FIRST MY ILLNESS
NOW
JOB DISCRIMINATION

STEPS TO RESOLUTION

Patient Advocate Foundation

Solving Insurance and Healthcare Access Problems | since 1995

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NOW
JOB DISCRIMINATION

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Patient Advocate Foundation

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Acknowledgments

This guide was written with the belief that the more information you have, the better educated you will be in making informed decisions on your own behalf. Resources are powerful tools when utilized. We sincerely hope that this guide will offer you the tools that you need to answer your questions.

First My Illness... Now Job Discrimination was inspired by patients and family members who work diligently at fighting a disease and for the right to treatment. The Patient Advocate Foundation would like to thank the doctors, nurses, and other professionals who assist patients and their families in these battles everyday. We would especially like to thank patients and professionals who were willing to discuss their needs and concerns which brought about the idea for this brochure.

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Patient Advocate Foundation

Patient Advocate Foundation is a national non-profit organization that serves as an active liaison between the patient and their insurer, employer and/or creditors to resolve insurance, job discrimination, and/or debt crisis matters relative to their diagnosis through case managers and attorneys. Patient Advocate Foundation seeks to safeguard patients through effective mediation assuring access to care, maintenance of employment and preservation of their financial stability.

Patient Advocate Foundation offers direct patient services through our toll-free number, website and can be contacted via E-mail:

National Toll-Free Number: 1-800-532-5274 or 757-873-6668

E-mail: info@patientadvocate.org

Web page: www.patientadvocate.org

First My Illness, Now Job Discrimination: Steps to Resolution

After being diagnosed with any illness, especially a serious or terminal one, other areas of your life are unfortunately affected as well. When your health does affect your employment, the last thing you expect is to be confronted with harassment or the threat of losing your job, income and health benefits. The following pages are designed to empower you to fully understand what your rights are, to assist you with direction in filing a claim of discrimination and to help you deal with job discrimination.

Steps to follow-

When preparing to file a claim, your state **Human Relations Committee** (see FEPA's below) or the **Equal Employment Opportunity Commission** (EEOC) is normally the first step unless the claim has to do with long-term disability benefits under ERISA or under a private policy, there is no such requirement. Instead, there is generally an administrative appeal process to the insurance carrier and/or Plan Administrator. If the administrative appeal fails, federal court litigation is the very next (and only remaining) step.

You must be patient-

The required forms are always mailed unless you go to your local office to pick them up and file. Understand that you must fill out all forms required. Some offices may require that you report to them in person, while others may have you fill out a questionnaire outlining the discriminatory charges. Document all sources such as treating physicians, job supervisors and/or plan administrators. The same applies to witnesses (examples could include family and friends, co-workers, supervisors, doctors,ect). Document all contacts with your employer and all inquiries made on your behalf regarding the case. The EEOC will suggest mediation with the employer first but you may waive that option. An attorney can get involved in the mediation process, although this is not mandatory. If your case can not be resolved to your satisfaction by mediation, your final recourse could be to hire an attorney to pursue litigation, in which case you will need to be patient, since it may take a year or more to reach a judgement or other conclusion. There are many factors that decide whether or not your case is processed quickly. Location is key. Of course the larger the city the more complaints there are. Gathering evidence, filing paperwork and follow up interviews with all witnesses are the other factors. The busier the EEOC office the longer the wait for the investigation.

If your state does not have an EEOC office-

Your state may have regulations and anti-discrimination laws or acts that mirror federal mandates that may prove valuable to you as well. The agency that enforces equal opportunity may have

a different name in your state because many states have anti-discrimination laws and agencies responsible for enforcing those laws. The EEOC refers to these agencies as **"Fair Employment Practices Agencies** (FEPAs)." Through the use of "work sharing agreements," the EEOC and the FEPAs avoid duplicating cases while at the same time ensuring that your rights are protected under both federal and state law. If a charge is filed with an FEPA and is also covered by federal law, the FEPA "dual files" the charge with EEOC to protect federal rights. The charge usually will stay with the FEPA for handling. If a charge is filed with the EEOC and also is covered by state or local law, the EEOC "dual files" the charge with the state or local FEPA, but normally retains the charge.

When you can file-

Employee must file with the state FEPAs within **180** days of the last act of discrimination. It is possible to extend the **180** days to **300** days in states that have FEPA agencies; however, good practice is to file the claim within **180** days. You may file a lawsuit against your employer within **90** days after receiving a notice of a "right to sue" from the EEOC. Under Title VII of the **Americans with Disabilities Act of 1990** (ADA), you can request a notice of **"right to sue"** from EEOC **180** days after the charge is first filed with the Commission. You may then bring suit within **90** days after receiving this notice. Under **the Age Discrimination Employment Agency** (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. This 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law covers the charge. For ADEA charges, only state laws extend the filing limit to 300 days. Legally, you **must** utilize the EEOC before any attempt to file a private suit against an employer. The EEOC prerequisites apply to many claims, including ADA and ADEA; however they are not required if you are making a claim for disability benefits under a long-term disability policy issued by or on behalf of your employer.

The Patient Advocate Foundation suggests that any individual who feels they are the victims of discrimination or potential discrimination should document particular instances at or near the time that such occurrences are taking place. The type of evidence, i.e., a journal note that the supervisor told me on "x" date "that my medical condition was a liability to the company," is often invaluable in later litigation.

The majority of patients, who face job discrimination due to a critical illness diagnosis, usually have problems in the following areas. The following are categories of possible discrimination and questions you should ask yourself in each category.

- **Job discrimination resulting in loss of employment.** If the loss of employment was due to excessive absence from work because of illness, your best advantage would

be the FMLA and or ADA. Did I utilize the benefits and was I made aware of them?

- **Age discrimination.**
  If facing discrimination by age check with Age Discrimination Employment Agency (ADEA) in regards to the Age Discrimination in Employment Act of 1967. Are you 40 years of age or older?

- **Layoff and downsizing affects.**
  Is the entire company, my department as a whole or those in similar positions experiencing a decrease in work hours? Is business slower right now? Will the decrease in hours affect my eligibility for Health Insurance? These are questions to ask before you consider filing a formal complaint to make sure that you are not filing a claim that may be dismissed.

- **Job discrimination resulting in decrease of wages.**
  In this event please seek the assistance of the EEOC. The Equal Pay Act of 1964 does call for equal pay for performing the same job, handicapped, disabled etc.

- **Job discrimination resulting in change of job description.** Are you performing the same job for a loss of wages and change of title? Can you still perform the job you have and have been given no specific reason for a demotion?

- **Job discrimination involving harassment.**
  Has your privacy been violated with other employees knowing your medical history? (The ADA specifically prohibits the disclosure of medical information except in limited situations, which do not include disclosure to coworkers). Are co-workers harassing you verbally or physically? (If physically or violently a charge should be filed with the police). Are you being singled out and harassed because you need to request specific dates off weekly for treatment? Please refer to the ADA and FMLA and contact your local EEOC or FEPA.

- **Job discrimination involving denial of disability benefits.** Do you have a copy of your benefits handbook that shows the policy and eligibility for all employees? Do you fit the requirements for this policy? You should check with your human resources department or employee benefits division. An administrative review may be required under the Plan policy; if the review yields unfavorable results, then the next step (after satisfying the appeals) is to file suit in a federal court.

Here are numbers you can use to contact the EEOC. Please bear in mind that offices do move and change numbers. If any of these numbers have changed you may contact the National Headquarters of the EEOC or local information for the office nearest you.

HEADQUARTERS

U.S. Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507
Phone: (202) 663-4900
TDD: (202) 663-4494

FIELD OFFICES

To be automatically connected with the nearest EEOC field office, call:
Phone: 1-800-669-4000
TDD: 1-800-669-6820.

