YOUR EMPLOYEES AND CANCER – WORKING TOGETHER

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. It was written in August 2001 by Barbara Ullman Schwerin, Esq., Director, Cancer Legal Resource Center, a joint program of the Western Law Center for Disability Rights and Loyola Law School, Los Angeles, CA. Research assistance was provided by Daniel Chang, Loyola Law School, J.D. anticipated 2003.

Cornell University was funded in the early 1990's by the U.S. Department of Education National Institute on Disability and Rehabilitation Research as a National Materials Development Project on the employment provisions (Title I) of the ADA (Grant #H133D10155). These updates, and the development of new brochures, have been funded by Cornell's Program on Employment and Disability, the Pacific Disability and Business Technical Assistance Center, and other supporters.

Cornell University currently serves as the Northeast Disability and Business Technical Assistance Center. Cornell is also conducting employment policy and practices research, examining private and federal sector employer responses to disability civil rights legislation. This research has been funded by the U.S. Department of Education National Institute on Disability and Rehabilitation Research (Grant #H133A70005) and the Presidential Task Force on Employment of Adults with Disabilities.

The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/surveyresults.html.

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org.

What is Cancer? [1]

Cancer is a disease that knows no boundaries. It strikes at every age and every demographic area. There are few people whose lives have not been touched by cancer, either because they have had cancer, or because they know a family member or friend who has or has had cancer.

The word "cancer" refers to a group of diseases that are characterized by the uncontrolled growth of abnormal cells. It is also characterized by the spread of abnormal cells. Scientists do not know for sure exactly how a particular type of cancer is caused, but believe it is caused by a combination of external and internal factors. If not treated, cancer can cause death.

How is Cancer Treated? [2]

Cancer is generally treated by several different methods, including surgery, radiation, chemotherapy, hormones and immunotherapy. Many of these treatments require substantial recovery time and may have significant side effects.

Who Gets Cancer? [3]

No one is immune from cancer. Most people do not develop cancer until they are middle-aged. A very high percentage [80%] of cancers are diagnosed at ages 55 and older. Many of these individuals, therefore, are diagnosed well before typical retirement age. Approximately 8.9 million Americans who had a history of cancer were alive in 1997. Of this 8.9 million people, some were considered cured, others were living with cancer, and others were undergoing treatment.

According to the American Cancer Society, about 1,268,000 new cancer cases are expected to be diagnosed in 2001. It is anticipated that more than one half million Americans will die of cancer in 2001. Cancer causes 25% of the deaths in the United States,

[1] Cancer Facts and Figures 2001, page 2, American Cancer Society, Inc. 2001.
[2] Cancer Facts and Figures 2001, page 2, American Cancer Society, Inc. 2001.
[3] Cancer Facts and Figures 2001, pages 3-4, American Cancer Society, Inc. 2001.

Updated Version Available

making it the second leading cause of death in the United States.

However, many people do survive this disease. The five-year survival rate for all cancers combined is 60%. This five-year survival rate represents persons who are alive five years after diagnosis, although they may be disease-free, in remission, or undergoing treatment. It is also important to recognize that these survival rates are based on patients who were diagnosed at least eight years ago and, therefore, do not reflect advances in treatment. Hence, survival rates may be increasing, but the statistics are not yet available to analyze the current rates of survival.

What Issues Arise for a Person with Cancer in the Workplace?

There are many workplace issues that arise for people who have cancer. For many people with cancer, being able to keep their job is of paramount importance. For many of us, going to work is one of the ways we define ourselves. Besides providing a source of income, going to work helps us focus on things other than disease while going through cancer treatment.

Additionally, with the advent of different types of treatment, including ways to minimize the side effects, many people are able to continue working while they undergo radiation and chemotherapy treatment. Others will need to take time off for treatment, but will be able to return to work once treatment is over.

