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The Equality Act 2010 Employment Implications

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The Equality Act passed into law on 6 April 2010, and the majority of its provisions came into force on Friday 1 October 2010. The Act is the single biggest piece of discrimination legislation enacted in the United Kingdom and it provides a new legislative framework to protect the rights of individuals and promote equal opportunities for all. The aim of the Act is to simplify and standardise existing discrimination laws but it also introduces some new restrictions and re-formulates others which employers need to be familiar with. Outlined below is a brief summary of some of the main changes introduced by the Act.

Protected Characteristics

The Act harmonises the various types of discrimination that have developed under previous legislation, so that individuals are protected against discrimination on the following grounds:

- Age
- Disability
- Gender reassignment
- Marriage/civil partnership
- Pregnancy/maternity
- Race
- Religion or belief
- Sex/sexual orientation.

These are described as “*protected characteristics*” in the Act. All of these characteristics were previously covered by discrimination legislation. However, there are a few changes, for example:

- The definition of “*disability*” has been changed so that there is no longer a requirement that an impairment

affects certain listed capacities (such as mobility, sight, hearing). Instead there is a more general requirement that the impairment must be long-term and have an effect on a person’s ability to carry out normal day-to-day activities. This does not widen the definition of disability significantly, but will make it easier for a person to show that they are disabled and require protection from discrimination

- Discrimination on the grounds of gender reassignment has been widened to remove any requirement for the person to be under medical supervision.

Direct Discrimination

Direct discrimination under the Act is defined as follows:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

Previously, direct discrimination had to be on the grounds of a particular characteristic. However the words “*on the grounds of*” have been replaced with the words “*because of*”. This is intended to simplify the wording and should not alter its meaning.

The new definition of direct discrimination also covers a situation where a person is treated less favourably than another because they associate with someone who has a protected characteristic (association discrimination) or because they are thought to have a protected characteristic (perception

discrimination). However marriage and civil partnership is expressly excluded from association and perception discrimination.

Indirect Discrimination

Indirect discrimination is defined in the Act as follows:

“A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”.

Indirect discrimination already applied to age, race, religion or belief, sex, sexual orientation and marriage and civil partnership, but it has now been extended to cover both disability and gender reassignment for the first time. However, it still does not apply to pregnancy or maternity.

Dual Discrimination

The Act introduces a new category of dual discrimination which will allow claims to be brought in relation to a combination of two protected characteristics. This will apply only to direct discrimination on the grounds of age, disability, gender re-assignment, race, religion or belief and sex or sexual orientation. This has not yet come into effect, it is anticipated this will be **April 2011** at the earliest.

Disability Discrimination

The previous legislation provided protection from direct discrimination on the grounds of disability, but made no provision for indirect discrimination, referring instead to “disability-related” discrimination. This has been replaced with two new types of disability discrimination, namely indirect discrimination and discrimination arising from a disability. The new provisions prohibit an employer from treating a disabled employee in a way which, because of the employee’s disability is to their detriment and which cannot be objectively justified. The employer has a defence if he can show that he did not know and could not reasonably be expected to know that the employee had a disability.

The Act consolidates and extends the requirement to make reasonable adjustments for disabled employees. It now covers not only situations where a disabled person is placed at a disadvantage by an employer’s provision, criterion

or practice or a physical feature of premises, but also a lack of auxiliary aid in such places. Further, there is a specific provision that an employer cannot require a disabled person to pay the costs of making any reasonable adjustments (this was not previously expressly stated).

Furthermore under the Act, employers will be prevented from asking job applicants questions concerning their health or disability before making an offer of employment, save for in certain circumstances, such as where it is necessary to ascertain whether an applicant will be able to carry out an intrinsic function for the role.

Harassment

Conduct can now amount to harassment if it is “related to” a protected characteristic so the characteristic does not have to be the reason for the conduct. For example, telling a racist joke might be conduct related to race, potentially amounting to harassment, regardless of the race of the person who it offends. Harassment “related to” a protected characteristic also includes harassment due to association with someone who has a protected characteristic or where they are wrongly perceived as having a protected characteristic. For example, a person who is harassed because of their spouse’s religious beliefs or because they are wrongly perceived to be gay would have a claim.

Employers will also be liable if they fail to protect their employees from harassment by third parties (e.g. clients and customers) on the grounds of race, religion or belief, disability, age, sexual orientation and gender reassignment by third parties (but not marriage and civil partnership or pregnancy and maternity). Previously employers were only liable for sexual harassment by third parties.

Victimisation

Victimisation occurs when the employer subjects the employee to detriment because they have done or are believed to have done a “protected act”. A comparator is no longer required. A “protected act” is described as: bringing proceedings under the Act; giving evidence/ information in such proceedings; doing anything related to the provisions of the Act; and making an allegation that another person has done something in breach of the Act. The victim need

not have a protected characteristic to bring a claim, they could be supporting someone with a protected characteristic who is making a claim.

Defences

For some types of discrimination an employer has a defence if it can justify how it treated the disabled person. An occupational requirement exception applies where being of a particular sex, race, disability, religion or belief, sexual orientation or age (or not being trans-sexual person, married or a civil partner) is a requirement of the occupation in question. In practice there will be no real change from the previous position, since occupational requirements must still be a proportionate means of achieving a legitimate aim.

In addition, an objective justification defence will apply in cases of indirect discrimination, direct age discrimination and discrimination arising from a disability where an employer can show that its actions were a proportionate means of achieving a legitimate aim.

This is just a brief summary of some of the main changes in this major piece of legislation. If you wish to discuss any of the issues raised above or would like a more in-depth analysis of The Equality Act 2010 please contact Charlotte Davies (charlotte.davies@incelaw.com), Katy Carr (katy.carr@incelaw.com) or your usual Ince contact.

Powers of Tribunals

The Act enables tribunals to make recommendations that benefit the wider workforce and not just the claimant. Recommendations are not binding but an employer's failure to comply with a recommendation could be used as evidence to support subsequent similar discrimination claims.

Conclusion - Practical Steps For Businesses

On a day-to-day basis, the changes introduced by the Equality Act 2010 should not affect employers who have strong anti-discrimination policies in place. However, employers are advised to review their existing policies and procedures in relation to discrimination and consider updating them where appropriate. It is also important to ensure that all directors and managers are aware of discrimination laws generally and the changes introduced by the Equality Act and that training is given where necessary. Recruitment processes and interview techniques should also be reviewed to ensure that inappropriate questions are not asked.

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