

Disability Rights Montana Presents

DISABILITY DISCRIMINATION IN EMPLOYMENT:

**The A.D.A., M.H.R.A., Reasonable
Accommodations, and Other Employment Issues**



Disability Rights Montana

**Disability Rights Montana (DRM)
is the designated protection
and advocacy system for the
state of Montana**

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DRM Programs . . .

AT:	Assistive Technology
CAP:	Client Assistance Program
PABSS:	Beneficiaries of Social Security
PADD:	Individuals with Developmental Disabilities
PAIMI:	Individuals with Mental Illness
PAIR:	Individual Rights
PATBI:	Traumatic Brain Injury
PAVA:	Voting Access

Laws Regarding Disability Discrimination

In the Beginning...



In the Beginning...

3300 Years Ago

Leviticus 19:14:

- **Do not curse the deaf or place a stumbling block before the blind...**

... And More Recently

1973

The Rehabilitation Act

- Creates a right to receive vocational rehabilitation
- Prohibits discrimination by federal funding recipients

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... And More Recently

1990

The Americans With Disabilities Act (ADA)

- **Provides equal opportunity and access in employment, governmental services, public accommodations, and telecommunications.**

... And More Recently

1993

The Family and Medical Leave Act

- Allows time off from work to care for themselves or family members with serious health conditions.

Montana State Law

- **Montana Human Rights Act**
 - Prohibits discrimination in employment, public accommodations, housing, and education
- **Governmental Code of Fair Practices**
 - Prohibits discrimination by the government in employment, education, licensing and governmental services

Relationship Between State & Federal Employment Laws

- Employer must comply with both federal and state laws if applicable
- In general, Montana Human Rights Act employment provision parallels Title I of the ADA, but there are differences in its scope and remedies available

The Americans With Disabilities Act (ADA)

The ADA in the Real World



The Americans with Disabilities Act (ADA)

- **Title I- Employment**
- **Title II- State and Local Government Services / Public Transportation**
- **Title III- Public Accommodations and Commercial Facilities**
- **Title IV- Telecommunications**
- **Title V- Miscellaneous**

Goals of The ADA

- **Eliminate discrimination**
- **Ensure that people with disabilities experience:**
 - **Equality of opportunity**
 - **Full participation and integration**
 - **Independence**

...More Goals

- Remove barriers to access. Barriers can be attitudinal, architectural, communicative, or transportation in nature
- Provide clear, strong, enforceable standards
- Provide **FAIRNESS!**

Title I of the ADA

The ADA in the Workplace



Who is Protected ?

**An employee is protected by the ADA
if he or she is:**

- **A qualified individual with a disability**
- **Two separate components:**
 - (1) **qualified**
 - (2) **individual with a disability**

Who is “Qualified?”

An employee who:

- *Qualified to do the essential job functions with or without a reasonable accommodation*
- *Has the necessary skill, experience, education, and other job-related requirements for the position*

Who is an “Individual With a Disability?”

Three definitions:

- 1) An individual with physical or mental impairment that substantially limits one or more major life activities
 - Requires an individualized assessment - Disability is decided on a case by case basis

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Major Life Activities include:

- **Breathing, walking, lifting, working, speaking, hearing, seeing, eating, caring for oneself, interacting with others, sex, sleeping, sitting, concentrating, performing manual tasks, learning, standing, reading, ...**

Three Factors to Consider:

When evaluating whether an impairment substantially limits a major life activity, you must consider:

- Its nature and severity**
- How long it will last or is expected to last**
- Its permanent or long term impact, or expected impact**

Other Definitions . . .

- 2) An individual with a “record of” such an impairment
- 3) An individual who is “regarded as” having such an impairment is also covered

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Employers Covered by the ADA



- Employers with 15 or more employees
- All State and local government employers with at least one employee
- Human Rights Act is Broader: *In Montana, all employers are covered by the Montana Human Rights Act, regardless of size*

ADA Workplace Protections

Discrimination is prohibited in any facet of employment, including:

- Job application procedures
- Hiring / firing
- Compensation
- Advancement
- Training
- Or any terms, conditions, or privileges of employment

What is Discrimination?

- **Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities because of disability**
- **Participating in a contractual or other arrangement or relationship which subjects an employer's qualified applicant or employee with a disability to discrimination**

Discrimination . . .

- Denying employment opportunities to a qualified individual because he or she has a relationship or association with a person with a disability
- Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the business

Discrimination . . .

