

Workplace Law

by Rabbi Aaron Melman

ויקרא כ"ה:מ"ו-נ"ה

(מו) וְהִתְנַחֲלֶתֶם אֹתָם לְבָנֵיכֶם אַחֲרֵיכֶם
 לְרֵשֶׁת אֲחִיזָה לְעֹלָם בְּהֵם תַּעֲבֹדוּ וּבְאַחֲיֵכֶם
 בְּנֵי־יִשְׂרָאֵל אִישׁ בְּאָחִיו לֹא־תִרְדֶּה בּוֹ בְּפָרֶךְ:
 (ס) (מז) וְכִי תִשְׁיֵג יָד גֵּר וְתוֹשֵׁב עִמָּךְ וּמָךְ
 אָחִיךָ עִמּוֹ וְנִמְכָּר לְגֵר תוֹשֵׁב עִמָּךְ אוֹ לְעַקֵּר
 מִשְׁפַּחַת גֵּר: (מח) אַחֲרַי נִמְכָּר גְּאֻלָּה
 תִּהְיֶה־לּוֹ אֶחָד מֵאָחָיו יִגְאֻלֵּנוּ: (מט) אוֹ־דָדוֹ
 אוֹ בֶן־דָּדוֹ יִגְאֻלֵּנוּ אוֹ־מִשְׁאֵר בְּשָׂרוֹ
 מִמִּשְׁפַּחַתוֹ יִגְאֻלֵּנוּ אוֹ־הַשִּׁיגָה יָדוֹ וְנִגְאָל: (נ)
 וְחָשַׁב עִם־קִנְיָהּ מִשְׁנַת הַמְּכָרוֹ לוֹ עַד שְׁנַת
 הַיָּבֵל וְהָיָה כְּסֹף מִמְכָּרוֹ בְּמִסְפַּר שָׁנִים כִּימֵי
 שְׂכִיר יִהְיֶה עִמּוֹ: (נא) אִם־עוֹד רַבּוֹת בְּשָׁנִים
 לְפִיָּהֶן יָשִׁיב גְּאֻלָּתוֹ מִכְּסֹף מִקְנָתוֹ: (נב)
 וְאִם־מְעַט נִשְׁאָר בְּשָׁנִים עַד־שְׁנַת הַיָּבֵל
 וְחָשַׁב־לוֹ כְּפִי שָׁנָיו יָשִׁיב אֶת־גְּאֻלָּתוֹ: (נג)
 כְּשְׂכִיר שָׁנָה בְּשָׁנָה יִהְיֶה עִמּוֹ לֹא־יִרְדָּנוּ
 בְּפָרֶךְ לְעֵינֶיךָ: (נד) וְאִם־לֹא יִגְאָל בְּאֻלָּה וַיִּצָּא
 בְּשְׁנַת הַיָּבֵל הוּא וּבָנָיו עִמּוֹ: (נה) כִּי־לִי
 בְּנֵי־יִשְׂרָאֵל עֲבָדִים עֲבָדֵי הֵם אֲשֶׁר־הוֹצֵאתִי
 אוֹתָם מֵאֶרֶץ מִצְרַיִם אֲנִי יְהוָה אֱלֹהֵיכֶם:

Leviticus 25:46-55

(46) you may keep them as a possession for your children after you, for them to inherit as property for all time. Such you may treat as slaves. But as for your Israelite kinsmen, no one shall rule ruthlessly over the other. (47) If a resident alien among you has prospered, and your kinsman being in straits, comes under his authority and gives himself over to the resident alien among you, or to an offshoot of an alien's family, (48) he shall have the right of redemption even after he has given himself over. One of his kinsmen shall redeem him, (49) or his uncle or his uncle's son shall redeem him, or anyone of his family who is of his own flesh shall redeem him; or, if he prospers, he may redeem himself. (50) He shall compute with his purchaser the total from the year he gave himself over to him until the jubilee year; the price of his sale shall be applied to the number of years, as though it were for a term as a hired laborer under the other's authority. (51) If many years remain, he shall pay back for his redemption in proportion to his purchase price; (52) and if few years remain until the jubilee year, he shall so compute: he shall make payment for his redemption according to the years

involved. (53) He shall be under his authority as a laborer hired by the year; he shall not rule ruthlessly over him in your sight. (54) If he has not been redeemed in any of those ways, he and his children with him shall go free in the jubilee year. (55) For it is to Me that the Israelites are servants: they are My servants, whom I freed from the land of Egypt, I the LORD your God.

