

The Equality Act:  
Guidance for small businesses

# Your role as an employer under the Equality Act



**Equality and  
Human Rights**  
Commission

This guide explains your responsibilities as an employer set out in the Equality Act 2010. The Equality Act also sets out your responsibilities when you provide services to the public. The Act means treating everyone fairly, with dignity and respect. Your business's policies for recruitment, promotion and management of staff should help you to stay within the law, attract talented employees and get the best out of them. Businesses which recruit from the widest possible talent pool will attract the best staff. Workplace policies that prevent discrimination and harassment, and that allow your employees to balance their work and home lives, will help you to retain workers and reduce your recruitment costs.

By being aware of the diverse needs of your customers, you could identify new products and markets. Your customers' buying decisions are also influenced by your reputation.

### **What is the Equality Act?**

The Equality Act 2010 brought together and updated a wide range of laws passed since the 1970s into one place, to make things fairer for everyone. It sets out the personal characteristics that are protected by law and the behaviour that is unlawful. The Act is a simplification of previous anti-discrimination laws and is not designed to create additional paper work for employers. It applies to businesses of any size, so it is important to understand what it means.

## **Who has duties under the Act?**

All employers, whatever their size, are covered by the Act.

As an employer, the law generally still applies to you if your workers are temporary, do not have written contracts or are recruited to other positions such as trainees, apprentices or business partners. All employers have the same legal duties under the Act, but the way that large and small employers carry out these duties may be different. Small employers may have practices that are more informal, have fewer written policies, and may be more constrained by financial resources than larger employers, but no employer is exempt from these duties because of size.

## **Who is protected by the Act?**

Everyone in Britain is protected from unlawful behaviour by the Act. The ‘protected characteristics’ under the Act are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation.

## What behaviour is unlawful?

Under the Act, people are not allowed to discriminate, harass or victimise another person because they have a 'protected characteristic', are perceived to have or are associated with someone who has a protected characteristic. Part 5 of the Act protects people with a protected characteristic against discrimination in employment, when seeking employment, or when engaged in occupations or activities related to work.

## Objective justification

It is possible to defend certain discrimination claims by arguing that the treatment or practice is justified. Those claims are:

- Indirect discrimination
- Direct age discrimination
- Discrimination arising from disability

In these claims, if an employer or service provider can show that the treatment or practice is a proportionate means of achieving a legitimate aim then the claim will not succeed.

The test is best applied in two stages:

- Does the aim of the treatment or policy represent a real need, which is not discriminatory?
- Are the means of achieving the aim proportionate - are there less discriminatory ways of achieving it?

If the aim is legitimate and there are no less discriminatory ways of achieving it, then in some instances discrimination may be objectively justified.

### **Example**

A building company has a policy of not employing under-18s on its more hazardous building sites. The aim behind this policy is to protect young people from health and safety risks associated with their lack of experience and less developed physical strength. This aim is supported by accident statistics for younger workers on building sites and is likely to be a legitimate one. Imposing an age threshold of 18 would probably be a proportionate means of achieving the aim if the evidence supports this.

## **Recruitment**

Prejudice-free recruitment helps you get the best possible person for the job.

The Act covers the entire recruitment process. For example:

- To avoid racial discrimination, overseas qualifications comparable with UK qualifications should be accepted as equivalents.
- The physical design of application forms should not discriminate against disabled people, for example, very small print size may not be readable for people with visual impairments.
- It would be unlawful to prefer a younger candidate in the belief that they will be 'hungry' and 'dynamic', and so perform better.

### **Job adverts**

You do not have to advertise a job vacancy in a particular way or at all. If you do advertise, whether it is on a notice board, in a shop window, in a newspaper, on a website, or by using a recruitment agency, you must not give the impression you intend to discriminate.

Here are a few examples of what discrimination means:

- Stating a preference for a man or woman in a job advertisement. This is unlawful sex discrimination unless the requirements of the particular job mean that it is lawful to employ only a man or a woman. Avoid gender-specific job titles, such as ‘waitress’, ‘handyman’ or ‘salesgirl’. It would be better to say for example a ‘salesperson’.
- Advertisements should not include age limits, unless these can be objectively justified. Avoid using words and phrases such as ‘young and dynamic’ or ‘mature person’. These could result in a complaint of age discrimination.

