



The Equality Act 2010

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The Equality Act 2010 has been described as one of the most significant developments in discrimination legislation in the past 40 years. The Act's effects will be far reaching, impacting on a range of diverse issues such as recruitment, gender pay and procurement. So, what is the Equality Act and what will it mean in practice?

What is the Equality Act 2010?

The Act received Royal Assent on 8 April 2010 and it replaces the 116 pieces of discrimination law and 13 Codes of Practice currently in force. The main provisions will come into force on 1 October 2010 with other provisions in April 2011 and 2012. Following the change of government in May, there was some uncertainty about these implementation dates but, in a recent statement, the Government Equalities Office has confirmed that it continues to work "on the basis of the previously announced timetable." Indeed, the Home Secretary has just confirmed that the Act will come into force as planned in October.

Why is the Act significant?

The Act simplifies and harmonises current discrimination law by consolidating it into one Act. It introduces new measures to deal with discrimination and promote equality because, it is recognised that inequality and discrimination persist today. For example, there continues to be a significant difference between the pay of men and women and the employment rates of disabled people are still much lower than for non-disabled people. The Act is significant because it will impact on all employers, regardless of size as well as public authorities and private sector organisations delivering a public service.

What are the Act's key measures?

The Act brings together the different strands of discrimination into 'Protected characteristics'. Specifically, age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Act will tackle discrimination in a number of key areas which include:

- Requiring public authorities to report on gender pay inequalities
- Making unenforceable pay secrecy clauses
- Introducing age discrimination legislation in relation to goods and services
- Strengthening the protection of disabled people
- Strengthening the powers of Employment Tribunals
- Introducing a new single equality duty on public authorities covering all areas of discrimination
- Using public procurement to improve equality

How will the Act impact on my organisation?

The impact will be significant in a number of key areas.

Firstly, there will be a requirement for more transparency in relation to pay. It is envisaged that from April 2011 if you are a public authority with over 150 employees you will be required to publish annual details of your gender pay gaps. Initially, it was intended that private sector employers with 250 or more employees would be expected to prepare these audits on a voluntary basis until 2013 when, if insufficient progress had been made, Regulations would be introduced to make these audits compulsory. Earlier this year, the Equalities and Human Rights Commission ('EHRC') stated that up to two years immunity from investigation would be given to employers who voluntarily report differences between their male and female employees.



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The EHRC has proposed three ways of measuring the pay gap: the difference between the average hourly earnings of men and women; the difference between the average basic pay and total average earnings of men and women by grade and job type; and the difference between men and women's starting salaries. Employers will also be given the option of including a narrative that explains the context of the pay gap.

However, there is currently some uncertainty about the proposals in relation to gender pay in the private sector. Prior to the election, the Conservatives announced that they opposed compulsory pay audits proposing that only an adverse Employment Tribunal decision against an employer should trigger an audit. The views of the Coalition government are unknown at present. In the past few days a spokesperson for the Government Equalities Office has stated that it will make an announcement 'in due course' about what its next steps on equal pay will be.

Secondly, an employer will generally no longer be able to use pre-employment health questionnaires before a job offer is made or before including an individual in a pool of applicants to be offered a job when a vacancy arises. Certain questions will be permitted where for example, the questions are necessary to establish whether the applicant will be able to carry out a function that is 'intrinsic' to the work applied for or to determine whether reasonable adjustments need to be made. This means that applicants with a disability such as a mental health condition will not have to disclose their condition before a job offer is made, unless it hampers their ability to do the job. Once you have made the job offer you can ask questions relating to health, however, if the job offer is then withdrawn, there is a risk that the individual may subsequently bring a discrimination claim. The burden of proof then passes to the employer who will have to show that no discrimination has taken place.

The duty to make reasonable adjustments remains largely the same with one addition, the need to provide an auxiliary aid where it is necessary to ensure that a disabled person is not placed at a substantial disadvantage.

The Act also provides that, Employment Tribunals will have the power to make wide-ranging recommendations which employers will be obliged to carry out, for example, recommendations that they introduce a bullying and harassment policy, provide equality and diversity training to their staff, or publish

the selection criteria used for staff promotion. While these recommendations will not be binding, a failure to follow through with the recommendations could be detrimental if any future claims are brought against the same employer.

