

Disability Rights & The Equality Act 2010



EQUALITY FOR EVERYONE

Overview

This booklet takes a closer look at the rights of workers with disabilities. We hope the language used will assist lay members and representatives in dealing with disability-related matters in an appropriate way.

The Disability Discrimination Act 1995 (DDA 1995), which came into force on the 2nd December 1996, was one of the most comprehensive and wide-ranging pieces of legislation on disability-related issues to affect the workplace. The Disability Discrimination Act 2005 improved upon the DDA 1995 and also extended the existing protection to public places.

The Equality Act 2010 (the Act) replaced the DDA 1995 (and 2005 amendments). The Equality Act also brought all 9 areas of discrimination law under the one umbrella.

Are you protected under the 2010 Equality Act?

To be protected under the Act you must be “disabled”. A person is stated to be disabled if they have a “physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities”.

Please read the following answers to questions typically posed on the Act. If, after reading the information, you think you are disabled or may have suffered discrimination under the Act, please contact your Union Representative or Union Headquarters immediately.

Does the Act apply to me?

Q: I'm not registered disabled - does the Act apply to me?

A: If you were a Green Card holder between December 1996 and December 1999 you are automatically protected by the Act but only in respect of past disabilities. Registration no longer applies in respect of the Act. Whether you are covered by the Act in respect of current disabilities will be determined by the criteria listed further on in this booklet.

Q: I've had a medical problem on and off for years - will the Act help me in any way?

A: Certain conditions, such as Multiple Sclerosis, Cancer and being HIV positive are covered by the Act from the point of diagnosis. If a person has what is regarded as a ‘severe disfigurement’ they will be automatically protected under the Act.

If you suffer with a progressive condition which has (or is expected to have) a substantial adverse effect on your ability to carry out normal day to day activities then it will be treated as a disability from the point that it affects (or affected) your ability to carry out normal day to day activities.

For other types of condition, it is difficult to say but, in order to be ‘disabled’ for the purposes of the Act you will have to show that:

- you have a physical or mental impairment;
- which has (or is likely to have) a substantial and long term adverse effect;
- on your ability to carry out normal day to day activities

For example, a person living with muscular dystrophy (muscle wasting disease) is finding it increasingly hard to walk. His doctor says that his walking ability will deteriorate further as the condition progresses. Given that the condition is already having an effect on his ability to carry out normal day to day activities and is expected (in future) to have a substantial adverse effect – it will be treated as having a substantial adverse effect on his ability to carry out normal day to day activities now.

So, if you are living with a medical condition which has lasted for 12 months or more, or is likely to last for 12 months or more; is serious and affects your life in more than a minor way, you may be ‘disabled’ for the purposes of the Act.

Q: “I suffer from diabetes and as long as I take my medication I have few symptoms, if any. Does the Act apply to me?”

A: Potentially yes - the Guidance and Explanatory Notes to the Act confirm that where medication is used to treat the condition, it is to be treated as “having the effect without the measures in question”. In other words, the fact that medication is used to treat or control the condition is ignored, e.g. if you are a diabetic, you would assess what effect your condition would have on your day to day activities, if you were not taking your medication and if you are deaf, you would assess the effect of your condition without the use of a hearing aid.

Q: I have a medical condition which was diagnosed when I was a child but is in remission and I presently have no symptoms. Does the Act apply to me?”

A: Potentially, yes. Progressive conditions are those which are likely to change and develop over time, such as muscular dystrophy. Periods of remission are counted as part of the length of the illness if the effects of the condition are likely to recur.

Q: I have been told that a medical procedure or drugs will cure my condition. Am I disabled under the Act?

A: Possibly not; if you can be cured by a one-off procedure or a course of medication your condition is unlikely to satisfy the definition of “disability” under the Act. For instance, if you break a leg and undergo surgery to repair the break, it is unlikely that your condition will be covered by the Act even though it may take 12 months or longer to fully recover. Similarly, if you are diagnosed as suffering with an illness, e.g. tuberculosis, which is treated and cured

by a short hospital stay with medication, your condition is unlikely to render you “disabled” as defined in the Act. However, if your condition is such that the medication only controls the symptoms and, disregarding the medication, you would satisfy the other elements of the definition of ‘disability’ then you may be covered by the Act.

Q: I suffer from clinical depression. Would I be covered under the Act as my condition affects me psychologically but not in any physical way?

A: The Act could apply to you. What you would need to show is that your depression has a long term, substantial, adverse effect on your ability to carry out normal day to day activities.

Q: Would every long term medical condition amount to a disability under the Act?

