



EMPLOYMENT RIGHTS FOR CANCER PATIENTS

A PUBLICATION OF THE
CANCER ADVOCACY PROJECT
OF THE CITY BAR JUSTICE CENTER

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INTRODUCTION

The Cancer Advocacy Project is a legal services program of the City Bar Justice Center. Our insurance law component provides direct representation to cancer survivors and patients in insurance, Medicaid and Medicare disputes, and advice and counseling on federal legal rights under the Family and Medical Leave Act (FMLA), COBRA (health continuation after termination of employment) and HIPAA (insurance portability), and other laws such as the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). Our employment discrimination component provides information, advice and counseling on issues relating to workplace discrimination and employee benefits. We provide cancer patients with various advance directives, like powers of attorney, health care proxies, and living wills, and we also offer clients pro bono assistance in the preparation of a basic will.

We developed this guide to help cancer survivors, patients and their families answer basic questions about employment law in New York State. Through our legal work on insurance and employment matters, we speak to many cancer patients and survivors who face some form of discrimination in the workplace. These individuals and their families often do not know where to turn for assistance. We hope this guide provides a helpful starting point for understanding employment rights.

IMPORTANT INFORMATION ABOUT THIS GUIDE

This guide is not intended to serve as legal advice and the Cancer Advocacy Project is not responsible for the accuracy or adequacy of any of the information contained in the guide or your reliance on this information. This guide discusses legal protections of cancer patients, survivors and their family members under federal, state and local employment nondiscrimination laws. It also includes important information about the rights that cancer patients, survivors and their family members have to take time off from work under the FMLA with continued group medical coverage and with a right to reinstatement to their position without adverse consequences to their job. Cancer patients, survivors and their family members are encouraged to use this guide and to consult with volunteer lawyers of the Cancer Advocacy Project about their rights under law as soon as they or their family members are diagnosed. Knowledge about your legal rights at the beginning of treatment for cancer will ensure you receive maximum benefits to which you are entitled under law.

Laws Prohibiting Job Discrimination

I. What Are the Federal Laws Prohibiting Job Discrimination?

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- The Pregnancy Discrimination Act, which prohibits employment discrimination based on pregnancy, childbirth and related medical conditions;
- the Equal Pay Act of 1963 (EPA), which prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions;
- the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older and prohibits discrimination in employment on the basis of age;
- the Americans with Disabilities Act of 1990 (ADA), as amended by the Americans with Disabilities Act Amendment Act of 2008 (ADAAA), which prohibits employment discrimination against individuals with disabilities and individuals regarded 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;
- the Rehabilitation Act of 1973, which, like the ADA, prohibits discrimination against qualified individuals with disabilities who work in the federal government and who work for federal contractors and subcontractors;
- the Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination by health insurers and employers based on people's genetic information; and
- the Civil Rights Act of 1991, which, 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. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. The most relevant of the above laws to potential discrimination faced by cancer survivors and their families are the ADA, Rehabilitation Act, Title VII and GINA. *More details about these laws are included below. Also, additional information can be found at the EEOC's website <http://www.eeoc.gov>.*

Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. 5 U.S.C. 2302. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions can not be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (www.OSC.gov) and the Merit Systems Protection Board (www.MSPB.gov).

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Additional information about the enforcement of the CSRA may be found on the OPM web site at <http://www.opm.gov/er/address2/guide01.htm>; from OSC at (202) 653-7188 or at <http://www.osc.gov>; and from MSPB at (202) 653-6772 or at <http://www.mspb.gov>.

II. What Discriminatory Practices Are Prohibited by the Federal Employment Nondiscrimination Laws?

It is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Prohibited discriminatory practices under these laws also include:

- harassment on the basis of 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 or assumptions 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. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Further, employers are required to reasonably accommodate individuals with disabilities in the job application process and during employment. Employers are also required to reasonably accommodate religion.

Special Note to Cancer Patients, Survivors and their Family Members

Cancer patients and survivors who face discrimination in the workplace typically would have claims under the ADA or the Rehabilitation Act for disability-related discrimination or discrimination directed at them because they are perceived as having a disability or have a record of a disability (i.e., cancer). They also might have claims for failure to accommodate. For example, as discussed in the FMLA section below, a cancer patient who requests but is denied additional unpaid leave beyond that required by the FMLA or his or her employer's policies, may have a claim for failure to accommodate, provided the additional unpaid leave would have been reasonable and would not have caused an undue hardship on the employer. Family members of cancer patients and survivors who face discrimination in the workplace similarly might have a claim under the ADA or the Rehabilitation Act for discrimination directed at them because of their association with an individual with a disability. More information about the ADA and the Rehabilitation Act is included below.

Cancer patients, survivors and their family members also might have claims under GINA if they face discrimination due to genetic information about them or perceived genetic tendencies to certain illnesses. More information about GINA is included below.

Additional Information

Employers are required to post notices to all employees advising them of their rights under the laws the EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with disabilities, including visual or other disabilities that affect reading.

