



EMPLOYMENT RIGHTS FOR PEOPLE WITH DISABILITIES

A BASIC GUIDE TO LAWS PROTECTING PEOPLE WITH DISABILITIES FROM DISCRIMINATION IN THE WORKPLACE

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INTRODUCTION

This manual is intended to provide a simple yet informative overview of the legal rights of individuals with disabilities in employment. The manual focuses on the two primary laws that provide civil rights protections for people with disabilities in Maine: the Americans with Disabilities Act (ADA) and the Maine Human Rights Act (MHRA). Many of the protections afforded by each of these laws are overlapping, but this manual highlights important differences.

This manual is not a substitute for legal advice. For specific questions or assistance with particular issues, please contact Disability Rights Maine.

OVERVIEW OF THE ADA AND MHRA

Who qualifies for employment protections under the ADA and MHRA?

In order to be protected under the ADA and the MHRA, a person must be a “qualified individual with a disability.” This leads to two questions: 1) What is a disability, and 2) Who is a qualified individual?

What is a disability under the laws?

A person must have a “physical or mental disability” in order to be protected under the ADA and the MHRA. The two laws have similar definitions of what qualifies as a disability, but there are some differences.

The MHRA has a list of disabilities that automatically qualify a person for protection under the law:

absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn’s disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson’s disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury

5 M.R.S.A. § 4553-A(1)(B)

If an individual does not have one of the listed disabilities, a person will still be covered under the MHRA if that person has a physical or mental impairment that 1) substantially limits one or more of a person’s major life

activities, 2) significantly impairs physical or mental health, or 3) requires special education, vocational rehabilitation or related service.

The MHRA definition of disability also includes individuals who have a record of an impairment that meets one of the definitions above, and individuals who are regarded as having or likely to develop such an impairment.

5 M.R.S.A. § 4553-A(1)(A), (C) & (D)

Under the ADA, the term “disability” means, with respect to an individual 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment.

42 U.S.C. § 12102

What is a “major life activity”?

If an individual has an impairment that substantially limits a major life activity, that person will have a disability under the ADA and the MHRA. The ADA has a list of activities that qualify as “major life activities”: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

A “major life activity” also includes “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

42 U.S.C. § 12102(2)(A) & (B)

What does it mean to “substantially limit” a major life activity?

The ADA states that an impairment need only substantially limit one major life activity to qualify as a disability. An impairment that is episodic or in

remission (such as cancer) qualifies as a disability if it would substantially limit a major life activity when active. Further, whether or not an impairment substantially limits a major life activity should be determined without considering mitigation measures that an individual may use, such as medications, prosthetics, or reasonable accommodations.

42 U.S.C. § 12102(4)(C), (D) & (E)

What does it mean to be “regarded as” having a disability?

If an employer treats an employee as if the employee has an impairment, even if that is not true, the employee is regarded as having a disability. Additionally, if the employee has an impairment that does not limit the employee’s ability to perform a job, but the employer treats the employee as if it does, that employee is regarded as having a disability. In order to prove a disability under this definition, an employee only needs to show that “he or she has been subjected to an [adverse employment action] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”

42 U.S.C. § 12102(3)(A)

Who is a “qualified individual”?

A “qualified individual” is defined as “an individual who, *with or without reasonable accommodation*, can perform the *essential functions* of the employment position that such individual holds or desires.”

The “essential functions” of a job are the fundamental job duties of a particular position and do not include marginal functions.

A “reasonable accommodation” includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their jobs. Reasonable accommodations are discussed in more detail below.

42 U.S.C. § 12111(8), 29 C.F.R. § 1630.2(n) & 42 U.S.C. § 12112(9)

How does an employee know what the essential functions of a job are?

If an employer has a written job description that outlines the duties of a position, this description is evidence of the essential functions of the job. An employer's judgment about what functions of a job are essential is considered important.

