

## Changes to Sex Discrimination & Maternity Rights Law



**A landmark judicial review case has prompted changes to the Sex Discrimination Act which came into force in April this year. Employers now face a heightened exposure to harassment claims and higher maternity law costs as a result of these changes. The court ruled that the amendments to the Act were necessary to comply with European Law. This Brief Update looks at the impact of these changes for employers and changes due to come into force later this year in relation to maternity rights.**

### Definition of Harassment

An employee will now be able to bring a harassment claim based on remarks directed at someone else, whether male or female and remarks made to no particular person. This is a much broader position than in the past when these claims could only succeed if the reason for the conduct was the Claimant's own particular gender. The Claimant will still require to show that the purpose of the conduct was to 'violate their dignity or create an intimidating, offence or hostile working environment' or that the conduct should reasonably be considered as having had that effect.

In essence, where harassment is considered to be connected with or related to sex, that will be enough to establish a claim, whether the Claimant be male or female. It is important to remember that a one off incident is enough to constitute harassment so a 'throw away' comment made idly or in the heat of the moment could result in an Employment Tribunal claim.

### Harassment of Employees by Third Parties

Employers are now expressly made liable for harassment by a third party if the employer, knowing that the employee has been harassed on two prior occasions by any third party has failed to take 'reasonably practicable' steps to prevent a further occurrence of harassment. It should be noted that the three instances do not require to have occurred within any particular timeframe nor have been perpetrated by the same third party and so could apply in relation to any contractor, agency worker or customer of the employer.

Employers should review their diversity/dignity at work policies and ensure that they have adequate training processes in place to deal with harassment at work. In appropriate circumstances third parties should be notified that conduct is unacceptable and this might for instance include posting public notices where employees are coming into contact with the general public. In addition, employers should ensure that companies providing contracts or agency workers have adequate training and policies in place.

### Maternity Leave/Pregnancy: No Requirement for Comparator

A woman who is pregnant or who has taken maternity leave is no longer obliged to compare herself with how she would have been treated had she not been pregnant or taken maternity leave in order to claim discrimination. In the past women were required to show that they were treated or being treated less favourably than women who were not pregnant. The Government has suggested that this might cover such things as employers refusing to provide additional toilet breaks for pregnant women or insisting that they continue to carry out lifting tasks for which they no longer fit.

### Maternity Leave: Benefits & Bonuses

Perhaps the most significant change for employers will be those to maternity rights for women whose expected week of childbirth falls on or after 5 October 2008 in relation to Additional Maternity Leave ("AML"). The Court has held that the differences that exist between contractual rights while on Ordinary Maternity Leave ("OML") and AML are incompatible with European Law.

A woman on AML will be entitled to receive contractual benefits that are not financial but which may have a financial value such as use of Company Car, Laptop, Mobile Phone, Medical or other Insurances, or Gym Membership. Importantly, contractual holidays will continue to accrue during AML for up to a further six months from the conclusion of OML. This becomes problematic in how to allocate holidays where a woman takes a full year maternity leave. Employers should take advice on how to allocate leave in such circumstances.

Employees are also given an express statutory right to a discretionary bonus entitlement in respect of the two weeks Compulsory Maternity Leave ("CML") following child birth, (there is already an express right to contractual bonus for this period). The position in relation to bonuses has been the subject of some controversy over recent years. It

is now clear that an employer cannot deny an employee access to any bonus simply because she is on maternity leave but that the bonus may be pro-rated to deduct periods throughout the year while the employee is on maternity leave (other than as stated above).

Employers have until October to update their Handbooks and Policies and address budget considerations for increased costs in relation to the changes made.

If you would like to discuss any aspect of this Update further, please contact one of our Team members being:-

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