

Disability discrimination: key points for the workplace

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About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

‘Must’ and ‘should’

Throughout the guide, a legal requirement is indicated by the word ‘must’ - for example, an employer must make ‘reasonable adjustments’ for an employee who it knows is disabled and who wants them.

The word ‘should’ indicates what Acas considers to be good employment practice.

Disability

This guide covers disability as defined in the Equality Act 2010.

Understanding the term ‘employee’

Regarding discrimination matters, under the Equality Act 2010, the definition of ‘employee’ is extended to include:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business.

December 2015

Information in this guide has been revised up to the date of publication.

For more information, go to the Acas website at www.acas.org.uk

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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About this guide

This guide offers employers, senior managers, line managers, HR personnel, employees, employee/trade union representatives and job applicants a grounding into how disability discrimination can occur in the workplace, how it can be dealt with and how to reduce the chance of future discrimination.

For an overview of how equality legislation applies generally at work, Acas provides the following guidance:

- Equality and discrimination: understand the basics
- Prevent discrimination: support equality
- Discrimination: what to do if it happens.

The Equality Act 2010 protects employees from disability-related discrimination, harassment and victimisation. Disability is one of nine features known in law as protected characteristics and covered by the Act. Guidance on other protected characteristics, and other useful tools and materials can be found at www.acas.org.uk/equality.

This guide is in line with the Government's Disability Confident campaign, which aims to give more employers the confidence to hire disabled people. To find out more about the campaign, go to www.dccampaign.org.

Latest figures from the Government's Labour Force Survey indicate there are more than three million disabled people in work and they make a positive contribution.

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which are not obvious – for example, some mental health conditions.
There is more on impairment further into this guide.

Long -term - lasting at least a year , or likely to be for the rest of the
person's life or recur

Substantial adverse effect - more than minor, but it may fluctuate or
change, and may not be present all the time

Normal day -to -day activities - not defined by the Act, but in and out of
the wor kplace they are taken to be common things for most people. For
example, in employment, they might include interacting with colleagues,
using a computer, writing, following instructions, keeping to a timetable,
sitting down, standing up, driving, lifting an d carrying everyday objects.

Exceptions to the main definition of disability

There are exceptions to the main definition of disability and this can be a
complicated area. Key exceptions are:

1. A person is treated as disabled and entitled to protection with out
having to show their condition has a substantial and long -term
adverse effect on their ability to carry ou t normal day -to -day
activities in the following situations :
 - where someone has cancer , HIV infection or multiple sclerosis .
The Act specifically says a person who has one of these conditions
is a disabled person from the point of diagnosis
 - where a consultant ophthalmologist has certified someone as
blind , severely sight -impaired , sight -impaired or partially -
sighted . The Act regards them as disabled

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if it had a substantial and long-term adverse effect on day-to-day activities. Other excluded conditions include pyromania, kleptomania, hay fever, and a tendency to be abusive physically or sexually. But these, too, can be a complicated area where other circumstances in an individual case can mean the exclusion does not apply.

Is obesity a disability?

Obesity itself is not a disability. But, it may cause an impairment - for example, mobility problems, depression or diabetes - which could be a disability. The impact would have to be substantially adverse and long-term on day-to-day activities. And it will depend on the particular circumstances of the individual case.

Where the impairment is a disability, an employer must consider and make 'reasonable adjustments'. Examples might include providing a special desk and chair, a parking space near the office, or modifying the employee's duties.

Also, employers need to ensure obese employees are not subjected to offensive comments or behaviour because of their weight and that obese job applicants are not discriminated against because of their weight.

If it is unclear whether or not an employee is disabled, it would be up to a court or employment tribunal to rule whether or not the employee was disabled.

Understanding what 'impairment' means

Impairments can be physical, mental or both. And impairments and their effects can fluctuate and may not be ap

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Impairment – other considerations :

- An exception to the general rule is that a severe disfigurement or deformity of the body is usually regarded as having a substantial adverse effect on the person's ability to carry out normal day -to -day activities. There is no need for them to show the effect.

