

# Do Workers Who Wear Religious Headwear Have to Use Hardhats?



Under OHS laws, employers must ensure that workers use PPE necessary to protect them from workplace hazards. Under human rights laws, employers must accommodate workers' religious beliefs to the point of undue hardship. These obligations come into conflict when a worker objects to using PPE on religious grounds, for example, when a worker of the Sikh religion won't wear a hardhat. Forcing the worker to remove his turban and wear the PPE could get you sued for failure to accommodate; but letting him work without adequate head protection would endanger the worker and expose your company to risk of OHS liability. Here's what OHS coordinators must know and do to resolve these dilemmas and ensure compliance with both laws.

## When Laws Collide

**OHS laws** require employers to ensure that workers use PPE necessary to protect them against the workplace hazards to which they're exposed, including hardhats to protect their heads, gloves to protect their hands, respirators to protect their lungs, etc. The OHS laws don't make allowances for religious preferences or anything else. Once the employer performs a hazard assessment and determines that PPE is necessary to protect against an identified hazard, everybody exposed to the hazard is required to use it.

**Human rights laws** ban employers from discriminating against workers based on their religion. Refusing to promote or otherwise treating workers less favourably than other workers simply because they're Muslim or Jewish is an obvious form of discrimination. But the ultimate goal of human rights laws isn't equal treatment but equal **opportunity**. And to provide equal opportunity, it may be necessary to treat protected workers **differently**. Specifically, employers must make reasonable accommodations to their normal policies and procedures for religious beliefs, such as not requiring them to work on the Sabbath even if that's a normal part of the work schedule.

## PPE Exemptions: Reasonable Accommodation or Undue Hardship'

There are 2 common situations in which a worker might seek accommodations from a mandatory PPE policy on religious grounds:

- A worker required to wear a hard hat or other form of head protection would have to take off his religious headwear; or
- A worker required to use a tight-fitting respirator that relies on an effective seal between the face mask and skin would have to shave the beard his religion requires him to wear.

The question then becomes whether exempting the worker from the mandatory PPE rule is a reasonable accommodation or undue hardship. **Answer:** The employer need not grant the exemption and can enforce the PPE rule if it can show that it's a 'bona fide occupational requirement' (BFOR). Specifically, the employer must prove 3 things:

1. It adopted the PPE policy to serve a legitimate, non-discriminatory purpose;
2. It had a sincere and good faith belief that it was necessary to adopt the policy to achieve that purpose; and
3. The policy is 'reasonably necessary' to accomplish the purpose and there were no less discriminatory alternatives available.

Protecting worker safety is recognized as a legitimate, non-discriminatory interest, not to mention a requirement of OHS law. So, prong 3 of the test is the key to determining if a mandatory PPE policy is a BFOR.

## Safety Trumps Religion but Accommodations Are Still Required

What used to be the leading case on this issue is a 1985 Supreme Court of Canada ruling in which a railway company fired a Sikh electrician for refusing to remove his turban and wear a hardhat. The electrician claimed that the company violated its duty to accommodate his religious beliefs by not making an exception to the hardhat rule. The company contended it was just complying with the OHS law and looking out for the electrician's safety. The Court agreed, ruling that the mandatory hardhat policy was a BFOR [*Bhinder v. CN*, 1985 CanLII 19 (SCC), [1985] 2 SCR 561].

**Takeaway:** A mandatory PPE policy is a BFOR as long as it's adopted in good faith and no broader than it must be to accomplish the safety and compliance purpose. However, since *Bhinder*, courts have gotten stricter. Now employers are expected to accommodate workers with religious objections so they can do their jobs without being subjected to the mandatory PPE policy. At the same time, accommodations aren't required if they'd impose undue hardship, including those that would force you to violate OHS laws and deliberately allow a worker to endanger a person's safety.

**Employer Loses:** Federal arbitrator rules that employer could and should have accommodated Sikh longshoremen by taking steps to ensure they weren't sent to worksites requiring use of a hardhat [*BC Maritime Employers Assn. v. International Longshore and Warehouse Union, Local 500 (Dhillon Grievance)*, [2006] C.L.A.D. No. 262].

