

Chairperson's Foreword

Hong Kong has become successful due to its fair, open and competitive society. Equality of opportunities in employment ensures that all suitable people compete equally and effectively on the basis of their abilities, aptitude and knowledge. This is an important element in sustaining Hong Kong's success.

Legislation on family status discrimination was introduced in Hong Kong not only to ensure equality of opportunities in certain area, but to reflect the growing needs of the Hong Kong community in:

upholding civil rights - Hong Kong has made significant advances in protecting individual rights and respecting human dignity. The elimination of discrimination on the ground of family status in employment signifies a progressive society and contributes to the development of civil rights for people in Hong Kong.

maintaining social harmony - Hong Kong prides itself on its low level of social conflict. Its economic success is a result of people being interested in fighting competitors in the market place rather than fighting other groups in society. Social harmony in Hong Kong can be maintained through the use of fair and open practices in social areas including employment.

ensuring better use of skills and resources - By tapping into the largest pool of available talent, Hong Kong employers can enhance the quality of their staff and thereby improve their competitive edge. Creating this pool means including all skilled and talented people whether or not they have a disability. This present a challenge to all of us - to accept and value differences, and to dispense with stereotypical assumptions of persons with a disability. Employers are encouraged to recast the conventional notion of 'suitability' and focus on the 'ability' of a person rather than the 'disability'.

There are additional advantages of employing persons with a disability. Overseas research and local experience suggest that employees with a disability are loyal and stable workers, and are able to handel a wide variety of jobs just as effectively, or even better than, their counterparts who do not have a disability.

achieving organizational success - Organizations which incorporate equality of opportunities into their organizational strategy will be improved by seeking to develop the abilities of all employees. There is indeed a close link that exists between affording equal opportunities in organizations and good employment practice. In some cases an initial cost may be incurred in implementing equal opportunities policies, but this will be more than compensated for by better employment relationships and better use of human resources.

This Code of Practice on Employment is offered to assist employers and employees in understanding the requirements of the Disability Discrimination Ordinance. In the long term, the Equal Opportunities Commission hopes to create, with the support of the community, an environment where there is no barrier to equal opportunities and no discrimination.

Code of Practice on Employment
under the Disability Discrimination Ordinance

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Introduction

1. Purpose of the Code

- 1.1. This Code of Practice is issued by the Equal Opportunities Commission (EOC) in accordance with the Disability Discrimination Ordinance (DDO).¹ It aims to eliminate discrimination, harassment and vilification of persons with a disability in employment. It also aims to eliminate disability victimisation in employment and to promote equal employment opportunities for persons with a disability.
- 1.2. The EOC believes that it is very important for employers, employees, and the general public to be aware of the principles prohibiting disability discrimination, harassment, victimisation and vilification in employment. This Code is designed to help employees with a disability, their colleagues, employers and other concerned parties to understand their responsibilities under the DDO. The Code also provides guidance on the procedures and systems that can help to prevent disability discrimination and to deal with unlawful acts in employment.

2. Application of the Code

- 2.1. The Code applies to employment in Hong Kong in any establishment,² unless the employee does his or her work wholly or mainly outside Hong Kong.³
- 2.2. The Code applies to employment relationships in both the public and private sectors, the employment of contract workers, selection of partners in partnerships,⁴ memberships in workers' or employers' organisations, the conferral of professional or trade authorisation or qualifications, employment-related training, the provision of services by employment agencies and the appointment of commission agents.
- 2.3. Employers are encouraged to follow the guidelines and the recommended good practices in this Code, unless there are justifiable grounds for not doing so. In all cases reference should be made to the provisions of the DDO.
- 2.4. The Code has to deal in general terms with disability discrimination, harassment, victimisation and vilification. In adopting the Code employers may take into consideration the size and structure of their organisations. Small businesses, for example, will require simplified procedures and it may not always be reasonable for them to carry out all the Code's recommendations. However, small firms should ensure that their practices comply with the DDO and the spirit of the Code.
- 2.5. In addition to the Code the EOC will, from time to time, issue guidelines on good employment practices to assist organisations in implementing the recommendations set out in this Code.

3. Definitions

3.1. For practical purposes, listed below are the definitions of disability discrimination (direct and indirect), harassment, victimisation and vilification that apply throughout this document.

3.1.1. Disability⁵ includes physical, mental, sensory, neurological or learning disabilities and the presence of some disease-causing organism in the body (for example, HIV). It also includes the malfunction, malformation or disfigurement of a part of a person's body; or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour. Disability includes a disability that presently exists; previously existed but no longer exists; may exist in the future; or is imputed to a person.

3.1.2. Direct disability discrimination means treating a person with a disability less favourably than someone without a disability in comparable circumstances.

Example: ABC Co. refuses to hire Mr. Wong, even though he is the best qualified person for the job, because Mr. Wong is blind and the company is concerned that this may damage "corporate image".

