

Guide for Managers

The Equality Act 2010 – An Employers Guide

This guide provides employers with a practical guide to the Equality Act 2010 which becomes law in October 2010.

The Act covers the same groups as existing legislation; age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now referred to as 'protected characteristics'.

The guide will outline the types of discrimination and will then proceed to discuss the amendments to existing legislation and the introduction of new laws.

Types of discrimination

Direct discrimination

Direct discrimination is where one worker is treated differently from another due to a protected characteristic.

Perceived discrimination

Perceived discrimination already applies to age, race, religion and sexual orientation. However, the new legislation will extend to cover disability, gender reassignment and sex. This is direct discrimination against an individual because others think they possess a particular protected characteristic.

Associative discrimination

Associative discrimination already applies to age, race, religion and sexual orientation. However, the new legislation will extend to cover disability, gender reassignment and sex. This is direct discrimination against someone because they associate with another person who has a protected characteristic.

Indirect discrimination

Indirect discrimination is where an apparently neutral provision, criterion or practice is applied, which puts, or would put workers of a certain protected characteristic, at a disadvantage. Current legislation covers age, race, religion or belief, sex, sexual orientation and marriage and civil partnership. The new legislation will cover disability and gender reassignment.

Indirect discrimination can be justified if you can show that you have acted reasonably in managing your business – that it is 'a proportionate means to achieve a legitimate aim'. The legitimate aim can be any lawful decision to the running of your company; and the 'proportionate means' dictates a reasonable approach.

Combined Discrimination

This is expected to come into force in April 2011 and will allow employees to bring claims of combined discrimination based on a combination of no more than two protected characteristics except for claims arising out of pregnancy and maternity or marriage and civil partnerships.

Harassment

A worker is harassing another worker if, due to a protected characteristic, s/he engages in unwanted conduct which has the purpose of violating the worker's dignity or creates an intimidating, hostile, degrading, humiliating, or offensive environment for the worker.

Harassment applies to all protected characteristics apart from pregnancy, maternity, marriage and civil partnerships. The new legislation allows employees to complain even if the conduct is not directed at them. In addition, employees can claim for perceived and associative harassment.

Third party harassment

Third party harassment currently only applies to sex. The new legislation will extend this cover to age, disability, gender reassignment, race, religion or belief and sexual orientation.

The Equality Act makes you potentially liable for harassment of your employees by a third party; for example a client or sub-contractor. The employer can only be held to be liable if harassment has occurred on two separate previous occasions which the employer was aware of and took no action to prevent reoccurrence.

Victimisation

Victimisation occurs when an employee is treated badly because they have made, or supported a complaint, or raised a grievance under the Equality Act, or because they are expected to be doing so. An employee is not protected if s/he makes or supports a malicious claim.

The protected characteristics – key points

Age (no change)

The Act protects people of all ages. However, different treatment because of age is not unlawful direct or indirect discrimination if the employer can justify a proportional means to a legitimate aim. The Act will continue to permit retirement at 65 years of age or above.

Disability (changes)

The Act will make it simpler for a worker to show that they are disabled and protected from disability discrimination. A person will be classified as being disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. Such activities could include making a telephone call or driving a car.

The Act still requires the employer to make reasonable adjustments for the worker to aid them to overcome disadvantages arising from a disability.

The Act also covers discrimination against anything arising from a disability. For example, discriminating against someone for spelling mistakes arising from dyslexia. This is unlawful where the employer is aware, or could reasonably be expected to know, of the worker's disability.-

In addition, indirect discrimination will be covered by the Act. This means that a job applicant or worker can claim that a criterion, policy or practice causes discrimination. Again, the employer may be able to justify this by showing it was reasonable.

The Act also covers health questionnaires; see 'Key features of Equality Act'.

Gender Reassignment

The Act will provide protection for transsexual people. A transsexual person is someone who proposes to, starts, or has completed a process to change gender. The Act no longer requires a person be under medical supervision. Therefore, a woman who lives permanently as a man but does not undergo any gender change procedures, would be covered.

The Act does not cover transgender people, such as cross dressers who do not permanently live in the opposite gender to that of their birth.

