Equality Act 2010
What does it mean for employers?
April 2010
Contents

Introduction

Summary

Protected characteristics

Types of discrimination

Pre-employment health questions

Exceptions

Enforcement

Pay transparency

Advising equality

Timetable

Find out more
Introduction

The Equality Act 2010 aims to consolidate, simplify and (to an extent) expand existing discrimination law. In this briefing note we focus on the most important aspects of the Act from an HR perspective, although the Act covers many other areas, including discrimination by service providers, educational institutions, clubs and associations and landlords, amongst others. Further e-briefings will follow, looking at the public sector single equality duty and new age discrimination law applicable to service providers.
Summary

New terminology:

‘protected characteristics’

New concepts:

• ‘detriment arising from disability’ - clarifies and widens protection against disability discrimination

• dual discrimination.

Extended scope:

• discrimination by association or based on perception included

• indirect discrimination extended to disability and gender reassignment

• protection against harassment by third parties extended

• hypothetical comparators now allowed in some gender pay claims

• ban on health questions in recruitment

• wider tribunal powers to make recommendations

• power to add caste as a protected characteristic later.

Pay transparency:

• power to compel larger employers to report gender pay data

• restrictions on secrecy clauses.

Advancing equality:

• new options for positive action - could trip employers up

• wider public sector equality duties: will affect monitoring and publishing employee diversity data and could impact on procurement decisions.
Protected characteristics

As with existing legislation, the Act protects against discrimination on the following grounds:

• Age;
• Disability;
• Gender reassignment;
• Marriage and civil partnership;
• Pregnancy and maternity;
• Race;
• Religion or belief;
• Sex; and
• Sexual orientation.

These are described in the Act as ‘protected characteristics’.

Disability

The Act widens the range of individuals who can benefit from disability discrimination protection. At present, with some exceptions (e.g., cancer, MS), an impairment usually only qualifies as a disability if it affects one or more of the following ‘capacities’:

• mobility
• manual dexterity
• physical co-ordination
• continence
• ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight
• memory or ability to concentrate, learn or understand, or
• perception of the risk of physical danger.

The Act abandons the list of capacities, relying instead on the general requirement that an impairment has a substantial (i.e., more than minor or trivial) and long-term effect on a person’s ability to carry out normal day-to-day activities (without specifying what those activities might be).

New guidance will be issued by the Government to assist in applying this less narrow definition.
Gender reassignment

This too is given a broader definition than is the case under the current provisions of the Sex Discrimination Act 1975. A person is protected under the Act’s gender reassignment provisions if that person is proposing to undergo, is undergoing or has undergone a process (or part) for the purpose of reassigning their sex by changing physiological or other attributes of sex. The provision removes the previous requirement for the process to have to be undertaken under medical supervision. So it will cover, for example, someone who is born physically male but who decides to live permanently as a woman.

Religion or belief

As with existing regulations, the Act aims to protect against discrimination on grounds of religious or other philosophical beliefs. This includes discrimination on grounds of what an employee does not believe in as well as what he or she does believe in.

There will continue to be much debate as to what kind of non-religious beliefs are covered. The explanatory notes to the Bill confidently drew a distinction between certain beliefs (atheism and humanism) which they asserted were covered, and others which, without further explanation, were said not to be protected (communism, Darwinism, fascism and socialism).

The explanatory notes run contrary to the views expressed by the Employment Appeal Tribunal in the recent case of Grainger Plc and ors v Nicholson (2009). There, the EAT accepted that a belief is not disqualified from being a philosophical belief simply because it is based entirely on scientific conclusions. The EAT gave the example Darwinism, which, it said, ‘must plainly be capable of being a philosophical belief’.

The EAT also added some comments on political beliefs. Although the EAT accepted that support of a political party would not meet the description of a philosophical belief, it noted that that does not mean that a belief in a political philosophy or doctrine, such as Socialism, Marxism, Communism or free-market Capitalism, would not qualify. This part of the EAT’s judgment is not legally binding and indeed was rejected by an employment tribunal recently in the case of Kelly and ors v Unison (28 January 2010), which could well now be going to appeal.

Caste

The Act also includes a power for ministers to add caste as a protected characteristic at some future point. The Government has commissioned some research into this area, the results of which should be available in the Summer. Whatever happens in the general election, there is a good chance that, if the research reveals that caste discrimination is a significant problem in the UK, the Act will be extended.
Types of discrimination

The Act uses the familiar concepts of direct discrimination, indirect discrimination, victimisation and harassment. However, there have been some changes to these concepts.

