

## EQUALITY ACT 2010 – BRIEFING

AUGUST 2010

**The main provisions of the Equality Act 2010 come into force on 1st October 2010.**

The Act consolidates the current anti-discrimination legislation and introduces new measures which will have direct implications for employers. **As a result, employers should review and may need to change some of their policies and practices.**

### 1. Protected characteristics

- The **protected characteristics** (those offered protection by the Act) include: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, gender and sexual orientation.
- The Act will make it easier for a person to show that they are disabled and therefore protected from discrimination. It abandons the current list of affected capacities, relying instead on a general requirement that a person is disabled, (for the purposes of the Act) if they have "**a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities**".
- The Act will provide protection for someone who is "proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex", a transsexual person. The provision removes the previous requirement for the process to have to be undertaken under medical supervision. **So it will cover, for example, someone who is born physically male but who decides to live permanently as a woman.**

### 2. Types of discrimination

Discrimination is defined as direct, associative, perceptive or indirect discrimination, harassment, third party harassment or victimisation.

- **Indirect discrimination** can happen when a policy or practice of the employer, which applies to everyone, particularly disadvantages people with a protected characteristic.

- **Associative discrimination** refers to when someone is discriminated against because of their association with someone who has a protected characteristic.
- **Perceptive discrimination** may happen where impairment does not have an actual substantial effect but a person perceives it to have an effect on them (assessed subjectively).
- **Third party harassment** refers to harassment by people who are not employed by the employer, for example contractors, suppliers or customers. This already applies to sex, but under the Act this extends to other protected characteristics.

### 3. Prohibition of Pre-employment Health Questionnaires

- The provision is intended to protect disabled job applicants from discrimination during the recruitment process. There will be a prohibition on pre-employment health questionnaires which request information about an applicant's general health or medical history.
- This provision is perhaps one which will require the most attention when amending policies and procedures.
- Note: asking about an applicant's health does not in itself contravene the Act, but rather the way in which such information is used may be a contravention.

**Employers will only be able ask health-related questions, prior to a job offer, to help them:**

- **Establish whether the applicant will be able to comply with a requirement to undergo an interview or other assessment and whether any reasonable adjustments need to be made;**
- **Establish whether an applicant can carry out an intrinsic function of the job.**  
For example, if the job entails heavy manual handling, an employer can ask candidates whether they could manage this.
- **Monitor diversity among job applicants;**
- **Take positive action to assist disabled people.** Employers are allowed to guarantee a disabled person an interview, and they can ask on the application form if the applicant has a disability for this purpose. But they must make it clear on the form why they're asking the question;
- **Establish whether a job candidate has a disability where the role requires the employee to have a particular disability;**
- **Vetting of applicants for work for reasons of national security.**

- **Employers need to act** and assess their recruitment policies prior to 1 October 2010. Any pre-employment health questionnaires need to be withdrawn or reviewed and revised so as to relate to the specific vacancy. Information pertaining to a person's health should only be requested where it is genuinely necessary for one or more of the reasons outlined above.
- The Equality and Human Rights Commission (EHRC), in response to **complaints** from applicants who believe employers are acting unlawfully, can investigate and require the employer to draw up an action plan and may also impose a fine of up to £5,000.
- Employers using pre-employment health questionnaires run the risk of them being used as evidence of discrimination. A disabled applicant could make a claim to the employment tribunal if they are not selected for a role. In such a case, it will be for the employer to prove discrimination did not take place and the decision not to offer the person employment was for reasons unconnected to their disability.

#### **4. Employment tribunals**

The Act provides tribunals with increased powers. When an employer is found guilty of discrimination, the tribunal will be able to make recommendations that go beyond the particular individual case, for example, they can recommend that the employer provides staff training to help eliminate or reduce the effect of discrimination on employees generally and not just in relation to the particular claimant in the matter.

#### **5. Equal pay**

Currently, a claim for direct discrimination for equal pay requires a comparison to be made with a real person of the opposite sex working in the same company. However the Act will allow a person to make a claim under this ground even if they do not have a 'comparator' in the business. A person can make a claim if they can show they would receive a better pay if they were a member of the opposite sex.

#### **6. Pay secrecy**

It will be unlawful to prevent employees from discussing differences in pay in circumstances where there is a perception the differences are related to protected characteristics.

A prohibition contained in contracts of employment that require pay secrecy will be unenforceable in these circumstances, unless they refer to discussing pay with competitors.

This is not intended to be a comprehensive summary of the Act but to highlight some of the areas of the law which are changing which employers should be aware of.

**Please contact your usual Lawsons' contact or our Employment & Litigation partner, David Gallagher, for a detailed review of your policies and procedures or if you have any questions or concerns.**

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