

EMPLOYMENT

CHAPTER 4

Problems concerning employment have continually frustrated individuals with disabilities. This chapter addresses state and federal laws that prohibit employment discrimination against individuals with disabilities. Also discussed are laws that allow special wage considerations for certain persons with mental or physical disabilities.

THE AMERICANS WITH DISABILITIES ACT OF 1990

Beginning in 1992, for employers with 25 or more employees and two years later for employers with as few as 15 employees, the Americans with Disabilities Act (ADA) made it unlawful to discriminate on the basis of disability in application procedures, hiring, advancement or discharge, and in the terms, conditions and privileges of employment. The employment provisions of the ADA protect “qualified” individuals with disabilities. Qualified individuals with disabilities are defined as persons who, with or without reasonable accommodation, can perform the essential functions of the job that such individual holds or desires. Employers are obligated to make reasonable accommodations, which may include such things as making facilities accessible, job restructuring, modifying schedules, acquiring or modifying equipment, or providing readers or interpreters, provided such accommodations do not impose undue hardship on the operation for the employer.

Persons who believe their rights to equal employment opportunities under the ADA have been violated must file a complaint with the United States Equal Employment Opportunity Commission within:

1. 180 days of the date of the alleged discrimination,
2. 300 days if the charge is filed with a designated state or local fair employment practice agency, or
3. Contact that agency for additional guidance.

Individuals may also wish to consult with a private attorney or an advocacy or legal services organization for more information regarding their rights and enforcement of the ADA. See Chapter 15 for a listing of organizations providing legal and advocacy assistance.

The ADA holds all federal agencies responsible for the enforcement of the Act and the enforcement of other federal laws prohibiting employment discrimination based on disability (such as the Rehabilitation Act of 1973) to coordinate their efforts, to avoid duplication and inconsistencies.

SECTION 504, REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973 is a part of the federal civil rights law which protects the rights of individuals with disabilities, including the right not to be discriminated against in any area of employment. 29 USC § 794.

Under federal law, a qualified person with a disability is defined as any person who:

1. Has a physical or mental impairment which substantially limits one or more major life activities (e.g., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working);
2. Has a record of such impairment, or;
3. Is regarded as having such an impairment; and
4. Is able, with reasonable accommodations, to perform the essential functions of the job.

Programs and Organizations Covered

Every public or private agency, institution, organization or other entity, which receives federal financial assistance (directly or indirectly), as well as every federal, state and political subdivision, is prohibited under federal law from discriminating against persons with disabilities. Federal financial assistance includes grants, contracts, etc. The Office for Civil Rights has jurisdiction over those facilities that receive federal financial assistance from the Department of Health and Human Services.

Discriminatory Employment Practices

Persons with disabilities may not be limited, segregated or classified in any manner which would adversely affect their future job opportunities or present job status.

A list of employment activities in which discrimination is prohibited includes:

- Recruitment;
- Hiring, promotion, award of tenure, transfer, right of return from layoff;
- Rates of pay or any other form of compensation;
- Job assignments and classifications;
- Seniority lists;
- Leaves of absence and sick leave;
- Fringe benefits;
- Selection and financial support for training;
- Employment sponsored programs including social and recreational activities; and
- Any other term, condition, or privilege of employment.

The law has recognized that in some situations a job function will not be suited to the limitations of a person with a disability. However, a qualified individual may not be denied employment simply

because the employer is unwilling to make reasonable accommodations for the individual's disability. Reasonable accommodations to meet the needs of the individual might include making the facility accessible, changing work schedules, modifying equipment or providing interpreters. The requirement does not apply to employers who would suffer undue hardship because of the size or type of their operation or because of the nature or cost of the proposed accommodations.

No employer covered under Section 504 may use tests or other screening devices that screen out persons with disabilities unless the tests can be shown to be job related and other less discriminatory tests are not available. Pre-employment inquiries can only be made to determine an applicant's ability to perform job-related functions.