Note: Many states and municipalities also have enacted protections against discrimination and harassment based on the same characteristics protected under the federal laws mentioned above, as well as based on sexual orientation, status as a parent, marital status and political affiliation. For information, please contact the EEOC District Office nearest you or the New York State Division of Human Rights (<http://www.dhr.state.ny.us/>) or the New York City Commission on Human Rights (<http://www.ci.nyc.ny.us/html/cchr/home.html>).

III. More Details About the ADA and GINA

The ADA

The ADA and similar state and local laws prohibit discrimination against qualified individuals with a disability who can perform the essential functions of their position (or a position they are applying for), even if a reasonable accommodation would be required for them to perform those functions. These same laws also prohibit stereotyping and discrimination against individuals who are "regarded as" having an impairment or who associate with someone with a disability.

The Reasonable Accommodation Obligation

Employers are required to provide "reasonable accommodations" to individuals with disabilities to assist them in performing the essential functions of their job (or a position they are applying for). Employers are not required to provide accommodations that would impose undue hardship

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on them. They also are not required to provide accommodations to individuals who do not have disabilities (i.e., a family member of a cancer patient or survivor). The determination of when an accommodation is reasonable and required must be assessed on a case by case basis taking into account a variety of factors including but not limited to the individual's position and responsibilities, the size of the department and company, and the costs of the accommodation. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.

Examples of potentially reasonable accommodations include:

- Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities;
- *Job restructuring;*
- *Part-time or modified work schedules including upon return from treatment;*
- *Work from home/telecommuting arrangements;*
- *Reassignment or transfer to a vacant position;*
- Acquisition or modification of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials or policies;
- The provision of qualified readers or interpreters;
- Adjusting or modifying examinations, training materials, or policies to make them accessible; and
- *Granting of unpaid leave above that which is otherwise available under the FMLA or company policies.*

The italicized examples above are those that may be most relevant to cancer patients and survivors. The ADA requires that employers and employees engage in an “interactive process” that requires participation by both the employer and the employee in determining what accommodations are required for an employee's disability.

Confidentiality and Medical Inquiries

Finally, under the ADA, medical information is confidential and must be treated confidentially. The law also prohibits employers from making certain medical inquiries. Specifically, before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the

examination is required for all entering employees in the same job category. Medical examinations of employees also must be job-related and consistent with business necessity. The federal law HIPPA also protects the confidentiality of medical information. It applies to health information maintained by health care providers, hospitals, health plans, health insurers, and health care clearinghouses. Together with its regulations, it limits the nonconsensual use and release of private health information; gives patients rights to access their medical records and to know who else has accessed them; restricts most disclosure of health information to the minimum needed for the intended purpose; establishes criminal and civil sanctions for improper use or disclosure; and establishes requirements for access to records by researchers and others.

Drug and Alcohol Use

Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

GINA

GINA broadens the scope of protections afforded to individuals with certain genetic traits (*e.g.*, a cancer gene or family history of cancer) against the illegal or unauthorized usage of genetic information by imposing certain prohibitions on health plans, insurers, and employers.

Title II of GINA creates a new law prohibiting discrimination on the basis of “genetic information” with respect to employment. GINA prohibits employers, employment agencies, labor organizations, and joint labor-management committees controlling apprenticeship and other training programs from:

- making employment decisions based on genetic information (*e.g.*, hiring, firing, promoting, etc.);
- retaliating against individuals who exercise their rights under GINA;
- requesting or requiring genetic information, except in limited circumstances; and
- disclosing genetic information about an individual, except in limited circumstances.

GINA broadly defines “genetic information” as information about an individual or his or her family’s genetic test(s) and/or about a family member’s *manifested* disease or disorder. For example, the results of a genetic test indicating that an employee carries an altered BRCA1 gene (which predisposes her to breast cancer) or the fact that her mother and grandmother had breast cancer would constitute “genetic information” under GINA. However, the fact that she has breast cancer is *not* “genetic information.” (This is true despite the fact that breast cancer, like many conditions, may have a genetic component.)

GINA’s definition of “genetic information” *excludes* information about sex or age but *includes* genetic information about a fetus carried by a pregnant woman or a legally-held embryo. The definition also includes requests for or the receipt of “genetic services” by the individual or his or her family’s participation in clinical research that includes

“genetic services.” GINA liberally defines the term “family member” to include dependents (as that term is used for purposes of HIPAA’s special enrollment rules) or any other first, second, third, or fourth-degree relative. “Genetic test” is defined as an “analysis of human DNA, RNA, chromosomes, proteins, or metabolites *that detects genotypes, mutations, or chromosomal changes.*” It does not include an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that does *not* detect genotypes, mutations, or chromosomal changes. Nor does it include a protein or metabolite analysis *directly* related to a *manifested* disease or disorder that is reasonably detectable by an appropriately trained healthcare professional. (genetic testing, genetic counseling, or genetic education in limited circumstances.)?