דברים כ"ד:י"ד-ט"ו

(יד) לֹא־תַעֲשֶׂק שָׂכִיר עָנִי וְאֶבְיֹן מֵאֲחִיקָא אוֹ
מִגֵּרָךְ אֲשֶׁר בְּאַרְצֶךָ בְּשַׁעֲרֶיךָ: (טו) בְּיוֹמוֹ תַתֵּן
שְׂכָרוֹ וְלֹא־תָבוֹא עָלָיו הַשֶּׁמֶשׁ כִּי עֲנִי הוּא
וְאֵלָיו הוּא נֹשֵׂא אֶת־נַפְשׁוֹ וְלֹא־יִקְרָא עָלֶיךָ
אֱלֹהִים וְהָיָה בְּךָ חַטָּא: (ס)

Deuteronomy 24:14-15

(14) You shall not abuse a needy and destitute laborer, whether a fellow countryman or a stranger in one of the communities of your land. (15) You must pay him his wages on the same day, before the sun sets, for he is needy and urgently depends on it; else he will cry to the LORD against you and you will incur guilt.

בבא מציעא קי"ב א

ואידך ההוא מיבעי ליה לכדתניא (דברים
כד, טו) ואליו הוא נושא את נפשו מפני
מה עלה זה בכבש ונתלה באילן ומסר את
עצמו למיתה לא על שכרו דבר אחר ואליו
הוא נושא את נפשו כל הכובש שכר שכיר
כאילו נוטל נפשו ממנו

Bava Metzia 112a

The Gemara asks: **And** what does **the other** Sage, the second *tanna*, derive from this verse? The Gemara responds: **That** verse is **necessary for that which is taught** in a *baraita*: The expression “**for he sets his soul upon it**” explains why one must be so precise when paying a laborer his wages: **For what** reason did **this** laborer **ascend on** a tall **ramp** or **suspend** himself **from a tree and risk**

death to himself? Was it not for his wages?
 How, then, can his employer delay his payment? **Alternatively**, the words “**for he sets his soul upon it**” teach that concerning **one who withholds the wages of a hired laborer, it is as though he takes his soul from him.**

While generally allowing “the custom of the place” to set workers’ wages and hours, Jewish law permits the workers to organize amongst themselves and to agree to standard prices. In medieval times, such law led to the establishment of workers’ guilds in many Jewish communities. In contemporary times, many legal authorities, including Rabbis Moshe Feinstein and Eliezer Waldenburg (we saw them last week), have used early sources on workers’ autonomy to justify unions and strikes. According to Feinstein, “in the case in which workers decide that they will not work until they receive a raise in salary or a similar thing. .. the majority may force the minority to observe it.”

ויקרא י"ט:י"ג

(יג) לֹא-תַעֲשֶׂק אֶת-רֵעֶךָ וְלֹא תִגְזֹל לְאֶתְלִין
 פְּעֻלַּת שְׂכִיר אֶתְּךָ עַד-בֹּקֶר:

Leviticus 19:13

(13) You shall not defraud your fellow. You shall not commit robbery. The wages of a laborer shall not remain with you until morning.

משנה תורה, הלכות שכירות י"א:ב'

(ב) כָּל הַפּוֹבֵשׁ שְׂכָר שְׂכִיר כְּאִלּוּ נָטַל נַפְשׁוֹ
 מִמֶּנּוּ שְׁנַאֲמַר (דברים כד טו) "וְאֵלָיו הוּא נִשְׂא
 אֶת נַפְשׁוֹ". וְעוֹבֵר בְּאַרְבַּע אֲזָהָרוֹת וְעֵשָׂה.
 עוֹבֵר מִשּׁוּם בֵּל (ויקרא יט יג) "תַּעֲשֶׂק"

Mishneh Torah, Hiring 11:2

(2) Anyone who detains the wages of a hired man is as if he took his life, as it is written: "His life depends on it" (15). — — When are wages due? A hireling for the day collects his wages all night, and about him it is written:

