

**acas** working  
for everyone

Guidance

# Equality and Discrimination: Understand the basics

September 2017



## About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to [www.acas.org.uk](http://www.acas.org.uk) for more details.

## 'Must' and 'should'

Throughout the guide, a legal requirement is indicated by the word "must" - for example, an employer must make 'reasonable adjustments' to ensure that workplace requirements or practices do not disadvantage employees or potential employees with a disability.

The word 'should' indicates what Acas considers to be good employment practice.

## Understanding the term 'employee'

Regarding discrimination matters, under the Equality Act 2010 the definition of 'employee' is extended to include:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- apprentices (those with a contract of apprenticeship)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business.

Job applicants are also protected.

### September 2017

Information in this guide has been revised up to the date of publishing. For more information, go to the Acas website at [www.acas.org.uk](http://www.acas.org.uk). Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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### **The difference between characteristics and types of discrimination**

If an employee believes they have been discriminated against, they will often connect this to grounds such as age, sex or race. These are called protected characteristics.

But the way in which they have been allegedly discriminated against will determine which type or types of discrimination apply within their protected characteristic. For example, whether direct, indirect, harassment or victimisation.

Sections on ‘protected characteristics’ and ‘types of discrimination’, along with an at-a-glance chart, explain how and where they can fit together.

## About this guide

This guide outlines the basics of what employers of all sizes, employees and their representatives must and should do to make their workplaces a fair environment and comply with equality legislation which:

- extends to nine areas known in law as protected characteristics: Age; Disability; Gender reassignment; Marriage and civil partnership; Pregnancy and maternity; Race; Religion or belief; Sex (gender); and Sexual orientation.
- sets out the different types of discrimination - for example, direct, indirect, harassment and victimisation.
- makes certain exemptions and exceptions where in some limited circumstances treating employees and job applicants less favourably can be lawful.

This is the first of three main guides for an overview of discrimination, equality and diversity. The second, Prevent discrimination: support equality, outlines how to promote and benefit from the principles of equality and diversity, and put them into practice in the workplace. The third, Discrimination: what to do if it happens, covers the basics of dealing with discrimination, including handling complaints.

There are also guides giving guidance related to individual protected characteristics.

## At-a-glance chart

The different 'types of discrimination' listed across this chart and the nine 'protected characteristics' set out down the left-hand side of the chart are fully explained further into this booklet.

Age	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Disability*	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Gender reassignment	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Marriage and civil partnership	Direct covered (but not by association or perception)	Indirect covered	Harassment not covered	Victimisation covered
Pregnancy and maternity	Direct covered (but not by association or perception)***	Indirect not covered	Harassment not covered	Victimisation covered
Race	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Religion or belief	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Sex (gender)**	Direct covered	Indirect covered	Harassment covered	Victimisation covered
Sexual orientation	Direct covered	Indirect covered	Harassment covered	Victimisation covered

\* Also includes 'discrimination arising' – see section headed 'Disability' for more information

\*\* Also includes 'sexual harassment'

\*\*\* While there is uncertainty over whether the Equality Act would allow a claim of direct discrimination by association because of Pregnancy or maternity, The Equality and Human Rights Commission's Code of Practice on Employment advises that an employee who is treated less favourably because of their association with a pregnant woman may have a claim for sex discrimination

## The nine protected characteristics

The Equality Act 2010 defines nine protected characteristics:

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

In the Equality Act, no one protected characteristic has a higher priority than any other.

Discrimination claims can be made on the grounds of:

- 1. a single protected characteristic** - for example, because an employee is female
- 2. a number of single, but unrelated, characteristics** – for example because an employee is female and also because she is of a particular age (in these situations, each characteristic would be considered separately).

### Age

The Equality Act protects employees from discrimination, harassment and victimisation because of age, which may include because they are 'younger' or 'older' than a relevant and comparable employee. For example, if an organisation has a training policy excluding employees aged 60 or more from applying for courses then this is likely to be discriminatory.

Direct discrimination because of age is the only one of the three different types of direct discrimination that may be objectively justified as what the law terms 'a proportionate means of achieving a legitimate aim' – for more information see the section headed, 'Can discrimination ever be justified?'

However, under the Act, limited exceptions in some other areas, including pay and other employment benefits, can be allowed based on length of service. There are also some limited exceptions and exemptions relating,

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for example, to the National Minimum Wage, redundancy payments, insurance and pensions.

To find out more about the protected characteristic of Age, see the Acas guide, [Age and the workplace: a guide for employers and employees](#).

## Disability

The Equality Act protects employees from discrimination - direct, including by association and by perception, indirect, harassment and victimisation - because of disability. For example, the dismissal of an employee because they are dyslexic could be potentially discriminatory.

Under the Act, a person is disabled if they have a physical or mental impairment which has a long-term (usually lasting more than a year) and substantial adverse effect on their ability to carry out normal day-to-day activities. A number of impairments, such as cancer, HIV and multiple sclerosis are automatically considered disabilities and other progressive conditions will be considered a disability as soon as the symptoms of that condition have an effect.

What constitutes a disability can be variable and difficult to define. Employers should remember that:

- a reasonable adjustment is a change or adaptation to the physical or working environment that has the effect of removing or minimising the impact of the individual's impairment in the workplace so they are able to undertake their job duties, and;
- employers are accountable for deciding what (if any) reasonable adjustments will be made. It is good practice for employers to seek advice in coming to this decision. The focus is very much on the employee's ability to function on a day-to-day basis rather than on medical diagnosis.

Where the employer or another person acting for the employer knows, or could reasonably be expected to know, that the employee or job applicant has a disability, the potential for discrimination occurs. An employer should be ready to discuss what a reasonable adjustment should be with the disabled employee or job applicant.