Complaint Procedure

Any person who believes that he has been discriminated against by a recipient of federal financial assistance in violation of this federal law may file a lawsuit in state or federal court or file a written complaint with the Office of Civil Rights of the federal agency that provides the financial assistance within 180 days of the violation. This should contain the complainant's name, address, and telephone number, as well as a description of the violation. This letter should also contain a statement of the person's disability.

The Office of Civil Rights also provides an automated complaint form online. The web address for the form is: <http://bcol01.ed.gov/CFAPPS/OCR/complaintform.cfm>.

The Office for Civil Rights will conduct a formal investigation and will notify the complainant, in writing, if it concludes that no discrimination has occurred. If the investigation indicates that a violation of Section 504 has occurred, the Office will attempt to resolve the matter through informal means. If this does not remedy the discrimination, the Office for Civil Rights has the power to:

1. Initiate administrative proceedings to terminate Department of Education financial funding to the recipient;
2. Refer the case to the Department of Justice; or
3. Refer it to the appropriate state authorities for enforcement.

At no time may an employer retaliate against any individual for having filed a complaint or participated in an investigation of employment discrimination.

SECTIONS 501 AND 503, REHABILITATION ACT OF 1973

Section 501 applies to employees of federal agencies, and Section 503 covers employees of federal contractors and subcontractors. Under Section 501 and 503, the definition of an individual with a disability and the requirement to accommodate the disability are virtually the same as in Section 504. However, Sections 501 and 503 go a step further and obligate employers to develop "affirmative action" programs to employ persons with disabilities, including appropriate recruiting activities.

Complaint Procedure

A complaint against a federal employer must be made to the employing agency. After exhaustion of remedies within the agency, complainant may then file a lawsuit in federal court. A Section 503 complaint must be filed with the:

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

MISSOURI LAW**Discrimination**

Missouri law states that is unlawful to discriminate against an individual who has a physical or mental impairment if this disability is unrelated to the person's ability to perform the duties of a particular job or position for which he would otherwise be eligible. This applies to promotions as well as employment opportunities.

Employers who must comply with this statute include:

1. All state agencies and organizations;
2. All political and civil subdivisions;
3. Any person employing six or more persons within the state; and
4. Any person acting on behalf of an employer.

This does not include corporations and associations owned and operated by religious or sectarian groups. In addition, the law prohibits labor organizations and employment agencies from discriminating in their hiring or referral practices. It is unlawful in Missouri for a(n):

1. Employer to fail to hire, refuse to hire, or to discharge any individual because of the individual's disability;
2. Employer to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment solely because of the individual's disability;
3. Employer to limit, segregate or classify his employees in a way that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of his disability;
4. Labor organization to exclude or to expel an individual from its membership list because of the disability of such individual;
5. Labor organization to classify its membership or fail or refuse to refer for employment any individual in any way that would deprive or tend to deprive any person with disabilities of employment opportunities or otherwise affect his status as an employee or applicant for employment;

6. Employer, labor organization, job training program or apprenticeship program to discriminate against any person with disabilities who is otherwise able and qualified to do the job; or
7. Employer or employment agency to use any form of application for employment or to make any inquiry in connection with the prospective employment that expresses, directly or indirectly, any limitation, specification, or discrimination because of a disability, unless the inquiry is based upon a legitimate occupational qualification. It is also an unlawful practice for an employment agency to fail or refuse to refer for employment or otherwise discriminate against any individual because of a disability.

When applying for a job, an individual does not have to answer any general questions such as, "Do you have a disability?" or "Have you had any nervous disorders?" If such questions are asked, the applicant should keep written documentation of the incident. An applicant may refuse to answer such questions or state that he does not believe that his disability will affect his performance on the job. An applicant must answer questions about his ability to do the job. Such a question might be, "Do you have any physical conditions which would impair your ability to do this job?" Once a job is secured, the employer can ask about an employee's disability to make any adjustments that are necessary in case of a medical emergency. The employee may request that this information be kept confidential.