ומשום בל (ויקרא יט ג) "תגזול" ומשום לא תלין פעלת שכיר ומשום (דברים כד טו) "לא תבוא עליו השמש" ומשום (דברים כד טו) "ביומו תתן שכרו". אי זהו זמנו שכיר יום גובה כל הלילה ועליו נאמר (ויקרא יט ג) "לא תלין פעלת שכיר אתה עד בקר". ושכיר לילה גובה כל היום ועליו נאמר ביומו תתן שכרו. ושכיר שעות של יום גובה כל היום ושכיר שעות של לילה גובה כל הלילה. שכיר שבת שכיר חדש שכיר שנה שכיר שבוע יצא ביום גובה כל היום יצא בלילה גובה כל (אותו) הלילה:

"You shall not detain overnight the wages of your day laborer until morning" (Leviticus 19:13). A hireling for the night collects all day, and about him it is written: "You must pay him his wages on the same day" (Deuteronomy 24:15). A hireling by the hour during the day collects all day; a hireling by the hour during the night collects all that night; a hireling by the week, by the month, by the year, by a seven-year period, collects all day if his term ends in the daytime; if his term ends in the night, he collects all that night.

Most Jewish employment law revolves around the concept of *minhag hamakom*—that the custom of the place determines workers' salaries, as well as other working conditions. This principle is laid out most clearly in Mishnah Bava Metzia 7:1.

משנה בבא מציעא ז'א'

(א) השוכר את הפועלים ואמר להם להשכים ולהעריב, מקום שנהגו שלא להשכים ושלא להעריב, אינו רשאי לכופן. מקום שנהגו לזון, יזון. לספק במתיקה, יספק. הכל כמנהג המדינה. מעשה ברבי יוחנן בן מתאי שאמר לבנו, צא שכר לנו פועלים. הלך ופסק להם מזונות. וכשבא

Mishnah Bava Metzia 7:1

(1) If one hired laborers and told them to work early or to work late, he has no right to compel them to do so where the custom is not to work early or not to work late. In a place where the custom is to give them their food he should give it to them, and where the custom is to provide them with sweet food, he must give it to them. Everything should follow local custom. It once happened that

אָצֵל אָבִיו, אָמַר לוֹ, בְּנִי, אֲפֹלוּ אִם אַתָּה
 עוֹשֶׂה לָּהֶם כְּסֻעַדַת שְׁלֹמֹה בְּשַׁעֲתוֹ, לֹא
 יֵצֵאתָ יְדֵי חוֹבָתְךָ עִמָּהֶן, שֶׁהֵן בְּנֵי אַבְרָהָם
 יִצְחָק וְיַעֲקֹב. אֲלָא עַד שְׁלֹא יִתְחִילוּ
 בְּמִלְאָכָה צֵא וְאָמַר לָהֶם, עַל מְנַת שְׂאִין
 לָכֶם עָלֵי אֲלָא פֶת וְקִטְנִית בְּלֶבֶד. רַבֵּן
 שִׁמְעוֹן בֶּן גַּמְלִיאֵל אוֹמֵר, לֹא הָיָה צְרִיךְ
 לוֹמֵר, הַכֹּל כְּמִנְהַג הַמְּדִינָה:

Rabbi Yochanan ben Mattia said to his son:
 “Go and hire laborers for us”. He went and
 struck a deal to provide them with food.
 When he came to his father, his father said to
 him, “My son, even if you make them a
 banquet like Solomon’s in his time you will
 not have fulfilled your obligation to them.
 For they are sons of Abraham, Isaac and
 Jacob. But, rather, before they begin to work
 go and say to them, “On condition that I am
 not bound to give you more than bread and
 beans only.” Rabban Shimon ben Gamaliel
 says: “It was not necessary to speak thus, for
 everything should follow local use.”



Religious Accommodation in the Workplace: Your Rights and Obligations

By The Union of Orthodox Jewish Congregations of America; Institute for Public Affairs

Religiously observant employees are often confronted with conflicts between their employment obligations and their religious beliefs. This brochure is meant to serve as a general guide to the protection of religious rights under Federal employment law.

WHAT ARE MY LEGAL RIGHTS IN THE WORKPLACE?

Federal law requires an employer to "reasonably accommodate" an employee's religious observances, practices and beliefs unless the employer can show that accommodation would cause an "undue hardship" to the employer's business.

What constitutes "reasonable accommodation" and "undue hardship" depends on the facts unique to a particular situation. Essentially, an employer must attempt to create a structure permitting employees to practice their religious beliefs while still maintaining their jobs. In some cases, accommodation may not be possible. However, the employer bears the burden of demonstrating that a serious attempt to accommodate the employee was made.