Also, for people with cancer, being able to maintain health insurance is of critical importance. Therefore, employees also want to keep their jobs, or be able to return to their jobs, so they will be able to maintain their health insurance.

What Laws Apply to Employees with Cancer?

The Americans with Disabilities Act[4]

In 1990, Congress passed the Americans with Disabilities Act [ADA]. The ADA is a very wide-ranging law. It prohibits discrimination in all areas of the employment process. An individual is protected in the application process, testing, hiring, assignments, medical exams, promotions, layoffs, compensation, benefits, and leave time. It is a civil rights law and was designed to level the playing field in the employment arena – so that people would not be denied jobs, or the benefits of jobs, simply because they had a disability.

To Whom Does the ADA Apply?

- **Employers --**The ADA applies to private employers with 15 or more employees. It also applies to employment agencies, labor organizations, and to local and county governments.[5]
- **Applicants/Employees--** The ADA provides protection to a "qualified individual with a disability." This is a two-pronged test. ***An individual must be both disabled and qualified*.**

An individual with a disability under the ADA is an individual with a physical or mental impairment that substantially limits a major life activity. The major life activity can be, among other things, caring for oneself, walking, talking, seeing, breathing, or working. A person may also have a disability if she has a record of an impairment or is regarded as having an impairment. The impairment that substantially impacts a major life function must be severe, not temporary, and must produce a permanent or long-term impact.

In determining whether an impairment is substantially limiting, the impairment must be looked at in its corrected, or mitigated, state.[6] Therefore, one must look at the individual's condition at the time of the alleged discrimination, including whether the individual has already had surgery and where the individual may be in his/her treatment program. One also must look at

[4] 42 U.S.C.~~A.~~ § 12101 *et seq*. (2001); 29 C.F.R. Pt. 1630 *et seq* (2001).

[5] While a claimant can no longer bring suit for money damages against state governments under the ADA [Board of Trustees of University of Alabama v. Garrett, 51 U.S. 356 (2001)], many states have pending legislation that would make that state liable for violations of the ADA. State employers should verify current state legislation to determine if they may be liable for claims of ADA violations.

[6] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

Updated Version Available

the medications that the individual may be taking to control the cancer, including a look at the side effects of radiation and chemotherapy or any other treatment..

If the person's cancer is completely or substantially controlled through surgery, radiation and chemotherapy, the person may not have a qualifying disability under the ADA because s/he would be unable to show a substantial impact on a major life function. However, the person may be protected under one of the other two prongs of the ADA; namely, that s/he may have a history of an impairment or the employer may be regarding him/her as having an impairment.

To be entitled to protection, the individual must also be "qualified." This means the individual must be able to perform the essential functions of the job with or without a reasonable accommodation. This can require a determination of what are the essential functions of the job versus the marginal functions. For example, if a person is a receptionist and cannot speak on the telephone because of the disability and no adaptive equipment is available, this person might not be able to perform the essential functions of the job. If the person is a truck driver and must move heavy materials from a loading dock to a truck, that person may not be a qualified individual, unless a reasonable accommodation is available, because moving the heavy materials may be an essential function of the job.

But, suppose the employee with cancer is in a sales position and can handle the telephone contacts, the individual appointments, all the paperwork and the computer work. However, this salesperson cannot move boxes of sales materials from her office to her car. This employee may be a qualified individual with a disability. Another person could help move the boxes to her car as a reasonable accommodation under the ADA, or moving the boxes may be a marginal function of the job.

How Can Reasonable Accommodations Work for Both the Employer and the Employee?

If a person is a qualified individual with a disability, s/he is entitled to a reasonable accommodation unless it would be an undue hardship for the employer. Some examples of reasonable accommodations include a flexible schedule, a light duty position, an extended period of leave time, or reassignment to a vacant position. Under some court interpretations of the ADA, attendance at a job can be an essential function of the job; other courts have held, however, that an extended period of paid or unpaid leave time may be a reasonable accommodation. Each situation is intended to be assessed on an individualized basis, including whether the reasonable accommodation would be an undue hardship for the employer.

