

Briefing

Disability and the Equality Act 2010: Employment, services, public functions and Equality duty provisions

Abridged content for sample purposes

This briefing is not an authoritative statement of the law. While we have made every effort to ensure that the information we have provided is correct, Business Disability Forum cannot accept any responsibility or liability.

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Introduction

Disability and the Equality Act 2010: Employment, services, public functions and Equality Duty provisions

This is one of a series of briefings, published by Business Disability Forum, which provide practical guidance for business on specific topics relating to disabled people. It will be particularly useful for personnel or human resources managers, occupational health advisers, line managers and employment agencies.

This paper provides a brief overview of the disability provisions of the Equality Act 2010 as they relate to employment, services, public functions and the Equality Duty. It will be useful for personnel, human resources and diversity managers as well as those responsible for customer service and training. Not all the provisions of the Equality Act 2010 have been brought into force to date and the government has indicated that it intends to repeal others so the law set out below is subject to change. You should check the current position before relying on anything in this briefing.

The Equality Act 2010 gives disabled people the right not to be discriminated against in a variety of areas including employment, the provision of services and public functions in England, Wales and Scotland. The Equality Act 2010 does not apply to Northern Ireland which retains the Disability Discrimination Act 1995.

What is a disability?

The Equality Act 2010 gives rights to disabled people who have, or have had, a disability which makes it difficult for them to carry out normal day-to-day activities.

The term 'disability' covers both physical and mental impairments that have a substantial and a long-term effect on the person's ability to carry out normal day-to-day activities. A long-term effect is one which has lasted, or is expected to last, at least 12 months or the rest of the person's life if shorter.

Medical or other treatment and aids which alleviate or remove the effect of the impairment are to be disregarded when assessing whether the impairment has a substantial adverse effect on normal day-to-day activities. This means people with conditions such as insulin dependent diabetes, epilepsy or depression may be protected.

The exception is people who wear spectacles or contact lenses – the effect on them must be assessed while the person is wearing the spectacles or contact lenses.

Progressive conditions, which have a slight effect on day-to-day activities but are expected to become substantial, are covered, as are conditions that have a substantial effect for short periods but are likely to recur.

HIV, multiple sclerosis and cancer are deemed to be disabilities from the date of diagnosis. People with severe disfigurements are also deemed to be disabled by the Act, as are people who are registered as blind or partially sighted with their local authority or an ophthalmologist.

People who have had a disability in the past which had a substantial adverse effect on their normal day-to-day activities for a period of at least 12 months are also protected by the Act. This is the case even if their disability existed before the Equality Act 2010 or its predecessor, the Disability Discrimination Act 1995 (DDA) came into force and they have now fully recovered.

People associated with a disabled person and people who are wrongly perceived to have a disability are also protected from direct discrimination and harassment. The duty to make reasonable adjustments, however, does not extend to people associated with a disabled person or who are perceived to be disabled.

Association example

A woman who has a young disabled son is criticised at work for coming in late and taking time off when her son is ill. She claims that she is being discriminated against not because she has a disability but because of her son's disability. She believes that she is being treated worse than parents of non disabled children who also come in late from time to time or take time off to care for a sick child. The only difference between these parents and her is that her child has a disability and so she alleges that this is direct discrimination by association.

She cannot ask for time off to care for her son as a reasonable adjustment because the reasonable adjustment provisions of the Equality Act 2010 do not apply to people who are associated with a disabled person. She could, however, ask her employer under the Flexible Working Regulations 2006 if she could work flexibly, e.g. change her hours or work from home to fit in with her childcare, arrangements. Her employer would have to give serious consideration to her request but it could refuse if there are good business reasons for doing so.

Some conditions are, however specifically excluded from protection under the Equality Act 2010.

These are:

- Tendency to set fires.
- Tendency to steal.
- Tendency to physical or sexual abuse of others.
- Exhibitionism.
- Voyeurism.
- Seasonal allergic rhinitis.
- Addiction to alcohol, nicotine or another substance (unless the addiction was originally the result of administration of medically prescribed drugs or other treatment).

