Guidance relating to disability for the NHS

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The NHS Staff Council’s Equality and Diversity Group has reviewed the advice within the national terms and conditions handbook and developed supplementary guidance on good practice in disability.

This highlights good practice advice for the management of disabled staff in relation to sickness absence, carers leave and redeployment to help organisations meet with their duties under the Equality Act 2010.
Introduction

The aim of this guidance is to help employers understand their responsibilities under the Equality Act 2010 in relation to removing the barriers that deny disabled people equality of outcome in the workplace. The guidance also covers suggestions and examples of good practice that will help employers create the best working environment in which disabled people are able to reach their full potential.

A. What are the legal requirements/obligations upon employers?

Protection against discrimination due to disability was first legislated for in the Disability Discrimination Act 1995 (DDA95) and is now covered by the Equality Act 2010. Whilst the Act aimed to streamline and harmonise all discrimination legislation it does allow that, due to the additional barriers faced by disabled people, they can be treated MORE favourably than their non-disabled colleagues. Understanding this, and the reasons for it, is crucial to removing the barriers that continue to deny disabled people equality of outcome in work and more broadly.

The UN Convention on the Rights of Persons with Disabilities, Article 27, on work and employment, prohibits discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions:

The Equality Act 2010 defines a disabled person as:

“... someone who has a mental or physical impairment that has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities.”

The Equality Act 2010 protects employees, and covers areas including:

- application forms
- interview arrangements
- aptitude or proficiency tests
- job offers
- terms of employment, including pay
- promotion, transfer and training opportunities
- dismissal or redundancy
- discipline and grievances.
Employers in the NHS have a legal obligation to consider reasonable adjustments in the workplace.

1. Reasonable Adjustments (section 20 Equality Act 2010)

The Equality Act 2010 requires that reasonable adjustments are made to working conditions, policies and practices that put a disabled member of staff at a disadvantage. A reasonable adjustment could include any of the following:

- making adjustments to premises
- acquiring and modifying equipment
- modifying instructions or reference manuals
- providing a reader or interpreter
- reallocating disabled employee’s duties to another person
- providing supervision or other support
- transferring him/her to fill an existing suitable vacancy without competitive interview
- altering his/her working hours
- assigning him/her to a different place of work
- allowing him/her to be absent during working hours for rehabilitation, assessment or treatment
- giving him/her, or arranging for him/her to be given, training or mentoring
- modifying procedures for testing or assessment
- employing a support worker
- modifying disciplinary or grievance procedures.

Employers are advised to take steps to identify if reasonable adjustments are needed at the start of a recruitment process i.e. when an applicant applies for a post and wherever the need arises during the employment cycle i.e. annual personal development reviews, return to work interviews after sickness absence and access to training.

Checklist:

- Do all our policies and practice covering the employment cycle:
  - eliminate discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010?
  - advance equality of opportunity between people from different groups?
- foster good relations between people from different groups?
- prevent disabled candidates from being unfairly screened out at an early stage of the recruitment process?

- Do we ask applicants if they require reasonable adjustment to the recruitment process to allow them to be considered for a job, and if they got the job do we ask them what reasonable adjustments they require to do the job?

- Do we ensure our managers and the chairs of interview panels have undergone appropriate recruitment and selection training that covers protection from discrimination and covering those who are disabled, those who are perceived as being disabled even if they are not, and those who may be associated with disabled people?

- Do we make sure our job description and person specification does not exclude disabled people from applying from a job, however, where a job has an essential requirement that cannot be met by reasonable adjustment this needs to be made explicit in the person specification requirements?

- Is the reasonable adjustment discussed with the affected staff by their line manager before decisions are made?

- Do we make reasonable adjustments for all staff experiencing illness regardless of whether they meet the legal definition of having a disability? If not, what is the reason for not doing so?

- Do we have a process in place for employees to make requests for reasonable adjustments and are these clearly set out in the relevant policies?

- Do we ensure all of our associated policies, for example recruitment and selection, training and development, redeployment policies, etc give a clear and consistent message on reasonable adjustments?

- When assessing requests for reasonable adjustments, is there a process for involving Occupational Health and Access to Work when appropriate?

Organisations should ensure that the process for requesting reasonable adjustments is outlined in any managing sickness absence or return to work policy, that there is a robust process in place for the consideration of such requests, and a monitoring and evaluation mechanism to ensure the policy and practice is fair and effective. Employers are advised to seek advice from occupational health or third parties, such as DWP Access to Work or the employment services within disability charities themselves, for specialist advice.

In most circumstances, people who have had a disability in the past are protected from discrimination even if they have since recovered.

It is important to realise that the definition of disability regards the person as they are without aids, support or medication (the exception being visual impairment that can be addressed by use of wearing prescription spectacles). This is particularly relevant for those with mental ill health
who are able to control their condition with medication, and also for those with conditions such as epilepsy and diabetes that are otherwise controlled by medication.

As well as providing protection against discrimination and harassment due to a person’s disability, the Equality Act 2010 provides protection from direct disability discrimination and harassment where this is based on a person’s association with a disabled person, or on a false perception that the person is disabled. This is of particular relevance to carers of disabled people (children or adults).

The Equality Act 2010 also contains a provision which limits the type of enquiries that a recruiting employer can make about disability and health when recruiting new staff. This provision will help prevent disabled candidates from being unfairly screened out at an early stage of the recruitment process.

A significant part of the Equality Act 2010 is the Public Sector Equality Duty that places obligations on public sector bodies to act proactively, and can be seen as an extension (albeit a diminished one) of the former Disability Equality Duty under DDA95. The Duty has three aims. When developing or implementing policy, it requires public bodies to have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010
- advance equality of opportunity between people from different groups
- foster good relations between people from different groups.

