Nothing stated in this book should be treated as an authoritative statement of the law as any particular point of any particular case in any jurisdiction will depend on the facts of that case. No legal advice or any matter can be given on the basis of this text alone. For specific advice on any matter you should consult the relevant country representative listed inside. The law is stated as at April 2011.

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Employment Discrimination Law
A European Guide
In today’s global marketplace, businesses increasingly operate on a regional or international scale. Companies that coordinate their employees across multiple jurisdictions must comply with the rules and regulations governing employment, labour, pensions, and immigration law in each of those jurisdictions. As a result, retaining legal experts with knowledge and experience in both international and local Human Resources law is essential for businesses of all sizes.

Lus Laboris is an alliance of leading Human Resources lawyers. We have more than 2,500 lawyers providing local expertise across the globe, with member firms in over 40 countries and coverage in more than 100 jurisdictions. Human Resources challenges require local expertise within a global framework. The complexities of national employment law demand it and the Lus Laboris members provide it.

Each of our members must be a top-ranking Human Resources or Pensions law firm in their respective locality to be invited to join Lus Laboris. We welcome into our Alliance only firms that possess focused expertise in all disciplines of labour, employment and pensions law. Our lawyers understand the issues and challenges associated with managing a workforce, wherever it is located.

The Alliance focuses on specific areas of expertise within our six International Practice Groups (IPGs). The IPGs bring together lawyers from across the Alliance with expertise in key areas of Human Resources law; including Individual Employment Rights, Discrimination, Restructuring and Labour Relations, Pensions, Employee Benefits and Tax, and Immigration.
In our experience, local expertise in these areas of law is crucial to developing coherent Human Resources strategies that work within a global framework. Our IPGs meet regularly and are well placed to coordinate regional and worldwide requests, drawing on each individual lawyer’s wealth of experience. Clients can access the work of our IPGs, which complement our extensive portfolio of legal services.

The Discrimination IPG focuses on discrimination issues. The lawyers in this group meet regularly to study trends in claims, compliance methods, how claims are litigated or otherwise resolved, methods of alternative dispute resolution, and other comparative issues. Each lawyer in the Discrimination IPG is dedicated to providing the best assistance to employers in their jurisdiction to avoid discrimination claims and resolve disputes. Each country has unique prohibitions regarding discrimination. Enforcement mechanisms differ widely. Accordingly, lawyers with local knowledge and expertise are essential to good results.

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Introduction

This booklet is intended to be a guide to discrimination law in many of the European jurisdictions where Ius Laboris, Global Human Resources Lawyers, are present and provides an overview for clients faced with discrimination issues.

Most of the jurisdictions covered by this booklet are part of the European Union (EU). EU law imposes various obligations on its member states, including in the field of employment law. The prohibition of discrimination is one of the most important examples of EU law influencing the national law of the member states.

Upon the foundation of the European Economic Community (now the European Union) in 1957, the EC Treaty contained a provision establishing the right to equal pay for equal work for men and women (Article 141, formerly Article 119, of the EC Treaty). At that point, the member states were not specifically concerned with protecting fundamental rights. The provision was primarily included for economic reasons as member states wanted to avoid giving any competitive advantage to countries allowing lower pay for women.

In 1975, a directive was adopted to facilitate the application of the right to equal pay for individual employees(1). As with all directives, this directive required member states to implement certain provisions into national law. In 1976, Directive 76/207(2) followed, prohibiting gender discrimination with regard to access to employment, vocational training, promotion and working conditions. In the 1980s and 1990s, additional directives on gender discrimination were adopted with regard to equal treatment in terms of social security (Directive 79/7(3), Directive 86/378(4) and Directive 96/97(5)). Directive 97/80(6) imposes a shared burden of proof in gender discrimination cases so that, broadly, once an individual has established facts which give reason to believe that gender discrimination has taken place, it is for the defendant to disprove discrimination.

With the 1997 Treaty of Amsterdam, the member states gave the EC Council authority to prohibit discrimination on grounds other than gender\(^\text{(7)}\). In 2000, two directives were adopted:

- Directive 2000/43\(^\text{(8)}\) implementing the principle of equal treatment irrespective of racial or ethnic origin
- Directive 2000/78\(^\text{(9)}\) establishing a general framework for equal treatment in employment and occupation with regard to discrimination based on age, disability, religion or belief and sexual orientation

Some countries have much experience in case law on discrimination (Denmark, France, the UK), while other countries have very limited case law (Germany, Luxembourg, Belgium). However, with the implementation of Directives 2000/43 and 2000/78 (which was due to be implemented by all current member states before the end of 2003), discrimination law is of increasing importance in all EU jurisdictions.

The most dramatic changes to national law and case law have of course occurred in the 10 new member states, who joined the EU in 2004. The new member states were required to implement all discrimination directives before joining on 1 May 2004.

In 2002, Directive 2002/73\(^\text{(10)}\) was adopted to modify Directive 76/207 on gender discrimination. The Directive aims to align the 1976 Directive with the decisions of the Court of Justice of the European Union and with the principles of Directives 2000/43 and 2000/78, also known as second-generation discrimination law. It was implemented by member states with effect from 5 October 2005. Details of national implementing measures are included in this booklet.

In 2006, Directive 2006/54\(^\text{(11)}\) was adopted. For reasons of clarity, the Directive aims to recast and amend Directives 75/117, 76/207, 86/378 and 97/80 and their relevant amendments by bringing together in a single text the main provisions existing in the gender discrimination field as well as certain developments arising out of the case law of the Court of Justice of the European Union. The provisions in the Directive, which represent a substantive change in relation to earlier directives, were implemented in the member states with effect from 15 August 2008. With effect from 15 August 2009, Directives 75/117, 76/207, 86/378 and 97/80 were repealed.

The Treaty of Lisbon, which entered into force on 1 December 2009, does not require the Charter of Fundamental Rights of the European Union to be included directly in the treaties, but with the Treaty of Lisbon the Charter has now become legally binding. The Charter is divided into six sections: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights and Justice.

For further information on the law in any given country, please contact the relevant Ius Laboris member firm listed above or:

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Co-Chairs of the Discrimination International Practice Group

\(^{(7)}\) Article 13 of the Treaty of Amsterdam.


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### 1. Implementation of EU Directives

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| | | Employment Law Harmonisation Act
| | | (Arbeitsvertragsrechtsanpassungsgesetz – ‘AVRAG’)
| | | White Collar Employees Act 1921 (Angestelltengesetz – ‘AngG’)
| Directive 2004/113/EC of 13 December 2004 | On the implementation of the principle of equal treatment between men and women in the access to and the supply of goods and services | The Directive was transposed in two steps:  
| | | • Insurance Law Amending Act (Versicherungsrechtsänderungsgesetz 2006), which came into force on 1 January and 1 December 2007. The transposition has been implemented into the following acts:
| | | Insurance Supervision Act 1978 (Versicherungsaufsichtsgesetz, ‘VAG’)
| | | • Second amendment of the Equal Treatment Act 2004, which came into force on 1 August 2008 |
| Directive 2006/54/EC (amendment) of 5 July 2006 | On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation | |
| Directive 2006/54/EC of 5 July 2006 | On the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation | |
| Austria has not adopted any new legislation to implement this Directive into national law, as the obligation to transpose this Directive is restricted to ‘new’ regulations (not already implemented in connection with previous Directives) | |

Only the main Acts are mentioned in the table above, however, the Directives have also been implemented into several other Decrees and federal Acts (which only apply in certain federal states of Austria).

2. **Legislation not based on EU Directives**

There is no legislation that is not based on EU directives.

3. **Definitions of the different prohibited types of discrimination**

In the past, there were only sporadic regulations in Austria concerning discrimination in the workplace. The first comprehensive ‘Equal Treatment Act’ (Gleichbehandlungsgesetz – ‘GIBG’) came into effect in July 2004. It prohibits direct and indirect discrimination against employees on the grounds of:

- gender (including with respect to marital and family status)
- age
- ethnicity
- physical or mental disability
- religious belief
- belief system (‘Weltanschauung’)
- sexual orientation.

The prohibition against discrimination applies to employment and working conditions, pay conditions for access to employment, self-employment or occupation, such as selection criteria and recruitment conditions, as well as termination of employment.
Within the scope of the Equal Treatment Act, direct discrimination is defined as occurring when one person is treated less favourably than another in a comparable situation on one of the grounds identified above. Indirect discrimination occurs where an apparently neutral provision, criterion, or practice would put persons at a particular disadvantage compared to other persons on one of the grounds mentioned above. Direct and indirect discrimination can be objectively justified by a legitimate aim, if the means of achieving that aim are appropriate and necessary.

The Equal Treatment Act not only prohibits discriminatory behaviour on the part of the employer, but also that of its representatives and employees. An employer must take the necessary measures to avoid unlawful discrimination. An employer must also protect its employees from discriminatory behaviour by third parties in connection with the employment relationship.

4. Discrimination during recruitment

4.1 Principles
According to the Equal Treatment Act, when recruiting employees an employer is prohibited from discriminating (this also includes the terms of remuneration) against job applicants on any of the grounds listed in section 3 above.

Exceptions can be permitted, if differential treatment is a requirement for the job and is therefore justified. For example, an employee of a particular sex may be required in a religious institution. Alternatively, if a job entails hard physical labour, an employee over a certain age may not be able to undertake it. Practice shows that discrimination during recruitment is still quite common. However, employers have learned to conceal discriminatory treatment by not telling a job applicant that its reason for refusing his or her application is based on one of the grounds of discrimination (in most cases it is age).

4.2 Burden of proof
The Equal Treatment Act can be enforced in the ordinary courts. There are special provisions regarding the burden of proof, which favour the ‘victim’, i.e. the job applicant. A job applicant must only ‘show credibly’ that discrimination occurred during recruitment (prima facie evidence) and the employer must then prove that there has been no discrimination.

4.3 Sanctions
A job applicant who is discriminated against by an employer in the recruitment process is entitled to compensation. Essentially, the amount of compensation for not getting a job based on discriminatory reasons is equal to at least two months’ remuneration, if the job applicant would have got the job in non-discriminatory circumstances. However, compensation is limited to EUR 500, if the employer can prove that the only harm sustained by the job applicant as a result of the discrimination was the employer’s refusal to consider his or her job application. If the discrimination resulted in a lower monthly salary, the difference would be awarded as compensation.

Other provisions of the Equal Treatment Act prohibit an employer and also employment agencies from advertising jobs in a discriminatory way. Employment agencies or an employer can be fined up to EUR 360 (after receiving a first warning from the authorities), if they infringe these provisions.

5. Discrimination during the employment relationship

5.1 Principles
An employer is prohibited from direct or indirect discrimination against an employee on any of the grounds referred to in section 3 above.

According to the Equal Treatment Act, the principle of equal treatment applies to education and training, promotion and all other working conditions. In Austria, the general principle of equal treatment applies, meaning that most of the measures or decisions taken by an employer must be assessed on the basis of this principle, even if it is not explicitly mentioned in the Equal Treatment Act.

The principle of equal treatment applies in the case of promotion or an employer’s voluntary increase of salary paid, provided that the employer uses a general standard. An employee must not be excluded from a voluntary increase in salary without an objective reason. Additionally, an employee must not be excluded from receiving bonuses or other payments that are made to other employees in a comparable situation, which the employer is not contractually bound to make. The same is valid for promotions.

A part-time employee must not be treated less favourably than a full-time employee with similar responsibilities by reason of the nature of his or her employment contract. Remuneration must be proportionate to the extent of the work undertaken.
The payment of different remuneration to men and women with the same or similar jobs does not breach the principle of equal treatment, if it is justified by physical (such as physical strength) or functional differences, education or work experience.

It is also possible to implement 'key date' rules, where, for example, a newly hired employee starting on a certain date is contractually excluded from getting bonuses or other kinds of benefits.

5.2 Burden of proof
If the discrimination is subject to the Equal Treatment Act, the shift in the burden of proof is the same as that described in section 4.2 above.

The burden of proof in other cases of discrimination (i.e. if the discrimination is not based on any of the grounds mentioned in section 3 above) lies with the employee (the claimant).

5.3 Sanctions
If an employee is discriminated against with regard to education, training or other working conditions, he or she is entitled to receive the relevant education or training and has the right to have the same working conditions as other employees who have not been discriminated against. Otherwise, he or she can claim compensation, including for non-material harm i.e. personal hardship.

If the discriminatory treatment results in an employee not being promoted, the difference between the lower and higher salaries would be awarded as compensation. If an employer unjustifiably fails to promote an employee who would otherwise be promoted, that employee can claim at least the difference between the lower and higher salary for a three-month period. If that employee would not be promoted, he or she can claim up to EUR 500.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
Before the Equal Treatment Act came into force in 2004, section 105 of the Austrian Labour Constitution Act was the only source of protection against termination on discriminatory grounds. Under this Act the strongest protection is provided for older employees.

The Equal Treatment Act provides protection against dismissal on any of the grounds mentioned in section 3 above.

However, since July 2004 only a few discriminatory dismissal claims have been brought, because most employees are already protected by section 105 of the Labour Constitution Act (especially with regard to being over a certain age).

In the future, the legal provisions against discrimination in connection with dismissals are more likely to be applied to cases involving the dismissal of an employee who is excluded from the scope of section 105 of the Labour Constitution Act and thus not generally protected against unfair dismissal. Amongst those excluded from this protection are senior executives with significant responsibility for staff and managers of incorporated entities (especially managing directors of limited liability companies (‘LLCs’) and members of the board of directors of registered cooperative societies). These two groups of people are in fact treated as employees to whom the provisions of the Equal Treatment Act apply. Until July 2004, such managers had no protection against dismissal whatsoever. However, since July 2004, an employer should be aware that, for example, a 55-year-old managing director of an LLC who is dismissed and replaced by a 40-year-old might successfully bring a claim in court against his or her dismissal on the grounds of age discrimination.

Other than that, most claims of discrimination are expected to occur in areas where there is no legal protection beyond that offered in the Equal Treatment Act, which covers recruitment, monthly salary, voluntary social benefits, vocational training, promotion, conditions of employment and harassment.

As stated above, there is certain case law that mainly concerns recruitment issues, where the amount of compensation is limited and, hence, these cases are rare.

6.2 Burden of proof
An employee must only ‘show credibly’ that discrimination has occurred and the employer must then prove that termination was for reasons that do not constitute discriminatory grounds.

6.3 Sanctions
If a discriminatory dismissal is proven, the employee must be reinstated in his or her former position and the employer must pay compensation for the duration of the legal proceedings i.e. the normal remuneration that the employee would have received for this period.

The payment of different remuneration to men and women with the same or similar jobs does not breach the principle of equal treatment, if it is justified by physical (such as physical strength) or functional differences, education or work experience.

It is also possible to implement 'key date' rules, where, for example, a newly hired employee starting on a certain date is contractually excluded from getting bonuses or other kinds of benefits.

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5.3 Sanctions
If an employee is discriminated against with regard to education, training or other working conditions, he or she is entitled to receive the relevant education or training and has the right to have the same working conditions as other employees who have not been discriminated against. Otherwise, he or she can claim compensation, including for non-material harm i.e. personal hardship.

If the discriminatory treatment results in an employee not being promoted, the difference between the lower and higher salaries would be awarded as compensation. If an employer unjustifiably fails to promote an employee who would otherwise be promoted, that employee can claim at least the difference between the lower and higher salary for a three-month period. If that employee would not be promoted, he or she can claim up to EUR 500.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
Before the Equal Treatment Act came into force in 2004, section 105 of the Austrian Labour Constitution Act was the only source of protection against termination on discriminatory grounds. Under this Act the strongest protection is provided for older employees.

The Equal Treatment Act provides protection against dismissal on any of the grounds mentioned in section 3 above.

However, since July 2004 only a few discriminatory dismissal claims have been brought, because most employees are already protected by section 105 of the Labour Constitution Act (especially with regard to being over a certain age).

In the future, the legal provisions against discrimination in connection with dismissals are more likely to be applied to cases involving the dismissal of an employee who is excluded from the scope of section 105 of the Labour Constitution Act and thus not generally protected against unfair dismissal. Amongst those excluded from this protection are senior executives with significant responsibility for staff and managers of incorporated entities (especially managing directors of limited liability companies (‘LLCs’) and members of the board of directors of registered cooperative societies). These two groups of people are in fact treated as employees to whom the provisions of the Equal Treatment Act apply. Until July 2004, such managers had no protection against dismissal whatsoever. However, since July 2004, an employer should be aware that, for example, a 55-year-old managing director of an LLC who is dismissed and replaced by a 40-year-old might successfully bring a claim in court against his or her dismissal on the grounds of age discrimination.

Other than that, most claims of discrimination are expected to occur in areas where there is no legal protection beyond that offered in the Equal Treatment Act, which covers recruitment, monthly salary, voluntary social benefits, vocational training, promotion, conditions of employment and harassment.

As stated above, there is certain case law that mainly concerns recruitment issues, where the amount of compensation is limited and, hence, these cases are rare.

6.2 Burden of proof
An employee must only ‘show credibly’ that discrimination has occurred and the employer must then prove that termination was for reasons that do not constitute discriminatory grounds.

6.3 Sanctions
If a discriminatory dismissal is proven, the employee must be reinstated in his or her former position and the employer must pay compensation for the duration of the legal proceedings i.e. the normal remuneration that the employee would have received for this period.
7. **Expected future developments**

The Equal Treatment Act is still fairly new and the number of relevant cases is quite small. Nonetheless, the law is under constant review and the latest amendments were made in January 2011. These amendments generally came into effect on 1 March 2011 and include the following essential modifications:

- From 1 March 2011, companies with more than 1000 employees (from 2012, with more than 500; from 2013, with more than 250; and from 2014, with more than 150) must prepare an income report for the respective preceding year (and then for every other preceding year).
- The income report must specify the number of women ranked in the different CBA groups (KV-Verwendungsgruppen) (although there is no requirement to indicate their specific duties) and how much women (as one group) and men earn on average in those groups. The total pay (including, for example, allowances) should be used as the basis for providing this information. Therefore, the informative value of such data is limited.
- The income report must be submitted to the (central) works council, which may inform employees of its contents. Employees are obliged to treat the data contained in the income report as strictly confidential.
- Employers and private or public law recruitment agents must indicate in job advertisements the minimum wage under the respective collective agreement, as well as indicating whether a higher wage might be possible. Fines for any breaches apply only from 1 January 2012.
- The European Court of Justice delivered a judgment on 18 November 2010 in the case of *Pensionsversicherungsanstalt v Christine Kleist* (C-356/09) in relation to regulations that permit an employer to dismiss a female employee who already has the right to retire with a pension. As the retirement age for women is five years less than the one for men, this form of dismissal constitutes direct discrimination on the grounds of sex and is prohibited by Directive 2003/85/EEC. Collective bargaining agreements providing such provisions (i.e. where an employee can be dismissed, if he or she reaches the statutory retirement age, which to date is different for men and women) must therefore be modified in order to comply with the general principle on equal treatment of men and women.
1. **Implementation of EU Directives**

2. **Legislation not based on EU Directives**

3. **Definitions of the different prohibited types of discrimination**

4. **Discrimination during recruitment**
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7. **Expected future developments**
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2. Legislation Not Based on EU Directives

The Act of 11 June 2002 regarding the protection against violence, harassment and sexual harassment at work, as amended by the Act of 10 January 2007, amending several provisions on the well-being of employees in the implementation of their work, including the protection against violence, harassment and sexual harassment at work.

3. Definitions of the Different Prohibited Types of Discrimination

In the Act of 10 May 2007, which prohibits certain forms of discrimination (the General Anti-Discrimination Act), there are 13 specific grounds upon which discrimination is prohibited. These are as follows:

- age
- sexual orientation
- marital status
- birth
- wealth
- religion or philosophical conviction
- political conviction
- language
- current or future health status
- disability
- physical or genetic features
- social origin
- trade union affiliation and ‘conviction’ (added to the list in 2010 following a judgment of the Belgian Constitutional Court).
In addition, there is a separate Anti-Racism Act that prohibits all discrimination based on nationality, race, ancestry, national or ethnic origin and a separate Gender Act that prohibits all discrimination based on gender.

In accordance with Belgian legislation:

- direct discrimination occurs when a difference in treatment cannot be reasonably and objectively justified;
- indirect discrimination occurs where an apparently neutral provision, criterion or practice has harmful effects on a person, unless the provision, criterion or practice can be objectively and reasonably justified;
- a disabled person will be considered to have been discriminated against, if there is a lack of reasonable adjustment in the workplace to meet his or her particular needs;
- harassment is considered to be a form of discrimination;
- an instruction to discriminate is also deemed to be a form of discrimination in itself.

The three new anti-discrimination Acts (the Gender Act, the Anti-Racism Act and the General Anti-Discrimination Act) specify that with regard to employment, a difference in treatment is objectively and reasonably justified, if a necessary characteristic constitutes an essential and determining professional requirement because of the nature of the professional activity or the context in which it is performed. The objective must be legitimate and the requirement must be proportionate to that objective.

A distinction is made between the different grounds of discrimination. Some grounds of discrimination (those prescribed by the EU directives: age, sexual orientation, religion or philosophical conviction, disability, sex and race) are only reasonable and objectively justified, if they are an essential professional requirement. For other grounds, any reasonable and objective justification can be invoked.

Affirmative action is permitted in Belgium, if the following conditions are fulfilled:

- there must be an apparent inequality;
- the abandonment of this inequality must be the objective of the affirmative action;
- the positive action must be temporary and must stop when the objective (i.e. equality) is reached;
- the positive action must not harm another individual's rights.

Differences in treatment on the basis of pregnancy or motherhood are considered to be gender discrimination. However, legal provisions regarding the protection of pregnant employees are not considered to be gender discrimination, but are deemed to be valid affirmative action.

The new Acts state that any difference in treatment that is imposed by law cannot constitute discrimination.

With regard to differences in treatment based on age, a specific regime is applicable. Differences in treatment based on age are allowed, if they can be reasonably and objectively justified by a legitimate aim, such as a legitimate employment policy, job market conditions or any other comparable legitimate aim. The means of achieving that aim must be appropriate and necessary. Various differences in treatment with regard to occupational social security schemes are provided in the General Anti-Discrimination Act.

4. **Discrimination during recruitment**

4.1 **Principles**

An employer cannot discriminate (directly or indirectly) against a job applicant during the recruitment process.

The same principle of non-discrimination must be observed with regard to access to self-employed activities.

4.2 **Burden of proof**

If a job applicant claims that he or she has been discriminated against before a competent court, and if he or she establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proving that there has been no discrimination shifts to the employer.

Examples of facts that can be used to demonstrate that discrimination is occurring or has occurred include statistical figures, figures indicating a pattern of unfavourable treatment towards persons protected by one of the grounds of discrimination, and figures indicating unfavourable treatment of a protected person compared to other employees.

4.3 **Sanctions**

Contractual provisions, collective bargaining agreements or other documents that are contrary to the principle of equal treatment are void.
A victim of discrimination can obtain an injunction from the President of the Labour Court to stop discriminatory acts, for example, a discriminatory recruitment process. The law provides for summary proceedings.

Certain infringements constitute criminal offences and are subject to imprisonment and/or penalty payments.

These sanctions do not preclude a claimant from bringing civil actions on the basis of infringements. In principle, a victim must prove the existence and the amount of his or her loss in order to claim compensation. Alternatively, the law provides a victim of discrimination with the ability to claim an indemnity equal to six months’ salary. If an employer can prove that the unfavourable treatment (e.g. not selecting a certain individual during recruitment) would also have occurred on objective grounds, the indemnity is limited to three months’ salary.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
An employer cannot discriminate with respect to promotion opportunities or working conditions.

An employer cannot discriminate against part-time or fixed-term workers in relation to working conditions.

5.2 Burden of proof
If an employee claims that he or she has been discriminated against before a competent court, and if he or she establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proving there has been no discrimination shifts to the employer.

Examples of facts that can be used to demonstrate that discrimination is occurring or has occurred are the same as those referred to in section 4.2 above.

The Acts of 5 March 2002 and 5 June 2002 do not contain any provisions regarding the division of the burden of proof. This implies that a person claiming discrimination on the grounds of part-time or fixed-term work carries the full burden of proof.

5.3 Sanctions
Contractual provisions, collective bargaining agreements or other documents that are contrary to the principle of equal treatment are void.

In practice, this means that an employee who is discriminated against because his or her contract lacks a benefit that appears in the contracts of other employees, will be deemed to benefit from that provision.

A victim of discrimination can obtain an injunction from the President of the Labour Court to stop discriminatory acts, for example, discriminatory employment conditions. The law provides for summary proceedings except in cases of sex discrimination.

Certain infringements constitute criminal offences and are subject to imprisonment and/or penalty payments.

These sanctions do not preclude a claimant from bringing civil actions on the basis of infringements. Please refer to section 4.3 above for further information.

The Acts of 5 March and 5 June 2002 do not make any specific provision with regard to sanctions. That does not, however, preclude civil actions on the basis of infringement of these Acts.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
An employer is prohibited from dismissing an employee on any of the grounds of discrimination. Furthermore, an employer cannot dismiss an employee or unilaterally change his or her working conditions on the basis that he or she has filed a complaint, or appeared in Court (either in person or as a witness) in a claim of discrimination under the Anti-Discrimination Acts, unless the termination or unilateral change is not related to the complaint or court action.

An employer cannot dismiss a pregnant worker or an employee on maternity or parental leave without due cause, unless the dismissal is for a reason unrelated to the employee’s pregnancy, maternity or parental leave.

6.2 Burden of proof
If a dismissed employee claims that he or she has been discriminated against before a competent court, and if he or she establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proving that there has been no breach shifts to the employer.

Examples of facts that can be used to demonstrate that discrimination is occurring or has occurred are the same as those referred to in section 4.2 above.
The burden of proving that an employment contract was terminated for reasons that are not connected with a complaint or court action based on the Anti-Discrimination Acts lies with the employer.

Where a pregnant employee or an employee on maternity or parental leave has been dismissed, the employer must be able to demonstrate that the reasons for the dismissal are unrelated to the physical condition of pregnancy or the maternity or parental leave.

6.3 Sanctions
A victim of discrimination can obtain an injunction from the President of the Labour Court to stop discriminatory acts. Although there is no case law yet, it is questionable whether a discriminatory dismissal could be the subject of such an injunction. The law provides for summary proceedings except in cases of sex discrimination.

Certain infringements constitute criminal offences and are subject to imprisonment and/or fines.

These sanctions do not preclude a claimant from bringing civil actions on the basis of infringements. Please refer to section 4.3 above for further information.

If an employer terminates an employment agreement or unilaterally changes the terms of employment contrary to the provisions of the Anti-Discrimination Acts, the employee concerned or his or her trade union may request that he or she be allowed to resume his or her function within the company under the same conditions as before. The employee or his or her trade union must do this by registered letter within 30 days of the termination or notice of termination, or within 30 days of the unilateral change of working conditions. The employer should respond within 30 days of receipt of the registered letter. If the employer accepts that the employee should be reinstated to his or her former position, it must pay the employee the income he or she lost because of the termination or the change in working conditions. In addition, the employer must pay both employee and employer social security contributions, which are due on that lost income.

If the employer does not want the employee to be reinstated in his or her former function and it has been found that the dismissal or the unilateral change of working conditions is contrary to the Act, the employer must pay the employee compensation which is, at the employee’s discretion, either a lump sum payment equivalent to six months’ gross pay, or a payment equal to the amount of the loss actually suffered. In the latter case, the employee is required to prove the amount of the loss suffered.

7. Expected future developments
There are no future legal developments in prospect. However, as case law is increasing, that will probably lead to a greater understanding of the different concepts described above.
1. **Implementation of EU Directives**

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2. **Legislation not based on EU Directives**

The Danish Freedom of Association Act of 13 June 1990.

3. **Definitions of the different prohibited types of discrimination**

Under Danish law, there is no general principle of equality that specifically prohibits discrimination in the workplace. Accordingly, Danish discrimination law consists of the Acts mentioned above, which prohibit different types of discrimination. However, fundamental principles may apply at EU level in relation to the different grounds of discrimination mentioned in section 4.1 below. For example, in the Küçükdeveci case (C-555/07), the European Court of Justice held that non-discrimination on the grounds of age must be considered as a general principle of EU law and this principle is specifically expressed in Directive 2000/78/EC.

Both direct and indirect discrimination are covered by the various Danish Acts that prohibit discrimination.
Direct discrimination is where one person (in a protected group) is treated less favourably than another person is, has been or would be treated in a comparable situation, on any of the grounds mentioned in section 4.1 below.

Indirect discrimination is where an apparently neutral provision, criterion or practice places a person (in a protected group) in a less favourable position than another person is, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In Denmark, discrimination on the grounds of pregnancy or maternity, paternity or parental leave constitutes gender discrimination. However, dismissal on the grounds of pregnancy or maternity, paternity or parental leave is expressly regulated.

