

*Draft Regulations laid before Parliament under paragraph 5(1) of Schedule 5 to the Retained EU Law (Revocation and Reform) Act 2023 (c. 28), for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2023 No.**

**RETAINED EU LAW REFORM**

**EQUALITY**

**The Equality Act 2010 (Amendment) Regulations 2023**

*Made* - - - -

*Coming into force* - - *1st January 2024*

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 12(8), 13(2), (3) and (7) and 20(1) of the Retained EU Law (Revocation and Reform) Act 2023(a).

The Secretary of State is a relevant national authority(b) for the purposes of section 12 of that Act.

In accordance with paragraph 5(1) of Schedule 5 to that Act, a draft of this instrument has been laid before, and approved by a resolution of, each House of Parliament.

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Equality Act 2010 (Amendment) Regulations 2023.

(2) These Regulations come into force on 1st January 2024.

(3) These Regulations extend to England and Wales and Scotland.

**Pregnancy, maternity and breastfeeding**

2.—(1) The Equality Act 2010(c) is amended in accordance with paragraphs (2) to (10).

(2) In section 13 (direct discrimination)—

(a) in subsection (6)(b), for “or childbirth” substitute “, childbirth or maternity”;

(b) omit subsection (7).

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(a) 2023 c. 28.

(b) “Relevant national authority” is defined in section 21(1) of the Retained EU Law (Revocation and Reform) Act 2023.

(c) 2010 c. 15.

(3) Section 18 (pregnancy and maternity discrimination: work cases) is amended in accordance with paragraphs (4) to (10).

(4) In subsection (2)—

- (a) in the opening words, after “in” (in the first place it occurs) insert “or after”;
- (b) in paragraph (b), for “as a result of it” substitute “in that protected period as a result of the pregnancy”.

(5) In subsection (3), after “leave” insert “or on equivalent compulsory maternity leave”.

(6) In subsection (4), after “leave” insert “or a right to equivalent maternity leave”.

(7) Omit subsection (5).

(8) In subsection (6)—

(a) after paragraph (a) insert—

“(aa) if she does not have that right, but has a right to equivalent maternity leave, at the end of that leave period, or (if earlier) when she returns to work after the pregnancy;”;

(b) in paragraph (b), for “that right” substitute “a right as described in paragraph (a) or (aa)”.

(9) After subsection (6), insert—

“(6A) For the purposes of this section—

“equivalent compulsory maternity leave” means a period of leave—

- (a) which is of a substantially similar nature (regardless of its length) to compulsory maternity leave, and
- (b) which is provided for under a statutory or contractual scheme;

“equivalent maternity leave” means a period of leave—

- (a) which is of a substantially similar nature (regardless of its length) to ordinary or additional maternity leave or both, and
- (b) which is provided for under a statutory or contractual scheme.”.

(10) In subsection (7)(a), after “in” (in the first place it occurs) insert “or after”.

(11) The amendments made by paragraphs (4) to (10) apply in relation to treatment occurring on or after 1st January 2024, but for that purpose it does not matter whether the protected period concerned ends before that date or on or after it.

### **Indirect discrimination: same disadvantage**

3.—(1) The Equality Act 2010 is amended in accordance with paragraphs (2) to (7).

(2) After section 19 (indirect discrimination) insert—

#### **“19A Indirect discrimination: same disadvantage**

(1) A person (A) discriminates against another (B) if—

- (a) A applies to B a provision, criterion or practice,
- (b) A also applies, or would apply, the provision, criterion or practice to—
  - (i) persons who share a relevant protected characteristic, and
  - (ii) persons who do not share that relevant protected characteristic,
- (c) B does not share that relevant protected characteristic,

- (d) the provision, criterion or practice puts, or would put, persons with the relevant protected characteristic at a particular disadvantage when compared with persons who do not share the relevant protected characteristic,
- (e) the provision, criterion or practice puts, or would put, B at substantively the same disadvantage as persons who do share the relevant protected characteristic, and
- (f) A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

(2) The relevant protected characteristics for the purposes of this section are—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.”.

