

EMPLOYMENT RIGHTS

INTRODUCTION:

There are over 11 million cancer survivors in the United States.¹ According to the American Cancer Society, in 2005, approximately 40 percent of Americans who are diagnosed with cancer were working adults. Cancer survivors still face many misperceptions about their ability to work during and after cancer treatment. As a result their employers often treat them unfairly.

This section of the Guide is designed to help you understand your rights as an employee with cancer, how to advocate for any work adjustment you may need during treatment or recovery, and help you to enforce your rights.

I. THE AMERICANS WITH DISABILITIES ACT OF 1990

- A. **Statute:** 42 U.S.C. §12101, *et seq.* - The Americans with Disabilities Act (ADA) prohibits discrimination in all employment practices against qualified employees with disabilities who can perform essential functions of their job, with or without reasonable accommodations.
- 1) **Covered Employers:**
 - (i) Private employers with 15 or more employees (Under Title I of the ADA)
 - (ii) State and Local government, regardless of size (Under Title II of the ADA)
 - 2) **Covered Employment Practices:**
 - (i) Job advertisements, applications, & recruiting;
 - (ii) Hiring & firing;
 - (iii) Leave & lay-offs;
 - (iv) Reinstatement & reassignment;
 - (v) Tenure & promotion;
 - (vi) Testing & training; and
 - (vii) Compensation & benefits.
- B. **Key Requirements for Protection under the ADA:**
- 1) **Qualified Individuals:** An applicant or employee with a disability must be able to perform the essential functions of the job, with or without reasonable accommodations in order to be protected under the ADA. This means an individual must satisfy two (2) requirements:
 - (i) Meet the skill, education, experience, and other job-related qualification standards required for the position, and
 - (ii) Be able to perform those tasks that are essential to the position, with or without reasonable accommodations.
 - *Note:* The ADA does not interfere with an employer's right to hire or promote the best-qualified person. While the ADA prohibits discrimination on the basis of disability, it does not impose any affirmative action obligation on an employer.

¹ Center for Disease Control and Prevention. "Cancer Survivorship Today."
(<http://www.cdc.gov/Features/CancerSurvivors/>)

- 2) **Essential Functions:** The essential functions are the basic job duties an employee must be able to perform, with or without reasonable accommodations.
- (i) **Factors to Consider in Determining if a Job Function is Essential are:**
- The function is the reason the job exists
 - The number of employees available to perform the function or among whom it can be distributed
 - The degree and skill required to perform that function
- (ii) **Essential Job Functions Can be Determined from a Variety of Sources, such as:**
- The written job description prepared for advertising or interviewing
 - The work experience of present or past employees in the same position
 - The time spent performing the function
 - The consequences of not requiring the employee to perform the function
- 3) **Disability:** Under the ADA, “disability” is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of an individual.”
- (i) **Major Life Activities:** This is a basic activity that the average person in the general population can perform with little or no difficulty, such as:
- Caring for oneself
 - Performing manual tasks
 - Speaking
 - Seeing
 - Hearing
 - Breathing
 - Walking
 - Working
- (ii) **Mitigating or Corrective Measures are Taken into Account:** Corrective measures are anything that allows an individual to control, compensate for, or alleviate a physical or mental impairment or the side effects of treatment for that impairment (e.g.: eyeglasses, medications, etc).
- (iii) **Americans with Disabilities Act Amendments Act (ADAAA):** On September 25, 2008, the ADAAA was signed into law and it will go into effect on January 1, 2009.
- The ADAAA rejects the narrow interpretation of “disability.” Under the ADAAA, “disability” is to be broadly construed and coverage will apply to the “maximum extent” permitted by the ADA and the ADAAA.

- The ADAAA also instructs the EEOC to issue new regulations to define the term “substantially limits,” so that the current definition of “significantly restricts” is changed to something that follows the ADAAA’s broader view.
- The ADAA also adds activities to the non-exhaustive list of major life activities covered by the statute, including: sleeping, concentrating, thinking, communication, and the operation of major bodily functions.