Sexual harassment constitutes gender discrimination and is defined as any kind of unwanted (non-)verbal or physical behaviour of a sexual nature, with the aim or effect of violating a person's dignity, particularly by creating a threatening, hostile, degrading, humiliating or unpleasant social environment.

Harassment on the grounds of gender, race, colour, religion or belief, political opinion, sexual orientation, age, disability, or national, social or ethnic origin constitutes discrimination. It is defined as any kind of unwanted (non-)verbal or physical behaviour in relation to the protected criteria, with the aim or effect of violating a person’s dignity, particularly by creating a threatening, hostile, degrading, humiliating or unpleasant social environment.

4. Discrimination during recruitment

4.1 Principles
An employer is prohibited from direct or indirect discrimination against a candidate on the grounds of:

- gender
- race
- colour
- religion or belief
- political opinion
- sexual orientation
- age
- disability
- national, social or ethnic origin.

One consequence of this prohibition is that an employer is prohibited from asking about a candidate's race, colour, religion or belief, political opinion, sexual orientation, or national, social or ethnic origin.

There are, however, certain exemptions to this prohibition. For example, the prohibition against discrimination on the grounds of political opinion, religion or belief does not apply if the reason for an employer's activities is to promote a certain political or religious opinion or belief and it can demonstrate that an employee's political or religious opinion or belief is relevant to the job. Therefore, this exemption would apply, for example, to an employee of the Catholic Church.

A proportional exemption may be granted by the Danish Minister of Employment, if it is a matter of vital importance that an employee: is of a specific race, political opinion, sexual orientation, or national, social or ethnic origin; has a certain skin colour, age, disability; or belongs to a specific religion or belief. The demand for such a specific characteristic must be legitimate. However, it is clear from the preparatory notes to the Act that such exemptions will only be granted in exceptional cases.

In accordance with Directive 2000/78/EC, Danish law now requires an employer to take appropriate measures where needed in order to enable a disabled person to have access to, participate in or advance in employment, unless such measures would impose a disproportionate burden on it. What constitutes 'appropriate measures', however, is an issue that has been (and still is) subject to interpretation. The Danish courts (and the European Court of Justice) have considered a number of cases involving this issue. However, those cases have primarily concerned situations where the employee has been dismissed.

Finally, certain positive discriminatory actions are allowed. For example, an employer is allowed to implement specific measures in order to promote employment of senior or disabled employees. An employer is not, however, allowed to give preference to a senior or disabled employee who is less qualified for the job than other candidates.

In relation to a disabled candidate, special rules apply to a public employer in the recruitment process. In some cases, for example, a disabled candidate must be given preference.

4.2 Burden of proof
Since the implementation of Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of gender discrimination, the burden of proof is shared by the employer and employee.
Since the implementation of Directives 2000/43/EC of 29 June 2000 and 2000/78/EC of 27 November 2000, the burden of proof is also shared in cases of discrimination based on race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. This means that, if a candidate claims that he or she has been discriminated against on any of these grounds, and can establish a presumption of direct or indirect discrimination, then it will be for the employer to disprove discrimination.

4.3 Sanctions
If the Danish courts find that a candidate has been discriminated against on the grounds of gender in the recruitment process, the candidate may be awarded compensation. No cap has been set on the amount of such compensation, although it is generally low, normally DKK 25,000 (EUR 3,400). For example, in a case from 2008, a woman who had been rejected for a warehouse job because there were no sanitary facilities for women, was awarded DKK 25,000 in compensation by the Danish Supreme Court. This case law is applied by the Danish Board of Equal Treatment, which is an administrative board that settles complaints from employees about discrimination on the grounds of age, disability, gender, sexual orientation, race, political opinion, colour or national, social or ethnic origin. According to case law, it seems that the amount of compensation may be higher, if the candidate applying for the job is already working for the employer on a fixed-term contract.

If the Danish courts find that a candidate has been discriminated against in the recruitment process on the grounds of his or her race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin, then he or she may be awarded compensation. No cap has been set on the amount of such compensation. So far, and in accordance with case law on gender discrimination, the Danish Board of Equal Treatment has awarded DKK 25,000 (EUR 3,400) in compensation in such cases.

5. Discrimination during the employment relationship

5.1 Principles
In Denmark, an employer is prohibited from direct or indirect discrimination against an employee on any of the grounds set out in section 4.1 above. This prohibition applies to all workplace activities such as promotion, pay and general working conditions.

Sexual or gender harassment of an employee constitutes gender discrimination (see section 3 above). Sexual harassment is therefore prohibited under the Danish Act on equal treatment of men and women as regards access to employment (the ‘Danish Act on Equal Treatment of Men and Women’).

Harassment on the grounds of gender, race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin constitutes discrimination. Harassment on the grounds of gender is prohibited under the Danish Act on Equal Treatment of Men and Women, while harassment on the grounds of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin is prohibited under the Danish Act on the prohibition against discrimination in the labour market (the ‘Danish Anti-Discrimination Act’).

Discrimination on the grounds of pregnancy constitutes gender discrimination and is therefore prohibited under the Danish Act on Equal Treatment of Men and Women.

Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work is implemented in Denmark by collective agreements and supplementary legislation, providing an employee who is not covered by a collective agreement with the level of protection required by the Directive. Under the collective agreements that implement Directive 97/81/EC, which in general correspond with the Directive, an employer is prohibited from treating a part-time employee less favourably than a comparable full-time employee solely because he or she works part-time, unless the differential treatment is justified on objective grounds. Where appropriate, the principle of pro rata temporis applies. Further, the Danish Part-Time Employment Act gives an employer and an employee the right to agree that the latter will work part-time, regardless of any direct or indirect barriers or limitations provided by, for example, collective agreements or implied by custom.

Likewise, Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work, is implemented in Denmark by collective agreements and supplementary legislation, providing an employee who is not covered by a collective agreement with the level of protection required by the Directive. Under the collective agreements that implement Directive 99/70/EC, which in general correspond with the Directive, an employer is prohibited from making the terms of employment of a fixed-term employee less favourable than the terms applicable to a comparable permanent employee, unless the differential treatment is justified on objective grounds. However, any difference
in terms of employment based solely on the fixed-term nature of the job is permitted. In addition, the Danish Fixed-Term Employment Act provides that fixed-term contracts may only be renewed, if the renewal is based on objective grounds. Further, an employer is required to inform a fixed-term employee of any vacancies available in the organisation with a view to allowing him or her to apply. An employer is also required to make it easier, as far as possible, for a fixed-term employee to obtain access to professional training in order to improve his or her skills.

With the implementation of Directive 2000/78/EC of 27 November 2000, age discrimination in employment is now prohibited. Under the Danish Anti-Discrimination Act, previously existing provisions on age in collective agreements may be maintained regardless of the prohibition, if those provisions are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The same Act also provides that the prohibition against age discrimination does not apply to recruitment, employment, pay and dismissal of an employee under the age of 18, if the employment relationship is covered by a collective agreement that contains specific rules on pay to employees under 18.

5.2 Burden of proof
If an employee claims that he or she has been discriminated against in employment on the grounds of gender, race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin, the burden of proof is shared between the employer and the employee. Accordingly, if an employee establishes a presumption of direct or indirect discrimination, the employer must disprove discrimination.

If an employee claims to have been discriminated against because he or she is working part time, the full burden of proof will be on the employee.

5.3 Sanctions
If an employee has been discriminated against in employment on the grounds of gender, the Danish courts may award him or her compensation. No cap has been set on the amount of such compensation.

In Denmark, most case law on gender discrimination in employment is in relation to sexual harassment or lack of equal pay, pay allowances or salary negotiations during maternity, paternity or parental leave.

Under present case law, the level of compensation awarded to an employee for sexual harassment is generally fairly low (in many cases between DKK 25,000 and 40,000 (between EUR 3,400 and 5,400)) and will usually not exceed DKK 100,000 (EUR 13,400).

When it comes to the level of compensation to an employee who has not received pay allowances or been invited to yearly salary negotiations during maternity, paternity or parental leave, the level of compensation will usually amount to between DKK 5,000 and 10,000 (between EUR 700 and 1,300).

If an employee has not received equal pay, he or she is entitled to the balance and, depending on the circumstances, also to compensation. The statutory basis for claiming compensation was introduced on 17 June 2008 with the Danish Act amending the Equal Pay Act and various other Acts. This amendment of the Danish Equal Pay Act regarding compensation implements Directive 2006/54/EC. So far, there has been only one example where case law has required an employer to pay such compensation (a district court awarded an employee 12 weeks’ pay in compensation because the employer had deferred a pay rise, referring to the fact that the employee had been absent on parental leave).

If the Danish courts find that an employee has been discriminated against in employment on the grounds of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin, the employee may be awarded compensation. The Danish Anti-Discrimination Act does not set a cap on the amount of compensation. In Denmark, most case law in this area of discrimination concerns claims where an employee has been dismissed (see section 6 below).

Where an employee has been discriminated against on the grounds of working part time or on a fixed-term contract, the Danish courts may award him or her compensation. No cap has been set on the amount of such compensation. However, so far, there is no case law requiring an employer to pay compensation for discrimination in employment against an employee on the grounds of working part time or on a fixed-term contract.

If a part-time employee or an employee on a fixed-term contract has received a lower amount of pay than a comparable full-time or permanent employee, he or she is entitled to the balance and, depending on the circumstances, also to compensation.
6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
A Danish employer is prohibited from dismissing an employee on any of the grounds set out in section 4.1 above.

An employee must not be dismissed on the grounds of pregnancy or for claiming his or her right to maternity, paternity or parental leave, as this constitutes gender discrimination.

In addition, a Danish employer is prohibited from dismissing an employee who claims his or her right not to be treated less favourably than a comparable full-time employee. Dismissing an employee for refusing or requesting part-time work is also prohibited.

Further, a Danish employer is prohibited from dismissing an employee for being a (non-)member of an organisation or a particular organisation. This means that an employer is not allowed to make employment conditional on (continued) membership of an organisation.

In December 2004, the prohibition against age discrimination was implemented into Danish law, which means that as a general rule, direct discrimination on the grounds of age is prohibited. The implementing Act does, however, include a few exceptions to this general prohibition. For example, it is permitted to set a mandatory retirement age of 70 (or more) in both individual employment contracts and collective agreements. Previously existing provisions in collective agreements on mandatory retirement ages below 70 may be upheld, provided that they are objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

6.2 Burden of proof
If an employee is dismissed while pregnant or on maternity, paternity or parental leave, the employer must prove that the decision to dismiss was not in any way related to the employee's pregnancy or leave.

It is clear from case law that this burden of proof is not easy to discharge, and a Danish employer is generally advised only to dismiss an employee who is pregnant or on leave, if there is an obviously non-discriminatory and fair reason for the dismissal.

If an employee claims for equal pay and is dismissed within one year of doing so, the full burden of proof will be on the employer to show that the decision to dismiss was not in any way related to the employee having claimed equal pay. If the employee is dismissed more than one year after claiming equal pay, the burden of proof is shared between the employer and the employee. If the employee establishes a presumption that the decision to dismiss was related to his or her claim for equal pay, the employer must disprove discrimination.

If an employee claims that he or she has been dismissed on the grounds of gender, but is not pregnant, nor on maternity, paternity or parental leave, and has not claimed equal pay, the burden of proof is shared between the employer and the employee. The same applies in cases where an employee claims that the dismissal is based on race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. This means that if an employee establishes a presumption that the decision to dismiss was related to one of these reasons, the employer must disprove discrimination.

If a part-time employee has claimed the right not to be treated less favourably than a comparable full-time employee, the full burden of proof will be on the employer to prove discrimination.

In cases of alleged discrimination based on an employee having refused or requested part-time work, the burden of proof is shared between the employer and the employee. If the employee establishes a presumption that the decision to dismiss was related to one of these two reasons, then it will be for the employer to disprove discrimination.

If an employee claims that he or she has been dismissed for being a (non-)member of an organisation or a particular organisation, the full burden of proof will be on the employee.

6.3 Sanctions
If a Danish court finds that a decision to dismiss an employee was related to the employee's claim for equal working conditions (other than for equal pay) for men and women in the workplace, the employee may be awarded compensation. The Danish Act on Equal Treatment of Men and Women sets no cap on the amount of such compensation.

As discussed in section 6.2 above, the burden of proof is on the employer to show that the decision to dismiss was not related to the employee claiming equal pay for men and women in the workplace, if the employee is dismissed within one year of claiming equal pay. If a Danish court is not satisfied that the employer has discharged the burden of proof, then the employee may be reinstated or awarded compensation. The Danish Equal Pay Act sets no cap on
the amount of such compensation (although, based on the limited case law, the level of compensation is likely to be equivalent to the compensation awarded under the Danish Act on Equal Treatment of Men and Women (see below). So far, however, the Danish courts have not used reinstatement as a remedy. If an employee is dismissed more than one year after claiming equal pay, the burden of proof is shared by the employer and the employee (see section 6.2 above).

If a Danish court is not satisfied that an employer has proved that the decision to dismiss was not related to an employee’s pregnancy or maternity, paternity, or parental leave, the employee may be reinstated or awarded compensation.

The Danish Act on Equal Treatment of Men and Women sets no cap on the amount of such compensation. Under current case law, the amount of compensation awarded usually varies between an amount equivalent to six months’ pay and one year’s pay. Reinstatement has not yet been used as a sanction in Danish case law.

If an employer dismisses an employee on the grounds of race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin, the employee may be awarded compensation. The Act sets no cap on the amount of such compensation.

Case law is still limited and it is therefore difficult to predict the level of compensation that may be awarded.

When it comes to age discrimination, the amount of compensation awarded seems to vary between an amount equivalent to six and nine months' pay. In a case from 2010, for example, the Danish High Court ruled in favour of five senior employees, awarding them each DKK 200,000 (EUR 27,000) in compensation, which translated into between seven and nine months’ pay each. The Danish High Court held that the decision of the employer (the Danish tax authorities) to relocate the five senior employees to another town following a restructuring exercise constituted age discrimination. This precedent has been followed by the lower courts and the Danish Board of Equal Treatment.

In addition, when it comes to dismissal on the grounds of disability, the amount of compensation awarded seems to vary between an amount equivalent to six and nine months’ pay. In a case from 2009, for example, the Copenhagen Maritime and Commercial Court ruled in favour of a trainee who had been dismissed for illness relating to back problems. The trainee was awarded an amount equivalent to six months’ pay in compensation because the employer had failed to take appropriate measures to enable him to continue in his job. In a High Court case from 2010, a dismissed employee was awarded nine months’ pay in compensation because the court held that she had been dismissed because of her disabled child and that she was covered by the EU law concept of disability. In another High Court case from 2010, however, a dismissed employee suffering from epilepsy was awarded DKK 40,000 (EUR 5,400) in compensation because the employer had failed to take appropriate measures to enable him to continue in his job. The employee had only been employed for nine months, and the High Court mentioned the period of employment as one of the reasons for the amount of compensation awarded.

When it comes to protected grounds other than age and disability, in one case the Danish High Court awarded three months’ pay in compensation to an employee who had been dismissed on the grounds of religious belief. The employee had been employed for less than six months, and this fact was undoubtedly a factor in the low amount of compensation awarded (Jehovah’s Witnesses case). In another High Court case from 2008, an employee who had been dismissed because of her religious belief was awarded just above one month’s pay in compensation. In this case, too, it should be noted that the employee was a temporary staff member and she had only worked there for a very short period of time.

In January 2005, the Danish Supreme Court rendered judgment in a case concerning an employee’s right to wear the Muslim headscarf. The employee was employed in a supermarket where the dress code required her to wear a uniform and banned headwear that did not form part of it. Three years into the employment, the employee informed the employer that she intended to wear the Muslim headscarf and she was summarily dismissed. The Danish Supreme Court ruled in favour of the employer, holding that enforcement of the prohibition in the dress code against headwear worn together with the described employee uniform, which was applicable to all employees with customer contact, could not be considered to constitute a violation of the prohibition against discrimination in the labour market. The Danish Supreme Court further held that, based on existing EU case law, there was no basis for finding the enforcement of the prohibition to be in contravention of Article 9 of the European Convention on Human Rights.

Where a part-time or fixed-term employee is dismissed for claiming the right not to be treated less favourably than a comparable full-time or permanent employee, or where a full-time employee is dismissed for refusing or
requesting part-time work, the employee may be awarded compensation. The Danish Part-Time Employment Act sets no cap on the amount of such compensation. In a High Court case from August 2004, an employee was awarded three months’ pay in compensation because she had been dismissed for refusing to work part-time instead of full-time. The case was appealed, however, and in May 2006 the Danish Supreme Court ruled in favour of the employer, holding that the Act does not prevent an employer from dismissing an employee, if the dismissal is based on a reasonable assessment of the need for manpower. In addition, in 2010, a part-time employee was awarded nine months’ pay in compensation for being dismissed for refusing to work full-time instead of part-time. The case was appealed, however, and the Danish High Court ruled in favour of the employer, holding that the employee was not entitled to compensation.

If a Danish court finds that a decision to dismiss is related to an employee’s (non-) membership of an organisation or a particular organisation, the employee may be reinstated or awarded compensation of between one and 24 months’ pay. If the employee has served more than two years, the amount of compensation will not be less than three months’ pay. Reinstatement has not yet been used as a remedy in Danish case law.

7. EXPECTED FUTURE DEVELOPMENTS

Notwithstanding the already quite extensive case law of the Court of Justice and the Danish courts on this matter, the term ‘disability’ is a much debated subject in Danish case law and legal literature. In 2007, the Danish High Court affirmed a judgment from a lower court that post-traumatic stress syndrome was not a ‘disability’ within the meaning of the Danish Anti-Discrimination Act. Another High Court case from 2007 came to a similar conclusion, holding that in that specific case multiple sclerosis was not a ‘disability’. In May 2008, a district court held that chronic headache was not a ‘disability’. In addition, in July 2009, a district court held that hearing impairment was not a ‘disability’ and, in another district court judgment from September 2010, osteoarthritis was not a ‘disability’. In all cases, the Danish High Court and the lower courts in question gave specific reasons for their conclusions.

The fact that an assessment must always be made in each individual case is illustrated by a case from the Copenhagen Maritime and Commercial Court from April 2009 and a district court case from May 2010. In the first case, back problems were considered a ‘disability’, but not in the second case. This is also illustrated by a High Court case from May 2010 and a decision from the Danish Board of Equal Treatment from March 2010. In the High Court case, epilepsy was considered a ‘disability’, but not in the decision from the Danish Board of Equal Treatment.

Another issue that has been (and still is) subject to interpretation is the question of what constitutes ‘appropriate measures’. The Danish courts have considered a number of cases concerning this matter. However, there is still room for interpretation. Recently, the Copenhagen Maritime and Commercial Court has asked the Court of Justice whether part-time work is an ‘appropriate measure’ under Directive 2000/78/EC.

The Court of Justice held in a case from 2007 (C-411/05) that Directive 2000/78/EC must be interpreted as not precluding national legislation which provides that clauses on mandatory retirement age contained in collective agreements are legal, if the sole requirements in such clauses are that an employee must have reached retirement age, set at 65 by national law, and have met the conditions set out in social security legislation as regards the entitlement to retirement pension under his or her contribution regime. The measure must be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market. The means put in place to achieve that aim of public interest must not be inappropriate and unnecessary for the purpose.

Since then, the Court of Justice has repeated and clarified its opinion on this matter in several other cases. However, the social partners in Denmark (i.e. the employers’ and employee organisations) continue to discuss whether the provision in the Danish Anti-Discrimination Act, which allows clauses stipulating a compulsory retirement age, is in accordance with the Directive. Cases regarding this issue are currently pending before the courts.

In addition, the question of whether or not the provision in the Act that the prohibition against age discrimination does not apply to employment, pay and dismissal of an employee under the age of 18 (if the employment relationship is covered by a collective agreement that contains specific rules on pay for an employee under the age of 18) is compatible with Directive 2000/78/EC is currently pending before the Danish Supreme Court. The Danish High Court has held that the provision was justified by Article 6 of Directive 2000/78/EC. Additionally, questions as to whether certain other Danish provisions are compatible with Directive 2000/78/EC are currently pending before the Danish courts. For example, in a recent case from October 2010, the Court of Justice...
held that Directive 2000/78/EC precludes national provisions such as section 2(a)(3) of the Danish Salaried Employees Act, which provides that an employee is not entitled to redundancy pay, if he or she is entitled to a retirement pension from his or her employer under a pension scheme that the employee joined before the age of 50.

Another issue that has been subject to interpretation is that of which groups of people are protected under the Directives. The Court of Justice held in a case from 2008 that the prohibition against discrimination on the grounds of disability provided in Directive 2000/78/EC also covers a person who is not disabled, but who has a disabled child. The question is how far this principle can be stretched when it comes to discrimination on grounds other than disability.

In accordance with initiatives in other Member States, on 1 January 2009, the Danish Government set up an administrative board, the Danish Board of Equal Treatment. The Board deals with complaints from employees regarding discrimination on the grounds of age, disability, sex, sexual orientation, race, political opinion, religion or belief, colour or national, social or ethnic origin. The Board can award compensation and order reinstatement, and its decisions may be brought before the ordinary courts. The complaints procedure is free of charge and, if the Board decides in favour of the claimant, and the (former) employer does not comply with the decision, the Board will, if so requested by the claimant, bring the case before the ordinary courts for no charge to the claimant. Since the Board was set up, there has been an increase in the number of cases that have found their way to the ordinary courts.
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1. **Implementation of EU Directives**

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The EU directives set out in the table above have been implemented into French legislation. However, some of the French Acts listed in the table already existed prior to these EU Directives and therefore do not expressly implement the EU Directives.

2. LEGISLATION NOT BASED ON EU DIRECTIVES

The main legislation not based on EU directives is Article 1 of the French Constitution which outlines the principle of equality of treatment between men and women.

3. DEFINITIONS OF THE DIFFERENT PROHIBITED TYPES OF DISCRIMINATION

The general prohibition of discrimination at work is contained in the preamble to the 1946 Constitution, which states ‘no person may be prejudiced, in their work or employment, on the grounds of their origins, opinions or beliefs’. The law against racism dated 1 July 1972 was the first legislative instrument to attempt to combat discrimination by imposing criminal penalties. However, it was the statute dated 4 August 1982, known as ‘Law AUROUX’ that introduced article L.1132-1 of the Labour Code. This was subsequently amended by statutes dated 31 December 1992, 16 November 2001 and 4 March 2002 (on the rights of sick employees), which provide a general prohibition of all forms of discrimination at work.

The general prohibition stipulates that no person may be denied access to a recruitment process, internship or training course and no employee may be sanctioned, dismissed or subjected to discriminatory measures, direct or indirect, particularly as concerns remuneration, training, appointment, qualification, rank, promotion, variation or renewal of contract, on the grounds of:

- origin
- sex
- morality
- sexual orientation
- age (unless the differential treatment is justified by a legitimate objective, such as when it is a specific requirement of the job)
- family status
- genetic characteristics
- actual or supposed (non-)adherence to any ethnic origin, nationality or race
- political opinions
- trade union membership or similar activity
- religious beliefs
- physical appearance
- surname
- health or disability.

All types of discrimination are prohibited, including direct and indirect discrimination.

No employee may be sanctioned, dismissed or subjected to any discriminatory measure on the grounds that he or she is lawfully exercising his or her right to strike.

The new law of 27 May 2008, transposing EU Directives into national law, has introduced some new details into the discrimination legislation.

Firstly, there is now a specific definition in French law of direct and indirect discrimination, similar to the one contained in the EU Directives and covering all types of discrimination, including the one based on age.

Direct discrimination implies treating an individual less favourably than others in a comparable situation.

Indirect discrimination concerns all measures, criteria or practices that may appear neutral but may confer a disadvantage on an individual compared to others, except if those measures, criteria or practices are objectively justified by a legitimate aim and if the means used to achieve that aim are necessary and appropriate.

4. DISCRIMINATION DURING RECRUITMENT

4.1 Principles

No person may be denied access to a recruitment process or subjected to any discriminatory measure, direct or indirect, during the recruitment process on any of the grounds set out in section 3 above.

The same protections apply to an employee who has witnessed or reported any acts of discrimination (Article L.1132-3 of the Labour Code).
The prohibition of discrimination during the recruitment process also applies to job offers. It is unlawful to make a job offer subject to any of the prohibited grounds of discrimination. In order to take account of the principle of equal opportunities between men and women, it is recommended that an employer refer to both the feminine and masculine sex when advertising a job. For example:

- employé, employée (male employee, female employee)
- conducteur, conductrice (male driver, female driver)
- vendeur, vendeuse (salesman, saleswoman).

If this is not possible, it should be pointed out that the job is available to candidates of either sex. For example:

- cadre H/F (manager M/F)
- chauffeur H/F (chauffeur M/F)
- ingénieur H/F (engineer M/F).

It should be noted that the prohibition of discrimination in recruitment was extended by statute, dated 16 November 2001, to include access to an internship or training course. This provision is designed to protect candidates for day-release contracts, such as apprenticeships, training contracts, career development or retraining contracts, as well as all those who are required to complete an internship as part of their training.

Pregnant women are not required to declare their pregnancy during the recruitment process. An employer cannot seek to find out whether a candidate is pregnant, nor can it refuse to recruit a candidate on the grounds of her pregnancy (Art.L.1225-1 and L.1225-2 of the Labour Code).

By way of exception to the prohibition of discrimination in recruitment, in certain circumstances differential treatment based on age does not constitute prohibited discrimination. This is the case particularly in relation to the requirements of the job (e.g. the employment of young, older or disabled people) or in order to protect young or older employees or disabled people. Likewise, differential treatment based on age does not constitute prohibited discrimination where an individual is certified by an occupational health specialist as being unfit to carry out his or her professional duties (Articles L.1133-1 to L.1133-3 of the Labour Code). Nevertheless, this differential treatment must be objectively and reasonably justified by a legitimate aim and the means of achieving this aim must be appropriate and necessary.

Individuals suffering from a mental or physical disability also benefit from specific employment related provisions designed to promote their integration into the workforce by imposing a positive employment obligation upon an employer. This employment obligation may be fulfilled by direct recruitment, sub-contracting, offering an internship, implementing a collective agreement that defines an action strategy for the benefit of disabled people, or making an annual payment to a private organisation that collects compensatory payments from companies unable to respect their employment quota for disabled persons (known as the ‘AGEFIPH’). The employment obligation is calculated as being equal to six per cent of the total workforce of the undertaking or the site (Article L.5212-2 of the Labour Code).

Nevertheless, health considerations cannot justify discrimination unless a certificate from the occupational health specialist is obtained, which confirms that the applicant is incapable of performing the job in question (Article L.1133-3, Labour Code).

An employer can in certain circumstances claim a state subsidy to help it put into practice an equal opportunities programme outlining the measures that will enable it to re-establish equality of opportunity between the two sexes, if necessary, in the fields of recruitment, vocational training and access to skilled jobs (Article L.5213-10 of the Labour Code).

4.2 Burden of proof

A job applicant who believes that he or she has been discriminated against, directly or indirectly, must provide the facts that establish the presumption of discrimination. In light of these facts, the employer must then prove that its decision was justified by objective facts without discrimination (Article L.1134-1 of the Labour Code).

A judge may investigate as he or she sees fit, by means of, for example, a survey or calling witnesses. The judge will make a decision based on the facts supplied by the parties and, where appropriate, on further investigation.

The statute dated 16 November 2001 gives representative trade unions the right to take any action required to protect an applicant for a job, a course or an internship, from discrimination. The trade unions may take action with impunity and without a supporting declaration signed by the applicant. However, the applicant needs to have been informed in writing of the proposed action by the trade union and he or she must not have expressed any objection to it (Article L.1134-2 of the Labour Code).
Similarly, associations that are lawfully established (i.e. at least five years previously) and whose purpose is to combat discrimination, may, on behalf of victims of discrimination, take any action with impunity, provided that they support this action with a declaration signed by the applicant. Associations that work for disabled persons are allowed to take similar actions (Article L.1134-3 of the Labour Code).

If a female job applicant claims that she has been discriminated against on the grounds of pregnancy, the employer must show the facts necessary to demonstrate that its decision not to recruit the applicant did not relate to pregnancy. If the employer fails to do this to the judge's satisfaction, the employer will be required to employ the pregnant employee (Article L.1225-3 of the Labour Code).

4.3 Sanctions
As a general rule, any Act constituting discrimination or breaching the prohibition of discrimination as set out in Article L.1132-1 of the Labour Code with regard to job applicants or applicants for courses or internships, is automatically void.

Any breach of the prohibition of discrimination is also a punishable criminal offence. The court can impose fines (of up to EUR 45,000) and prison sentences (up to three years) on individuals found guilty of acts of discrimination during recruitment. A company, as a legal person, can be held liable in cases where it has refused to recruit an individual or to accept him or her for a course or appointment (Article L.225-2 of the Criminal Code).