(3) In section 23(1) (comparison by reference to circumstances), for “or 19” substitute “19 or 19A”.

(4) In section 25 (references to particular strands of discrimination), in each of the following places after “section 19” insert “or 19A” —

- (a) subsection (1)(b);
- (b) subsection (2)(c);
- (c) subsection (3)(c);
- (d) subsection (4)(b);
- (e) subsection (6)(b);
- (f) subsection (7)(b);
- (g) subsection (8)(b);
- (h) subsection (9)(b).

(5) In section 119(5)(a) (remedies), after “section 19” insert “or 19A”.

(6) In section 124(4)(a) (remedies: general), after “section 19” insert “or 19A”.

(7) In Schedule 28 (definitions), in the second column of the row beginning “Discrimination”, for “19” substitute “19A”.

(8) In section 24A(1)(e) of the Equality Act 2006 (enforcement powers: supplemental)(a), after “section 19” insert “or 19A”.

#### **Access to employment etc**

4.—(1) The Equality Act 2010 is amended as follows.

(2) In the italic heading before section 60 (enquiries about disability and health) after “Recruitment” insert “etc”.

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(a) 2006 c. 3. Section 24A was inserted by paragraph 68 of Schedule 26 to the Equality Act 2010.

(3) In section 60 (enquiries about disability and health), in subsection (11) after paragraph (j) insert—

“(k) section 60A(1).”.

(4) After section 60 insert—

**“60A Discriminatory statements**

- (1) A person (A) must not make a discriminatory statement in connection with a relevant decision that A makes or might make.
- (2) References in this section to a “relevant decision” are to be determined as follows—

<i>Where A is—</i>	<i>A relevant decision is—</i>
An employer	Deciding to whom to offer employment
A principal (as defined by section 41(5))	Deciding whether to allow a contract worker (as defined by section 41(7)) to do, or to continue to do, work
A firm or proposed firm (as defined by section 46(2) and (3))	Deciding to whom to offer a position as a partner (read in accordance with section 44(8))
An LLP or proposed LLP (as defined by section 46(4) and (5))	Deciding to whom to offer a position as a member
A barrister or a barrister’s clerk (read in accordance with section 47(8))	Deciding to whom to offer a pupillage or tenancy
An advocate (as defined by section 48(9)) or an advocate’s clerk (read in accordance with section 48(8))	Deciding who to take as a devil or to whom to offer membership of a stable
A person with power to make an appointment to a personal office (as defined by section 49(2))	Deciding to whom to offer the appointment
A person with power to make an appointment to a public office within section 50(2)(a), (b) or (d)	Deciding to whom to offer the appointment
A person with power to make a recommendation for or give approval to an appointment to a public office within section 50(2)(a), (b) or (d) (read in accordance with section 51(5))	Deciding who to recommend for appointment or to whose appointment to give approval
A qualifications body (as defined by section 54)	Deciding to whom to confer a relevant qualification (as defined by section 54)
A person concerned with the provision of an employment service (read in accordance with section 56)	Deciding on the selection of persons to whom to provide, or to whom to offer to provide, the employment service

<i>Where A is—</i>	<i>A relevant decision is—</i>
A trade organisation (as defined by section 57(7))	Deciding to whom to offer membership of the organisation.

