

Focus on disability: Workplace inclusion and reporting

In brief

Now more than ever, businesses recognise the importance of diversity and inclusion in the workplace. One of the most complex and challenging areas is that of disability - yet it has got surprisingly little attention from employers, the media, or in respect of initiatives from Government, with recent focus and investment tending to centre around gender, LGBT+, and ethnicity. Despite disability discrimination in employment being outlawed since 1995, for many disabled people significant barriers to entry into employment and equality within it, still remain.

In late July 2021, the UK Government set out a new strategy on disability inclusion with Boris Johnson claiming "Our new National Disability Strategy is a clear plan – from giving disabled people the best start in school to unlocking equal job opportunities, this strategy sets us on a path to improve their everyday lives." In this article we consider the employment aspects of the strategy and the legal implications of them. We also consider practical steps employers can take to better understand and address disability inclusion within the workplace.

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Key takeaways

With a new UK Government strategy on disability, and focus on health and wellbeing in the workplace increasing, now more than ever employers may wish to revisit their approach to disability inclusion. Disability inclusion is a complex area; employers should appreciate, and where reasonably possible, accommodate the needs of disabled candidates and employees in a way which recognises their specific circumstances. This may require imagination, consultation, a data-led approach, and a genuine 'speak up and listen' workplace culture. With changes to access to flexible working and a new right to unpaid carers leave proposed, employers should watch this space for further developments.

The Government Disability Strategy

In terms of employment aspects, the strategy is focused on improving inclusion in the workplace and tackling the disability employment gap. Proposed measures include:

- In 2021, the Cabinet Office will consult on workforce reporting on disability for large employers, exploring voluntary and mandated workplace transparency, and publish a set of next steps.
- A BEIS review of the statutory right to request flexible working. A consultation on the proposal to make the right to request flexible working a "day one" right for employees was launched in September 2021.
- Commitment to introduce new unpaid carers' leave.
- Review the Disability Confident scheme.



- Launching a new online advice hub available to both disabled people and employers, which provides information and advice on disability discrimination in the workplace, flexible working and rights and obligations around reasonable adjustments.
- Piloting an Access to Work Adjustments Passport to help smooth the transition into employment and support people changing jobs.

At this stage these are just proposals, although the Government has committed to update on progress every 12 months. Any legislative change is unlikely until 2022 or 2023 at the earliest.

Why is action required?

There are 7 million working-age people with a disability or long-term health condition in the UK, but only a little over half are in work. The disability employment gap has narrowed significantly in recent years, from 33.8% in 2014 to 28.6% in 2021. However, according to Scope (a national disability charity), there are more than one million disabled people who are not in work but would like to be.

From April 2017, Gender Pay Gap Regulations have required employers with 250+ employees to publish a range of metrics including the mean and median hourly pay gap between men and women, and information on their gender bonus gap. The UK Government is considering implementing ethnicity pay gap reporting, but has not yet tabled proposals, and while some employers now report their ethnicity pay gap voluntarily, few report their disability pay gap. A 2018 study by the EHRC found that 77% of companies currently collect general data on pay and progression but have not analysed it by disability.

In 2018 the disability pay gap was assessed by the Office for National Statistics as 12.2% overall. The size of the gap varies depending on the nature of the disability - the gap in respect of those with neurological conditions, mental health conditions or learning difficulties tends to be greater. It is also important to view the impact intersectionally, with men tending to experience a greater pay gap; for example men with physical impairments experience pay gaps in the range of 15-28% compared to 8-18% in respect of women. The National Disability Strategy specifically states: "There is increasing interest in making disability reporting mandatory, particularly for large employers, whilst recognising the challenges facing businesses"; adding that there will be a consultation to consider this further. Interestingly, in Northern Ireland, legislation has been approved requiring employers to publish statistics on workers within each pay band in relation to disability and ethnicity as well as gender. However, no regulations have been issued yet to bring the provisions into operation.

