

Briefing

Health and safety and the Equality Act 2010

Abridged content for sample purposes

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Introduction

Health and safety and the Equality Act 2010

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

This briefing offers guidance on the interaction between the Equality Act 2010 and other legal duties of the employer to ensure the health and safety of all employees. It provides practical information for employers on the development of effective health and safety policies and procedures to ensure the safety of all employees without unfairly discriminating against disabled people.

In addition, it offers guidance on ways to ensure an employer's duties under health and safety legislation both complement and supplement their duties under the Equality Act 2010. Finally, it will assist employers to promote and maintain safe and healthy working environments to the benefit of both disabled and non-disabled employees.

Health and safety legislation

Under health and safety law it is the duty of every employer to provide a safe system of work for all employees.

The Health and Safety at Work Act 1974

The Health and Safety at Work Act 1974 imposes several statutory duties upon the employer. For example, the employer must, "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all employees".

Employers also have duties to protect the health and safety of others not directly in their employment, but who may be affected by the employer's activities or undertakings. For example, contractors, visitors, customers, members of the emergency services, and members of the public.

Employers' duties for the health, safety and welfare of all employees extend to:

- The provision and maintenance of plant and systems of work.
- Use, handling, storage and transport of articles and substances.
- Provision of information, instruction, training and supervision.
- Places of work and means of access and egress.
- The working environment, facilities and welfare arrangements.

The Management of Health and Safety at Work Regulations 1999

The Management Regulations give guidance to employers on how to manage their duty to provide safe working practices in a systematic way.

They require an employer to:

- Conduct risk assessments – make a suitable and sufficient assessment to identify the risks to the health and safety of their employees, and identify related precautions to manage these risks.
- Implement management systems – to ensure that precautions are implemented.
- Appoint a competent source of health and safety advice.
- Develop emergency procedures.

The Approved Code of Practice to the regulations states that employers, in undertaking their risk assessment, should identify groups of workers who might be particularly at risk. It refers to disabled staff as one of these groups.

Breach of this duty may lead to an improvement or prohibition notice being imposed on an employer or a criminal prosecution. Breach of more specific duties may also give rise to civil action against an employer.

Fulfilling your responsibilities under health and safety legislation and the Equality Act 2010

Unlike other anti-discrimination legislation, the Equality Act 2010 allows for circumstances under which treating a disabled person unfavourably because of a disability may be justified if it is a proportionate means of achieving a legitimate aim (unless the need for the unfavourable treatment could be removed by providing a reasonable adjustment).

In limited circumstances the failure to retain a disabled employee or recruit a disabled applicant may be justified if it can be shown that there is an unacceptable risk to the disabled person's own safety or the safety of others, and that this risk cannot be managed.

In the vast majority of cases health and safety presents no barriers to the employment of disabled people.

However, health and safety is frequently used as the rationale for the non-recruitment or dismissal of a disabled person.

Employers often have a mistaken belief that the employment of disabled people will present an unmanageable risk to the health and safety of both the disabled person and their colleagues. This belief is particularly entrenched in employer's attitudes towards individuals with impairments such as diabetes, epilepsy or mental health problems.

Research sponsored by the Health and Safety Executive (HSE) and the Disability Rights Commission (DRC) in 2003 found that:

- One in five large employers had decided not to offer a job to an applicant with a disability, ill-health condition or injury because of health and safety concerns. One third had dismissed an employee with a disability, injury or ill-health condition on grounds of the perceived risk to health and safety.
- One in four occupational health advisers interviewed felt that there was a conflict between the requirements of the DDA (now part of the Equality Act 2010) and compliance with health and safety legislation.
- Nearly one third of health and safety practitioners had health and safety concerns regarding the employment of people with disabilities, injuries or ill-health conditions.

The findings of this report suggest there is a lack of understanding among some employers about what constitutes a genuine health and safety risk. Lack of knowledge about the impact of a particular condition or disability can result in a paternalistic and overly cautious assessment of a disabled person's capacity to do a job.

Situations may arise where an employer believes they cannot meet their statutory duties under health and safety law if they employ a disabled person in a particular job. However, if this belief proves ill-founded, this may result in unlawful discrimination and litigation under the Equality Act 2010.