If, however, a person develops another condition as a result of or associated with an excluded condition, e.g. liver disease as a result of an addiction to alcohol, this condition might be a disability in its own right. It doesn't matter that it was caused by the excluded condition. If the consequential condition or illness has a long-term and substantial adverse effect on the person's ability to carry out normal day to day activities they will be protected by the disability provisions of the Equality Act 2010.

There is always a risk of both litigation and loss of reputation if an employer or service provider fails to follow the requirements of the law because they assume that an employee or customer will not meet the definition of disability. Remember that the purpose of a reasonable adjustment is to enable an employee to perform to the best of their ability or for a customer or service user to access your services.

If you are uncertain whether an individual is covered by the Act, you should assume that they are and make any reasonable adjustments that are necessary for them to do their job or use the service you offer.

Types of discrimination

Direct discrimination

Under the Equality Act 2010 it is unlawful for an employer, service provider or provider of public functions to treat a disabled job applicant, employee, customer or service user less favourably simply because of their disability, i.e. worse than someone without that disability when all the surrounding circumstances including the abilities of the disabled person, are the same. This type of discrimination is known as direct discrimination. It is unlawful and cannot be justified.

Discrimination arising out of disability

It is also unlawful for an employer, service provider or provider of public functions to treat a disabled person unfavourably for a reason arising out of their disability unless the treatment can be justified. A reason arising out of disability could be the ability to, work certain hours, disability related sickness absence, appearance or behaviour.

Discrimination arising from disability which occurs when:

- An employer, service provider or provider of public functions knows or could reasonably be expected to know that the person is disabled.
- The disabled person experiences unfavourable treatment which arises as a consequence of their disability.

There is no requirement for a comparator, i.e. the disabled person does not have to show that they have been treated or would have been treated less favourably than someone else.

Unfavourable treatment can only be justified if it can be shown to be a proportionate means of achieving a legitimate aim.

This means that decisions should only be made after proper investigation of the particular circumstances and not be based on stereotypical assumptions. If reasonable adjustments (see page 13) would make the unfavourable treatment unnecessary then they should be made. The treatment is unlikely to be justified if reasonable adjustments have not been made.

Example

An employer has a flexible working policy which allows employees to start work early or to work late into the evening. The employer, however, tells a disabled employee that she cannot start early or stay after everyone else has left for health and safety reasons. The employer is concerned about this employee working alone in case she is taken ill.

Ensuring the health and safety of all employees is a legitimate aim but the employer is still unlikely to be justified in refusing to allow the disabled employee to work flexibly because it has based its decisions on assumptions rather than carrying out a proper risk assessment and it has not considered any reasonable adjustments that might reduce any increased risk that there might be for this individual. The treatment, i.e. refusing to allow the person to work late or early, is unlikely to be a proportionate means of achieving the legitimate aim of ensuring health and safety.

Pre-employment enquiries about disability and health

The Equality Act 2010 prohibits employers from asking job applicants questions about their disability or health except in some prescribed circumstances.

What is unlawful?

The Act makes it unlawful for employers to ask applicants general questions about their health, medical history or disability prior to making an offer of employment.

Employers cannot ask applicants for general information about their health or a disability: for example, in a standardised medical questionnaire that asks questions about past and current illnesses, injuries, treatment or medication.

Employers who ask questions about past sickness absence on application forms or in references from previous employers requested prior to a job offer may also be acting unlawfully as this could be interpreted as asking questions about health or disability.

What is still lawful?

Employers can ask applicants if they need any reasonable adjustments for the application process, assessments or interview.

Employers can ask applicants how they will carry out any intrinsic elements of the job and if there are any limitations on them carrying out such duties. For example, employers can ask applicants for a job as a driver if there are any health restrictions on their ability to drive.

Employers can ask successful applicants health-related questions so that any necessary reasonable adjustments can be made.

Employers can ask questions about disability for equal opportunities monitoring purposes and in order to take positive action, for example, the two ticks symbol under which interviews are guaranteed to disabled applicants who meet the essential criteria for a post.

If personal knowledge or experience of a particular disability is required for the job, e.g. mental illness for a mental health case worker the employer can ask if the applicant has or had that disability.

