

## Legal Eyes: EQUALITY ACT 2010 – What are the implications for the workplace?

### **When did the Equality Act come into force?**

Most of the provisions of the Equality Act came into force on 1st October 2010. However, some parts, such as the single public sector equality duty, will come into effect later and some provisions may not come into effect at all.

### **What is the purpose of the Act?**

Its aim is to harmonise existing equality law. In doing so, it brings together and re-states the existing discrimination legislation. It seeks to adopt a single approach. It also makes some important changes and extends some existing protection.

### **How does the Act change the law?**

#### **Protected characteristics**

The same categories are afforded protection from discrimination – age, disability, gender-reassignment, marriage and civil partnership, pregnancy, maternity, race, religion or belief, sex and sexual orientation.

#### **Direct Discrimination**

The current requirement for a real or hypothetical comparator who does not share the relevant protected characteristic is retained. However, the statutory wording found in previous legislation – “on the grounds of” [race/sex/religion etc] – will be replaced by the words “because of”. The guidance suggests that this is not intended to change the meaning, but is simply to ensure the legislation is accessible to the “ordinary user”.

#### **Discrimination by association and perception**

Direct discrimination or harassment based on association or perception are made unlawful across all the protected characteristics, except marital and civil partnership status. This means that discrimination by “association” with a third party’s protected characteristic or as a result of a person’s “perceived” protected characteristic (eg, treating somebody less favourably simply because they are perceived to be gay) can be pursued as claims in the Employment Tribunal.

#### **Indirect Discrimination**

The scope of indirect discrimination is extended to cover disability and gender re-assignment.

Claims for indirect discrimination will be able to be brought by a person put at a particular disadvantage by the relevant provision, criterion or practice (PCP) and who also would be put to a particular disadvantage. For example, those who are deterred by a discriminatory PCP from seeking employment for which they would be qualified for will have a claim.

#### **Harassment**

Protection from harassment will be extended to all the protected characteristics apart from marriage, civil partnership or pregnancy and maternity.

As stated above, victims of harassment will not have to possess the “protected characteristic” themselves but may be associated with someone with the protected characteristic or simply perceived to have the protected characteristic.

In some circumstances, employers are now also liable if staff are being harassed by third parties, such as customers or suppliers.

Employers will be liable if an employee is harassed and the employer knew that the employee had previously been harassed on at least two other occasions by a third party and the employer failed to take reasonable steps to protect the employee.

### **Victimisation**

Previous discrimination legislation required claimants to show that they had been treated less favourably than a comparator. The Act removes the requirement for a comparator. However, in practice, comparison of an individual’s treatment with that of a comparator will still be an effective way of establishing the reason for the treatment.

### **Disability Discrimination**

The definition of disability remains largely the same, except that the Act has now removed the need for a disability to affect certain capabilities, such as mobility, manual dexterity, co-ordination, memory or eyesight.

The Act now also creates the claim of discrimination arising from disability. A disabled person has been discriminated against if he has been treated unfavourably because of something arising in consequence of his disability. Replacing “less favourable” with “unfavourable” removes the need for a disabled person to show that a non-disabled was treated better and therefore removes the employer’s ability to defend a claim by pointing to a non-disabled person with similar circumstances who was treated equally.

Discrimination arising from disability can be justified if such treatment is shown to be a “proportionate means of achieving a legitimate aim”.

As stated above, the Act also extends indirect discrimination to include disability.

### **Pre-employment health questions**

New rules have been introduced by the Act which make it unlawful for an employer to ask about the health of an applicant before offering them work. This is subject to specifically identified exceptions, including questions designed to explore whether reasonable adjustments may be needed as part of the assessment process or establishing whether the applicant will be able to carry out a function which is intrinsic to the work concerned.

### **Secrecy clauses**

Contractual clauses that hinder pay discussions carried out to establish if there is any discrimination are prohibited. This is quite a limited provision as employers could still

punish employees for having discussions relating to pay if those discussions are not for the purpose of establishing whether there is discrimination.

**Is there any guidance to help us understand the new Act in the field of employment law?**

Short guides to the Equality Act have been produced by the Government Equalities Office and ACAS. More detailed guidance has been produced by the Equality and Human Rights Commission. Many of these contain useful practical examples illustrating how the Act may operate in practice. Further detailed guidance from the Equality and Human Rights Commission is expected in due course.

Employers will however not be able to gauge the full practical impact of the Act until real cases are tried and tested through courts and tribunals over the coming years. It is therefore important in the meantime to ensure that policies and procedures are updated to reflect the changes made, and that managers and HR staff in particular are kept abreast of legal developments as they happen.

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