### **Reasonable adjustments**

An employer must make 'reasonable adjustments' to ensure that workplace requirements or practices do not disadvantage employees or potential employees with a disability.

Reasonable adjustments should be made with the employee's involvement. They can often be simple and inexpensive. In law, adjustments have to be 'reasonable', and need not be excessive. There is more on ['reasonable adjustments'](#) further into this guide.

### **Discrimination arising from a disability**

The Equality Act also protects an employee from what the law terms 'discrimination arising from a disability' – this is where they are treated unfavourably because of something connected with their disability. For example, a tendency to make spelling mistakes arising from dyslexia.

At an employment tribunal, a claim of discrimination arising from disability would succeed if the employer (or, for example, the manager or another employee against whom the allegation was made) was unable to objectively justify the unfavourable treatment by pointing to a valid and non-discriminatory reason for it.

In law, this means the unfavourable treatment would have to be justified as 'a proportionate means of achieving a legitimate aim'. For more information see the section headed, ['Can discrimination ever be justified?'](#)

However, it is very unlikely an employer would be able to justify discrimination arising from a disability if the unfavourable treatment could have been prevented by a reasonable adjustment.

### **Questions about job applicants' health**

Health issues should be treated with care, as it is generally unlawful for an employer to ask questions about a job applicant's health, absences from work or disability before offering them employment. There is more on ['job applicants' health'](#) further into this guide.

To find out more about the protected characteristic of Disability, see the Acas website page on Disability discrimination, and the Acas guide, [Disability discrimination: key points for the workplace](#).

## **Gender reassignment**

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The Equality Act protects employees from discrimination, harassment and victimisation relating to gender reassignment. In the Act, someone who proposes to, starts, or has completed a process to change his or her gender is referred to as a 'transsexual'.

Previously, people reassigning their gender had to be under medical supervision to be covered, but this is no longer the case. For example, a male employee who decides to live as a woman, but does not undergo any medical procedures, must not be harassed if the employee begins to use female toilet facilities.

It is discriminatory to treat a transsexual employee less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment. An employer must not treat them any differently than it would if they were absent because they were ill or injured.

In law, cross-dressers are not regarded as transsexual people as they do not intend to live permanently in the gender opposite to their sex at birth. While they are not specifically protected under the Act as cross-dressers, if they are harassed because they are perceived to be transsexual or to have a particular sexual orientation, they may be in a position to claim discrimination under the relevant protected characteristics.

As a matter of good practice, employers and employees should not try to make a distinction whether a colleague is a cross-dresser or transsexual. An employer should make it clear to all staff that it agrees that a transsexual employee, once living and working in their new gender, can then use the toilet facilities for that gender.

To find out more about the protected characteristic of Gender reassignment, see the Acas website page on Gender reassignment discrimination and the [Acas guide, Gender reassignment discrimination: key points for the workplace](#).

## Marriage and civil partnership

The Equality Act protects employees from direct discrimination (although not the forms by association or by perception), indirect discrimination and victimisation because of marriage or civil partnership. For example, an employee must not be ignored for promotion because they are in a civil partnership. However, single people and couples in relationships which are not legally recognised are not protected.

As well as direct discrimination by perception or association, harassment because of this characteristic is also not covered by the Equality Act, but

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there are legal provisions where claims against some behaviours might be made. For example, there might be circumstances where harassment of an employee in a marriage or civil partnership amounts to discrimination because of sex or sexual orientation, or sexual harassment. Regarding civil partnership, there might be circumstances where an employee in a civil partnership may have grounds to bring a claim of sexual orientation discrimination.

As this is one of only two protected characteristics where some types of discrimination do not apply, see the chart for the at-a-glance overview of where protected characteristics and types of discrimination can fit together.

### **Civil partnerships and same-sex marriage**

Civil partnerships have the same legal protection against discrimination as marriage. Same-sex marriages became legally recognised in England and Wales on 29/03/2014 and in Scotland on 16/12/2014.

Employers should also ensure that employees in same-sex marriages or civil partnerships are not subjected to behaviour that could amount to harassment because of sexual orientation.

To find out more about the protected characteristic of Marriage and civil partnership, see the Acas website page on Marriage and civil partnerships, and the Acas guide, [Marriage and civil partnership discrimination: key points for the workplace](#).

### **Pregnancy and maternity**

The Equality Act protects an employee from one type of direct discrimination and victimisation because of their pregnancy, or for taking/seeking to take maternity leave. For example, an employer must not take into account pregnancy-related illness when considering other sickness absence or in making a decision about her employment. During this time, any other discrimination because of her sex would be a separate and overlapping matter which might amount to sex discrimination and/or sexual harassment.

A particular aspect of the Pregnancy and maternity protected characteristic is that a woman who is pregnant or on maternity leave must not be treated **unfavourably** because of pregnancy or maternity leave. That means there is no need for her to show that she has been treated **less favourably** than a man, or a woman who was not pregnant, just that she was in fact treated detrimentally because of pregnancy or maternity.

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As this is one of only two protected characteristics where some types of discrimination do not apply, see the chart for the at-a-glance overview of where protected characteristics and types of discrimination can fit together.

To find out more about the protected characteristic of Pregnancy and maternity, see the Acas website page on [Pregnancy and maternity discrimination](#).

If an organisation is considering redundancies, an employee who is pregnant or on maternity leave can have additional employment rights. To find out more, see the joint Acas and Equality and Human Rights Commission guide *Managing redundancy for pregnant employees or those on maternity leave*.

