

## The Equality Act 2010

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**It is finally here! The Equality Act is now in force. In this Alert we set out a reminder of what this means for employers and what steps you should have taken or need to take to ensure that you comply with the new Act. If, like many employers, you haven't yet considered what changes are needed to your internal policies in order to comply with the Equality Act, do have a look at our special offer at the end of this Alert.**

### Protected Characteristics

The Equality Act has not changed or added to the number of grounds of discrimination but they are now to be known as "protected characteristics". It remains unlawful to discriminate on any of the following grounds: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and philosophical belief, sex and sexual orientation.

### Associative discrimination

The Equality Act protects employees against discrimination 'because of' a protected characteristic whether they or another person has that characteristic. In other words the Act extends protection to employees who associate with someone who has any of the protected characteristics. So, it will be unlawful to discriminate against an employee because, for example, they care for an elderly relative who has dementia or some other disabling condition. Equally an employee who has a gay brother may be able to seek redress for harassment if other employees make inappropriate jokes about gays.

The practical implication of this is that employers will have to be more aware of areas of sensitivity in their workforce and will need to take a much more holistic approach to employee relations.

### Perception is key

The Equality Act gives new protection to employees who are discriminated against because they are perceived to have a protected characteristic (even if they do not). An employer would now unlawfully discriminate against a woman by not promoting her because he thinks she's pregnant even if she is not. Equally, if an employee is harassed at work because he is believed to be Muslim, he will have a discrimination claim, regardless of his actual religious beliefs.

### Harassment by third parties

Harassment in the workplace is a difficult area to manage and over the last few years has resulted in an increasing number of claims. Employers are already vicariously liable for the behaviour of their employees whilst they are at work. The Equality Act will make employers liable in certain circumstances for the behaviour of third parties towards their employees.

This is the so-called "three strikes" rule. Liability will arise if a third party such as a contractor or customer harasses an employee based on, for example, their race. If the employer knows that the employee has been harassed on at least two other occasions and has not taken "reasonably practicable" steps to prevent the harassment occurring again, they will be liable. This will be the case even if the person harassing the employee is different on each occasion.

### Pre-employment Health Questionnaires

From 1 October 2010 employers cannot ask job applicants questions about their health before deciding whether to offer them employment. This effectively means the end of standard pre-employment health questionnaires. There are some exceptions to this rule.

An employer is allowed to ask questions of a job applicant in certain specific circumstances. The most relevant of these include:

- 1.1 When the question is asked to determine whether the employer needs to make any adjustments to enable the candidate to comply with the interview process;
- 1.2 To monitor diversity;
- 1.3 To determine whether an applicant could carry out an intrinsic part of the job.

Here is an example. An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required).

The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.

Unfortunately, in the absence of detailed guidance, the matter of where the line between necessary and unnecessary questions should be drawn will only be addressed in litigation.

While asking an applicant pre-employment health questions will not in itself amount to discrimination against a job applicant, acting on the answers may well do. The risk for employers is that if they ask a candidate about their health and then don't offer that candidate the job, the burden of proof shifts to the employer to show that the reason they did not offer the job was not the applicant's disability. In practice often an employer will pick a candidate simply because he or she feels right or will fit within the organisation. In such cases it will be difficult to show that health was not the reason and therefore it is best just to avoid the questions altogether.

However questions about an applicant's state of health can be asked after an offer of employment has been made. An employer can make a conditional offer and then undertake a health check. But, if such a check raises an issue, the employer will need to be conscious not to discriminate against a possibly disabled applicant and if they are the need to make reasonable adjustments. The employer will find it less easy to hide behind a spurious reason for not continuing with the recruitment as it will be clear why they have changed their mind.

### **Tribunal Powers**

Where an employer is found to have discriminated the Employment Tribunal now has the power to make recommendations that apply to the whole of an employer's workforce, not just in relation the employee who has brought the claim. Employers may therefore face a recommendation that they properly implement a harassment policy or re-train all their staff on discrimination issues. Although the recommendations are not binding, they may be used by future claimants seeking to embarrass their employer for failing to comply with an earlier recommendation.

### **Special Offer**

If you still haven't updated your Equal Opportunities Policy or Harassment Policy we would be happy to help. We have a special offer – we will review your policies for

free and let you know whether they need any changes. We will then either update your policies or provide you with new versions for a fixed fee of £195 plus VAT (for both policies). If you would like to take advantage of this offer, please contact one of the employment team.

### **And finally ....**

Don't forget that the national minimum wage rates increased on 1 October. The new rates are:

- £5.93 for workers aged 21 and over (up from £5.80)
- £4.92 for 18 – 20 year olds (up from £4.83)
- £3.64 for 16 and 17 year olds (up from £3.57)

For more information please contact:



### **Petra Venton**

Professional Support Lawyer

T: +44 (0)1892 506 041

E: [petra.venton@crippslaw.com](mailto:petra.venton@crippslaw.com)