

TRANSFORMING
THE UK'S
RESPONSE
TO HIV



Advice for employers

HIV + Recruitment

Personal Information

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HIV + Recruitment

Personal Information

NAME (LAST NAME FIRST)		CITY
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As a responsible employer you want to recruit an effective high-quality workforce. This will mean recruiting on the basis of ability rather than discriminating against the best candidates for unacceptable reasons. It will also mean retaining good employees and ensuring they do not leave as a result of prejudice or discrimination experienced in the workplace.

One example of such unacceptable prejudice is discrimination on the basis of disability, which includes on the basis of someone's HIV positive status.

This guide looks at one specific issue - the recruitment process - and has been updated in light of changes in the Equality Act 2010 which came into force in October 2010. It contains information to advise on how to avoid discrimination and provide a fair, safe and supportive process through which you can select the best candidate for the job.

This guide is not a substitute for professional legal advice, but it does provide pointers both to the requirements of the law and to agreed best practice which will help you in recruiting a high-quality and diverse workforce suitable for your needs.

Legal protection from discrimination

The Equality Act 2010, which supersedes the Disability Discrimination Act (DDA) 1995 and 2005, protects disabled people from discrimination at work and gives them the right to ask for 'reasonable adjustments' – this means removing barriers which may prevent disabled people from being able to undertake aspects of a job.¹

Because of the original definition of disability within the Disability Discrimination Act 1995, people who were HIV positive but who had no symptoms were often not protected by the law, even though they experienced discrimination in the workplace. As of 2005, HIV positive people have been protected from discrimination from the moment they are diagnosed – a protection that continues in the Equality Act 2010.

This legal protection applies to the recruitment process and to job applicants as well as to those currently employed in your workforce. The Equality Act 2010 also protects people from discrimination if they are mistakenly perceived to be HIV

positive or associated with someone who is HIV positive. For example, if the partner of someone living with HIV was refused a job interview because of their partner's HIV status, this would be unlawful discrimination.

Living and working with HIV

With the introduction of effective HIV treatments (known as antiretroviral therapy or ART), people living with HIV who are diagnosed early can remain well, have a normal life-span and lead active, working lives. It is a misconception to assume that someone living with HIV will require more time off than another member of staff. NAT's research into the employment experiences of 1,800 gay and bisexual men living with HIV found there was no significant difference in the number of sick days HIV positive men took compared with HIV negative men. In fact, the majority of respondents had taken no HIV-related sickness days in the last year.²

In almost all working environments there is no risk of HIV transmission through normal work contact for either colleagues or the public.

¹ The Equality Act 2010 does not generally apply in Northern Ireland, with a few exceptions. Northern Ireland has separate equalities laws in place. For information contact the Equality Commission for Northern Ireland.

Sometimes there will be some HIV-related needs which employers may need to respond to with ‘reasonable adjustments’. A reasonable adjustment is a change to the workplace or work practices which removes a substantial (more than minor or trivial) disadvantage that a disabled person might experience because of their disability.

As the vast majority of people living with HIV need, if anything, only minor changes in the workplace or in working practice, most adjustments have no cost, but the ‘Access to Work’ scheme provides financial support to help employers make reasonable adjustments to their working environment.³ You can find out more about reasonable adjustments and HIV in our companion publication *HIV@Work: Advice for employers*.

Signposting good practice – encouraging good job applicants

It is important to be aware of and sensitive to the possible apprehensions of people living with HIV applying for a job. Since the beginning of the epidemic there has been stigma and discrimination against people living with HIV.

People living with HIV may not wish to disclose their status when applying for a job because:

- they may not consider themselves ‘disabled’, despite being protected by the law
- they may feel that disclosing their status may make them vulnerable to discrimination from the employer
- they may feel concerned that disclosure will not be kept confidential, or could provoke discrimination amongst colleagues.

Your recruitment process has to take account of such concerns and sensitivities and you should carefully consider how you handle and respond to any information provided about someone’s HIV status or other disability.

One important way to encourage good applicants for jobs, including those with a disability such as HIV positive status, is clearly to signpost – and then act on – a commitment to diversity and equality.

Employers displaying the ‘Positive About Disabled People’ or ‘Two Ticks’ logo as part of the job application process have made a commitment to employing disabled people and

² *Working with HIV: a summary of NAT’s employment research*, NAT, 2009

³ Further information about the ‘Access to Work’ can be found at www.direct.gov.uk

this includes people living with HIV. Many employers now have positive statements about disability and HIV in their equality, diversity and employment policies. Having clearly signposted commitments to disability equality on your website and in job advertisements will give important initial indicators to potential job applicants of your determination not to discriminate. Of course, any such statements have to be backed up by the necessary actions if they are to be meaningful.⁴

Another way to signpost good practice is to have a specific HIV policy - or a long term conditions or equality and diversity policy which specifically mentions HIV - clearly available on your website. Such a policy will send a clear message to potential employees that they will not face discrimination during any interactions with a prospective employer.

