

FAQ: Non-Discrimination Law in the UK under the EU Charter

Contents

If you are a citizen of an EU Member State, then you are an EU citizen and have a number of rights, including the right to be free from discrimination.

This FAQ discusses:

- The right to non-discrimination in EU law
- Prohibited grounds of discrimination
- Prohibited types of discrimination
- The scope of EU non-discrimination law
- The future of non-discrimination post-Brexit

It is intended to present an outline of the main issues relating to EU non-discrimination law in the UK, and is therefore not comprehensive.

Citizens of European Economic Area (EEA) Member States (Iceland, Liechtenstein and Norway), and Switzerland, have rights equivalent to EU nationals and should be presumed as included in the term 'EU citizen' when used in this FAQ.

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Protected grounds	Field of protection from discrimination	Directive
Race or ethnic origin	<ul style="list-style-type: none"> • Access to employment • Conditions of employment (including pay and dismissal) • Occupational pensions • Vocational guidance and training • Access to self-employment • Social protection (including social security and healthcare) • Education • Access to and supply of goods and services (including housing) 	Racial Equality Directive (2000/43/EC)
Sex	<ul style="list-style-type: none"> • Access to employment • Conditions of employment (including pay and dismissal) • Occupational pensions • Vocational guidance and training • Access to self-employment • Social security • Access to and supply of goods and services 	The Gender Equality Directive (Recast Directive) (2006/54/EC) Gender Goods and Services Directive (2004/113/EC) Gender Social Security Directive (79/7/EEC)
Religion or belief, disability, age, or sexual orientation	<ul style="list-style-type: none"> • Access to employment • Conditions of employment (including pay and dismissal) • Occupational pensions • Vocational guidance and training • Access to self-employment 	Employment Equality Directive (2000/78/EC)

1. Introduction

Q: Is there a right to non-discrimination under EU law?

A: Yes. The right to non-discrimination originated in the founding EU Treaties and has been expanded upon in the case law of the Court of Justice of the EU. In 2009, the right to non-discrimination gained additional force through its inclusion in the Charter of Fundamental Rights. The prohibition of discrimination is enshrined in primary EU law under Article 21 of the EU Charter of Fundamental Rights. The Charter binds the EU institutions as well as the Member States when they are interpreting and applying EU law.

Article 21 - Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty, establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Freedom from discrimination is concurrently ensured through EU secondary law by way of various non-discrimination directives, which prohibit discrimination on various grounds.

Q: Does this translate into protection from discrimination under domestic law?

A: Yes. EU Member States have an obligation to implement EU law in their national legislation and to apply it correctly. All EU Member States have included the general principle of equal treatment or non-discrimination in their Constitution and/or national anti-discrimination legislation. A number of Member States chose not to restrict their anti-discrimination laws to the grounds found within the directives and have opted for a broader list of prohibited grounds (including health condition, language and marital status).

2. Grounds of Discrimination

Q: On what grounds is discrimination prohibited under EU law?

A: The EU non-discrimination directives prohibit discrimination on the grounds of: sex, sexual orientation, religion or belief, race, disability, and age. Further, the Free Movement Directive prohibits discrimination on the grounds of nationality.

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3. Types of Discrimination

Q: What types of discrimination are prohibited under EU law?

A: EU non-discrimination directives prohibit four different types of discrimination:

- *Direct discrimination* is when an individual is treated unfavourably in comparison to how others in a similar situation have been or would be treated because of a particular characteristic they hold, which falls under one of the grounds protected under Article 21(1).
- *Indirect discrimination* occurs when a neutral rule, criterion or practice has a more detrimental effect on a group that is protected in comparison to others in a similar situation.
- *Harassment* amounts to discrimination when it is related to a ground for discrimination prohibited by Article 21(1), and is perpetrated with the intention and/or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment.
- *Victimisation* is defined as subjecting a person to a further detriment after they complain or bring proceedings in connection with discrimination, on their own behalf or on behalf of someone else.

4. Scope of EU Non-Discrimination Law

Q: In what context does the prohibition of discrimination apply?

