

Employment
Rights of
Individuals with
Disabilities



EMPLOYMENT RIGHTS OF INDIVIDUALS WITH DISABILITIES

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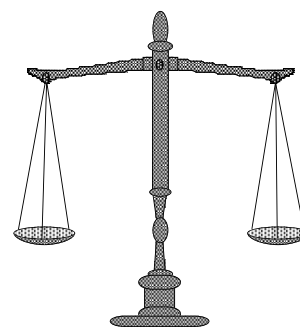
The Advocacy Center is a private, non-profit corporation designated by the Governor as Louisiana's protection and advocacy agency for persons with developmental disabilities, severe disabilities, and mental illness; and as the Client Assistance Program for clients of the Louisiana Division of Rehabilitation Services. The Advocacy Center provides legal services to persons aged sixty and older in several parishes in Louisiana. Under a contract with the Governor's Office of Elderly Affairs, the Advocacy Center also provides legal services to nursing home residents. Also, under a contract with the state Office of the Attorney General, Civil Division, the Advocacy Center provides ombudsman services to residents of privately run ICF/MR facilities for individuals with developmental disabilities.

This booklet provides an overview of the rights of individuals with disabilities in the area of employment. While this publication deals with legal issues, it is not a substitute for legal advice. If you feel you have been discriminated against because of a disability, and you have not been able to resolve the problem amicably with your employer, we recommend that you speak with an attorney to determine your rights. It is important to seek professional legal advice as quickly as possible because there are time limits within which you must file a claim or lawsuit.

Both federal and state laws protect individuals with disabilities from employment discrimination. The laws discussed in this booklet are:

- I Title I of the Americans with Disabilities Act**
- II Section 504 of the Rehabilitation Act of 1973**
- III Louisiana's Employment Discrimination Law**

We hope this guide will answer many questions you have and provide a starting point for further information.





I TITLE I OF THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq., generally prohibits employment discrimination by “covered entities” against a “qualified individual with a disability.” “Covered entities” include employers, employment agencies, labor organizations, joint labor-management committees, and “discrimination” is prohibited in connection with job applications, hiring, firing, promotion, pay, training, and all other terms, conditions, benefits, and privileges of employment. The law also applies to job recruitment and advertising. Employers and other covered entities are required to make “reasonable accommodations” for the known physical or mental limitations of individuals with disabilities.

The ADA applies to employers with 15 or more employees, including private employers and state and local governments. Excluded from coverage under the ADA are the federal government and corporations owned by the federal government (which in general are covered by the 1973 Rehabilitation Act), Native American Indian tribes, bona fide tax-exempt private membership clubs, and certain religious organizations.

Defining "Disability"

Under the ADA, an individual with a disability is one who 1) has a physical or mental impairment that substantially limits one or more major life activities, 2) has a record of such impairment, or 3) is regarded as having such an impairment.

“Major life activities” are things such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The term also includes the operation of a major bodily

function, like the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The existence of a disability is determined without consideration of “mitigating measures” such as medication, medical supplies, and assistive technology devices such as hearing aids or mobility devices.

A condition that comes and goes, or that is in remission, is considered a disability if that condition substantially limits a major life activity when it is active. However, a condition that only lasts a short time – such as a sprained ankle, broken leg, or seasonal flu – generally would not be covered.

A person who has a past record of a disability, or who has a history of a disability, even if they do not have a disability now, is protected from discrimination. This part of the definition might cover, for example, a person who has recovered from cancer or mental illness.

A person meets the requirement of being “regarded as having such an impairment” if they are treated as if they had a disability, even if they do not in fact have, and never had, a disability.

Excluded Classes

The ADA excludes from its definition of “disability” homosexuality, bisexuality, transvestism, and transsexualism. Pedophilia, exhibitionism, and voyeurism are also excluded. If an individual with one of these conditions also has an impairment that is considered a disability under the ADA, then that individual will be covered with regard to that impairment.

Both the ADA and the Rehabilitation Act of 1973 allow employers to take actions against employees for current drug abuse, and against employees whose use of alcohol affects their job performance. Employers may not, however, discriminate against a past or rehabilitated illegal drug user or alcoholic.

Qualified Individual

A "qualified individual with a disability" is a person with a disability who can perform the essential functions of a job. If the person is able to perform the essential functions of the job except for limitations caused by the disability, the employer must consider whether the person could perform these functions with reasonable accommodations.

Generally, it is the employer who determines the essential functions of the job. The ADA does not require employers to formulate and maintain job descriptions. Written descriptions can help determine what the essential functions of a job are, but they are not the only evidence and are not always accurate.