3.1.3. Indirect disability discrimination consists of applying the same treatment as between persons with a disability and persons without a disability, but is in practice discriminatory in its effect on persons with a disability.

Example: Ms. Mak applies for a job with a large company that requires all job applicants to take an oral test. Because she has impaired hearing and the company refuses to make reasonable modifications to the test procedure, Ms. Mak and anyone else with a similar disability cannot perform well in the test. Although the requirement of an oral test was equally applied to all applicants, the proportion of persons with a relevant disability who could comply with it was considerably smaller than the proportion of persons without the disability. This requirement was to Ms Mak's detriment. In these circumstances, applying a requirement for an oral test could be discriminatory unless shown to be justifiable.

3.1.4. Disability discrimination against a person includes discrimination against him or her -

3.1.4.1. on the ground of the disability of his or her associate (e.g. carer or relative);⁶

3.1.4.2. because of the fact that that person is accompanied by, or possesses a palliative or therapeutic device or auxiliary aid, or any matter related to this fact;⁷

3.1.4.3. because of the fact that that person is accompanied by an interpreter, a reader, an assistant or a carer, or any matter related to this fact.⁸

3.1.5. Disability Harassment⁹ means unwelcome conduct towards a person in relation to his or her disability, or towards a person on the ground of the disability of his or her associate, in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated.

3.1.6. Disability Victimisation¹⁰ arises where a person (the discriminator) treats another person (the person victimised) less favourably than other persons in comparable circumstances because the person victimised or a third person has done or intends to do, or is suspected to have done or to intend to do, the following:

3.1.6.1. bringing proceedings against the discriminator or any other person under the DDO;

3.1.6.2. giving evidence or information in connection with proceedings brought by any person against the discriminator or any other person under the DDO;

3.1.6.3. otherwise doing anything under or by reference to the DDO in relation to the discriminator or any other person; or

3.1.6.4. alleging that the discriminator or any other person has committed an act which is unlawful under the DDO.

3.1.7. Disability vilification means any "activity in public" to incite hatred towards, serious contempt for, or severe ridicule of, a person or persons with a disability. "Activity in public" includes any form of communication, any conduct observable by the public and the distribution or dissemination of any matter to the public.¹¹

The implications of the DDO in employment

4. General liability

4.1. According to the DDO, an act done by a person in the course of his or her employment may render both that person and his or her employer liable. Similarly, an act done by a person as agent for another may render both the agent and principal liable. Employers are legally responsible for the actions of their employees, done in the course of their employment, whether or not these were done

with the employer's knowledge or approval.¹²

- 4.2. A failure on the part of a person to observe any of the recommendations contained in this Code does not automatically render him or her liable to any proceedings. However, if a person is accused of disability discrimination, harassment, victimisation or vilification, failure to implement the recommendations outlined in this Code could be used as evidence in a court of law.¹³ This applies to both employers and employees, as well as agents and principals.
- 4.3. When the EOC investigates an alleged discriminatory act or conducts a formal investigation, the EOC will also take compliance of this Code into account.
- 4.4. It is also unlawful to instruct, induce, threaten or knowingly aid others to commit unlawful acts under the DDO.¹⁴
- 4.5. This Code may be used as a guidance for employers as to what steps it is reasonably practicable for them to take to prevent their employees from committing unlawful acts. Where the Code offers specific guidelines to employers and they follow such guidelines, the fact they did so will assist a court to determine that they have taken all reasonable steps practicable.¹⁵

5. Disability discrimination in employment

- 5.1. Under the DDO, it is unlawful to discriminate in employment on the ground of the employee's disability or the disability of an associate of the employee. Disability discrimination in employment includes the following situations:
 - 5.1.1. treating an applicant or an employee less favourably;
 - 5.1.2. discriminating against a person when selecting a partner (in a firm consisting of not less than six partners);
 - 5.1.3. discriminating against a person seeking to be a member (or a person who is a member) of an organisation of workers or employers, or professionals;
 - 5.1.4. discriminating against a person seeking an authorisation or qualification which is needed for a particular profession or trade;
 - 5.1.5. discriminating against a person seeking or undergoing training which would help the person to fit for that employment;
 - 5.1.6. discriminating against a person in relation to services offered by an employment agency; and
 - 5.1.7. discriminating against a person who is a contract worker or a commission agent.
- 5.2. Acting upon stereotypical assumptions based on disability could lead to discrimination.

