

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

**EMPLOYMENT EQUALITY (SEXUAL ORIENTATION) REGULATIONS
2003**

QUESTIONS AND ANSWERS

Q1 What do you mean by sexual orientation?

A1 Sexual orientation describes who we are sexually attracted to. Everyone has a sexual orientation and a gender (male or female), but often the terms used may be confusing.

Asexual refers to those who have no sexual attraction to either gender. There is debate whether this is actually a valid orientation or a physical or emotional disorder which creates a low or non-existent sex drive;

Bisexual refers to those who are attracted to the same and the opposite gender;

Gay (male), attracted to the same gender;

Heterosexual/straight, attracted to the opposite gender;

Homosexual refers to gay or lesbian;

Lesbian (female), attracted to the same gender;

Transgender refers to an individual whose biological gender does not fit with their internal sense of identity and may refer to a male who believes they are (or should be physically seen as) female and vice versa. An individual who is transgender does not define their sexuality and transgender people may be bisexual, heterosexual or gay or lesbian and are protected under these Regulations in relation to their sexual orientation. Transgender people are also protected under the Sex Discrimination (Gender Reassignment) Regulations 1999 and the Gender Recognition Act 2004.

Q2 What is direct discrimination?

A2 Treating someone less favourably because they are of a particular sexual orientation, for example refusing to employ or dismissing someone because they are gay, or you believe that they may be gay.

Q3 What is indirect discrimination?

A3 Applying a provision, criterion or practice which although applied equally to everyone, disadvantages those of a particular sexual orientation such as placing job adverts in the gay and lesbian press, which may exclude heterosexual applicants learning of the vacancy.

Q4 What is harassment?

A4 Offensive behaviour, such as bullying, which can be unintentional or subtle such as teasing an individual about aspects of their personal life and the people they associate with. It can include a lesbian employee being made to feel unwelcome by work colleagues.

Q5 What is victimisation?

A5 Detrimental treatment (e.g. dismissal or bullying) because someone has made a complaint under or done something in connection with the Regulations, such as acting as a witness for someone who claims they have been discriminated against or harassed, or making a discrimination claim.

Q6 Do we have to collect data on our staff's sexual orientation?

A6 This is not a 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.

Q7 We only employ five staff so do the Regulations apply to us?

A7 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.

Q8 We don't employ any gay or lesbians, so we don't have to do anything about the Regulations.

A8 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 known but the Regulations will also protect an individual who is subjected to discrimination on the basis of their perceived sexual orientation or the sexual orientation of someone else, for example where they may be known to have gay or lesbian friends.

The Regulations also apply to job applicants as well as employees and you can discriminate in the selection and recruitment process.

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Q9 We comply with the Regulations. We have an Equal Opportunities Policy which we tell everyone about when they apply for work.

A9 Simply having an Equal Opportunities Policy doesn't mean that you are complying with Regulations, and simply telling staff about it when they apply for work, doesn't mean to say that 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 so that they can act promptly to prevent matters escalating. This includes, but is not just limited to being 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 employer you may be liable for those actions unless you can demonstrate that you took all reasonably practicable steps to prevent it happening. Having a policy isn't enough to protect you from liability.

Q11 Staff do enjoy a good banter and will often make fun of each other. It's harmless.

A11 Do not make assumptions. Individuals may feel that they cannot complain and it remains the case that many acts of harassment go unreported. As an employer you should ensure that staff are aware of your Equal Opportunities Policy, can raise in confidence any concerns that they may have over what is being said and that you act to stop what may be harmless banter becoming a subtle form of bullying.

Q12 We have a particular religious ethos and some of our staff may refuse to work with gay or lesbian colleagues

A12 Some religions have views opposed to gay and lesbians but in the main such religions do not promote persecution, which would amount to discrimination. Not all staff have to share your views and it may be sufficient that they are sympathetic to your particular business rather than religious ethos and values. Staff do not need to be friends but can be asked to work in a professional manner.

Only where there is a Genuine Occupational Requirement can staff be positively recruited on the basis of their sexual orientation, but this is a narrow exception and requires a careful consideration of the job to determine whether the job holder needs to have a particular orientation. Care also needs to be taken in relation to general gender based (sex) discrimination.

Q13 We have had two applicants, A and B, both are similarly qualified, although B has more experience but B has stated he is gay. We do not think he will fit in, so have decided not to offer him the job.

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- A13 A decision not to offer employment based on the applicant's sexual orientation is likely to be direct discrimination, unless there is a Genuine Occupational Requirement. B would appear to be the person best suited to the role.
- Q14 Our office manager's daughter is known to be a lesbian. We are a friendly, extrovert, bunch who enjoy banter, including jokes about gays and lesbians.**
- A14 This may amount to harassment. Remember it does not need to be the complainant's sexual orientation which is complained of. The banter may create a potentially oppressive environment or may simply cause offence. It would be good practice to ensure that staff are reminded of the Regulations and to check with your office manager that she has no complaint.
- Q15 A former employee has asked me for a reference. Can I mention he never fitted in here because he was bisexual?**
- A15 No. References are a complex area, but where you give a reference you have a responsibility to be true and fair. It may be true to say that he was bisexual, but is that relevant to the job he did, or the role he is applying for? Is it true that he didn't fit in because of his sexual orientation or is that just your assumption? If it is true then as well as a discrimination claim relating to the content of your reference you open up the possibility of a discrimination claim relating to the period of employment where you allowed him to be excluded on the basis of his sexual orientation.
- Q16 We are an organisation who promotes gay rights. We only advertise new jobs in magazines aimed at gay men, as we think that only they will be able to really understand the job.**
- A16 This may amount to indirect discrimination as you are advertising in a particular journal which heterosexuals are less likely to read. It is unlikely that there will be a Genuine Occupational Requirement, unless the role was sufficiently senior where public perception was significant, such as the chief executive.
- Q17 We have a building for which we require a caretaker and cleaner. In the past, we have found a husband and wife team works well, so we are advertising for that again.**
- A17 This may be discrimination against civil partners; advertise for a "couple". You can distinguish between married and unmarried couples.
- Q18 Employee X has a same sex partner whose has been rushed into hospital. We would let a husband leave work to be with his wife in the same circumstances, what should we do here?**

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A18 Under the Employment Rights Act 1996 employees are entitled to unpaid leave to deal with unexpected or sudden emergencies concerning a dependant or close family member, including a same sex partner. You must apply the same benefits to married and to civil partners. If you would allow unmarried partners to have time off in such circumstances you must do so irrespective of the gender of the partner.

Q19 An employee has confidentially told us they have been considered for gender reassignment.

A19 This is not the same issue as sexual orientation. This would come under different regulations - The Sexual Discrimination (Gender Reassignment) Regulations 1999.

Q20 My social enterprise company produces advice and information of interest to lesbians, gay men and bisexuals. Will we have to change?

A20 No-one is required to change the nature of their business by this legislation, so a company that targets its products at lesbians, gays or bisexuals is not obliged to develop a set of new products and services of specific interest to heterosexuals or vice versa

Q21 We are organising a sixth form school trip to France. Is there any justification for not allowing Sam to go? Sam is gay and has suffered from bullying in the past.

A21 No, a school cannot prevent a pupil going on a school trip because a pupil is or is perceived to be gay. Schools should also take note of guidance on bullying on the grounds of discrimination.

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