: www.ohrc.on.ca

Available in other accessible formats on request

Disponible en français

Contents

Introduction	4
Application of this Policy.....	4
Creed	4
Equal treatment on the ground of creed	5
Discrimination.....	5
Discrimination and harassment	5
Direct and indirect discrimination	6
Constructive discrimination.....	6
Needs of the group	7
The duty to accommodate.....	7
Rights and duties	8
Unions and the duty to accommodate	9
The standard of undue hardship	9
Specific cases	10
Dress codes.....	10
Break policies	11
Recruitment procedures	12
Religious leave	12
Flexible scheduling	14
Rescheduling and the <i>Employment Standards Act</i>	14
Exceptions.....	15
Participating in special interest organizations	15
Employment in special interest organizations	15
Reasonable and bona fide occupational requirements, qualifications or factors	15
Conclusion	16
For more information	17

Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code* (*Code*) authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.^{*} The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.^{**} Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,^{***} applied to the facts of the case before the court or Tribunal, and quoted in the decisions of these bodies.^{****}

* The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices.

** Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the Ontario Human Rights Commission.

*** In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

**** Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on*

Introduction

The *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

Creed is a prohibited ground of discrimination under the *Code*. Every person has the right to equal treatment with respect to services, goods, facilities, employment, the occupancy of accommodation, the right to enter into contracts and the right to join trade unions or other vocational associations, without discrimination because of creed.

These policy guidelines set out the position of the OHRC with respect to creed and the accommodation of religious observances related to a person's creed.

Application of this Policy

The *Human Rights Code* applies to:

1. the workplace (including recruiting, application forms, interviews, promotions, office dress codes and shift schedules)
2. services, goods and facilities (schools, school boards, shops, restaurants, hospitals, schools, correctional facilities and insurance services)
3. the occupancy of accommodation (including rental accommodation such as apartments, college residences, hotel/motel facilities and condominium housing)
4. contracts (verbal or written agreements)
5. membership in occupational associations and trade unions.

Creed

Creed¹ is not a defined term in the *Code*. The OHRC has adopted the following definition of creed:

Creed is interpreted to mean “religious creed” or “religion.” It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the OHRC to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as bona fide newer religions (assessed on a case by case basis).

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

Disability and the Duty to Accommodate, available at:
www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

"Creed" is defined subjectively. The *Code* protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed² provided they are sincerely held.

It is the OHRC's position that every person has the right to be free from discriminatory or harassing behaviour that is based on religion or which arises because the person who is the target of the behaviour does not share the same faith. This principle extends to situations where the person who is the target of such behaviour has no religious beliefs whatsoever, including atheists and agnostics who may, in these circumstances, benefit from the protection set out in the *Code*.³

In either situation, creed must be involved – either because the person who is the subject of the discrimination is seeking to practice his or her own religion, or because the person who is harassing or discriminating is trying to impose their creed on someone else. In both cases, creed must be involved.

Creed does *not* include secular, moral or ethical beliefs or political convictions.⁴ This policy does not extend to religions that incite hatred or violence against other individuals or groups,⁵ or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.⁶

Equal treatment on the ground of creed

Freedom of religion is the basic principle that informs the right to equal treatment under the *Code* on the ground of creed.⁷ First, this implies that the law can require measures to facilitate the practice of religious observances.⁸ Second, it also means that no person can force another to accept or comply with religious beliefs or practices.

This dual aspect of equality is emphasized by case law that has consistently protected freedom of religion and expressions of religious beliefs *as well as* non-beliefs and refusals to participate in religious practices.⁹ According to a 1989 human rights decision, no matter how convinced a person may be that he or she has a religious message that others should hear and heed, the *Code* prohibits the imposition of that message onto others. "In the workplace, a religiously militant employer is no more entitled to impose his or her version of religious enlightenment on employees than a sexually militant employer is entitled to impose his or her sexual ideas or wishes."¹⁰

Discrimination

Discrimination and harassment

In *Dufour v. J. Roger Deschamps Comptable Agréé*, a human rights tribunal stated that:

*[H]arassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society.*¹¹

Discrimination because of creed includes any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect the nullification or impairment of the recognition of human rights and fundamental freedoms on an equal basis.¹²

Harassment on the grounds of creed is a form of discrimination. It involves conduct or comments concerning religious beliefs or practices which are known or ought to be known to be offensive. A single incident may constitute harassment and may create a poisoned environment if it is substantial or significant enough.