- (3) For the purposes of subsection (1) a statement is discriminatory if—
- it is directed to the public or a section of the public, and
  - were it made in connection with a relevant decision, the making of it would amount to treatment of a person that is direct discrimination.
- (4) A statement made by a person (B) who—
- is not an employee of A acting in the course of B's employment, and
  - is not an agent of A acting with A's authority,
- is to be treated for the purposes of this section as if made by A if there are reasonable grounds for the public, or a section of the public, to believe that B is capable of exercising decisive influence on the making by A of a relevant decision.
- (5) Regard is to be had (among other things) to the factors mentioned in subsection (6) when determining—
- whether a statement is made in connection with a relevant decision for the purposes of subsection (1);
  - whether there are reasonable grounds for the belief mentioned in subsection (4).
- (6) The factors are—
- the status of the person making the statement at the time it is made;
  - the nature and content of the statement;
  - the context in which the statement is made;
  - in the case of a statement that A is treated as having made by virtue of subsection (4), the steps (if any) taken by A to disassociate A from the statement made by B.
- (7) It does not matter for the purposes of this section whether or not—
- an individual has or may have been affected by the discriminatory statement in question;
  - A has made, or plans to make, arrangements which would involve the making of a relevant decision.
- (8) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8), is enforceable only by the Commission<sup>(a)</sup> under that Part).
- (9) In subsection (3) the reference to direct discrimination is to a contravention of this Act by virtue of section 13 or 18.
- (10) Nothing in this section limits or otherwise affects—
- other prohibitions imposed by this Chapter;

(a) The Commission is defined by section 212(1) of the Equality Act 2010 as the Commission for Equality and Human Rights which was established under Part 1 of the Equality Act 2006.

- (b) the application of section 109 (liability of employers and principals for acts of employees and agents).”.

(5) In section 120 (jurisdiction of employment tribunal), in subsection (8) after “60(1)” insert “or 60A(1)”.

(6) In Schedule 9 (work: exceptions)—

- (a) in paragraph 1(2), after paragraph (g) insert—

“(h) section 60A(1).”;

- (b) in paragraph 2(2), after paragraph (d) insert—

“(e) section 60A(1).”;

- (c) in paragraph 4(1), after “or (2)(b)” insert “or section 60A(1)”;

- (d) in paragraph 5, in each of sub-paragraphs (1), (2) and (3), after “section 55(1) or (2)” insert “or section 60A(1)”.

### **Comparators for purposes of equal pay**

**5.**—(1) Section 79 of the Equality Act 2010 (comparators) is amended as follows.

(2) In subsection (2), for “(3) or (4)” substitute “(3), (4), (4A) or (4B)”.

(3) After subsection (4) insert—

“(4A) This subsection applies if a single body—

- (a) is responsible for setting or continuing the terms on which A and B are employed, and
- (b) is in a position to ensure equal treatment between A and B in respect of such terms.

(4B) This subsection applies if the terms on which A and B are employed are governed by the same collective agreement.”.

(4) After subsection (9) insert—

“(10) In subsection (4B) “collective agreement” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992(a) (see section 178 of that Act).”.

### **Disability**

**6.** In Schedule 1 to the Equality Act 2010 (disability: supplementary provision), after paragraph 5 insert—

*“Normal day-to-day activities*

5A (1) This paragraph has effect for the purposes of the application to the protected characteristic of disability of—

- (a) Part 5 (work);
- (b) Part 8 (prohibited conduct: ancillary), so far as relating to Part 5;
- (c) Part 10 (contracts), so far as relating to Part 5;
- (d) Schedule 21 (reasonable adjustments: supplementary), so far as applying for the purposes of Schedule 8.

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(a) 1992 c. 52.

- (2) References in the relevant provisions to a person's ability to carry out normal day-to-day activities are to be taken as including references to the person's ability to participate fully and effectively in working life on an equal basis with other workers.
- (3) The "relevant provisions" are—
  - (a) section 6 (disability);
  - (b) other provisions of this Schedule;
  - (c) regulations under this Schedule (whenever made)."

Date Secretary of State for Business and Trade and Minister for Women and Equalities  
Department for Business and Trade

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations reproduce the effects of retained EU law in relation to several aspects of the Equality Act 2010 (c. 15). They amend the Equality Act 2010 to ensure that current rights continue once the interpretive effects of EU law on the United Kingdom's statute book have been removed, at the end of 2023, by the Retained EU Law (Revocation and Reform) Act 2023 (c. 28). In particular, they reproduce effects deriving from the following EU law as it has been interpreted in case law:

- Article 157 of the Treaty on the Functioning of the European Union;
- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Race Directive”);
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (“the Framework Directive”);
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and
- Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (“the Recast Directive”).