29 C.F.R. § 1630.2(n)(2) &(3)

Which employers are covered under the laws?

The employment discrimination prohibitions under the MHRA and the ADA apply to employers, employment agencies, and labor unions. The MHRA applies to most employers in Maine, regardless of their size. The ADA applies to employers with 15 or more employees. There are some exceptions for private membership clubs and religious organizations.

5 M.R.S.A. § 4553(1-B) & (4); 42 U.S.C. § 12111(2) & (5)

What kinds of actions by an employer are prohibited under the laws?

Both the ADA and the MHRA have a broad prohibition against discriminatory actions by an employer. An employer may not discriminate against a qualified individual with a disability because of that disability in job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment. Both laws also require employers to provide reasonable accommodations for employees with disabilities.

5 M.R.S.A. § 4572(2); 42 U.S.C. § 12112(a)

Does an employee have to tell an employer about a disability in order to be protected?

Yes. The ADA and the MHRA only prohibit discrimination when an employer knows about an employee's disability. An employer also is only required to provide reasonable accommodations for employees with known disabilities. General statements made to an employer describing health problems or temporary illnesses may not be enough to give an employer notice that the employee has a disability covered by the ADA or the MHRA.

42 U.S.C. § 12112(5)(A); 5 M.R.S.A. § 4553(2)(E)

How does an employee prove a disability to an employer?

If a disability is obvious, such as a person who uses a wheelchair, the employee may not need to provide any additional information about a disability to an employer. In other cases, such as a person who has a mental illness, the employee will likely need to provide a doctor's note indicating that the employee has a disability that meets one of the legal definitions.

PRE-EMPLOYMENT ISSUES

Can an employer ask about a disability on a job application?

Generally, no. Under both the MHRA and the ADA, an employer is prohibited from asking if job applicants have disabilities. Employment applications should not ask for information about medical history, Workers' Compensation claims, or medications.

5 M.R.S.A. § 4572(2)(B); 42 U.S.C § 12112(d)(2)(A)

What types of questions can an employer ask at an interview?

Although an employer is prohibited from asking a job applicant about disabilities, an employer may ask questions about the applicant's ability to perform job-related functions. If an employer has reasonable concerns about an employee's ability to perform certain job duties, the employer can ask the employee to describe or demonstrate how those duties will be performed.

5 M.R.S.A. § 4572(2)(B); 42 U.S.C § 12112(d)(2)(B)

If a disability is obvious, can an employer ask about reasonable accommodations?

If an applicant has a disability that is apparent to the employer, or if the applicant has voluntarily disclosed a disability during the application process, an employer may ask some limited questions about what accommodations may be needed, as long as the employer reasonably believes that the applicant would need accommodations to perform job functions.

What if a job applicant needs an accommodation when applying for a job?

Employers are required to provide reasonable accommodations to job applicants. For example, if an applicant who uses a wheelchair is scheduled for a job interview at an inaccessible location, the employer should move the interview to an accessible place.

5 M.R.S.A. § 4553(2)(E); 42 U.S.C. § 12112(b)(2)

Can an employer require job applicants to have a medical examination?

An employer can require medical examinations, but only after an offer of employment has been made. An employer can condition the offer of employment on the completion of a medical examination. However, an employer who chooses to give medical examinations must require all applicants to undergo an exam, regardless of disability, and must keep medical information obtained during the examination confidential.

5 M.R.S.A. § 4572(2)(C); 42 U.S.C. § 12112(d)(3)

After an employee is hired, can the employer require a medical examination?

An employer can ask an employee about a disability and request a medical examination as long as it is job-related and consistent with business necessity. In order to be job-related and consistent with business necessity, an employer must have “a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.”

5 M.R.S.A. § 4572(2)(D); 42 U.S.C. § 12112(d)(4)(A)

Do the laws prohibit drug testing?

Neither the ADA nor the MHRA prohibit an employer from performing drug tests. Further, both laws state that employers may prohibit the use of illegal drugs and alcohol in the workplace and may prohibit employees from being under the influence of illegal drugs or alcohol in the workplace.