Title I of GINA, which relates to health plans, expands the existing nondiscrimination requirements contained in the Health Insurance Portability and Accountability Act (“HIPAA”) by amending the relevant provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”), the Public Health Service Act, the Internal Revenue Code of 1986, and Title XVIII of the Social Security Act (relating to Medigap plans).

GINA prohibits group health plans and health insurance issuers offering health coverage in connection with such a plan from:

- requesting or requiring genetic testing;
- increasing group premiums or denying enrollment based on genetic information;
- requesting, requiring, or purchasing genetic information for underwriting purposes or with respect to any individual *prior* to enrollment and in connection with enrollment; and
- using or disclosing genetic information about an individual for underwriting purposes.

In addition, GINA prohibits insurers in the individual market from establishing enrollment eligibility rules, including continued eligibility, based on genetic information and prohibits such insurers from imposing a pre-existing condition exclusion based on genetic information. (The existing HIPAA law already contains such a provision applicable to group health plans.)

GINA does not preempt state employment laws. Turning to enforcement mechanisms and monetary penalties for violations, the same powers, remedies, and procedures currently used for Title VII and the ADA are available under GINA. (These damages are outlined in 42 U.S.C. § 1981a.) GINA’s remedies are determined by which Act would otherwise cover the individual. With regard to employees or applicants who come under GINA’s embrace because they were already covered by Title VII, the same powers, remedies, procedures and damages as available under Title VII are available to them.

IV. Who is Covered by the Federal Non-Discrimination Laws and How Does An Individual File a Complaint Under these Laws?

A. Which Employers and Other Entities Are Covered by These Laws?

Title VII, the ADA and GINA cover all private employers, state and local governments, and education institutions that employ 15 or more individuals. These laws also cover private and

public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.

Title VII also covers the federal government. In addition, the federal government is covered by Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, which incorporate the requirements of the ADA. However, different procedures are used for processing complaints of federal discrimination. For more information on how to file a complaint of federal discrimination, contact the EEO office of the federal agency where the alleged discrimination occurred.

The Civil Service Reform Act (not enforced by EEOC) covers most federal agency employees except employees of a government corporation, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and as determined by the President, any executive agency or unit thereof, the principal function of which is the conduct of foreign intelligence or counterintelligence activities, or the General Accounting Office.

B. Who Can File a Charge of Discrimination?

- Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with EEOC.
- In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

C. How Is a Charge of Discrimination Filed with the EEOC?

- A charge may be filed by mail or in person at the nearest EEOC office. Individuals may consult their local telephone directory (U.S. Government listing) or call 1-800-669-4000 (voice) or 1-800-669-6820 (TTY) to contact the nearest EEOC office for more information on specific procedures for filing a charge.
- Individuals who need an accommodation in order to file a charge (*e.g.*, sign language interpreter, print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made.
- Federal employees or applicants for employment should see the fact sheet at www.eeoc.gov/facts/fs-fed.html.

D. What Information Must Be Provided to File a Charge?

- The complaining party's name, address, and telephone number;
- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and number of employees (or union members), if known;
- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated); and
- The date(s) of the alleged violation(s).

E. What Are the Time Limits for Filing a Charge of Discrimination?

All laws enforced by EEOC, (except the Equal Pay Act), require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed:

- A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights.
- This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.
- To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.
- Federal employees or applicants for employment should see the fact sheet at www.eeoc.gov/facts/fs-fed.html.

F. What Happens after a Charge is Filed with EEOC?

The employer is notified that the charge has been filed. From this point there are a number of ways a charge may be handled:

- A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong, the charge may be assigned for follow up investigation to determine whether it is likely that a violation has occurred.
- EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues.
- In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate.
- The charge may be selected for EEOC's mediation program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation.
- A charge may be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. A charge may be dismissed at the time it is filed, if an initial in-depth interview does not produce evidence to support the claim. When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party 90 days in which to file a lawsuit on his or her own behalf.
- Federal employees or applicants for employment should see the fact sheet at www.eeoc.gov/facts/fs-fed.html.

G. How Does EEOC Resolve Discrimination Charges?

- If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf.
- If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.
- If the case is successfully conciliated, or if a case has earlier been successfully mediated or settled, neither EEOC nor the charging party may go to court unless the conciliation, mediation, or settlement agreement is not honored.
- If EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If EEOC decides not to sue, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf. In Title VII and ADA cases against state or local governments, the Department of Justice takes these actions.
- Federal employees or applicants for employment should see the fact sheet at www.eeoc.gov/facts/fs-fed.html.

H. When Can an Individual File an Employment Discrimination Lawsuit in Court?

A charging party may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC, as stated above. Under Title VII and the ADA, a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice. Under the ADEA, a suit may be filed at any time 60 days after filing a charge with EEOC, but not later than 90 days after EEOC gives notice that it has completed action on the charge.

Under the EPA, a lawsuit must be filed within two years (three years for willful violations) of the discriminatory act, which in most cases is payment of a discriminatory lower wage.

Federal employees or applicants for employment should see the fact sheet at www.eeoc.gov/facts/fs-fed.html.

