



# DISABILITY LAW CENTER

Utah's Protection and Advocacy Agency

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## **Your employment rights and how to protect them**

Every year the Disability Law Center (DLC) gathers input from citizens with disabilities, advocacy groups, advisory councils and our Board of Trustees. What we hear is that people with disabilities know they have employment rights but do not understand what those rights are.

This guide is a basic overview of some of the laws that protect the employment rights of people with disabilities. Please keep in mind that volumes have been written about employment rights. It would not be possible to provide information about all the rights, exceptions, and special circumstances about all employment laws in this guide. This guide is intended to answer some basic questions so that individuals with disabilities can understand some of their rights and understand what to do if their rights have been violated.

This guide is informational only and is not intended to be legal advice. Also, the laws addressed in this guide change frequently based on different courts' interpretations of them. Whenever anyone has an actual legal problem it is best to contact a lawyer to determine which laws may apply to that specific situation at that time.

This guide was written by the Disability Law Center, a private non-profit organization designated by the governor to protect the rights of people with disabilities in Utah. The DLC envisions a society where abilities rather than disabilities are emphasized; where all people have an equal opportunity to participate in society; where all people are treated with equity, dignity and respect for their expressed choices.

For more information, please call the Disability Law Center at 1-800-662-9080 (voice) or 1-800-550-4182 (TTY).

Individuals with disabilities should be given the same consideration for employment that individuals without disabilities are given.

## **A few laws that impact employment rights**

**Age Discrimination in Employment Act of 1967 (ADEA)** prohibits employment discrimination on the basis of age for people 40 years of age and older.

**Age Discrimination in Federally Assisted Programs Act of 1975** prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.

**Family Medical Leave Act (FMLA)** provides that covered employers must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for the birth and care of a newborn child of the employee; for placement with the employee of a son or daughter for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition.

**Sections 501 and 505 of the Rehabilitation Act of 1973** prohibit discrimination against qualified individuals with disabilities who work in the federal government.

**Section 504 of the Rehabilitation Act of 1973** prohibits discrimination against qualified individuals with disabilities by employers who receive funding from the federal government.

**Title I of the Americans with Disabilities Act of 1990 (ADA)** prohibits employment discrimination against qualified individuals with disabilities in the private sector.

**Utah Antidiscrimination Act (UADA)** prohibits discrimination by Utah employers and the state of Utah, against otherwise qualified persons on the basis of disability, race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age (if 40 years of age or older), religion or national origin.

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## **This guide focuses on the Americans with Disabilities Act (ADA) Title I**

Title I of the ADA prohibits discrimination against qualified individuals with disabilities by covered entities in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

To understand what this means, you first need to learn some definitions found in the ADA. Also, you need to know that the United States Supreme Court has issued rulings about the ADA that have limited what some of the definitions in the ADA mean. Some of the major limitations are noted below.

## Some definitions needed to understand your rights

**Covered Entity** means an employer, employment agency, labor organization, or joint labor management committee.

**Employer** means a person engaged in an industry affecting commerce that has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

- The term employer does not include the United States, a corporation wholly owned by the government of the United States; an Indian tribe; or a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501 (c) of the Internal Revenue Code of 1986.

**Employee** means an individual employed by an employer.

**Disability** means with respect to an individual (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

- Disability does not include: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; psychoactive substance use disorders resulting from current illegal use of drugs; or homosexuality and bisexuality.

**Major life activities** means but is not limited to, functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

- Working has some special considerations in showing that one is substantially limited in it as a major life activity. If a person was considering suing an employer, in showing s/he is disabled under the terms of the ADA, s/he should use a substantial limitation in the major life activity of working only as a last resort; if that person can claim s/he is substantially limited in any other major life activity, s/he should so claim.

**Substantially limits** means unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

- In determining that a person is substantially limited, ADA says that we need to consider the nature and severity of the impairment, the expected duration of the impairment and the expected permanent or long term impact of the impairment – meaning that a person with a broken leg might be substantially limited in the major life activity of walking, but because s/he will only have the broken leg for two months until the bone heals, s/he would not be considered disabled under the ADA.
- Also, the United States Supreme Court has said that we must take into account any mitigating measures a person may be using. Mitigating measures may take a variety of forms but some examples include corrective eye glasses or contact lenses, hearing aids and medications. This means that if a person with

a vision impairment wears glasses, when we are determining if they are substantially limited in the major life activity of sight, we need to analyze how they can see with their glasses on.

**Qualified individual with a disability** means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

- An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

**Reasonable accommodation** means any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy the benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities. Below are some examples.

