

# Electricity Industry Occupational Health Advisory Group



## Guidance Note 1.3

### Equality Act 2010 Guidance for Managers on Medical Issues

The Occupational Health Advisory Group for the Electricity Industry (OHAG) is an independent body of senior occupational physicians. They all have a professional role to provide advice to individual companies in the electricity industry and they meet together three times a year to discuss matters of common interest and to promote good practice in occupational health across the industry. The main route for doing this is by the preparation of guidance notes on topics of interest to the industry. The remit of OHAG and its guidance covers all aspect of the industry from generation, through transmission and distribution to retail and supply.

Until now the promulgation of this OHAG guidance has largely been by means of paper copies of the documents circulating within individual companies in the electricity industry. OHAG recognises that there is a need to make these papers more widely available and is grateful for the support provided by the Energy Networks Association (ENA) in hosting these documents on their website, and the links to them from the websites of the Association of Energy Producers (AEP) and the Energy Retail Association (ERA).

The guidance notes will be of interest to managers, employees and occupational health professionals within the industry. They give general advice which has to be interpreted in the light of local circumstances. Health professional using the guidance retain an individual responsibility to act in accordance with appropriate professional standards and ethics. This guidance is offered in good faith and neither the individual members of OHAG, the companies they support, the ENA, AEP or the ERA can accept any liability for actions taken as a result of using the guidance.



## Equality Act 2010 - Guidance for Managers on Medical Issues

### 1. Introduction

The purpose of this document is to summarise the medical provisions of the Equality Act which are relevant to electricity companies and to give guidance on the role Occupational Health (OH) can play in assisting managers to comply with these provisions.

The Equality Act became statute on 8<sup>th</sup> April 2010 and replaces nine pieces of legislation and four major European directives, including the Disability Discrimination Act (DDA) 1995. The Act has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.

Under the Equality Act the following provisions are protected;

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The Equality Act introduces several changes to the DDA, however the general principle of making reasonable adjustment for an individual with a long term physical or mental health condition remains.

### 2. Definition of Disability

The definition of disability is essentially unchanged from the DDA;

A person has a disability if they have a **physical or mental impairment**, and the impairment has a **substantial and long-term adverse** effect on their ability to carry out **normal day-to-day activities**.

The Equality Act however differs significantly from the DDA in that the previous constraints that the disability had to arise from one of eight functional capacities such as mobility, manual dexterity, speech etc. no longer applies. Fire-setting, hay fever, exhibitionism or voyeurism and the use of drugs or alcohol, which were previously excluded from being considered to be disabilities, are not specifically excluded from the Equality Act. Severe disfigurement, cancer, HIV infection and multiple sclerosis will remain statutory disabilities.



Strictly the decision as to whether an employee or applicant for employment is covered by the Act can only be made by an Employment Tribunal (ET). However, it is clear that managers in member companies need to decide if the Act applies in individual cases so that appropriate actions can be taken and, hopefully, referral to an ET avoided.

In view of the complexities of the definition, it is recommended that advice is always sought from the Company's OH service. Occupational Physicians are familiar with the requirements of the Act and can state whether it is likely or unlikely to apply in a particular case. A categorical statement (that it does or does not apply) is unwise for the reason given above.

Some aspects of the definition are worthy of particular note:

**a) Physical or mental impairment**

Since December 2005, mental impairment need no longer only refer to a clinically recognised psychiatric illness. However, employees with a mental illness will still need to show that their impairment meets the criteria stated above, i.e., it has a substantial long term adverse effect on normal day to day activities.

Should medication effectively counter an impairment which would otherwise meet the definition, the Equality Act still applies. An example would be epilepsy which was well controlled by regular medication.

Certain individuals with specified medical conditions will meet the definition of disability regardless of how little impairment they have. These conditions are HIV infections, any cancer and multiple sclerosis.

**b) Long Term**

The Act states that, for the purpose of deciding whether a person is disabled, a long term effect of an impairment is one;

- which has lasted at least 12 months
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected



There are in addition several points of note:

- i. A condition which has remissions, during which there is no disability, can be covered.
- ii. The Act applies if a condition is known to always progress to a stage where there would be a relevant disability. Thus a person with such an impairment would be protected by the Act at a stage in the illness where there was little or no impact on normal day-to-day activities. These conditions are known as 'progressive' conditions. Examples might include rheumatoid arthritis, dementia and motor neurone disease.
- iii. If an individual is covered by the Act but their condition is subsequently treated successfully (e.g. they had cancer) or the impairment becomes much less severe, they remain protected by the Act.

### c) **Normal day-to-day activities**

As previously stated the Equality Act no longer defines what is to be regarded as a 'normal day to day activity'.

It should be noted that a normal day to day activity is not necessarily one undertaken by most people, however it would be unlikely to apply to highly specialised work activities undertaken by only a few individuals.

