

April 2015 Issue

# Multi-jurisdictional Labor and Employment Law update



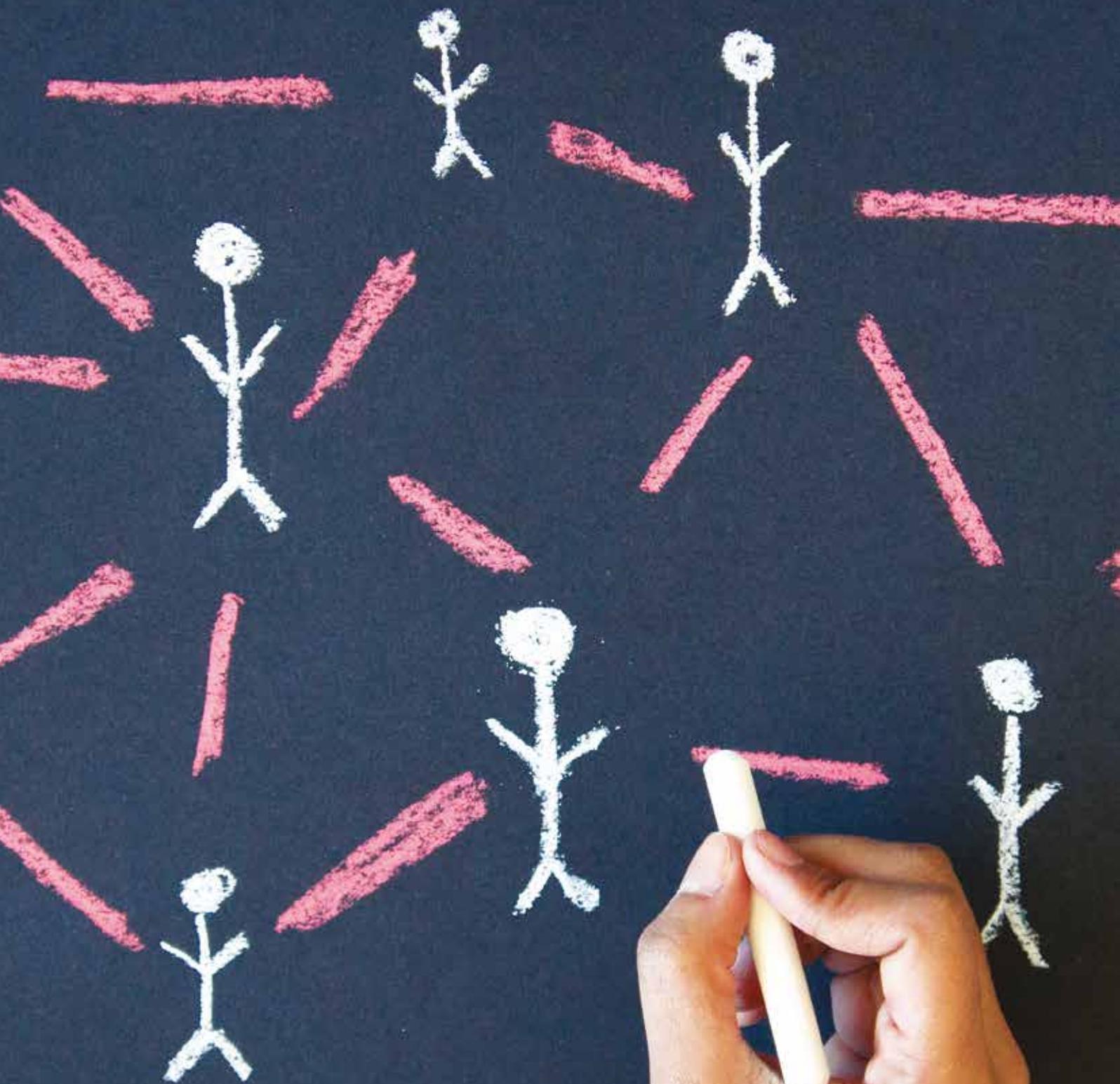
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# Editorial

Most countries in the world have anti-discrimination laws and yet surprisingly no two countries will have the exact same laws. This illustrates the complexities of dealing with discrimination in a globalized environment, where different cultures collide on a daily basis, and where the definition of what is discrimination and what is not will vary from one legal system and culture to another.



Even in the European Union, where a Directive on discrimination exists, each country in Europe has its own laws, its own dispute resolution system including special rules in the matter of proof. Moreover, the Americas and Asia-Pacific have their own rules as well.

Therefore, HR and legal professionals should carefully be aware of the rules on discrimination in different countries to ensure compliance, and implement measures to proactively prevent exposure.

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# Argentina

## Discrimination at the workplace

First, we should mention that because of the prevailing cultural multiplicity in our country, discrimination is not a relevant issue in Argentina.

In our country, discrimination in the workplace is the differential treatment of employees by an employer not attributable to objective reasons which places the employee in an inferior position as compared to the group, thus causing real or potential harm, whether material or moral, throughout the stages of the labor relationship.

The non-discrimination policy is grounded in the Constitution of Argentina (hereinafter "CA"), ensuring the right to equal treatment, whereby it is stated that "All inhabitants are equal before the law and admissible in employment, provided that they are suitable" (article 16 of the CA). It is also related to the right to equal pay for equal work established in article 14 bis of the AC.

Argentina has ratified several conventions, such as Convention No. 111 Discrimination (Employment and Occupation). Such convention defines discrimination as "any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

In addition, Employment Contract Law (Law No. 20,744) prohibits any type of discrimination among workers on the basis of sex, race, nationality, religion, political or trade union opinion or age (section 17).

It also establishes equality in treatment in it stating that "*The employer shall provide all employees with equal treatment in equal situations.*" Thus, unequal treatment is deemed to exist when arbitrary discrimination is produced on the basis of sex, religion or race (section 81).

Moreover, Employment Contract Law gathers these principles establishing the prohibition of discriminatory treatment based on the woman's marital status or sex (section 172).

Furthermore, Antidiscrimination Law (Law No. 23,592) states that "whoever arbitrarily hinders, obstructs, restricts or in any way impinges upon the full and equitable exercise on an equal basis of the fundamental rights and guarantees recognized in the Constitution of Argentina shall be obliged, at the request of the injured party, to make the discriminatory act null and void or to cease its implementation, and to compensate the moral and material damages caused."

This law particularly considers the discriminatory acts and omissions based on race, religion, nationality, ideology, political or trade union opinion, sex, economic status, social position or physical characteristics.

Discriminatory treatment may occur at any stage of the employment relationship: at recruitment, during the effectiveness of the employment relationship or upon its termination, but equal treatment is required throughout the contractual instances.

The employee may file claims against the employer at every stage of the employment relationship. The penalty shall consist in making the discriminatory act null and void or cease its implementation and compensate the moral and material damages caused.

At selection, compensation for damages may be claimed for failing to offer someone a position. Should the employment contract not be executed, the Constitution of Argentina and the provisions of the Civil Code regarding the employer's noncontractual liability shall be applied.

During the employment relationship and until its dissolution, the employee may claim that he/she be reemployed plus compensation for damages (material and moral damage) and also claim payment of

compensation equal to the pay for unfair dismissal established in Employment Contract Law.

Considering that the right against arbitrary discrimination is protected by top and supra-legal hierarchy regulations and it has also entered into the domain of jus cogens, when the employer is deemed to be unfairly discriminated against, the employer is required to prove that his action has justifiable causes which were exterior to the alleged infringement of fundamental rights.

The essential human right against discrimination is implied in labor law.

Argentine case law has considered discrimination and issued a resolution against it; for example, the case entitled "*Asociación Mujeres en Igualdad v. Freddo S.A. on constitutional rights protection action*" of the Labor Court of Appeals in and for the City of Buenos Aires, whereby the defendant is condemned to recruit only female workers in the future until the inequality caused by hiring only male workers is offset; therefore, an annual report ensuring access to the information should be filed.

In addition, the employment court in the case "*Balaguer Catalina v. Pepsico de Argentina S.R.L.*", accepted a dismissed worker's claim that she had been subject to discrimination by the employer on the basis of trade union activities and her being the common law spouse of a union delegate.

In conclusion, while Argentina has legislation and judicial precedents against employment discrimination, it is not a concern in our country.

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1. Constitution of Argentina, law of highest rank in Argentina.

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## Unprecedented damages awarded for workplace sexual harassment

In Australia, there are federal laws and state and territory laws that render unlawful any discrimination in the workplace in respect of, among other things, age, race, ethnicity, religion, political opinion, disability and sex (including sexual harassment).

Since their inception 30 years ago, these laws have evolved in accordance with changing community standards and expectations. For example, in 2013, the list of prohibited grounds, was expanded to include intersex status, sexual orientation and gender identity. This was done to protect persons who identify as being neither male nor female, and persons whose sexual orientation is toward persons of the same or different gender.

In 2014, the Full Court of the Federal Court of Australia gave Australia's anti-discrimination and harassment framework renewed vigor. It ordered an Australian subsidiary of a multinational technology corporation to pay an unprecedented amount of damages to a former employee as compensation for workplace sexual harassment.

The case in question involved a female former employee of an Australian corporation. She claimed to have been subjected to verbal sexual harassment by a male colleague over a six-month period during her employment.

Ms. Richardson had initially commenced Federal Court proceedings against Oracle as well as the male colleague. She did this on the basis that – pursuant to the federal Sex Discrimination Act 1984 – in failing to take “all reasonable steps” to prevent the workplace harassment, Oracle was vicariously liable for the male employee's actions.

At first instance, the Federal Court found for Ms. Richardson in holding both Oracle and the male employee liable. Importantly, the

Federal Court accepted Ms. Richardson's contention that Oracle was vicariously liable in failing to take “all reasonable steps,” on the basis that its global policies and training were found to be inadequate.

