DISABILITY JUSTICE

Disability Rights in Employment

TOOLKIT

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1. WHAT LAWS PROTECT EMPLOYEES WITH DISABILITIES?

Title I of the Americans with Disabilities Act (ADA) offers protection from discrimination based on disability for qualified people with disabilities. The law covers state government, local government, and private employers with 15 or more workers. Religious organizations are typically exempt.[1]

The Colorado Anti-Discrimination Act (CADA) protects employees with disabilities in Colorado regardless of the number of workers employed. Unlike the ADA, it also provides protection from discrimination based on other protected identities. Religious organizations are typically exempt.[2]

Note: Federal government employees have protections under different laws, but Title I of the ADA and CADA do not apply. If you are a federal government employee, you should contact an attorney for advice specific to the federal government.

2. WHAT IS A DISABILITY?

Under the civil rights laws listed above, the term *disability* means:

1) A physical or mental impairment that *substantially limits* one or more major life activities of a person; or
2) A *record of* such an impairment; or
3) Being *regarded as* having such an impairment.[3]

1) Substantial Limitation: A physical or mental impairment that substantially limits one or more major life activities is not meant to be a demanding standard but should instead be construed broadly in favor of expansive coverage. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Major life activities include activities such as walking, breathing, and caring for oneself, and also include major bodily functions, such as bladder and brain functions.[4] The list of major life activities is not exhaustive, meaning many other activities may be included in addition to what is listed.

The determination of whether an impairment substantially limits a major life activity must be made without considering whether a mitigating measure, such as a hearing aid, reduces the limitation (with the exception of “ordinary eyeglasses or contact lenses”).[5] As an example, a person with an amputated leg would still be substantially limited in a major life activity of walking even though a prosthetic leg could allow them to walk.

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[1] 42 U.S.C. §§ 12111-12117.
[2] Colo. Rev. Stat. § 24-34-401.
[3] 42 U.S.C. §§ 12102(1)(A)-(C).
[4] 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.2(j)(1)(i), (j)(1)(ii), (i).
[5] 42 U.S.C. §§ 12102(2), (4)(D), (4)(E); 29 C.F.R. § 1630.2 (j)(1)(vi).

2) Record of Such an Impairment: The term "record of such an impairment" means you have a history of, or have a record of having, a mental or physical impairment that substantially limits one or more major life activities.[6] An example of this is someone who has a history of diabetes, but they are now able to control it without medication. Another example is a person with a history of being in an institution, such as a mental health hospital or residential treatment facility, and who now lives in the community and does not take medications for any mental health diagnoses.

3) Regarded as Having Such an Impairment: To determine whether a person is regarded as having a disability, the focus for establishing coverage is on how a person has been *treated* based on a real or perceived impairment, regardless of whether the person has an actual disability. It is important to note that a person who is covered by the law because of being regarded as a person with a disability is not entitled to reasonable accommodations.[7] Therefore, you must show that you have either an actual disability or record of a disability to qualify for reasonable accommodations.

(a) Limitations on Disabilities

Temporary Impairments

Under the ADA, temporary conditions that are minor usually do not qualify as disabilities (e.g. colds, the flu, and sprains), assuming they don't have serious, long-term consequences. A temporary impairment caused by an injury may be a covered "disability" under the ADA if it's "sufficiently severe" to substantially limit a major life activity. Whether a temporary impairment will rise to the level of disability will necessarily be fact-specific and on a case-by-case basis.

In Remission or Episodic Impairments

The ADA specifically states that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. Examples of impairments that may be episodic include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADA.[8]

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[6] 29 C.F.R. § 1630.2(k).
[7] 42 U.S.C. § 12102(3); *Id.* § 1630.2(l).
[8] 29 C.F.R. § 1630.2(j)(1)(vii)*; Summers v. Altarum Inst., Corp*., 740 F.3d 325 (4th Cir. 2014).

Substance Use Disorders

A person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation if he or she is qualified to perform the essential functions of a job. However, an employer may discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that they can no longer complete their essential job functions.

Illegal drug use is never protected, but recovering addicts are protected under the ADA. According to the Equal Opportunity Employment Commission's ("EEOC") manual, "persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction." However, a drug test that shows the employee is using an illicit substance qualifies as "illegal drug use" and bars them from ADA protections.

