

GUIDANCE

# Understanding the Legal Definitions of Discrimination and Unlawful Behaviour in the Equality Act 2010

Guidance for Small Business

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# *Introduction*

This guide gives a brief overview of the legal definitions and types of discrimination and harassment set out in the Equality Act 2010. The Equality Act sets out your responsibilities as an employer and how 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.

# *The Equality Act 2010*

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

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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?**

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All employers and service providers, 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.

You are a service provider if you provide goods, facilities or services to the general public or a section of it, free or paid for. If you are not providing services to the public, you still have responsibilities if you are a private club or association.

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?

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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, it is unlawful to **discriminate**, **harass** or **victimise** someone because they have or are perceived to have a “protected characteristic” or are associated with someone who has a protected characteristic.

## **Discrimination**

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There are several types of discrimination:

### **Direct discrimination**

This means treating someone less favourably than someone else because of a protected characteristic.

**Example:** An employer does not interview a job applicant because of the applicant’s ethnic background.

In the case of age, you may, in limited circumstances, be able to treat someone less favourably than someone else if you can show that there is a good reason for what you are doing and that what you are doing is **proportionate**.

### **Direct discrimination by perception**

This means treating one person less favourably than someone else, because you incorrectly think they have a protected characteristic.

**Example:** An employer falsely tells a man looking for work that there are no vacancies because the employer believes the man is gay. Even if the man is not gay, the employer is discriminating on grounds of perception.

## Indirect discrimination

Indirect discrimination means putting in place, a rule or policy or way of doing things that has a worse impact on someone with a protected characteristic than someone without one, when this cannot be objectively justified.

### Examples:

- A hair salon owner has a policy of not employing stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. It is clear that this policy puts Muslim and Sikh women at a particular disadvantage as well as Sikh men who cover their hair. This may be indirect discrimination unless the policy can be objectively justified.
- A food manufacturer has a rule that beards are forbidden for people working on the factory floor. Unless it can be objectively justified, this rule may be indirect religion or belief discrimination against the Sikh and Muslim workers in the factory. If the aim of the rule were to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer would need to show that the ban on beards is a proportionate means of achieving this aim. When considering whether the policy is justified, the Employment Tribunal is likely to examine closely the reasons given by the employer as to why he cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, for example by providing a beard mask or snood.

## Discrimination arising from disability

This means treating a disabled person unfavourably because of something connected with their disability when this cannot be objectively justified. This will only apply if you know or could reasonably have been expected to know that the worker is a disabled person. **A business does not have to know that a person meets the legal definition of “a disabled person” just that he or she has an impairment which is likely to meet the definition.**

**Example:** An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated

unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave).

### Direct discrimination by association

This means treating someone less favourably than another person because they are associated with a person who has a protected characteristic.

**Example:** An employer gives the father of a disabled child a poor appraisal because they disapprove of the man's requests to attend his child's hospital appointments.

### Failing to make reasonable adjustments

To do this for disabled people is also a form of discrimination. You can read more about what is meant by reasonable adjustments and how they work in practice in other guidance at <http://www.equalityhumanrights.com/advice-and-guidance/here-for-business/guidance-for-businesses/>.

#### Examples:

- A disabled employee has to eat at set times to manage their blood sugar because of diabetes. This is only possible by taking work breaks at slightly different times from those that usually apply. This does not have a negative impact on the worker's ability to do the job. In fact, it makes the job possible. It is likely to be a reasonable adjustment to allow him to change the times of his breaks.
- An employer has a policy that designated car parking spaces are only offered to senior managers. A worker who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

## Harassment

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Harassment is unwanted behaviour related to a protected characteristic which has the purpose or effect of violating someone's dignity or which creates a hostile, degrading, humiliating or offensive environment. You may be held responsible for acts of harassment carried out by your workers or people acting as your agents. In some circumstances, you may even be responsible for acts of harassment by people who do not work for you.

**Example:** A woman works in a bar with a mostly young, male customer base. She is subjected to sexually explicit comments about her appearance by the same two customers and has complained to her employer on many occasions. Despite this, her employer does not do anything to stop the behaviour, for example by speaking to the individuals involved and letting them know that their behaviour will not be tolerated. The employer might be legally responsible for the harassment of his employee by the customers.

## Victimisation

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Victimisation is treating someone unfavourably because they have taken some form of action relating to the Equality Act, e.g. made a complaint under the Act or supported somebody who is doing so, such as appearing as a witness.

**Example:** A worker gives evidence on behalf of a disabled colleague at an Employment Tribunal hearing where disability discrimination is claimed. If the worker were subsequently refused a promotion because of that action, this would be victimisation.

# *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:** An outdoor centre provides a variety of activities from gentle walks to strenuous climbing. On safety grounds, it requires a medical certificate of good health for all centre users. Although ensuring health and safety is a legitimate aim, the blanket policy requiring certificates is likely to be unjustified. This is because it could prevent certain disabled customers from using the centre even though they could participate in some of the activities. A less discriminatory policy would be to require certificates for the more strenuous activities only.

**Age** is treated differently 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, there are only limited situations in which direct age discrimination will be objectively justified.

When what you are doing is **direct** age discrimination you are only allowed to rely on a limited number of reasons. These are generally those that would be in the wider public interest, like promoting access to employment for younger people, or preserving the dignity of older workers as opposed to reasons particular to you. Even if you have a good reason, your actions must still be **proportionate**.

**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.

The test is not quite the same as for **indirect discrimination**. This is because for indirect discrimination you are allowed to rely on any reason for wanting to make a decision or apply a rule provided it represents a real objective consideration and it is **proportionate**.

## *After your relationship has ended*

You must not discriminate, harass, fail to make reasonable adjustments, or victimise a person even after your relationship with them ends. It will be unlawful if you do this and your actions arise out of and are closely connected to the relationship that you have had with them.

## *For further information*

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

- Your role as an employer under 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. This publication and related equality and human rights resources are available from the Commission's website:

[www.equalityhumanrights.com](http://www.equalityhumanrights.com).

For advice, information or guidance on equality, discrimination or human rights issues, please contact the **Equality Advisory and Support Service**, a free and independent service.

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