A guide for employers and employees



Sexual orientation and the workplace



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Sexual orientation and the workplace

Putting the Equality Act 2010 into practice

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Introduction

Fairness at work and good job performance go hand in hand. Tackling discrimination helps to attract, motivate and retain staff and enhances an organisation's reputation as an employer. Eliminating discrimination helps everyone to have an equal opportunity to work and to develop their skills.

From 1 December 2003, when the Employment Equality (Sexual Orientation) Regulations came into force, it became unlawful to discriminate against workers because of sexual orientation. The Equality Act 2010 replaces these Regulations. As an employer, your obligations remain largely the same as under the Regulations, although you should be aware that the Act will extend protection from third party harassment to cover sexual orientation, making employers potentially liable for harassment of their staff by people they do not employ (see page 6).

Employers are encouraged to consider whether their policies and procedures respect the sensitivity of the individual's sexual orientation and the importance of maintaining a high level of confidentiality. Workers of all sexual orientations should feel welcome and safe in their workplace and the dignity of all should be respected.

What does the law say? - in summary

What does the law say? - in summary

It is unlawful because of sexual orientation to:

- discriminate directly against anyone that is, to treat them less favourably than others because of their actual or perceived sexual orientation, or because they associate with someone of a particular sexual orientation
- discriminate indirectly against anyone that is, to apply a criterion, provision or practice which disadvantages people of a particular sexual orientation unless it can be objectively justified
- subject someone to harassment
- victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination on grounds of sexual orientation
- discriminate against someone, in certain circumstances, after the working relationship has ended.

1.1 Sexual orientation

Sexual orientation is defined as:

- orientation towards persons of the same sex (lesbians and gay men)
- orientation towards persons of the opposite sex (heterosexual)
- orientation towards persons of the same sex and the opposite sex (bisexual).

It is as unlawful to discriminate against heterosexual people as it is to discriminate against lesbians, gay men and bisexual people.

1.2 Direct discrimination

Direct discrimination means that workers or job applicants are treated less favourably because of their actual or perceived sexual orientation or because they associate with someone of a particular sexual orientation. For example it is unlawful to:

- decide not to employ someone
- dismiss them
- refuse to provide them with training
- deny them promotion
- give them adverse terms and conditions
- deny them access to benefits. It is lawful to restrict benefits to people
 who are either married or in a civil partnership to the exclusion of
 people who hold neither status but where this is the case there must
 be equal treatment for:
 - Civil partners and spouses
 - Unmarried couples of the same or opposite sex who are not civil partners.

Example: Whilst being interviewed, a job applicant says that she has a same sex partner. Although she has all the skills and competences required of the job holder, the organisation decides not to offer her the job because she is lesbian. This is direct discrimination.

1.3 Indirect discrimination

Indirect discrimination can occur if you have selection criteria, policies, benefits, employment rules or any other practices which, although they are applied to all employees, have the effect of disadvantaging people of a particular sexual orientation unless the practice can be justified. Indirect discrimination is unlawful whether it is intentional or not.

In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified. To justify it, you must show that there is a legitimate aim (eg a real business need) and that the practice is proportionate to that aim (ie necessary, and there is no alternative means available).

1.4 Harassment

Harassment is unwanted conduct related to a relevant protected characteristic, such as sexual orientation, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

It may be intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting. It may be about the individual's sexual orientation (real or perceived) or it may be about the sexual orientation (real or perceived) of those with whom the individual associates. It may not be targeted at an individual(s) but consist of a general culture which, for instance, appears to tolerate the telling of homophobic jokes.

Example: A male worker who has a same sex partner is continually referred to by female nicknames which he finds humiliating and distressing. This is harassment.

Example: A worker has a son who is gay. People in the workplace often tell jokes about gay people and tease the worker about his son's sexual orientation. This may be harassment on grounds of sexual orientation, despite it not being the victim's own sexuality that is the subject of the teasing.

The harassing behaviour may not always be overtly related to sexual orientation. For example, an individual could be ostracised or excluded by colleagues because of their sexual orientation.

Employees may be able to claim harassment in circumstances where the unwanted behaviour is not directed at them, but at a colleague for example, if they can demonstrate that it created an offensive environment for them. The complainant need not have the same sexual orientation as the person who is being harassed.