4) **Who is Protected:**

(i) **The ADA Prohibits Discrimination Against Applicants or Employees who either:**

- Have an impairment;
- Have a history of an impairment; or
- Are regarded as having an impairment.

(ii) The ADA’s protection also extends to people who are “associated with” a person who has a disability.

- For example: caregivers are protected against discrimination in the workplace.

(iii) The ADA prohibits retaliation against individuals who assert their rights as a person with a disability or assist people with known disabilities who are asserting their rights.

C. **Reasonable Accommodations:**

1) **Definition:** A reasonable accommodation is any change or adjustment in the work environment, or in the way things are customarily done, that enables an individual with a disability to enjoy equal benefit and employment opportunities. An employer is required to take reasonable steps to accommodate a disability unless it would cause the employer an undue hardship.

(i) Reasonable accommodations for people with cancer may include:

- Making facilities accessible;
- Flexible work hours;
- Reassignment to light duty;
- Modified or part-time work schedule;
- Job restructuring to a vacant position; and
- Extended leave time

2) **Test to Determine What is Reasonable (case-by-case analysis):** An accommodation is reasonable if it is effective. This means that the accommodation must meet the individual’s needs in that circumstance. The employer should give the employee’s preference primary consideration, but if more than one effective accommodation is available, the employer may choose the less expensive or burdensome accommodation.

(i) **An Employer Need Not Provide the Following Accommodations:**

- Eliminate essential functions or redefine the position

- Bump another employee from his/her position
- Create a new position
- Lower the production standards, qualitatively or quantitatively

3) **Requests for Reasonable Accommodations:**

- (i) **When to Request a Reasonable Accommodation:** It is important to inform the employer of a need for a reasonable accommodation if an employee is experiencing health related difficulties, before the difficulties become a performance issue, which may lead to disciplinary action. It is best to notify the employer as soon as the employee realizes he/she needs some adjustment in the work environment or time schedule. An employer may need advance notice to arrange for the necessary changes.
- (ii) **How to Request a Reasonable Accommodation:** A request for a reasonable accommodation may be made to the employee's supervisor or to a human resources representative. Although a request for accommodation can be oral, it is advisable to submit it in writing, so both sides have a record of the request. Written requests may be made via email, memo or letter. The request can be in plain language and does not have to mention reasonable accommodations or refer to the ADA, Rehabilitation Act, or the California Fair Employment and Housing Act (FEHA). Always keep a copy of all correspondence sent to or received from an employer regarding requests for reasonable accommodations. The employer may request that the employee fill out a form after an informal request has been made. Employers who have not been explicitly notified of an employee's disability may not be liable for failing to accommodate or for terminating an employee based on performance problems related to the disability, or otherwise.
- See APPENDIX ER1 for example of what can be included in a job accommodation request letter.
- (iii) **Who May Request a Reasonable Accommodation:** A request for a reasonable accommodation may be made by the employee, a family member, a friend, a health care professional, or any other person acting on behalf of the employee.
- (iv) **Both Employer & Employee Have a Duty to Engage in an Interactive Process:** Once a request for a reasonable accommodation is made, both the employer and the employee must engage in good faith negotiations to explore and implement the most effective accommodation.
- **Employer's obligations in the interactive process:**
 - ⇒ Respond in a timely manner to requests for reasonable accommodations;
 - ⇒ Ask relevant questions about disability and functional limitations;
 - ⇒ Explore feasibility of suggested reasonable accommodations with employee;
 - ⇒ Consult outside resources if not familiar with appropriate reasonable accommodations; and

⇒ Implement effective accommodations in a timely manner.

- **Employee's obligations in the interactive process:**

- ⇒ Explain the disability and why accommodations are needed;

- ⇒ Provide medical documentation, but only information relating to the "job function"; and

- ⇒ Accept effective accommodations offered, even if it is not the preferred accommodation.

(v) **When Does the Interactive Process End?:** Employers must continue the process until an effective reasonable accommodation is found or no longer needed. For cancer patients, this may be an ongoing process – accommodation needs may change as treatment progresses or ends. Sometimes, the most effective accommodation may only be determined through trial and error. If that is the case, the parties need to continue negotiations until they arrive at the most effective solution.

