

GUIDANCE

Pre-employment health questions

Guidance for employers on
Section 60 of the Equality Act 2010

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Introduction

Section 60 of the Equality Act 2010 makes it generally unlawful to ask questions about disability and health before you make a job offer. The Commission can take legal action and job applicants may have claims of discrimination where these legal requirements have been breached.

The legal interpretation of Section 60 can be found in our publication: Employment Statutory Code of Practice, at pages 126 to 131. Please see our website: www.equalityhumanrights.com. We also refer to it in our Equality Act 2010 guidance for employers: What equality law means for you as an employer: When you recruit someone to work for you (also available on the Commission's website).

Section 60 complements other legal requirements in the Equality Act 2010 designed to remove barriers that disabled people experience in securing jobs.

Section 60 does not affect the employer's legal responsibility to make reasonable adjustments for disabled job applicants where this duty applies. This duty requires prospective employers to take reasonable steps to overcome the disadvantages that disabled people may experience during the recruitment process. A failure to make reasonable adjustments for a disabled job applicant during the recruitment process constitutes unlawful disability discrimination that cannot be justified. The Employment Code of Practice and Equality Act 2010 guidance both provide further information about this duty.

Section 60 does not prevent employers selecting the best candidate for the job; instead it ensures recruitment decisions are objectively made, based on each candidate's true abilities.

The purpose of Section 60

The purpose of Section 60 is to prevent disability or health information being used to sift out job applicants without first giving them the opportunity to show they have the skills to do the job.

What and who does Section 60 apply to?

Section 60 applies to:

- any job recruitment process in England, Scotland or Wales involving internal or external applicants, and also to selecting a pool of candidates who may be offered work in the future
- employers, employment agencies and authorised agents
- all applicants for work and all individuals and organisations offering work
- contract workers, partnership positions, pupillages and tenancies (including Scottish equivalents) and appointments to personal or public office.

What enquiries does Section 60 prohibit?

- Enquiries by or on behalf of an employer about a job applicant's disability and health during the recruitment process up to the point when a job offer is made.
- Written and verbal questions put to job applicants and to any third party– for example, a current or ex-employer.

The job offer can be conditional or unconditional. An employer can make an offer conditional on medical checks and then ask health-related questions without being in breach of Section 60.

Exceptional circumstances when health questions are permitted

Section 60 allows questions about health and disability to be asked before job applicants are offered the job only when the law says they are **necessary** and fall within these narrow exceptions:

1. To find out if a job applicant can take part in any assessment to test their ability to do the job or to find out if reasonable adjustments are needed to enable a disabled job applicant to take part in any assessment (see frequently asked question 9 below). **This information should be collected separately from other information given in the application for the job.**

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2. To find out whether a job applicant will be able to carry out an **intrinsic** part of the job. If this part of a job can be changed or assigned to another person then this may count as a reasonable adjustment for a disabled job applicant – see below for further explanation of this duty and see also the Commission's Employment Statutory Code of Practice (see questions 3, 8, 10 and 11 below).
3. To find out whether a job applicant has a particular disability where having that disability is an occupational requirement of the job (see question 5 below).
4. To monitor the diversity of people applying for the job. This information should be collected separately from other information given in the application for the job (see questions 6 and 7 below).
5. To take positive action in relation to disabled people – for example, to decide if job applicants qualify for measures the employer takes to improve disabled people's employment rates (see question 4 below).
6. Where another legal requirement means an employer has to ask health- or disability-related questions. For example, Merchant Shipping Regulations prohibit the employment of seafarers unless they have a valid medical fitness certificate.
7. To vet applicants for the purposes of national security.

What if prohibited questions are asked?

Section 60 has been in force since October 2010 and employers can expect to be increasingly asked why disability- or health-related questions are being asked during a recruitment process. If the purpose of those questions is not clearly explained with reference to the statutory exceptions, then dissatisfied job applicants who have been disadvantaged by those questions may be able to bring legal proceedings.

It is not possible for a job applicant to bring a claim against an employer just because they have been asked questions about health or disability which are not allowed by Section 60. However, if an employer does ask questions that are not allowed and does not then offer the applicant a job, the employer could be liable for unlawful disability discrimination and, if so, will have to pay the financial damages that result from this.

The employer would only be liable if they did not select the applicant for the job because he/she is disabled or because the employer thought that he/she is disabled. There may also be a claim if an applicant is offered a job subject to health checks and it is then withdrawn simply because he/she is disabled or because the employer thinks that he/she is disabled.

The Commission is responsible for regulating employer's compliance with Section 60 and it can take legal enforcement action against employers for non-compliance when it is proportionate to do so.

Examples of Section 60 breaches and compliance

In the following section there are examples to illustrate how Section 60 is intended to work in practice. It is done in the form of answers to frequently asked questions about how these duties will affect the lawfulness of the particular recruitment process or practice.

Application forms

- 1. Question:** An employer's standard job application form for all jobs contains a section requiring job applicants to reveal information about any health issues and the number of days they have had off because of ill health in the last two years. Is this lawful?

