

Employment Law

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Pre-employment health questionnaire – What employers need to know?

Background

The Equality Act 2010 received royal assent in April and the majority of it is due to come into force in October this year. We cannot deal with the whole of the Act in one Alert but wanted to bring one aspect to your attention now. The issue of pre-employment health questionnaires was not included in the original draft of the Act but, following lobbying by disability charities, provisions were included as the Act passed through Parliament.

Section 60 of the Act seeks to address the problems experienced by job applicants with a history of health or disability issues when faced with a pre-employment questionnaire. Disability lobby groups argued that such questions often put disabled applicants at a significant disadvantage and may dissuade disabled applicants from applying for a role. The Disability Network (RADAR) has said that provisions to prohibit the use of such questions would 'probably [be] the single biggest difference and improvement that could be made through the Equality Act' as far as the disability provisions are concerned.

What does the Act prohibit?

The Act prohibits (subject to certain exceptions) employers asking job

applicants questions about their health before deciding whether to offer them employment or include the applicant in a pool of potential future employees. This effectively means the end of standard pre-employment health questionnaires.

The Act does not prevent an employer from asking medical questions or asking an individual to undergo a medical assessment after the job offer has been made.

The exceptions

The Act does allow the employer to ask questions of a job applicant in certain specific circumstances. These are set out below where A is the employer and B is the applicant. The question must be necessary for the purpose of:

1. establishing whether B will be able to comply with a requirement to undergo an interview or other assessment;
2. establishing whether a duty to make reasonable adjustments is or will be imposed on A in connection with a requirement to undergo an interview or other assessment;
3. establishing whether B will be able to carry out a function that is intrinsic to the work concerned;
4. monitoring diversity in the range of

- persons applying to work for A;
5. taking 'positive action' enabling disabled people to overcome a disadvantage;
6. establishing whether B has a particular disability which A has made a requirement of the role;
7. vetting applicants for work for reasons of national security.

The difficulty with the exceptions is that it is not clear how the tribunals and other bodies will interpret what is 'necessary'. Take, for example, the exception in 3 above relating to the applicant's ability to carry out an intrinsic function. The explanatory notes accompanying the Act state:

"An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job."

Another example in the explanatory notes considers where Applicants are 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 a permitted question and allows, for example, an applicant with a speech impairment more time for an interview.

One fears that there will be considerable litigation over what is deemed a necessary question within the exceptions and what is prohibited. What is clear is that any questions should concentrate on the applicant's current health and not on past conditions.

Potential claims

The Equality and Human Rights Commission will have the power to investigate the use of non-permitted questions and take enforcement action where appropriate. This is the case even if no disability discrimination has occurred.

If an applicant is unsuccessful they may bring a disability discrimination claim. If the applicant can show that the employer asked a prohibited question, discrimination is inferred. The burden of proof then falls on the employer to show that the reason the applicant did not get the job was not because of their answer to the prohibited question. For example, the employer may be able to show that the applicant was not selected as other candidates had better qualifications.

What should employers do?

October will come round quicker than we all think. Employers should now look at their use of pre-employment health questionnaires. Any questionnaires used should be tailored to include only the permitted questions.

If you would like help reviewing or formatting a pre-employment health questionnaire, please contact one of the employment team.

For more information please contact:



Petra Venton

t: +44 (0)1892 506041

e: petra.venton@crippslaw.com