

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
JULY 2007**

Employment Equality (Sexual Orientation) Regulations 2003
Employment Equality (Religion Or Belief) Regulations 2003
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Introduction

The Regulations came into force on 1 December 2003. They apply to England, Scotland and Wales but not to Northern Ireland. They represent one of the several stages of implementation of the European Equal Treatment Directive; others include the more recent Age Discrimination Regulations.

The Regulations make it unlawful for employers to discriminate on the grounds of sexual orientation/religion or belief. Protection is given to employees, workers and to others outside of employment. Protection will be extended to cover the provision of goods, services and facilities.

So, why must employers consider the potential impact of the Regulations? If employers do not comply with the Regulations, as the ACAS guidance tells us, it is:

- Otherwise unlawful.
- Hurtful to individuals.
- Best practice to promote diversity.
- Expensive - no cap on employment tribunal awards so potentially harmful, particularly if the organisation is small and has a small level of reserves with which, potentially, it would have to pay any award.

Firstly, I am going to deal with the Regulations in respect of employment. And, secondly, in relation to them as applied to the provision of goods and services as has now become effective since 30 April this year.

Definitions

One of the key elements to get your head around these Regulations is the definitions.

- Sexual **orientation**. This 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 (bi-sexual).

WRIGLEYS

— SOLICITORS —

- It does not cover:
 - Asexuals.
 - Celibates.
 - Persons orientated towards other species or objects.
 - Persons with more specific orientations or sexual preferences, for example paedophiles, sado-masochists.

It should be noted that it does not have to be the complainant's sexual orientation, for example it could be a close family member of the individual or the individual's perceived sexual orientation.

- **Religion or Belief.** The Regulations do not clearly define what may be a religion or belief. In most cases, it will be clear whether the Regulations apply and where it is an issue an employment tribunal would have to consider various factors such as collective worship, whether there is a clear belief system which extends beyond the main or more recognisable religions such as Christianity, Islam, and Hinduism (which represent between them over 75% of the population according to the 2001 UK census).

Since the Regulations were first introduced there has been a change in the actual wording of the definitions of religion or belief. Under the Regulations the definition of "religion or belief" was previously "any religion, religious belief or similar philosophical belief". Part 2 of the Equality Act 2006, Discrimination on the Grounds of Religion or Belief, came into force on 30 April 2007. This changes the definition to "any religion, or religious or philosophical belief". As you can see, the word "similar" is the key omission. The removal of this one word is likely to open up the debate again as to what is or is not included within this definition.

Again it does not have to be the complainant's religion or belief. For example it could be a close family member or their perceived religion or belief.

Common themes in discrimination

Like most areas of discrimination, there are common themes as to how discrimination is defined. They are the same for both sets of Regulations.

- Discrimination is defined as:
 - Direct discrimination: that is, to treat someone less favourably than others because of their actual or perceived sexual orientation/religion or belief. An employer who sees two applicants for interview for a new post, one of whom is Muslim. Both are similarly qualified and have similar experience but the Muslim requests specific prayer facilities. If the employer refuses

WRIGLEYS

— SOLICITORS —

to employ him because he thinks this will be disruptive to his other staff, he could face a claim of direct discrimination.

- Indirect discrimination: that is, to apply a criterion, provision or practice which disadvantages people of a particular sexual orientation/religion or belief unless it can be objectively justified. If an employer has a general rule against wearing headwear at work, this will disadvantage Sikhs who wear turbans for religious reasons. Another example is placing job adverts in the gay or lesbian press which may exclude heterosexual applicants learning of the vacancy.
- Harassment: this is unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them having regards to all the circumstances including the perception of the victim.
- For example, in 2003, a general manager in the leisure industry was overheard referring to a gay colleague in offensive terms. Although the gay employee did not hear the remarks himself, an employment tribunal found this to be harassment contrary to the Regulations.
- Victimisation: where someone has made or intends to make a complaint or allegation or has given or intended to give evidence in relation to a complaint of discrimination on the grounds of sexual orientation/religion or belief.
- For example, in 2006, a teacher was suspended following a refusal to remove her veil when teaching. Although the requirement that the teacher remove her veil did not amount to unlawful discrimination on grounds of her religion or belief, her treatment during the investigation and her subsequent complaint was held to amount to victimisation. Wearing the veil was held to be a cultural rather than a religious issue.
- In another case, a judge was held not to have discriminated against an individual when asking her to remove her veil. The issue was that the judge could not properly hear her and, therefore, could not conduct court business satisfactorily.