Direct discrimination

Direct discrimination is defined as discrimination ‘because of’ a protected characteristic. Although existing legislation uses the phrase ‘on grounds of’ rather than ‘because of’, Government ministers have made it clear that they consider the two phrases to be synonymous.

As with existing discrimination law, only direct age discrimination is capable of justification. Other types of direct discrimination cannot be defended (except in the case of lawful positive action or by reference to a specific exemption, as to which see below).

Discrimination by association

The Act makes it clear that discrimination occurs if an employer discriminates against an employee because of a protected characteristic, whether or not the employee him or herself possesses that protected characteristic.

This means, for example, that it will be unlawful to discriminate against someone because they associate with a third person who possesses a protected characteristic.

This kind of ‘associative discrimination’ is already prohibited where discrimination is on grounds of religion or belief, sexual orientation or on racial grounds. The Act puts it beyond doubt that the same principle will also apply to sex, pregnancy, gender reassignment, age and disability discrimination.

By wording the Act in this way the Government aims to bring UK law in line with the case of Coleman v Attridge Law and the European Court of Justice’s clear direction (in that case, in relation to disability discrimination) that member states were required to ensure that discrimination legislation prohibits discrimination in its widest sense, ie not just in that case on grounds of the claimant/victim having a disability, but where the treatment was linked to disability itself.

There are two exceptions.

Firstly, in the case of discrimination on grounds of marital status or civil partnership, direct discrimination only arises if the employee is treated in a particular way because he or she is married or a civil partner. Thus, associative discrimination does not extend into the areas of UK law which fall outside the reach of European discrimination legislation (which does not cover marriage discrimination).

The second exception covers benefits related to the provision of child-care (eg crèche facilities). Essentially the Act says it will not be age discrimination if an employer restricts access to such benefits by reference to the age of the child.

Discrimination by perception

The way the Act is worded means that it is unlawful to discriminate against someone because they are perceived to possess a particular protected characteristic, even if the employer is mistaken.

This kind of discrimination by perception was already prohibited where discrimination was on grounds of sexual orientation, age or on racial grounds. The Act puts it beyond doubt that the same principle also applies to sex, pregnancy, gender reassignment, age and disability discrimination by perception (at least if the legislation is taken at face value).

As with associative discrimination, the protected characteristic of marital status/civil partnership is not covered by perception discrimination.

Breastfeeding

Discrimination against a woman because she is breastfeeding is deemed to be a case of sex discrimination.
**Combined discrimination**

Individuals who consider that they have been discriminated against because of a combination of protected characteristics (as opposed to a single characteristic) will be able to bring claims of dual discrimination. The new concept only applies to claims brought based on two combined protected characteristics (excluding pregnancy and maternity, or marriage and civil partnerships).

An example of dual discrimination contained in the explanatory notes to the Bill is a black woman who is passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles, whereas the employer would not feel the same about a white woman or a black man. In other words, it is the combination of being black and female which is the basis of discrimination.

This new type of claim will be limited to direct discrimination claims; indirect discrimination claims and harassment will be excluded. The exclusion of indirect discrimination is perhaps understandable because of the difficulties and complications of identifying the appropriate comparator groups and establishing disparate impact. What is more surprising is the suggestion that harassment should be excluded. However, an individual who believes they have been harassed because of a combination of protected characteristics will still be able to bring a claim of harassment based on those separate characteristics. They might also, in some cases, be able to pursue such a complaint as one of (combined) direct discrimination.

**Indirect discrimination**

Indirect discrimination occurs when a policy or practice that applies in the same way for everybody has an effect which particularly disadvantages people who share a protected characteristic. This kind of discrimination is unlawful unless the employer can show that it is justified ie a proportionate means of achieving a legitimate aim.

As is already the case, unjustified indirect discrimination will continue to be unlawful in relation to the protected characteristics of age, marriage and civil partnership, race, religion or belief, sex, and sexual orientation but not pregnancy and maternity. In addition, the Act extends protection against unjustified indirect discrimination to gender reassignment and, more significantly, disability.

This means an employee or a job candidate who has a disability will be able to complain that an organisation has adopted a provision, criterion or practice (PCP) which puts people with the same disability at a particular disadvantage. To avoid liability the employer will have to demonstrate that the PCP is justified as a proportionate means of achieving a legitimate aim. Significantly, there is no ‘lack of knowledge’ defence available to an employer that did not know the individual was disabled or might be adversely affected.