Reasonable Accommodation/Undue Hardship

The ADA requires an employer to make a "reasonable accommodation" to the known physical or mental limitations of an otherwise qualified person with a disability, unless to do so would impose an "undue hardship". A "reasonable accommodation" may be any change in or adjustment to a job, or to the work environment, that enables a qualified applicant or employee with a disability to apply for the job, to do the essential job functions, or to have equal rights on the job. Examples include installing ramps and making structural modifications for an employee using a wheelchair, providing a TDD or a sign language interpreter for a deaf employee, or restructuring a job so that its essential functions can be performed by an individual with a disability.

An employer will not be required to make an accommodation if to do so would impose an "undue hardship." An undue hardship is defined as "an action requiring significant difficulty or expense." To determine whether an accommodation would impose an undue hardship, the following factors will be considered: 1) the nature and size of the accommodation; 2) the size, type, and financial resources of the specific facility where the accommodation would have to be made; 3) the size, type, and financial resources of the covered employer; and 4) the covered employer's type of operation,

including the composition, structure, and functions of its work force, and the geographic separateness and administrative or fiscal relationship between the facility and the covered employer.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that would not be an undue hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying some of the costs or getting the accommodation from another source.

There is a detailed explanation of the reasonable accommodation requirement in the EEOC handout online at <http://www.eeoc.gov/policy/docs/accommodation.html>.

If you are trying to get help on figuring out what accommodation might be appropriate, you or your employer might contact the Job Accommodation Network (JAN) at 1-800-526-7234(Voice), 1-877-781-9403(TTY).

Other resources for locating reasonable accommodations are:

- the U.S. Equal Employment Opportunity Commission, 1-800-669-4000(Voice), 1-800-669-6820(TTY), <http://www.eeoc.gov>;
- for sign language interpreters, the Registry of Interpreters for the Deaf 1-703-838-0030(Voice), 1-703-838-0459(TTY), <http://www.rid.org>;
- for ideas on technology-related services for people with disabilities, you might also contact RESNA, 1-703-524-6686(Voice), <http://resna.org/>;
- for accommodations for people with mental illness, Boston University's Center for Psychiatric Rehabilitation, 1-617-353-3549(Voice), 1-617-353-7700(Fax), or their web page on accommodations at <http://www.bu.edu/cpr/reasaccom/whatareras.html>.

Other Defenses

An employer may successfully defend against a claim of discrimination by showing that the challenged employment practice is job-related and consistent with business necessity, and that reasonable accommodation of the disability would not work. Another defense is that the individual poses a direct threat to the health and safety of himself or other individuals in the workplace.

Tests and Examinations

The ADA generally prohibits the use of pre-employment tests or medical examinations, and it prohibits employers from asking orally or on an application as to whether an applicant has a disability. Employers may ask whether an applicant can perform a job-related function. An applicant may be required to take a medical examination, but only: 1) after an offer of employment has been made; 2) if the medical examination is consistent with the business necessity of the employer; and 3) if such examinations are required of all employees. An employer may test an employee or applicant for the use of illegal drugs, but such tests should be conducted only for that purpose and not to determine if an applicant or employee is taking legally prescribed medication.

For detailed information about the kinds of medical questions and exams that are OK prior to hiring a person with a disability, look at the EEOC handout online at <http://www.eeoc.gov/policy/docs/preemp.html>.

After a person starts work, there are only a few reasons that would allow an employer to force an employee to answer medical questions or undergo a medical exam. For example, the employer may require an employee to have a medical exam if there is reason to believe the employee cannot perform his or her job, or cannot do the job safely. The employer may also require an exam if the exam is required by some other Federal laws.

For more information on medical questions and exams of current employ-

ees, see the EEOC handout online at <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.

Retaliation

Employers cannot retaliate against employees (or former employees) for filing a discrimination complaint, or trying to report or stop disability discrimination, or asking for a reasonable accommodation. Also, an employer cannot try to coerce, intimidate, threaten, or otherwise interfere with any person regarding their legal rights discussed in this handout.

You do not need to be a “qualified individual with a disability” in order to complain about retaliation.