A: Not necessarily. Certain conditions are excluded from protection under the Act, for example, glasses wearers are generally not deemed to be ‘disabled’ and hay fever is not automatically covered under the Act. Addictions i.e. to alcohol or drugs are not covered, however, where an addiction leads to another medical condition or impairment, e.g. liver disease, the impairment will be covered provided that the effects of the impairment are substantial, long term, etc.

How does the Act protect me?

Q: If my medical condition amounts to a disability for the purposes of the Act, what protection does the Act give me?

A: If you are disabled under the Act, an employer or prospective employer will be acting unlawfully if they discriminate against you:

- because of your disability; **(direct discrimination)**
- for a reason arising in consequence of your disability; **(discrimination arising from disability)**
- by applying to you a “provision, criterion or practice” **(indirect discrimination);**
- by failing to make reasonable adjustments as would remove or reduce any disadvantage facing you; **(reasonable adjustments)**
- by subjecting you to harassment for reasons relating to disability; **(harassment)**
- by victimising you for reasons relating to disability **(victimisation)**

Direct discrimination

In order to prove direct discrimination you must show that your employer has treated you less favourably because of disability than others have or would be treated. The reason for the less favourable treatment must be ‘disability’. For example, an employer who refuses to employ or promote the best person for the job because of a disability will be acting unlawfully.

Q: I applied for a job and, although I was told that I was the most qualified candidate for the role, wasn't appointed because of my multiple sclerosis. Can the Act help me?

A: Yes – it is unlawful for a prospective employer to refuse to offer you employment (provided, as you say, you were the best candidate) because of your multiple sclerosis.

Q: What if I miss out on a promotion because I care for a disabled child?

A: The less favourable treatment need not have arisen because of a disability that you have – rather, because you associate with someone else who is disabled.

Q: What if I am not offered a job because the person interviewing me thinks that I'm disabled when in fact I'm not?

A: A prospective employer will be acting unlawfully when they treat a person less favourably because of a perceived disability, e.g. by failing to offer employment to the best person for the job because they (wrongly) perceive that person to have a disability.

Q: I started working for my employer some years ago but since joining have developed diabetes. I have never told my employer as am afraid of losing my job. What's my position?

A: Many people are concerned about disclosing their medical conditions both when applying for jobs and during employment. You are not obliged to disclose a disability to your employer (or prospective employer) but it may be in your interest to do so as an employer will only be held responsible for disability discrimination if they actually know, or ought reasonably to have known that you are disabled. Also it can be helpful for you to disclose a disability at the outset of employment as it may assist an employer to make any reasonable adjustments that may be required.

Indirect discrimination

This arises when an employer applies a “provision, criterion or practice” to the workforce (or a group of workers) which disproportionately and adversely affects workers with disabilities (or a particular disability); adversely affects you and cannot be justified by the employer as being a proportionate means of achieving a legitimate aim.

Q: I suffer from dyslexia and want to go for promotion. However, I have been told that I must sit a test which involves a written exercise and an assessment performed under timed conditions. My condition gets worse if I am under pressure. Is there anything I can do?

A: Yes, dyslexia is capable of amounting to a disability under the Act. Operating a policy which requires all candidates for promotion to undergo a written test is likely to have a

disproportionately adverse effect on candidates with dyslexia, may adversely affect you and, may be difficult for your employer to justify as being a proportionate means of achieving a legitimate aim. What you can do is make sure that your employer is aware of your dyslexia and ask for adjustments to be made to the testing procedure. These may include, e.g. allowing you more time to take the test or to ask for alternative conditions under which to take the test. You should not be placed at a disadvantage because of your disability.

Q: I suffer with epilepsy and have been ‘fit free’ for 5 years. I now hold a full driving license but I have been told by my manager that I cannot drive or operate machinery in work. Is that lawful?”

A: You may be disadvantaged by your employer’s policy, however, your employer has a duty to protect you and all other staff at work from risk and it may be necessary, in order to keep you and others safe, to restrict your driving duties in this way. So, while the policy itself may be discriminatory on disability grounds, your employer could be justified in preventing you from taking control of machinery or from driving in these circumstances.

However, an employer who simply applies the policy without obtaining a medical report or otherwise assessing the potential risks, if any, may be acting unlawfully. It might be appropriate for your Manager to send you to their medical advisors for an assessment of your condition. You might also like to invite them to write to your GP or consultant for further advice.

Where the DVLA has confirmed that you are fit to drive a vehicle on the road, there may be no good reason for your employer to deny or restrict your driving duties at work

Discrimination arising from disability

Often the reason for the less favourable treatment is not the disability itself but something arising in consequence of the disability. The Act protects those who suffer less favourable treatment for disability-related reasons by permitting a claim of “discrimination arising from disability” to be pursued in the employment tribunal.

