

pre-employment health questions

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A brief guide...

The Equality Act contains a new provision relating to disability discrimination which is the ban on asking pre-employment health questions. Once a job offer has been made it is acceptable for questions to be asked but employers must ensure the responses do not influence their decision not to employ a disabled applicant. The applicant should be selected on the basis of his or her skills, attributes and aptitude, not on whether they have a disability or not.

Section 60 of the Equality Act states:

1. A person (A) to whom an application for work is made must not ask about the health of the applicant (B) –
 - (a) before offering work to B, or
 - (b) Where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.

These provisions apply to any person recruiting, including a recruiter working on an employer's behalf. They also apply when recruiting for contract work, business and limited liability partnerships, enlisting the services of a barrister and other similar situations. The provision is to be widely applied.

It is worth noting that questions relating to previous sickness absence are considered to be questions that relate to disability or health.

It is unlawful for an employer to ask any job applicant about their health or disability unless a job offer has been made.

There are six specific circumstances when health questions are allowed. They are:

1. To determine whether any reasonable adjustments need to be made so that the applicant can participate in the recruitment process and any assessment contained in it, s.60(6)(a). It is fine to state on an application form "if you are disabled and require any adjustments for interview please contact us". Questions about reasonable adjustments required for doing the job itself should not be asked until after an offer is made.
2. To determine whether the applicant can take part in an assessment to determine suitability, s.60(6)(a). The example given in the Code is of an outdoor activity centre that is recruiting play workers. The employer can ask the applicant about health to determine if they are able to take part in a practical test (which requires mobility).
3. To establish whether the job applicant can do the job. For instance, if the applicant is mobility impaired an employer is entitled to determine whether he can scale a ladder which is an intrinsic part of the job, s.60(6)(b).
4. To monitor diversity among applicants (as long as this information is kept separate from application forms), s.60(6)(c).
5. To implement positive action measures, s.60(6)(d). The example given in the Code is a guaranteed interview scheme for disabled applicants operated by an employer whose workforce is underrepresented by disabled employees.
6. To fill a job which requires the applicant to be disabled. For example an employer wants to recruit a deafblind worker who has personal experience of this disability. It is lawful for the employer to ask about the disability on the application form in such a circumstance.

Apply the exceptions narrowly

The exceptions should be applied narrowly. The best course of action unless it is absolutely vital to the job or the application process is not to ask health-related questions. Even if one of the exceptions above applies, employers and recruiters should refrain from asking further questions about disability other than what they strictly need to know. If a disabled applicant volunteers information, an employer or recruiter should not view this as carte blanche to start asking lots of questions. The rules as to not asking still apply. Let the candidate say as much as he or she wants but avoid probing as this could give rise to unlawful discrimination even if it occurs with the best possible intentions.

Can I make the offer conditional on health checks?

Yes, it is lawful to make a job offer conditional upon satisfactory responses to pre-employment health enquiries or health checks. However, employers must be careful not to discriminate solely on the basis of the response to such checks and enquiries. If the employer rescinds the offer because a disability is revealed this may be unlawful direct discrimination. When a disability is revealed that is the time for the employer to consider reasonable adjustments which can be made as opposed to dismissing the candidate out of hand because of a disability.

If an employer has pooled a selection of candidates but is not yet in a position to offer a job it is lawful for them to ask health questions at this stage.

What do I do with the health enquiry results?

Where pre-employment health enquiries are made, the employer must not use the outcome of those enquiries to discriminate. The example in the Code is of a woman with HIV from whom an offer is withdrawn on discovery of this information. In practice it might not be straightforward for a candidate to demonstrate that this is the reason for not being given the role. However, where an employer has one or more equally qualified candidates and the one who was turned down for the job happens to be disabled, this might give rise to a presumption that it is on the basis of a newly discovered health information.

The role of Occupational Health

In practice Occupational Health practitioners should be working alongside employers to devise job application forms, assessments and policies which, wherever possible, steer of making any health-related enquiries unless absolutely necessary and intrinsic to the role in question. This is the safest course of action. Occupational Health also has a key role in showing the employer that the disabled applicant may be able to fully perform the role once reasonable adjustments have been made.

What is the applicant's remedy?

If an applicant thinks an employer has acted unlawfully by asking health-related questions they are entitled to complain to the Equality and Human Rights Commission (EHRC) which can use enforcement powers against the employer. Even if the person concerned is not actually disabled but there is a perception that he or she is, they can complain to the EHRC. Asking health-related questions is not a ground for bringing a claim in the Employment Tribunals unless the questions have led to direct discrimination. If the information is not used by the employer in making a decision to offer the job, no discrimination will have occurred.