

The logo for the City Bar Justice Center, featuring the text "CITY BAR JUSTICE CENTER" in a serif font, with a horizontal line above and below the text.

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A Beginner's Guide to:

# **CANCER AND WORKPLACE DISCRIMINATION**

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# **Publication of the Cancer Advocacy Project of the City Bar Justice Center**

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Judges & Lawyers Breast Cancer Alert (JALBCA).**

The Cancer Advocacy Project is a legal services program of the City Bar Justice Center. The project provides cancer patients and survivors with no-cost legal information and advice in three areas: life (estate) planning, coverage denials by private health insurers, and cancer-related employment discrimination.

The purpose of this booklet is to provide a general overview of employment laws in New York State that may be of particular relevance for cancer survivors, patients and family caregivers of those undergoing treatment. It contains basic information that can be used as a starting point for those facing cancer-related discrimination in the workplace and to identify potential protections that you can discuss with your attorney. It is not intended to substitute for legal advice.



## AN OVERVIEW OF THE ISSUES

A cancer diagnosis often impacts many areas of an individual's life in addition to the immediate health-related concerns. For many, the stress of undergoing medical procedures is made worse by problems with insurance coverage, medical debt, and job-related insecurity. Navigating the workplace as a cancer survivor, patient or family caregiver can raise many questions, including whether to disclose the diagnosis, how to request medical leave, and transitioning back to work after a break – all of which should be approached carefully. A cancer diagnosis may result in others making assumptions about your ability to continue doing your job – with the potential for discriminatory actions against you. Important Protections may be available to you under a number of laws that recognize cancer as a disability. Knowing your legal rights will enable you to seek help if you are being subjected to unlawful treatment.

***Note: Certain key terms used in this booklet are defined in a Glossary on page 12.***

# KEY FEDERAL LAWS AGAINST EMPLOYMENT DISCRIMINATION

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*Listed below are laws that prohibit employers from targeting certain individuals and are especially relevant for cancer survivors, patients and their family caregivers who experience discrimination in the workplace:*

**Title VII of the Civil Rights Act (Title VII) (1964)**, amended as the **Equal Employment Opportunity Act (1972)**: created the Equal Employment Opportunity Commission to interpret and enforce laws prohibiting discrimination related to employment, including disability discrimination;

**Americans with Disabilities Act (ADA) (1990)**: prohibits employment discrimination against individuals with disabilities and individuals perceived as having a disability and requires employers to 'reasonably accommodate' individuals with disabilities to assist them in performing the essential functions of a job that they are qualified for. Cancer is a recognized disability under the ADA;

**Rehabilitation Act (1973)**: similar to the ADA, but focuses on the federal government. It prohibits discrimination against qualified individuals with disabilities who work in the federal government and for federal contractors and subcontractors;

**Genetic Information Nondiscrimination Act (GINA)**: prohibits discrimination by health insurers and employers based on your genetic information; and

**Civil Rights Act (1991)**: among other things, provides for compensatory and punitive monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. It also provides oversight and coordination of all federal equal employment opportunity regulations, practices and policies. Additional information can be found at the EEOC's website: <http://www.eeoc.gov>.

**Note:** *Information about New York State and New York City's Human Rights Laws and their protections are discussed later in this booklet.*

## Examples of ‘prohibited discriminatory practices’, some covering cancer as a disability, include:

- harassment based on race, color, religion, sex, pregnancy, national origin, disability, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- employment decisions based on stereotypes, assumptions, or perceptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and
- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability.

**Note:** If you have a disability, employers are required to provide you with a **reasonable accommodation** in the job application process and during employment. More information on this issue is provided later in this booklet.



# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 1. Where should I start? I know nothing about employment law or my rights in the workplace.

The Americans with Disabilities Act (ADA) applies to private employers, state and local governments, employment agencies and labor unions and **covers employers with 15 or more employees**, including state and local governments.

The ADA (and similar state and local laws) prohibits employers from discriminating against you if you fall within one of its protected categories, such as having, or being perceived as having, a disability and you can perform the essential functions of your job. This applies even if you would need some form of assistance (a 'reasonable accommodation') to be able to perform those job functions. Under the ADA, cancer is recognized as a disability. (<https://www.eeoc.gov/laws/guidance/cancer-workplace-and-ada>).



# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 2. Does my employer have to give me the accommodation that I request?

It may be necessary for you to obtain a reasonable accommodation in order for you to apply for a job or to perform your job functions.

If you have a disability, your employer is required to provide reasonable accommodations that will help you to carry out the essential functions of your job (or a job that you are applying for).

Whether a requested accommodation is 'reasonable' is decided on a case-by-case basis and will take into account a variety of factors including: your position and responsibilities, the size of the department and company, and the costs of permitting the accommodation.

Employers are not required to provide accommodations that would cause undue hardship for the business, for example an accommodation that would require the employer to lower their production standards.

## 3. What are some examples of potentially reasonable accommodations?

The aim is to make the existing facilities used by employees easily accessible to, and usable by, individuals with disabilities and include:

- Job restructuring;
- Modification of work schedules or providing unpaid leave;
- Work from home/telecommuting arrangements;
- Reassignment to a vacant position;
- Purchasing or modifying equipment or devices;
- Providing qualified readers or interpreters; and
- Granting a longer period of unpaid leave than the duration granted under the Federal, State and local laws, or the company's policies.

When considering a request for an accommodation, the ADA requires that employers and employees engage in an "interactive process" where both participate in working out what adjustments are needed to accommodate the employee's disability.

# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 4. I have a BRCA gene mutation. Can my employer use that against me?

The **Genetic Information Nondiscrimination Act (GINA)** provides protections if you have certain genetic traits (e.g., a cancer gene or family history of cancer) to prevent your genetic information from being used in an illegal or unauthorized way by health plans, insurers, and employers.

Prohibited behavior includes:

- making employment decisions based on your genetic information (e.g., hiring, firing, promoting, etc.);
- retaliating against you for exercising your rights under GINA;
- requesting or requiring your genetic information, except in limited circumstances; and
- disclosing genetic information about you, except in limited circumstances.





# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 5. I think my employer is treating me unfairly because of my cancer diagnosis. What should I do?

The **U.S. Equal Employment Opportunity Commission** (EEOC) enforces federal laws prohibiting employment discrimination. These laws protect you against employment discrimination when it involves:

- (a) Unfair treatment because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information;
- (b) Harassment by managers, co-workers, or others in your workplace for the reasons listed in (a);
- (c) Denial of a reasonable workplace accommodation that you need because of your disability or religious beliefs;
- (d) Retaliation because you complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.

**Note:** Not all employers are covered by the laws enforced by the EEOC, and not all employees are protected. This can vary depending on the type of employer, the number of employees it has, and the type of discrimination alleged.

If you believe that you have been discriminated against at work, you may be able to file a "Charge of Discrimination" with the EEOC. **For more information**, visit the EEOC website at: <https://www.eeoc.gov/filing-charge-discrimination> or call: 1-800-669-4000.

**Important:** there are strict time limits for filing a Charge with the EEOC. If possible, you should also speak with an employment law attorney.

# RESPONSES TO FREQUENTLY ASKED QUESTIONS



## 6. I am a federal employee; does that make a difference?

The ADA's nondiscrimination standards described above also apply to federal sector employees under the **Rehabilitation Act**, which prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The law includes protection against discrimination based on disability or genetic information, and also against retaliation if you challenge employment discrimination, file a complaint of discrimination, or participate in the EEOC's complaint process (called an "EEO Complaint").

If you are a federal employee or job applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. You can contact an EEO Counselor by calling the office responsible for the agency's complaints program. For more information or to file a complaint, visit the EEOC website at:

<https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process>

# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 7. I have recently been diagnosed with cancer and need to take medical leave. What are my rights?

The **Family and Medical Leave Act (FMLA)** provides eligible employees with up to 12-weeks of unpaid leave during a 12-month period for a number of reasons, including time off for a serious health condition such as cancer, or time off to care for a family member with a serious health condition.

Except for a few limited circumstances, FMLA will protect your job, allowing you to return to the same position, or an equivalent position, at the end of your FMLA leave.

During your FMLA leave, your employer must allow you to continue to participate in their group health plan on the same terms and conditions as the other employees.

