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## Member Brief No 128

# Preventing Discrimination in Labour Provision

### 1. INTRODUCTION

Discrimination law in the United Kingdom seeks to ensure that there is equality of opportunity at work and that the dignity of individuals (including workers and employees) is protected.

Labour Providers should ensure that they are familiar with the laws on discrimination (as set out in the Equality Act 2010), because they affect many areas of running a business and there is the risk of claims if not followed. We will cover these key areas in this Brief and they may be viewed in more detail in the Equality and Human Rights Commission (EHRC) [Guidance for employers about their rights under the Equality Act 2010](#).

Allegations of discrimination or harassment are likely to create bad publicity for Labour Providers, and can provoke investigation by the Gangmasters Licensing Authority ("the GLA"). It is better to avoid giving rise to a claim than to manage a crisis after a claim has been made. Discrimination and harassment issues can also be highly emotive and have a negative impact on worker and employee morale.

There is no limit to the amount of financial loss that can be awarded in a successful discrimination case. Litigation can also involve significant management time and legal costs, which are usually not recoverable.

### 2. WHAT AREAS ARE COVERED?

Discrimination law protects temporary and agency workers, freelance workers, consultants, partners and directors, employees and more. It covers all areas of employment and engagement of workers, including job adverts and the recruitment process, terms and conditions of work, your conduct during an individual's employment and engagement and can cover social events at work. It also covers dismissal and work-related matters arising after employment has ended, such as giving references.

### 3. WHAT CHARACTERISTICS ARE PROTECTED?

Discrimination law covers certain protected characteristics. This means that you must not discriminate against workers or employees on the basis of:

- Sex or gender
- Race (including ethnic or national origin, nationality and colour)
- Religion or belief
- Sexual orientation
- Disability
- Age
- Gender reassignment
- Being married or in a civil partnership
- Being pregnant or on maternity leave

### 4. WHAT ARE THE KEY TYPES OF DISCRIMINATION?

Discrimination can take a number of forms, including:

**Direct discrimination.** This type of discrimination occurs when a person is treated less favourably than another person in the same or similar circumstances (called the "comparator"), and that treatment is because of one of the above protected characteristics. Direct discrimination cannot

normally be justified – there is only a potential justification defence available in certain circumstances with regard to the protected characteristic of age.

**Indirect discrimination** - This type of discrimination occurs where an apparently neutral provision, criterion or practice (PCP) is applied, but which puts those of the employee's or worker's protected group at a particular disadvantage compared to other groups. The employee or worker must also suffer a disadvantage as a member of that group and the employer must be unable to show that its PCP is objectively justified (discussed below). Protected groups are those defined by reference to any of the above characteristics.

**Discrimination arising from disability** - This occurs when the employee or worker suffers unfavourable treatment arising in consequence of their disability and it cannot be shown that this treatment is objectively justified (discussed below).

**Harassment** - This involves unwanted conduct that has the purpose or effect of violating a person's dignity or creating an offensive, intimidating or hostile environment for them. It is discriminatory if it is related to any of the characteristics listed above (except marital/civil partnership status and pregnancy/maternity, which are covered elsewhere).

**Victimisation** - This involves treating a person less favourably because they have complained (or intend to complain) about discrimination, or because they have given evidence in relation to another person's complaint. An employee must not be disciplined or dismissed, or suffer reprisals from colleagues, for complaining about discrimination or harassment at work.

Discrimination can also occur where the duty to make reasonable adjustments for a person (such as a worker or employee) with a disability applies under the Equality Act, but there is a failure to comply with this duty. This is discussed further below.

## 5. WHO CAN BE FOUND LIABLE FOR DISCRIMINATION CLAIMS?

A Labour Provider will often be held responsible and liable for the discriminatory actions of its employees or workers.

A Labour Provider may also be held responsible by an Employment Tribunal for discrimination by other businesses involved in the supply or placement of workers, if they are acting with the Labour Provider's authority.

A Labour Provider may be found liable for the actions of Labour Users against its workers or employees. For example, if a disabled worker is treated unfavourably on a farm site of a Labour User due to their disability, then the Labour Provider may be found liable for this discrimination in certain circumstances. This is discussed further below.

## 6. ARE THERE ANY DEFENCES TO DISCRIMINATION CLAIMS?

In some limited circumstances, a Labour Provider or a Labour User may be able to justify having treated workers or employees differently if they can show that the treatment was a proportionate means of achieving a legitimate aim. It would have to be shown that there was a legitimate aim being pursued and that the treatment was appropriate and proportionate. However, this defence is not available for all types of discrimination claims.