### **Questions about health or disability**

Except in very restricted circumstances, an employer is not allowed to ask a job applicant about health or disability until the person has been:

- Offered a job either outright or on a conditional basis, or
- Included in a pool of successful candidates to be offered a job when a position becomes available.

This includes asking questions during the application process or interview or in a questionnaire about health before a job offer. Questions relating to previous sickness absence count as questions that relate to health or disability.

No one else, such as a recruitment agency or occupational health practitioner can ask these questions on behalf of the employer either.

You can ask questions once you have made a job offer or included someone in a group of successful candidates. At that stage, you can make sure that someone's health would not prevent them from doing the job. However, you must consider whether there are reasonable adjustments that would enable them to do the job.

You can ask questions about health or disability when:

- The questions relate to a person's ability to carry out a function that is intrinsic (or absolutely fundamental) to that job, or where the questions will help you to find out if a person can carry out the function with reasonable adjustments in place.
- You are finding out if any applicant needs reasonable adjustments for the recruitment process, such as for an assessment or an interview.
- You are asking the questions for monitoring purposes to check the diversity of applicants (although this information should be collected separately and must not form part of the recruitment process).

## Your role as an employer under the Equality Act

- You want to make sure that an applicant who is a disabled person can benefit from any measures aimed at improving disabled people's employment rates - for example, the guaranteed interview scheme. You should make clear to job applicants that this is why you are asking the question.
- You are asking the question because having a specific impairment is an occupational requirement for a particular job - for example, a deaf blind project worker for a charity that works exclusively with deaf blind people.
- The questions relate to a requirement to vet applicants for the purposes of national security.

### **Example**

A construction company is recruiting scaffolders. The company can ask about health or disability on the application form or at interview if the questions relate specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is a function that is intrinsic or fundamental to the job.

### **Example**

At an interview for a research post, a disabled applicant volunteers the information that he will not be able to use standard computer software to prepare reports because of the nature of his impairment. The interviewers are not sure whether they can ask additional questions about this.



If the preparation of reports is an intrinsic part of the job then additional questions can be asked to establish whether there are reasonable adjustments that can be made - for example, the provision of a voice activated computer - and to establish whether he is able to prepare reports with those adjustments in place. It would be good practice for the interviewers to explain the reasons for the additional questions during the interview.

## **Recruiting women who are pregnant or on maternity leave**

You must not refuse to employ a woman because she is pregnant, on maternity leave or because she has (or has had), an illness related to her pregnancy.

Equality law does not say that a woman applying for a job has to tell you that she is pregnant. This is because you must not base your decision about whether or not to employ her on whether she is pregnant but on whether she has the skills to do the job.

If a woman does not tell you that she is pregnant and is given the job, you must not dismiss her when she tells you about her pregnancy.

You also cannot ask a woman whether she intends to have children, whatever her age or marital status or even if you think she might be pregnant. This is not something that should be taken into account in deciding whether a person has the skills needed for a particular job.

## Working hours and flexible working

This guide is only about equality law. There are other laws giving employees with caring responsibilities for children or particular adults the right to have a request for flexible working considered according to set procedures (this is the ‘right to request’ procedure).

There are many types of flexible working. For example, it might mean someone:

- Working part-time, working only during term time or working from home some of the time to allow them to collect their children from school
- Adjusting their start and finish times to accommodate a health condition
- Adopting a particular shift pattern or working extended hours on some days with time off on others.

An effective way to avoid discrimination when deciding who can change their working hours or work flexibly is to develop and follow a set procedure to manage flexible working requests. The Government proposes to extend the right to request flexible working to all employees from 2014.

## **Requests for changes to hours of work or flexible working based on association with a protected characteristic**

The duty to make reasonable adjustments to remove barriers for disabled people does not apply to non-disabled workers who require adjustments to take care of a disabled person with whom they are associated.