4) **Employer Defenses:** The employer is not required to provide reasonable accommodations if the required action poses an undue hardship, which is a high standard, or the employee poses a direct threat to himself/herself or other employees and the threat cannot be eliminated through reasonable accommodations.

(i) The required action poses an undue hardship if it:

- Requires significant difficulty or expense;
- Is unduly costly, extensive, substantial or disruptive; or
- Would fundamentally alter the nature of the operation.

(ii) A court will decide if an undue hardship exists by assessing the nature and the cost of the accommodation against the nature, the size and resources of the employer, the impact of the required accommodation on the facility, and the number of employees. However, even if the most effective accommodation would pose an undue hardship, the employer must still:

- Look for another effective accommodation;
- Consider funding from outside sources; and
- Give the employee an opportunity to pay for it.

5) **Reasonable Accommodations in the Job Application Process:**

(i) **Pre-Offer:** During the application process, and before a job offer is made, an employer may not ask if the applicant has a disability or about the nature or the severity of a disability (even if the applicant has a visible disability), or require the applicant to take a physical exam. The employer may, however, ask about the applicant's ability to perform job-related functions if the questions are not designed to elicit disability-related information or ask the applicant to demonstrate/describe how he or she will perform the essential job functions with or without reasonable accommodations.

(ii) **Post Offer:** Once an employer has made a job offer, and before the employee starts to work, the employer may ask the applicant to take a medical exam (but only if everyone else in the same job category must also take the exam), or condition the job offer on the results of the medical exam. If an employee is not hired because of the medical exam results, the employer must show that:

- The reason for rescinding the offer was job related and necessary for the conduct of business; and
- There was no reasonable accommodation available to make the performance of the essential job function possible.

(iii) An employee does not have to disclose a medical condition or a need for reasonable accommodations on an application form or in an interview, unless the accommodation is required for the application or interviewing process. Determining the best moment to tell a prospective employer about the need for reasonable accommodations is a personal decision. Often applicants do not realize that they may need accommodations until they know more about the job and the work environment. Some choose to inform the employer during the application process, after they understand the job requirements. Others chose to wait until they receive a job offer.

6) **Confidentiality of Medical Records:** Any inquiries about one's reasonable accommodations and all related documentation and medical records are confidential and must be kept in separate medical files apart from an employee's personnel file. Information from these confidential records may only be shared with the following individuals:

- (i) Managers and supervisors, if the information is necessary to determine restrictions or accommodations for a particular employee;
- (ii) First aid and safety personnel, if the employee requires emergency treatment or some other assistance at work;
- (iii) Government officials investigating ADA §501, 503 and 504 and FEHA compliance; and
- (iv) Workers' compensation offices and insurance carriers.

D. **Discrimination Complaint Process under the ADA:** The federal agency that enforces the ADA is the Equal Employment Opportunity Commission (EEOC). If an employee believes that he/she experienced unlawful discrimination, the employee must exhaust the administrative complaint procedures available through the EEOC before an employee can file a disability related discrimination suit in federal court. For example, an employee, who believes that his or her employment rights have been violated on the basis of cancer, must first file a "charge of discrimination" with the EEOC.

1) **Mediation and Investigation:** Before conducting a formal investigation, the EEOC may select the charge for EEOC's mediation program. Both parties must agree to mediate, which may prevent a time-consuming investigation. Participation in mediation is free, voluntary, and confidential. If mediation is unsuccessful, the EEOC will then investigate the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable

cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a “right to sue” which then allows the employee to file a discrimination suit in federal court.

- 2) **Deadline for Submitting a Charge:** A charge must be filed with the EEOC within 180 days from the date of the alleged violation. But, if the charge is also covered by a state or local anti-discrimination law, the complaint must be filed with the applicable state entity first, which may also jointly file with the EEOC, and the complaint must be filed within 300 days from the date of the alleged violation, or within 30 days after the employee receives notification from the state agency that the case has been closed, whichever is earlier.
- 3) **Deadline for Filing a Claim in Court:** If the EEOC finds no discrimination, or if an attempt to resolve the charge in mediation fails and the EEOC decides not to file suit, and if the EEOC issues a notice of a “right to sue”, the charging party has 90 days to file a court action. A charging party can also request a “right to sue” notice from the EEOC within 180 days after the charge first was filed with the EEOC and may then bring suit within 90 days after receiving notice.

