

Pre-employment health questions

Guidance for job applicants
on Section 60 of the Equality
Act 2010

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Introduction

Section 60 of the Equality Act 2010 makes it generally unlawful for you to be asked questions about your health or disability before you are offered a job. The Commission can take legal action and you may have a claim of disability discrimination if you are asked unlawful questions.

The legal interpretation of Section 60 can be found in our publication: Employment Statutory Code of Practice, at pages 126 to 131. Please see our website: www.equalityhumanrights.com. We also refer to it in our Equality Act 2010 guidance for workers: Your rights to equality at work: When you apply for a job (also available on the Commission's website).

The purpose of Section 60

The purpose of Section 60 is to prevent information about your disability or health being used to reject your job application without first giving you the opportunity to show that you have the skills to do the job.

What and who does Section 60 apply to?

Section 60 applies to:

- any job recruitment process in England, Scotland or Wales involving internal or external applicants, and also to selecting a pool of candidates who may be offered work in the future
- employers, employment agencies and authorised agents
- all applicants for work and all individuals and organisations offering work
- contract workers, partnership positions, pupillages and tenancies (including Scottish equivalents) and appointments to personal or public office.

What enquiries does Section 60 prohibit:

- Enquiries by or on behalf of an employer about your disability and health during the recruitment process up to the point when a job offer is made.
- Written and verbal questions put to you and to any third party – for example, your current or ex-employer.

The job offer can be conditional or unconditional. An employer can make you an offer conditional on medical checks and then ask health-related questions without being in breach of Section 60.

More information about being made an offer conditional on medical checks can be found in our Equality Act 2012 Guidance for Employees – Your rights to equality at work: when you apply for a job.

Exceptional circumstances when health questions are permitted

Section 60 allows questions about health and disability to be asked before you are offered a job only when the law says they are **necessary** and fall within these narrow exceptions:

1. To find out if you can take part in any assessment to test your ability to do the job or to find out if reasonable adjustments are needed to enable you to take part in any assessment if you are disabled (see frequently asked question 9 below). **This information should be collected separately from other information you give in your application for the job.**
2. To find out whether you will be able to carry out an **intrinsic** part of the job. If you are disabled and part of a job can be changed or assigned to another person then this may count as a reasonable adjustment – see the Commission's Employment Statutory Code of Practice for the legal explanation of this duty (and see questions 3, 8, 10 and 11 below).
3. To find out whether you have a particular disability where having that disability is an occupational requirement of the job (see question 5 below).
4. To monitor the diversity of people applying for the job. This information should be collected separately from other information you give in your application for the job (see questions 6 and 7 below).
5. To take positive action in relation to disabled people – for example, to decide whether you qualify for any measures taken by the employer to improve disabled people's employment rates (see question 4 below).
6. Where another legal requirement means an employer has to ask health- or disability-related questions. For example, Merchant Shipping Regulations prohibit the employment of seafarers unless they have a valid medical fitness certificate.

What if prohibited questions are asked?

You will want to present a good impression in a job application form or at an interview. If an employer asks you questions you think are unlawful, it may be difficult for you to refuse to answer although you are entitled to do so. One way if you are not sure why certain questions are being asked could be to ask the employer the purpose of the questions before deciding whether to answer them. It is especially difficult to do this at an interview, but you can ask afterwards. If you think you may want to ask afterwards, try to make a note of the questions and your answers after the interview so you have a record of what was said.

It is not possible for you to bring a claim against an employer just because you have been asked questions about your health or disability which are not allowed by Section 60. If you are asked questions that are not allowed and you are not then offered a job you may have a claim for direct disability discrimination if this is because you are disabled or because the employer thinks that you are. The employer would only be liable if they did not select you for the job because you are disabled or because they think that you are. You may also have a claim if you are offered a job subject to health checks and it is then withdrawn because you are disabled or because the employer thinks that you are.

The Commission is responsible for regulating employers' compliance with Section 60 and can take legal enforcement action against them for non-compliance when it is proportionate to do so. Please see our guidance *What to do if you think you've been discriminated against* for more information: <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-workers/what-to-do-if-you-believe-youve-been-discriminated-against/>

Examples of Section 60 breaches and compliance

In the following sections we provide illustrations of how these duties are intended to work in practice. We do this by answering a number of frequently asked questions about how these duties will affect the lawfulness of the recruitment process or practice.

Application forms

1. Question:

You are completing a job application. It contains a section requiring job applicants to reveal information about any health issues and the number

of days they have had off because of ill health in the last two years. Is this lawful?