It should be pointed out that the Criminal Code also created individual criminal responsibility for legal entities. Accordingly, a legal entity is also covered by the prohibition and sanctioning of discrimination. In such cases, a company may be sentenced to a fine of EUR 225,000 and possibly to some additional sanctions, namely the dissolution of the legal entity, the publication of the judgment, a ban on a determined professional activity, or the closure of the company's entities.

The Labour Inspector has the authority to monitor compliance with the prohibition of discrimination. He may request any document or item of information. In the case of failure to supply such a document or item of information, the Labour Inspector can issue a writ, which is valid until proven otherwise, and pursue the relevant party before the courts (Articles L.8112-2 and L.8113-4 of the Labour Code).

In practice, a job applicant who is a victim of an act of discrimination can seek redress through the civil and/or criminal justice system and be awarded compensation for his or her loss. The employer will not, however, be compelled to employ him or her.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
No employee may be sanctioned or subjected to any act of discrimination, direct or indirect, on the grounds set out in section 3 above (Article L.1132-2 of the Labour Code) with regard to:

- remuneration
- training
- appointment
- qualification
- rank
- promotion
- variation or renewal of a contract.

This protection also applies to any employee who may have witnessed or reported prohibited acts of discrimination, as well as to any employee who has lawfully exercised his or her right to strike (Article L.1132-3 of the Labour Code).

An employer must comply with the general principle of equal treatment, particularly the principle of ‘equal pay for equal work’. If two employees find themselves in comparable roles, they should receive the same salary, the same rank and equal opportunities to advance their careers. Any differential treatment must be objectively justified. An employer must also comply with the general principle of equal treatment for disabled workers. For example, it must take appropriate and reasonable measures to re-establish equality by offering a plan (e.g. for training and development) or by giving specific training to the disabled workers.

The prohibition of discrimination in employment applies to employees with flexible hours (i.e. part-time and occasional workers). These employees should enjoy the same rights as full-time employees and they should not be discriminated against, particularly with regard to:
• the length of the probationary period
• seniority
• remuneration
• termination and retirement payments.

(Articles L.3123-9 et seq. and L.3123-36 of the Labour Code)

Employees with fixed-term contracts are protected in accordance with express legislative provisions (specifically relating to termination, length of contract, breach of contract, holiday pay and termination payments), specific legal and procedural measures, as well as by the provisions applicable to permanent employees (Article L.1242-14 et seq. of the Labour Code).

This protection against dismissal also applies during the probationary period. In fact, in France, an employer is free on principle to dismiss an employee at any time during the trial period without having to justify its decision in any way. However, if an illness contracted by the employee is the cause of the termination during the trial period, such an action constitutes an act of discrimination, which is prohibited. That was the opinion formulated for the first time by the Court of Cassation in a ruling handed down on 16 February 2005 (no 02-43.402) in the framework of Article L.1132-1. In effect, the Court ruled that all illegal acts of discrimination are prohibited at all stages of the working relationship. Consequently, termination of a contract of employment during the trial period can be considered as abusive, if it falls within the scope of an act of discrimination.

Protected employees (i.e. employee representatives, whether elected or not, e.g. a works council, an employee delegate, a health and safety committee, a working conditions committee, a European committee, or a person appointed by the unions, such as a union representative, union delegate, or employee who officiates at the employment tribunal) cannot be subjected to any kind of discrimination connected with their office. In this regard, they enjoy an extraordinary additional protection against any kind of discrimination. As a result, no variation of contract or change in employment conditions may be imposed upon them (Articles L.2411-3, L.2411-8 and L.2412-3 of the Labour Code).

Disabled workers enjoy the same rights as those applicable to all other employees, except that there are certain alternative provisions motivated by public policy, specifically in relation to apprenticeship, training and health and safety (Article L.1132-2 of the Labour Code).

The salary of a disabled worker must be no less than that which is provided by statutory or regulatory provisions or by collective agreement, unless the performance of the individual in question is significantly diminished. In such cases, the salary is fixed by regulations (Article L.5212-9 of the Labour Code).

Parental leave or part-time work following the birth or adoption of a child is available to both the father and mother, who may exercise their rights either simultaneously or separately, up to the time of the child’s third birthday (Article L.1225-47 et seq. of the Labour Code).

A pregnant employee is protected against the risk of discrimination from the moment that she informs her employer of her pregnancy. This protection is guaranteed by means of an absolute prohibition of working for a total period of eight weeks before and after the birth, six weeks of which must be immediately following the birth. The statutory maternity (or adoption) leave periods are (Article L.1225-17 and following of the Labour Code):

• 10 weeks for the first two children
• 18 weeks for the third or any subsequent child
• 22 weeks in the case of multiple births.

A pregnant employee is protected against acts of discrimination such as an illicit variation of the contract or a reduction in salary. There is also a prohibition of carrying out work that is hazardous to the health of the mother or child. At the end of a period of maternity leave, the employee has the right to return to the position which she held before any variation was made for medical reasons (Article L.1225-25 of the Labour Code).

The father has the right to paternity leave of 11 consecutive days (extended to 18 days in the case of multiple births), to be taken during the four months immediately following the birth. This leave can be combined with statutory birth leave of three days (Articles L.1225-35 and L.3142-1 of the Labour Code).

5.2 Burden of proof
As a general rule, an employee who believes that he or she has been discriminated against, directly or indirectly, must provide the facts giving rise to the presumption of discrimination (Article L.1134-2 of the Labour Code).

There is a substantial body of case law on discrimination on the grounds of trade union membership, which has resulted in loss of opportunity with regard to career progression, training and remuneration. In these cases, the burden of proving trade union discrimination lies with the employer (Article L.1134-2 of the Labour Code).
If an employee brings a claim of discrimination on the grounds of pregnancy during the term of her employment contract, the employer must provide the facts justifying its decision. If any doubt persists, the employer will be required to reinstate the pregnant employee (Article L.1225-3 of the Labour Code).

5.3 Sanctions
According to Article L.1132-4 of the Labour Code, ‘any contrary provision or act with regard to an employee shall be ipso jure invalid’. Therefore, any act towards an employee that constitutes discrimination or that breaches the prohibition of discrimination, is automatically void.

When the discrimination is the result of a positive measure or act by an employer, the sanction is clear, that is to say the measure or act is ipso jure invalid. However, in the case of a failure to act, a sanction of invalidity cannot be applied. Therefore, the sanction may take the form of implementing concrete measures to ensure that the discrimination does not persist.

Generally, the Court of Cassation applies the civil law principle of awarding compensation to the victim for the discrimination suffered. In a new case, however, the Court went further by awarding to the victim a form of redress in kind, in addition to compensation. The case in question (Court of Cassation, Industrial Relations, 24 February 2004) concerned an employee in an organisation, a truck driver, who was the victim of discrimination in terms of his working conditions. The employer had withdrawn the use of the truck, which had previously been supplied to the employee. The Court of Appeal ordered the employer not only to pay compensation to the employee for the discrimination, but also to supply the vehicle to him. The ruling therefore establishes the principle of redress in kind and reflects an increasingly clear trend at the level of the Court of Cassation. Moreover, the latter had already confirmed two rulings of the Court of Appeal ordering measures to ensure discrimination does not persist. For example, the Court of Cassation has awarded career readjustments for employees who had been held back career-wise for reasons of discrimination. The readjustments involved a new classification and a new coefficient (i.e. a new number value attributed to the job). In addition, the employees in question were awarded the corresponding compensation.

Any breach of the prohibition of discrimination is also a punishable criminal offence. Please see section 4.3 above regarding the relevant sanctions; individual criminal responsibility for legal entities under the Criminal Code and the Labour Inspector’s powers to monitor compliance with the prohibition of discrimination.

Discrimination against any institution that is representing an employee and/or towards trade unions or their representatives constitutes the offence of obstruction and is punishable by criminal sanctions (fines of up to EUR 3,750 and/or a prison sentence of up to one year, doubled in the case of a second or subsequent offence (Article L.2146-2 of the Labour Code). The offence sanctioned by Article L.2141-5 (trade union discrimination) of the Labour Code assumes that the union activity was intentionally taken into account. The Labour Inspector also has authority to issue a writ (Articles L.8113-7 et seq. of the Labour Code). An employer who obstructs the Labour Inspector or Labour Supervisor in his or her duties, particularly where these are being exercised in relation to the prohibition of discrimination, is guilty of the offence of obstruction, which is punishable by the same criminal sanctions (Article L.8114-1 of the Labour Code).

An employee representative and/or trade union can also seek redress through the civil justice system in the form of compensation for loss. Trade unions can bring a claim based on direct or indirect discrimination against the collective interests of the particular profession that they represent (Article L.2132-3).

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
An employee may not be dismissed on any of the grounds set out in section 3 above.

This protection against dismissal also applies to any employee who may have witnessed or reported a prohibited act of discrimination, as well as any employee who has lawfully exercised his or her right to strike (Articles L.1132-2 and L.2141-2 of the Labour Code).

A pregnant woman enjoys specific protection against dismissal for any reason (i.e. individual dismissal or collective dismissal for economic reasons) in the following circumstances (Article L.1225-4 of the Labour Code):

- during the medically certified period of pregnancy up to the date when her contract is suspended
- during the period for which her contract is suspended
- during the four-week period following the expiry of the period during which her contract is suspended.

This prohibition of dismissal applies to the father in the event of the mother’s death.
By way of exception to this prohibition, an employer may dismiss a pregnant employee for gross misconduct unconnected with her pregnancy, or where for a reason unconnected with the pregnancy it is impossible for the employment contract to continue. However, the dismissal cannot take place or be communicated to the employee during her period of maternity leave (Article L.1225-4 of the Labour Code).

Elected or appointed representatives of an employee (please see section 5.1 above), former representatives of an employee, employees who have requested an election, and candidates for election enjoy a specific protection against dismissal for any reason (i.e. individual dismissal or collective dismissal for economic reasons). However, union delegates can only be dismissed with the prior authorisation of the Labour Inspector. The dismissal of any protected employee is submitted to the works council in advance, and then to the Labour Inspector for authorisation. The Labour Inspector must then satisfy himself or herself that the proposed step is ‘unconnected to the office(s)’ (i.e. free from any discrimination), otherwise he or she will refuse to give the authorisation (Articles L.2411-1 et seq. of the Labour Code).

An employee who takes time off work because of industrial injury or illness is protected against dismissal for the whole period of suspension of the employment contract. By way of exception, an employee who is off work because of industrial injury or illness may be dismissed for gross misconduct or where it is impossible for the employment relationship to continue for a reason unconnected with the injury (Articles L.1226-7 and L.1226-9 of the Labour Code).

6.2 Burden of proof
A dismissed employee who brings a claim of discrimination, whether direct or indirect, must provide the facts giving rise to the presumption of discrimination. In light of these facts, the employer must then prove that its decision to dismiss that employee was justified by facts untainted by discrimination (Article L.1134-1 of the Labour Code).

A judge may investigate as he or she sees fit, for example, by means of a survey or calling witnesses. The judge makes the decision based on the facts supplied by the parties and, where appropriate, on further investigation.

A statute dated 16 November 2001 gives representative trade unions the right to take any action necessary to protect an employee against discrimination with impunity and without needing a supporting declaration signed by the applicant. However, the applicant needs to have been informed in writing of the action by the union and must not have expressed any objection to the proposed action (Article L.1134-2 of the Labour Code).

Similarly, associations that are lawfully established (at least five years previously) and whose purpose is to combat discrimination, may take any action with impunity, on behalf of victims of this form of discrimination, provided that they support this action with a declaration signed by the applicant (Article L.1134-3 of the Labour Code).

6.3 Sanctions
Any dismissal constituting discrimination, prohibited by Article L.1132-1 of the Labour Code, is void in law. The dismissed employee must be reinstated. The employee may apply by emergency procedure to the judge for an order to this effect.

For example, age discrimination against an employee is sanctioned by the invalidation of the discriminatory dismissal. In a judgment dated 27 January 2004, the Paris Court of Appeal ruled that:

‘an employee cannot be made to take retirement, even if the employee is entitled to a full retirement pension, if there is a collective agreement under which the employee is given the right to continue his or her contract of employment ... consequently the decision to make the employee take retirement constitutes dismissal, which, based exclusively on the employee’s age, is invalid pursuant to article L.1132-1of the Labour Code ...consequently, [the employee] is entitled to be re-integrated into the company’.

The same principle applies to any dismissal of (or sanction against) an employee on strike, except in cases of gross misconduct.

The dismissal of a protected employee carried out without authorisation is void. The dismissed employee must be reinstated. The employer must reinstate the employee unless it is absolutely impossible for it to do so.

Any breach of the prohibition of discrimination is also a punishable criminal offence. Please see section 4.3 regarding the relevant sanctions; individual criminal responsibility for legal entities under the Criminal Code and the Labour Inspector’s power to monitor compliance with the prohibition of discrimination.

Discriminatory dismissal of an employee representative or union representative constitutes the offence of obstruction and is punishable by both civil and criminal sanctions (fines of up to EUR 3,750 and/or a prison sentence of up to one year, doubled in the case of a second or subsequent offence (Article L.2146-2 of the Labour Code). The Labour Inspector also has authority to issue a writ – please see section 5.3 above.
An employee representative and/or trade union can also seek redress through the civil justice system in the form of compensation for loss. Please see section 5.3 above.

A dismissal of a pregnant employee, which contravenes the protective provisions, is rendered void if, within 15 days of notification of dismissal, the employee presents her employer with a certificate of pregnancy or adoption. If she does so, the employer must reinstate her (Article L.1225-5 of the Labour Code).

An employee who is dismissed while suffering from an industrial injury or illness can apply to the judge to be reinstated with his or her length of service and statutory rights intact. If the employer refuses to reinstate the employee, or if he or she rejects reinstatement, the tribunal will order an award of compensation equal to no less than 12 months’ salary (Article L.1226-14 of the Labour Code).

7. Expected future developments

A law of 30 December 2004 created the ‘HALDE’ (High Authority against Discrimination and for Equality), which became effective in 2005. The HALDE is not a Court, but a moral authority on all types of discrimination, direct or indirect, which are prohibited under French law or an internationally approved or ratified Directive. The HALDE is empowered to deal with any type of discrimination on grounds related to age (direct or indirect) and it has been given powers to provide information, to undertake investigations and to provide advice. The HALDE is also able to take legal action. This anti-discrimination body is not empowered to impose sanctions. The HALDE’s functions may in the coming months be integrated into a new body (the Rights Protector).

As specified above, the new law of 27 May 2008, transposing European Directives into national law, has introduced some new provisions into French discrimination legislation.
## Implementation of EU Directives

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2. LEGISLATION NOT BASED ON EU DIRECTIVES

German Constitution
The German Constitution, enacted in 1949, prohibits any discrimination between persons of a comparable group without objective reasons. Article 3 of the Constitution provides that men and women have equal rights and no person can be given preferential treatment or be discriminated against on the grounds of sex, descent, racial origin, language, homeland or ethnic origin, faith, religious or political opinions. It also stipulates that no one can be discriminated against on the grounds of disability. This constitutional principle has a direct influence on employees employed by the State and the government. State employees can directly refer to the Constitution. Although not directly, this constitutional principle also has a strong influence on German civil law and employment law.

Principle of equal treatment
Under German labour law, there is also a basic unwritten principle of equal treatment (Arbeitsrechtlicher Gleichbehandlungsgrundsatz). This is based on
the principle of equal treatment in Article 3 of the German Constitution, which has been developed by case law. This principle states that comparable employees must not be treated differently by their employer without there being objective reasons. In particular, the principle of equal treatment refers to voluntary increases in salary by an employer or bonuses, such as a Christmas bonus (Weihnachtsgeld). An employee has a legal right to equal treatment and can claim pecuniary compensation for a benefit from which he or she has been excluded.

3. Definitions of the different prohibited types of discrimination

Grounds for discrimination
Section 1 of the Federal Equal Treatment Act, enacted on 18 August 2006, provides that an employee must not be discriminated against on any of the following grounds:

- racial origin
- ethnic origin
- sex
- religion or philosophy of life
- disability
- age
- sexual identity or orientation.

In addition to these grounds, there are several more grounds that are based on case law and mainly derived from the German Constitution:

- political opinion
- membership of a trade union
- marital status
- pregnancy.

Exceptions
The Federal Equal Treatment Act provides some exceptions to these rules regarding differential treatment.

Section 8 stipulates that differential treatment is allowed in order to meet the specific requirements of a certain kind of work, as long as the requirements are appropriate. For example, a municipality could offer only female candidates the job of an equal opportunity commissioner, if she would be the contact person for Muslim women and women’s refuges (Federal Labour Court, decision of 18 March 2010). Moreover, teachers who work for the State, have a duty to be neutral on political and religious matters, which is why a teacher must not wear a headscarf while teaching (Higher Labour Court of Hamm, decision of 16 October 2008).

Under section 9, paragraph 1 of the Federal Equal Treatment Act, treating a person differently because of his or her religion or belief within churches and similar organisations does not constitute discrimination, if his or her religion or belief constitutes a genuine, legitimate and justified occupational requirement, by reason of the nature of the activities involved or the organisation’s ethos. The European Commission holds that the exception in section 9 of the Federal Equal Treatment Act is too wide. Article 4, paragraph 2 of Directive 2000/78/EC provides that a difference in treatment is allowed, if a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, by reason of the nature of the activities involved and the organisation’s ethos. However, one female employee of a church received compensation because her fixed-term employment contract was not renewed on account of her membership of another church, although the guidelines of the church she worked for allowed membership of other churches (Labour Court of Hamburg, decision of 28 August 2009).

Section 10 of the Federal Equal Treatment Act provides another exception based on the age of an employee or candidate. A difference in treatment because of a person’s age is not prohibited, if it is objective, appropriate and justified by a legitimate aim. For example, an employer may classify employees according to their age and dismiss a proportionate number of employees from each class in order to maintain the ageing structure of its workforce (Federal Labour Court, decision of 6 November 2008). In contrast, such classification is deemed to be discrimination based on age, if an employer decides to dismiss only employees of a specific class (Federal Labour Court, decision of 21 January 2009). Furthermore, it is acceptable to reject a candidate who has not reached the age of 18, if this is the minimum age requirement for a certain kind of work, and this minimum requirement is appropriate and necessary. Previously (prior to the Federal Equal Treatment Act), in exceptional cases a clause that terminated a contract at a certain age, where that age was lower than the legal retirement age, was acceptable (e.g. pilots, for safety reasons). This might change under the Federal Equal Treatment Act (see the European Court of Justice, C-447/09, Prigg). However, it is deemed to be discrimination based on age, if a collective agreement stipulates an age limit of 60 for flight attendants (Federal Labour Court, decision of 23 June 2010).
**Forms of discrimination**

The various forms of discrimination are defined in section 3 of the Federal Equal Treatment Act, that is, direct and indirect discrimination, as well as harassment.

Direct discrimination occurs when a person is treated less favourably than other people in a comparable situation are, have been or would be treated on one of the grounds provided by section 1 of the Federal Equal Treatment Act.

Indirect discrimination occurs when an apparently neutral practice, criterion or provision would put a person at a particular disadvantage compared with other persons, unless that practice, criterion or provision is objectively justified by a legitimate aim and the measures to achieve that aim are appropriate and necessary.

Harassment is defined as any unwanted conduct relating to one of the grounds provided by section 1 of the Federal Equal Treatment Act, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment is defined as any unwanted, sexually motivated conduct. This includes unwanted sexual acts and demands to perform such acts, sexually motivated physical contact, remarks of a sexual content and any unwanted display or visible posting of pornographic images with the purpose or effect of violating the dignity of a person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment.

4. **Discrimination during recruitment**

4.1 Principles

Under section 2, paragraph 1, no 1 of the Federal Equal Treatment Act, the Act is applicable to recruitment conditions. Therefore, discrimination based on any of the grounds referred to in section 3 above is prohibited during the recruitment process. This means that job advertisements must be framed in a neutral way so as not to discriminate against certain candidates. For example, it is discrimination based on ethnic origin, if a job applicant is not considered because his or her ‘native language is not German’ (Labour Court of Berlin, decision of 11 February 2009). As already stated, exceptions are allowed, as long as they satisfy the strict conditions provided by the Federal Equal Treatment Act.

When recruiting, an employer must be especially cautious when asking questions in an interview, if the questions could result in discrimination. For example, the question ‘how old are you?’ could lead to discrimination on the grounds of age; the question ‘are you planning to or do you have any children?’ could indicate discrimination on the grounds of sex; ‘are you receiving psychiatric treatment?’ could indicate discrimination on the grounds of disability (Federal Labour Court, decision of 17 December 2009). Similarly, questions concerning religion or family responsibilities may also result in discrimination.

An employee does not need to give a true answer when asked such questions. Instead, he or she has the ‘right to lie’, unless a true answer is essential for the specific job. For example, in an interview for a job that requires excellent physical health, a severely disabled employee would need to give a true answer to the employer, if asked whether he or she is severely disabled or not. Once in employment, an employee no longer has the ‘right to lie’. There are special procedural rules in Germany that are designed to protect severely disabled employees from discrimination. For example, an employer must inform its representative body for disabled employees of any job application by a person with a severe disability. Therefore, an employer must carefully examine every job application that it receives and be aware of any indication that the job applicant might be severely disabled (Federal Labour Court, decision of 16 September 2008).

An employer is entitled to recruit an employee of, for example, a particular sex, race or religion, if this is a ‘genuine occupational requirement’. However, such situations are very rare. In addition, a job advertisement may include the information that the employer is ‘especially interested in applications from women’, as long as women are underrepresented in the respective field of work (Higher Labour Court of Düsseldorf, decision of 12 November 2008).

The German Federal Labour Court asked the European Court of Justice for a preliminary ruling on the question of whether a job applicant, who claims that he or she has been discriminated against, can demand information from the employer as to whether another job applicant has been recruited and, if so, on what criteria this decision was based (see the European Court of Justice, C-415/10, Meister).

4.2 Burden of proof

Under German civil and labour law, the claimant usually bears the burden of proof. In cases of discrimination, the burden of proof is reversed under section 22 of the Federal Equal Treatment Act. If an employee takes legal action
against an employer because of discrimination, he or she only needs to provide presumptive/circumstantial evidence (indication) that leads to the assumption that discrimination has occurred. If an employee is able to do so, the employer must then prove that no discrimination has occurred.

In an interview with a job applicant certain questions are sufficient to shift the initial burden of proof from him or her to the employer (for examples of such questions please see section 4.1 above).

Often, the nature of a company's job advertisements will result in the burden of proof shifting to it. For example, a job advertisement addressing ‘young’ applicants is always regarded as discriminatory against older candidates (Federal Labour Court, decision of 19 August 2010). A job advertisement addressing only ‘creative men’ is regarded as both direct discrimination against female candidates and indirect discrimination against older candidates, because the word ‘creative’ is generally associated with young people. In such a case, it would be assumed that an older woman who applied for this job would be discriminated against, if she was rejected. The employer would then have the (full) burden of proof that it did not discriminate against the female candidate.

In contrast, the courts recently held that a job advertisement addressing ‘flexible and resilient’ people contains neither direct nor indirect discrimination against disabled candidates, because it is a set phrase and only clarifies that a varied job requires considerable commitment (Higher Labour Court of Nuremberg, decision of 19 February 2008).

Generally, there can be no discrimination, if the applicants concerned are not comparable, for example, because of a different education or if an employer receives a job application after the decision to offer employment to another job applicant has already been made (Federal Labour Court, decision of 19 August 2010).

4.3 Sanctions
Under section 15 of the Federal Equal Treatment Act, a job applicant who has been discriminated against by an employer may claim compensation for financial loss (if the employer acted negligently or with intent). A job applicant is also entitled to claim compensation for pain and suffering (irrespective of whether the employer acted negligently or with intent). However, the amount of compensation for financial loss during recruitment is limited to the salary the candidate would have received until the earliest termination date. Compensation for pain and suffering during recruitment is limited to three

month’s salary, if a candidate has been rejected on any of the grounds provided by section 1 of the Federal Equal Treatment Act and if he or she would not have been hired in any event. Compensation for pain and suffering is not as relevant in Germany as in some other countries, because the amount of compensation is relatively small. For example, an employer who dismissed only those employees over the age of 40 had to pay compensation of EUR 1000 to the employee who brought the claim (Federal Labour Court, decision of 22 January 2009).

The candidate must claim compensation within a period of two months after finding out about the alleged discrimination (see European Court of Justice, C-246/09, Bulicke).

An employer with more than 20 employees must employ a certain number of disabled people. Disabled people should hold five per cent of all the jobs in the company. An employer that cannot fulfil this obligation must pay a fine (an equalisation fee). The fine is comparatively small.

5. Discrimination during the employment relationship

5.1 Principles
The Federal Equal Treatment Act provides different kinds of protection against discrimination and harassment of employees at work.

In general, section 12, paragraph 1 of the Federal Equal Treatment Act provides that an employer must take all measures necessary (including preventive measures) to protect its employees from discrimination and harassment on any of the grounds provided by section 1 of the Federal Equal Treatment Act. Under section 12, paragraph 2 of the Federal Equal Treatment Act, an employer must train its employees adequately so that they know how to react in cases of discrimination or harassment and how such an occurrence can be prevented. An employer must not only provide protection against harassment from other employees, but also from superiors and third parties such as customers. Section 12, paragraph 4 of the Federal Equal Treatment Act provides that in the case of discrimination by a third party, an employer must take appropriate and adequate measures to ensure the protection of the particular employee. For example, this could include a house ban on a customer who regularly discriminates against an employee.

Besides the Federal Equal Treatment Act, other legislation also provides protection against discrimination. Under section 4 of the Federal Part-time and
Limited Contract Act, a part-time employee must not be treated less favourably than comparable full-time employees, unless there is an objective reason for differential treatment. For example, qualifications and seniority in the company have been accepted as objective reasons for differential treatment.

5.2 Burden of Proof
In cases of discrimination on one of the grounds provided by section 1 of the Federal Equal Treatment Act, the rules of section 22 apply. An employee only needs to provide presumptive/circumstantial evidence (indication) that leads to the assumption that discrimination has occurred. If the employee is able to do so, the employer then has the full burden of proof that no discrimination has occurred. Statistical data can be used as an indication that discrimination has occurred. If a female employee wants to prove discrimination on the grounds of sex (e.g. if she was not promoted because of a ‘glass ceiling’ for women), the requirements are quite strict. The statistical data must show the percentage of women in the whole company, the percentage of women above the glass ceiling and the percentage of women in the last hierarchical group below it. In addition to the statistical data, supporting evidence is necessary (Federal Labour Court, decision of 22 July 2010).

Within the scope of the Federal Part-time and Limited Contract Act, section 22 of the Federal Equal Treatment Act does not apply. Instead, an employee with a part-time or fixed-term contract has the full burden of proof in a discrimination claim. The same applies when an employee brings a claim out of the basic unwritten principle of equal treatment (see section 2.2 above). He or she must prove that there is a benefit, which he or she has been excluded from, although other comparable employees have received this benefit from the employer.

5.3 Sanctions
Within the scope of the Federal Equal Treatment Act, an employee who has been discriminated against by an employer may claim compensation for financial loss (section 15, paragraph 1). Under section 15, paragraph 2, he or she is entitled to claim compensation for pain and suffering. The amount of compensation is not limited, other than during recruitment.

A victim of discrimination can appeal to a complaints board, which must be established by the employer (section 13 of the Federal Equal Treatment Act – there is no corresponding EU Directive). If a works council exists, it has a right of co-determination concerning the initiation and organisation of the complaints procedure, but is not involved in the appointment of the members of the complaints board and where it is located.

If an employer takes no measures or takes clearly unsuitable measures to stop harassment in the workplace, under certain conditions the employee is entitled to stop working without loss of pay (section 14 of the Federal Equal Treatment Act – there is no corresponding EU Directive). However, the employee bears the risk that the conditions may not be fulfilled, i.e. the employer might be entitled to dismiss the employee (after giving a warning), because he or she refused to perform the contractual tasks.

In workplaces where a works council exists or could be elected, the works council or a trade union which is represented in the workplace can file for injunctive relief, if the employer grossly violates the Federal Equal Treatment Act (section 17, paragraph 2 – there is no corresponding EU Directive). The works council or the trade union can also claim remedies, but they are not allowed to assert claims on behalf of the individual employee. For example, the works council can claim that the employer is not allowed to use an internal job advertisement searching for ‘employees in their first year of service’ with the company.

Discrimination that does not fall within the scope of the Federal Equal Treatment Act, for example, discrimination of part-time employees, is not sanctioned by German labour law. Instead, an employee who has been discriminated against has a legal claim to equal treatment and any existing discriminatory agreements become void.