I. What Remedies Are Available When Discrimination Is Found?

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- back pay,
- hiring,
- promotion,
- reinstatement,
- front pay,

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- reasonable accommodation, or
- other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

- attorneys' fees,
- expert witness fees, and
- court costs.

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.

In cases concerning reasonable accommodation under the ADA, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

J. What Information and Other Assistance Is Available from EEOC?

EEOC provides a range of informational materials and assistance to individuals and entities with rights and responsibilities under EEOC-enforced laws. Most materials and assistance are provided to the public at no cost. Additional specialized training and technical assistance are provided on a fee basis under the auspices of the EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992. For information on educational and other assistance available, contact the nearest EEOC office by calling: 1-800-669-4000 (voice) or 1-800-669-6820 (TTY).

Publications available at no cost include posters advising employees of their EEO rights, and pamphlets, manuals, fact sheets, and enforcement guidance on laws enforced by the Commission. For a list of EEOC publications, or to order publications, write, call, or fax:

U.S. Equal Employment Opportunity Commission
Publications Distribution Center
P.O. Box 12549
Cincinnati, Ohio 45212-0549
1-800-669-3362 (voice)
1-800-800-3302 (TTY)
513-489-8692 (fax)

Telephone operators are available to take orders (in English or Spanish) from 8:30 a.m. to 5:00 p.m. (EST), Monday through Friday. Orders generally are mailed within 48 hours after receipt.

Information about EEOC and the laws it enforces also can be found at the following internet address: <http://www.eeoc.gov>.

V. What Other Federal Laws Not Administered by the EEOC Could Apply to Cancer Patients?

A. Rehabilitation Act

The Rehabilitation Act 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 standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act.

Section 501

Section 501 requires affirmative action and nondiscrimination in employment by Federal agencies of the executive branch. To obtain more information or to file a complaint, employees should contact their agency's Equal Employment Opportunity Office.

Section 503

Section 503 requires affirmative action and prohibits employment discrimination by Federal government contractors and subcontractors with contracts of more than \$10,000. For more information on section 503, contact:

Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room C-3325
Washington, D.C. 20210

www.dol.gov/esa/ofccp

(202) 693-0106 (voice/relay)

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Section 504

Section 504 states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that either receives Federal financial assistance or is conducted by any Executive agency or the United States Postal Service.

Each Federal agency has its own set of section 504 regulations that apply to its own programs. Agencies that provide Federal financial assistance also have section 504 regulations covering entities that receive Federal aid. Requirements common to these regulations include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people who have hearing or vision disabilities; and accessible new construction and alterations. Each agency is responsible for enforcing its own regulations. Section 504 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.

For information on how to file 504 complaints with the appropriate agency, contact:

U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Disability Rights Section - NYAV
Washington, D.C. 20530

www.ada.gov

(800) 514-0301 (voice)
(800) 514-0383 (TTY)

Who is covered?

Section 503 of the Rehabilitation Act of 1973, as amended, requires employers with federal contracts or subcontracts that exceed \$10,000, and contracts or subcontracts for indefinite quantities (unless the purchaser has reason to believe that the cost in any one year will not exceed \$10,000), to take affirmative steps to hire, retain, and promote qualified individuals with disabilities. The regulations implementing Section 503 make clear that this obligation to take affirmative steps includes the duty to refrain from discrimination in employment against qualified individuals with disabilities.

The following types of contracts and subcontracts are exempt from Section 503:

- Those not exceeding \$10,000;
- Those for work that is performed outside the U.S.; and
- Those with state or local governments, except for the specific government entity that participates in work on or under the contract.

The Deputy Assistant Secretary may grant a waiver from the requirements of Section 503 in the following circumstances:

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- For specific contracts, subcontracts or purchase orders, if special circumstances in the national interest require such an exemption;
- For facilities not connected to performance of the federal contract, upon the written request of the contractor, if certain conditions listed in the regulations are met. This type of waiver will terminate, at the very latest, two years after the date on which the waiver is granted, and earlier under certain specific circumstances; and
- Contracts and subcontracts involving national security, if the head of the contracting agency determines both that (1) the contract is essential to national security, and (2) noncompliance with a particular requirement of the Executive Order or the regulations with respect to the process of awarding the contract is essential to national security.

Under Section 503 and its implementing regulations, an "individual with a disability" means a person 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.

A "qualified individual with a disability" means a person with a disability who satisfies the job-related requirements of the employment position he or she holds or is applying for, and who, with or without reasonable accommodation, can perform the essential job functions of that position.

Additional information on the definitions of "individual with a disability" and "qualified individual with a disability" can be found in several of the enforcement guidances published by the Equal Employment Opportunity Commission (EEOC). These guidances may be found at www.eeoc.gov/policy/guidance.html.

Basic Provisions/Requirements

Under Section 503 and its implementing regulations, covered employers with federal contracts or subcontracts must take affirmative steps to employ qualified individuals with disabilities. This obligation covers the full range of employment and personnel practices, such as recruitment, hiring, and rates of pay, upgrading, and selection for training. All covered contractors and subcontractors must also include a specific equal opportunity clause in each of their nonexempt contracts and subcontracts. The regulations provide the required language for this clause.