In both cases, employers are allowed to hold the individuals to the performance standards applicable to their jobs, and an employer may prohibit the use of drugs and alcohol in the workplace and require that employees not be under the influence of alcohol or drugs in the workplace.[9]

3. WHAT DOES IT MEAN TO BE A "QUALIFIED" EMPLOYEE?

In addition to having a disability, to be protected by the ADA and CADA, an employee with a disability must also be "qualified" for their job. This means that the employee (1) has the requisite skill, experience, education, and other job-related requirements, and (2) can perform the essential functions of their job, with or without reasonable accommodations.

Essential functions are the necessary duties and activities of the job position such that removing them would fundamentally change the position.[10] Non-essential functions, or "marginal functions," are parts of the job that are relatively less important to the position and could be removed without changing the nature of the position.

- *Example:* Consider a person who works in an office as a secretary. They spend most of their day on their computer or on the phone with staff or clients. Occasionally, they will restock various office supplies around the office. However, due to their disability, they cannot lift over 15 pounds. This means there are a few office supply items, such as boxes of reams of paper, that they cannot lift. The ability to lift the few items that weigh more than 15 pounds is likely a marginal job function because removing it would not alter

[9] *See* https://www.usccr.gov/files/pubs/ada/ch4.htm.
[10] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

the fundamental nature of the secretary position. Therefore, even though this person cannot lift over 15 pounds, they are still a "qualified" employee.

4. WHAT ARE MY RIGHTS AS A QUALIFIED EMPLOYEE WITH A DISABILITY?

(a) Freedom from Discrimination

As a qualified employee with a disability, you have the right be free from discrimination in all employment practices, including:

- Hiring
- Recruitment
- Retention
- Training
- Job assignments
- Promotions
- Pay
- Benefits
- Lay offs
- Leave
- All other employment related activities[11]

This means that your employer cannot take an adverse action against you because of your disability.[12] An adverse action is something that constitutes a meaningful and negative change to an employee's job opportunities or status, such as hiring, firing, failing to promote, or a significant change in benefits.[13]

The ADA also protects you if you are a victim of discrimination because of your familial, business, social, or other relationship or association with an individual with a disability. This is known as "associational discrimination."[14]

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[11] 42 U.S.C. § 12112(a).
[12] *See Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 896 (10th Cir. 2017); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995); *Barcikowski v. Sun Microsystems, Inc.*, 420 F.Supp.2d 1163, 1181 (D. Colo. 2006).
[13] *See EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011).
[14] 29 C.F.R. §1630.8. While people who are associated with a person with a disability are protected from discrimination, they are not entitled to reasonable accommodations.

(b) Freedom from Harassment

You have the right to be free from disability-related harassment. This includes harassment by a co-worker, supervisor, or someone who is not an employee, such as a vendor or customer. Under the ADA, illegal workplace harassment is unwelcome conduct because of your disability that is so severe and pervasive that it creates a hostile work environment. To determine whether conduct is sufficiently severe and pervasive, courts look at factors such as the frequency of discriminatory conduct; its severity; whether it was physically threatening, humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance.[15] You also need to establish that this harassing conduct was subjectively offensive to you and would be objectively offensive to a reasonable person in your situation.

Colorado adopted a new standard for harassment in 2023 that generally makes it easier for people with disabilities to prove they were illegally harassed at work. Under the Colorado Anti-Discrimination Act (CADA), you do not have to establish that the harassing conduct was severe or pervasive if you can establish the purpose of the harassment was to create an intimidating, hostile, or offensive work environment, or that your submission to the harassment has become a condition of your employment or an employment-related decision. You will still need to establish that this harassing conduct was subjectively offensive to you and would be objectively offensive to a reasonable person in your situation.[16] Note that if you want to benefit from Colorado's new standard, you would need to file your complaint with the Colorado Civil Rights Division (CCRD), the state agency, instead of the Equal Employment Opportunity Commission (EEOC), the federal agency. These complaint options are discussed in Section 7(b) below.

It's also important to highlight that under both the ADA and CADA, the harassing conduct is only illegal if it is done because of your disability.[17] You have to show that the harassing person would not be harassing you if you did not have a disability.

