

Isle of Man Equality Bill 2016: What it means for employers

Businesses need to gear up for a raft of new, far reaching social legislation that aims to ensure fair and equal treatment for all.

The Equality Bill 2016 will create rights in the Isle of Man which are entirely new and it will be unlawful for anyone to discriminate, in the provision of goods and services as well as in employment, on the grounds of age, disability, gender, race, religion and sexual orientation. The associated regulations and codes of practice will also be very significant in the implementation of the Act.

The remit of the Island's Employment Tribunal will be extended and it will be renamed the Employment and Equality Tribunal. The Tribunal will have the power to introduce fees in respect of claims filed, although it is expected these will be of a "threshold" nature to discourage weak cases.

It has been rightly said that this is one of the Isle of Man's major pieces of legislation when enacted later this year [it is currently in its second reading]. If Manx Companies, including public bodies, are going to be in a position to comply with the new requirements, it will be necessary to review existing practices, policies and contractual arrangements.

A key concept in the Bill is its definition of the "protected characteristics" in relation to which discrimination is unlawful. These include age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The conduct prohibited by the Bill is wide ranging. It includes direct discrimination and indirect discrimination. An example of the latter is a shift pattern which might adversely affect a woman who needs to look after her children at particular times of day, unless allowances are made because of those needs.

The legislation covers contract or agency workers in addition to employees, partnerships, personal and public (including local government) appointments, qualifications bodies, employment agencies and trade organisations.

The prohibition of age discrimination is new in the Isle of Man. Compulsory retirement of any employee on reaching a given age will amount to direct age discrimination, unless it is objectively

justified as a proportionate means of achieving a legitimate aim. This will generally mean a person will have a right to continue work until either they retire voluntarily or they are no longer capable of carrying out their employment to an appropriate standard, which would need to be managed through capability procedures. It is a situation which has given rise to some difficulty (and litigation) in the UK and is unlikely to be problem free in the Island. Contracts of employment, partnership agreements and other relevant material will require review.

There is also a restriction on the right of the person to whom an application for work is made to ask about the health of the applicant before an offer is made. There are various exceptions to this general prohibition, for example to determine if the applicant will be able to comply with the requirement to undergo an assessment. However, in making a health enquiry, care will be needed to ensure that it falls within one of the exceptions.

To establish the principle of equal pay for both sexes the Bill requires that the terms of work will be treated as including a sex equality clause. The contract of employment will be amended to remove the inequality. In most cases it will be preferable to include an express clause.

A new provision has been introduced into the Bill to enable the Department of Economic Development to put forward regulations about what constitutes (or does not constitute) a proportionate means of achieving a legitimate aim (for example where the underlying reason for a difference in pay of male and female employees engaged in equal work is not because of the employee's gender). Here, too, existing contracts of employment will require review.

Another principle established in the Bill is that the terms of work for women must include a maternity equality clause (unless an express clause is already included) under which any pay increase a woman receives (or would have received if she had not been on maternity leave) is taken into account in the calculation of her maternity-related pay and to ensure that on her return to work following maternity leave to take account of any pay increase which she would have received if she had not been on statutory maternity leave. These provisions are backed up with prohibition on pregnancy and maternity discrimination.

In the field of disability discrimination it will also be possible to justify treatment that would otherwise be unlawful if it can be shown to be a proportionate means of achieving a legitimate aim. The aim is to establish a balance between enabling a disabled person to complain of any detriment arising from a disability and the employer's right to defend that treatment; in practice it will be important for employers to have in place clear policies for the treatment of disabled employees.

There is also a duty to make adjustments for persons with disability where they are placed at “a substantial disadvantage” because of that disability. This may involve making changes in the way things are done, making physical changes to premises or providing auxiliary aids.

Prohibited conduct also includes harassment and victimisation which might include, for example, an attempt to discourage dialogue within work places about pay. An employer who displays any material of a sexual nature, such as a calendar which includes photographs of topless women, may be harassing employees where this makes the workplace an offensive place to work for any employee, be they female or male.

The application of prohibited conduct extends to the supply of services, although there are exceptions, for example a tour operator can continue to offer holidays to persons of 18 and a dating agency can restrict its services to applicants who are single.

There are special provisions (and some exceptions) prohibiting discrimination in relation to the disposal and management of premises and applying to leasehold properties the duty to make reasonable adjustments. These provisions will be particularly relevant to estate agents, letting agents and professional landlords.

The Bill contains express provisions with regard to occupational pension schemes which will be taken to include non-discrimination and sex equality rules and there are specific provisions regarding the application of the Bill in other key areas including education.

The Act prescribes general duty on public authorities to have due regard, when carrying out their functions, to the need to eliminate unlawful discrimination, harassment or victimisation to advance equality of opportunity and to foster good relations between persons who share protected characteristics and those who do not. Whilst these requirements apply to public authorities it can be expected that they will, in turn, impose them on their contractors and suppliers as well. It will be important for such organisations to review their contractual arrangements and internal policies and procedures to ensure they will be in a position to comply.

The Act will also make changes in other areas. In particular, in the Control of Employment Act 2014 the definition of “Manx worker” and the availability of spouse/civil partner permits will be extended to make the Isle of Man more attractive to the workers that the Island needs in order to increase the size of the working population which is currently falling.

The Redundancy Payments Act 1990 will be amended to clarify that redundancy payments which will be made in circumstances where there is a transfer of business. This includes the retention for the

employee concerned of his or her continuity of employment with the previous employer and removing the upper age limit for entitlement to a statutory redundancy payment but to capping the entitlement at 26 weeks.

Whilst it is likely the Bill will become an Act later this year, the Government has promised that a two year lead-time will be allowed for businesses to become familiar with the provisions of the Act and the Regulations and Codes of Practice which will be issued, before the applicable parts of the Act are brought into effect. Also as regards disability discrimination, disability in respect of the provision of goods and services (but not employment) covered by the Disability Discrimination Act 2006 (DDA) (which will be repealed) the Government has already made it clear that these provisions will not come into force earlier than January 1st 2020 when the DDA was to take effect.

It can be expected that the cost of compliance with the new legislation will not be insignificant. The Government has indicated that the cost of business is not at present quantifiable but it is hoped that it will increase productivity and reduce dependency on the state by assisting disabled persons to be able to contribute more fully in employment, enabling older workers to continue working longer and reducing the gender pay gap. It remains to be seen whether the benefits which may arise from these aspirations might exceed the cost of compliance to the employer and others affected by the Bill.

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