In addition, Section 503 and its regulations require covered federal contractors and subcontractors to make reasonable accommodations for the known physical or mental limitations of qualified individuals with disabilities, unless providing an accommodation would create an undue hardship. Furthermore, covered contractors and subcontractors are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against any individual for filing a complaint or participating in a proceeding under Section 503.

Under Section 503, each employer that has both (1) a federal contract or subcontract of \$50,000 or more, and (2) 50 or more employees, must prepare, implement, and maintain a written affirmative action program covering each of its establishments. The employer must review and update the program annually and must make it available for inspection by any employee or applicant for employment, as well as by the Office of Federal Contract Compliance Programs (OFCCP). The program may be integrated with, or kept separate from, any other affirmative action program the employer is required to prepare.

Employee Rights

Employees of and applicants for employment with a covered contractor or subcontractor have the right to file a complaint with OFCCP if they believe that a federal contractor or subcontractor has discriminated against them on the basis of a disability. Anyone may call OFCCP with a question about interpreting the regulations, filing a complaint, or any other related matter. The main telephone numbers for OFCCP's national offices are 202-693-0101 and 202-693-1308 (TTY). Additional telephone numbers are located at www.dol.gov/esa/contacts/ofccp/ofcpekey.htm.

Penalties/Sanctions

OFCCP investigates for violations of Section 503 either through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the federal contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may initiate an administrative enforcement proceeding by issuing an administrative complaint against the contractor or subcontractor.

If OFCCP files an administrative complaint, the contractor or subcontractor has 20 days to request a review by an administrative law judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ's decision, it may appeal the decision to the Department of Labor's Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that a violation of Section 503 has occurred, it may order the contractor or subcontractor to provide appropriate relief, which may include back pay and benefits, and restoration of employment status, for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment.

If the contractor or subcontractor is dissatisfied with the Board's decision, it may appeal that decision to the federal courts.

B. Family Medical Leave Act

The FMLA provides eligible employees with up to 12-weeks of unpaid leave during a 12-month period for the reasons specified below, which include time off for a serious health condition such as cancer and time off to care for a family member with a serious health condition such as cancer. As discussed below, employers must reinstate employees who use FMLA leave to their same position or an equivalent position upon return from FMLA leave (except for limited circumstances). Employers also must allow employees to continue to participate in group health plans during FMLA leave on the same terms and conditions as active employees. Employers are prohibited from disciplining employees for taking FMLA leave or taking any other adverse action against an employee that would interfere with the employee taking advantage of FMLA leave or that would constitute retaliation against the employee for taking FMLA leave.

The FMLA applies to any employer in the private sector who engages in commerce, or in any industry or activity affecting commerce, and who has 50 or more employees each working day during at least 20 calendar weeks in the current or preceding calendar year. The law covers all

public agencies (state and local governments) and local education agencies (schools, whether public or private). These employers do not need to meet the "50 employee" test. Title II of FMLA covers most federal employees, who are subject to regulations issued by the Office of Personnel Management.

Not everyone is eligible for FMLA leave. To be eligible for FMLA leave, an individual 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 FMLA leave begins.

As discussed below, cancer patients and survivors may utilize FMLA leave for treatment and follow-up visits for their cancer. Also, spouses, children and parents of cancer patients can utilize FMLA leave to care for their family member with cancer (e.g., to offer support while the family member is in the hospital for surgery, to care for a family member recovering from surgery, and to accompany the family member to chemotherapy). While FMLA leave is unpaid, in most situations, accrued paid leave, such as vacation, personal days or sick leave may be utilized during FMLA leave such that the employee receives paid leave benefits during the time off from work. Also, due to new changes in the law, cancer patients and survivors who are receiving short-term disability benefits at less than 100% of their pay can, if their employer agrees, utilize accrued leave benefits on a pro-rata basis to supplement their disability benefits so that all or a portion of their leave is paid at 100% of their base salary rate.

More information about the FMLA is included below. Also, for more information, employees should consult with their company's Human Resources department or personnel manager. Employers are required to post their FMLA policy. More information about the FMLA also can be found at the U.S. Department of Labor website at <http://www.dol.gov/esa/whd/fmla/>. Additionally, a number of states (though not New York), have laws that are more expansive than the FMLA and/or that provide for state-paid benefits for a portion of FMLA leave. Connecticut, for example, has a state law that provides up to 24 weeks of unpaid leave in a 24 month period. For more information about Connecticut law see http://www.das.state.ct.us/Hr/FMLA_Booklet.pdf. In all instances, the employee must be provided the benefit of the most generous leave available under federal and state leave laws. Because of continuing changes to the law, it is important for cancer patients, survivors and family members to check with their employers and the U.S. Department of Labor and state department of labor websites for up to date information on their rights under federal and state leave law.

