

## Sex Equality Legislation Update for Employers

### IN BRIEF...


On 6 April 2008, the **Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008** came into force in Northern Ireland. They introduced a number of important changes to the employment provisions of the Sex Discrimination (Northern Ireland) Order 1976, which affect employers in Northern Ireland.

In particular, they:-

- changed the definition of '**sex harassment**', in order to prohibit unwanted conduct that is 'related to' a woman's sex or that of another person;
- made it clear that **employers** must take reasonably practicable steps to protect their employees from **harassment by third parties** (such as clients or customers), where such harassment is known to have occurred on at least two other occasions;
- removed the need for a **comparator** in complaints of discrimination on the grounds of **pregnancy or maternity leave**;
- made changes to an employee's entitlement to certain **benefits** of her terms and conditions of employment, whilst on **compulsory and additional maternity leave**.

### Introduction

This fact sheet outlines changes made to the Sex Discrimination (Northern Ireland) Order 1976, by the **Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008** ('the 2008 Regulations').



The 2008 Regulations came into force in Northern Ireland on **6 April 2008**. It should however be noted that changes relating to an employee's entitlement to certain benefits of her terms and conditions of employment during compulsory and additional maternity leave, only apply where a woman's expected week of childbirth begins **on or after 5 October 2008**.

This fact sheet provides general guidance only, and the information and examples contained within it, should not be treated as complete or authoritative statements of the law. Authoritative interpretation of the 2008 Regulations is a matter for the Courts.


### **Changes to the definition of sex harassment**

The Sex Discrimination (Northern Ireland) Order 1976, as amended, expressly prohibits sex harassment, sexual harassment and gender reassignment harassment. These forms of harassment are unlawful if they have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

**Sex harassment** occurs when a person behaves in an offensive way to another related to gender; such as a male manager referring to a female colleague as a "bimbo" or "airhead", or making other similar disparaging or belittling comments about women. By contrast, **sexual harassment** occurs where a person subjects another to unwanted attention of a sexual nature; for example, inappropriate sexual contact or making lewd comments.

The 2008 Regulations, have amended the definition of 'sex harassment'. The previous definition prohibited unwanted conduct "on the ground of " a person's sex. This meant that the conduct had to be motivated by, or, by reason of, the person's sex.

The new definition of sex harassment prohibits unwanted conduct that is "**related to**" a woman's sex or that of another person. This means that unwanted conduct **associated with** a person's sex, is now covered by the definition. It is no longer a requirement that the conduct has to be motivated or caused by the person's sex. The definitions of sexual harassment and gender reassignment harassment remain unchanged.



As a result of these changes, a wider range of conduct now amounts to unlawful sex harassment.

### **Example**


A male manager follows a female colleague into the ladies toilets in order to shout at her for poor performance. He would have similarly followed a male employee into the male toilets in order to reprimand him for poor performance. This is likely to fall within the new definition of sex harassment, because the unwanted conduct is related to or associated with the woman's sex, and has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her.

This conduct is unlikely to have been unlawful under the former definition of sex harassment because the manager's conduct was not caused or motivated by the woman's sex.

The new definition will also facilitate claims by people who have **witnessed** sex harassment. In other words, witnesses to sex harassment, including witnesses of the opposite sex, who are not the direct recipient of the conduct in question, but who feel harassed by the conduct, can now bring complaints under the sex discrimination legislation. For a successful claim, the witness must show that all elements of the test of harassment have been satisfied in respect of him/her.

### **Example**

A female manager calls a female employee a "floozy", and this is witnessed by a male colleague. As a result of changes to the definition of sex harassment, the male colleague who witnessed this conduct, can allege that his dignity has been violated by this, or that it has created an intimidating, hostile, degrading, humiliating, or offensive environment for him.



Harassment under the Sex Discrimination (NI) Order 1976 can include unintentional behaviour, but in such cases the behaviour will only amount to harassment where, having regard to all the circumstances, including in particular, the perception of the person making the complaint, it should be reasonably considered as having that effect.

### **Employer liability for harassment by customers/clients**

The 2008 Regulations make it clear that employers are liable if they fail to take **reasonably practicable steps** to prevent the repeated harassment of an employee by **third parties** (such as clients or customers).

The employer is not liable for a failure to take such steps **unless** s/he knows that the employee has been subjected to harassment during the course of his/ her employment on at least **two other occasions** by one or more third parties. The harassment can therefore be carried out by the same third party or different third parties.


Employer liability for third party harassment applies not only to sex harassment, but also to sexual harassment and gender reassignment harassment.

#### **Example**

An employer knows that on more than 2 occasions, a customer, when coming into the factory to pick up goods, has sexually harassed a female member of staff.

Although he is aware of such conduct, having witnessed it himself, and complaints have been made about the customer doing this, the employer nevertheless chooses to do nothing about the situation because he doesn't want to lose the customer.

The employer is likely to be liable for the harassment by the customer in these circumstances. He is liable if he fails to protect the employee from repetitive harassment by a customer (a third party) over which he has some control.



Employers are **not** liable for one-off incidents of third party harassment, third party conduct beyond their control or in circumstances where they were not aware of the harassment.

The 2008 Regulations do not affect an employer's liability for acts of harassment carried out by their **employees**. Employers remain liable for acts of harassment carried out by their employees in the course of their employment, whether or not they knew of these acts, or approved of them. Employers are liable unless they take such steps as are reasonably practicable to prevent employees harassing other employees or customers / service users.

