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## **Member Brief No 80**

### **The Equality Act and Pre-Employment Health-Related Checks**

#### **Introduction**

The bulk of the [Equality Act 2010](#) (“the Act”) became law on October 1<sup>st</sup> 2010.

One of the key aims of the Act is to harmonise discrimination law by bringing together the “Protected Characteristics”; the grounds on which discrimination will be unlawful. These characteristics are: Age, Disability, Gender Reassignment, Marriage and Civil Partnership, Pregnancy and Maternity, Race, Religion or Belief, Sex and Sexual Orientation.

Obligations on employers remain largely the same and ACAS has produced a useful guide entitled [“The Equality Act – What’s new for employers?”](#) which outlines key points on types of discrimination, the protected characteristics and key changes.

One significant change is that, due to apparently high levels of discrimination against disabled people in employers’ recruitment processes, and concerns that people are often put off even applying for jobs because of pre-employment health questions, the Act limits the circumstances when health related-related questions can be asked before the individual has been offered a job.

Labour providers who are still routinely asking job applicants to complete pre-employment health questionnaires as a matter of course before a formal job offer is made should change their recruitment policies and practices.

#### **What the Act requires with regard Pre-Employment Health-Related Checks**

Section 60 of the Act states that except in the situations specified below, an employer must not ask about a job applicant’s health until that person has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful candidates to be offered a job when a suitable position arises. Making an offer of work subject to a satisfactory medical is therefore perfectly in order.

The specified situations where health related enquiries can be made before an offer is made are where this is necessary to:

- find out whether reasonable adjustments have to be made to the normal job application process (e.g. if the normal interview room is up steep stairs); or
- find out if the job applicant will be able to carry out a function that is intrinsic to the work concerned with reasonable adjustments in place as required; or

- monitor diversity in the people applying for work;
- take positive action to assist a disabled person where that is allowed by other provisions; or
- find out that a job applicant has a particular disability where the job genuinely requires that they have that disability, or
- where they are needed in the context of national security vetting.

Of most interest to recruiters is the exception that allows health-related questions that determine whether the job applicant “will be able to carry out a function that is intrinsic to the work concerned”. The Act's [explanatory notes](#), provide the following example:

*"An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job."*

### **The Potential Penalties**

Section 60 of the Act, subsection (3) informs us that with regard to any questions asked about the applicant's health:

*(3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.*

This means that where there is a complaint that a recruiter is merely asking a health related enquiry in contravention of the provisions then this may give the Equality and Human Rights Commission the power to investigate and issue an "unlawful act notice".

However, in a situation where an employer makes a health related enquiry in contravention of the provisions and an applicant suffers a detriment e.g. is rejected due to some unsatisfactory answer they gave; the applicant can make a claim to an Employment Tribunal for direct disability discrimination. An employer who is sued will have an uphill struggle to avoid liability as the burden of proof will generally be reversed. A specific provision ensures that an employment tribunal must treat the allegations in a rejected job applicant's complaint as "*facts from which the court could decide, in the absence of any other explanation*" that the employer was in breach of the rules - in other words, it will be for the employer to show that it had not discriminated against the candidate.

### **Actions for Labour Providers**

Labour providers must review their pre-employment health questions to ensure that they are likely to be compliant with the new restrictions.

It will be important to word questions appropriately and to ensure they go no further than is necessary in order to establish the relevant information.

Particular attention should be given to the following:

- Labour providers should agree, with each labour user to whom they supply workers, the questions that are required in the selection process to establish whether the applicant will be able to carry out a function that is intrinsic to the work concerned. These should be the same questions that the labour user would ask if they were recruiting directly.

This should specify at which stage health related questions should be asked i.e. at interview / registration or once that person has been either offered a job, on a conditional or unconditional basis, or been included in a pool of successful candidates to be offered a job when a suitable position arises.

- Only questions which are necessary and which fall into one of the excluded categories should be asked prior to employment. These are predominantly questions asked solely for the purposes of establishing whether the applicant will be able to carry out a function that is intrinsic to the work concerned, or whether any adjustments may be required should the individual be engaged.
- With regard to a generic question such as: “Taking into account the work that you are applying for, do you have any health related condition that may affect your ability to do the work? The Equality and Human Rights Commission (EHRC) lawyers have commented: “Applicants may not understand the question because it is too general. It is also potentially discriminatory because it would probably fail the ‘essential to the job’ test because it is so vague.”
- Questions about current health would be more acceptable than those about work seekers’ past health. For example, a question beginning "Have you ever suffered from...?", is likely to fall foul as it is not focused on the applicant's current ability to carry out a function that is intrinsic to the work concerned.
- Labour providers should ensure that the reasons for recruitment decisions that are based on responses to pre-employment health-related questions are documented and filed, in case any grievances are raised by job applicants that are not offered positions.
- For food handler roles, health information is required from job applicants to determine that they do not present a food safety risk. The law requires that:

“No person suffering from, or being a carrier of a disease likely to be transmitted through food or afflicted, for example, with infected wounds, skin infections, sores or diarrhoea is to be permitted to handle food or enter any food-handling area in any capacity if there is any likelihood of direct or indirect contamination.”

The Food Standards Agency has produced a booklet entitled [“Food Handlers: Fitness to Work - Regulatory Guidance and Best Practice Advice for Food Business Operators”](#). Based on this guidance the Association proposed specific pre-employment food safety related health questions as contained in the table below to the EHRC lawyers for comment who replied: “They could probably justify the other questions as being essential to the job. However in my opinion the question that relates to a recurring bowel disorder should be removed because presumably someone with Crohn's disease could work safely with food and their guidance says people who have had a colostomy can too. The question “Do you suffer from a recurring bowel disorder?” has therefore been removed from the questions below.

Do you need us to make any adjustments to the selection process because you are a disabled person or due to a health related condition?	Yes/No	If Yes Please Give Details
<b>UK and EC legislation puts the onus on employers to satisfy themselves that no food handler poses a hygiene risk to the product. Please answer the following questions if you will be working with food.</b>		
At present, or in the last seven days, are you suffering from diarrhoea and/or vomiting?	Yes/No	If Yes Please Give Details
At present, or in the last seven days, are you suffering from stomach pain, nausea or fever?	Yes/No	If Yes Please Give Details
At present, are you suffering from skin infections of the hands, arms or face e.g. boils, styes, septic fingers or discharge from eye / ear / gums / mouth?	Yes/No	If Yes Please Give Details
At present, are you suffering from jaundice?	Yes/No	If Yes Please Give Details
Do you suffer from recurring infections of the skin, ear or throat?	Yes/No	If Yes Please Give Details
Have you ever had typhoid or paratyphoid fever or are you now known to be a carrier of Salmonella Typhi or Paratyphi?	Yes/No	If Yes Please Give Details
Are you a carrier of any type of Salmonella?	Yes/No	If Yes Please Give Details
In the last 21 days have you had contact with anyone, at home or abroad, who may have been suffering from typhoid or paratyphoid?	Yes/No	If Yes Please Give Details
Countries visited in the last 6 weeks:		

Case law will no doubt define what is and what is not acceptable more precisely but in the meantime labour providers should err on the sign of caution. As stated previously this is an area where the recruiter will generally be treated as "guilty" unless he can prove himself innocent.

On a final note, these new rules are about what happens before a job offer is made. Disability discrimination rules applying after a job offer has been made will continue more or less as at present.

If you have a question for the ALP Legal Support Service on this or any other matter, please call 01276 509306 or email [info@labourproviders.org.uk](mailto:info@labourproviders.org.uk).