

## Disability Discrimination Act (DDA) 1995

# 2004 – Overview of the key employment changes to the Disability Discrimination Act

Please note that this factsheet gives general guidance only and should not be treated as a complete and authoritative statement of the law.

## Introduction

Significant changes to the employment provisions of the DDA were brought about by the Disability Discrimination (Amendment Northern Ireland) Regulations 2004 which came into effect on 1st October 2004 (referred to in this fact sheet as the regulations). These amendments will implement the provisions of the EC Employment Framework Directive.

## Changes to the scope of the DDA

- **Removal of small employer exemption (for employers with less than 15 employees)**

One of the major changes is the removal of the small employer exemption which means the DDA will apply to **all** employers irrespective of size including employment in private households.

This will have a major impact on both employers and disabled employees and job applicants in Northern Ireland as around 80% of Northern Ireland's employers who were previously exempt will now have obligations under the DDA.

- **Inclusion of previously exempt occupations**

The regulations bring previously excluded occupations within the scope of the DDA. This includes police officers, firefighters, prison officers, and those employed on ships, hovercrafts or aircraft. The armed forces will continue to be exempt.

- **Extension of rights to people in other working relationships**

The regulations extend the DDA's coverage to include, partners in firms, barristers, office holders and those on work experience placements for the purposes of vocational training.

- **Qualification bodies**

The regulations prohibit discrimination by qualifications bodies. These are defined as '**an authority or body which can confer, review, or extend a professional or trade qualification**'.

Qualification bodies will be subject to the duty to make reasonable adjustments except in respect of the way a 'competence standard' is applied to a disabled person. 'Competence standard' is defined as 'an academic, medical or other standard applied by or on behalf of a qualifications body for the purpose of determining whether or not a person has a particular level of competence or ability'. However the way a competence standard is assessed is likely to be subject to the reasonable adjustment duty.

- **Constructive dismissal**

The Regulations provide protection in circumstances of a constructive dismissal.

- **Instructions to discriminate**

The Regulations make it unlawful for a person who has authority or influence over another person to instruct that person, or put pressure on him/her to act unlawfully. Only The Equality Commission can take legal action in respect of instructions or pressure to discriminate.

- **Questionnaire**

Under the regulations a potential complainant can seek evidence that he/she has been discriminated against through the questionnaire procedure. An employer must respond to a questionnaire within **eight weeks**.

## **New Definition of Discrimination**

The Regulations introduce a new definition of discrimination into the DDA. This is known as **direct discrimination** and is in addition to the existing two main forms of discrimination – less favourable treatment (or disability related discrimination as it is now known) and failure to make a reasonable adjustment.

Direct discrimination is defined as:

'A person directly discriminates against a disabled person if, on the grounds of the disabled persons disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances including his abilities are the same as, or not materially different from, those of the disabled person.'

'An employer seeking a sales representative turns down a disabled applicant with a severe facial disfigurement solely on the grounds that other employees would be uncomfortable working alongside the disabled person. This would amount to direct discrimination and would be unlawful'

Unlike disability related discrimination (previously referred to as less favourable treatment) direct discrimination **cannot** be justified.

## Changes to the Reasonable Adjustment Duty

- The regulations make important changes to the nature, scope and extent of the duty to make reasonable adjustments.

At present employers have a duty to make reasonable adjustments where any **physical feature** of premises or any **arrangements** made by or on behalf of the employer cause a substantial disadvantage to a disabled person. The duty is being extended to cover any '**provision, criterion or practice**' applied by or on behalf of an employer. This means that where a provision, criterion or practice applied by or on behalf of an employer places a disabled person at a substantial disadvantage compared to people who are not disabled, the employer will need to consider making reasonable adjustments.

- The examples of steps which an employer might have to take, in order to comply with the duty to make reasonable adjustments, are modified to explicitly refer to **training, mentoring and support**. The steps now include:
  - Altering the person's hours of work or training
  - Assigning him or her to a different place of work or training
  - Giving or arranging training or mentoring
  - Providing supervision or other support.
- The regulations remove the employer's justification defence in respect of a failure to make reasonable adjustments. Previously the DDA allowed employers to justify failures to make reasonable adjustments where they could show a material and substantial reason.

## Harassment

Prior to 1st October 2004, the DDA did not provide an explicit definition or prohibition of harassment. The regulations change this by introducing a free-standing definition of harassment which removes the need for a comparator. The Regulations state:

'A person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of:

- Violating the disabled person's dignity, or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for him.'

## Ex-employees

- The regulations amend the DDA so that where a disabled person's **employment has come** to an end, it is unlawful for his or her former employer:

- to discriminate against him or her by subjecting him or her to a detriment, or
- to subject him or her to harassment, provided that the discrimination or harassment arises out of the employment which has come to an end and is closely related to it. Examples include provision of references, or access to company sports or social facilities offered to other ex employees.
- In addition the regulations create a duty to make reasonable adjustments for a **former employee** who is a disabled person. The Code of practice gives the example of a former employee with lifetime membership of the work's social club who is no longer able to enter the club premises because of a mobility impairment. Once the employer becomes aware of the problem, it will need to consider making reasonable adjustments.

## Discriminatory Advertisements

The regulations make it unlawful to publish discriminatory advertisements, i.e. an advertisement indicating an intention to discriminate on the ground of disability or a reluctance to make a reasonable adjustment. The revised employment Code of Practice gives the example of a job advertisement which stipulates that a driving licence is required even though the post itself does not involve significant amounts of driving and reasonable adjustments such as allowing travel by taxi would be possible. This is likely to be unlawful.

## Burden of Proof

The regulations make changes to the burden of proof. If an employee establishes facts from which discrimination could be inferred, it will be the employer's responsibility to prove to a tribunal that it did not discriminate unlawfully. This change will make it easier for complainants to succeed in their claims.

## Further Help

For more information about the new regulations and the new Code of Practice on Employment and Occupation:

Equality Commission

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