It is discrimination to treat transsexual people less favourably for being absent from work due to medical gender reassignment procedures compared to a worker who is absent due to another illness.

Marriage and civil partnerships (no change)

The Act protects workers who are married or in a civil partnership from discrimination. Single people are not protected.

Pregnancy and maternity (no change)

A woman is protected against discrimination on the grounds of pregnancy during the period of her pregnancy and any statutory maternity leave to which she is entitled.

You must not take into account an employee's period of absence due to pregnancy-related illness when making a decision about her employment.

Race (no change)

For the purposes of the Act 'race' includes colour, nationality and ethnic or national origins. A racial group can be made up of two or more different racial groups (eg Black Britons).

Religion or belief (no change)

In the Equality Act, the definition of religion includes *any* religion. It also includes a lack of religion, in other words employees or jobseekers are protected if they do not follow a certain religion or have no religion at all. Additionally, a religion must have a clear structure and belief system. Belief means any religious or philosophical belief or a lack of such belief. To be protected, a belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour. Denominations or sects within a religion can be considered a protected religion or religious belief. Humanism is a protected philosophical belief but political beliefs would not be protected.

Discrimination because of religion or belief can occur even where both the discriminator and recipient are of the same religion or belief.

Sex (no change)

Both men and women are protected under the Act.

Sexual orientation (no change)

The Act protects bisexual, homosexual and heterosexual people.

Key features of the Equality Act

Health questionnaires

The Act also introduces new legislation that covers the health questionnaires at the interview stage. Such questionnaires should not be issued before a job offer is made. Up to this point, the organisation can only ask questions to;

- A. decide whether you need to make any reasonable adjustments for the person during the selection process. For example, an organisation can ask interviewees if they require any reasonable adjustments at the interview process to ensure everyone performs to the best of their ability.
- B. decide whether an applicant can carry out a function that is essential to the job. For example, if the job required lifting heavy objects, they could ask an interviewee with a visually recognisable physical impairment if they could manage the job. However, they could not ask the interviewee if they can travel to and from work, as this is not intrinsic to the job.
- C. monitor the diversity of the job applicants. For example an employer may wish to ask applicants if they have a disability to see if the advertisements are reaching disabled people.

- D. take positive action to assist disabled people. If an employer wishes to improve disabled peoples' chances of being selected for vacancies, they may wish to guarantee interviews to disabled people. In order to achieve this, they may need to ask if the applicant is disabled.
- E. the employer may wish to recruit a person who has a disability relevant to the job. For example, a counselling service for people with mental health problems requires a worker who has personal experience with mental health conditions. The employer is permitted to advertise for people who have such a condition and ask the person at interview to confirm this.

Positive action

As with previous equality legislation, the Equality Act allows you to take positive action if you think that employees or job applicants who share a particular protected characteristic suffer a disadvantage connected to that characteristic, or if their participation in an activity is disproportionately low. This provision however may be subject to repeal.

Extension of employment tribunal powers

Under previous legislation, an employment tribunal could make a recommendation that an employer must eliminate or reduce the effect on the claimant of any discrimination. The Act extends this power so that it will now be possible for a tribunal to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not only on the claimant. For example, the tribunal might specify that an employer needs to train all staff about the organisation's bullying and harassment policy. This power does not apply to equal pay cases.

Equal pay – direct discrimination

The Equality Act retains the framework that was previously in place. This means that in most circumstances a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment.

However, a change in the Equality Act allows a claim of direct pay discrimination to be made, even if no real comparator can be found.

This means that a claimant who can show evidence that they would have received better remuneration from their employer if they were of a different sex may have a claim, even if there is no-one of the opposite sex doing equal work in the organisation. This would be a claim under sex discrimination.

One of the aims of the Act will give the Government power to require employers to publish information relating to differences in pay between male and female employees. These provisions however are unlikely to be implemented before 2013 and will apply to employers with over 250 employees.

Pay secrecy

The Act makes it unlawful for the employer to prevent or restrict their employees from having a discussion to establish if differences in pay, related to protected characteristics, exist. It also makes terms in the Contract of Employment regarding pay secrecy unenforceable.

An employer can require their employees to keep pay rates confidential from people outside the workplace, for example a competitor organisation.