

## **The Equality Act 2010 Impact on Employers – HR Factsheet**

The Equality Act came into force on 1 October 2010. It replaces all previous discrimination law over the past 40 years from the Sex Discrimination Act 1975 to the Sexual Orientation Regulations 2003. As the majority of the Act's provisions are due to come into force this now, employers need to ensure that their policies, procedures and practices are compliant with the requirements of the Act. The focus of this factsheet is on the Act's key changes to discrimination law which are likely to have the greatest impact on employers.

### **Key changes**

There are a number of new discrimination claims which are being introduced by the Equality Act as well as amendments to existing claims which will affect employers.

#### ***Dual discrimination***

Under the Equality Act, claimants who believe they have been discriminated against because of a particular combination of two protected characteristics can bring a dual discrimination claim. Therefore a black woman could bring a dual sex and race discrimination claim. Only claims of direct discrimination can be brought and it is limited to a combination of two of the protected characteristics.

The aim of the provision is to address the discrimination based on 'specific stereotypes, assumptions or prejudices' about those with a particular combination of protected characteristics, i.e. black men or asian women. A claim of dual discrimination can be brought alongside single discrimination claims and claimants do not need to be successful in their single claims in order to be successful in a dual discrimination claim. However, success in a dual discrimination claim does not entitle the Claimant to any additional compensation. This provision is due to come into force in April 2011.

#### ***Discrimination arising from a disability***

This replaces the previous claim of disability related discrimination in the Disability Discrimination Act (DDA). Whereas under the DDA, the disabled person had to demonstrate less favourable treatment compared to a non-disabled person, the new claim only requires the disabled person to show that they have been 'unfavourably' treated 'because of something arising or in consequence' of their disability. Employers will have to show that any unfavourable treatment was a 'proportionate means of achieving a legitimate aim' in order to justify that treatment. This will impact on disability related absences which will inevitably be 'arising from or in consequence of' a person's disability. Employers will therefore still need to consider reasonable adjustments for disabled persons and whether they are justified in terminating the employee's employment for their absence. This will involve a detailed analysis of their current condition and prognosis. The use of an occupational health provider is strongly recommended with sickness absence cases.

#### ***Pre-Employment Enquiries about health***

Under the Equality Act, employers will be acting unlawfully if they ask a job applicant questions about their health (including any disability), unless those questions fall within one of six exceptions. The main exceptions employers are likely to rely upon are to establish whether reasonable adjustments are needed in the recruitment process and whether the applicant can carry out a function intrinsic to the job (with reasonable adjustments if required).

This is designed to prevent the use of pre-employment health questionnaires and blanket questioning of candidates about their health, which might preclude a job offer. If organisations currently use pre-employment health questionnaires, a best practice method of managing these ongoing in line with the amended legislation is to accept completed questionnaires in a sealed envelope during an interview. Following an accepted job offer, the envelope should ideally be sent to occupational health for review or, in the absence of a medical advice provider, opened to establish health issues and the requirement to make reasonable adjustments.

## ***Pay Secrecy Clauses***

Pay secrecy clauses in contracts of employment are not outlawed under the Equality Act, but they are rendered unenforceable where the employee has made or sought a 'relevant pay disclosure'. A 'relevant pay disclosure' is a discussion between colleagues (or with a trade union representative) to find out whether there is a connection between any difference in pay and a protected characteristic. Therefore, if a woman asks a male colleague what he is paid because she suspects she is paid less *because she is a woman*, this is a relevant pay disclosure. Employers should note that this is not limited to gender pay differences and therefore could include a discussion between two male colleagues about their pay if one of them suspects they are paid less because they are black or disabled etc. The victimisation provisions in the Equality Act have also been amended to specifically prohibit treating someone less favourably for making or seeking a relevant pay disclosure.

## ***Extension of Associative and Perceptive Discrimination and Harassment***

Under the Equality Act this protection is extended to all protected characteristics, except pregnancy/maternity and marriage/civil partnership. The Equality and Human Rights Commission suggests that a person can be 'associated' with another if they are that person's parent, partner, carer or friend and a claim based on perception includes a mistaken perception.

## ***What employers need to do to be compliant with the Equality Act***

- Amend Equal Opportunities and Anti-Harassment Policies to ensure that harassment and discrimination based on a person's association with someone with a protected characteristic or because they are perceived to have a protected characteristic are covered.
- Ensure that sickness absence policies require a consideration of reasonable adjustments and redeployment, as well as a procedure for consulting with the employee and obtaining medical evidence about their condition, before any decision to dismiss is taken.
- Assess the recruitment process to ensure that pre-employment health questionnaires are no longer used and that blanket questions about health or disability are removed from job application forms. Those conducting interviews should be trained on the new provisions so they are aware of the circumstances in which questions about a candidate's health are allowed.
- Consider whether pay secrecy clauses in contracts of employment should be removed or amended so there is an exception where employees are involved in making or seeking a relevant pay disclosure. Disciplinary policies which list breaching pay secrecy clauses as a disciplinary offence should be amended so it will not apply in cases where the employee is involved in making or seeking a relevant pay disclosure.
- Ensure that recruitment decisions are taken by two people and any decision recorded in writing with reasons why the candidate was unsuccessful or successful. Where possible, standardise recruitment procedures and questions asked at interview to limit the risk of unsuccessful applicants bringing a dual discrimination claim. Consider training managers on the dual discrimination provisions and amend equal opportunities policies to make it clear that direct dual discrimination is also prohibited.
- Provide training to staff regarding the new rights and amendments

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