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The Implications of the Equality Act on Pre-Employment Health Questionnaires - The Equality Act 2010

The standard use of pre-employment health related questionnaires is a common practice within employment, and has long been used by many employers to weed out job applicants who might have had particular health problems or taken long periods of sick leave.

The new provisions of the Equality Act ('the Act') introduce sweeping changes to the law relating to pre-employment health questionnaires. The Act brings in stronger protections for those with health or disability issues who may currently face discrimination when applying for jobs.

What will be restricted?

With limited exceptions, employers are prohibited from asking prospective employees questions about their health or sickness absence *prior* to an offer of employment being made, or being included in a pool of successful candidates to be offered a job when a position becomes available. For example, it will not be permissible to ask questions that aim to establish how many days of sick leave an applicant has accrued during their previous employment prior to the candidate being made a conditional or unconditional offer of work.

The Equality and Human Rights Commission's ('EHRC') Code of Practice on Employment explains that this new provision was designed to ensure that disabled candidates are assessed objectively for their ability to do the job in question, and that they are not rejected because of any disability.

The Exceptions

The Act does recognise that there are certain limited circumstances where an employer may need to ask questions about an applicant's health where such questions are deemed "necessary" for any of the permitted reasons listed below: -

- **Establishing suitability or adjustments:** this includes establishing whether a candidate will be able to comply with a requirement to undergo an assessment for the job or establishing whether reasonable adjustments are needed in respect of any such assessment; for example someone suffering from epilepsy.

The first important thing to consider is whether epilepsy is even relevant. Before raising the question you might need to do a [risk assessment](#). When doing so you should consider what [reasonable adjustments](#) you could put in place for any employee that might eliminate the consequences of the condition. If the condition precludes an applicant or requires adjustments you may insert the question. However, when asking if a potential candidate has a condition you should also allow the candidate to put their thoughts as to why the condition might not be an issue.

On receiving an application from an epileptic, you must not discard their application on the basis of the condition. It is important to consider the individual and how the condition affects them. Some epileptics might not have a seizure for decades. Some seizures will be predictable and mild.

You will also have to consider the intrinsic risk of the job. The risk that a fighter jet pilot might have a mild seizure once every 30 years would be sufficient to exclude a candidate.

It is important to note that not everyone with epilepsy will need adjustments and any that are needed will vary depending on the person's needs. Adjustments that may be helpful to consider for someone with epilepsy include making the workspace safer. Avoiding lone working. Adapting equipment or providing equipment or support to help them do their job.

What substantiates a 'reasonable' adjustment depends on the situation and cost. It might include how practical the adjustment is to make, how effective the adjustment would be in helping the employee, and how it might affect other employees. It is also worth remembering that some people's epilepsy can change over time, for example if their seizures become controlled (stop happening), so the need for reasonable adjustments may change.

- **Establishing ability to perform essential functions:** questions can be asked to establish if the candidate can undertake the essential functions of the work concerned. For example, a construction company could need to know whether the candidate can lift heavy goods, if that were an intrinsic part of the job. There is no set way these questions might be phrased. However if a disability comes to light, the employer will still be under a duty to consider reasonable adjustments before assessing whether the function is intrinsic or not. Further considerations are as follows:
- **Monitoring diversity in the range of people applying for employment:** Answers to diversity questions should be kept separate from an individual's application form and should not be available to those short-listing candidates for the work concerned.
- **Permitted positive action:** Steps can be taken in order to facilitate employers taking proportionate measures to train or encourage under-represented groups to apply for jobs.
- **Where a disability is required for the role:** where this is an occupational requirement capable of objective justification. For example, where recruiting a deaf- blind project worker with personal experience of deaf blindness.

It is unfortunate that there is no detailed guidance on what 'necessary' means but it is worth noting that any employers who during the interview stage ask prospective candidates about their health will be taking a risk if the questions are not within the remit of the permitted questions above. Thus, if the candidate is not appointed but was asked questions about his/her health during the interview process, it will be very hard for any employer to defend an allegation of discrimination unless the questions were deemed to be 'essential'.

In Practice

If a candidate considers that a prospective employer has acted unlawfully by asking questions that are prohibited he or she can make a complaint to the EHRC. The EHRC has wide-ranging powers and will have the power to investigate and take enforcement action where necessary. A serious breach could result in a fine of up to £5,000. The burden of proof then falls on the employer to show that discrimination did not take place.

The provisions will not prevent employers from asking medical questions or requesting that individuals undergo a medical assessment after the job offer has been made (but prior to commencement of employment). The Act states that a conditional offer of work may be an offer pending references and/or health assessment. This would allow an employer to make any reasonable adjustments they feel is necessary, which may be required to facilitate new recruitment.

Moving forward

The new provisions significantly alter the standard practices of many employers. It is no longer acceptable for standard pre-employment health questionnaires to ask applicants questions about their health and medical issues, regardless of the relevance of the issues to the job being applied for. Employers must be careful to only ask questions within the narrow exceptions listed previously.

Employers should be very cautious when clarifying why a particular question is being asked and how the information will be used. Questions asked to any candidate should be fully noted, along with any justifications for them.

Employers will also need to be careful in the phrasing of any pre-employment questions, and should focus only on the existing health and capabilities of the candidate. For example, an assessment of someone's present ability to lift heavy objects might be essential to consider their suitability to perform a role requiring this kind of work, but an employer may not be able to justify broader questions about their past health or abilities.

As an employer in the recruitment process it is important that you start to consider any changes that you may need to make to your employment documents, policies, and procedures. These include reviewing your application forms and recruitment processes to ensure they conform with the limited scope of pre-employment health questions and educating all employees on the changes to the concept of discrimination.

The Act makes numerous other changes, which have not been mentioned in this article. If you would like to know more about the implications of the Equality Act 2010 or any other employment related matter, please contact the Employment department at Anthony Gold Solicitors, a London based law firm, on 0207 940 4000.