## 7. HOW DISCRIMINATION CLAIMS AND ISSUES CAN ARISE FOR A LABOUR PROVIDER:

GLA Licensing Standard 5.7 states that "*A licence holder must not unlawfully discriminate against a worker or work seeker on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.*"

**What must and mustn't a labour provider do:**

A labour provider must **not** discriminate against anyone:

- i) in the arrangements it makes for selecting who to provide its services to or who to offer to provide its services to;
- ii) as to the terms on which it provides or offers to provide its services;
- iii) by terminating the provision of services to a person or by subjecting a person to any detriment;
- iv) by not providing its services or by not offering to provide its services; or
- v) by subjecting a person to any other detriment

**a. Advertising:**

A Labour Provider can be liable for discrimination if the wording used in an advertisement indicates that there is an intention to discriminate because of a protected characteristic.

**EXAMPLES:**

- A Labour Provider publishes an advertisement on its website for work on a farm, stating that applicants over 45 need not apply. This is likely to be direct age discrimination.
- An advert is placed for Lithuanian workers only to apply. This is likely to be race/nationality discrimination.

**b. Recruitment and sourcing labour:**

Due to apparently high levels of discrimination against disabled people in employers' recruitment processes, and concerns that people are often put off even applying for jobs because of pre-employment health questions, the Equality Act limits the circumstances when health related questions can be asked before the individual has been offered a job.

Labour Providers who are still routinely asking job applicants to complete pre-employment health questionnaires as a matter of course before a formal job offer is made should change their recruitment policies and practices. ALP Member Brief No 80 deals with the Equality Act and Pre-Employment Health-Related Checks in more detail.

**c. Acting on a discriminatory instruction from an end user client during selection processes or afterwards**

If a Labour User gives a Labour Provider an instruction which is discriminatory and this is acted on, the Labour User and the Labour Provider may be liable for the discrimination.

**EXAMPLE:** if a Labour User tells you, the Labour Provider, that it needs to fill a role but it does not want any women put forward as they are likely to need time off for pregnancies, this would be a discriminatory instruction. If the Labour Provider then selected only male candidates it has registered to put forward, then it would be discriminating against the female candidates it has registered. Both the Labour Provider and the Labour User could be liable for discrimination in this example.

**d. Discrimination and Harassment by 3<sup>rd</sup> parties**

Labour Providers can be held liable for the discrimination or harassment of employees or job applicants by third parties (such as Labour Users) even though these parties are not directly under the control of a Labour Provider.

Under the Equality Act 2010, inaction in the face of third-party harassment could itself amount to an unlawful act. It is best to take preventative measures at the outset to reduce this risk so far as possible. Please see section 8 below for further guidance.

**e. Requests by the Labour User for the Labour Provider to not use or to dismiss a worker:**

**EXAMPLE:** A disabled worker says that he is going to raise a complaint about individuals at the Labour User who have made offensive jokes concerning his disability. As a result, the Labour User no longer wants the worker to continue working there on assignment. The Labour Provider decides not to put him forward for any assignments. This is likely to amount to victimisation.

**f. Disabled workers:**

Labour Providers have the same duty as end user clients to make reasonable adjustments for disabled persons who use or seek to use their services or who they engage directly (whether as employees or workers). This means that:

- i) A Labour Provider must take steps to avoid the disadvantage caused to a disabled person by any provision, criterion or practice which places the disabled person at a disadvantage.
- ii) If a physical feature puts a disabled person at a disadvantage, then the Labour Provider is required to take reasonable steps to avoid the disadvantage. Physical features can include: steps, stairways, entrances, exits, doors, toilet and washing facilities, lighting and more. The EHRC gives an example of clear glass doors at the

end of a corridor in a particular workplace presenting a disadvantage for a visually impaired worker for these purposes.

- iii) A Labour Provider must provide a disabled person with an auxiliary aid where reasonable, if this will prevent a disabled person from being placed at a disadvantage. For example, this might mean providing an interpreter for a candidate who has a hearing impediment.

What is reasonable will depend on each case. The EHRC's Code (discussed further below) also gives examples of potentially reasonable adjustments as follows: adjustments to premises, changing working times, allocating certain duties to another person, modifying equipment, providing supervision or other support, modifying policies and procedures and more.

**g. Younger and Older workers:**

Care must be taken to ensure that Labour Providers do not discriminate against younger and older workers – this may not be intentional but could still constitute discrimination.

**EXAMPLE:** if an older person sought to register with a labour provider for farm work and was subjected to offensive jokes about his age and told that he was 'past it' for picking work, this would amount to harassment on the grounds of age.

**EXAMPLE:** you issue an advertisement for new workers and state that the role would be ideal for those who have just left school or college and so you are only accepting applications from applicants aged 16 – 20 years. This is likely to amount to direct age discrimination. Although, please see the comments below about potential defences that may be available.

When dealing with apprentices, you still need to comply with the law on discrimination. This means that, if the advertisement in the second example above had requested applications from applicants aged 16-20 years for an apprenticeship, then this is still likely to be age discrimination, unless you can rely on a defence in the circumstances (discussed below).