Albuquerque District Office
505 Marquette Street, N.W.
Suite 900
Albuquerque, NM 87102
Phone: 505-248-5201
TDD: 505-248-5240

Atlanta District Office
100 Alabama Street
Suite 4R30
Atlanta, GA 30303
Phone: 404-562-6800
TDD: 404-562-6801

Baltimore District Office
City Crescent Building
10 South Howard Street
3rd Floor
Baltimore, MD 21201
Phone: 410-962-3932
TDD: 410-962-6065

Birmingham District Office
1900 3rd Avenue, North
Suite 101
Birmingham, AL 35203-2397
Phone: 205-731-1359
TDD: 205-731-0095

Boston Area Office
1 Congress Street
10th Floor, Room 1001
Boston, MA 02114
Phone: 617-565-3200
TDD: 617-565-3204

Buffalo Local Office
6 Fountain Plaza
Suite 350
Buffalo, NY 14202
Phone: 716-846-4441
TDD: 716-846-5923

Charlotte District Office
129 West Trade Street
Suite 400
Charlotte, NC 28202
Phone: 704-344-6682
TDD: 704-344-6684

Chicago District Office
500 West Madison Street
Suite 2800
Chicago, IL 60661
Phone: 312-353-2713
TDD: 312-353-2421

Cincinnati Area Office
525 Vine Street
Suite 810
Cincinnati, OH 45202-3122
Phone: 513-684-2851
TDD: 513-684-2074

Cleveland District Office
1660 West Second Street
Suite 850
Cleveland, OH 44113-1454
Phone: 216-522-2001
TDD: 216-522-8441

Dallas District Office
207 S. Houston Street
3rd Floor
Dallas, TX 75202-4726
Phone: 214-655-3355
TDD: 214-655-3363

Denver District Office
303 E. 17th Avenue
Suite 510
Denver, CO 80203
Phone: 303-866-1300
TDD: 303-866-1950

Detroit District Office
477 Michigan Avenue
Room 865
Detroit, MI 48226-9704
Phone: 313-226-7636
TDD: 313-226-7599

El Paso Area Office
The Commons, Building C
Suite 100
4171 N. Mesa Street
El Paso, TX 79902
Phone: 915-534-6550
TDD: 915-534-6545

Fresno Local Office
1265 West Shaw Avenue
Suite 103
Fresno, CA 93711
Phone: 209-487-5793
TDD: 209-487-5837

Greensboro Local Office
801 Summit Avenue
Greensboro, NC 27405-7813
Phone: 910-333-5174
TDD: 910-333-5542

Greenville Local Office
Wachovia Building, Suite 530
15 South Main Street
Greenville, SC 29601
Phone: 803-241-4400
TDD: 803-241-4403

Honolulu Local Office
300 Ala Moana Boulevard
Room 7123-A
P.O. Box 50082
Honolulu, HI 96850-0051
Phone: 808-541-3120
TDD: 808-541-3131

Houston District Office
1919 Smith Street, 7th Floor
Houston, TX 77002
Phone: 713-209-3320
TDD: 713-209-3367

Indianapolis District Office
101 W. Ohio Street
Suite 1900
Indianapolis, IN 46204-4203
Phone: 317-226-7212
TDD: 317-226-5162

Jackson Area Office
207 West Amite Street
Jackson, MS 39201
Phone: 601-965-4537
TDD: 601-965-4915

Kansas City Area Office
400 State Avenue
Suite 905
Kansas City, KS 66101
Phone: 913-551-5655
TDD: 913-551-5657

Little Rock Area Office
425 West Capitol Avenue
Suite 625
Little Rock, AR 72201
Phone: 501-324-5060
TDD: 501-324-5481

Los Angeles District Office
255 E. Temple
4th Floor
Los Angeles, CA 90012
Phone: 213-894-1000
TDD: 213-894-1121

Louisville Area Office
600 Dr. Martin Luther King Jr. Place
Suite 268
Louisville, KY 40202
Phone: 502-582-6082
TDD: 502-582-6285

Memphis District Office
1407 Union Avenue
Suite 521
Memphis, TN 38104
Phone: 901-544-0115
TDD: 901-544-0112

Miami District Office
One Biscayne Tower
2 South Biscayne Boulevard
Suite 2700
Miami, FL 33131
Phone: 305-536-4491
TDD: 305-536-5721

Milwaukee District Office
310 West Wisconsin Avenue
Suite 800
Milwaukee, WI 53203-2292
Phone: 414-297-1111
TDD: 414-297-1115

Minneapolis Area Office
330 South Second Avenue
Suite 430
Minneapolis, MN 55401-2224
Phone: 612-335-4040
TDD: 612-335-4045

Nashville Area Office
50 Vantage Way
Suite 202
Nashville, TN 37228
Phone: 615-736-5820
TDD: 615-736-5870

Newark Area Office
1 Newark Center, 21st Floor
Newark, NJ 07102-5233
Phone: 201-645-6383
TDD: 201-645-3004

New Orleans District Office
701 Loyola Avenue
Suite 600
New Orleans, LA 70113-9936
Phone: 504-589-2329
TDD: 504-589-2958

New York District Office
7 World Trade Center
18th Floor
New York, NY 10048-0948
Phone: 212-748-8500
TDD: 212-748-8399

Norfolk Area Office
World Trade Center
101 West Main Street
Suite 4300
Norfolk, VA 23510
Phone: 757-441-3470
TDD: 757-441-3578

Oakland Local Office
1301 Clay Street
Suite 1170-N
Oakland, CA 94612-5217
Phone: 510-637-3230
TDD: 510-637-3234

Oklahoma Area Office
210 Park Avenue
Oklahoma City, OK 73102
Phone: 405-231-4911
TDD: 405-231-5745

Philadelphia District Office
21 South 5th Street
4th Floor
Philadephia, PA 19106
Phone: 215-451-5800
TDD: 215-451-5814

Phoenix District Office
3300 N. Central Avenue
Phoenix, AZ 85012-1848
Phone: 602-640-5000
TDD: 602-640-5072

Pittsburgh Area Office
1001 Liberty Avenue
Suite 300
Pittsburgh, PA 15222-4187
Phone: 412-644-3444
TDD: 412-644-2720

Raleigh Area Office
1309 Annapolis Drive
Raleigh, NC 27608-2129
Phone: 919-856-4064
TDD: 919-856-4296

Richmond Area Office
3600 West Broad Street
Room 229
Richmond, VA 23230
Phone: 804-278-4651
TDD: 804-278-4654

San Antonio District Office
5410 Fredericksburg Road
Suite 200
San Antonio, TX 78229-3555
Phone: 210-229-4810
TDD: 210-229-4858

San Diego Area Office
401 B Street
Suite 1550
San Diego, CA 92101
Phone: 619-557-7235
TDD: 619-557-7232

San Francisco District Office
901 Market Street
Suite 500
San Francisco, CA 94103
Phone: 415-356-5100
TDD: 415-356-5098

San Jose Local Office
96 North 3rd Street
Suite 200
San Jose, CA 95112
Phone: 408-291-7352
TDD: 408-291-7374

Savannah Local Office
410 Mall Boulevard
Suite G
Savannah, GA 31406-4821
Phone: 912-652-4234
TDD: 912-652-4439

Seattle District Office
Federal Office Building
909 First Avenue, Suite 400
Seattle, WA 98104-1061
Phone: 206-220-6883
TDD: 206-220-6882

St. Louis District Office
Robert A. Young Building
122 Spruce Street
Room 8.100
St. Louis, MO 63103
Phone: 314-539-7800
TDD: 314-539-7803

Tampa Area Office
501 East Polk Street
10th Floor
Tampa, FL 33602
Phone: 813-228-2310
TDD: 813-228-2003

Washington Field Office
1400 L Street, N.W. Suite 200
Washington, D.C. 20005
Phone: 202-275-7377
TDD: 202-275-7518

Listed next you will find a listing of Fair Employment Practices Agencies (FEPA's). Please bear in mind that offices do move and change numbers. If any of these numbers have changed you may contact the National Headquarters of the EEOC or local information for the office nearest you.

