

Equality Act 2010: Health-related questions during the recruitment process

From 1 October 2010, under section 60 of the Equality Act 2010 (the Act), it is unlawful for employers to ask job applicants questions about their health or any disabilities prior to making the person a job offer or including them in a pool of successful candidates to be offered a job when a position becomes vacant. EEF members have asked us many questions about the impact of the new law; we have summarised these questions in this guide.

Impact of the new law on the recruitment process

Employers are concerned that the effect of delaying health and disability questions until after an offer is made is that they will have wasted recruitment resources and managers' time interviewing/assessing people who it turns out were plainly unable to do the main functions of the job. The law recognises this possibility and so allows employers to continue asking a limited range of health questions pre-job offer to establish if applicants can perform the intrinsic (that is, the fundamental) functions of the job. You can also ask questions to establish if a person is able to participate in your assessment process or needs reasonable adjustments to be made to enable them to do so. There are also other exemptions permitting questions relating to monitoring, positive action and genuine occupational qualifications.

A company can continue to ask health and disability-related questions post-offer (even if the offer is only a conditional one). However, at all stages of the recruitment process the employer must take full account of the disability discrimination provisions of the Act especially the duty to make reasonable adjustments. It is likely an applicant will feel particularly aggrieved if an offer is withdrawn on health grounds late in the recruitment process and so the risk of a disability discrimination claim at this stage probably increases. A company's processes and records of decision-making need to be robust to help them defeat such claims.

What does the law say is an 'intrinsic' function?

The law takes a very narrow view of what an intrinsic function is. Only functions or tasks that are fundamental to the role can be properly labelled 'intrinsic'. Also you need to take into account whether reasonable adjustments can be made to the job you are recruiting to. So it is only the residual parts of the job that you can ask health-related questions about.

Can we still send out our existing pre-employment medical questionnaire with an application form?

No. If the questionnaire is given to applicants pre-offer, it needs to be targeted on intrinsic functions only (see below) and/or on the applicant's ability to participate in the assessment process. Or it should only be given to applicants after you have made an offer of employment, whether conditional or unconditional (see below for more on conditional offers of employment).

Does the law contain any further guidance?

No, but the statutory Code of Practice on Employment published by the Equality and Human Rights Commission (the EHRC) contains the following example:

"A construction company is recruiting scaffolders. It would be lawful under the Act to ask about disability or health on the application form or at interview if the questions related specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is intrinsic to the job."

How do we decide what is an intrinsic function?

The task of deciding whether it is safe to ask a particular question at the pre-offer stage is slightly easier if you focus on function, not what illness or condition an applicant could possibly have:

- how does a person need to function to do the job satisfactorily (for example, be able to sit for long periods)?
- can we adjust the job for applicants who cannot sit for long periods?
- if not, sitting for long periods is an intrinsic function and we can legitimately ask questions about ability to sit at the pre-offer stage.

The simple message is: if you can vary a function, you should not label it 'intrinsic'.

So, how should we approach recruitment and health questions in the future?

If you believe it is necessary to ask some health-related questions before the offer stage:

- focus on the job description and person specification setting out the essential criteria that a person must satisfy
- the job description should only include tasks and duties that are objectively justifiable as being necessary to that post
- a health or disability question that helps to determine whether a person can carry out this function "with reasonable adjustments in place" is permitted
- if a person volunteers information about their disability or health, for example, at interview, you can only ask further questions about what they have said if the information is relevant to the intrinsic functions - including asking questions about what reasonable adjustments would be required to enable the person to carry out an intrinsic function of the job.

Can we still ask questions before making an offer about a person's sickness absence record?

No, because the question relates to a person's health or disability, not their ability to perform an intrinsic function. Nor are you permitted to ask the question of a previous employer, until after you have made an offer. It is permissible to ask the question post-offer but remember you are at greater risk of a tribunal claim if you withdraw an offer on the basis of a poor record. If you know or have reason to believe the job applicant might have a disability and the absence relates to it, the duty to make reasonable adjustments to your selection criteria is triggered (for more on withdrawing conditional offers, see below).

When and how can we ask applicants if they need reasonable adjustments to undergo a recruitment assessment/interview?

There is a specific exemption allowing you to ask applicants questions about their fitness to undertake your assessment and interview processes or whether, if they have a disability, they need reasonable adjustments. However, ask yourself if the way you collect that information might leave the person/people making a decision about short listing vulnerable to a suggestion that they were consciously or unconsciously influenced by the health information the applicant provided. For example, is there a mechanism, such as a detachable form, to keep this personal information separate from the main application form?

Can we still ask applicants to sign a general 'good faith' declaration about their state of health (for example, on an application form)?

You can only request an applicant sign a declaration at the pre-offer stage where it is tied to the intrinsic functions of the job.

Isn't it safest to just defer asking health and disability questions until after we have made an offer? Can we withdraw an offer if a person does not have a satisfactory medical record?

The purpose of the legislation is to ensure that people with disabilities are not unjustifiably screened out of job opportunities on health/disability grounds before they have had the opportunity to demonstrate that they qualify for their job because they have the required skills and experience. The general thrust of the legislation is, therefore, to make sure employers ask health and disability related questions at the post offer stage unless they can justify asking them earlier because they relate to the intrinsic functions of the job (or one of the other exemptions apply). You can continue to make an offer of a job conditional on the company receiving a satisfactory reference, satisfactory medical report, etc.

However, it would be a mistake to think that it is 'safer' to defer asking the questions until you have made a conditional offer. It is correct that if you delay asking the questions you will be complying with this part (section 60) of the Equality Act. But your overriding obligation not to discriminate on the grounds of a person's disability, still applies in full.

So, for example, if you withdraw an offer of employment because a person does not have a satisfactory medical record, and the person's qualifies as disabled under the Act, they may well bring a claim against the company. You may have to objectively justify any health and fitness criteria you apply; you will also have to demonstrate that you considered your duty to make reasonable adjustments. You should, therefore, think through carefully what criteria you apply, who makes the decisions and what guidance/training they receive, etc. You should make sure you discuss the results of, for example a pre-employment medical questionnaire or a medical report with the applicant before you withdraw an offer and ensure you keep rigorous records of such discussions and decisions.

How is the new law enforced?

It is only enforced directly by the Equality and Human Rights Commission (EHRC), which has the power to investigate an employer's practices. The EHRC can enforce s60 irrespective of whether people with disabilities have in fact been adversely affected by an employer's questions.

In reality though, aggrieved job applicants are more likely to seek to hold employers to account via disability discrimination claims in the tribunal. This is because the Act provides that if a company has asked health questions, the burden is on it to prove that it did not discriminate against the applicant on the grounds of disability.