

Equality in the Workplace

An Employer's Guide

Under equality legislation there are nine grounds defined where discrimination is prohibited in employment, including access to employment, terms and conditions of employment, training or experience for, or in relation to, employment and promotion or the re-grading or re-classification of posts.

The equality legislation is governed by the Employment Equality Acts 1998-2008 and prohibits discrimination on the following grounds:

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| Gender | Being male or female (the European Court of Justice has held that discrimination against a transsexual person also constitutes discrimination on the grounds of gender). |
| Civil status | Being single, married, separated, divorced, widowed or in a civil partnership. |
| Family status | Being pregnant or having the responsibility as a parent for a person under 18 years or having a responsibility as a parent or the resident primary carer for an adult with a disability who needs care or support on a continuing, regular or frequent basis. |
| Sexual Orientation | Being heterosexual, homosexual or bisexual. |
| Religion | Having religious beliefs or having none; the term 'religious belief' includes religious background or outlook. |
| Age | Generally, this applies to everybody over 18 (an exception concerns the provision of the protection of young persons and the provisions regarding minimum wage for a young person). |
| Disability | The term 'disability' is broadly defined and covers a wide range of impairments and illnesses, including all physical, sensory, learning and intellectual disabilities and mental health difficulties. |
| Race | Including colour, nationality, ethnic or national origin. |
| Membership of the Traveller Community | People with a shared history, culture and tradition, identified historically as having a nomadic way of life on the island of Ireland. |

Equality legislation applies to:

- All employees, regardless of their length of service.
- Candidates or potential candidates for employment.
- Partners in a partnership.
- All policies and procedures, which affect employees such as recruitment, work conditions, pay, promotions, dismissals, redundancies and retirements.
- All steps leading up to the potential employment of, and the employment of, an individual.
- Customers/Clients/ Contractors (under the Equal Status Act).

Businesses need to have policies and procedures in place, which adhere to the equality legislation. For instance, during the recruitment process, employers are restricted from asking certain questions which may have a discriminatory impact and are related to the nine grounds of equality, such as:

- *What age are you?*
- *Are you married?*
- *Do you have children?*
- *Are you planning to have children?*

Similar questions are also not allowed in Job Application Forms. In advertising the vacancy, employers cannot discriminate on the nine grounds and should not include in the advertisement discriminatory clauses, such as:

- *Young and dynamic staff wanted.*
- *Only males need to apply.*
- *Only females need to apply.*
- *Only Irish need to apply*

These examples are not exhaustive.

Discrimination

Discrimination can be both direct and indirect. Direct Discrimination is the less favourable treatment of an individual on one or more of the nine grounds.

- Examples of direct discrimination are:
- Paying men more than women for similar/equivalent work.
- Not hiring pregnant women.
- Hiring only non-Irish nationals.

These examples are not exhaustive.

Indirect Discrimination occurs when an apparently neutral provision puts persons of a group at a disadvantage, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Examples of indirect discrimination include requiring:

- Fluent excellent English language skills for manual jobs so that non-Irish nationals will not qualify for the vacancies.
- That as part of the selection process for office jobs, candidates be able to perform a fitness test in order to avoid hiring people with disabilities.

These examples are not exhaustive.

Harassment

Harassment is a form of discriminatory behaviour also prohibited by Equality Legislation. Harassment is defined as any form of unwanted conduct related to any of the nine discriminatory grounds. Harassment occurs where the conduct has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

Sexual harassment is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, which has the purpose and effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Such conduct may consist of

acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

Where an employee is harassed either in the workplace or otherwise in the course of his or her employment by a manager, a fellow employee or a client, a customer or other business contact of the employer, that harassment constitutes discrimination. If a case is taken against the company, the employer will need to show that he/she has taken all reasonable and practicable steps to prevent harassment and address any complaint of harassment brought to their attention.

Victimisation

Victimisation occurs where dismissal or other adverse treatment occurs as a reaction to, for example:

- A complaint of discrimination made by the employee to the employer.
- Any proceedings by a complainant.
- An employee having represented or otherwise supported a complainant.
- The work of an employee having been compared with that of another employee for the purposes of the Equality Legislation.
- An employee having opposed by lawful means an act which is unlawful under the Equality Legislation.

An employee having given notice of an intention to take any of these actions may be entitled to claim unfair dismissal on the grounds of Constructive Dismissal.

Disability

People with disabilities are a diverse group. They may have a physical, sensory or intellectual disability or a mental health issue, and some may have a combination of these. Their disability may have little impact on their ability to work and take part in society, or it may have some impact, requiring a degree of support, or specific assistance.

An employer is not required to recruit, retrain, train or promote a person who is not fully competent to carry out the duties concerned. However, the employer, under equality legislation, has the obligation to provide reasonable accommodation to employees with a disability. Reasonable accommodation is about taking appropriate measures by the employer to allow a person with a disability to perform their core duties on an equal footing with other employees.

Appropriate measures should not impose a disproportionate burden on the employer and may include the adaptation of the work environment and equipment, patterns of working time, the distribution or sequence of tasks, the provision of training or integration resources. They do not include any treatment, facility or equipment that the person might ordinarily provide for themselves.

Not all employees who have a disability, or acquire it during employment, will need reasonable accommodation.

Factors to determine whether there is a disproportionate burden on the employer are as follows:

- The financial and other costs.
- The scale and financial resources of the employer's business.
- The possibility of public funding or other assistance.