**Employer Wins:** Three Sikh drivers claimed that it was religious discrimination to bar them from entering a port's terminals without hardhats. Originally, the drivers were allowed to stay in their trucks while containers were loaded, but this accommodation was later deemed unviable because it increased loading time. The Quebec court ruled that the drivers had to wear hardhats in the workplace when safety standards require them [*Singh c. Montreal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP Ltée)*, [2016] QCCS 4521 (CanLII)].

## 5 Strategies for Balancing Safety and Religious Rights

Ultimately, if it's a choice between safety and religion, safety prevails. But the best compliance strategy is to avoid having to make that choice in the first place. Here are 5 strategies to consider.

### Strategy 1: Perform Area-by-Area PPE Assessment

First, revisit your hazard assessment to ensure that it's not overly broad as far as hardhats and other PPE requirements are concerned. **Question to ask:** Is it really necessary for all persons to wear hardhats in this **particular area** of the workplace? This area-by-area hardhat assessment becomes mandatory in BC on September 1, 2021. 'This regulatory change provides more opportunities for employers to safely accommodate workers who wear head coverings, such as a turban, as a religious practice,' notes WorkSafeBC. It's also advisable to follow the same approach even if you're not in BC.

### Strategy 2: Consider Alternatives that Accommodate Worker's Faith

As illustrated by the *Dhillon* case above, workers with religious objections to a PPE policy that qualifies as a BFOR are still entitled to accommodations up to the point of undue hardship. Accommodations to consider include:

- Making an exception to the policy if it would be safe and not violate OHS requirements;
- Modifying equipment or machinery so the worker can do the job without using the PPE;
- Reassigning the worker to duties, work areas or worksites where the PPE isn't required;

- Changing the worker's schedule so he/she can avoid exposure to the hazard the PPE protects against; and
- Asking the OHS regulator of your province for a variance or exception to the PPE requirement.

While you need a policy and procedure for evaluating accommodations requests, you don't have to make any accommodations that would impose undue hardship, including exemptions to PPE policies that would violate OHS rules or put the worker or any other person's health and safety in danger.

### **Strategy 3: Consult Workers on Changes to PPE Rules**

Be sensitive of how PPE policies might affect workers of different faiths and discuss them with the JHSC, health and safety representative or directly with workers **before** you impose them. Such engagement is likely to result in constructive solutions and head off disputes and discrimination claims.

**Example:** A BC sawmill suddenly changed its hardhat rules to require all workers to wear hardhats. Two long-time workers of the Sikh faith were disciplined for refusing to comply with the new policy. The sawmill eventually settled their religious discrimination lawsuit by assigning the men to jobs in an area not requiring hardhats. But it might have avoided the problem completely had it discussed its plans to change the hardhat rule with the workers in advance.

### **Strategy 4: Consider Alternate Types of PPE**

If you can't eliminate the hazard that the PPE protects against, consider whether a different type of PPE might provide the same protection for the worker. Let's use the example where Sikh workers using respirators object to a company policy requiring them to be clean-shaven. First, have the workers undergo a fit test using the respirators to see if their beards actually do interfere with a good seal. If so, consider other types of respirators that might fit differently, or the use of a gel that can be applied to the workers' beards to create an effective seal. If that isn't possible and it's beardless or nothing, find a way to assign them to jobs not requiring tight-fitting respirator use.

### **Strategy 5: Explore Possibility of Accommodations by Worker**

Keep in mind that the choice between PPE and religion may not necessarily be all or nothing. Maybe there's something the worker can do to make the headwear work with the PPE. For example, a Work Safe Alberta bulletin on protective headwear and turbans suggests asking the worker to remove the bulky 'overturban' and wear just the 'underturban,' which is smaller and secured to the head. Wearing the underturban alone may satisfy the worker's religious obligations while permitting the use of a hardhat.