- **Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the business**

Discrimination . . .

- **Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure)**

Discrimination . . .

- **Retaliation: Discriminating against an individual because he or she has opposed an employment practice of the employer or filed a complaint, testified, assisted or participated in an investigation, proceeding, or hearing to enforce provisions of the Act**

Reasonable Accommodation

Any change or adjustment to a job or work environment that allows a person to:

- **Participate in the job application process**
- **Perform “Essential Functions” of the job**
 - **Fundamental Job Duties**
 - **An employer cannot refuse to hire someone because of inability to perform non-essential duties**
 - **Job descriptions may be used as evidence but are not necessarily determinative**
- **Enjoy benefits and privileges of employment**

Examples of Reasonable Accommodations

- Providing or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- Job reassignment
- Modifying exams, training, or policies
- Providing readers and interpreters
- Making the workplace accessible
- *Utilize the employee's ideas and the Job Accommodation Network*



Reasonable Accommodation Requirements

- Reasonable Accommodations must be provided unless there's an *undue hardship* or a *health and safety risk to the employee or to others*
- An *undue hardship* is defined as requiring significant difficulty or expense
- Employers must provide an *effective accommodation*, not necessarily the exact accommodation requested
- *Fundamental alterations* are not required

Why are Reasonable Accommodations Required?

- Purpose is to **reduce unnecessary barriers**. These barriers are just as discriminatory as overt exclusionary practices

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Reasonable Accommodation: Responsibility of Employees

The Employee must make the request for a reasonable accommodation

- The request need not be in writing but it is in everybody's interest to have the request written, dated, and signed
- The request should include:
 - Nature of the disability
 - Reason for request
 - Requested accommodation



The form is titled "Request for Reasonable Accommodation" and features the NMSD logo. It contains several sections for data entry:

1. REQUESTER'S NAME		2. REQUESTING REASONABLE REQUEST	
3. DATE OF REQUEST	4. REQUEST NUMBER	5. REQUESTER'S TELEPHONE NUMBER	
6. ACCOMMODATIONS REQUESTED (Do not specify location, e.g., another apartment, house, etc.)			
7. REASON FOR REQUEST			
8. IF ACCOMMODATION IS INDISSENTIBLE, PLEASE EXPLAIN			

NMSD FORM 100 (07/01)

Reasonable Accommodation: The Interactive Process

- *The Employee should make the request for a reasonable accommodation*
- **The Employee, their supervisor(s), and Human Resources should be involved in the *interactive process***
- **Employers must provide an *effective accommodation*, not necessarily the exact accommodation requested by the employee**
- **The JAN Website is a useful Resource**

Disability Disclosure

- The following question is permissible on a job application or at an interview:
 - **Are you able to do the essential functions of the job with or without a reasonable accommodation?**
- Further questioning may elicit improper information concerning a disability.
- An employee or applicant is not obligated to mention that they have a disability until they request a reasonable accommodation.

Medical Examinations and Disability Inquiries

Four basic rules . . .

- 1) Employers may not ask job applicants about the existence, nature or severity of a disability.
- 2) Applicants may be asked about their ability to perform specific job functions.

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... Four basic rules

- 3) 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 similar jobs.**
- 4) Medical examinations of employees must be job related and consistent with the employer's business needs.**

Medical Examinations and Disability Inquiries

Three Stages

- Pre-job offer
- Post-job offer
- During employment

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Stage One – disability inquiries

Pre-Job Offer:

- An employer may not ask any disability-related questions, even if they are related to the job.
- An employer may not require any medical examinations

Illegal pre-offer interview questions

- If hired, are there any obligations which would prevent you from reporting each day on time to perform your job duties?

..... Yes No

- If yes, what are they?

Illegal pre-offer interview questions

- *After reviewing a list of the essential functions of the job or jobs for which you wish to be considered, is there any reason you cannot perform these job duties?*
- *If your answer is yes, please explain why you are unable to do these tasks and describe anything we might do to make it possible for you to perform these job duties.*

Illegal pre-offer interview questions

- *Are you able to perform the essential functions of the position for which you are applying either with or without reasonable accommodations? YES NO*
- *If necessary, please describe what types of reasonable accommodations are needed*

Illegal pre-offer interview questions

- Do you have any physical limitations that would prevent you from successfully performing any position at Kay-Bee?

YES NO

- If yes, please explain. . .

