

Employing people with OCD in England & Wales

What you need to know

Obsessive Compulsive Disorder (OCD) is a hidden condition that affects around 1-2% of the population and is frequently misunderstood. This leaflet will help you understand OCD and how people with the condition can contribute successfully to your workforce and deliver their best to you.

OCD Action takes every care to make sure that information is up to date and accurate; the charity however does not offer legal advice. Please consult a legal expert if you need specific legal information about your case.

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Employment and OCD

Many people will experience mental health problems at some point in their lives; possibly you will know at least one person who has done so. According to the Trade Union Congress (TUC), at any one time one in six workers will be experiencing stress, anxiety or depression. Obsessive Compulsive Disorder (OCD) is an 'anxiety disorder' and is generally very poorly understood. It is a condition which affects about 1-2% of the general population. The information provided here will help you to:

- Understand OCD;
- See that many people with OCD are some of the most able and conscientious people in society; and,
- Understand your responsibilities to them under the Equality Act 2010.

What exactly is OCD?

There are many myths and stereotypes about OCD and the term is often misused to describe someone who is fastidious or excessively neat and tidy.

OCD can take many forms but it is based upon two elements: obsessions and compulsions. Obsessions are unwanted thoughts that won't go away and compulsions (which are often associated with obsessions) are actions people take in order to get rid of their unwanted thoughts or neutralise them.

So, for example, someone with obsessional thoughts about germs might wash excessively or avoid certain situations or people. Someone who has obsessive fears about something unpleasant happening to their family may repeat certain phrases over in their heads a number of times as by doing so they feel that they will prevent anything bad from happening.

People with OCD often feel responsible far beyond what is reasonable and they carry that weight of responsibility very heavily. They tend to be very hard on themselves if they make mistakes as they usually want to do things really well.

OCD can affect anybody no matter their age, gender or background but it is treatable.

Employing someone with OCD

If you are employing a worker with OCD there are five key areas that you are likely to need to consider:

- Your employee's disclosure of their OCD;
- Confidentiality;
- Your duties to them under the Equality Act 2010 e.g. reasonable adjustments you might need to make for them in the workplace;
- Health & safety (H&S) issues; and
- Sickness absence.

What is the Equality Act (EA) 2010?

The Equality Act 2010 brought together 116 separate pieces of anti-discrimination legislation into one single act which provides a legal framework to protect the rights of individuals and advance equality of opportunity for all.

Under the Act a person is disabled if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities e.g. using a telephone, reading a book or using public transport etc. In this definition, 'substantial' means more than minor or trivial and 'long term' means lasting more than 12 months, or likely to last more than 12 months. The Equality Act 2010 Guidance on the definition of disability produced by the Office for Disability Issues (ODI) includes OCD in its list of examples of mental impairment.

Recruitment process

In most circumstances, employers are not allowed to ask a job candidate (or a third party, such as the candidate's former employer, or their agent) questions about their health or whether they have a disability until after they have offered the candidate the job. This includes questions about their previous sickness absence. Even if the candidate volunteers information about their health or disability the employer must not discuss it except to make certain enquiries that are permitted by the Act (see below).

Employers can make an offer conditional on health or disability checks but if the employer subsequently decides not to confirm the offer, or withdraws it because of the candidate's disability this is likely to be unlawful discrimination.

One important exception is where reasonable adjustments may be required to make the recruitment exercise accessible and non-discriminatory for a disabled applicant (see below under reasonable adjustments.)

In summary, before you have offered the individual a job you can only ask health-related questions to help you to:

- Decide whether the candidate is able to do an assessment (such as the job interview);
- Decide whether you need to make any 'reasonable adjustments' to the assessment process for the person;
- Decide whether an applicant can carry out a function that is essential (intrinsic) to the job;
- Monitor diversity in the range of applicants;
- Take positive action to assist disabled people;
- Assure yourself that, where the job genuinely requires the jobholder to have a disability, a candidate has the disability.

Disclosure of OCD

A person with OCD may be reluctant to tell you about their condition because they may fear that it will affect their employment prospects and lead to stigma or ridicule in the workplace.

