

The Equality Act Guide for HR Professionals

The employment implications of the Equality Act 2010

Background

In February 2005 the Government launched a review of UK discrimination law. The main objective was to consider the main principles and underlying concepts of discrimination law, investigate different approaches to compliance and enforcement, and consider the opportunity of introducing a single Act to harmonise discrimination law and strengthen it to support progress on equality. After years of consultation *The Equality Bill* was introduced in the House of Commons in April 2009, on 6 April 2010 it completed the final stage of its passage through Parliament, and on 1 October 2011 it became law.

In summary the aim of the new legislation is to harmonise discrimination law and to strengthen it to support progress on equality. The Act makes a number of important changes from an employment law perspective which all HR Professionals should be aware of. All changes will need to be reflected in your policies and practices. Whilst the full impact of the changes the Act will bring is not yet known, it is important that you are fully up-to-date on the employment law provisions contained in the new legislation to avoid unnecessary challenges to your policies and practices.

Summary of key changes to employment law

The Act introduces the following key concepts:

1. Unlawful discrimination in relation to nine “protected characteristics”.
2. A new definition of direct discrimination and harassment to cover “associative” and “perceptive” discrimination.
3. Harmonisation of the available defences in discrimination cases across all protected characteristics.
4. Liability for harassment of staff by third parties.
5. Discrimination arising from disability - protecting disabled people who are disadvantaged as a consequence of their disability.
6. Limits on the use of pre-employment health questions.
7. Limits on the validity of secrecy clauses which prevent staff from discussing their pay and contractual benefits.
8. Power for employment tribunal to make recommendations

The Act also introduces further key concepts which are not yet in force and the Government are currently considering whether and how to implement these provisions:

9. Extension of the scope of positive action allowing the taking of proportionate measures to overcome disadvantage or to meet specific needs based on a protected characteristic.
10. The potential to claim direct discrimination because of a combination of two protected characteristics.

11. Additional equality duties in the public sector and for organisations who exercise public functions.
12. Unlawful age discrimination in the provision of goods, facilities or services.

Detailed Analysis:

1. Grounds for discrimination – the nine “protected characteristics”.

The Act does not change the characteristics protected under previous law. Employees continue to be protected from discrimination based on their: age; disability; gender reassignment; marriage or civil partnership; pregnancy or maternity; race (which includes colour, nationality, ethnic or national origin); religion or belief; sex and sexual orientation.

There are however some minor changes:

(i) Disability

The definition of disability in the Disability Discrimination Act protected people whose impairment had a long-term (12 months) adverse effect on their ability to carry out normal day-to-day activities. The Act does not change this definition. However, the activities will no longer have to fall into a specific category of ‘capacities’. The effect of this should not be significant but our view is that it will now be easier for employees to prove that they suffer from a disability. You may need to alter any equality policies to reflect these changes. You may also need to review any standard letters of instruction you use when seeking information from a medical or occupational health expert.

(ii) Gender reassignment

There is no longer be a requirement for an individual to show either ongoing medical supervision or surgery in order to claim protection. This widens the scope of employees that can complain of gender reassignment discrimination.

(iii) Race

It is worth noting that the definition of “race” under the Act includes colour, nationality and ethnic or national origin. This list is non-exhaustive and the wording suggests that in the future other factors could be included (for example “caste”).

2. A new definition of direct discrimination and harassment to cover “associative” and “perceptive” discrimination.

The wording typically in previous legislation that discrimination must be “on the grounds of” a particular characteristic is replaced with the wording “because of”. Therefore, rather than having to prove less favourable treatment on the grounds of, for example, age, an individual will now have to show less favourable treatment because of age. This definition applies to both direct discrimination and harassment claims.

This wider definition covers associative discrimination. For example, if an employer treats an employee less favourably because they care for a person who is disabled such treatment

would be “because of” disability even though it is not the disability of the individual who has been treated less favourably. The wider definition also includes perceptive discrimination. An example of this may be if an employee is not invited out for a drink because they are perceived to be a Muslim who would not drink. Even if the individual is not in fact Muslim this would be discrimination “because of” religion or belief even though it is not the religion or belief of the individual in question.

