

Advertising

What equality law
means for advertisers
and publishers



Introduction

Placing or publishing a discriminatory advert is unlawful under the Equality Act 2010 ('the Act'). The Act protects individuals from discrimination because of sex, race, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, religion and belief, sexual orientation and age ('protected characteristics').

Who is this guidance for?

This guidance is for employers who place or publish adverts for job opportunities, and all those who advertise goods, facilities and services. Employers include: employment agencies and those who advertise for contract workers; those who provide vocational training services; trade unions; and partnerships. Goods, facilities and service providers include: education providers; those who let and sell land or property; pubs, clubs and shops.

Who is an advertiser?

An advertiser is someone who targets potential employees or customers using a form of media to market employment opportunities or their products or services. If you are responsible for creating an advert that reaches the public, you are an advertiser, irrespective of whether you are also responsible for distributing it or publishing it.

Examples:

An employer places a job vacancy with a newspaper. The employer is the advertiser. If the advert is discriminatory, the employer will be legally responsible.

A store puts up an advert for a job at the store in its window. The store is the advertiser. If the advert is discriminatory, the store will be legally responsible.

Who is a publisher?

Publishers publish or distribute adverts in paper or electronic form. A publisher may publish other people's adverts. If the advertiser publishes their own advert, then they are both the advertiser and the publisher.

Publishers include newspapers, television and radio stations, cinemas, taxis, buses, employment agencies, Jobcentres, advertising agencies, websites and any shops, hotels, restaurants or other small businesses which display adverts.

Who is liable if an advert is discriminatory?

Both the publisher and the advertiser are potentially acting unlawfully if a discriminatory advert is published.

Although publishers may not be responsible for the content of an advert, they are legally responsible for its dissemination. However, publishers are not liable if they can show:

- that they relied on a statement from the advertiser that the publication of a particular advert would not be unlawful, and
- that it was reasonable for them to rely on that statement.

It is good practice for publishers to seek written confirmation from the advertiser that it considers the advert to be lawful. A person who knowingly or recklessly makes such a statement when it is false or misleading is committing an offence.

Example:

A free newspaper publishes an advert for a male forklift truck driver. This would constitute sex discrimination. The newspaper would be liable as the publisher of the advert, while the employer would be liable as the advertiser.

Are Information Society Service Providers (ISSPs) liable?

ISSPs (organisations providing services through a website) that are based in Great Britain must comply with equality legislation and the Electronic Commerce Regulations where the services are accessed in any European Economic Area (EEA) member state. The Equality Act 2010 covers all forms of internet advertising, including formal advert networks provided through internet search engines or social networking sites and all forms of user-generated listings and adverts.

Online publishing platforms may only facilitate the publication of adverts, but if they fail to remove any discriminatory adverts once they became aware of them, they can be held liable as a publisher.

Examples:

A travel company based in Great Britain advertises hotel accommodation in France on its website. The advert states that the hotel does not accept bookings from groups of young men. The advert is discriminatory in relation to both age and sex. As the travel company is based in Great Britain even though the hotel is in another EEA state, the travel company would be legally responsible for the advert.

A company in Greece advertise on their website for male crane drivers to work in England. While this discriminates against women, the Greek company would not be legally responsible for the advert in Great Britain as the company is not based in Great Britain and so not covered by British law.

As with other publishers, ISSPs may not be responsible for the content of an advert but they are liable in relation to its dissemination. For example, an ISSP that hosts information provided by service users is not liable if:

- It can show that it had no actual knowledge when the advert was placed that it was discriminatory.
- Once it is made aware that the information is discriminatory, it immediately removes or disables access to the advert.

Is it unlawful to instruct someone to discriminate?

It is unlawful to instruct someone to either carry out or help another person to commit a discriminatory act. This would include instructing a publisher to publish a discriminatory advert.

It is also unlawful to knowingly help someone discriminate against another person, for example by agreeing to publish an advert that is obviously discriminatory. A person who helps someone in this way will be treated as having carried out the act of discrimination themselves.

Example:

An employer instructs an employment agency to advertise for a young graduate. This is age discrimination. The employer would be liable, as would the employment agency if it complied with this request.

When is a job advertisement discriminatory?

Employers must not discriminate when recruiting employees, either directly or indirectly, because of a protected characteristic. An advert is part of the arrangements for recruiting. Adverts that restrict employment to a particular group because of a protected characteristic are unlawful except in very limited circumstances. Please see below for further details.

Employment service providers, such as employment agencies or Jobcentre Plus, help people find jobs. An employment service provider has similar obligations to an employer. It is unlawful for employment service providers to discriminate against someone in relation to arrangements made for recruiting people for employment vacancies.

Direct discrimination means treating someone worse than another person because of a protected characteristic. For example, not appointing someone because they are Black or gay.