People in this position, and those assisting children or older relatives (whether or not they are disabled) with their day-to-day care needs, are often referred to as ‘carers’. Most will qualify for the right to request flexible working once they have worked for their employer for at least 26 weeks.

## **Requests for changes to hours of work or flexible working relating to religion or belief**

Some religions or beliefs may require their followers to pray at certain times of the day, or to have finished work by a particular time.

If you apply a general rule about working hours that means a worker has to take rest breaks or finish work at a particular time, you need to be able to objectively justify the rule, as otherwise this may be indirect discrimination because of religion or belief.

## **Requests for changes to hours of work or flexible working relating to gender reassignment**

If a request to work flexibly is because someone proposes to undergo, is undergoing or has undergone gender reassignment, you should consider the request on the same basis as you would consider any similar request to work flexibly for reasons not related to gender reassignment.

You should not refuse a request or treat it less seriously because a transsexual person is making it.

## **Decisions relating to time off**

Employment law (rather than equality law) sets out people's rights to:

- A minimum number of days of paid time off
- Paid and unpaid maternity leave
- Paid paternity leave
- Paid and unpaid adoption leave
- Unpaid parental leave
- Unpaid family emergency leave in certain circumstances (for example, if a worker's usual childcare or care for other family members who depend on them is not available at short notice)

- Paid or unpaid time off for public duties and trade union responsibilities.

In general, equality law applies not to whether someone has a right to time off, but how their employer makes decisions about:

- Who gets to take time off, when and how much
- Whether the time off should be paid or unpaid
- How the employer records different types of absence.

Exceptions to this, where equality law does affect whether someone has a right to time off, are:

- Time off as a reasonable adjustment to remove barriers for disabled people
- Gender reassignment leave
- Pregnancy-related absence

## **Time off for sickness**

Employers sometimes use workers' sickness absence records to help them make decisions about things like:

- Promotion
- Bonuses

- Redundancy
- References.

If you treat time off taken by a disabled person that relates to their disability in exactly the same way as you treat sickness absence taken by a worker who is not disabled, this may result in the disabled person being treated worse than another worker because of something arising from their disability.

You must also make sure that you have complied with the duty to make reasonable adjustments.

You should:

- Record disability-related time off separately from general sick leave.
- Stay in touch if someone is absent for a long period to find out how they are and to tell them what is happening at work (though they should make it clear they do not expect the person to come back to work before they are ready).
- Think about a plan for return to work, for example, arranging for the person to start work again gradually or to do some work at home before they come into the workplace, if this is possible in the particular job.
- Consider reasonable adjustments with the person and, if necessary, use expert advice to work out what adjustments can be made for when the person is ready to return to work. If a change is reasonable, you must make it.

You do not have to pay sick pay for longer than you normally pay just because time off is disability-related. However, it may be a reasonable adjustment to:

- Offer unpaid disability leave, or
- Allow someone to take the extra time off as annual leave.

However, if the reason someone is absent is because of a delay by you in implementing a reasonable adjustment, such as a particular type of software or keyboard, that would enable the person to return to the workplace, maintaining full pay may well be a further reasonable adjustment to make.

## **Pregnancy-related absences**

Special rules apply to sickness absence, which relates to pregnancy or having given birth. You should record pregnancy-related illness separately from other kinds of illness and should not count it towards someone's total sickness record.

You should not pay a woman who is absent for a pregnancy-related illness less than the contractual sick pay she would receive if she was absent for any other illness with a statement of fitness to work ('fit note').

You must not take into account a period of absence due to pregnancy-related illness, or maternity leave, when making a decision about a woman's employment, for example, for disciplinary purposes or if you are selecting workers for redundancy. Sickness absence associated with a miscarriage should be treated as pregnancy-related illness.

You must give a pregnant employee time off for antenatal care. Antenatal care can include medical examinations and parenting classes.

The right to paid time off does not extend to the partners of pregnant women, although you could choose, as a matter of good practice, to allow someone to take annual leave or unpaid leave or to work flexibly to support their partner.