We would suggest that any equality policies are updated to reflect these changes. We also consider it would be useful to train staff to understand what could now amount to discrimination or harassment.

3. Harmonisation of the available defences in discrimination cases across all protected characteristics.

In certain circumstances, an employer may have a defence to an act of direct or indirect discrimination that is otherwise unlawful.

The main exceptions to the general prohibition on discrimination were ‘genuine occupational requirements’ (GORs) and ‘genuine occupational qualifications’ (GOQs). These enabled an employer to stipulate that, because of the nature of the job in question, only people with a particular characteristic are eligible. The new Act replaces GORs and GOQs with an ‘occupational requirement’ (OR) defence dropping any need for the OR to be “genuine”.

However, the new law confirms that instead of the previous requirement for it to be “proportionate” to rely on a GOR or GOQ, in order to rely on the new OR defence, employers also have to show that applying the discriminatory criterion was a “proportionate means of achieving a legitimate aim”. We do not consider this change should alter existing practice regarding OR’s. However, if you currently rely on GORs or GOQs you may wish consider revision of your recruitment and promotion policy criteria and any diversity policy to ensure that they reflect the new rules on ORs.

Other defences set out in the Act seek to replicate defences available under previous law. For example, it is lawful to discriminate on grounds of age in relation to benefits based on length of service, compulsory retirement, redundancy pay, national minimum wage and life assurance.

4. Liability for harassment of staff by third parties.

Previously, employers were only liable for harassment of an employee by a client or customer where the harassment was based on gender. The Act has widened this so that employers can be liable for harassment of an employee by a third party because of the employee’s race, sexual orientation, religion, disability, age, or gender reassignment.

This provision is far reaching because it also applies to perceived characteristics. An example might be where a male employee is subjected to harassment by customers because they think that he is homosexual. Even if he is not homosexual, employers would be liable for the discriminatory actions of the customer.

Liability is limited in that the employer will only be held liable where the harassment has taken place on two previous occasions, this has been reported to the employer and the employer has failed to take reasonably practicable steps to prevent the third party harassment. This gives employers a chance to deal with the situation effectively.

You therefore should ensure that you have policies in place for reporting such complaints and that staff are trained in how to deal with incidents of harassment, especially from clients or customers. You might also consider taking steps to alert clients and customers that your staff should not be subject to discriminatory treatment (although this may not be appropriate in some circumstances).

5. Discrimination arising from disability - protecting disabled people who are disadvantaged because of a consequence of their disability.

The Act introduces indirect disability discrimination as well as a new concept of “discrimination arising from disability”.

To succeed in an indirect disability discrimination claim under the Act, an individual will have to show that they had been, because of their disability, disadvantaged by a “provision, criterion or practice” of the employer. The Tribunal will also have to consider whether the provision, criterion or practice could be objectively justified. We do not consider this extends previous protection.

The previous concept of disability related discrimination has been replaced with a new concept of “discrimination arising from disability”. A person (A) will discriminate against a disabled person (B) if:

- A treats B unfavourably because of something arising in consequence of B’s disability; and
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The section will not apply if A can show that they did not know, and could not reasonably have been expected to know, that B had the disability. This avoids the need for a comparator. For example, if an employee is on long term sick leave and that leave is arising from their disability, an employer will have to show that any treatment of the employee in question (for example dismissal) is a proportionate means of achieving a legitimate aim. Employers will therefore need to consider decisions carefully where individuals are at a disadvantage as a consequence of their disability.

You may wish to ensure that any diversity policy which covers disability is updated to reflect the new test.

With regard to the duty on employers to make reasonable adjustments, this provision has remained virtually unchanged. The only amendment is that the Act provides that the costs of a reasonable adjustment should not be passed on to the disabled person concerned.

6. Limits on the use of pre-employment health questions.

The Government has been concerned that many applicants with a history of health problems or with a disability experience significant problems when applying for jobs. As a result health enquiries made by the employer during the recruitment process have been severely limited by the Act. Health related questions can now only be raised where the purpose of the enquiry is for a prescribed reason which includes:-

- establishing whether the individual needs further assessment;

- establishing whether the employer has a duty to make reasonable adjustments for the individual;
- establishing whether the applicant will be able to carry out a function that is intrinsic to the work concerned; and
- diversity monitoring.