## Race

The Equality Act protects employees from discrimination, harassment and victimisation because of the protected characteristic of Race, which may include different elements that often merge:

- **race** – an umbrella term for the other four aspects.
- **colour** – like 'race' it tends to overlap, particularly with the concepts of 'ethnic origin' and 'national origin'. Examples include black and white.
- **ethnic origin** – may include racial, religious and cultural factors which give a group of people a distinct social identity with a long and shared history. Examples include Sikhs, Jews, Romany Gypsies and Irish Travellers.
- **national origin** – birthplace, the geographical area and its history can be key factors. Examples include Welsh and English.
- **nationality** – usually the recognised state of which the employee is a citizen. In other words, what it says in their passport if they have one. For example, British citizen.

For example, it would be unlawful for an employee to make racial slurs against Eastern European colleagues. Additionally, a racial group can be made up of two or more of these aspects, such as black Britons. Welsh, Scottish, Northern Irish/Irish and English are all recognised under this protected characteristic, as is British.

But the Race protected characteristic does not cover more local or regional distinctions. For example, an employee working in the south of England who feels they are being treated unfairly solely because they are a 'Geordie', or an employee treated unfairly solely because they are a

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'Southerner' with an Essex accent working in the north of England, are unlikely to succeed in claims of race discrimination.

However, there could be circumstances where such behaviour might be argued to be because of national identity, while other legislation and employment rights may still offer other protections. In addition, such behaviour should be considered unacceptable as it damages workplace morale and an individual's dignity.

### **Caste discrimination**

Caste usually refers to the social levels in certain cultures and racial groups, such as in India, where people's positions in society are fixed by birth or occupation, and are hereditary.

There are moves to have 'caste' recognised specifically as part of the Race protected characteristic. While it is possible the Equality Act 2010 may be amended in the future, some legal opinions and cases consider caste to be already covered because they say it coincides with ethnic origin.

To find out more about the protected characteristic of Race, see the companion guide in this series, [Race discrimination: key points for the workplace](#).

### **Religion or belief**

The Equality Act protects employees from discrimination, harassment and victimisation because of religion or belief. For example, a manager should ensure that religiously offensive graffiti in a staff toilet is removed, and that the matter is thoroughly investigated and handled. The law also protects employees or job applicants if they do not follow a certain religion or belief, or have no religion or belief at all.

In the Act, **religion** means any religion with a clear structure and **belief** system. Belief means any religious or philosophical belief. Denominations or sects within a religion can be considered a protected religion or religious belief. A belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour, worthy of respect in a democratic society and does not conflict with the fundamental rights of others.

The Equality Act has special provisions which, while rarely applicable, can place restrictions or requirements on job applicants and jobholders with a certain protected characteristic or protected characteristics (including religion and belief, sex, sexual orientation, gender reassignment, and marriage and civil partnership) in organised religion or where the

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organisation has an 'ethos based on religion or belief' – for example, a deeply-held and sincere environmental belief.

### **Political affiliations**

Political affiliations are unlikely to be protected under the Equality Act. However, under other legislation – The Employment Rights Act 1996 - dismissing an employee because of their political opinions or affiliation may be unlawful.

To find out more about the protected characteristic of Religion or belief, see the Acas guide, [Religion or belief discrimination and the workplace](#).

## **Sex (Gender)**

The Equality Act protects both male and female employees from discrimination, harassment and victimisation because of sex (gender). For example, an employer must ensure its managers do not favour team members of a particular gender.

### **Protection from sexual harassment**

Employees are protected against sexual harassment, which is unwanted conduct that is of a sexual nature and/or relates to the protected characteristics of sex and/or gender reassignment. Examples may be either verbal or physical, and may include staring or leering, or a display of explicit material.

It would have the purpose or effect of violating the employee's dignity, or creating an environment for the employee which is intimidating, hostile, degrading, humiliating or offensive. It also applies where an employee is treated 'less favourably' because they have rejected sexual harassment or been the victim of it.

An employer should make clear to employees what sort of behaviour would be considered sexual harassment.

Sexual harassment may be both an employment rights matter and a criminal matter, such as in sexual assault allegations.

To find out more about the protected characteristic of Sex, see the Acas website page on Sex discrimination, and the Acas guide, [Sex discrimination: key points for the workplace](#).

## **Sexual orientation**

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The Equality Act protects employees from discrimination, harassment and victimisation because of sexual orientation. It applies equally to bisexual, gay, heterosexual and lesbian orientations. For example, an employer must ensure that an employee who is perceived to be bisexual (whether they are or are not is irrelevant) is not bullied by colleagues.

To find out more about the protected characteristic of Sexual orientation, see the companion guide in this series, [Sexual orientation: key points for the workplace](#).

## Types of discrimination

Under the Equality Act, there are four main types of discrimination:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

No minimum length of continuous employment is necessary for a discrimination claim to be made to an employment tribunal. Protection starts from when a role is advertised through to the last day of employment and beyond to include references.

## Direct discrimination

Direct discrimination occurs where someone is treated less favourably directly because of:

- a protected characteristic they possess – this is **ordinary direct discrimination**; and/or
- a protected characteristic of someone they are associated with, such as a friend, family member or colleague – this is **direct discrimination by association**; and/or
- a protected characteristic they are thought to have, regardless of whether this perception by others is actually correct or not – this is **direct discrimination by perception**.

Direct discrimination in all its forms could involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of a protected characteristic.

**For example... ordinary direct discrimination**

Paul, a senior manager, turns down Angela's application for promotion to supervisor. Angela, a lesbian, learns that Paul did this because he believes the team she applied to manage are homophobic. He thought that her sexual orientation would prevent her from gaining the team's respect and managing them effectively. This is direct discrimination against Angela because of her sexual orientation.

