

## **Q & A Brief for Employers on the Equality Act 2010**

This Briefing Note has been produced by the Employment Team to assist businesses in determining what practical steps you need to take to ensure your business is legally compliant with the new law.

### **What are the employment changes introduced by the new Act?**

Most of the old anti discrimination laws will be repealed to make way for the new Act making it easier to apply the law.

The grounds of discrimination (now called ‘protected characteristics’) within which claims are made are *still* age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The most significant change

Despite what has been said in the press, the Act will not result in radical changes in the law and employers already compliant with equal opportunities will probably not need to significantly revise your practices. We set out here the main changes. From 1 October 2010 it will be unlawful to:

- Discriminate on grounds of associative discrimination and perceptive discrimination;
- Ask job applicants health or disability related questions during the recruitment and selection process except in certain prescribed areas;
- Discriminate for a reason related to disability
- Fail to take steps to protect your employees from harassment by third parties e.g. customers

### **What are associative and perceptive discrimination?**

Associative discrimination is to treat someone less favourably because of their *association* with a person who has a protected characteristic. The employee bringing the claim does not need to possess the protected characteristic.

**Case studies of associative discrimination:**

June works for Uckfield Organics and cares for her disabled son. Her manager thinks that she will not be able to concentrate on her job because of the amount of care required for her son and she is excluded from a performance related bonus scheme. June has been treated less favourably because of her association with a disabled person and this is unlawful.

Susan is excluded from corporate events and so misses out on trips abroad and to London, because she is married to a Moslem man. Susan has been treated less favourably because of her association with a person of a particular religion and this is unlawful.

Perceptive discrimination is where an employee is subjected to less favourable treatment because they are *perceived* to have a protected characteristic, whether they actually do or not.

**Case study of perceptive discrimination**

Jim Mobu a white applicant is rejected for a job because the employer thinks he is black due to his African sounding name on his application form. Jim has been treated less favourably because he is perceived to be black and this is unlawful race discrimination.

Associative and perceptive discrimination do not apply to the protected characteristics of marriage and civil partnership, pregnancy and maternity. This means that it is only possible to directly discriminate against somebody on these grounds if the less favourable treatment is because the person bringing the claim is married or in a civil partnership or is pregnant or on maternity leave.

**There has been a lot of publicity about the fact that employers cannot now ask about whether a job applicant is actually fit to do the job for which they are applying. Is this true?**

No. Although the Act does limit the questions you can ask job applicants about their health and disabilities to ensure that disabled job applicants are not rejected purely because of their medical condition.

**So what can I ask?**

Before you make a job offer (whether conditional or not) you can ask questions in these circumstances:

- You can ask questions so as to determine whether you need to make reasonable adjustments to the recruitment process such as allowing an applicant more time to read any forms to complete if they have dyslexia.
- You can ask questions to determine whether the job applicant can do the intrinsic elements of the job. This is common sense as otherwise you cannot decide whether you can offer the job to the applicant.

If you ask questions at interview about a person's health on other issues and the applicant is not offered the job *and* is suitable for it, then you could be liable for a successful disability discrimination claim. At any tribunal hearing, if you fail to show that your decision to reject such an applicant was not disability discrimination then you will lose.

#### **Case study of health and disability questions during the recruitment process**

Uckfield Enterprises is recruiting a warehouse person. The job requires the ability to lift heavy objects and to complete stock forms accurately. Jim applies for the job. He has a heart condition. The application form says: *'Please contact our HR Department if you need the application form in an alternative format or if you need any adjustments for the interview.'* Jim telephones and says that because of his heart condition he cannot walk up more than one flight of stairs and is reassured that the interviews will take place on the ground floor and the warehouse has no stairs at all.

The company does not give information about Jim's call to the interviewer. If Jim was then rejected because the company felt that his medical condition and inability to walk up the stairs meant he couldn't do the job this could be unlawful disability discrimination.