Example: Management makes an employee's religious practices or beliefs the subject of jokes or derogatory comments or by other employees. This conduct is a form of harassment and the employee has the right to file a claim with the Human Rights Tribunal of Ontario.

Direct and indirect discrimination

Discriminatory practices that fail to meet any statutory justification test¹³ are illegal and will be struck down.

Example: Unless the client-employer is a "special interest organization,"¹⁴ an employment agency that screens out all persons who do not share the employer-client's religion is acting illegally. Such practices cannot be justified on the grounds of customer preference.¹⁵

Example: A public school that gives priority to the Lord's Prayer as part of opening and closing exercises fails to treat non-Christians equally.¹⁶

Discrimination can also be indirect.

Example: A landlord prefers renting to tenants whose religion is the same as the landlord's. If a tenant refuses to sublet the apartment based on the landlord's "rule," then the landlord may be also be named as a respondent to a human rights claim.¹⁷

Constructive discrimination

Constructive discrimination arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the *Code*. Because of its adverse impact, this is said to result in "constructive discrimination." Section 11(1) of the *Code* provides that discrimination occurs:

Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.

Unless an exception is provided by law, constructive discrimination cannot be tolerated unless the employer takes reasonable steps to accommodate the affected person. A *prima facie* case of constructive discrimination is established if it can be shown that an individual has been subject to an exclusion, restriction or preference that has had an adverse impact on members of a group protected by the *Code*.

Typically, in the context of creed, issues arise in the areas of:

1. dress codes
2. break policies
3. recruitment and job applications
4. flexible scheduling
5. rescheduling
6. religious leave.

We will deal each of these special cases in Part 7.

Needs of the group

The term “needs of the group” means the needs of the religious group to which an individual belongs. The group’s needs must be assessed to accommodate the individual.¹⁸ Courts have looked to the accepted religious practices and observances that are part of a given religion or creed to assess those needs.

Example: School teachers of the Jewish faith request a paid day of leave to observe Yom Kippur. To assess the needs of the group, the employer should seek information about the tenets of the Jewish faith, which establish that observant Jews cannot work on Yom Kippur.¹⁹

The duty to accommodate

The *Code* provides the right to be free from discrimination, and there is a general corresponding duty to protect the right: the “duty to accommodate.” The duty arises when a person’s religious beliefs conflict with a requirement, qualification or practice. The *Code* imposes a duty to accommodate based on the needs of the group of which the person making the request is a member. Accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation.

Subsection 11(2) of the *Code* imposes the duty to accommodate in cases of constructive discrimination:

11(2). The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Rights and duties

Both the people responsible for providing the accommodation and the person requesting it have rights and responsibilities during accommodation. We list some of these below by way of example:

Person requesting: Take the initiative to request accommodation

Person responsible: Respect the dignity of the person seeking accommodation

Person requesting: Explain why accommodation is required

Person responsible: Assess the need for accommodation based on the needs of the group of which the person is a member.²⁰

Person requesting: Provide notice of request in writing, and allow a reasonable time for reply

Person responsible: Reply to the request within a reasonable time

Person requesting: Explain what measures of accommodation are required

Person responsible: Grant requests related to the observance of religious practices

Person requesting: Deal in good faith

Person responsible: Deal in good faith

Person requesting: Be flexible and realistic

Person responsible: Consider alternatives

Person requesting: The individual may request details of the cost of accommodation if undue hardship may be a factor

Person responsible: If accommodation is not possible because of undue hardship, explain this clearly to the person concerned and be prepared to demonstrate why this is so

Sometimes, it may not be possible completely to resolve the conflict without causing undue hardship to the person responsible for providing the accommodation. A measure of accommodation may be acceptable if meets the needs of the person, to the greatest extent possible, short of undue hardship, and if it respects the dignity of the person requiring the accommodation.