Indirect discrimination has traditionally been viewed as a means of tackling group disadvantage. It is far from clear how it will be applied in the case of disabilities given the vast range of impairments that could constitute a disability and the huge variation in impacts that a particular impairment could have from one person to the next.

This is one of two changes introduced in an attempt to address the perceived problems caused by the House of Lords decision in London Borough of Lewisham v Malcolm (2008) (a case which changed the group of persons with whom a disabled individual can compare himself and thereby significantly limited future claims). The second change involves the introduction of a new concept of ‘detriment arising from disability’.
Detriment arising from disability

The Act introduces a new type of disability discrimination - ‘detriment arising from disability’. This new provision is intended to work in the same way as disability related discrimination under the Disability Discrimination Act 1995 pre the Malcolm case above (but with a more stringent justification test). It will replace the previous concept of ‘disability related discrimination’ and alleviate the perceived problems created by Malcolm.

There was a problem with the way the original clause in the Bill was worded; it would not, for example, have covered someone who is dismissed because of absence caused by a disability. That defective wording has now been fixed and, in fact, probably goes even further than disability related discrimination was thought to pre-Malcolm - certainly the test for justifying this kind of discrimination will be more difficult to satisfy than the existing test for justifying disability related discrimination.

The new provision reads as follows:

1. A person:
   (A) discriminates against a disabled person
   (B) if—
      (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
      (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

A typical example of this type of discrimination would be dismissing someone because of a poor attendance record when their absences were a consequence of a disability. The employer would have to show that dismissal was a proportionate means of achieving a legitimate aim.

Importantly, an employer will have a defence to a claim if it did not know and could not reasonably have been expected to know that the individual had a disability.

Duty to make reasonable adjustments

As far as employment relationships are concerned, the duty to make reasonable adjustments for the benefit of employees with disabilities appears, superficially at least, to be substantially the same as in the Disability Discrimination Act. The Act does, however, spell out that employers are under a duty to take reasonable steps to provide auxiliary aids/auxiliary services where this would alleviate any disadvantage. It also spells out that the cost should not be passed on to the disabled person.
Harassment

A uniform test of harassment will apply to all the protected characteristics other than pregnancy/maternity and marriage/civil partnerships.

The reason pregnancy/maternity and marriage/civil partnerships are treated differently is because there is not the same need for consistency from EU Law; civil partnership and marital status do not arise from the UK’s European obligations, and the pregnancy and maternity provisions are also dealt with separately and outside of the EU Framework Directive through the Pregnancy Directives.

In the Act, harassment is defined as 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.

At present, legislation refers to unwanted conduct ‘on the grounds of’ the various characteristics. In contrast, the Act talks about unwanted conduct that is ‘related to’ a protected characteristic. This moves the emphasis away from the reason for the harassment. It also means that employees will clearly be able to complain of behaviour that they find offensive even if it is not directed at them. What is more, the ‘victim’ need not possess the relevant characteristic themselves.

As is the case under existing law, harassment will also encompass unwanted conduct of a sexual nature and less favourable treatment for rejecting/submitting to sexual conduct or unwanted conduct based on sex/gender reassignment.

Third party harassment

In 2008 the law on sex discrimination was changed to make it possible for employees to bring a claim against their employer in some circumstances where they have experienced sexual, or sex related, harassment at work by someone from outside their employer’s organisation. Before this, employers could usually only be held responsible for harassment committed by a fellow employee.

The Act extends protection against third-party harassment to all protected characteristics (again, other than pregnancy/maternity and marriage/civil partnerships), where the employer has failed to take such steps as would have been reasonably practicable to prevent the harassment.

Controversially, the ‘three-strikes’ rule used in sex/sexual harassment cases is retained and applied to all protected characteristics. This essentially means that an employer cannot be held responsible unless the employer knows that the employee has experienced third-party harassment on at least two prior occasions (although the perpetrator need not be the same person on all three occasions).

The idea behind this is to ensure employers are not made liable unless something happens to put them on notice that the employee was at risk, giving the employer an opportunity to act to put a stop to any inappropriate conduct. It is questionable, however, whether this wording is consistent with EU law. For example, it would not protect an employee who is harassed only once or twice by a customer, even if that customer is known to have harassed other members of staff in the past; it is arguable that EU law requires the employer to be held responsible where it knew, or ought reasonably to have known, that the employee was at a real risk of being harassed by a third party, yet did nothing to protect the employee.
Equal pay

The Act maintains the distinct regime for the law around sex discrimination in relation to contractual pay and benefits and other contract terms.