Neither statutes nor the courts have clearly defined undue hardship. The Supreme Court ruled that an employer need not incur more than minimal costs in order to accommodate an employee's religious practices. *Trans World Airlines V. Hardison*, 432 U.S. 63 (1977). Nevertheless, an employer may not simply refuse to accommodate an employee. If the employer claims that accommodation is not feasible because it would result in undue hardship, the employer must demonstrate an actual effect that accommodation would have on the business. However, once the employer has reasonably accommodated an employee's religious needs, the employer need not consider the employee's alternative suggested accommodations even if the employee's preferred accommodation would not cause undue hardship to the employer. *Ansonia Board of Education V. Philbrook*, 479 U.S. 60 (1986).

Parallel to the duty imposed on employers to accommodate the religious needs of their workers, employees seeking to observe their religious beliefs and practices must help resolve conflicts between job duties and religious needs. Thus, when an individual accepts a job, he or she should indicate to the employer any religious commitments which may conflict with work responsibilities.

Many employers have come to realize that a commitment to religious accommodation can improve employee morale by demonstrating that the company is sensitive to its religious employees' needs. Such accommodation in the workplace is one method of retaining valued employees in the workforce just like "family friendly" employee policies which help workers to balance the demands of work and family.

A. RELIGIOUS LEAVE

AM I ENTITLED TO BE ABSENT FROM WORK IN ORDER TO OBSERVE A RELIGIOUS HOLIDAY OR THE SABBATH?

The obligation that an employer reasonably accommodate the religious needs of employees includes Sabbath observance. Whether a method of reasonable accommodation can be devised will mostly depend on the type of work involved and the size of the employer's workforce.

Some examples of possible accommodation without causing "undue hardship" include voluntary substitutions, flexible scheduling (allowing you to work on Sundays, Christmas, or other national holidays), lateral transfers, and change of job assignments. An employer could allow an employee who is a Sabbath observer to work longer hours on Monday through Thursday to enable the employee to leave early on Friday to be home for the Sabbath. The employer must offer a "reasonable" means of accommodating an employee.

In 1997, President Clinton issued Guidelines on Religious Exercise and Expression in the Federal Workplace. These Guidelines clarify the rights of civilian federal employees with regard to religious exercise and expression in the workplace. In general, the Guidelines provide that the federal government, in its role as an employer, should accommodate the religious observances of employees so long as that accommodation is consistent with workplace arrangements and efficiency. (A copy of these Guidelines may be obtained from the Institute for Public Affairs.)

For private employers, the duty to accommodate does not require an employer to violate the seniority rights of other employees. *Trans World Airlines V. Hardison*, 432 U.S. 63(1977). Re-assigning employees with more seniority to a less desirable shift or task in order to accommodate the religious observance of a holiday by a more junior employee is not mandated by law. Further, under certain circumstances, it may be impossible to reasonably accommodate an employee's refusal to work on the Sabbath without incurring undue hardship. For example, an employer would not be required to train a part-time employee at substantial cost in order to accommodate an employee who is unable to work on Saturdays.

Employees seeking to observe their religious beliefs and practices share the responsibility to resolve conflicts between job duties and religious needs. Thus, an employee should indicate his or her religious commitment (leaving early on Fridays, not working Saturdays, and being unable to work on holidays) at the time the job is accepted or immediately upon becoming observant if he or she becomes more observant while employed. Employees who are union members should disclose their religious observance to their union representative.

IS AN EMPLOYER OBLIGATED TO COMPENSATE YOU FOR YOUR ABSENCE FROM WORK FOR HIGH HOLY DAY WORSHIP AND OTHER HOLIDAYS?

No. An employer is generally not required to pay the employee for time taken off for religious observance. The United States Supreme Court determined that allowing an employee to take unpaid leave for the holiday observance would generally be deemed a reasonable accommodation; however, such unpaid leave would not be a reasonable accommodation when paid leave was provided for all purposes except religious ones. *Ansonia Board of Education V. Philbrook*, 479 U.S. 60 (1986). In addition, an employer is not required to pay premium or overtime costs in order to accommodate the religious needs of employees. Some employers do pay these costs by choice and it is certainly legal; however, this is up to the employer.

Requiring employers to pay the employee for taking time off for religious observances would most likely impose an undue hardship on the employer under current court precedents. As with Sabbath observance, an employee should indicate his or her religious commitment, including absences for holidays, when the job is accepted. Some states have laws requiring the employee to notify his or her employer a certain number of days before each absence for holidays. Moreover, the employee should arrange with his or her employer to take religious holidays as vacation days, personal days, and/or unpaid personal days.