Unions and the duty to accommodate

In the case of discrimination in the workplace, both management and the union have a duty to accommodate. In *Central Okanagan School District No. 23 v. Renaud*²¹ the Court noted that although the principle of equal liability applies, the employer has charge of the workplace and will be in a better position to formulate measures of accommodation. The employer, therefore, can be expected to initiate the process of taking measures to accommodate an employee. Nevertheless, the Court also noted that they will not absolve a union of its duty if it fails to put forward alternative measures that are available. In short, when a union is a co-discriminator with an employer it shares the obligation to remove or alleviate the source of the discriminatory effect.²²

Example: Mr. Renaud, a school custodian, complained that the school board and the union had failed to agree on how to modify Mr. Renaud's shift hours. As a Seventh Day Adventist, he was unable to work Friday afternoons. It was decided that the union, together with the employer, had a duty to accommodate Mr. Renaud, short of undue hardship. Mr. Justice Sopinka wrote that the union may be liable in two situations:

...first, [the union] may cause or contribute to the discrimination by participating in the formulation of the work rule that has a discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement;

*second, a union may be liable if it impedes the reasonable efforts of an employer to accommodate.*²³

In *Gohm v. Domtar*²⁴ the employer agreed to accommodate Mrs. Gohm by rescheduling her to work Sunday instead of Saturday, if she would not receive premium pay as provided by the collective agreement. The employer's attempt was blocked by the union. In finding that the union had discriminated against the complainant, the Ontario Divisional Court set out the concept of "equal partnership":

Discrimination in the workplace is everybody's business. There can be no hierarchy of responsibility...companies, unions and persons are all in a primary and equal position in a single line of defence against all types of discrimination. To conclude otherwise would fail to afford to the Human Rights Code the broad purposive intent that is mandated.

*Any interpretation short of this would...be inconsistent with the philosophy and policy enunciated by the Supreme Court of Canada in O'Malley v. Simpson-Sears.*²⁵

The standard of undue hardship

The duty to accommodate is limited to those steps that may be required to accommodate short of undue hardship. The burden of proving undue hardship lies with the person responsible for providing the accommodation. Each option should be examined to decide

whether undue hardship will result. In determining whether or not an accommodation measure creates undue hardship, the following factors should be considered:

Cost: This includes the actual, present financial cost of carrying out an accommodation measure, as well as any reasonably foreseeable costs that may arise. The cost to the person responsible for providing the accommodation may include operational costs which may be significant enough to constitute undue hardship.

Health and safety risks: Health and safety risks to the person requesting the accommodation, as well as to other employees and/or the general public, are to be taken into consideration.

The assessment of these factors should be undertaken having regard to the size of the organization and its operations, the nature of its business and its financial capabilities. In no circumstances should discriminatory customer preferences or those of co-workers be considered valid factors when evaluating whether or not an accommodation measure will create undue hardship.

Undue hardship is a relative concept. Accommodation may cause undue hardship to one employer but not to another. It is also possible that a method of accommodation that does not cause undue hardship to an employer now may cause undue hardship in the future. This may happen as circumstances change; for example, the number of employees requesting accommodation may increase significantly. Therefore, it is important to take into consideration all the relevant factors when attempting to determine when the standard of undue hardship is met.

Specific cases

Dress codes, work schedules or shift work sometimes adversely affect individuals because of religious requirements. When this happens, the obligation to accommodate the individual, based on the needs of the *group*, is triggered under the *Code*.

Dress codes

Workplaces, services and facilities frequently have rules about dress. These may take the form of having to wear a particular uniform, having to wear protective gear, or a requirement that no person may wear a head covering. These rules may come into direct conflict with religious dress requirements. When they do, there is a duty to accommodate the person, short of undue hardship.

Example: A school requires its students to wear a particular uniform that prohibits any head covering. A Muslim girl wears a head covering as part of her religious observance. The school authorities have a duty to accommodate such a student and to permit her to wear the head covering.

Example: Certain creeds do not permit men to cut their hair. Workplaces that prefer to employ men with short hair are acting in a discriminatory manner, unless they fall under a legal exception under the *Code*. It should be noted that for health and safety reasons, an employer may ask employees to contain their hair with a net or other appropriate head covering.