Who might be liable?

An organisation may be held responsible for:

- its own actions, for example in its policies and procedures;
- the actions of their staff (as well as its agents and any workmen of another organisation based on its site). This is called vicarious liability.

- Individual staff may be held liable for their own actions. This is particularly the case in harassment claims.

It is worth noting that there is no "small employer" exception. The Regulations apply to all employers, including those in the public and private sector, including charities, partnerships and sole traders. The Regulations also apply to those applying for work, as well as those in work, and will protect ex-employees, for example where you give (or refuse) a reference. Another reason why employers must be particularly careful in this area.

When do the Regulations apply?

The Regulations apply, as I said, before during and after employment and in respect of the provision of goods and services. Employers must not make assumptions either. So it is not adequate to say we do not currently employ any gays or lesbians and, therefore, the Regulations do not apply to us. Unless you are collecting data about your staff's sexual orientation you cannot be certain. It is very much down to the individual whether they make their own sexual orientation or indeed religion or belief known. The Regulations also protect an individual from discrimination on the basis of their perceived sexual orientation or the sexual orientation of someone else.

In terms of collecting data on those areas, there is no specific requirement under the Regulations. However, it can allow you to monitor the effect of your policies and procedures. Consultation with staff on how work affects them personally can achieve the same ends.

Simply having an Equal Opportunities Policy does not mean that you are complying with the Regulations, and simply telling staff you have an Equal Opportunities Policy when they apply does not help either - it does not mean it is being followed. As an employer, it is important that you regularly remind staff about what policies you have and what they mean. Your managers should be able to spot problems as they arise and be able to respond when a complaint is made.

It is important for all employers to remember that many complaints of discrimination, including harassment, arise through the actions of work colleagues. As an employer you may be liable for those actions unless you can demonstrate that you took all reasonably practicable steps to prevent it happening. Simply having a policy is not enough to protect you from liability.

So, the Regulations apply before employment (e.g. recruitment, advertisement, interview).

- Advertisement - accessibility to diverse audience. For example, advertising in a magazine aimed directly at gay men may indirectly discriminate against heterosexuals who may be less likely to read such a publication. The other difficulty in advertisements is, for example, where a Christian employer wishes to promote its Christian ethos. This may be potentially discriminatory against applicants. Only the narrow exception of a Genuine Occupational Requirement can staff be positively recruited on the basis of their religion or

WRIGLEYS

— SOLICITORS —

belief. Careful consideration should be given as to where this is strictly necessary. For example, a faith school may seek a headmaster who practices the particular faith. Other teachers could be sympathetic to the particular ethos and values of the school without belonging to a particular religion. It is unlikely that non-teaching staff would satisfy the Genuine Occupational Requirement exception.

- Interviews and Application forms: no personal questions and do not be influenced if such information is offered. For example, it is good practice to avoid questions about marital status, the number of children and arrangements for their care, sexual orientation and social life.
- Recruitment: establish criteria relevant to the required skill for the job. Appoint on the basis of skills and aptitudes only. Do not set unnecessary selection criteria, for example, requiring a husband and wife team and therefore discriminating against civil partners. Obviously, a decision not to offer employment based on an applicant's sexual orientation is likely to be direct discrimination; unless one of the very few Genuine Occupational Requirements apply.
- Criminal convictions: laws relating to gays have significantly changed over time so applicants may have acquired a criminal conviction for something which is no longer unlawful.

During employment (e.g. office environment, promotion, benefits)

- Policies and procedures: in particular in your Equal Opportunities Policy ensure that the sexual orientation/religion or belief regulations are covered. Further, ensure policies are kept updated, that they are communicated to staff and staff receive training on equal opportunities. They must also be cross referenced to other policies, for example, discipline and grievance and harassment.
- Opportunities for promotion and training should be equally available.
- Benefits, for example, insurance/health care. Ensure that there is no potential for direct or indirect discrimination. However, it is not unlawful to restrict benefits on the grounds of marriage only. Check with your contracted in-house occupational pension scheme that the scheme rules comply with civil partnership regulations and make sure employees are aware these changes have taken place.
- Banter and general office environment. Bullying is a form of harassment and comments which some may see as harmless may still be offensive. Employers should not assume staff enjoying banter and making fun of each other in a jokey atmosphere is harmless. Individuals may feel that they cannot complain and it remains the case that many acts of harassment go unreported.