HEADQUARTERS
U.S. Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507
Phone: (202) 663-4900
TDD: (202) 663-4494

Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669
Phone: 907-276-7474
Fax: 907-278-8588

Albuquerqe District Office
505 Marquett, N.W. Suite 900
Albuquerque, NW 87102
Phone: 505-248-5201
Fax: 505-248-5233

Alexandria Office of Human Rights
110 North Royal Street
Suite 201
Alexandria, VA 22314
Phone: 703-838-6390
Fax: 703-838-4976

Anchorage Equal Rights Commission
620 East 10th Avenue
Suite 204
Anchorage, AK 99501
Phone: 907-343-4342
Fax: 907-276-4630

Arizona Office of the Attorney General Civil Rights Division
400 W. Congress – Suite 215
Tusau, AZ 95701
Phone: 520-628-6500
Fax: 520-628-6265

Arlington County Human Rights Commission
1 Courthouse Plaza
Suite 106
2100 Clarendon Blvd.
Arlington, VA 22201
Phone: 703-358-3929
Fax: 703-358-4390

Augusta-Richmond County Human Relations
360 Bay Street, Suite 240
Augusta, GA 30901
Phone: 706-821-2506
Fax: 706-821-2501

Austin Human Rights Commission Compliance Division
P.O. Box 1088
14th Floor, Room 14.138
Austin, TX 78767
Phone: 512-499-3251
Fax: 512-499-3278

Baltimore Community Relations Commission
10 North Calvert Street
Suite 915
Equitable Building
Baltimore , MD 21202
Phone: 410-396-3141/3160
Fax: 410-396-9586

Broward County Human Rights Division
115 South Andrews Avenue
Room A640
Fort Lauderdale, FL 33301
Phone: 954-357-6050
Fax: 954-357-5746

California Department of Fair Employment And Housing
2014 T Street, Suite 210
Sacramento, CA 95814-6835
Phone: 916-227-2878
Fax: 916-227-2870

City of Orlando Human Relations Department
400 South Orange Avenue
Orlando, FL 32801
Phone: 407-246-2122
Fax: 407-246-2308

City of St. Petersburg Human Relations Commission
P.O. Box 2842
St. Petersburg, FL 33731
Phone: 813-893-7151
Fax: 813-892-5064

City of Tampa Office of Community Relations and Services
712 W. Ross Avenue
Tampa, FL 33602
Phone: 813-223-8241
Fax: 813-274-7207

Clearwater Human Relations Department
City of Clearwater
P.O. Box 4748
400 North Myrtle Avenue
1st Floor
Clearwater, FL 34618-4748
Phone: 813-462-6884
Fax: 813-462-6437

Colorado Civil Rights Division
1560 Broadway, Suite 1050
Denver, CO 80202
Phone: 303-894-2997
Fax: 303-894-7830

Connecticut Commission on Human Rights and Opportunities
21 Grand Street
Hartford, CT 05106
Phone: 860-541-3400
Fax: 860-246-5419

Corpus Christi Human Relations Commission
P.O. Box 9277
Corpus Christi, TX 78461-9277
Phone: 512-880-3190
Fax: 512-880-3192

Dade County Equal Opportunity Board
111 NW 1st Street, Suite 650
Miami, FL 33128-1965
Phone: 305-375-5272
Fax: 305-375-5715

Delaware Department of Labor
4425 North Market Street
Wilmington, DE 19809
Phone: 302-761-8200
Fax: 302-761-6601

District of Columbia Office of Human Rights
441 4th Street, NW
Suite 970 North
Washington, DC 20001
Phone: 202-724-1385
Fax: 202-724-3786

Durham Human Relations Commission
101 City Hall Plaza
Durham, NC 27701
Phone: 919-560-4107
Fax: 919-560-4092

Fairfax County Human Right Commission
12000 Government Center Parkway, Suite 318
Fairfax, VA 22035-0093
Phone: 703-324-2953
Fax: 703-324-3570

Florida Commission on Human Relations
325 John Knox Road
Building F – Suite 240
Tallahassee, FL 32303-4149
Phone: 904-630-4911
Fax: 904-488-5291

Fort Worth Human Relations Commission
1000 Throckmorton Street
Fort Worth, TX 76102
Phone: 817-871-7525
Fax: 817-871-7529

Georgia Commision on Equal Opportunity
229 Peachtree Street, N.E.
suite 710 – Cain Tower
Atlanta, GA 30303
Phone: 404-656-1736
Fax: 404-656-4399

Hawaii Civil Rights Commission
830 Punchbowl Street
Suite 411
Honolulu, HI 96813
Phone: 808-5886-8636
Fax: 808-586-8655

Howard County Office of Human Rights
6751 Columbia Gateway Dr.
2nd Floor
Columbia, MD 21046
Phone: 410-313-6430
Fax: 410-313-6424

Idaho Human Rights Commission
1109 Man St., Suite 400
P.O. Box 83720
Boise, ID 83720-0040
Phone: 208-334-2873
Fax: 208-334-2664

Illinois Department of Human Rights
100 West Randolph Street
10th Floor, Suite 100
Chicago, IL 60601
Phone: 312-814-6245
Fax: 312-814-1436

Industrial Commission of Utah Anti-Discrimination Division
160 East 300 South, 3rd Floor
P.O. Box 146640
Salt Lake City, UT 84114-6640
Phone: 801-530-6801
Fax: 801-530-7609

Iowa Civil Rights Commission
211 E. Maple Street
2nd Floor
Des Moines, IA 50309
Phone: 515-281-8084
Fax: 515-242-5840

Jacksonville Equal Employment Opportunity Commission
421 West Church Street
Suite 705
Town Center Building
Jacksonville, FL 32202
Phone: 904-630-4911
Fax: 904-630-4948

Kansas City Human Relations Department
414 East 12th Street
City Hall, 4th Floor
Kansas City, MO 64106
Phone: 816-274-1432
Fax: 816-274-1025

Kansas Human Rights Commission
900 Southwest Jackson
Suite 851-S
Topeka, KS 66612-1258
Phone: 913-296-3206
Fax: 913-296-0589

Louisiana Commission on Human Rights
P.O. Box 94004
Baton Rouge, LA 70804
Phone: 504-342-6969
Fax: 504-342-2063

Madison Equal Opportunities Commission
210 Martin Luther King Blvd.
Room 500
Madison, WI 53710-0001
Phone: 608-266-4910
Fax: 608-266-6514

Maine Human Right Commission
State House – Station 51
Augusta, ME
Phone: 207-624-6050
Fax: 207-624-6063

Maryland Commission on Human Relations
#6 St.Paul Street, Suite 900
Baltimore, MD 21202
Phone: 410-767-8600
Fax: 410-333-1841

Massachusetts Commission Against Discrimination
One Ashburton Place
Room 601
Boston, MA 02108
Phone: 617-727-3990
Fax: 617-720-6053

Memphis District Office
1407 Union Avenue
Room 621
Memphis, TN 38104
Phone: 901-722-2617
Fax: 901-722-2602

Miami District Office
1 Northeast First Street
6th Floor
Miami, FL 33132
Phone: 305-536-7589
Fax: 305-530-7660

Milwaukee District Office
310 West Wisconsin Avenue
Suite 800
Milwaukee, WS 53203
Phone: 414-297-1111
Fax: 414-297-1275

Minneapolis Department of Civil Rights
350 S. 5th Street, Room 239
Minneapolis, MN 55415
Phone: 612-673-3012
Fax: 612-673-2599

Minnesota Department of Human Rights
190 E. 5th Street, Suite 700
St. Paul, MN 55101
Phone: 612-296-5663
Fax: 612-296-1736

Missouri Commission on Human Rights
3315 W. Truman Blvd.
P.O. Box 1129
Jefferson City, MO 65102-1129
Phone: 573-751-3325
Fax: 573-751-2905

Montana Human Rights Commission
PO Box 1728
Helena, MT 59624-1728
Phone: 406-444-2884
ext 3870
Fax: 406-444-2798

Montgomery County Human Relations Commision
164 Rollins Avenue, 2nd Floor
Rockville, MD 20852
Phone: 301-468-4260
Fax: 301-468-4130

New Hampshire Commission for Human Rights
163 Loudon Road
Concord, NH 03301-6053
Phone: 603-271-2767
Fax: 603-271-6339

New Hanover County Human Relations Commission
402 Chestnut Street
Wilmington, NC 28401
Phone: 910-341-7171
Fax: 910-815-3587

New Jersey Division of Civil Rights
CN 089
383 West State Street
Trenton, NJ 08625
Phone: 609-984-3100
Fax: 292-3458

New Mexico Department of Labor
Human Rights Division
1596Pacheco St.
Aspen Plaza
Santa Fe, New Mexico 87505
Phone: 505-827-5346

