

## **The Equality Act 2010: the key provisions for employers**

The Equality Bill was first announced by Harriet Harman on 26 June 2008. Whilst a number of its provisions have fallen away, the Bill has now received Royal Assent and most of the Equality Act 2010 (the Act) is due to come into force in October 2010. The intention behind the Act is to harmonise discrimination law and strengthen the law to “support progress on equality”.

### **Concepts of discrimination**

#### **Protected characteristics**

Although the characteristics that are protected by statute remain unchanged, as compared to current law, there have been a few changes to their definitions, including the following.

- Gender reassignment – there is now protection for those who are “proposing to undergo” a process for the purpose of reassignment of sex by changing physiological or other attributes of sex (and so there is no requirement for medical supervision).
- Race/racial group – is now non-exhaustive and it may be that caste is added as a protected characteristic at a later date.
- Disability – a wider range of individuals who are likely to be protected fall within the Act where they meet a general requirement that their impairment has a substantial and long-term effect on their ability to carry out normal day-to-day activities.

#### **Combined discrimination**

Expected to come into force in April 2011, employees will be able to bring claims of combined discrimination, based on a combination of no more than two protected characteristics (save for claims arising out of pregnancy and maternity or marriage and civil partnerships).

#### **Direct discrimination and protection against discrimination by association or perception**

The Act amends the existing definition of direct discrimination so that it will be unlawful to discriminate against someone *because* of a particular protected characteristic. As a result, this will cover those discriminated against because they are associated with a third party who is covered by that protected characteristic. It will also cover discrimination where the employer wrongly perceives the employee to have a protected characteristic (save for marital status/civil partnerships, which are not covered).

#### **Protection against harassment by third parties**

Protection from harassment in respect of the protected characteristics (save for pregnancy/maternity and marriage/civil partnerships) will be widened to protect employees who are harassed by someone from outside of the employer’s workforce.

#### **Positive action**

Employers will be allowed to (not obliged to) discriminate in favour of a minority applicant who is as qualified as another applicant for the same role, if that minority group is under-represented in the workforce.

#### **Indirect discrimination**

A standard definition of indirect discrimination is adopted to ensure uniformity of protection across the protected characteristics. Importantly, indirect discrimination applies to all the protected characteristics (except for pregnancy and maternity), including - for the first time - disability and gender reassignment.

## **Disability discrimination**

To address the gap following the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] (which made it more difficult for a disabled person to prove disability-related discrimination), the Act provides for a new type of disability discrimination – “detriment arising from disability”.

The Act sets out that a person (A) discriminates against a disabled person (B) if: he treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim (ie it cannot be justified). In order to discriminate, A must know, or be reasonably expected to know, that B had the disability. This protection replaces the old “disability-related discrimination” head of claim.

## **Gender pay and equality reports**

One of the aims of the Act is to promote transparency within the workplace and the Act gives the Government power to require employers to publish information relating to differences in pay between male and female employees if the employer has over 250 employees (private sector) or 150 employees (public sector). It is unlikely that these provisions will come into force before April 2011 (in relation to the public sector) or before 2013 in relation to private sector employers. Public sector employers meeting the threshold are also likely to have to report on their disability and ethnic minority employment rates.

## **Pay secrecy clauses**

Contrary to some earlier media reports, pay secrecy clauses will not be banned but a secrecy clause will be unenforceable against employees involved in a “relevant pay disclosure”. There is likely to be much discussion over what a relevant pay disclosure is, but it is clear that the disclosure in question must relate, to some degree, to the question of whether pay may be discriminatory.

## **Employment tribunals**

Employment tribunals will be able to make recommendations against unsuccessful respondents in discrimination cases to include requirements to remedy matters not just for the individual claimant but also for the wider workforce. A failure to comply with a recommendation would not result in enforcement action but a failure to comply could be used in evidence to support later discrimination claims.

## **New equality duty on public bodies**

Not expected to come into force before April 2011, a single equality duty will impose a duty on a public body, when exercising its functions, to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act
- advance equality of opportunity between those with a protected characteristic and those without (except in relation to the characteristic of marriage and civil partnership)
- foster good relations between those with a protected characteristic and those without (except in relation to the characteristic of marriage and civil partnership)

## **Pre-employment health questions**

Health questions during the recruitment process will be banned (but are permitted once an employee has accepted employment).