



Home Office

# **Draft Code of practice for employers**

Avoiding unlawful discrimination while  
preventing illegal working

May 2014

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## Avoiding unlawful discrimination while preventing illegal working

Presented to Parliament pursuant to section 23(2)(d) of the Immigration, Asylum and Nationality Act 2006.

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# 1: Introduction

Employers have a duty to prevent illegal working in the UK by carrying out document checks on people before employing them to confirm they have a right to work here. Failing to conduct these checks is not itself a criminal offence, but if an employer only carries them out on people who they *believe* are not British citizens, for example, on the basis of their colour, or ethnic or national origins, they could find themselves accused of discrimination and it could be used as evidence against them in proceedings under the Equality Act 2010 or the Race Relations (Northern Ireland) Order 1997, as amended.

Anyone who believes that they have been discriminated against, either directly or indirectly, by an employer, a prospective employer or an employment agency, because of their race may bring a complaint before an Employment Tribunal, or an Industrial Tribunal in Northern Ireland. If the complaint is upheld, the Tribunal will normally order the payment of compensation, for which there is no upper limit.

This is why we recommend that you, as an employer, obtain a statutory excuse for **all** prospective workers as this will protect you from liability for a civil penalty if the person in question is an illegal worker, whilst also demonstrating consistent, transparent and non-discriminatory recruitment practices. Where the employee only has a limited entitlement to remain in the UK, these checks should be repeated as prescribed in the guidance and 'Code of practice on preventing illegal working: civil penalty scheme for employers' in order to retain the excuse. Further information on the right to work checks and the statutory excuse may be found at <http://www.gov.uk/government/collections/employers-illegal-working-penalties>.

It is important to remember that the population of the UK is ethnically diverse. Many people from ethnic minorities in this country are British citizens and many non-British citizens from black and minority ethnic communities are entitled to work here. You must not therefore *assume* that someone from an ethnic minority is an immigrant, or that someone born abroad or who speaks with a particular accent is not allowed to work in the UK.

We have issued this Code of practice for employers to strengthen the safeguards against unlawful discrimination when recruiting people.

## **For whom is this Code of practice relevant?**

This Code of practice applies where employment commenced on or after 16 May 2014. It also applies where a repeat check on an existing worker is required to be carried out on or after 16 May 2014 to retain a statutory excuse.

All employers in England, Scotland, Wales and Northern Ireland must adhere to this Code. It also applies to certain organisations, such as employment businesses and employment and recruitment agencies (including on-line agencies). An employment agency or business practising unlawful discrimination may be liable, even if it is acting on the instructions of an employer, i.e. at the behest of one of its clients.

Whilst some smaller organisations may wish to adapt this guidance to suit their particular circumstances, it should be noted that no allowances can be made for smaller companies when considering their liability under the law. We recommend that smaller organisations ensure that their employment practices do not discriminate on any of the grounds set out in law and they follow the advice given in this Code.

## **How should this Code of practice be used?**

This Code of practice has been issued under section 23(1) of the Immigration, Asylum and Nationality Act 2006. It sets out an employer's legal obligations under the Equality Act 2010 and the Race Relations (Northern Ireland) Order 1997, as amended. It provides practical guidance on how to avoid unlawful discrimination when complying with your duty as an employer to conduct right to work checks. It is not, however, intended to be a comprehensive statement of the law. This Code has been issued alongside guidance and the 'Code of practice on preventing illegal working: civil penalty scheme for employers'.

## **Who should use this Code of practice?**

This is a statutory Code. This means it has been approved by the Secretary of State and laid before Parliament. The Code does not impose any legal duties on employers, nor is it an authoritative statement of the law; only the Courts and Employment Tribunals can provide that. However, this Code may be used as evidence in legal proceedings. Courts and Employment Tribunals may take account of any part of this Code which may be relevant to matters of discrimination.

Public authorities must also adhere to this Code. In addition, they are subject to the public sector equality duty which requires public authorities to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it ('protected characteristic' is defined below); and
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

## **References in this Code**

Throughout this Code of practice, the Equality Act 2010 is referred to as 'the 2010 Act', and the Race Relations (Northern Ireland) Order 1997, as amended, as 'the 1997 Order'.