The Act treats disabled people differently from those with other protected characteristics. It is not unlawful to treat a disabled person more favourably than a non-disabled person because of disability. For example, it is lawful to treat disabled people more favourably in a recruitment process by operating a guaranteed interview scheme for those who identify as disabled and meet the minimum requirements for the post. An advert stating this would not be unlawful.

Indirect discrimination may occur where an organisation applies a practice or rule which on the face of it treats everyone the same but in fact puts people with a particular protected characteristic at a disadvantage compared with others. For example, an advert for a bank account that states applicants must have a permanent address could indirectly discriminate against a Syrian asylum seeker who is unable to open a bank account. This eligibility requirement would be unlawful unless it could be objectively justified. In order to be objectively justified there must be a legitimate aim for the practice or rule, which in turn must be a proportionate way of achieving that aim.

For there to be a legitimate aim, the rule or policy must represent a real, objective consideration. To show proportionality, an employer or service provider needs to demonstrate both that the aim is (or will be) actually achieved by the means adopted and that there are no alternative, less discriminatory steps that can be reasonably be taken to achieve that aim. For example, in order to lawfully refuse bank accounts to persons without a permanent address, a bank would need to demonstrate that its policy was necessary for a legitimate reason (such as to prevent fraud) and that there was no practical alternative.

Examples:

A recruitment agency publishes a job advert for another company on its website which states that applicants over 45 need not apply. This is direct age discrimination which, unless it can be objectively justified, is unlawful. The recruitment agency would be liable as the advertiser and publisher.

A club publishes on its website that 'spouses' will receive free membership but does not extend this to civil partners. This directly discriminates against lesbians and gay men in a civil partnership because of their sexual orientation. The club would be liable as the advertiser and publisher.

Can an advertiser ask for a particular type of person in a job advert?

The Act allows an employer to require a job applicant or employee to have a particular protected characteristic when it is genuinely needed for the job, known as an 'occupational requirement'. The requirement must be crucial to the post, not just one of several important factors. Where an occupational requirement applies, the employer is required to ensure that imposing the requirement is objectively justifiable.

Occupational requirements may apply where being of a particular sex, race, sexual orientation or age, having a particular disability or religion or belief, or not being married, a civil partner or a transsexual person is a requirement for work.

There are also specific exceptions in the Act permitting jobs to be restricted to a particular group in very limited circumstances, for example, on the basis of religion or belief. Generally, exceptions need to be objectively justified.

When claiming an exception or an occupational requirement, or seeking to use an objective justification for a discriminatory advert, it is good practice for the advertiser to provide the publisher with a written statement explaining their justification and the basis for relying on it.

If a publisher is concerned about the lawfulness of any advert, they should seek further clarification from the advertiser about whether the advertiser is relying on an exception.

Examples:

An advert for firefighters states that applicants will have to take physical tests. While this requirement could rule out some disabled people this is not unlawful if the fire service can show it is objectively justifiable. The fire service's justification for the test is to make sure candidates are fit enough to do the job. This is a legitimate aim and making candidates take physical tests is likely to be a proportionate way of achieving this aim.

A building company advertises for Polish builders to work on their construction site on the basis that they believe that they will stay on the job longer. This belief, based on a racial stereotype, will not qualify as a justifiable occupational requirement and would be unlawful race discrimination.

Can an advert restrict the provision of goods, facilities or services to a particular group?

People or organisations providing goods, facilities or services to the public must not discriminate either directly or indirectly because of a protected characteristic against a person who might want to buy or use them. This applies to service providers in the public, private and voluntary sectors and to free or paid-for goods, facilities and services.

Example:

A club advertises salsa classes that are 'not suitable for people over 60' in a free local paper. The club assumes that people over the age of 60 are not fit enough. This is age discrimination and is unlawful. The salsa club would be liable as the service provider and the free paper would be liable as the publisher.

However, the Act provides for limited exceptions, which allow the provision of goods, facilities and services to be restricted to a particular group in particular circumstances. Where an exception is used, the provider of the goods, facilities or services is generally required to ensure that there is a genuine business need and the proposed requirement is a proportionate means of meeting this need.

Provided that certain conditions set out in the Act are met, there are some further specific exemptions that permit restrictions in the provision of goods, facilities and services on the basis of protected characteristics.

For example:

- Private members' clubs can advertise membership to people who share a particular protected characteristic, as long as they do not restrict membership on the basis of colour.
- Advertising male-only or female-only competitive events is permitted in sport when, due to physical strength, stamina or physique, one sex would be at an advantage over the other.
- A provider can advertise single-sex services for men or women where a joint service would be less effective, it is not practicable to provide the service to both sexes, or where only people of that sex need the service. In each case, the provider must justify the restriction of the service.
- Unless their sole or main purpose is commercial, religious organisations can advertise that their provision of goods, facilities and services, participation in their activities, the use or letting of their premises and their membership are restricted in relation to sexual orientation and religion or belief. Where required for religious reasons, ministers may also advertise separate services for men and women provided in places used for the purposes of an organised religion.