New Orleans District Office
701 Loyola Avenue, Suite 600
New Orleans, LA 70113-9935
Phone: 504-589-3842
Fax: 504-589-6861

New York City Commission on Human Rights
40 Rector Street
New York, NY 10006
Phone: 212-306-7550
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New York District Office
7 World Trade Center
18th Floor
New York, NY 10048-0948
Phone: 212-748-8500
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New York State Division of Human Rights
55 West 125th Street
New York, NY 10027
Phone: 212-961-8790
Fax: 212-961-8552

North Carolina Office of Administrative Hearings
1203 Front Street, Suite 240
Raleigh, NC, 27609
Phone: 919-733-0431
Fax: 919-733-4866

Ohio Civil Rights Commission
1111 East Broad Street
Suite 301
Columbus, OH 43205
Phone: 614-466-6715
Fax: 614-644-8776

Oklahoma Human Rights Commission
2101 North Lincoln Blvd.
Room 481
Oklahoma City, OK 73105
Phone: 405-521-3441
Fax: 405-522-3635

Orange County Human Relations Commission
110 South Churton Street
PO Box 8181
Hillsborough, NC 27278

Oregon Bureau of Labor and Industries Civil Right Division
800 N.E. Oregon Street, #32
Portland, OR 97232
Phone: 503-731-4075 ext 422
Fax: 503-731-4069

Palm Beach County Office of Equal Opportunity
215 North Olive Avenue
Suite 130
West Palm Beach, FL 33401
Phone: 407-355-4884
Fax: 407-355-4932

Pennsylvania Human Relations Commission
101 S. Second Street
Suite 300
Harrisburg, PA 17101
Phone: 717-787-4410
Fax: 717-787-0420

Philadelphia Commission on Human Relations
34 South Eleven Street
6th Floor
Philadelphia, PA 19107
Phone: 215-686-4673
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Philadelphia District Office
21 S. Fifth Street
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Philadelphia, PA 19106-2515
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Phoenix District Office
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Phoenix, AZ 85012
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Pittsburgh Commission on Human Relations
908 City-County Building
414 Grant Street
Pittsburgh, PA 15219-2464
Phone: 412-255-2600
Fax: 412-255-2288

Prince George's County Human Relations Commision
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Suite 245
Landover, MD 20785
Phone: 301-883-6170
Fax: 301-883-6262

Prince William County Human Right Commission
15941 Cardinal Drive
Suite 125
Woodbridge, VA 22191
Phone: 703-792-4680
Fax: 703-792-6944

Puerto Rico Department of Labor & Human Resources Anti-Discrimination Unit
505 Munoz Rivera Avenue
Hato Rey, Puerto Rico 00918
Phone: 787-754-5867

Rhode Island Commission for Human Rights
10 Abbott Park Place
Providence, RI 02903
Phone: 401-277-2661
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San Antonio District Office
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San Antonio, TX 78229
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San Francisco District Office
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San Francisco, CA 94013
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Seattle District Office
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Seattle, WA 98104-1061
Phone: 206-220-6883
Fax: 206-220-6911

Seattle Human Rights Department
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Seattle, WA 98104
Phone: 206-684-4500
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South Carolina Human Affairs Commission
2611 Forest Drive
PO Box 4490
Columbia, SC 29240
Phone: 803-737-7800
Fax: 803-253-4191

St. Louis Civil Rights Enforcement Agency
905-Olive Street, Suite 1100
St. Louis, MO 63101
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St. Louis District Office
Robert A. Young Building
1222 Spruce Street
Room 8.100
St. Louis, MO 63103
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St. Paul Human Rights Department
15 West Kellogg Blvd.
Room 900
St. Paul, MN 55102
Phone: 612-266-8964
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Tacoma Human Rights Department
747 Market Street
Room 808
Tacoma, WA 98402
Phone: 206-591-5156
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Tennessee Human Rights Commission
530 Church Street
Cornerstone Square Bldg.
Suite 400
Nashville, TN 37243-0745
Phone: 615-741-5825
Fax: 615-532-2196

Texas Commission on Human Rights
6330 Highway 290 East
Suite 250
Austin, TX 78723
Phone: 512-437-3450
Fax: 512-437-3478

Vermont Attorney General's Office Public Protection Division
109 State Street
Pavilion Office Bldg.
Montpelier, VT 05601
Phone: 802-828-3171
Fax: 802-828-2154

Virginia Council on Human Rights
1100 Bank Street, 12th Floor
Richmond, VA 23219
Phone: 804-225-2292/2438
Fax: 804-225-3294

Virgin Islands Department of Labor
Division of Labor Relations
#3012 Vitraco Mall
Estate Golden Rock
Christiansted,
St. Croix, VI 00820
Phone: 809-692-9686
Fax: 809-773-4338

Washington Field Office
1400 L Street, N.W.
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Washington, DC 20005
Phone: 202-275-7164
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Washington State Human Rights Commission
711 South Capital Way
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P.O. Box 42490
Olympia, WA 98504-2490
Phone: 360-753-6770
Fax: 360-586-2282

West Virginia Human Rights Commission
1321 Plaza East, Room 108
Charleston, WV 25301-1400
Phone: 304-558-2616
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Wisconsin Department of Labor, Industry and Human Relations, Equal Rights Division
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Understanding the ABC's of the ADA and the FMLA

The two major laws that exist to ensure that anyone with a disability or anyone dealing with a health crisis is not discriminated against are the **Americans with Disabilities Act** and the **Family and Medical Leave Act**. Listed below are the things you must know in order to understand and effectively deal with job discrimination. While the policies don't change daily, weekly or even monthly, please be aware that laws and regulations do change and that you should contact your National EEOC and/or Department of Labor for up to date information. Consulting with an attorney who is knowledgeable in the area of disability law can help to ensure the validity of an employee's suspected discrimination.

Be sure of the validity of your discrimination by understanding what qualifies as discrimination or ADA violations and other terms and conditions of employment.

Americans with Disabilities Act

- **Disability**—under the "Definitions" sec.12102. (section 3) of the ADA, disability is defined as, with respect to an individual; A physical or mental impairment that substantially limits one or more of the major life activities of such individual; A record of such an impairment; or Being regarded as having such an impairment.

The Americans with Disabilities Act presents many novel challenges for both an employee and employers.

It is important to understand before bringing a claim under the ADA act and other disability discrimination statutes that employees often may have to forego rights and benefits under other laws. The reason is because these other laws such as Social Security Disability require that an employee must be totally disabled. As will be explained in this pamphlet under this Section, you cannot be totally disabled in order to qualify as a disabled person under the Americans with Disabilities Act.

Disability has different meanings for other organizations such as the Social Security Administration and other health insurance companies. Please see the plan documentation for your insurance company for their definition of disability. The Social Security Administration has it's own criteria for determining disability, please contact your local Social Security office for more information.

- **Discrimination**—Discriminatory Under Title VII, the ADA, and the ADEA, 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

- **Practices under these laws also include:**
  - — Harassment on the basis of race, color, religion, sex, 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.
  - — Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. These notices must be accessible, as needed, to persons with visual or other disabilities that affect reading. Title VII and the ADA cover all private employers, state and local governments, and educational institutions that employ **15** or more individuals. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees that control apprenticeship and training.

The ADEA covers all private employers with **20** or more employees, state and local governments (including school districts), employment agencies and labor organizations.

Understand what the ADA means by "Reasonable Accommodations"

The Americans with Disabilities Act (ADA) requires an employer with 15 or more employees to provide reasonable accommodation for individuals with disabilities, unless it would cause undue hardship. A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations":

- **Changes to the job application process.**
- **Changes to the work environment or the way a job is usually completed.**
- **Changes that enable an employee with a disability to enjoy equal benefits and privileges of employment.**

— "Undue Hardship" would be changes to the work environment that would include significant difficulty and/or expense. Undue hardship also refers to accommodations that would be disruptive or that would alter the nature of the business. Each case of "reasonable accommodation" or employers' charge of "undue hardship" would be handled on a case by case basis.

