The Equality Act 2010 (the “Act”) came into force on 1 October 2010. It harmonises and updates the UK’s anti-discrimination framework. The Act is supported by Codes of Practice, which are still being finalised. These Codes are accompanied by guidance written by statutory bodies such as ACAS, the Government Equalities Office and the Equality and Human Rights Commission.

We summarise below the principal changes introduced by the Act on 1 October 2010 (click here) and those that may come into effect in the future (click here). We also provide practical guidance for employers (click here).

Discrimination law in Europe has developed at an unprecedented rate over the course of the last few years, principally as a result of the implementation of two EU Directives of 2000: the Racial Equality Directive and the Employment Equality Directive.

English law on discrimination was already fairly well evolved when the Directives were implemented. However, it has developed significantly since then to comply with European law and the European Court of Justice’s interpretation of certain key concepts. The Equality Act is another large step in the evolutionary process.

**Changes effective from 1 October 2010**

1. **Discrimination**

The Act still applies to nine “protected characteristics”: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. During consultation, it was suggested that characteristics such as language and genetic predisposition should also be protected, but the Government rejected those proposals.

2. **Direct discrimination - associative and perceptive discrimination**

Direct discrimination under the Act occurs when someone is treated less favourably than another person “because of” a protected characteristic. Previously, direct discrimination had to be “on the grounds of” one of the protected characteristics. The change is intended to simplify the definition. It also has the effect of prohibiting “associative discrimination” (i.e. discrimination because someone is associated with another person who possesses a protected characteristic) and “perceptive discrimination” (i.e. discrimination because others mistakenly think someone possesses a protected characteristic). The prohibition against associative and perceptive discrimination applies across most of the protected characteristics (excluding marriage or civil partnership).

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3. Victimisation and harassment

The Act introduces a number of changes to victimisation and harassment. Victimisation occurs when an employee is subject to detriment because he/she has (or is believed to have) made or supported a complaint or raised a grievance under the Act. A complainant is no longer required to point to a hypothetical or actual comparator who has not made or supported a complaint under the Act.

Harassment is now defined as “unwanted conduct related to a protected characteristic”, which has the “purpose or effect of violating [an individual’s] dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment” for that individual. The Act harmonises protection from harassment in the employment field across most of the protected characteristics (excluding pregnancy or maternity and marriage or civil partnership). The scope of harassment has also been widened as unwanted conduct must now be *related to* a protected characteristic (as opposed to “on the grounds of” a protected characteristic under the former discrimination structure). This means that employees are able to claim of harassment even if it is not directed at them and/or they do not possess the relevant characteristic themselves (associative and perceptive harassment). For example, associative harassment might occur if someone is treated adversely because they take time off to care for a disabled relative. A person who is wrongly perceived to be gay and who is harassed as a result might have a claim for perceptive discrimination.

Further, the circumstances in which an employer may be liable for harassment by third parties in the workplace has been extended under the Act; employers may be liable if an employee suffers (on two or more occasions) harassment from a third party, such as a customer or client, that is related to a protected characteristic. This has long been the case in relation to sex harassment claims; the Government has now extended the protection to cover other protected characteristics.

4. Disability discrimination

Disability discrimination has also undergone significant reform. It is no longer necessary to prove that an impairment adversely affects a claimant’s ability to perform one or more of a list of activities (which previously included mobility, manual dexterity, memory and ability to concentrate, amongst others), with the result that it is now easier to establish protection from disability discrimination.

The concept of *indirect discrimination* has been expanded under the Act to cover disability. Indirect disability discrimination can now occur when a provision, criterion or practice that applies to everyone within an organisation particularly disadvantages people with a disability, unless it can be justified as a proportionate means of achieving a legitimate aim.

The concept of *discrimination arising from disability* has also been introduced; this replaces disability-related discrimination under the old legislation. Discrimination arising from a disability will occur where a person is treated unfavourably because of *something arising in consequence of that person’s disability*, unless the treatment can be justified as a proportionate means of achieving a legitimate aim. So, for example, an employee who is dismissed after three months of sickness absence may assert discrimination arising from disability and thereby avoid the need to compare his/her treatment with that of a non-disabled employee (which is required where either direct or indirect disability discrimination is alleged). An employer will not be liable if it did not know and could not reasonably have been expected to know that the person had a disability.
5. Gender reassignment

The Act has expanded the concept of **indirect discrimination** to cover gender reassignment. Indirect discrimination can now occur when a provision, criterion or practice that applies to everyone within an organisation particularly disadvantages people who fall within the gender reassignment protected characteristic (unless it can be justified as a proportionate means of achieving a legitimate aim).