In particular, Oracle's relevant policies were found to be inadequate in that they did not expressly state:

- ▶ That there are federal, state and territory anti-discrimination and harassment laws
- ▶ That sexual harassment is unlawful and prohibited under these laws
- ▶ That an employer may be liable for sexual harassment committed by an employee

This was despite the fact that Oracle had handled Ms. Richardson's internal complaint effectively and had found against the male employee.

The Federal Court awarded an amount of A\$18,000 to Ms. Richardson as compensation for non-economic loss (i.e., for pain and suffering). Compensation was not awarded by the Federal Court for Ms. Richardson's claim for economic loss, because the Federal Court held that there was no causal link between the sexual harassment and Ms. Richardson's decision to resign from Oracle.

On appeal before the Full Court, Ms. Richardson submitted that the Federal Court had erred by awarding “manifestly inadequate” general damages and no damages for economic loss. Oracle contended that the amount Ms. Richardson was awarded by the Federal Court was well within the ordinary range awarded for sexual harassment of the kind found in this case (i.e., between A\$12,000 and A\$20,000).

Ultimately, the Full Court upheld part of Ms. Richardson's appeal, finding that the Federal Court had erred in awarding such a “low level of damages” and that her compensation amount should be increased. The Full Court explicitly stated that the rationale behind its finding was that, “while the sum of A\$18,000 was not out of step with past awards in cases of this kind ...,

it was out of step with the general standards prevailing in the community, regarding the monetary value of the loss and damage of the kind Ms. Richardson suffered.”

The Full Court consequently set aside the lower court's damages award and ordered Oracle to instead pay a total of A\$130,000 in damages as compensation to Ms. Richardson (comprising A\$100,000 for non-economic loss and A\$30,000 for economic loss, being the difference between Ms. Richardson's salary while at Oracle and at her new role over a three-year period).

In raising the amount of damages typically awarded for sexual harassment of this kind by more than A\$100,000, the Full Court made a significant departure from precedent.

### Message for employers

Global employers should be aware that the changes in treatment of sexual harassment claims may prompt an increase in employee complaints and an increase in both the compensation sought and awarded by courts.

In order to mitigate any risk of workplace claims, employers are therefore advised to:

- ▶ Review global anti-discrimination and harassment policies, training and procedures for compliance with, and express reference to, Australian laws merely having a (non-localized) policy or training in place may not be a sufficient defense.
- ▶ Review any grievance policies to ensure that they are workable and are operating appropriately.
- ▶ Remind employees that they and the corporation may be jointly liable in discrimination cases.

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# Austria

## Recent case law on discrimination on grounds of gender

According to Austrian law, ordinary termination of employment generally does not require any specific cause, although notice periods and termination dates must be observed. Several groups of employees, such as pregnant employees, members of the works council, disabled employees and mothers and fathers on parental leave, enjoy special protection against termination.

Pursuant to article 10 of the Maternity Protection Act (MSchG), an employee protected by this act may be given notice only upon prior approval of the court. Pregnant women are protected, as are women until the end of a four-month period following childbirth. The duration of the protection against termination is extended if parental leave or parental part-time is taken. The protection ends four weeks after the end of the agreed parental leave or parental part-time but, in any case, not later than four weeks after the child reaches the age of four. Employees are further protected until their child reaches the age of seven, if the reason for the termination is the part-time work of the employee.

The Austrian Supreme Court recently had to decide whether a female employee should, under certain circumstances, enjoy special protection against termination of employment before pregnancy.

In the case at hand, the plaintiff, a female employee, became pregnant and announced her pregnancy to her employer. The employer reproached the woman, claiming that he would not have hired her if he had known about her intention to become pregnant. The woman then suffered a miscarriage and returned to the office after three weeks' sick leave.

Only a few days after her return, the employer terminated the woman's employment. He argued that she had

planned the recent pregnancy and that there would thus be a substantial risk that the woman would become pregnant again in the near future. This would cause additional costs for the employer.

The female employee accepted the termination but claimed compensation for the lost income and the personal damage suffered. The claim was based on article 3, para 1, number 7 of the Act on Equal Treatment (GIBG). The employee argued that the employer had infringed the principle of equal treatment, because the termination was based on sex.

The employer disagreed and pointed out that the employee had not been pregnant at the time of the termination of her employment. Non-pregnant women do not enjoy protection against dismissal within the scope of the MSchG. Granting such special protection to non-pregnant women would result in all young women (who potentially could become pregnant) claiming special protection against dismissal. This would thus lead to an undesired and unpredictable stretching of this protection.

The first and second instance decided in favor of the woman. The Supreme Court upheld the decisions of the lower-instance courts.

The Supreme Court held that pursuant to article 3 para 6 number 7 of GIBG, there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, with reference, in particular, to marital or family status. The principle of equal treatment applies with regard to working conditions, including the conditions governing dismissal.

Direct discrimination on grounds of sex occurs when one person is treated less favorably than another person in a comparable situation because of their sex. The same applies if circumstances that can only be experienced by one sex serve as criteria for the less favorable treatment. Thus, worse treatment for

reasons of pregnancy is considered direct discrimination on grounds of sex. If an employment relationship is terminated on grounds of sex, the employee may seek either the continuation of the employment relationship or compensation for the caused financial damage and the suffered personal damage (Art 12, para 7, GIBG).

In the case at hand, the main reason for the termination of the employment relationship was the employer's assumption that the woman would become pregnant in the near future. As this criterion can only be fulfilled by female employees, the Supreme Court confirmed that the termination breached the principle of equal treatment.

Regarding the reasoning of the employer, the Supreme Court stressed that special protection based on the MSchG is not comparable with the protection arising out of the GIBG. While the MSchG protects pregnant women regardless of the employer's reason for termination, the protection resulting out of the GIBG explicitly requires prima facie evidence (Glaubhaftmachung) of a forbidden reason. Thus, in the case at hand, the plaintiff had to establish facts from which it could be presumed that the reason for the termination of the employment relationship was her possible future pregnancy.

The case at hand shows that, under certain circumstances, non-pregnant employees are entitled to contest a termination for infringing the principle of equal treatment. As a prerequisite, the non-pregnant employee must furnish prima facie evidence that the reason for the termination was the chance of pregnancy.

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## New legal framework to tackle the gender pay gap in Belgium

The gender pay gap represents the difference between the average gross hourly earnings of male and female employees. It is shown as a percentage of men's earnings.

### Legislation

In Belgium, the general legal basis for gender pay equality on a federal level is formed by the national Collective Bargaining Agreement no. 25 and the Discrimination Act of 10 May 2007. Nevertheless, as mentioned above, gender equality is still not a reality.

These legal instruments both provide for equal treatment in wages for men and women. However, in practice, their existence has clearly not been enough to eliminate the differences in wages. In this context, the Belgian Federal Government has taken additional measures, which have culminated in the Act of 22 April 2012 and several royal decrees.

### Measures introduced at inter sectoral level

Every even year, the report of the National Labor Council must now contain a section showing the evolution of the wage gap between men and women.

The social partners are now expected to conclude collective bargaining agreements to fight against the gender wage gap by introducing gender-neutral classifications and by evaluating the gender-neutral nature of the new job evaluation and classification scales.

### Measures introduced at sectoral level

During negotiations, gender-neutral collective bargaining agreements have to be concluded to fight against the gender pay gap. The joint committee has to carry out a preliminary check, based on an available checklist, before agreements are transferred to the Federal Ministry of Employment.

The General Directorate of Collective Labor Relations must examine agreements, to assess whether they achieve a gender-neutral classification and it will provide advice, within a certain time limit. In cases of negative advice, the joint committee has 24 months to adapt the agreements in order to achieve a gender-neutral classification.

If a joint committee maintains a non-gender-neutral classification, that joint committee will be included in a list sent to the Federal Minister of Employment and to the Institute for Equality of Women and Men. And the joint committee will be given three months to explain why it is not complying.

### Measures introduced at company level

#### Analysis of the remuneration structure

Once every two years, employers who usually employ an average of 50 or more employees on an annual basis will have to set up a detailed analysis of the remuneration structure within the company. This analysis must be carried out on the basis of a model report. The model report is different for companies with 100 or more employees.

This analysis will make it possible to determine whether the company conducts a gender-neutral remuneration policy and, if the company does not conduct such a policy, that finding will lead to the setting up of consultations with employee representatives to achieve a gender-neutral pay structure via an action plan. This analysis has to contain the remuneration and extralegal benefits of employees.

The employer has to communicate the report of the analysis to the works council (or otherwise the trade union delegation) or will be subject to penal sanctions. The works council will discuss the report and, if appropriate, draft an action plan. This action plan will contain concrete objectives, instruments to achieve them, the period of realization and a system to monitor the implementation.

### The mediator

In a company that usually employs an average of 50 or more employees, a mediator can be appointed, proposed by the works council, or in the absence of such a council, by the trade union delegation. They are entrusted with:

- ▶ Providing expert advice in connection with the desirability of drawing up an action plan for the implementation of a gender-neutral salary structure within the company
- ▶ Advising the employer, and helping the employer draft a progress report on the implementation of the action plan
- ▶ Hearing the complaints of employees who believe themselves to be the subject of unequal treatment regarding remuneration, because of their gender; and informing such employees of the possibility of an informal solution through the intervention of the company head or another of the employee's superiors
- ▶ Helping the employer establish the mediating procedure as described in the law

Mediators must have certain competencies, and they must be given the opportunity to follow training at the employer's expense. They must comply with certain rules of professional conduct – confidentiality is particularly important and they must prepare a report for each of their activities.

Employers who prevent mediators accessing the social data they need to fulfill their tasks will face sanctions.

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# Brazil

## Discrimination in the workplace

Among all the challenges faced today by companies, discrimination in the workplace is a matter of particular importance.

Although Brazil has made considerable progress by signing conventions with the International Labor Organization (ILO) there are still many issues that require attention. Since discrimination comes in many forms, both positive and negative, combating these conditions to ensure equal opportunities among workers is a never-ending battle.

Negative discrimination is considered as being any act that provokes unjustified inequality between individuals. Some examples include sexual or work-related discrimination against women, against people of different races and religions, as well as against people suffering from physical or mental disabilities.