Reasonable accommodations include but are not limited to the following examples:

- **Shifting minor job responsibilities to other employees**
- **Unpaid leave time that does not present undue hardship**
- **Modified or part time scheduling**
- **Reassignment to a new position that you are qualified for**
- **Making the workplace accessible and usable for people with disabilities**

Key things to consider when requesting a reasonable accommodation:

- **Qualification for a new position or ability to still perform previous position.**
- **The employer is not required to eliminate primary job responsibilities.**
- **The employer is not required to provide personal use items like wheelchairs or prosthetic devices.**
- **The employer is not required to modify a work schedule if it hinders the productivity of other employees and if it causes undue hardship.**
- **The employer can deny a leave request when no approximate return date is given so that they may either plan for your return or get a replacement, which would involve undue hardship.**

When leave is necessary and if you qualify you should utilize the Family Medical Leave Act.

Family and Medical Leave Act of 1993

This law contains provisions on employer coverage; employee eligibility for the law's benefits; leave entitlement, maintaining health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protection for employees who request or take FMLA leave. The law also requires employers to keep records. Unlike the ADA, you may file a complaint and get an attorney without a "right to sue" letter.

Employer Coverage

FMLA applies to-all public agencies, including state, local and federal employers, local education agencies (schools), and pri-

vate-sector employers who employed **50** or more employees in **20** or more workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce including joint employers and successors of covered employers.

Am I eligible?

All employees must have worked for the employer for a total of 12 months;

- have worked at least 1,250 hours over the previous 12 months; and
- work at a location in the United States or in any territory or possession of the United States where the employer within 75 miles employs at least 50 employees.

What are my benefits under the FMLA?

A covered employer must grant an eligible employee up to a total of **12** workweeks of **unpaid** leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**
- to take medical leave when the employee is unable to work because of a serious health condition.
- The Family and Medical Leave Act, unlike the Americans for Disabilities Act, addresses not only permanent illness or injuries but temporary illnesses or injuries suffered not just by employees but also the employee's family members.

Spouses employed by the same employer are jointly entitled to a **combined** total of **12** work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever **medically necessary** to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees **or** employers may choose to use accrued **paid** leave (such as sick or vacation leave) to cover some or all of the FMLA leave.

The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee.

What happens to my health benefits?

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever the insurance was provided before the leave was taken and on the same terms as if the employee had never left work. If necessary, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave. If the health benefits expire while you are out on FMLA it is the responsibility of the employer to notify you of **COBRA** benefits and, if applicable, a letter of creditable coverage (see **HIPAA**).

- Consolidated Omnibus Budget Reconciliation Act **(COBRA)** was passed by Congress in 1986. This law ensures that employers provide continuation of group health coverage that otherwise would have been terminated upon such time as the employee left or was terminated. This law covers employers with **20** or more employees and applies to private sector, state and local governments. Upon unemployment, the employer must notify you of benefits and then you would have **60 days** to choose COBRA or lose all rights to the benefits. The usual length of coverage is **18 months** unless there are other circumstances that would cause the employer to extend the benefits to the maximum of **36 months** of coverage. Any coverage provided while you are out on FMLA is **not** to be considered as COBRA coverage. The premium you must pay may vary but cannot exceed 102% of the normal coverage rate for a similarly situated employee.
- The Health Insurance Portability and Accountability Act of 1996 **(HIPPA)**. This law includes important new protections for working Americans and their families who have pre-existing medical conditions or who might suffer discrimination in health coverage. HIPPA also limits exclusions for preexisting conditions, prohibits discrimination against employees and dependents based on their health status and guarantees renewability and availability of health coverage.

What happens to my job?

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to **before** using FMLA leave, nor be counted against the employee under a "no fault" attendance policy. Under limited circumstances where returning to employment will cause substantial and economic injury to its operations, an employer may refuse to reinstate highly paid "**key**" employees after using

FMLA leave during which health coverage was maintained. In order to do this, the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; **and**
- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "**key**" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

When do I have to give notice to utilize my benefits?

Employees seeking to use FMLA leave are required to provide **30-day advance notice** of the need to take FMLA leave when the need is foreseeable and such notice is practicable.

Employers may also require employees to provide:

- medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member; (a serious health condition is one that requires either the employee to miss three days of work due to illness or injury);
- second or third medical opinions (at the employer's expense) and periodic re-certification; If an employee submits proper documentation from his or her treating health care provider that demonstrates a serious health condition, the employer has the right to have the employee seen for second opinions. However, the health care provider selected by the employer must not work for the employer or have a contract with the employer to provide medical services unless there are two or less health care providers in the vicinity to provide the type of medical services for the health care provider; **and**
- periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation. Covered employers must inform employees of their rights and responsibilities under FMLA, including giving **specific written information** on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

Signing documents-

When signing forms for leave that are not regulated under the FMLA or ADA be aware of the benefits that you have accrued. Make sure that you are not using valuable vacation and sick leave time when you should be using FMLA or ADA. Some employers offer sick leave and vacation time as pay when an employee is out. The employee should always fully understand what they are signing; otherwise the law will assume the employee did understand and consented to the contents of that document. An attorney experienced in this area could be a valuable asset.

When taking internal action with your employer:

- If you are the one filing a complaint with human resources you must sign the official complaint, but always ask what are the consequences of signing any document that is given. Carefully review each document for content.
- Check with local EEOC office if it is something that is not easily understood or contact PAF for Case Manager or Attorney advisement.
- With recent changes in the ADA and the very definition of disability being basically reconsidered on a daily basis, the FMLA is a patients' best friend. It is the only law that protects your job and clearly defines exactly what benefits an employee has.
- An employer must within two business days of being notified that an employee has a potential serious health condition designate the leave as Family and Medical Leave Act leave. Therefore, it is essential to notify an employer as soon as possible about serious health conditions suffered.
- If an employer fails to re-credit leave, the employee may bring an action to enforce rights under the FMLA.

How can the Patient Advocate Foundation (PAF) assist me with my job discrimination issues?

- Patient Advocate Foundation Case Managers are also available to assist you with locating information and advice on employment issues. After reviewing your information the Case Manager may refer you to a Patient Advocate Foundation attorney. PAF attorneys assist with job discrimination due to diagnosis of a chronic, debilitating and/or life threatening diagnosis.
- The Patient Advocate Foundation has at least 2 attorneys in each state to assist patients facing insurance issues/debt crisis intervention and job discrimination due to a chronic, debilitating and/or life-threatening diagnosis. After receiving the "right to sue" letter, a PAF attorney can give you a pro-bono advisement and can review materials you have received from your employer to help you evaluate your next move and/or represent you in your case against your employer. The PAF attorney will advise the patient of any fees and payments required for services during the initial consultation.

- Below are some actual cases handled by PAF attorneys and the outcome therein:

  Patient number one- A breast cancer patient who won a settlement that she could not expose per court order but was very happy with the outcome. " I never believed this would happen to me after 11 years of employment with my company." This patient returned from short-term disability leave to find out that she had lost her job and health insurance benefits. "After the betrayal I didn't feel I could ever trust anyone again." The Human Resources team lead was an old friend of mine who was telling me that "It was all my fault for being gone so long." This after she shared with me the story of how her mother was diagnosed years before and that she had sympathy for me and was now telling me I was fired without health benefits as if she never knew me." Within 24 hours of contacting PAF patient number one was placed with an attorney who assisted her with filing and after receipt of the "right to sue" represented the patient until completion of her case.

  Patient number two- Also a breast cancer patient who had her hours reduced to part-time upon return from short-term disability and was told she would lose her health benefits as a result. " I could not understand why they would do this since I was receiving full paid benefits while I was out for treatment and now they want to cut me down just when I am back to my fullest potential." Patient number two had the advisement of a PAF attorney and was represented through her mediation process with the EEOC. "I understand that sometimes these things drag out," says patient number two, " but all I wanted was my job and benefits back." After three weeks of mediation patient number two was reinstated to full time status with benefits and a guarantee in writing from her employer to reasonably accommodate her.

Printed below you will find a more comprehensive account of job discrimination and how the ADA handles these issues by attorney Sheldon Weinhaus Esq. This paper is for the legal professional who may be interested in assisting patients. This legal document indicates how courts are not necessarily in agreement with all of the "language" or "terms" of the ADA and actions of the EEOC with case studies provided for each as follows;

Section 1 explains how the Civil Rights Act ties in with the EEOC with case history included.