- A potential employer or an employment agency might need to make modifications or adjustments to a job application process to allow a qualified applicant with a disability to be considered for a position that person is qualified for and wants.
- An employer might need to make changes to the work place, or to the way in which a job is usually done if it is held by a qualified person with a disability and the change enables that qualified individual with a disability to perform the essential functions of that position. For example, an employer who typically requires her employees to type their notes and memorandum might need to allow a qualified employee with a disability that affects his manual dexterity to dictate notes and memorandum onto audio tape.
- An employer or a labor organization might need to make modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. For example, a labor organization might need to hold its annual election meeting in a location that is physically accessible to a union member who is a qualified individual with a disability to ensure that union member is able to participate. An employer might need to make existing facilities used by employees readily accessible to and usable by employees who are individuals with disabilities. This might include building a ramp into a lunch room.
- An employer might need to provide job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices that help an employee with a disability perform their job.
- An employer, employment agency, labor organization or joint labor management committee might need to provide appropriate adjustment or modifications of examinations, training materials, or policies; provide qualified readers or interpreters in some settings; and provide other similar accommodations for individuals with disabilities.

**Undue hardship** means with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity. Undue hardship is determined on a case by case basis and is considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.

**Qualification standards** means the personal and professional skills, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must have in order to perform the essential parts of the job in question, and to be eligible for the position held or desired.

**Direct threat** means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

## **Some examples of prohibited discrimination**

### **Limiting, segregating and classifying**

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his/her employment opportunities or status on the basis of a disability.

- This means a covered entity is prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis. For example, it would be prohibited for an employment agency to not provide an individual who is deaf with notices of job openings that require the use of a telephone simply because the employment agency believes persons who are deaf cannot communicate via telephone.
- Covered entities are also prohibited from segregating qualified employees with disabilities into separate work areas or into separate lines of advancement. For example, it would be prohibited for an employer to have all of his employees who have disabilities sit in one portion of his building and all employees without disabilities sit in the other portion of his building, if this division was because of disability.

### **Contractual or other arrangements**

It is unlawful for a covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to discrimination.

- This means it would be a violation of the ADA for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability, or on a presumption about the abilities of an individual with such a disability. For example, it would be a violation of the ADA for an employer to disallow a mailroom employee who is blind from delivering mail to the employer's adjacent building because the employer believes it would be too hard for the employee who is blind to find his way.
- It would also be a violation for an employer to adopt a separate track of job promotion or progression for employees based on a presumption that employees with disabilities are uninterested in, or incapable of performing a particular job.

## **Relationship or association with an individual with a disability**

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

- This means that the ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse.

## **Qualification standards, tests and other selection criteria**

It is unlawful for a covered entity to use qualification standards or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

- For example, it would be unlawful for an employment agency to require all individuals to successfully complete a hearing examination in order to try to obtain work through their agency; in some instances the ability to hear may not be job-related or consistent with business necessity and the hearing test requirement would have the effect of discriminating on the basis of disability against persons who are deaf or hard of hearing.

## **Administration of tests**

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

- Individuals are not to be excluded from a job they can perform merely because a disability prevents them from taking a test, or negatively influences the results of the test, as long as there are other ways to determine whether the individual can perform the essential functions of the job. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure. For example, if an employer typically tested her employees' knowledge about auto parts by giving them a written test, she would need to provide her otherwise qualified employee who has a reading impairment with the test in a different format so that she could accurately determine that employee's knowledge about auto parts rather than simply capturing his inability to read because of his disability.

## **Not making reasonable accommodation**

It is unlawful for a covered entity not to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability that the individual requests, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

- This means that if an adjustment or modification is job related, which means that it specifically assists the individual in performing the duties of a particular job and thus is a type of reasonable accommodation, an employer has a duty to provide it after the employee requests it unless it would be an undue hardship on the employer. However, if a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. While an employer is not generally obligated to provide an accommodation if the employee does not request one, if a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one.

**Note: It is your responsibility to ask for an accommodation!**

## Sample request for reasonable accommodation in employment

Date \_\_\_\_\_

Employer \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Dear \_\_\_\_\_

(employer name)

I have worked for you for \_\_\_\_\_ as a \_\_\_\_\_.

