



Equality Act 2010 briefing 1: Pre-employment health enquiries



Rachel Crasnow details the implications of the most radical aspect of the Equality Act – the prohibition of pre-employment health enquiries

Until now pre-employment health enquiries by employers were generally believed to help those with disabilities to secure jobs and were legally permitted. It was thought that disability-related information could enable employers to decide whether the applicant would need reasonable adjustments and so enhance opportunities for disabled people's participation in the labour market.

In reality there have been a number of reports of health enquiries disincentivising disabled people from making applications and as of this month, brought in by the Equality Act 2010 on the 1 October, the position for employers has changed radically and will now be prohibited in many cases.

In the drafting of the Equality Act it was made clear during Government consultations that screening through health enquiries could actually prevent disabled candidates from applying for work where they feared stigmatisation and negative stereotyping, such as in mental disability cases. A candidate with a history of bipolar disorder, for example, may have little faith in being shortlisted for interview if she or he has been required to give details of this prior to being offered a job. The Government also received evidence that suggested one in four people had had a job offer withdrawn after disclosing a mental health condition.

Those living with HIV may also have felt the questionnaires were a barrier to entering the workforce and the National AIDS Trust suggested that a prohibition on the use of pre-employment health questionnaires before a job offer would actually enhance protection against disability discrimination. It was also noted that in the U.S. legislation only permitted the use of health questionnaires once a conditional job offer has been made, and only where all new employees are subjected to health examinations, regardless of disability.

In attempting to tackle the disincentive effect they seemed to have on some disabled people making applications for work, the Government decided that the use of pre-employment health-related questions not directly relevant to a candidate's ability to do the job she or he has applied for, would be prohibited, and that employers should now only ask 'relevant' health related questions pre-employment. The new law does not only apply to recruiting permanent employees, it also applies to contract work, business partnerships, office-holders, barristers and advocates.

The amendments were introduced in what is now section 60 of the Act. The Explanatory Notes which accompany the Act state that an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis), or included in a pool of successful candidates to be offered a job when a suitable position arises, except in the following situations:

- finding out whether a job applicant would be able to participate in an assessment to test his or her suitability for the work;
- making reasonable adjustments to enable the disabled person to participate in the recruitment process;
- finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
- monitoring diversity in applications for jobs;
- supporting positive action in employment for disabled people;
- enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.

The exceptions to the prohibition are extremely narrow. Enquiries are permissible where needed for relevant necessary adjustments linked to the recruitment process. So the explanatory notes suggest that applicants could be asked on an application form whether they have a disability that requires the employer to make a reasonable adjustment to the recruitment process. This is to allow, for example, someone with a speech impairment more time during interview. Mental health disabilities might also be relevant to the time needed to complete psychometric tests or time-limited tasks at interview.

The most difficult exception to operate will be the intrinsic function measure under section 60(6)(b). Here a question may be asked where it is needed to establish if the prospective employee is able to carry out an intrinsic function to the work concerned. Possible examples could include asking a prospective scaffolder about his mobility; a candidate for a building job requiring heavy manual lifting whether they can manage it; a prospective call centre worker if she can hear. In these examples the employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.

Many jobs do not involve such straightforward functions and there will inevitably be grey areas as a result, for example would it be permissible to ask someone who occasionally needed to drive council vehicles whether they had or were able to get a driving licence, in a situation where a reasonable adjustment to the post could involve the use of taxis? Is it acceptable to ask a candidate whether they think they will be able to withstand the normal pressures of a job known to be stressful?

Consideration of adjustments would need to take place prior to the extent of the pre-employment enquiry being determined and section 60(7) of the Equality Act only permits questions to be asked about functions which would be intrinsic to the work concerned once any reasonable adjustments had been made. It is impossible to generalise about what questions concern intrinsic functions and which do not, since this issue is unique to individual job specifications.

In practice this means employers will need to take a case-by-case approach which will involve considerable time and resource – but is there any way of avoiding this? It seems unlikely that employers would be able to continue to send out pre-employment health questionnaires but inform applicants that they only need answer questions

which relate to their intrinsic ability to perform the post. This places too high a burden on candidates without reassuring them on how the information will be used.

Another concern may be whether the monitoring diversity exception could be used as a way round the general prohibition in section 60. While it would be good practice for replies to monitoring queries to be kept separate from the recruitment or interviewing panel and used solely by human resources, it might be difficult to argue that a failure to divide various parts of application forms immediately amounted to discrimination.

Lastly employers could continue to ask questions on the basis that such enquiries were solely aimed at establishing whether a job applicant could comply with a requirement to undergo an assessment or interview. In such a situation a risk would remain that an employer might use information gleaned from the suitability assessment exception, to screen out job applicants with disabilities they deem unsuitable *per se*.

Under section 60(2), the Equality and Human Rights Commission is given the power to enforce the prohibition on pre-employment health enquiries. This is likely to be of most relevance to large employers, particularly those in the public sector. In 2008 NHS guidance required all NHS staff to have a pre-employment health check, but this will no doubt be reviewed upon implementation of the new provision.

But individuals can complain about the use of health questions as well. As previously a job applicant may personally complain of disability discrimination where pre-employment health-related enquiries are used to discriminate against them because of disability. It's also important to remember that where a disappointed candidate makes a claim to an employment tribunal for direct discrimination, the burden of proof will shift to the employer to show that he or she has not discriminated against the applicant because of the disability.

While this legislation may prevent the screening out of applicants who might otherwise be barred without the chance to demonstrate their skills and competencies for the job, could such a prohibition operate in the employer's favour when it comes to arguing lack of knowledge for the purpose of disability related discrimination?

An employer will not be liable for discrimination arising from disability under section 15 of the Equality Act where it did not know and could not reasonably have been expected to know that the employee had the disability. It might be that the very provisions brought in pursuant to section 60 to protect disabled job applicants will actually be used against them once employed, to the advantage of employers. The prohibition on pre-employment health enquiries could enable employers to practice a "don't ask" evasion policy or practice deliberate ignorance, in order to avoid liability for disability discrimination claims.

How does this fit with the employer's duty to do all they can reasonably be expected to do to find out if a person has a disability? The provisions of section 60 will not stop employers from asking medical questions post job offer. This opportunity enables reasonable adjustments and fulfils the knowledge requirement, as well as providing an applicant with the chance to argue that an employer was unreasonable in not making such enquiries at this legitimate stage.

The potential clash between the knowledge requirement and the bar on pre-employment health inquiries is likely to come down to questions of reasonableness and how the courts interpret the exceptions to the general rule within section 60. However there are bound to be cases where the employer argues the knowledge requirement is not satisfied since at the key stage of inquiry it was not reasonable to

ask a Claimant if she or he suffered from a disability due to the prohibition in section 60.

From the employers' perspective, it's not just a question of avoiding pre-employment health questions for the same reasons as being wary of asking women of a certain age if they plan on having children, or applicants of a certain age what their retirement plans are, it could also assist them in defeating claims brought by actual employees – far from what the Government intended.

© Cloisters