The impact of the COVID-19 pandemic on the economy has also had an impact on disabled people's work. Disabled people are one of the groups more likely to have experienced a reduction in earnings through redundancy, a reduction in hours, or being furloughed.

Tackling access to work, and equality within it, is likely to be good for business. Research has consistently shown that diverse businesses with inclusive cultures outperform their counterparts. Employers seeking to address these issues could help to foster unique skill sets, resilience, and diversity of thought in the workforce, and making those that represent businesses (and make decisions) more reflective of society.

The challenges to disability data collection

Increasingly, employers are becoming more sophisticated in the planning and monitoring of inclusion and diversity initiatives, wishing to analyse their employment statistics in order to ensure that barriers can be correctly identified, and that investment can be made in the right places. In addition, for employers wanting to embrace disability pay gap reporting on a voluntary basis, careful consideration is required in respect of the legal and practical issues surrounding the collection of disability data, such as poor response rates, problems with ensuring anonymity, and the risk of skewed results because of small sample sizes. Taking some of these issues in turn:

- **GDPR**

The collection of disability data is considered special category data under the GDPR. There is a general prohibition of processing special category data unless an exception applies, and importantly, obtaining employee consent would not (of itself) be sufficient to comply with the requirements. If disability pay gap reporting became mandatory, employers would be permitted to process the data. Until that happens however, employers acting voluntarily will have to give careful consideration on how to gather and publish disability pay gap statistics. There are several exceptions employers could potentially use now



to allow the lawful processing of disability data, including collection of data necessary for reasons of substantial public interest. Whilst consent cannot be relied on in isolation, voluntary collection of data with employee consent will nonetheless mitigate the risk to some extent. Employers wanting to collect disability data are likely going to need to also conduct a Data Protection Impact Assessment (DPIA).

- **Sample size:**

Even with a lawful basis, employers are still required to have due regard to the data protection principles and would have to consider the granularity of the data they are collecting in order to ensure that it remains anonymised. This is obviously dependent on what percentage of the population falls within the disabled category. In addition, a recent study suggested as many as 43% of people wouldn't feel confident discussing any health issue with their employer. Smaller sample sizes lead to more volatile data, with a greater risk of significant shifts in measurements. If individuals are easy to identify, the collection and publication of data might be regarded as disproportionate. Employers might want to set a minimum number of employees in each relevant category before reporting on it, so as to ensure the data is sufficiently anonymised. In order to maximise responses to self-identification requests, employers will want a carefully considered communication strategy, with thought given to how they explain to employees what the data will be used for, as well as any security and confidentiality measures that will be put in place to safeguard the data.

- **Categorisation:**

Companies which have included disability statistics in their 2020 Pay Gap Report, have often displayed them in the same manner as they are required to display gender pay information i.e., companies publish the median and mean pay gap (on a disabled vs. non-disabled basis) and some publish the proportion of disabled individuals in each quartile. There is also usually a description of the initiatives companies are taking to improve disability diversity. Employers may wish to think practically about what data it has and what would be helpful to publish in relation to disability, such as the percentage of employees who have self-disclosed their status which may help to explain the limitations on the data. Alternatively, publishing how many disabled people are within each pay band can help to contextualise the gap.

Access to Work and reasonable adjustments

Under the Equality Act 2010, there is a duty on employers to put in place reasonable adjustments for disabled employees. The duty has various elements:

1. where a **provision, criterion, or practice** puts or would put a disabled person at a substantial disadvantage as compared to non-disabled person, the employer must take such steps as are reasonable in order to avoid the disadvantage;
2. where a **physical feature** puts or would put a disabled person at a substantial disadvantage as compared to non-disabled person, the employer must take such steps as are reasonable in order to avoid the disadvantage; and
3. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage as compared to non-disabled person, the employer must take such steps as are reasonable to provide the auxiliary aid.