B. WEARING RELIGIOUS GARB OR SYMBOLS

DOES AN OBSERVANT JEW HAVE THE RIGHT TO WEAR A YARMULKE IN THE WORK PLACE?

Employers must attempt to accommodate employees who, for religious reasons, must maintain a particular physical appearance or manner of dress in keeping with the tenets of their religion. Again, accommodation is possible if it can be made without undue hardship to the employer.

C. OTHER LEGAL ISSUES

MAY AN EMPLOYER POSE QUESTIONS TO A JOB APPLICANT REGARDING THE APPLICANT'S RELIGION OR RELIGIOUS PRACTICES?

Questions concerning an applicant's religion or the religious holidays observed by an applicant are totally impermissible. For example, an employer may not ask an applicant: "Does your religion prevent you from working weekends or holidays?," or "What synagogue or church do you attend?" However, during an interview an employer may describe the regular days, hours or shifts of the job.

The employee has the responsibility to inform the employer of any aspect of his or her religious observance which will affect job responsibilities. For example, if an employee must leave early on Friday and cannot work on Saturday, he or she should indicate this when the job is accepted.

WHAT ARE MY RIGHTS WHEN AN EMPLOYER SCHEDULES EMPLOYMENT-RELATED TESTS ON THE SABBATH OR HOLIDAY?

An employer may not schedule tests in a manner that totally precludes the participation of Sabbath observers. As with the scheduling of work, the employer must attempt to accommodate the religious needs of the employee or prospective employee. The applicant, however, cannot be unreasonable in demanding accommodation. For example, if the same test is being given in another location on another day, the applicant may be required to travel to take it elsewhere. In addition, the employee may be required to take personal time to complete the test after business hours on the Monday following the scheduled test date. The same law applies to schools and educational institutions regarding final exams and other tests.

WHAT PROTECTION DO I HAVE AGAINST RELIGIOUS HARASSMENT BY A WORK SUPERVISOR OR FELLOW EMPLOYEES?

Under Title VII, an employer has an affirmative obligation to maintain a work environment free of harassment, intimidation, and insult. The Supreme Court held that harassment need "not seriously affect employees' psychological well being" in order to be actionable under Title VII "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive." *Harris V. Forklift Systems Inc.*, 114 S.Ct. 367, 371 (1993). The employer's obligation extends to situations where he or she knows of the harassment or has reason to know of it and does nothing to correct the situation. If fellow employees are creating a hostile work environment through religious harassment, the employee has an affirmative obligation to notify his/her supervisor of the harassment. If the harassment continues after the supervisor is notified, the employee may file a complaint of discrimination against the employer with the appropriate government agency.

An important note:

The rights described above are based on Federal law. Many states also have laws which may provide additional protection for observant employees.

Moreover, the Orthodox Union's Institute for Public Affairs is working with other organizations to press for changes in Federal law that would benefit religious employees. The Workplace Religious Freedom Act, would overturn the Supreme Court's restrictive readings of Federal law. The thrust of ("WRFA") this legislation is to extend the privileges granted to Federal Government employees through RFRA to the private sector. WRFA would override the Court's determination that anything greater than a minimal cost constitutes undue hardship. Rather, the act would define undue hardship as an act requiring "significant difficulty or expense". Additionally, the act would give employees more flexibility in proposing accommodations. Under its terms, an employer must accept an employee's suggested "reasonable accommodation" so long as it does not cause undue hardship.

The Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America is the non-partisan public policy research and advocacy center created to represent and mobilize the world's largest Orthodox community.

The Institute for Public Affairs (IPA) works with our constituency across America to coordinate and support its involvement in local state, national and international affairs.

The IPA serves as the Orthodox community's representative to the Conference of Presidents of Major American Jewish Organizations, the Jewish Council for Public Affairs, the World Jewish Congress, the International Committee on Free Trade with Israel, and to other umbrella groups. We raise Orthodox Jewry's voice for Israel's security and the protection of Jewish interest and values in Washington, D.C., state and local capitals and at the United Nations as a non-governmental organization (NGO).

In addition to its day-to-day activities, the IPA sponsors an annual conference on law and public policy, a program placing Orthodox Jewish interns in key governmental offices each summer, the publication of a variety of informative papers, and nationwide campaigns on behalf of causes of interest and concern to the Jewish community.