II. THE REHABILITATION ACT OF 1973, as amended in 1992

- A. **Statute:** 29 U.S.C. §501 – The Rehabilitation Act prohibits federal executive agencies, including the U.S. Postal Service and the U.S. Postal Rate Commission, from discriminating against qualified individuals with disabilities. It also requires executive agencies to take affirmative action in the hiring, placing and advancing of individuals with disabilities.
- B. **Statute:** 29 U.S.C. §503 – The Rehabilitation Act prohibits contractors, and their subcontractors, who receive federal contracts over \$10,000 from discriminating against individuals with disabilities and requires them to take affirmative action in the hiring, placing and advancing of individuals with disabilities.
- C. **Statute:** 29 U.S.C. §504 – The Rehabilitation Act prohibits recipients of federal financial assistance from discriminating against qualified individuals with disabilities in employment and in their programs and activities. An example of an employer that falls under § 504, is a private university that receives federal funding.
- D. **Disability and Reasonable Accommodations:** The definition of disability, the requirements for reasonable accommodations and the standards for employment discrimination are the same as under Title I of the ADA outlined above.
- E. **Discrimination Complaint Process:**
 - 1) **Federal Employees:** The agency enforcing §501 is the Equal Employment Opportunity Commission (EEOC). Employees of federal programs and agencies must therefore submit their complaints to their local EEOC branch

offices or follow an internal EEOC procedure. The complaint process and the deadlines for filing a complaint under §501 are the same as under the ADA.

- 2) **Employees of Federal Contractor and their Subcontractors:** Complaints regarding violations of §503 of the Rehabilitation Act may be submitted to the Office of Federal Compliance Programs (OFCCP) of the U.S. Department of Labor. If a complaint involves discrimination against only one person, the OFCCP will normally refer it to the Equal Employment Opportunity Commission (EEOC). Complaints that involve groups of people or indicate patterns of discrimination are generally investigated by the OFCCP.
 - (i) **Filing Deadlines:** Complaints alleging violations of §503 must be filed within 300 days of the alleged act of discrimination, unless the time for filing is extended for good cause. Extensions of the filing time require approval by OFCCP's Deputy Assistant Secretary.

- 3) **Employees of Employers Receiving Federal Funding:** Each federal agency has its own set of §504 regulations that apply to its own programs. Each agency is responsible for enforcing its own regulations. §504 violations may also be enforced through private lawsuits. It is not necessary to file a complaint with a federal agency or to receive a "right-to-sue" letter before going to court.
 - (i) **Filing information:** If a state or local government employer receives federal financing, the employee may file a complaint with the Civil Rights Division of either the federal agency that provides the funds or the U.S. Department of Justice.
 - *Note:* As discussed above, an employee does not have to exhaust administrative remedies under §504 of the Rehabilitation Act, but may directly sue the public entity for discrimination in federal court.

III. **THE CALIFORNIA FAIR EMPLOYMENT & HOUSING ACT of 1988, as amended in 2002**

- A. **Statute:** Cal. Gov. Code §12900 – The California Fair Employment and Housing Act (FEHA), prohibits discrimination in all employment practices against qualified individuals with disabilities who can perform the essential functions of their job, with or without reasonable accommodations. FEHA originally mirrored the provisions of the ADA, but was amended in 2002, to fill the gaps that left many employees with disabilities unprotected.

- B. **Broader Disability Related Protections:**
 - 1) **FEHA Covers Smaller Employers:** While the ADA applies to private employers with 15 or more employees, the FEHA extends to private business with as few as five employees. It also covers state and local governments of any size.

 - 2) **Broader Definition of Disability:** The FEHA defines a disability as a "mental or physical condition or disorder that limits a major life activity. This means that the disability must only make it difficult to perform a major life activity. The ADA imposes a much higher standard. Under the ADA, the disability

must pose a substantial limitation on a major life activity, which means it must be nearly impossible to perform it. The FEHA also specifically notes cancer as a disability. According to the statute, "medical condition" is defined to include any health impairment related to or associated with a diagnosis of cancer or a record of a history of cancer.