(years/months/days)

(job title)

I am a qualified individual with a disability. By this, I mean I have \_\_\_\_\_

(name of disability)

and I can perform the essential functions of \_\_\_\_\_

(title of job)

with reasonable accommodations. I am having trouble with the \_\_\_\_\_

(title of job)

because of:

\_\_\_\_\_

(list the problems you are having)

To help me perform the essential functions of this job, I need accommodations including but not limited to the following:

\_\_\_\_\_

(list needed accommodations)

\_\_\_\_\_

I would like to meet with you to discuss these and any other accommodations that will enable me to best perform my job. Please let me know what, if any, additional information you need from my health care provider in order to better understand my disability and the limitations it imposes.

Please contact me within two weeks to discuss this issue. Please keep this request for accommodation confidential, as required by federal law.

Sincerely,

\_\_\_\_\_

(your signature)

## **Some other facts**

### **Retaliation**

It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by the ADA or the other nondiscrimination laws listed above, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision of the ADA or the other nondiscrimination laws listed above.

### **Coercion**

It is also unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by the ADA.

### **Medical examinations and inquiries**

The ADA has some specific rules about what types of medical examinations and inquiries are acceptable and when they are acceptable. Some types are never okay and some types are okay only after certain things have happened, like a job offer has been made.

#### **Application stage - medical examinations and inquiries that are prohibited**

It is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

- It is important to remember, as was pointed out above in the definition of employer, that the ADA does not apply to the Federal government and consequently, neither does this rule. Federal contractors and subcontractors who are covered by the affirmative action requirements of section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves as having a disability on a job application form or by other pre-employment inquiry, to satisfy the section 503 affirmative action requirements. Employers who request such information must observe section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records. Also, a pre-employment inquiry about a disability is allowed if required by another Federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

#### **Inquiries that are specifically permitted**

A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

## **Employment entrance examination**

After making a job offer to a job applicant and before the applicant begins his/her employment duties, an employer may require a medical examination and/or make medical inquiries, and the employer may condition the offer of employment on the results of such examination if all entering employees in the same job category are subjected to such an examination regardless of disability. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity. However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a "direct threat" in the workplace (i.e., a significant risk substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity.

## **Employee medical examinations**

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current fitness to perform a particular job, and voluntary examinations that are part of employee health programs.

## **Confidential medical records**

Information from all medical examinations and inquiries that are done by employers must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

## **Drug tests are permitted**

It is extremely important to remember that tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations. Employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests. However, if the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

## What to do if your rights have been violated

If you feel your employment rights have been violated you can file a complaint with the Utah Antidiscrimination and Labor Division. Your employer must have at least 15 employees. You must file your charge of employment discrimination within 180 days of the alleged discriminatory act. If more than 180 days have passed since the last day of harm, but less than 300 days, your charge will be sent by the UALD to the federal Equal Employment Opportunity Commission (EEOC) for its consideration.

### Utah Antidiscrimination and Labor Division (UALD)

The UALD is empowered to act as an agent of the EEOC and has authority to enforce Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

The UALD receives, mediates (for early resolution), investigates, and resolves charges of employment discrimination. It also acts as a resource to employees and employers concerning laws which prohibit employment discrimination, conducts seminars, and utilizes other teaching methods to make employers aware of conditions which lead to employment discrimination.

If you have questions concerning employment discrimination please contact the UALD at:

**Mail Address** P.O. Box 146630  
Salt Lake City, UT, 84114-6630

**Street Address** 160 East 300 South, 3rd Floor  
Salt Lake City, UT 84111

**Telephone** (801) 530-6801 or 1-800-222-1238  
(801) 530-7685 (TDD)

**FAX** (801) 530-7609

**E-Mail** [pparsell@utah.gov](mailto:pparsell@utah.gov)

### Be prepared

If you plan to file a complaint with UALD, you should be prepared with the following information:

- a written statement in chronological order of what happened
- names of people treated more favorably who do the same kind of work or were hired to perform the same job
- records of the reasonable accommodation requested
- what was the requested accommodation
- when was the request for accommodation made
- to whom was the request for accommodation made
- the employer's response to the request for reasonable accommodation
- copies of relevant documents
- contact information of witnesses and what information they can provide

## ***For more information***

If you have questions about employment rights, you may contact the Disability Law Center (DLC). The DLC is a private non-profit organization designated by the governor to protect the rights of people with disabilities in Utah.

If you are not happy with any service you received or any decision made by the DLC, you have the right to file a grievance. If you would like to file a grievance, we will send you a form for this purpose and a copy of our grievance policy.

For more information, please contact the DLC, 1-800-662-9080 (voice) or 1-800-550-4182 (TTY) [www.disabilitylawcenter.org](http://www.disabilitylawcenter.org), 205 North 400 West, Salt Lake City, Utah 84103.