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## **The Employment Equality (Sex Discrimination) Regulations 2005**

These Regulations implement an EC Directive which is concerned with the equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions. The Regulations came into force on **1 October 2005**. The main provisions employers should be aware of are:

1. Regulation 3 contains a revised definition of *indirect* discrimination on grounds of sex.
2. Regulation 4 sets out a definition of discrimination on the grounds of pregnancy and maternity leave.
3. Regulation 5 sets out a definition of harassment, on the grounds of a person's sex (or on the grounds of gender re-assignment), and provides that a person may not be treated less favourably because of either submission to or rejection of conduct amounting to harassment.
4. Regulation 7 makes it unlawful for an employer to subject to harassment an employee/ applicant for employment.
5. Regulation 8 sets out the extent to which it is discriminatory to deprive a woman of the benefit of the terms and conditions of her employment during maternity leave.
6. Regulation 21 makes it unlawful to subject a person to discrimination/harassment after the employment relationship has ended.
7. Regulation 28 adds harassment to the claims which may be presented to an employment tribunal.
8. Regulation 29 states that the burden of proof for harassment claims in the ET will be the same as for discrimination claims brought there.
9. Regulation 32 states that employers must reply to an employee's preliminary questions within 8 weeks of being served with them.

Essentially, the Regulations *clarify* a number of existing obligations already acknowledged and acted upon by responsible employers, as regards keeping the workplace free from discrimination and harassment.

\*Employers should note that those undertaking *unpaid* work experience are now also protected from discrimination/harassment.

If an employee or ex-employee alleges they have suffered discrimination/harassment, employers must reply to their questionnaire within 8 weeks. Failure to do so could count against the employer in the ET.

### *Additional notes*

#### Definition of indirect discrimination

New wording inserted into the SDA states that a person discriminates against a woman if :

“he applies to her a provision, criterion or practice which he applies or would apply equally to a man but  
which puts or would put women at a particular disadvantage when compared with men,  
which puts her at that disadvantage; and  
which he cannot show to be a proportionate means of achieving a legitimate aim.”

N.B. Indirect discrimination can be inadvertent, e.g. requiring employees to work overtime; refusal to allow working from home.

#### Harassment and sexual harassment

The Regulations amend the SDA so that a person subjects a woman to harassment if –

“*on the ground of her sex*, he engages in unwanted conduct that has the purpose or effect-  
of violating her dignity, or  
of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

**or**

he engages in any form of unwanted verbal, non-verbal or physical conduct *of a sexual nature* that has the purpose or effect-  
of violating her dignity, or  
of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

**or**

on the ground of her *rejection of or submission to* unwanted conduct [of this kind], he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.”

Note – harassment can be action that takes place because someone is a woman ( e.g. putting tools on a high shelf), although it is not of a sexual

nature. The third 'category' of harassment – treating someone less favourably because they rejected or submitted to harassment – covers new ground.

Beware – harassment can be unintentional, in the sense that the 'harasser' need not intend his conduct to have the effect complained of. However, conduct will only be taken to have the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment if having regard to all the circumstances, including in particular the perception of the complainant, it is *reasonably* considered as having that effect.

### Pregnancy and Maternity Leave

The regulations have amended the SDA to make it *explicit* that women are protected from discrimination on the ground that they are pregnant, and this applies not only to employees but also to applicants and those on vocational training. It is also made explicit that women are protected from discrimination during both OML and AML.

### Replying to a questionnaire

The Regulations amend the SDA so that employers must reply to a claimant's questionnaire in discrimination/harassment cases within 8 weeks, or adverse inferences may be drawn.

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