

## Employment news: A briefing on pre-employment health screening

03 SEPTEMBER 2010

Christina Morton

PROFESSIONAL SUPPORT LAWYER | UK

**CATEGORY:**  
ARTICLE

### The current legal position

Many employers seek information about the health of prospective employees and there are good reasons for doing so, including the employer's duty of care to employees and duties under disability discrimination law.

Some employers undertake health screening at an early stage of the recruitment process. Others wait until the offer stage and make an offer of employment conditional on the employee undergoing and performing satisfactorily in a health assessment.

At present there are limited restrictions (such as the provisions of the Data Protection Act) on the way in which employers carry out pre-employment health screening. There may also be legal consequences, particularly under the Disability Discrimination Act, if they deal inappropriately with the information disclosed during screening.

However, evidence that many disabled people are deterred from applying for employment by the prospect of having to deal with health questionnaires has led to campaigns for more specific measures. As a result, provisions have been included in the Equality Act 2010 (the 'Act'). These are due to come into effect in October this year.

### The position after October 2010

The Act introduces a new provision that restricts the circumstances in which employers can undertake health screening at the earlier stages of a recruitment exercise.

### What is prohibited?

The Act states that employers must not ask about a job applicant's health before:

- offering work to the applicant; or
- deciding whether to include the applicant in a short list.

### Exceptions

Prospective employers can ask health-related questions before short-listing or making a job offer if it is necessary for them to do so for one or more reasons permitted by the Act. The reasons are that:

- the employer needs to establish whether the employee is fit to undergo an assessment, or whether the employer has a duty to make reasonable adjustments in connection with an assessment;
- the employer needs to establish whether the job applicant will be able to carry out a function that is intrinsic to the job concerned;
- the employer wishes to undertake diversity monitoring;
- the employer is considering taking positive action in relation to disabled persons; and
- it is a genuine requirement of the job that the employee has a particular disability.

A question that does not fall within one or more of these exceptions will be prohibited.

### Consequences of asking prohibited questions

Asking a prohibited question does not by itself give a job applicant a tribunal claim. However, if a job applicant who has been asked a prohibited question does bring a claim of disability discrimination, the burden will be on the employer to prove that it has not discriminated. If it cannot do so,

the tribunal will be bound to find that the employer has discriminated by posing the prohibited question.

The Act also provides that an employer who asks prohibited questions may be subject to enforcement action by the Equality and Human Rights Commission.

#### Practical consequences

Employers who use health questionnaires or health screening as part of their recruitment exercises should review:

- the type of questions they pose; and
- the time at which they pose them.

They should consider amending their procedures if, for example:

- they use questionnaires before short-listing;
- they use standard form questionnaires for all job applicants;
- they are not simply asking questions for diversity monitoring purposes or to establish whether they need to make reasonable adjustments to the recruitment process; or
- they routinely screen out before short-listing applications which disclose a complex medical history.

Even employers who do not send out questionnaires until a job offer has been made should consider:

- the type of questions they are asking and whether these are well designed to elicit the information they need;
- how they deal with the information once it has been disclosed, bearing in mind the duty to make reasonable adjustments; and
- whether their procedures comply with the Information Commissioner's Code of Practice on Employment.

# Authors

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 [christina.morton@withersworldwide.com](mailto:christina.morton@withersworldwide.com)