

## **The Equality Act 2010 - What Does It Mean For Employers?**

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The Equality Act 2010 ("EA 2010") is the most comprehensive piece of discrimination legislation created in the UK and harmonises 116 different Acts of Parliament, Regulations and Codes of Practice into one Act. Most parts of the EA 2010 came into force on 1<sup>st</sup> October 2010. It affects all employers whether large or small.

### **What are the main changes?**

#### **1. Pre-employment questionnaires**

Employers will **not** be able to ask pre-employment health questions prior to making a job offer or prior to placing employees in a pool of employees offered work. There are some exceptions - most notably that in relation to jobs that require physical effort, such questions can be asked to establish whether the applicant would be able to carry out a function that is intrinsic to the work concerned.

This changes the position that we have all become used to in that the Disability Discrimination Act 1995 did not prevent an employer from making health or disability related enquiries of job applicants (albeit it did make it unlawful to use the result of such enquiries to discriminate against a candidate because of his or her disability).

This is best explained by the following example. Candidate A is the best qualified candidate for the job in terms of skills, qualifications and experience, but another candidate B is employed for the post. If Candidate A had been asked about their health prior to any job offer being issued to either candidate, and this had revealed that he had a disability, then the onus will fall to the employer to show that disability discrimination had not occurred.

#### **2. The Protected Characteristics**

The EA 2010 merges discrimination and equality legislation into categories called "protected characteristics" and seeks to ensure that in employment, education, housing, service provision and public functions, individuals are not discriminated against on the basis of a protected characteristic. These characteristics include: age, disability, gender-reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Whilst, at first glance, this would seem quite a wide-ranging list, there is nothing here that was not already covered by existing legislation. Employers will therefore be relieved to know that the characteristics covered are largely the same now as they were prior to the EA 2010 coming into force.

However, it is worth noting that the previous Government commissioned the National Institute of Economic and Social Research to investigate the extent to which caste discrimination is an issue. Whilst the EA 2010 does not bring in a prohibition on caste discrimination, if there is evidence of a need to legislate further, secondary legislation may follow in this regard.

### **3. Dual discrimination**

Whilst not yet in force, it is expected that the EA 2010 will, for the first time from April 2011, allow an employee to claim that less favourable treatment arose from a combination of two protected characteristics.

An example of a situation such as this would occur where a black woman is passed over for a promotion because the employer believes that black women are not competent in customer-facing roles. At present, an employer may well be able to defend the race allegations by pointing to the fair treatment of black men in the company and defend the sex discrimination aspect of the claim by demonstrating that women are generally treated equally to men in the company. However, as from April 2011 if combined discrimination comes in to force, a black woman would be able to attempt to prove that the less favourable treatment was because of the combination alleged (i.e. being black and female), in comparison to someone who does not have either of the characteristics.

It is expected that the combination will be any two of the protected characteristics set out in the EA 2010 (except marriage and civil partnership, or pregnancy/maternity). This right to make combined claims of discrimination will probably make it harder for employers to defend claims and also more costly as Tribunal hearings are likely to take longer, as employers will need to bring more evidence to rebut the allegations.

### **4. Direct discrimination**

One of the most important changes the EA 2010 incorporates is also the most subtle - the change to the definition of direct discrimination. This now occurs when an individual is treated less favourably "because of" a protected characteristic (previously it was where an individual was treated less favourably "on the grounds" of a protected characteristic). What this means is that the protected characteristic now does not need to be the only or main reason for less favourable treatment and could arguably make it easier for the individual to prove direct discrimination.

Furthermore, this means that an individual is protected when they have been discriminated against because it is mistakenly perceived that they have the protected characteristic (even if they do not). Further, discrimination against an individual because they are associated with (i.e. care for, are related to etc) a person with a protected characteristic is outlawed.

### **5. Indirect Discrimination**

Indirect discrimination occurs when a policy or practice that applies to everyone particularly disadvantages any person who shares a protected characteristic. Indirect discrimination under the EA 2010 is defined as "*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*"

Indirect discrimination can only be justified by an employer if they can show that the policy or practice is a proportionate means of achieving a legitimate aim. Indirect discrimination had already applied to age, race, religion or belief, sex, sexual orientation and marriage and civil partnership. It has now been extended to cover disability and gender re-assignment. It does not apply to pregnancy or maternity.

### **6. Equal Pay**

Pay discrimination remains one of the most persistent forms of inequality in the UK, with female workers earning less than men for the same work, or work of equal value. A range of measures are designed to target this, largely through transparency about pay. For example, pay secrecy clauses in employment contracts have been

outlawed, with employers no longer able to discipline staff for discussing and comparing their pay, where this may be linked to legitimate discussions between them as to whether discrimination is occurring.

### **7. Harassment**

An employer must take reasonable steps to prevent a third party (to include a customer or contractor) from harassing an employee if the employee has been harassed on at least two other occasions.

#### **What should I be doing now?**

If you are an employer (small or large) then you should ensure that your practices are in accordance with the EA 2010 and that may well involve you updating your Equality and Protection from Harassment policy and training your managers on the new procedures, particularly with regard to recruitment.

It is also worth familiarising yourself with the new statutory codes of practice issued by the EHRC and also the ACAS guidance - "The Equality Act - What's New for Employers".

***For further information, please contact Rupa Mooker, Senior Associate, or Graham Mitchell, Partner, Employment Law Group, MacRoberts LLP on 0141 303 1100.***

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