The definition of gender reassignment has also been broadened. A person will be regarded as having the protected characteristic if he/she proposes to undergo, is undergoing or has actually undergone the process of reassigning sex. This means that a person will no longer be required to be under medical supervision to fall within the definition. To reassign gender, the employee may simply decide to live and dress as someone of the opposite sex. However, transvestites or those who choose temporarily to adopt the appearance of the opposite sex will not be covered.

6. Pre-employment health questions

Employers are now prohibited from asking pre-employment health questions of a job applicant, unless they are made for certain prescribed reasons. For example, pre-employment health-related questions may be permissible if they are intended to enable the employer to determine: (i) whether any reasonable adjustments are required to be made to the selection process for that individual; (ii) whether an applicant is able to perform a function that is intrinsic to the work concerned; or (iii) to monitor diversity among job applicants.

Once an individual has passed the interview and been offered a job (on a conditional or unconditional basis) the employer is permitted to ask appropriate health-related questions.

7. Secrecy clauses

Despite the introduction of equal pay legislation 40 years ago, a significant gender pay gap still exists. The Act endeavours to address this inequality by **rendering contractual pay secrecy clauses unenforceable** if they seek to prevent employees disclosing information about their pay with a view to finding out if there are any differences that are related to a protected characteristic. To avoid a breach of contract, employees will have to prove that the disclosure of information about pay related to the possibility of some form of discrimination. Contrary to some recent press reports, there is no absolute prohibition on secrecy clauses, but employers should be aware of their limitations and draft accordingly.

8. Powers of the Employment Tribunal

Employment Tribunals have been given **wider powers to make recommendations** (such as retraining staff) that benefit the wider workforce, not just a claimant in a successful discrimination claim.

**FUTURE CHANGES UNDER THE ACT**

The Government is still considering and consulting on how best to implement the following provisions, which are not yet in force:

1. **Gender pay reporting**

The Government may require public and private sector employers with a certain number of employees to publish information relating to pay differences between male and female employees. If this power is exercised, public sector employers will not be required to publish such information until April 2011 and private sector employers will not be required to publish such information until 2013 (at the earliest).

2. **Dual discrimination provisions**

The Act introduces the concept of dual discrimination. An individual can bring a combined claim if he or she has been treated less favourably because of a combination of two protected characteristics (for example, the recent
allegations by several high profile female British broadcasters that they were dismissed as a result of discriminatory attitudes towards older female television presenters, which would not have applied to younger female or older male presenters). This provision is not expected to come into force until at least April 2011.

3. Positive action

The concept of positive action will permit (but not require) employers positively to discriminate in relation to under-represented groups in both recruitment and promotion, provided the employer can demonstrate that the successful candidate is from a protected group which is at a disadvantage or under-represented and that the successful candidate is “as qualified” as any other eligible applicant. This provision is not expected to come into force until April 2011 (at the earliest).

4. Public sector - single equality duty

It is intended that the Act will replace existing public sector equality duties with a single unified duty covering all discrimination strands. Public bodies will also have a mandatory duty to promote equality when making strategic decisions about how to exercise their functions. This provision is not expected to come into force until at least April 2011.

WHAT DO EMPLOYERS NEED TO CONSIDER? (back)

**Handbooks and policies:** Employers should consider whether existing policies and procedures need to be updated to ensure that they comply with the Act. For example, the extension of the definition of third-party harassment will mean that employers will need to revisit their harassment/bullying policies and also consider how they approach relationships with customers and clients. It will be necessary to ensure that gender reassignment is covered in diversity policies.

**Application forms/interview procedures:** Job application forms and procedures for conducting interviews should be reviewed to ensure compliance with the new restrictions on pre-employment questions relating to health.

**Training and awareness:** Employers should ensure that line managers and HR personnel are trained and fully aware of the principal changes under the Act. Employers should also provide general equal opportunities/harassment training for all staff.

**Internal networks:** Employers should consider establishing an internal network to promote awareness of equal opportunities and diversity issues - and to encourage best practice. It may also be beneficial to appoint a “champion”, a leader within the business who is responsible for actively promoting equality/diversity and enforcing compliance with the Act.

**Equal opportunities/diversity monitoring:** Anonymous equal opportunities/diversity monitoring should be conducted at the start of employment and repeated on an annual basis, so employers can understand the composition of their workforce and ensure equal opportunities are available to all. Such data can also be important when defending relevant Employment Tribunal claims. Employers may also consider tracking grievances and other employment claims to identify equality trends or particular problem areas within the organisation.

**Equal pay audit:** If an employer believes that it may have an equal pay issue, it might consider implementing an equal pay audit - although, unless conducted by external lawyers, the results of such an audit may not be privileged and could be disclosable in an equal pay claim. Therefore, an employer should exercise caution when considering equal pay audits and from the outset would need to be fully committed to resolving any discrepancies that may become apparent.