Answer: This section of the form is in breach of Section 60 because the questions clearly relate to health (and possibly disability) and this general health information is not necessary under one of the defined exceptions.

- 2. Question:** A recruitment agency acting for a large employer has been asked to select a pool of candidates who can do a range of jobs for them at short notice. The agency draws up a shortlist partly based on information that it requests from referees some of which relates to health and disability (e.g. sickness absence figures). Is this lawful?

Answer: There is a breach of Section 60. This is because the agency, acting on behalf of the employer, has requested information about health and disability to determine who should be shortlisted. It would be good practice for employers to instruct agencies not to ask questions about health or disability when carrying out an exercise of this nature unless they are allowed to do so under one of the exceptions.

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- 3. Question:** When recruiting scaffolders, a construction company asks applicants whether they have a disability or health condition that affects their ability to climb ladders. Is this lawful?

Answer: As the ability to climb ladders and scaffolding is an intrinsic function of the job, the construction company is not in breach of Section 60.

Positive action

- 1. Question:** A telesales company wishes to achieve greater diversity in its workforce to reflect the consumers it provides services to. Various groups are under-represented, including disabled people. In its recruitment materials it asks disabled candidates to identify themselves so that they can benefit from the company's guaranteed interview scheme for disabled candidates. Is this lawful?

Answer: Asking health- or disability-related questions for this legitimate purpose – promoting lawful positive action – is not in breach of Section 60.

Occupational requirement

- 1. Question:** A charity wishes to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states that this is the case. In the application form the employer asks for evidence that applicants meet this requirement. Is this lawful?

Answer: It is lawful because being Deafblind is an occupational requirement of the job.

Monitoring

- 1. Question:** The monitoring forms containing health- and disability-related information that a large public sector employer uses have not been separated from the rest of the job application forms. Consequently, the panel making shortlisting decisions uses the information it has been given about health and disability to sift out candidates that in its view are not up to the job. Is this lawful?

Answer: It is a breach of Section 60 to ask for information about health and disability in order to shortlist candidates during a recruitment process. If the

information is legitimately sought for monitoring purposes, it should be kept separate from the application form and should not be seen by the interview panel.

- 2. Question:** A small employer is unable to separate monitoring information about disability in job application forms because she personally handles the whole recruitment process. However, she takes care to disregard this information in respect of shortlisting and selection. Is this lawful?

Answer: Provided that she disregards information about disabilities (for anything other than monitoring purposes) and considers each job applicant's ability to do the job without reference to disability, then this is compliant with Section 60.

Interviews

- 1. Question:** At an interview for a research post a disabled applicant volunteers the information that he will not be able to use standard computer software to prepare reports because of the nature of his impairment. The interviewers are not sure whether they can ask additional questions about this.

Answer: If the preparation of reports is an intrinsic part of the job then additional questions can be asked to establish whether there are reasonable adjustments that can be made – for example, the provision of a voice activated computer – and to establish whether he is able to prepare reports with those adjustments in place. It would be good practice for the interviewers to explain the reasons for the additional questions during the interview.

- 2. Question:** During the course of an interview, a job applicant discloses that he has a visual impairment which is not otherwise obvious. Unprompted, he tells the interview panel that he does not consider that the impairment affects his ability to do the job and asks if there are any questions they would like to ask him about this. A panel member does ask him if he will need any adjustments to carry out a test if he makes it to the next stage of the recruitment process. The panel does not use any disability-related information to decide if his application can proceed further. Is this lawful?

Answer: The panel has before it disability-related information which it ignores in its decision-making process. A panel member asks a legitimate question about adjustments to the recruitment process which falls within an exception. This means that the employer is not in breach of Section 60.

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- 3. Question:** An internal applicant is interviewed for a job. The interview panel includes someone who is aware that this applicant was recently absent from work due to a mental health condition for a number of months.

During the interview this panel member asks the applicant whether there are any health issues which would affect his ability to cope with the mental pressures of the job. Is this lawful?

Answer: This will be in breach of Section 60 if coping with mental pressure is not an intrinsic function of this particular job.

- 4. Question:** An employer is interviewing an applicant for a post where coping with mental pressure is an intrinsic function of the job. The employer asks the applicant to give examples of how he has handled a difficult situation or worked to a tight deadline.

Answer: The employer has not breached Section 60 by asking these questions as they are about the applicant's ability to do the job and are not related to the applicant's health or disability.

The position once work has been offered

- 1. Question:** An employer refers successful candidates to its own occupational health practitioner who asks them to complete a health questionnaire. This asks questions about mental health which are not necessary to assess the candidate's ability to do the job. One disabled applicant gives information about a long-standing mental health condition which is well controlled by medication. The employer withdraws the job offer relying on this information.

Answer: Questions about health and disability can be asked after a job offer has been made but the successful candidate would be able to make a claim of disability discrimination if the offer has been withdrawn because of his disability. However, referring successful candidates to an occupational health practitioner can be a positive step as it should provide an opportunity to explore reasonable adjustments with candidates who have a disability.