Further advice and information on good practice measures for employers in preventing harassment in the workplace is available from the Equality Commission. In particular, the Equality Commission has produced a **model harassment policy and procedure**<sup>1</sup>, and with the Labour Relations Agency, has published joint **guidance**<sup>2</sup> on dealing with harassment and bullying in the workplace.

### **Removal of comparator - pregnancy and maternity leave discrimination**

It is direct sex discrimination to treat a female worker or applicant less favourably on the grounds of her pregnancy or maternity leave.

As a result of changes introduced by the 2008 Regulations, in order to establish that she has been treated less favourably on the ground of pregnancy, a woman no longer needs to compare her treatment to that of anyone else (male or female); not even with the way she would have been treated if she were not pregnant.

The 2008 Regulations therefore **removed the requirement** that a woman must show that she has been treated less favourably than a comparator who is not pregnant. Similar changes were made to discrimination on the ground of maternity leave, in that a woman no longer has to compare her treatment with a comparator who is not on maternity leave.

<sup>1</sup>Model Harassment Policy and Procedure, ECNI, March 2007, [www.equalityni.org](http://www.equalityni.org).

<sup>2</sup>Harassment and Bullying in the workplace, ECNI and LRA, March 2006, [www.equalityni.org](http://www.equalityni.org)

## Example

An employee, due to her pregnancy, needs to take more frequent toilet breaks than other employees. Her employer refuses to let her take the additional toilet breaks, insisting that she must take the same breaks as all other employees.

The employer's refusal to allow the additional breaks is likely to be unlawful, as a result of changes to the sex discrimination legislation. These changes recognise that pregnancy is a special position requiring special protection, and the pregnant employee no longer needs to compare her treatment to the way in which she would have been treated had she not been pregnant.

## Benefits during maternity leave

The 2008 Regulations have made changes to an employee's entitlement to benefits arising out of her terms and conditions of employment, whilst on **compulsory and additional maternity leave**.

These changes apply where a woman's expected week of childbirth begins **on or after 5 October 2008**.

There are different periods of maternity leave. '**Compulsory maternity leave**' is the first two weeks (four weeks for factory workers) immediately following the birth of a child and during which a woman is prohibited from working. Following compulsory maternity leave, there is a further 24 weeks (totalling the period up to 26 weeks), which is referred to as '**ordinary maternity leave**'. Ordinary maternity leave includes compulsory leave. Then there is an additional 26 weeks which is referred to as '**additional maternity leave**'. Additional maternity leave must be taken immediately after ordinary maternity leave.

## Discretionary bonuses during compulsory maternity leave

As a result of changes introduced by the 2008 Regulations, women are entitled to **discretionary bonuses** during **compulsory maternity leave**.

## Non-pay benefits during additional maternity leave

The 2008 Regulations have also made it clear that women on **additional maternity leave** may now be able to seek a remedy under the sex discrimination legislation, if they are not awarded the same **non-pay benefits** arising out of their terms and conditions of employment, as when on ordinary maternity leave.

These changes apply only to **non-pay benefits** arising out of their terms and conditions of employment. Employers can still make distinctions during ordinary maternity leave and additional maternity leave as regards pay.

As a result of these changes, a woman should benefit from most of her terms and conditions of employment during additional maternity leave, to the same extent as ordinary maternity leave.


### Example

Examples of non-pay benefits arising out of a female employee's terms and conditions of employment can include contractual annual leave above the statutory minimum, gym membership, participation in share schemes, health insurance, counting time spent on additional maternity leave towards length of service calculations, and the use of mobile phones and company cars (unless provided for business use only).

The **Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations (Northern Ireland) 2008**, which came into force in Northern Ireland on 1 October 2008, reflect the above changes to the sex discrimination legislation. They remove the distinction between the rights of employees on ordinary maternity leave and those of employees on additional maternity leave (apart from terms and conditions relating to pay).<sup>3</sup>

The changes apply to an employee whose expected week of childbirth begins **on or after 5 October 2008**. These Regulations provide that the seniority, pension and similar rights of an employee returning from additional maternity leave are, like those returning from ordinary maternity leave, unaffected by her absence. The Regulations also made similar amendments as regards the rights of employees on ordinary adoption leave and those of employees on additional adoption leave.

<sup>3</sup>Further guidance on maternity leave and adoption leave can be found in the Department for Employment and Learning's booklets "Maternity Rights: A guide for employers and employees" (ER16) and "Adoptive Parents: A guide for employers and employees" (ER35) which are available from [www.delni.gov.uk/erbooklets](http://www.delni.gov.uk/erbooklets).



These changes will have a significant impact on businesses which do not currently provide women on additional maternity leave with the same level of non-pay benefits arising out of their terms and conditions of employment, as they provide to them whilst on ordinary maternity leave.

### **Further Information**

Further information and advice on the sex discrimination legislation is available from the Equality Commission.

This fact sheet can be obtained in alternative formats. The Equality Commission provides a free and confidential information and advice service, and produces a range of advisory publications on the sex discrimination legislation, which can be obtained free of charge from the Equality Commission, or downloaded from its website ([www.equalityni.org](http://www.equalityni.org)).

### **Equality Commission for Northern Ireland**

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

Enquiry Line: 028 90 890 890  
Telephone: 028 90 500 600  
Textphone: 028 90 500 589  
Fax: 028 90 315 993  
Email: [information@equalityni.org](mailto:information@equalityni.org)  
Website: [www.equalityni.org](http://www.equalityni.org)

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**Equality Commission**

FOR NORTHERN IRELAND