Positive discrimination is tied to the idea of promoting equality. In other words, it

promotes the same opportunities for all people possessing equal skill and education levels.

Under current Brazilian legislation, all companies established in Brazil must observe the following rules:

- ▶ Minimum quota for hiring employees with physical or mental disabilities;
- ▶ Minimum quota for hiring apprentices between the ages 14 to 24
- ▶ Minimum quota for granting scholarships to African descendants looking to attend Rio Branco Institute, a school specializing in the education of diplomats
- ▶ National Program of Affirmative Actions, that establishes, for public administrations, a minimum percentage in the fulfillment of certain positions, such as leadership and superior advisory (DAS)

Despite these guidelines established under Brazilian law, the country still struggles with many challenges due to its size and multicultural population characterized by several races, cultures and creeds. Thus, discrimination will only be truly abolished once there is significant change within society's behavior as a whole.

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## Equal pay requirements

Remuneration is one of the most important elements of an employment relationship and is also a common area of discrimination in the work place. Foreigners, women, minors, persons close to retirement and retirees are groups who most often suffer remuneration-based discrimination. Today, most often multiple types of discrimination are observed.

The principle that equal remuneration must be paid to all employees who occupy the same and equivalent work lies at the very foundation of anti-discrimination legislation. This principle is a right for all employees and at the same time an obligation for employers.

The employer must remunerate equally all employees who have the “same” and “equivalent” work. According to Supreme Court case law, the criterion “same work” is satisfied when different persons have the same labor qualities (including qualification, professional skills and competences). On the other hand, “equivalent work” is done when various persons with different professional qualifications and characteristics deliver products of the same value and utility. In order to apply the principle of equal treatment, the work performed by two or more employees must also be comparable. The formal title of a job position is not always a clear sign that employees are entitled to receive equal remuneration.

In one of its cases, the Supreme Court has found that the jobs of flight managers working at two airports were not comparable because of different levels of

stress and intensity of the work in these airports. Although the job descriptions and the working time of both employees were the same, they fairly received different remuneration. The court found no discrimination in this case.

No discrimination was found in a case where one research worker was treated differently from another research worker working in the same service. In this case, the worker treated differently did not “fit-in” as well in the team and therefore was not as efficient as his colleague. The Supreme Court has again stated that it is not the job position itself, but the actual work done that has to be compared.

In another case, the Supreme Court found that there was no discrimination in a case where a driver in a company argued discrimination based on remuneration against three other drivers. All three had a different car to take care of and the court considered that they were therefore in different situations.

In support of these cases, the court has found it fair that an employer give lower remuneration to a pregnant woman in comparison to a man holding the same job position. The Court reasoned that the pregnant woman was advisedly assigned lighter working tasks and did not go on business trips and – these activities were all transferred to her colleague.

Other court decisions have resulted in the conclusion that an employee who returns from maternity leave has to be equally paid. Respectively, her remuneration has to be increased by the same amount as that of her colleagues in the same job position,

regardless of the fact that she has been absent from work for a certain period of time.

Another important conclusion based on court practice is that, in comparing the professional characteristics of two employees, education should be taken into account only when it is explicitly required for doing the work.

We would like to highlight the fact that the Bulgarian Supreme Court explicitly pronounced that the amount of the remuneration paid cannot depend on the opinion expressed and the behavior of the employee outside their job responsibilities. Even the fact that an employee refused to return part of the remuneration received by mistake (when the law allowed him to refuse), may not be considered as a circumstance allowing the employer not to increase the employee’s remuneration in future if it is due. The remuneration must not serve as a tool for punishment, and each act of the employer in this respect shall be considered as a form of discrimination.

Finally, the interpretation of the relevant legal provision leads to the conclusion that equality concerns all types of remuneration paid to employees, no matter whether in cash or in kind.

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# Colombia

## Discrimination against people with recognized health conditions in Colombia

Colombia has been experiencing a particular situation of discrimination in the workplace against people suffering from a recognized health condition. On the one hand, there are regulations that allow certain benefits to employers that hire handicapped employees. But on the other, Colombian High Courts of Justice protect this social group to the point that, more often than not, employers choose not to enjoy the aforementioned benefits.

Colombian Labor Law protects handicapped employees by establishing some limits to the legal conditions of their hiring, providing them with reinforced labor stability that restricts the liberty of employers to terminate their employment agreements under certain circumstances.

Parallel to this labor protection, Colombian Law also encourages the hiring of handicapped employees. Law 361 of 1997 offers different benefits to employers that hire people whose disability is classified as impacting more than 25% of their body. Among these benefits, employers are allowed to deduct on their income tax returns 200% of the salaries and fringe benefits paid to handicapped employees; apprentices' mandatory quota is decreased by 50% if handicapped trainees are recruited and employers can also be beneficiaries of soft credits granted by the Colombian Government. Also, Law 789 of 2002 established that employers of disabled people are exempt from paying

payroll provided that the employees' remuneration does not exceed three minimum legal monthly wages.

On paper, these benefits represent a convenient way of implementing measures for social integration of disabled people, the promotion of employment and the extension of social security to a larger portion of the Colombian population. However, in practice, the implementation of these benefits has not yielded the expected results due to strong labor protection established in jurisprudence for people with a recognized health condition.

### Discrimination as a consequence

Hiring handicapped individuals with a recognized health condition in Colombia implies the risk of not being able to terminate our employment contract as freely as for employees who do not suffer from a recognized health condition.

One of the latest rulings of the Colombian Constitutional Court (T-217-14) in this respect resulted in the judicial order of rehiring an employee whose employment contract was terminated according to all legal requirements. However, the employee proved that he was suffering from a recognized health condition by then (he was not classified as handicapped or suffering from a disability), and therefore the employer could not terminate the employment contract.

Given the line of jurisprudence that the High Courts of Justice in Colombia have rendered in this sense, employers prefer to leave aside the legal benefits of hiring

handicapped people, and rather hire people in normal health condition.

Some believe that it is necessary to harmonize legislation in this sense, and to push for an alignment of labor conditions between employees in good health and employees suffering for a recognized health condition, particularly regarding the requirements to terminate their employment contracts. In other words, employers should be able to trust the legal system and the labor rules so the hiring of handicapped individuals or any person with a recognized health condition does not represent a burden that ends up as a discrimination dispute.

In conclusion, some feel that Colombia needs to create a balance in the legal field with the cooperation of the judicial branch because, at the moment, the protection established for handicapped employees has been overly reinforced. Indeed, initially Colombian law protected disabled employees, whereas it now covers individuals suffering from recognized health conditions as well.

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## **New EU Court ruling: obesity is no disability**

On 19 December 2014, the EU Court ruled that EU law does not involve a general principle to prohibit discrimination on grounds of fatness/obesity and that fatness or obesity does not in itself constitute a disability within the meaning of Directive 2000/78.

This decision, in a preliminary ruling given on reference from a Danish court, represents the first time that the EU Court has addressed this issue. Local Government Denmark and the Danish municipality were parties to this litigation.

The case concerned a male employee who, after 15 years of employment with a municipality as a childminder was dismissed because due to redundancy and declining birth rates. During his employment with the municipality, the employee weighed more than 160kg.

The employee's trade union issued proceedings against the municipality before the Danish District Court in Kolding, claiming compensation under the Danish Anti-Discrimination Act. The trade union claimed that the employee had been dismissed because of his fatness and that this is unlawful under EU Directive 2000/78.

The Danish District Court decided to ask the EU Court for its opinion.

## **No general principle to prohibit discrimination on grounds of fatness**

The EU Court decided that EU law does not include a general principle to prohibit discrimination on grounds of fatness/obesity. Furthermore, the court ruled that fatness or obesity does not in itself constitute a disability within the meaning of Directive 2000/78.

However, the EU Court determined that fatness/obesity may constitute a disability if:

“under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one ...”

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## Discrimination in the workplace

### Equality: a cornerstone of Finnish working life

Equality is an important value in Finnish working life and is a constitutionally protected right. Finnish legislation regarding discrimination was recently renewed. A new Non-Discrimination Act came into force on January 1, 2015. The act was extended to apply to all public and private functions, with the exception of private and family life and the practice of religion.

Discrimination protection was extended to include protection from:

- ▶ Direct and indirect discrimination, harassment and orders to discriminate
- ▶ The refusal to perform reasonable adjustments to accommodate disabled persons in order to guarantee non-discrimination in conditions and treatment
- ▶ Discrimination based on assumption or association

The range of use for compensation for discrimination and anti-discriminatory countermeasures was also extended, and the maximum limit for compensation was eliminated.

In addition, with the new law, companies with more than 30 employees on a regular basis must prepare an equality encouragement plan, which should be discussed with employees or their representatives.

### Gender equality at the forefront of legislation

Another important law regarding discrimination and equality is the Finnish Act on Equality between Women and Men. The objectives of the act are to prevent discrimination based on gender and to promote equality between women and men, so as to improve the status of women, particularly in working life. Along with the new Non-Discrimination Act, the discrimination prohibitions in the Act on Equality between Women and Men

were extended to include protection from discrimination based on gender identity and gender expression.

In Finland, the number of women on listed companies' boards of directors is high compared with that in many other EU countries. The Finnish Government has set a goal to increase the percentage of women in middle-sized and large listed companies' boards of directors up to 40% by 2020.

However, the Government has also renounced the proposal for a quota for women's participation in working life. The Finnish Chamber of Commerce (FCC) has strongly rejected the proposed quota and prefers to stick to soft law regulation.

The number of women on the boards of directors of listed companies has doubled in the five years following the addition to the Finnish Corporate Governance rules of a requirement that boards of directors should include representatives of both sexes. The FCC suggests that more women should be encouraged to join operational business leadership, because it is from among these positions that board members are most often selected.

### Anti-discriminatory recruitment policies and employee treatment

Regarding discrimination in professional contexts, the Finnish Employment Contracts Act draws from the Non-Discrimination Act and the Act on Equality between Women and Men. The Finnish Employment Contracts Act states that employers shall not exercise any unjustified discrimination against employees on the basis of age, health, disability, nationality, ethnicity, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or any other comparable circumstance.