Regarding disfigurement, it may be necessary to take into account factors such as whether it is permanent, its size and where it is. For example, is it large or small, clearly visible or hidden under clothing,

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There are two additional types which apply solely to this protected characteristic:

- Discrimination arising from disability
- Failure to make 'reasonable adjustments'

Employers should be aware that successfully dealing with a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination might be prevented. To find out(d)-1(is)2ilitymur Te2(o)1(er)1(e ci)1()-3(p)-3(l)-2(an)-2(t)3(h)-3(ab)-3A

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Adjustments can often be simple and inexpensive, and sometimes cost nothing. In law, adjustments need not be excessive; they only have to be 'reasonable'. An employer is not required to change the basic nature of a job, but, where there is a 'reasonable adjustments' cost, it is responsible for paying. However, a government scheme, Access to Work, can help with advice and, depending on circumstances, some costs – for example, it might pay for, or contribute towards, adjustments such as special equipment, a support worker for the disabled employee and fares to work if the employee cannot use public transport.

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Making reasonable adjustments can be a complex area. The Acas Helpline on 0300 123 1100 can give advice on specifics. Also, the Equality and Human Rights Commission's Employment Statutory Code of Practice gives

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this exception may benefit from taking legal advice on the matter and
should

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and online accessibility for the disabled may prove difficult or impracticable for some small employers.

Interviewers should not ask personal questions, which may be perceived as intrusive, not relevant to the job and imply potential discrimination. Where such information is volunteered, interviewers or others involved in the selection process should take particular care not to be influenced by that information.

Health issues should be treated with particular care, as it is generally unlawful for an employer to ask questions about a job applicant's health, absences from work or disability before offering them employment. Under the Equality Act, if an employer believes it is necessary to ask health related questions before making a job offer, it can do so only for four specific and limited reasons. To find out more, see the section, Asking questions about health. Outside of these limited reasons, even in a situation where information is volunteered by the candidate about their health or disability, an interviewer or employer must not respond by asking questions about the candidate's health or disability.

Some employers encourage disabled candidates to apply, guaranteeing an interview for those who meet the minimum requirements of the job. This is lawful and falls under what is termed 'Positive action'. Employers interested in learning more about the scheme should go to www.gov.uk/recruitment-disabled-people/encouraging-applications

For example... discrimination in recruitment

Wojciech sees a job advertisement for a special educational needs adviser with the city council. He currently works in special educational needs and is looking to step up into an adviser role. However, he notices that the ad says applicants need to have a driving licence. He thinks this is unfair as the role is in an urban area with good train, tram and bus links used regularly by other employees he knows at the council.

Wojciech is no longer allowed to drive by the Government's Driver and Vehicle Licensing Agency because he has become partially sighted. He believes the driving licence requirement by the council is indirect discrimination as it bars him and others with this condition and other conditions from applying for the job. He also thinks it would be difficult for the council to justify the requirement, unless driving to remote locations not served by public transport was a core part of the job.

Pay, and terms and conditions of employment

It is important to ensure there are no terms and conditions (including contractual benefits) that disadvantage or exclude people because of their

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disability, perceived disability, association with someone with a disability, or something linked to their disability. For example, this might include pay, sick pay, a bonus, death in service benefits, parental leave or compassionate leave. In particular, an employer should be careful how it manages its sick pay policy regarding an employee absent for a disability

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good practice in the Equality and Human Rights Commission's
Employment Statutory Code of Practice .

Such policies are more common in the public sector, and in private or voluntary organisations carrying out work for a public sector employer. This is because of what is called the 'public sector equality duty' where these employers have a legal duty to prevent and eliminate discrimination. To find out more about the duty, see the companion guide, Equality and discrimination: under stand the basics. Also see this guide's section s

For example... discrimination in promotion

Paul has had spells of depression affecting his mood, confidence and decision-making at work. However, with the help of a course of antidepressants from his GP, taking up regular exercise and giving up alcohol, he has turned his life around.

He applies for promotion to senior management. He is now pleased with his job performance and had an excellent end-of-year review, yet does not get an interview for the post. He has been passed over, as the two senior managers sifting applications decided he would be unable to cope with the role's additional responsibilities and pressures – and that his depression would probably come back.