You can find out more about managing pregnancy and redundancy in the guide by the Commission and ACAS available on [our website](#)

## Maternity, paternity, adoption and parental leave

When dealing with workers who request or take maternity, paternity, adoption or parental leave, you must make sure you do not discriminate against a person because of a protected characteristic.

### Example

A lesbian has asked her employer for unpaid parental leave. She and her partner adopted a child two years ago and she wants to be able to look after her child for part of the summer holidays. The worker made sure the time she has requested does not conflict with parental leave being taken by other workers. In exercising their discretion whether to grant parental leave, the woman's line manager refuses her request because they do not agree with same-sex couples being allowed to adopt children. This is likely to be direct discrimination because of sexual orientation.



## **Pay and benefits**

Employers' decisions on pay and benefits may be influenced by:

- The going rate for the job in the relevant sector and/or area
- The skills and qualifications needed by someone when they do the job
- The employee's performance in the job.

You must make sure that the way you work out and apply these criteria does not discriminate unlawfully.

Specific rules apply where pay or benefits are part of the worker's contract of employment and women and men are being paid differently.

To help avoid discrimination, you can:

- Make sure you know why you are paying people differently.
- Check that people who share a particular protected characteristic are not generally paid less than people who do not share it.
- Use an equal pay audit to check the impact of decisions on pay and benefits.
- Implement a transparent, structured pay system based on a valid job evaluation scheme, which is more likely to be free of bias than one that relies primarily on managerial discretion.

You should consider whether all aspects of your pay and benefits comply with equality law, including:

- Any service you give your workers as a benefit, such as group insurance
- The pay rate for men and women
- Bonus payments
- Occupational pension schemes
- Health insurance

### **Career development: training, promotion and transfer**

Providing development opportunities can boost loyalty, morale and productivity, help with retention and ensure that you promote the staff who will make a difference to your business.

#### **Training**

You can generally decide whether to offer training and who needs it. However, you must do this without unlawful discrimination, making reasonable adjustments if necessary.

You should consider all aspects of training, from learning ‘on the job’ to induction, coaching and day release.

You must not stop someone doing training because they are pregnant, on maternity leave or due to take maternity leave, or on pregnancy or maternity-related sickness absence, unless a specific risk to health and safety has been identified.

## Promotion or transfer

Promoting or transferring a worker is very similar to recruiting them in the first place.

You must not deny someone promotion opportunities because they are pregnant or on maternity leave. You should tell women about promotion opportunities when they are on maternity leave.

If a disabled person might be eligible for promotion, transfer or other development opportunity, you should:

- Not make assumptions about the person's abilities or willingness to take on a new role
- Consider whether particular qualifications are actually required or whether what they really need is a particular skill level
- Not say or imply that it is unsuitable for a disabled person unless there is a clear role-related reason for this
- Tell everyone, including workers who have a disability, about any promotion or transfer or other development opportunity, including giving them the information in the format they usually use at work, for example, large print or electronically
- Make any reasonable adjustments needed to participate in an interview
- Take account of how reasonable adjustments could enable someone to meet the new requirements when assessing their suitability for a new role.

If, after working out how reasonable adjustments could enable the disabled person to meet the new requirements of a new role, you decide that they are not the best person for the promotion, you do not have to offer it to them.

### **Facilities**

Facilities can be space or equipment necessary for a person or group of workers to carry out their work. They can include:

- Access to computers, mobile phones and other technology
- Toilet and washing facilities
- Kitchen or tea and coffee making facilities
- Parking for cars or bicycles
- Prayer and quiet rooms
- Facilities for breastfeeding mothers.

There are some circumstances where you should take care to avoid unlawful discrimination.

### **Single-sex facilities and workers' religion or belief & transgender**

If workers are provided with changing facilities or showers, you must provide these in a way that avoids unlawful discrimination because of religion or belief or transgender.

## **Example**

An employer requires workers to change their clothing and/or shower for reasons of health and safety. Some religions or beliefs do not allow their adherents to undress or shower in the company of others for modesty reasons. Insisting upon communal showers and changing facilities, even if segregated by sex, could be viewed as indirect discrimination as it may put at particular disadvantage workers sharing a certain religion or belief whose requirement for modesty prevents them from changing their clothing in the presence of others, even others of the same sex. You would need to show that this provision, criterion or practice was objectively justified.