Additional information on the definition of disability is attached in Appendix A.

B. Good practice in the NHS

This section covers what is deemed as good practice.

NHS employers, in their quest to be employers of choice, will want to have regard to a number of good practice issues and initiatives in relation to disability in the workplace. Some key issues are outlined below and are intended to be good practice.

1. Carer support

There may be occasions when a member of staff requires a carer or support worker to accompany them to work or out on work business. In such cases, where the carer/support worker’s expenses are not paid for by a third party (e.g. DWP Access to Work) the employer should be responsible for the reimbursement of travel and subsistence allowances as would be paid to the employee themselves.
Checklist:

- Do we have a process in place from when an applicant is successful for a post to contact DWP Access to Work for practical support/funding to start work?
- Do we have provisions in our managing sickness absence policy that refer employees to the travel and subsistence allowance terms and conditions?

2. Disability related absence

NHS employers recognise that disability and ill health are not the same thing. Disabled staff may, however, require time off work to help them manage their disability e.g. to attend appointments or consultations or have treatment related to the ongoing management of their disability.

For attendance recording and on ESR, it is good practice that such time as described above should be identifiable as such (and can be differentiated from ‘normal’ sickness absence). This is not a statutory requirement but can be seen as a reasonable adjustment that may prevent discriminatory action being taken against a disabled member of staff.

Such time off is sometimes known as ‘disability related absence’ and it is good practice to outline provision for it in an agreed policy that should, as a minimum, contain the following points:

- The purpose of this provision is to ensure that disabled staff are not discriminated against in managing absence policies that have trigger points for capability procedures by reason of their disability rather than their capability.
- An agreed level of paid disability leave per annum may be negotiated on an individual basis with a disabled staff member as an expected or tolerated level of leave required to manage their disability effectively. In agreeing to this, consideration should be given to patient, service and organisational needs. Employers may also wish to take advice from Occupational Health services.
- It is good practice for employers to review this provision with staff regularly, and at least annually.
- Local arrangements should specify the timeframe and process for a disabled staff member to make a request for disability leave. However, it should be accepted that sometimes late notification will be inevitable and should not be penalised where there is good reason.
- NHS organisations are advised to consider developing their own managing absence policy that ensures disability related absences are recorded appropriately and absences are reviewed, monitored and managed in line with their policy to ensure it is fit for purpose.
Checklist:

- Do we have in place a means of recording disability related absences from work separately from ordinary sickness absences?
- Do we have provisions for staff to be able to take disability related absences? What reasons would we have for not making this provision?
- Have appropriate levels of paid disability leave been agreed/reviewed on an annual basis? Has Occupational Health advice been sought?
- Is the process for requesting disability leave clearly set out and do managers understand their scope for discretion when supporting short notice requests?

C. Further information

1. EHRC Employer code:

2. On the NHS Employers website: www.nhsemployers.org/HealthyWorkplaces/Action-on-absence/Pages/ManagersGuideSicknessAbsence.aspx#9
Appendix A

1. The meaning of disability

In order to avoid discrimination, it is recommended that instead of trying to make a judgement as to whether a person falls within the statutory definition of disability, we focus on meeting the needs of each worker and job applicant.

2. When is a person disabled?

A person has a disability if he/she has a physical or mental impairment, which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities.

3. What about people who have recovered from a disability?

In most circumstances, people who have had a disability within the definition in the past are protected from discrimination even if they have since recovered.

4. What does ‘impairment’ cover?

It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

5. Are all mental impairments covered?

The term ‘mental impairment’ is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities. Hidden impairments such as mental illness, mental health conditions, diabetes and epilepsy may count as disabilities where they meet the definition in the Act.

6. What is a ‘substantial’ adverse effect?

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.
7. What is a ‘long-term’ effect?
A long-term effect of an impairment is one:

- which has lasted at least 12 months, or
- where the total period for which it lasts is likely to be at least 12 months, or
- which is likely to last for the rest of the life of the person affected.

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

8. What if a person has no medical diagnosis?
There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.

9. What if the effects come and go over a period of time?
If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is if it is more probable than not that the effect will recur.

10. What are ‘normal day-to-day activities’?
They are activities which are carried out by most people on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument or a sport to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompass the activities which are relevant to working life.

11. What about treatment?
Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (i.e. the impairment has been cured).
Members of staff requiring treatment for an impairment must be allowed time off work to attend. This must be recorded as disability related absence and not counted as sickness absence. For more information, see absence management policy.

12. Does this include people who wear spectacles?
No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

13. Are people who have disfigurements covered?
People with severe disfigurements are covered by the Act and are automatically treated as this having a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the long-term requirement.

14. Are there any other people who are automatically treated as disabled under the Act?
Anyone who has HIV infection, cancer or Multiple Sclerosis is automatically treated as disabled under the Act. In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist, are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act’s definition of disability.

15. What about people who know their condition is going to get worse over time?
Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he/she will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment is likely eventually to have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition.

16. Are people with genetic conditions covered?
If a genetic condition has no effect on ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

17. Are any conditions specifically excluded from the coverage of the Act?
Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:
• addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed)
• seasonal allergic rhinitis (e.g. hay fever), except where it aggravates the effect of another condition
• tendency to set fires
• tendency to steal
• tendency to physical or sexual abuse of other persons
• exhibitionism
• voyeurism.

Also, disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person’s ability to carry out normal day-to-day activities (from The Equality Act 201, Employment statutory code of practice).

This information is not definitive. Further guidance on matters to be taken into account in determining questions relating to the definition of disability is also available from the Office for Disability Issues: www.officefordisability.gov.uk/docs/wor/new/ea-guide.pdf