The way the two senior managers blocked Paul's application is likely to be discriminatory, even though they might have had genuine concerns about the role's pressures and the possible impact on Paul's well-being. The concerns might have been addressed more fairly by meeting with each job candidate to clarify job pressures and by assessing all candidates using the same criteria. It would also have been advisable to have kept some evidence showing that all candidates were questioned and assessed consistently – for example, written notes.

Training

Withholding training from an employee because of their disability, perceived disability, association with someone with a disability or something linked to their disability would be discriminatory.

Also, an employer must make 'reasonable adjustments' to training, if required, including possibly the way it is delivered, so an employee with a disability can undertake the training and not be disadvantaged.

In particular, an employer should not assume that an employee with a learning disability cannot benefit from training. A learning disability can stem from a host of reasons including other disabilities such as autism, epilepsy and cerebral palsy.

People with a learning disability tend to learn differently, so may sometimes need 'reasonable adjustments' – for example, being given extra time.

Learning disability charity Mencap advises that many people with a learning disability learn new skills best 'on the job' rather than in a classroom environment. This means training them in the same

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building, surrounded by the same people, and using the same equipment as they would when working. To find out more, See Mencap's guide, You can work it out! Best practice in employment for people with a learning disability, on www.mencap.org.uk/node/5859

For example...

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- it has followed a fair capability procedure, and can provide evidence that it has carefully considered and discussed the disability/capability issue – for example, notes of meetings, conversations and phone calls, emails, the occupational health report, the investigation of the matter, the disciplinary or capability procedure meetings, and any appeal – to show its actions were justified.

Employment tribunals may take into consideration whether an employer is a small firm, where the impact of a lack of capability and long-term absence can be more acute on the business and other staff. But, employers should keep firmly in mind that this can be a complex area and it may be advisable to take legal advice.

In addition, see earlier sections in this guide on Failure to make 'reasonable adjustments', Making 'reasonable adjustments' and Sickness absence.

Redundancy

To avoid the risk of being discriminatory, an employer must consider making 'reasonable adjustments' so employees are not at a disadvantage in a redundancy process because of disability.

Risk of discrimination tends to be in two key areas:

- the criteria an employer uses to select employees for redundancy
- how an employer manages the redundancy process.

An employer should check the redundancy selection criteria it is intending to use including:

- absence - consider whether it might be a 'reasonable adjustment' to disregard some or all of an employee's disability-related absence, or use another period of time. Failure to do so might be discriminatory
- working hours - avoid simply selecting part-time staff or those with other flexible working arrangements. They could include employees who work part-time or flexibly because of their disability or because they care for someone with a disability. Also, do not alter scores through making assumptions about their performance or output because of these arrangements
- job performance - scoring of this factor might need a 'reasonable adjustment' to take into account an employee's disability. For example, an employee's stroke has slowed the speed at which they work, and their score may need to be adjusted upwards

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This can be a legally complicated area. An employer should ensure that scores comparable periods, and can clearly show that adjusting a score upwards is proportionate, appropriate and necessary so an employee is not at a disadvantage because of disability

- skills, experience and qualifications - for example, an employee may have had time off related to their disability and missed important exams for a qualification to help further their career – a

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Subsequent case law, though, has indicated that an employer does not always have to redeploy employees who are or become disabled. Neither does it have to give them favourable treatment in promoting them to jobs beyond their qualifications or experience.

However, what is reasonable will always depend on all the circumstances of an individual case.

- offering an alternative role - make sure the new role does not include tasks the employee could not do, or would struggle with, because of their disability – unless a 'reasonable adjustment' would remove a disadvantage. However, an employer does not have to create a vacancy for a disabled employee.

For example... discrimination in redundancy

Ramla worked in a company's admin team. She was made redundant, partly based on her job performance. For Ramla and colleagues in the pool at risk of losing their jobs, this included

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Otherwise , u nder the Equality Act, if an employer believes it is necessary to ask health -related questions before making a job offer, it can do so only in the following circumstances:

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without a disability as 'able-bodied', as this suggests all disabilities are physical and that disabled employees or job applicants are not capable. Instead, if it is really necessary to make the distinction, use the term 'non-disabled'.

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- before making a job offer, an employer can ask health-related questions in very limited circumstances. See the section, Asking questions about health.