6. Discrimination when an employee is dismissed

6.1 Principles
Although a discriminatory dismissal is void under German law, the main protection against dismissals in Germany is provided by the Federal Protection Against Unfair Dismissals Act. This Act is applicable to all dismissals, if the corporation employs more than ten employees and the employee who is to be dismissed has been employed for more than six months. In such a case, the dismissal must be ‘socially justified’. This means the dismissal must be caused by compelling business requirements (e.g. a plant closure, a drop in orders, rationalisation), reasons related to the conduct of the employee (e.g. theft, breach of contract) or reasons related to the employee himself or herself (e.g. a long-term sickness). Furthermore, the dismissal must be the last resort, that is, the employer must have exhausted all other available and reasonable means, such as a transfer, relocation, reassignment and training for other jobs, before an employee may be dismissed. Additionally, a dismissal for misconduct without prior warning (Abmahnung) is generally considered to be invalid.
The Federal Equal Treatment Act is more relevant to corporations that do not fall within the scope of the Federal Protection Against Unfair Dismissals Act (if they have less than ten employees or the length of the employee’s employment is less than six months). In such cases, the Federal Equal Treatment Act provides protection against discriminatory dismissals.

Some groups of employees are subject to special proceedings to guarantee them a higher level of protection. For example:

- Members of the works council and other boards of co-determination: they can only be dismissed for urgent reasons, unless the business operation/plant is closed. The employer needs the prior approval of the works council.
- Severely disabled persons: the employer needs the prior approval of the Office for Integration (Integrationsamt).
- Mothers during pregnancy and up until four months after child birth: the employer needs the prior approval of the responsible authority.
- Employees on parental leave: the employer needs the prior approval of the responsible authority.
- Employees on leave for military service: during military service they cannot be dismissed. Before and after leave for military service, a dismissal motivated by military service is invalid. However, a dismissal for urgent reasons is possible. The military service itself is not accepted as an urgent reason.

6.2 Burden of Proof
Under German civil and labour law, the claimant usually bears the burden of proof. However, if the employee claims that the dismissal was not ‘socially justified’ in accordance with the requirements of the Federal Protection Against Unfair Dismissals Act, the employer bears the burden of proof for the ‘social justification’. This means, the employer must explain the cause for the dismissal (compelling business requirements, reasons related to the conduct of the employee or reasons related to the employee himself or herself. If the dismissal is ‘socially justified’, it cannot be discriminatory.

It is disputed whether an employee who is not protected by the Federal Protection Against Unfair Dismissals Act can claim that his or her dismissal is in breach of the Federal Equal Treatment Act (with the consequence that the employer bears the burden of proof) or whether such an employee must claim that the discriminatory dismissal fails to conform to public policy and good faith (with the possible consequence that the employee bears the full burden of proof).

6.3 Sanctions
Discriminatory dismissals are void and a dismissed employee can bring a claim for reinstatement against his or her employer. Within the scope of the Federal Protection Against Unfair Dismissals Act, the employee may theoretically request termination of the contract and payment of compensation, if continuing to work for the employer is unacceptable. In practice, this option is rarely chosen by employees. Instead, the majority of cases are resolved with a settlement agreement in court stating that the employment relationship is terminated and a severance payment has been/will be paid.

It is disputed whether the employee can claim compensation in the case of a discriminatory dismissal (section 15 of the Federal Equal Treatment Act), since the only consequence of a void dismissal is the reinstatement of the employee in accordance with German dismissal law.

7. Expected future developments
Since the enactment of the Federal Equal Treatment Act of 2006, there has been a gradual increase in the volume of case law regarding discrimination. Most case law is in relation to either discrimination during recruitment or discrimination in relation to dismissals. During recruitment there have been some cases of so-called ‘AGG-Hoppers’. These people intentionally apply to discriminatory job advertisements in order to be discriminated against, in the hope that they will receive compensation. Because of the small amount of compensation that can usually be rewarded, the number of such cases is very low. According to one law firm’s online data bank, the number of AGG-Hoppers is much less than expected. Many employers were willing to settle these cases out of court, since under section 22 of the Federal Equal Treatment Act, it is the employer who bears the burden of proof. However, courts now look closely at the claimant’s record in order to prevent abuse.
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7. **Expected future developments**
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<td>Presidential Decree no 87/2002; Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers, and workers who have recently given birth and who are breastfeeding; Law no 1483/84; Law no 1414/8; and Presidential Decree no 17697</td>
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<td>The framework agreement on part-time work concluded by UNICE, CEEP and the ETUC</td>
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<td>Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</td>
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<td>Establishing a general framework for equal treatment in employment and occupation</td>
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<td>2002/73/EC of 23 September 2002</td>
<td>Amending Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions</td>
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2. **Legislation not based on EU Directives**

The fundamental national legislation was originally based on the EU Directives listed above. However, within this, there have been some supplementary statutes made more independently, with regard to establishing organisations and authorities entrusted with recommending and taking appropriate measures to implement the principle of equal treatment in its different aspects. More specifically, certain statutes have established the General Secretariat for Gender Equality and a number of decentralised departments within it in the region of Attica (e.g. Presidential Decree no 5/2008, establishing a new Agency of the General Secretariat for Gender Equality for better and more efficient operation of its service, as amended by Presidential Decrees nos 189/2009 and 96/2010). It should be noted that the General Secretariat for Gender Equality, which was initially founded by Law 1558/1985, as an independent public service and at that time belonged to the Ministry of the Presidency of the Government, has the task of implementing legal and substantive equality between men and women in Greece in all sectors (political, economic, cultural and social) and of addressing the shortfall in equality that is to be found in practice in many areas. For example, its remit covers market and labour relations in the private and public sector, the deficit of female participation in decision-making, violence against women and stereotyped perceptions of gender roles. It can be said that this institution is the most important we have for defending these rights and ensuring legal protection of them.

3. **Definitions of the Different Prohibited Types of Discrimination**

Under Greek legislation there is a general prohibition of discrimination in employment. Accordingly, discrimination in relation to an individual's right to work is prohibited on the following grounds:

- race
- sex or sexual orientation
- age
- political opinion
- religion
- trade union (non-)membership
- marital status
- pregnancy.
Discrimination is also prohibited in relation to an individual's choice of profession, his or her right to safe and appropriate working conditions, protection against unemployment, sexual harassment, equal pay for equal work and appropriate and fair remuneration.

4. DISCRIMINATION DURING RECRUITMENT

4.1 Principles

Under Greek law, every individual has the freedom and the right to work. The principle of equal treatment is recognised as a result of the principle of freedom of movement (Article 48, paragraph 2 of the Rome Convention, and Articles 7 and 8 of Regulation no 1612/88). Consequently, any discrimination between Greek citizens and immigrants from other EU Member States during the recruitment process is prohibited.

Although work permits are not required for EU citizens, a special residence permit is required. Under Greek law, non-EU immigrants are not entitled to be employed unless they have previously been granted a residence permit issued for the purpose of employment.

When recruiting an employee, the law prohibits an employer from discriminating against a job applicant on any of the grounds set out in section 3 above.

However, there are some exceptions relating to the employment of young people (under 18 years of age: Law no 3863/2010), elderly people and women (Law no 3227/2004). These exceptions are intended to protect the young, the elderly and women in certain circumstances and to support their access to employment.

Article 4, paragraph 1 and 2 of the Constitution provides for equality in law and equal rights for Greek men and women. A further legislative measure is the amendment of Article 116 of the revised Greek Constitution, which provides that ‘positive measures for the promotion of equality between men and women do not constitute sex discrimination’.

The constitutional principle of gender equality covers all types of discrimination on the basis of an employee's sex, including indirect discrimination. This means that, in general, an employee must not be recruited on the basis of his or her sex. On the contrary, the criteria for the selection of an employee should be objective and based on due merits (i.e. taking account of his or her qualifications).

Currently, the number of cases of direct discrimination based on sex being seen before the courts is diminishing. The number of cases of indirect discrimination is, however, increasing. Greek Courts follow the general interpretation of ‘indirect discrimination’, which occurs when men and women are treated differently because an apparently neutral provision in practice puts a substantially higher proportion of the members of one sex at a disadvantage.

Any legal provision (e.g. legislative, regulatory or by collective agreement) that includes indirect discrimination is unconstitutional. Article 3 of Law no 1414/84 (on access to occupations) provides that access to all sectors and stages of an occupation should be available to all employees or applicants regardless of sex or marital status.

Article 3 of Law no 1414/84 prohibits a distinction between men and women in an employment contract, whether a competitive and open process was used to fill the position or not. Such distinctions render any such contract void. Consequently, advertising positions separately for men and women, and the preparation of shortlists of applicants on the basis of sex, are prohibited and also invalid (e.g. see Appeal Court of Thessaloniki 1758/1999 and Supreme Court 1095/1998).

In the event that an unsuccessful candidate is able to prove that discrimination took place during the recruitment process, then the employer may be liable in a civil action to employ that candidate and to pay him or her the salary to which he or she would have been entitled in the interim period.

As regards discrimination during the employment relationship, if an employee succeeds in a claim for equal pay, the employer must pay that employee the appropriate difference in pay.

Finally, if an employee is dismissed owing to a discriminatory attitude towards him or her, the primary sanction is the invalidity of the dismissal. If the dismissal is deemed invalid the employer must pay any outstanding wages to that employee from the time of his or her dismissal until the time of the judgment in his or her favour.

Law no 2839/2000 on the ‘Regulation of matters regarding the Ministry of Foreign Affairs, Public Administration and other Provisions’ introduced a gender quota system to governing councils, administrative boards and collective bodies in the public sector. Other developments include: Article 7 of the National Collective Agreement 2006/2007, which provides terms on ‘the support of family and the reinforcement of women’s employment’; Article 22
of the National Collective Agreement 2000/2001 on ‘respect for workers’ ethnic, religious and cultural particularities’, which provides that ‘the contracting parties agree that all possible efforts should be made to achieve respect in practice for the racial, ethnic, religious or cultural particularities of all workers and to facilitate their adaptation to the work environment’; and Article 10 of the National Collective Agreement 1998/1999 on racism and xenophobia, which provides that ‘the contracting parties recognise the necessity of cultivating a spirit of humanity, sensitivity and solidarity on matters related to ethnic and racial discrimination’.

Further, the provisions created by Law 3304/2005 (on the ‘implementation of the principle of equal treatment regardless of racial or national origin, religious or other beliefs, disability, age or sexual orientation’), incorporated into Greek law by EU Directives 2000/43/EC and 2000/78/EC, ensure the principle of equal treatment is upheld, and should reduce discrimination in the workplace (in both the private and public sectors).

Law 3304/2005 introduced specific positive measures designed to prevent or counterbalance any disadvantages on account of race, national origin, religion, age, disability or sexual orientation. These measures were explicitly considered to be non-discriminatory. Moreover, it provided sanctions to prevent any discrimination based on race or national origin, religion or belief, disability, age or sexual orientation, particularly in employment and occupation. Finally, Law no 3304/2005 provided measures to enhance the legal protection of people with disabilities against discriminatory attitudes. Accordingly, within the principle of equal treatment and in compliance with Article 10 of Law no 3304/2005, an employer is obliged to take all appropriate measures to guarantee that such people have free access to employment and that their position is secured in a way which enables them to have the opportunity to participate in training. An employer is required to do so, unless this results in a disproportionate burden upon it.

More recently, Law no 3769/2009 and Law no 3896/2010 specify positive measures to be taken to support the stance against discrimination between men and women as regards employment. These Laws also contain provisions to enhance and protect motherhood, fatherhood and family life, which under the established principle of equal treatment between genders, remain the primary aims of EU legislation.

An important addition has been made by Law no 3896/2010, in accordance with the specific scope of Directive 2006/54/EC, which aims to eliminate discrimination effectively. The sanctions imposed in the case of a violation of the principle of equality between men and women in the workplace, have become more strict and explicit, consisting not only of monetary measures but also custodial sentences.

Finally, regarding the protection of generally vulnerable groups in relation to employment, a number of legislative provisions have been established (Law no 2956/2001, no 2972/2001, no 3051/2002, no 3227/2004 and no 3454/2006) of which the most important is Law no 2643/1998. It seeks to balance the protection of persons with disabilities with the need for measures to enhance competitiveness in the workplace. The protection of these groups includes both their employment and the establishment of special protection regarding termination of the employment relationship. The main feature of the protection provided for those people is that they are essentially hired by a competent authority, which substitutes the will of the parties in the employment contract. Termination of the employment relationship for such people is not without restrictions and is only allowed in certain circumstances as specified in law. Specifically and according to Law no 2643/1998, there is an obligation that an average of two to three per cent of the workforce should comprise people with disabilities in varied working positions. The most recent legislation amended Law no 2643/1998 and introduced changes to make its provisions more favourable and effective for people with disabilities.

4.2 Burden of proof
The initial burden of proof lies with the unsuccessful job applicant who claims that he or she has been discriminated against. If that applicant can demonstrate evidence of discrimination, the burden of proof passes onto the employer, who must prove that no discrimination took place. The same applies in cases of sexual discrimination, according to Article 24 of Law 3896/2010.

4.3 Sanctions
The primary civil sanction provided under Greek law is that an employer may be liable to employ a job applicant and pay him or her the salary to which he or she would have been entitled. Moreover, as the new Law 3896/2010 prescribes, an employee is entitled to seek supplementary compensation not only for positive and consequential loss, but also for moral damage, because of the discriminatory behaviour he or she has suffered. Moreover, under Article 12 of Law 1414/84, administrative sanctions may be imposed (primarily fines by the competent Labour Inspectorate). These administrative sanctions are also provided by Law 3304/2005 and Law 3896/2010, which refer to discrimination on the basis of gender as a violation of labour legislation.
Most significant of all is that an employer that violates the principle of equal opportunities and equal treatment in the workplace, can also be held criminally liable. More specifically, if a person exploits the post of another person or the position of a person who is seeking a job, he or she can be punished with imprisonment for between six months and three years and a fine of at least EUR 1,000. These new penalties are provided, in addition to other civil and administrative sanctions that already exist in Greece, in accordance with Law 3896/2010, which transposed Directive 2006/54/EC into the national legislation.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
According to the fundamental principles of ‘free will’ and ‘contractual freedom’, an employer is free to determine together with the employee the terms of the employee's employment contract. These terms may vary to the benefit or to the detriment of the individual employee, as long as the restrictions imposed by statute law are not breached.

These principles are, however, secondary to the principle of equal treatment. Accordingly, an employer should not treat an employee differently with regard to opportunities in the employment context, or remuneration and benefits, unless those differences in treatment are objectively justified on the basis of fair and reasonable criteria.

The principle of equal treatment also applies where an employer rewards an employee with discretionary bonus payments or other incentives. An employer is not entitled to arbitrarily differentiate between employees in the same position, because according to the Constitution, employees should receive equal pay for equal work.

The principle of equal treatment is not purely a principle of labour law. On the contrary, it is a manifestation of the general principle of equality, which is set out in the Greek Constitution (Article 4, paragraph 1). Consequently, an employer is obliged to treat all of its employees in the same way, so that employees doing equivalent work have similar terms of employment.

As already stated, discrimination may appear in two different forms: either as direct or indirect discrimination. Indirect discrimination is an apparently neutral practice, but it conceals clear evidence of discriminatory behaviour regarding nationality, sex or age, which puts some groups or individuals in a disadvantageous position in comparison to others. Therefore, in relation to job advertisements, certain behaviour may conceal discriminatory intentions. Moreover, indirect discrimination may arise if an employer evaluates an employee based on criteria that are discriminatory and which cannot be objectively justified. For example, although the criteria or performance measures may not be directly linked to the sex of an applicant, they may nevertheless indicate a gender feature that cannot be met by the members of one particular sex. Such criteria or performance measures are only acceptable where an employer can clearly demonstrate that they are sufficiently justified by the interests of the business.

The provisions of the fundamental Law 3304/2005, with its amendments, protect an employee not only against direct but also indirect discrimination. Traditionally, sex is the main distinction in such cases, but recently age is also increasingly being found as a reason for discriminatory behaviour.

The prohibition against discrimination on the basis of sex constitutes a restriction of an employer’s freedom to contract. The prohibition applies to all of the conditions of work, including an employee’s rights, expectations and obligations regardless of availability of work, the working environment and the employee’s behaviour. The prohibition applies to all of an employer’s decisions, even discretionary decisions such as the delegation of additional responsibilities, overtime and bonuses. Article 5, paragraph 1 of Law 1414/84 (on the implementation of the principle of equality) provides that ‘every distinction based on the sex of the employee regarding the terms of their contract of employment, their terms of employment, professional development and career is prohibited’. Terms of employment include pay, overtime, terms in relation to working on Sundays, illegal overtime and all illegal employment relations.

On the other hand, privileges afforded to certain categories of employee do not constitute prohibited discrimination. This means that special protective measures for pregnant women or for trade unionists are valid. Greek legislation has relevant provisions in Law no 1302/82 and Law no 103/1952 (International Work Convention); Article 15 of Law no 1483/84; Article 9 of Law 2224/94; and Article 142 of Law no 3655/2008. These provisions entitle a pregnant employee to take maternity leave, regardless of her length of service, upon submission of a doctor’s certificate that indicates the expected date of childbirth. The total duration of maternity leave is 17 weeks (119 days). Moreover, a special benefit has been established for the protection of motherhood (special maternity leave), which a female employee is entitled to take after the expiration of the above period and which lasts for six months.
In accordance with Law no 1285/82, a similar special protection is afforded to employees with several children, to disabled people, and to former members of the National Resistance and their children. Another special provision applies to trade union representatives. An employer is obliged to grant leave to the members of the Board of Directors of the trade union to enable them to properly fulfill their duties. The duration of this leave should be appropriate to the level and size of the trade union, in accordance with Article 6 of Law no 2224/94.

Various legislation also provides specific protection, for example, for women and workers who are under 16 years of age.

Theoretically, the law protects the victims of discrimination. However, it is not easy for someone seeking a job to prove that he or she has been a victim of discrimination. A number of necessary steps must be taken to gather as much evidence as possible for the case (e.g. documents, interviews, the content of advertisements and the CVs of other candidates who have been recruited). These elements can also be used extra-judicially, and more specifically before the two competent authorities against discrimination, namely the Ombudsman, who mediates in such cases, and the Equal Treatment Commission of the Ministry of Justice.

5.2 Burden of proof
The burden of proof lies initially with the employee who claims that he or she has been discriminated against (please see section 4.2 above).

5.3 Sanctions
If an employee succeeds in a claim for equal pay, the employer must pay that employee the appropriate difference in pay. An employer who prevents an employee from pursuing his or her legal rights can also be liable to criminal sanctions (please see section 4.3. above). Under Law no 1414/84 and in the case of a discriminatory attitude in the workplace, civil actions can be brought against an employer, according to the main provisions of the Greek Civil Code, as determined by Law no 3896/2010. At the same time, an employer that breaches the above principle may be punished with an administrative penalty (please see section 4.3 above).

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
As a general principle, an employer has the freedom to dismiss an employee and can exercise this right at any time. However, the general provisions on the prohibition of discrimination also apply in a dismissal situation.

The freedom to dismiss an employee is also specifically restricted in certain cases. The dismissal of an employee on leave is absolutely prohibited, except in the case of unpaid or extended leave.

The dismissal of an employee during compulsory military service and for at least one year afterwards, is prohibited by Article 1 of Law no 3514/1928, provided that the employee meets the qualifying criteria, which includes a minimum of six months’ service and the giving of notice to the employer that he or she wishes to return to work within one month after the completion of military service.

The dismissal of a pregnant woman during her pregnancy, for one year afterwards, and during any illness resulting from the pregnancy, is unconditionally prohibited and is void if carried out.

The dismissal of an employee with an addiction, on the basis of that addiction, is prohibited, particularly where that employee is shown to be actively seeking treatment for his or her addiction.

The dismissal of an employee in the tourist industry (e.g. if it is a seasonal occupation, such as a hotel employee or a cook), an employee who is undertaking postgraduate studies, or a trainee, is prohibited under Article 5 of Law no 4032/60 and Article 15, paragraph 4 of Law no 1077/80. The dismissal of a trade union member is prohibited, unless the relevant legislative procedure is followed.

Furthermore, it is illegal for an employer to dismiss an employee on the grounds of his or her sex, or as a consequence of him or her taking legal proceedings against the employer (Article 6 of Law no 1414/84). In this case, the dismissal is void, and the employee in question will be deemed not to have been dismissed.

The provisions of the new law no 3863/10 offer protection against dismissal. According to this, the number of dismissals of people aged between 55 and 64 years cannot exceed ten per cent of the total number of employees.

6.2 Burden of proof
The burden of proof lies with the employee who claims that he or she has been discriminated against.
6.3 Sanctions
The primary sanction is the invalidity of the dismissal. Consequently, an employer must pay any outstanding wages to the employee from the time of his or her dismissal until the time of the judgment in his or her favour.

7. Expected future developments
Following the implementation of Directive 2006/54/EC into Greek legislation, with Law no 3896/2010, and the publication of the recent Law no 3863/2010 on labour and social security issues, no further development is expected in the near future.
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2. **Legislation not based on EU Directives**

The Sex Disqualification (Removal) Act 1919 and The Unfair Dismissals Acts 1977-2007 (the ‘Act’)

3. **Definitions of the different prohibited types of discrimination**

Ireland has been progressive in recognising equality in the law from its very inception as a Free State. The Irish Constitution provides that all citizens must, as human beings, be held equal before the law. However, the State may have due regard to differences of capacity, physical and moral, and of social function. The Irish Constitution also forbids discrimination on religious and political grounds and on the basis of a person’s membership of a family.

There is also specific legislation preventing discrimination in the context of employment. The Employment Equality Acts 1998 to 2008 (the ‘Employment Equality Act’) prohibit discrimination on the following grounds:

- gender
- marital status
- family status
- sexual orientation
- religion
- age
- race
- membership of the traveller community
- disability (includes persons with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions. This seems to be a broader definition than that required under Council Directive 2000/78/EC).

The Protection of Employees (Part-Time Work) Act 2001 provides that a part-time employee must not be treated less favourably than a full-time employee.

The Protection of Employees (Fixed-Term Work) Act 2003 ensures that a fixed-term employee must not be treated less favourably than a comparable permanent employee and that an employer cannot continually renew fixed-term contracts.

There is also a separate right to equal pay between men and women.
As well as differing grounds of discrimination, there are also different types of discrimination covered by the Employment Equality Act 1998:

**Direct discrimination**
Direct discrimination occurs where an individual is treated in a less favourable way than another individual is, has been, or would be treated in a comparable situation on any of the nine discriminatory grounds, or is imputed to the person concerned.

**Indirect discrimination**
Indirect discrimination occurs where an apparently neutral provision puts a person in the relevant category at a particular disadvantage compared with another employee, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

**Discrimination by association**
Discrimination by association is where a person associated with another person (belonging to any of the nine discriminatory grounds) is treated less favourably because of that association. This type of discrimination has been recognised by the European Court of Justice even though it is not specifically provided for in Council Directive 2000/78/EC.

**Harassment**
Harassment is also a form of discrimination and is defined as any form of unwanted conduct related to any of the discriminatory grounds, which has the purpose or effect of violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Sexual harassment is also viewed as discrimination and is defined as unwanted verbal, non-verbal or physical conduct of a sexual nature.

It is important to note that the Act does not apply to a generalised harassment claim that does not have any link to the nine discriminatory grounds.

**Victimisation**
Victimisation is prohibited and occurs where an individual is subjected to a detriment because he or she has complained about discrimination or assisted someone else in doing so. The employee need not actually have made a complaint. It is sufficient that the he or she gives notice of an intention to bring a complaint. Again, the victimisation must be connected to one of the nine discriminatory grounds.

Discrimination in Ireland is not confined to an employer/employee relationship, but also extends to partnerships and self-employed persons.

### 4. DISCRIMINATION DURING RECRUITMENT

#### 4.1 Principles

Section 8 of the Employment Equality Act 1998 prohibits discrimination in relation to access to employment. Discrimination is prohibited in relation to advertisements for employment, short-listing of candidates, selection of candidates, job specification, application forms and arrangements for interview.

As far as access to employment or promotion is concerned, it is not a question of determining who the most meritorious candidate is, but whether any of the nine discriminatory grounds influenced the choice of the interviewer or selection board. Account will be taken of whether the interview was conducted in a discriminatory manner, such as by asking discriminatory questions.

In relation to discrimination based on disability, a balance must be struck between ensuring that a person is not discriminated against because of his or her disability and acknowledging that an employer should not be obliged to employ somebody who is not capable of carrying out the particular position in question. In order to address this balance, an employer is required to do all that is reasonable to accommodate the needs of an individual with a disability subject to it not imposing a disproportionate burden on the employer, i.e. it should take appropriate measures to enable a disabled person to have access to and participate in employment and to undergo training. This duty on the employer also applies at the interview stage.

An employer is, however, not required to recruit a person who, inter alia, is not fully willing, capable or competent to carry out (or continue to carry out) the duties concerned. The employer may well need to determine the capability of that person to perform certain duties or identify what needs to be done to accommodate him or her, such as carrying out a pre-employment medical (provided the person has actually been offered the job and the offer is subject to the satisfactory completion of a pre-employment medical). However, in doing so an employer must ensure that they do not breach employment equality legislation.

Similar to the other eight discriminatory grounds, the Employment Equality Act 1998 provides that it is not unlawful to confine a post to a man or woman where gender is a genuine ‘occupational requirement’ because of the particular occupational activities concerned or the context in which they are carried out.
An employer that refuses to engage a woman because she is pregnant is guilty of direct discrimination, since pregnancy is a condition that can only affect women. In addition, it is not unlawful for an employer to arrange for or provide treatment that confers benefits on women in connection with pregnancy and maternity (including breast-feeding) or adoption.

Less favourable treatment of an employee because of his or her race, colour, nationality or ethnic or national origin is prohibited. This provision is broader than Council Directive 2000/43/EC, which does not include less favourable treatment based on nationality.

While age discrimination is also prohibited, there are a number of specific exceptions during recruitment by an employer, allowing it to directly discriminate on grounds of age. Occupational benefit schemes allow an employer to fix different ages for admission to the scheme for entitlement to benefits under it and to use age criteria, provided there is no gender discrimination. An employer is also permitted to set a maximum age of recruitment in certain circumstances.

The Supreme Court in Ireland has also recognised that it is constitutionally permissible for certain religious, educational and medical institutions to give more favourable treatment to a prospective employee where it is reasonable to do so, in order to maintain the religious ethos of the institution.

4.2 Burden of proof
In proving the existence of discrimination, the job applicant must only establish facts from which it may be presumed that discrimination occurred. Once this has been established, the employer must then prove that discrimination did not occur on the balance of probabilities. Indeed, it has been consistently held that evidence of less favourable treatment that an employer does not succeed in attributing to objective, non-discriminatory grounds is sufficient to establish discrimination.

If a job applicant claims disability discrimination, he or she must prove his or her disability. In Ireland, the courts have taken a very broad view of disability. In the case of discrimination arising in consequence of a disability, it is for the employer to prove any justification for the treatment.

In a case involving discrimination based on disability, an employer may plead in its defence that a disabled person must be treated less favourably where he or she is not competent to perform the duties attached to a position (subject to the reasonable accommodation requirement stated above).

It would appear from Irish case law on gender discrimination that the existence of the pregnancy itself is sufficient to shift the burden of proof to the employer to prove that the dismissal or other less favourable treatment of a pregnant employee was not on grounds of pregnancy.

Previously, the proof requirement in a discriminatory case involving a claim of unequal pay was a difficult burden to overcome. The job applicant first had to establish an appropriate comparator in the workplace. In addition, proving that the difference in pay was due to discrimination on one of the prohibited grounds was difficult, because of the changing nature of paid work. Now, where the job applicant establishes that he or she is engaged in like work with an appropriate comparator, the burden of proof then shifts to the employer to justify the difference in pay.

4.3 Sanctions
It is common for an employer to be challenged on its actions at the recruitment stage of the employment relationship. A case of discrimination may be made in respect of any element of the recruitment procedure.

A job applicant who claims to have been discriminated against in the recruitment procedure may seek redress by referring the case to the Director of the Equality Tribunal, who will appoint an Equality Officer to investigate the complaint. The Equality Tribunal is a quasi-judicial body established to investigate, hear and decide on claims of discrimination.

A complaint must be made within six months of the last act of discrimination (the six-month period may be extended to twelve months where reasonable cause exists).

Where the Equality Officer finds in favour of the job applicant, the most common orders made are an order for compensation and/or an order that a specific course of action be taken (such as the prospective employee being re-interviewed).

An order may be appealed to the Labour Court with a further right of appeal to the High Court on a point of law only.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
In addition to access to employment, the Employment Equality Act 1998 outlaws discrimination in relation to conditions of employment, training or
experience for or in relation to employment, promotion or regrading and classification of posts.

In relation to discrimination based on disability, an employer is not required to retain, train or promote a person, who, inter alia, is not fully willing, capable or competent to carry out (or continue to carry out) the duties concerned.