**For example... direct discrimination by association**

June, a project manager, has been promised promotion by her boss. However, after she tells him that her mother, who lives at home, has cancer, he withdraws the promotion because he feels the commitment of looking after her mother and moving to a higher grade role will be too much for her. This is potentially discrimination against June because of her association with a disabled person.

**For example... direct discrimination by perception**

Dimitri is 45, but looks much younger. Many people assume he is in his mid-twenties. He is not allowed to represent his company at an international meeting because the managing director thinks he is too young. Dimitri has been discriminated against because of his perceived age.

## Indirect discrimination

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice is applied equally to a group of employees/job applicants, but has (or will have) the effect of putting those who share a certain protected characteristic at a particular disadvantage when compared to others without the characteristic in the group, and the employer is unable to justify it.

An employee or job applicant claiming indirect discrimination must show how they have been, or could be, personally disadvantaged. They must also show how the application of the 'provision, criterion or practice' has or might disproportionately disadvantage other employees or job candidates with the same protected characteristic.

The Equality Act does not define a 'provision, criterion or practice'. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include recruitment selection criteria, contractual benefits, a redundancy scoring matrix or any other work practice.

In some limited circumstances, indirect discrimination may be justified if it is 'a proportionate means of achieving a legitimate aim', an area covered later in this guide.

### **For example... indirect discrimination**

Abu is in his late twenties and working as a surveyor in a property investment company. He is fully qualified, doing well in his current role and ambitious. He spots a post advertised with another employer for what he sees as the next step in his career.

However, the advertisement specifies that candidates must have ten years' experience in the profession. Abu has six.

Unless the employer can lawfully justify why candidates need ten years' experience, this is likely to be indirect discrimination against young candidates such as Abu who can demonstrate that they are qualified and capable, but don't have ten years' experience because of their age.

## **Harassment**

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic or be 'of a sexual nature'. It must also have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

Generally, harassment:

- includes bullying, nicknames, threats, jokes, 'banter', gossip, inappropriate questions, excluding an employee (for example - ignoring them or not inviting them to meetings), insults or unwanted physical contact
- can be verbal, written or physical
- is based on the victim's perception of the unwanted behaviour rather than that of the harasser, and whether it is reasonable for the victim to feel that way
- can also apply to an employee who is harassed because they are perceived to have a protected characteristic, whether they actually have it or not
- can also apply to an employee who is harassed because they are associated with someone with a protected characteristic
- can also apply to an employee who witnesses harassment because of a protected characteristic and that has a negative impact on their dignity at work or the working environment, irrespective of whether they share the protected characteristic of the employee who is being harassed.

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While the Equality Act 2010 protects against harassment related to most protected characteristics, other legislation such as the Protection from Harassment Act 1997 may also apply. This legislation is not limited to circumstances where harassment relates to a protected characteristic. For example, it may apply where a protected characteristic is not specifically covered for harassment in the Equality Act (Marriage and civil partnership, and Pregnancy and maternity). Harassment under the Protection from Harassment Act must amount to conduct which is criminal.

### **For example... harassment within an organisation**

Nnamdi has a severe stammer and is claiming harassment against his line manager after she frequently teased and humiliated him about his disability. Richard, who shares an office with Nnamdi, is also claiming harassment, even though he is not disabled, as the manager's behaviour created an offensive environment for him, too.

Both lodged separate grievances against the manager who, at the grievance hearings, was found to be at fault. She apologised to both Nnamdi and Richard, and welcomed senior management's decision that she should undergo full refresher training in the manager's role in fostering equality and diversity in the organisation.

### **Harassment from outside an organisation (third party)**

Harassment of an employee by individuals outside an organisation - such as customers, clients and suppliers - as a defined type of discrimination was removed from the Equality Act in October, 2013.

However, even though third party harassment, as it was known, is no longer listed as a specific type of discrimination under the Act, employees may still be protected against this type of harassment if an employer fails to take reasonable steps to prevent it. The protection may arise from the broader provisions of the Act and other legal protections for employees.

An employer should make it clear, within and outside its organisation, that it will not tolerate harassment, and if it does occur that all reasonable steps will be taken to prevent it from happening again. This is a complex area and employers with concerns may wish to seek legal advice.

#### **For example...**

Chris manages a council benefits office. One of his staff, Frank, who is gay, mentions that he is unhappy after a claimant made homophobic remarks in his hearing. Chris is concerned and monitors the situation.

Within a few days, the claimant makes further offensive remarks. Chris reacts by having a word with the claimant, pointing out that this behaviour is unacceptable. He follows it up with a letter to the claimant pointing out he will be banned from the benefits office if he behaves that way again. Chris keeps Frank informed of the actions he is taking and believes he is taking all reasonable steps to protect Frank from harassment.

### **Victimisation**

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm or loss - because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act 2010

Victimisation may also occur because an employee is suspected of doing one or more of these things.

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An employee is protected under the Equality Act if they make, or support, an allegation of victimisation in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence in bad faith – in other words maliciously.

### **For example... victimisation**

Halina makes a formal complaint against her manager because she feels she has been discriminated against because she is married. Although the complaint is resolved through the organisation's grievance procedures, Halina is subsequently ignored and excluded from work-related social events by her colleagues after they realised she had named them in her complaint. She could claim victimisation.

## **Exemptions and exceptions – where discrimination is lawful**

### **Matching core 'occupational requirements' of the job**

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an 'occupational requirement'.

Examples might include specifying a practising Catholic to work as a chaplain in a Catholic chaplaincy at a university. Or, specifying an actor for a film role needs to be a young woman.

However, it is not enough for an employer to simply decide they would prefer to employ someone who has a particular protected characteristic. The requirement must:

- be crucial to the post, and not just one of several important factors **and**
- relate to the nature of the job **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in the next section.