## **Facilities provided because of workers' religion or belief**

Many employers recognise that it is good practice to provide facilities which cater for the needs of staff with a particular religion or belief. These might include making a room available for prayer, providing particular fridge shelves for food that needs to be kept separate and, if an organisation provides refreshments or meals for staff, meeting dietary requirements.

## **Breastfeeding**

An employer has a legal duty to provide suitable rest facilities for breastfeeding women - to enable her to express milk, for example. There is no legal right for a woman to breastfeed in the workplace. However, a refusal to allow a woman to express milk or to adjust her working conditions to enable her to continue to breastfeed outside the workplace may amount to unlawful sex discrimination.

## **Dress codes**

You must avoid unlawful discrimination in requiring workers to dress or modify their personal appearance in a particular way. This does not stop you from having a dress code but you must be careful that the code and the way it is applied does not discriminate. This is particularly relevant in relation to sex, disability, transgender and religion or belief, for example specifying a skirt for women or no headscarves.

## **Management and appraisal**

Every organisation manages the performance of its workers to make sure that they are getting their job done in the way the employer wants them to. This can be formally through an appraisal scheme, with regular line management meetings and annual reports or it may be informally, by talking over performance as the job is carried out.

## **Disciplinary procedures**

The disciplinary process must be fair and reasonable adjustments must be made to it if necessary, for example:

- Documents in different formats
- Holding meetings in accessible rooms
- Providing an interpreter for someone who is deaf
- Providing someone to complete a form if the person has severe dyslexia

- changes to the process such as more breaks to ask for an explanation from an official companion.

## Reasonable adjustments

Employers have a legal duty to consider reasonable adjustments to employees at every stage of the employment relationship. Reasonable adjustments vary enormously but could include:

- A phased return to work for someone who has been off for a while
- Part-time or flexible hours
- Changes to premises
- Provision of additional equipment
- Additional support, such as a part-time reader for someone with a visual impairment
- Reassigning some elements of the job to another member of staff or transferring the person to another role in the organisation.

Most adjustments are free. Where a cost is attached, it may still be reasonable for you to make it. However, your employee may be able to get support from the **Government's Access to Work** scheme, which can pay for things like taxis to and from work; British Sign Language interpretation and support workers.

## Age

Age is different from other protected characteristics. If you can show that it is objectively justified, you can make a decision based on someone's age, even if this would otherwise be direct discrimination.

However, it is difficult to be able to objectively justify direct age discrimination. You should be careful not to use stereotypes about a person's age to make a judgement about their fitness or ability to do a job.

## Occupational requirements

If you can show that a particular protected characteristic is central to a particular job, you can insist that only someone who has that particular protected characteristic is suitable for the job.

This would be an 'occupational requirement'. For example, you can specify that only a female assistant can fit bras in a women's clothing shop.

## Obeying another law

You can take into account a protected characteristic where not doing this would mean breaking another law. For example, a driving school could reject a 19-year old applying to be an instructor because legally a driving instructor be at least 21 years old.



## **National security**

You can take a person's protected characteristic into account if there is a need to safeguard national security and the discrimination is proportionate.

## **Other Exceptions**

Equality law sometimes applies differently depending on the identity of the employer. Other exceptions that only apply to some employers include:

- An employment service provider may be able to say that a person must have a particular protected characteristic to do vocational training, if the training leads to work for which having that characteristic is an occupational requirement.
- An educational establishment like a school or college may be able to say that someone has to be of a particular religion or belief, or must be a woman to apply for or hold a particular post.

In addition to these exceptions, equality law allows any employer to:

- Treat disabled people better than non-disabled people
- Use voluntary positive action in relation to any group.

## **Positive action**

Positive action means you can, (if you wish to), take steps to encourage people who share a protected characteristic and who

experience disadvantage or low participation because of that characteristic to take up employment opportunities, including jobs, training, promotion, transfer or other development opportunities.