Jim is invited to interview and is asked about whether he can lift, as this is an intrinsic part of the job. Jim explains that he cannot lift heavy objects and the company discusses with Jim what reasonable adjustments can be made to minimise the disadvantage caused by his disability. This may be providing mechanical aids, or varying the work so that he concentrates on the administration or client dealing work. Ultimately the company may decide that as the only warehouse worker and if there are no reasonable adjustments that can be made they cannot recruit him.

- You can also ask questions for the purposes of monitoring equality. For example, you may want to monitor whether women are seeing your advertisements by asking applicants what their gender is and how they found out about your vacancy. It is best to do this anonymously as otherwise a job applicant may claim this information was used to discriminate against them when recruiting.
- You can ask whether a person has a particular characteristic where this is a requirement for the job. For example, a Counselling Service for people with mental health problems requires a counsellor with personal experience of mental health issues and so are entitled to ask job applicants whether they have such a condition. However it is rare for such a requirement to be justified so do take advice before advertising in this way.

### **Are there any other changes in the law on disability discrimination?**

Yes. It is unlawful to discriminate by treating a disabled person unfavourably because of something connected with their disability (e.g. their sickness absence) and not just the fact of their being disabled, unless it can be justified. An employer may not be liable if they did not know (or could not be expected to know) that the employee was disabled.

#### **Case study on disability discrimination**

Jim has MS and is a production worker. His employer decides to increase the length of the shifts to increase productivity. Jim cannot work longer hours and so he is not as productive as his colleagues. The company decide that they cannot carry Jim as that would be giving him preferential treatment and he is dismissed.

Jim is not dismissed because of his disability, which would be unlawful, but for a reason connected to it i.e. his inability to do the hours or the additional work. If the company can justify the decision to dismiss Jim e.g. if there is a business requirement for him to do the longer hours and there is no alternative to dismissal such as varying his duties then the decision will not be discriminatory.

**How can I be liable if our customers or other third parties harass any employees?**

Harassment is: ‘unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating an individual’s dignity or creating an intimidating hostile degrading humiliating or offensive environment for that individual.’ (Harassment for reasons relating to a person’s marital or civil partnership or their pregnancy or maternity are not covered by the Act).

If an employee has been harassed in the course of employment on at least two previous occasions (whether or not by the same third party) where you are aware it has taken place and do not take reasonable steps to stop it happening again, you can be liable for unlawful harassment.

#### **Case study on harassment by third parties**

Uckfield Organics employ Rachel a receptionist who is blonde and looks much younger than her age. She is repeatedly teased by clients and finds this offensive. On two separate occasions she speaks to her manager. However he decides to do nothing as he feels her presence on reception is good for business. In that situation he would be liable for an age/sex discrimination claim by Rachel if it happened again.

#### **What do I need to do to ensure my business is legally compliant?**

Examples of actions you should be considering now and in which we can assist you to ensure that your business is legally compliant, include:

- Review your equal opportunities/equality policies to expressly include reference to these new forms of discrimination (and to give practical examples by way of explanation). You should also review your associated policies such as on disciplinary, grievance and bullying or harassment.
- Review your recruitment and selection documentation and processes so as to remove any unlawful questions on job applicants’ health/disability and to ensure that such questions at interview are limited to those necessary to determine whether the applicant can do the intrinsic elements of the job.
- Brief your managers/supervisors so as to avoid potentially discriminatory associative or perceptive practices occurring and discuss and act on how you can raise awareness amongst your staff e.g. by including it in induction training for new starters, departmental briefing or attendance on formal courses (whether they want to or not).

- Identify at risk areas e.g. ensuring that managers of employees who have care responsibilities are aware of the changes with regard to associative discrimination; ensuring that managers involved in shortlisting/interviewing are aware of and comply with any changes in your recruitment and selection procedures; ensuring that managers with responsibility for employees in client facing roles are aware of the changes with regard to third party harassment.

NB If you have an equal opportunities policy and take active steps to promulgate it in your business this can be a defence to a claim of unlawful discrimination. In a recent sex discrimination case a job applicant was awarded £4,000 because of the “complete failure” of the employer to follow their Equal Opportunities Policy.

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