Section 2 addresses how both the ADA and the Consolidated Omnibus Budget Reconciliation Act (COBRA) ties in with the

actions of the EEOC and case history included.

Section 3 shows the involvement of the Employee Retirement Income Security Act (ERISA) in the ADA and long term disability benefits. Section 3 also explains how some health insurers try to use the ADA language as protection and how it regulates employer's health insurance limitations.

ISSUES INVOLVING ANTI-DISCRIMINATION STATUTES

TITLE VII and the ADA

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Section 1

Title VII (Civil Rights Act)

a. Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §2000e-2(a)(2) and (k)(1)(B)(i), forbids discriminatory practices and discrimination as to fringe benefits, and that prohibition includes actions that have a disparate impact on those groups protected by Title VII. While question whether "disparate impact" proofs can be made in in vitro fertilization cases, Krauel v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996), on the presumption male infertility also not covered,[1] query the decision of many health insurers still resisting payment for high dose chemotherapy for breast and ovarian cancer?

b. "Employer" is defined to include those acting as agent of the employer. 42 U.S.C. §2000e(a). If the insurer compels the employer to give it the right to make fiduciary decisions, not simply administer the plan, or if the insurer demands the right to amend the plan unilaterally to change benefits or benefit levels, a plan sponsor prerogative, may the insurer be deemed in fact an employer or co-employer. This is still an open question as the result of the November 1995 modification of the decision in Henderson v. Bodine Aluminum Co., 70 F.3d 958 (8th Cir. 1995). And if the latter set of circumstances makes an insurer an employer or co-employer, what about conversion policies some courts hold covered under ERISA, where the benefits of the conversion policy do not resemble those of the plan and are set entirely by the insurer for the employee.

[1]In light of the determination in Bragdon v. Abbott, 524 U.S. 624. 8 AD Cases 239 (1998), the Eighth Circuit's premise that reproduction is not a major life activity, is subject to grave question.

c. The complainant must first complain to the Equal Employment Opportunity Commission (EEOC). Be aware of the 180/300 day period of limitations, from the date of denial. One would guess that if the date is critical, insurers would argue the date should be the earlier date of denial of precertification, not the later date of denial after a bill has been denied. Although in seeking preliminary relief it can be anticipated that defendants will attempt to urge necessity for ERISA exhaustion, as in Henderson v. Bodine Aluminum Co., 4 AD Cases 835 (E.D. Mo. 1995), reversed, 70 F.3d 958 (8th Cir. 1995). Exhaustion of EEOC procedures will not defeat threshold jurisdiction. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Jackson v. Seaboard Coast Line RR, 678 F.2d 992, 999-1010 (11th Cir. 1982).

Section 2

Americans with Disabilities Act

d. Title I of the ADA prohibits employers and those acting for employers, from discriminating as to fringe benefits, against those with disabilities. 42 U.S.C. §12112(b)(2) and (b)(3)(a). See 29 C.F.R. §1630.5.

i. Effective date: July 26, 1992 for employers employing 25 or more employees.

ii. "Employer" is defined broadly to include "any agent of such person" and could therefore include insurers who retain the right to amend the group health insurance policy from time to time, as some insurers do. 42 U.S.C. §12111(5)(A). As noted above, one question now posed in the pending Missouri cases against Blue Cross is whether the insurer's seizure of the employer's power to amend plan benefits and change benefit levels whenever the insurer wishes, makes it independently liable as employer or as to benefits, co-employer.

iii. If the beneficiary is a COBRA continuee, can that person claim coverage or must that claimant claim coverage only as a qualified individual with a disability? The Eleventh Circuit has determined former employees cannot qualify as a qualified individual with a disability. 42 U.S.C. §12112(a). Gonzales v. Garner Food Services, Inc., 855 F.Supp. 371 (N.D. 1994), affirmed 89 F.3d 1523, 5 AD Cases 1202 (11th Cir. 1996). The decision in Robinson v. Shell Oil Co., 519 U.S. 337, 117 S.Ct. 843, 72 FEP 1856 (1997), finding terminated workers may under certain circumstances be treated as employees under Title VII CRA anti-retaliation provisions, may have some bearing on the future development of the status of former employees. See, e.g., McKeever v. Ironworkers' District Council, 73 FEP 1000 (E.D. Pa. 1997) (ADEA applies to protect retirees from discontinuance of health care benefits if benefits continued for active workers). Moreover, as to

health care benefits, as distinguished from disability benefits, query whether "former employee" has any meaning in light of the COBRA requirement the continuee stand in the shoes of a substantially similar active employee? 29 U.S.C. §1162.

Recently in Ford v. Schering-Plough Corp., 145 F.3d 601, 8 AD Cases 190 (3rd Cir. 1998), held that disabled former employees may sue under Title I, need not be an employee able to work with or without reasonable accommodation at time suit is brought. But court held ADA does not require under either Titles I and III equal insurance coverage as between those suffering from physical or mental disabilities, looks at Congressional history after enactment of the ADA for Congress' intentions. Court rejects an insurance policy as a public accommodation. Court also disagrees about subterfuge language in ADA 501c safe harbor provision, demanding subterfuge still meant what it did (Public Employees Retirement Sys. of Ohio v.Betts, 492 U.S. 158 (1988)) before the 1991 CRA and OWBPA amendments. Courts are fearful of "destabilizing" insurance industry which according to an OTA assessment and DOJ preamble to ADA, decides coverage questions on subjective basis, not on basis approved in safe harbor provision.

The Second Circuit likewise does not require active employee status for standing to sue under the ADA. In Castellano v. New York, and Graboski v. Giulani, it permitted disabled retirees to sue for ADA discrimination, there the failure to allow them enhanced retirement benefits because they did not have at least 20 years of active service. 25 BPR 579; 21 EBC 2697. On the merits no discrimination was found, since disabled employees with 20 years of active service were entitled to the same enhancement.

iv. The EEOC's guidelines indicate it believes dependents are protected by ADA, and Henderson v. Bodine Aluminum, Inc., supra, involved medical treatment for a dependent of a worker who alleged no disability himself. The EEOC has argued Title I even protects the COBRA continuee. There is a further possibility under ERISA: the right of the COBRA continue to the same benefits as similarly situated employees. 29 U.S.C. §1162.

e. There is now a clear split in the circuits as to whether Title III (public accommodations) may apply to insurance coverages as well. 42 U.S.C. §12182(b)(7)(F). Carparts Distribution Center v. Automotive Wholesalers' Association, 37 F.3d 12 (1st Cir. 1994). While two district courts early on

rejected Carparts, Parker v. Metropolitan Life Ins. Co., 875 F.Supp 1321 (W.D. Tenn. 1995), affirmed 6 AD Cases 1865, 121 F.3d 1006 (6th Cir. 1997), cert. denied, 1998; Pappas v. Bethesda Hosp. Assn, 861 F.Supp. 616 (S. D. Ohio 1994), others felt the analysis of the court of appeals in the 1st Circuit is superior. See, e.g., Baker v. Hartford Life Ins. Co., 6 AD Cases 135 (N.D. Ill. 1995); Kotev v. First Colony Life Ins. Co., 927 F.Supp. 1316 (C.D. Cal. 1996), See also Schroeder v. Connecticut General Life Ins. Co., 943 F.Supp. 1304 (D. Colo. 1994) (ADA prohibits differential treatment of individuals with disabilities in insurance matters, both employer and its insurer); Anderson v. Gus Mayer Boston Store of Delaware, 924 F.Supp. 763 (E.D. Tex. 1996) (ADA Title III covers employer's denial of group health insurance to HIV-positive worker); Cloutier v. Prudential Ins. Co., 964 F.Supp. 299 (C.D. Cal. 1997) (refusal to issue life insurance policies to spouses/life partners of HIV-positive individuals, violates ADA III; insurer required forward with data if it attempts to use "safe harbor" exception); Doukas v. Metropolitan Life Ins. Co., 950 F.Supp. 422 (D. N.H. 1996) (Title III applies to insurance discrimination against those with psychological/psychiatric maladies); World Ins. Co. v. Branch, 966 F.Supp. 1203 (N.D. Ga. 1997) (health care cap of $5,000 for those with AIDS, when others given $2 million cap, illegal under ADA); Doe v. Chubb Sovereign Life Ins. Co., F.Supp. (N.D. Cal. 1996) (ADA Title III covers insurer's refusal to cover HIV-negative application whose spouse was HIV positive); Doe and Smith v. Mutual of Omaha Ins. Co., No. 98C0325 (N.D. Ill. 1998) (Title III protects AIDs victims from getting smaller lifetime caps that insurer gives to others), reversed, 9 AD Cases 657 (7th Cir. 1999); Winslow v. IDS Life Ins. Co., 29 F.Supp.2d (D. Minn. 1998) (refusal of disability insurer to accept application for coverage from a person who insurer perceives to have the potential for a future disability because of treatment within the previous year for a mental condition, violates Title III; denying insurance coverage categorically to people with mental disabilities violates Title III); Conners v. Maine Medical Center (D. Maine 1999) reported in 8 BNA ADAM Newsletter no. 6 (3/25/99) (Title III of ADA applicable to suit by former employee for discrimination between lengths of coverage, depending upon whether physical or mental). Although not a Title III case, see EEOC v. Chase Manhattan Bank, 1998 Westlaw 851605 (S.D. NY 1998) (insurance plan which discriminates against persons with mental illness is permissible as long as benefits for persons suffering from mental illness are not denied altogether).

