

Equal Opportunities and Discrimination

No Comments

The new Equality Act came into force in October 2010 and replaces all previous equality legislation – namely the Race Relations Act 1976, the Disability Discrimination Act 1995, the Sex Discrimination Act, the Equal Pay Act, the Employment Equality (Age) Regulations 2006, The Civil Partnership Act 2004, the Employment Equality Regulations 2003 (religions and belief and sexual orientation). Ready for the details? Here we go.

The Equality Act covers the same characteristics that are protected by existing equality legislation

- Age
- Disability
- Gender reassignment
- Race
- Religion or belief
- Sex
- Sexual orientation
- Marriage and civil partnership
- Pregnancy and maternity.

However, these groups will now be called 'Protected Characteristics' (PC's).

The new Act also extends protections to some other characteristics and introduces other changes. This Act applies equally to employees, workers and many of those who are self-employed (only Freelancers who fall under Part 5 of the Equality Act 2010 are covered – that is those who are described as 'contract workers' and are contracted **personally** to do the work, i.e you cannot claim discrimination against your Employer if you are contracted for the provision of services and hire someone else, or sub-contract someone else, to do the work – you must do the work yourself personally).

The Protected Characteristics

Age

The Act protects people of all ages. However, different treatment because of age is not necessarily unlawful (direct or indirect) discrimination if Employers can justify it, i.e. they can demonstrate that it is a proportionate means of meeting a legitimate aim

The Act continues to allow employers to have a default retirement age of 65.

Disability (the new Act introduces a new definition and other changes)

The Act has made it easier for a person to show that they are disabled and so protected under disability discrimination. Under the new Act, a person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (which would include things like using a

telephone, reading a book or using public transport).

Previous legislation provided a list of capacities that must be impaired, that a person must have at least one of, to be classified as disabled under the act. These were mobility; manual dexterity; physical coordination; continence; ability to lift, carry or move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; perception of the risk of physical danger. This list has now been removed.

As before, the Act puts a duty on Employers to make reasonable adjustments for staff to help them overcome disadvantage resulting from an impairment. Disabled people are no longer required themselves to establish that their treatment is less favourable than that experienced by a non-disabled employee.

The Act includes a new protection from discrimination arising from disability – namely that it is discrimination to treat a disabled person unfavourably because of something connected with their disability (e.g. a tendency to make spelling mistakes arising from dyslexia). This type of discrimination is unlawful where the employer or other person acting for the employer knows, or could reasonably be expected to know, that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is a proportionate means of achieving a legitimate aim.

Additionally, indirect discrimination now covers disabled people.

The Act also includes a new provision which makes it unlawful, except in certain circumstances, for employers to ask about a candidate's health before offering them work (see below).

Gender reassignment (The new Act introduces a new definition)

The Act provides protection for transsexual people. A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender. The Act no longer requires a person to be under medical supervision to be protected – so a woman who decides to live permanently as a man but does not undergo any medical procedures would be covered.

Transgender people such as cross dressers, who are not transsexual because they do not intend to live permanently in the gender opposite to their birth sex, are not protected by the Act.

It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured. Medical procedures for gender reassignment such as hormone treatment cannot be treated as a 'lifestyle' choice.

Race

For the purposes of the Act 'race' includes colour, nationality and ethnic or national origins. A racial group can be made up of two or more different racial groups (eg Black Britons).

Religion or belief

- In the Equality Act, religion includes any religion. It also includes a lack of religion, in other words employees or jobseekers are protected if they do not follow a certain religion or have no religion at all.
- A religion must have a clear structure and belief system. To be protected, a belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour.
- Discrimination because of religion or belief can occur even where both the discriminator and recipient are of the same religion or belief.
- See our [Guide to Dress Codes](#) at work here.

Sex

Both men and women are protected under the Act.

Sexual orientation

The Act protects bisexual, gay, heterosexual and lesbian individuals.

Marriage and civil partnership

The Act protects employees who are married or in a civil partnership against discrimination. Single people are not protected.

Pregnancy and maternity

A woman is protected against discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and any [statutory maternity leave](#) to which she is entitled up to 6 months after the birth or while still breastfeeding. During this period, pregnancy and maternity discrimination cannot be treated as sex discrimination. For example, an Agency cannot refuse to place a worker, or a hirer refuse to accept a worker because she is pregnant, or terminate the placement. If you are an 'Agency Worker' please see our [new Guide to the Agency Worker Regulations](#) and what this will mean if you are pregnant.

Types of discrimination

Direct discrimination

- Occurs when someone is treated less favourably than another person because of a protected characteristic.
- Existed previously for all protected characteristics and no change in the new legislation.

Associative discrimination

- This is direct discrimination against someone because they associate with another person who possesses a protected characteristic (e.g. a mother of a disabled child).
- Applies to race, religion or belief, sexual orientation, age, disability, gender

- reassignment and sex.
- Does not apply to marriage/civil partnerships or pregnancy/maternity.

Perceptive discrimination

- This is direct discrimination against an individual because others think they possess a particular protected characteristic. It applies even if the person does not actually possess that characteristic.
- Already applies to age, race, religion or belief, sexual orientation, disability, gender reassignment and sex.
- Does not apply to marriage/civil partnerships or pregnancy/maternity.

