



Disability discrimination in the workplace

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From the symptoms of the menopause to long Covid, it can be difficult for employers to identify when individuals may have a disability. What is a disability and what are the risks employers ought to be aware of?

What is a 'disability'?

Some conditions are automatically deemed to be disabilities, including cancer, HIV and multiple sclerosis. Other conditions can amount to a disability if the following things apply:

- a. The individual has a physical or mental impairment
- b. The impairment has a 'substantial' and 'long term' adverse effect on their ability to carry out normal day-to-day activities (such as walking, writing, standing up for example)

'Long term' means that the effects have lasted or are likely to last 12 months or more. An impairment will have a 'substantial' effect if its effects are more than minor or trivial.

Why is it important to understand if someone may have a disability?

Employers have a legal obligation to make reasonable adjustments for individuals with disabilities (see 'Duty to make Reasonable Adjustments' below for more information). It is also unlawful to discriminate against such individuals in any of the following ways. Note that these protections apply to job applicants and all types of workers (including agency workers) and not just employees.

- **Direct discrimination:** This is where a person is treated less favourably because of any disability. It can never be justified. An example would be not promoting someone because they have a disability.
- **Indirect discrimination:** If the employer has a 'provision, criterion or practice' ('PCP') that applies to all but puts those that suffer with a certain disability at a disadvantage compared to others (such as a requirement to attend work at 9 am) the employer must 'objectively justify' it. This means showing there was a legitimate reason for it and that the PCP was a proportionate way to meet that aim.
- **Discrimination arising from disability:** If an employer treats a disabled person unfavourably because of something that arises in consequence of their disability (such as sickness absence for example) the employer must be able to objectively justify the treatment.
- **Harassment and victimisation:** Harassment is when a person is subjected to bullying or unwanted behaviour which is related to disability and creates a hostile or offensive environment for them.
- **Victimisation:** This where a person is treated detrimentally because they raise a complaint of discrimination, bring a claim in relation to it or assist someone in their complaint or claim.

There are also certain restrictions on asking pre-employment health questions which are outside the scope of this summary.

Duty to make Reasonable Adjustments

If a disabled person would be put at a substantial disadvantage compared to others due to:

- a PCP of the employer
- a workplace feature or
- not having an auxiliary aid

then the employer must take reasonable steps to avoid the disadvantage. This might include making adjustments to workplace premises, such as providing a ramp, providing information in accessible formats, e.g., in braille or large font, or altering a disabled worker's hours. Note the obligation is to make adjustments that are reasonable in the circumstances and there may be adjustments which are too expensive or impractical to put in place.

Risks

Failing to comply with these obligations could leave an employer facing a costly claim for disability discrimination. If successful, the employer can be ordered to pay the disabled person uncapped compensation. Bearing in mind these risks, employers should tread carefully where individuals may have a disability and seek appropriate advice.

This note is for information only and is not legal advice. It reflects the position as at 14 October 2021. For any questions, please get in touch with [Natasha Adom](#), [Alison Sneddon](#) or your normal GQ|Littler contact.