According to the Employment Contracts Act, less favorable employment terms than those applicable to other employment relationships must not be applied to fixed-term and part-time employment relationships, without proper and justified

reason, merely because of the duration of the employment contract or the number of working hours. Furthermore, employers must also treat employees equally in all other aspects, unless there is an acceptable cause for derogation deriving from the duties and position of the employees. Employers must also observe the prohibition of discrimination when recruiting employees.

The legislation in Finland does allow positive discrimination. Positive discrimination must always serve the purpose of achieving genuine equality in order to prevent, and to minimize the disadvantages caused by, the various types of discrimination previously outlined.

Discrimination can be a criminal offence in Finland. Those convicted can face a fine or imprisonment of up to six months.

### Handling discrimination issues and diversity at the workplace

Employees are allowed to wear their own scarves. This situation is mostly the result of the settlement of a year-long dispute in which a domestic bus transfer company prohibited a bus driver from wearing a turban while behind the steering wheel. Authorities perceived this as discriminatory behavior. The dispute was finally resolved with an agreement of the employer and employee unions, and resulted in employees being allowed to include headgear as part of their workwear.

When managed well, multicultural and diverse teams can be a great asset for a company. Diversity can, however, also create conflicts within the work community when common ground rules are missing. The key to non-discrimination at the workplace lies in proactive leadership and leadership training for all levels of personnel.

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The manner in which the concept of discrimination is understood and treated varies greatly, depending on the cultural prism through which the issue is observed. Indeed, the manner in which different cultures treat issues such as age and gender defines how discrimination at work is managed.

Discrimination at work has become a key legal and HR issue given that, in a globalizing world, each company's workforce is bound to become more culturally diverse.

## Discrimination and the veil at work

The notion of discrimination in France covers a vast area, which is not exclusively tied to the usual questions of race, gender and sexual orientation. Preventing discrimination at work in France also includes preventing discrimination based on political activities, such as trade union organization, and religious belief. Both of these issues are particularly sensitive in France, for reasons that are both historical and contemporary. French employees are protected against discrimination at work by two types of mechanisms: independent administrative authorities, and the law.

Independent administrative authorities in France have an impact on the protection of employees against discrimination through their "soft power." The main administrative authority is the "Defender of rights." Its function is to protect individuals against discrimination, in particular at work.

Individuals who feel they have been the victim of discrimination have the right to file a claim before the Defender of rights. The Defender of rights then renders a decision on the matter that is not legally binding, but which has strong reiterated evidentiary value in the case of litigation.

French law prohibits discrimination based on any one of 20 criteria, which include political opinions, age, religious belief, health and gender. Therefore, in principle, there can be no differences in treatment based on any of the 20 criteria, unless such differences are due to an essential professional requirement and under the condition that the objective of such a difference in treatment is justified by the task at hand and the means proportionate to its goal.

One of the most high-profile recent cases regarding discrimination at work involves a veiled employee and her employer. A French nursery had provided in its internal rules and regulations that "independently of each employee's freedom of thought and belief, employees shall abide by the principles of neutrality and secularism [*laïcité* in French]." After returning from parental leave, the employee came to work wearing a head veil and was dismissed for not complying with the provisions of the nursery's rules and regulations.

The employee filed a claim before the French employment court, on 9 February 2009, for discriminatory dismissal based on religious practices. Following a lengthy and complex legal process, the French Supreme Court's plenary assembly

rendered its decision on June 16, 2014 confirming that the dismissal was lawful and therefore that the nursery's internal rules and regulations were not discriminatory. Paradoxically, the Defender of rights had rendered an opinion stating that the dismissal was discriminatory.

The French Supreme Court's plenary assembly the principle that any valid discrimination must be due to an essential professional requirement, and that the objective of such a difference in treatment is justified by the task at hand and the means proportionate to its goal.

It then emphasized two key elements. First, given that the task at hand required that the employee be in contact with young children and that the nursery was not religiously oriented, discrimination was due to an essential professional requirement and the objective of such a difference in treatment is justified by the task at hand. Second, the French Supreme Court's plenary assembly insisted on the fact that the nursery was a small company with a limited number of employees. This raises the question as to whether such internal rules and regulations could apply to a large company which, could simply propose an alternate position to the employee.

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# Germany

## German Act on Equal Treatment

It has been eight years since the German Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* or AGG) came into force. The AGG prohibits any discrimination against employees because of their race and ethnic origin, gender, religion and belief, disability, age and sexual identity.

The case law – be it under the German jurisdiction or on a European level – has added clarity to a number of discussions around the concept of equal treatment and prohibition against discrimination. At the same time, however, the amount of case law also demonstrates that ignorance of the law still exists.

In practice, potential risks of discriminatory behavior in particular exist with regards to job advertisements, job interviews, promotions, terminations and salary. Without knowledge of the scope and challenges of the AGG, employers face several risks of claims for compensation or even invalid agreements with their employees.

“Employees,” according to the AGG, also refers to trainees, candidates, temporary workers and others. Furthermore, even contractors and members of the board fall within the scope of the act.

A common example of discriminatory behavior is a company advertising for a “skilled worker between 20 and 30 years” or offering internal training courses for “employees younger than 35 years.”

Whereas the former example is presumably well known and considered by companies, the latter example is often not considered (though not deliberately). However, consider a case where the internal training was offered to female employees only but not to their male colleagues. Would that be discriminatory behavior?

What makes the application of the AGG rather complex in practice is the fact that discrimination cannot merely occur as direct discrimination, but also in terms of indirect discrimination. Furthermore, not each and every instance of discrimination is prohibited according to the AGG. The act also provides for a number of specific grounds for justification.

For instance, a quite recent case in Germany (that demonstrated the complexity and difficulty relating to the existence of discrimination and its potential justification) concerned a contractual provision that granted older employees higher leave (holiday) entitlements than younger employees. This is clear discrimination based on age to the disadvantage of younger employees. The German Federal Labor Court, however, determined that, in this case, discrimination was utterly justified since it was reasonable that the older employees were more worn out from work than their younger colleagues and, therefore, required more leave. The court decided that assessment of a justification always requires an analysis of the work that is performed within the respective company. This is to say, that higher leave entitlements for older employees is not justified in every case.

Again, this reservation was in line with an older decision of the Federal Labor Court in 2012, where it had ruled that such distinction was not justified at all.

Discriminatory behavior in violation of the AGG grants employees particular rights, such as an employer’s liability in terms of payments to the person discriminated against. With regard to any immaterial damages, the employer’s liability does not even require any actual fault or negligence of the employer.

The amount of compensation to be paid is determined by the courts on a case-by-case basis. With regard to discrimination during an application procedure, for instance, compensation can be an amount of up to three months’ gross salary. In case of missing a promotion for discriminatory reasons, the disadvantaged employee could claim the difference in remuneration (as material damage) plus compensation (for immaterial damage) of even more than three months’ gross salary.

That said, employers are well advised to undertake any required means in order to protect their employees against discrimination.

In order to minimize liability, employers should, for example, analyze where in their company discrimination could occur, and implement methods to prevent it. Actions taken by a company can, for instance, involve the execution of a relevant code of conduct, implementation of regular training for management and employees, and regular reviews of existing contractual frameworks by adapting the most recent court decisions.

In summary, organizations should monitor their relevant processes and tailor instruments that help to implement the standards and requirements under the AGG. This will not only support the achievement of equal treatment, but at the same time minimize the company’s liability, if any.

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## Discrimination in Greece

The principle of equality, established by article 4, paragraph 1 of the Greek Constitution, provides for the equality of Greek citizens before the law. As a result, the legislator is bound by the aforementioned provision, when it comes to regulating substantially similar relations or situations, not to treat these cases inconsistently by enacting exceptions and by making discriminations, except if such treatment is imposed by social reasons or reasons of public interest. The same principle is applied by Greek courts to the statutory terms of the Collective Labor Agreements (CLA) and of the Arbitration Awards (AA), since these terms have the force of law and are directly and mandatorily applicable.

Apart from this, there are many constitutional provisions (mainly setting out general principles) enshrining human rights, which directly or indirectly address discrimination. Article 25 of the Greek Constitution is immensely important because it clearly states that private employers must respect the constitutional rights of their employees (e.g., the rights of equality and non-discrimination). In the Civil Code (civil law), there are also certain open-ended clauses that could be invoked by persons who have suffered discrimination and who are seeking equal treatment and non-discrimination in their employment.

Furthermore, at the normative level (legal rules of the Greek legal system), Law 3304/2005 implements the European Council Directives 2000/43/EC (on equal treatment between persons irrespective of racial or ethnic origin) and 2000/78/EC (on equal treatment in employment and occupation). This law prohibits any direct or indirect discrimination on the grounds

of racial or ethnic origin, religion, belief, disability, age or sexual orientation in employment and occupation.

In addition, Law 3895/2010 incorporates the provisions of the European Council Directive 2006/54/EC on equal opportunities and equal treatment for men and women in matters of employment and occupation. This law prohibits any direct or indirect discrimination on the grounds of sex, and especially in relation to marital status, in matters of employment and occupation.

Finally, Law 2643/1998 fosters the employment of "protected" persons. Article 2 of this law applies to private companies that operate in Greece and employ more than 50 people. Such companies must ensure that a certain percentage of their workforce is made up of persons from protected categories. These protected categories include persons with disabilities, members of large families and veterans.

Apart from the Greek courts, the main body that safeguards the implementation of the rule of equal treatment is the Greek Ombudsman. The Greek Ombudsman is an independent authority sanctioned by the Greek Constitution.