There are a number of additional exceptions to the prohibition against discrimination on the grounds of disability, such as where an employer imposes a requirement that a specific educational qualification must be held by a person in relation to a particular position.

On the other hand, the Employment Equality Act 1998 permits an employer to treat a disabled employee positively to allow him or her to undertake vocational training of a particular kind. Such treatment cannot be alleged to be discriminatory by a person who does not have that disability.

Gender discrimination is prohibited during the period of employment and occurs where, on a ground related to her pregnancy or maternity leave, a female employee is treated, contrary to any statutory requirement, ‘less favourably than another employee is, has been or would be treated’. In addition, it is not unlawful for an employer to arrange for or provide treatment that confers benefits on a female employee in connection with pregnancy and maternity (including breast-feeding) or adoption.

An employee is entitled to equal pay where he or she is doing like work with a comparator who is similarly situated. Indeed, legislation makes it clear that it is a term of every employee’s contract that he or she is entitled to the same rate of pay for work as an employee of the other sex who is employed to do like work by the same or an associated employer.

If, however, the difference of pay between the parties is genuinely based on grounds other than any of the nine discriminatory grounds, no entitlement to equal pay can arise.

While an employer may generally not discriminate on grounds of age, direct discrimination is nonetheless permitted during the employee relationship in certain circumstances. For example, in collective agreements, where length of service would otherwise be regarded as equal, seniority may be determined by reference to the relative ages of employees.

An employer is prohibited under the Protection of Employees (Part-Time Work) Act 2001 from treating a part-time employee in a less favourable manner than a comparable full-time employee because he or she works part-time, unless the unfavourable treatment can be objectively justified. The majority of cases involving discrimination against a part-time employee constitute indirect discrimination, as a large number of women work part-time, unlike their male counterparts. The test is whether the overall pay of a full-time employee is higher than that of a part-time worker for the same number of hours worked.

Under the Protection of Employees (Fixed-Term Work) Act 2003, an employer is prohibited from treating a fixed-term employee in a less favourable manner than a comparable permanent employee because he or she works on a fixed-term basis, unless such treatment is capable of being objectively justified.

5.2 Burden of proof
The same principles of burden of proof as set out in section 4 above in relation to job applicants apply during the employment relationship.

5.3 Sanctions
As with a complaint of discrimination during the recruitment process, an employee claiming discrimination in relation to conditions of employment may refer the case to the Director of the Equality Tribunal, who will appoint an Equality Officer to investigate the complaint. The same procedure and time limits as stated in section 4 above apply.

Where the Equality Officer finds in favour of the employee, the following orders may be made:

- in equal pay claims, an order for equal pay and up to three years’ arrears
- in other cases, an order for equal treatment and compensation for the effects of discrimination of up to a maximum of two years’ pay. This is the maximum compensation that may be awarded, even where there has been discrimination on more than one ground. However, separate awards of up to two years’ pay can be made for different forms of discrimination or victimisation
- an order for reinstatement or re-engagement, which may be accompanied by compensation
- an order that a specific course of action be taken.

Gender discrimination claims relating to equal pay claims are initiated in the Circuit Court. Unlike the Equality Tribunal, there is no limit to the amount of compensation that may be ordered by the Circuit Court.
The same principles as set out in section 4 above apply in relation to rights of appeal and enforcing orders.

6. **DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED**

6.1 **Principles**
In general, it is unlawful to discriminate directly or indirectly against an employee by dismissing him or her. The Employment Equality Act 1998 provides for an independent cause of action of discriminatory dismissal.

While the employer has a right to dismiss an employee, if he or she is not capable of doing the job, the employer must first get the full facts and a medical opinion in order to determine the employee’s capability, the degree and duration of his or her impairment and whether any specialist treatment would overcome any such impairment.

An employee has the right not to be dismissed for pregnancy-related reasons. Irish case law has established that an employer must cite duly substantiated grounds in writing where a pregnant worker is dismissed on grounds of maternity, paternity or parental leave, whether the employee is employed part-time or on a fixed-term contract.

However, an employer may set different ages for the retirement of employees in Ireland.

6.2 **Burden of proof**
The same principles of burden of proof as set out in section 4 above apply when there is a dismissal.

6.3 **Sanctions**
The same sanctions as set out in section 5 apply when there is a dismissal.

The Unfair Dismissals Act 1977-2007 permits an employee with one year’s continuous service to bring a claim against his or her employer for unfair dismissal on certain grounds. Therefore, an employee who has been dismissed for a discriminatory reason might also claim unfair dismissal, but he or she cannot be compensated twice for the same loss.

7. **EXPECTED FUTURE DEVELOPMENTS**
At the time of writing there are no new developments in prospect.
## 1. Implementation of EU Directives

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<td>Act no 151 of 26 March 2001 on maternity, paternity and parental leave, as amended by Act no 115 of 23 April 2003</td>
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<td>Directive 96/34/EC of 3 June 1996</td>
<td>On the framework agreement on parental leave</td>
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2. \textbf{Legislation not based on EU Directives}

Under Italian legislation, the general principles on discrimination are included in the Italian Constitution of 1948 and in the Workers' Statute of 1970 (see above).

3. \textbf{Definitions of the different prohibited types of discrimination}

Under Italian legislation, there is a general principle of equality, which prohibits every form of discrimination. According to Article 3 of the Constitution:

‘All citizens have equal social dignity and are equal with regard to the law, without distinction of sex, race, language, religion, political opinions, personal or social conditions. The Republic shall remove all economic and social obstacles that limit de facto the freedom and equality of its citizens, prevent the full development of the individual and hinder the effective participation of all employees within the political, economic and social organisation of the country.’

Under Italian law, direct discrimination occurs when a person (for the reasons set out in section 4.1 below) is, has been or would be treated less favourably than another person in an analogous situation (Act no 215 and Act no 216 of 9 July 2003).

Indirect discrimination occurs when an apparently neutral requirement, criteria or general rule places (for the reasons set out in section 4.1 below) a person at a particular disadvantage or in a less favourable position, unless such a requirement, criteria or general rule is objectively justified by a legitimate aim and employs methods that are appropriate and necessary to achieve that aim (Act no 215 and Act no 216 of 9 July 2003).

Harassment is considered to be a form of discrimination. Harassment is defined as any unwanted conduct related to any of the grounds of discrimination, with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.

An instruction to discriminate against a person is also deemed to be discrimination.

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<td>99/70/EC of 28 June 1999</td>
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<td>2000/43/EC of 29 June 2000</td>
<td>Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</td>
<td>Act no 215 of 9 July 2003</td>
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<td>2000/78/EC of 27 November 2000</td>
<td>Establishing a general framework for equal treatment in employment and occupation</td>
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<td>2006/54/EC on equal opportunities</td>
<td>On the implementation of the principle of equal treatment for men and women in matters of employment and occupation</td>
<td>Act no 198 of 11 April 2006, the ‘Equal Opportunities Code’ Act no 5 of 25 January 2010</td>
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</table>
Under Italian law, discrimination includes any behaviour aimed at distinguishing, excluding, restricting or preferring a particular person – either directly or indirectly – on the basis of his or her race, colour, ethnic or national origin, religious beliefs and practices, with the aim of hindering or compromising the fulfilment of his or her human rights and fundamental freedom in every domain of public life.

4. ** Discrimination during recruitment **

4.1 Principles

When recruiting an employee, an employer is prohibited from discriminating against a job applicant on the grounds of:

- sex
- race
- colour
- religion
- political opinion
- sexual orientation
- national, social or ethnic origin
- membership of a trade union
- marital status
- pregnancy
- disability
- age
- personal opinion.

The exceptions to the prohibition against discrimination on the grounds of sex are in relation to:

- particularly heavy work – where a list of exceptions can be provided in National Collective Agreements
- the fields of fashion, art and entertainment – where ‘basing recruitment on sex is not discriminatory when it is inherent to the nature of the job or of the performance’.

The exceptions to the prohibition against discrimination based on religion, age, disability, personal opinions and sexual orientation are in relation to:

- particular activities for which these characteristics are essential
- when these characteristics are relevant to the ability of the person to carry out his or her duties in the police force, the prison services, the health services and the army
- particular provisions that require a certain ability to carry out a specific job and provisions that differentiate between teenagers, young people, elderly employees and employees with dependants, as dictated by the particular nature of the employment relationship, work policy, the job market and professional development
- any difference in treatment based on a particular religion or personal opinion within religious organisations or other public or private entities, if religion or personal opinion is essential to carry out these activities
- any other difference in treatment justified by lawful purposes and pursued appropriately.

The exceptions to the prohibition against discrimination based on race or ethnic origin are in relation to:

- particular activities for which these characteristics are essential
- any difference in treatment justified by lawful purposes and pursued appropriately.

Even with the consent of a prospective employee, an employer (or personnel search and recruitment agencies), cannot carry out any inquiry, data processing or pre-selection of that employee on the basis of any of the information listed above, including the existence of any claim brought against a previous employer and the employee’s state of health. An employer is prohibited from inquiring about a job applicant’s details or opinions, if they are not relevant to the job. This prohibition also exists during the employment relationship. This type of inquiry is only allowed where the information being sought constitutes an essential pre-requisite for the job applicant to carry out the job in question, or where it has an impact on the way the job is done.

An employer in both the public and private sectors must employ disabled employees, in line with quotas, which vary according to the size of the company. Partial exemptions are provided for an employer that, by reason of conditions peculiar to its activity, cannot employ its full quota of disabled employees.

4.2 Burden of proof

The law provides that discrimination must be proved on the basis of facts (including statistical facts), from which it may be presumed that there has been direct or indirect discrimination. In this case, there is a partial inversion of the
burden of proof. If an employee succeeds in establishing a presumption of discrimination, then the employer must prove that it did not breach the principle of equal treatment and that discrimination did not occur.

Specific bodies approved by the Labour Ministry and the Equal Opportunity Ministry have the right to represent an employee before a judge.

The Labour Ministry has set up a special Department for the promotion of equal treatment and the removal of discrimination. This Department has the power to monitor equal treatment and to check the effectiveness of any instruments in place to protect employees, and also to give assistance during legal proceedings.

4.3 Sanctions
A court may order an employer to pay compensation, to stop the discriminatory behaviour or to develop a plan to remove the discriminatory practices. A court may also publish its decision in a national newspaper. No ceiling has been imposed on the amount of compensation. However, in quantifying the amount, a court will consider whether the employer’s discrimination is in retaliation for a previous claim brought against it by the employee, or whether it is an unfair reaction to a previous case in which it was ordered to comply with the principle of equal opportunity. A court could also revoke possible public benefits.

An employer could receive a fine of up to EUR 1,500 in any discrimination case.

The law provides that ‘any act or pact aimed at discriminating against the recruitment of an employee on account of his or her membership of a trade union (i.e. forcing him or her to resign his or her membership), his or her political opinions, religion, race, language, sex, disability, age, sexual orientation and personal opinions’ is void.

In the event that an employer hires an employee on the condition that he or she does or does not join a trade union, or that he or she withdraws his or her membership, the employer may be either fined between EUR 154 and 1,549 or sentenced to imprisonment for between 15 days and one year. The same sanctions apply when an employer violates the prohibition against enquiring about personal details (please see section 4.1 above). In addition, the law provides that in serious cases the sanction of imprisonment can be imposed jointly with the fine, where it is shown that the monetary sanction would be ineffective. Even where the maximum fine has been imposed, a judge can increase it by up to five times the original amount.

Furthermore, any act aimed at discriminating against the recruitment of an employee because of his or her marital or family status or pregnancy is void.

If an employer fails to comply with the legal provisions in relation to a disabled employee’s right to work, it must pay an administrative fine equivalent to EUR 516, to which EUR 25 per day can be added for a delay in compliance. If the request to comply with the law is not dealt with within 60 days of the imposition of the obligation, or if an employer fails to hire the appropriate employee(s), it must pay an administrative fine equivalent to EUR 51 per day per employee.

Lastly, if sex discrimination has occurred, a claim could be brought autonomously by the ‘Consigliere di Parità’ (specific bodies approved by the Labour Ministry and the Equal Opportunity Ministry).

5. Discrimination during the employment relationship

5.1 Principles
During the employment relationship, an employer is prohibited from direct or indirect discrimination against an employee with regard to job classification, salary, career prospects and, in general, terms of the employment contract, on any of the grounds listed in section 4.1 above. Every act or agreement, the purpose of which is based on discrimination, is void.

A female employee has the same rights as a male employee and must earn the same salary for the same tasks (i.e. she must not be discriminated against on the basis of her gender).

Exceptions to the prohibition of discrimination based on religion, personal opinion, disability, age, sexual orientations, race and ethnic origin are the same as those listed in section 4.1 above.

The law prohibits discriminatory collective economic treatment on the grounds of membership of a trade union, participation in a strike, ethnic origin, linguistic group, religion, nationality, political opinion, sex, disability, age, sexual orientation or personal opinion.

A disabled employee is entitled to be treated in accordance with the law and National Collective Agreements. An employer cannot request a disabled employee to perform activities that are incompatible with his or her disability. The law provides protection for pregnancy and birth. Periods of absence from work and leave can be granted to the mother or, alternatively and cumulatively,
to both parents (though not if it is a same-sex couple). There is no necessary minimum period of employment for the enjoyment of this right. The main forms of leave are maternity, paternity and parental leave.

Sexual harassment is considered to be a form of discrimination. Harassment is defined as any unwanted conduct related to any of the grounds of discrimination, with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.

5.2 Burden of proof
During the employment contract, an employee must prove discrimination using facts (including statistical facts) relating to, for example, functions, qualifications, transfers and career progression, which demonstrate the employer’s discriminatory intent.

In cases of discrimination carried out against an employee with anti-union purposes (i.e. limiting his or her freedom to join a trade union or right to strike), an employer may also be prosecuted at the initiative of the trade unions.

In the case of discrimination on the grounds of sex, an employee can bring a court claim against the employer through the so-called ‘Consigliere di Parità’, by making a request for an emergency hearing. Within two days of the request, the court will summons the parties concerned. If the court decides that there has been a violation, it can issue an order with immediate effect. This order compels the employer to desist from the discriminatory behaviour, to take all necessary steps to remove the effects of the discrimination and to put into place a plan to avoid such discrimination in the future. An employer that fails to comply with the order is punishable under the Criminal Code.

5.3 Sanctions
The sanctions are the same as those referred to in section 4.3 above.

Furthermore, the law provides that any act aimed at discriminating against an employee in the allocation of categories, tasks, transfers or disciplinary actions, is void. Likewise, any act that causes him or her any other detriment by reason of his or her trade union membership, participation in a strike, political opinions, religion, race, language, sex, disability, age, sexual orientation, personal opinions, marital and family status, or pregnancy, is void.

In relation to discriminatory collective economic treatment, the law provides that, if an employee (against whom a discriminatory action was committed) or the trade union appointed by him or her, makes a request and the facts have been ascertained, a court can order the employer to pay into the Pensions Adjustment Fund a sum equivalent to the amount that was illicitly paid, for a maximum period of one year.

In cases of anti-trade union behaviour, a court may order an employer to cease the prohibited practices immediately. If an employer fails to comply with a court order, it may be liable to prosecution under the Penal Code.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
An employer is prohibited from dismissing an employee on any of the grounds listed in section 4.1 above.

The law states that a female employee cannot be dismissed on the grounds of pregnancy.

The law similarly provides that a dismissal on the grounds of marriage is void. Dismissal caused by an employee making a request for or taking parental leave, taking leave to care for a sick child, or taking paternity leave, is void. The period in which the dismissal cannot take place varies, as follows:

• for mothers, dismissal is prohibited from the beginning of the pregnancy until her child is one year old
• for fathers who take paternity leave, dismissal is prohibited during the leave itself and until his child is one year old.

The law provides for specific exceptions to the prohibition against dismissal of a female employee on account of pregnancy and to the prohibition against dismissal of a working father on account of paternity leave. These exceptions arise:

• when a just cause exists
• when an employer terminates the activity to which an employee is assigned
• upon the termination of the specific project for which an employee was hired
• upon the expiry of a fixed-term contract
• during a trial period.
In the case of collective dismissal, the law provides that:

- an employer is prohibited from dismissing a percentage of women that is greater than the percentage of women working on the tasks affected by the redundancy
- any direct or indirect sex discrimination in the management of redundancies in the workforce, is prohibited
- the number of disabled employees remaining after a collective dismissal cannot be less than the percentage provided by the law on obligatory recruitment.

6.2 Burden of proof
There is a partial inversion of the burden of proof, as described in section 4.2 above.

6.3 Sanctions
Dismissing based on discriminatory reasons is void. Article 18 of the Workers’ Statute applies, regardless of the number of employees hired by an employer (i.e. an employer must reinstate an employee in his or her former position and pay an indemnity equivalent to the salary payable between the date of the unfair dismissal and the date of the effective reinstatement, for a minimum of five months, plus social security contributions). These provisions also apply to executives, who are not normally entitled to this kind of protection.

A female employee dismissed during her pregnancy or her child’s first year of life (even in the case of adoption) has the right to have the dismissal declared void, if she produces all the documents that are necessary to demonstrate the existence, at the point of the dismissal, of the conditions that led to it.

Dismissing occurring between the announcement of an engagement and one year after the wedding ceremony is void. In this case, an employer must prove that the employee’s marital status did not in any way motivate the dismissal.

The resignation of a female employee during pregnancy, her child’s first year of life or the period between the announcement of her engagement and one year following her wedding ceremony is void, unless the resignation is confirmed by her at the Labour Office.

Additionally, a father who takes paternity leave and resigns during his child’s first year of life, must confirm his resignation at the Labour Office.

7. Expected future developments
Currently, several Acts dealing with discrimination are pending in Parliament. These are aimed at providing more effective protection against discrimination in general, by creating sanctions under the Criminal Code and widening the protection available against discrimination based on sexual orientation (also under the Criminal Code).
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Law of 26 May 2000 regarding the protection against sexual harassment in employment relationships  
Law of 28 June 2001 on the burden of proof in cases of sex discrimination

The framework agreement on part-time work concluded by UNICE, CEEP and the ETUC  
No specific measures to transpose the Directive were considered by the Luxembourg authorities

The framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC  
Luxembourg did not adopt new legislation to transpose the Directive. Provisions on fixed-term work were already in place, notably in the law on contracts of employment, which is now part of the Labour Code

Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin  
Law of 28 November 2006, which has introduced a new Title V ‘Equality of treatment in employment and occupation’ in Book 2 of the Labour Code

Establishing a general framework for equal treatment in employment and occupation  
Law of 28 November 2006 (as above)

Amending the Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions  
Law of 13 May 2008 on equal treatment for men and women, which modified Title IV ‘Equality of treatment between men and women’ and two articles of Title V ‘Equality of treatment in employment and occupation’ in Book 2 of the Labour Code (two months earlier, the Grand Duchy of Luxembourg was held liable for failing to implement this Directive (European Court of Justice, 6 March 2008, no C-340/07))  
Law of 30 June 2004 on collective bargaining agreements

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2. Legislation not based on EU Directives

The following are not based on EU Directives:

- Article 10 bis (1) of the Luxembourg Constitution guarantees equality in law to all Luxembourg citizens
- Article 111 of the Luxembourg Constitution extends the application of Article 10 to all foreign nationals falling within the scope of Luxembourg law (Constitutional Court Cases no 29/06 to 33/06 and 39/07)
- Article 11(2) of the Luxembourg Constitution provides that men and women have equal rights and duties. The State of Luxembourg actively promotes the removal of barriers that might exist in the field of equality between men and women (Law of 13 July 2006, Memorial A no 124 of 19 July 2006)
- Chapter 3 ‘Part-time work’ of Title 2 ‘Employment Contract’ in Book 1 of the Labour Code
- Chapters 1, 2, 4, 5 and 6 of Title 2 ‘Employment Contract’ in Book 1 of the Labour Code
- The following Articles give powers to staff representatives to guarantee the principle of non-discrimination: L.162-12 (3), points 3 and 4; L.162-12 (4) points 3 and 4; L.245-6, L.414-1 (2), point 9; L.414-3, L.414-4 (3); and L.423-6
3. **Definitions of the Different Prohibited Types of Discrimination**

**Luxembourg Constitution**

Under Article 10 bis (1) of the Luxembourg Constitution, ‘Luxembourg citizens are equal in law’. Pursuant to Luxembourg case law (Constitutional Court, case no 2/98, 13 November 1998), this constitutional principle of equality implies that all people who are in the same situation in respect of facts and rights must be treated equally.

The Constitutional Court of Luxembourg (‘Constant case law’, the first of which was no 7/99 of 26 March 1999) clearly provided for an exception to the equality principle:

‘The legislator can, without breaching the constitutional principle of equality, subordinate some categories of individuals to different legal rules, provided that the difference lies within factual disparities, that it is rationally justified, adequate and proportionate to the aim’.

Indeed, in Luxembourg, discrimination must be distinguished from the concept of differentiation. While discrimination is prohibited, differentiation is acceptable. It is common for particular legal dispositions to mark their boundaries by making a distinction between different groups of individuals (e.g. the exceptions to the principle of non-discrimination provided by the Labour Code).

The Luxembourg Constitution was amended on 13 July 2006 in order to allow the legislator to take ‘affirmative action’ against discrimination on the grounds of sex. Under article 11(2) of the Constitution, the State of Luxembourg must actively promote the elimination of restrictions, which could exist with regard to equality between men and women.

**Penal Code**

Article 454 of the Penal Code prohibits discrimination on the grounds of:

- origin
- colour
- sex
- sexual orientation
- family status
- age
- state of health
- disability
- moral, political or philosophical opinions
- trade union membership
- actual or supposed membership of an ethnic group, race or particular religion
- (non-)membership of a group or community.

Article 454 applies to natural persons, as well as to legal persons. The latter must not be discriminated against because of the characteristics of their members.

The definition of discrimination in Article 454 is much wider than the one in the Labour Code.

**Labour Code**

Article L.251-1(1) of the Labour Code (law of 28 November 2006) prohibits any direct or indirect discrimination on the grounds of religion or belief, incapacity, age, sexual orientation, or actual or supposed (non-)membership of an ethnic group or race.


The law of 13 May 2008 underlines that the provisions for the protection of pregnancy and maternity do not constitute discrimination ‘but a condition for achieving equal treatment between men and women’ (Article L.241-3(1) of the Labour Code).

The prohibitions provided by Articles L.251-1 and L.241-1 of the Labour Code apply to all employees (including part-time, temporary and fixed-term employees) and employers in relation to:

- the conditions for access to employment, self-employment or occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion
- access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience
- employment and working conditions, including dismissals and pay conditions
• membership of and involvement in an organisation of employees or employers, or any organisation whose members carry on a particular profession, including the benefits provided by such organisations.

Under Article L.251-1(2), direct discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds mentioned in Article L.251-1(1).

Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, disability, age, sexual orientation, actual or supposed (non-)membership of an ethnic group or race, at a particular disadvantage compared with other persons, unless this provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving this aim are appropriate and necessary.

Without prejudice to specific provisions on sexual and moral harassment in the workplace, harassment is deemed to be a form of discrimination when unwanted conduct related to any of the grounds mentioned in Article L.251-1(1) take place, with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment in the workplace is considered to be contrary to the principle of equal treatment (Article L.245-3 of the Labour Code).

Article L.245-2 of the Labour Code defines sexual harassment as any behaviour based on sex by which the perpetrator knowingly affects the dignity of a person in the workplace, provided that one of the following three conditions is met:

• the behaviour is misplaced, excessive and hurtful
• refusing or accepting the behaviour has affected the employee's rights in matters of professional training, employment, continuing employment, professional promotion, remuneration or any other decision relating to employment
• the behaviour creates a feeling of intimidation, hostility or humiliation for the victim.

The prohibited behaviour may be physical, verbal or non-verbal and the element of intent is presumed.

Article L.251-1(4) of the Labour Code also stipulates that instructing someone to discriminate against people on any of the grounds mentioned in Article L.251-1(1) is discriminatory.

The Labour Code provides exceptions to the principle of non-discrimination:

• Under Article L.252-1(1) of the Labour Code, notwithstanding the principle of equal treatment, a difference in treatment based on a characteristic related to any of the grounds mentioned in Article L.251-1(1), including gender discrimination (Article L.241-3), does not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

• Article L.252-1(2) applies to professional activities, which have an ethos based on religion or belief. In this case, when the religion or belief constitute an essential professional requirement, which is legitimate and justified in view of the organisation's ethos, a difference in treatment based on this religion or belief is not considered to be discriminatory.

• Article L.252-2(1) of the Labour Code provides for the possibility of a difference in treatment on grounds of age, if it is objectively and reasonably justified by a legitimate aim (e.g. a legitimate employment policy or job market and vocational training objectives), if the means of achieving this aim are appropriate and necessary.

• Additional pension schemes might result in a difference in treatment on grounds of age, if the difference is objectively and reasonably justified. In accordance with Article 6, point 2 of Directive 2000/78/EC, the law of 13 May 2008 added a second paragraph to Article L.252-2 of the Labour Code (law of 13 May 2008 implementing Directive 76/207/EEC, Official Journal (Mémorial) A no 70 of 26 May 2008, page 962); ‘the objectively and reasonably justified fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex’.

• The principle of equal treatment does not prevent the upholding or adoption of specific measures to prevent or compensate disadvantages on the grounds of sex or the family or matrimonial situation, or any of the grounds mentioned in Article L.251-1(1), in order to guarantee equal treatment and to ensure full equality in practice (Articles L.241-4(2) and 252-3(1) of the Labour Code),
• Within this framework, Articles L.243-1 to L.243-5 of the Labour Code provide for the possibility of positive discrimination in the private sector, in order to make the exercise of a professional activity by the under-represented sex easier or to anticipate or compensate for disadvantages in a person’s professional career.

• As regards disabled persons and employees with a limited capacity to work, Article L.252-3(2) of the Labour Code stipulates that provisions for the protection of health and safety at work or measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment, do not constitute direct or indirect discrimination.

4. Discrimination during recruitment

4.1 Principles

Penal Code

Article 455(6) of the Penal Code prohibits discrimination against job applicants in the recruitment process on any of the grounds specified in section 3 above.

Nevertheless, Article 457 of the Penal Code provides that this prohibition does not apply to:

• discrimination based on a physical condition, when this is designed to prevent death, physical injury or risks of industrial incapacity or invalidity
• discrimination based on a health condition or a disability, when this results in the rejection of a job application or a dismissal based on the medically established incapacity of the individual
• discrimination based on an individual’s nationality, when under national law nationality is a determining factor for a job in the public sector.

Labour Code

Regarding conditions for access to employment (including selection criteria and recruitment conditions), Article L.251-2 of the Labour Code prohibits any direct or indirect discrimination on the grounds of religion or belief, incapacity, age, sexual orientation, or actual or supposed (non-)membership of an ethnic group or race.

Furthermore, Article L.241-2 of the Labour Code (modified by the law of 13 May 2008) ensures equality of treatment between men and women and prohibits discrimination on the grounds of sex, especially regarding access to employment (including selection criteria and recruitment conditions).

Under Article L.242-3(1) of the Labour Code, an employer that wants to hire a person from the under-represented sex is allowed to notify or edit offers of employment, which favour employees from the under-represented sex.

The prohibition against discrimination in the recruitment process on the grounds of sex also protects pregnant women. A woman who omits to mention her pregnancy to her future employer is not at fault. Her employer is not entitled to bring a claim against her on the basis of wilful misrepresentation (Article 1109 of the Civil Code) or fraud (Article 1116 of the Civil Code) (Labour Court, 21 February 1991).

Luxembourg legislation also protects disabled workers. The law of 12 September 2003 regarding disabled workers provides for compulsory provisions relating to the recruitment of disabled employees.

A public sector employer must employ disabled workers equivalent to five per cent of its entire staff (Article L.562-3(1) of the Labour Code).

A private sector employer must employ one disabled worker, if it has a workforce exceeding 25 employees. Two per cent of its workforce must be disabled, if it has more than 50 employees. Five per cent of its workforce must be disabled, if it has more than 300 employees (Article L.562-3(2) of the Labour Code).

4.2 Burden of proof


The law of 28 November 2006 modified the burden of proof in cases of discrimination based on other criteria (Article L.253-2 of the Labour Code).

Consequently, if a person considers that he or she has been wronged because the principle of equal treatment has not been applied to them, and establishes before a court or other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, the employer must prove that there has been no breach of the principle of equal treatment. Note that this does not apply to criminal procedures.

In civil and administrative proceedings (other than criminal proceedings) the alleged victim of discrimination must establish the presumption of discrimination.
The employer must then prove that there has been no breach of the principle of equal treatment.

Under Articles L.241-5 to L.241-7 and L.253-2 of the Labour Code, discrimination can be directly established by the victim himself or herself, a competent non-profit making organisation or a competent trade union.