Comparators

It is a unique feature of sex discrimination legislation that an individual who claims they have suffered discrimination in respect of their contractual pay must identify an actual ‘comparator’ of the opposite sex who is in the same employment (which usually means employed by the same employer), doing equal work and who is better paid, relying on the Equal Pay Act 1970. The Equality Act retains many of the Equal Pay Act’s provisions.

The case of McCarthy v Smith established that under equal pay law a comparison can be made with the predecessor in post. The Equality Bill did not initially make it clear that that would still be the case. Therefore the Bill was amended to ensure there would be no change.

However, it seems the amendment could have unintended consequences. The new section would also allow a comparison with a successor. This is not currently permitted under the Equal Pay Act 1970.

Hypothetical comparators

Under existing equal pay law, if the claimant cannot point to an actual comparator then he or she cannot make a claim, even if they have strong evidence that their contractual pay is in fact less favourable because of their sex.

For example, if an employer said to a female employee ‘I would pay you more if you were a man’, the employee would only be able to make a claim if there was a man in the same employment doing equal work who was paid more. In contrast, if an employer said ‘I would pay you more if you were white’, the absence of a white employee doing the same work for more money would be no obstacle to a race discrimination claim.

The Act attempts to address this difference in treatment, but only partly. It says that where there is direct sex discrimination in contractual pay but no actual comparator, an individual will be able to bring a sex discrimination claim based on how an employer would treat a hypothetical comparator of the opposite sex.

The claim would have to be brought under the usual sex discrimination provisions in the Act (rather than the special equal pay rules). This means that the shorter three month time limit would apply. It also means that, unlike in equal pay cases, a tribunal would be able to award damages for injury to feelings.

Where contractual pay is concerned, the ability to identify a hypothetical comparator applies only to direct discrimination claims. It will still not be possible to claim indirect sex discrimination in respect of contractual pay where there is no actual comparator.

Material factor defence

The Act retains the material factor defence that currently exists to resist equal pay claims.

As with the Equal Pay Act 1970, the Act gives an employer a defence to an equal pay claim if it can show that the difference in pay is because of a material factor. Existing case-law makes it clear that the material factor must be nothing to do with sex: it must not be directly sex discriminatory and, if indirectly discriminatory, must be justified as a proportionate means of achieving a legitimate aim.
In contrast, the original wording in the Bill appeared to offer an employer two alternatives:

- showing that the pay difference is not due to sex;
  or
- showing (where it is indirectly discriminatory) that it is a proportionate means of achieving a legitimate aim.

This suggested that an employer could have a defence if it could disprove direct discrimination alone. That would have contradicted EU equal pay law.

Unsurprisingly, the Bill was amended, replacing the word ‘or’ with ‘and’. The effect is to maintains the status quo of the Equal Pay Act 1970, requiring the employer to disprove direct discrimination and justify any indirect discrimination.

Pay protection

The Act makes it clear that introducing measures such as pay protection to reduce inequality will always be regarded as a legitimate aim that could potentially justify the indirect discrimination that is often inherent in such pay protection schemes. However, an employer would still have to establish that the way in which it has introduced those steps to reduce the inequality is proportionate. On this point the Act does not expand further so the provision is of little practical help to employers attempting to introduce new pay and grading systems in a fair manner in the hope of tackling historic pay inequality between men and women.
The Act contains an important new provision which was added to the Bill during Parliamentary debates. The new section is aimed at discouraging employers from asking job candidates about their health at an early stage in the recruitment process.

Section 60 of the Act ostensibly prohibits asking about a candidate’s health before offering them work. But this does not provide a free-standing right for an employee to claim should the employer infringe the prohibition. The remedy lies with the Equality and Human Rights Commission, which can take enforcement action under the Equality Act 2006. In practice enforcement action is only likely in the case of persistent offenders.

Employers who ask job candidates about their health could also find it harder to defend themselves against a disability discrimination claim. If an individual is turned down for a job and claims this was discriminatory, then the burden will be on the employer to disprove discrimination where the individual claims that the employer asked questions about their health. It is not clear whether the claimant merely has to allege that the employer asked questions about their health, or must prove that the employer asked such a question, before the burden of proof is reversed in this way.