However, the laws do provide that employers must make reasonable accommodations for individuals who are seeking treatment for alcoholism or drug abuse, or who have successfully completed treatment.

5 M.R.S.A. § 4572(2)(F); 42 U.S.C. § 12114

REASONABLE ACCOMMODATIONS

What is a reasonable accommodation?

A “reasonable accommodation” includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their jobs. An employer is not required to provide a “reasonable accommodation” if it can establish that to do so would be an undue hardship.

Some examples of reasonable accommodations include the following: allowing an employee to take time off from work for doctor appointments or visits to a therapist; restructuring the job description to eliminate non-essential functions; providing a wheelchair accessible work site or a sign language interpreter; or simply educating and reshaping co-worker attitudes.

5 M.R.S.A. § 4553(2)(E); 42 U.S.C. § 12112(5)

Can reassignment to a different job be a reasonable accommodation?

Job reassignment can be a reasonable accommodation, but it typically must be to a vacant or soon to be vacant position. The employee must be qualified for the available job. Employers are generally not required to create a new position as a reasonable accommodation.

42 U.S.C. § 12119(B)

How does an employee ask for a reasonable accommodation?

When an individual decides to request a reasonable accommodation, the employee must let the employer know that the employee needs an adjustment or change at work for a reason related to a disability. To

request an accommodation, an individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation.”

A request for reasonable accommodation is the first step in an informal, interactive process between the employee and the employer. In some instances, before addressing an accommodation request, the employer needs to determine if the individual’s medical condition meets the MHRA or ADA definition of “disability,” which is required for the employee to be entitled to a reasonable accommodation.

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA, available at <http://www.eeoc.gov/policy/docs/accommodation.html>

May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.

EEOC Enforcement Guidance

Do requests for reasonable accommodation need to be in writing?

No, requests do not need to be in writing. An employer may, however, often ask an employee to fill out a form to request an accommodation.

EEOC Enforcement Guidance

May an employer ask an individual for documentation when the individual requests reasonable accommodation?

Yes, an employer may ask for documentation when a disability is not obvious or the need for accommodation is not obvious. The employer’s

request should be limited to documentation establishing the existence of a disability and the need for an accommodation.

EEOC Enforcement Guidance

May an employer require an employee to get a medical examination from a doctor of the employer's choosing to determine the need for an accommodation?

The MHRA and the ADA do not prohibit an employer from requiring an employee requesting an accommodation to see a health care practitioner if the employer has insufficient information. However, and medical examination should be limited to gathering information sufficient to establish a disability and the need for an accommodation.

EEOC Enforcement Guidance

Does an employer have to provide the exact accommodation requested by the employee?

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. As part of the discussion with the employee, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

29 C.F.R. § 1630.2(o)(3); EEOC Enforcement Guidance

What is an undue hardship?

An undue hardship means an action requiring significant difficulty or expense, and a number of factors are considered when determining if a reasonable accommodation would pose an undue hardship:

- the nature and cost of the accommodation
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation

- the number of persons employed at such facility
- the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility
- the overall financial resources of the covered entity
- the overall size of the business of a covered entity with respect to the number of its employees
- the number, type, and location of its facilities
- the type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity
- the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity

42 U.S.C. § 12111(10)(A)-(B); 5 M.R.S.A. § 4553(9-B)

Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

No. If modifying one employee's work hours (or granting leave) would end up preventing other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

EEOC Enforcement Guidance

Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, a disruption to the operations of the employer's business that occurs because the employer can neither plan for the employee's return nor permanently fill the position may constitute an undue hardship. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to

require, as part of the interactive process, that the employee provide periodic updates on the condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

EEOC Enforcement Guidance

OTHER EMPLOYMENT DISCRIMINATION ISSUES

Can an employer fire an employee because of disability-related safety concerns?