6. Disability harassment in employment

- 6.1. Under the DDO disability harassment in employment is unlawful. Without limiting the meaning of harassment as defined in the DDO, the following behaviour can be regarded as disability harassment:
 - 6.1.1. insulting comments;
 - 6.1.2. offensive jokes;
 - 6.1.3. unnecessary gestures mimicking someone's disability; or
 - 6.1.4. intentionally disclosing or threatening to disclose information on disability or medical history in circumstances that would offend, humiliate or intimidate the employees with a disability concerned.
- 6.2. Under the DDO, disability harassment in employment includes the following situations:¹⁶
 - 6.2.1. harassing a person who is employed or seeking to be employed either by the employer or by someone else within the same organisation;
 - 6.2.2. harassing a contract worker or a commission agent;
 - 6.2.3. harassing a fellow contract worker or a fellow commission agent;
 - 6.2.4. harassing an employer or potential employer;
 - 6.2.5. harassing a person who is a partner or is seeking partnership and this is applicable to persons proposing to form themselves into a partnership;
 - 6.2.6. harassing a person who is employed by another person and whose employment requires him or her to carry out his or her duties in any premises where the harasser is a person residing in the premises;
 - 6.2.7. harassing a person who is seeking to be, or is a member of, an organisation of workers or employers or professionals;
 - 6.2.8. harassing a person seeking an authorisation or qualification which is needed for a particular profession or trade;
 - 6.2.9. harassing a person seeking or undergoing training which would help the person to fit for

employment; and

6.2.10. harassing a person in relation to services offered by an employment agency.

6.3. A series of incidents may constitute harassment. However, depending on the circumstances, it is not necessary for there to be a series of incidents. One incident may be sufficient to constitute harassment.

7. Disability Discrimination in employment by way of victimisation

7.1. Under the DDO, it is unlawful to discriminate in employment by way of victimisation. Victimisation in employment may occur where a person:¹⁷

- 7.1.1. makes a complaint of discrimination under the DDO against the discriminator or another person;
- 7.1.2. acts as a representative on behalf of a person complaining of discrimination (whether the complaint is made to the EOC or within the organisation);
- 7.1.3. gives evidence or information in connection with any proceedings under the DDO, e.g. acting as a witness in a court case;
- 7.1.4. provides information to the EOC for the purposes of investigation by the EOC;
- 7.1.5. provides information to the organisation in respect of a complaint of discrimination; or
- 7.1.6. alleges that someone has committed an act which is unlawful under the DDO.¹⁸

7.2. Victimisation in employment also covers the situations listed under paragraph 5.1 of this Code.

8. Vilification in the workplace

8.1. Under the DDO, it is unlawful to vilify a person or persons with a disability.

8.2. The incitement of hatred towards, serious contempt for, or severe ridicule of people with a disability in a workplace may also constitute disability vilification.

9. Positive action¹⁹

9.1. The DDO allows for positive action whereby, an act targeting persons with a disability would not be unlawful if it is reasonably intended to ensure that persons with a disability have equal opportunities in employment, or to provide them with goods, access to services, facilities, opportunities, grants, benefits or programmes to meet their special needs in relation to employment.

10. Partnership, membership in workers' and employers' organisations and employment agencies

10.1. The principles underlying this Code should be applied, where applicable, in the selection of partners in partnerships, admission to membership in workers' and employers' organisations, provision of services by employment agencies, and selection and treatment of contract workers and commission agents.

Practical guidelines for employers

11. Eliminating disability discrimination in employment

11.1. The primary responsibility of each employer is to ensure that there is no discrimination against persons with a disability at work. The DDO makes it unlawful to discriminate on such a ground.

11.2. This section describes good management practices which will help to eliminate discrimination. It recommends the use of **consistent selection criteria** for recruitment, promotion, transfer, training, dismissal and redundancy as well as terms and conditions of employment. These criteria and terms and conditions should be made known to all employees and job applicants upon request. Without this consistency, decisions can be subjective and leave the way open for discrimination to occur.

11.3. Developing a set of **consistent selection criteria** for all aspects of employment is one of the most important steps in eliminating discrimination in the workplace. This can be done by reference to the duties and responsibilities that would need to be carried out in the job. The application of **consistent selection criteria** is good management practice as it helps organisations to:

- 11.3.1. make faster decisions because the criteria for decisions are clear;