Also, to succeed on a harassment claim, you must establish that there is a reason why your employer should be held legally responsible:

- If the harassing person is a **supervisor**, you do not have the burden of proving anything else. Your employer can only avoid liability by showing that they reasonably tried to prevent or promptly correct the harassing behavior and you failed to take advantage of these opportunities.

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[15] *Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 897 (10th Cir. 2017).
[16] Colo. Rev. Stat. § 24-34-402(1.3).
[17] CADA covers many other protected traits such as race, gender, gender identity, sexual orientation, and religion. While the ADA does not cover traits other than disability, there are other federal laws that do. *See* https://www.eeoc.gov/discrimination-type.

- If the harassing person is not a supervisor, such as a **co-worker or customer**, you will have to show that your employer knew or should have known about the harassment and failed to take prompt and corrective action. Accordingly, it's important to inform your employer of what is happening one way or another.

(c) Freedom from Retaliation

You also have the right to be free from retaliation when you assert your rights under the ADA or CADA.[18] Retaliation occurs when (1) you previously engaged in a protected activity, (2) the employer took a materially adverse action, and (3) retaliation caused the employer's action.

- "Protected activities" are actions taken to assert your rights under the ADA or CADA. This includes requesting an accommodation, refusing to follow orders that would result in discrimination, reporting harassment or discrimination to your supervisor or human resources department, filing a charge of discrimination with CCRD or the EEOC, or being a witness in an investigation or lawsuit. This list is not exhaustive.

- "Materially adverse employment actions" are actions that might deter a reasonable person from engaging in protected activities. Trivial punishment, petty slights, or minor annoyances are not likely to be sufficient to establish retaliation under the ADA and CADA. Deciding whether something is materially adverse depends on each employee's circumstance. Some examples of employment actions that are generally considered materially adverse are:
    - Termination or demotion
    - Failure to hire or promote
    - Suspensions
    - Work related threats, warnings, or reprimands
    - Transfers to a less desirable position
    - Negative employment evaluations

- "Causation." Finally, you must show that the adverse action occurred because of your protected activity. There are many ways to establish this, such as showing your employer knew about your protected activity, they took a negative action soon after your protected activity, they made negative comments about your protected activity, the action they took was against company policy, and/or other employees in similar jobs were not disciplined for similar behaviors. You should know that this is generally difficult to establish, so you should try to collect as much evidence as possible that shows causation. It is a good idea to save any written communications, such as emails, and to immediately document any verbal communications in writing, including the date, time, specifically what was said, who said it, and names of any witnesses to the verbal communication.

[18] 42 U.S.C. § 12203; Colo. Rev. Stat. § 24-34-402(1)(e).

This right extends to anyone engaging in protected activity under the ADA. Therefore, even if you are not a qualified individual with a disability, you are still protected from unlawful retaliation by your employer.

(d) Right to Reasonable Accommodations

You have a right to reasonable accommodations for your disability. Please refer to the next section for a more in-depth discussion of reasonable accommodations.[19]

5. REASONABLE ACCOMMODATIONS

(a) What is a reasonable accommodation?

A reasonable accommodation is any change in the work environment, or the way things are usually done, that gives equal employment opportunities to a person with a disability. An accommodation is considered reasonable if it is feasible and meets the need of the person with a disability without causing an undue burden or fundamental alteration for the employer.[20]

Reasonable accommodations may be needed:

- During the application and interview process;
- To perform the essential functions of the job; and
- For the enjoyment of equal terms, conditions, and privileges of employment.[21]

Requests for reasonable accommodations may include, but are not limited to:

- Changes to the physical accessibility of location/work site;
- Job restructuring;
- Modified work schedule;
- Acquisition or modification of work equipment;
- Modification of training materials or examinations;
- Modification of policies;
- Altering how an essential function of the job is performed; or
- Reassignment to a vacant position.

If you are unsure about what accommodation may work best for you, visit the Job Accommodation Network (JAN). You can explore accommodation ideas by searching your disability or specific limitations.