Example: A school principal tells the parents of a Sikh child that wearing a turban or kirpan to school is not allowed. However, the "five K's" and related religious rules that include the wearing of a turban by Sikh men are part of the Sikh faith. In similar cases, human rights tribunals have rejected arguments by schools based on safety, on the grounds that wearing a ceremonial kirpan does not raise sufficiently compelling safety concerns. Schools must modify their policies to accommodate children seeking to modify the application of the rule for religious reasons.²⁶

Considerations when dealing with dress codes:

1. What is the exact nature of the religious observance?
2. What is the reason for the uniform or dress code?
3. What measures can be taken to accommodate the person?
Are there alternatives?
4. Are there health or safety factors involved?
5. If so, do they involve the health or safety of the employee alone or are there consequences for other employees?
6. If so, has the employer shown that to accommodate the employee would create a health or safety hazard that would amount to undue hardship for the employer?

As a rule, uniforms such as school uniforms and work uniforms that have no health or safety rationale can be modified easily to permit the person concerned to wear the required item(s) of clothing. Clothing or gear with a health or safety rationale may constitute a reasonable occupational requirement. Nevertheless, the employer is obliged to accommodate the employee; for example, by seeing whether the gear can be modified to permit the person to wear the religious dress safely (subject to the undue hardship test), or by examining whether the employee can be transferred to another job that may be available in the company that does not require the clothing or gear.

Break policies

Some religions require that their members observe periods of prayer at particular times during a day. This practice may conflict with an employer's regular work hours or daily routines in the workplace. The employer has a duty to accommodate the employee's needs, short of undue hardship.

Possible forms of accommodation include:

1. a modified break policy
2. flexible hours

3. providing a private area for devotions.

Recruitment procedures

A job applicant's religion cannot be used as a selection criterion for employment. There is an exception if the workplace qualifies as a "special interest" organization under the *Code* (that is, one that is a religious, educational or other social institution or organization that is primarily engaged in serving the interests of persons who are identified by their creed – s. 24(1)(a) of the *Code*). Subject to this exception, attempting to obtain information concerning the applicant's creed at the pre-interview stage of a recruitment process is not acceptable.

Consequently, invitations to apply for employment and job application forms *cannot* contain:

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

However, nothing prevents the employer from asking questions about creed at a personal employment interview, if the questions are otherwise permitted by the *Code*.

For more information, consult the OHRC's publication, *Human Rights at Work*, which is available on the OHRC's website: www.ohrc.on.ca .

Example: It is permitted at an employment interview to ask religious membership for a teaching position in a denominational school if the job involves communicating religious values to students.

If a person has been offered employment, the person has the obligation to notify the employer of any religious requirements that are relevant to the performance of his or her duties, and to request accommodation.

Religious leave

When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. The extent of the accommodation required is an issue that comes up frequently. Does the person have to be paid? Until what point? What about unpaid leave?

Two Christian holidays (Christmas Day and Good Friday) are also statutory holidays in Ontario. This is sometimes held up as evidence of the "non-discriminatory" nature of these holidays. Some employers have argued that because these holidays are now statutory, the employer has no obligation to accommodate employees by paying for other religious holidays. The Supreme Court of Canada has stated that this approach is incorrect. In *Chambly*,²⁷ the Court examined the issue of whether the "secularized"

nature of Good Friday and Christmas can excuse a policy alleged to be discriminatory based on religion because it is based on the Christian calendar. The Court wrote:

*Here the schedule of work is based upon the Catholic calendar of holidays. Nonetheless, I think the calendar should be taken to be secular in nature and thus neutral or non-discriminatory on its face. It will be remembered that the majority of the Court of Appeal determined that since the calendar did not have any religious aims, it was not discriminatory. With respect, I think this was an erroneous conclusion. It is true that this approach can properly serve to determine that there has been no direct discrimination. However, the analysis cannot stop there. Consideration must still be given to the **effect** of the calendar in order to determine if there is indirect or adverse effect discrimination.*²⁸ [Emphasis in original.]

In other words, the secularized nature of traditional Christian holidays may remove the taint of direct discrimination but not of constructive discrimination.

Example: In *Chambly*, three Jewish teachers employed by a Catholic school board were denied access to the special purpose paid-leave provisions in the collective agreement so that they could observe Yom Kippur. They were told instead that they could take the day off, but unpaid. The Court held that the school board's leave policy had an adverse effect on Jewish teachers despite the secularized nature of Good Friday and Christmas. The following is the analysis which led to the Court's finding of adverse effect:

*...Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers ... [t]hey...must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect.*²⁹

The Court then examined the nature of the accommodation that would be required to alleviate the adverse effect. It rejected the view that the school board's offer of unpaid leave to the Jewish teachers was sufficient accommodation. Mr. Justice Cory wrote:

*If a condition of work existed which denied all Asian teachers one day's pay, it would amount to direct discrimination . . . The loss of one day's pay resulting from direct discrimination would not be tolerated...and would fly in the face of human rights legislation. Similarly adverse effect discrimination resulting in the same loss cannot be tolerated **unless the employer takes reasonable steps to accommodate the affected employees.***³⁰ [emphasis added.]