When we refer to 'we' or 'us' in this Code we mean the Home Office. When we refer to 'you' and 'your' this means the employer.

## 2: Your duty under the law

**It is unlawful to discriminate in employment practices because of race.** In Great Britain under section 39 of the 2010 Act and in Northern Ireland under article 6 of the 1997 Order, you cannot discriminate against a potential or existing worker because of race (2010 Act) or on racial grounds (1997 Order). Race and racial grounds include colour, nationality and ethnic or national origins.

Race discrimination may be either **direct** or **indirect**.

### Direct race discrimination

**Direct discrimination** means treating a person less favourably because of race or on racial grounds, for example, by rejecting all job applicants who do not have British nationality or another specified nationality, or by refusing to consider any non-European job applicants. Treatment based on racial or national stereotypes can also constitute direct discrimination. Examples include:

- where the assumption is made that people from certain nationalities or ethnic groups cannot work as a team;
- where individuals are only recruited from one nationality or ethnic group;
- where all refugees are automatically rejected;
- where an employee with time-limited permission to be in the UK is given less favourable or more detrimental work than workers with unlimited leave; or
- where it is assumed that overseas qualifications and experience are inferior to those gained in the UK.

### Indirect race discrimination

**Indirect discrimination** occurs where a provision, criterion or practice, although applied equally to others, would put persons of a particular racial group at a particular disadvantage compared with other persons, unless the provision, criterion or practice is objectively justified by a legitimate aim. For example, to require that a person has been resident in the UK for over 5 years is likely to be indirectly discriminatory since some migrants will not have been resident in the UK for that period of time.

It is unlawful to victimise a person because he or she has made or supported a complaint of race discrimination.

It is also unlawful to instruct or induce another person to discriminate, or to publish an advertisement or notice that indicates an intention to discriminate.



## Unlawful race discrimination

You must not discriminate because of race:

- (a) in the arrangements you make to decide who should be offered employment; or
- (b) as to the terms on which you offer to employ a person; or
- (c) by refusing or deliberately failing to offer employment.

It is also unlawful for you to discriminate because of race against a worker:

- (a) in the terms of employment provided; or
- (b) in the way you make opportunities for training, promotion, transfer, facilities, services or other benefits available; or
- (c) by refusing access to such opportunities, benefits, facilities or services; or
- (d) by dismissing the worker or subjecting him to any other detriment.

You must also not subject a job applicant or worker to harassment under the terms of the 2010 Act. Harassment is unwanted conduct related to age, disability, gender reassignment, race, religion or belief, sex or sexual orientation that violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them. Harassment also includes unwanted conduct of a sexual nature which violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

It is also unlawful to segregate a worker from others on the basis of race.

Under the 2010 Act and the 1997 Order, discrimination committed by an **employee** in the course of their employment, is treated as having been committed by you as the employer, as well as by the individual employee, **whether or not you knew or approved the acts of discrimination**. You can avoid this liability if you can prove that you took all reasonable steps to prevent such discrimination, for example, by providing training to employees on how to apply checks in accordance with this Code. It might also be a reasonable step for an employer to have an equality policy in place and ensure that it is put into practice. A claim to an Employment Tribunal may be made against both you and the individual employee who is alleged to have discriminated.

## Other discrimination grounds

The 2010 Act also prohibits discrimination in employment practices on the following grounds (which together with race are known as the 'protected characteristics' under the 2010 Act):

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

Although this Code only addresses race discrimination, you should be mindful of these other forms of discrimination when applying the provisions of the Act. If, for example, people affected by religious discrimination are from a particular racial group, the discrimination might also amount to indirect race discrimination – for example, case law has established that Sikhs and Jews can be described as having an ‘ethnic origin’. It should also be noted that in Northern Ireland, the 1997 Order also covers the Irish Traveller Community. The Fair Employment and Treatment (Northern Ireland) Order 1998, as amended, also makes it unlawful to discriminate on the grounds of religious belief and political opinion.