Where health and safety is put forward as the reason for refusal to recruit or retain a disabled individual, employers must be sure that the reason is justifiable.

To meet your obligations under both health and safety and equality legislation you are advised to:

- Adopt a case management approach.
- Make an individual, objective and competent assessment of any risks associated with employment of the disabled individual.
- Implement 'reasonable adjustments' which would reduce or remove risks for the individual.
- Do all that is 'reasonably practicable' to remove or reduce risks associated with the environment or work activities and to uphold safe working practices.
- Deal reasonably with any cases involving residual risks.

Case management approach

A case management or disability management approach can prove extremely effective in managing the health and safety of disabled employees at work in ways which are mindful of the employer's duties under both health and safety legislation and the Equality Act 2010.

A case management approach can result in:

- Early identification of employees' and prospective employees' requirements.
- Efficient provision of reasonable adjustments.
- The implementation and maintenance of safe and efficient working systems.

The crucial component is co-ordination of the many factors and personnel who may be involved. This is best accomplished by appointing a disability management co-ordinator.

The disability management co-ordinator is pivotal to the system, linking together expertise in assessment, operation and review. Human resources managers often take on this role.

A collaborative approach is important as advisers will need to work as a team especially on policy-making reviews and in resolution of disagreements. It is the disability management co-ordinator who guides this process as 'case manager'.

The disability management co-ordinator's duties are likely to include:

- Identifying individuals who need disability management or support in the course of their employment.
- Working closely with the individual through the assessment, decision making and review process.
- Managing the redeployment process where necessary.
- Protecting the individual's rights, ensuring confidentiality and explaining these to the individual.
- Managing assessment and the commission of specialist advice where needed.
- Briefing advisers thoroughly.
- Co-ordinating the functional analysis of particular jobs including core competencies and capability standards required.
- Gathering reports for cross-disciplinary review to interpret assessments and adjustments recommended, i.e. equipment, changes to the environment or modifications to the job, supported as appropriate by training.
- Documenting the process in relation to each individual, including any material and substantial justifications for less favourable treatment.
- Managing the termination of employment where necessary.

The key players in disability case management are:

- The disabled individual.
- Disability management co-ordinator.
- Line manager.

and, as appropriate:

- Human resources manager.
- Occupational health adviser.
- General practitioner (GP).
- Specialist medical adviser or paramedic such as an occupational therapist, physiotherapist or psychiatric nurse.
- The Access to Work (AtW) adviser who can offer a range of practical and financial assistance.
- Health and safety officer.
- Ergonomic specialist.
- Other employee representative.

Risk assessment

Risk assessments are integral to the effective and systematic management of health and safety for all employees, including those with a disability.

The purpose of a risk assessment is twofold:

- To identify any hazards associated with a particular work environment, facility or activity, which have the potential to cause harm.
- To assess the level of risk that each hazard poses based on the likelihood that the hazard will actually result in the particular circumstances and the severity of the consequences of this.

The risk assessment provides an employer with necessary information to identify hazards and lower the risks associated with each work activity. Through risk assessments employers are able to design effective policies to control identified risks and to establish procedures for safe systems of work.

Individual and competent risk assessment

In some cases an employer may need to conduct an individual risk assessment for a disabled employee or applicant to determine whether the individual's particular disability presents any increased risks either to themselves or others when working in a specific role or environment.

An individual and competent risk assessment will provide the means of ensuring that any genuine concerns can be addressed in ways which are rational, proportionate to the level of risk, and which do not unduly disadvantage the disabled person.

Such risk assessments must always be specific to the particular individual, job-role and working environment concerned. It is therefore unlikely that an organisation that has a general policy of excluding or restricting the career opportunities open to people with particular impairments will be able to justify doing so, even if this policy is in accordance with the advice of an occupational health adviser.

For example, a children's nursery that has a blanket prohibition on employing anyone with epilepsy without conducting competent risk assessments on individual applicants is likely to be guilty of direct discrimination under the Equality Act 2010.