Example: Jenny is a lesbian and is claiming harassment against her line manager after he frequently teased and humiliated her about her sexual orientation. Caroline shares an office with Jenny and she too is claiming harassment, even though she is not a lesbian, as the manager's behaviour has also created an offensive environment for her.

You may be held responsible for the actions of your staff as well as the staff being individually responsible. If harassment takes place in the workplace or at a time and place associated with the workplace, for example a work related social gathering, you may be liable and may be ordered to pay compensation unless it can be shown that you took reasonable steps to prevent harassment. Individuals who harass may also be ordered to pay compensation.

See section 2.2. for guidance on preventing harassment in your workplace.

1.5 Third party harassment

The Equality Act 2010 extends protection from third party harassment to cover sexual orientation. If one of your employees is subjected to harassment by someone you do not employ (e.g. a customer), you could be liable for this in circumstances where:

- harassment has occurred on at least two previous occasions. This
 means that the same member of staff has been harassed twice,
 not necessarily by the same third party;
- you are aware that harassment has occurred;
- you have not taken reasonable steps to prevent it from reoccurring.

You should develop a reporting procedure for third party harassment, and should make all staff aware of the process for reporting an incident. You should also ensure that you put processes in place to manage customers who behave in an offensive way.

You may wish to consider placing signs on your premises or website stating that harassment of staff will not be tolerated. Handouts to workers visiting your premises could include a summary of your Equality Policy, as well as the more usual health and safety instructions.

Example: Martin manages a doctor's surgery. One of his staff, Jim, is gay. Jim mentions to Martin that he is feeling unhappy after a patient made a homophobic remark to him. Martin is concerned and monitors the situation. Within a few days a different patient makes a homophobic remark to Jim. Martin reacts by having a word with the patient, pointing out that this behaviour is unacceptable. He puts up posters in the surgery office informing patients that harassment of staff will not be tolerated. Martin keeps Jim in the picture with the actions he is taking and believes that he is taking reasonable steps to protect Jim from third party harassment.

1.6 Victimisation

Victimisation is when an individual is treated detrimentally because they have made a complaint or intend to make a complaint about discrimination or harassment or have given evidence or intend to give evidence relating to a complaint about discrimination or harassment.

They may become labelled 'troublemaker', denied promotion or training, or be 'sent to Coventry' by their colleagues. If this happens or if you fail to take reasonable steps to prevent it from happening, you will be liable and may be ordered to pay compensation. Individuals who victimise may also be ordered to pay compensation.

You should make staff aware that they must not penalise any individuals who make a complaint of discrimination. This applies to all staff, including those who are the subject of a complaint, mentioned as a witness, asked to give relevant evidence, or are supportive of the alleged discrimination. If a complaint is made, you should carefully monitor the situation to ensure that victimisation does not occur.

Example: A worker gives evidence for a colleague who has brought an employment tribunal claim against the organisation of discrimination on grounds of sexual orientation. When that worker applies for promotion her application is rejected even though she is able to show she has all the necessary skills and experience. Her manager maintains she is a 'troublemaker' because she had given evidence at the tribunal and therefore should not be promoted. This would be victimisation.

1.7 At the end of the working relationship

Discrimination, harassment or victimisation following the end of a working relationship covers issues such as references either written or verbal.

Example: A manager is approached by someone from another organisation. He says that Ms 'A' has applied for a job and asks for a reference. The manager says that he cannot recommend the worker as she was not accepted by other staff because she was bisexual. This is direct discrimination because of sexual orientation.

Sexual orientation and the workplace –

some key areas

This section describes some good practice measures that will help you avoid putting people at disadvantage in the workplace because of sexual orientation.

2.1 Recruitment and selection

You should ensure that you do not set unnecessary selection criteria or standards which might prevent people from applying because of their sexual orientation.

Example: A sports club requires two individuals to manage the bar and other facilities. They advertise for a husband and wife team. This is likely to be direct discrimination on grounds of sexual orientation because the sports club is treating civil partners less favourably than spouses.

At the interview or selection process questions should be asked or tests set to check for the skills and competencies needed for the post. Interviewers should not be tempted to ask personal questions, which may be perceived to be intrusive and imply potential discrimination.

Where such information is volunteered, selectors should take particular care not to allow themselves to be influenced by that information. An organisation only needs to know if the person can do the job and if they are willing to do the job. Assumptions should not be made about who will and who will not fit in.

