



Bond Pearce

# The Equality Act 2010

## Key issues for employers

### Introduction

The Act has been described as “a historic piece of legislation”. It was published in April 2009 after four years of reviews, discussions and consultations and made it on to the statute book just before the general election. It runs to 218 sections and 28 schedules, together with many hundreds of pages of guidance notes, and consolidates over 100 pieces of legislation into a single Act. Most of it came into force on 1 October 2010.

Its purposes are: (1) to harmonise discrimination law; and (2) to strengthen it to support progress on equality. The Act brings together and re-states existing legislation and adopts a unified approach where appropriate. However it also makes some significant changes to the law, which employers need to understand. This factsheet is intended to explain these changes and to outline some of the steps you need to take in order to deal with them. We will focus on the provisions that are directly relevant to employers.

### Protected characteristics

The Act sets out a number of characteristics, which are protected by the Act. They are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. Direct or indirect discrimination, harassment or victimisation on the grounds of a protected characteristic are unlawful. The duty to make adjustments in relation to disabled people still applies but the definition of disability has been changed so that employees no longer need to show that their condition affects one of eight specified functions such as mobility, manual dexterity and perception of danger. This will make it easier for an employee suffering from stress or depression to show he is disabled.

An employee who is going through gender reassignment no longer has to be under medical supervision in order to be protected and only has to show that he is proposing to undergo, is undergoing or has undergone a process for the purpose of reassigning his sex. The Act also contains a provision allowing discrimination because of caste to be included in the future, once further research has been concluded.

### Association and perception

Direct discrimination and harassment have been extended to cover association and perception. Associative cases would include subjecting an employee to a detriment because he cares for an elderly relative. Perceptive cases include those in relation to perceived (rather than actual) age or sexual orientation.

### Third party harassment

Employers will be liable for harassment by third parties in the workplace if the employee has been harassed on at least two other occasions and the employer failed to take reasonable steps to stop it. This could include, for example, harassment by contractors and customers. An example is a gay shop worker who is harassed by customers; he would be able to bring a claim against his employer if he was harassed at least three times and his employer had not tried to stop it. However, it was announced in March 2011 that this provision will be reviewed and it may be repealed.

### Combined discrimination

The Act includes a new concept of “combined discrimination” where an employee can bring a claim based on a combination of two protected characteristics. An example of this is a Muslim woman who is passed over for promotion.



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The fact that she is Muslim and a woman might not give her much of a claim separately but she could combine these two characteristics and bring a claim on that basis. The Government announced in March 2011 that this provision would not be brought into force.

### **Pre-employment health enquiries**

Pre-employment health enquiries are outlawed by the Act unless they are made for prescribed reasons, such as in order to allow the employer to make reasonable adjustments to an assessment that is part of the recruitment process, in order to carry out diversity monitoring or to establish if the individual will be able to carry out a function that is intrinsic to the work concerned. If the employer asks a question where one of these exceptions does not apply and acts on the answer, the candidate will have a claim under the Act. In addition, if these questions are asked, the Equality and Human Rights Commission can investigate and take enforcement action against the employer. However, note that employers can still ask questions after a job offer is made and can still make offers of employment that are conditional on a medical being passed or satisfactory answers being given to a health questionnaire.

### **Positive action**

The Act extends the concept of positive action to allow employers to recruit or promote someone from an under-represented group, thereby redressing the imbalance. It only applies where two candidates are “as qualified” as each other and one of them has a protected characteristic. In that situation, the employer can select the employee with the protected characteristic (but is not obliged to do so). Selecting an employee who is less well qualified is not permitted and there is likely to be litigation over what is meant by “as qualified”. As it is a voluntary measure, if the employer decides not to take positive action, a disappointed candidate cannot complain. Although it is unlikely that most employers will adopt positive action, those who enter into contracts with the public sector may have to divulge their diversity statistics so there may be an incentive for them to take positive action and improve their statistics.

This provision came into force on 6 April 2011.

### **Equal pay**

The Act attempts to strengthen discrimination law in relation to equal pay in two areas. First, it provides for large employers (with more than 250 employees) to publish their gender/pay statistics if progress on voluntary reporting is not made by 2013. Public sector employers with more than 150 employees have had to publish details of their gender pay gap, ethnic minority employment rate and disability employment rate since 2011.

Secondly, the Act limits the enforceability of “pay secrecy” clauses in contracts of employment. Such clauses (which prevent employees disclosing their pay to colleagues) will be unenforceable if the information is sought or disclosed because an employee believes he may have a claim. An employee will have a claim for victimisation if he discloses details of his pay or asks a colleague for pay details and the employer takes action against him. An employee will not have to disclose his pay and will not be protected if he discloses his pay for another reason (such as to a competitor in connection with applying for a new job).

### **Enforcement**

The Act enables Employment Tribunals to make recommendations that benefit the whole of the workforce and not just the claimant. Examples might include the introduction of an equal opportunities policy, diversity training for all staff and making public the selection criteria for promotion. Recommendations are not binding but could be used as evidence against the employer in future claims. For that reason, claimants serving a discrimination questionnaire on the employer are likely to ask whether recommendations have been made in respect of the employer in the past and, if so, whether the employer has complied with them.

New statutory question and answer forms have been published to assist claimants in obtaining information from respondents in connection with a claim or potential claim.



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There are now just two forms: one for all types of discrimination (referred to as prohibited conduct) and one for equal pay (referred to as equality of terms).

### **Codes of Practice and non-statutory guidance**

The Equality and Human Rights Commission (**EHRC**) has produced various Codes of Practice on the Act to explain the statutory provisions. These are admissible in evidence and, if relevant, have to be taken into account by an Employment Tribunal.

The Codes that are relevant to employers are as follows:

- Equal pay – this came into force on 6 April 2011
- Employment – this also came into force on 6 April 2011.

The EHRC has also published non-statutory guidance for employers and workers, which aims to help explain the Act and provide practical examples on how the law has changed. This is available on the EHRC website ([www.equalityhumanrights.com](http://www.equalityhumanrights.com)). In particular, the Guidance on the Definition of Disability will be relevant.

### **Timetable and transitional provisions**

Most of the main provisions of the Act came into force on 1 October 2010.

Transitional provisions set out which law applies to various scenarios. The position is:

- where an act of discrimination occurred wholly before 1 October 2010, the claim will be brought under the old legislation
- where an act of discrimination occurred wholly after 1 October 2010, the claim will be brought under the Equality Act
- where a continuing act of discrimination spans 1 October 2010, the claim will be brought under the Equality Act, provided the acts amount to discrimination under each relevant piece of legislation.

### **What employers need to do**

There are a number of actions that you should take if you have not already done so, including:

1. Update equal opportunities policies.
2. Review contracts of employment and amend them if they include pay secrecy clauses.
3. Amend standard documents that refer to previous discrimination legislation, such as compromise agreements.
4. Look at recruitment policies, particularly around pre-employment health questionnaires and standard application forms.
5. Review employment policies and practices of contractors and suppliers and carry out thorough due diligence before using a third party.
6. Check contracts with third parties (such as contractors and suppliers) to ensure you have a right to veto anyone who harasses your staff.
7. Decide whether you will take positive action.
8. Train managers on the key changes (as set out above) and the areas of risk, such as in relation to pre-employment health questionnaires and third party harassment.



## Training

We are able to deliver training sessions on practical ways of reducing risks under the Equality Act and recruitment after the Equality Act. If you would like us to run one of these sessions in-house for your managers, please email us at [info@bondpearce.com](mailto:info@bondpearce.com)

## Key Contacts



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