

EQUALITY ACT 2010: WHAT YOU NEED TO KNOW

On the first of this month, the coalition government implemented one of the last milestones of the Labour government's legislative programme. Although the Equality Act 2010 has added certain new protections, it has one principal aim: putting under one roof the many strands of the discrimination legislation, ranging from the Equal Pay Act 1970 to the Employment Equality (Age) Regulations 2006. This note is an overview of the Act and does not intend to be a complete guide. We will undoubtedly write more about the Act in the forthcoming years as case law develops.

Protected characteristics

For a number of years, it has been unlawful to discriminate against an employee because of:

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

This has not changed. However, in the new Act these are now called protected characteristics.

Associative and perceptive discrimination

As the discrimination legislation developed over a number of years, there were inconsistencies in the types of protection available to an employee depending on the situation. Under the old regime, you were not exposed to an age discrimination claim if you discriminated against someone because they associated with someone else who had a protected characteristic, an example of this would be where you refused to promote an employee because you don't like the fact that his girlfriend was 20 years older than him. However, you were exposed to a claim if you refused to promote an employee because you did not like the fact that his girlfriend was black. In effect, discrimination by association was extended to some acts of discrimination but not to others.

This has now changed with the introduction of the concept of associative discrimination. An example of associative discrimination is it will be unlawful to treat an employee less favourably because he cares for an elderly relative: the protective characteristic is age, even though it is not your employee's age that matters.

The Act also introduces the concept of perceptive discrimination, which first appeared in the Age Regulations. This is discrimination on the grounds of a perceived characteristic. For example, it will now be unlawful to discriminate against an employee because you thought the employee was disabled.

Despite the fact that part of the purpose of the legislation was to iron out inconsistencies, some do remain. Both associative and perceptive discrimination is now illegal for all protected characteristics except marriage and civil partnership. You can therefore still discriminate against someone because you believe that he is not married.

Disability discrimination

There are a number of changes to the protection afforded to disabled employees. For example, disabled employees will now benefit from being able to bring indirect discrimination claims. As the changes to this legislation are complex, we will save the details for another email out.

Dual discrimination

The Act introduces the concept of dual discrimination. Although dual discrimination is not yet in force, the timetable for the Act suggests that it may be in force as early as April 2011. Dual discrimination allows for a claim to be brought in relation to a combination of two protected characteristics, for example age and sex. You may have noticed that whilst you can name a handful of older TV news readers, and a handful of female TV news readers you will struggle to name older female TV news readers. Under the concept of dual discrimination, employees who suffer discrimination not because of one protected characteristic but because of a combination of two characteristics will fall within the ambit of the law.

Although these changes seem pretty huge, it is likely that the main impact they will have on you in the short term will be to update your staff handbook and equality policy if you have one.

The two following changes may have wider implications for you.

Pre-employment health checks

It is now unlawful to ask job applicants about their health (including whether they have a disability):

- before offering work to an applicant
- before including the applicant in a pool of applicants from whom the employer intends to offer work to in the future.

Under the Act, there are a few exceptions where the questions are for the purposes of supporting disabled applicants during a recruitment exercise, such as:

- questions that are necessary to establish whether the job applicant will be able to comply with a requirement to undergo an assessment (such as an interview or selection test)
- whether a duty to make reasonable adjustments will arise in connection with any such assessment
- to monitor diversity information
- whether the applicant will be able to carry out a function that is intrinsic to the work concerned (assuming that if reasonable adjustments were required, they would be made).

This final exception will be the most helpful for employers who need to make sure that their employees are capable of a particular job, for example, where a job requires someone to be physically capable of lifting.

Confidentiality regarding pay

The Act makes contractual pay secrecy clauses unenforceable. An employee cannot be dismissed for asking their colleagues how much they earn and nor can those colleagues be dismissed for saying what they earn, provided that the employee asks for the information in order to find out whether and to what extent there is a connection between a difference in pay and a protected characteristic.

The aim of this new protection is to promote equal pay and narrow the pay gap between genders. However, whilst male colleagues might now tell their female counterparts how much they earn, they do not have to do so. For many, salary remains a very private matter, and we believe it is unlikely that the removal of the pay secrecy clause will lead to an avalanche of equal pay claims.

The Act also contains an obligation on larger organisations to publish information regarding their gender pay gap. This duty to report has deliberately not been implemented by the coalition government.

For the time being, the Equality Act 2010 is going to be more of an issue for us employment lawyers, keeping us awake at night wrestling with questions such as what are the implications of the change of terminology from “on the grounds of” to “because of”? Is the concept of indirect disability discrimination going to be more wide ranging than a breach of the duty to make reasonable adjustment? But should you continue to sleep peacefully? The answer is mostly yes, at the moment.

Our advice right now is to review your policies and handbook. Train your managers, as this will enhance your change of successfully defending a claim of discrimination. Keep an eye out and call us if you have any problems.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at info@employease.co.uk.

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