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In addition, there can be exemptions and exceptions regarding occupational requirements related to particular protected characteristics. For more information, see the companion Acas guides on individual protected characteristics.

An occupational requirement must be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.

An employer should think very carefully, and consider seeking specialist legal advice, before claiming an 'occupational requirement', as it can be **difficult to justify** and will be rare. Also, a job applicant might challenge at an employment tribunal an 'occupational requirement' which appears unjustified.

Further, an occupational requirement can only be used in a defence against claims of direct discrimination (but not for by association or by perception). It cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

### **'Occupational requirements' and religion or belief**

Regarding 'occupational requirements', there are exemptions and exceptions in the protected characteristic of Religion or belief which are not found in the other protected characteristics.

To find out more, see Acas guide Religion or belief discrimination and the workplace.

## **Can discrimination ever be justified?**

There are limited circumstances where an employer may act in a way which is discriminatory, but where it can objectively justify discrimination as 'a proportionate means of achieving a legitimate aim'.

Employers should note that proving 'a proportionate means of achieving a legitimate aim' can be a difficult process.

Direct discrimination because of age is the only form of direct discrimination which may be objectively justified. Indirect discrimination is potentially justifiable in all of the relevant protected characteristics. In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

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- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient **and**
- the actions are proportionate, appropriate and necessary.

Both points apply in justifying 'a proportionate means of achieving a legitimate aim', not just one of them.

An employer should consider if there is another way to achieve the same aim which would be less discriminatory. Also, it should be able to show it was fair and reasonable, and looked for a less discriminatory alternative.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the employee and group of employees with the protected characteristic.

Employers should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified. For example, is there another way of achieving the same aim which would be less discriminatory?

It is important to stress that employers should monitor carefully their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce. For more on monitoring, see the companion guide, Prevent discrimination: support equality.

### **For example... discrimination which is potentially lawful**

A small finance company needs its staff to work late on Friday afternoons to analyse stock prices in the American finance market. The figures arrive late in the day because of the time difference, where London is five hours ahead of New York. During the winter, some staff would like to be released early on Friday afternoons to be home before sunset – a requirement of their religion.

They propose to make up the time during the rest of the week. The company is not able to agree to the request because the American figures are necessary to the business, they need to be worked on immediately and the company is too small to have anyone else do the work.

The requirement to work late on Friday afternoons is unlikely to be unlawful indirect discrimination as it could be seen as a proportionate response to achieving a legitimate business aim and there is no alternative course available.

### **For example... discrimination which is potentially unlawful**

In another small finance firm, some staff make the same request as in the example above. However, in this case there is a key difference – this London firm specialises in dealing with stock prices from Frankfurt, Germany, which is one hour ahead of the UK. The Frankfurt data arrives so they can complete their tasks on a Friday, go home before sunset and make up the time during the rest of the week.

For the firm to insist they stay until after sunset could be ruled to be unreasonable – unless there was another business reason it could objectively justify as 'a proportionate means of achieving a legitimate aim'.

## **Taking 'positive action' in the workplace**

Under the Equality Act, an employer can take what the law terms 'positive action' to help employees or job applicants it thinks:

- are at a disadvantage because of a protected characteristic, and/or
- are under-represented in the organisation, or whose participation in the organisation is disproportionately low, because of a protected characteristic and/or
- have specific needs connected to a protected characteristic.

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An employer must be able to show evidence that any positive action is reasonably considered and will not discriminate against others. If it can, it may legally:

- take proportionate steps to remove any barriers or disadvantages
- provide support, training and encouragement to increase the participation of people with a particular protected characteristic.

There is no legal necessity for an employer to take - or consider taking - positive action if it does not wish to do so.

### **For example... taking 'positive action'**

A national retailer finds out that despite employing a diverse workforce at junior management level, only three of 55 senior managers are female. Research indicates that many of the female employees are put off from applying for promotion because of an apparent 'all-male environment' and that this is losing the business a wealth of experience and creativity.

The company sets up a programme of training and development for female staff where they can develop management skills and gain an understanding of how senior management operates through a mentoring scheme. Over the next 12 months, the proportion of female applicants and appointments increase, and a new campaign spearheaded by the newly-promoted staff brings an increase in sales.

## **Taking 'positive action' in hiring and promoting staff**

In certain circumstances, an employer could use a protected characteristic as a 'tie-breaker' when deciding who to recruit or promote. These situations arise where the employer needs evidence to show that employees and/or job applicants with that protected characteristic:

- experience disadvantage related to that characteristic in the workplace, or
- are disproportionately under-represented in the workforce or the particular job where there is a vacancy.

This does not mean the tying candidates need to have exactly the same qualifications as each other – but it does mean that the employer's selection assessment on a range of criteria rates them as equally qualified and/or capable of doing the job.

The 'tie-breaker' must only be used in considering an individual vacancy and means that in these circumstances it may not be unlawful to select

## Equality and Discrimination: Understand the basics

the candidate with the protected characteristic. However, automatically treating all job applicants who share a protected characteristic more favourably (or guaranteeing them a promotion because of that characteristic) would be discriminatory.

Employers should also be mindful that there can be circumstances where 'positive action' can unintentionally unsettle all staff.

It remains good practice – and is sound - to distinguish between candidates based entirely on their qualifications, attributes and ability to do the job, rather than a protected characteristic.

### **For example... taking 'positive action' in recruitment**

A high school, where almost half of the pupils are from a minority ethnic group and none of the ten existing department heads are from a minority community, is recruiting for a new department head.

In the job advertisement, the school says it would welcome applications from qualified candidates from minority ethnic groups as they are under-represented in senior staff positions at the school. All 80 staff at the school are trained to put into practice its equality policies, and deal with any bullying and harassment.