The Greek Ombudsman mediates between the public administration and citizens in order to help citizens exercise their rights effectively. The Greek Ombudsman's mission is also:

- ▶ To safeguard and promote children's rights
- ▶ To promote equal treatment and fight discrimination based on race, ethnicity, religious or other conviction, disability, age or sexual orientation, in the public sector
- ▶ To monitor and promote the application

of equal opportunities and equal treatment of men and women:

- ▶ In matters of employment, both in the public and the private sector
- ▶ In matters of men's and women's access to goods and services from the public sector

As a mediator, the Greek Ombudsman makes recommendations and proposals to the public administration and does not impose sanctions or annul illegal actions by the public administration.

The Labor Inspectorate is a governmental body that is only active in the private sector, in the field of employment and occupation. The Inspectorate acts as conciliator between employers and employees. Where it finds violations of the equal treatment principle, it can impose fines (payable to the state and not to the employee). It can also conduct independent surveys concerning discrimination, publish independent reports and make recommendations concerning discrimination. The Inspectorate has the right to hear witnesses and to demand information be supplied by the accused or by a third party (public authority or individual).

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## Discrimination at work: Italian practices and regulations

With reference to Italian anti-discrimination legislation, the general principle of equality laid down by Article 3 of the Italian Constitution states that all citizens have equal social dignity and are equal before the law, regardless of sex, race, language, religion, political opinion and personal and social conditions.

In particular, Article 37 of the Italian Constitution guarantees equal working conditions for men and women. Working conditions must allow women to carry out their essential role in the family and ensure special appropriate protection for the mother and the child.

A general principle of equal treatment in employment is also established in the *Statuto dei Lavoratori* (Law no. 300/1970, Article 15), modified by Legislative Decree no. 216/2003 implementing European Directive 2000/78/EC, which has introduced further protection against discrimination.

From a formal point of view, these provisions are compatible and complementary. Both the *Statuto* and the Decree are in compliance with the general principles laid down by the Constitution that prevails over other laws.

With particular reference to different kinds of employment contracts, Section 6 of Legislative decree no. 368/2001 on fixed-term work relationships affirms the principle of non-discrimination between permanent and fixed-term workers. Equal treatment should be guaranteed (unless objective reasons exist for other treatment) for holidays, Christmas bonuses or “13th month” payments, severance payments and any other allowances payable to comparable workers on open-ended contracts.

As well as these mentioned laws/regulations, the Italian legal system guarantees the equality at work principle in several other provisions, such as Legislative Decree no. 198/2006, Legislative Decree no. 215/2003 implementing Directive 2000/43/EC, Legislative Decree no. 5/2010 and Legislative Decree no. 151/2001.

According to Italian Law, direct discrimination occurs when a person is treated less favorably than others for reasons based on age, sex, race, language, religion, political opinion or personal and social conditions. On the other hand, indirect discrimination occurs when an apparently neutral requirement places a person in a less favorable position for discriminatory reasons, unless such a requirement, criteria or general rule is objectively justified by a legitimate aim.

In order to strengthen these mentioned principles in the workplace, some Italian companies have started to implement best practices and social policies to combat discrimination. One of the most common practices in the field of diversity and inclusion is to grant cohabiting partners the same rights as a spouse, including (i) special paid leave in the event of a wedding extended to cohabiting partners (as well as same-sex partners) and (ii) parental leave in case of illness of the child of cohabiting partners as well (or same-sex partners).

Another practice implemented by several Italian companies concerns the creation of a working group aimed at evaluating different views and opinions, respecting each employee's personal needs and promoting a workplace free from harassment and discrimination.

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## Discrimination in the workplace

Kazakhstan labor legislation prohibits any type of discrimination at work. It states that nobody can be discriminated against due to their gender, age, disability, race, nationality, language, material, social and official status, place of residence, religion, political opinion or affiliation with a class, social group or public associations.

One of the most common types of discrimination at work is associated with establishing a higher amount of salary to foreign specialists compared with local specialists. In those particular cases, the salary of foreign employees was notably higher than that of the Kazakhstan citizens working at the same position and grade. There have been a number of cases where local employees raised this issue (through strikes, filing appeals to the labor inspection or prosecutor's office, etc.).

The Kazakhstan labor authorities and prosecutor's office monitor this issue very closely, penalize such employers and often make information on the discovered facts of discrimination publicly available via the media.

Besides the discrimination based on nationality, quite often, employers tend to discriminate against employees of pre-retirement age, pregnant women or employees with babies. In particular, employers tend not to hire such employees or dismiss them first in case of work shortage. Kazakhstan's labor legislation limits the possibility of dismissal of such employees under the employer's initiative. Moreover, there is criminal liability for unreasonable refusal to hire, or illegal dismissal of, pregnant women or women with children under three years of age.

Language discrimination is an interesting case. When employers indicate knowledge of foreign languages as a pre-requisite to potential candidates, the labor authorities view it as language discrimination.

According to labor authorities, employers cannot turn down candidates because they do not know foreign languages. Being able to speak languages that are not official ones in Kazakhstan cannot be a pre-requisite for employment. Such prohibitions are surprising especially when employers need specialists, such as lawyers, with knowledge of English; labor authorities claim that they should hire local lawyers and have a translator.

The Kazakhstan state authorities actively work to eliminate discrimination at work. This is done by increasing the level and amount of liability for discrimination, and taking certain measures to improve the quality of the local labor market. For example, the current Code on Administrative Offences envisages the imposition of a fine for discrimination in terms of the salary level and requirements during recruitment process in the amount of up to US\$1,000.

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# Mexico

## A glance at labor discrimination in Mexico

### 1. Statutory framework

The Mexican Constitution sets forth, through several provisions, the right of individuals – whether Mexican nationals or foreigners – to “freedom of work,” as long as the activity is legal. This is sustained by the international treaties signed and ratified by Mexico,<sup>1</sup> and by a vast statutory framework regarding labor relationships, including the Federal Labor Law (*Ley Federal del Trabajo* or FLL), Mexico’s main regulation of the matter.

In 2001, Article One of the Mexican Constitution was amended to include a non-discrimination principle.

In 2003, the Federal Law to Prevent and Eradicate Discrimination (*Ley Federal para Prevenir y Eliminar la Discriminación* or LFPED) was enacted. It granted the National Council to Prevent and Eradicate Discrimination (*Consejo Nacional para Prevenir la Discriminación* or CONAPRED) the necessary powers to support efficiently and protect the rights and obligations set forth in that law.

### 2. Exposed individuals and communities in Mexico

- ▶ Women, whose participation in the work force has more than doubled over the last three decades
- ▶ Minors are legally permitted to work, with certain restrictions, at age 14. They are freely allowed to join the workforce at age 16 (10.7% of the population is aged between 15 and 17 work in Mexico)
- ▶ The elderly population, for legal purposes in Mexico, is defined as those of 60 years of age and above
- ▶ Individuals of certain ethnic origins
- ▶ Those with sexual orientation disabilities or their physical appearance

- ▶ Religious minorities, people who suffer from diseases, such as HIV and immigrants are considered as exposed individuals and communities in Mexico

### 3. LFPED and CONAPRED

LFPED is not specifically a labor regulation. Rather, it contains provisions regarding discrimination in general. It is an acceptable law that contains, in general terms, different aspects, such as:

- ▶ A definition of discrimination
- ▶ The establishment of differences among practices in order to create equal opportunities
- ▶ A broad list of actions that must be followed in order to prevent discrimination practices
- ▶ Measures that employers must implement

### 4. The CONAPRED

Some of CONAPRED’s powers include requesting complementary reports and documents relating to the matter at hand; performing inspections where the alleged conduct occurred and questioning the individuals involved; summoning any individual to appear as a witness or expert to testify; and taking any other actions deemed necessary and in the best interests of each matter.

It also has power to build programs, issue mandatory and binding resolutions, pursue any action whatsoever on behalf of individuals and to levy penalties in cases where discriminatory activity or a reoccurrence of such is proven. These may be imposed in a joint or separate manner if necessary. The penalties imposed can include restitution of the infringed right; indemnification; public admonition; a public or private apology; or requesting any kind of warranty to prevent any reoccurrence of the discriminatory conduct. These penalties shall be imposed

without prejudice of all civil, criminal or administrative responsibility the affected party may pursue.

A discrimination action is pursued by the filing of a complaint (administrative process) with CONAPRED. If, once the investigation stage has concluded, said discriminatory acts have not been proven, CONAPRED must issue a “no discrimination” resolution.

A National Discrimination Report, issued on a yearly basis by CONAPRED, brings forth positive aspects and figures that encourage the institutions and non-governmental organizations to continue with their good efforts.

Finally, due to discrimination in the workplace being a recent topic in Mexico, there are not yet any judicial or labor precedents regarding discrimination that provide us with clarification on how the authorities will resolve these matters.

In addition, even when LFPED is supporting the FLL for discrimination issues, we consider that an amendment to the FLL is necessary to clarify several provisions and procedures, because there are only three articles in the law that refer to discriminatory conduct.

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## Equal treatment in employment in the Netherlands

### Legal framework

According to Article 1 of the Constitution, all persons in the Netherlands should be treated equally in equal circumstances. A number of acts has been adopted to clarify the meaning of this article, in particular in employment relations.

Discrimination in office, occupation and trade based on race, religion, conviction, sex or any other ground is prohibited under criminal law. Criminal law, however, is only applied in extreme cases of discrimination. In general, anti-discrimination cases are carried out on the basis of civil law statutes and procedures.

Legal instruments to fight discrimination are the Dutch equal treatment acts, the Dutch Civil Code, EU directives and international conventions. The Equal Treatment Act explicitly prohibits unequal treatment on grounds of gender, marital status, race, nationality, religion, belief, political opinion and hetero- or homosexual preference.

In employment relations, unequal treatment on grounds of part-time or full-time employment, handicap, chronic illness, age or temporary employment contracts is prohibited as well. These prohibitions have been further elaborated in several equal treatment laws and apply to all aspects of employment and professions, e.g., advertising, recruitment, appointment, terms and conditions of employment including salary and dismissal.

Finally, the Working Conditions Act obliges employers to list and assess all the risks, including discrimination, posed by the working conditions. Based on this act, the employer has to take all necessary actions to eliminate the identified risks.