Remember, when conducting a risk assessment, those involved must:

- Focus on facts, not assumptions.
- Assess the individual and avoid blanket restrictions.
- Discuss with the individual how limitations may be overcome.
- Obtain the best medical evidence on prognosis and associated occupational hazards/risks.
- Consult with other practitioners.
- Relate the individual's requirements to the essential requirements of the job.
- Consider all relevant occupational factors.
- Identify the actual duration and frequency of hazardous situations.

Identify potential adjustments

To make an individual, objective and competent assessment of any risk associated with the employment of a disabled person, employers are advised to:

Identify the hazards

Make a list of the activities that the disabled person will be expected to perform and identify any potential hazards that may arise from these activities or from features of the working environment.

Assess the impact of the individual's disability

Ensure that whoever is responsible for conducting the risk assessment has adequate information and understanding about the impact that the individual's impairment is likely to have upon their ability to perform their duties, and their vulnerability to workplace hazards. Consult the employee, your occupational health specialist, and with the employee's own medical adviser (with their consent) if necessary.

Evaluate the extent of the risk

Take into account any reasonable adjustments that either have been, or could reasonably be, provided and evaluate their effectiveness in assisting the disabled person to avoid/reduce the risk. Make sure that any cases involving residual risks are dealt with rationally and reasonably, and those decisions are based on the real likelihood of a hazard posing a problem in the circumstances.

Record the significant findings of the assessment

This will be invaluable to informing management of reasonable adjustments under the Equality Act 2010, and responsibilities under health and safety legislation. If a risk assessment identifies that, even with reasonable adjustments, it is not possible to manage the risk, these records will constitute important evidence in the event of tribunal proceedings.

Review the assessment at regular intervals

Effective risk assessment is a continual process. Changes in the impact or effect of an individual's disability or condition on his or her working activities may require a new risk assessment. Similarly, changes to an individual's role as their career progresses may also require a new risk assessment. Changes to the working environment such as refurbishments or alterations to the premises, changes to policies or procedures, or the provision of new machinery or equipment may require a new risk assessment to be conducted.

NB: Employers are advised to consider the impact of organisational and structural change on their employees, including their disabled employees, before investing in new workplace features, e.g. telephone or computer systems or procedures which may result in the requirement under the Equality Act 2010 to make costly adjustments retrospectively.

Under health and safety legislation, a risk assessment must be suitable and sufficient.

An employer should not subject a disabled person to a risk assessment if this is not merited by the particular circumstances of the case. To do so may amount to discrimination.

Reducing risk through reasonable adjustments

Reasonable adjustments made by an employer fulfilling their duties under the Equality Act 2010 may remove or reduce a health and safety risk related to a person's disability.

Examples of reasonable adjustments might include:

- Making adjustments to premises.
- Acquiring or modifying equipment.
- Allocating some of the disabled person's duties to another person.
- Giving or arranging training or mentoring (whether for the disabled person or for any other person).
- Providing additional supervision.

For more information about reasonable adjustments, including guidance on what is meant by 'reasonable' see the 'adjustments in employment' briefing.

If you need to make reasonable adjustments remember your employee may be entitled to support from the Access to Work (AtW) scheme.

Access to Work (AtW) is a government run programme that offers financial support for reasonable adjustments, such as a support worker. For more information contact an Access to Work (AtW) Adviser who will tell you more about the scheme and how it could help you. For more information about the Access to Work (AtW) scheme visit the Business Disability Forum website at www.businessdisabilityforum.org.uk

Reducing risk through reasonably practicable adjustments

Under the Health and Safety at Work Act 1974, employers have wide-ranging duties to ensure, so far as is reasonably practicable, the health, safety and welfare, of all employees. This includes the requirement to adjust the workplace to reduce risks so far as is reasonably practicable. In practice therefore, the Act requires reasonably practicable adjustments to be made, although this is not a term used in the statute.

The employer's duty to make adjustments to its premises to reduce risk as far as is reasonably practicable both complements and supplements the Equality Act 2010. In many cases reasonably practicable adjustments will be the same as reasonable adjustments. However, a risk assessment approach may enable organisations to identify additional 'control measures' that may serve as reasonably practicable adjustments to reduce risk.

