Sex Discrimination Act amended  
– the key changes  
November 2005
The key changes

The Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467, amending the Sex Discrimination Act 1975 and the Equal Pay Act 1970, became law on 1 October 2005. The Regulations introduce amendments to sex discrimination and equal pay legislation designed to fulfill the UK’s obligations under the Equal Treatment Amendment Directive (No. 2002/73). In this update we look at the key changes that these new regulations bring into force.

The key changes are as follows:-

- a new definition of indirect discrimination;
- express prohibitions against harassment, including harassment on the ground of the victim’s sex and harassment of a sexual nature;
- an express prohibition of discrimination on the grounds of pregnancy or maternity leave;
- extended protection for people who work for British organisations outside Great Britain; and
- an eight week time limit for responding to questionnaires in cases of discrimination and harassment.

The changes in detail

**Indirect discrimination**

There is a new definition of indirect discrimination, which incorporates two main changes:

- evaluating whether the impact of a provision, criterion or practice is to the detriment of "a considerably larger proportion of women than men" will be replaced by an assessment of whether the provision, criterion or practice "puts or would put women at a particular disadvantage". This change recognises that it is not always possible or necessary to use detailed statistics to show that claimants have been disadvantaged; and
- an employer will have to show that the provision, criterion or practice is "a proportionate means of achieving a legitimate aim", rather than show that it is justifiable.

This brings the text for indirect sex discrimination in line with definitions of indirect discrimination found in the race, religion or belief and sexual orientation legislation. A similar definition of indirect discrimination will also apply to discriminatory treatment against married people.

The question of whether unlawful indirect discrimination has taken place will depend on the facts of each case, particularly when considering if an employer can show that a provision, criterion or practice meets "a legitimate aim" and if it is a "proportionate means" of meeting the aim.

**Harassment**

The Regulations expressly prohibit sexual harassment and harassment on the grounds of sex. Previously, those subjected to 'harassment' had to rely upon the direct discrimination provisions of the Sex Discrimination Act 1975, arguing that the harassment amounted to less favourable treatment on the ground of their sex.

Now, a person will subject a woman to harassment if:

- on the ground of her sex, he engages in unwanted conduct that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her; or
- he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her; or
• on the ground of her rejection of or submission to unwanted conduct [of this kind], he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

While many will welcome the clarity provided by these new express provisions on sexual harassment, reservations have been expressed about some aspects of the Government's implementation of the Directive on this. The Directive prohibits harassment "related to the sex of a person" and not "on the ground of her sex". It does not require comparison with the treatment of a man. However, the Regulations prohibit conduct directed at a woman because of her sex. Unlike the Directive, the Regulations seem to require an employee to make a comparison with the treatment of a man. Women complaining of harassment will still have to show not just that they experienced the prohibited conduct as defined, but also that the reason why they experienced it was on the grounds of their sex. It appears therefore that an employer will not be liable if a man in comparable circumstances would have been treated similarly. The complications and lack of clarity arising out of this look set to ensure that handling claims of sexual harassment will still be very tricky for HR practitioners. It is noteworthy that "conduct of a sexual nature" is not defined in the Regulations. The Government has stated that this omission is deliberate, because it believes that this should be left to the tribunals to determine. It will be interesting to see how case law develops this concept.

**Maternity/Pregnancy**

The Regulations amend the legislation to explicitly prohibit discrimination on the grounds of pregnancy and maternity leave. Less favourable treatment on grounds of pregnancy and maternity leave is already regarded as unlawful discrimination as a result of case law, and the changes have not created any new rights or duties. Therefore, in practice, little will change, and it will continue to be unlawful to, for instance, demote or dismiss an employee for reasons relating to either pregnancy or maternity leave.

**Territorial extent**

The scope of territoriality for sex discrimination and equal pay claims has been extended to be consistent with other strands of the equality legislation. The new definition provides that an employee's employment will be regarded as being at an establishment in Great Britain if the employee "does his work wholly or partly in Great Britain". This means that an employee will be treated as employed at an establishment in Great Britain if he or she works partly in Great Britain, even if only for a small proportion of his or her time.
**Government Guidance**

The Government has produced some useful guidance notes on the new regulations ("Changes to Sex Discrimination Legislation in Great Britain: Explaining the Employment Equality (Sex Discrimination) Regulations 2005"), aimed at employers, which are available on the DTI's Women and Equality Unit website.

Click here for details
http://www.womenandequalityunit.gov.uk/legislation/index.htm

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