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Sexual orientation, gender identity, gender reassignment and employment

Explore the UK legal position and main issues for employers on sexual orientation discrimination, gender identity and reassignment discrimination in the workplace

Introduction

Sexual orientation discrimination and gender reassignment discrimination are both illegal in the UK. They are listed as protected characteristics in the Equality Act 2010. They arise when someone is unfairly disadvantaged for reasons related to their sexual orientation or because of being trans.

This factsheet offers an overview of the different types of discrimination with examples of how they apply to sexual orientation and gender reassignment. It highlights the need for employers to take action and suggests good employment practices to ensure everyone has fair access and opportunity to progress in work, regardless of sexual orientation, gender identity or gender expression.

Explore [our viewpoint on sexual orientation, gender identity and reassignment](#) in more detail, along with actions for government and recommendations for employers.

What are sexual orientation and gender identity?

Stonewall defines sexual orientation as 'a person's emotional, romantic and/or sexual attraction to another person'. Discrimination arises when someone is treated less favourably because of their sexual orientation. Sexual orientation and discrimination protection has nothing to do with someone's sexual practices, for example sadomasochism

Stonewall defines gender identity as a person's innate sense of their own gender, whether male, female or something else, which may or may not correspond to the sex assigned at birth. Gender reassignment discrimination is when someone is treated less favourably because of being trans. This covers people whose gender identity differs from the gender assigned at birth. Stonewall explains: 'To undergo gender reassignment can include undergoing some sort of medical intervention, but it can also mean changing names, pronouns, dressing differently and living in their self-identified gender'.

Research for our Perspectives on LGBT+ working lives report found that LGB+ and trans workers experience higher levels of conflict at work compared to heterosexual employees. Many LGB+ and trans workers stated that even after reporting incidents, conflicts were not resolved. Some of the findings were very positive however, with very high percentages of LGB+ and trans respondents reporting that they had good working relationships at work. Job satisfaction levels are on a par with heterosexual workers.

The UK legal position

In Great Britain, discrimination on the grounds of sexual orientation or gender reassignment is contained within the Equality Act 2010. Many different issues arise according to the precise facts and type of discrimination involved; due to the similarities in the legal concepts involved in sexual orientation discrimination and gender reassignment discrimination. Both 'protected characteristics' are addressed in this factsheet.

The Equality and Human Rights Commission (EHRC) has published guidance on sexual orientation discrimination and the Equality Act including a Code of practice on employment. The code gives important guidance on good practice and failure to follow it may be taken into account by tribunals or courts. CIPD members can find out more in our Sexual orientation discrimination law Q&As.

Our Brexit hub has more on what the implications of leaving the EU might be for UK employment law.

Sexual orientation discrimination

From the legal viewpoint of the Equality Act 2010, there are only three sexual orientations:

- Persons of the same sex (lesbian, gay).
- Persons of the opposite sex (straight).
- An emotional and/ or sexual orientation towards more than one gender (bi).

Gender reassignment discrimination

The law protects trans men and women. There does not need to be any medical process so, for example, a trans man who was assigned female identity at birth but has a male gender identity and lives as a man would be protected. The [Equality and Human Rights Commission](#) say: 'You can be at any stage in the transition process – from proposing to reassign your gender, to undergoing a process to reassign your gender, or having completed it'.

The terms 'gender reassignment' and 'transsexual' as originally used in the Equality Act have been criticised for being unclear who is covered by the Act and who isn't. Terminology evolves and 'transsexual' is just one term under the broader umbrella of 'trans' which describes people whose gender is different from the sex they were allocated at birth.

For example, the Act doesn't mention people who identify as non-binary - 'someone who does not subscribe to the customary binary approach to gender, and who may regard themselves as neither male nor female, or both male and female, or take another approach to gender entirely' ([Government Equalities Office](#)). Case law has confirmed that people who identify as non-binary or gender fluid are still protected by the Act. [Acas](#) confirm that 'someone with a non-binary identity could be protected if they are discriminated against because they are thought to be considering, thought to be going through, or thought to have gone through gender reassignment..., regardless of whether this perception is correct or not'. The category 'perceptive discrimination' (see below) and case law interpretation should cover gaps in the legislation.

Types of discrimination

Within the Equality Act 2010 there are a number of different types of discrimination. These apply to the protected characteristics which include sexual orientation and gender reassignment.

Direct discrimination

This applies to all protected characteristics. It's treating someone less favourably than another person because of a protected characteristic that they have. For example, it's

promoting a heterosexual man rather than a gay man because of their sexual orientation.

Indirect discrimination

Indirect discrimination occurs when:

1. a provision, criterion or practice is applied to all, **and:**
2. it puts a group with a protected characteristic at a disadvantage when compared with another group
3. an individual is put at a disadvantage
4. the employer cannot show it to be a proportionate means of achieving a legitimate aim.

For example, if a criterion is put in place that unsociable shifts must be undertaken by those without child-caring responsibilities. As it is currently statistically less likely for same-sex couples to have children or young families, they may be more likely to be given the unsociable shifts. Whilst the policy appears to treat all employees equally, in practice it places LGBT+ staff at a particular disadvantage and amounts to indirect discrimination. The employer may attempt to justify the discrimination by showing that it is a proportionate means of achieving a legitimate aim.

Associative discrimination

This is treating someone less favourably because they associate with an individual who has a protected characteristic. For example, treating someone less favourably because their daughter is a lesbian or because their son is trans.