Control measures

Hazard elimination – to remove the hazard through design improvements or by just deciding not to attempt the work.

Hazard substitution – to replace the source of the hazard can lower the risk, e.g. replacing one chemical with another less dangerous one, or using a more appropriate (safer) piece of equipment.

Use of barriers – hazard isolation – to reduce contact with a hazard through use of barriers or other isolation techniques, e.g. by erecting a safety guard around a dangerous piece of machinery, or alternatively segregate employees from contact with a hazard by transferring them to a protective space for example a soundproof workroom or a sterile laboratory.

Use of procedures – introducing and monitoring safe systems of work to limit exposure to hazards and to define acceptable limitations on the work.

Procedures may include ongoing risk assessments and appropriate supervision and training for employees.

Use of warning systems – use of signs, instructions and labels to alert employees to potential hazards and to reinforce procedures around safe systems of work.

Use of personal protective equipment – provision of personal protective equipment, if used appropriately, may safeguard employees against any residual risks relating to a particular occupational hazard.

How do reasonable adjustments compare with reasonably practicable adjustments?

Guidance on Health and Safety at Work Act 1974 indicates that the financial standing of the employer is not relevant to the judgement of reasonable practicability. Arguably therefore, the duty to make adjustments under health and safety law may be more stringent than under the Equality Act 2010.

It is also worth noting that while employers have a duty to make reasonable adjustments only in respect of individuals who fall within the definition of disability given in the Equality Act 2010, any employee with any condition which has implications for health and safety, is protected by the duty to make reasonably practicable adjustments.

When managing health and safety, both the duties under the Equality Act 2010 and under health and safety law are relevant. The employer must fully explore the potential of both reasonable adjustments and reasonably practical adjustments to eliminate risks and to avoid unfair treatment.

Adjustments in action

Here are some examples where reasonable or reasonably practical adjustments may have an impact in reducing the level of risk that a disabled employee is exposed to:

- Modifying a job description to remove non-essential, but potentially hazardous duties may allow employment with minimal disruption, e.g. removal of the occasional requirement to lift for a person with arthritis, or the removal of the minor requirement to work at heights for a person with epilepsy.
- Replacing a sensitising or irritant product with an alternative may, together with health surveillance, enable an employee with asthma or eczema to continue working as a paint sprayer or cleaner.
- An employee of a factory has a substantial hearing impairment but is unable to wear hearing protection because it impairs communication. There is concern that noise exposure from nearby machinery may cause further damage. The health and safety adviser and occupational physician recommend that compliance with health and safety law could be achieved by the installation of sound barriers and regular audiometric surveillance. Because of the considerable expense involved, the managing director takes further advice and concludes that the recommended measures may not be required as reasonable adjustments on cost grounds, but to avoid a breach of health and safety law it would be prudent to implement them as reasonably practicable adjustments.

Dealing with residual health and safety risks

Despite adjustments, the employment of a disabled person may still entail health and safety risks to the individual or to others. Unacceptable residual risks, properly assessed as such under health and safety law, may be justification under the Equality Act 2010 for rejection at recruitment or even dismissal if no redeployment options are available.

However, risks may embrace a spectrum from trivial to serious. Health and safety law does not require employers to remove all conceivable risk, but to ensure that risk is properly appreciated, understood and managed. The question will therefore arise for employers, “what is acceptable or unacceptable?”

This is a complex area. However, important principles of good practice in the following areas should be considered.

Management and medical responsibilities

Human resource managers often ask a doctor to assess fitness for work when the employment of a person with a medical condition may give rise to risks. This does not mean that the decision on employability is a medical responsibility. The doctor’s role is to assess the risks and present them as clearly as possible.

It is then the employer’s responsibility to decide on the acceptability of risks after reasonable adjustments have been made under the Equality Act 2010 and health and safety legislation. Specialist occupational physicians, however, may be able to assist employers in deciding the level of risk that is acceptable.

For more information about the use of occupational health specialists refer to the ‘disability management and the medical adviser’ briefing.

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