- 11.3.2. make better decisions because the criteria directly relate to work performance; and
- 11.3.3. form the basis for effective job evaluation.
- 11.4. Save for a few exceptions, such criteria should not make reference to disability. They should be specifically related to the job, such as:
- 11.4.1. the type of experience the job holder should have, e.g. merchandising experience;
- 11.4.2. the amount of experience required for the job, e.g. five years experience;
- 11.4.3. the educational qualifications, if necessary, e.g. a diploma in merchandising;
- 11.4.4. the specific technical and managerial skills, e.g. use of certain computer software, proficiency in Cantonese and English;
- 11.4.5. the personal qualities required for the job, e.g. willingness to travel, willingness to meet people of different backgrounds; and
- 11.4.6. the physical and other skills required for the job, e.g. eye-hand co-ordination for delicate assembly work.
- 11.5. In line with good management practice, it is recommended that employers:
- 11.5.1. develop **consistent selection criteria** as one of the first steps in establishing a fair recruitment practice; and
- 11.5.2. from time to time re-examine the criteria to see whether they still apply or need to be modified.
- **Exception where absence of disability is a Genuine Occupational Qualification (GOQ)²⁰**
- 11.6. Disability discrimination by an employer in recruiting for a job, or in providing opportunities for promotion or transfer to, or training for, a job is not unlawful where the absence of disability is a **genuine occupational qualification (GOQ)** for the job. The criteria for determining whether the absence of disability is a GOQ for a particular job are set out in the DDO and are explained below:
- 11.6.1. the essential nature of the job calls for a person without a disability for reasons of (i) physiology; or (ii) authenticity in dramatic performances or other entertainment; or
- 11.6.2. the nature or location of the organisation makes it impracticable for the employee to live somewhere else other than in the premises provided by the employer and no suitable premises are available, e.g. a person confined to a wheelchair would not be eligible for a position as a resident caretaker in an establishment where there are no suitable accommodation or sanitary facilities.²¹
- 11.7. The GOQ is not an automatic exception for general categories of jobs; in every case it will be necessary for the employer to show, if the exception is to be claimed, that it applies to the particular job in question.
- **Exceptions relating to inherent requirements of jobs and unjustifiable hardship**
- 11.8. Under the DDO, disability discrimination is not unlawful where, taking into account certain factors:²²
- (a) a person with a disability is unable to perform the **inherent requirements** of a job; or
- (b) a person with a disability (i) requires services or facilities that are not required by a person without a disability in order to carry out the **inherent requirements** of a job, and (ii) the provision of which would impose **unjustifiable hardship** on the employer.
- 11.9. In identifying the **inherent requirements** of a job, regard may be had to the duties and responsibilities required. There must be a definite relationship between the **inherent requirements** of the job and the personal disability which disqualifies the person from being able to perform the job.
- **Reasonable accommodation**
- 11.10. For many people with a disability, the main barrier to equal opportunities, participation and performance at work is not the disability itself, but certain features of the work that could otherwise be reasonably altered.
- 11.11. If a person with a disability can perform the **inherent requirements** of the job with some adjustments, including the provision of certain services or facilities, employers should consider making such changes unless this imposes **unjustifiable hardship**. Making adjustments where required to ensure equal opportunities for people with a disability is commonly referred to as **reasonable accommodation**. **Reasonable accommodation** may be made at any stage of employment, according to the needs of the person with a disability.
- 11.12. Each case needs to be considered in its own circumstances and on its own merits but the types of

adjustment could include:

- 11.12.1. changes or adjustments to recruitment and selection procedures that enable a qualified applicant with a disability to be considered, if possible;
 - 11.12.2. modifications to work premises to ensure that work areas and facilities are accessible and can meet the special needs of employees with a disability;
 - 11.12.3. changes to job design, work schedules or other work practices to enable qualified individuals with a disability to perform the essential functions of that position, such as job-sharing and flexi-hours;
 - 11.12.4. provision and modification of equipment to enable ease of use by employees with a disability; and
 - 11.12.5. provision of training and other assistance.
- 11.13. Many adjustments will be cost free or will cost very little. In addition, employers should also take into account the potential benefit of adjustments for all employees and customers, e.g. installing a "voice tape"; to a lift or having a lift control panel in Braille will assist an employee with visual impairment as well as potentially benefiting customers with a similar disability.
- 11.14. Resources are currently available to employers to help provide certain facilities in the workplace for employees with a disability. In addition, the Selective Placement Division of the Labour Department provides advice and information on employing persons with a disability. However, the best advisers available are often persons with a disability themselves or disability groups. Employers are encouraged to consult with them directly in order to gain a better understanding of the practical measures that can be taken to accommodate employees with a disability.
- 11.15. If an employer seeks to rely on the exceptions relating to **inherent requirements** but has not taken into account **reasonable adjustments** to accommodate an employee with a disability, the employer may incur liability for discrimination under the DDO.