### Direct or indirect discrimination

The Dutch equal treatment acts are founded on making a direct and an indirect distinction based on a defined discriminatory element.

Direct discrimination, only allowed if explicitly foreseen in legal exceptions, involves a straight link to one of the forbidden discriminatory grounds. For example, dismissing a person because of their age is a case of direct discrimination.

Indirect discrimination occurs where the effect of certain requirements imposed by an employer have an adverse impact, disproportionately on certain employees. For example, an employer requires staff to commit working from 20:00 to 23:00 indirectly discriminating against women who are more likely to be primary caretakers of children.

In order to make a distinction based on an objective ground, it must be demonstrated that the distinction is made to serve a legitimate purpose. The applicable criteria must comply with the demands of proportionality, legitimacy and efficiency.

### The (actual) practice

Employees are on average reluctant to file a discrimination case in court. In 2014, only about 10 cases were dealt with by the court. Most employees fear that the potential private benefits from starting a court case do not outweigh the expected private costs and, therefore, they would rather involve the Human Rights Committee.

The Committee can examine an alleged violation of equal treatment laws on request, or of its own accord, and will announce its ruling to the applicant and the alleged violator.

In 2014, the Committee received approximately 1,900 complaints. Most complaints (35%) concern discrimination on grounds of race. About 25% of the complaints concern gender discrimination and 20% concerns discrimination based on disability.

The committee's rulings are not legally binding so employers are not bound to act on the Committee's ruling. However, judges are obligated to take into account such rulings when rendering a verdict. Besides, the rulings fulfil an important social function as no employer prefers to be associated with discrimination in public.

### Noticeable case

In a recent case currently pending at the Court of Appeals, an individual filed a lawsuit alleging discrimination based on gender.

This case highlighted the importance of assessment against objective criteria and recordkeeping for an employer in order to avoid discrimination. In this case, a female candidate applied for a job as lecturer at the University of Amsterdam but she was not shortlisted. She filed a complaint at the Human Rights Committee that subsequently decided that the University discriminated against her because of her gender while recruiting for a lecturer role for which she was fully qualified. The burden of proving that discrimination was not the reason for failing to shortlist her fell to the University but the University could not provide evidence that this candidate had not been discriminated against.

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# New Zealand

## Anti-discrimination law in New Zealand

In New Zealand, employees are protected from workplace discrimination under both the Employment Relations Act and the Human Rights Act. Each Act has a slightly different focus and a different claims mechanism. Employees may choose to bring a claim under either Act, but not both. The ambit of the Human Rights Act is not restricted to employment situations, but can be used by employees as an alternative to the Employment Relations Act provisions.

In our experience, discrimination claims in New Zealand are much rarer than in other similar jurisdictions, such as the United Kingdom, the United States and Australia, and represent less than 2% of all labor litigation in 2014.

### Unlawful discrimination

Both Acts prevent an employer or a representative of the employer from refusing to offer work or benefits, dismissing an employee, subjecting an employee to a detriment or retiring an employee on a number of protected grounds, including:

- ▶ Sex and sexual orientation
- ▶ Color, race, national or ethnic origins
- ▶ Disability
- ▶ Involvement in union activities or on grounds of health and safety
- ▶ Marital, family or employment status
- ▶ Religious or ethical belief
- ▶ Age
- ▶ Political opinion

Employees are also protected if the protected ground relates either to the employee or to the employee's relatives or associates. For example, an employee is protected if she is discriminated against on grounds of her brother being homosexual.

### Exceptions

There are a number of exceptions to the Acts, including for reasons of health and safety, privacy, authenticity and other legal

requirements. For example, actors can be required to be of a particular sex or race, superannuation schemes can have "age related" criteria (backed up by actuarial data) and religious organizations can discriminate on grounds of religion and sex when required to in accordance with their religious doctrine, rules or customs.

There are also exceptions to allow for positive discrimination, both in relation to pregnancy, childbirth and caring responsibilities and also, more generally, in relation to classes of individuals who need assistance to achieve an equal place with other members of the community.

### Harassment

There are specific protections against sexual and racial harassment by the employer or an employer representative. Employers are also required to protect employees against sexual harassment by clients or customers by investigating any complaint and, if the complaint is upheld, taking all practicable steps to prevent any repetition of the conduct. If practicable steps are not taken, any further harassment is deemed to be that of the employer. Other types of harassment and bullying are dealt with by way of a general discrimination claim or a personal grievance for unjustified disadvantage.

### Claims mechanism

Employees may bring a discrimination claim by either:

- ▶ Raising a personal grievance with the Employment Relations Authority under the Employment Relations Act; or
- ▶ Making a complaint to the Human Rights Commission under the Human Rights Act.

When an employee files a claim with the Employment Relations Authority, the parties will usually be directed to government-provided mediation in the first instance (if they have not already attended). If mediation is unsuccessful, the Authority will convene an investigation meeting to consider the claim. This involves

a fairly informal hearing, following which the authority will determine whether discrimination has occurred and, if so, what remedies are appropriate. Remedies can include loss of benefits and wages, compensation for hurt and humiliation or recommendations for the employer. If either party is dissatisfied with the determination, they can apply to the Employment Court for a new hearing.

When a claim is brought before the Human Rights Commission, the Commissioner will make an initial decision as to whether to take action in respect of the claim. If the Commissioner decides not to take any action, the claimant may still personally bring proceedings before the Human Rights Review Tribunal in respect of the claim. If the Commissioner decides to take action in respect of the complaint, the Commissioner will seek information about the complaint and endeavor to settle it, where possible. If settlement cannot be reached, the Commissioner may refer the matter to the Director of Human Rights Proceedings, who will decide whether to represent the claimant before the Human Rights Review Tribunal. Claims can also be brought before the Human Rights Review Tribunal at this stage by the claimant personally, but these must be funded by the claimant. Remedies are similar to those awarded by the Employment Relations Authority.

The preferred claims mechanism will depend on cost (if the employees are represented by the Director of Human Rights Proceedings, they will not bear any cost), timing (there are different periods in which a claim may be raised), timeliness (authority hearings generally take place much more quickly) and complexity (the authority process is usually simpler to negotiate and gives the claimant more control).

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## Discrimination in the workplace: the right to insight into colleagues' salaries

### 1. New anti-discrimination legislation

In 2014, four new anti-discrimination laws were passed and entered into force in Norway: a new Gender Equality Act, the Prohibition against Discrimination on Grounds of Sexual Orientation Act, the Prohibition against Discrimination on Grounds of Ethnicity Act and the Anti-Discrimination and Accessibility Act. These acts form the core of anti-discrimination legislation in Norway. In addition, the Working Environment Act prohibits direct and indirect discrimination at the workplace on the grounds of political views, membership of a trade union and age.

The anti-discrimination laws are similar in structure and, to a large extent, in content. Among other things, the rules on redress and compensation are the same. The laws make few material changes in the former legislation, and uphold prohibitions against direct and indirect discrimination, harassment, incitement and participation in discrimination.

The main purpose of the new legislation was to simplify the former legislation. One material change that is relevant in the workplace, however, is regulation of the right to insight into colleagues' salaries. The purpose of these new provisions is to contribute to greater openness about salaries in the workplace and to ensure effective enforcement of the prohibition against wage discrimination.

### 2. Right to insight into colleagues' salaries

The new anti-discrimination laws entitle employees who suspect they are being discriminated against in terms of salary to insight into the salary conditions of their colleagues by requiring the employer to provide written confirmation of the salary levels and the criteria used for determining the salaries of other employees with whom the employees compare themselves.

The right of insight for the employee is matched by an obligation for the employer to provide the information. The employee's right of insight and the employer's disclosure obligation apply only where the grounds for discrimination fall within the scope of the new anti-discrimination legislation, i.e., where there is an allegation of discrimination on the grounds of gender, ethnicity, religion, belief, disability, sexual orientation, sexual identity or sexual expression. Since there is no similar provision in the Working Environment Act, the employee has no right of insight into, and the employer has no obligation to disclose, salary information in cases where there is an allegation of discrimination on the grounds of political views, membership of a trade union, age, or part-time or temporary employment.

The preparatory work to the new anti-discrimination legislation indicates that the requirement of suspicion entails that the employee must cite the specific grounds for the discrimination, such as sex or ethnicity, when making a claim for insight into salary information. In addition, the suspicion must be based on a specific circumstance, such as equal work duties, seniority or category of position. An employee may therefore only demand insight into the salaries of colleagues who have the same or very similar work duties and positions.

The employer has a duty to inform the employees concerned about the information that has been disclosed and to whom.

An employee who is granted insight into salary information is bound by confidentiality with regard to the information received and the employer shall require the employee to sign a confidentiality agreement. Breach of confidentiality carries no particular sanctions but will constitute breach of the employment contract and may therefore, depending on the circumstances, have consequences for the employment relationship.

If the employer fails to comply with the obligation to disclose salary information, the employee may appeal to the Equality and Anti-Discrimination Ombudsman, who may order the employer to disclose the information. Having reviewed the disclosed information, employees who still believe they are being discriminated against may take further legal action. An employee who is discriminated against may claim both economic and non-economic compensation.

The Government's quoted objective with the new legislation is to give everyone equal opportunities and the freedom to make their own choices, to strengthen equality and to improve protection against discrimination for everyone. The anti-discrimination legislation is enforced by the Equality and Anti-Discrimination Ombudsman, and anyone experiencing discrimination may issue a complaint to the Ombudsman. Appeals against the decisions of the Equality and Anti-Discrimination Ombudsman are heard by the Equality and Discrimination Tribunal.

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# Poland

Polish regulations regarding discrimination in the workplace are specified in the act of June 23, 1974 – the Labour code. The present provisions are mainly a result of implementing the EU anti-discrimination directives, such as Directive 2006/54/EC of the European Parliament and of the Council of July 5, 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The Labour code - as a one of basic principles of labour law - adopts the principle of equality of employees. The said principle grants employees equal rights with respect to the same performance of the same duties; this applies in particular to the equal treatment of men and women in employment. The Labour code also establishes a prohibition of discrimination in employment, direct or indirect, in particular with respect to personal features such as: gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or an indefinite period of time full or part time.