Asking about disability

Until recently there was no legal impediment to an employer asking questions about disability and long-term health conditions in the recruitment process. However, the Equality Act 2010 limits the circumstances when you can ask a

job-applicant a health-related question before they have been offered a job.⁵ Before a job offer is made, you can only ask health-related questions in the following circumstances:

- To ask the applicant whether they need you to make any reasonable adjustments for the selection process. (This is unlikely in the case of people living with HIV, but one example may be someone with HIV who sometimes experiences side-effects after taking their morning medication asking for a later interview slot).

It is best practice to clearly state that responding to this question is voluntary. As stated above, many people living with HIV are concerned about discrimination and may not wish to disclose their status or their need for a reasonable adjustment until after they have been selected for interview or offered a job. An applicant is under no obligation to disclose their HIV status at this stage if they do not wish.

⁴ Further information about the 'Two Ticks' scheme can be found at www.direct.gov.uk

⁵ Or before the applicant has been included in a group of successful candidates to be offered a job when a vacancy becomes available.

- To decide whether an applicant can carry out a function that is essential ('intrinsic') to the job. (For example, a construction company advertising for scaffolders may ask specific questions about applicants' mobility and would need to know if an applicant experienced vertigo, as climbing scaffolding is intrinsic to the job).
- To monitor the diversity of people applying for jobs (see later)
- In circumstances where the job has a genuine requirement for the postholder to have a disability. (For example, a counselling service for people who are newly diagnosed with HIV may have a requirement that the applicants are themselves living with HIV).

There are only very limited and specific circumstances when it would be appropriate to ask a question related to this. You would not, for example, be able to ask someone about their HIV status because you wrongly assumed that if they were HIV positive they would be tired and unable to carry out the role. You can only ask this question if, even with reasonable adjustments, somebody with a certain disability could not carry out a task that was essential to the job.

- To take positive action to assist disabled people. (For example, employers who are part of the two tick scheme referred to above have committed to interview all disabled applicants who meet a jobs minimum requirements – though it is important to note that it is still up to the applicant whether they choose to disclose a disability to these employers).

If an employer asks a question about an applicant's health or disability for a reason not given above and the applicant is then rejected, the applicant could then make a direct disability discrimination claim to an Employment Tribunal and it would be for the employer to show that it had not discriminated against the candidate.

In addition, if such questions are asked, an applicant can make a complaint to the Equality and Human Rights Commission which has the power to conduct an investigation into the employer's recruitment processes. To avoid this situation, do not ask applicants questions about their health or a potential disability unless you are absolutely sure it is necessary for one of the reasons above.

To avoid this situation, do not ask applicants questions about their health or a potential disability unless you are absolutely sure it is necessary for one of these specific reasons.

Reasonable adjustment questions

For those applying for a job, it is good practice to ask at an early stage of the recruitment process whether the applicant needs any reasonable adjustment to attend an interview or for any other aspect of the selection and recruitment process.

It is best practice to ensure candidates are asked if they require reasonable adjustments during the recruitment process only after they have been shortlisted for interview. Changes to legislation in the Equality Act 2010 mean that you can only ask questions about reasonable adjustments an individual might require in the workplace once the successful candidate has been offered the job (see above).

Equal opportunities questions

Many employers use surveys or questionnaires to assess how diverse a workforce they have and how they are performing as an employer against standards of equality and non-discrimination. In relation to the recruitment process any questions need to be sent on a detachable form to all job applicants along with the application form, with a clear statement that it is optional whether or not to respond. There also needs to be a stated commitment to confidentiality, ensuring that the applicant knows that any information provided will not be used as part of the selection process. It is good practice to separate the form from the application prior to short-listing.

References

When requesting references for candidates, be careful not to ask specific questions about health or disability which may result in a former employer disclosing somebody's HIV status without that individual's consent.

Referees should not mention someone's HIV status in the reference, and in most cases, the inclusion of such information could contravene the provisions of the

Data Protection Act. If you do receive such unsolicited information, you should ensure that your subsequent actions are not discriminatory.

Candidates, even those who are unsuccessful, have a right to ask to access any information held about them by an organisation, including any references received in connection with a potential role. They are entitled to ask you to see the references that their former employer(s) have sent you.