Example:

The local health authority advertises a 'new fathers' support group'. This will be lawful if the local authority can show that many new fathers did not attend mixed-sex parents' support groups, and that providing men-only groups would be a proportionate way of making the service more effective overall.

Is it lawful to advertise accommodation restricted to particular groups?

It is unlawful to publish a discriminatory advert for the sale or letting of premises. 'Premises' includes land, houses, flats and business premises. It applies to public housing, including housing associations, and to private housing, to furnished or unfurnished accommodation, and to the sub-letting of premises.

There are some exceptions for lettings in 'small premises' where the person (or close relative) renting out the accommodation also lives there and there are shared facilities such as a bathroom and/or kitchen. Premises are classed as small if they are not normally able to accommodate more than two other households (or no more than six people) in addition to the person renting out the property and/or their close relatives living there.

There are also exceptions for communal accommodation, such as dormitories, and accommodation that is provided for one sex.

Regardless of the accommodation being offered, there is no exception that permits discrimination because of race, which includes colour and nationality.

Can I advertise that job applications from particular groups are welcome?

It is not unlawful to encourage groups who share a particular protected characteristic to apply for vacancies in order to address disadvantage or underrepresentation. This is called **positive action**. Positive action is lawful if it is reasonable to think that people with a particular protected characteristic are underrepresented or face disadvantage and the action taken is proportionate.

If an employer wants to take positive action in this way, the advert should clearly state the employer is seeking applications from everyone but wishes to encourage applications from people with a particular protected characteristic on the basis that they are underrepresented or face disadvantage. Positive action in employment can only be used to encourage people to apply for a job. It cannot be used to restrict the job opportunity to someone with a particular protected characteristic or result in an applicant being treated more favourably during the recruitment process because they have a protected characteristic. However, if the two best candidates for a job are equally qualified, the candidate from a disadvantaged or underrepresented group can be given preference for the job if this is a proportionate means of helping to address the disadvantage or increase the group's participation.

It is also lawful to treat disabled people more favourably in a recruitment process by operating a guaranteed interview scheme for those who identify as disabled and meet the minimum requirements for the post. An advert stating this would not be unlawful.

Example:

An engineering firm places a job advert for a trainee engineer stating that applications from women and ethnic minorities are welcome. This is because these groups are currently underrepresented in the engineering industry, and is therefore likely to be lawful positive action.

In general the Act does not allow an employer to treat a person more favourably during the recruitment process because they have a protected characteristic, unless that person is disabled (as outlined earlier in this guide). However, as a very limited exception, the Act allows employers, when deciding between two candidates who have been assessed to be equally qualified, to choose a candidate because they are from a protected group because it reasonably thinks that group is underrepresented or faces disadvantage in the organisation or sector.

Can I advertise that a service welcomes participation from particular groups?

Positive action allows organisations that provide facilities or services to treat one group more favourably, to help members of that group overcome a disadvantage or participate more fully, or to meet the special needs of particular communities. If a service provider wants to encourage participation by a particular protected group that is underrepresented or faces disadvantage, this should be stated in the advert.

Example:

A sports centre identifies that Chinese women use its facilities far less than other groups even though the centre is based within a large Chinese community. To encourage Chinese women to use the centre, it advertises an open day and taster gym sessions for Chinese women only.



Equality Act 2010 - Advertising

The Equality and Human Rights Commission has published a series of complementary guidance documents:

- Advertising – Frequently asked questions about what is lawful advertising for: jobs; goods, facilities and services; and accommodation
- Advertising – A good practice checklist for advertisers and publishers
- Advertising – Making an enquiry about a discriminatory advert

You can also find more detailed information in the **Employment Statutory Code of Practice** or the **Services, Public Functions and Associations Statutory Code of Practice** available on the Commission's website at www.equalityhumanrights.com.

Complaints about dishonest or offensive advertising should be made to the **Advertising Standards Authority**, Mid City Place, 71 High Holborn, London, WC1V 6QT.

Contacts

This publication and related equality and human rights resources are available from the Commission's website:

www.equalityhumanrights.com

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

Website **www.equalityadvisoryservice.com**

Telephone **0808 800 0082**

Textphone **0808 800 0084**

Hours **09:00 to 20:00 (Monday to Friday)**

10:00 to 14:00 (Saturday)

Post **FREEPOST Equality Advisory Support Service FPN4431**

Questions and comments regarding this publication may be addressed to: **correspondence@equalityhumanrights.com**.

The Commission welcomes your feedback.

Alternative formats

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