An employer is permitted to have in place qualification standards for employees that can include a requirement that employees not pose a direct threat to the health and safety of others in the workplace.

An employer must make an individualized assessment of an employee if the employer believes that the employee may pose a direct threat. This assessment must be based on objective medical evidence, and cannot be based on stereotypes or assumptions.

42 U.S.C. § 12113(a) & (b), 5 M.R.S.A. § 4573-A

Can an employer refuse to promote an employee because of a disability?

No, both the ADA and the MHRA prohibit employers from denying a qualified individual with a disability a promotion because of that employee's disability. Neither law, however, requires employers to have in place an affirmative action program for the hiring or advancement of employees with disabilities.

42 U.S.C. § 12112(a), 5 M.R.S.A. § 4572(1)(A)

Can an employee with a disability be paid less than other employees?

No, employers cannot discriminate against employees with disabilities with regard to compensation. Under the ADA, a discriminatory action occurs each time an employee is paid a paycheck based on an employer's discriminatory compensation decision.

42 U.S.C. § 2000e-5(e)(3)

Can an employee be discriminated against because a family member has a disability?

Both the ADA and the MHRA prohibit employers from discriminating against employees “because of the known disability of an individual with whom the [employee] is known to have a relationship or association.” For example, an employer cannot fire an employee because of the fact that the employee’s spouse or child has a disability. However, the employer is not required to provide reasonable accommodations to the employee simply because of the employee’s relationship or association with a person with a disability.

42 U.S.C. § 12112(b)(4), 5 M.R.S.A. § 4553(2)(D)

What protections do employees have for exercising their rights?

The ADA and the MHRA prohibit employers from discriminating “against any individual because such individual has opposed any act or practice made unlawful [by the ADA or MHRA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.”

In other words, an employer cannot discriminate against an employee because that employee requests a reasonable accommodation, complains about discrimination, or participates in any investigation concerning discrimination.

42 U.S.C. § 12203, 5 M.R.S.A. § 4633

OTHER EMPLOYMENT RIGHTS

What if an employee needs extended time off of work because of a disability?

The Family Medical Leave Act (FMLA) and the Maine Family Medical Leave Act (MFMLA) both require employers to provide leave to employees if leave is necessary due to the serious health condition of an employee or a family member.

The FMLA provides up to 12 weeks of unpaid leave per year, while the MFMLA provides up to 10 weeks of unpaid leave every two years. In order to be qualified for leave, the employee must have worked for the employer for 12 months. The FMLA applies to employers with 50 or more employees, while the MFMLA applies to employers with 15 or more employees.

At the end of any qualified medical leave, the employer is required to reinstate the employee to the same position.

29 U.S.C. § 2601 et seq., 26 M.R.S.A. § 843 et seq.

What should an employee do if injured on the job?

Although an on-the-job injury may implicate disability and medical leave laws, the employee should first give notice of the injury to the employer, which will usually begin a claim under the Workers' Compensation Act. An employee must provide notice to the employer within 90 days of the date of injury. Employees often have rights to reinstatement and reasonable accommodation under the Workers' Compensation Act. Additionally, employers are prohibited from discriminating against an employee because an employee has filed a workers' compensation claim.

39-A M.R.S.A. § 301 & 218

Are federal employees protected from disability discrimination?

Yes. Section 501 of the Rehabilitation Act of 1973 protects federal employees from disability discrimination. This law overlaps significantly with the protections of the ADA, discussed above. Federal employees have to comply with a different administrative process to pursue a claim of discrimination, however. An employee must file a complaint with the federal agency's EEO Counselor within 45 days of the date of discrimination.

Significantly, the Rehabilitation Act does require federal agencies to have in place affirmative action policies for the hiring and advancement of people with disabilities.

29 U.S.C. § 791

Should an employee who has been fired due to potential disability discrimination apply for Social Security Disability Insurance?

