

EQUALITY ACT 2010



The Equality Act, which came into force on 1 October 2010, provides the legal framework for discrimination law in Scotland, England, and Wales.

- DISCRIMINATION
- VICTIMISATION
- PUBLIC SECTOR EQUALITY DUTY
- HARASSMENT
- EQUAL PAY
- POSITIVE ACTION

What does the Equality Act do?

The Act outlaws discrimination for the following nine “protected characteristics” - age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

It replaces all previous equality law including the Equal Pay Act, the Sex Discrimination Act, the Race Relations Act, the Disability Discrimination Act and the regulations outlawing discrimination on the basis of age, religion or belief and sexual orientation as well as all other related legislation.

The information contained in this booklet is not a substitute for legal advice. You should talk to a lawyer or advisor before making a decision about what to do.

Thompsons Solicitors and Solicitor Advocates is regulated by the Law Society of Scotland.

To whom does the Act apply?

The Act applies to all employers and anyone providing a service (for instance organisations that provide goods or facilities to the public) or exercising a public function. It also applies to anyone running a private club or association.

All job applicants and employees are protected, as are workers (including contract workers). It also covers the self-employed who are personally engaged to do the work.

Agency workers engaged by an employment business may be classed as contract workers if they are employed by that business. Agency workers supplied to a principal to do work and paid by an employment business under a contract will also be protected.

What is unlawful discrimination under the Act?

There are a number of different types of discrimination under the Act, as follows:

Direct discrimination

This is when someone is treated less favourably than someone else because of a protected characteristic.

Associative discrimination

This is the same as direct discrimination but applies to someone because of their association with a person who has a protected characteristic (such as the mother of a disabled child).

This provision does not apply specifically to the protected characteristic of pregnancy and maternity, although it may be possible to argue that a worker treated less favourably because of their association with a pregnant woman amounts to associative sex discrimination.

Perceptive discrimination

This is the same as direct discrimination but applies to someone because another person thinks they possess a particular protected characteristic. This provision does not apply to the protected characteristic of marriage/civil partnerships and pregnancy and maternity.

Indirect discrimination

This is when an employer applies a provision, criterion or practice (PCP) which is applied equally to everyone but which in fact puts (or would put) people with a protected characteristic at a particular disadvantage compared with those who do not

share that characteristic and which cannot be justified by the employer.

Indirect discrimination can only be justified if the employer can show that the PCP is a proportionate means of achieving a legitimate aim.

The provisions on indirect discrimination do not apply to pregnancy and maternity.

Discrimination arising from disability

This is when an employer knows that someone has a disability and discriminates against them because of something arising in consequence of their disability and cannot be justified.

Duty to make adjustments

Employers have to make reasonable adjustments for disabled people in three circumstances:

- If a provision, criterion or practice puts them at a substantial disadvantage in comparison with someone who is not disabled.
- If a physical feature puts them at a substantial disadvantage in comparison with someone who is not disabled.
- If a disabled person would be put at a substantial disadvantage in comparison with someone who is not disabled, were it not for an auxiliary aid.

What other conduct is prohibited?

Harassment

Harassment is “unwanted conduct related to a relevant 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 provisions on harassment do not apply to the protected characteristics of pregnancy and maternity and marriage and civil partnerships. However, someone subject to harassment related to these protected characteristics may be able to bring a claim of harassment related to sex and/or sexual orientation.

People at work can complain about behaviour that they find offensive even if they do not have the protected characteristic themselves. So, for example, witnesses to harassment may be protected.

The Act specifically prohibits three types of harassment - unwanted conduct related to a relevant protected characteristic; sexual harassment; and less favourable treatment of someone because they agreed to or rejected sexual harassment or harassment related to their sex or gender reassignment.

Victimisation

This is when an employee is treated badly because they have done or may do a protected act. A protected act includes:

- Bringing proceedings under the Act, or previous discrimination legislation.
- Making allegations of a breach of the Act or previous discrimination legislation.
- Giving evidence or information in connection with proceedings that someone else has brought.
- Doing anything else such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation has to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.

What does the Act say about Pay?