Regulation 2 reproduces aspects of the Recast Directive in relation to pregnancy, maternity and breastfeeding. It amends section 13(6)(b) of the Equality Act 2010 so that no account is to be taken of special treatment in connection with maternity (in addition to pregnancy or childbirth) in a direct sex discrimination case (regulation 2(2)(a)). It gives effect to the principle in *Otero Ramos v Servicio Galego de Saude and another* [2018] ICR 965 that direct discrimination on grounds of breastfeeding is direct sex discrimination by repealing section 13(7), which restricted such claims in cases relating to Part 5 (work) of the Equality Act 2010 (regulation 2(2)(b)). It amends section 18(2) so that protection against discrimination on grounds of pregnancy and maternity covers unfavourable treatment after the “protected period” as well as during it, where the treatment is because of the pregnancy or pregnancy-related illness during the protected period (regulation 2(4)), reflecting the principle in *Brown v Rentokil (C-179/88)*. Finally, it amends section 18 to extend the protected period to cover women whose right to maternity leave arises under an occupational scheme rather than under the Employment Rights Act 1996. This reflects the decision in *Chief Officer of Police of the Metropolis v Geldart* [2021] EWCA Civ 611 which applied the principle in *Webb v EMO Air Cargo (UK) Ltd (C-32/93)*, that no comparator is needed in cases of pregnancy and maternity discrimination, to such a case.

Regulation 3 adds section 19A to the Equality Act 2010 to reproduce the principle established in “*CHEZ Razpredelenie Bulgaria*” AD v *Komisia za zashtita ot diskriminatsia (Case C-83/14)* that a person without a relevant protected characteristic is indirectly discriminated against where they suffer alongside persons with a relevant protected characteristic from a particular disadvantage arising from a discriminatory provision, criterion or practice.

Regulation 4 reproduces the effect of retained case law in relation to direct discrimination in the context of conditions for access to employment and occupation. It gives effect to the principles of retained case law, in particular *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford (Case C-507/18)* such that a public statement made by a person (A) in connection with a relevant decision relating to access to employment or occupation, may amount to direct discrimination even if there is no active recruitment exercise taking place and no identifiable victim. It adds section 60A to the Equality Act 2010 to provide for this type of unlawful conduct.



Subsection (6) outlines the factors that must be considered when determining whether a statement is made in connection with a relevant decision.

Regulation 5 reproduces the effects of Article 157 of the Treaty on the Functioning of the European Union (“the right to equal pay”) as regards the principle of “single source” which has been recognised in a number of domestic and European cases, e.g. *Lawrence v Regent Office Care Ltd* [2003] ICR 1092. It amends section 79 of the Equality Act 2010 to provide that the circumstances in which employees and others are taken to be comparators for the purposes of Chapter 3 of Part 5 of the 2010 Act include where the employees’ terms are attributable to a single body (ie. single source) which is responsible for the alleged pay inequality and capable of restoring equal treatment. This also applies where employees’ terms are governed by the same collective agreement.

Regulation 6 reproduces the effect of retained case law in relation to the definition of disability for the purposes of the Framework Directive, in particular *Sonia Chacón Navas v Eurest Colectividades SA* (C-13/05) and *HK Danmark acting on behalf of Ring v Dansk almennyttigt Boligselskab* (C-355/11). This is done by inserting a new paragraph 5A into Schedule 1 to the Equality Act 2010 to provide that, in relation to specified provisions of the Act relating to employment and occupation, provisions of the Act defining disability by reference to a person’s ability to carry out normal day-to-day activities must be read as including a person’s ability to participate fully and effectively in working life on an equal basis with other workers.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

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