

**A guide for employers**  
Legislation

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# 5 Legislation

The employment provisions of the Equality Act 2010 (the Act) come into force on 1 October 2010. The Act replaces current discrimination laws, including the Disability Discrimination Act (DDA), bringing them all together under one piece of legislation.

The Act aims to make discrimination legislation more consistent, clearer and easier to follow. It may require you to make some changes to the way you manage employees. This includes people who have cancer, or who care for someone with cancer.

We've put together this handy bite-sized breakdown of what the Act does to support people living with cancer, and what it means for you as an employer. It is not a substitute for legal advice. If you need more details on your rights, or legal advice, please contact a solicitor. While we endeavour to provide information of the highest quality, Macmillan will not accept any liability for the use, or inability to use any information provided in this booklet.

## How are people with cancer affected by the Act?

The new law protects anyone who has, or has had, a disability. When a person is diagnosed with cancer, they are automatically classified as disabled for the purposes of the Equality Act. This protection from discrimination continues even when there is no longer any evidence of the cancer. So even if the cancer has been successfully treated, employees will continue to be protected against discrimination.

## So what's changed?

Like the DDA, the Act requires employers to make reasonable adjustments for employees with a disability. But it also includes important new provisions to prevent discrimination arising

from disability, indirect discrimination, and discrimination against carers. It also restricts medical questions being asked during the recruitment process.

Previously, protection did not extend to people who are mistakenly thought to have a disability. These people, and those who experience discrimination because of their association with a person who has a disability, are now protected against both direct discrimination and harassment.

## What aspects of employment are covered?

The Equality Act covers all aspects of employment including the recruitment process, terms, conditions and benefits, and opportunities for promotion and training. It also covers unfair treatment compared to other workers, such as dismissal, harassment and victimisation.

## What about carers?

The Act protects people who experience discrimination because they are associated with someone who has a disability. For example, it would be unlawful if the partner of someone who has cancer was refused promotion because of concerns that they would be unable to give sufficient attention to the job.

Note, however, that the Equality Act does not allow reasonable adjustments to be claimed for caring responsibilities, although other legislation

may provide the right to a 'reasonable' amount of unpaid time off work for caring responsibilities (see page 28).

### Discrimination – the new law explained

The rest of this section will discuss discrimination against disabled people, and this should be understood as including direct discrimination and harassment because of perception, association or a past disability. Here we go into a bit more detail about discrimination, and what you can do to avoid it.

#### What is direct disability discrimination?

Direct discrimination occurs where, because of their disability, a person receives poor treatment compared to someone who does not have a disability.

**Example: Razia was rejected when she applied for a job because her employer knew that she had previously had a cancer diagnosis. He was concerned that if it recurred she would have to take sick leave.**

This provision in the Act is intended to stop people who have a disability from being dismissed, refused a job, or receiving worse treatment at work because of prejudice or stereotypical assumptions.

Direct discrimination can occur even if it is meant with good intentions. For example, if an employer suggests that a person with cancer would be better off not being promoted because the new job would be too demanding.

#### What is discrimination arising from disability? (changed from the DDA)

Discrimination arising from disability (DAD) occurs when someone with a disability is treated unfavourably because of something *relating* to their disability. It is different from direct discrimination, which occurs when a person is

treated less favourably because of the disability *itself*. Unlike direct discrimination there is no need to show that a non-disabled person would have been treated differently.

**Example: Jim's boss gave him a poor appraisal because he had missed targets due to treatment and fatigue. Even if the employer treated other people in the same way for missing their targets, it would be unlawful to treat Jim like this unless the employer could show that the action was justified under the Equality Act.**

DAD only occurs when the unfavourable treatment cannot be justified. Action will be lawful if it can be shown that it is intended to meet a legitimate objective in a 'proportionate' (i.e. fair, balanced and reasonable) way.

It is important to understand the need to apply a flexible approach when a rule or practice disadvantages any employee who has a disability. Employers need to strike a balance between having a negative impact on that person, and any potentially lawful reasons for the action.

DAD will also be lawful if the employer can show that he or she did not know, and could not be reasonably expected to know, that the person was disabled. You should therefore take reasonable steps to find out if an employee has a disability.

This is a new provision which replaces previous protection in disability discrimination law that was not fully effective. The way in which an employer can legally justify treatment that has a negative impact on a disabled person has also changed.

### **What is indirect disability discrimination? (changed from the DDA)**

Indirect disability discrimination happens when there is a rule, policy or practice that applies to everyone, but which disadvantages people with a particular disability compared to people without that disability.

**Example: An employer used the amount of sick leave taken by employees as criteria for selection of redundancy. Kathleen had taken time off work because of cancer. The rule would affect her, and other people with cancer, adversely compared to people who do not have cancer. It would constitute indirect discrimination unless the employer could show that it was legally justified.**

Action will be lawful if it can be justified as meeting a legitimate objective in a fair, balanced and reasonable way.

As with DAD, it is necessary for employers to strike a balance between the negative impact of rules or practices on some people and the reasons for applying them. You will therefore need to consider whether there is any other way to meet your objectives that will not have a discriminatory effect.

### **What is harassment?**

Disability harassment is unwanted behaviour related to disability. It has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

**Example: Following her chemotherapy, Rebecca's colleagues were constantly teasing her about her hair loss. She felt humiliated but didn't feel able to challenge them. She complained to her manager, who then spoke to staff.**

### **What is victimisation? (changed from the DDA)**

It is unlawful victimisation for an employer to treat someone badly because they have made a complaint about discrimination or harassment under the Equality Act, or helped someone else to make a complaint, or because the employer thinks that they may do these things. This applies whether or not the person is disabled.