Example: The perception of the interviewee is important. Questions not obviously related to the post may be perceived as providing a basis for discrimination and, in addition, the interviewer may subconsciously take personal matters into consideration. It is good practice to avoid enquiring about marital status, number of children and arrangements for their care, sexual orientation, and social life.

Care should be taken with the wording on application forms. It is most unlikely, for instance, that an organisation needs to know the marital status or civil partnership status of the applicant. If such information is required people should be asked if they are married or in a civil partnership but not asked to say which. If there are any circumstances where it is necessary to identify married people and civil partners separately, for purposes such as security clearance, the information can be sought in confidence when the selection process has been completed.

Selection for recruitment or promotion must be on merit, irrespective of sexual orientation. Where employers have reason to believe that persons of a particular sexual orientation are under-represented in the workforce, it is possible to take certain steps to redress the effects of any previous inequality of opportunity. This is called 'positive action'.

Employers may wish to consider positive measures such as:

- training their existing employees for work which has historically been the preserve of individuals of a particular sexual orientation;
- advertisements which encourage applications from people of a particular sexual orientation but making it clear that selection will be on merit without reference to sexual orientation.

You should be aware that the laws relating to gay men have changed significantly over time. It is possible that applicants may have acquired a criminal conviction many years before for a matter no longer unlawful (such as consensual adult gay sex). This is unlikely to have any bearing on the individual's skills and suitability for the job or training advertised.

2.2 Workplace behaviours and preventing harassment

Acas research in 2007 showed that workplace discrimination allegations regarding sexual orientation were dominated by claims of bullying and harassment, including name calling, threats and physical assaults.

Everyone should understand what discrimination and harassment is and that it is hurtful, unlawful and totally unacceptable. However large or small your organisation, it is good practice for you to have an Equality Policy and to train all staff to ensure that they understand their rights and responsibilities. This will help to reduce the likelihood of discrimination, harassment and victimisation taking place and may help to limit your liability if a complaint is made.

When delivering equality training, you should cover issues such as homophobic and biphobic comments and jokes and the use of inappropriate language which may simply have been intended as 'banter' but which have the effect of being degrading or distressing. Some words can be seen as offensive, and may be viewed as harassment. When talking about sexual orientation, words such as heterosexual, bisexual, lesbian and gay are generally acceptable.

You should ensure that your staff understand that if they harass colleagues, they could be personally liable and may have to pay compensation themselves. Such liability is separate from, and in addition to, any compensation that the organisation is ordered to pay. Workers should understand that merely saying "no offence was intended" will not constitute a defence. In addition, an absence of complaint from the individual being harassed does not mean that harassment has not taken place.

Some of your employees may hold particular views about sexual orientation related to their religion or belief. While employees have the right not to be discriminated against because of religion or belief, you can legitimately require that they do not manifest their religion or belief in a way that breaches your Equality Policy (for example, by discriminating against or harassing colleagues or customers of a particular sexual orientation).

Staff should be made aware of what steps they could take if they feel they have been discriminated against, harassed or victimised. They should feel confident that their complaint will be treated seriously, that managers will deal with the cause of the problem and that the process will be undertaken in confidence. If it is practical, it is a good idea for organisations to have a named individual who is trained and specifically responsible for dealing with employment equality issues and complaints.

2.3 Confidentiality

By their very nature, sexual matters are private and confidential. Although some people are comfortable talking about their partner, many people do not share such information with their managers and colleagues. They may find it very difficult to make a complaint about discrimination or harassment, or be fearful that by making a complaint they will be 'outed' in the workplace. You should make strenuous efforts to ensure confidentiality of procedures and information management systems and reassure your staff that policies to ensure confidentiality are in place.

'Outing' is when, against their wishes, a person's sexual orientation is revealed by another person. 'Outing' someone without their clear permission is inappropriate and a breach of that person's privacy. It may constitute harassment and/or a breach of the Data Protection Act.

Lesbians, gay men and bisexual people are sometimes 'outed' for malicious reasons and consequently suffer harassment by colleagues or service users/customers. You should treat such a matter seriously.

Personal information should be maintained in the strictest confidence. Managers should not forget that even basic information such as a partner's name is confidential, nor should they assume that it is common knowledge. Managers should remember that all such information is covered under the data Protection Act 1998.

