

Risk Assessment for Health & Safety Purposes during and post Covid 19 for those employees who have a disability or are medically susceptible or compromised*

In dealing with the issue of the duties of both employers and employees under the Safety Health & Welfare at Work Act in dealing with those with a disability it is important to understand what a disability is for the Employment Equality Act 1998, as amended.

A disability means;

- (a) The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- (b) The presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) The malfunction, malformation or disfigurement of a part of a person's body
- (d) A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- (e) A condition, illness or disease which effects a person's thought processes, perception of reality, emotions or judgement, or, which results in disturbed behaviour

and shall be taken to include a disability, which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person”.

That is a very wide definition of what a disability is. It would be helpful if the Government assisted employers and employees by producing a list of what is a disability. The issue of a person suffering an illness where they have a health issue which is compromised is one which is going to need to be assessed by a Doctor. What will be needed in one workplace may be different than what is needed in another workplace.

Because of the threat that will always be there, of a complaint under the Employment Equality Act 1998, as amended, for discrimination on

the disability ground, once a person claims that they have a disability it will be necessary for the employer

1. To ascertain what disability they have;
2. To determine whether what the employee claims is a disability is in fact a disability as defined by the legislation;
3. Put in place as assessment as to whether it will be practicable, possible and safe for the employee to work in the workplace without any special or additional facilities;
4. If such facilities are needed to work out exactly what they are going to be and this will probably mean getting medical advice;
5. Looking to see if the employee's job can be altered to take some duties away from that employee so as to make it possible for them to continue their employment. This is called "reasonable accommodation".

That does not mean however that the employee is entitled to a different job. Reasonable accommodation does not mean giving the employee a completely different job. It means looking at their job and seeing what functions could be reallocated to enable them to continue in their job but with portion of their functions removed. For example, you could have two employees who both do the same job. Part of that job involved interacting with members of the public. One suffers from a disability where interaction by them with members of the public would cause them difficulties and where they could not perform that job. If the interaction was only 20% the interaction was not full time and was a small percentage of their work and the other employee could see those members of the public and it would not impact on the service being provided then in those circumstances the employer may need to seriously need to look at reallocating a portion of the functions to the other employee;

6. When dealing with reallocating functions it is important to explain to the employee involved that an explanation will probably be needed to be given to the other employee and to get their consent under GDPR for the employer to disclose such information as is reasonably necessary for the employer to explain why the other employee, who is not disabled, may have to take over a portion of the functions of the disabled employee;

7. Where these are not properly addressed as regards the health & safety assessment and dealing with the particular job of the employee with the disability then an employer who fails to address these issues could be subjected to a claim under the Employment Equality Act 1998 and under the GDPR Regulations. An employer must also be wary of the fact that failing to deal with matters properly may also leave the employer open to a Personal Injury claim if as a result of failing to take appropriate action an employee suffers an injury or illness which could have been avoided;
8. In the case of an employee whose health is compromised they do not have the protections under the Employment Equality Act 1998 if they do not suffer from a disability. There will always be a fine line as to whether an illness is or is not a disability and appropriate advice is always going to be needed;
9. In dealing with an individual who has an illness the issue of reasonable accommodation does not apply strictly from an employment law perspective. However, the practical reality of matters is that to retain that employee it may be necessary to make some accommodation and changes to how they work. Again, there are going to be issues under GDPR in that information as to the reason why some other worker may have to take on a portion of their work and other pieces of work transferring to the person with the illness is always going to be a concern.
10. There is also the potential exposure by the employer to a personal injury claim by the person with an illness if appropriate health and safety checks have not been put in place and an appropriate risk assessment.

Conclusion

This may sound in some way negative. We do not intend this to be seen as negative. What we are doing is highlighting the difficulties and the challenges. By having a proper health and safety assessment put in place which identifies the risks this will avoid Personal Injury claims, possible Unfair Dismissal claims for Constructive Dismissal,

and, claims under the Safety Health and Welfare at Work Act. Equally, by doing it properly it will avoid interpersonal disputes and grievances being raised by employees with employers. Clearly there are challenges. Those challenges may involve employers having to get advice from health and safety experts, medical practitioners, and, Solicitors who understand Employment Law and Health & Safety Law.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**

***In contentious cases a solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.**