WRIGLEYS

— SOLICITORS —

- Equality Monitoring: we have already mentioned collecting data on staff briefly. As stated, there is no legal requirement to monitor but it is good practice and will enable you to see whether there is any indication that discrimination may exist. For example a high proportion of gay applicants but few appointments, or a large Muslim workforce, but few in management. Maintaining statistics and monitoring them allows you to take positive steps.

The Regulations also apply after employment (e.g. references and grievances)

- Grievances: remember that the statutory grievance procedure may apply even though you have dismissed an employee. Raising a grievance may be a requirement before the ex-employee can make a complaint to an employment tribunal.
- References: references are a complex area in themselves, but where an employer does give a reference, it has a responsibility to be true and fair. All references (internal or external, oral or written) should be non-discriminatory. Whether or not you give them, and what you say, should be applied fairly. Keep them brief and limited to period of employment and the job title.

The Regulations also now cover the provision of goods, facilities and services (as of 30 April 2007). I shall come back to this shortly.

The Regulations also cover:

- Partnerships including terms of partnership offered.
- Trade unions and relations with their members.
- Providers of vocational training.
- Employment agencies and the services they provide to workers.
- Further and higher education and relations with students.

Exceptions

The Regulations, as have been described do, however, contain some important exceptions:

- Firstly, geographical limitations - employees in question must work wholly or substantially outside the UK to fall within this exception.
- Secondly, national security, which is self-explanatory.

WRIGLEYS

— SOLICITORS —

- Next: employee benefits dependent on marital status (where marital status includes civil partnerships).
- And lastly, preventative action. This is a statutory defence for an employer against a claim of vicarious liability. It is essential for the employer to demonstrate that they have taken all reasonable steps to limit the risk of any discriminatory act, for example through having an Equal Opportunity Policy which is brought to the attention of staff and where there is equal opportunity training. An employer must show that they have attempted to stop a particular act or committing of discrimination acts in general to fall within this exception.

Justifications

In addition to the Exceptions, there are also what are termed Justifications.

1. Direct and indirect discrimination does not apply where there is a Genuine Occupation Requirement (GOR). However, this rarely applies - and worth bearing in mind is possibly rarer in application than you might imagine.
 - A GOR exists where there is an 'essential' requirement, something more than a preference.
 - A specific GOR applies in relation to employment 'for the purposes of an organised religion'. It is not enough simply to have a religious ethos; the GOR required is to comply with religious doctrine.
2. Indirect discrimination is deemed to be not unlawful if it can be justified as a proportionate means of achieving a legitimate aim.
 - For example an employee was asked to work on Sunday when she had previously notified the employer that they would be attending Sunday Church Service. The employer sought to identify alternatives and entered into consultation with the affected employee. Here there was a genuine business case for insisting on Sunday working and the decision was held to be justified.
3. Positive action. An employer can take steps to encourage and promote under represented groups, including training directed at such a group, but this stops short of positive discrimination of one group e.g. gays against straight men.
 - For example, an employer has a need for new staff but finds that many of those who live in the local community, which has a high proportion of a particular religious group, do not apply for work. The employer targets that group through advertising in the community confirming that local residents are particularly welcome to apply. Once the applications are received they are treated equally with non-local applicants.

Provision of Goods and Services

And finally, since 30 April 2007 it has been the case for both sets of Regulations that they apply also to the provision of goods and services.

For the Religion or Belief Regulations, the new rules made it unlawful to discriminate against a person because of their real or perceived religion or belief, or lack of religion or belief. These will apply if you

- Provide goods, facilities or services.
- Manage or dispose of premises i.e. when selling or renting property.
- Work in education. All maintained and special schools, academies in England and Wales, and all public, granted-aided and independent schools in Scotland are covered by the Regulations. In part, this follows what it already states in the School Admissions Code. The Regulations do not, however, have any effect on teaching and the curriculum in schools.
- Exercise public functions. Public authorities, including non-legislative decisions of Ministers, Local Authorities, the police and other governmental organisations, must not discriminate when exercising public functions.

Again, the common themes we had earlier: direct and indirect discrimination and victimisation reoccur. In addition, you must not:

- Advertise in a way which shows an intention to discriminate unlawfully.
- Cause discrimination e.g. get someone else to do these things.

The new rules will not apply if you:

- Manage small premises in which you or a close relative live.
- Dispose of premises privately, without advertisement.
- Use a skill in a certain way of a single religion, e.g. in preparing only halal or kosher food.