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[19] 42 U.S.C. § 12111(8); 29 C.F.R. §1630.2(m).
[20] 42 U.S.C. § 12111(9)-(10); 29 C.F.R. §§ 1620.9, 1630.2(o), (p).
[21] 42 U.S.C. §12112.

(b) When can an employer decline to provide a reasonable accommodation?

An employer must make a reasonable accommodation for an employee with a known disability if the employee requests it and can show that it is necessary **unless** the employer can show that the accommodation would cause an undue financial or administrative burden on the operations of its business.[22]

An employer can also decline an accommodation if it would prevent the employee from performing an **essential function of their job** ("essential functions" is defined above in Section 3). For a basic example, a grocery store clerk's accommodation request to work from home would likely prevent them from completing the essential functions of their job, as this type of work necessitates being onsite.

(c) What is the process for requesting and receiving reasonable accommodations?

If you need an accommodation, you should tell your employer (1) that you have a disability, (2) how your disability interferes with your ability to complete your job functions, and (3) what accommodation(s) you need to do your job. You may use "plain English" and do not need to mention the ADA or use the phrase "reasonable accommodation." Requests for a reasonable accommodation do not need to be in writing; [23] however, it is better practice to put your request in writing so that you have a record of it. For a sample letter requesting a reasonable accommodation, please see page 20 of this packet.

Once an employee requests a reasonable accommodation, the employer and employee should engage in the "interactive process." This should be a productive and interactive exchange to determine which accommodations are appropriate to the needs of the employee.[24] If a specific accommodation is requested, the employer should consider the specific request, but may provide an equally effective alternative, even if it is not the employee's preferred accommodation.[25] It's important to note however that employers must give preference to a service animal as an accommodation in employment under Colorado law.[26]

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[22] 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. § 1630.9.
[23] *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1188 (10th Cir. 2016) *citing Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) ("Although the notice or request does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation,' it nonetheless must make clear that the employee wants assistance for his or her disability.")
[24] 29 C.F.R. 1630.2(o)(3).
[25] 29 C.F.R. § 1630.9; *see also Brooks v. Colo. Dep't of Corrs.*, 12 F.4th 1160, 1171-72 (10th Cir. 2021) (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 399-400 (2002)).
[26] Colo. Rev. Stat. § 24-34-803(3)(a).

Creating reasonable accommodations is an **individualized** process and will vary from person to person based on functional limitations and the nature of the job.

If the interactive process reveals there is no reasonable accommodation that would enable the employee to complete their essential job functions, then the employer must consider reassigning the employee to a vacant position as an accommodation. The employer must reassign the employee if (1) there is a vacant position of similar status, (2) the employee is qualified for the position, and (3) the employee could complete the essential job functions with or without reasonable accommodations. If there is not a suitable reassignment option, the employer can legally terminate the employee.

(d) What medical information do I have to provide to my employer to support my accommodation request?

After an employee requests an accommodation, the employer can request medical documentation of the disability and the need for the accommodation **unless** the disability and the need for an accommodation is obvious. Any medical information provided to the employer is to be treated as confidential and kept in a record separate from the employee personnel file.[27]

An employee does not need to provide all of their medical files; they only need to submit medical information that establishes a substantial limitation and need for the requested accommodation.[28]

DOCTOR'S NOTE CHECK-LIST

To provide sufficient documentation to support your accommodation request, make sure your doctor's note includes:

- ☐ Information that establishes that you have a legally recognized disability (see page 3).
- ☐ A description of the impairments and/or limitations you're seeking accommodations for.
- ☐ An explanation of your requested accommodation and why it is effective and will enable you to complete the essential functions of your job.
- ☐ If necessary, an explanation of why alternative accommodations are not effective for you.

(e) Are the ADA and the Family Medical Leave Act (FMLA) the same?

The ADA and FMLA are not the same. The purpose of the FMLA is to provide job protection for employees (1) with serious health conditions, (2) who care for family members with serious health conditions, (3) who will have a child born, placed, or

[27] 29 C.F.R. 1630.14(c); U.S. EQUAL OPPORTUNITY COMM'N, POLICY GUIDANCE ON EXECUTIVE ORDER 13164: ESTABLISHING PROCEDURES TO FACILITATE THE PROVISION OF REASONABLE ACCOMMODATION, *available at https://www.eeoc.gov/laws/guidance/policy-guidance-executive-order-13164-establishing-procedures-facilitate-provision.*

[28] 42 U.S.C. § 12112(d); 29 C.F.R. 1630.14(c).

adopted into the family, (4) who care for family members in the armed forces undergoing medical treatment, recuperation, or therapy for a serious injury or illness, or (5) who require leave for a "qualifying exigency" related to a family member's active duty in the armed forces. Not all employment positions qualify for FMLA leave. Please check with your employer regarding your specific employment situation.