Equality law allows an employer to target opportunities at particular groups. Equality law does not allow employers to appoint a candidate who is not the best person for the job because the candidate has a protected characteristic (this is sometimes called positive discrimination).

However, in a situation where two candidates are equally qualified, it is possible to appoint one belonging to a group sharing a protected characteristic if you reasonably believe this group to be disadvantaged or under-represented in the workforce or if their participation in an activity is disproportionately low.

Equality law additionally allows an employer to treat a disabled person better, or more favourably, than a non-disabled person. This recognises the additional barriers to work that disabled people face.

## **Dismissal, redundancy and retirement**

### **Dismissal**

This guide is only about equality law. There are other laws that employers need to follow to make sure that dismissal is fair, in the sense that proper procedures have been followed.

You can find out more about managing dismissals from the [ACAS website](#).

You must take extra steps if you want to dismiss someone who is disabled. If you wish to do this because you believe that the disabled person can no longer do the job, you need to:

- consider if there are reasonable adjustments that would mean a return to work (including redeployment in another role), or
- make sure that you can objectively justify dismissal.

If you cannot retain the disabled person, a dismissal can be a 'medical retirement' or a 'retirement on ill health grounds' if there are benefits for them in retiring, such as a pension.

## **Redundancy**

This guide is only about equality law. There are other laws, which employers must follow to make sure redundancy dismissal is fair, in the sense that the proper procedures have been followed. Your redundancy criteria and procedures must not unlawfully discriminate. Failing to make reasonable adjustments to redundancy criteria and procedures for a disabled person is a form of unlawful discrimination. This applies to both voluntary and compulsory redundancy.

You can find out more about managing pregnancy, maternity and redundancy in the guide by the Commission and ACAS, 'Managing redundancy for pregnant employees and those on maternity leave' on [our website](#)

## **Retirement**

Making someone retire at a particular age is, on the face of it, discrimination because of age. Equality law no longer makes a blanket exception for retirement (except if an employer served a retirement notice on a worker before 6 April 2011 and the necessary procedures are followed).

Under the new law, it is direct age discrimination to require a worker to retire unless the decision can be objectively justified. This is a two-stage test where you would need to show that there is a real need for a compulsory retirement policy and that your particular policy is the least discriminatory way of meeting that need.

## **After someone has left a job**

Sometimes your responsibilities continue after a worker has stopped working for you. You must still not discriminate unlawfully against the worker, e.g. by giving the worker a poor reference because he or she has brought a discrimination claim against you. Apart from references, another situation where someone might have a continuing relationship with an employer would be if they were receiving continuing benefits, i.e. pension or shares.

## For further information:

This guide is part of the series entitled: **The Equality Act: Guidance for small businesses**, other titles in the series are

- Understanding legal definitions of discrimination and unlawful behaviour in the Equality Act
- Your role as a service provider under the Equality Act

You can also find more detailed information in the ‘Code of Practice on Employment’ and the ‘Code of Practice on Services, Public Functions and Associations’, available on the Commission’s website.

## What is the role of the Commission?

The Commission is here to help you with information about the Act. We provide guidance and statutory Codes of Practice explaining how to comply with the law.

As well as explaining the law, we can enforce it. Our powers include helping individuals with their legal cases and taking legal action ourselves against organisations that appear to have broken the law.

# Contacts

The Commission's publications are available to download on our website: **[www.equalityhumanrights.com](http://www.equalityhumanrights.com)**

If you would like to discuss the option of accessing a publication in an alternative format please contact:

**[engagementdesk@equalityhumanrights.com](mailto:engagementdesk@equalityhumanrights.com)**

## Equality Advisory and Support Service (EASS)

The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

Telephone: 0808 800 0082

Textphone: 0808 800 0084

### Opening hours:

09:00 to 20:00 Monday to Friday

10:00 to 14:00 Saturday

**Website:** [www.equalityadvisoryservice.com](http://www.equalityadvisoryservice.com)

**Post:** FREEPOST Equality Advisory Support Service FPN4431

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