Employees should be treated equally in relation to establishing and terminating an employment relationship, performance of employment, remuneration and promotion conditions, as well as access to training in order to improve professional qualifications. According to the established jurisprudence, the discrimination is a qualified form of an infringement of the principle of equality.

The Polish Labour code provides for two types of discrimination: direct and indirect. Direct discrimination means less advantageous treatment of an employee due to his or her personal feature (gender, age, disability etc.) in the similar situation compared to other employees. Indirect discrimination is taken to occur where

an apparently neutral criterion places or would place a number of employees belonging to a particular group on the grounds of one or more features at a disproportionate disadvantage, or at a particular disadvantage in relation to the establishment and termination of an employment relationship, performance of employment, remuneration and promotion conditions, as well as access to training in order to improve professional qualifications. Indirect discrimination does not occur where the criterion is objectively justified by a legitimate aim to be achieved, and the means of achieving that aim are appropriate and necessary. Harassment and sexual harassment are also considered discrimination.

A particular act is not considered discrimination if it is proportionate and legitimately differentiates the situation of an employee, such as applying means that differentiate the legal situation of an employee with respect to the protection of parenthood or disability or applying the criterion of the employment period in establishing employment and dismissal conditions. What is more, the Labour code provides the possibility of positive discrimination, stating that the principle of equal treatment in employment is not violated by conduct undertaken for a certain period of time, aimed at creating equal opportunities for a number of employees distinguished by one or more personal features, by reducing the actual inequalities for the advantage of such employees.

A person whose rights were violated by the employer has the right to compensation of at least the amount of the minimum remuneration for work (currently ca. EUR 420). The Labour code does not set the maximum compensation level. During the court proceeds, the employer is responsible for proving that a particular action is not prohibited discrimination or that the discrimination was justified.

The above regulations do not apply to persons employed on the basis of civil law agreements, such as contracts for services' provision or contracts for specific tasks. Such employees are protected by more general provisions of the Act on December 3, 2010 on implementing certain provisions of the EU regarding equal treatment. In case of suffering from unequal treatment in scope of conditions of undertaking or performing work on such conditions, a person is entitled to compensation according to general rules provided in the civil law. The exemption from these general rules is that the person shall only substantiate the fact of unequal treatment. The Act also establishes a prohibition of any negative treatment of a person who exercised his or her rights due to a violation of the principle of equal treatment.

The anti-discrimination regulations are not always properly used in practice. Cases regarding discrimination in the workplace are still rare. What is more, the report prepared by the Polish Anti-Discrimination Association showed that during the period of 2004-2011 nearly 65% of such cases in the first instance ended in a dismissal of lawsuits. As regards the act on implementing certain provisions of the EU regarding equal treatment, in the years 2011-2012 in Polish courts there was no proceeding conducted on the grounds of violating its provisions.

The main reason is lack of knowledge of the rights of employees and the fear of retaliation for exercising their rights. Therefore raising awareness regarding discrimination in Poland is an important objective for the upcoming years.

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## A different retirement age for men and women – discrimination on the grounds of sex

In May 2014, the National Council for Combating Discrimination (NCCD) issued a press release on some cases of female nurses dismissed on the grounds that they reached the standard retirement age established by social security legislation.

Thus, for a short period of time (i.e., 22 days), a law was in force establishing that the nurses retire according to the legal provisions (i.e., pension law). Subsequently, the law was amended, establishing that the nurses retire at age 65, irrespective of gender.

However, based on the provisions that were in force for 22 days, the employers requested that female nurses who reached the standard retirement age retire. Otherwise, they would be dismissed.

Pursuant to Romanian pension law, the standard retirement age is 63 for women and 65 for men, implemented progressively.

Although this two-year gap between is considered by the authorities a positive discrimination, in many cases, women who are forced to retire earlier than men suffer substantial financial losses due to the low value of their pension.

The Constitutional Court of Romania ruled several times on the constitutionality of the gap between the standard retirement ages of men and women, mentioning that the equalization of retirement age is a social process that should be accomplished progressively.

Also, the Constitutional Court considered this gap as a protection measure for women and, therefore, an allowed piece of positive discrimination.

Despite the position of the Constitutional Court, the NCCD stated firmly in its press release that the actions of employers who are forcing their female employees to retire before the age of 65 are discriminatory on grounds of sex, and requested that the employers stop such actions immediately.

Further, in December 2014, NCCD issued a decision in a case filed by a nurse who was forced to retire when she reached the standard retirement age.

NCCD mentioned that the traditional role of a woman in society of mother and wife should no longer be a reason to have differences between genders. Thus, pension legislation should be interpreted in the sense that the woman must decide whether she wants to continue working until 65, or retire when she reaches the standard retirement age of 63 for women. She should be the one to determine if the two-year gap is positive discrimination or a disadvantage for her.

Therefore, forcing women to retire at an earlier age than men or dismissing them if they refuse to retire is an act of discrimination on grounds of sex, according to the NCCD.

Although these acts of discrimination in the medical field were “resolved” by the amendment to the specific legislation, this issue is still open in many other domains.

The Romanian Labor Code provides that the employment an contract terminates by law when the conditions for retirement are met (i.e., standard retirement age and minimum contribution stage). Consequently, when such conditions are met, even if the female employee wishes to continue working until 65, it is up to the employer to decide if employment continues or not. In many cases, especially in the public sector (i.e., education), continuing the employment relationship is not possible due to headcount restrictions.

In our view, in order to avoid misinterpretation, current legislation should specifically mention that retiring before age 65 is a right for women and not an obligation.

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## Non-discrimination in the workplace for health reasons in Spain

Traditionally, the Spanish Supreme Court has been reluctant to declare null and void dismissals from the workplace related to illnesses that prevent employees from attending work, or from working at full capacity, during temporary periods. During temporary incapacity an employee might be dismissed under such circumstances without any justification. Such dismissals are usually reputed to be unfair, which entitles the employee to a severance payment.

This situation has raised intense debate as to whether this kind of dismissal should be considered a violation of the constitutional principle of non-discrimination and, consequently, be declared null and void.

On the one hand, non-discrimination is a constitutional fundamental right, which implies that any dismissal based on discriminative grounds shall be reputed null and void. On the other hand, the extent to which health might fall within the scope of the non-discrimination right is uncertain. Moreover, albeit a constitutional right, the right to health is not a fundamental right. Therefore, in principle, it is not safeguarded through null dismissal declarations by the Social Courts of Justice.

All in all, this rather complex situation has been dealt with in a case-by-case approach by the Spanish National Courts, which have been deeply influenced by European Court of Justice (ECJ) case law and some EU regulations. The main guidelines to help understand Spanish case law related to this matter are the following:

1. When it comes to deciding if a dismissal grounded on an illness suffered by an employee is discriminatory, the Constitutional and Supreme Courts have often assessed whether such illness is socially "stigmatized." This happens clearly, for instance, if the dismissed employee is infected with the AIDS virus.
2. If the illness itself does not justify a dismissal, it is necessary that the illness have a negative impact to the company. The undesirable economic impact that generally results from nonattendance at the workplace by healthy employees is usually the cause alleged by the employers dismissing sick employees.
3. The Spanish Constitution does not explicitly include health in the right to non-discrimination, and neither do the (Treaty on the Functioning of the European Union) TFEU and the Council Directive 2000/78/CE establishing a general framework for equal treatment in employment and occupation. However, both the aforementioned directive and the TFEU include disability in the scope of the right to non-discrimination. Therefore, dismissals grounded on the disability of an employee are reputed null and void, while dismissals based on an illness suffered by an employee are considered unfair in most cases.

External labor risk prevention services are rendered by specialized entities in the following cases:

The traditional differentiation between illness and disability made by the Spanish Courts may vary in the coming years as a consequence of some judgments made by the ECJ.

Back in 2006, in the *Chacón Navas v Eurest Colectividades SA* case, the ECJ ruled that "disability" refers to a limitation that results in particular from physical, mental or psychological impairments, hinders the participation of the person concerned in working life and is likely to last for a long time. Such a judgment made it possible for the Spanish Courts to continue applying their doctrine, according to which employees suffering from temporary illnesses could be dismissed through unfair dismissal.

In a more recent judgment, released by the ECJ on 11 April 2013, the scope of the "disability" concept was widened. Any limitation resulting from a temporary illness that hinders full and effective participation in professional life in a long-term period is likely to be considered as a disability. In theory, widening the scope of the "disability" concept shall have an impact on Spanish case law, in the sense that a larger number of dismissals of sick employees is likely to be deemed null and void. So far, this doctrine has had no impact on Spanish case law by the Supreme Court, although it matches the criteria traditionally settled by the High Courts of Justice, which have been traditionally more inclined to declare this kind of dismissal null and void.

Time will tell whether Spanish Courts will follow the new criteria established by the ECJ as regarding the interpretation of the disability concept. The importance of such judgment may be vital in the future, not only as regards the nature of a number of dismissals carried out in Spain, but also when it comes to determining the extent to which health is affected by the non-discrimination principle in the EU.

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## Preventing discrimination in the workplace in Ukraine

Until recently, the legal framework designed to provide protection from discrimination in Ukraine was highly undeveloped. The main anti-discrimination principles and regulations were set in the Constitution of Ukraine, the Labor Code of Ukraine and the Law of Ukraine "On provision of equal rights and opportunities to women and men." Such principles and regulations, however, were very basic and, thus, did not provide for sufficient protection of workers.

However, as part of the process of harmonization of the Ukrainian law with the law of the European Union (EU), in the context of the Association Agreement between Ukraine and the EU, the Ukrainian Parliament adopted the Law "On foundations of preventing and counteracting discrimination in Ukraine" (the Anti-Discrimination law). Additionally, several anti-discrimination provisions, which prevent discrimination at the workplace, were included in the Law "On employment," a new version of which was also recently adopted.

The new laws introduced many new elements to the anti-discrimination sphere in Ukraine and became the basis for further law-changing initiatives.

