

Guidance Note

Employment Equality (Sexual Orientation) Regulations December 2003

From 1st December 2003, when the Employment Equality (Sexual Orientation) Regulations came into force, it is unlawful to discriminate against workers because of sexual orientation.

Definition:

Sexual orientation includes orientation towards the same sex, the opposite sex or both sexes. The new legislation specifically excludes sexual practices such as sado-masochism and pedophilia.

The regulations provide protections against discrimination and harassment, they do not establish entitlements.

Discrimination will be unlawful;

- During recruitment and selection
- In relation to terms of employment
- In relation to access to training, promotion, promotion transfer or other employee benefit

It is unlawful on the grounds 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:

- discriminate indirectly against anyone - that is, to apply a criterion, provision or practice which disadvantages an individual because of their sexual orientation without a good reason.
- subject someone to harassment. Harassment is unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.
- victimise someone because they have made a complaint or allegation or have given evidence against someone else in relation to a complaint of discrimination on grounds of sexual orientation;
- discriminate against someone, in certain circumstances, after the working relationship has ended.

Exceptions may be made in very limited circumstances if there is a genuine occupational requirement for the worker to be of a particular sexual orientation in order to do the job.

Direct Discrimination:

Direct discrimination means that workers or job applicants must not be treated less favourably because of their sexual orientation or their perceived 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 available to individuals of a different sexual orientation (unless the benefits are dependent on marital status) because they are, or are thought to be, lesbian, gay, bisexual or heterosexual.

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 organization decides not to offer her the job because she is lesbian. This is direct discrimination.

NB: A job applicant can make a claim to an Employment Tribunal, it is not necessary for them to have been employed by the organisation to make a claim of discrimination. Direct discrimination may only be justified in the very limited circumstances where a genuine occupational requirement can be shown to apply.

Indirect Discrimination

Indirect discrimination means that an organization must not 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, an employer 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).

Harassment:

Harassment includes behaviour that is offensive, frightening or in any way distressing. 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 behavior 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

The Regulations apply as equally to the harassment of heterosexual people as they do to the harassment of lesbians, gay men, and bisexual people. Organisations may be held responsible for the actions of their 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, the organisation may be liable and may be ordered to pay compensation unless it can be shown that it took reasonable steps to prevent harassment. Individuals who harass may also be ordered to pay compensation.

It is good practice for employers to protect their workers from harassment by third parties, such as service users and customers. Employers investigating claims of harassment should consider all the circumstances before reaching a conclusion, and particularly the perception of the complainant as harassment is often subjective. Having gathered all the evidence employers should ask themselves "could what has taken place be reasonably considered to have caused offence?"

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.

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

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.

Discrimination, harassment or victimization 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.

A genuine occupational requirement (GOR).

In very limited circumstances it will be lawful for an employer to treat people differently if it is a genuine occupational requirement that the job holder must be of a particular sexual orientation. When deciding if this applies, it is necessary to consider the nature of the work and the context in which it is carried out. Jobs may change over time and organisations should, from time to time, consider whether the requirement continues to apply, particularly when recruiting.

Example: An organisation advising on and promoting gay rights may be able to show that it is essential to the credibility of its chief executive who will be the public face of the organisation that s/he should be gay. The sexual orientation of the holder of that post may therefore be a genuine occupational requirement.

The Regulations also permit differences of treatment on grounds of sexual orientation where the employment is for the purposes of an organised religion – such as the leader of a faith or of an establishment such as a mosque or temple. Any organisation wishing to rely on this provision will also need to establish that the requirement is necessary to comply with religious doctrine; or, because of the nature of the work and the context in which it is carried out, to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

Positive Action:

Selection for recruitment or promotion must be on merit, irrespective of sexual orientation. However, it is possible to take certain steps to redress the effects of

previous inequality of opportunity. This is called positive action. Employers may give special encouragement to, or provide specific training for people who are gay or lesbian who are in a minority in the workplace. Employers may wish to consider positive measures such as:

- training their own employees for work which has historically been the preserve of individuals from a particular sexual orientation

The law allows organisations to introduce positive action measures where they can demonstrate that staffs of a particular sexual orientation are at a disadvantage. However, it is unlikely that organisations will have sufficient information to consider positive action programmes.

For further information on sexuality please see the good practice booklet??????

Source ACAS