

The Equality Act 2010 – key areas for employers and how to meet the challenge

The main provisions of the Act came into force on 1 October 2010.

Who is protected?

As previously, job applicants, employees (and former employees), partners (and former partners) and workers (and former workers) are protected.

Which characteristics are protected?

As previously, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation are protected. The Act widens the definitions of disability and gender reassignment.

What conduct is prohibited?

Direct discrimination (treating someone less favourably because of a protected characteristic) – applies to all protected characteristics. It includes discrimination by perception or association, which applies to all protected characteristics with the exception of marriage and civil partnership and pregnancy and maternity. As previously, there is a 'proportionate means of achieving a legitimate aim' defence in relation to age only.

Indirect discrimination (where a provision, criteria or practice which is applied equally puts or would put people with a particular protected characteristic at a disadvantage) – applies to all protected characteristics, with the exception of pregnancy and maternity. As previously, there is a 'proportionate means of achieving a legitimate aim' defence.

Harassment (unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them) – this includes harassment by perception or association. Liability for harassment by third parties is extended to all relevant protected characteristics. This arises where a third party, for example a supplier or client, harasses a person in the course of their employment and the employer has failed to take reasonable steps to prevent it.

Victimisation (subjecting a person to a detriment because they have done a 'protected act' or because it is believed that they have done or may do a 'protected act', for example bring a claim under the Act). The Act extends the definition of a 'protected act' to alleging a breach of an 'equality clause or rule'.

Discrimination arising from disability (treating a disabled person unfavourably because of something arising in consequence of their disability) – this is a new concept designed to increase protection for disabled people. There is a 'proportionate means of achieving a legitimate aim' defence.

Failure to make reasonable adjustments – as previously, employers have a duty to make reasonable adjustments for people who have a disability.

Which other provisions are effective from 1 October 2010?

The previous provisions on equal pay are largely replicated in the Act.

Except in very limited circumstances, employers are not able to ask about the health of job applicants (including whether or not they have a disability) before offering them work.

Secrecy clauses in contracts which prohibit people from discussing their pay in order to establish whether there is a connection between pay and having (or not having) a particular protected characteristic are unenforceable.

Employment Tribunals are able to make recommendations which benefit the wider workforce rather than only the claimant in the particular case.

Which provisions are still under consideration or consultation?

Dual characteristics discrimination, positive action in recruitment and promotion, and gender pay gap reporting in the private sector are still under consideration. Consultation is also underway on implementation of the new single public sector equality duty which will affect organisations which provide services to the public sector.

How to meet the challenge

Ensure that you have a robust and up to date equal opportunities policy, and that it is followed.

Provide training in equal opportunities.

Recruitment

Review all of your policies, procedures and practices (including application forms, interview questions, questionnaires and reference requests) to ensure that they reflect the changes.

Be mindful of the potential for selection criteria (for example 'must be able to work long hours') and job adverts (for example 'recent graduates only', 'must have a degree from a UK university' or 'we cannot consider applications for part time work') to be discriminatory.

Make decisions solely on merit and in accordance with the selection criteria. Document the reasons why candidates are selected or not selected and retain this documentation for at least 3 months from the date of rejection (the time period within which a claim must be brought) but be mindful of the Data Protection Act.

During employment

Review all of your contracts, policies, procedures and practices (including those which are unwritten or informal) to ensure that they reflect the changes. Be particularly mindful of the potential for indirect discrimination.

Areas frequently subject to discrimination claims include pay reviews, promotions, disciplinaries and dismissals. Treat people consistently, and wherever possible communicate the reasons for your decisions and actions.

Equal pay claims are time consuming and costly to defend. Conduct an audit and remember that equal pay extends to jobs which are different but are of 'equal value'.

Review contracts with third parties who come into contact with your workforce and consider obtaining indemnities stating that they will be liable for any acts of discrimination which they commit. Ensure your policies for the reporting and handling of complaints of discrimination cover complaints relating to discrimination by third parties and address such complaints properly.

Take extra care in relation to disability, particularly when considering how to deal with performance or attendance issues. Obtain medical evidence and seek legal advice. The introduction of the concept of 'discrimination arising from disability' is likely to cause particular difficulties for employers. For example, if a person is dismissed because of sick leave related to their disability, this can constitute discrimination if not a proportionate means of achieving a legitimate aim. Always seek legal advice first.

Post employment

Have a clear policy covering the provision of references and ensure that you apply it consistently. Take extra care when responding to questions about performance or attendance where these may be related to a disability: making negative comments in such circumstances may constitute discrimination. In situations where someone has done, is believed to have done or may do a 'protected act', for example making a complaint of discrimination, refusal to provide a reference may result in a separate and additional claim of victimisation.

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For further information

Please call us on 020 7148 7850 or email info@levenesemployment.co.uk.

Alternatively please contact Audrey Onwukwe directly on 020 7148 7851 or aonwukwe@levenesemployment.co.uk.

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