**Example: Jim's boss was being awkward about his request for time off for a chemotherapy appointment. Jim reported the problem to the Human Resources department. The HR manager told Jim's boss that she had to give him the time off. Jim's boss was angry that Jim went 'over her head', and as a result stopped Jim from going on a training course, and also gave him a poor appraisal.**

Under the new Act, there is no need for a victim to prove that they have been treated less favourably than someone who has not made a complaint. The employee only needs to show that they were treated badly.

### **What are the limits on medical questions during recruitment? (changed from the DDA)**

Employers can no longer ask questions about a candidate's health during the recruitment process. This includes asking whether or not a candidate has a disability. You can only ask someone about their medical circumstances after they have been offered the job.

If, on the basis of this information, an employer then withdraws the job offer they will need to make sure that this is on a non-discriminatory basis. This includes considering any reasonable adjustments that could be made to allow the person to take up the post.

It is still acceptable to ask questions about a person's health for the following purposes:

- equality monitoring
- to conduct positive action
- to enquire whether reasonable adjustments are needed for the recruitment process
- to establish whether the job applicant will be able to carry out a function that is fundamental to the role.

If a job involves heavy lifting, for example, you have the right to find out if a health condition could prevent a candidate from carrying out that task.

### What are reasonable adjustments for disabled people?

Employers have a duty to make 'reasonable adjustments' to workplaces and working practices to ensure that people with a disability are not at a disadvantage compared to others. There is no fixed definition of 'reasonable'. What is reasonable will depend on all the circumstances, including practicality, cost, and the extent to which business may be disrupted.

Any planned adjustments should be discussed with, and approved by, the employee concerned.

Reasonable adjustments for someone with cancer might include:

- letting them take time off to attend medical appointments
- modifying a job description to remove tasks that cause particular difficulty – either on a temporary or permanent basis
- being flexible around working hours, or offering the option to work from home
- allowing extra breaks to help them cope with fatigue
- adjusting performance targets to take into account the effect of sick leave/fatigue etc on the employee, or giving them a post with more suitable duties

- moving a work station, for example to avoid stairs
- ensuring easy access to premises for someone who is using a wheelchair or crutches
- providing disabled toilet facilities
- allowing a gradual, phased return to work after extended sick leave
- changing the date or time of a job interview if it coincides with a medical appointment.

Just one or two little changes could be all it takes to help an employee stay in work.

## Other relevant legislation

### Carers' rights

#### Time off for dependants

Under the amended Employments Rights Act 1996, employees have the right to take a 'reasonable' amount of unpaid time off work in order to deal with particular situations affecting their dependants. Some organisations enhance this and provide paid time off for employees in these circumstances.

A 'dependant' is defined as a spouse, civil partner, child or parent (but not grandparent) of the employee or a person who lives in the same household as the employee. In addition, 'dependant' includes those who reasonably rely on the employee to provide assistance if a dependant falls ill or to make arrangements for the provision of care.

An employee is only entitled to take time off for dependants under this statutory right where it is necessary for that person:

- to provide assistance if a dependant falls ill
- to make longer-term care arrangements for the provision of care for a dependant who is ill or injured. This would include, for example, arranging to employ a temporary

carer. It does not enable the employee to take additional or ongoing time off to care for the dependant themselves

- to deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant.

It should be noted that the statutory regime does not apply to planned time off to care for dependants (for example, to take them to a medical appointment).

What counts as a reasonable amount of time off will depend on the individual circumstances. The nature of the incident, the closeness of the relationship between the employee and the dependant and the extent to which another person was available to assist are all relevant factors. An employer should always take into account the employee's individual circumstances. Decisions should always be based on the facts of each case.

### Right to request flexible working

Under the Work and Families Act 2006, Carers who meet the eligibility criteria can make a request to work flexibly, such as changing hours or working from home. There is no automatic right to actually work flexibly; rather the right is to make a request to do so. Employers can refuse a request, but only on specified grounds. Employees can appeal against such a refusal. If a request is granted, it will be a permanent change to the employee's contract, unless agreed otherwise.

The definition of a carer is someone who is, or expects to be, caring for a person aged 18 or over who is in need of care and who is either:

- a spouse, partner or civil partner
- a close relative (parent, parent-in-law, child, sibling, uncle, aunt, grandparent, step-grandparent) or someone who is living at the same address.

### Confidentiality

The Human Rights Act 1998 protects an individual's right to have personal information kept private, this includes medical information. An employer does not have an automatic right to access medical information about an employee. However, an employer may ask an employee for their consent to seek a medical report on their condition from their doctor or other health professional. The employee has the right to see any medical report provided by their GP or treating health professional before it is supplied to the employer.

It is helpful if the person affected by cancer agrees that colleagues and clients can be informed about their condition. However, an employer may not divulge this information without the employee's consent. Employers should take care to protect the employee's records, including emails and any notes from meetings containing details about the employee's medical condition. This is sensitive personal data and should be treated as such.

### Further information

If you'd like to know more, or you have questions about work and cancer that we haven't covered here, you can find us online at [macmillan.org.uk/work](http://macmillan.org.uk/work). Or speak to us over the Macmillan Support Line on **0808 808 00 00**.

'I've returned to work since I was diagnosed with oesophageal cancer and I can't thank my employers enough. Throughout my treatment, surgery and recovery they offered me help and showed true understanding and friendship. Without them, I don't know what position I'd be in today.'

**Gary, Manchester**