More information

The Equal Employment Opportunity Commission (EEOC) is the main federal agency that is supposed to enforce the laws against employment discrimination. The EEOC has developed several resources to help employers and people with disabilities understand and comply with the employment provisions of the ADA. Those resources include:



- The EEOC’s Technical Assistance Manual that provides “how-to” guidance on the employment provisions of the ADA as well as a resource directory to help individuals find specific information. The Technical Assistance Manual is online at <http://askjan.org/links/ADAtam1.html>;
- For more information on the reasonable accommodation process, see the materials online at <http://www.eeoc.gov/facts/accommodation.html>;
- A summary of your rights under the American with Disabilities Act (ADA), which is online at <http://www.eeoc.gov/facts/ada18.html>.

Filing a charge of discrimination

Anyone who feels that he or she has been subject to illegal employment discrimination on the basis of disability by an employer, prospective employer, or other entity covered by the ADA has the right to file a complaint with:

Equal Employment Opportunity Commission (EEOC)
1555 Poydras Street Suite 1900
New Orleans, Louisiana 70112
(800) 669-4000, (504) 504-595-2958 (TTY)
<http://www.eeoc.gov/field/neworleans/index.cfm>

and/or

Louisiana Commission on Human Rights
P.O. Box 94004
Baton Rouge, Louisiana 70804-9004
(225) 342-6969 (Voice), (888) 248-0859 (TTY)
<http://gov.louisiana.gov/HumanRights/humanrightshome.htm>

A “charge” is a written complaint about discrimination that you sign under oath, and file with one of the agencies above. It should contain the name, address, and phone number of the person bringing the charge; the name, address, and phone number of the employer; the basis of discrimination (disability and/or retaliation), and the date, place, and circumstances of the practice you are complaining about.

A form used by the Louisiana Commission on Human Rights appears at the end of this booklet. [Note: the address shown above, not that shown on the forms, is the current address for the Louisiana Commission on Human Rights.]

A charge of discrimination may be filed with either the Louisiana Commission on Human Rights or the Equal Employment Opportunity Commission within 300 days of the alleged discriminatory act. (If the charge is filed more than 180 days, but less than 300 days, after the alleged discriminatory act,

the State agency will forward it to the EEOC for processing.)

The EEOC then has 180 days to investigate and bring an action against the employer or issue a "right to sue" letter to the employee. A "right to sue letter" is a letter from the EEOC that says they do not intend to take further action and giving the complainant the right to file a lawsuit. After the employee receives the "right to sue" letter, he or she will have 90 days to bring a private lawsuit.

While it is necessary to file a timely charge with these agencies in order to enforce your rights under the ADA, it is important to know that both the Louisiana Commission on Human Rights and the EEOC have many more cases than they can handle. If you believe you have been discriminated against and want to seek relief, you cannot rely on these agencies to pursue your case for you. You need to see a lawyer with experience litigating these claims.

Remedies

If you win the case, there are different forms of relief you can receive. You may be hired or rehired (with or without back pay and benefits). You may receive front pay if you are not rehired, reasonable attorney's fees, and reimbursement for other costs related to the lawsuit.

The Americans with Disabilities Act also gives the plaintiff who wins the case the right to receive a limited amount of compensatory damages and punitive damages (against non-governmental defendants only).

Compensatory damages include future money losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Punitive damages are a way to punish the employer if it is proven that the employer discriminated on the basis of disability "with malice or reckless indifference" to the rights of the individual protected under federal law.

There is a limit to the amount of compensatory and punitive damages which may be awarded. It is based on the size of the employer which is determined by the number of employees:

15 - 100 employees	\$50,000
101-200 employees	\$100,000
201-500 employees	\$200,000
501 or more employees	\$300,000

The Supreme Court held in the case of Board of Trustees of University of Alabama v. Garrett, 531 U. S. 356 (2001) that back pay and other damages are not available under the ADA where the employer is the state or a state agency, though such damages may be available under other laws against employment discrimination.



II

SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, bars discrimination against "otherwise qualified individuals with disabilities" in certain federal agencies, the US Postal Service, and in any program or activity receiving federal financial assistance. Its protections are generally the same as those of the ADA, but the entities covered by the law, the damages available, and the procedures that must be followed to pursue the case are different.

Unlike the ADA, Section 504 can apply to employers with fewer than 15 employees and to religious institutions.

Damages may be available from State agencies receiving federal financial assistance.

Damages under Section 504 are not capped based on the number of employees. Punitive damages may not be available against some governmental defendants.

"Federal financial assistance" includes any grant, loan, contract, or any other arrangement by which a federal agency provides assistance, though it does not include compensation or procurement contracts. Medical offices and hospitals that receive Medicaid or Medicare payments, and colleges and universities that receive federal student aid such as Pell grants are included.

