Update

Pinsent Masons

June 2011

Equality Act 2010: Top 12 Issues For Employers

Introduction	The Equality Act 2010 ("the Act") was passed on 8 April 2010 when the Labour government was still in power. It has two main purposes - to harmonise discrimination law and to strengthen the law to support progress on equality. In this Update we take a look at the top 12 things you need to know about the Act including what you need to do about its impact on your business. We have tried to select issues of potential relevance to all employers, so this Update does not cover those aspects of the Act which are only of relevance to public sector employers, such as the single equality duty.
1. Timetable	The core provisions of the Act came into force on 1 October 2010. All of the matters covered in this Update came into force on that date, other than positive action, the combined discrimination provisions and public sector gender pay reporting. The positive action provisions come into force in April this year. Public sector gender pay reporting must begin in July this year. No date has been set for the combined discrimination provisions to come into force.
2. Repeals existing discrimination legislation and brings it under one roof	Most discrimination legislation is now contained in the Act and most of the previous discrimination legislation which you were familiar with has now gone. The Sex, Race and Disability Discrimination and Equal Pay Acts have been repealed in their entirety (subject to transitional provisions) and the Sexual Orientation and Religion/Belief Regulations and the Age Discrimination Regulations have also been revoked, again subject to transitional provisions. However, the Part-time Workers Regulations and Fixed-term Employees Regulations are untouched by the Act and remain in force.
4. Irons out anomalies	The Act harmonises various concepts and irons out previous anomalies, so there is now a standard definition of direct discrimination, indirect discrimination, harassment, objective justification, victimisation, occupational requirement etc. For the most part these concepts apply to all of the protected characteristics, although some anomalies remain. Indirect discrimination is extended to cover disability (see below) and gender reassignment (but not pregnancy and maternity leave); and the job specific genuine occupational qualifications (which previously applied in relation to sex, gender reassignment and nationality) have been removed and replaced with the common occupational requirement defence.
5. Covers perceived and associative discrimination	The Act covers direct discrimination based on perception and association across all the protected characteristics (except marriage and civil partnership status). This means that a person is able to claim direct discrimination even if they themselves do not have the relevant protected characteristic, but they nevertheless suffer less favourable treatment "because of a protected characteristic". This addresses the problem in the *Coleman* case - where Ms Coleman could not claim disability discrimination where she alleged that she had been discriminated against because of her son's disability. It could also cover a situation where a person is treated less favourably because they are perceived to be (but are not) LGBT. Note that harassment based on perception and association is also prohibited, although (oddly) the harassment provisions do not cover the protected characteristics of pregnancy and maternity or marriage and civil partnership. But it will still be possible to bring claims related to those characteristics as direct discrimination claims.

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6. Covers "combined" direct discrimination	The Act introduces the right to bring **direct** discrimination claims based on a combination of 2 (but no more than 2) protected characteristics. (Note that pregnancy and maternity, and marriage and civil partnership are excluded for these purposes.) This means that a person could claim that they have been discriminated against because they are a black woman. The absence of a right to bring such a claim has been perceived as a problem for some time and it is widely believed that individuals who fall into more than one category may face more acute disadvantage. However, a person who brings a "combined" discrimination claim will still be able to bring claims based on each of the single protected characteristics at the same time. So, in the above example, the person could bring sex discrimination and race discrimination claims at the same time as a combined discrimination claim based on race and sex. This is likely to make discrimination complaints more complicated and take longer, particularly as there will be different comparators for each claim. No date has been set for this provision to come into force.
7. Covers harassment by third parties	Only the Sex Discrimination Act 1975 ("SDA") made an employer liable for harassment by third parties, such as harassment of its employees by customers and contractors. The Act extends this liability to all of the protected characteristics (apart from pregnancy and maternity, and marriage and civil partnership) and the "three strikes" rule under the SDA applies – so an employer will only be liable (1) where its employee has been harassed by a third party on at least two occasions (not necessarily by the same person), (2) the employer is aware of this and (3) the employer does not take reasonably practicable steps to prevent it happening again.
8. Allows positive action	One of the most controversial aspects of the Act is that it allows employers to recruit or promote someone from an under-represented or disadvantaged group, where it has a choice between two or more candidates who are "as qualified as each other." It is not clear how the issue of whether two candidates are "as qualified" as each other will be determined, but the Government Equalities Office guidance suggests that an employer can take into account both a candidate's overall ability, competence and professional experience and any relevant formal or academic qualifications. So an academically-qualified person with little experience could be as qualified as a person with no formal qualifications but with years of practical experience. Although this suggests that employers have a reasonable amount of flexibility in determining the issue, the downside of getting it wrong (a direct discrimination claim by the unsuccessful candidate) is probably not a risk employers will want to take. The positive action provisions are coming into force in April 2011.
9. Introduces changes to disability discrimination laws	The main changes introduced by the Act to disability discrimination laws are: • the introduction of two new types of discrimination: (1) discrimination arising from disability (replacing disability-related discrimination); and (2) indirect disability discrimination; and • the prohibition on pre-employment health enquiries. ***Discrimination arising from disability*** This is intended to overcome the problem caused by the House of Lords' *Malcolm* ruling on the correct comparator for disability-related discrimination. It does this by removing the requirement for a comparator altogether. It is unlawful to treat someone unfavourably "because of something arising in consequence of" their disability, for example their sickness absence. The employer is able to justify the treatment where it is a proportionate means of achieving a legitimate aim. The Act makes it clear that an employer will not be liable if the employer did not know, and could not reasonably be expected to have known, of the disability. ***Indirect disability discrimination*** The Act also outlaws indirect disability discrimination where persons sharing the same disability as the claimant are put at a particular disadvantage by a provision, criterion or practice applied by the employer. This may turn out not to be particularly useful in practice. Disability varies from person to person, so it will often be difficult to establish that a number of persons share the same disability, meaning that claimants may not be able to

