

Equality Act 2010

This article will consider the impact on employers of the reforms to be brought about by the Equality Act 2010 ("the Act"). The majority of the Act is due to come into force in October 2010 and some changes may be required to policy and practice.

Employers

The Act harmonises and replaces all previous discrimination legislation, such as the Race Relations Act 1976 and the Disability Discrimination Act 1995 ("DDA"). The changes brought by the Act that come into force in October 2010 are set out below.

Protected Characteristics

The groups protected by the Act are defined as those possessing "Protected Characteristics" and the changes in definition in relation to each characteristic are as follows:

- **Age** - No change.
- **Disability** – The need for an individual to show that one of the "capacities" currently listed in Schedule 1 of the DDA is affected by the disability has been removed. It is thought that this will make it less difficult for employees to prove that they are disabled.
- **Gender Reassignment** – The Act will create a new definition: a person is no longer required to be under medical supervision to be protected, however an individual must live permanently in the gender opposite to their birth sex.
- **Marriage and Civil Partnership** – No change.
- **Pregnancy and Maternity** – No change.
- **Race** – No change.
- **Religion or Belief** – No change.
- **Sex** – No change.
- **Sexual Orientation** – No change.

Types of Discrimination

- **Direct Discrimination** – This is treating someone less favourably because of a Protected Characteristic. Direct discrimination remains unchanged and applies to all the Protected Characteristics.
- **Associative Discrimination** – This is direct discrimination against someone because they associate with another person possessing a Protected Characteristic. It already applies to race, religion or belief or sexual orientation and will be extended to cover age, disability, gender reassignment and sex.
- **Perceptive Discrimination** – This is direct discrimination against someone because others think they possess a Protected Characteristic. It already applies to age, race, religion or belief and sexual orientation and will be extended to cover disability, gender reassignment and sex.
- **Indirect Discrimination** – This already applies to age, race, religion or belief, sex sexual orientation and marriage and civil partnership. It will be extended to apply to disability and gender reassignment.
- **Harassment** - This applies to all Protected Characteristics except for pregnancy and maternity and marriage and civil partnership. Employees will now be able to complain of behaviour that they find offensive even if it is not directed at them and the complainant does not have to possess the Protected Characteristic.
- **Third Party Harassment** - This is harassment of employees by a third party, e.g. a client or customer. It already applies to sex and will now apply to age, disability, gender reassignment, race, religion or belief and sexual orientation. An employer will only be liable if harassment has occurred on at least two previous occasions, they are aware it has taken place and have not taken reasonable steps to prevent it from happening again.

- **Victimisation** – This applies to all Protected Characteristics, but there is no longer a need to compare treatment of a complainant with that of a person who has not made a complaint. Practically, this is unlikely to make a significant difference, as the tribunal will have to consider how the employer treats other people in order to decide why the complainant has been victimised.
- **Discrimination Arising From A Disability** - The Act introduces a new type of disability discrimination: treating a disabled person unfavourably because of something arising from their disability (for example, a tendency to make spelling mistakes arising from dyslexia), rather than because of the disability itself.

Pre-Employment Health-Related Checks

Prior to offering an individual a job, a prospective employer can only ask health-related questions to enable them to:

- Decide whether they need to make any reasonable adjustments for the person to the selection process.
- Decide whether an applicant can carry out a function that is intrinsic to the job.
- Monitor diversity among people making job applications.
- Take positive action to assist disabled people.
- Assure themselves that a candidate has a disability where the job genuinely requires the jobholder to have a disability.

A jobseeker cannot take a potential employer to the Employment Tribunal for asking prohibited questions but they can complain to the Equality and Human Rights Commission. Further, if an unsuccessful applicant brings a direct discrimination claim and can show that the employer asked a prohibited question, the burden of proof will shift automatically to the employer to show no discrimination took place.

Once a person has been offered a job an employer is permitted to ask health related questions as long as they are appropriate. Employers should begin to review their recruitment procedures in light of these changes

Positive Action

The Act widens the defence of Positive Action, where the reason for the discrimination is that the employer considers that individuals that share a Particular Characteristic are disadvantaged or under-represented. This previously only applied to training and encouragement, but under the Act employers can take more general action in the form of reasonable measures to overcome the perceived disadvantage/under-representation. In taking positive action whilst recruiting an employer will have to demonstrate that the successful candidate is at least as qualified as any other eligible applicant. This defence will not cover employment quotas, or positive discrimination.

Employment Tribunal's Powers

The employment tribunal's powers will be extended to enable them to make recommendations that an organisation take steps to eliminate or reduce the effect of discrimination on employees other than the claimant. Although a recommendation is not binding, an employer's failure to comply with a recommendation could be used as evidence to support subsequent similar discrimination claims.

Equal Pay

The Act allows a claim of direct pay discrimination to be made even if no real person comparator can be found, i.e. a claim can be made entirely on the basis of a hypothetical comparator.

The Act also makes it unlawful for an employer to prevent or restrict their employees from having a discussion to establish if differences in pay related to Protected Characteristics exist and contractual terms requiring pay secrecy are unenforceable in relation to these discussions. Employers will be able to require their employees to keep pay rates confidential from individuals outside their workplace, e.g. competitors.

Employers would be advised to review their policies and employment manuals in light of the above reforms. For assistance please contact Martin John of Beale and Company on +44 (0)20 7420 8728 or at m.john@beale-law.com.

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