Whilst certain enquiries can still be raised during the recruitment process, it is now unlawful to make recruitment decisions based upon these enquiries.

We would therefore advise that you update your job application forms and recruitment policies and practices to reflect these changes. Staff should be made aware that any questions relating to candidates health should be carefully noted and be justifiable under the Act. Any failure to abide by this part of the Act could result in claims of discrimination.

7. Limits on the validity of secrecy clauses which prevent staff from discussing their pay and contractual benefits.

Despite the Equal Pay Act coming into force in 1970, previous Government was concerned that there continues to be a significant gender pay gap. The Government felt that this situation could be improved by encouraging greater transparency in this area. With a view of promoting transparency, the Act limits the effect of employment contract clauses which seek to prevent employees from disclosing their salary and/or bonuses. However, the Act does not completely outlaw secrecy clauses. Instead, such clauses are unenforceable in situations where employees discuss their benefits package to explore whether there is a connection between pay and having (or not having) a particular protected characteristic.

A possible knock on effect is an increase in equal pay claims as employees will now more readily find out what other employees earn.

You therefore need to be aware that the insertion of such a clause in employee contracts does not guarantee complete pay secrecy and it will now be very important that such clauses are drafted correctly to remain enforceable.

We would also advise you to consider a review of your pay structures to ensure that there is no unintended disparity. If you have never carried out any job evaluation of posts within your organisation it may be time to set up an evaluation process.

There have been some concerns that large employers (with over 250 staff) will be forced to divulge pay information on Government request following the Act. Although there is provision in the Act for the Government to order such disclosure, it is unlikely to come into force in the near future.

8. Employment tribunal recommendations.

Where an employee is successful at an employment tribunal, an employer's biggest concern might be the amount of compensation awarded. However tribunals often make recommendations for the employer to follow alongside or instead of compensation.

Previously, tribunals could only make recommendations in relation to the treatment of the complainant following a claim for discrimination. The Act strengthens enforcement powers by enabling tribunals to make recommendations that apply to the wider workforce. Examples of this might be a recommendation that an employer should implement an equality policy or set

up a review panel for grievances. Although any recommendations will not be binding upon an employer, they may still have some impact. A failure to comply can be used against employers in further tribunal hearings and may have a negative impact on public perception of the organisation.

To avoid recommendations being made but also to try to avoid any claims in the first place, we would advise that you have comprehensive equal opportunities, harassment, grievance and disciplinary policies in place and ensure fair and objective recruitment and promotion criteria.

Further key concepts which are not yet in force and which the Government are currently considering whether and how to implement:

9. Extension of the scope of positive action allowing the taking of proportionate measures to overcome disadvantage or to meet specific needs based on a protected characteristic.

Much media speculation has surrounded this section of the Act. There is no duty for you to positively discriminate. Instead, the Act contains provisions concerning lawful positive action, are designed to apply where persons who share a protected characteristic suffer a disadvantage connected to the characteristic, have particular needs or are disproportionately under-represented. However, you are not obliged to take positive action.

There are two positive action provisions:

- The general positive action where you reasonably think that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented and you take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation. This is wider than the positive action exceptions in the previous discrimination legislation, which were limited to providing "training and encouragement" for under-represented groups.
- The provision concerning positive action in recruitment and promotion. This has not been brought into force. If implemented, the Act provides an option to recruit or promote someone from an under represented group where there is a choice between two equally suitable candidates. This would apply in situation where you might have identified that certain groups of people sharing a characteristic (e.g. women) are disadvantaged or under-represented in your organisation. However, the Act does not allow use of this provision where you have a policy of treating persons who share a protected characteristic more favourably.