- 3) **Mitigating Measures are Generally Irrelevant:** Under the FEHA, corrective measures such as medications or prostheses are not considered, unless these measures themselves limit a major life activity.

C. **Reasonable Accommodations:** The requirements for reasonable accommodations and the standards for employment discrimination are the same as under Title I of the ADA, outlined above.

D. **Discrimination Complaint Process:** The California agency that enforces the FEHA is the Department of Fair Employment and Housing (DFEH). If the employee believes that he/she experienced unlawful discrimination, the employee has two options. The employee may file an administrative complaint that is investigated by the DFEH. Complainants are first interviewed to collect facts about possible discrimination. Every person wishing to file a complaint will be given a date, time and place where the interview will be held. If the employee wants to file a disability related suit in state or federal court, the employee can file a complaint with the DFEH and receive an "immediate right-to-sue" notice. For more information, please visit the DFEH website at www.dfeh.ca.gov.

- 1) The DFEH will accept requests for an immediate DFEH "right-to-sue notice" from persons who have decided to proceed in court. The decision to request such an authorization is a critical one. If a complainant chooses to request a "right-to-sue notice" first, the DFEH will not investigate the complaint. Obtaining a "right-to-sue notice" and waiving the DFEH investigation should not be done without consulting an attorney.

- (i) **Deadline for Submitting a Complaint:** A complaint must be filed with the DFEH within one year (which generally means 364 days from the last act of discrimination). If the DFEH accepts the case for investigation, it will be automatically filed with the EEOC, if the case also falls under EEOC jurisdiction. The DFEH will close a case if they find no merit in the charge or the employee asks for an "immediately right-to-sue notice."

- (ii) **Deadline for Filing a Claim in Court:** An employee, who chooses to request an immediate "right-to-sue notice," has one year from the date of the "right-to-sue-notice" to file a lawsuit in state court. If an employee chooses to request an immediate "right-to-sue notice," the DFEH will close the case and the complaint will not be filed with the EEOC if it also falls under the ADA. If the employee is also protected under the ADA, and wishes to pursue a "federal right-to-sue notice," the employee must file a separate complaint with the EEOC. The employee must do so within 30 days of receiving notice from the DFEH that they have closed the case, or within 300 days from the date of the alleged violation, whichever is earlier.

IV. CONTACT INFORMATION

| | |
|--|--|
| <p>For questions about the ADA: Equal Employment Opportunity Commission 1801 L Street, N.W. Washington, D.C. 20507 (202) 663-4900 or (202) 663-4494 (TTY) www.eeoc.gov</p> | <p>Equal Employment Opportunity Commission 401 B Street, Suite 1550 San Diego, CA 92101 (619) 557-7235 or (800) 669-4000</p> |
| <p>Equal Employment Opportunity Commission 1265 West Shaw Avenue, #103 Fresno, CA 93711 (559) 487-5793 or (800) 669-4000</p> | <p>Equal Employment Opportunity Commission 901 Market Street, #500 San Francisco, CA 94103 (415) 356-5100 or (800) 669-4000</p> |
| <p>Equal Employment Opportunity Commission 255 E. Temple, 4th Floor Los Angeles, CA 90012 (213) 894-1000 or (800) 669-4000</p> | <p>Equal Employment Opportunity Commission 96 North 3rd Street, #200 San Jose, CA 95112 (408) 291-7352 or (800) 669-4000</p> |
| <p>Equal Employment Opportunity Commission 1301 Clay Street, #1170-N Oakland, CA 94612-5217 (510) 637-3230 or (800) 669-4000</p> | <p>For questions about job accommodations: Job Accommodation Network (JAN) P.O. Box 6080 Morgantown, WV 26506-6080 (800) 526-7234 or (800) ADA-WORK www.jan.wvu.edu</p> |
| <p>For questions about §503 of the Rehabilitation Act: U.S. Dept. of Labor Office of Federal Compliance Program 11000 Wilshire Blvd, Suite 8130 Los Angeles, CA 90024 (310) 235-6800 or www.dol.gov/esa/ofccp</p> | <p>U.S. Dept. of Labor Office of Federal Compliance Program 5675 Ruffin Road, Suite 320 San Diego, CA 92123-1362 (619) 557-6489 or www.dol.gov/esa/ofccp</p> |

