

# Employment Discrimination

## How does employment discrimination apply to cancer?

Employment discrimination occurs when an employer makes decisions about your employment based on certain characteristics (for example, race, age, sex, physical ability and religion), without looking at whether you can actually perform the job. For cancer survivors, employment discrimination could be focused on your medical condition. This discrimination can be based on myths, fears and stereotypes about what people with cancer can or cannot do at work. An employment decision should not be based on speculation or a guess about what a post-treatment or long-term cancer survivor can and cannot do in the workplace.

Employment discrimination also includes an employer's failure to provide a "reasonable accommodation" to allow a qualified person with cancer to perform his or her job. An accommodation is a change your employer makes to help you do your job during or after your cancer treatment. Examples of accommodations include a change in the number of hours you work or changes to your job duties.

Experiencing employment discrimination after you have successfully completed treatment for cancer is very discouraging. With all of the health, emotional and financial challenges of treatment, experiencing employment discrimination can seem overwhelming and unfair. Because discrimination happens, survivors must learn about the laws and their rights.

## Why would a cancer survivor be at risk for employment discrimination?

Cancer, cancer treatment or late-effects of cancer may or may not affect your ability to do your job. If it does not affect your job performance, you are not required to tell your employer about your cancer.

Your cancer, cancer treatment or late-effects of treatment may entitle you to protection under the Americans with Disabilities Act (ADA). If so, your employer cannot discriminate against you because you have cancer or late-effects of cancer as long as you are qualified to do your job. In addition, if your cancer or late-effects of cancer interfere with your job, your employer may need to provide reasonable accommodations to allow you to perform the essential functions of your job.

Some common reasons survivors experience employment discrimination include:

- Employers sometimes have incorrect assumptions about what cancer survivors can or cannot do.
- Survivors sometimes need to leave town for treatment.
- Employers are often uncertain about the time requirements needed for cancer treatment or follow-up appointments.
- Employers sometimes fear their insurance costs will go up.
- Survivors may need to change how they perform their job.
- Employers sometimes incorrectly view cancer as a death sentence and are worried that survivors may not be able to perform their job duties.
- Sometimes post-treatment and long-term survivors have effects from their cancer treatment, such as fatigue, chronic pain or some type of cognitive problem. If a person is qualified to do his or her job, the employer will need to provide a reasonable accommodation.

## **Which federal laws protect cancer survivors?**

Two main federal laws protect cancer survivors from employment discrimination: the Americans with Disabilities Act and the Family and Medical Leave Act. Both are described below.

### **Americans with Disabilities Act**

The ADA's goal is to "level the playing field" for people with disabilities so that they have equal opportunity for employment. The ADA applies to all phases of the employment process, including hiring, benefits, promotions, layoffs and raises.

### **Who is covered under the ADA?**

The ADA applies to employers with 15 or more employees and to employees of state and local governments. State employees cannot sue for monetary damages against their state employer, but can still sue their state to get their job back. State employees may also have additional protection under their own state laws.

### **How do you get protection under the ADA?**

The ADA applies to a person who is a "qualified individual with a disability."

A person can show they are disabled by the following:

- ✓ Having a physical or mental impairment that substantially limits a major life function, such as concentrating, sleeping, eating, walking, talking, breathing, caring for oneself; or
- ✓ Having a history of an impairment; or
- ✓ Being regarded as having an impairment
- ✓ Post-treatment and long-term survivors may fall into the category of "having a history of an impairment."

The disability must be looked at in its corrected condition. For example, you have to look at how a person is doing at the time s/he thinks the discrimination occurred and what the effects of the cancer treatment were at that time. If medications were effectively limiting the symptoms, then the person may not be protected. This means that if your cancer treatment symptoms or your post-treatment symptoms are under control by medications, you MAY NOT be protected. This is decided on a case by case basis.

A person must also be a “qualified individual.” This legal term means the person can perform the essential functions of the job with or without reasonable accommodation. The employer must provide reasonable accommodation to a qualified individual so long as it does not create an undue hardship to the employer.

Some examples of reasonable accommodations are:

- Reassignment to a vacant position
- Light duty
- Flexible hours
- Possibly a period of leave time

Generally, employees must ask the employer for a reasonable accommodation. A company's human resource department often supervises the accommodations. All requests for accommodation are confidential.

## **Do I have to tell my employer I have cancer if I don't need a reasonable accommodation?**

This is a personal choice each person must make. You are not required to tell your employer you have or had cancer. Not every employee wants to tell his or her employer. Some employees are concerned that if they tell their employer they have or had cancer, they will be treated differently and will be discriminated against. Some survivors choose not to disclose their medical condition if they do not need the employer to make any reasonable accommodations. However, if you think you are being discriminated against because you have or had cancer, you are not entitled to protection under these laws if your employer does not know about your medical condition.