It is unlawful for any employer, employment agency, or labor organization to discharge or otherwise discriminate against any individual who has opposed practices forbidden under this law or because he has filed a complaint, testified, or assisted in any proceedings under the Missouri Equal Opportunity Employment Law.

Complaint Procedure

Persons who believe that they have been discriminated against because of a disability should file a Charge of Discrimination and Initial Complaint Interview Form with the Missouri Commission on Human Rights (MCHR), P.O. Box 1129, Jefferson City, Missouri 65102-1129. These forms are available at www.dolir.mo.gov/hr/forms.htm. For assistance in filing charges of discrimination, contact MCHR at:

- (877) 781-4236 voice
- (800) 735-2466 Relay
- (800) 735-2966 TDD
- Visit <http://www.dolir.state.mo.us/hr/index.htm>

Complaints must be "filed" within 180 days of the latest date of discrimination and must be signed. Once a complaint is filed, the MCHR staff will conduct a fact-finding investigation. Thereafter, the Executive Director makes a determination whether there is "probable cause" to believe a violation of the Missouri Human Rights Act has occurred. If there is no probable cause found, meaning the MCHR cannot connect what happened to the person's protected status, the complaint is dismissed and the complainant is notified of his/her right to appeal the decision to circuit court. If the case is found to be probable cause, the complainant and respondent will be asked to consider a formal settlement. If settlement fails, the case may be resolved at a public hearing. However,

not all cases that fail settlement will automatically go to a public hearing. The public hearing determines whether discrimination occurred. Three members of the eleven-member commission serve as a hearing panel and make this decision.

WAGE LAWS

Fair Labor Standards Act

This federal law was enacted in 1936 and initiated the minimum wage and the 40-hour workweek. After a period of time, it became apparent that under some circumstances the provisions of this law worked to exclude individuals with disabilities from employment opportunities. So, in 1966 an amendment was added to allow individuals with disabilities the right to be issued a special certificate and be paid a special minimum wage (SMW). This certificate allows a person with a disability to be employed at a rate below the minimum wage “in order to prevent curtailment of employment opportunities for” individuals with disabilities.

A worker who has disabilities for the job being performed is one whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury. According to the Department of Labor, disabilities that may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction. However, this rule only applies if the disability actually impairs the worker's earning or productive capacity for the work being performed. The fact that a worker may have a disability is not in and of itself sufficient to warrant the payment of a special minimum wage.

Applying for Certification

Employers must obtain an authorizing certificate from the Wage and Hour Division before paying special minimum wages. In order to receive a certificate, employers shall submit a properly completed application to United States Department of Labor, Employment Standards Administration, Wage and Hour Division, 230 South Dearborn Street, Room 524, Chicago, Illinois, 60604-1591; (312) 353-7246 which includes a(n):

- Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226). Using this form, the applicant reports information regarding the work that will be performed, the prevailing wage surveys conducted by the employer, and the productivity evaluations conducted to establish the commensurate pay rates the firm pays the workers with disabilities. If workers with disabilities will be paid a SMW for work subject to the McNamara-O'Hara Service Contract Act (SCA), data must also be provided regarding such contract work. This form is available on the Internet at <http://www.dol.gov/esa/forms/whd/wh226.pdf>.
- Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (Form WH-226A). This form requires the applicant to list the names of the individuals that will be paid SMWs, identify the

disabilities that impair their productivity, and report their average earnings. A separate WH-226A must be submitted for each branch establishment (physically separate location) at which employees with disabilities will receive SMWs.