| | |
|--|--|
| <p>U.S. Dept. of Labor Office of Federal Compliance Program 90 7th Street, Suite # 11-100 San Francisco, CA 94103 (415) 625-7828 or www.dol.gov/esa/ofccp</p> | <p>U.S. Dept. of Labor Office of Federal Compliance Program 60 South Market St., Suite 410 San Jose, CA 95113 (408) 291-7384 or www.dol.gov/esa/ofccp</p> |
| <p>U.S. Dept. of Labor Office of Federal Compliance Program 770 The City Drive, Suite 5700 Orange, CA 92868 (714) 621-1631 or www.dol.gov/esa/ofccp</p> | <p>U.S. Dept. of Labor Office of Federal Compliance Program Frances Perkins Building, Room C-3325 200 Constitution Avenue, N.W. Washington, D.C. 20210 (202) 693-0106 or www.dol.gov/esa/ofccp</p> |
| <p>For questions about §504 the Rehabilitation</p> | |

| | |
|--|---|
| <p>Act: U.S. Department of Justice Civil Rights Division - Disability Rights Section 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530 (800) 514-0301 or (800) 614-0383 (TTY)</p> | |
| <p>For questions about the Fair Employment & Housing Act (FEHA): California Dept. of Fair Employment & Housing 611 West 6th Street, Suite 1500 Los Angeles, CA 90012 (800) 884-1684 or (213) 439-6799 www.dfeh.ca.gov <i>(Los Angeles County)</i></p> | <p>California Dept. of Fair Employment & Housing 2101 East 4th Street, Suite 255-B Santa Ana, CA 92705-3855 (800) 884-1684 or (714) 558-4266 www.dfeh.ca.gov <i>(Orange County)</i></p> |
| <p>California Dept. of Fair Employment & Housing 1515 Clay Street, Suite 701 Oakland, CA 94612-2512 (800) 884-1684 or (510) 622-2941 www.dfeh.ca.gov <i>((Alameda, Contra Costa, San Joaquin, Solano, Napa Counties)</i></p> | <p>California Dept. of Fair Employment & Housing 111 North Market Street, Suite 810 San Jose, CA 95113-1102 (800) 884-1684 or (408) 385-0344 www.dfeh.ca.gov <i>(Monterrey, San Benito, Santa Cruz, Santa Clara Counties)</i></p> |
| <p>California Dept. of Fair Employment & Housing 1001 Tower Way, Suite 250 Bakersfield, CA 93309-1596 (800) 884-1664 or (661) 395-2729 www.dfeh.ca.gov <i>(Kern, Tulare, Inyo, & Mono Counties)</i></p> | <p>California Dept. of Fair Employment & Housing 1350 Front Street, Suite 005 San Diego, CA 92101 (800) 884-1684 or (619) 645-2681 www.dfeh.ca.gov <i>(San Diego & Imperial Counties)</i></p> |

| | |
|---|--|
| <p>California Dept. of Fair Employment & Housing 1320 East Shaw Ave., Suite 150 Fresno, CA 93710 (800) 884-1684 or (559) 244-4760 www.dfeh.ca.gov <i>(Fresno, Kings, Madera, Merced, Stanislaus, Mariposa Counties)</i></p> | <p>California Dept. of Fair Employment & Housing 2000 O Street, Suite 120 Sacramento, CA 95814-5212 (800) 884-1684 or (916) 445-5523 www.dfeh.ca.gov <i>(Sacramento, Yolo, Glenn, Tehama, Trinity, Shasta, Modoc, Lassen, Plumas, Sierra, Nevada, Placer, El Dorado, Yuba, Sutter, Amador, Calaveras, Alpine, Toulumne Counties)</i></p> |
|---|--|