Lawsuits under §504

Unlike the ADA, there is no requirement that a person complaining of discrimination (except for federal government employees) file a charge of discrimination before filing a lawsuit under 504.

A lawsuit under Section 504 must generally be filed within one year of the date of the complained-of discrimination.

Administrative complaints under §504

In addition to a private law suit, an administrative complaint can be filed with the civil rights department of the federal office that made the grant to the employer. Most agencies require that such complaints be filed within 180 days of the complained-of discrimination. A complaint can be a letter explaining why you think that your employer has violated Section 504. In order to assist the investigator, the employee's complaint should state all facts clearly and precisely. The investigator will use the facts provided in the complaint, contact other individuals, and review documents that the investigator finds pertinent. A decision will be made as to whether there was discrimination. The civil rights office of the appropriate federal agency will recommend that the employer make changes to correct the problem. Should an employer refuse to take the corrective actions, the agency can take measures to bar the employer from receiving federal funds.

Two of the largest grantors are the U.S. Department of Education and the U.S. Department of Health and Human Services. Any Section 504 complaints involving either of these agencies should be filed with their respective offices of civil rights. Their office addresses and telephone numbers are:

U.S. Department of Education Office for Civil Rights
1999 Bryan Street., Suite 1620
Dallas, Texas 75201
(214) 661-9600 (Voice); (877) 521-2172 (TDD)

U.S. Department of Health and Human Services
Office of Civil Rights
1301 Young Street, Suite 1169
Dallas, Texas 75202 (214) 767-4056 (Voice) (214) 767-8940 (TTY)

Other information on how to file § 504 complaints with the appropriate agency may be available from:

U.S. Department of Justice, Civil Rights Division, Disability Rights Section - NYA
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(800) 514-0301 (voice), (800) 514-0383 (TTY),
<http://www.usdoj.gov/crt/ada/adahom1.htm>



III LOUISIANA'S EMPLOYMENT DISCRIMINATION LAW

Louisiana's law that addresses employment discrimination against employees and applicants for employment is called the Louisiana Employment Discrimination Law, La. R.S. 23:301-369. The Louisiana Employment Discrimination Law prohibits discrimination by employers, employment agencies, and labor organizations on the basis of age, disability, race, color, religion, sex, national origin, pregnancy, childbirth and related medical conditions, sickle cell trait or protected genetic information. The law dealing with employment discrimination on the basis of disability (§§ 322-325) applies to any employer with fifteen or more employees, including State and local government agencies, private clubs, and religious entities.

Reasonable Accommodation

Louisiana law defines "reasonable accommodation" more strictly than either the ADA or the Rehabilitation Act. Under the Louisiana statute, a reasonable accommodation is an adjustment or modification to a known physical limitation of an otherwise qualified person with a disability. The cost of such modifications to the employer is not supposed to exceed the amount allowed as a federal tax deduction at the time the law was passed. Private sector employers are not required to incur any costs to hire or promote persons with disabilities unless the costs are imposed by other laws.

How to File a Lawsuit under the Louisiana Employment Discrimination Law

A person with a disability who believes that he or she has experienced discrimination in violation of Louisiana's Employment Discrimination Law may file a lawsuit in civil district court in the parish in which the discrimination occurred.

The law generally requires that the lawsuit be filed within one year from the date of the discriminatory act or from the date the employee knew about the discriminatory act. This one year period is suspended for up to six months while a charge is pending with the EEOC or the Louisiana Commission on Human Rights. Also, the employee must give the person or organization who has allegedly committed the discriminatory act written notice detailing the discrimination at least thirty days prior to starting court action, and must make a good faith effort to resolve the dispute before initiating a court action. If you fail to prevail in your lawsuit under this law, you might be held responsible for the opposing party's attorneys' fees and court costs.



IV

SUMMARY

FOR QUESTIONS REGARDING THE CONTENT OF THIS PUBLICATION, PLEASE CONTACT:

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New Orleans, Louisiana 70118
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Email: advocacycenter@advocacyla.org
www.advocacyla.org
www.facebook.com/advocacyla



See the complaint questionnaire of the Louisiana Commission on Human Rights on the following pages.

This brochure should not be used as a substitute for consulting a person knowledgeable about this area of the law. If you believe you have been discriminated against under any of the previously discussed laws, and you have not been able to resolve the problem amicably with your employer, consult an attorney.

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The Advocacy Center is a 501c3 non-profit organization that provides free legal services and advocacy to people with disabilities living in Louisiana. All donations are tax deductible.



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