### Definitions

The new Anti-Discrimination Law for the first time introduced a long list of definitions in the anti-discrimination sphere. In particular, the Law gave explicit definitions to direct and indirect discrimination, solicitation to discrimination, aiding in discrimination, positive actions, harassment and other areas.

The Law also contains an open-ended list of the grounds receiving protection from discrimination: race, color, political, religious and other beliefs, sex, age, disability, ethnic or social origin, family and property status, place of residence and language.

Moreover, the Law changed the legal concept of discrimination, which is now a situation rather than an unlawful action.

### Reasonable accommodation for disabled persons

The new Law "On employment" introduced a principle of reasonable accommodation. Ukrainian employers are now obliged to undertake all appropriate measures to enable a person with a disability to have access to, participate in, or advance in, employment.

### Positive actions

Another new concept introduced by the Anti-Discrimination Law is positive actions, which are defined as temporary measures that have an objectively reasonable goal aimed at eliminating inequality in opportunities for individuals to exercise equal rights and freedoms.

It is worth mentioning in Ukraine, several categories of employees, such as disabled individuals, college graduates, pregnant women and some others, used to have preferable treatment in employment before the mentioned changes were introduced in to the anti-discrimination sphere.

### Sanctions for discrimination at the workplace

Generally, individuals who are violating the Anti-Discrimination Law may bear civil, administrative, disciplinary and criminal liability.

According to the Labor Code of Ukraine, the following disciplinary sanctions may be imposed on employees:

- ▶ A reprimand (a formal caution)
- ▶ A dismissal

Such disciplinary sanctions may be imposed on employees for general violation of labor discipline (e.g., breach of provisions of the labor law or the company's internal procedures and policies).

At the same time, Ukrainian labor law does not envisage any specific disciplinary measures for employees who do not comply with the Anti-Discrimination Law. Therefore, in order to be able to impose the disciplinary sanctions on the delinquent individuals, it is recommended that companies enact codes of conduct, as part of their internal documents and policies.

Criminal liability including imprisonment may be imposed for violations of Anti-Discriminatory Law.

### Case law

Currently, there is no extensive judicial practice in the anti-discrimination sphere in Ukraine. This is because individuals who suffered from discrimination may usually claim only for non-pecuniary damages, which are fairly low in Ukraine and are very hard to substantiate.

Moreover, if a person is employment was unlawfully terminated due to discrimination, Ukrainian law allows them to file a lawsuit only for reinstatement in the company and to claim for non-pecuniary damages. At the same time, this practice is proven to be ineffective because such employees do not usually wish to be reinstated in the same company.

In conclusion, the new laws have significantly improved the anti-discrimination legal environment and given new momentum to combating discrimination and promoting equality in Ukraine. However, we believe that Ukraine still needs to intensify the struggle against discrimination by specifying existing laws and developing new laws that follow international experience.

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# United Kingdom

## Discrimination – case update

Two recent cases from the United Kingdom (UK) demonstrate how quickly the area of discrimination law can change and develop to meet novel situations in the workplace.

Discrimination on the basis of an employee's religion or belief has been prohibited in the UK since 2003. In the recent case of *Henderson vs. GMB*, the Employment Appeal Tribunal (EAT) has confirmed that the protection within the legislation expands to employee's philosophical belief (whether it be political or otherwise) in addition to religious beliefs.

Mr Henderson identified himself as a "left-wing democratic socialist" and was employed as a regional organiser for the GMB, a trade union. Part of his role included undertaking political work in order to support the UK Labour Party. Mr. Henderson was dismissed on the basis that his conduct had led to him being unmanageable and that this constituted gross misconduct. Mr. Henderson brought claims for direct discrimination and harassment on the basis of his "left wing" beliefs. One of the incidents in question was an exchange where Mr. Henderson's supervisor shouted at him for being too left wing, after his actions had allegedly caused embarrassment for Ed Miliband, the leader of the UK Labour Party.

The EAT found that there was no evidence of direct discrimination and that what was more likely to have resulted in the treatment of Mr. Henderson was his conduct in refusing to accept reasonable management instructions. It also found that the comment that he was too left wing was as a result of Mr. Henderson's actions rather than because of any intrinsic belief he held.

**While Mr. Henderson was unsuccessful in this case, the EAT made it clear that philosophical beliefs are just as important as religious ones and will be given the same level of protection.** This will have a substantial impact and has the potential to widen the circumstances in which employees are able to take discrimination claims significantly. UK employees could now potentially claim that their belief in for example "right wing politics" provides them with the scope to claim that they have been discriminated against. As beliefs are difficult to identify and define precisely this could cause significant confusion in the workplace.

Another example of the recent expansion in the grounds of discrimination is the case of *Tirkey vs. Chandhok* and another that found that the definition of race within the Equality Act 2010 was sufficiently wide to include caste (caste is a system of social stratification found in some areas of the Hindhu and Sikh religions).

Ms Tirkey worked for Mr. and Mrs. Chandhok between 2008 and 2012 as a domestic worker. Ms Tirkey was part of the caste called Adivasi known as the "servant caste," which is considered to be low in status. Ms Tirkey claimed that she was treated in a demeaning and hurtful manner by Mr. and Mrs. Chandhok as a result of her caste. Ms Tirkey alleged that she was required to work seven days a week, from around 6:00 to 12:30. She was not allowed to sit on the same furniture as the family, and was made to use separate crockery and cutlery as higher caste people would not touch plates and cups that she had used.

Ms Tirkey brought a number of claims against the Chandhoks and included a claim of caste discrimination as part of her race discrimination claim. The Chandhoks applied to strike out this claim on the grounds that "caste" did not fall within the Equality Act 2010 definition of "race."

The case reached the EAT, which dismissed the strike out claim. The EAT found that the definition of "ethnic origins" – included within the definition of race in the Equality Act 2010 – was sufficiently wide to include caste, and so Ms Tirkey was able to continue with her claim. Interestingly, the Government is now consulting about a proposed amendment to the Equality Act 2010 to expressly include caste as a protected ground.

These cases provide a good indication of the subtlety and challenges which the anti-discrimination framework (and associated case law) can present for employers operating in the UK.

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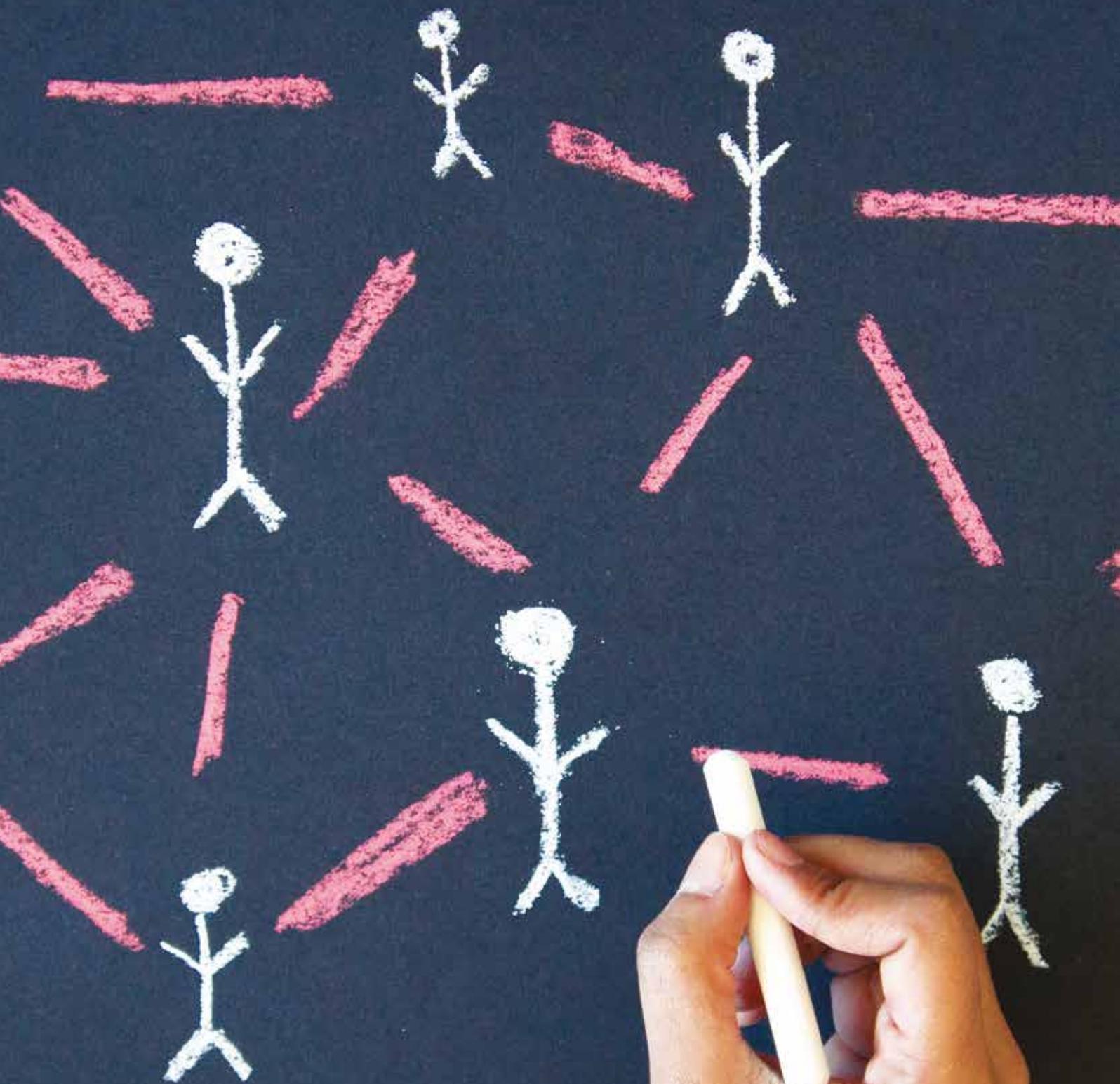
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