Questions when you interview

As set out above, you cannot ask about an applicant's health during an interview unless specific physical fitness or health-related requirements are a necessary criterion to do the job. However, should their HIV positive status be raised in interview by a job applicant, it will be important to be sensitive, assuring the candidate that you are an equal opportunities employer, that you never discriminate on grounds of disability or HIV status, that you are always prepared to make reasonable adjustments in the workplace and in working practice, and that you will keep any information they provide confidential.

Questions when you offer a job

Once you have taken the decision to appoint someone, you might want to know if you need to make any reasonable adjustments in the workplace relating to disability for the employee to perform to the best of their ability. It would be appropriate to ask this question once the applicant has accepted the job offer, assuring the person of the confidentiality of all personal information. It is a good idea to offer the opportunity for further discussion with human resources and/or occupational health if available, or on a confidential basis with an appropriate member of staff. More information about reasonable adjustments and other things to consider when employing staff living with HIV is available in our companion publication *HIV@Work: Advice for employers*.

Sick leave and disability leave

Sick leave is time off related to illness. Individual employers will have their own policies related to sick leave.

Disability leave is time off for a disability-related reason. It is distinct from sick leave and is one type of reasonable adjustment an employee with HIV may request. It may be planned in advance, for example to attend clinic appointments, but it doesn't need to be. It isn't sick leave, so the employee doesn't need to be unwell to request disability leave, as long as the absence directly relates to managing their HIV.

Disability-related absence

Some employers may wish to find out about the past sickness absence record of the successful job applicant. Remember, you can only ask these questions once a job offer (conditional or unconditional) has been made. It is good practice when considering past absence records (and indeed when recording employee absence) to make a distinction between disability-related absence and sickness absence (see box). Both referees and job applicants may well vary in whether and how they provide information on disability-related absence. It is good practice for you

to make clear in requesting information on sickness absence that you are not asking for information on absence related to disability. If disability-related absence is brought to your attention, it should be considered separately from sickness absence.

You should not assume that past disability-related absence is bound to recur. The absence could, for example, have been caused by a failure of a past employer to provide reasonable adjustments, or the applicant's condition might now have stabilised or be better managed. For people living with HIV, there are

two main 'flash points' when HIV is more likely to impact on their work life: when they are diagnosed; and when they start or switch treatment. You need to ensure that you are not making discriminatory and unlawful judgements on the basis of someone's past absence record.

You should always offer applicants to whom you have offered a job the opportunity to discuss any relevant health-related issues with occupational health or another appropriate member of staff on a confidential basis at an early stage.

Gaps in employment history

The same principles apply to time spent not in paid employment for disability-related reasons. Someone living with HIV might have had time away from paid employment for reasons relating to their HIV status, for example coming to terms with their diagnosis or adjusting to starting HIV treatment.⁶

If you choose to ask about these periods away from the labour market, you may wish to preface this with assurances that if the absences are due to disability, the job applicant will not be discriminated against.

A better approach may be to ask what sort of activities were pursued by the applicant during gaps in employment, rather than asking for the 'reason' why they occurred. **Remember, you cannot ask an applicant if periods away from the labour market are related to a period of ill health or a disability (see above).**

Note that for someone living with HIV, responding to questions about gaps in a CV might itself be difficult. Questions need to be handled sensitively, as some people may not wish to disclose their HIV positive status in an interview.

Medical questionnaires

Except in very specific circumstances, where there are health-related requirements that are essential to a job, employers cannot ask applicants to fill in medical questionnaires as part of their recruitment process prior to the offer of a job.⁷

Once a job offer has been made, an employer can ask the successful applicant to complete a medical questionnaire. However, such procedures may provoke fears or suspicion of discrimination, and employers should consider whether

⁶ *Working with HIV: a summary of NAT's employment research*, NAT, 2009

⁷ Or prior to inclusion in a group of successful candidates to be offered a job when a vacancy becomes available.

they are entirely necessary for the role.

If after you have offered somebody a job, their HIV status is brought to your attention, it must be treated as a disability, and subject to all the protections of the Equality Act 2010. Any discriminatory behaviour arising after a medical questionnaire (such as withdrawing a job offer on the basis of their HIV status) would contravene the Act.

In asking medical questions, you should make clear that individuals are welcome to discuss any health-related matters in person and in confidence with an appropriate member of your staff, either in addition to or as an alternative to filling in a questionnaire. Some people living with HIV prefer to be able to explain in more detail how they are successfully managing their condition and be on hand to answer any questions, rather than rely on a form.