## **Family and Medical Leave Act**

The other federal law that helps cancer survivors and their caregivers is the Family and Medical Leave Act. Under the FMLA, a person can take up to 12 weeks of unpaid medical leave in a year to care for a seriously ill spouse, parent or child or for an employee's serious medical condition. The FMLA applies to employers with 50 or more employees within a 75-mile radius. A person must have worked at the company for at least one year and have worked a minimum of 1,250 hours in that year to take leave under the FMLA.

The leave is unpaid. However, the employee's job is protected. This means that the employee can return to the same or an equivalent position. The employee's benefits also stay in place. If the employer is paying for someone's health insurance, the employer will continue to pay while a person is on FMLA leave time.

The leave time can be taken all at once or as a person needs to take time off. Also, cancer patients may be able to take time off for 12 weeks under the FMLA and then possibly take an extended medical leave as a reasonable accommodation under the ADA.

## **Do state laws protect cancer survivors' employment rights?**

The State where you live may have similar or more protective laws that protect people with cancer. These laws may apply to employers with fewer employees than under the ADA. Find out the specific FMLA law for the state in which you reside. This law may be different in each state.

## **Can an employer fire someone who has cancer?**

Employers do not have to hold someone's job indefinitely. How long an employer must hold someone's job generally depends on whether the time off creates an undue hardship for the employer. The employer may also have a medical leave policy that limits the amount of time someone can take off.

Employers can fire people for many reasons. For example, a company can "downsize" and many employees may lose their jobs. Or, an employee can be fired for not doing a good job. However, an employer cannot fire people with disabilities just because they have disabilities.

## **What can a survivor do to prevent employment discrimination?**

Do not lie on a job or insurance application. You don't want to lose your job or your health insurance because you did not tell the truth.

You do not have to volunteer that you have or had cancer unless it directly affects your ability to perform the job.

Be confident in your abilities and apply for jobs that match your abilities.

Educate yourself about your legal rights as a cancer survivor.

Prepare your resume so that it focuses on your skills and work experience and not periods of unemployment.

You may have to explain periods of unemployment. Focus on your current health, and, if possible, explain why you are now in good health and expect to remain in good health.

Do not ask about health insurance while you are interviewing for a job. Wait until you have been offered the job.

Workplace discrimination due to a medical condition is a concern. The goal is to achieve appropriate accommodation, which involves working with the employer. Litigation is difficult and expensive, and most survivors do not need a legal battle on top of the challenges of cancer.

Knowing these laws is beneficial. If your company has an employee or personnel handbook, look carefully at the medical leave policy. Talking to your employer about their obligations and your expectations is also important. Sometimes these discussions can resolve problems early and avoid involving additional parties or agencies. Know your legal rights for employment and how to enforce these rights if you suspect they have been violated. Information on your legal rights can often be found with the Equal Employment Opportunity Commission or the local office that enforces employment discrimination laws in your state.

## **What should survivors know about job searches after cancer?**

Many people wonder what they have to tell a prospective employer when they are looking for a new job. Employees do not need to disclose their medical condition unless they need a reasonable accommodation. An employer cannot ask about your medical condition, but can ask if the employee can perform the essential functions of the job with or without a reasonable accommodation. If an employee has a visible disability, the employer can ask prospective employees to demonstrate their ability to do the job. Employers can ask employees to take medical examinations, but they must require it for all employees entering that same position and must make a conditional offer based on the employee passing the medical examination. The employer cannot take back the job offer unless the medical exam shows the person cannot perform the essential functions of the job with or without a reasonable accommodation.

If an employee has a conditional offer and has to take a medical exam, prospective employees must answer the questions carefully and accurately. You could lose your job by misrepresenting information.

## **What should a survivor do if s/he experiences employment discrimination?**

If survivors think they are experiencing employment discrimination, they can educate themselves about the laws that provide protection. They may be able to work with their employer to get a reasonable accommodation at work and be able to keep their job. The ADA wants employers and employees to work together on workplace accommodations. However, sometimes dealing with employment discrimination is difficult. Then, employees must decide what action to take. Sometimes employees want to try to work with their employer to “fix” the situation. Some may seek legal action. Others may want to go to another job and not use energy “fighting” with their employer. Each survivor must decide what is best for him or her. For more information, see Suggestions.

### **Local Resources**

**Cancer Lifeline Seattle**  
Dorothy S. O'Brien Center  
6522 Fremont Ave N  
Seattle, WA 98103  
206-297-2100  
[www.cancerlifeline.org](http://www.cancerlifeline.org)

**Seattle Cancer Care Alliance**  
Social Work Department  
825 Eastlake Ave E  
PO Box 19023  
Seattle WA 98109-1023  
206-288-1076  
e-mail [socialw@seattlecca.org](mailto:socialw@seattlecca.org)

### **Works Cited**

Lance Armstrong Foundation Survivorship Topics  
[www.livestrong.org](http://www.livestrong.org)

Hoffman, Barbara, ed. National Coalition for Cancer Survivorship. A Cancer Survivor's Almanac: Charting Your Journey, 3d Edition. Hoboken: John Wiley and Sons, 2004.