You may have both a "disability" within the meaning of the ADA and a serious health condition within the meaning of the FMLA. The FMLA is not intended to modify or impact the ADA or its coverage. The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. The purpose of the FMLA is to make leave available to eligible employees and not to limit already existing rights and protections under other laws. An employer must provide leave under whichever statutory provision provides the greater rights to you. When an employer violates both the FMLA and the ADA, you may be able to recover under either or both statutes. When you are a qualified individual with a disability under the ADA, the employer must make reasonable accommodations for you, while at the same time affording you your rights under the FMLA.

For more information regarding FMLA please see The Family Medical Leave Act of 1993 (FMLA)[29] or the U.S. Department of Labor's FMLA Fact Sheet.

6. DO I HAVE TO DISCLOSE MY DISABILITY TO MY EMPLOYER?

It depends, and the rule changes depending on which phase of employment you're in.

- Application and pre-offer stage: An employer cannot require you to disclose your disability unless you are seeking an accommodation for the hiring process. The only question employers are permitted to ask is whether you can complete the essential functions of the job *with or without* reasonable accommodations.

  Sometimes employers will encourage you to disclose your disability during the hiring process because of equity, diversity, inclusion, and accessibility (EDIA) initiatives. It is still entirely up to you to decide whether you would like to disclose in this situation. That means that your employer cannot accuse you of lying or otherwise punish you for not checking a box that you have a disability, or otherwise choosing not to disclose. However, if you need accommodations for the application or interview process, you will need to disclose that you have a disability that entitles you to the accommodations.

- Conditional offers: After they extend a conditional offer, employers are permitted to ask disability or medically related questions and/or require

[29] 29 U.S.C. §2601 et seq., 29 C.F.R 825.100 et seq.

medical examinations only if they do this for all new employees in the same or similar positions as that you were hired to fill. They cannot single you out. They can only withdraw their offer if the information reveals that you cannot complete the essential job functions, or your disability poses a direct threat to the health and safety of yourself or others.

- During employment: You will need to disclose your disability if you are seeking accommodations. You also need to respond to your employer's disability or medically related inquiries or submit to a medical examination if doing so is job-related and consistent with business necessity. This usually means that your ability to perform your essential job functions is in question due to a medical condition and/or they believe your condition may pose a direct threat to the safety of yourself or others.

For more information, review the EEOC's guidance on medical inquiries.

7. WHAT SHOULD I DO IF I BELIEVE MY RIGHTS WERE VIOLATED?

(a) First steps: Consider Informal Options, Keep Documentation, and Report to HR

If you suspect you have been the subject of harassment, retaliation, discrimination, or if your employer failed to provide reasonable accommodations, you may have a few options to consider. You have the right to file a complaint or charge of discrimination with the Equal Employment Opportunity Commission (EEOC) or the Colorado Civil Rights Division (CCRD). However, before doing so, you should consider whether there are ways to resolve the issue within your employment setting, such as:

- Are you represented by a union that can advocate for your rights?
- Does your company employ an ADA Coordinator or someone who monitors compliance with discrimination laws? This information may be available through your human resources (HR) department.
- Are you a state employee who may be required to enter an internal process before filing a charge with the EEOC/CCRD?
- Is there an internal grievance procedure, an administrator with decision making powers, or a board where your issues can be heard and addressed?
- Is there an opportunity to negotiate or mediate with your employer?

Generally, for non-government employees, there is no requirement that you explore these other informal options prior to filing a complaint with the EEOC/CCRD. However, utilizing these processes sometimes will lead to a faster outcome and may be the best way to maintain a positive relationship with your employer.

