

# **NDA guidance re counting staff with disabilities**

## **People who have been reasonably accommodated in relation to a substantial incapacity to work without such accommodation**

This note is for information and guidance only, and does not purport to be a legal interpretation of the Act

### **Context**

#### **Legal obligation to report no. of staff with a disability**

Under s.47 of the Disability Act 2005, a public body is legally obliged, unless there is good reason to the contrary for not doing so, to ensure it reaches the compliance target (currently 3%) for employment of people with disabilities. Under s.48 (2), public bodies must report each year on compliance with the target, and the reports must be in the format set out by the National Disability Authority (NDA).

These reports must specify the total number of staff employed, and the number of staff with a disability.

#### **How to count staff with a disability is not prescribed**

The Disability Act is not prescriptive as to how to count staff with a disability. Clearly, there is a public interest in having as accurate a count as possible.

The NDA has issued guidance to public bodies

- to conduct an initial baseline census of staff to ascertain who has and who has not a disability (as defined in the Act)
- to update the initial baseline by tracking staff changes (Initial count of staff with disabilities + new entrants with disabilities + staff who have acquired a disability since the initial count, less staff with disabilities who have left)

#### **Disclosure issue – mental health**

Both national and international research shows that people with mental health conditions are particularly reluctant to disclose a disability to an employer. This aspect is acknowledged in the NDA's annual reports on compliance.

#### **Definition of disability in Disability Act 2005**

“Disability”, in relation to a person, means a **substantial restriction** in the capacity of the person to carry on a profession, business or occupation in the

State **or** to participate in social or cultural life in the State by reason of an **enduring** physical, sensory, mental health or intellectual impairment.

### **Social model of disability**

This definition is consistent with the social model of disability, which looks at the interaction between a person's impairment, and the social barriers towards participation of people with impairments, for example buildings that are inaccessible to people with disabilities.

### **Key concepts**

**Enduring impairment** - includes long-term conditions with intermittent bouts of impairment (e.g. MS, schizophrenia) but not short-term conditions such as a broken leg.

**Substantial restriction** - it is not the nature of the condition but the degree of restriction on capacity that is the issue.

**Economic or social life** - Someone whose capacity to work could be restricted by their impairment, **or** whose capacity to socialise would be restricted by their impairment. Inclusion in the statistical count is **not** a reflection on an individual's work performance but could reflect

- that they would need significant accommodations to enable them to work; **or**
- that they would be significantly impacted in their capacity to engage in social or cultural life by their impairment – e.g. restricted no. of venues that are accessible to them; unable to see films or hear music performances because of their impairment

## **Can a public body include staff who've had reasonable accommodations?**

### **What is 'reasonable accommodation'**

The Employment Equality Acts require employers to take reasonable steps to accommodate the needs of employees and prospective employees with disabilities. 'Reasonable accommodation' can be defined as some modification to the tasks, the structure of a job or the workplace, or provision of special equipment or facilities, which allows the employee with a disability to do the job and enjoy equal employment opportunities.

### **Person who could not work without reasonable accommodation**

Where an employee would have a substantial restriction in their capacity to do their job, unless they had been offered a reasonable accommodation of their

disability by their employer, then that person would appear to come within the definition of disability as set out in the Disability Act.

The primary obligation under the Disability Act is 'to promote and support the employment of people with disabilities'. It would not make sense where employers go to substantial lengths to accommodate employees with disabilities, that these employees would no longer be regarded as 'disabled' for the purposes of the 3% target.

The purpose of the annual count is to ascertain compliance with the 3% target, and to identify non-compliant bodies, who may under S.49 be directed to take mandatory actions towards achieving compliance. In that spirit, details of the number of staff who would have substantial difficulties in doing their work if they were not accommodated to do so constitutes evidence of efforts to achieve compliance and to promote and support the employment of people with disabilities.

### **In principle, count people who've been accommodated to do their jobs**

The National Disability Authority advises that, in principle, staff who would have substantial difficulties in doing their work if they were not accommodated to do so should be included in the statistical return.

### **Data protection issues**

There are two separate statutory processes

- the obligation to provide statistical returns under the Disability Act
- the obligation under Data Protection law to deal with personal information in a fair manner, and the special protections given in this legislation to sensitive personal information, including disability status

### **Compatibility of recording process with data protection**

Any information obtained from individuals about their disability status must be treated fairly and confidentially, and any use to which the information is to be put must be communicated to the individuals.

### **Suggested process to introduce inclusion of number of 'reasonably accommodated' people in the annual return under the Disability Act**

- Draft a paragraph for personnel manual (model paragraph attached) setting out the policy in this regard
- Communicate this to staff generally and to staff representatives
- Incorporate this text into the personnel manual as standard operating policy

- When dealing with new requests for reasonable accommodation that address a 'substantial restriction', ensure that staff concerned are informed that they will be included in an anonymous statistical return of the numbers of people with disabilities employed. That means staff are clear on the uses to which data on numbers getting reasonable accommodations will be put

### **Alignment of administrative data on reasonable accommodation with data from a staff census**

- If a staff member has declared a disability in a staff census and has also received a reasonable accommodation, they should not be double counted
- If a staff member has not returned a census form and has received a reasonable accommodation, they can be included in the statistical count, adding to the numbers from any census process, provided this practice is covered in the personnel manual, and staff and their representatives have been duly informed that this is now personnel policy
- If a staff member has returned a census form stating they do not have a disability, but the individual concerned has received a reasonable accommodation in relation to substantial restriction in their capacity, the person concerned could be contacted directly about the matter. A more practical way to proceed would be to send in a supplementary explanation to the official data, stating that in addition to X people who have declared a disability there are a further Y people, who have stated they do not have a disability but who have been reasonably accommodated in relation to a substantial restriction in their capacity otherwise to work

### **Sensitive personal data**

All data in relation to a person's disability status should be kept securely, there should be strict limits on who can see it, and the purposes for which it can be used need to be clearly set out and communicated to the individual concerned.