Disabled people are not under a legal obligation to disclose their disability or long-term health condition to you before or during their employment but if they choose not to then this may affect their ability to assert their legal rights under the Equality Act 2010. However, as an employer you must do all you reasonably can do to find out whether an employee has a disability so that you can comply with your duty to make 'reasonable adjustments' if required.

What is a reasonable adjustment?

The Equality Act 2010 places a duty on employers to make reasonable adjustments where a disabled employee or job applicant would be at a substantial (more than minor or trivial) disadvantage compared with their nondisabled colleagues; the adjustment has to remedy the disadvantage. It covers 'provisions, criteria and practices', 'physical features' and 'provision of auxiliary aids'. So, for the duty to arise the individual must be put at a substantial disadvantage compared with a non-disabled colleague by a provision, criterion or practice of the employer, by a physical feature of the employer's premises or by the lack of an auxiliary aid.

Where the employer knows or can reasonably be expected to know about the individual's disability and the disadvantage to the individual, they are under a duty to make enquiries about what adjustments should be made and to make reasonable adjustments. It is advisable for disabled employees who require adjustments to be made to inform their employer of this in writing.

Reasonable adjustments should be made in a timely fashion. Failure to make a reasonable adjustment that is required for a particular disabled employee or job applicant is a breach of the law and amounts to direct discrimination.

There is no definition within the Equality Act of the term 'reasonable'. However, The Disability Discrimination Act 1995 which was replaced by the Equality Act 2010 contains a list of factors which might be relevant when deciding whether an adjustment is reasonable. These include:

1. To what extent will the adjustment reduce the disadvantage?
2. Is it practical to make the adjustment?
3. How much will it cost to make the adjustment and will it cause disruption to the employer's activities?
4. What financial and other resources are available to the employer (including from public organisations and other outside organisations)?

The European Union's Equal Treatment Directive suggests in relation to adjustments that employers should take 'appropriate measures' except where the measures would impose a 'disproportionate burden on the employer'. Where adjustments need to be made, the employer must bear the cost.

Deciding what is 'reasonable' can be an area for debate but some past examples have included:

- Allocating some of the disabled person's duties to another person;
- Allowing the employee to work different hours;
- Arranging for or allowing the employee to have training;
- Allowing the person to take more frequent breaks;
- Providing a workplace 'buddy';
- Changing the person's work duties;
- Altering supervision or appraisal methods;
- Redeploying the person into a different role;
- Building in time so that people can attend therapy or hospital appointments;
- Modifying performance-related pay arrangements

Except in exceptional circumstances, it is not a reasonable adjustment to allow disabled staff to receive sick pay for longer than non-disabled staff. However, where an employee is on sick leave due to an employer's failure to make a reasonable adjustment it is likely to be regarded as an additional reasonable adjustment for the employer to pay the employee full pay for the period of time until the first adjustment has been put in place.

Other types of discrimination

In addition to a failure to make reasonable adjustments the Equality Act protects people with a disability from:

- **Direct discrimination:** This is where a person is treated less favourably than someone else because of their disability (section 13 EA). E.g. excluding someone with OCD from meetings or emails or micromanaging them simply because they have a mental health problem. N.B. It is not direct discrimination to treat a disabled person more favourably than a non-disabled person.
- **Indirect discrimination:** This is where an employer's practice or arrangement, which applies to everyone and appears to be neutral and non-discriminatory, puts a disabled individual at a particular disadvantage compared to people who are not

disabled. Unless you could objectively justify the practice or arrangement, this would be unlawful. E.g. a policy of not allowing employees to work different hours could put an employee with a certain type of OCD (where they struggle to leave home at a set time) at a particular disadvantage compared with other staff. Indirect discrimination is unlawful whether or not the employer knows the employee has a disability.

- **Discrimination arising from disability:** This states that it is discrimination to treat a disabled person unfavourably because of something arising or resulting from their disability. E.g. someone with a certain type of OCD might need extra time to recheck information or figures before submitting them. The delay caused by this is arising from their disability. If the employer disciplined them for the delay (e.g. by giving them a warning) it could be unlawful discrimination. This type of discrimination is unlawful where the employer or other person acting for the employer knows or could reasonably be expected to know that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is 'a proportionate means of achieving a legitimate aim'.
- **Victimisation:** This is where a person is subjected to detrimental treatment or placed at a disadvantage by their employer because they have done something (or intend to do something) to protect or enforce the right not to be discriminated against, e.g. by making an allegation of discrimination, or supporting someone else who has made an allegation of discrimination.
- **Harassment:** This is defined under the Equality Act as unwanted behaviour related to disability that has the purpose (or effect) of violating someone's dignity or creating an environment that is intimidating, degrading or humiliating. E.g. where colleagues or customers make fun or light of someone's OCD or use abusive language towards them because of it.