- **Unjustifiable hardship**

- 11.16. Where an employer claims **unjustifiable hardship** in defence of not providing **reasonable accommodation** or in respect of GOQ, the burden of proof will lie with the employer.
- 11.17. In determining what constitutes **unjustifiable hardship**, all relevant circumstances of the particular case are to be taken into account. This emphasises the importance of assessing what is required in meeting the needs of the individual person. Employers should avoid making assumptions in general about people with a disability or with a particular type of disability.
- 11.18. Relevant circumstances referred to in paragraph 11.17 above may include:²³
- 11.18.1. the reasonableness of any accommodation to be made available -- this may include the nature and cost of the accommodation;
 - 11.18.2. the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned -- benefit or detriment to all persons concerned needs to be considered. This means that, apart from the benefits to all persons who are seeking the adjustment, benefits to other employees or potential employees should also be considered. Customers who have similar needs, either because of disability or for other reasons, may benefit as well. For example, a ramp or lift may also be of assistance to both employees moving goods around the business premises, and to customers with prams;
 - 11.18.3. the effect of the disability of a person concerned -- only those adjustments which the person needs are required; assumptions should not be made about the needs of a person with a disability. Adjustments or alterations are not required which would not in fact be effective or relevant in assisting a person with a disability to perform the **inherent requirements** of the job; and
 - 11.18.4. the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming **unjustifiable hardship** -- it clearly may be more difficult for organisations with limited resources to make some types of adjustment or accommodation. The DDO allows differences in financial capacity of an organisation to be taken into account.

12. Guidelines for recruitment

- 12.1. Employers should make all recruitment decisions on the basis of consistent selection criteria. In this way, each individual can be assessed according to his or her capabilities to carry out a given job and will not be judged by irrelevant considerations.
- 12.2. Do not assume that persons with a disability are only able to do certain kinds of work. Someone with a visual impairment may be wrongly assumed to be unsuitable to work as a word-processing operator whereas he or she could work competently with an aiding device, e.g. a device for enlarging words on the computer screen.

- 12.3. Employers should ensure that disability is not used as a ground for determining who should be offered employment. This applies no matter whether recruiting by advertisement, through employment agencies or through career offices in educational establishments.
- 12.4. In addition, employees handling applications and conducting interviews should be trained to avoid acts of discrimination.

- **Advertising**

- 12.5. Employers should ensure that the contents of advertisements are based on **consistent selection criteria**.²⁴ In line with good management practice, it is recommended that employers:
 - 12.5.1. advertise for jobs on the basis of **consistent selection criteria** in order to encourage applications from suitable candidates regardless of whether they have a disability;
 - 12.5.2. avoid requests for photographs and copies of ID cards at the application stage as this may indicate an intention to discriminate on the ground of disability, although asking for ID numbers would be acceptable. However, requests for photographs and copies of ID card at the interview stage can be made for identification purposes;
 - 12.5.3. where jobs are traditionally held by employees who do not have a disability and absence of disability is not a GOQ, consider including statements such as the post is equally open to persons with a disability's; as this will send out a clear message that applicants with a disability are welcome; and
 - 12.5.4. where vacancies are to be filled by promotion or transfer, publish the information to all eligible employees so that there is no restriction on applications from employees either with or without a disability.

- **Shortlisting**

- 12.6. In line with good management practice, it is recommended that employers:
 - 12.6.1. use **consistent selection criteria** as the basis for shortlisting, matching these objective standards against the corresponding experience and capability of each applicant;
 - 12.6.2. guard against making assumptions in general about the abilities of persons with a disability, which may not be true of the individual; and
 - 12.6.3. train personnel staff to recognise the danger of such generalisations and to use objective comparisons when shortlisting.

- **Vetting applications**

- 12.7. In line with good management practice, it is recommended that:
 - 12.7.1. questions on application forms should not suggest that the employer wishes to take into account any factors that would, or might, discriminate on the ground of disability;
 - 12.7.2. only job-related information on disability and medical history be requested; and
 - 12.7.3. with the exception of positive action,²⁵ applications from persons with a disability should be processed in exactly the same way as other applications.

- **Interviewing**

- 12.8. An interviewer who seeks evidence of skills and abilities and who relies on facts rather than generalised hunches will be less likely to be biased. In line with good management practice, it is recommended that:
 - 12.8.1. employers ensure that personnel staff, line managers and all other employees who may be involved in the staff recruitment process, should be trained on lawful, non-discriminatory practice. It should also be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate;
 - 12.8.2. interviews should be conducted at accessible venues if there is prior request;
 - 12.8.3. candidates should be permitted to use auxiliary aids or other assistance during the interview process, e.g. a sign interpreter for applicants with a hearing impairment;
 - 12.8.4. interview processes should be flexible and adjusted to the special needs of applicants with a disability, e.g. applicants with a hearing impairment should be allowed to use written responses instead of answering questions orally;
 - 12.8.5. rather than make assumptions, employers should ask if the applicant would have any special needs to enable him or her to meet the **inherent requirements** of the job;

- 12.8.6. information necessary for personnel records can be collected after a job offer has been made;²⁶ and
- 12.8.7. keep records of interviews to show the reasons why applicants were or were not appointed. Although it may not be necessary to keep such records indefinitely, it is advisable for employers to keep them for a period of not less than 12 months.²⁷
- 12.9. It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed on the applicant's ability to meet the **consistent selection criteria**. This will not only ensure a logical assessment of the applicant's strengths and weaknesses but will also serve as a valuable explanation and defence against any unfounded suggestion of bias.

