

# Appendix 1

## **Section 60 of the Equality Act 2010**

This appendix covers the provisions under section 60 of the Equality Act only.

A full copy of the Act can be found on the [legislation.gov.uk](http://legislation.gov.uk) website.

Further guidance about the disability provisions and employer responsibilities under the Equality Act can be found on the Equality and Human Rights Commission website.

### **The purpose of section 60**

Section 60 of the Equality Act came into force in October 2010. Its key purpose is to prevent disability or health information being used to disadvantage applicants without first giving them the opportunity to show that they have the skills and experience to carry out a role. It outlines when and what information can be sought as part of the recruitment process regarding an applicant's health or disability.

It also places a duty on employers to consider all adjustments (as far as is reasonably practical) to ensure that applicants who have a disability are not unfairly disadvantaged or discriminated against when being considered for a role.

### **Prohibited questions**

Section 60 prohibits any questions being posed by/or on behalf of an employer about an applicant's disability and health prior to making a job offer. This is regardless as to whether the offer is conditional or unconditional.

This restriction relates to any questions that might require the disclosure of information about an applicant's disability or health as part of:

- an application for a position
- the interview process
- a reference request.

The Act outlines the exceptional circumstances where employers may ask health-related questions earlier in the recruitment process. These are described in more detail below.

When obtaining references, employers should refer to guidance provided in the NHS employment history and reference check standard. This standard provides useful template forms which outline the type of questions that may legally be asked as part of a reference request.

### **Exceptional circumstances**

There are a number of exceptional circumstances where it would be acceptable for an employer to ask an applicant health-related questions prior to issuing an appointment offer.

These circumstances include where:

- Ascertaining what reasonable adjustments may be necessary as part of the interview process. Any questions should focus on identifying any special needs the applicant may have to enable them to have ease of access to the building or interview room and/or for them to carry out any required assessment(s) that form part of the interview process.
- Ascertaining if the applicant can carry out a specific function which is intrinsic to the role they are applying for. Any questions should be relevant to the position being offered and focus on identifying whether any reasonable adjustments need to be considered to enable the applicant to carry out certain aspects of the role. For example, Mary is applying for a position as a nurse on an elderly ward. The role will quite often require her to assist in lifting and physically supporting patients. In this instance it would be acceptable for the employer to ask Mary questions to ascertain whether she has a disability or any health issues which may restrict or prevent her from carrying out these duties safely without putting either herself or patients at risk of harm.
- Taking positive action to help people with disabilities. For example, this might include asking targeted questions to assess whether applicants may benefit from any schemes or measures that are intended to help people with disabilities to gain meaningful employment. The purpose of any such questions must be made clear to the applicant from the outset.

- There is a legitimate occupational requirement for a person with a specific disability or impairment. Any questions asked should be focused on helping the employer identify if applicants meet those requirements. As above, the purpose of the questions should be explained to applicants from the outset.
- Monitoring diversity. Any data obtained as part of any monitoring process should be collected and recorded separately from application information.

### **Duty to make reasonable adjustments**

The duty for employers to make all reasonable adjustments is intended to reinforce the importance of taking positive steps to ensure that people with disabilities have equal access to and can progress in employment. This goes beyond simply avoiding treating workers or applicants with a disability less favourably than those who do not. It outlines an employers' responsibility to consider additional steps that workers and applicants who are not disabled would not be entitled to.

This duty comprises of the following three requirements:

1. Removing any employer provision or practice that is likely to put a worker or applicant with a disability at a significant unfair disadvantage compared to those who are not disabled. For example, this would include any policies, rules, arrangements, conditions, criterion, or pre-requisites which cannot be objectively justified. It also includes any decisions to introduce any such provisions in the future, as well as one-off or discretionary decisions.
2. Removing or altering a physical feature or providing a reasonable means of avoiding such a feature (either permanently or temporarily) where it puts a worker or applicant with a disability at a substantial disadvantage compared to those who are not disabled. The Act defines this as any:
  - a. feature of the design or construction of a building
  - b. feature of the approach to or the entrance/exit from a building

- c. equipment, fixture, fitting, furniture, furnishings, materials in or on the premises
- d. other physical element or the quality of the premises.

A physical feature may include (but is not exclusive to) steps, stairways, curbs, paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or moveable items.

1. Provide an auxiliary aid or service where a disabled person would, if it wasn't for the provision of that auxiliary aid or service, be put at a substantial disadvantage compared to those who are not disabled. For instance, this might include providing information in an accessible format, for example, providing letters, training materials or recruitment forms in Braille or on audio tape.

### **Reasonable steps**

Ultimately, the test of what might be considered reasonable falls to the employer. This should be assessed on a case-by-case basis and will depend on what effective and practical adjustments may be made to help an individual overcome a disadvantage based on the size of the organisation and the resources made available to it.

In many cases, there will be little, or no cost or disruption associated with making the necessary adjustments. Even where there is a significant cost attributed to making an adjustment, it may still prove to be cost-effective compared to having to recruit and train a new member of staff.

Employers should take the following factors into account when determining what might be deemed as a reasonable step to take:

- How practical is it?
- How effective will it be in preventing the substantial disadvantage?
- How much will it cost to put in place?
- Will it cause any disruption to services and if so, to what extent?

- What financial or other assistance might be available to make the necessary adjustments (for example, through Access at Work)?

### **Failure to comply with the duty**

The Act does not permit an employer to justify a failure to comply with the duty to make a reasonable adjustment.

An employment tribunal will only find an employer in breach of this duty if they consider the adjustment in question to be one that would be reasonable for them to make.

Where the duty applies, the question of reasonableness determines whether the adjustment will need to be made.

An employer will be committing unlawful discrimination if it does not comply with the duty to make reasonable adjustments and a disabled worker may have the right to make a claim to the employment tribunal based on this.

### **Summary of updates**

#### **April 2023**

- Updated information about Records Management Code of Practice (**para 6.1.2**).
- Standard reformatted to make it easier to refer to. Wording changed to make requirements clearer. Links updated throughout.

#### **May 2022**

- Inserted link to the Department of Health and Social Care Green Book (**para 3.1.3**).
- Inserted link to the registration page for a vaccination update from Public Health England (**para 3.1.4**).

#### **March 2022**

- Standard reformatted to make it easier to refer to. Wording changed to make requirements clearer. Links updated throughout.
- Minimum requirement of complying with the equality act made clearer (**section 2.1**).
- Reference to the streamlining programme removed.
- Reference to the COVID-19 vaccination requirement removed. Further information can be found about this on our employment checks FAQ page.

### **February 2022**

- Page 8: we included news of the governments decision to remove the COVID-19 vaccine mandate for health and social care staff, subject to consultation and parliamentary approval.

### **January 2022**

- Page 8: inclusion of information on the requirement for all healthcare staff who are deployed in regulated activity and have direct face-to-face contact with patients to be fully vaccinated against COVID-19 from 1 April 2022.

### **August 2021**

- Page 8: inclusion of government announcement that staff entering care homes must be vaccinated against COVID-19 before doing so and supporting NHSE/I and DHSC guidance.