Health and Safety at Work Act 1974

Whilst there is generally no legal obligation to disclose a disability, there is an obligation for employees to disclose their disability under the Health and Safety at Work Act 1974 if issues resulting from that disability are likely to put either themselves or others at risk.

Employers should think about the welfare of their workforce and of the public, but this duty should not be used as an excuse to discriminate against or stop a person with a mental health issue doing their job if they are performing it safely within the remit of the law.

You can get further information about Health and Safety issues, disability and the law at The Health and Safety Executive: www.hse.gov.uk

Sickness

Most people with OCD are acutely aware of their condition and are often very worried about missing work or having to take time off. The nature of the condition often means that they are very conscientious and organised and take commitments very seriously.

In this respect they are no more likely to take more sick leave than an average employee; however, they may sometimes have to attend hospital or therapy appointments.

If an employee with OCD does have to have an extended period of time off sick it is essential to manage their return to work carefully as stress can often trigger a worsening of someone's OCD symptoms.

The Equality & Human Rights Commission's statutory Code of Practice on employment suggests that a reasonable adjustment might be: *Allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment.*

TUC guidance in 'Representing and supporting members with mental health problems at work' indicates that ideally there should be a provision for allowing people to take 'disability leave' to attend counselling, go for hospital appointments etc. www.tuc.org.uk

Does the Equality Act cover your organisation?

Except for the Armed Forces, these duties of the Equality Act now apply to all employers no matter how many (or how few) people they employ. Please access the Equality & Human Rights Commission's Code of Practice on employment for further details.

The positive effects of employing someone with OCD in your workforce

- Including people with a disability of any sort will enrich and benefit your workforce. It will challenge prejudice and break down stereotypes and introduce a new team dynamic into the workforce.
- If you recruit someone with OCD into your work force, they are likely to show a high level of commitment and loyalty to you.
- You will have contributed significantly to the confidence and self-esteem of the person with OCD who may have been struggling with the idea that they might be rejected as an employee if they disclosed their condition. A person who is understood and who feels valued in their work is likely to deliver their very best to you as an employer.
- Employers who visibly support the community by displaying a commitment to equal opportunities by employing a diverse work force and who openly demonstrate community involvement by sponsorship and charitable giving in the main receive better patronage from the public.

You could even apply for the 'disability confident' symbol which you can use on job adverts and in general advertising, this shows the public that you have made a commitment to employing disabled people. See: www.gov.uk/guidance/disability-confident-how-to-sign-up-to-the-employer-scheme

Confidentiality

Any information disclosed to you by an employee about their OCD should be treated in line with data protection legislation. For guidance on the Data Protection Act 1998 please see: http://ico.org.uk/for_organisations/data_protection/the_guide.

For more information on OCD please access the OCD Action website which will tell you in detail about the condition. www.ocdaction.org.uk.

Information Sources

- **TUC** publication: Disability & Work 2011 – a guide to the law & good practice
<http://www.tuc.org.uk/sites/default/files/extras/disabilityandwork.pdf>
- **Equality & Human Rights Commission (EHRC)** – resources for employers including the statutory Code of Practice on employment: <http://www.equalityhumanrights.com>
- **Office for Disability Issues:** <http://odi.dwp.gov.uk/>
- **Equality Act 2010 government guidance:** <https://www.gov.uk/guidance/equality-act-2010-guidance>
- **ACAS** – provides information and advice for both employers and employees in addition to its role as a conciliator: www.acas.org.uk
- **Business Disability Forum** - provides a unique range of advice, support and expert tools to help organisations become disability-smart: www.businessdisabilityforum.org.uk
- **Access to Work** - For information on support for employees please see: <https://www.gov.uk/government/publications/access-to-work-guide-for-employers>

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