

Employment E-Bulletin

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Equality Act 2010



Introduction

UK equality legislation has developed over the past forty years and is currently governed by nine major pieces of legislation. Employers (and advisers) have long complained of the difficulties they experience when attempting to interpret and apply the legislation. In 2005 the Government announced it would be undertaking a review of all UK discrimination law with a view to consolidating and streamlining it in a single piece of legislation.

Following the review and a public consultation in 2007 the Equality Bill ("the Bill") was born. The Bill entered the House of Commons in April 2009 and following numerous debates on the main provisions in both Houses, the Equality Act 2010 ("the Act") received Royal Assent on 8th April.

Key changes

The Government hopes the Act will draw together all strands of discrimination legislation in the UK in to one, easy to understand set of rules. In doing so, whilst the Act restates much of the existing legislation, it also contains a number of important changes. In this e-bulletin we have provided a brief summary of some of the most important aspects of the Act from a HR practitioner's perspective.

Indirect discrimination

At present, it is unlawful for an employer to indirectly discriminate against someone on the grounds of their age, marriage and civil partnership, race, religion or religious belief, sex or sexual orientation. Indirect discrimination arises where an employer applies a provision, criterion or practice which although applies in the same way to all employees, has the effect of putting others at a disadvantage on one of the above grounds.

Historically, there has not been any prohibition on indirect discrimination on the grounds of an individual's disability or gender-reassignment. To resolve this inconsistency the

Government has extended the scope of indirect discrimination to cover these two protected characteristics. In addition to this, the Act also harmonises the definition of indirect discrimination in relation to all protected characteristics.

Discrimination based on association and perception

The Act states that discrimination will arise where an employer discriminates against an employee on the grounds of certain protected characteristics (religion or belief, sexual orientation, racial grounds, sex, pregnancy, gender-reassignment, age and disability) whether or not the employee possesses that characteristic. This will therefore mean that it will be unlawful for an employer to discriminate against an employee on the grounds of their association with another person who possesses a protected characteristic such as a mother who has to spend time off work in order to look after her disabled child.

The Act will also make it unlawful to discriminate against a person on the grounds that they are perceived to possess a particular protected characteristic (that they are gay for example), even if they have a mistaken belief that this is the case. This concept of discrimination by perception will apply to perception on the grounds of sexual orientation, age, racial grounds, sex, pregnancy, gender-reassignment, age and disability but not marital status/civil partnership.

Combined discrimination

Currently, if a person brings a claim of discrimination on the grounds of more than 1 protected characteristic such as sex and race, an Employment Tribunal must consider both characteristics separately. The Act introduces a new concept of "combined discrimination" which will allow an Employment Tribunal to make a global finding rather than looking at the two protected characteristics separately.

The example referred to in the explanatory notes to the Bill refers to a black woman who is passed over for promotion to work on reception on the basis that her employer believes black women do

not perform well in a customer services function yet would not hold the same view in relation to a white woman or black man. It is therefore the combination of being black and female which would be the basis for the discrimination.

Importantly, the new concept of combined discrimination will only apply to direct discrimination and not indirect discrimination or harassment. Nor will it apply to all protected characteristics and will exclude pregnancy, maternity and marriage and civil partnerships.

Pre-employment health questionnaires

The Act attempts to outlaw pre-employment health questionnaires save in limited circumstances. Whilst asking such questions will not give rise to a freestanding discrimination claim the Equality & Human Rights Commission will have the right to take enforcement action. Furthermore, where an employer has used a questionnaire, the burden of proof will shift to the employer to demonstrate that it did not discriminate against the applicant, making it harder to defend any potential disability discrimination claim.

Equal pay

The Government wants to “shine a spotlight” on workplace gender pay discrimination and in this regard the Act introduces a power for the Government to introduce regulations requiring businesses with 250 or more employees to publish their pay statistics. The Government has however, committed to not using this power until 2013 at the earliest and only then if sufficient progress on reporting has not been made.

This provision was heavily criticised in the House of Commons and the Conservatives have indicated that they would impose mandatory equal pay audits for all employers, regardless of their size, but only once the employer has lost an equal pay claim.

Positive action

The Act will enable employers to take positive action to appoint an individual from an under-represented group, provided they meet the criteria for the position. Should the Conservatives win the General Election in May 2010 however, they have indicated that they may not implement this provision.

Comment

Whilst the Act has been widely welcomed by employers and advisers, the number of changes set to come in to force will no doubt present challenges to employers. With this in mind, it is important you review your current practices to ensure you have in place appropriate measures to ensure compliance and reduce the risk of discrimination claims when the Act comes into force which is expected to be October this year. To help prepare you for the Act's introduction, we will be running half day seminars after the summer break in order to advise upon the key principles set out in the Act and what measures employers need to put in place to comply with the new law. If you would be interested in attending one of these seminars please e-mail tlf@glaisyers.com.

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