Pregnancy

A large volume of equality case law concerns pregnancy. An employer, who refuses to engage or dismisses a woman, because she is pregnant, commits an act of direct discrimination as pregnancy can only affect women.

Discrimination on the grounds of gender shall be taken to occur where, on a ground related to her pregnancy or maternity leave, a female employee is treated, contrary to any statutory requirement, 'less favourably than another employee is, has been or would be treated'.

Maternity Entitlements

As of September 2011, an employee is entitled to a minimum of twenty-six paid (by social welfare) consecutive weeks maternity leave. The employee may, if so desired, take an additional sixteen weeks leave immediately after the twenty-six weeks at her own expense. The employee must take at least two weeks before the end of the week which the baby is due and at least four weeks after the birth as part of their maternity leave.

Return to work

The employee must inform the company in writing at least four weeks before she intends to return to work.

Where an employee takes additional maternity leave, the company must be notified in writing by the employee or someone acting on her behalf, of her intention to do so. This notification must be received by the company no later than four weeks before the end of the maternity leave.

During maternity leave, and extended maternity leave, the employee's rights, e.g. annual leave, seniority, etc. are preserved and continue to accrue as if she was not absent from work.

Breastfeeding

Upon return to work, a breastfeeding mother is entitled to, without loss of pay, at the option of her employer to take a break of one hour, where suitable facilities are provided in the workplace or a reduction of working hours (for up to six months after giving birth, to facilitate breastfeeding). The one-hour break may be split into shorter periods of time totalling one hour.

Parental Leave

The Parental Leave Act 1998 (Amendment Act 2006) was introduced to allow working parents leave to look after their children. Each parent is entitled to fourteen weeks' unpaid parental leave for each child up to eight years of age or sixteen years of age in the case of a child with a disability. Generally, the employee must have at least one year's continuous service with the employer before he/she is entitled to take parental leave.

A person acting in place of the parents, such as a guardian, is also entitled to parental leave.

Force majeure leave (covered under parental leave) allows limited paid leave to enable employees to deal with family emergencies resulting from the injury or illness of a family member up to a maximum of 3 days in any 12 consecutive months or 5 days in any 36 consecutive months.

An employee is entitled to force majeure leave with pay from his or her employer for urgent family reasons, owing to the injury or illness of any of the persons listed below:

- a child or adoptive child of the employee; the spouse of the employee or a person with whom the employee is living as husband or wife
- a person to whom the employee is in loco parentis
- a brother or sister of the employee
- a parent or grandparent of the employee

- persons in a relationship of domestic dependency, including same-sex partners

Age Discrimination

It is unlawful to advertise a job in such a way that the advertisement could reasonably be interpreted as indicating an intention to discriminate. It is discriminatory, for instance, to advertise for a 'young and dynamic professional'. It was the view of the Equality Officer that the use of the word "young" as a requirement in employment advertisement constitutes discrimination on the age ground (*Equality Authority v Ryanair* DEC-E/2000/14).

Currently there is no national mandatory retirement age in Ireland. However, employers are permitted to set compulsory retirement ages for their employees under the Employment Equality Acts 1998-2008 (the "Acts"). The Acts also provide for several other permissible age limits including:

- A minimum age requirement (not exceeding 18 years) for recruitment to a post.
- Different retirement ages for employees or any class or description of employee.
- A maximum recruitment age to take account of the costs or time involved in training an employee to a standard at which they will be effective in the job, or if there is a need for there to be a reasonable period prior to retirement age during which they will be effective.

Vicarious Liability

Employers are liable for anything done by an employee in the course of his or her employment, unless the employer can prove that he or she took reasonably practicable steps to prevent the discrimination. This is called vicarious liability and is an important responsibility for any employer. An example of vicarious liability is where an employee discriminates against a foreign employee of the company by calling him names, referring to his country of origin. Whether this incident happened in the workplace or in a work-related function outside the workplace, the employer is responsible.

If a company wants to protect itself, it will need to put in place measures to prevent discrimination, such as:

- An equality policy.
- A bullying and harassment policy.
- An equal status policy.
- Proof that employees received a copy of the policies or that employees had easy access to the policies and understand the policies.
- Proof that managers and supervisors were trained regarding equality.
- Proof that the policies were explained to employees and that they were made aware of and understand their responsibilities.

Please note that vicarious liability can also apply where contractors, self-employed people in the workplace and employees of companies who regularly visit the workplace act in a discriminatory manner, unless the company has given and explained the company equality policies to them.

Once the company becomes aware of potential issues, the person designated to deal with equality should speak to the individual concerned and establish what happened, what is necessary to resolve the issue and document the discussions.

Burden of proof

In claims of discrimination on all nine grounds, including indirect discrimination, victimisation, harassment and sexual harassment, where facts are established by a complainant, the onus is on the employer to show that they took reasonable steps to prevent the discrimination. This can only be done by having a policy in place and being able to prove that the employee received a copy, the policy was explained to the employee and that the policy was implemented.

If a company is found not to have complied with equality legislation resulting in discrimination against employees, customers and/or contractors, the company may face litigation and may have to compensate victims of the discrimination with up to 2 years pay or, in the case of gender discrimination taken directly to the Circuit Court, no maximum cap.

The failure to implement the following policies will make an employer increasingly liable for any equality and discrimination claims:

- Equality Policies
- Bullying and Harassment
- Equal Status Policy

For further information please contact HR@ISME.ie.