Similarly, the Sexual Orientation Regulations make it unlawful to discriminate against a person because of their sexual orientation. These new rules will apply if you:

- Provide goods, facilities or services.
- Hire, let or sell premises.

WRIGLEYS

— SOLICITORS —

- Work in primary or secondary education.
- Deliver public services, including as a third party on behalf of public authorities.

The new rules will also protect everyone against victimisation and cover both direct and indirect discrimination. This means that you should review seemingly neutral policies. For example, if you offer a discount to married couples, the same discount ought to be available to civil partners. It is also worth pointing out that there is no exception for faith-based adoption agencies. Earlier this year there was much press coverage about Roman Catholic agencies which had previously not permitted applications from homosexual couples campaigning for an exemption so that they were not constrained by the Regulations. However, they will no longer be able to do this but do have a 21 month transitional period before this will come fully into force.

There has been some concern about the sexual orientation regulations in the context of religious freedom, for example, in school curricula for faith schools. The concerns expressed are that faith schools will not longer be able to teach according to an aspect of their belief or faith - which is the importance of traditional family values and that same sex relationships are sinful. There are similar concerns that the possibility of individual teachers expressing their views in this area, whether based on their religion or not, might be the subject of legal action.

The Regulations will not prevent any of this. So, if a pupil asks a teacher his views on homosexuality and the teacher gives his view then the teacher will not be acting unlawfully.

Further, there is an actual exemption for organisations or persons acting for such an organisation whose purposes are:

- The practice, advance or teach the practice or principles of any religion; or
- Enable persons of the religion or belief to receive any benefit or engage in any activity, within the framework of the religion or belief.

Those wishing to take advantage of this exemption must prove that:

- Their purpose is not mainly or wholly commercial;
- The service in question is not being provided on behalf of or under contract with a public authority;
- The restrictions imposed are necessary to comply with the doctrine of the organisation, or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

When the exemption applies, the Regulations allow for organisations lawfully to restrict on the grounds of sexual orientation:

WRIGLEYS

— SOLICITORS —

- Their membership;
- Participation in their activities or activities undertaken on their behalf or under their auspices;
- The provision of goods, facilities or services in the course of their activities/activities undertaken on their behalf or under their auspices;
- The use of disposal of premises owned or controlled by them.

If you currently only provide goods or services to a certain section of the public, you will be able to continue to do so. If, for example, you provide advice and information to lesbian, gay and bisexual people, you will not have to offer new resources of equal interest to heterosexual people. No one is required to change the nature of their business by this legislation. However, you will have to treat all customers and potential customers, of whatever sexual orientation, in a fair and equal manner. In this way you would need to be willing to provide the information designed for lesbian, gay and bisexual people to heterosexual people.

Faith based voluntary organisations and charities will not have to comply with the Regulations where this would conflict with either the doctrine of their organisation or the strongly-held beliefs of a significant number of the religion's followers - provided they are not operating on either a commercial basis, or on behalf of and under contract with a public authority.

The activities which are covered by this exception are:

- To practice a religion or belief;
- To advance a religion or belief;
- To reach the practice or principles of a religion or belief;
- To enable persons of a religion or belief to receive any benefit, or to engage in any activity with the framework of a religion or belief.

As under the Sexual Orientation Regulations, those wanting to benefit from this exception will need to demonstrate they are not commercial, that the exception relates to the religion or belief to which the organisation itself relates. Where there is the exception it allows organisations to lawfully restrict on the grounds of religion or belief:

- Their membership;
- Participation in their activities, or those under their auspices;
- The provision of goods, facilities or services;
- The use or disposal of premises.

WRIGLEYS

— SOLICITORS —

So, a charity dedicated to providing housing for retired members of a particular religion will not have to broaden the range of people it serves.

So, for example, the following can continue to carry out their current activities:

- A charity supporting victims of homophobic hate crime;
- A helpline for lesbian, gay or bisexual young people with mental health difficulties;
- A charity campaigning for equal treatment for lesbian, gay or bisexual people.

Similarly, organisations which restrict their services or facilities for special needs of education, training or welfare on grounds of an individual's sexual orientation, for example:

- Sexual health advice services;
- Hostel accommodation;
- Mental health services.

Such targeted services meeting a justified need are still lawful.

And finally, the Regulations will not interfere with current charity law. If a charity is required to discriminate in line with the explicit terms of the charitable instrument under which it is established, it may continue to do so. Apart from this, it may not discriminate on the grounds of sexual orientation.

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