

Employment news: Equality Act reaches the statute book

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Having survived a series of arcane Parliamentary processes (such as 'wash-up' and 'ping-pong'), the much heralded statute aimed at consolidating and rationalising discrimination law received Royal Assent on 8 April 2010. Do employers need to take heed or is it business as usual?

The main provisions of the Equality Act 2010 will come into effect on 1 October this year and its impact is likely to be subtle rather than dramatic. It replaces existing discrimination legislation with a single Act that covers discrimination both within and outside the employment field. It covers discrimination on grounds of sex, race, disability, age, sexual orientation and religion or belief (the 'protected characteristics').

Any change in the precise words used in legislation, even if it is not intended to change the substantive law, will have some unintended consequences. These, however, tend to emerge over time, and the impact is rarely felt in the first year after a new law comes into effect. But some of the Act's changes are substantive and potentially problematic for employers and employees.

What will the Act do?

Harmonisation

The Act harmonises key concepts and definitions, such as indirect discrimination, justification, occupational requirements and the burden of proof. Technical and historic differences between the definitions in different statutes gave rise to confusion (and, some would say, unnecessary case law).

Perception and association

Direct discrimination will cover discrimination by *association* with someone with any protected characteristic (for example, harassing an employee because they care for an elderly relative would be discrimination by association because of age).

The Act will also cover discrimination by *perception* (for example, treating someone less favourably because you perceive them to be Muslim because of the way they dress). The employee will be protected from discrimination because of religion, even if he or she has no actual religious belief.

Third party harassment

The Act extends the protection available to employees who are harassed at work by third parties such as clients or customers. At present, this protection is available in cases of sex-based or sexual harassment, but not in cases involving other protected characteristics. Employers will be liable where they have failed to take reasonably practicable steps to prevent harassment by third parties where the employer knows that this has taken place on at least two occasions.

Restriction on pre-employment questions about health

The Act restricts the ability of employers to ask questions relating to a job applicant's health record. A question about health may only be put if, for example, the employer needs to establish whether the employee will be able to carry out the functions that are 'intrinsic' to the job, or to establish whether any adjustment needs to be made for a disabled applicant who needs to undergo an assessment for the job. Whilst a person will not be able to complain of discrimination just because a question has been put when it should not have been, that person will be able to bring a claim about the way in which the employer acts on that information and the burden of proof will fall on the employer if the conduct amounts to unfavourable treatment.

Protection for disabled employees strengthened

The Act generally extends the protection available to disabled people, which has been narrowed as a result of recent case law. Disabled people will for the first time be protected from 'discrimination arising from disability', a new concept which covers unjustified unfavourable treatment 'because of something arising in consequence of ...disability'. An example might be a decision not to appoint someone to a job because arthritis made it difficult for them to stand up to make presentations to clients. This new definition is very wide and it is not clear how close the connection between the disability and the 'something' will have to be for an employer to be liable.

Disabled employees will also be protected from indirect disability discrimination for the first time.

Positive action rules extended

Positive discrimination is currently unlawful and will remain so under the Act, except in the very specific circumstances described below. Positive discrimination means giving more favourable treatment to someone because they have a protected characteristic.

Positive action on the other hand is lawful, but is currently restricted to action such as training designed to encourage under represented groups to apply for particular jobs. The Act will allow employers to recruit or promote someone from an under represented group, but only where they have a choice between two or more equally qualified candidates. Arguably this is a form of positive discrimination, although the Act calls it 'Positive action: recruitment and promotion'. The question of what being 'equally qualified' means is not dealt with in the Act.

Protected discussions about pay

The Act will protect employees who discuss their pay with one another (or with others such as union representatives) with a view to establishing whether there is a connection between pay and one of the protected characteristics. Clauses in contracts prohibiting these discussions will be unenforceable. It is unclear how much a pay-related discussion must concern the possibility of discrimination for it to attract protection under the Act.

Gender pay reporting

The Act also contains proposals for gender pay reporting, aimed at reducing the persistent gender pay gap. However, these provisions will not come into force until 2013 at the earliest.

Overseas employees

The Act apparently reduces the protection available to employees of UK companies who work overseas. At present, those who do at least some of their work in the UK or have sufficient connection with the UK are covered by UK discrimination law. These old rules do not appear in the Act and it will be a matter for tribunals to decide whether the protection of UK law should apply.

Already then it is clear that there are significant areas where the meaning of the law and its effect on individuals is debatable. As always, it will be for the courts to fill the gaps.

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