But even before the run of circuit court opinions determining no Title III protection, including the Sixth Circuit in Parker, the Third Circuit in Schering-Plough, the Seventh

Circuit in Doe v. Mutual of Omaha, 179 F.3d 557, 9 AD Cases 657 (7th Cir. 1999) low cap on health insurance benefits for AIDS conditions does not breach ADA), and more recently the Fourth Circuit in Lewis v. K-Mart Corp.,180 F.3d 166, 9 AD Cases 791 (4th Cir. 1999), many district courts were already adopting the Parker line: Brewster v. Cooley Associates/Coun-seling and Consulting Servs., Ltd., 7 AD Cases 1423, 1997 Westlaw 896421 (D. NM 1997); Weyer v. Twentieth Century Fox Film Corp., 11 NDLR ¶379 (W.D. Wash. 1997); Leonard F. v. Israel Discount Bank of NY, 967 F.Supp. 802 (S.D. NY 1997) (ADA Title III does not require parity for mental health benefits); Fennell v. Aetna Life Ins. Co. 37 F. Supp. 2d40 (D. D.C. 1999) (same). And the Sixth Circuit strongly endorsed its view once again in Lenox v. Healthwise of Kentucky, Ltd., 149 F.3d 453 (6th Cir. 1998) on July 8, 1998 in which the court saw no prohibited Title III discrimination in granting coverage for many types of organ transplants, but not for heart transplants, holding once again, citing Parker, supra, that Title III does not apply to benefit plans, that such benefits are not "goods."

Section 3

The prohibitory language in the ADA reads:

"(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others."

f. The ADA contains some language that health insurers believe protects them. 42 U.S.C. §12201©. However, the Preamble to the Rules issued by DOJ (28 C.F.R. Part 36), suggests that insurers may face some difficult tasks in attempting to fall within the exception, and the legislative history may also have some effect on the breadth of this exception. See 29 C.F.R. §1630.5:

"In addition, it should also be noted that this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees. This part does not, however, affect pre-existing condition clauses included in health insurance policies offered by employers. Consequently, employer may continue to offer policies that contain such clauses, even if they adversely affect individuals with disabilities, so long as the clauses are not used as a subterfuge to evade the purposes of this part.

"So, for example, it would be permissible for an employer to offer an insurance policy that limits coverage for certain procedures or treatments to a specified number per year. Thus, if a health insurance plan provided coverage for five blood transfusions a year to all covered employees, it would not be discriminatory to offer this plan simply because a hemophiliac employee may require more than five blood transfusions annually. However, it would not be permissible to limit or deny the hemophiliac employee coverage for other procedures, such as heart surgery or the setting of a broken leg, even though the plan would not have to provide coverage for the additional blood transfusions that may be involved in these procedures. Likewise, limits may be placed on reimbursements for certain procedures or on the types of drugs or procedures covered (e.g. limits on the number of permitted X-rays or non-coverage of experimental drugs or procedures), but that limitation must be applied equally to individuals with and without disabilities. See Senate Report at 28-29; House Labor Report at 58-59; House Judiciary Report at 36."

g. The ADA provides it should not be construed to prohibit or restrict "a covered person or organization" from "establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan." While changes made effective now or since enactment under the ADA may defeat claims of "bona fide" now, what about plan terms pre-existing the ADA? This is an issue presented in the ADA case brought by a self-insured benefit plan. Mason Tenders Dist. Council Welfare Fund v. Donaghey, 2 AD Cases 1745 (S.D. N.Y. 1993). In that case the welfare benefit plan was amended the end of 1991 to exclude benefits for HIV-positive members. That case once believed to be destined for the Su-

preme Court, was recently settled in 1995 by reinstatement of the benefit.

i. The 8th Circuit in Krauel, supra, emphasized the "subterfuge" exception of 501© in a Title I case. See also Ford v. Schering-Plough Corp., supra, for the like view of the Third Circuit. One district court seems to put the proof burden on this issue, on the insurer/plan. Schroeder v. Connecticut General Life Ins. Co., supra.

ii. Anticipated issues in future cases in those circuits still prohibiting discrimination in insurance provisions, will be who bears—or ought to bear—the burden of proof on this issue? Mrs. Krauel obviously bore the burden in her case. Does the fact that the insurer/plan has not conducted risk analysis or lacks actuarial support, and usually decides coverage questions solely on a subjective basis, shift any burden on subterfuge to it? If there is some disparate impact possibilities, would this affect the subterfuge question? And as to new coverages or new exclusionary language occurring after the enactment of the ADA, would this also not change the equation? Not according to the Third Circuit in Schering-Plough. Krauel may be tainted in light of the recent Supreme Court holding that procreation is a substantive function.

Advantages of ADA over ERISA for claimant

h. In Henderson v. Bodine Aluminum, Inc., supra, the appellate court expected the employer to come forward with its insurer's evidence to support validity of claim procedure is experimental. But the patient should not rely exclusively on using the ADA or other protective laws, and should request of the plan and its insurer information that will determine to what extent other medical procedures that are paid for, are "proven ," and what procedures that are paid for are performed under protocols and IRB's. This is a relevant area of inquiry. Although not a disclosure case, see Ravenscraft v. Hy-Vee Employee Benefit Plan and Trust, (8th Cir. 1996) ("unreasonable inconsistency" in paying benefits is evidence of arbitrary and capricious conduct).

i. No claim brought under the ADA has been subjected to internal administrative exhaustion. One reason for this is that the Courts do not defer to plan administrators and fiduciaries on questions of law or give such persons the right to determine whether plan provisions or policies are sustainable under other laws as the ADA and Title VII. In effect, the claim to violation of other anti-discrimination statutes, as the ADA, is directly against the employer and the benefit plan itself.

ii. But please be aware the courts were beginning to impose ADR procedures written into employment contracts, on claimants. However, see Wright v. Universal

Maritime Service Corp., 525 U.S.70 (1998) (ADR clause that did not "clearly and unmistakably" cover dispute involving statutory discrimination, cannot prevent direct access; Supreme Court left for another day issues of direct access where language was clear and unmistakable).

