

The Equality Act 2010 – Harmony or Havoc? / Explained

In October 2010 the Equality Act ("the Act") came into force. It is now the largest body of Discrimination legislation in existence. Its aim is to harmonise, simplify and update all existing Discrimination Law and to create consistent standards to apply to the workplace.

For employers, obligations remain largely the same in practical terms. However the Act has extended protection to areas which were previously not addressed and enhanced other elements of the law, so it may be necessary to review existing policies and procedures to ensure they don't fall foul of the Act.

What is covered?

The Act still covers the following areas:

Sex

Race

Disability

Age

Pregnancy and Maternity

Gender Reassignment

Sexual Orientation

Religion or Belief

Marriage and Civil Partnership

These areas are now called Protected Characteristics (PC) and if an individual holds a PC, or more than one as can often be the case, the Act will potentially protect him/her.

What has changed?

There are now additional types of discrimination in relation to some PCs and the definitions of some PCs have been extended. We set out these changes below:

Types of Discrimination

Direct Discrimination

This is defined as less favourable treatment against an individual because he/she has a PC, is perceived to have a PC or is associated with someone who has a PC. This has and still does apply to all PCs.

Discrimination by Association

This is defined as direct discrimination against an individual because he/she associates with someone who possesses a PC. Prior to the Act this option only existed in cases of Race, Religion or Belief or Sexual Orientation discrimination. Now this also applies to Age, Disability, Gender Reassignment and Sex.

Discrimination by Perception

This is defined as direct discrimination against an individual because others think he/she possesses a particular PC. Prior to the Act this option only existed in cases of Age, Race, Religion or Belief and Sexual Orientation discrimination. Now this also applies to Disability, Sex and Gender Reassignment.

Indirect Discrimination

This is defined as a condition, rule, policy or practice that applies equally to everyone but treats a particular group with a common PC less favourably than others. Prior to the Act this option only existed in cases of Age, Race, Religion or Belief, Sex, Sexual Orientation and Marriage and Civil Partnership discrimination. Now this also applies to Disability and Gender Reassignment.

Harassment

This is defined as unwanted conduct related to a particular PC which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. This has always applied to all PCs. However now the Act allows an individual to complain about behaviour that he/she finds offensive etc even if it is not directed at him/her and the particular PC in question does not apply to him/her.

Third Party Harassment

This is defined as harassment (outlined above) carried out by a third party, e.g. a customer or client against an individual. However this type of discrimination can only be pursued if harassment has occurred at least twice, the individual has made his/her employer aware of it and no reasonable steps were taken by the employer to prevent it occurring again. Prior to the Act this option only existed in cases of Sex discrimination. Now this also applies to Age, Disability, Gender Reassignment, Race, Religion or Belief and Sexual Orientation.

Victimisation

This is defined as less favourable treatment against an individual because he/she has made or supported a complaint or grievance with reference to the Act or is expected to do so. This has always applied to all PCs. However now under the Act there is no requirement for the individual making the complaint to compare his/her treatment with that of a person who has not made a complaint (the comparator).

PC Definitions

Disability

The Act defines a disability as 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. Previously there was a definition for normal day to day activities in the Disability Discrimination Act 1995 however the Act has removed this thereby widening the scope for people trying to fulfill the test.

The Act has introduced a new form of protection called discrimination arising from disability. This covers situations where a person is treated less favourably because of something connected with his/her disability. It will now be unlawful for an employer or other person on behalf of the employer to behave in this way where it knows or could be expected to know of the disability. However the Act does provide the employer with a defence if it can show that the discrimination was a proportionate means of achieving a legitimate aim.

In addition, the Act has created another form of protection by making it unlawful in certain circumstances, for employers to enquire about a prospective employee's health before offering him/her work.

Gender Reassignment

The Act now covers transsexuals without the need for them to be under medical supervision.

Race

The Act has changed the definition of Race so that it includes (but is no longer limited to) colour, nationality, ethnic or national origin.

Key Changes

Over and above the amendments we have already outlined, the Act has addressed some new areas which companies should be aware of:

Positive Action

If a company believes that employees sharing a particular PC are at a disadvantage due to that PC they can take positive action to address the problem which will not be classed as discriminatory against other employees.

The Act allows for two forms of Positive Action:

1. General Positive Action
2. Positive Action in recruitment and selection

Type 1 came into force in October 2010 but type 2 are yet to take effect.

Pre-Employment Health Questionnaires

Whilst in the past employers were free to question an applicant's health history in depth and also decline to offer a job to that person if health was a concern, the Act now limits this ability such that questions regarding health cannot (generally) be asked prior to offering a person the role applied for.

The Act does however allow questions of this nature to be raised where it is necessary for the purposes of:

1. Determining whether an applicant can comply with a requirement to be assessed, for example attending an interview or taking a test.
2. Determining whether an applicant will be able to perform a function crucial to the role, for example heavy lifting
3. Determining whether reasonable adjustments need to be made in relation to the selection process
4. Ensuring a range of applicants are considered in the interests of diversity
5. Taking Positive Action
6. Confirming that an applicant has a disability which is genuinely required for the role in question

If you do ask questions about an applicant's health (which cannot be justified using the above objectives) and then rely on the responses to avoid offering him/her a job this could be deemed a discriminatory act. It is therefore very important to ensure you only ask questions that are truly necessary prior to offering a position.

Tribunal Powers

Up to the introduction of the Act Tribunals could make recommendations that an employer reduce or eliminate discrimination against a Claimant only. The Act has extended this power so that Tribunals can now recommend organisation-wide changes to stop discrimination across the workforce.

It should be noted that this power does not apply to Equal Pay cases.

Retirement at 65

At present a company can retire an employee at 65 provided the correct procedure is followed and even if the employee does not wish to retire. However in July 2010 a government consultation document was issued proposing to eradicate the default retirement age. As a result from 6th April 2011 transitional provisions for the change could apply and no new notices to retire can be issued and from October 2011 the default retirement age could be phased out.

Pay Secrecy

It has always been common knowledge that discussion about pay between employees was forbidden and could result in disciplinary action. However the Act has turned the tables in this area and it is now unlawful to stop employees from discussing wages in order to determine if pay differentials exist which relate to PCs. It also prevents clauses in contracts of employment which relate to pay secrecy from being enforceable.

It is still acceptable to forbid employees from talking about pay to outside parties such as competitor companies.

Next Steps

The Act has already been in force for 3 months so if you have not taken the following action you should make it a priority to do so:

1. Discuss the changes with management and key personnel
2. Consider whether your policies and procedures need amending to comply with the changes particularly in relation to equal opportunities and recruitment
3. Carry out a review of your contracts of employment to ensure they do not need changing, specifically in relation to pay secrecy
4. Visit the Equality and Human Rights Commission website to check the statutory codes of practice connected with the Act

If you are not sure how to make the above changes or need guidance to make sure you carry out everything correctly, we at Sydney Mitchell are here to help. Our team of dedicated Employment Solicitors are on hand to walk you through any changes you may need to action as a result of the Equality Act and can advise you on all aspects of Employment Law generally whenever you need them. For further information on the firm and the Employment Team please contact us on 0121 698 2200 or visit our website at www.sydney-mitchell.co.uk.