

THE DISABILITY DISCRIMINATION ACT 1995 AND EMPLOYMENT: WHAT DOES IT MEAN FOR PEOPLE LIVING WITH HIV?

What is the Disability Discrimination Act 1995 (DDA 1995)?

- The DDA 1995 is the law protecting people living with a disability from discrimination.
- The DDA 1995 gives disabled people rights in the areas of employment, access to goods and services, education and housing.
- The Act applies to the whole of the UK, including Northern Ireland in relation to employment.
- The agency monitoring the DDA 1995 is the Disability Rights Commission (DRC) www.drc-gb.org

Are all people living with HIV protected under the DDA 1995?

- The DDA 1995 currently protects people with **HIV at the symptomatic stage**, and those **previously HIV symptomatic or diagnosed with AIDS**.
- **From December 2005**, the DDA 1995 will protect people living with HIV from the moment of diagnosis.

Are all employers liable under the DDA 1995?

No. However, from 1st October 2004 employers are liable regardless of the size of their workforce.

The categories **NOT** currently covered by the law include:

- Armed forces;
- Local councillors, elected office holders, magistrates, school governors;
- Examination bodies;
- Voluntary organisations.

How does the DDA 1995 protect people living with HIV?

An employer **cannot** discriminate against an HIV-positive employee (covered by the definition of disability):

- In the recruitment process;
- In the terms and conditions of employment;
- In the opportunities offered for training, promotion, transfer or any other benefits of employment;
- By dismissing them unfairly;
- By treating them less favourably than other employees;

- By subjecting them to harassment or subjecting them to any other detriment.

What does “discriminate” mean?

The DDA 1995 **prohibits**:

- *Direct discrimination*

Direct discrimination occurs if an employer treats a disabled job applicant/employee less favourably than he treats (or would treat) another job applicant/employee not having that particular disability.

- *Failure to comply with a duty to make reasonable adjustments*

Employers have a duty to make reasonable adjustments (RA) for disabled job applicants and employees when any features or any working arrangements (or arrangements for an interview) may cause a substantial disadvantage to a disabled person.

Examples of RA include: allocating some of the disabled person’s duties to another person, altering working hours, assigning the person to a different place of work, allowing them to be absent during working hours for medical treatment, allowing home working.

Example

An HIV-positive employee suffering from fatigue is allowed to work from home.

- *Treating a disabled person less favourably*

This form of discrimination will occur if an employer treats a disabled job applicant/employee less favourably than he would treat other job applicants/employees for a reason related to their disability.

Example

A job applicant best qualified for a job is refused employment after he told his future employer that he is HIV-positive.

- *Harassment*

Harassment is defined as an employer’s or employee(s)’ 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.

Example

An HIV-positive employee is subject to verbal abuse by his colleagues.

- *Victimisation*

Victimisation occurs when an employer has treated a disabled job applicant/employee less favourably than another job applicant/employee because:

- They intend to bring a case under the legislation;
- They have given evidence in a case;

- They have alleged in good faith that someone else could be in breach of the Act.

Example

An employee with HIV was dismissed after complaining of being verbally abused by one of his superiors

- *Instructions or pressure to discriminate*

It is unlawful for an employer to instruct or attempt to instruct any other person to discriminate against a job applicant/employee on grounds of disability. It is also unlawful to ask, persuade or pressurise another person to discriminate by bribery, threat or placing that person at a disadvantage.

Example

An employer asks one of his employees to harass an HIV-positive employee with the view of leading to his resignation.

- *Constructive dismissal*

This form of discrimination results from an employee's decision to terminate leave his job in circumstances such that they are entitled to terminate it without notice by reason of the conduct of the employer.

Example

An HIV-positive employee is subjected to ongoing harassment by his colleagues. He tells his employer but no action is taken. The employee resigns because he cannot cope anymore.

Do I have to disclose my HIV status at the recruitment stage?

