

# Employment Rights for Employees Living with Cancer

Wellness House of Annapolis

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# The Americans with Disabilities Act of 1990

- Prohibits discrimination against individuals with disabilities
- The ADA Amendments Act of 2008

# Does the ADA apply to your employer?

- 15 or more employees
- Covers private employers
- Covers state and local government employers
- The Rehabilitation Act applies to federal employment

# Who is protected?

- A physical or mental impairment that substantially limits one or more major life activities
- A record of impairment
- Being regarded as having an impairment

# Who is protected under the ADA?

- ADA protects an individual with a disability who, with or without reasonable accommodation, can perform essential job functions.
  - An application for disability insurance creates no special negative presumption.

# Substantial limitation of a major life activity

- 2008 amendment can help people with cancer
- Amendment added major body functions such as functions of the immune system, normal cell growth, digestive, bowel, bladder, central nervous system, brain, respiratory, circulatory, endocrine, and reproductive systems.
- Other major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

# Examples of cancer as a disability under the ADA

- When treatment causes extreme nausea and constant fatigue
- If chemotherapy renders one sterile

# Record of Impairment

- Includes individuals who have a history of illness (such as cancer)
- For example, an employee's absence from work during cancer treatments provided record of being substantially limited in major life activities of working and thinking. *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426 (3d Cir. 2009).

# Being Regarded as Having an Impairment

- Does not require any showing of a limitation nor any impact on a major life activity
- Covers those with minor impairment that is treated by others as if it imposed a greater limitation
- Covers those with no impairment at all but are treated as if they did

# Examples of Cancer Being Regarded as an Impairment

- If an employee has extensive facial scarring from skin cancer treatment and a potential employer presumes customers will react negatively to the scar
- If an employer withdraws a job offer based on genetic profile showing increased likelihood of cancer in future

# Disparate Treatment

- Discrimination (harassment, termination, failure to promote, etc.)
- Prohibition against denial of equal jobs or benefits to those who associate with disabled (for example, cannot adversely treat employee in area of health insurance even if results in higher cost to employer)

# Disparate Impact

- Employment tests

# Reasonable Accommodation Examples

- Making existing facilities accessible
- Job restructuring
- Part-time or modified work schedule
- Reassignment to a vacant position
- Acquisition of equipment (such as a chair or stool)
- Leave for doctors' appointments and/or to seek or recuperate from treatment
- Period breaks or a private area to rest or take medication
- Permission to work at home
- Modification of office temperature
- Permission to use work telephone to call doctors
- Reallocation of marginal tasks to another employee

# Duty to Accommodate Does Not Arise until Employer Knows of Limitation

- Employee must initiate process

# “Informal, interactive process”

- Identify barrier
- Identify possible accommodation
- Assess reasonableness
- Implement most appropriate accommodation

# What is an undue hardship to the employer?

- Consider nature and cost of accommodation
- Consider overall financial resources and size of employer

# Medical Examinations and Inquiries about Disabilities

- Cannot conduct a medical examination until after offer of employment
- Cannot ask whether an applicant has or ever had cancer or whether undergoing treatment for cancer
- Cannot ask whether applicant has ever taken leave for medical treatment
- Can ask questions pertaining to performance of the job, such as whether an applicant can lift up to a certain weight, travel out of town, or work rotating shifts.
- Individuals with disabilities may not be singled out for medical examinations
- Must be kept confidential and separate
- On-the-job employees cannot be subjected to a medical examination unless employer can show it's job-related

# What if my employer violates the ADA?

- Administrative exhaustion
- Damages

# State and County Laws on Disability Discrimination

- Maryland's Title 20 (must be filed within 180 days)
- Baltimore County (less than 15 employees)
- Howard County (5 or more employees)
- Montgomery County (1 or more employees and adds family responsibilities)
- Prince George's County (1 or more employees)

# Family Medical Leave Act of 1993

- Is my employer covered? (50 or more employees)

# Am I eligible for FMLA leave?

- Must have worked for employer for at least 12 months
- Must have worked at least 1,250 hours over the previous 12 months
- Must work at a location with at least 50 employees within 75 miles of the worksite

# How do I calculate the FMLA leave period?

- 12 work weeks of leave
- Must check employer's policies
- Employer may elect calendar year, fixed 12 month period (such as a fiscal year), or a “rolling” period

# Am I entitled to FMLA leave?

- To care for an immediate family member (spouse, child, or parent) with a serious health condition
- To take medical leave when the employee is unable to work because of a serious health condition

# What is a serious health condition?

- An illness that involves inpatient care or continuing treatment by a health care provider
- Includes any period of absence to receive multiple treatments by a health care provider (such as chemotherapy and radiation treatment)
- Includes a period of incapacity for more than three consecutive calendar days

# Intermittent Leave

- For occasional medical appointments or a spread out regimen of treatments (such as chemotherapy)

# Is FMLA leave paid?

- Employer is not required to pay for FMLA leave
- Employee may substitute paid leave for FMLA leave

# How much notice must I give for FMLA leave?

- Not less than 30 days
- If treatment requires leave to begin in less than 30 days, then “practicable” notice
- Must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer’s operations

# Medical Certification for FMLA Leave

- Employer may require certification from health care provider (must allow employee 15 days to provide it)
- Certification must state date treatment began, probable duration, appropriate medical facts, and confirm employee unable to perform job

# Job and Benefits Protection

- Must be restored to original or equivalent job
- Cannot result in loss of any employee benefit
- Exception for “key” employees
- Cannot take adverse action because of FMLA leave activity

# What if my employer violates the FMLA?

- May file lawsuit or complaint with Secretary of Labor
- Damages, such as lost compensation, liquidated damages, and reimbursement of attorneys' fees

# What about my health insurance during my FMLA leave?

- Must observe benefit plans

# Maryland Flexible Leave Act

- Covers employers with 15 or more employees
- Employee may use paid accrued but unused leave.

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