If this section does come into force in the future, you will need to be very careful how you exercise this right. Firstly, you should be aware that the phrase "as qualified as" should be given a broad meaning and this requires a full and objective assessment of each candidate's suitability, skills, qualifications, competence and professional performance. With this difficult test, there is a real possibility of disappointed candidates claiming that they were better "qualified". Secondly, you could open your organisation up to discrimination claims from the unsuccessful candidates, if you are not able to demonstrate that a successful candidate is from a protected group who are at a disadvantage or under-

represented. Thirdly, you cannot take the action in pursuance of policy of more favourable treatment for a particular group.

10. The potential to claim direct discrimination because of a combination of two protected characteristics.

Currently a tribunal hearing a direct discrimination case must consider the grounds of, for example, race and sex, separately and cannot consider a claim that an individual has been treated less favourably because of combination of two protected characteristics: for example, that she is a “Bangladeshi woman”. The Government considers that many people are affected by such ‘multiple discrimination’.

If implemented, the Act will allow for an employee to complain of discrimination because of a combination of two (and no more) protected characteristics (e.g. being a woman and originating from Pakistan). It is anticipated that not all protected characteristics will be covered: pregnancy/maternity and married/civil partner status are excluded. Further, only direct combined discrimination will be outlawed and the provisions do not cover indirect discrimination, harassment or victimisation.

It is anticipated that this action will not be available to employees until April 2011. In the meantime, you should be aware of the potential for these claims which may increase employee chances of success in discrimination claims.

11. Additional equality duties in the public sector and for organisations who exercise public functions.

The current Government is currently consulting about the public sector duties under the Act and proposes to bring the duties into force in April 2011.

Act introduces significantly extended equality duties for public authorities and any organisations who exercise “public functions”:

- A duty to report on equality issues in the workplace including gender, pay, ethnic and disability minority employment rates is expected to be introduced in April 2011. This will apply to public bodies with over 150 employees.
- The Act also replaces the existing race, disability and gender public sector equality duties with a single duty that will apply to all protected characteristics (apart from marriage and civil partnership). This provides that public authorities must, in the exercise of their functions, have due regard to the need to:

“(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it”. This will have impact for public authorities at all stages of the employment relationship - recruitment, development and parting of the ways. We would advise that all public authority employers prepare

a single equality strategy and develop mechanisms to measure success in respect of employment.

- The new Coalition Government further proposes the following specific equality duties:
 - (a) Transparency.
 - (b) Workforce transparency.
 - (c) Transparency in public service provision.
 - (d) Transparency about impact on equality.

Private and third sector employers shall be aware that the Act provides that a person who is not a public authority but who exercises public functions will be subject to the public sector duty when exercising those functions. It is our view that employment of staff, who work in a part of a business that exercises public functions, will not be caught by this duty. However, this could be open to challenge.

12. Unlawful age discrimination in the provision of goods, facilities or services.

The Act makes it unlawful to discriminate on the grounds of age in the provision of services. Organisations will need to be aware that the customers/clients/service users of the business must not be discriminated against on the basis of age. Although there will be several exceptions to the rule, these will not be clear until regulations are published.

These provisions are unlikely to take effect until April 2012 at the earliest. Organisations should however be aware that they may need to review their policies on admission of customers/clients/service users in line with these provisions.

Conclusion

The Act came into force on 1 October 2010, save for specific provisions outline above. Now that the majority of the Act is in force, we would advise that all HR professionals:

1. Review and update your recruitment and promotion policy and related documents.
2. Review and update your Equal Opportunities/Equality and Diversity policy to reflect the changes.
3. Review contracts which include a pay secrecy clause.
4. Provide your staff with training on equality and diversity.
5. If your organisation exercises a public function, consider preparing a strategy to implement the public equality duty and mechanisms for reporting on equality performance.

How can we help you?

We are already working with a number of organisations (public, private and third sector) to help them meet the immediate and longer term challenges laid down by the Act.

We can help you comply with the Act by assessing your compliance with discrimination law including reviewing your policies and practices; providing you with a report outlining your areas of risk; suggesting tailored solutions to reduce or eliminate these risks; and providing interactive training to your staff on equalities, commission and procurement.

In addition, you may also find it helpful to discuss with us broader issues arising for your organisation as a result of this legislation.