- **Requests for information including medical information**

- 12.10. Under the DDO, it is unlawful for employers to request information from persons, which persons without a disability would not ordinarily be requested to provide, for the purpose of discriminating on the basis of a disability.²⁸
- 12.11. It is also unlawful for an employer to request medical information for the purpose of discriminating against applicants for a job on the basis of disability.²⁹
- 12.12. However, it is not unlawful for employers to request medical information where such information is necessary to determine:
- (i) whether an applicant is able to carry out the **inherent requirements** of the job; or
 - (ii) whether an applicant would require services or facilities not required by a person without a disability.³⁰
- 12.13. Where medical information is required by an employer, the employer should:
- 12.13.1. remember that, in most cases, having a disability does not adversely affect a person's general ability;
 - 12.13.2. avoid asking (either in application forms, interviews or through other means) questions of a medical nature, unless directly relevant to the performance of the **inherent requirements** of the job; and
 - 12.13.3. ensure that any decision based on such information relates to a person's ability to do the work.
- 12.14. In respect of pre-employment medical examinations required by an employer, the employer should also ensure that:
- 12.14.1. the medical information is relevant to the particular duties and responsibilities of the job;
 - 12.14.2. where the applicant is not hired or offered the job after the medical examination reveals a disability, the decision not to employ is based on the person's inability to perform the **inherent requirements** of the job; and
 - 12.14.3. no **reasonable accommodation** was available to enable the applicant to perform the **inherent requirements** of the job, or that accommodation would impose an **unjustifiable hardship**.
- 12.15. Under the DDO, it is not unlawful to discriminate against a person who has an infectious disease and the discrimination is reasonably necessary to protect public health.³¹ Infectious diseases are set out in the First Schedule to the Quarantine and Prevention of Disease Ordinance, and also include any communicable disease specified by the Director of Health. For the avoidance of doubt, HIV infection is not an infectious disease for the purposes of section 61 of the DDO.

- **Tests**

- 12.16. If tests are to be used for selection purposes, it is recommended that:
- 12.16.1. tests used are specifically related to the job and/or the career requirements and should measure an applicant's actual or potential ability to do or train for the job;
 - 12.16.2. professionally designed tests should be used wherever possible. These can contribute important objective information about the applicant, e.g. intelligence, aptitude and skills. They have the advantage that they produce numerical scores which do not depend upon opinion or subjective interpretation;
 - 12.16.3. the administration and content of tests should be flexible and adjusted to the needs of applicants with a disability, e.g. oral rather than written tests for visually impaired persons; and
 - 12.16.4. tests should be reviewed regularly to ensure that they remain relevant and free from any bias, either in content or in scoring.

- **Post-hiring enquiries**

- 12.17. Employers should draw a distinction between pre-employment and post-hiring enquiries. There are some questions that could give rise to allegations under the DDO if asked before the applicant has been hired. It is therefore recommended that an employer should not ask questions which might subsequently give rise to any such allegation.
- 12.18. As an example, it could be valid after hiring to request more detailed medical information in order to help the employee in the event of an emergency.
- 12.19. As an example, it could be valid after hiring to request more detailed medical information in order to help the employee in the event of an emergency. As an example, it could be valid after hiring to request more detailed medical information in order to help the employee in the event of an emergency.

- **Recruitment through employment agencies or employment services**

- 12.20. Where recruitment is done through employment agencies, employment services provided by the Labour Department, educational establishments or non-government organisations, the employer should advise them that they should comply with the DDO and follow the recommendations in this Code as far as practicable.
- 12.21. Where appropriate, employers should specify that vacancies are open to persons of both sexes with a disability when notifying employment agencies, or employment services.

13. Guidelines for terms and conditions of employment, benefits, facilities and services

- 13.1 Under the DDO, it is unlawful to discriminate, on the ground of disability, in the terms and conditions of employment or access to benefits, facilities or services. This applies to both existing contracts and new ones. Benefits may include fringe benefits, commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit and performance pay, or any other benefits available to employees generally.
- 13.2 It is recommended that employers provide **reasonable accommodation** to assist employees with a disability to carry out the requirements of the job and to enjoy the same level of benefits.

- **Equal pay for equal work**

- 13.3. In respect of the terms and conditions of employment, employers should maintain the principle of equal pay for equal work. That is, an employee with a disability is entitled to equal pay when he or she is doing "like work" or the same work as someone who does not have a disability. "Like work" means work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment.³²
- 13.4. Different job titles, job descriptions or contractual obligations do not necessarily imply that the work is different. It is what the job-holders actually do that matters. The question of whether the two jobs are "like work" can be answered by a general consideration of the type of work involved and the skill and knowledge required to do them.