The new rules will not apply to questions that are necessary for the purpose of:

- establishing whether a candidate will be able to comply with a requirement to undergo an assessment for the job or establishing whether reasonable adjustments are needed in respect of any such assessment
- establishing whether a candidate will be able to carry out a function that is intrinsic to the work concerned
- monitoring diversity
- taking positive action
- where having a particular disability is an occupational requirement, establishing whether a candidate has that disability.
Exceptions

Under existing discrimination law, certain acts that would otherwise be discriminatory are deemed not to be unlawful. Most of these exceptions are retained in the Act. Some of the more significant exemptions are outlined below.

Occupational requirement

If possessing a particular protected characteristic is a requirement of a job, an employer will not be acting unlawfully in refusing to employ someone who does not possess that characteristic provided the employer can show that applying the requirement is a proportionate means of achieving a legitimate aim.

In the case of some protected characteristics, the defence covers a requirement not to possess the characteristic: ie marriage (where the exception applies to a requirement not to be married), transsexuals (where it applies to a requirement not to be a transsexual) and religion or belief (where the defence could apply to a requirement not to be of a certain religion or belief).

This exception replaces the ‘genuine occupational qualification’ and ‘genuine occupational requirement’ exemptions in existing discrimination law.

It is not enough for an employer to simply to decide that they would prefer to employ someone with a particular protected characteristic. Rather, it must be an ‘occupational requirement’. The explanatory notes to the Bill explained this as follows: ‘The requirement must be crucial to the post, and not merely one of several important factors.’

The word ‘occupational’ means the requirement must relate to the nature of the job in question, rather than the nature of the employing organisation.

Even if possessing a particular characteristic is an occupational requirement, the employer still has to show that applying the requirement is a proportionate means of achieving a legitimate aim. The test will not be satisfied if it would have been reasonably possible to achieve the result in some other way.

- The notes to the Bill gave the following examples of when the occupational requirement exemption might apply:
  - The need for authenticity or realism might require someone of a particular race, sex or age for acting roles (for example, a black man to play the part of Othello) or modelling jobs.
  - Considerations of privacy or decency might require a public changing room or lavatory attendant to be of the same sex as those using the facilities.
  - An organisation for deaf people might legitimately employ a deaf person who uses British Sign Language to work as a counsellor to other deaf people whose first or preferred language is BSL.
  - Unemployed Muslim women might not take advantage of the services of an outreach worker to help them find employment if they were provided by a man.
  - A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a gender recognition certificate, in order to avoid causing them further distress.
Religion/belief

Organisations with an ethos based on religion or belief

In addition to the general occupational requirement exemption, there is a separate (but very similar) exclusion that applies to organisations with an ethos based on religion or belief. The defence enables such employers to limit some roles to those who share the beliefs of the organisation.

However, as with the general occupational requirement defence, the employer will still have to demonstrate that being of a particular religion or belief is an occupational requirement and that the requirement is a proportionate means of achieving a legitimate aim. The only difference is that under this defence, the question of whether the requirement satisfies the test is to be determined ‘having regard to [the employer’s] ethos and the nature or context of the work’.

Organised religion

Additional exemptions apply where employment is for the purpose of organised religion. In such cases, some roles can be restricted to people of a particular sex or sexual orientation, non-transsexuals, people who are not married or in a civil partnership; or people who are not divorced or married to (or in a civil partnership with) someone who has been divorced. In addition, requirements ‘related to’ sexual orientation can be imposed on certain roles, ie a requirement to be celibate if gay.

The exception only applies where either of the following principles is engaged:

- the requirement is applied so as to comply with the doctrines of the religion; this is known as the ‘compliance principle’;

- because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers; this is known as the ‘non-conflict principle’.

In the original version of the Bill, the compliance and non-conflict principles were both qualified by the need for any requirement to be of a particular sex etc to be proportionate. That qualification was voted out of the Bill in the House of Lords after representatives of some religions, in particular, argued that it was too restrictive. Yet, despite the absence of any explicit reference to proportionality, European law, in the shape of the Framework Equality Directive, only permits exemptions that are proportionate. Given that UK law has to be interpreted so as to give effect to the Directive, this exemption might not be as wide as it first appears.

The EU Commission has already criticised the absence of any reference to proportionality in existing legislation and could well take proceedings against the UK in due course.
Age discrimination

The various exceptions contained in the Age Discrimination Regulations are repeated in the Act. This includes the default retirement age of 65, which allows employers to retire employees against their wishes provided the correct procedure is followed. Some House of Lords peers did attempts to amend the Bill to repeal the default retirement age but without success.

It remains to be seen how long forced retirement will remain an option for employers. The Government’s review of the law is nearing completion and we expect the default retirement age to be either raised or abolished as a consequence. There is likely to be a formal consultation on any proposals after the election (whichever party comes to power), and a change in the law no sooner than 2011.