Basic Leave Provisions

The FMLA provides eligible employees with up to 12 workweeks of unpaid leave in a 12-month period (generally measured on a rolling backward basis from the first day of leave, though it may be measured on a going forward basis from the first day of leave, by the calendar year or by the employee's anniversary date with the employer) for the following reasons:

- the birth of the employee's child or to care for the newborn child;
- the placement of a child with the employee for adoption or foster care or to care for the newly placed child;

- the employee’s own serious health condition (including pregnancy-related disability, pre-natal medical care and childbirth) that makes the employee unable to perform one or more of the essential functions of his or her job;
- to care for the employee’s spouse, child (including a child for whom the employee stands *in loco parentis*) or parent (which does not include in-laws but does include persons who stand *in loco parentis*) with a serious health condition;
- qualifying exigent circumstances arising out of the fact that the employee’s spouse, son, daughter or parent is a “covered military member” on active duty or is on call for such duty in the United States National Guard or Reserves in support of a “contingency operation.”

The FMLA also provides eligible employees with up to 26 workweeks of unpaid leave in a 12-month period (measured on a going forward basis from the first day of leave) to:

- care for the employee’s spouse, child, parent or other relative who is next-of-kin, who is also a “covered servicemember” of the United States Armed Forces, National Guard or Reserves with a serious injury or illness incurred in the line of duty on active duty (a/k/a “military caregiver leave”) that may render the servicemember medically unfit to perform his or her duties and for which he or she is undergoing medical treatment, recuperation or therapy; or is in outplacement status; or is on the temporary disability leave list.

Leave Can Be Taken Intermittently

Importantly for cancer survivors and their families, FMLA leave does not need to be taken in a single block of time. Single and part-day absences may qualify. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

When diagnosed with cancer, the individual should carefully consider the treatment plan and determine how to make the best use of the 12-weeks of FMLA protected leave. Taking some leave in a block of time and the rest on a reduced hours basis may give the individual the maximum job protected benefits and ensure maximum protection of group health insurance coverage during treatment. 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 (e.g., one or two afternoons per week or one day per week) such that all of her absences for treatment would be protected FMLA leave.

Importantly, taking leave on an intermittent basis, even if burdensome to an employer, must be granted to an employee if medically necessary. An employee who needs intermittent days off or reduced hours for his or her own treatment of cancer, however, must make reasonable attempts to schedule intermittent leave at times that will not unduly disrupt his or her employer’s operations. For example, an employee should consider the needs of his or her employer and the operations of the department when scheduling chemotherapy or radiation treatments. However, if intermittent

leave for such treatments can only be scheduled at a certain time due to the doctor's schedule or the protocols of the treatment, the employer must grant the employee the time off.

If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the ADA), and state law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave. The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job.

The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

Calculating Intermittent and Reduced Hours Leave

When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave

provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.

When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off 8 hours, the employee would use $\frac{1}{5}$ of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use $\frac{1}{2}$ week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third ($\frac{1}{3}$) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.

If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For

example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($\frac{8}{48} = \frac{1}{6}$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

Special Rules About FMLA Leave and Intermittent Leave for Employees of Schools

Special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. "Instructional employees" are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

- Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or
- Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position.

If an instructional employee does not give required notice of foreseeable FMLA leave to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take

leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

- An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if: (i) The leave will last at least three weeks, and (ii) The employee would return to work during the three-week period before the end of the term.
- The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if: (i) The leave will last more than two weeks, and (ii) The employee would return to work during the two-week period before the end of the term.
- The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember.
- The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

For purposes of these provisions, "academic term" means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

If an employee chooses to take leave for "periods of a particular duration" in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave. In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

Restoration to Job Upon Return from FMLA Leave

On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay,

and other terms and conditions of employment, with certain limited exceptions discussed below. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. An employee is not entitled to accrue benefits during periods of unpaid FMLA leave, but the employer must return him or her to employment with the same benefits at the same levels as existed when leave began. Finally, an employer may require an employee to submit a fitness for duty certification from his or her health care provider before being reinstated to work.

There are some limitations, as mentioned above, to reinstatement. Generally, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example: (1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position would not meet the requirements of an equivalent position. If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed. Additionally, in some instances, an employer may refuse to institute key employees (i.e., those who are among the top 10% of the highest paid employees of the Company). Employers must give notice to key employees about any condition on reinstatement.

Special rules concerning reinstatement also apply for instructional employees of schools. The determination of how an employee is to be restored to "an equivalent position" upon return from FMLA leave will be made on the basis of "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The "established policies" and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to "an equivalent position" must provide substantially the same protections as provided in the Act for reinstated employees. In other words, the policy or collective bargaining agreement must provide for restoration to an "equivalent position" with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

Maintenance of Group Health Benefits During FMLA Leave

If an employee was receiving group health benefits when leave began, an employer must maintain them at the same level and in the same manner during periods of FMLA leave as if the employee had continued to work. Generally, if the employee is utilizing accrued paid leave during FMLA leave, deductions for premiums will be made in the same manner as when the

employee was actively at work. Otherwise, the employee and employer will come to an agreement about payment of the premiums.