Checklist for employers

Set out below is a non-exhaustive checklist of actions for employers that will help to promote compliance with Section 60. It is strongly recommended that employers use this in order to avoid breaching Section 60.

Review recruitment policies, practices and procedures to analyse and ensure compliance with Section 60.

- Remove general questions to job applicants and third parties that relate to health and disability (e.g. questions concerning sickness absence) in recruitment materials.
- If seeking references in advance of an offer being made, do not ask for information about sickness absence.
- Train employees and instruct agents making recruitment decisions of their practical responsibilities under Section 60, especially on what they can and cannot do.
- Structure the recruitment exercise, so far as is possible, to focus objectively on relevant and necessary skills, knowledge, abilities and experience, avoiding reference to health and disability questions that do not fall within legitimate Section 60 exceptions.
- Clearly explain why information about disability is being sought for monitoring purposes, spelling out what this information will and will not be used for.
- Where possible, separate disability monitoring data from other information provided by job applicants and take all necessary steps to ensure that this information is not used by those making recruitment decisions.
- Ask questions about reasonable adjustments relating to the recruitment process at the appropriate stage, for example, in the job advert in relation to adjustments to completion of forms or CVs; or after shortlisting candidates in relation to adjustments to tests, interviews or assessments.
- Clearly explain when exceptions to Section 60 are being used and why you believe it is necessary to ask disability- or health-related questions.
- Take care to refer candidates to occupational health practitioners only after a job offer has been made.
- Provide instructions to occupational health practitioners that discourage adverse assumptions being made about disability, and enable proper consideration of reasonable adjustments, where required, resulting in appropriate recommendations.

- Incorporate Section 60 compliance measures within the policies, practices and procedures in place to prevent unlawful discrimination from arising in the recruitment process as a whole.
- Monitor and review the effectiveness of such compliance measures, and take additional action to achieve compliance where needed.

Further sources of information and advice

Equality and Human Rights Commission

The Equality and Human Rights Commission is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. If you need expert information, advice and support on discrimination and human rights issues and the applicable law, especially if you need more help than advice agencies and other local organisations can provide, please contact the Equality Advisory and Support Service (EASS), below. EASS was commissioned by Government in 2012 to replace the EHRC Helpline, which is now closed. EASS is completely independent of the Commission.

Equality Advisory Support Service (EASS)

The Helpline advises and assists individuals on issues relating to equality and human rights, across England, Scotland and Wales. It replaces the Equality and Human Rights Commission's helpline and is aimed at individuals who need more expert advice and support on discrimination than advice agencies and other local organisations can provide. They can also accept referrals from organisations which, due to capacity or funding issues, are unable to provide face to face advice to local users of their services.

- Telephone: 0808 800 0082 (Mon to Fri 9am to 8pm and Sat 10am to 2pm)
- Text phone: 0808 800 0084 (Mon to Fri 9am to 8pm and Sat 10am to 2pm)

Acas – The Independent Advisory, Conciliation and Arbitration Service

Acas aims to improve organisations and working life through better employment relations. It provides impartial advice, training, information and a range of problem resolution services.

- Website: www.acas.org.uk
- Telephone: 0300 123 1100 (Monday to Friday: 8am to 8pm; Saturday: 9am to 1pm)

Access to Work

Access to Work can help disabled people or their employers if their condition or disability affects the ease by which they can carry out their job or gain employment. It gives advice and support with extra costs which may arise because of certain needs.

- Website: www.gov.uk/access-to-work/overview

Citizens Advice Bureau

Citizens Advice Bureaux offer free, confidential, impartial and independent advice from over 3,500 locations. These include high streets, community centres, doctors' surgeries, courts and prisons. It is available to everyone.

Advice may be given face-to-face or by phone. Most bureaux can arrange home visits and some also provide email advice. A growing number are piloting the use of text, online chat and webcams.

- Website: <http://www.citizensadvice.org.uk/getadvice.ihtml>
- Telephone (England): 03454 04 05 06
- Telephone (Welsh-speaking advisor): 03454 04 05 05

Citizens Advice Scotland

- Website: www.cas.org.uk

Law Centres Federation

The Law Centres Federation is the national coordinating organisation for a network of community-based law centres. Law centres provide free and independent specialist legal advice and representation to people who live or work in their catchment areas. The Federation does not itself provide legal advice, but can provide details of your nearest law centre.

- Website: www.lawcentres.org.uk
- Telephone: 020 7842 0720
- Fax: 020 7842 0721
- Email: info@lawcentres.org.uk

Scottish Association of Law Centres (SALC)

SALC represents law centres across Scotland.

- Website: www.scotlawcentres.blogspot.com
- Telephone: 0141 561 7266

Contact us

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

Website www.equalityadvisoryservice.com

Telephone 0808 800 0082

Textphone 0808 800 0084

Hours 09:00 to 20:00 (Monday to Friday)
10:00 to 14:00 (Saturday)

Post FREEPOST Equality Advisory Support Service FPN4431

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. The Commission welcomes your feedback

Alternative formats

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