



**Bulletin 187**

**November 2010**

## **PRE-EMPLOYMENT HEALTH QUESTIONS**

The Equality Act (EA) came into force on 1 October 2010. The EA harmonises discrimination laws and implements a number of changes aimed at strengthening equality in the workplace.

The EA implements new rules in relation to the type of pre-employment health questions which may be asked by employers when seeking to fill a job vacancy.

### **General Prohibition**

Under section 60 of the EA, a person to whom a job application is made must not ask about the health of the applicant before offering work to the applicant or before including the applicant in a pool of applicants for potential future work.

A failure to comply with this general prohibition may, subject to certain exceptions, be deemed an unlawful act capable of investigation and enforcement action by the Equality and Human Rights Commission.

The EA confirms that an employer will not commit an unlawful act merely by asking questions about a candidate's health, however, the employer's conduct in reliance on the applicant's response to such questions may be deemed a contravention of the EA.

### **Exceptions**

The EA provides that the general prohibition against asking pre-employment health questions will not apply where the question is necessary in order to:

- Establish whether the applicant will be able to comply with a requirement to undergo an assessment or whether there is a duty to make reasonable adjustments in relation to an assessment process
- Establish whether the applicant will be able to carry out a function which is intrinsic to the work concerned (for example, manual lifting)
- Monitoring diversity in the range of applicants
- Take positive action to enable a disabled person to overcome a disadvantage
- Determine whether the applicant has a particular disability which is required in order to the work concerned.

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## Practical Tips

Unfortunately there is little guidance available to assist employers in determining what may be “intrinsic” to a role and inevitably this will increase the risk of litigation. The explanatory notes to the EA provide an example of an applicant applying for a job in a warehouse that requires manual lifting and the handling of heavy items. In that instance, the employer would be entitled to ask the applicant questions about his health to establish whether he is able to do the job (manual handling would be deemed “intrinsic” to the job), however, the employer would not be able to ask other health questions until it had actually offered a job to the applicant.

Questions must go no further than necessary to establish whether an applicant will be able to carry out an intrinsic function and should focus on the applicant’s current capabilities. Questions which ask an applicant if he “*has ever suffered from...*” are likely to breach the general prohibition.

Employers should now revisit the scope and content of their existing questionnaires.

If you would like us to review your Health Questionnaire or require any further advice in respect of the EA, please do not hesitate to contact a member of the Employment Team.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

If you no longer wish to receive the bulletin please let us know by return e-mail to [kimberley.malcolm@brabnerscs.com](mailto:kimberley.malcolm@brabnerscs.com)

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