## **Action against you**

Anyone who believes that they have been discriminated against, either directly or indirectly, by you, as an employer, a prospective employer or an employment agency, may issue a claim in an Employment Tribunal, or an Industrial Tribunal in Northern Ireland. If the claim is upheld, the Tribunal will normally order you to pay compensation, for which there is no upper limit.

The Equality and Human Rights Commission and the Northern Ireland Equality Commission can also take regulatory action against you if you publish a discriminatory advertisement, or instruct or induce another person to discriminate.

Where you are found to have committed an act of unlawful race discrimination, the Public Procurement Regulations 2006 provide that public authorities may disqualify your organisation from entering into public procurement contracts.

# 3: How you avoid race discrimination

As a matter of good employment practice, you should have clear written procedures for the recruitment and selection of all workers based on equal and fair treatment for all applicants. Copies of these procedures should be made available to all relevant staff.

All job selections should be on the basis of suitability for the post. You should ensure that no prospective job applicants are discouraged or excluded, either directly or indirectly, because of their personal appearance or accent. You should not make assumptions about a person's right to work or immigration status on the basis of their colour, nationality, ethnic or national origins, accent or the length of time they have been resident in the UK.

The best way to ensure that you do not discriminate is to treat all applicants fairly and in the same way at each stage of the recruitment process.

## Fair recruitment practices

If you provide information to prospective applicants or if you supply an application form, you could also include a reminder that the successful applicant, or short-listed applicants, will be required to produce original, acceptable documents.

You may ask applicants to provide the specified document(s) to obtain a statutory excuse at any stage **before** they start work. Depending on your recruitment processes, you may find it most convenient to request documents from all those called to a first interview, or just from those called to a second interview, or only from persons short-listed to fill the vacancy. Original documents should be checked before employment commences. **If you ask for documents from one applicant, you should make sure you ask for documents from all applicants being considered at that stage.**

Job applicants should not be treated less favourably if they produce acceptable documents showing a time-limited right to work in the UK. Once a person who has time-limited permission to stay in the UK has established their initial and on-going entitlement to work, they should not be treated less favourably during their employment, including the terms of their employment, opportunities for training, promotion or transfer, benefits, facilities or services, or by dismissing the worker or subjecting them to some other detriment, other than further right to work checks as prescribed in the guidance and 'Code of practice on preventing illegal working: civil penalty scheme for employers'.

You should only ask questions about an applicant's or worker's immigration status where it is necessary to determine whether their status imposes limitations on the number of hours they may work each week, the type of work they may carry out or on the length of time for which they are permitted to work.

If a person is not able to produce acceptable documents, you should not assume that they are living or working in the UK illegally. You should try to keep the job open for as long as possible in order to provide them with the opportunity to demonstrate their right to work, but you are not obliged to do so if you need to recruit someone urgently. **It is ultimately the decision of the employer whether or not to employ an individual.**

As a matter of good practice, you should monitor the diversity details of applications during the recruitment and selection process of job applicants. This will include the gender, disability status and the ethnic and national origins of applicants. This will help you to know whether you are reaching a wide range of potential job applicants. This information can then be used in reviewing recruitment procedures.

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## 4: If you need more information

The Equality and Human Rights Commission (EHRC) and the Equality Commission for Northern Ireland provide further information on matters relating to the law on discrimination. Information and contact details are available at <http://www.equalityhumanrights.com/> and <http://www.equalityni.org>.

The EHRC has produced a Statutory Code of Practice on Employment which contains detailed and practical guidance to help employers to comply with the Equality Act 2010, together with guidance and good practice for small businesses. These publications are available on its website.

Home Office guidance and the 'Code of practice on the prevention of illegal working: civil penalty scheme for employers' are available at: <http://www.gov.uk/government/collections/employers-illegal-working-penalties>.

Home Office advice for employers about complying with the law on preventing illegal migrant working is available from the Employers' Helpline on **0845 010 6677**. The Helpline is open Monday to Friday, between 9am and 5pm, except bank holidays.

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