Q: I have had a lot of sick leave due to a long term medical condition which has finally, after 18 months, been diagnosed as ME. My employer has started proceedings against me under the Attendance Procedure. Can they do that?

A: An employer is entitled to expect regular attendance from its employees; however, where the reason for your absence relates to a disability, the employer should consider whether reasonable adjustments could be made to enable you to remain in work, e.g. a more flexible working pattern; time off for medical appointments or treatment.

An employer who dismisses an employee because of their disability related absences will be acting unlawfully and will expose themselves to a claim of discrimination arising from disability. It is considered good practice for employers to discount all disability-related absences when following the Attendance Procedure.

The duty to make reasonable adjustments

The duty to make reasonable adjustments means that an employer is obliged to take all reasonable steps to remove the workplace disadvantage facing an employee with disabilities. This may involve treating employees with disabilities more favourably than other employees and the more positive treatment will not, of itself, amount to discrimination.

Q: So what types of reasonable adjustments can I ask the employer to make if I suffer from a disability under the Act?

A: The types of adjustment you might suggest to your employer ought to be made in order to remove or reduce the workplace disadvantage facing you, including:

- adjustments to the physical premises;
- allocating some of your duties to another;
- transferring you to an existing vacancy in another department;
- altering your working hours;
- moving you to a different place of work;
- allowing you to be absent during working hours for rehabilitation, assessment or treatment;
- giving you training to do another job;
- acquiring and modifying equipment;
- modifying instruction/reference manuals;
- modifying procedure, suggestion or assessment;
- providing a reader interpreter; and
- providing supervision;

Remember that you are not expected to contribute to the cost of making any reasonable adjustments. Also, it may be useful to consider any alternative sources of assistance, for example, Access to Work through Job Centre Plus.

Q: I suffer from a back condition and I have now developed arthritis. I can no longer stand for long periods and I find walking difficult. As a result of the physical nature of the job I have had time off sick. My doctor has told me I can return to work as long as it's on light duties with less walking, however I am a Postman. Will I lose my job?

A: Not necessarily. The Act places a duty on the employer to make reasonable adjustments as might help you to stay in work. There is no obligation on the employer to create a new job for you (if you are unable, because of your arthritis, to do your original job) but if placing you on light duties would remove the substantial disadvantage then, if possible, you should be offered light duties. Other reasonable adjustments might include providing you with an ergonomically designed chair or allowing you to work indoors on a variety of administrative and sorting duties.

It will help if you can tell your employer what adjustments you think might need to be made to allow you to do your job. You could also ask your GP to write to your employer and seek advice from the Union (we may be able to make representations on your behalf regarding reasonable adjustments).

If your employer is aware of the adjustments you require, it must decide whether (given all the circumstances) it is reasonable to implement them. Your employer may refuse to make an adjustment on cost grounds or they may claim that the adjustment would not be practical, taking into account the nature of your job or, that the adjustment would not be effective in removing or reducing the substantial disadvantage facing you. In most cases, however, an employer will implement reasonable adjustments before proceeding with the Attendance Procedure.

I think I have suffered disability discrimination - what should I do now?

Q: What should I do if I think I have been discriminated against by my employer?

A: Seek advice from your union rep as soon as possible. Most discrimination claims must be lodged in the employment tribunal within three months of the act of discrimination complained of. For example, if you have been turned down for a promotion because of your disability, the time for lodging a claim in the tribunal starts to run from the date that you are notified by your employer that your application was unsuccessful. Similarly, if you have been harassed at work because of your disability, the time period for lodging a tribunal claim runs from the date on which the last incident of harassment occurred.

If you are unsure whether the way in which you've been treated by your employer amounts to discrimination, you can use the discrimination "Questionnaire" procedure to request further information about the way in which you have been treated or, about policies and procedures you believe may be discriminatory. The procedure entitles you to ask formal questions of your employer saying why you feel you have been discriminated against and asking why you have been treated in the way you have.

You should obtain CWU advice before sending a Questionnaire. It is not a substitute for submitting a claim in time. Questions can be asked during the three month time period for

lodging a Tribunal claim or within 21 days of having lodged a claim in the tribunal. Your employer is not legally obliged to respond to or answer any of the questions you have posed but an employment tribunal may draw 'adverse inferences' from an employer's refusal or failure to respond to a Questionnaire. Similarly, an employer's answers can be quoted in evidence.