Enforcement

The Equality and Human Rights Commission (EHRC) can take enforcement action against any employer who does ask questions about health or disability prior to the offer of a job. Employers found guilty of discrimination will be required to draw up an action plan, overseen by the EHRC. Failure to comply could result in a £5,000 fine.

In addition, a job applicant who believes that they suffered a detriment, for example by not being appointed because of questions they were asked about their health or medical history, may use the questions asked as evidence of direct discrimination and/or discrimination arising out of a disability in a tribunal claim. It will then be for the employer to prove that the answers to these questions did not influence the decision not to appoint the applicant.

Indirect discrimination

The Equality Act 2010 has introduced the new concept of indirect disability discrimination.

Indirect discrimination occurs when a seemingly neutral provision, criterion or practice that applies to everyone places a group who share a characteristic, e.g. a disability or a type of disability at a particular disadvantage.

Indirect discrimination may be justified if it can be shown that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

Example

A bank asks for a driving licence as photographic identification before allowing customers to open a certain type of account to prevent fraud. This is a rule that applies to everyone but it places some disabled people who cannot drive because of their disability, e.g. a visual impairment at a disadvantage because they do not have a driving licence. This is indirect discrimination.

Preventing fraud is a legitimate aim but accepting only driving licences as proof of identity is unlikely to be a proportionate means of achieving that aim. The bank could accept other forms of photographic identification such as passports from people who don't have driving licences.

Harassment

It is also unlawful to harass a disabled person because of their disability. Harassment occurs when an intimidating, hostile, degrading, humiliating or offensive environment is created by the perpetrator or where their behaviour violates the dignity of the disabled person.

The Equality Act 2010 currently also has provisions preventing third party harassment. This means that an employee can take action against their employer if they are:

- Subjected to harassment or unwanted conduct on three occasions, and
- The employer knew about the unwanted conduct; and
- The employer did not take reasonable steps to try to prevent the conduct.

The employee can only make a claim after the third incident of harassment.

However the Government has said that it will repeal these provisions from the Equality Act 2010.

Reasonable adjustments

An employer, service provider or provider of public functions has a duty under the Equality Act 2010 to make reasonable adjustments to prevent a disabled person from being placed at a substantial disadvantage compared to people without a disability by:

- Any provision, criterion or practice, or
- Physical feature of premises, or
- Lack of an auxiliary aid.

Where a physical feature of premises places a disabled person at a substantial disadvantage, reasonable steps must be taken to

- Remove the feature.
- Alter the feature.
- Provide a reasonable means of avoiding the feature.

The Equality Act 2010 also specifically states that where a provision, criteria or practice or lack of an auxiliary aid relates to the provision of information that information must be provided in an accessible format.

The cost of a reasonable adjustment cannot be passed onto the disabled person.

Reasonable adjustments and employment

The reasonable adjustment duty applies to all aspects of employment, including recruitment and selection, training, transfer, career development and retention.

An employer must make reasonable adjustments when it knows or could reasonably be expected to know that an applicant or an employee is at a substantial disadvantage in the workplace because of a disability.

When deciding whether or not an adjustment is reasonable an employer should consider:

- The effectiveness of the adjustment in preventing the disadvantage.
- The practicality of the adjustment.
- The financial and other costs of the adjustment and the extent of any disruption caused.
- The extent of the employer's financial or other resources.
- The availability to the employer of financial or other assistance to help make an adjustment, e.g. through the Access to Work (AtW) scheme and the support of the Jobcentre Plus.

Failure to make reasonable adjustments cannot be justified.

Whenever an employer is told or could reasonably be expected to know that an employee or applicant for a post might have difficulty doing a job because of a disability, it should investigate reasonable adjustments to the working environment or arrangements that could overcome the barriers faced by that person. Failure to do so could lead to unfavourable treatment of the person for a reason arising out of their disability if, for example, they are not appointed or promoted, or have their contract of employment terminated.

It is important to remember that treating everyone the same does not mean that everyone is treated fairly. The Equality Act 2010 requires people to be treated differently according to their needs by making reasonable adjustments for them.

Which employers are affected?