2. ADA and Long Term Disability Benefits

a. "Disability threshold": What is a disability under ADA:

i. An impairment that substantially limits one or more major life activities

(1) Some courts view cancer as no impairment on major life activities. E.g., Ellison v. Softwear Spectrum, Inc., 85 F.3d 187, 5 AD Cases 920 (5th Cir. 1996) (breast cancer is not a disability, nor perceived to be a disability); Schwertfager v. City of Boynton Beach, 15 NDLR ¶76 (S.D. Fla. 1999) (female with history of breast cancer not disabled; person is not incapacitated even though she experienced temporary limitations in her ability to perform daily, routine functions, duration during which limitation occurs must be "significantly" long; court would not permit finding of a record of impairment based on diagnosis and hospitalizations and treatment); Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907, 6 AD Cases 282 (11th Cir. 1996) (shoulder cancer); EEOC v. R.J. Gallagher Co., 6 AD Cases 1165 (S.D. Tex. 1997) (leukemia does not constitute an impairment); Sanders v. Arneson Products, Inc., 91 F.3d 1351 (9th Cir. 1996), cert. denied, (1998) (psychological impairment resulting from stress reaction to cancerous condition in the bladder, too short in time to be considered a disability); Madjlessi v. Mach's West, Inc., 11 NLDR ¶157 (N.D. Cal. 1997 (sales manager with breast cancer who went into remission year after chemotherapy, not disabled). [Someone ought to tell the malignant cells there is no serious impairment!] Of course, to assure there is a Catch-22, if the individual is dying from the cancer, he too is not a qualified individual with a disability. Hirsch v. National Mall & Serv. Co., 11 NDLR ¶210 (N.D. Ill. 1997) (even though worker was dying from non-Hodgkins lymphoma, did not show the cancer was a disability under ADA; no evidence of impairment in daily activities or that employer regarded worker as disabled before employer terminated cancer victim to cut its health costs, which court noted might mean an ERISA violation but not one under ADA). Others in the disability community, such as those who suffer from epilepsy, especially if treatment cuts down the severity of the

seizures, may do no better. Todd v. Academy Corp., 1999 U.S. Dist. LEXIS 12133 (S.D. Tex. 1999).

(2) But see Christian v. St. Anthony Medical Center, Inc., 6 AD Cases 1665 (7th Cir. 1997) in which the court said

> . . . if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act, even though the disability is, as it were, at one removed from the condition. We cannot find a case on the question, but the answer seems obvious—maybe that's why there are no cases; in Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 (11th Cir. 1996), for example, it was simply assumed that chemotherapy treatment for a cancer not itself shown to be disabling could be disabling within the meaning of the Act. In its early stages cancer is usually not disabling, but aggressive treatment of a cancer at an early stage may be, and if it is, the protections of the Act are triggered.

(a) See also unreported decision in Bizelli v. Parker Amchem and Henkel Corp., 7 AD Cases 592 (E.D. Mo. 9/22/97) (cancer patient established a "record of impairment" by having been on a leave of absence and receiving short term disability benefits since diagnoses for testicular cancer; former cancer patient cannot be discriminated against on the basis of prior medical history, citing EEOC Interpretative Guidelines, 29 C.F.R. Pt. 1630, App. § 1630.2(k)). This is further enforced by Berk v. Bates Advertising USA, 7 ADA Manual 3 (S.D. NY 1997) (employee with breast cancer who first had to be absent from work for intensive chemotherapy, and then asked to return to work while she received treatment outside of work hours, found to be a qualified individual with a disability, because she has a record of impairment).

(3) Lake Point Tower Ltd. v. Ill. Human Rights Commission, Ill AppCt. No. 196-3008 (Memorandum decision 8/29/97) reported in BNA's Employment Discrimination Report 9/17/97 vol 9 p.398-99 (spa violated state law by firing employee who was about to receive chemotherapy treatment for non-Hodgkins lymphoma, cancer found to be a handicap within meaning of state act).

(4) See also Karuschkat v. Jessel Rothman, P.C., No. 2-E-D-93-3501414, N.Y.S.D.H.R. 1996) (employee cannot be fired for missing work because of time

she took off for chemotherapy treatments). However, suppose attendance was absolutely an essential part of the job and no absence could be accomodated? Such would not be likely, and one must remember the FMLA would likely protect these absences if the other FMLA requirements were met.

(5) Outside of cancer, see some of the more recent cases that have been decided since the Supreme Court's 1999 trilogy (Sutton v. United Air Lines, 9 AD Cases 673 (1999) (vision impairment removed by use of eyeglasses); Murphy v. Unmited Parcel Serv. Inc., 9 AD Cases 691 (1999) (impairment removed by medicine, leaving no substantial limitation); Albertsons Inc. v. Kirkingburg, 9 AD Cases 694 (1999) (blindness in one eye not substantially limiting where brain made adjustments), holding in effect disability of a person is to be judged in its medicated state, not in ignorance of such medicants and prophylactic devices: Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 8/19/1999) (worker is nonetheless still disabled where drug used to control bi-polar disorder is not perfect, leaving worker still substantially limited in her ability to think, and the side effects of the drug impair concentration and create memory problems, all of which interfere with her work and compel the employer to try to accomodate); Fjellestad v. Pizza Hut of America, 188F.3d 944 (8th Cir. 8/25/1999) (worker who suffered severe injuries in auto accident but who was returned to work by her doctors with limnited restrictions after reaching her maximum recovery, still made jury submissable case when occupational expert offered that based on her work skills and the locale in which she lived, she experiences a 91% reduction in employability and a 95% reduction in labor market access; compare her and her restrictions with the average person in the general population to determine if work restrictions still remaining were significant).

(6) Cancer will not protect a worker who engages in misconduct, as defaming the employer or insubordination. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997).

ii. Record of (or being regarded as having) impairment. See Bizelli, supra.

i) Able to perform essential functions of job with or without reasonable accommodation

(1) Kennedy v. Applause Inc., 3 AD Cases 1734, 1994 Westlaw 740765 (C.D. Cal. 1994), affirmed, 90 F.3d 1477 (9th Cir. 1996) (person/saleswoman with chronic fatigue syndrome needing open-ended work

schedule to accommodate unpredictable changes in her condition, not a qualified individual; plaintiff must show ability to maintain a regular and reliable level of attendance at the job claimed).

(2) There is always great danger if an employee who must be accommodated, asserts she can fully perform all parts of her job, even though it is obvious some accommodation had been provided: Ellison v. Softwear Spectrum, Inc., supra.

b. "Total disability": unable to perform any job reasonably suited by education, experience or training.

i. Work comp settlements not conclusive on issue under ERISA: Hurt v. Pullman Inc., 764 F.2d 1443, 1449 (11th Cir. 1985); Pagan v. NYNEX Pension Plan, 18 EBC 1382, 1384 (D.D. N.Y. 1994); Kustanaar v. Connecticut General Life Ins. Co., 902 F.2d 181, 184 (2nd Cir. 1990). But what if worker in the state compensation proceeding claims inability to work? See Jackson v. County of Los Angeles, 11 NDLR ¶195 (Cal. Ct. App. 1997) in which court found estoppel, but it was not *per se* for the court carefully examined as to whether the claim of work comp disability was one for which that the employer could make some accommodation.

(1) But suppose the LTD plan determines the claimant does not qualify for LTD benefits, that she can work, and yet the employer terminates without any attempt to accommodate. What effect does this have? Should the plan itself be stopped from making a claim the individual is not disabled. See Hayden v. Texas U.S. Chemical Co., 557 F.Supp 382 (E.D. Tex. 1983); Bonin v. American Airlines, Inc., 562 F.Supp. 896 (N.D. Tex. 1983), affirmed, 783 F.2d 435 (5th Cir. 1984), cert denied, 105 S.Ct. 1968 (1985). Or conversely, should employer be stopped from claiming no reasonable accommodation could be made, and that there was no need to look for alternative jobs?

ii. Social security findings of total disability not conclusive on issue of what is a "total disability" under ERISA: Cox v. Mid-America Dairymen, Inc., 965 F.2d 569 (8th Cir. 1992); Madden v. ITT Long Term Disability Plan, 914 F.2d 1279 (9th Cir. 1990); Conley v. Pitney Bowes, Inc., 176 F.3d 1044 (8th Cir. 1999). Nor should it, nor an application for social security benefits, be necessarily disqualifying of a claim for accommodation under the ADA: Cleveland v. Policy Management Systems, 526 U.S. 795 9 AD Cases 491 (1999).

DISCLAIMER

The U.S. Department of Labor has offered the information in this book. Every effort has been made to to make this guide as up-to-date as possible, however, change is inevitable. If you find any information that is not current or correct in this publication, please notify us and we will correct it in the next printing. Furthermore, if there are organizations that are not listed here that you feel would be helpful to others, we welcome your suggestions. Contact us at 1-800-532-5274 or by email at **info@patientadvocate.org.**

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