In criminal proceedings, the claimant must prove the facts. Moreover, if the defendant (the employer) alleges a condition that may absolve its responsibility, the claimant must establish the fallacy of these allegations.

In general civil proceedings, the burden of proof lies entirely with the victim (the claimant).

Article L.253-1, paragraph 2 of the Labour Code prohibits retaliation against a person who has testified in a case relating to discriminatory facts.

Under Article L.245-5(1) of the Labour Code, an employee must not be the subject of a reprisal or retaliation because he or she protests or resists an act of sexual harassment from the employer or any other immediate superior, fellow worker, or external person connected to the employer. Similarly, no employee may be subject to a reprisal for having testified to any of the acts defined in Article L.245-2 or for having recounted them (Article L.245-5(2) of the Labour Code).

4.3 Sanctions

Criminal sanction of the Penal Code

An employer that refuses a job applicant on the basis of his or her origin, colour, sex, sexual orientation, family situation, age, health, disability, moral, political or philosophical opinions, trade union (non-)membership, ethnic group, nation, race or religion could be imprisoned for between eight days and two years and/or receive a fine of between EUR 251 and 25,000 (Article 455 of the Penal Code).

The job applicant may also claim for non-material harm (intangible loss) caused by the discrimination (a criminal sentence always implies the existence of a civil fault, which gives the victim the right to claim compensation).

A judge has the authority to order the accused employer to pay compensation to the victim, if loss or harm resulted from the offence. Consequently, the victim will also be indemnified for his or her non-material harm.

Civil sanction of the Labour Code

Articles L.241-9 and L.253-3 of the Labour Code provide for a civil sanction: any discriminatory provision written, notably, in a contract, an individual or collective agreement or a company internal policy is considered to be void. Likewise, similar provisions in regulations applicable to (non-)profit making organisations, self-employed professions and organisations of employees and employers are considered to be void (Articles L.241-9 and L.253-3 of the Labour Code).

Furthermore, within the framework of equal treatment between men and women, Article L.241-11 of the Labour Code provides that in the case of a discriminatory job advertisement or any announcement related to employment where the author, in spite of the Labour Administration’s written summons, persists in using the advertisement or announcement, is subject to a fine of between EUR 251 and 2,000. If it is a second offence, the fine may reach EUR 4,000.

Connection between civil and penal sanctions

In Luxembourg, a civil action concerning a misdemeanour may be judged before either a criminal or a civil court, depending on the victim’s choice. This choice is limited by the adage ‘electa una via non datur recursus ad alteram’, meaning that if the victim brings the action before a civil court, he or she may not then bring it before a criminal court. In contrast, if the victim first brings the action before a criminal court, he or she is still entitled to bring the action before a civil court.

Disabled workers

Under Article L.562-5 of the Labour Code, if an employer does not comply with the provisions of Article L.562-3 (section 4.1(b)), it must pay a monthly fee to the tax administration, equivalent to 50 per cent of the statutory minimum wage (the statutory minimum wage is EUR 1,757.56, based on the index of 719.84. Therefore, the amount of the fine would be equivalent to EUR 878.78). This fee must be paid as long as the employer refuses to employ disabled workers, as well as for each disabled worker in the employer’s quota that it has failed to employ.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles

Article 454 of the Penal Code prohibits discrimination during the employment relationship based on any of the grounds set out in section 3 above.
However, Article 457 of the Penal Code provides that the prohibition is not applicable to discrimination based on a physical condition, when this is designed to prevent death, physical injury or risk of industrial incapacity or invalidity.

As regards civil legislation, the Labour Code ensures equality of treatment, especially regarding the terms of employment, salary and access to professional training and promotion (Articles L.241-2 and L.251-2 of the Labour Code).

Consequently, it is prohibited to discriminate between individuals on the basis of sex or on any of the grounds mentioned in Article L.251-1 of the Labour Code, as regards terms of employment and access to professional training and promotion.

An employer and employee, as well as any client or supplier of the company, must refrain from any act of sexual harassment within the framework of the employment relationship (Article L.245-4(1) of the Labour Code).

Under Article L.245-4(3) of the Labour Code, an employer is required to take all preventive measures necessary to ensure the protection of the dignity of any person during the course of his or her employment in the workplace. These measures must include providing employees with information on the procedures relating to sexual harassment. In addition, Article L.245-4(2) of the Labour Code provides that an employer must do whatever is necessary to put an immediate end to any act of sexual harassment that it is aware of.

A Grand Ducal Regulation of 10 July 1974, inspired by Article 199 of the EC Treaty and Convention no 100 of the International Labour Organisation, guarantees equal pay for equal work between men and women. According to Article 3, contractual details regarding remuneration, categories and classification criteria must be established with equal standards for men and women.

The courts have wide-ranging powers to decide what information can be taken into consideration (Court of Appeal, 2 May 1985, no 8085 of the register, in which the fact that family income support was given to female employees only under certain conditions, while male employees were entitled to this benefit without needing to fulfill any condition, was deemed to be clearly discriminatory. Women must be entitled to such income support based on the same conditions as men).

The regulation of 10 July 1974 does not indicate which sector (private or public) it applies to. It is likely to apply to both sectors, as Luxembourg has signed international treaties, which ensure non discrimination in remuneration both in the private and public sector.

Article L.415-5 of the Labour Code relating to employee representatives, provides that employee delegates must not suffer any reduction in their remuneration for absences in relation to their responsibilities as employee representatives. Moreover, an employer is not entitled to hinder the election or work of the employee representatives.

Pursuant to the provisions of the Labour Code regarding the protection of pregnant workers, an employer must keep a female worker’s job or a similar job open, accompanied by the same remuneration and other benefits, during the entire period of compulsory maternity leave (Article L.332-3(1) of the Labour Code). The period of maternity leave is eight weeks preceding childbirth and 8 or 12 weeks following childbirth (12 in case of breast-feeding or premature birth or multiple births).

Moreover, after maternity leave, in order to raise her child, a female employee is given the option of not resuming her post without being required to give notice or pay any penalty. She retains the option to re-apply for a similar post in the event of a suitable vacancy for a period of one year from the end of her maternity leave. The employer is required to give priority to this employee in any recruitment process for the whole of year following the employee’s request.

Under Article L.234-43 and the provisions of the Labour Code regarding parental leave, an employer must keep a male or female worker in the same job or a similar job, with the same remuneration and other benefits during the whole period of parental leave (Article L.234-48(7) of the Labour Code).

Male and female employees may take parental leave after maternity leave for a maximum period of six months (full-time parental leave) or 12 months (part-time parental leave).

Under Article L.123-6 of the Labour Code, part-time employees have the same rights and obligations as full-time employees.

5.2 Burden of proof
Please see section 4.2 above.
5.3 Sanctions

Criminal sanction of the Penal Code

Criminal sanctions applicable to discrimination occurring in the recruitment process are also applicable to a breach of equality in working conditions (imprisonment between eight days and two years and/or a fine of between EUR 251 and 25,000). It is important to mention that Article 455 of the Penal Code only gives the possibility of a punitive sanction. The victim may not ask to be reinstated in his or her former job. Nevertheless, he or she may bring a claim of compensation before a criminal or civil court (please see sections 4.1 and 4.3 above).

Civil sanction of the Labour Code

Articles L.241-9 and L.253-3 of the Labour Code provide for a civil sanction: any discriminatory provisions written, notably, in a contract, an individual or collective agreement or a company internal policy are considered to be void. Likewise, similar provisions in regulations applicable to (non-)profit making organisations, self-employed professions and organisations of employees and employers are considered to be void.

Under the Grand Ducal Regulation of 10 July 1974 providing equal pay for equal work between men and women, any contract, collective bargaining agreement, rule or regulation of a company foreseeing a different level of remuneration for men and women, is void. As a consequence, the highest remuneration rate will apply to both men and women (Article 4 of the Grand Ducal Regulation of 1974).

An employer that hinders the election or work of employee representatives incurs a fine of between EUR 251 and 15,000 (Article L.417-4 of the Labour Code).

Pursuant to Article L.427-3 relating to the joint works council, an employer that hinders the election or work of the joint works council’s representatives is liable to pay a fine of between EUR 251 and 10,000.

Under Article L.331-1 and the provisions of the Labour Code regarding the protection of pregnant workers if an employer fails to comply with the provisions of the law, it is liable to imprisonment of between eight days and six months and/or a fine of between EUR 251 and 25,000 (Article L.338-4 of the Labour Code). Moreover, a female employee may bring an action against the employer before the Labour Court to be reinstated, if the employer did not reserve the same job or a similar job for her to return to after maternity leave.

Pursuant to Article L.234-43 and the provisions of the Labour Code regarding parental leave, any dispute arising from breach of the legal provisions may be brought before the Labour Court.

Under Article L.245-7 of the Labour Code, a sexually harassed employee can terminate his or her contract on the ground of sexual harassment. In this case, he or she is entitled to terminate the employment contract with immediate effect based on gross misconduct and the employer may be liable to pay compensation.

Nevertheless, an employer cannot be held responsible, if it is not aware of the act(s) of sexual harassment. Indeed, the employer’s knowledge of the sexual harassment act(s) is a prerequisite and necessary condition to establish its responsibility (Court of Appeal, 28 October 2004, no 28262 of the register).

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles

Article 454 of the Penal Code prohibits an employer from dismissing an employee on any of the grounds set out in section 3 above.

However, Article 457 of the Criminal Code provides that the prohibition is not applicable to:

- discrimination based on a physical condition, when this is designed to prevent death, physical injury or risks of industrial incapacity or invalidity
- discrimination based on a health condition or disability, when this relates to a dismissal based on a medically established incapacity of the individual.

As regards civil legislation, the Labour Code ensures equality of treatment, especially regarding dismissal conditions (Articles L.241-2 and L.251-2 of the Labour Code).

It is forbidden to dismiss a person on the basis of sex or any of the grounds mentioned in Article L.251-1. Such a dismissal is considered to be void (please see section 6.3 above).

Article L.415-11 of the Labour Code relating to employee representatives, provides that an employer is not entitled to dismiss or substantially change the terms of employment of any employee delegate during his or her term of office. Nevertheless, an employer may suspend the delegate’s employment
contract in the case of gross misconduct and apply to the Labour Court for its rescission.

The same provisions apply to representatives of the joint works council in limited liability companies (Article L.426-9 of the Labour Code).

A female employee must not be dismissed during either her pregnancy or maternity leave (Article L.337-1 of the Labour Code). This protection begins when she presents a medical certificate to the employer proving her pregnancy. Furthermore, if the employer gives notice of dismissal before the presentation of the medical certificate, she is entitled to hand in the certificate within eight days of receiving notice of dismissal and ask for the dismissal to be revoked. The employer may nevertheless suspend the employee's employment contract in cases of gross misconduct and ask for it to be rescinded before the Labour Court.

Under Article L.337-6 of the Labour Code, an employer is not entitled to give notice of dismissal to a female employee on the basis of her marriage. Nor is an employer entitled to dismiss an employee on parental leave, except in the case of gross misconduct (Article L.234-48 of the Labour Code).

6.2 Burden of proof
Please see section 4.2 above.

6.3 Sanctions

Criminal sanctions of the Penal Code
An employer who dismisses an employee for discriminatory reasons is liable to imprisonment of between eight days and two years and/or a fine of between EUR 251 and 25,000 (Article 455 of the Penal Code).

It is important to note that the Penal Code only gives the possibility of a punitive sanction. The victim may not ask to be reinstated in his or her former job. Nevertheless, he or she may bring a claim of compensation before a criminal court.

Civil sanctions of the Labour Code
According to Articles L.241-8, L.245-5(3) and L.253-1 of the Labour Code, a dismissal based on discrimination is void.

Within 15 days after notification of the dismissal, an employee can make a request to the President of the Labour jurisdiction for a summary judgment to declare the dismissal void and to order his or her tenure of office or reinstatement. The same provisions apply to employee representatives during their term of office (Article L.415-11 of the Labour Code), representatives of the joint works council (Article L.426-9 of the Labour Code), and pregnant workers (Article L.337-1 of the Labour Code). They also apply to employees on parental leave, except in the case of gross misconduct (Article L.243-48 of the Labour Code).

Moreover, if an employer unfairly suspends the employment contract of an employee representative or a pregnant worker for gross misconduct, the president of the Labour court can pronounce the retroactive cancellation of the suspension and the reinstatement of the representative.

Article L.337-6 of the Labour Code provides that a female worker dismissed on grounds relating to her marriage, may seek to revoke the dismissal and ask for her reinstatement by registered mail within the two-month period following the dismissal. In this case, her employment contract continues and she is entitled to receive her full salary. If she does not request the revocation of her dismissal by registered letter, she is still entitled to the termination payments provided under Article L.124-7 of the Labour Code. She may also bring a claim of unfair dismissal against the employer.

Articles L.253-1 and L.241-8 also prohibit any reprisal by an employer and prohibit retaliation against an employee who protested against actions or behaviour contrary to the principal of equality.

Moreover, an employee is protected against dismissal or other adverse treatment emanating from the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. The same protection applies to any witness and person recounting adverse treatment.

Any decisions that are taken by an employer, which are considered to be reprisals, will be void.

Consequently, any provision or action contrary to the prohibition of retaliation, such as a dismissal, is void. However, the dismissal must be declared void by a tribunal. An employee who is dismissed because of retaliation has 15 days to bring a claim against his or her employer. The tribunal adjudicates urgently and its decision is provisionally enforceable and subject to appeal. The Court of Appeal must also adjudicate urgently.
Similarly, any discriminatory provisions written, notably, in a contract, an individual or collective agreement or a company internal policy, are considered to be void. Likewise, similar provisions in regulations applicable to non-profit making organisations, self-employed professions and organisations of employees and employers are considered to be void (Articles L.241-9 and L.253-3 of the Labour Code).

7. **Expected future developments**

On 20 January 2010, Bill no 6101 was proposed in order to modify Articles L.243-1 to L.243-5 of the Labour Code, concerning positive discrimination. The purpose of this Bill is to add the principle of equal treatment between men and women in relation to the concept of the under-represented sex.
1. **Implementation of EU Directives**

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### Legislation not based on EU Directives

All Dutch legislation regarding discrimination is based on the EU Directives.

### Definitions of the different prohibited types of discrimination

The General Act on Equal Treatment ("the General Act") prohibits direct and indirect discrimination on the grounds of:

- religion
- political views
- race
- gender
- nationality
- hetero- and homosexuality
- marital status.

The General Act applies to all aspects of society, including the provision of services and employment relations.
In addition to the General Act, the Dutch Civil Code (Articles 7:646 – 7:649 BW) prohibits discrimination on the basis of gender in part- or full-time employment. It also prohibits unequal treatment in an employment setting with either fixed or indefinite term employment contracts.

Furthermore, a number of separate laws have been enacted to implement the various EU Directives. The Equal Opportunities Act is supplementary to the articles in the Dutch Civil Code (referred to in the preceding paragraph) and prohibits discrimination by the employer against men and women in an employment relationship. The Equal Opportunities Act considers an employment relationship as a situation in which an employee is working under supervision, which is broader than an employment agreement. The Equal Opportunities Act applies to government and municipalities, as well as to employers in the private sector.

Direct and indirect discrimination are prohibited with regard to a job offer or the filling of a vacancy, during the course of the employment relationship and in the case of the termination of an employment agreement. Men and women working within the same enterprise must receive equal compensation if they do substantially the same work.

Direct discrimination under Dutch law is deemed to include discrimination on the grounds of pregnancy, confinement and motherhood.

Indirect discrimination means discrimination on the grounds of characteristics other than gender, for example marital status or family circumstances, which result in discrimination on the basis of sex. The prohibitions against direct and indirect discrimination do not apply if such discrimination can be objectively justified.

The Act on equal treatment on the basis of disability and/or chronic illness prohibits direct and indirect discrimination on these grounds when entering into an employment relationship, as well as during the employment and upon termination. Furthermore, the employer must make adequate and necessary adjustments to enable the disabled employee to take part in day to day life in the same way as any other employee would, unless this requires a disproportionate action by the employer. The Act applies to government and municipalities, as well as to employers in the private sector.

The Act on discrimination on the basis of age prohibits any direct or indirect discrimination based on age in any situation relating to employment. This includes, for example, the application procedure, the termination of employment, employment conditions and working conditions.

4. **Discrimination during Recruitment**

4.1 Principles

When recruiting, an employer is prohibited from direct or indirect discrimination on the grounds set out in section 3 above, unless it is objectively justified. For example, job advertisements must mention explicitly that both men and women can apply (by stating: ‘m/w’) and any reference to an exact age should be avoided.

Discrimination is allowed if it can be objectively justified, or in the following cases:

- cases where gender is decisive, such as an actor, artist, singer, dancer or a member of the clergy;
- provisions relating to the protection of women, in particular in connection with pregnancy or motherhood;
- recruitment actions, which are intended to put female employees, minorities, disabled and/or chronically ill persons into a privileged position in order to end or reduce existing inequalities and discrimination, provided the actions are in proportion to the intended objective. This should be explicitly stated in the recruitment advertisement.

4.2 Burden of proof

If the employee presents facts which may give rise to a presumption of discrimination, the employer must prove that it has not breached the discrimination regulations.

4.3 Sanctions

An applicant who is rejected on discriminatory grounds cannot claim an employment agreement. However, the Court may award damages to the applicant.

5. **Discrimination during the Employment Relationship**

5.1 Principles

In principle, unless such discrimination can be objectively justified, direct and indirect discrimination on the grounds set out in section 3 above are prohibited during the employment relationship, with regard to employee benefits (equal compensation), including fringe benefits, pension arrangements, the provision of training, job evaluation and promotion.
Further, under Dutch law it is prohibited to discriminate against part-time workers, fixed-term workers, disabled employees or employees with a chronic illness, unless there is an objective justification for the discrimination.

An employer must not discriminate against employees on the basis of a difference between the number of working hours in the conditions of their employment agreement, unless such discrimination is objectively justified.

The Employment of Disabled Employees Act imposes an obligation on employers, employers’ organisations and unions, to provide equal opportunities for the employment of disabled and non-disabled employees and to take measures to improve working conditions for the disabled. Among other things, it provides for the mandatory hiring of between three and seven disabled persons per 100 employees in certain appointed sectors of industry government and municipalities.

Discrimination will be considered as objectively justifiable if it serves a legitimate aim and the measures taken to reach that aim are proportionate and suitable. According to case law of the European Court of Justice, justification for discrimination on the basis of gender needs to be properly substantiated. In principle, general terms are considered to be insufficient justification.

5.2 Burden of proof
If the employee presents facts which may give rise to a presumption of discrimination, the employer must prove that it has not breached the discrimination regulations.

For example, if the employment contract of a female employee is terminated during the trial period after she has told her employer that she is pregnant and she assumes that the termination and the announcement are related, the burden of proof shifts to the employer.

Sexual discrimination
Since the amendment of the Equal Treatment Act and the Equal Opportunity Act, complaints of sexual harassment can also generally be based on these Acts. This has had the effect of making the burden of proof shift to the accused (i.e. the employer), who must prove that the alleged harassment has not taken place.

The Work Conditions Act provides that the employer must, apart from taking measures in the interest of the health and working conditions of the employee, protect the employee as much as possible against sexual harassment and its consequences. This Act compels the employer to focus its enterprise policy on the maintenance and improvement of the safety, health and well-being of its employees. In this respect, the employer must also take measures to prevent sexual harassment.

The government has initiated a number of measures that are aimed at preventing sexual harassment. Trade and industry are encouraged by the government to actively prevent and eradicate sexual harassment. Consequently, some Collective Labour Agreements include provisions regarding the prevention of sexual harassment, and set out the procedures for complaints.

5.3 Sanctions
Any provision in an employment agreement or Collective Labour Agreement that breaches the principle of equal treatment is void. However, an act of discrimination must be declared void by the employee within a certain period, as prescribed by law. If the employer fails to acknowledge the invalidity of the respective provision, the employee may commence legal proceedings.

The employee can either obtain a court injunction to stop discriminatory actions (for example, discriminatory employment benefits) or commence an action to recover back pay or other employee benefits.

Furthermore, the employee, the Works Council and any other affected parties may make a request to the Equal Treatment Commission for an investigation into whether or not discrimination took place or is still taking place. The Equal Treatment Commission can also act on its own initiative. The opinion of the Equal Treatment Commission does not have any legal consequences (i.e. it has no legal force, nor is it binding on the parties involved). However, the Equal Treatment Commission could apply to the Court for a legally binding decision.

Certain infringements constitute criminal offences subject to imprisonment and/or penalty payments. These infringements are set out in the Dutch Criminal Code, and constitute serious acts of discrimination.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
Direct and indirect discrimination are prohibited on the grounds set out in section 3 above in relation to the termination of an employment agreement, unless the termination is objectively justified.
An employer is prohibited from giving notice of the termination of a contract of employment to a sick employee (unless the illness has lasted for at least two years). An employer is also prohibited from dismissing a female employee during her pregnancy, during the period in which she is entitled to maternity leave, or a period of six weeks immediately following the confinement in cases where the employee is ill. Additionally, an employer is prohibited from giving notice of the termination of a contract of employment to an employee on maternity leave or parental leave. However, an employer may give notice where the reason for the termination is unrelated to the factors mentioned above (for example, the closing of the business).

An employer requires permission from the Employee Insurance Agency (UWV Werkbedrijf) to give notice of the termination of an employment agreement. If the reason for dismissal is economic, the UWV Werkbedrijf could refuse the employer such permission, if the employee involved is in a weak position in the job market. Furthermore, the UWV Werkbedrijf will give special consideration to discrimination when reviewing a request for permission to terminate employment agreements.

The termination of an employment agreement by the employer on grounds that are based on discrimination (i.e. a difference in the number of working hours) may be declared void in a judicial proceeding.

6.2 Burden of proof
If the employee presents facts which may give rise to a presumption of discrimination, the employer must prove that it has not breached the discrimination regulations.

6.3 Sanctions
The termination of an employment agreement by an employer in contravention of the non-discrimination regulations may be nullified by the judge. An employee must bring a claim for discrimination within two months of the termination of the employment agreement, otherwise his or her right to do so will lapse. Notice of termination in contravention of the non-discrimination regulations does not render the employer liable to pay compensation to the employee. In such circumstances the employee can only have the termination declared void, as a result of which the employment agreement would continue.

7. Expected future developments
New legislation is being prepared to amend the General Act. The legislation proposes to cancel the so-called ‘single fact construction’. This proposal is intended to strengthen the prohibition relating to discrimination against homosexuals. According to the current Equal Treatment Act, an employer is prohibited from considering there to be a difference between employees on the grounds of the ‘single fact’ of homosexuality. However, ‘additional circumstances’ can make it possible for some employers (for example, Christian schools) to exclude homosexual candidates. In this way, discrimination against homosexuals and lesbians is still allowed under certain conditions. Already in 2004, European experts highlighted that the definition of ‘additional circumstances’ in the Dutch Equal Treatment Act is broader than the European Directive 2000/78/EC allows. For that reason, some members of Parliament filed a proposal to make the ‘single fact construction’ unlawful. The proposal is currently with Parliament (Tweede Kamer) for its approval.
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## 1. Implementation of EU Directives

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### 2. Legislation not based on EU Directives

All employment related legislation on non-discrimination has been adopted through implementation of EU Directives. Only the Polish Constitution of 1997, containing certain general rules on equal treatment, is not based on EU legislation.

### 3. Definitions of the different prohibited types of discrimination

The majority of anti-discrimination provisions are contained in the Labour Code. Anti-discrimination legislation in Poland is very strict. It prohibits ‘any discrimination’ in the field of employment. The list of the grounds of discrimination is non-exhaustive.
Direct discrimination occurs where an employee is, has been or could be treated less favourably than other employees in a comparable situation because of one or more unlawful grounds.

Indirect discrimination occurs where, as a result of an apparently neutral provision, criterion or practice, there exists or there might occur a disproportionate or particularly disadvantageous situation to the detriment of all or a significant number of employees belonging to a protected group, in relation to the commencement and/or termination of an employment relationship, the terms of employment, promotion or access to advanced vocational training. Such indirect discrimination arises unless the provision, criterion or action can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Sexual harassment amounts to a form of discrimination on grounds of sex. Sexual harassment means undesirable behaviour of a sexual nature or that referring to an employee's sex, aimed at or resulting in infringement of the dignity of an employee, in particular by creating towards him or her a frightening, hostile, degrading, humiliating or insulting atmosphere. Such behaviour may include physical, verbal or non-verbal elements.

The following actions constitute additional forms of discrimination:

- encouraging another person to infringe the principle of equal treatment in employment or ordering him or her to do so
- undesirable behaviour that aims at or results in the violation of an employee's dignity and creation towards him or her of a frightening, hostile, degrading, humiliating or insulting atmosphere.

4. Discrimination during recruitment

4.1 Principles

When recruiting an employee, an employer is prohibited from discriminating (directly or indirectly) against job applicants on the grounds of:

- sex
- age
- disability
- race
- religion
- nationality
- political views
- trade union membership
- ethnic origin
- religious conviction
- sexual orientation
- employment for a definite or indefinite period
- full- or part-time employment.

As stated above, the list of the grounds of discrimination is non-exhaustive. Therefore, an employer must not discriminate on any other grounds that might be considered as immoral and unjustified.

The following are the exceptions to the general principle of equal treatment, provided that they are proportionate to the legitimate aim of differentiation:

- refusal to hire an employee on one of the grounds set out above, if the type of work, working conditions or professional requirements in relation to the job result in (one of) the grounds being legitimate and necessary;
- differentiation based on parenthood or disability;
- differentiation based on the length of service as regards conditions of employment and dismissal of an employee, conditions of remuneration and promotion, and access to advanced vocational training, if it justifies different treatment of employees based on age;
- differentiation based on religion or religious conviction, if the religion of an employee is a legitimate requirement for employment by churches or religious organisations.

An employer may positively discriminate on all of the grounds stated above. However, differentiation of treatment must last for a limited period of time and must aim to achieve equal opportunities for all or for a large number of employees belonging to a protected group.

The outcome of differentiation should be a reduction of factual differences to the benefit of those employees. The scope of positive discrimination comprises the commencement and termination of an employment contract, terms of employment, promotion and access to advanced vocational training.

Where an employee is submitted to harassment or sexual harassment, or where an employee takes action against harassment or sexual harassment, there must be no negative consequences for him or her.
4.2 Burden of proof
In cases of discrimination, a split burden of proof applies. If an employee establishes facts before a court from which it may be presumed that discrimination has taken place, then an employer must prove that it had objective reasons for differentiation.

4.3 Sanctions
An employee may claim ‘compensation’ for discrimination. Compensation should be equal to the full material harm (actual loss and lost profits) incurred by an employee who has been discriminated against. The amount of compensation cannot be less than the national minimum monthly remuneration (currently approximately EUR 350).

If discrimination causes no pecuniary damage to an employee, an employee can still claim compensation for non-material harm (for infringement of an employee’s personal rights, such as his or her dignity). In such cases the amount should then be established by the court in principle, having regard to the extent of an employee’s suffering. Compensation for non-material harm does not have a ‘punitive’ character but it must be effective, proportionate and discouraging. If an act of discrimination causes non-material harm, an employee may also pursue other claims warranted by the Civil Code – in particular, an employee can demand an apology appropriate in form and content and can demand that the discriminatory treatment cease.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
An employer is prohibited from direct or indirect discrimination against an employee in any of the forms referred to in section 2 above and on any of the grounds referred to in section 3 above.

An employer cannot discriminate against an employee as regards working conditions (including granting remuneration and other benefits), promotion and access to advanced professional training.

An employee has the right to equal pay for equal work or for work of equal value. Work of equal value is work that requires from employees comparable professional qualifications, which should be confirmed by the relevant documentation or professional experience. It also requires comparable responsibility and effort.

Remuneration granted to employees in relation to work comprises all the components of pay and other benefits, irrespective of their name and type, in cash or otherwise.

Polish law guarantees the right to equal pay for equal work to all employees and does not provide for any exceptions. The only differentiation that can arise in respect of remuneration occurs in relation to the length of service. According to the case law of the Polish Supreme Court, such differentiation may be considered discriminatory, if an employer cannot prove that the length of service positively affected the quality of an employee’s work.

If an employee exercises his or her rights in the case of an employer’s infringement of the principle of equal treatment in employment, an employer cannot treat that employee less favourably, nor can it impose any negative consequences on him or her (including termination of employment).

The same applies to an employee who in any way supported another employee in exercising his or her rights in the case of an employer’s infringement of the principle of equal treatment.

At the end of maternity leave an employee is entitled to return to his or her job or to an equivalent post or another post appropriate to his or her qualifications. Such an employee is then entitled to the same remuneration as he or she would have received, had he or she not taken leave.

5.2 Burden of proof
In cases of discrimination, a split burden of proof applies. If an employee establishes facts before a court from which it may be presumed that discrimination has taken place, then the employer must prove that it had objective reasons for discriminating against that employee.

