

The Equality Bill in the UK: Ramifications for Employers

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Introduction

The Equality Bill in the UK on 7 April passed the final stages of parliamentary approval and has been sent for Royal Assent before the General Election on 6 May 2010. It is likely that the majority of the new provisions will come into force in October 2010. The new law aims to unify the existing strands of discrimination regulation into one piece of legislation and to classify the following “protected characteristics”: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Immediate Implications

The immediate ramifications of the bill call for employers to do the following:

- Treat equality and diversity issues with careful attention and implement training to make sure all employees and managers are aware of their rights and responsibilities
- Review existing policies and procedures and amend them where appropriate to ensure that employees are protected from discrimination based on associated and/or perceived disabilities
- Consider other policies that may impact employees associated with persons with protected characteristics
- Review employment contracts and bonus programs to determine whether they contain any “secrecy” clauses. Employers will also need to decide whether to remove these clauses, as they are unlikely to be enforceable in the UK in the context of a “relevant pay discussion”
- Start thinking about disclosing gender pay information on a voluntary basis
- Consider whether to use positive action in recruitment and promotion
- Review flexible working policies and implement a policy of considering flexible working applications on a case-by-case basis

Although gender pay gap reporting will not be mandatory until 2013 (at the earliest), employers may wish to consider carrying out gender pay gap audits in conjunction with reviews of pay packages. This will help employers to assess what they will be required to disclose going forward and provide them with an opportunity to mitigate any associated risks.

Changes to Current Law

Whilst the bill largely restates existing legislation, there are several changes of significant note, which are highlighted below.

Direct Discrimination

- An employer will be found to directly discriminate against an individual where it treats an individual less favourably because of a protected characteristic than it would treat another employee not possessing that characteristic.
- The definition of “direct discrimination” has been harmonised and widened so that discrimination by association or because of a person’s perceived characteristic will be unlawful (e.g., discrimination because of an (incorrect) perception that somebody is gay will be a potential ground of unlawful discrimination).
- Employers should be particularly mindful of flexible working applications made by an employee in order to care for somebody—if an employee feels that he or she has been discriminated against because he or she has a responsibility for somebody who has a protected characteristic (e.g., a disabled relative), he or she will be able to make a claim for direct discrimination.
- Employers will need to exercise caution before disciplining an employee (e.g., on the basis of his or her performance or attendance) or before making a hiring decision, if such an action is influenced by the employee’s having or being associated with someone who has a protected characteristic.

Indirect Discrimination

- A standard definition of “indirect discrimination” has been created to harmonise the existing law in this area. By this definition, an employer will indirectly discriminate against an employee if it adopts a discriminatory provision, criterion or practice in relation to the relevant protected characteristic.

Protection for Disabled Employees

- The definition of “disability” has been simplified—it is no longer a requirement that the claimant’s impairment affect one of the eight specified capacities listed at Schedule 1 of the Disability Discrimination Act 1995 (e.g., mobility, manual dexterity)—making it easier for a claimant to establish that he or she is disabled.
- Following the Supreme Court’s judgement in the case of *London Borough of Lewisham v Malcolm* (which made it considerably more difficult for employees successfully to bring a claim of disability-related discrimination), the law was changed to make indirect disability discrimination unlawful (see above). The bill has also created a new prohibition on discrimination arising from a disability, so that it is discriminatory to treat a disabled person in a way which, because of that person’s disability, amounts to a detriment, and such treatment cannot be shown to be justified.
- To the extent that prerecruitment questionnaires are permitted (these are allowable in very limited circumstances), the use of a questionnaire will not in and of itself amount to discrimination but acting on the answers may well do so.

Harassment and Victimisation

- The bill harmonises victimisation and protection from harassment across all the protected characteristics.
- Of significant note, protection from harassment has been extended to cover harassment by third parties in certain circumstances (this is potentially particularly wide ranging and potentially includes harassment by customers, clients, suppliers and contractors).

Steps Forward

The bill proposes several ways to strengthen the progress towards equality, including:

Positive Action

Employers in the UK may take positive action measures by offering access to facilities for training and encouragement to underrepresented groups—although specific positive action provisions vary across the different strands of existing discrimination legislation. Generally speaking, positive action does not currently extend to the point of recruitment or promotion.

The bill permits employers (although does not require them) to take underrepresentation of those with a protected characteristic into account when selecting between two equally qualified candidates for recruitment or promotion, provided that there is no automatic selection of underrepresented groups and decisions are not made irrespective of merit (i.e., by the use of mandatory quotas). Regardless of the new provisions, the selection of a lesser-qualified candidate on the grounds he or she is in a protected category will remain unlawful.

The bill does not address how employers are to determine whether candidates are “equally qualified” or how “underrepresented groups” are to be defined. Employers may therefore be fearful of exercising positive action in the event that they are exposed to discrimination claims from unsuccessful candidates. Furthermore, using this selection method for recruitment and promotion may lead to hostility in the workforce against those individuals selected by positive action.

The Equality and Human Rights Commission has committed to publishing user-friendly guidance on this issue, which hopefully will provide much-needed clarity.

Gender Pay Gap Reporting

The bill introduces new measures in an attempt to tackle the gender pay gap. Private sector employers with more than 250 employees or more in Great Britain will be encouraged to publish information voluntarily on an annual basis about the difference in the pay between male and female employees.

The bill gives the Government power to implement mandatory gender-reporting regulations, including civil and criminal sanctions for noncompliance. The Government hopes that employers will comply with reporting obligations of their own volition.

The Government has indicated that it will not invoke its power to make gender pay reporting mandatory until 2013, to allow a period of time for voluntary compliance. It will introduce mandatory gender pay reporting if sufficient progress on reporting has not been made by 2013.

Employment Tribunal Recommendations

If an Employment Tribunal makes a finding of discrimination against an employer, under the new powers in the bill it will be able to make wide-reaching recommendations across the workforce to help prevent discrimination occurring in the future (currently recommendations are limited in respect of the claimant only). For example, the Tribunal may recommend that an employer introduce an equal opportunities policy, retrain staff or set up a review panel to deal with equal opportunities, harassment and grievances.

Although any recommendations made will not be legally binding on an employer, a failure to implement any such recommendations may be used by employees as evidence to support subsequent discrimination claims (although the extent to which an employee is aware of any previous recommendations made is questionable).

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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