Further guidance is contained in the document 'Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability' <http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf>

## **3. Discrimination in Employment**

Like the DDA the Equality Act makes it unlawful for an employer to discriminate against a disabled person who is a job applicant:

- In the arrangements for deciding to whom employment should be offered
- The terms on which employment is offered
- Refusing or deliberately not offering the disabled person employment

It is also unlawful for an employer to discriminate against an existing employee who is disabled:

- In his/her terms of employment
- In terms of the opportunities he provides for promotion, transfer, training or any other benefit
- By refusing or deliberately not offering to give the employee such opportunity
- By dismissing him/her or subjecting him/her to any other detriment



### **(a) Meaning of Discrimination**

The Act makes it unlawful for an employer to discriminate against a disabled person if, **for a reason which relates to the disabled person's disability**, he treats him/her **less favourably than** he treats or would treat others to whom that reason does not or would not apply and he cannot show that such treatment is **justified**.

It is not simply a case of comparing the treatment of a disabled person with a non-disabled person as this would mean an employer could treat a disabled person with mental ill health less favourably than one with physical ill health. Similarly a disabled person may not be able to identify another person who is actually treated more favourably but may still claim less favourable treatment if the employer would have given better treatment to someone else to whom the reason for treatment of a disabled person did not apply.

Less favourable treatment of a disabled person may be **justified only if** the reason for it is both **material** to the circumstances of the particular case **and substantial**. In other words the reason has to relate to the individual circumstances in question and not be minor or trivial. In this context health and safety considerations could be substantial.

### **(b) Duty to make Reasonable Adjustments**

Where existing work arrangements or any physical feature of premises place a disabled person at a substantial disadvantage in comparison with others who are not disabled (and with whom they are competing in the employment setting) the employer must take such steps as are reasonably practicable to eliminate the disadvantage.

The Act lists examples of the steps that an employer may have to take in order to comply with the requirement to make Reasonable Adjustments. These range from alterations to working hours and the allocation of some duties of a job to another person to acquiring or modifying equipment/tools and making adjustments to premises.

## **4. Recruitment**

Section 60 of the Equality Act expressly removes the power of employers to ask about health or disability, including about someone's sickness absence record, prior to a job offer or to the inclusion in a pool of applicants for work. Health enquiries **pre job-offer** (whether obtained through OH or not) are only permissible in the following situations;

- Establishing whether an applicant will be able to comply with a requirement to undergo an assessment/interview or establishing whether there is a need to make reasonable adjustments as part of this.



- Establishing whether an applicant will be able to carry out a function that is intrinsic to the work concerned (such as meeting the medical standard for HGV driving)
- Monitoring and promoting diversity
- If there are specific occupational requirements for an applicant to have a particular disability.

After an offer of employment has been made there are no specific limits on what health questions can be asked by an employer. However, it remains good practice that this is undertaken through a suitable OH process that considers health in relation to the job role. Pre-employment health questionnaires which are constructed in very wide terms, covering matters not relevant to the job, are not suitable. The use of a health questionnaire by non-medical personnel may place the organisation at risk of legal action should the individual perceive the questionnaire to be in medical confidence and therefore only to be reviewed by a health professional.

The OH report can provide guidance on the likelihood of an individual being covered by the Act and what adjustments might need to be considered. It is ultimately a decision for the employer as to what adjustments are 'reasonable' in the context of the organisation.

## **5. Disability during Employment**

In practice the Equality Act may need to be considered and OH advice sought in the following circumstances:

- (a) Where an employee is off sick on a long-term basis and their manager or HR wish to know when they might return and whether any changes to their normal work might enable an earlier return.
- (b) Where an employee has a history of frequent short-term absences due to relapses of an existing disability.
- (c) Where an employee is offered a new job (possibly as promotion) and, as a result of an existing disability, they cannot perform all aspects of the new role.
- (d) Where an employee who is still at work, develops a disability and, as a result they cannot perform all the tasks expected of them.



Clearly, the first of these scenarios is the most common. In all cases referral should be made to OH. When OH includes in their report that it is likely the Equality Act applies and recommends certain restrictions on activities, the manager should try to accommodate these restrictions. If such adjustment cannot be made, it is recommended the HR department is contacted.

If the employee being referred for sickness absence reason is already covered by the Act (i.e. OH has previously stated that the Act is likely to apply) care should be taken when deciding when to make the referral. In some circumstances, allowing additional absence from work would be regarded as a reasonable adjustment.

### References and sources of further information

- Equality Act 2010 and Code of Practice:  
<http://odi.dwp.gov.uk/disabled-people-and-legislation/equality-act-2010-and-dda-1995.php>
- Guidance on matters to be taken into account in determining questions relating to the definition of disability:  
<http://odi.dwp.gov.uk/docs/law/ea/ea-guide-2.pdf>
- Employers Forum on Disability website: <http://www.efd.org.uk/>