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Stage One – disability inquiries

Pre-Job Offer:

- **Basic Rule: the ADA prohibits inquiries likely to elicit information about a disability. (e.g., workers' compensation history; prior sick leave usage, illnesses, diseases, impairments, general physical and mental health)**

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Stage One – disability inquiries

Pre-Job Offer:

**NO DISABILITY
INQUIRIES OR
MEDICAL
EXAMINATIONS
ALLOWED**

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Stage Two - disability inquiries **Post-Job offer**

- **This stage is after a conditional job offer has been given but before s/he starts work. At this stage, an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. 42 U.S.C. §12112(d)(3).**

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Stage Two - disability inquiries

Post-Job offer

- **An employer may ask questions that were prohibited at the pre-offer stage (e.g., workers' compensation history; prior sick leave usage, illnesses/diseases/impairments, general physical and mental health).**

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Stage Two – disability inquiries **Post-Job offer**

- **An employer cannot reject an applicant because of information about his/her disability revealed by the medical examination . . . unless, the reasons for rejection are job-related and necessary for the conduct of the employer's business.**

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Stage Two – disability inquiries

Post-Job offer

- “Job-related and consistent with business necessity” means when employer has reasonable belief, based on objective evidence, that:
- An employee’s ability to perform essential job functions will be impaired by a medical condition; or
- An employee will pose a direct threat.

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Stage Two – disability inquiries **Post-Job offer**

An employer cannot refuse to hire an applicant because of his/her disability IF he/she can perform the essential functions of the job with an accommodation.

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Stage Three – disability inquiries **During Employment**

- **An employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).**

Confidentiality

- All information about disability and reasonable accommodations
- Information can be available to supervisors
- Separate medical and personnel files



Harassment

- Based on disability (often due to jealousy over accommodations that are provided)
- Pervasive or severe and affecting a term, condition, or privilege of employment
- Employer knew or should have known, and failed to take remedial action



Retaliation

- **It is unlawful to discriminate against any individual because that individual has opposed a discriminatory act or practice or has filed a discrimination complaint or participated in a discrimination investigation or proceeding**

Retaliation – Six Month rule

- **Under Montana law, any adverse action against employee within six months of discrimination proceedings is presumed to be discriminatory. Burden is on employer to rebut presumption**
- **After six months, burden is on the employee to prove causation**

Retaliation –

What Employees are covered?

- **Unlike other discrimination claims, you do not need to have a disability to make a retaliation claim. E.g., retaliation against employee for being a witness in another employee's case.**
- **It does not matter whether your underlying claim has merit, still can have a retaliation claim**

Enforcement

- **For employment claims under the ADA or MHRA, employee cannot go straight to court, must go to Human Rights Bureau/EEOC**
- **Human Rights Bureau conducts investigation, then issues either a right-to-sue letter or cause finding**

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Remedies

- **Non-monetary remedies such as: hiring, reinstatement, reasonable accommodation**
- **Damages such as back pay, front pay**
- **Compensatory damages for monetary losses/emotional distress. ADA has caps on damages depending on employers size**

Remedies (Cont.)

- **Affirmative relief: EEO training, Adopt anti-discrimination policies, Notice to employees, etc.**
- **Punitive damages: Not available under MHRA, but permissible under ADA except against state or local government**
- **Don't forget about Attorney Fees**

Employment Statistics

"Get your facts first, and then you can distort them as much as you please."

Mark Twain

"There are white lies, damn lies, and statistics."

Will Rogers

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Reasonable Accommodation Costs vs. Benefits

Reasonable Accommodation Costs

- 20% cost nothing
- Over 70% cost \$ 500 or less
- Median Cost: \$ 250



Reasonable Accommodation Benefits

- Hiring/Retaining a qualified employee
- Saved insurance and training costs
- Increased Productivity



Benefit to the Company: \$ 35 for each \$1 spent

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Resources

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1-800-245-4743

- **Job Accommodation Network**

www.jan.wvu.edu

- **Equal Employment Opportunity Commission**

www.eeoc.gov

- **Social Security Administration**

www.ssa.gov



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More Resources

- **U.S. Department of Justice ADA Home Page**
www.usdoj.gov/crt/adahom1.htm
- **ADA Disability and Business Tech. Asst. Ctr.**
www.adata.org/dbtac.html
- **Industrial Labor Relation Program on
Employment and Disability**
www.ilr.cornell.edu/ped



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THE END