The Court concluded religious leave should have been available under the special purpose paid-leave provision in the collective agreement. This did not cause undue hardship to the school board.

A number of general principles emerge from this case that are not limited in their application to the particular terms of the collective agreement examined in *Chambly*.

1. The employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.
2. Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday).
3. The number of paid days may be three under some collective agreements which also make Easter Monday a holiday.
4. Beyond this point (*i.e.*, two or three days), individuals may still seek accommodation. For example, measures might include additional paid leave days such as floating days or compassionate leave days, if such exist under company policy or collective agreements, or through unpaid leave.
5. The standard for *all* accommodation requests is undue hardship, which places a specific burden on the employer to produce evidence to the standard of undueness of the hardship and of its effect.

Flexible scheduling

The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. For example, Seventh Day Adventists and members of the Jewish faith observe a Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times.

Flexible scheduling may include: alternative arrival and departure times on the days when the person cannot work for the entire period, or use of lunch times in exchange for early departure or staggered work hours. Where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up time lost or use floating days off.

Rescheduling and the Employment Standards Act

In some workplaces, rescheduling may be a practicable accommodation measure. However, it may also pose a financial difficulty because of the requirement of paying wages at a premium rate, typically at one and a half times the regular rate, to people who work on Good Friday and Christmas. It should be noted that some employers may argue that the requirement of premium pay for work done on public holidays may present a financial obstacle to accommodation in that it may constitute undue hardship.

In Ontario, the *Employment Standards Act*, S.O 2000 c. 41 outlines various options relating to work and entitlements on a public holiday.

Exceptions

Discrimination or unequal treatment may be legally defensible in certain circumstances.

Participating in special interest organizations

First, s. 18 of the *Code* provides that religious, philanthropic, educational, fraternal or social institutions that are primarily engaged in serving the interests of persons who are identified by their creed, may give priority to persons of the same creed with regard to participation or membership.

Employment in special interest organizations

Second, s. 24(1)(a) of the *Code* provides that religious, philanthropic, educational, fraternal or social institutions that are primarily engaged in serving the interests of persons identified by their creed may employ or give preference in employment to persons similarly identified, if the qualification is *reasonable and in good faith* in relation to the nature of the employment.

Example: An educational institution such as a denominational school may prefer to employ teachers of the same denomination or faith. This hiring policy would be permitted if the teacher's own faith is related to the professional functions that teachers are expected to perform in denominational schools. However, this same defence is not available to the school with respect to the hiring of maintenance staff. The school must show that the requirement of belonging to a particular faith has a rational connection to the essential duties of a job.

Reasonable and bona fide occupational requirements, qualifications or factors

If a requirement, qualification or factor is neutral or non-discriminatory on its face, it may nonetheless have an adverse impact effect and may be discriminatory under s. 11 of the *Code*. However, the *Code* provides a defence if the requirement, qualification or factor is *reasonable and in good faith*, and if the needs of the persons affected cannot be accommodated without undue hardship to the person responsible for accommodating those needs.

Example: A policy that requires all employees to work on a day that coincides with the holy day of a particular creed may be defensible, despite its adverse impact on some employees, because the nature of the business is such that a certain day of the week is critical to the operations of the establishment. However, the employer has a duty to accommodate an employee, if this can be accomplished short of undue

hardship to the employer. Administrative inconvenience does not constitute undue hardship.

1. The requirement in question must be established in good faith with the *intention* of achieving its stated business objective, and not as a means to avoid the purpose of the *Code*.
2. The requirement must be objectively connected to its stated business purpose.
3. The requirement should be the least discriminatory alternative available, other things being equal.

Conclusion

Religious pluralism poses a challenge in any multicultural society, especially one as diverse as ours. Although the law is developing rapidly in this area, an informed spirit of tolerance and compromise is indispensable to any civil society, as well as to its capacity to make opportunities available to everyone, on equal terms, regardless of creed.

