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NEWS REPORT

Country:	France
Title:	Law n° 2016-1088 of 8 August 2016 relating to employment, modernization of social dialogue and securing professional life (Law El Khomri)
Date:	8 September 2016
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<u>Context</u>	
Issue at stake:	Introduction of the possibility to limit expression of religious freedom by way of the employer's in-house regulation
Ground of discrimination:	Religion/belief
Source:	Legislation
Field:	Private employment
Applicable law:	Article L 1321-2-1 of the Labour Code

Content

Law n° 2016-1088 of 8 August 2016 was adopted on 20 July 2016 and was challenged before the Constitutional Council before promulgation. It was promulgated on 9 August after the decision of the Constitutional Council which was rendered on 4 August 2016.

Article 2 of the Law adopts an amendment to the Labour Code creating Article L 1321-2-1 which provides that the employer's in-house regulation can inscribe the principle of neutrality as a rule and stipulate restrictions to the principle of religious freedom for employees if these restrictions are justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service, as long as they are proportionate to the objective pursued.¹

In-house Regulations which have to be followed by the employees are regulated by article 1321-1 of the Labour Code. Article 1321-1 provides that such Regulations are unilaterally determined by the employer.

Key points of analysis: Before the adoption of this legislation, French legislation did not provide explicitly for the possibility by the employer to restrict religious freedom in private employment.

The debate as to whether or not the employer can unilaterally impose such limits on the basis of authorized exception related to genuine and determining occupational requirements has been at the center of a long jurisprudential controversy which has lead the Cour de cassation to address a referral to the European Court of Justice in the

¹ « le règlement intérieur peut contenir des dispositions inscrivant le principe de neutralité et restreignant la manifestation de convictions religieuses des salariés, si ces restrictions sont justifiées par l'exercice d'autres libertés et droits fondamentaux ou par les nécessités du bon fonctionnement de l'entreprise et si elles sont proportionnées au but recherché. »

Bougnaoui case, (C-188-15) raising the issue of whether private clients' desire not to be served by persons wearing an Islamic Veil qualify as a determining occupational

requirement related to the nature or the conditions of performance of the working contract, the Court refers the question to the CJEU.

The Court of cassation had already determined in the Baby Loup Case (FR 108- 2014) that the principle of secularity affirmed in article 1 of the Constitution was not applicable to employees of the private sector that are not in a position of managing a public service. It therefore cannot be invoked by a private employer to hinder the protection afforded by the Labour Code at articles L. 1121-1, L. 1132-1, L. 1133-1 and L. 1321-3. It had however already considered that restrictions to freedom of religion must be justified by the nature of the particular occupational activities concerned or of the context in which they are carried out, and constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Without awaiting the decision of the European Court of Justice, all Members of the Senate of all political orientations, except the Communists, voted in favor of this amendment with the support of the Government.

The conformity of this text to the Constitution or to EU Directives as regards the protection of the principle of freedom of religion or the principle of non-discrimination on the ground of religion in employment was not discussed before Parliament.

While commentators raised the question of the conformity of this provision to the Constitution, it was not raised before the Constitutional Council, which could have raised this issue unilaterally but did not discuss this point or the constitutionality of this provision at all in its decision of 4 August 2016.

Internet link source:

<https://www.legifrance.gouv.fr/eli/loi/2016/8/8/2016-1088/jo/texte>