As you are considering your options, keep in mind the filing deadlines explained below in Section 7(c). Additionally, here are some critical steps you should take:

- **Document everything**. This means that you should try to keep all communications and interactions over email. If you have a verbal conversation with someone, consider following up with that person over email to summarize the conversation. If you are being harassed or discriminated against, it may be helpful for you to keep a journal or log where you can keep track of the dates and details of the unwanted conduct. Having everything written down and documented will be very helpful to an attorney who is reviewing your case and can help you prove your case in the administrative complaint process and/or court.

- **Contact HR**. Human resources (HR) is typically the department that handles these matters, so they may be able to resolve your issue for you. However, beware that sometimes HR departments make mistakes about disability law. Additionally, for harassment claims, you will need to show that your employer knew or should have known about the discrimination, so reporting the unwelcome conduct to HR in writing is a way to ensure you are able to prove this.

(b) Where and how can I file a charge of discrimination?

Colorado Civil Rights Division (CCRD)
1560 Broadway, Suite 1050
Denver, CO 80202
Phone: (303) 894-2997
Toll Free: (800) 262-4845
V/TTY: (711) 894-2997
https://ccrd.colorado.gov/

CCRD has jurisdiction over employers regardless of the number of employees.

Equal Employment Opportunity Commission (EEOC)
303 East 17th Avenue, Suite 510
Denver, CO 80203
Toll Free: (800) 669-4000
TTY: (800) 669-6820
or
Video Phone: (844) 234-5122
www.eeoc.gov/

The EEOC has jurisdiction over employers with 15 or more employees.

Both the EEOC and CCRD have online portal systems. You will need to make an account and submit an online "inquiry" that provides some details about the discrimination. After you submit an inquiry, you will need to schedule an interview with the respective agency. Once your interview is complete, the agency will prepare the charge of discrimination for you to review. After you review it, the agency will file the charge of discrimination and serve it on the responding party(s) for you.

Neither the EEOC nor CCRD require that you have an attorney to file a charge of discrimination. In fact, their systems are designed to be accessible for people without attorneys. While having an attorney is always helpful, you can proceed without one.

If you need assistance completing this process, you may contact the agency directly. You can also request reasonable accommodations or modifications to their complaint procedures to make them more accessible to you.

(c) How quickly must I file to protect my legal rights?

Both the EEOC and CCRD require that you file your complaint or charge of discrimination within **300 days** from the date the discrimination occurred. It's important to understand that submitting an inquiry with the EEOC or CCRD does not mean that you filed a complaint or charge of discrimination. You must submit an inquiry, have an interview with an EEOC/CCRD intake specialist, and approve their draft of the complaint/charge of discrimination **prior to the 300-day deadline**. This process can be lengthy, so it's important to start as soon as possible.

To protect your legal rights, you **must** file with EEOC/CCRD within these timeframes. Failure to do so will result in your inability to file a lawsuit.

Beware of Alternative Deadlines:
You should also be aware that State and/or unionized employees may have mandatory prerequisites to the deadlines listed above. Deadlines may be within a few days. *Additionally, other employment claims (not related to disability discrimination) may have different filing requirements and deadlines.*

Private Lawsuits:
In most cases, you must file with the EEOC or CCRD before filing a private lawsuit alleging disability discrimination in a state or federal court. You must receive a right-to-sue letter from EEOC/CCRD prior to filing a private suit.

(d) What is the process for filing a charge with the EEOC/CCRD?

As the charging party, you should be prepared to provide the who, what, when, where, and how of the discrimination. For example, your charge should include:

- Your name, address, and telephone number;
- Your employer's name, address, and telephone number;
- The number of employees, if known;
- A description and timeline of events, with any available documentation, to support your claim of disability discrimination;
- The names, addresses, and phone numbers of anyone who could support your claim of employment discrimination (witnesses); and
- Documentation of your disability.

When you file a charge of disability discrimination with the EEOC or CCRD, you will be assigned a charge number. An investigator will have primary responsibility for handling your complaint. The employer that you filed a charge against will have the opportunity to respond to your statements alleging discrimination. The EEOC or CCRD may request that you submit additional information related to your charge.

You may be offered the chance to mediate with your employer, but mediation will occur only if you and your employer both voluntarily agree to it. The goal of mediation is to reach a settlement, meaning the EEOC/CCRD process would end, and you would give up your claims in exchange for something (usually money) from your employer.