Managing mental health at work

There can still be reluctance for a job applicant or employee to tell an employer that they have a disability. They may worry that even though it is unlawful, an employer may find their disability, and consequently them, a problem.

This can be particularly the case with mental health impairments which can be difficult to spot and identify. An employer may not realise a job applicant or employee has a condition unless they tell the employer.

There can also be a reluctance to manage mental health in the workplace because people can feel uncomfortable talking about it – it can still be something of a taboo among some employers, although in others it is beginning to be broken down. Acas has a guide, training and E-Learning on breaking down this taboo so managers understand what they can do, and job applicants and employees can feel comfortable talking about their condition.

For more information, go to www.acas.org.uk/mentalhealth

Matching core 'Occupational requirements' of the job

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an 'occupational requirement'. For example, an employer might specify that job applicants must have a particular disability for a role in giving advice about the condition to others.

However, it is not enough for an employer to simply decide they would prefer to employ someone who has a particular disability. Any such requirement must:

- be crucial to the post, and not just one of several important factors, and
- relate to the nature of the job, and

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- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim a n occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section,

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because they have a disability – doing so can have a damaging impact on workplace morale when there are ways to select the best candidate solely on merit .

However , there is an exception in the Act which allows a charity to lawfully only employ disabled people under what the law terms 'supported employment'.

While an employer can use 'positive action' to encourage people with a particular impairment, generally it may be unlawful for an employer to prefer one disability over another. This is a complex area and it may be advisable to take legal advice.

For more on 'positive action', see the companion Acas guide, Equality and discrimination: understand the basics. There is no legal necessity for an employer to take - or consider taking -

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How employees should raise complaints is covered in more detail in the companion guide, *Discrimination: what to do if it happens*. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

When an employee experiences discrimination

When an employee makes a complaint that they have been a direct target of discrimination, an employer should be mindful that the employee may feel they have been personally attacked. Handling the situation with sensitivity is essential, whether this is being done informally or formally.

For example... How an informal complaint can work

Mervyn takes medication for epilepsy. Side-effects include drowsiness and lack of energy which mean he struggles to get up in the morning. His manager has agreed that when this happens he can start later.

Mervyn's five team colleagues know of his epilepsy and the agreement, but four of them cannot resist sometimes making what they think are wisecracks such as 'Afternoon, dozy' and 'Get wasted again?' The jibes get worse and upset him. He asks them to stop, but they just laugh. He complains to his manager who was unaware of the remarks. Mervyn says he would prefer that his colleagues did not get into a lot of trouble, but he wants the comments to stop.

The manager tells the team: that derogatory comments about Mervyn's condition are unacceptable and must stop immediately; the comments amount to harassment under equality law; and that Mervyn's epilepsy is a disability. He adds that because of Mervyn's wishes no formal action will be taken this time against those who have made the comments, although the matter will be recorded. Should the comments happen again, the employer will take formal action.

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For example... How a formal approach can work

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For example... How a formal approach can work

Josh, a supervisor from another department, overhears two staff

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that an informal approach still means the complaint is being treated seriously and, in the circumstances, is potentially the best way to try for the most desirable outcome for all concerned.

For example... Informal response to informal complaint

Joe has an anxiety disorder, but tries to overcome his symptoms. His manager is aware of his mental health condition, which can include panic attacks with bodily shaking and chest pains. Joe's manager has agreed he can work from home when he thinks the hubbub of their open plan office is starting to get too much for him.

Joe's colleagues all admire how he battles on, but five others in another team have been overheard making facetious remarks about his mental health, such as 'Is Joe out... of his mind?' The remarks are reported to their manager who makes it clear to them their comments are both inappropriate and unacceptable. The comments were not heard by Joe, but by another employee who found them offensive.

The five apologise and say nothing like that will happen again. They all agree they would benefit from refresher training about equality, diversity and discrimination. The manager updates the complainant who says she thinks the matter is being handled in the best way.

When to consider a formal response

The formal response, usually using the employer's formal grievance procedure including a hearing, is very likely to be the way forward when the allegation of discrimination is particularly serious. It is even more likely if the complaint could also lead to a disciplinary investigation.

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broken ankle before her bulimia flare - up.

After the grievance hearing, where Lorraine is accompanied by a colleague, the department head decides to uphold

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