Respecting confidentiality

The Data Protection Act (DPA) 1998 regulates how personal information is processed and protects all personal sensitive data disclosed by a job applicant or employee.⁸ This includes a physical or mental health condition. Every responsible employer should have procedures in place to ensure that personal information about employees is properly handled. The Information Commissioner's Office has produced a code of practice for employers and can also advise where people believe their rights may have been infringed.⁹

The Data Protection Act 1998 specifies that written consent is needed for personal sensitive information to be passed on. This includes racial or ethnic origin, political opinions, religious or other beliefs, trade union membership, physical or mental health condition, sex life, criminal proceedings or convictions.

Depending on individual circumstances, you might need to disclose this information to third parties. In this case, only personnel

⁸ The term 'personal sensitive data' has a technical definition within the Data Protection Act (1998). See www.ico.gov.uk for more information.

⁹ The Information Commissioner's Office 'The Employment Practices Code' (2005) is available at www.ico.gov.uk 7 More information about this and other aspects of Data Protection can be found at www.ico.gov.uk

that 'need-to-know' should be informed of the situation. In practice, this will tend to include the Human Resources Manager (where there is one) or the person in charge of implementing any reasonable adjustments.

The Data Protection Act states that explicit consent should be sought from employees when sensitive information, particularly relating to health information, is processed by an organisation. Sometimes you will need colleagues' co-operation to implement a reasonable adjustment, but confidential details must not be disclosed without the consent of the employee concerned.

Some final thoughts

- The person living with HIV could be your best job applicant – not discriminating is ensuring the best opportunities for that person and your workplace.
 - You should realise, given the fact that there is a social stigma attached to HIV, that issues of disclosure of disability are more complicated for people living with this condition.
 - The issue of disability has no place in assessing the suitability
- of a candidate for employment. While it may be legitimate to ask about someone's disability or long-term health condition for disability monitoring purposes or in order to arrange reasonable adjustments for the interview process, these processes should be 'HIV friendly'.
- The Equality Act 2010 means it is illegal to ask a candidate about their health or disability before the offer of a job has been made (except in a few very specific circumstances).
 - If you decide to raise health or disability related enquiries after you have made a job offer to the successful applicant, they should be done fairly and transparently so that people living with HIV experience a fair and nondiscriminatory process.
 - Having a workplace policy that specifically addresses the needs of people living with HIV is an important first step in recruiting, retaining and supporting this group of people.

For more information about employing people living with HIV see our guidance *HIV@work: advice for employers*, available at www.nat.org.uk.

For contact details for further information, advice and resources see the central spread in this booklet.

Further information, advice and resources

Equality and Human Rights Commission (EHRC)

The EHRC have a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the seven “protected” grounds - age, disability, gender, race, religion and belief, sexual orientation and gender reassignment.

Helpline:

- England: 0845 604 6610
- Scotland: 0845 604 5510
- Wales: 0845 604 8810

www.equalityhumanrights.com

In Northern Ireland, you can contact the Equality Commission for Northern Ireland.

Enquiry Line: 028 90 890 890
www.equalityni.org

Trade Union Congress (TUC)

The TUC has 58 affiliated unions representing 6.2 million working people from all walks of life. The TUC campaigns for a fair deal at work and for social justice at home and abroad.

Know your rights line: 0870 600 4882
www.tuc.org.uk

Acas (Advisory, Conciliation and Arbitration Service)

Acas has a range of services which can help individuals or groups of employees to avoid or resolve problems and disputes in the workplace. The Acas helpline offers free, confidential and impartial guidance on employment rights and workplace issues. They provide general information on employment rights and

responsibilities and can also help employees and employers who are involved in an employment dispute to identify practical ways of sorting out the problem.

Helpline: 08457 47 47 47
www.acas.org.uk

Disability Law Service

The Disability Law Service is a national registered charity that provides confidential and free legal advice to disabled people and their families, carers and advocates.

Advice line: 020 7791 9800
www.dls.org.uk

Advicenow

Advicenow is an independent, not-for-profit website providing accurate, up-to-date information on rights and legal issues.

www.advicenow.org.uk

Information Commissioners Office

The Information Commissioner's Office is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

www.ico.gov.uk

THT Direct

Provides information, support and advice on HIV and sexual health

THT Direct: 845 1221 200

www.tht.org.uk

NAM aidsmap

NAM's e-atlas can direct you to an HIV support organisation in your local area.

www.aidsmap.com/

RADAR: The Disability Network

RADAR is the UK's largest disability campaigning organisation, with a membership of over 900 disability organisations and individual campaigners.

www.radar.org.uk