For the time being, employers will still be able to retire employees by following the correct procedure. The retirement procedure has not been reproduced in the Act; instead Schedule 6 of the Age Regulations will continue to apply, leaving it as one of the few parts of existing discrimination legislation that will not be repealed and replaced by the Act.

Pay during maternity leave

The Act retains the exemptions that allow an employer to stop paying a woman when she is on maternity leave (other than statutory maternity pay and any contractual enhanced maternity pay).
Enforcement

Time limits

The usual time limits for bringing claims will apply ie (except in equal pay cases) three months from the act of discrimination unless a tribunal considers it just and equitable to extend time.

In equal pay cases the usual time limit for claiming remains six months from the end of employment, unless there is an ongoing ‘stable working relationship’, in which case time does not start to run until six months after that relationship ends. Arguments have arisen through the case law about whether a time limit is triggered when someone continues working for an organisation but in a different role or on new terms. Sadly, there is no attempt to codify the case law and define what is meant by a stable working relationship.

Remedies

As with existing discrimination law, if an employment tribunal upholds a claim of discrimination, it will be able make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate and order the respondent to pay compensation.

In addition, the Act broadens the scope for a tribunal to make recommendations that an organisation takes specified steps to obviate or reduce the effect of any discrimination that has been found to have occurred. At present, where a discrimination claim is upheld an employment tribunal can make a recommendation that the respondent take, within a specified period, action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.’

If an employee is no longer employed by the respondent the scope for a tribunal to make a recommendation is very limited because it is unlikely to have any effect on the claimant.

The Act expands tribunals’ existing powers so that a recommendation can be aimed at reducing the effect of discrimination on any other person rather than simply improving the lot of the complainant. There is, however, no sanction in the Act for failing to comply with a recommendation that does not specifically relate to the claimant.

The notes to the Bill gave the following examples of possible recommendations:

- introduce an equal opportunities policy
- ensure a harassment policy is more effectively implemented
- set up a review panel to deal with equal opportunities
- retrain staff
- publicise selection/promotion criteria.

The power to make recommendations does not apply to equal pay cases so it will not be possible for tribunals to order an employer to conduct an equal pay audit after being found in breach of an equality clause. Interestingly the Conservatives said at one point that they would introduce such a power should they win the next election.

Presumably further guidance and training will be provided to employment tribunals. We also hope that a clear procedure, amended Tribunal Rules or even a Practice Direction will be issued to ensure that there is an appropriate assessment and opportunity or process followed before recommendations are made against an employer.
Pay transparency

Gender pay gap publication - private and third sectors

The Act gives the Government power to introduce new regulations, at some future date, requiring private and third sector employers of more than 250 employees (in Great Britain) to publish their gender pay gap, ie the difference in pay between male and female employees. The obligation will extend to public bodies not covered by the specific equality duties (see below).

The Act does not specify how the pay gap is to be calculated or the timing and form of publication. However, the Government has asked the Equality and Human Rights Commission (EHRC) to develop workable arrangements for voluntary reporting by employers. Ministers have said they do not intend to make reporting compulsory at this stage, but want the option to do so should voluntary reporting not take off (the Government has made it clear that it does not intend to use this power any sooner than 2013).

The Commission issued a public consultation paper on this matter last year and published its resulting proposals on 19 January 2010. The Commission is proposing a ‘menu’ of options for reporting on pay by gender, which organisations can choose from. They include reporting:

- the single figure difference between the median hourly earnings of men and women; and/or
- the difference between the average basic pay and total average earnings of men and women by grade and job type; and/or
- the difference between men’s and women’s average starting salaries.

Employers would also be able to include an explanation of the causes of their organisation’s gender pay gap (known as a ‘narrative’).

The EHRC wants larger organisations (those with more than 500 employees) to opt initially to publish information using at least one of the three measures (or ‘metrics’) outlined above and, in addition, to include an explanation for any apparent gap. The Commission hopes that after a couple of years these larger organisations will move to using at least two of the three metrics, combined with an explanation of the causes as before. As for smaller organisations, the EHRC acknowledges that they can probably only be expected to use one of the three metrics identified above.

The EHRC said it would produce guidance on these proposals in April 2010. It will then begin monitoring the take up of the new scheme by larger organisations later this year. Monitoring will be extended to organisations with between 250 and 500 employees next year.