In the recruitment process, all the candidates are scored against a range of job-relevant questions in interviews. The interview panel also objectively assess the experience and qualifications of each candidate. At the end of a rigorous and well-documented selection process, the two best candidates have equal scores. The interview panel has robust documentary evidence to prove the two candidates are equally qualified for the role.

Both are women and one is black. The head of the school thinks it important that its senior leadership reflects the local population and the school, and so decides to appoint the black candidate. This may be lawful under the Equality Act.

### **'Positive action' is not 'positive discrimination'**

Positive discrimination is not specifically mentioned in the Equality Act, but is otherwise generally regarded as automatically favouring, without proper consideration of merit, under-represented individuals from minority groups over individuals in majority groups. On this basis, positive discrimination is unlawful in England, Scotland and Wales.

## **Other aspects of equality law**

## Making reasonable adjustments

An employer can lawfully treat employees who are disabled more favourably because of their disability than non-disabled employees. In fact, it is unlawful for an employer to fail to make 'reasonable adjustments' enabling a disabled person to work for it.

However, employees who are not disabled are unable to claim discrimination on the grounds they have been treated less favourably because of the 'reasonable adjustments' given to a disabled colleague.

An example of a 'reasonable adjustment' might include changing a disabled employee's terms and conditions of employment or working arrangements, so they will not be disadvantaged in doing their job compared to colleagues who are not disabled, and/or so they and their work performance really benefit from the change.

An employer must consider making 'reasonable adjustments', involving the disabled employee or job applicant in the decision, if:

- it becomes aware of their disability
- a disabled employee or job applicant asks for adjustments to be made
- a disabled employee is having difficulty with any part of their job
- either an employee's sickness record, or delay in returning to work, is linked to their disability.

Further, there are three questions an employer should consider in assessing what reasonable adjustments might need to be made:

### 1. Does it need to **change how things are done**?

**For example...** The employer's policy is to only offer car parking spaces to senior managers. However an employee who is not a manager has developed a mobility impairment and needs to park very close to the office. The employee is allocated a parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

### 2. Does it need to **physically change the workplace**?

**For example...** Clear glass doors at the end of a workplace corridor present a hazard for a visually impaired employee. The employer adds brightly coloured strips at eye level that can be more easily seen by the employee. This is likely to be a reasonable adjustment.

3. Does it need to **provide extra equipment** or get someone to **assist** the disabled employee in some way?

**For example...** As a reasonable adjustment the employer provides specialist software for an employee who has developed a visual impairment. Their job involves using a computer and the software enables them to continue in the role.

But whether any suggested adjustments are actually reasonable can depend on whether:

- they are practical for the employer to make
- the employer has the resources to pay for them? An employment tribunal may expect more from a large organisation than a small one because it may have greater means, or if an organisation has access to other funding such as the Government's Access to Work scheme
- they will be effective in overcoming the 'disadvantage' in the workplace.

In considering reasonable adjustments for a disabled employee or job applicant, an employer should meet with them to discuss what can be done to support them. While an employer has a legal duty to make 'reasonable adjustments', there may be times when suggested changes are unreasonable and it can lawfully refuse to make them.

Making reasonable adjustments can be a complex area. The Acas helpline on 0300 123 1100 can give advice on specifics.

## Equal pay (Sex Equality)

The Equality Act says men and women in full-time or part-time employment have a right to 'no less favourable' pay, benefits and terms and conditions in their employment contracts where they are doing equal work either as:

- **'like work'** – work by one employee that is the same or broadly similar to that done by an employee of the opposite sex. It is the nature of the work that is important, rather than the job title or job description, or
- **'work rated as equivalent'** - an employee's work is rated as equivalent to that of an employee of the opposite sex if an employer's job evaluation study of a number of roles gives an equal rating to their work in terms of factors such as effort, skill and decision-making. Because of the focus on the jobs' demands rather than their nature,

## Equality and Discrimination: Understand the basics

jobs which may seem of a very different type can be rated as equivalent, or

- **'work of equal value'**– the work one employee does, although different from an employee of the opposite sex, is assessed as of 'equal value' in terms of the demands placed on the two employees. So while the jobs are different, they can be regarded as of equal worth when looking at the training and skills necessary to do each job, the working conditions or the decision-making required. Again, in some cases, jobs thought to be of an entirely different type – for example, manual and administrative – can be rated as being of equal value.

The main difference between 'work rated as equivalent' and 'work of equal value' is that the former is usually based on a comprehensive job evaluation study taking into account a wide range of different jobs. In contrast, an assessment of 'work of equal value' will tend to focus on an individual case - the role of the employee making the equal pay claim and the job of the employee he or she is comparing their role to – the comparator.

Regarding 'comparators', there could be circumstances where a comparator cannot be found. For example, a woman may be appointed to a post where she later finds out the previous holder of the post, a man, was paid more than her. Even though the man is no longer with the company, his salary could still be used as evidence.

### **The right to equal pay on grounds other than gender**

An employee concerned over inequality on pay and other terms and conditions of employment will usually challenge their employer by making a comparison with someone of the opposite sex in what the law terms 'the same employment' with that organisation. The other person is called a comparator.

However, an employee might make a claim under the Equality Act that he or she is being paid less on the grounds of their protected characteristic of race. Claims for discrimination on pay could also be made on the grounds of other protected characteristics, such as disability and religion or belief.

Since October 1, 2014, an employment tribunal can order an employer, which it finds has breached its equal pay duties, to carry out an organisation-wide audit on pay as a first step towards helping the organisation get in line with the law.