The ADA does not specifically provide a list of reasonable accommodations – it is meant to be a dialogue between the individual and employer and based upon the specific type of job and nature, size, and resources of the company involved. Additionally, accommodations are only required for known disabilities of the individual --- the employer must first be aware that an individual is seeking a reasonable accommodation under the ADA. It is also generally up to the individual needing the accommodation to make suggestions to the employer about the type of reasonable accommodations s/he is requesting.

What Else Does the ADA Govern?

If a prospective employee is applying for a new job, s/he does not need to disclose her medical condition. S/he can ask for the reasonable accommodation after s/he gets the job. If a person has a visible impairment, the prospective employer can ask the potential employee how s/he would perform the job function, and ask for a demonstration.

If a person receives a conditional job offer based upon undergoing a medical examination, such an examination must be required of all employees in the same job category. The offer cannot be rescinded unless the medical examination indicates that the person cannot perform the essential functions of the job with or without a reasonable accommodation.

Finally, any requests for reasonable accommodations under the ADA are to be kept confidential. The request and any information obtained from the individual

Updated Version Available

in support of the request should be kept in a file that is kept separate and apart from a person's personnel file.

What Other Laws May Apply in the Workplace?

There are other laws that may provide protections to employees in the workplace. The ADA can work hand in hand with another law, the Family and Medical Leave Act[7]. The FMLA provides for a person to take up to 12 weeks of unpaid medical leave to care for a seriously ill spouse, parent or child. It also allows for up to 12 weeks of unpaid leave for a serious medical condition of the employee. Although unpaid (unless the employer requires use of or the employee opts to use available annual or sick leave), this is job-protected leave, which means the employee returns to the same or an equivalent position. This law also requires the employer to keep an employee's benefits intact.

The FMLA applies to employers with 50 or more employees. Covered employees must have been employed at least a year and have worked a minimum of 1,250 hours in that year. Sometimes, a person will need more than the 12 weeks of unpaid leave provided by the FMLA. In that case, a person may be able to take an extended period of leave time as a reasonable accommodation under the ADA.

Additionally, there may be state laws that provide protections equal to or greater than the ADA or FMLA. Each employer should review the applicable state laws to determine the employer and employee's rights and responsibilities under these laws.

Working Together

Cancer can be a life-altering experience, for the person with cancer and also for those impacted by the disease, including family, friends, employers and co-workers. By communicating with each other and working together, employers and employees can seek ways in which employees can maintain their employment status and employers can still have positive business results.

Resources

ADA Disability and Business Technical Assistance Center Hotline –
(800)949-4232 (Voice/TTY).

American Cancer Society
1-800-ACS-2345
http://www.cancer.org/

Cancer Legal Resource Center,
Western Law Center for Disability Rights
919 South Albany Street
Los Angeles, CA 90015-1211
Phone: (213) 736-1455
Fax: (213) 736-1428
TTY: (213) 736-8310
http://wlcdr.everybody.org/special-programs/cancer.mason

U.S. Equal Employment Opportunity Commission, 1801 L Street, NW, Washington, DC 20507, Technical Assistance - (800) 669-4000 (voice); (800) 800-3302 (TTY). Publications - (800) 666-EEOC (Voice)/(800) 800-3302 (TTY). For on-line information, go to www.eeoc.gov.

Disclaimer
This material was produced by the Program on Employment and Disability, School of Industrial and Labor Relations-Extension Division, Cornell University, and funded by a grant from the National Institute on Disability and Rehabilitation and Rehabilitation Research (grant #H133D10155). The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Equal Employment Opportunity Commission or the publisher. The Commission's interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and EEOC Enforcement Guidance.

Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, you should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at: http://www.eeoc.gov

Updated Version Available

[7] 29 U.S.C.~~A~~ §§2601-2615 (2001).