After the claim has been investigated, the EEOC or CCRD will determine if there is "probable cause" to substantiate discrimination. If the EEOC or CCRD finds there is "no probable cause," you will be provided with a right-to-sue letter that will enable you to file your complaint of discrimination in federal or state court if you wish. You will lose your right to sue if you do not file such a complaint in court within 90 days from the date on the letter. If the EEOC or CCRD finds that there is "probable cause," you and your employer will go through conciliation, a process that is similar to mediation. If you and your employer do not reach a settlement through conciliation, the EEOC may choose to pursue a lawsuit on your behalf, or they may provide you with a right-to-sue letter.

You should visit https://www.eeoc.gov/filing-charge-discrimination (EEOC) and https://ccrd.colorado.gov/the-complaint-process (CCRD) for additional information on this process.

(e) What remedies are available to me if I am successful?

There are two general types of remedies available if you are successful under the ADA or CADA: monetary and non-monetary relief. This relief can be obtained through a settlement agreement or awarded by a court.

Monetary relief:

- **Back pay (lost wages):** This is income you would have already earned if your employer had not discriminated against you, minus any income that you earned after that time (such as by getting another job).
    - *Tip:* You need to mitigate your damages. More on how to do this below in Section 7(f).
    - *Tip:* Bonuses, commissions, tips, raises, and benefits can also be part of back pay.
    - *Tip:* You may also be awarded additional money as interest and to pay you for the added tax burden caused by the delay in receiving your back pay.

- **Front pay:** This is income that you would have earned in the future if your employer had not discriminated against you. Front pay is awarded if your employer cannot give you your job back.
    - *Tip:* Front pay is hard to get from a judge or in a settlement.

- **Compensatory damages:** This is money for your emotional distress, medical expenses, pain and suffering, or other injuries not related to your income.
    - *Tip:* You must prove that you suffered these harms. You can prove this through relevant receipts, your own testimony, witnesses who know you, or experts such as doctors or therapists.

- **Punitive damages:** This is money awarded to you to "punish" your employer.
    - *Tip:* To receive punitive damages, you must show that your employer violated your rights with malice or reckless indifference. This is generally difficult to prove.

- **Limits on compensatory and punitive damages:** The ADA and CADA limit the amount of money you can get in punitive and compensatory damages (combined). The limit is determined by the number of people your employer employs.
    - For employers with 15-100 employees, the limit is $50,000.
    - For employers with 101-200 employees, the limit is $100,000.
    - For employers with 201-500 employees, the limit is $200,000.
    - For employers with more than 500 employees, the limit is $300,000.

  These limits do not apply to other types of monetary relief, such as back pay, front pay, attorneys' fees, or costs.

- **Attorney's fees:** If you win in court, the judge will order your employer to pay your attorney for the time spent on the case. A judge could order you to pay for the defendant's attorney if you lose and they find that your lawsuit was frivolous or only filed to harass the defendant.

- **Costs:** If you win in court, the judge will order your employer to reimburse you or your attorney for certain costs paid to bring your lawsuit, such as transcripts, travel costs, witness fees, and research fees. You may have to pay these costs to the defendant if you lose.

It's important to understand that monetary relief is taxable and can affect benefits such as Social Security or Medicaid. If you receive a monetary award from the court or settlement, you should seek advice from a tax advisor/attorney or a benefits counselor. Disability Justice does not provide advice on these subjects.

Non-Monetary relief:

- **Reinstatement/instatement:**
  - If you were fired, you could get your job back (reinstatement).
  - If you were never hired, you could get a job (instatement).
  - If you were denied a promotion or transfer to a more desirable job, you could get placed in such a position if its available.

- **Positive/neutral reference letter:** If you win, the court may order your employer to write a letter about you to help you find another job.

- **Reasonable accommodations:** If you are still employed or get your job back, you can ask that your employer give you a reasonable accommodation.

- **Modified policies:** You can ask that your employer change their rules or practices to make sure they follow the law in the future.

- **ADA/Disability training:** You can ask that your employer get training about the ADA and other laws about employees with disabilities. This will help ensure that they follow the law and create a fair workplace for the future.