Your employer is not permitted to discipline you, retaliate or take any other adverse action against you or otherwise punish you, for taking FMLA leave.

With a few exceptions, FMLA applies to any employer in the private sector who runs a business that has 50 or more employees and functions for at least 20 calendar weeks of the current (or preceding) calendar year.

### To be eligible for FMLA leave, you must:

1. be employed by a covered employer and work at a worksite with **50 or more employees or within 75 miles** of such a worksite;
2. have been employed **at least 12 months** (which do not have to be consecutive) for the employer; and
3. have worked **at least 1,250 hours during the 12 months** immediately before the date that your FMLA leave begins.

Cancer patients and survivors can use FMLA leave for their own medical care, such as surgery, recovery and follow-up treatments and visits. Spouses, children and parents of cancer patients can also use FMLA leave to care for their family member with cancer (e.g., to care for a family member recovering from surgery, and to accompany them to chemotherapy appointments.)

## 8. Do I have to use the entire 12 weeks of FMLA leave at once?

No. Importantly for cancer patients and their families, FMLA leave does not need to be taken in a single block of time. Examples of intermittent leave include single and part-day absences to attend medical appointments, or taken several days at a time and spread over a period of six months, such as for chemotherapy. For example, a woman with breast cancer may be able to return to work within a few days after a lumpectomy or within two or three weeks after a mastectomy and then schedule radiation or chemotherapy treatments for times that would minimize absence from work (such as one or two afternoons a week, or one day a week) so that all of her absences for treatment would be protected FMLA leave.

If possible, you should try to keep any disruption to your employer's operations to a minimum when scheduling your leave. However, if intermittent leave for treatments such as chemotherapy and radiation can only be scheduled at a certain time because of treatment protocols or the doctor's schedule, your employer must grant you the time off.

## 9. My 12 weeks of FMLA leave is almost up but my doctor has advised me to take more time off. Do I have to return to work immediately despite my doctor's advice?

If you need additional leave beyond what is provided under the FMLA, state leave laws and your workplace policies, you may be able to get additional unpaid leave as an accommodation. The ADA, the New York State Human Rights law and the New York City Human Rights law all require employers to provide reasonable accommodations to individuals with disabilities if it will not cause an undue burden, as explained earlier. For example, if you need two additional months of leave to complete chemotherapy, the request could be considered reasonable and an employer may be required to provide it under applicable law. However, a request for open ended leave (with no anticipated return date) or leave of more than one year, could be considered an undue burden on the employer.

## 10. Where should I go if I have additional questions about medical leave under the FMLA?

More information about the FMLA, including the process for requesting leave and for filing a complaint if an employer fails to comply with the law, can be found on the U.S. Department of Labor website at <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>

FMLA Fact Sheets: <https://www.dol.gov/agencies/whd/fmla/factsheets>

*If possible, you should also speak with an employment law attorney.*

# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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## 11. My workplace only has 8 employees, so the ADA does not apply. Do I have any protections?

While the ADA requires a minimum of 15 employees to apply, under the New York State Human Rights Law (NYS HRL), there is **no minimum number of employees** for an employer to be covered – one employee would be sufficient; the law applies to all employers within New York State.

Similar to the ADA, the NYS HRL prohibits discrimination in hiring and firing, as well as work assignments, salary, benefits, promotions, performance evaluations, and discipline based upon race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, arrest or conviction record, or marital status. The Law also prohibits your employer from making statements, asking questions during interviews or circulating job announcements that suggest a preference for or prejudice against hiring individuals based on the groups listed above.

If you are completing the essential tasks of your job in a reasonable manner, your employer cannot treat you differently, withhold promotion, or fire you because of your disability. If you need a reasonable accommodation because of your disability to complete the essential tasks of your job in a reasonable manner, your employer is required to provide that accommodation.

To obtain the accommodation, you must provide medical documentation to support your request, but you do not always have to identify what your disability is. In a pre-employment interview, it is illegal for the interviewer to ask specific questions about your health or health history, though they may describe job duties and ask if you can perform them in a reasonable manner. An employer does not need to hire or retain employees who are unable to perform essential job duties in a reasonable manner.