If a special minimum wage certificate is issued, a copy shall be sent to the employer. If denied, the employer will be notified in writing and told the reasons for the denial, as well as the right to petition under Section 525.18. Any person aggrieved by any action of the Administrator of the Wage and Hour Division having to do with the issuance of certificates under Section 14(c) of the FLSA may file with the Administrator, within 60 days of the action, a petition for review. Such review, if granted, shall be made by the Administrator. Other interested parties, to the extent it is deemed appropriate, may be afforded an opportunity to present data and views.

Types of Certificates

There are four types of certificates that can be issued. They include: work centers, hospitals/residential care facilities, business establishments, and school work exploration programs (SWEP).

- **Work Centers** are also referred to as *sheltered workshops* and have historically provided rehabilitation services, day treatment, training, and employment opportunities. Work centers need to submit only one application, but must include a separate supplemental sheet (WH-226A) for each physically separate branch location where workers with disabilities are employed at SMWs.
- **Hospitals/residential care facilities** that employ patient workers may be issued certificates authorizing the payment of SMWs. These certificates remain in effect for two years. If the facility also operates a work center, however, it must apply for a separate certificate for the work center. If the hospital or residential care facility places patients in jobs at business establishments in the community, it must either obtain a work center certificate or ensure that the business establishment has its own certificate if those workers are to receive SMWs.
- A **business establishment** (not a work center or a hospital/residential care facility) that chooses to employ workers with disabilities as SMWs must also obtain a certificate from the Department of Labor. If the employer has multiple establishments, a certificate must be obtained for each establishment in which workers with disabilities will be employed at SMWs. Business establishment certificates expire annually. But if an individual with a disability is placed at a business by a work center, supervised by work center staff, and carried on the work center's payroll, the business establishment need not obtain a certificate - the authorization to pay a SMW to the worker will stem from the certificate held by the work center. Such placements are sometimes called "supported employment" or "an enclave" worksite.
- **School Work Exploration Programs (SWEP)** place students with disabilities who receive SMWs at work sites in the community. Certificates for this program are issued to the school administering the program and expire annually.

Certificates covering employees of work centers and patient workers normally remain in effect for two years. However, certificates covering workers with disabilities placed in competitive employment situations or School Work Exploration Programs (SWEPs) are issued annually.

Wage Rates

The wage rate set in the special certificate must be based on the wages paid to a non-disabled worker (commensurate wage) in the same industry and region for essentially the same type of employment. The key elements in computing commensurate rates are the:

- Standard for workers who do not have disabilities: the objective gauge against which the productivity of the worker with a disability is measured;
- Prevailing wage: the wage paid to experienced workers who do not have disabilities for the same or similar work and who are performing such work in the area. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for work on the SCA contract; and
- Quantity and quality of the productivity of the worker with the disability.

All special minimum wages must be reviewed and adjusted, if appropriate, at periodic intervals. At a minimum, the productivity of hourly paid workers must be reevaluated every six months and a new prevailing wage survey must be conducted at least every twelve months.

Enforcement

The Wage and Hour Division is responsible for the administration and enforcement of the FLSA. In addition, any worker with a disability paid at special minimum wages, or his/her parent or guardian, may petition the Administrator of the Wage and Hour Division for a review of their special wage rates by a Department of Labor Administrative Law Judge.

Worker Notification

Each worker with a disability and, where appropriate, the parent or guardian of such worker, shall be informed orally and in writing by the employer of the terms of the certificate under which such worker is employed. In addition, employers must display the Wage and Hour Division poster, *Notice to Workers with Disabilities Paid at Special Minimum Wages* (WH Publication 1284), available on the Internet at: <http://www.dol.gov/esa/regs/compliance/posters/disab.htm>.

CONCLUSION

For Fact Sheets and additional information about wages, certificates, and laws, visit <http://www.dol.gov/esa/sec14c/index.htm> or call your local Wage and Hour Division Office, (312) 596-7200 and/or call our Wage-Hour toll-free information and helpline, available 8am to 5pm in your time zone, 1-866-4USWAGE (1-866-487-9243).