In certain limited circumstances, a Labour Provider may be able to argue that using people of a particular age group is a proportionate means of achieving a legitimate aim. Please see the comments at section 6 above.

There is also a defence referred to in paragraph 1, schedule 9 of the Equality Act that is available against age discrimination (and certain other types of discrimination) where specific requirements are met. With regard to age discrimination, the requirements are: (a) that being a particular age is an occupational requirement (given the nature or context of the work); (b) that the requirement is a proportionate means of achieving a legitimate aim; and (c) the complainant does not meet the occupational requirement or there are reasonable grounds for not being satisfied that this is the case. Specific advice should be sought if you intend to rely on this,

**h. Workers of a specific religion / holding religious beliefs:**

Workers of a specific religion and / or who hold religious beliefs are protected under discrimination law. There are occasions where applying a general requirement may mean that an employee or worker holding such beliefs is disadvantaged by that requirement (for example if they are not permitted to pray at specific times as a result). This treatment could be discriminatory unless it can be objectively justified as being a "proportionate means of achieving a legitimate aim".

**EXAMPLE:** Many businesses (including Labour Users) enforce a dress code or uniform with the aim of ensuring that workers dress in a manner that is appropriate to the business or workplace or to meet health and safety requirements. However, dress codes may indirectly discriminate against workers sharing a protected characteristic. To avoid indirect discrimination, any dress rules would need to be justified as a proportionate means of achieving a legitimate aim such as health and safety considerations.

As another example, Labour Providers who require workers to take annual leave during an annual closedown (for example, during Christian holidays) but who do not permit workers holding other religious beliefs (not of the Christian faith) to take annual leave during their religious holidays and festivals are likely to be putting those workers at a disadvantage. This could constitute indirect discrimination, unless the Labour Provider is able to show that the treatment was a proportionate means of achieving a legitimate aim (discussed above). This

reinforces the importance for Labour Providers to: (a) consider the reasons for any requests to take annual leave carefully (if provided) and, in particular, before refusing a request; and (b) to have a clear policy relating to the taking of holidays and processing of requests for holidays.

The Equality Act 2010 sets out a number of limited "occupational requirement" exceptions that a Labour Provider might be able to rely on to justify certain differences in treatment. These exceptions include, amongst others, where an employment service provider (such as an employment agency or business) treats a person with a protected characteristic less favourably and that treatment relates to work that could be refused to that person because of an occupational requirement. However, an employer is still only entitled to apply an occupational requirement in this manner where doing so is a "proportionate means of achieving a legitimate aim" and certain additional requirements are met. Specific advice should be sought before seeking to rely on the exemptions.

**i. Agency Workers and the impact of the Agency Workers Regulations 2010:**

Although it will depend on exactly how they are engaged, agency workers will usually have the benefit of relying on discrimination law. The Agency Workers Regulations 2010 also brought in additional requirements that must be met for agency workers that are pregnant – these requirements are covered in ALP Member Brief 79.

**j. Importance of the recommendations of the Equality and Human Rights Commission:**

The EHRC has issued a Statutory Code of Practice (the Code) to provide "comprehensive and technical guide to the detail of law". Importantly, Employment Tribunals will be obliged to take the Code into account when considering claims under the Equality Act 2010.

Detailed guidance is provided in the Code on various discrimination issues (some of which have been discussed in this note) and examples of potentially discriminatory / non-discriminatory treatment given. The Code can be found at the EHRC's website at <http://www.equalityhumanrights.com/publication/employment-statutory-code-practice>.

## **8. WHAT LABOUR PROVIDERS CAN DO TO HELP PROTECT THEIR BUSINESS**

- Provide workers and other staff with employment handbooks, including policies on equal opportunities and harassment, setting out what constitutes acceptable behaviour and what does not.
- Provide training on equal opportunities and harassment. This may help avoid inappropriate questions at interviews, or allow your staff to recognise and deal with harassment at an early stage.
- Set up clear procedures for workers and staff to raise concerns and complaints, and for dealing with complaints.
- Ensure discriminatory behaviour by staff is not tolerated and is dealt with through proper disciplinary measures.
- Review all contractual documents, worker contracts, employment contracts and policies to ensure that they comply with the law.
- Make reasonable adjustments where this will alleviate difficulties suffered by a disabled employee or worker in the workplace.
- Accommodate workers' different cultures and religious beliefs, if possible. For example, requests for time off to pray should be allowed unless a refusal is justified.
- Try to accommodate requests for family-friendly hours by employees or workers with childcare or other family commitments, unless refusal is justified.
- Carry out equal opportunities monitoring but do not use these forms as part of recruitment or other decision-making. Data from the forms should be aggregated and anonymised.

**Please note that this Brief provides a general overview about key areas of discrimination only and should not be used for any other purposes.**