# RESPONSES TO FREQUENTLY ASKED QUESTIONS

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New York City residents may also consider the **New York City Human Rights Law (NYC HRL)** which provides similar protections. For protection under this law, your workplace must be located within the five boroughs of New York City and have **at least four employees**. It does not apply to the state or federal governments.

If you have a disability, your employer is required to make a reasonable accommodation to enable you to perform and fulfill the requirements of your job. The NYC HRL defines a disability as 'any physical, medical, mental, or psychological impairment, or a history or a record of impairment.' A reasonable accommodation to a person with a disability is one that will not cause an undue hardship in the operation of the employer's business. It is your responsibility, as an employee with a disability, to inform your employer that you need an accommodation. Your employer may ask for written documentation from your doctor to support the request.

More information about NYC HRL and disability protections, can be found at: [https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR\\_LegalGuide-DisabilityFinal.2.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf)

## 12. My mother is undergoing cancer treatment and I will need time off to care for her while she recovers. I know I have protections under the ADA, but is there anything else I should know about?

If you live in New York State, you may be eligible for **Paid Family Leave** which provides up to 12 weeks of job protected, paid time off under specific circumstances, including caring for a family member with a serious health condition. This time can be taken all at once, or in increments of full days.

**New York Paid Family Leave** guarantees that:

- Employees have job protection, ensuring they can return to the same job (or a comparable one) when they return from Paid Family Leave.
- Employees can keep their health insurance while on leave on the same terms they had while working.
- Employers are prohibited from discriminating or retaliating against employees for requesting or taking Paid Family Leave.

**Note:** NY Paid Family Leave cannot be used for your own serious health condition. For more information visit:

<https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf>

# CONCLUSION

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Navigating the workplace after a cancer diagnosis can be a minefield – while some provide a supportive environment, others do not. Knowing your legal rights is crucial. While this booklet provides a basic overview of some of the legal protections available to eligible cancer patients, survivors and their family caregivers, employment law is complicated and very specific to the facts of each person's case. It is strongly recommended that you seek advice from an employment attorney if you believe you are being discriminated against in the workplace because of your own cancer diagnosis, or because you are caring for a family member undergoing cancer treatment.



# GLOSSARY

**Accommodation/Reasonable Accommodation:** A reasonable accommodation is assistance or changes to a position or workplace that will enable an employee to do his or her job despite having a disability

**Discrimination/Discriminatory:** To "discriminate" against someone means to treat that person differently, or less favorably, for some reason. Disability discrimination occurs when an employer treats a qualified individual who is an employee or applicant unfavorably because he or she has a disability. For example, a manager may pass up an employee in a wheelchair for a job that requires driving long distances, based on the incorrect assumption that they would not be able to manage that.

**Essential Functions/Essential Functions of a Job:** Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. For example, someone hired as a pilot must be able to fly a plane and must be able to do so either with or without an accommodation. If the employee cannot perform the essential functions of the job even with a reasonable accommodation, they would not be protected from discrimination under the ADA.

**Harassment:** Workplace harassment is broadly defined. Harassment can take the form of spoken words (such as offensive remarks), gestures, showing offensive pictures, physical contact, or intimidation. The law protects disabled individuals from being harassed by anyone in the workplace, including supervisors, coworkers and customers. Bullying, nicknames, inappropriate questions and unwanted jokes are all forms of disability harassment.

**Prohibit/Prohibited:** Something that is not allowed. It is forbidden or banned.

**Retaliation/Retaliatory:** Retaliation is a harmful act against a person that is made in response to that person's grievance or participation in an activity that is protected by law. It occurs when employers treat applicants, employees or former employees, or people closely associated with these individuals, less favorably for reporting discrimination.

**Undue Hardship or Undue Burden:** An employer is not required to make an accommodation if it would impose an "undue hardship" or "undue burden" on the operation of the employer's business. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors, including the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis.



The employment law basics covered by this booklet are intended to educate and inform, but not substitute for legal advice. The Cancer Advocacy Project provides free legal assistance to financially eligible cancer patients and survivors seeking advice about cancer-related workplace discrimination through consultation with a qualified attorney. For further information please contact the Cancer Advocacy Project:

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