Access to Work is a government scheme which supports employees when they are not covered by the reasonable adjustment provisions above. This could be because the steps required would not be reasonable for the employer to take in the circumstances of the particular case. Access to Work can provide special equipment, adaptations or support services as well as help with transport to get to and from work.

The government's newest proposal is for an Access to Work Passport which will provide an indicative overview for employers of the possible support available from Access to Work in order to help build employer understanding of disability and adjustments. A pilot scheme is planned for 2021.

New unpaid carer's leave and flexible working

Currently in the UK employees with caring responsibilities will often rely on the flexibility of their employer to deal with issues as and when they arise. Employees may take sick leave if these issues have made them too unwell to work (and can generally self-certify an absence for seven days), or use the statutory right to unpaid time off for emergencies related to dependants (such as when they fall ill, to make arrangements for care, or an unexpected disruption to care), which is typically limited to one or two days. The Disability Strategy includes a commitment to introduce a new entitlement to unpaid leave for carers of up to one week.



The Government response to its 2020 consultation on carer's leave was published in September 2021. It confirms that it will implement a new right, and that this right for time of for carers:

- will be a "day one" right without any service requirement;
- will be one week of unpaid leave per employee, per year;
- can be taken as half-days, full-days, or a one week block;
- will require advance notice of twice the length of the leave requested;
- will rely on the carer's relationship with the person cared for (broadly in line with the definitions used for emergency time off for dependants); and
- will depend on the caring needs being long-term.

Employees who take unpaid carer's leave will also be protected from detriment or dismissal related to their taking the leave. In respect of flexible working, since 2014 all employees (regardless of health, family status or caring status) have had a right to request flexible working from the employer, where they have 26 weeks' service. BEIS is currently undertaking a review with the possibility of it becoming the default position for all roles, unless employers have a good reason not to. This was previously included in the Conservative Party 2019 Manifesto, and the Labour Party have also called for the right to flexible working to be the default for all employees on day one of employment. The recent consultation stops short of suggesting there should be a "right to have" rather than a "right to request", and instead focuses on the following:

- making the right to request flexible working a day one right;
- whether the eight business reasons for refusing a request all remain valid;
- requiring the employer to suggest alternatives if it intends to refuse a request;
- the administrative process underpinning the Right to Request Flexible Working; and
- requesting a temporary arrangement.

No doubt employers will keenly watch for developments in this area.

Practical tips

1. **Audit** - Review what data is already held within your organisation, consider why it was collected and how (including evaluating any limitations);
2. **Planning** - complete a DPIA to review your plans and analyse the risks, carefully considering and documenting your lawful basis and any mitigating practices. Most people are more comfortable identifying as disabled anonymously for example through an employee survey. However, identification can be important to measure career progression and pay gaps. A hybrid approach is recommended, this way if your data quality is poor through one channel, you are still ensuring data is being captured through other means. Organisations should also ensure there are opportunities to share information about disability throughout the course of the employment relationship and not just at the recruitment stage;
3. **Parameters** - consider issues such as sample size and categorisation. In order to ensure anonymity, some organisations decide to only publish the data once the pool reaches a minimum size;
4. **Communication and consultation** - clearly communicate the reasons for collection, explain what the data will be used for, give appropriate assurances as to confidentiality and security. Unless employees understand the types of issues employers are seeking to address, and trust them to use the data lawfully and responsibly, take up of a self-identification campaign is likely to be low. Where appropriate, employers should engage with unions, employee forums or employee disability networks regarding any data collection campaign in order to listen and respond to any concerns raised;
5. **Strategy** - once you have the data, ensure that its value is not lost. Allowing the data to identify areas of concerns or trends which can then inform your strategic decisions about disability I&D initiatives.



Contact Us



Monica Kurnatowska
Partner
monica.kurnatowska
@bakermckenzie.com



Hannah Swift
Senior Associate
hannah.swift
@bakermckenzie.com



Megan Clarkson Bowly
Associate
megan.clarksonbowly
@bakermckenzie.com

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