(f) What is the duty to mitigate my damages?

If you lost your job due to disability discrimination and plan to take legal action against your former employer, you have a duty to mitigate your damages. This means that you have a duty to reduce the amount of money that you lost because of the discrimination.

Practically, this means you have an obligation to make a reasonable and good faith effort to (1) find another job and (2) accept a job offer for a substantially similar position. If you do not succeed in finding another job or regaining employment, that is okay. The key is that you made a good faith and reasonable effort.

If you do not mitigate your damages, your lost wages (back and front pay) may be eliminated or reduced, even if you win your case.

If you do mitigate your damages, your new earnings are deducted from your lost wages.

- *Example:* if you earned $50,000 a year and are out of work for three years before your case is decided, you will seek $150,000 in back pay.

  If you try to find other employment but are unsuccessful, you can seek $150,000 in back pay.

  Lost wages ($150,000)
  – Mitigation ($0)
  = $150,000

If you try to find another job, and after one year of searching, find a position that pays $45,000, then you can seek $60,000 in back pay.

Lost wages ($150,000)
– 1st Year Mitigation ($0)
– 2nd Year Mitigation ($45,000)
– 3rd Year Mitigation ($45,000)
= $60,000

Because of this rule, it is helpful if you gather evidence to prove that you were mitigating your damages. Here are some things you should do to prove that you mitigated your damages:

- Keep **a job search log** to document your mitigation efforts. During your lawsuit, you will be asked what you did to try to find another job. For a template job search log, please see page 21 of this packet.
- Keep copies of your job search documents, including applications, emails with prospective employers, cover letters, resumes, etc.
- Keep track of other things you did as part of your job search, such as networking, registering with an employment agency or service, meeting with your Division of Vocational Rehabilitation counselor, posting your resume on a job board, etc. For a template tracker, please see page 22 of this packet.

8. OTHER RESOURCES

(a) Internet Resources

Equal Employment Opportunity Commission

- EEOC: www.eeoc.gov
- EEOC Denver Field Office: www.eeoc.gov/field/denver/charge.cfm
- EEOC Disability-Related Resources: www.eeoc.gov/laws/types/disability.cfm

Colorado Civil Rights Division

- CCRD: ccrd.colorado.gov

Job Accommodation Network

- JAN: www.askjan.org/
- JAN Publications: askjan.org/publications

ADA National Network

- Employment Resource Hub: adata.org/employment-resource-hub

The Division of Vocational Rehabilitation (DVR)

- DVR: dvr.colorado.gov/

(b) Sample Letter: Requesting a Reasonable Accommodation from Your Employer

[*Date*]

[*Name of Manager*]
[*Company Name*]
[*Address*]

Dear **[*Name of Manager*]**:

I have worked at **[*company name*]** as a **[*position or position in "X department" if appropriate*]** since **[*approximate date of hire*]**. I have a condition that qualifies me as a person with a disability, namely I ***[describe disability or, to be more general, describe the major life activities that are limited]***.

I am experiencing the following difficulties in performing my job because of my disability: **[*describe the difficulties you're experiencing*]**. I am writing to request that you **[*state requested accommodation*]** as a reasonable accommodation. Having this accommodation will help me by **[*explain how you would benefit from the accommodation and how it would help you do your job*]**.

If you have alternative suggestions regarding reasonable accommodations, please share them with me so we can work together to find a workable and effective accommodation.

I have a disability as defined by the Americans with Disabilities Act, and I need this accommodation to successfully perform my job.

If you have any questions about my request, you can contact me in writing or by phone. However, I ask that you provide me a written response to this request within two weeks of the date of this letter. Thank you very much.

Sincerely,
[*Your name*]
[*Your full address*]
[*Your phone number*]

(c) For Mitigating Damages: Documenting Job Search Efforts

Job Search Log				
Date of Initial Application (or Inquiry)	**Company & Position**	**Communications with Company (Calls & Interviews)**	**Offer (Y/N) If declined, reason for doing so**	**Documentation**

Additional Job Search Efforts

(Examples: networking, registering with employment agencies or services, posting resumes on job boards, etc.)

Date	Effort	Communications	Outcome	Documentation