Perceptive discrimination

This is treating someone less favourably because it's perceived that they have a protected characteristic, whether they do or not. For example, treating someone less favourably because it's perceived that they're gay when they're not.

Victimisation

Victimisation occurs when someone is treated less favourably because they have made or supported a complaint, or raised a grievance under the Equality Act 2010. It also applies if it's thought that they have made a complaint. A comparator isn't required for a claim of victimisation. Post-employment victimisation can occur - for example, refusing to give a reference to someone who had made a complaint under the Equality Act 2010 - although the Act has some grey areas concerning post-employment victimisation.

Harassment

Harassment is 'unwanted conduct related to a relevant protected characteristic, 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'.

There's no longer any specific legislation making employers liable for harassment that comes from a third party (for example, a customer). However an employer can still be liable as a result of numerous other legal duties, for example breach of contract, direct discrimination and under the Protection from Harassment Act 1997. This, and good practice, mean that employers should continue to take steps to protect employees from all forms of harassment.

Find out more in our [factsheet on workplace bullying and harassment](#).

Occupational Requirement

Where there is an Occupational Requirement to employ a person with a particular protected characteristic, certain very limited exceptions from the law are permitted covering selection, promotion and training. The employer must be able to show that there is a genuine need, taking account of the type of work.

Positive action

Employers can take positive action, for example to address under-representation or other forms of disadvantage within the workforce. The provisions are complex and must be handled very carefully. Different provisions apply concerning positive action relating to recruitment and promotion. See [guidance from the EHRC](#).

Good employment practices

People professionals have a key role in creating fair and inclusive workplaces. As part of coherent [inclusion, diversity](#) and [employee engagement](#) strategies, employers should undertake thorough reviews or equality analyses of policies and working practices to remove unfair discrimination and bias. However, there's still a significant way to go until we can claim this is the case with LGBT+ inclusion.

Our [viewpoint on sexual orientation, gender identity and reassignment](#) gives recommendations for employers, with additional information below.

Inclusion policy

Although there's no legal requirement to have a written inclusion and diversity policy, it's a good idea to produce and actively use one. In some discrimination claims, employers may have a defence if they can show that they took all reasonable steps to prevent the discrimination occurring. Having a comprehensive current policy, and recent relevant training will help employers to distance themselves from liability for acts such as harassment by an individual perpetrator employed by them. A policy also demonstrates the organisation takes its legal and moral obligations towards being a diverse and inclusive employer seriously. It can also encourage employees to treat others equally.

Communication and training

Employers should:

- Communicate a firm commitment to LGBT+ inclusion and ensure equality and diversity policies and statements are easily accessible to all. Use a variety of communication methods and channels to do this.
- Ensure all employees understand their personal responsibility to treat colleagues with respect. Make it clear the organisation has a zero-tolerance approach to bullying, harassment and discrimination. Provide examples of the standards of behaviour required of everyone, what bullying, harassment and discrimination with respect to sexual orientation and gender identity looks like, and the consequences of breaking the behaviour codes.
- Ensure all staff are aware of how to report instances of bullying, harassment or discrimination on the basis of sexual orientation or gender identity, and feel able to do so. Deal proactively with all complaints of inappropriate behaviour swiftly, seriously and compassionately.
- Ensure line managers understand their role in promoting inclusion and understand how to support trans and LGBT+ staff. Ensure they are trained and confident to challenge any form of inappropriate behaviour. Work closely with managers to ensure they implement people management practices fairly and consistently.
- Work with employee networks to understand LGBT+-specific issues in the organisation, how staff can be better supported, and work collaboratively in communicating the importance of inclusion and diversity to the rest of the organisation.

Reviewing employment practices

Employers should:

- Assign senior level responsibilities for driving diversity issues, including a sponsor for LGBT+ inclusion and allocating appropriate resources.
- Ensure recruitment and selection processes are fair and not open to discrimination on the basis of sexual orientation or gender identity. For example, take care in drafting advertisements to avoid discrimination and stereotyping through language and images, and aim to attract candidates from diverse sources. Indicate if any genuine Occupational Requirements apply.
- Incorporate a diversity statement in every job advert. Have links to your organisation's inclusion and diversity webpage where people can find out more about your commitment, and information about employee resource groups, such as an LGBT+ network.
- Operate transparent and consistent performance management processes career paths, and promotion and development opportunities for all.
- Review policies and procedures, and terms and conditions of employment to ensure fairness and legal compliance. Involve your LGBT+ network in reviewing policies if you have one.
- Ensure the wording of policies and procedures is gender neutral. For example, paternity, maternity, shared parental leave and adoption leave policies should be explicitly inclusive of same gender partners and non-binary people.
- Have policies such as a transitioning at work, diversity, equal opportunity and anti-bullying which set out how the organisation will support staff to live and work in the gender they identify as. Stonewall provides [comprehensive guidance](#) for employers on trans inclusion at work.

Useful contacts and further reading

Contacts

[Acas – Discrimination, bullying and harassment](#)

[GOV.UK - Employers: preventing discrimination](#)

[Equality and Human Rights Commission - Gender reassignment discrimination](#)

[Equality and Human Rights Commission - Sexual orientation discrimination](#)

[Government Equalities Office](#)

[Stonewall - top 100 employers list](#)

Books and reports

ACAS (2016) [Sexual orientation discrimination: key points for the workplace](#). London: Acas.

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Journal articles

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