The Equality Act 2010 applies to all employers regardless of size. It also now covers the following people who were previously excluded:

- Prison officers.
- Fire fighters.
- Police officers.
- Partners in firms, barristers.
- Office holders.
- People undertaking practical work experience for the purposes of vocational training.
- People employed on board ships, hovercrafts and aeroplanes.

People who work outside the UK, but for an establishment based in the UK, also have the protection of the Act. The armed forces, however, continue to be exempt.

Quota Scheme

Registration as disabled (known as the 'Green Card') and the Quota Scheme ended with the introduction of the Disability Discrimination Act 1995 (DDA) which preceded the Equality Act 2010.

Disabled people no longer need to register, and employers are no longer required to employ a quota of registered disabled people. The only exception is that people who are registered as blind or partially sighted by an NHS consultant ophthalmologist or local authority are deemed to be disabled.

There is, however, nothing to stop employers setting targets for the employment of disabled people and most employers can advertise jobs as open only to disabled candidates. This is because the disability provisions of the Equality Act 2010 are asymmetric in that they provide protection from discrimination only to disabled people. For more on recruitment of disabled people see the 'managing recruitment' briefing.

Trade organisations and qualifications bodies

The Act makes it unlawful for a trade organisation to discriminate against a disabled person in relation to membership of the organisation or access to membership benefits. The Act also makes it unlawful for a qualification body to discriminate in relation to conferring professional or trade qualifications.

Employment services

It is unlawful for employment service providers to discriminate against disabled people looking for employment. Employment service providers include both public and private sector employment and recruitment agencies.

Reasonable adjustments and goods, facilities, services and property and providers of public functions

The Act prohibits discrimination by anyone who provides goods, facilities or services or public functions to members of the public whether paid for or free.

Providing goods and services could range from selling groceries in a supermarket, buying train tickets online, to booking an appointment to see a GP. A public function is something that only a public authority can carry out; for example, arresting and detaining a suspect, imprisoning someone who has been convicted of a criminal offence, collecting taxes or processing applications for benefits.

Service providers and providers of public functions must also make reasonable adjustments to the way their services are provided to prevent disabled people being placed at a substantial disadvantage. This is an 'anticipatory duty'.

This means that, unlike the employment provisions where an employer only has to make reasonable adjustments when it knows (or ought reasonably to be expected to know) that a disabled person needs them, service providers must anticipate that they will have disabled customers and have made adjustments for them in advance.

If, however, even with the anticipatory adjustment, a disabled person is still substantially disadvantaged when using the service because of their disability the service provider must make a further adjustment specifically for that person.

Example

A shop owner has widened walkways and lowered shelves in anticipation of the needs of wheelchair users. However, a customer who is a wheelchair user is still not able to reach goods on

the shelves because he has limited movement and cannot lift heavy items off the shelves. A further reasonable adjustment for this customer would be for an employee of the shop to help him with his shopping by taking items off the shelves and taking them to the checkout for him. Remember that a reasonable adjustment is sometimes a person who can help the disabled customer.

Specifically, service providers must consider:

- Providing equipment or other aids which make it easier for disabled people to use their service, if it is reasonable to do so. For example, an induction loop for people who use hearing aids, or information in an alternative format such as large print for someone with a visual impairment or easy read for someone with a learning disability.
- Changing any provisions, criteria or practices which place disabled people to use the service at a substantial disadvantage, for example, accepting complaints by email where an individual is unable because of their disability to comply with a policy requiring all complaints to be made by telephone.
- Altering, removing or finding means of avoiding physical features of their premises where this is needed to provide reasonable access to disabled people (e.g. by installing ramps or widening doorways).
- Where physical features of premises place disabled people at a substantial disadvantage when using the service and it is not reasonable to alter them, providing other ways of letting disabled people use their services. For example, if a library's reference section is on the first floor and it is not reasonably possible to install a lift, library staff could offer to bring reference books to a disabled person who cannot climb stairs.

If a service provider has a choice of adjustments that could be made to overcome a barrier that a disabled person faces he must make the one that would enable the disabled person to enjoy a service that is as close as possible to that of non-disabled people.

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