A: The non-discrimination directives do not prohibit discrimination in all areas of life, but rather in certain specified fields: employment, goods and services, and the welfare system. EU non-discrimination law was introduced to facilitate the functioning of the internal market, and was accordingly traditionally confined to the sphere of employment. This was subsequently expanded to include access to goods and services, and access to the welfare system, on the premise that equality in the workplace was conditional on equal treatment in other areas of life that could impact employment. Protection against discrimination in employment is extended under the non-discrimination directives. Discrimination in the field of access to the supply of goods and services applies to the grounds of race and sex. Broad protection against discrimination in accessing the welfare system and other forms of social security is only provided on the ground of race, however a right of equal treatment on the basis of sex in relation to the narrower field of 'social security' is also established.

The 'Horizontal Directive', aimed at extending the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation beyond the field of employment, has been under debate by the EU legislative institutions since 2008.

Q: Who is protected by EU non-discrimination law?

A: In general the non-discrimination directives afford protection to everyone within the EU, not only EU citizens. However, many do include various exclusions of application for third-country nationals (TCNs – i.e. non-EU nationals). For example, while the Gender Equality (Recast) Directive and Gender Goods and Services Directive do not exclude protection for TCNs, the Employment Equality Directive expressly states that it does not create any right to equal treatment for TCNs in relation to access to employment and occupation. Further, the non-discrimination directives expressly exclude their application to nationality discrimination. The prohibition of discrimination on the grounds of nationality is only afforded to EU citizens.

Q: Does everyone in the EU have to respect the prohibition of discrimination?

A: Yes. Individuals, companies of all sizes, associations, local authorities, the government and all other organisations in both the public and private sectors have to comply with non-discrimination law.

5. Right to Non-Discrimination Post-Brexit

Q: How has EU non-discrimination law been implemented into the domestic legal order?

A: Almost all EU non-discrimination directives are currently transposed through the Equality Act 2010, which prohibits discrimination on the grounds of age, disability, gender reassignment, marriage or civil partnership, race, sex, sexual orientation and religion or belief. The Act does not implement the directives into domestic law for the first time; rather, it replaces earlier legislation that implemented specific non-discrimination directives.

Q: How will this change once the UK has left the EU?

A: The Great Repeal Bill, announced to Parliament on 10 October 2015, will preserve all EU law as it stands at the time when the UK leaves the EU. All non-discrimination directives as implemented into the domestic legal order will therefore initially remain. It will subsequently be Parliament's prerogative to decide which elements of the Equality Act 2010 to keep, amend or repeal.

Q: What will happen to UK citizen's non-discrimination rights after Brexit?

A: The answer to this question is not yet known. The only conclusion that can be drawn with certainty is contingent upon the outcome of the Article 50 negotiation process. If the UK chooses to remain a member state of the European Economic Area (EEA), in order to maintain unfettered access to the single market, certain EU law deemed of relevance to the markets' homogenous functioning - and accordingly incorporated into the 1992 EEA Agreement - will have to remain part of the domestic legal order. Annex XVII of the EEA Agreement includes EU legislation ensuring only gender equality in relation to working-life: the Recast Directive, the Gender Goods and Services Directive and the Gender Social Security Directive. Therefore, if the UK remains an EEA member state, UK citizens are guaranteed to maintain the same rights to non-discrimination on the grounds of sex. Whether UK law will continue to prohibit discrimination on grounds other than sex is dependent on domestic policy, as is the case with all non-discrimination law in the UK if EEA member state status is surrendered.

Q: Which aspects of non-discrimination law are likely to be maintained?

A: The post-Brexit government will have legal freedom to remove non-discrimination rights and remedies. Therefore, consideration must be made as to which rights or remedies are actually vulnerable. The domestic prohibition of discrimination on the grounds of sex, race or disability in the fields of employment, education and access to goods and services pre-date EU legislation to this effect (see: Sex Discrimination Act 1995, Race Relations Act 1976 and Disability Discrimination Act 1995) and are therefore likely to survive post-Brexit. However, non-discrimination on the grounds of sex or race in relation to the welfare state is less firmly enshrined in the domestic legal order. Further, the prohibition of discrimination on the grounds of age, sexual orientation and religion or belief in the employment context was only introduced into UK law in order to give effect to the 2000 Employment Equality Directive, with Successive Conservative and Labour governments having previously refused to introduce legislation in this area. These grounds are accordingly less secure post-Brexit, with the prohibition of detrimental treatment owing to old age being particularly vulnerable to repeal. It remains to be seen how post-Brexit UK courts will interpret non-discrimination legislation and apply previous precedents that have been decided by reference to the requirements of EU law. One possible change that we may see would be the imposition of a cap on compensation for discrimination claims, the removal of which resulted from EU case law.