

Equality at work



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Discrimination in the workplace is governed by the Equality Act 2010. This brings together into one place all of the equality laws that had developed over a number of years, including those based on EU law. It also covers discrimination in other areas such as the provision of goods, facilities and services.

This Inbrief gives an overview of the law in an employment context.

Background

Equality legislation has been around now for 50 years. The Equality Act 2010 brings all of these laws together into one piece of legislation. Much of our discrimination law has been influenced by EU directives and cases. Although these no longer apply directly after Brexit, the law is likely to continue to be based on these underlying principles.

Protected characteristics

"Protected characteristic" is the general term used for the various strands of discrimination. The protected characteristics are:

- ▶ **Age** – which covers any age
- ▶ **Disability** – defined as a physical or mental impairment which has a substantial effect on day to day activities or participation in working life (see our [Inbrief on disability discrimination](#) for more information)
- ▶ **Gender reassignment** – which includes anyone who intends to change their gender or is in the process of doing so
- ▶ Being **married or in a civil partnership**
- ▶ **Pregnancy and maternity** – which includes taking maternity leave
- ▶ **Race** – which covers colour, nationality, national origins and ethnic origins
- ▶ **Religion or belief** – which covers any religion, religious beliefs, philosophical beliefs, and the lack of a religion or belief
- ▶ **Sex** – which covers being a man or a woman
- ▶ **Sexual orientation** – which covers a sexual orientation towards the same sex, the opposite sex, or both sexes

Types of discrimination

There are different types of discrimination, all of which apply in the workplace:

- ▶ **Direct discrimination** - less favourable treatment because of a protected characteristic. For example, refusing to employ a woman because she is pregnant. Apart from direct age discrimination, direct discrimination cannot be justified.
- ▶ **Indirect discrimination** - applying a provision, criterion or practice which disadvantages an employee/job applicant, would put others with the same protected characteristic at a particular disadvantage, and which is not a proportionate means of achieving a legitimate aim (i.e. not justified by the employer). For example, an employer with a rule that all staff must work weekend shifts may disadvantage Christian employees who hold a genuine belief that they should not work on Sundays. There is also a new type of indirect discrimination from 1 January 2024 - applying a provision, criterion or practice which disadvantages persons who share a protected characteristic and which puts a person without that protected characteristic at "substantively" the same disadvantage. This can also be justified by the employer.
- ▶ **Victimisation** - subjecting someone to a detriment for making a complaint or bringing or assisting with a claim. For example, not promoting an employee because she had previously brought a grievance about race discrimination.



- **Harassment** - unwanted conduct related to a protected characteristic which violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. For example, making fun of a colleague's mental health condition. The definition covers both single acts directed at a particular person and more general behaviour that creates an inappropriate environment. Sexual harassment is unwanted conduct of a sexual nature. It is also unlawful to treat someone less favourably because they have rejected or submitted to these types of unwanted conduct.

Direct discrimination and harassment also apply where this is based on a perceived characteristic, whether this perception is correct or not. For example, if an employee is harassed because he is mistakenly perceived to be gay, this will be unlawful sexual orientation discrimination. This also means that in some cases a person doesn't need to reveal their actual characteristics in order to make a claim. For example, if someone is harassed based on sexual orientation or gender reassignment, they can bring a claim for harassment without revealing these private details about themselves.

Similarly, direct discrimination or harassment can be based on the characteristics of a person with whom the employee associates, rather than their own characteristics. For example, it would be unlawful religious discrimination to treat a female employee badly because her husband is a Muslim, even if she is not a Muslim herself.

Who is protected?

In the employment context, it is unlawful to discriminate against:

- Job applicants - in relation to recruitment arrangements and decisions, harassment and victimisation.
- Employees - in relation to terms, promotions, transfers, training, benefits, dismissal, harassment and victimisation.
- Ex-employees - where the discrimination is closely connected to the employment.

"Employment" is defined quite widely for the purpose of discrimination law. It covers any contract personally to do work, meaning that most self-employed workers will also be protected. There are also separate provisions which prevent discrimination against agency workers and partners.

Disability discrimination

As well as the types of discrimination set out above, employees with a disability have two additional areas of protection.

Discrimination "arising from disability" occurs where an employer treats a disabled employee unfavourably "because of something arising in consequence of his or her disability" and the employer cannot show that the treatment is justified (i.e. a proportionate means of achieving a legitimate aim). For example, if an employee has clinical depression amounting to a disability and as a consequence does not turn up for work on most days, an employer who treats him unfavourably (e.g. by giving him a final written warning) would discriminate unless able to show that the giving of a final warning was a

proportionate means of achieving a legitimate aim.

There is also a duty on employers to make reasonable adjustments for disabled employees. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice imposed by the employer or by a physical feature of the employer's premises, the employer has a duty to take reasonable steps to avoid that disadvantage. There is also a duty to provide an auxiliary aid if this will avoid a disadvantage to a disabled employee. Reasonable adjustments can cover all kinds of steps, from physical alterations to premises to changes to working patterns or duties.

For more information on disability discrimination, please see our [Inbrief on this topic](#).

Equal pay

There are separate provision in the Equality Act about equal pay, which covers inequality in pay or other contractual terms between men and women.

An employee can make a claim for equal pay if there is an actual comparator of the opposite sex who is paid more for carrying out work of equal value. If there is no actual comparator, hypothetical comparators are also permitted - meaning that a woman can say "I would have been paid more if I were a man" without the need to identify a specific man who is paid more, and bring a sex discrimination claim.

There is also special protection for women on maternity leave.