- **Equal pay for work of equal value**

- 13.5 A related principle to equal pay for equal work is that of equal pay for work of equal value. Where employees with a disability undertake work as demanding as that of colleagues who do not have a disability, even though the work is different, they should receive the same pay and benefits. That is, jobs of equal value warrant equal pay.
- 13.6. Overseas experience suggests that different jobs done by different workers can be compared on the basis of the demands made on a worker in terms of effort, skill, responsibility and working conditions.³³ Employers can set individual pay rates based on market forces and individual performance but should not pay a class of workers less for doing work of equal value on the basis of disability.
- 13.7. Employers should maintain the principle of equal pay for equal work and are encouraged to progressively implement of equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory. Large organisations in both the public and private sectors with a structured human resources department could take a lead in this.

- **Considerations for individual differences in pay**

- 13.8. Individual differences in pay are not in themselves discriminatory. Each case should be considered on its own merits. According to overseas experience,³⁴ the following considerations are relevant in considering differences in pay for equal work or work of equal value:
- 13.8.1. different performance ratings;
 - 13.8.2. length of service;
 - 13.8.3. a re-evaluation and down-grading of the position of an employee based on objective work-related criteria;
 - 13.8.4. a temporary training position;
 - 13.8.5. the existence of internal labour shortage in a particular job classification;
 - 13.8.6. a reclassification of a position to a lower level, where the person continues to get the former level of pay;
 - 13.8.7. regional rates of pay, e.g. an employee is rewarded because the work is done in different locations; and
 - 13.8.8. economic factors, such as a temporary shortage in a particular type of skilled labour.
- 13.9. In addition, such considerations should:
- 13.9.1. actually exist (e.g. the employee without a disability has more experience than the one with the disability);
 - 13.9.2. be genuinely the cause of the difference in pay (i.e. the employer should have a pay system which applies to employees with and without a disability alike and consistently rewards experience where appropriate);
 - 13.9.3. account for the whole of the pay gap (i.e. the extra payment is not an excessive reward for the additional experience); and
 - 13.9.4. have the effect which the employer sets out to achieve (e.g. there is evidence that, as a result of the experience of the employee without a disability, he or she does the work better than the one with the disability).

14. Guidelines for promotion, transfer and training

- 14.1. It is unlawful for employers to discriminate on the ground of disability in the way they give opportunities for promotion, transfer or training. In line with good management practice, it is recommended that employers:
- 14.1.1. where an appraisal system exists, examine the assessment criteria to ensure that employees are promoted on merit and the criteria adopted are not discriminatory. Measurable standards for evaluating job performance should be established;
 - 14.1.2. organise selection for promotion along the same lines as recruitment. The **consistent selection criteria** for the posts should be compared with the detailed assessment of all candidates' abilities and qualities including their potential. The individual whose profile best fits the job requirements should be selected;
 - 14.1.3. where opportunities for promotion, training or transfer arise, specify the conditions for application to all staff who may be interested, and set out related procedures in writing for communication to all employees (irrespective of disability) who are eligible;³⁵
 - 14.1.4. assess all possible candidates, and if promotion is by nomination, ensure that everyone suitable is considered and that nobody with potential has been overlooked;
 - 14.1.5. keep records of notes on promotions, transfers and training. It is advisable that employers keep such records for a period of not less than 12 months;³⁶
 - 14.1.6. review and change rules which restrict or preclude transfer between certain jobs if they are found to be discriminatory; and
 - 14.1.7. examine policies and practices regarding selection for training, day release and personal development to identify direct and indirect discrimination. Where there is found to be an imbalance in training between persons with a disability and persons without a disability, the cause should be identified and, if necessary, remedied to ensure that it is not discriminatory.

15. Guidelines for dismissals, redundancies and unfavourable treatment of employees

- 15.1. It is unlawful to discriminate on the ground of disability by dismissing the employee or subjecting him or her to any other detriment. In line with good management practice, it is recommended that employers:

- 15.1.1. ensure that employees with a disability are not disciplined or dismissed for performance or behaviour which would be overlooked or condoned in those without a disability;
- 15.1.2. review redundancy procedures affecting a group of employees who have a disability so as to ensure that there is no discrimination and to remove any effects which could be disproportionate and unjustifiable;
- 15.1.3. ensure that conditions of access to voluntary redundancy benefits are available on equal terms to employees with or without a disability in the same or similar circumstances;
- 15.1.4. ensure that when there is down-grading or short-time working (for example, owing to a change in the nature or volume of an employer's business) the arrangements do not discriminate on the ground of disability;
- 15.1.5. keep records of notes on dismissals and redundancies. Although it may not be necessary to keep such records indefinitely, it is advisable for employers to keep them for a period of not less than 12 months;³⁷ and
- 15.1.6. take all reasonably practicable steps to ensure that a standard of conduct or behaviour is observed to prevent members with a disability from being intimidated, harassed or otherwise subjected to unfavourable treatment.

