

THE IMPACT OF THE EQUALITY ACT ON PRE-EMPLOYMENT SCREENING

BACKGROUND

The Equality Act affects employers from 1st October 2010. Many organisations are still uncertain how it will affect screening of new recruits. There is an assumption that pre employment screening is banned. However, it will not actually be illegal to ask new recruits questions about their health. The timing is critical as is the appropriateness of the questioning.

In recent years it has been considered poor employment practice to allow an offer to be affected by knowledge of a disability, as this could be construed as discriminatory under the Disability Discrimination Act. What the Equality Act does is enshrine good practice into law with a view to treating all potential candidates with parity, fairness and the removal of discrimination from the selection process.

This law proposes that ill health (past or present) should not be a barrier to work and those individuals should not be 'put off' applying for jobs just because they will be subject to medical assessment before hand.

The Act says

Section 60(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 who A intends (when in a position to do so) to select a person to whom to offer work

This covers pre-employment questionnaires, the general use of health questions within application forms and questions asked at interview; including potentially the questioning about a person's sickness absence.

THE EMPLOYER WILL STILL BE ABLE TO ASK QUESTIONS ABOUT HEALTH ONCE AN APPLICANT IS OFFERED THE JOB

The provision of the Act is designed to prevent the use of 'pre-employment' questionnaires and blanket questioning of candidates about their health, which are undertaken before a decision would otherwise be made on whether an offer is made. Section 60(6) does not apply to questions that are necessary to:

"Consider reasonable adjustments during the recruitment process; establish whether the applicant can carry out an intrinsic function; monitor diversity; take positive action for disabled people; or genuine occupational requirement for job to be done by a disabled person."

Generally speaking this means that health screening can still be done after a job offer is made. The offer can however still be conditional upon satisfactory (and relevant) pre entry screening.



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Where the applicant is required to carry out a function that is intrinsic to work, some questioning about health will still be allowed prior to job offer. The explanatory notes to the Act give the example of an applicant who applies for a job in a warehouse that requires manual lifting and handling of heavy items. As manual handling is a function, which is intrinsic to the job, the employer may ask the applicant relevant questions about their health to establish whether or not they are able to do the job (and to consider the application of reasonable adjustments if necessary).

It is still absolutely essential for reasonable adjustments to be considered. It is likely that until the Act has been tested, many employers will want to proceed cautiously. Our advice is that in general and initial communications, application forms, etc. the employer should only ask questions about health that may affect the 'interview process for the relevant position' with regard to disability and the making of reasonable adjustments i.e. it is acceptable to ask candidates if they require any adjustments to be made to the proposed interview format to accommodate a health condition/disability, to enable access to site etc. In addition they may choose to ask specific questions where there is a statutory requirement of fitness intrinsic to the job e.g. a railway worker. Please take caution to ensure relevance, timeliness and appropriateness of such questions.

MANAGING HEALTH ASSESSMENT IN PRACTICAL TERMS

It will not automatically be discriminatory to ask questions about a person's health after a job offer has been made, although the treatment of such information will be crucial.

In the period immediately after the introduction of the Act, it is likely that the way that new questionnaires phrase such a question will be subject to much debate. It would appear that the functional aspect of the role is most important. The questionnaire would need to be either tailored for each role in order to ensure that the line of questioning is appropriate or be very generic in its questioning e.g. "Do you believe that you are fit for the role of ...?" "Do you think that you are physically fit and capable of undertaking the physical requirements of the role?"

It is essential to remember though that the conduct of the employer in reliance on interpreting the answer could still be considered discriminatory.

Where an individual alleges discrimination through health screening the onus on an employer will be that they will need to prove that they have not used health screening to discriminate in the selection process and that all reasonable measures to removing barriers to work have been explored. The use of questions, which cover only intrinsic functions of the role, or general questioning about health, will therefore be a part of the representation of 'appropriate and reasonable behaviour by the employer'.

Paradoxically, health screening using a trusted party such as an occupational health provider and good personnel/management records to show the serious consideration of managing ill health conditions and the making of reasonable adjustments is likely to reduce the likelihood of an employee bringing a discrimination case as the employer is more likely to have acted responsibly, within the law and following best practice.

This article is not intended to replace the advice of a qualified lawyer.



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