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	establish group disadvantage. In addition, it is hard to envisage a situation where an employer's policy would be indirectly discriminatory, but would not also be caught by either discrimination arising from a disability or the duty to make reasonable adjustments – which are less complex provisions and easier to prove. ***Pre-employment health enquiries*** The Act prohibits an employer from asking questions about a job applicant's health **before** offering them work or **before** including them in a pool of candidates from whom a post will be filled when a vacancy arises. The purpose is to prevent disabled candidates being screened out without being given the chance to show they have the skills and competencies for the job. It was also thought that pre-employment health questionnaires deter disabled people from applying for a job in the first place. Employers may still make health-related enquiries where they are necessary: • to establish whether the job applicant will be able to comply with the requirement to undergo an assessment (e.g. an interview or selection test) to test their suitability for the work; • to determine whether the employer has a duty to make reasonable adjustments in respect of the interview and recruitment process; • to establish whether a candidate will be able to carry out a function intrinsic to the work concerned; • to monitor diversity in applications for jobs; • to enable the employer to take positive action (see above); and • to establish whether a job applicant has a particular disability, where having a disability is an occupational requirement. Simply asking a question about health will not amount to disability discrimination but could lead to an employment tribunal drawing an inference of discrimination requiring the employer to prove that no discrimination has in fact occurred. However, the EHRC will be able to investigate the use of prohibited questions and take enforcement action, even where no discrimination can be shown to have taken place.
10. Promotes pay transparency	***Discussions about pay*** Terms in employment contracts which purport to prevent or restrict a person from seeking or disclosing information about pay (and other employment terms) are now unenforceable in circumstances where the purpose of seeking or making the disclosure is to establish discrimination in relation to any of the protected characteristics. This covers not just discussions between employees, but also discussions with union representatives. If a person is disciplined or otherwise treated detrimentally as a result of disclosing or seeking such information, this will amount to victimisation entitling the person concerned to bring a tribunal claim. ***Gender pay reporting*** The Act contains provisions dealing with gender pay reporting which differ between the private and public sector. As to the private sector, it contains a power to issue regulations requiring employers with 250 or more employees to publish pay data to show if there are differences in the pay of male and female employees. The government will not be implementing this provision for the time being. Instead it wants to work with businesses to develop a voluntary scheme for gender pay reporting in the private and voluntary sectors. As to the public sector, specific duties underpinning the Act's single equality duty will require public bodies to publish by 31 December 2011 information on their gender pay gap, as well as on the proportion and distribution of disabled employees and staff from ethnic minorities.

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11. Increases tribunal powers to make recommendations	Employment tribunals will be able to make recommendations that benefit the wider workforce where an employer is found to have discriminated. This compares with the previous position where it could only make a recommendation which benefited the claimant. Although recommendations are not binding, a failure to comply could result in an inference of discrimination in subsequent discrimination proceedings.
12. What you need to do	• Amend policies and procedures (in particular equal opportunities policies) to reflect the new harmonised definitions and concepts; • Amend compromise agreements and COT3s to reflect the new statutory references in the Act; • Review application forms and recruitment procedures in light of the prohibition on making pre-employment health enquiries. Consider whether enquiries about health or disability come within the permitted exceptions; • Review any contractual pay secrecy clauses and consider whether they should be removed from contracts, handbooks and salary review letters. If they are to be retained make sure that managers receive training so that they are aware of their limitations; • Review occupational requirements imposed in relation to specific roles and consider whether they fall within the new harmonised occupational requirement defence; • Consider whether steps should be taken to inform customers and contractors that harassment of employees is unacceptable (in order to help establish a reasonable steps defence to third party harassment); • Train staff on the new concepts so that they understand the changes to the law.

We can help with all of these matters. If you would like any help or should you have any questions please contact Bob Mecrate Butcher (robert.mecrate-butcher@pinsentmasons.com) or your usual Pinsent Masons adviser who will be able to assist you further.

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