5.3 Sanctions
The sanctions are the same as in the case of discrimination in recruitment (in particular, an employee may bring a claim for full compensation).

When discrimination occurs in the field of remuneration, an employee who has been discriminated against may claim the material shortfall for the past three years (in line with the statute of limitation).

An employee can also request that the State Labour Inspection audit an employer’s compliance with the law on equal treatment. In certain cases, inspectors are entitled to impose fines (up to PLN 30,000, approximately EUR...
7,500) on an employer for breach of labour law. They may also issue orders for payment of employment related benefits owed to an employee. This also applies to benefits denied to an employee on a discriminatory basis.

There are no criminal sanctions for breach of the principle of equal treatment. However, in particularly extreme cases, discriminatory behaviour may fall under the general criminal sanction for ‘malicious breach of employment law’. Cases of sexual harassment may lead to the criminal liability of the harasser.

6. Discrimination when an Employee is Dismissed

6.1 Principles
An employer is prohibited from dismissing an employee on discriminatory grounds. Notably, if an employee exercises his or her rights when an employer infringes the principle of equal treatment in employment, this cannot constitute a justification for that employer to serve notice of the termination of the employment contract or to immediately terminate the employment relationship.

The same applies to an employee who has in any way supported another employee in exercising his or her rights in the case of an employer’s infringement of the principle of equal treatment.

An employer can neither serve notice of termination of an employment contract nor terminate the employment of a pregnant woman, although immediate termination of the employment relationship on serious grounds is possible. However, a trade union representing the employee (if any) must give its consent in order for immediate termination to take place. The same applies during an employee’s period of maternity leave.

If a mother uses at least 14 weeks of her maternity leave immediately after giving birth, the remaining part of her leave may be granted to the father who is taking care of the child. In such a case, the above rights in relation to dismissal also apply to him during his ‘maternity leave’.

Regarding a pregnant employee, a contract for a definite period of time for the performance of a specific task or for a probationary period exceeding one month that would normally end after the third month of pregnancy, is extended to the day of birth.

Additionally, an employee on parental leave is protected against dismissal.

Parental leave can last for up to three years. Analogous protection (limited to a 12 month-period) is granted to any employee who has requested a working-time reduction instead of using (a part of) his or her parental leave.

6.2 Burden of proof
The burden of proof in the case of dismissal of an employee lies with the employer. The employer must prove that serving notice of termination of a contract for an indefinite period and immediate dismissal were justified.

In cases of alleged discriminatory dismissal, an employer must prove that the dismissal was not discriminatory.

6.3 Sanctions
If an employer is not able to prove that an employee was dismissed on a non–discriminatory basis, the employee can be reinstated to work or granted compensation.

If an employee is reinstated, he or she can additionally be granted remuneration for a maximum of two months. However, if a dismissed pregnant woman or an employee taking maternity leave is reinstated, additional remuneration can be claimed for the whole period that he or she did not work.

Compensation is limited to three months’ remuneration. If an employee requests compensation of more than three months’ remuneration, he or she can claim full compensation. To do so, he or she must prove any harm caused and the link of causality between an illegal or unjustified dismissal and such harm. Currently, the above refers to material harm only (but note that there is a legal trend towards widening the scope of harm). It is not yet clear if granting compensation for breach of the principle of equal treatment, independently from compensation for illegal or unjustified dismissal, is possible.

7. Expected Future Developments
There is still no case law regarding the most recent implementation of Directive 2006/54/EC. It is expected that there will be future development in this field.
1. **Implementation of EU Directives**

2. **Legislation not based on EU Directives**

3. **Definitions of the different prohibited types of discrimination**

4. **Discrimination during recruitment**
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5. **Discrimination during the employment relationship**
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6. **Discrimination when an employee is dismissed**
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7. **Expected future developments**
### 1. Implementation of EU Directives

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Amending Directive 76/207/EEC, on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

### Directive 2006/54/EC of 5 July 2006
On equal opportunities and equal treatment of men and women in matters of employment and occupation

### Directive 2010/18/EU of 3 June 2010
On the framework agreement on parental leave

### Legislation not based on EU Directives
The main principle prohibiting discrimination is set out in the Portuguese Constitution, which is not based on any of the EU Directives. The various specific provisions prohibiting discrimination are, however, based on EU Directives.

### Definitions of the different prohibited types of discrimination
There is a general principle of non-discrimination, applicable to both employees and job candidates. According to this principle, an individual cannot be discriminated against on the basis of, among other things, birth, race, sex, religion, opinion or any other personal, social or political circumstances. Both direct and indirect discrimination are prohibited under Portuguese law.

According to Portuguese law:

- direct discrimination occurs when a person is treated less favourably than other people in a similar situation for reasons of, for example, birth, race or sex;
- indirect discrimination occurs when an apparently neutral provision, criterion or practice may cause harmful effects on a person, unless the provision, criterion or practice can be objectively and reasonably justified;
- harassment is considered to be a form of discrimination;
- an instruction to discriminate is also deemed to be a form of discrimination.

With regard to employment, provided that the objective is legitimate and the requirement is proportionate to the objective, a difference in treatment is objectively and reasonably justified if a particular characteristic constitutes an essential and determining professional requirement, due to the nature of the professional activity or the context in which it is performed.

### Discrimination during recruitment

#### 4.1 Principles
When recruiting employees, an employer is prohibited from discriminating against job applicants on the grounds of:

- sex
- race
- colour
- religion
- political and ideological opinion
- sexual orientation
- national, social or ethnic origin
- membership of a trade union organisation
- marital status
- pregnancy
- language
- disability or reduced work capability
- chronic disease.
Exceptions to the prohibition against discrimination based on the elements listed above are:

- particular activities for which these characteristics are essential;
- differential treatment based on age, dictated by the particular nature of the working conditions, work policy, job market or professional development. Nevertheless, this differential treatment must be objectively and reasonably justified by a legitimate objective and the means of achieving this objective must be appropriate and necessary;
- any difference in treatment based on a particular religion or personal/political opinions within religious organisations or other public or private entities, if religion or personal/political opinions are essential for carrying out these activities;
- any other difference in treatment justified by lawful purposes and pursued appropriately and proportionally.

An employer cannot discriminate (directly or indirectly) against job applicants during the recruitment process.

According to Portuguese law, there are no limitations on an employer’s decision to hire employees: an employer is free to hire any person who, according to its best judgment, is the most qualified for the job.

However, an employer should comply with the generic principle of good faith and observe pre-established provisions, notably if there has been a public advertisement for the hiring of employees. This principle (Article 102 of the Portuguese Labour Code) provides that the parties negotiating the execution of an employment contract (either in a preliminary phase or in the formation of the contract) are bound to proceed according to the principle of good faith. A breach may give rise to civil liability under general principles of law.

The main issues related to the hiring of employees concern the disclosure of private data (e.g. on health, sexual behaviour and religious beliefs) and, in particular, inquiries about information that is not objectively job-related.

According to Portuguese law, the employer cannot ask the applicant to disclose information related to his or her private life, health or pregnancy status, unless such information is strictly needed and relevant in assessing his or her ability to do the job in question and the employer provides the reasons for such a request in writing.

However, the employer cannot ask a female applicant to perform or disclose any tests or pregnancy examinations.

The prohibition against discrimination during the recruitment process also applies to job offers. It is unlawful to make a job offer based on any of the prohibited grounds of discrimination. For example, according to the principle of equal opportunity between women and men, employers cannot, either directly or indirectly, make any restriction, specification or preference based on gender when advertising a job.

4.2 Burden of proof
In cases of discrimination, there is a split burden of proof. On the one hand, an employee who alleges that he or she has been treated less favourably than another employee must prove such an allegation. On the other hand, the employer must demonstrate that such a difference of treatment was not based on discriminatory grounds.

4.3 Sanctions
A breach of the legal provisions that prohibit discrimination is considered to be gross misconduct and may lead to the imposition of fines varying between EUR 2,040 and EUR 61,200.

The imposition of fines does not preclude the claimant from bringing civil actions on the basis of these infringements under general principles of law.

In addition, Portuguese law considers that any act with regard to an employee that may discriminate against him or her is invalid.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
During the employment relationship an employer is prohibited from direct or indirect discrimination against employees as regards job classification, salary, career progression and, in terms of the content of the employment contract, on the grounds listed in section 4.1 above.

Female workers have the same rights as male workers (notably in relation to working conditions) and must earn the same salary when performing the same tasks (i.e. they cannot be discriminated against on the basis of their sex). Notwithstanding this, Portuguese law permits differences in salary when based on objective criteria such as (i) merit, (ii) productivity, (iii) attendance, or (iv) seniority, except in cases of leave and absence(s) related to maternity and paternity.
The criteria used to define professional rankings and groups must follow common rules applicable to both sexes. Similarly, the system for promotion within a company must follow common rules for both sexes.

In general, an employer cannot discriminate with respect to promotion opportunities or working conditions.

An employer must comply with the general principle of equal treatment, particularly the principle of ‘equal pay for equal work’. Employees in comparable tasks must receive the same salary, the same rank and equal opportunities to progress in their careers. Any unequal treatment must be objectively justified, notably on the grounds of quantity, quality and nature of the work.

Part-time employees must not be treated less favourably than full-time employees who perform similar tasks. Salary must be proportional to the reduced hours.

An employer is prohibited from treating a fixed-term employee in a less favourable manner than a comparable permanent employee based on the nature of the contract, unless the different treatment is objectively justified.

An employer is prohibited from discrimination on grounds of disability. An employer also has an obligation to make reasonable adjustments to working practices and the workplace to eliminate disadvantages. It is also unlawful to subject an employee to harassment.

Pregnancy and birth are protected by law and periods of absence from work and leave can be granted to the mother or, alternatively or cumulatively, to the father. No minimum period of employment is required to be able to benefit from this right. The main form of leave is parental leave.

A pregnant employee or breast-feeding employee is also entitled to certain absences from work (e.g. for medical examinations or assistance or for breast-feeding) which are considered justified absences.

In the case of pregnant employees, there is also a prohibition against requiring the mother of a child to carry out work that is hazardous to her health.

Finally, it should be noted that the employer cannot ask a female applicant to perform or disclose any tests or pregnancy examinations.

5.2 Burden of proof

The same principles of burden of proof as set out in section 4.2 above apply to sex, race, disability and other types of discrimination during the employment relationship.

5.3 Sanctions

Breach of the legal provisions that prohibit discrimination is considered gross misconduct and may lead to the imposition of fines varying between EUR 2,040 and EUR 61,200.

The imposition of fines does not preclude the claimant from bringing civil actions on the basis of these infringements under general principles of law.

In addition, Portuguese law considers that any act with regard to an employee that may discriminate against him or her on the grounds of discrimination is invalid.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles

Generally, an employer is prohibited from dismissing an employee for discriminatory reasons.

Portuguese law expressly provides that dismissal based on political, ideological, ethnic or religious reasons is unlawful, even when the employer invokes a different reason.

Certain categories of employees benefit from specific legislative protection. If these individuals are dismissed, their dismissal is presumed to be unfair.

The main protected categories are:

- pregnant employees, as of the date the employer is informed of the pregnancy and up to one year after the child’s birth. If there are grounds for fair dismissal, the employer must consult the Commission for Equality (CITE) in advance;
- candidates for unions, as well as employees who are or have been members of such bodies within the last three years.
6.2 Burden of proof
The same principles of burden of proof as set out in section 4.2 above apply to sex, race, disability and other types of discrimination during the employment relationship in cases of unfair dismissal.

6.3 Sanctions
If the dismissal is declared unlawful, notably if based on political, ideological, ethnic or religious reasons, the employer may be obliged to:

- compensate the employee for all harm (both pecuniary and moral) caused
- reinstate the employee in his or her former position.

The employee is also entitled to receive all the salary that has become due from the date of the dismissal until the court’s final decision.

In most cases, the employee can choose to receive compensation rather than being reinstated. Compensation varies between 15 and 45 days of basic salary and seniority allowances for each full year of service, taking into account the salary level and the degree of unlawfulness of the dismissal. Compensation cannot be less than the equivalent of three months’ pay.

Where a company employs a maximum of ten employees or employees occupying management positions and except in cases of unlawful dismissal based on political, ideological, ethnic or religious reasons, the employer can oppose reinstatement, if it can demonstrate that this would be severely detrimental to the company’s activities.

If the court decides in favour of the employer, compensation will then be between 30 and 60 days of basic salary and seniority allowances for each full year of service (with a minimum of six months’ pay).

7. Expected future developments
Although in Portugal there have been some cases decided by courts regarding discrimination, it is expected that employees will be increasingly aware of the rights granted to them by law and will try more frequently to enforce those rights both before courts and before the relevant public authorities. There are no changes to the law expected in the near future.
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1. **IMPLEMENTATION OF EU DIRECTIVES**

The Russian Federation is not a member of the European Union and EU legislation does not apply.

2. **LEGISLATION NOT BASED ON EU DIRECTIVES**

Russian anti-discrimination legislation in the labour market is, for the most part, based on the Constitution of the Russian Federation and the Russian Labour Code.

3. **DEFINITIONS OF THE DIFFERENT PROHIBITED TYPES OF DISCRIMINATION**

Neither the Constitution nor Labour Code stipulate any specific types of discrimination, but instead provide a non-exhaustive list of the different grounds upon which discrimination can be based, such as sex, race, colour, nationality, language, origin, property, family, social or employment status, age, place of residence, religion, political views, (non-)participation in non-governmental organisations, as well as any other circumstances not associated with the professional qualities of an employee.

Established court practice recognises certain professional qualities, in particular an employee’s ability to perform specific job-related functions, taking into account his or her existing professional qualifications and work experience (e.g. in relation to specific professions and specialist fields), as well as his or her personal characteristics (e.g. health and education).

The following are the most common grounds on which discrimination can be based:

- age
- sex
- pregnancy and maternity leave
- marital status
- residence and nationality.
4. DISCRIMINATION DURING RECRUITMENT

4.1 Principles

The Labour Code provides for equal opportunities for all to exercise employment rights. It prohibits any discrimination in the field of employment. Individual rights can be restricted only by federal law.

During the recruitment process, an employer must only consider a job applicant’s professional qualities. Any reason for refusing to hire a job applicant that is not related to his or her professional qualities is deemed to be unlawful. An employee can bring a claim of discrimination against the employer. In this respect, a job vacancy with specific requirements in relation to a particular age, sex, place of residence or appearance, is prohibited in law.

Certain exceptions, preferences, restrictions and other special requirements apply to certain occupations in relation to an applicant in special cases, as provided by federal law. These refer to specific occupational requirements, such as a job applicant’s ability to work under special conditions or any qualification requirements prescribed by law. A job applicant who is treated in accordance with these requirements is not regarded as having been discriminated against.

Discrimination against a job applicant on the grounds of his or her disability is prohibited. Under the Labour Code, organisations with 100 or more employees must comply with a specific quota for employing disabled persons equal to a percentage of the average number of employees in the organisation (but not less than two and no more than four percent), in accordance with the legislation of each of the subjects (i.e. territorial units) of the Russian Federation.

In practice, discrimination restrictions are often violated. Generally, it is graduates, young people, or pregnant women, women with young children and pensioners who suffer from discrimination in recruitment.

4.2 Burden of proof

Pursuant to Russian procedural legislation, each party to a dispute must prove all the facts upon which it relies as the grounds for its claims and objections. Legislation imposes a split burden of proof in discrimination disputes. An employee must establish before a court the discriminatory grounds on which the employer refused to employ him or her. The employer must prove its objective and lawful reasons for refusing to employ the individual and must show that there has been no discrimination.

4.3 Sanctions

A job applicant who was refused employment can make a request to the employer to provide in writing the reason for its refusal. If the job applicant considers this refusal to be unlawful and discriminatory, he or she may bring a claim for the restoration of his or her violated rights and compensation for loss and non-material harm. The time limit for making such an application is three months from the date when the employee first became aware of the discrimination.

An employer and its officials who violate the anti-discrimination legislation can be assigned one or more of the following three forms of liability:

- disciplinary liability in the form of a warning, reprimand or dismissal, to be applied by the employer to its officials;
- civil liability in the form of compensation for loss and non-material harm;
- administrative liability:
  - for the employer’s officials, an administrative fine of between RUB 1,000 and 5,000 (currently approximately EUR 25 to 125) or, for a repeated violation, disqualification (e.g. from holding certain posts) for a period of between one and three years;
  - for a legal entity, an administrative fine of between RUB 30,000 and 50,000 (currently approximately EUR 750 to 1,250) or an administrative suspension of business for a period of up to 90 days.

In addition to the sanctions referred to above, officials of the employer authorised with the right to hire and dismiss, can be held criminally liable for refusing to conclude an employment agreement without just cause or for dismissing a pregnant woman or a woman with a child under the age of three years. In this case, they can be fined up to RUB 200,000 (currently approximately EUR 5,000) or in the amount of wages or other income for a period of up to 18 months. Alternatively, an employer’s official can be subjected to compulsory works (i.e. community service) for a period of between 120 and 180 hours. However, in practice, holding employer’s officials to be criminally liable is extremely rare.

The refusal of an employer to hire a disabled person within the prescribed quota can result in an administrative fine on officials of between RUB 2,000 and 3,000 (currently approximately EUR 50 to 75).
Before filing a claim with the court, a job applicant who is deemed to have
been discriminated against can apply within three months to the Labour
Disputes Commission (comprising of an equal number of employees and
employer representatives) in order to resolve the dispute with the employer.
The decision of the Labour Disputes Commission can be appealed to a court
within ten days of the date of its receipt.

A job applicant can also apply to the State Labour Inspection to audit an
employer’s compliance with anti-discrimination laws. A State Labour Inspector
is entitled to issue an order on elimination of labour law violation obligatory
for execution within 15 days of the date of receiving a job applicant’s application.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
Pursuant to the Russian Constitution, all individuals have a right to work in
conditions complying with health and safety requirements, as well as to
remuneration for work without any discrimination.

As well as the discriminatory grounds mentioned in section 3 above, an
employee must not be discriminated against with regard to working terms and
conditions, remuneration, access to promotion and professional training.
Discrimination is also prohibited in relation to part-time employees and
employees on a probationary period. Part-time employment is strictly regulated
by federal law. An employer must not treat a part-time employee less favourable
than a full-time employee.

5.2 Burden of proof
The burden of proof is the same as in the case of discrimination in recruitment.
Please see section 4 above.

5.3 Sanctions
The sanctions are the same as in the case of discrimination in recruitment.
Please see section 4 above.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
An employer is prohibited from dismissing an employee on discriminatory
grounds. In addition to the general restriction on discrimination, the law
provides supplementary guarantees for some categories of employees.

In particular, an employer is generally prohibited from terminating an employment
agreement with a pregnant employee on the initiative of the employer.
Additionally, an employer is prohibited from terminating an employment
agreement with a female employee who has a child of up to three years of
age; a single mother with a child of up to fourteen years of age (or a disabled
child of up to eighteen years of age); other employees bringing up a child
without its mother (with some exceptions); and certain other categories of
employees.

An employer is also prohibited from dismissing an employee on the grounds
of his or her membership of a trade union or part-time employment.
An employer must not dismiss an employee without compensation, as prescribed
by legislation, in the case of personnel reduction.

6.2 Burden of proof
The burden of proof is the same as in cases of discrimination in recruitment
and employment. In the case of a dismissal, an employee must prove the facts
of discrimination, while the employer must establish the lawfulness of the
dismissal.

6.3 Sanctions
The sanctions for an illegal dismissal may be the same as for discrimination in
recruitment. However, the employee who has been discriminated against must
bring his or her claim before a court within one month of the date when he or
she received a copy of the order for dismissal or the employment book.

A wrongfully dismissed employee can claim reinstatement and reimbursement
of the average salary that he or she did not receive for the whole period of the
unlawful restriction of his or her ability to work. He or she can also claim
compensation for non-material harm.
7. **Expected future developments**

In general, Russian anti-discrimination legislation is not as up to date as that of Europe. It needs to be significantly developed. In this respect, adoption of a new common anti-discrimination law is currently being discussed. The proposal is to transfer the burden of proof to the employer, as it is the stronger party in a dispute. It is also proposed that the rebuttable presumption of an employer's guilt in cases of discrimination should be defined. In addition, the difference between discrimination and other violations of employment legislation should be clarified; the specific claims of discrimination that can be made need to be clarified; and liability for discrimination needs to be made distinct. However, this initiative is only at the public discussion stage and no draft law has been developed as yet.
### Implementation of EU Directives

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</table>
2. **Legislation not based on EU Directives**

There is no relevant legislation that is not originally based on EU Directives.

3. **Definitions of the different prohibited types of discrimination**

Under Spanish law there is a general principle of equality, which prohibits all forms of discrimination. According to Article 14 of the Spanish Constitution, all individuals are equal and must not be subjected to any discrimination by reason of birth, race, sex, religion, opinion or any other personal or social circumstances.

Discrimination can be either direct or indirect.

Direct discrimination occurs when a person is treated less favourably than other people in an analogous situation, for reasons of, for example, birth, race or sex (Articles 9.2, 14, 28.1 and 35.1 of the Spanish Constitution and Articles 4.2(c), 17, 28, 53.4, 55.5 and 68(c) of the Workers’ Statute).

Indirect discrimination occurs when an apparently neutral provision, criterion or general rule can put a person of a particular sex at a specified disadvantage in comparison with other individuals, owing to his or her sex or other characteristics (the Spanish Constitutional Court 145/91; High Court of Justice of the Basque Country 16-6-93).

Article 6 of Law 3/07 of 22 March set out the definitions of direct and indirect discrimination for the first time. Previously, the definitions were contained only in case law. Likewise, Article 7 set out for the first time the definitions of sexual harassment and harassment on grounds of sex. Article 8 specifically refers to discrimination in relation to pregnancy or maternity leave, which constitutes direct discrimination in all cases. Article 9 provides special protection against a reprisal for bringing a claim to prevent discrimination. Such a scenario is also considered to be discrimination on the grounds of sex.

4. **Discrimination during recruitment**

4.1 **Principles**

According to Article 4.2(c) of the Workers’ Statute, job applicants must not be discriminated against with regards to access to employment, on the basis of any of the following characteristics:

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</tr>
</tbody>
</table>
• sex
• marital status
• age
• race
• social class
• religion or political opinion
• membership of a trade union
• language
• disability.

It is a very serious violation of the prohibition against discrimination, if the conditions of job recruitment are advertised or job offers are made by any means that limit access to employment on the basis of any of the above grounds.

In order to achieve equality between men and women (and in accordance with the EU recommendation of 13 December (Recommendation 84/635/EEC, of 13 December 1984, related to the promotion of affirmative action on behalf women), the law in Spain expressly recognises and promotes affirmative action. An employer that hires workers who face difficulties in finding work (e.g. women in general, young people aged between 16 and 30 years and workers over 45 years of age) is entitled to rebates on employer social security contributions.

Since June 2010, the National Programme for Encouraging the Employment of Older Workers is contained in Law 35/2010 and Royal Decree 10/2010.

There are also rules concerning the compulsory employment of disabled employees (Act 13/1982 and Royal Decree 27/2000). A privately owned company with more than 50 permanent employees must hire a number of disabled workers equal to at least two per cent of the number of its permanent employees on the payroll. In exceptional cases, a company may be wholly or partially exempt from this obligation. For a State owned company the obligation was increased (by Royal Decree 2271/2004 of 3 December 2004) to five per cent of its annual number of job vacancies (including temporary positions).

4.2 Burden of proof
The Spanish Constitutional Court has confirmed that the burden of proof is reversed in cases of discrimination. Provided that an applicant produces evidence indicating that discrimination has occurred, the burden rests on an employer to demonstrate the existence of objective and reasonable grounds, unrelated to any discriminatory intent. Prior to presenting evidence, an employer must prove that the grounds for the decision were reasonable and necessary from a business perspective (Spanish Constitutional Court 135/1990).

The Employment Procedure Act (‘Ley de Procedimiento Laboral’) sets out the procedural rules for discrimination cases (specifically Articles 20, 90, 95 and 96).

4.3 Sanctions
It is a serious breach of the prohibition against discrimination, if employment conditions (established by means of advertising, allocation of job offers or any other means) limit access to employment on any of the grounds of discrimination.

Discrimination can give rise to cumulative liabilities in various jurisdictions, both for a company and its executives.

Criminal jurisdiction is contained in the Spanish Penal Code (‘Código Penal’) in the chapter on offences against workers’ rights and infringements of the employment legislation classified as crimes, with the specific prohibition against discrimination being governed by Article 313.

Under Spanish law (Article 314 of the Criminal Code) it is a criminal offence for an employer to fail to restore equality by remedying the loss caused, after receiving an administrative order or sanction for serious discrimination in public or private employment, on the grounds of, inter alia, sex or sexual orientation.

Civil jurisdiction is contained in Articles 1101 and 1902 of the Spanish Civil Code (‘Código Civil’), which impose liability in contract and tort.

Administrative jurisdiction
An employer may breach Regulation RD 5/2000, if it takes a unilateral decision that results in either favourable or unfavourable discrimination in terms of seniority, training and promotion, pay, working time or any other terms of employment. A breach may arise where an employer takes such a decision on the grounds of sex, origin, marital status, race, social class, religious belief, political ideas, (non-)membership of a trade union, language or physical reasons. Breach of Regulation RD 5/2000 is punishable by fines of between EUR 6,251 and EUR 187,515.

Employment jurisdiction
Article 17 of the Workers’ Statute provides that any Act, collective agreement, individual contractor or unilateral employer decision aimed at discrimination is void. An employee who has been discriminated against may file a claim before a judge to have the discriminatory act declared void and to receive compensation for the loss suffered. There is no cap on the amount of compensation that can be awarded.
5. **Discrimination during the employment relationship**

5.1 **Principles**

Discrimination on the grounds referred to in section 3 above is prohibited with regard to the execution of the employment contract (the Spanish Constitution 1978 and Article 4.2(c) of the Workers’ Statute).

According to Article 22.4 of the Workers’ Statute, the criteria used to define professional rankings and groups must follow common rules for both sexes. Similarly, the system for promotion within a business must follow common rules for both sexes.

Article 28 of the Workers’ Statute prohibits discrimination in pay based on sex. Recently, this Article has been amended in order to implement Council Directive 75/117/EEC.

According to Article 68(c) of the Workers Statute, members of the works council and employee representatives cannot be discriminated against in terms of economic or professional promotion based on the exercise of their representative functions.

Directive 97/81/EC of 15 December concerning the framework agreement on part-time work has been implemented by Royal Decree 144/1999. Part-time employees must not be treated less favourably than full-time employees who perform similar tasks.

Disabled employees are entitled to receive the same pay treatment as other employees who perform similar tasks. However, an employer cannot ask a disabled worker to perform activities that are incompatible with his or her disability.

Protection against discrimination on the grounds of pregnancy or birth is provided in law by means of enabling employers to grant periods of absence from work and leave. These can be granted either to the mother or alternatively, or cumulatively, to both parents.

**Maternity leave**

The law grants maternity leave for a period of 16 weeks. In the case of multiple births, an additional two weeks’ leave per additional child is granted.

During this period a female employee is obliged to take the 16 weeks’ leave from work. At a minimum, the first six weeks must be taken immediately after the birth and as full-time leave. The remaining ten weeks of maternity leave can be taken either on a part- or full-time basis. During this period, an employee is entitled to an indemnity from the ‘INSS’ (National Institute for Social Security) equal to 100% of her earnings, up to a maximum level approved each year by the government.

During the first nine months following the birth, employed mothers and/or fathers have the right to one hour’s absence from work per day, without loss of earnings. This hour can be divided into two periods of 30 minutes each throughout the working day; alternatively, the length of the normal working day can be shortened by 30 minutes, or the hours can be accumulated and leave taken.

**Paternity leave**

Fathers are entitled to paid leave of 13 calendar days and this can be extended in the case of multiple births by two additional days per child. During this period an employer must pay the employee 100% of his salary.

The maximum length of paternity leave a father can take is 20 days if it is a birth in a large family, or there is a disabled person in the family.

A mother may choose to transfer part or all of her maternity leave (except for the initial six-week minimum period) to the father. During this period, a father is entitled to an indemnity from the INSS (National Institute for Social Security) equal to 100% of his earnings, up to a maximum level determined each year by the government.

The duration of paternity leave was increased by the Government by Law 9/2009 of 6 October, which was due to come into force on 1 January 2011 and provided for an increase in paternity leave to four weeks. However, because of the economic crisis, the government has since decided to postpone this extension until 2012.