Coordination with Other Leave and Paid Leave Benefits and Extension of Leave

FMLA leave often runs concurrently with other forms of leave. For example, a cancer patient who needs leave for treatment will often be eligible for short-term disability benefits through the state and/or his or her employer's short-term disability plan. New York State, for example, provides up to 26 weeks of short term disability benefits. The period of time taken as short-term disability leave is typically also counted against the employee's FMLA leave entitlement. If a cancer patient's short-term disability benefits do not equal 100% of the individual's base pay, an employer may agree to allow the patient to utilize his or her accrued paid leave (such as accrued vacation, personal days, sick leave) to supplement his or her income during a period of short-term disability.

Family members of cancer patients who need time off from work to care for the cancer patient also will either be permitted or required to utilize accrued paid leave (such as vacation or personal days) during FMLA leave. Use of paid leave allows the employee to receive pay during what would otherwise be unpaid FMLA leave. Use of paid leave does not extend FMLA leave but rather runs concurrently with FMLA leave.

An employer may offer additional leave benefits above and beyond what the FMLA requires. Also, as mentioned above, state law may provide for more generous leave benefits. Cancer patients and their family members should carefully review the benefits available to them with their employers to ensure they take advantage of the maximum benefits provided and to ensure that their FMLA leave is properly coordinated with other leave benefits.

Finally, cancer patients who need additional leave beyond what is provided under the FMLA, state leave laws and their employer policies, may be able to obtain 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 accommodation to individuals with disabilities. Cancer patients as a general rule will be deemed to be covered individuals with disabilities and may request additional, job protected unpaid leave as an accommodation. Employers are required to provide such unpaid additional leave so long as it is reasonable and not an undue hardship. For example, if an individual needed three additional months of leave to complete chemotherapy, such a request may very well be reasonable and an employer may be required to provide it under applicable law. However, a request for open ended leave or leave of more than one year may be deemed unduly burdensome on the employer.

Required Notices and Documentation

An employee must give his or her employer notice of the need for FMLA leave. When the need for leave is foreseeable, an employee must give the employer at least 30 days notice, or as much notice as is practicable. When the leave is not foreseeable, the employee must provide such notice as soon as possible.

An employer may require medical certification of a serious health condition such as cancer from the employee's health care provider. A cancer patient who needs FMLA leave also may be

required to apply for short- and/or long-term disability benefits and supply information, including medical certifications in order to qualify for such benefits. As mentioned above, FMLA runs concurrently with other leaves such as short-term disability leave. An employer may also require periodic reports during the period of leave of the employee's status and intent to return to work, as well as "fitness-for-duty" certification upon return to work in appropriate situations.

Individuals who need FMLA leave should ensure that they comply with all of the notice requirements set forth in their employer's FMLA policy and that they timely provide completed medical certification forms to ensure that they receive protected FMLA leave.

How to Address a Violation of the FMLA and Compliance Assistance

The Wage and Hour Division of the Employment Standards Administration, within the Department of Labor, administers FMLA. More detailed information, including copies of explanatory brochures, may be obtained by contacting the local Wage and Hour office:

New York City District Office

US Dept. of Labor
ESA Wage & Hour Division
26 Federal Plaza, Room 3700
New York, NY 10278

Phone:
1-866-4-USWAGE
(1-866-487-9243)

Philip Jacobson
District Director

In addition, the Wage and Hour Division has developed the *elaws* Family and Medical Leave Act Advisor, (at www.dol.gov/elaws/fmla.htm), which is an online resource that answers a variety of commonly asked questions about FMLA, including employee eligibility, valid reasons for leave, notification responsibilities of employers and employees, and rights and benefits of employees. Compliance assistance information is also available from the Wage and Hour Division's Web site, www.wagehour.dol.gov.

Penalties/Sanctions

Employees and other persons may file complaints with the Employment Standards Administration (usually through the nearest office of the Wage and Hour Division). The Department of Labor may file suit to ensure compliance and recover damages if a complaint cannot be resolved administratively. Employees also have private rights of action, without involvement of the Department of Labor, to correct violations and recover damages through the courts. The FMLA also gives employees the right to file a complaint with the Wage and Hour Division, file a private lawsuit under the Act (or cause a complaint or lawsuit to be filed), and testify or cooperate in other ways with an investigation or lawsuit without being fired or discriminated against in any other manner.

A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's Web site. A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated but no more than two years after the action which is alleged to be a violation of FMLA occurred, City Bar Justice Center
Employment Rights for Cancer Patients

or three years in the case of a willful violation. No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

Finally, the FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

*For additional information: 1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV.*

VI. What About a Claim That is Also Covered by State or Local Law?

The State and City Laws against disability discrimination potentially may be far more effective for plaintiffs and formidable for defendants than the ADA.