Equality data publication - public sector

So far as the public sector is concerned, there are likely to be specific duties for certain public bodies to publish gender pay gap figures and probably also employment rates for minority ethnic groups and disabled people. These duties are not set out in the Act but are likely to follow in separate regulations implemented by the English, Welsh and Scottish governments respectively.
Pay secrecy clauses

Some employment contracts try to prohibit employees from discussing their pay terms with others. Such terms are most commonly seen in specific sectors, such as financial services, and tend to go hand in hand with the entirely discretionary nature of pay provisions, but particularly bonuses. With discretionary bonuses, employers are often keen to minimise any perceived unfairness in how the employer allocates their bonus, by making it a condition that employees will not discuss the amount that they have received with any other colleague.

The Equality Bill originally sought to protect employees who discussed their terms of work with a work colleague. The Bill was, however, extended so that the Act also covers discussions with people who are not work colleagues, for example a union official who is not a fellow employee.

The Act says that an employer cannot enforce a term in the contract which restricts an individual from discussing the terms of work where the discussion is a ‘relevant pay discussion’. In addition, the Act says that it is unlawful victimisation to take action against an employee who has engaged in a relevant pay discussion.

A relevant pay discussion is a discussion ‘relating to whether pay is connected to a protected characteristic’, such as sex or age. It is not entirely clear what that means. In some conversations the question of whether there is a link between pay and a protected characteristic might be explicitly flagged up; an example would be if someone were to say to a union rep ‘I think I might be getting paid less than others just because of my age. I earn £25,000. What do others doing my job get?’ But what if the employee had simply said: ‘What are others in my department paid? I’m on £25,000. Does that sound low to you?’ Is it sufficient that the employee’s motive for having the discussion was linked to an unexpressed belief that pay might be linked to a protected characteristic?

The Act does not provide a clear answer but the explanatory notes that accompanied the Bill suggest that all that is needed is for one of the parties to the discussion to be aiming to find out if differences exist that are related to a protected characteristic. The notes gave the following example:

A female employee thinks she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him.

But in this example how would the employer know what had prompted the pay discussion? After all, the man who disclosed the salary might not even have known why he had been asked the question.

The lesson is that employers need to think carefully before taking disciplinary action against any employee who has discussed pay with a work colleague. That is not to say that disciplinary action will never be appropriate, it is simply a case of avoiding knee-jerk disciplinary action in every case.
Advancing equality

Positive action

Sections 158 and 159 deal with positive action, the first section generally and the second specifically in relation to recruitment opportunities.

General

Section 158 allows an employer to take certain ‘positive action’ measures if it reasonably thinks that:

- people who share a protected characteristic suffer a disadvantage connected to the characteristic, or have needs that are different from the needs of those who do not share that characteristic; or

- participation in an activity by persons who share a protected characteristic is disproportionately low.

In these circumstances, proportionate steps can be taken to meet their needs or to enable or encourage them to overcome or minimise the disadvantage or participate in the relevant activity.

The concept of positive action is not new. However, at present the various positive action provisions in existing law apply to different protected characteristics in different ways. Section 158 aims to harmonise the various existing provisions and give employers more scope to take positive action.

Section 158 covers such things as job adverts, training, mentoring and other forms of encouragement for certain forms of work, but does not allow employers to take any form of positive action at the actual point of recruitment or promotion. Positive action in recruitment is addressed by a separate provision: section 159.

Recruitment and promotion

Section 159 is one of the most controversial aspects of the Act. It allows employers to recruit or promote someone because of their protected characteristic, in preference to another candidate, if he/she is ‘as qualified as’ the other candidate, provided the following conditions are met:

- the employer must reasonably think that:
  - people who share a protected characteristic suffer a disadvantage connected to the characteristic, or
  - participation in an activity by persons who share a protected characteristic is disproportionately low; and

- the action taken must be with the aim of, and a proportionate means of, enabling or encouraging people who share the protected characteristic to:
  - overcome or minimise that disadvantage, or
  - participate in that activity, and

- the employer must not have a blanket policy which automatically treats people more favourably in relation to recruitment and promotion because of their protected characteristic.
It is not at all clear what an employer would have to do to show that its belief that certain groups are ‘disadvantaged’ or underrepresented is reasonable. It is also far from obvious when an individual can legitimately be considered ‘as qualified’ as others.

Cases from the European Court of Justice do provide some illumination. It is clear, for example, that preference can only be given where there has been an objective assessment of the candidates’ respective merits. This is reflected in the above requirement that employers must not have an automatic positive action policy when it comes to recruitment and promotion. In addition, case-law suggests that preference can only be given where candidates possess ‘substantially equivalent merits’, although precisely what that means is itself unclear.