The permission will extend paternity cover to childbirth, adoption or fostering, at a rate of two days more for each child after the second one. At the same time, the employment contract can be suspended if the employee is within the social security system and has either a minimum period of contribution of 180 days in the seven years immediately prior to the start of the suspension of employment or 360 days throughout the employee’s working life. An allowance will then be payable by the National Social Security Institute (INSS). If the employee’s employment contract comes to an end during paternity he will continue to receive the allowance until it would normally terminate.
Full-time parental leave
Each family is entitled to full-time leave without pay until their child is three years old. This means that a maximum of two years’ full-time unpaid leave is available. During the first year of a child’s life an employee is entitled to return to his or her former role. After this period, he or she is only entitled to return to a job at the same level. Leave is a family entitlement, either parent can take it, but only one parent may take leave at any time.

Parents taking leave receive no benefit payments. An employer’s social security payments are reduced if it hires a substitute for an employee on maternity or parental leave.

Part-time parental leave
Parents with a child under eight years of age, or a disabled child, can reduce their working hours by between a half and one-eighth, but without compensation for lost earnings. Both parents can claim this right at the same time.

In cases of premature births or hospitalisation of a child, a mother or father can take one hour off work per day without loss of earnings. They can also reduce their working hours by two hours per day, with a proportional diminution in earnings.

Child sickness leave
Parents are entitled to take two days’ leave to care for a sick child or for other family reasons (serious illness or death of parents, siblings, grandparents, grandchildren, aunts, uncles, first cousins, nieces and nephews). It is an individual right, paid for by an employer. The entitlement is extended to four days if travel is required.

Female employees as victims of violence in the workplace
Statutory Law 1/2004 of 28 December established a series of measures, including measures against violence towards women.

Female employees who are victims of violence in the workplace have the right to reduce or rearrange their working time, to change their work location (if possible), to suspend their employment or to terminate their employment contract. During a period of suspension of employment or after termination of a contract, a female employee is entitled to claim social security and unemployment benefits.

A company that uses temporary contracts to replace female employees who have suspended their employment contracts or who have changed their location of work, has the right to a deduction of 100% of the enterprise quotas to the social security by non-professionals, during the period of suspension, or for a period of six months in the case of a change in the location of work.

5.2 Burden of proof
The same principles of burden of proof as set out in section 3 above apply to sex, race, disability or other types of discrimination during the employment relationship.

5.3 Sanctions
An employer may breach Regulation RD 5/2000, if it takes a unilateral decision that results in either favourable or unfavourable discrimination in terms of seniority, training and promotion, pay, working time or any other terms of employment. This may arise if the unilateral decision is taken on the grounds of sex, origin, marital status, race, social class, religious belief, political ideas, (non-)membership of a trade union, language or physical reasons. Breach of Regulation RD 5/2000 is punishable by fines of between EUR 6,251 and EUR 187,515.

Under Spanish law it is a criminal offence (Article 314 Criminal Code) for an employer to fail to restore equality by remedying the loss caused to the affected employee(s), where it has received an administrative order or sanction for serious discrimination in public or private employment on the grounds of, inter alia, sex or sexual orientation.

Article 17 of the Workers’ Statute provides that any Act, collective agreement, individual contract or unilateral decision by an employer aimed at discrimination will be void. An employee who has been discriminated against may file a claim before a judge to have the discriminatory act declared void and to receive compensation for the loss suffered. There is no cap on the amount of compensation that can be awarded.

If a court finds that an employee has not received equal pay for equal work, then an employee is entitled to payment of the difference.
6. **DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED**

6.1 Principles
The following types of dismissal are void (in accordance with Articles 55.5 and 55.6 of the Workers Statute, as amended by Act 39/1999 and Articles 108.2 and 108.3 of the Employment Procedure Act):

- a dismissal motivated by one of the grounds of discrimination prohibited by the Spanish Constitution (Article 14) or by Law ET (Articles 4.2(c) or (28));
- a dismissal that breaches the fundamental rights and political freedoms of an employee;
- the dismissal of an employee during the suspension of his or her employment agreement due to maternity, risk during pregnancy, adoption or foster care placement;
- the dismissal of a pregnant employee at any time between the start of the pregnancy until the beginning of the maternity leave;
- the dismissal of an employee who has requested permission to breastfeed or a reduction in working hours to care for a minor under the age of eight or a disabled person, or an employee who is currently enjoying such arrangements;
- the dismissal of an employee who has requested leave to care for a child under the age of eight or to care for a family member;
- the dismissal of an employee after being reinstated to work at the end of the periods of suspension of the contract for maternity, adoption, foster care or parent leave, provided always that these do not amount to more than nine months from the date of birth, adoption or placement of the child;
- the dismissal of a female victim of violence who has requested any measure for the reorganisation of her working time.

6.2 Burden of proof
Please see section 3 above.

6.3 Sanctions
If a dismissal is declared void, an employer will be ordered to reinstate the employee immediately, and to pay the employee any back pay (Article 55.6 ET).

7. **EXPECTED FUTURE DEVELOPMENTS**

A draft Bill for Equal Treatment and non-discrimination was presented at Congress on 18 January 2011. Its aim is to consolidate the law on equality and establish new guarantees for its enjoyment.
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<td>Directive 2004/113/EC of 13 December 2004</td>
<td>On the implementation of the principle of equal treatment between men and women in the access to and the supply of goods and services</td>
<td>Discrimination Act (2008:567)</td>
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2. Legislation not based on EU Directives

There is no legislation relating to discrimination that does not derive from the EU Directives.

3. Definitions of the different prohibited types of discrimination

On 1 January 2009, the new Discrimination Act (2008:567) (the ‘DA’) entered into force. The DA replaced the Equal Opportunities Act (1991:433) and six other anti-discrimination laws. However, the Prohibition to Discriminate against Part-time and Fixed-term Employees Act (2002:293) is still in force.

The DA and the Prohibition to Discriminate against Part-time and Fixed-term Employees Act specifically prohibit certain types of discrimination based on:

- sex
- trans-gender identity or expression (i.e. someone who does not identify himself or herself as a man or a woman, or expresses by his or her manner of dressing or in some other way that he or she belongs to the opposite sex)
- ethnic origin (race, colour, national or ethnic origin)
- religion or other belief
- mental or physical disability (including current or future health conditions)
- sexual orientation (homosexual, bisexual or heterosexual orientation)
- age
- part-time employment
- fixed-term employment.

Discrimination legislation in Sweden has been amended to comply with the relevant EU Directives and the split burden of proof applies to all claims of discrimination.

Direct discrimination occurs when a difference in treatment is directly based on one of the grounds of discrimination and cannot be reasonably and objectively justified.

Indirect discrimination occurs when an employer applies a provision, criterion or practice that appears to be neutral, but in fact discriminates against a job applicant (including a person who is enquiring about work, applying for a traineeship or is available to work as temporary or borrowed labour), a trainee, a person who is working as temporary or borrowed labour, or an employee to whom one of the grounds of discrimination apply. Indirect discrimination does
not occur where the difference in treatment can be reasonably and objectively justified and where it is necessary in order to achieve a legitimate aim.

Disabled persons, job applicants, trainees and employees will be considered to have been discriminated against, if there is a lack of reasonable accommodation to meet their particular needs.

An employer must not discriminate against a job applicant, an employee, a trainee or a person who is working as temporary or borrowed labour by harassing him or her. The term ‘harassment’ means conduct in working life that, based on the grounds of discrimination, violates the dignity of that person.

According to the DA, an employer is prohibited from subjecting a job applicant, an employee, a trainee or a person who is working as temporary or borrowed labour to reprisals based on the fact that he or she (1) has reported or called attention to the fact that the employer has acted contrary to the DA; (2) participated in an investigation under the DA; or (3) rejected or given in to harassment or sexual harassment on the part of the employer.

Furthermore, an employer who learns that an employee considers himself or herself to be a victim of harassment or sexual harassment from another employee, has an obligation to investigate the circumstances surrounding the alleged harassment and, if necessary, take reasonable measures to prevent further harassment or sexual harassment.

The Prohibition to Discriminate against Part-time and Fixed-term Employees Act contains no provisions regarding harassment on grounds of part-time or fixed-term work.

An employer must not order or instruct one employee to discriminate against another employee.

To a certain extent, affirmative action is allowed under the DA in the sense that differences in treatment are permitted in the workplace as a way of obtaining equality between men and women. However, differences in treatment are not permitted in respect of pay or other employment conditions for jobs that are considered as equal or equivalent.

A new agency, the Equality Ombudsman, monitors compliance with the discrimination legislation. In conjunction with the establishment of the new Equality Ombudsman, the four previous offices of the anti-discrimination ombudsmen have been phased out.

4. DISCRIMINATION DURING RECRUITMENT

4.1 Principles

An employer is prohibited from direct or indirect differential treatment of a job applicant (including a person who is enquiring about work, applying for a traineeship and is available to perform work as temporary or borrowed labour) based on any of the grounds of discrimination specified in section 3 above.

Upon request, an unsuccessful job applicant is entitled to obtain written information from the employer regarding the training, professional experience and other qualifications of the successful applicant.

The Prohibition to Discriminate against Part-time and Fixed-term employees Act does not apply during the recruitment process.

4.2 Burden of proof

If a job applicant claims that he or she has been discriminated against before a competent court, and if he or she establishes facts from which it can be presumed that there has been direct or indirect discrimination, the burden of proving that there has been no discrimination shifts to the employer. It is then the employer who must prove that discrimination has not occurred, or rather, that the unfavourable treatment does not have any connection to any of the grounds of discrimination.

Regarding direct discrimination, a job applicant must prove (1) that he or she belongs to a ‘protected category’ (the discriminatory factor); (2) that he or she has been treated unfavourably; and (3) that the situation is comparable, by making a comparison with a comparable person (real or hypothetical). The employer must prove that the job applicant has not been discriminated against, that the situation or measures taken have no connection with any of the grounds of discrimination, or that some rule of exception applies.

An employer may deviate from the prohibition of direct discrimination, if the difference in treatment is necessary for the nature or context of the work in question (e.g. the casting of a certain character in a play).

Regarding indirect discrimination, a job applicant who belongs to a ‘protected group’ must prove that the employer has treated him or her less favourably than it has treated other employees, by applying a criterion, provision or practice that appears neutral, but in reality puts at a disadvantage persons who belong to the protected group. If the job applicant succeeds in proving this, the employer must then show that this criterion, provision or practice is
shifts to the employer. The employer must then prove that discrimination has not occurred, or rather, that the unfavourable treatment does not have any connection to the grounds of discrimination.

Regarding both direct and indirect discrimination in relation to an employee, the same rules apply as those for a job applicant. Please see section 4.2 above.

5.3 Sanctions
If the measures taken are, or the contract itself is, discriminatory according to the DA, the measures or the contract may be declared void upon the request of the employee. An employee who has been discriminated against has the right to claim compensation for both discrimination and financial harm.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
In order for a Swedish employer to dismiss an employee, there must be a just cause for the dismissal in accordance with the Employment Protection Act (1982:80), i.e. the prohibitions on discrimination complement the fundamental principle of just cause.

6.2 Burden of proof
The rules in relation to the burden of proof when an employee is dismissed are the same as those described in sections 4.2 and 5.2 above.

Regarding both direct and indirect discrimination in relation to an employee who is dismissed, the same rules apply as those described in sections 4.2 and 5.2 above.

6.3 Sanctions
If a dismissal is found to be based on any of the grounds of discrimination and without just cause, the dismissal may be declared void upon the request of the dismissed employee. Furthermore, the employee has the right to claim compensation for both discrimination and financial harm.

7. EXPECTED FUTURE DEVELOPMENTS

The Swedish legislation on discrimination has recently undergone extensive amendments. Therefore, it is unlikely that it or the DA will be modified again in the near future.
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<td>Article 10 of the Turkish Constitution (‘the Constitution’) states that all individuals are equal without discrimination in law, irrespective of language, race, colour, sex, political opinion, religion or any such characteristic. Men and women have equal rights. Additionally, Article 5 of the Turkish Labour Law no 4857 (‘the Labour Law’) stipulates equality between men and women in employment. Please refer to section 3 below for further detail</td>
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<td>Directive 79/7/EEC of 19 February 1978</td>
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1. IMPLEMENTATION OF MEASURES TO ENCOURAGE WORKPLACE IMPROVEMENTS IN THE SAFETY AND HEALTH AT WORK OF PREGNANT WORKERS, AND WORKERS WHO HAVE RECENTLY GIVEN BIRTH OR ARE BREASTFEEDING

Article 74 of the Labour Law states that if deemed necessary by a doctor's report, a pregnant employee may be assigned to lighter duties. In such a case no reduction shall be made to her wage. In addition, employees who have given birth are entitled to breastfeeding leave (1.5 hours per business day) until the child becomes one year old.

2. LEGISLATION NOT BASED ON EU DIRECTIVES

The Turkish Constitution, which provides certain general principles in relation to discrimination.

3. DEFINITIONS OF THE DIFFERENT PROHIBITED TYPES OF DISCRIMINATION

Article 5 of the Labour Law states:

‘In an employment relationship, no discrimination may be made on the basis of language, race, sex, political opinion, philosophical belief, religion and sect, and any such reasons’.

Additionally, it states:

‘The employer may not treat a worker differently in concluding the labour contract, establishing the conditions, implementing and terminating it for reasons of gender or pregnancy, unless biological reasons or those pertaining to work qualifications so necessitate. A lower wage cannot be decided for an equal or equivalent job on the grounds of gender. Implementation of special protective provisions due to the gender of the worker does not justify the payment of a lower wage’.

Article 5 provides specific protected classes, and yet also states ‘and any such reasons’ in addition to them. Clearly, the scope of Article 5 is wide and open to some interpretation. Therefore, it is not fully established in law that categories such as sexual orientation are included. Many legal authorities are of the opinion that sexual orientation is included, although, there is no case law on this point. However, any discrimination on the basis of race, sex, political opinion, religion, or pregnancy in relation to an individual’s right to work is prohibited. The same also applies to an individual’s choice of profession, his or her right to

Turkey is party to the Discrimination Convention no 111 (Employment and Occupation) and the Employment Policy Convention no 122 of the International Labour Organisation (‘ILO’). Through these conventions, Turkey pursues by appropriate domestic methods, a national policy to: promote equal opportunity and treatment for employment and occupation; eliminate discrimination, on the basis of, inter alia, religion, gender and race; and procure, for each worker, freedom of choice of employment irrespective of his or her gender, race or religion.

<table>
<thead>
<tr>
<th>Directive</th>
<th>Legal Basis</th>
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<tbody>
<tr>
<td>92/85/EEC of 19 October 1992</td>
<td>On the introduction of measures to encourage workplace improvements in the safety and health at work of pregnant workers, and workers who have recently given birth or are breastfeeding</td>
</tr>
<tr>
<td>96/97/EC of 20 December 1996 amending Directive 86/378/EEC</td>
<td>On the implementation of the principle of equal treatment for men and women in occupational social security schemes</td>
</tr>
<tr>
<td>97/80/EC of 15 December 1997</td>
<td>On the burden of proof in cases of discrimination based on sex</td>
</tr>
<tr>
<td>97/81/EC of 15 December 1997</td>
<td>The framework agreement on part-time work concluded by UNICEF, CEEP and the ETUC</td>
</tr>
<tr>
<td>99/70/EC of 28 June 1999</td>
<td>The framework agreement on fixed-term work concluded by UNICEF, CEEP and the ETUC</td>
</tr>
<tr>
<td>2000/43/EC of 29 June 2000</td>
<td>Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</td>
</tr>
<tr>
<td>2000/78/EC of 27 November 2000</td>
<td>Establishing a general framework for equal treatment in employment and occupation</td>
</tr>
</tbody>
</table>
safe and appropriate working conditions, protection against unlawful termination of employment, equal pay for equal work and appropriate and fair remuneration.

4. Discrimination during recruitment

4.1 Principles
According to Article 48 of the Constitution, each individual has the freedom to work and the right to work in the field of his or her choice.

When recruiting an employee, the Labour Law and the Constitution prohibit an employer from discriminating against a job applicant on the grounds of language, race, sex, political opinion, philosophical belief, religion and sect, pregnancy or any other similar reasons.

In addition, except for biological reasons or reasons related to the nature of the job, an employer must not discriminate, either directly or indirectly, when recruiting a potential employee based on his or her gender or maternity status.

However, there are some exceptions relating to the employment of young people (under 18 years of age) and women. These exceptions are intended to protect young people and women in certain circumstances.

4.2 Burden of proof
The burden of proof is on the claimant to provide sufficient evidence that unlawful discrimination has occurred during recruitment.

4.3 Sanctions
If there has been a breach of the equal treatment provisions of Article 5, an ‘administrative penalty’ may apply pursuant to Article 99(a) of the Labour Law. For the year 2011, the administrative penalty was set at TRL 108 (approximately 54 Euros) for each employee discriminated against.

5. Discrimination during the employment relationship

5.1 Principles
Unless there are essential reasons for differential treatment, an employer must not discriminate between a full-time and a part-time employee or an employee working under a fixed-term employment contract (for a definite period) and one working under an open-ended employment contract (for an indefinite period).

Additionally, except for biological reasons or reasons related to the nature of the job, an employer must not discriminate, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of the employment contract on account of his or her gender or maternity status.

No lower wage can be agreed upon by reason of gender for the same job or a job with equal value.

5.2 Burden of proof
The burden of proof is on the claimant to provide sufficient evidence of unlawful discrimination during the employment relationship.

5.3 Sanctions
If there has been a breach of the equal treatment provisions of Article 5, an ‘administrative penalty’ may apply pursuant to Article 99(a) of the Labour Law. For the year 2011, the administrative penalty was set at TRL 108 (approximately 54 Euros) for each employee discriminated against.

Additionally, where an employer has failed to comply with the equal treatment provisions, an employee may bring a claim before the Labour Courts and seek reasonable compensation in an amount of up to four months’ salary. An employee can also demand the rights of which he or she has been deprived.

6. Discrimination when an employee is dismissed

6.1 Principles
Generally, based on Article 18 of the Labour Law, an employer of 30 employees or more must have a valid or justified reason to dismiss an employee. However, Article 18 also expressly states those reasons that are considered not to be valid reasons for dismissal: an employee’s race, colour, gender, marital status, religion, political opinion or other similar reasons (such as union membership).

Additionally, an employer cannot dismiss a pregnant employee or an employee on maternity leave or parental leave, unless the dismissal is for a reason unrelated to that employee’s pregnancy or maternity or parental leave.

6.2 Burden of proof
The burden of proof in a dismissal case differs from the norm. Generally, the burden of proof is on an employee to present his or her claim of unlawful dismissal. However, Labour law clearly states that the burden of proof is on the employer to show that the dismissal was made on valid or justified grounds.
6.3 Sanctions
An employee can bring a claim before the Labour Courts for unlawful dismissal (Article 20 of the Labour Law). If a court determines that no valid reason for the termination existed, it is deemed void. In this case, an employer is obliged to either re-employ that employee within one month following the decision of the court or compensate him or her with between four and eight months’ wages (according to the decision of the court). Additionally, the court may award an employee a maximum of four months’ wages and other benefits accrued to represent the period during which he or she pursued the case and could not work.

Furthermore, if an employee was not given notice of termination, then an employer must also pay salary for the notice period.

In addition, an employee may bring a claim before the Labour Courts and seek reasonable compensation, to an amount of up to four months’ salary. An employee can also demand the rights of which he or she has been deprived.

If there has been a breach of the equal treatment provisions of Article 5, an ‘administrative penalty’ pursuant to Article 99(a) of the Labour Law may apply. For the year 2011, the administrative penalty was set at TRL 108 (approximately 55 Euros) for each employee discriminated against.

7. Expected future developments
The expansion of the content of Article 5 has been done, not so much in response to employees’ actual needs, but in order to harmonise Turkish law with that of the EU.
## 1. Implementation of EU Directives

<table>
<thead>
<tr>
<th>Directives</th>
<th>What they cover</th>
<th>Implementing legislation</th>
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</thead>
<tbody>
<tr>
<td>Directive</td>
<td>On the framework agreement on parental leave</td>
<td>The Maternity and Parental Leave etc. Regulations 1999; and the Paternity and Adoption Leave (Amendment) Regulations 2006</td>
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<tr>
<td>Directive 2000/43/EC of 29 June 2000</td>
<td>Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</td>
<td>Discrimination of this kind was already prohibited by the Race Relations Act 1976. The UK made some changes to the Act to fully comply with the Directive through the Race Relations Act 1976 (Amendment) Regulations 2003; now consolidated into the Equality Act 2010</td>
</tr>
</tbody>
</table>

2. Legislation not based on EU Directives


3. Definitions of the different prohibited types of discrimination

In the UK, there is no general or constitutional right not to be discriminated against. However, there is specific legislation preventing discrimination in the context of employment.

Discrimination based on the following protected characteristics is prohibited under UK employment law, and various pieces of legislation have recently been consolidated into the Equality Act 2010:

- race, ethnic or national origin, colour or nationality (these types of discrimination tend to be described together as ‘race discrimination’)
- religion or belief
- sex
Harassment is also a form of discrimination. It is defined as unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. There is an additional form of sexual harassment, where someone engages in unwanted verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect as above. Harassment also occurs where a person is treated less favourably because he or she submitted to or rejected unwanted conduct of a sexual nature, or unwanted conduct related to sex or gender reassignment.

4. Discrimination during recruitment

4.1 Principles
When recruiting, an employer is prohibited from direct discrimination, indirect discrimination or victimisation in the arrangements it makes for deciding who should be offered employment, the terms on which employment is offered or failing to offer employment. An employer is prohibited from unfavourable treatment of a disabled applicant because of something arising in consequence of his or her disability, unless this is justified. Also, an employer has a positive duty to make reasonable adjustments to its recruitment process to eliminate disadvantages to disabled applicants, and must consider a disabled applicant’s ability to carry out the job on the assumption that such reasonable adjustments have been made to working practices or the workplace.

An employer is entitled to recruit employees of, for example, a particular sex, race or religion, when this is an ‘occupational requirement’ and proportionate in the circumstances, but these situations are very limited.

Affirmative action is not generally lawful in the UK, except in relation to disabled employees. However, there is no requirement upon an employer to recruit a quota of disabled employees.

4.2 Burden of proof
Since the implementation of Directive 1997/80/EC, the legislation imposes a split burden of proof in all cases of discrimination. The split burden of proof means that, if the job applicant establishes facts from which the court or tribunal could decide, in the absence of an explanation, that there has been direct or indirect discrimination, it will be for the employer to prove that there has been no discrimination.

If a job applicant claims disability discrimination, the job applicant must prove
that he or she was disabled. The split burden of proof applies in relation to whether he or she was treated unfavourably because of something arising in consequence of his or her disability, or whether the employer failed to make reasonable adjustments. In the case of discrimination arising in consequence of a disability, it is for the employer to prove any justification for the treatment.

In all types of discrimination cases, a job applicant who claims that he or she has been discriminated against is allowed to issue a discrimination questionnaire to the employer which he or she holds responsible for the discriminatory treatment, in order to help establish the case. A response is not obligatory, but delay, refusal to respond or evasive answers can lead to adverse inferences of discrimination being drawn by an employment tribunal.

4.3 Sanctions
If a tribunal finds that an employer has unlawfully discriminated against a job applicant, it can make various awards. It can make a declaration of discrimination and an award of compensation. It can also make a recommendation that the employer take, within a specified period, action that the courts believe will reduce the effect of discrimination on the job applicant or on any other person. In practice, such recommendations are rare and the tribunals tend to award compensation and declarations.

There is no cap on the award of compensation, but it must be what the tribunal considers to be just and equitable, and reflect the loss suffered by the individual. This may include past and future loss of pay, loss of the value of benefits, an award of aggravated damages, and an award for injury to feelings (which can cover both physical and psychiatric illness). There are no criminal sanctions.

5. DISCRIMINATION DURING THE EMPLOYMENT RELATIONSHIP

5.1 Principles
It is unlawful for an employer to subject an employee to direct discrimination, indirect discrimination or victimisation in affording access to training, promotion or other benefits or by subjecting the employee to any other detriment. An employer is prohibited from discriminating against an employee because of something arising in consequence of a disability, unless justified. An employer has a positive duty to make reasonable adjustments to working practices and the workplace in order to eliminate disadvantages. It is also unlawful to subject an employee to harassment.

The Maternity and Parental Leave Regulations prohibit detrimental treatment of an employee because the employee has claimed his or her right to maternity, paternity or parental leave. As mentioned in section 3 above, pregnancy and maternity are also protected characteristics.

Discrimination is also prohibited in relation to pay and contractual benefits. For most protected characteristics, this will simply be a discrimination claim under the Equality Act. However, discrimination in relation to pay and contractual benefits between men and women is dealt with in separate equal pay provisions in the Equality Act. These provisions imply an ‘equality clause’ into the contracts of all employees to the effect that they are entitled to pay and contractual benefits equal to those of a person of the opposite sex engaged in the same work, work that has been rated as equivalent, or work of equal value.

Under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations, an employer is prohibited from treating a part-time employee in a less favourable manner than a comparable full-time employee just because he or she works part time, unless detrimental treatment is justified on objective grounds. Where appropriate, the principle of pro rata temporis applies (i.e. payments and benefits can be calculated according to hours worked, as a proportion of full-time hours). However, the legislation does not give full-time employees the right to work part time.

Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations, an employer is prohibited from treating a fixed-term employee in a less favourable manner than a comparable permanent employee just because he or she works on a fixed-term basis, unless detrimental treatment is justified on objective grounds.

As well as being prohibited by the Regulations mentioned above, discrimination against part-time workers and fixed-term employees can also constitute indirect sex discrimination.

5.2 Burden of proof
The same principles of burden of proof as set out in section 4 above in relation to job applicants apply during the employment relationship. The questionnaire procedure described in section 4 above is available to employees as well as job applicants.

As described above, discrimination in relation to pay and contractual benefits between men and women is dealt with under special equal pay provisions in the
Equality Act. For example, if a female employee makes an equal pay claim, the burden is on the employee to prove that she has received less favourable terms or benefits than a comparable man doing the same work, work that has been rated as equivalent, or work of equal value. Once it has been proven that she has been treated less favourably than a comparable man, it is for the employer to prove any ‘genuine material factor’ that justifies the difference and which is not connected with sex. If the genuine material factor may indirectly discriminate against women, the employer must prove that it is justifiable on objective grounds. These are also the principles set out in the discrimination questionnaire used for other claims.

If an employee claims to have been discriminated against because he or she has exercised his or her right to maternity, paternity or parental leave under the Maternity and Parental Leave Regulations, then the burden of proof is on the employer to show that no discrimination took place.

If an employee claims to have been discriminated against because he or she is working part time or on a fixed-term contract, then the burden of proof is on the employee to show that he or she has received less favourable treatment. It is then for the employer to prove any justification.

5.3 Sanctions
The same sanctions as set out in section 4 above in relation to job applicants apply during the employment relationship.

If a court finds that an employee has not been equally paid for equal work, then the employee is entitled to payment of the difference for up to six years preceding the commencement of the claim.

If a court finds that an employee has been discriminated against because he or she has exercised his or her right to maternity, paternity or parental leave, the court may award the employee a ‘just and equitable’ amount of compensation. There is no cap on the amount of compensation.

If a court finds that an employee has been discriminated against on grounds of working part time or being on a fixed-term contract, the court may award the employee a ‘just and equitable’ amount of compensation. There is no cap on the amount of compensation.

6. DISCRIMINATION WHEN AN EMPLOYEE IS DISMISSED

6.1 Principles
It is unlawful to discriminate directly or indirectly against an employee by dismissing him or her. Under the disability discrimination legislation, it is unlawful to dismiss a disabled person for something arising in consequence of his or her disability, unless justified. It may also be a reasonable adjustment not to dismiss a disabled employee in circumstances where other employees would be dismissed.

Employees have the right not to be dismissed for pregnancy-related reasons or on grounds of maternity, paternity or parental leave, working part-time or being employed on a fixed-term contract.

As with job applicants and the position during the employment relationship, dismissals which amount to victimisation are also prohibited.

6.2 Burden of proof
The same principles of burden of proof as set out in sections 4 and 5 above apply when there is a dismissal and the same questionnaire procedure is available.

6.3 Sanctions
The same sanctions as set out in sections 4 and 5 above apply when there is a dismissal.

In the UK, there is legislation prohibiting unfair dismissal (which, in brief, allows an employer to dismiss employees with more than one year’s service only on certain grounds and only if it acts reasonably in doing so). A dismissal that constitutes unlawful discrimination will almost always constitute an unfair dismissal. This has few (if any) practical implications, however, the employee cannot be compensated twice for the same loss and the compensation available for discrimination is greater than the compensation available for unfair dismissal.

7. EXPECTED FUTURE DEVELOPMENTS
Some parts of the Equality Act 2010 have not yet been brought into force, including the ability to bring claims based on a combination of two protected characteristics.
A new provision allowing limited positive action in recruitment and promotion where two candidates are equally qualified comes into force in April 2011.

**Northern Ireland**
This memorandum does not deal with discrimination law in Northern Ireland, which is broadly similar to the law in the rest of the UK but with some differences.