Indirect discrimination

- Indirect discrimination can occur when your Employer has a condition, rule, policy or a practice in the company that applies to everyone but which particularly disadvantages people who share a protected characteristic.
- Indirect discrimination can be justified if Employers can show they acted reasonably in managing their business.
- Applies to age, race, religion or belief, sex, sexual orientation and marriage, civil partnership, disability and gender reassignment.
- Does not apply to pregnancy/maternity.

Harassment

- Harassment is “unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual” .
- Harassment 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 need not possess the relevant characteristic themselves.
- Employees are also protected from harassment because of perception and association.

Third party harassment

- The Equality Act makes Employers potentially liable for harassment of their employees by people (third parties) who are not employees of the company, such as customers or clients; and also makes Employers liable for acts of harassment by their employees, even outside of normal working hours. In March 2011 the Government announced they are going to consult to remove this part of the Act. More information to follow when this becomes clear.
- Employers will only be liable when harassment has occurred on at least two previous occasions and they were aware that it has taken place but did not take reasonable

steps to prevent it from happening again.

- Applies to sex, age, disability, gender reassignment, race, religion or belief and sexual orientation.
- Does not apply to marriage/civil partnerships or pregnancy/maternity.

Victimisation

- Victimisation occurs when an employee is treated badly because they have made or supported a complaint or raised a grievance under the Equality Act; or because they are suspected of doing so.
- An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint.
- There is no longer a need to compare treatment of a complainant with that of a person who has not made or supported a complaint under the Act.
- Exists for all Protected Characteristics.

Dual Discrimination

The concept of dual discrimination is introduced by the Act and was due to come into effect in March 2011, but was later postponed. This is where an individual, who believes that he or she has been treated less favourably because of a combination of two protected characteristics can bring a combined claim, but only for direct discrimination (and with the exception of the protected characteristics of marriage/civil partnership and pregnancy/maternity). If this concept is re-examined we will update accordingly.

Other key points and changes

Positive action

The Equality Act allows Employers to take positive action if they 'reasonably believe' that employees or job applicants who have a particular protected characteristic suffer a disadvantage connected to that characteristic, or if their participation in an activity is disproportionately low or they are under-represented in the workplace.

From 6th April 2011, a further part of the Act is implemented that is aimed at improving diversity when recruiting and promoting candidates and means that Employers can give such a person 'more favourable treatment in relation to recruitment' than someone without that characteristic as long as the action is proportionate and does not contravene, in a direct or indirect way, any other part of the Equality Act. This extension to the Act of positive action in recruitment is entirely voluntary for Employers and is not a legal requirement.

Pre-employment health-related checks

The new Equality Act limits the circumstances when Employers (or Agencies) can ask health-related questions (of the applicant or in a reference request letter) before they offer an individual a job.

Now, before a job offer, Employers can only ask health-related questions that help them:

- Decide whether they need to make any reasonable adjustments, for the person,

during the selection process

- Decide whether an applicant can carry out a function that is essential ('intrinsic') to the job
- Monitor diversity among people making applications for jobs
- Take positive action to help disabled people assure themselves that a candidate has the disability where the job genuinely requires the jobholder to have a disability

Once a person has passed the interview and has been offered a job then it is permitted for Employers to ask appropriate health-related questions.

Extension of employment tribunal powers

Under previous legislation, an employment tribunal could make a recommendation that an employer must eliminate or reduce the effect on the claimant of any discrimination. The Act extends this power so that it will now be possible for a tribunal to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not only on the claimant (even if the claimant has left their employer).

For example, the tribunal might specify that an employer needs to train all staff about the organisation's bullying and harassment policy. This power does not apply to equal pay cases.

Equal pay – direct discrimination

The Equality Act retains the previous framework that was in place. This means that in most circumstances a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment.

However, a change in the Equality Act allows a claim of direct pay discrimination to be made, where no real person comparator can be found. This means that a claimant who can show evidence that they would have received better remuneration from their employer if they were of a different sex may have a claim, even if there is no-one of the opposite sex doing equal work in the organisation. This would be a claim under sex discrimination.

The Act carries provisions to introduce compulsory pay audits for Employers with more than 250 employees from 2013 (if felt legislatively necessary). Public sector bodies with more than 150 employees will be required to report on gender pay (as well as other equality data) by April 2011.

Pay secrecy

The Act makes it unlawful for an Employer to prevent or restrict their employees from having a discussion to establish if differences in pay exist that are related to protected characteristics and outlaws pay secrecy clauses in contracts of employment.

An employer can require their employees to keep pay rates confidential from some people outside the workplace, for example a competitor organisation.

Your Employer must, by law, have an Equal Opportunities policy

The following must also be considered:

- [Right to apply for flexible working for parents](#)
- [Prevention of less favourable treatment for part-time workers](#)
- [Prevention of less favourable treatment for Fixed Term employees](#)
- [Maternity Rights](#)

In addition there is specific legislation in Northern Ireland that amends the Race Relations Act by identifying the Irish Traveller community as a racial community and makes it unlawful to discriminate against someone on the grounds of religious belief or political opinion. They cover direct and indirect discrimination and victimisation.

The Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality were merged in October 2007 to form a single equality body called the [Commission for Equality and Human Rights](#). It offers various publications and advice to explain the above in more detail.

Workline is supported by Employment Lawyers Goodman Derrick LLP. Please note that the advice given on this website and by our Advisors is guidance only and cannot be taken as an authoritative interpretation of the law. It can also not be seen as specific advice for individual cases. Please also note that there are differences in legislation in Northern Ireland.