Answer:

This section of the form is in breach of Section 60 because the questions clearly relate to health (and possibly disability) and this general health information is not necessary under one of the defined exceptions.

2. Question:

A recruitment agency acting for a large employer has been asked to select a pool of candidates who can do a range of jobs for them at short notice. The agency draws up a shortlist based on information that it already holds on file – including health- and disability-related information – and information which it obtains via referees some of which relates to health and disability (e.g. sickness absence figures). Is this lawful?

Answer:

Both the recruitment agency and the employer who is using them are in breach of Section 60. This is because the agency, acting on behalf of the employer, has used information about health and disability to determine who should be shortlisted without considering the requirements of Section 60.

3. Question:

When recruiting scaffolders, a construction company asks applicants whether they have a disability or health condition that affects their ability to climb ladders. Is this lawful?

Answer:

As the ability to climb ladders and scaffolding is an intrinsic function of the job, the construction company is not in breach of Section 60.

Positive action

4. Question:

A telesales company wishes to achieve greater diversity in its workforce to reflect the consumers it provides services to. Various groups are under-represented, including disabled people. In its recruitment materials it asks disabled candidates to identify themselves so that they can benefit from the company's guaranteed interview scheme for disabled candidates. Is this lawful?

Answer:

Asking health- or disability-related questions for this legitimate purpose – promoting lawful positive action – is not in breach of Section 60.

Occupational requirement

5. Question:

A charity wishes to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states that this is the case. In the application form the employer asks for evidence that applicants meet this requirement. Is this lawful?

Answer:

It is lawful because being Deafblind is an occupational requirement of the job.

Monitoring

6. Question:

The monitoring forms containing health- and disability-related information that a large public sector employer uses have not been separated from the rest of the job application forms. Consequently, the panel making shortlisting decisions uses the information it has been given about health and disability to sift out candidates that in its view are not up to the job. Is this lawful?

Answer:

It is a breach of Section 60 to use monitoring information about health and disability to shortlist candidates during a recruitment process. If the information is legitimately sought for monitoring purposes then it should be kept separate from the application form and should not be seen by the interview panel.

7. Question:

A small employer is unable to separate monitoring information about disability in job application forms because she personally handles the whole recruitment process. However, she takes care to disregard this information in respect of shortlisting and selection. Is this lawful?

Answer:

Provided that she disregarded information about disabilities (for anything other than monitoring purposes) and then properly considers each job applicant's ability to do the job without reference to disability then this is compliant with Section 60.

Interviews

8. Question:

At an interview for a research post a disabled applicant volunteers the information that he will not be able to use standard computer software to prepare reports because of the nature of his impairment. The

interviewers are not sure whether they can ask additional questions about this.

Answer:

If the preparation of reports is an intrinsic part of the job then additional questions can be asked to establish whether there are reasonable adjustments that can be made – for example, the provision of a voice activated computer – and to establish whether he is able to prepare reports with those adjustments in place. It would be good practice for the interviewers to explain the reasons for the additional questions during the interview.

9. Question:

During the course of an interview a job applicant discloses that he has a visual impairment which is not otherwise obvious. Unprompted, he tells the interview panel that he does not consider that the impairment affects his ability to do the job, and asks if there are any questions they would like to ask him about this. A panel member does ask him if he will need any adjustments to carry out a test if he makes it to the next stage of the recruitment process. The panel does not use any disability-related information to decide if his application can proceed further. Is this lawful?

Answer:

The panel has before it disability-related information which it ignores in its decision-making process. A panel member asks a legitimate question about adjustments to the recruitment process which falls within an exception. This means that the employer is not in breach of Section 60.

10. Question:

An internal applicant is interviewed for a job. The interview panel includes someone who is aware that this applicant was recently absent from work due to a mental health condition for a number of months. During the interview this panel member asks the applicant whether there are any health issues which would affect his ability to cope with the mental pressures of the job. Is this lawful?

Answer:

This will be in breach of Section 60 if coping with mental pressure is not an intrinsic function of this particular job.

11. Question:

An employer is interviewing an applicant for a post where coping with mental pressure is an intrinsic function of the job. The employer asks the applicant to give examples of how he has handled a difficult situation or worked to a tight deadline.

Answer:

The employer has not breached Section 60 by asking these questions as they are about the applicant's ability to do the job and are not related to the applicant's health or disability.