Equal Pay

A person bringing an equal pay claim under the Act can rely on a hypothetical comparator if they have evidence of direct sex discrimination but there is no actual comparator doing equal work.

So if the claimant can provide evidence showing that they would have been paid more if they were of a different sex, they can still bring their claim, even if there is no-one of the opposite sex doing equal work in the organisation.

Pay secrecy

The Act says that employers cannot stop their employees from having a discussion about whether there are differences in their pay related to protected characteristics. It also outlaws “gagging clauses” in people’s contracts.

However, employers can stipulate that employees keep pay rates confidential from certain groups outside the workplace, for example competitor organisations.

Gender pay reporting

The Act allows for compulsory pay audits for organisations with more than 250 employees from 2013 although given this government’s preferred voluntary approach, it is not clear when or if this section will be enacted.

However, it has decided to introduce a power for employment tribunals to order compulsory gender pay audits when an employer has been found to have discriminated on the ground of sex.

Micro-businesses (those with fewer than 10 employees) will be exempt. It is not yet clear when the power will become effective.

From 2016 it is expected companies with more than 250 employees will be required to publish what is commonly referred to as the "Gender Pay Gap" data. This is the average take home pay of all women and men across the company. The Scottish Government has announced a proposal to bring in this provision for organisations with 20 employees or more requiring them to report on gender pay gap information and occupational segregation.

In general terms the requirement to publish this information was created in the knowledge that this information would not assist in establishing the basis for an Equal Pay Claim. This is because any difference in pay which emerges can be caused by a variety of factors, some of which may not be unlawful. In other words, a difference in pay across every job in an organisation does not mean that there has been any unlawful pay discrimination as the cause of that difference in pay and may reflect other factors used to determine pay.

A requirement to publish (as seen elsewhere in the EU) of intra-grade comparison is more useful as this can show an appearance of pay difference between men and women doing jobs that may be considered to be equal. However, there would still require to be a determination of why such pay differences exist and whether there is justification for how pay has been determined.

It is important to remember that the former Equal Pay Questionnaire process which operated within the Employment Tribunal process has been abolished making it more difficult for individual employees to investigate whether they have the grounds to pursue an equal pay claim.

What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. Advance equality of opportunity between people from different groups. Foster good relations between people from different groups.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they "reasonably" think the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the characteristic provided that:

- The person is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.

The Employment Rights Bill

The Employment rights bill is expected to make the most substantial changes to equality law in over a decade. A key development is the introduction of **mandatory Equality Action Plans** for large employers (those with 250 or more employees).

Under the new framework, employers above a defined size threshold will be legally required to **produce and publish an Equality Action Plan**, a structured document setting out how they will identify, monitor, and address workplace inequality. This particular development is not designed to come into force until 2027, however, demonstrates a step towards stronger protections for those protected under the Act.

Time limits for making a claim to an employment tribunal are also expected to increase to 6 months for all claims. The current time limit for most claims is 3 months, this change is expected in October 2026.

Thompsons are committed to ensuring we remain up to date with the changes to the legislation and there are many to cover. If you have a query in relation to a specific change implemented by the Bill, please communicate this to your case handler.

What are pre-employment health-related checks?

An employer must not ask about a job applicant's health or whether they have a disability until they have either been offered a job or been included in a pool of successful applicants.

However, this is not a blanket ban and an employer can ask questions about or whether a person has a disability before offering a job to an applicant if it will help them to:

- Make a reasonable adjustment to the selection process.
- Decide whether an applicant can carry out a function that is essential to the job.
- Monitor diversity among applicants.
- Take positive action to help the disabled.
- Ensure that the candidate actually has the disability if the job genuinely requires the jobholder to have a particular disability.

How do claimants gather information from their employer?

Workers can no longer use standard forms (the questionnaire procedure) when requesting information from their employer about their complaint. They can still ask their employer to provide them with information, but there is no obligation on the employer to provide it.

It is helpful to identify any documents which could be requested through tribunal procedure at the earliest opportunity.

What time limits apply?

At present, claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

Where the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

It is useful to be able to demonstrate that a written grievance has been issued to the employer setting out the complaint in order to prevent any possible reduction in any Tribunal award. However, lodging a grievance does not alter the time limits above.

0141 566 6899

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