16. Guidelines for grievance procedures

- 16.1. In line with good management practice, it is recommended that employers:
 - 16.1.1. take particular care to ensure that employees who have, in good faith, taken action under the DDO do not receive less favourable treatment than other employees, for example by being disciplined or dismissed;
 - 16.1.2. designate an internal grievance procedure or an officer to deal with complaints concerning discrimination, harassment, victimisation or vilification within an organisation. These procedures should be communicated to all staff and be reviewed from time to time;
 - 16.1.3. advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual's right to apply to the EOC or the court;
 - 16.1.4. deal with all complaints of discrimination, harassment, victimisation or vilification effectively. It should not be assumed that they are made by those who are over-sensitive. The rule of confidentiality should be observed and the rights of both the complainant and respondent respected; and
 - 16.1.5. handle disciplinary procedures uniformly without reference to disability.
- 16.2. It is not victimisation if an employee is treated less favourably as a result of an allegation which is false and not made in good faith.³⁸

Equal employment opportunities policies

17. Formulating a policy to eliminate discrimination, harassment and vilification on the ground of disability

- 17.1. A policy that promotes equality of opportunities for all will ensure the effective use of human resources in the best interests of both the organisation and its employees. It is a commitment by an employer to the development of his or her staff.
- 17.2. The organisation should commit to use employment procedures and practices which do not discriminate on the ground of disability and which provide equal opportunities for all employees. The details of the policy will vary according to the size of the organisation.
- 17.3. The organisation should also issue a policy statement which expressly states that harassment and vilification on the ground of disability at work is unlawful and will not be permitted. Employees have a right to complain should these occur.
- 17.4. To demonstrate a commitment to the equal opportunities policy, it is recommended that the responsibility for the policy should be held by a member of senior management.

18. Implementing the policy

- 18.1. To ensure that the policy is fully effective, it is recommended that employers:
 - 18.1.1. involve employees in the development and review of the policy;
 - 18.1.2. state the policy clearly;
 - 18.1.3. ensure that overall responsibility for implementing the policy rests with senior management;

- 18.1.4. make the policy known to all employees and, where reasonably practicable, to all job applicants;
- 18.1.5. provide training to all employees who may be involved in human resource matters; and
- 18.1.6. make all new recruits aware of the equal opportunities policy.

19. Monitoring the policy

- 19.1. It is recommended that the policy be monitored regularly to ensure that it is working in practice. To this end, consideration could be given to setting up a joint committee consisting of management and employee representatives.
 - 19.2. In a small firm with a simple structure it may be quite adequate to assess the deployment and pay scales of employees from personal knowledge.
 - 19.3. In a large and complex organisation a more formal analysis may be useful, for example, by disability, grade and pay in each unit. This may need to be introduced in stages as resources permit. Any formal analysis should be regularly updated and reviewed to enable any necessary action to be taken.
 - 19.4. Sensible monitoring will show, for example, whether persons with a disability:
 - 19.4.1. do not apply for employment or promotion, or that fewer apply than might be expected;
 - 19.4.2. are not recruited, promoted or selected for training and development or are appointed/selected in a significantly lower proportion than their rate of application; and
 - 19.4.3. are concentrated in certain jobs, sections or departments.
 - 19.5. The employers should review information obtained from monitoring to ascertain whether or not the pattern of employment and deployment indicates any unlawful discrimination.
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The employee's role

20. The employee's responsibilities

- 20.1. While the employer has the main responsibility for eliminating discrimination, harassment and vilification, and providing equal opportunities, employees at all levels, especially when they are acting as agents of their employer, have responsibilities too.
- 20.2. Employees may be personally liable for acts committed by them during the course of their employment. They should therefore observe the requirements of the DDO and follow the recommendations of this Code where applicable.
- 20.3. Employees should take note that, under the DDO, it is unlawful for them to harass a co-worker, potential co-worker, an employer or a potential employer when he or she has a disability, or is an associate of a person with a disability.
- 20.4. Employees can play a key role in creating a work environment friendly to persons with a disability and should note that vilification of any person, including co-workers with a disability, is unlawful under the DDO.

21. Eliminating discrimination

- 21.1. Employees can be proactive in helping to eliminate discrimination by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employer to do so.
- 21.2. Whenever appropriate, employees could also encourage their employers to formulate disability discrimination policies and to implement preventive measures.
- 21.3. Employees are encouraged to be supportive of friends or colleagues who intend, in good faith, to lodge a complaint about discrimination or have lodged such complaint.
- 21.4. Employees are also encouraged to co-operate with their employers and colleagues in implementing **reasonable accommodation** which needs to be made within the workplace to facilitate the work of an employee with a disability.