The position once work has been offered

12. Question:

An employer refers successful candidates to its own occupational health practitioner who asks them to complete a health questionnaire. This asks questions about mental health which are not necessary to assess the candidate's ability to do the job. One disabled applicant gives information about a long standing mental health condition which is well controlled by medication. The employer withdraws the job offer relying on this information.

Answer:

Questions about health and disability can be asked after a job offer has been made but the successful candidate would be able to make a claim of disability discrimination if the offer has been withdrawn because of his disability. However, referring successful candidates to an occupational health practitioner can be a positive step as it should provide an opportunity to explore reasonable adjustments with candidates who have a disability.

Further sources of information and advice

Equality and Human Rights Commission: The Equality and Human Rights Commission is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. The Commission provides advice and guidance on rights, responsibilities and good practice, based on equality law and human rights. More information on managing disability and health in the workplace for both employers and employees is available on our website.

Website: www.equalityhumanrights.com

Equality Advisory and Support Service (EASS)

This service replaces the Equality and Human Rights Commission's helpline. The new service is aimed at individuals who need more expert advice and support on discrimination than advice agencies and other local organisations can provide. It will give bespoke advice to individuals across the whole of Great Britain on discrimination issues. It will explain legal rights and remedies within discrimination legislation, across the three nations. It will explain options for informal resolution and help people to pursue them. It will refer people who cannot or do not wish to go down this road to conciliation or mediation services. It will help people who need or want to seek a legal solution by helping to establish eligibility for legal aid and, if they are not eligible, to find an accessible legal service or to prepare and lodge a claim themselves.

Telephone: 0800 444 205

Textphone: 0800 444 206

Opening hours:

09:00 to 20:00 Monday to Friday

10:00 to 14:00 Saturday

closed on Sundays and Bank Holidays

Website: www.equalityadvisoryservice.com

Post: FREEPOST Equality Advisory Support Service FPN4431

Acas – The Independent Advisory, Conciliation and Arbitration Service:

Acas aims to improve organisations and working life through better employment relations. It provides impartial advice, training, information and a range of problem resolution services.

Website: www.acas.org.uk

Telephone: 08457 47 47 47 (Monday to Friday: 08:00 to 20:00; Saturday: 09:00 to 13:00)

Access to Work:

Access to Work can help disabled people or their employers if their condition or disability affects the ease by which they can carry out their job or gain employment. It gives advice and support with extra costs which may arise because of certain needs.

Website:

www.direct.gov.uk/en/disabledpeople/employmentsupport/workschemesandprogrammes

Citizens Advice:

Citizens Advice Bureaux provide free, confidential and independent advice in England and Wales. Advice is available face-to-face and by telephone. Most bureaux offer home visits and some also provide email advice. To receive advice, contact your local Citizens Advice Bureau, which you can find by visiting the website.

Website: **www.citizensadvice.org.uk**

Telephone: (admin only) 020 7833 2181

Fax: (admin only) 020 7833 4371

The Adviceguide website is the main public information service of Citizens Advice. It covers England, Scotland and Wales.

Website: **www.adviceguide.org.uk**

Citizens Advice Scotland:

Citizens Advice Scotland is the umbrella organisation for bureaux in Scotland. They do not offer advice directly but can provide information on Scottish bureaux.

Website: **www.cas.org.uk**

Law Centres Federation:

The Law Centres Federation is the national co-ordinating organisation for a network of community-based law centres. Law centres provide free and independent specialist legal advice and representation to people who live or work in their catchment areas. The Federation does not itself provide legal advice, but can provide details of your nearest law centre.

Website: **www.lawcentres.org.uk**

Telephone: 020 7842 0720

Fax: 020 7842 0721

Email: **info@lawcentres.org.uk**

Scottish Association of Law Centres (SALC):

SALC represents law centres across Scotland.
Website: **www.scotlawcentres.blogspot.com**
Telephone: 0141 561 7266

Contacts

www.equalityhumanrights.com

The Commission's publications are available to download on our website: **www.equalityhumanrights.com**. If you are an organisation and would like to discuss the option of accessing a publication in an alternative format or language please contact engagementdesk@equalityhumanrights.com. If you are an individual please contact the Equality Advisory and Support Service (EASS) using the contact methods below.

Equality Advisory and Support Service (EASS)

The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

Telephone: 0800 444 205

Textphone: 0800 444 206

Opening hours:

09:00 to 20:00 Monday to Friday

10:00 to 14:00 Saturday

Website: www.equalityadvisoryservice.com

Post: FREEPOST Equality Advisory Support Service FPN4431

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