To find out more, see the Acas website page on Equal pay, and the [Equality and Human Rights Commission](#) website for Pay audits and Equal pay action plans.

## Who is liable?

Both employers and their employees can be held responsible and liable for their actions where they breach the Equality Act. So, in relevant circumstances, someone who believes they have been discriminated against at work can write to an employment tribunal, naming their employer, and any colleagues they allege were involved, as 'Respondents'.

Staff are responsible for their actions in what the law terms 'the course of their employment' if they discriminate against, harass or victimise a colleague because of a protected characteristic. The behaviour might occur at work or at a time and place associated with the workplace, such as at a social gathering or through the use of personal social media accounts. Whether the colleague intended to discriminate or cause offence will not usually make a difference or constitute a defence. They may have to pay compensation.

An employer will also be liable for the actions of its staff. This aspect of liability is known as **vicarious liability** or **secondary liability**.

So, in circumstances where an employer has not discriminated against an employee because of a protected characteristic, it could still be held responsible if one of its staff discriminates against, harasses or victimises a colleague because of a protected characteristic during 'the course of their employment'.

### **For example... an employer taking steps to protect itself against vicarious liability**

James and Opeyemi both work for CarpetZone as sales staff. As with all staff, CarpetZone annually trains and tests James on equality, diversity and discrimination. James was also familiarised with the 'respect for people' part of the employee handbook at his induction. Last year, CarpetZone ran an anti-bullying campaign across all its stores.

James sends Opeyemi a string of offensive and sexually suggestive emails at work. After Opeyemi complains about this to her line manager, CarpetZone immediately opens an investigation into the matter and suspends James' access to his email account.

CarpetZone's actions may help to show it took 'all reasonable steps' to prevent discrimination occurring and could be taken into account if Opeyemi chooses to submit an employment tribunal claim.

An employer may not be found to be vicariously liable if an employment tribunal decides that the employer took all reasonable steps to prevent discrimination, harassment and victimisation. Whether the employer has

an equality policy, provided managers and all staff with equality training, and how any complaint of discrimination, harassment and victimisation was dealt with, are likely to be key factors when establishing whether the employer is vicariously liable for the actions of its staff.

### Job applicants' health

For all job interviews and recruitment processes, an employer must ask whether a job applicant needs any reasonable adjustments, often called 'access requirements', for any part of the process.

#### For example...

The Holm City Gazette asks job applicants if they require any reasonable adjustments to the selection process so they can give their best. They do not take this information into account when deciding who to employ.

However, under the Equality Act, if an employer believes it is necessary to ask health-related questions before making a job offer, it can do so only in the following circumstances:

1. To determine whether an applicant can carry out a **function essential to the role**

**For example...** The Holm City Gazette has a job which entails a lot of heavy manual lifting. It could ask a candidate with a mobility impairment whether they could manage the lifting, but it could not ask how the impairment might affect their journey to work as that is not part of the actual role.

2. To take '**positive action**' to assist disabled people

**For example...** The Holm City Gazette wants to improve disabled people's chances of being selected for its vacancies, offering guaranteed interviews to disabled people. To identify disabled people, it asks on the application form whether a candidate is disabled and makes it clear why the question is being asked.

3. To **monitor**, without revealing the candidate's identity, whether they are disabled

**For example...** The Holm City Gazette which has a small proportion of disabled people working for it may decide to ask applicants to state whether they have a disability so it can assess whether its vacancy advertisements are reaching disabled people.

4. To check that a candidate has a disability where this is a **genuine requirement** of the job

**For example...** An advice service for people with mental health conditions requires a counsellor who has personal experience of mental health conditions. It advertises for candidates who have such a condition and is allowed to ask at interview that an applicant confirms that they have the condition.

These limited circumstances apply to all stages of the recruitment process prior to a job offer. This includes application forms, health questionnaires, interviews and any other assessment and selection methods.

A job applicant who thinks an employer is acting unlawfully by asking questions about their health cannot take it to an employment tribunal on that basis alone – but they can complain to the [Equality and Human Rights Commission](#), which has powers of enforcement if an employer is found to be non-compliant.

However, if an employer does ask unlawful questions about a job applicant's health, and the employer does not subsequently employ the candidate, they could bring a claim of discrimination against the employer.

For most jobs, it is not necessary for candidates' health to be checked before they are offered a job, but once an employer has offered a candidate a job, whether unconditionally or conditionally, it is permitted to ask appropriate health-related questions.

That might be because of other legislation - for example, the legal requirement for a commercial vehicle driver to have an eye-sight test. Or, it might be to do with a requirement of the job – for example, the employer's cycle couriers need a health check because its insurer insists on it.

Employers making conditional offers are advised to keep a full record of why an offer is withdrawn for health reasons in case the matter leads to a claim of discrimination.

Also, an employer must ensure that a health check itself does not discriminate. For example, targeting health checks at certain age groups, singling out disabled people for assessment or discouraging people from applying are likely to be discriminatory.

## References

## Equality and Discrimination: Understand the basics

An employer should always be careful in writing a reference – it should always be accurate and fair.

Protections in the Equality Act reach beyond the end of the working relationship, so it would be unlawful if a former employer provided a written or verbal reference that discriminated against, harassed or victimised a former employee.

### **For example... direct discrimination in a reference**

Natalie's former line manager is approached by a prospective employer asking for a reference because she has applied for a job with it. The manager says he cannot recommend Natalie, as her decision to 'come out' as bisexual was disruptive, and lists a number of examples where he believed this resulted in team arguments, customer complaints and other members of staff quitting.

An option for an employer can be to have a rule that it will only give a simple, factual reference for all employees and former employees. For example, this might amount to job titles, dates of employment and salary. The employer should also explain, in giving the reference, that this is its policy.