An employer can defend an equal pay claim by showing that any difference in pay (or other contractual terms) is due



to a "material factor" other than sex. This reason needs to be genuine. However, if the reason itself has a discriminatory effect, the employer must go further and show that it is objectively justified. For example, if bonuses are paid for working anti-social hours, this may disadvantage women who tend to have childcare responsibilities and so are unable to work those hours. In this case, the employer would need to show both that there is a legitimate aim of paying bonuses in this way, and that this is a proportionate way of meeting that aim.

The law on equal pay can be complex, and our [Inbrief on this topic](#) provides further information.

Employment benefits

The law also applies to discrimination in the provision of employment benefits. This means that benefits that are provided to opposite-sex couples must also be provided to same-sex couples. This could apply to a wide range of benefits — for example, pension benefits for partners, medical insurance coverage, beneficiaries of death in service benefits, and travel or other concessions. There is an exception for benefits that are only provided to both married couples and civil partners, which means it is not unlawful discrimination to limit benefits to married couples and civil partners only.

Occupational requirements and positive action

As explained above, some types of discrimination can be justified. However, it is generally not possible to justify direct discrimination (except for direct age discrimination).

There is a limited exception to this, which applies where having a particular

protected characteristic is a "**genuine occupational requirement**". The employer must take into account the nature of the employment and the context in which it is carried out. The employer will only have a defence to a direct discrimination claim if it can show that this requirement is genuine, and that applying this requirement is a proportionate means of achieving a legitimate aim. It is likely to be difficult for an employer to show a valid occupational requirement, and alternatives such as allocating specific duties to others should always be considered. Possible examples might be requiring a black actor for the lead role in Othello, or hiring only female employees for the role of attendant in a women-only changing room

There are some additional exceptions relating to religion and belief:

- ▶ An employer with an ethos based on religion or belief may, in certain circumstances, show that being of a particular religion or belief is an occupational requirement.
- ▶ Certain requirements relating to sex, marriage or civil partnership, gender reassignment and sexual orientation can be used if it is a proportionate means of complying with religious doctrine or avoiding conflict with religious convictions. This exemption applies only to those who work for an organised religion - it does not apply where the employer simply has a religious ethos, such as a faith school

There is also a limited power to take positive action, which involves favouring an under-represented group. Where an employer reasonably thinks that persons who share a protected characteristic (e.g. women or older people):

- ▶ have needs which are different from others who do not share the characteristic;
- ▶ suffer a disadvantage connected to the characteristic; and
- ▶ have a disproportionately low participation rate in an activity

it can take action to meet those needs or to enable or encourage those persons to overcome the disadvantage or to participate in the activity. However, the action taken by the employer must be a proportionate means to achieve whatever its aim is. Possible examples include training, targeted assistance with job applications, work experience or free English language lessons.

The Equality Act also contains positive action provisions applying to recruitment and promotion. These allow a 'tie break' in a favour of disadvantaged groups in circumstances where employers are faced with candidates of equal merit. However, the preferred candidate must be "as qualified" as the other candidates, and the employer cannot have a general policy of treating such candidates more favourably.

Public sector equality duty

Public sector bodies have a single equality duty extending to all characteristics other than marriage and civil partnership. When exercising functions, the authority is required to have regard to the need to eliminate discrimination and harassment, to advance equality of opportunity and to foster good relations between those who share protected characteristics and those who do not. These duties apply to persons who are not public authorities but who exercise public functions. For example, academies and



social landlords will be subject to the duty.

Equality policies

Employers need to ensure that they have one or more diversity or equal opportunities policies in place. They must also ensure that staff are aware of these policies and receive appropriate training. Acas guidance recommends that these policies should be reinforced by:

- ▶ making it clear to staff what behaviour is unacceptable, including the fact that discrimination is unlawful;
- ▶ making sure that staff know what to do if they think discrimination or harassment is taking place;
- ▶ ensuring that staff are trained in equality issues, including issues relating to race.

An employer will normally be liable for acts of discrimination carried out by its employees. The employer will only have a defence if it can show that it has taken all reasonable steps to prevent employees from discriminating against or harassing other employees. A diversity or equal opportunities policy, backed up by appropriate training (which is not simply a "tick box" exercise), is essential if the employer wants to avoid being liable for discriminatory conduct by its employees.

This is also very important to help show compliance with the duty to take reasonable steps to prevent sexual harassment (unwanted conduct of a sexual nature). This applies to sexual

harassment by both colleagues and third parties (such as customers, clients and members of the public). If the employer fails to comply with this duty it can lead to an increase in compensation following a successful Employment Tribunal claim for sexual harassment, and the Equality and Human Rights Commission may also take enforcement action.

Equal opportunities monitoring

There is no obligation in the Equality Act (or elsewhere) for employers to collect information from employees about their protected characteristics, and similarly no obligation not to do so. Employers who decide to collect such information should do so on a voluntary basis, explaining why the question is being asked and what the information will be used for. For most purposes, it will be possible for the information to be gathered confidentially and anonymously and this may persuade employees to co-operate. Remember that information about race, health and sexual orientation will be "special category" information for data protection purposes and should be treated accordingly.

Equality and Human Rights Commission

The Equality and Human Rights Commission have published statutory codes of practice on employment and on equal pay, which are taken into account by the Employment Tribunals when deciding discrimination cases.

There is also associated guidance for employers on a variety of equality topics. These documents provide useful guidance and examples on different types of discrimination, and can be accessed on the EHRC website www.equalityhumanrights.com.

For further information on this subject, please contact:



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