It is important to bear in mind that this aspect of the Act is entirely voluntary. Employers looking to rely on will do so at risk and should expect their decisions on whether candidates are equal, as well as their assessments of under-representation and disadvantage, to be exposed to scrutiny by a tribunal.

Public sector single equality duty

The Act introduces a new ‘single’ equality duty to replace the existing race, disability and gender equality duties by 2011. The new general public sector duty will apply not only to public sector bodies (such as government departments, local authorities, NHS Trusts etc) but also to organisations in the private and third sectors that carry out ‘functions of a public nature’. This phrase that has been borrowed from the Human Rights Act 1998 and its reach is far from clear.

The new equality duty will require all public bodies, in the exercise of their functions, to have ‘due regard to the need to:

• eliminate discrimination, harassment, victimisation and any other conduct that is prohibited

• advance equality of opportunity between persons who share a ‘relevant protected characteristic’ and persons who do not share it, and

• foster good relations between persons who share a relevant protected characteristic and persons who do not share it.’

The duty applies to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. This represents a significant widening of the obligations in respect of race, disability and gender currently placed on public bodies, although some public bodies have already implemented Single Equality Schemes.

On this occasion, pregnancy and maternity are included within the characteristics covered by the public sector duty, and the ‘poor relations’ of civil partnership and marriage are excluded.

The Act also gives the governments of England, Wales and Scotland power to impose specific duties on specified public authorities to enable them to carry out their equality duty more effectively. Those authorities include, amongst others, NHS bodies, local authorities, educational establishments, police authorities and fire and rescue authorities.
We shall examine the public sector duties in more detail in a separate briefing note when regulations setting out the specific duties are finalised. For present purposes, it is worth noting that the specific duties are likely to be different in England, Wales and Scotland. From an HR perspective, they could well cover:

- For larger authorities, a duty to report certain equality data relating to the workforce.
- Duties in relation to procurement; these could include a duty on contracting authorities:
  - when setting out their equality objectives and the steps they intend to take to achieve them, to include how they will ensure that equality factors are considered as part of their public procurement activities to help contribute to the delivery of those objectives
  - to consider the use of equality-related award criteria and equality-related contract conditions where they relate to the performance of the contract and are proportionate.

Socio-economic disadvantage

The Act also introduces an entirely new duty for certain public bodies to have due regard to the desirability of reducing socio-economic disadvantage when making strategic decisions. This duty is beyond the scope of this briefing, suffice it to say that it does not give an individual a stand alone right to complain about discrimination; does not extend to private employers; and, in contrast with the single equality duty, applies only to a restricted and specifically defined list of public bodies.
Timetable

| All elements of the Act covered by this briefing, other than those set out below. | 1 October 2010 |
| Combined discrimination | April 2011 |
| Public sector equality duties | April 2011 |
| Socio-economic duties | April 2011 |
| Age discrimination by service providers | April 2012 |
| Compulsory gender pay reporting (if implemented by regulation) | not before 2013 |

The above timetable reflects the plans of the current government. However, commencement dates are not set out in the Act itself. So a change of government could result in a different timetable. The Conservatives have not said they will delay implementation but it is conceivable that they might; moreover, it is possible that a Conservative government might simply decline to implement some of the provisions they are not particularly happy with (eg positive action in recruitment, gender pay reporting, the socio-economic duty).
Finding out more

Codes of practice and guidance

The Equality and Human Rights Commission is preparing Codes of Practice on three aspects of the Act: employment; equal pay; and services, public functions and associations. The Commission is currently consulting on drafts of the Codes, and the final versions are expected to become available shortly. The drafts can be found here: http://www.equalityhumanrights.com/legislative-framework/equality-bill/equality-bill-codes-of-practice-consultation/#1.

The EHRC will also be producing guidance for employers, designed to be ‘down-to-earth, practical, and accessible.’ The guidance is presently in draft form for consultation and can be found here: http://ehrc-consult.limehouse.co.uk/portal.

Training

We will be running half day briefings, before the summer break, with the EHRC and ACAS to explain the measures in the Equality Act 2010 that apply to the workplace. For further information, or to register your interest, email training@eversheds.com .

Contacts

For further information please contact:

Audrey Williams
Partner, Head of Discrimination Law
0845 498 7572
audreywilliams@eversheds.com

Adele Aspden
Associate, Professional Support Lawyer
0845 497 6153
adeleaspden@eversheds.com