Finally, the Act includes a provision permitting positive action whereby employers will be permitted to offer a job to someone who is from an under-represented group if the employers have the choice between two or more candidates who are equally qualified. The selection of a less well qualified candidate will not be allowed and employers will not be compelled to select the individual from the under-represented group. Prior to the general election the Conservatives stated that if elected they would not introduce the positive action provision. To date, no statement has been given by the Coalition government about its stance on positive action but it appears that it will in fact be permitted according to some recently published guidance, see below.

How will the Act impact on my staff?

The Act will limit the enforceability of contractual pay secrecy clauses. Staff will be free to disclose information about their pay and any attempts by an employer to restrict this will be unenforceable if the disclosure is made in order to find out whether there is a link between pay and a protected characteristic or the disclosure was made with the possibility of pay discrimination in mind. In these circumstances any disciplinary action will amount to victimisation.

The Act has a significant impact in the context of disability discrimination. The Disability Discrimination Act 1995 (DDA) states that a person has a disability if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities. The definition refers to an impairment which impacts on certain specified functions, for example, mobility or hearing. Under the Act this constraint is removed which in theory makes it easier for an individual to show that they have difficulty in carrying out day-to-day activities and so, making it easier to satisfy the definition of disability.

The Act also introduces a new provision, discrimination 'arising' from disability. This will make it unlawful to treat a person unfavourably because of something connected with the disability. The Act removes the need for a comparator but the employer will have a defence if it can show that the unfavourable treatment was a proportionate means



to achieving a legitimate aim or if the employer does not know, or could not reasonably know, the employee had a disability.

Significantly, the protection of the law on discrimination is broadened to include discrimination by 'association'. For example, an employee who cares for a disabled relative should not receive less favourable treatment because of her 'association' with the disabled relative. The Act also introduces discrimination by perception which will protect employees who are discriminated against because they are wrongly thought to have a protected characteristic.

Under the Act it will be possible to claim direct discrimination on a combination of two protected characteristics. Note also that the Act provides protection against persistent harassment by third parties, for example, customers or suppliers.

How will the Act affect public authorities?

The Act creates a new single public sector equality duty which will cover race, gender and disability (which are the current equality duties) but will also cover age, sexual orientation, religion or belief, pregnancy and maternity and gender re-assignment. This means that public authorities will need to consider the needs of different groups when designing and delivering public service. This new duty will come into force in April 2011.

Provision is made in relation to the public authorities' procurement functions, for example, when putting out work for tender, asking potential contractors for a gender breakdown of their workforce or asking for the details of policies and procedures in place to promote equalities thus using public sector procurement to hold firms to account. Private firms bidding for government contracts will have to publish details of their diversity policies.

The Act also contains a provision placing a new duty on certain public authorities to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions. Once again, prior to the general election, the Conservatives stated that if elected they would not introduce this new duty and there has been no further statement. There is still some uncertainty therefore about whether or not this provision will be introduced.

Do I need to do anything now?

In readiness for implementation, employers and managers should be trained on the wide-ranging impact of the Act and to learn about its key provisions. Policies and procedures should be reviewed to ensure they are equality compliant particularly those relating to equal opportunities and recruitment. Depending on the size of the organisation (if private sector) it is also worth looking at gender pay to establish whether there are any inequalities and the possible reasons for these. Bear in mind too that an organisation's own record on equality issues will be increasingly significant in the future during any procurement process.

Is there any further information available about the Act?

Yes. The Act is accompanied by more than two hundred pages of Explanatory Notes. More manageable is the recently published series of summary guidance by the Government Equalities Office and prepared in conjunction with the British Chamber of Commerce, the Equality and Diversity Forum and Citizens Advice. The guidance covers individuals' rights and guidance for voluntary and community sector service providers, public sector organisations and businesses who sell goods and services. The guidance is available on www.equalities.gov.uk

The EHRC is also about to publish comprehensive guidance on the Act in the areas of employment, services, public functions and associations and education. The EHRC's consultation exercise on Codes of Practice for employment, equal pay and services, public functions and associations ended in April 2010 and it will be publishing final versions of the Codes in due course.

Morgan Cole's Equality Group is a cross-practice group of lawyers with a special interest in the Equality Act. They play a leading role in equality issues and provide training to other lawyers and clients about the Equality Act. Members of the Group have a extensive experience of equality litigation and advice spanning several practice areas including, Employment, Pensions and Benefits, Local Authorities and the Health and Education sectors. To speak to a member of the Group please contact [Debra Gers](mailto:Debra.Gers@morgan-cole.com) in the first instance on 029 2038 5487 or debra.gers@morgan-cole.com.

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