- HIV-positive job applicants have no legal obligations to disclose their status.
- If your HIV status does not affect your ability to work, you should not feel obligated to disclose it.
- There is no legislation preventing an employer from asking questions about health and disability on the application form or during the interview, but he must not use any information offered to discriminate against an employee.
- If you do not want to disclose your HIV status but need some adjustments, it is a good idea to tell your employer about any particular needs.
- Even if you do not need any necessary adjustments at the time of the recruitment, if your health changes during the course of employment, it will be easier to discuss your requirements with your employer.
- If you give false or misleading information, you may be in breach of your employment contract.

- You should always read the application form carefully as the way an employer seeks information can sometimes offer positive guidance on how they view disability (e.g. medical questions relevant to the job).
- Being asked about a disability does not mean that the employer wants to exclude disabled applicants. It may be because of the employer's duty under the DDA 1995 not to treat applicants with a disability less favourably than other applicants.
- Any medical questionnaire you are required to fill out should be detached from the application and retained by the personnel department.
- If you are unsure how to complete your application form, you should contact a Placement and Employment Support Worker at the UK Coalition of People Living with HIV and AIDS. Call 020 7564 2180 or email reception@ukcoalition.org

Can I work in healthcare if I am HIV-positive?

- People living with HIV can work in healthcare if their job does not involve exposure prone procedures (procedures characterised by the potential for direct contact between the healthcare worker's skin and sharp surgical instruments, needles or sharp tissues in body cavities). Jobs involving exposure prone procedures include surgeon, dentist, and midwife.
- If your job involves exposure prone procedures and you find out about your HIV-positive status during the course of your employment, you must seek advice from an occupational health physician and cease to perform these procedures immediately.
- Your employer has a duty to arrange suitable alternative work or training, or where appropriate, early retirement.

Is it legal for an employer to require pre-employment medical examination?

- There is no law stopping an employer from asking job applicants to undergo a test for HIV as part of a medical, provided that they get your consent to be tested.
- It is mandatory for people applying for jobs involving exposure prone procedures to be tested for HIV (as well as Hepatitis and TB).
- Unless the position applied for involves carrying out exposure prone procedures or travels to countries asking for evidence of HIV status before issuing visas, there is no justification for testing job applicants for HIV or asking indirect questions which may lead to HIV status related information (e.g. Have you had a blood test recently?). You should ask your employer why the test is needed.

- If you are required to undergo a pre-employment medical, including a blood test, you should be told what condition(s) they are being tested for.
- A test for HIV cannot be carried out without your informed consent and your test results cannot be disclosed unless you have given your consent to your doctor to disclose your test results.

Do I have to disclose my HIV status during employment?

- If you feel you need some reasonable adjustments to perform your job, you should tell your employer so that he can take the necessary steps to enable you to carry on working.
- Your employer should treat this information in confidence. An employer is not legally entitled to disclose that an employee is HIV-positive without the employee's consent. The only exception to the confidentiality rule is that it was in the public interest for others to know, but even then, disclosure should only be to those who have a real need to know the information.

Can an employer fire an HIV-positive employee required to travel to a country requiring evidence of a negative HIV status before granting a visa or work permit?

- If you have not disclosed your HIV status to your employer, you should check your employer's policy:
 - If the policy deals with this issue, you should talk to your employer.
 - If the policy does not address this issue or does not deal with HIV and AIDS, you should talk to the occupational health department if there is one, or to whomever you think will be sympathetic and will keep the information confidential.
- Your employer should treat you fairly and seek alternative arrangements or redeployment if you cannot travel to the country. If this is not possible, other options should be considered.

Where can I get advice and further information?

- If you think you have been discriminated against, specialist employment advice is available from the Terrence Higgins Trust (THT) via their direct line 0845 1221 200.
- You can also contact the Disability Rights Commission by calling 08457 622 633 or filling out the online enquiry form at:
- www.drc-gb.org/whatwedo/enquirydiscriminate.asp
- Positive Futures at www.positive-futures.org

- Are YOU HIV Prejudiced? Website at www.areyouhivprejudiced.org
- Fife information on www.fifemen.co.uk
- Unison websites including: www.unison-fife.org.uk/lg.htm
- www.unison-scotland.org.uk/lesbiangay/index.html