A. What Are the State Laws Prohibiting Job Discrimination?

New York State Human Rights Law

Under the state law an employer must have at least four employees to be covered. The employees do not need to work at one location. The Law 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 advancement, or fire you because of your disability. If you need 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. Some examples of a reasonable accommodation include:

- Making existing workplace facilities readily accessible to and usable by an employee with a disability;
- Job restructuring;
- Modification of work schedules or providing unpaid leave;
- Reassignment to a vacant position;
- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials, or policies;
- Providing qualified readers or interpreters.

You must provide medical documentation of your need, but you don't 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. An employer may describe job duties and ask if you can perform them in a reasonable manner. The employer does not need to hire or retain employees who are unable to perform essential job duties in a reasonable manner.

Filing

- You must file your complaint within one year of the date the discrimination occurred. However you may file directly in State court within three years of the most recent act of discrimination, but you cannot file in both the Division and State Courts.
- You should keep careful records of the dates, names, addresses and phone numbers of any witnesses of the discriminatory act(s). A diary or journal of the actions taken against you is very helpful for the investigation.

B. What State Agency handles claims of discrimination?

New York State Division of Human Rights

Regional Offices:

Upper Manhattan
State Office Building
163 West 125th Street
4th Floor
New York, NY 10027
(212) 961-8650

Brooklyn
55 Hanson Place
Room 304
Brooklyn, NY 11217
(718) 722-2856

Lower Manhattan
20 Exchange Place
2nd Floor
New York, NY 10005
(212) 480-2522

C. What City Laws Prohibit Job Discrimination?

New York City Human Rights Law

Your company must have four or more workers for you to be protected by the City Human Rights Law. The Law also applies to employment agencies and labor organizations.

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 City Human Rights Law 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 health care provider to support the request.

If you are applying for a job and have a disability, your prospective employer may not ask you about the existence, nature, or severity of a disability, although you may be asked about your ability to perform specific job functions. An employer may not make medical inquiries or conduct a medical examination of you, the applicant, until a job offer has been made. Medical examinations of employees must be job-related and consistent with the employer's business needs.

Some examples of a reasonable accommodation include:

- Making existing workplace facilities readily accessible to and usable by an employee with a disability;
- Job restructuring;

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Employment Rights for Cancer Patients

- Modification of work schedules or providing unpaid leave;
- Reassignment to a vacant position;
- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials, or policies;
- Providing qualified readers or interpreters.

Employers are not required to lower quality or quantity standards to make an accommodation nor are they obligated to provide you with personal items, such as glasses or hearing aids.

How to File a Complaint

You may file a complaint with the Law Enforcement Bureau of the City’s Commission on Human Rights, located at 40 Rector Street, 9th Floor, in lower Manhattan or any of the Community Service Centers within one year of the last alleged act of discrimination.

You must make an appointment for an intake interview. Complaints will not be taken at the office without an appointment. To schedule an appointment, please call (212) 306-7450. If you are unable to travel to the Commission’s offices, we will make alternative arrangements.

When you visit the Commission on Human Rights, you will meet with a Human Rights Specialist or a staff attorney. To expedite the interview process, please bring all relevant information covered in the complaint with you such as names, addresses, and phone numbers of the people or organizations you are charging and the exact dates of the events.

From the intake the Commission will proceed to investigate the allegation. If a determination of probable cause is made the claim will be assigned to an attorney, otherwise it will be dismissed and you will have an opportunity to appeal. An administrative law judge will hold a pre-trial hearing and if no settlement is reached, the judge will conduct a hearing and issue a report and recommendation. The Commission then issues an order either granting relief or dismissing the claim.

Remedies

Remedies may include requiring the respondent to hire, reinstate, or promote a complainant; to compensate the complainant for lost wages; to provide a reasonable accommodation for a complainant’s disability; to rent or sell a housing accommodation to a complainant; and/or compensate a complainant for emotional distress. In addition, the Commission has the power to order respondents to implement anti-discrimination policies or participate in training. Finally, the Commission may impose a civil penalty of up to \$100,000 if the Commission finds that the discrimination was the result of a willful or malicious act.

D. Where can I reach the City Commission on Human Rights?

40 Rector Street
 New York, NY 10006
 (212) 306-7500 Fax:(212) 306-7658
 NY Relay Services: English: (800) 421-1220 Spanish: (877) 622-4886
www.nyc.gov/cchr

Bronx

1932 Arthur Avenue,
Room 203A
Bronx, NY 10457
(718) 579-6900
Queens

136-56 39th Avenue,
3rd Floor
Flushing, NY 11354
(718) 886-6162
Brooklyn

275 Livingston
Street, 2nd Floor
Brooklyn, NY 11217
(718) 722-3130
Staten Island

60 Bay Street
Staten Island, NY
10301
(718) 390-8506

FOR MORE INFORMATION

If you have any questions about this guide, suggestions for improving it, or the names of other organizations that you would like to see included in future editions, please contact the Cancer Advocacy Project at:

City Bar Justice Center
Cancer Advocacy Project
42 West 44th Street, New York, NY 10036-6689
Phone: (212) 382-4785
Fax: (212) 221-5318
E-mail: cap@nycbar.org

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