

THE DISABILITY DISCRIMINATION ACT 2005

Does this change the way we practise?

The Disability Discrimination Act 1995 is now very much part of our lives and certainly influences our Occupational Health and HR practise. The original Act first came into effect on the 2 December 1996 and defined 'disability', and made it unlawful to discriminate against 'disabled' people.

The 1995 Act defined disability as a person who 'has or has had a physical or mental impairment that has a substantial and long term adverse affect on his/her ability to carry out normal day to day activities'. There has often been confusion with regards to the main focus of the Act, is it about the workplace or the home? The Act determines an employee's ability to carry out their 'normal day to day activities' and not their activities within the workplace.

The Act does not provide a definition of physical disability but does list a series of headings under which an individual's physical capability should be considered. The 1995 Act defines mental impairment as 'a mental illness which is a clinically well recognised mental illness' the Act excludes addictions to alcohol, nicotine or any other substances, it also excludes conditions such as a tendency to create fires or steal, a tendency to physical or sexual abuse, exhibitionism and voyeurism. Severe disfigurements are included under the definition of disability but not tattoos and body piercing for non medical purposes. Currently the Disability Discrimination Act does not apply to the armed forces.

Medical conditions that have the potential to reoccur but may be in remission or are controlled by treatment, such as diabetes or epilepsy are considered by the Act to have long lasting effects and are included even though the employee may be perfectly fit. The Act looks at what the situation would be if the employee was not able to receive treatment.

The areas of day to day activity which must be impaired in order to achieve a degree of disability as defined by the Act are

- Mobility
- Manual dexterity
- Continence
- Physical co-ordination
- The ability to lift, carry or move every day objects
- Speech, hearing or eye sight
- Memory or ability to concentrate, learn or understand
- The perception of risk or physical danger

The Disability Discrimination Act defines discrimination as occurring when a disabled person is treated less favourably for reasons associated with their disability. Employers may also be found to have discriminated unlawfully if they fail to make reasonable adjustments to the workplace and/or an employee's employment arrangements, which would otherwise overcome the disadvantage encountered by the disabled person. Although in most cases it is obvious where a disability exists, it is only an industrial tribunal or a court of law that can say with any certainty which employee is disabled. The final decision therefore is a legal one.

While the Act places a duty of care on the employer not to discriminate against a disabled person there is, perversely, no duty on the employee or the potential employee to inform the employer of their disability! However, if an employee fails to protect others against due to the fact that they have a disability he or she may be found liable under the Health and Safety at work Act 1974.

Where a disability is reasonably obviously, or another of the company's employees, and this may include a HR professional or an Occupational Health professional, has been informed then the employer will be assumed to have knowledge of the disability. The employer, however, is not expected to breach Health and Safety legislation in employing or making reasonable adjustments in order to accommodate a disabled person.

There is no absolute requirement for an employer to make reasonable adjustments. The decision to implement a reasonable adjustment and what constitutes a reasonable adjustment lies with the employer who must take advice from other professionals including Health & Safety advisors, HR advisors, Legal advisors and their Occupational Health team.



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Under the Disability Discrimination Act an employer is expected to review the potential for redeployment as a reasonable adjustment and current case law would indicate that positive discrimination on behalf of the disabled employee should be practiced.

Factors that should be considered in the event of such reasonable adjustments or redeployment options are

- The effectiveness of the adjustment in preventing the disadvantage
- The practicality of the adjustment
- The financial cost of the adjustment or redeployment
- The disruption caused
- The extent of the employers resources
- The size of the company
- The availability of financial or other assistance
- The effects of the process on other employee's
- The co-operation and motivation of the disabled employee

The Disability Discrimination Act 2005 received its Royal ascent in April this year. The main amendments of the 2005 Act now mean that employee's with cancer, HIV and debilitating conditions such as multiple sclerosis and rheumatoid arthritis are protected from the point of diagnosis rather than having to wait for their symptoms to affect their day to day Activities. The definition of mental impairment has been widened.

Since the initial 1995 Act came into force there has been a number of landmark judgements.

Archibald –v- Fife council - House of Lords judgement

The House of Lords judgement ruled that the Disability Discrimination Act overrules the employers own redeployment policies. If an employee is no longer able to do their job because of a disability, the employer must transfer them to a suitably vacant position, even if that position is at a higher grade and importantly without requiring them to take part in any competitive interview.

Nottinghamshire County Council – v – Meikle – Court of Appeal Decision

The Court of Appeals decision was that an employee that was off sick and waiting for the employer to make reasonable adjustments to the workplace or to review the potential for deployment to a suitable vacant position should not have their pay reduced.



The Disability Discrimination Act 2005 I am sure will not be the last series of amendments to the original Act. While a final decision as to whether an employee is covered by the Act has to be a legal one, it is important that a manager, or an employer considers the implications of the Act for each employee who is absent from work for any length of time for health reasons. Occupational Health is able to assist in providing the manager with useful management information with regards to an employees health issues and the impairment of day to day activities and also the potential for them to be redeployed, or to benefit from reasonable adjustments.

Preventative Health Care Providers useful proactive occupational health information for managers. Further information is available on our web site www.phcohealth.com or from Jane Puncher on 01622 775285 or j.puncher@phcohealth.co.uk