## **Bullying and the Equality Act**

Bullying and harassment are terms often used inter-changeably. However, employers should be aware that 'harassment' is covered under the Equality Act and a harassment claim can be made to an employment tribunal, whereas a claim of 'bullying' cannot be taken to a tribunal because it is not related to a protected characteristic.

While the unwanted behaviours that constitute bullying and harassment are the same, harassment is behaviour related to a protected characteristic, with the exception of sexual harassment. Sexual harassment is unwanted conduct that is of a sexual nature and/or relates to the protected characteristics of sex and/or gender reassignment.

There can be circumstances where an employee might experience conduct amounting to both bullying and harassment, with the bullying part of the behaviour not related to a protected characteristic, and the harassment part of the behaviour related to a protected characteristic.

Employers have a legal 'duty of care' for all their employees, are usually responsible for the acts of their employees and are accountable for taking all reasonable steps to prevent both bullying and harassment. In an

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extreme case, where bullying and harassment caused an employee to become ill, an employer might face a civil claim under common law.

Acas characterises bullying as offensive, intimidating, malicious or insulting behaviour, or an abuse or misuse of power through ways that undermine, humiliate, denigrate or injure the recipient.

While it is not possible in law to make a specific complaint about bullying to an employment tribunal, there can be circumstances where bullying might amount to behaviour defined as harassment or discrimination under the Equality Act.

Or, because of bullying and harassment at work, an employee might resign and go to an employment tribunal claiming 'constructive dismissal' on the grounds of breach of contract. This aspect and more information about 'bullying and harassment' are covered in the Acas guides *Bullying and harassment at work: a guide for managers and employers*, or *Bullying and harassment at work: a guide for employees*.

## Further information

### Acas learning online

Acas offers free E-Learning. The Equality and diversity course gives an overview of what equality and diversity mean, why they are important, putting the principles into practice in an organisation and a test to gauge understanding of the key points.

### Acas training

Our Equality and Diversity training is carried out by experienced Acas staff who work with businesses every day. Training can be specially designed for smaller companies and our current programme includes:

- equality, diversity and discrimination: the essentials
- tackling bullying and harassment at work
- promoting mental health at work.

Go to [www.acas.org.uk/training](http://www.acas.org.uk/training) for up-to-date information about our training and booking places on face-to-face courses.

Also, Acas specialists can visit an organisation, diagnose issues in its workplace, and tailor training and support to address the challenges it faces. To find out more, see to the Acas website page *Business solutions*.

### Acas guidance

Prevent discrimination: support equality

Discrimination: what to do if it happens

## Equality and Discrimination: Understand the basics

Age and the workplace: a guide for employers and employees

Disability discrimination: key points for the workplace

Gender reassignment discrimination: key points for the workplace

Marriage and civil partnership discrimination: key points for the workplace

Religion or belief discrimination and the workplace

Sex discrimination: key points for the workplace

Sexual orientation discrimination: key points for the workplace

Race discrimination: key points for the workplace

Asking and responding to questions of discrimination in the workplace

Managing redundancy for pregnant employees or those on maternity leave

Bullying and harassment at work: a guide for managers and employers

Bullying and harassment at work: a guide for employees

Code of practice on discipline and grievance

Guide on discipline and grievances at work

Age discrimination

Disability discrimination

Gender identity discrimination

Marriage and civil partnerships

Maternity leave and pay

Race discrimination

Religion or belief discrimination

Sex discrimination

Sexual orientation discrimination

Equal pay

### **The Equality and Human Rights Commission**

<http://www.equalityhumanrights.com/>

### **Equality Advisory Support Service**

For wider equality issues the Acas helpline does not cover, call the EASS helpline on 0808 800 0082 (Text phone: 0808 800 0084)

### **Additional help**

Employers may be able to seek assistance from groups where they are members. For example, if an employer is a member of the Confederation of British Industry or the Federation of Small Businesses, it could seek its help and guidance.

If an employee is a trade union member, they can seek help and guidance from their trade union representative or trade union equality representative.

## Keep up-to-date and stay informed

Visit [www.acas.org.uk](http://www.acas.org.uk) for:

- Employment relations and employment law guidance – free to view, download or share
- Tools and resources including free-to-download templates, forms and checklists
- An introduction to other Acas services including mediation, conciliation, training, arbitration and the Acas Early Conciliation service
- Research and discussion papers on the UK workplace and employment practices
- Details of Acas training courses, conferences and events.

**Sign up for the free Acas e-newsletter.** The Acas email newsletter is a great way of keeping up to date with changes to employment law and to hear about events in your area. Find out more at:

[www.acas.org.uk/subscribe](http://www.acas.org.uk/subscribe)

**The Acas Model Workplace.** This engaging and interactive tool can help an employer diagnose employment relations issues in its workplace. The tool will work with you to identify areas of improvement you can consider, and will point toward the latest guidance and best practice:

[www.acas.org.uk/modelworkplace](http://www.acas.org.uk/modelworkplace)

**Acas Helpline Online.** Have a question? We have a database of frequently asked employment queries that has been developed to help both employees and employers. It is an automated system, designed to give you a straightforward answer to your employment questions, and also gives links to further advice and guidance on our website:

[www.acas.org.uk/helplineonline](http://www.acas.org.uk/helplineonline)

**Acas Helpline.** Call the Acas Helpline for free and impartial advice. We can provide employers and employees with clear and confidential guidance about any kind of dispute or relationship issue in the workplace. You may want to know about employment rights and rules, best practice or may need advice about a dispute. Whatever it is, our team are on hand. Find out more: [www.acas.org.uk/helpline](http://www.acas.org.uk/helpline)

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