Some individuals with disabilities may consider filing for Social Security Disability Insurance (SSDI) benefits if they have been fired due to discrimination. An application for SSDI may have a negative impact on a potential claim for discrimination, however. In order to prove a case of discrimination, an employee must show an ability to perform a job with or without reasonable accommodation. On the other hand, SSDI requires that individuals prove that they are unable to work because of a disability. Therefore, a statement on an SSDI application that an individual is unable to work could pose a problem in a case of discrimination. If an individual is considering pursuing both a case of discrimination and SSDI benefits, it is important to speak with an attorney first.

REMEDIES FOR DISCRIMINATION

How does an employee file a complaint of discrimination?

In order to pursue a case of discrimination, an employee in Maine must first file a charge of discrimination with the Maine Human Rights Commission (MHRC). Any charge must be filed within 300 days of the date of discrimination.

It is advisable to have an attorney assist you through this process.

The MHRC can be reached at 207.624.6290. An employee can also fill out an intake questionnaire online at <http://www.maine.gov/mhrc>.

The MHRC has a duty to investigate complaints of discrimination to determine if reasonable grounds exist to believe that discrimination occurred.

What happens after an employee files a charge of discrimination?

After a signed and notarized charge of discrimination is filed with the MHRC, the MHRC will send the charge to the employer asking for a written response. That response will be shared with the employee, and the employee has the opportunity to respond in writing.

After the written responses are submitted, the case will be assigned to an MHRC investigator, who will review the file and determine the appropriate next steps. This could involve a Fact Finding Conference, where witnesses are questioned about the events surrounding the allegation of discrimination; or the investigator could hold an Issues and Resolutions Conference, to briefly discuss the charge with the parties and attempt to resolve the case through settlement; finally, the investigator could decide that no further information is needed and write a report.

What happens after an investigator completes a report?

When the investigator completes a report, a copy will be sent to each party. The report will describe the arguments made by each party and the factual findings made by the investigator. The report will also describe the standards that are applied to discrimination cases. Finally, the report will have a recommendation: either a finding of Reasonable Grounds to believe that discrimination occurred, or a finding of No Reasonable Grounds.

If either party disagrees with the report, a statement of disagreements can be submitted for consideration by the MHRC. The case will be placed on an agenda of the MHRC, and the parties will have the opportunity to make an oral argument to the Commissioners of the MHRC. After the argument, the Commissioners vote on whether or not there are Reasonable Grounds.

If neither party files written disagreements with the investigator's report, the case will appear on the MHRC's Consent Agenda, and no oral arguments will be heard.

What happens after a finding by the MHRC?

If the MHRC finds Reasonable Grounds, the MHRC will engage the parties to determine if the case can be resolved by a settlement. If settlement attempts are unsuccessful, or if the MHRC finds No Reasonable Grounds, the MHRC's process terminates and the employee has the right to file a complaint in court, generally within 90 days.

What remedies are available in a case of employment discrimination?

The laws permit an employee to request a number of different remedies if a case of discrimination is proven: reinstatement to a former job, back pay for lost wages, compensatory damages for pain and suffering, and punitive damages if the employer exhibited a reckless disregard for the employee's protected rights.

42 U.S.C. § 1981a, 5 M.R.S.A. § 4613(2)

APPENDIX I: FORM REASONABLE ACCOMMODATION REQUEST

Dear [Employer]:

I am an employee with a disability as defined by the Maine Human Rights Act and the Americans with Disabilities Act.

In order to perform my job duties I require a reasonable accommodation. I have the following disability: [state the disability].

My disability impacts me in the following manner: [Briefly describe how the disability substantially limits major life activities.]

I need the following accommodation[s]: [List one or more specific reasonable accommodations.]

Please let me know within 10 days whether you will grant my accommodation request. I would be happy to meet with you to discuss this accommodation [or these accommodations] further. If you require medical documentation regarding my disability and my need for accommodations, please let me know.

Sincerely,
[Employee]