You might also decide to put your complaint in writing to your employer, i.e. lodge a grievance. Should you decide to lodge a grievance remember that the time limit for lodging a claim in the Tribunal may have already begun and **will not be extended** until after a decision on your grievance has been made. Tribunals can extend the time for accepting a late claim but only in exceptional circumstances.

If you have been dismissed or forced to take compulsory medical retirement for reasons relating to your disability - the time for lodging a tribunal claim begins to run from the date of your dismissal.

If you think you may have a claim under the Equality Act 2010, please do not hesitate to contact your Union representative or contact CWU Headquarters on 020 8971 7200.

How the Equality Act 2010 changes the law; A Summary

The Equality Act 2010 brought into effect some changes to the law for employees with disabilities AND workers who have primary care responsibilities for someone else who is disabled.

Association & Perception Discrimination

Additional protection from direct discrimination for employees who are treated less favourably than others because they are thought to have a disability (or other protected characteristic covered by the Act), i.e. perception discrimination or because they associate with someone else who is disabled (or who has a protected characteristic) i.e. discrimination by association.

Discrimination arising from Disability

Under the Act, a person discriminates against a disabled person if he/she treats them less favourably because of something arising in consequence of their disability, and this treatment cannot be justified as a proportionate means of achieving a legitimate aim. This form of discrimination does not require the use of a comparator.

Duty to make reasonable adjustments

The Act consolidated and extended the duty of employers and suppliers of goods and services under the old DDA 1995 to make reasonable adjustments for disabled persons.

The duty now arises:

- Where a provision, criterion or practice puts a disabled person at substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the person to whom the duty applies must take reasonable steps to avoid the disadvantage.

- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons are not disabled, the person to whom the duty applies must take reasonable steps to avoid the disadvantage.
- Where a disabled person would, but for the provision of an auxiliary aid [technology or equipment], be at a substantial disadvantage in comparison with persons who are not disabled, the person to whom the duty applies must take reasonable steps to provide the auxiliary aid.

Harassment

The Act defines unlawful harassment as “unwanted conduct relevant to a protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile or degrading, humiliating or offensive environment for that individual”.

For harassment related to a protected characteristic, ‘related to’ includes where the employee or client being harassed has a protected characteristic or where there is any connection with a protective characteristic. ‘Any connection’ includes a situation where the employee or client being harassed has an association who has a protected characteristic or where they are wrongly perceived as having a particular protected characteristic.

Victimisation

Victimisation occurs when an employer or service provider subjects a person to a detriment because the person has carried out (or believes that they have or may have carried out) what is referred to as a ‘protected act’.

A protected act includes any of the following:

- Bringing proceedings under the Act;
- Giving evidence or information which is related to the provisions of the Act;
- Doing anything which is related to the provision of the Act;
- Making an allegation that another person has done something in breach of the Act;

The term ‘detriment’ is not currently defined under the Act but it can reasonably be inferred that if an action has the effect of putting a person at a disadvantage or if it makes their position worse, such treatment will amount to a detriment.

Restrictions on employers asking disability or health related questions of job applicants

The need to respond to health or disability related questions during the recruitment and selection process has had a disincentive effect on some disabled people applying for work. Unfortunately the DDA 1995 offered little in the way of protection for applicants with disabilities who, having been asked health or disability questions on the application form, were subsequently excluded by employers from the shortlist for interview despite many having the capacity to fulfill the role.

The Act restricts the ability of a prospective employer to ask health questions of applicants (including whether an applicant has a disability), until they have been able to successfully pass an interview, or some other assessment, to show that they meet some of the non-health requirements of the job. Certain 'specific purpose' exceptions apply, but generally the provision covers any enquiries made before an offer (conditional or unconditional) is made.

Positive action

The ability of an employer to now treat a disabled worker more favourably than a non-disabled worker will see many more disabled workers protected in workplace scenarios where previously the probability of an enforced ill-health retirement or some other 'managed exit' would have been quite high. Our reps must take this development and use it to the advantage of our disabled members.

Tackling existing workplace culture may also pose challenges, not least because some able-bodied colleagues may struggle to understand that the employer's duty to make reasonable adjustments to remove disadvantage for disabled employees is a positive duty that involves **doing more** for disabled employees than may be required to be done for others. While such situations will need to be handled sensitively, reps should do what they can to explain that the 'more favourable treatment' helps to prevent many of our disabled colleagues from being managed out of the business.

On the flip-side, where employers are found to be failing in their positive duties we should not hesitate to warn them that they are potentially exposed to claims from members pursuing in connection with the Equality Act and that subsequent legal action could follow unless action is taken to comply with the Act.