For more information

For more information about the OHRC or this policy statement, please visit our website at: www.ohrc.on.ca.

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

¹ Human rights laws in other Canadian jurisdictions use terms such as “religion” as prohibited grounds of discrimination. For a review of decisions dealing with “creed” and “religion,” see Tarnopolsky, *Discrimination and the Law* (Toronto: Richard deBoo, 1985) at 6-1 to 6-6.

² See *Singh v. Workmen's Compensation Board Hospital & Rehabilitation Centre* (1981), 2 C.H.R.R. /549 (Ontario Board of Inquiry); *Bhinder v. Canadian National Railway Co.* (1981), 2 C.H.R.R. D/546 (Cdn. Human Rights Tribunal), reversed [1983] 2 F.C. 531, affirmed [1985] 2 S.C.R. 561.

³ Atheists deny the existence of God; agnostics are of the view that nothing is known or likely to be known about the existence of God.

⁴ But see *Obdeyn v. Walbar Machine Products of Canada Ltd.* (1982), 3 C.H.R.R. D/712 (Ont. Bd. of Inquiry) at D/716 - D/717.

⁵ Not only are such groups not protected under the *Code*, but they may also be subject to provisions of the *Criminal Code*. Any reports of activities involving such groups should be immediately reported to the police.

⁶ For example, female genital mutilation is a violation of women's human rights and is not protected on the ground of creed. See the Commission's *Policy on Female Genital Mutilation*.

⁷ This is reflected in the Preamble of the *Code* which recognizes that the
recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace ... [and that has as its aim] the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

⁸ The notion of “accommodation” is dealt with in the section entitled “Duty to Accommodate.”

⁹ The principle was established in the Charter context in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 (S.C.C.) at par. 24775.

¹⁰ *Dufour v. J. Roger Deschamps Comptable Agréé* (1989), 10 C.H.R.R. D/6153 (Ont. Bd. of Inquiry) at 6170.

¹¹ *Ibid.*

¹² See the *International Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981).

¹³ S. 24(1)(a) of the *Code*, for example, allows an institution that primarily serves the interests of an identifiable religious group to prefer job applicants who are also members of that group.

¹⁴ *Ibid.*

¹⁵ S. 23(4) of the *Code*.

¹⁶ See *Opening and Closing Exercises for Public Schools in Ontario* (Ministry of Education and Training, 1993). See also *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (Ont. C.A.).

¹⁷ S. 9 of the *Code* deals with indirect discrimination.

¹⁸ S. 11(2) of the *Code*.

¹⁹ *Commission scolaire régionale de Chambly v. Bergevin* (1994), 22 C.H.R.R. D/1 (S.C.C.).

²⁰ S. 11 of the *Code*. Individuals may seek accommodation for religious practices or observances that do not conform to established dogma, or they may seek to observe a practice that is not shared by all members of the creed. Dress codes, dietary laws, *etc.* are good examples of religious practices that are sincerely observed but may not be followed by all practitioners of a creed.

²¹ *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425, Supreme Court of Canada. The British Columbia *Human Rights Act* which was in force at the time did not mention the duty to accommodate explicitly. The principle reached by the Supreme Court of Canada in *Renaud*, namely, that the union as well as the employer has a duty to accommodate short of undue hardship, applies *a fortiori* to the Ontario *Human Rights Code* which explicitly imposes a duty to accommodate, short of undue hardship.

²² *Ibid.* at D/438.

²³ *Supra*, note 21 at D/436 - D/437.

²⁴ (1982), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).

²⁵ *Ibid.* at 312.

²⁶ *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry); *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, aff'd (1991), 14 C.H.R.R. D/403 (Ont. Div. Ct.), leave to Ont. C.A. refused.

²⁷ *Commission scolaire régionale de Chambly v. Bergevin* (1994) 22 C.H.R.R. D/1 (S.C.C.).

²⁸ *Ibid.* at D/11.

²⁹ *Ibid.* at D/11 - D/12.

³⁰ *Ibid.* at D/12.

³¹ "Public holiday" is defined in s. 1 of the ESA as including "New Year's Day, Christmas Day and the 26th day of December."

³² *Supra*, note 21.