Example: On a residential training course, delegates are required to give the tutor the name, telephone number and relationship of an emergency contact. The completed forms are left on the tutor's desk where they can be seen by other delegates. As a result it becomes common knowledge that one of the delegates has a same sex partner. The delegate is distressed and as a result resigns from the company.

2.4 Monitoring sexual orientation in the workplace

The purpose of monitoring sexual orientation is to enable you to examine how your policies and practices are affecting jobseekers and employees. If they are not working well you need to ask yourself 'why' and do something to put it right.

Monitoring involves:

- 1. Gathering individual personal information on the diversity of your potential recruits or existing employees.
- 2. Comparing and analysing this against:
 - other groups of employees in your company
 - jobseekers in the local community
 - the broader national labour market.

Employees or job applicants may be unwilling to disclose their sexual orientation because they have concerns about the confidentiality and security of such information. They may also be concerned that they may be inadvertently identified in any monitoring activity. You should address these and other issues before you begin monitoring.

Preparation is the key to monitoring sexual orientation.

You need to:

- explain to staff why you are monitoring
- decide on the best way to communicate your message eg magazine articles, intranet site
- involve your trade union equality reps or staff council in persuading employees of the benefits of monitoring
- provide a point of contact if employees have concerns
- select a senior manager or member of staff to champion the monitoring process
- encourage external recruits to complete the monitoring form
- reassure staff that all information collected will remain strictly confidential.

You may wish in the first instance to consider anonymous monitoring of sexual orientation to enable you to establish some baseline information.

As well as asking employees to state their sexual orientation, it is useful to include a supplementary question for lesbian, gay and bisexual respondents, asking whether the respondent is 'out' at work. Answers to this question will indicate the extent to which people feel confident and safe in your workplace.

It is also good practice to collect and analyse data on attitudes to sexual orientation in your organisation. Staff surveys and exit interviews could include specific questions on how friendly the workplace is to lesbian, gay and bisexual staff.

The Acas guidance booklet Delivering equality and diversity provides information on how to ensure monitoring is confidential, effective and compliant with the Data Protection Act 1998.

Appendix 1 Occupational Requirements - Guidance

In certain circumstances, it will be lawful for employers to specify that job applicants must have, or must not have, a particular protected characteristic under the Equality Act 2010. For example, an employer might specify that job applicants must be lesbian. This is known as an 'occupational requirement'.

It is not enough for you to simply decide that you prefer to employ someone who has a particular sexual orientation. Rather, the requirement must be:

- crucial to the post, and not just one of several important factors
- relating to the nature of job in question, rather than the nature of the employing organisation
- a proportionate means of achieving a legitimate aim. If there is any reasonable and less discriminatory way of achieving your aim, it is likely that you could not claim an occupational requirement.

An occupational requirement must be reassessed on each occasion a post becomes vacant to ensure that it can still be validly claimed. Circumstances may have changed, rendering the occupational requirement inapplicable.

An organisation which provides counselling services for young gay men may be able to show that there is an occupational requirement for counsellors to be gay, as callers may not feel comfortable discussing some issues with a heterosexual counsellor.

Organised religion

Additional exemptions apply where employment is for the purpose of organised religion, such as being a Minister or otherwise promoting or representing the religion.

In such cases, some roles can be restricted to people of a particular sex or sexual orientation, non-transsexuals, people who are not married or in a civil partnership; or people who are not divorced or married to (or in a civil partnership with) someone who has been divorced. In addition, requirements 'related to' sexual orientation can be imposed on certain roles, eg a requirement to be celibate if gay or lesbian.

The exception only applies where either of the following is the case:

- appointing a person who meets the requirement in question is a proportionate way of complying with the doctrines of the religion; or
- because of the nature or context of the employment, employing a person who does not meet the requirement would conflict with a significant number of the religion's followers' strongly held religious convictions. The requirement must be a proportionate way of avoiding such a conflict.

As with all occupational requirements, the requirement must be essential to the post, and not merely one of several important factors.

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Notes

Notes

Information in this handbook has been revised up to the date of the last reprint – see date below. For more up-to-date information please check the Acas website at www.acas.org.uk.

Legal information is provided for guidance only and should not be regarded as an authoratitive 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.

Acas aims to improve organisations and working life through better employment relations. We provide up-to-date information, independent advice, high quality training and we work with employers and employees to solve problems and improve performance.

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