

Chapter 9

Employment Discrimination

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SYNOPSIS

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There are several types of discrimination that are illegal in the United States, such as discrimination based upon a person's age, race, color, religion, sex, national origin, and disability. These types of discrimination may occur in several venues, such as employment, housing, and other public accommodations. Both federal and state laws prohibit discrimination.

The federal Age Discrimination in Employment Act (ADEA) makes it illegal for an employer to discriminate against employees because of their age.

Another federal law, Title VII of the Civil Rights Act of 1964, as amended, protects individuals from discrimination because of their race, color, religion, sex, and national origin in the areas of voting, public accommodations, public facilities, public education, federally assisted programs, and employment.

Federal law also makes it illegal to discriminate against people with disabilities. Under the federal Americans with Disabilities Act, it is illegal to discriminate against people with disabilities in employment, public accommodations, and government services.

In addition to these federal laws, Colorado has a state law known as the Anti-Discrimination Act. Like the federal laws noted above, this state law prohibits discrimination against individuals in employment based on their disability, race, creed, color, sex, religion,

age, national origin, or ancestry. Like the federal laws, it also prohibits discrimination in the areas of public accommodations and housing. However, in addition, Colorado law also prohibits discrimination on the basis of sexual orientation and being married to another employee, neither of which are currently covered by federal law.

The federal laws generally apply only to employers with at least 15 employees (the ADEA requires 20). However, Colorado law generally applies to any employers with at least two or more employees (the prohibition on marital status discrimination only applies to employers with more than 25 employees).

Employers are prohibited from discriminating in a variety of employment issues, such as job advertisements; hiring; pay and benefits, which affect compensation; promotion; demotion; and termination.

Employment discrimination includes adverse actions directly motivated by discriminatory intent, as well as adverse actions that may not be caused by a discriminatory intent but nevertheless have an adverse impact on employees in a protected group.

9-1. Age

The federal Age Discrimination in Employment Act (ADEA) makes it illegal for an employer to discriminate against a qualified employee because of his or her age. Employees who are 40 years or older are protected from discrimination based on their age. Employers are prohibited from treating qualified workers, 40 years or older, less favorably than other employees because of the older worker's age. Employers covered by this statute include those who employ 20 or more employees.

The Colorado statute prohibiting age discrimination contains an exception permitting employers to compel retirement for workers between the ages of 65 and 70 who have held executive or policy making positions and have access to immediate retirement benefits of at least a certain amount. The ADEA does not have this upper-age exception. Employers covered by the Colorado statute include those who employ two or more employees.

These statutes were enacted to protect older workers from stereotypes, including beliefs that older workers are slow, unable to adapt to change, unable to learn current technology or procedures, or that they should retire at a certain age.

The Older Workers Benefit Protection Act (OWBPA) is an amendment to the ADEA limiting the manner in which an employee 40 years or older may waive his or her protections under the ADEA. Under the OWBPA, an individual may not waive any right or claim under the ADEA unless the waiver is understood and voluntary. Any release executed by an employee is not considered valid unless the following minimum guidelines of the OWBPA are met:

- ▶ The waiver is part of an understandable written agreement that specifically refers to rights under the ADEA;
- ▶ The individual does not waive rights that may arise after the date the waiver is executed;

- ▶ The waiver must be accompanied by consideration (*i.e.*, money) in addition to severance or other benefits that the employee is already entitled to receive;
- ▶ The waiver must advise the individual in writing to consult with an attorney before executing the waiver;
- ▶ The employee must be granted a period of at least 21 days within which to consider the agreement; and
- ▶ The waiver also must state that the offer remains revocable for at least seven days after the date of signature.

If the waiver is requested as part of an exit incentive, group layoff, or other program offered to a class of employees, then these requirements are altered somewhat. Rather than having 21 days to consider the terms, 45 days must be given. Also, the employer must provide information about how eligibility for the program was determined, and the job titles and ages for those selected or eligible, as well as for those not selected or eligible.

9-2. Race, Color, Religion, Sex, and National Origin

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII), prohibits employment discrimination and/or harassment based on race, color, religion, sex, and national origin. Employers covered by this statute include those who employ 15 or more employees.

Employers covered by the Colorado statute, which prohibits this type of discrimination, include those who employ two or more employees. Colorado also prohibits discrimination based on sexual orientation, and, for employers with more than 25 employees, generally prohibits discriminating against a person because their spouse or fiancé is an employee.

9-3. Disability

Employment Protections for People with Disabilities

Title I of the Americans with Disabilities Act (ADA) offers protection from employment discrimination based on disability for qualified people with disabilities. The law covers employers with 15 or more workers.

Another federal law, Section 504 of the Rehabilitation Act, states that no qualified individual with a disability will be “excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.” This includes employment.

The Colorado Anti-Discrimination Act protects employees with disabilities from discrimination regardless of the number of workers employed.

Definition of Disability and Qualified Individual With a Disability

Under the civil rights protections listed above, the term “disability” means, with respect to an individual:

- ▶ A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- ▶ A record of such an impairment; or
- ▶ Being regarded as having such an impairment.

In order to be considered a “qualified individual with a disability,” a worker must be able to perform the essential functions of his or her job, with or without a reasonable accommodation. Essential functions are the necessary duties and activities of the job position.

Reasonable Accommodations

A “reasonable accommodation” is any change in the work environment or the way things are usually done that enables a person with a disability to perform the essential functions of the job. An accommodation is considered reasonable if it is feasible and meets the needs of the person with a disability.

An employer must make a reasonable accommodation to an employee with a known disability, unless the employer can show that the accommodation would cause an undue financial burden or hardship on the operations of its business, or that providing the accommodation would pose a direct threat to the health or safety of the employee or others.

Reasonable accommodations may be needed:

- ▶ During the application/interview process;
- ▶ To perform the essential functions of the job; or
- ▶ For the enjoyment of equal terms, conditions, and privileges of employment.

When an employee requests an accommodation, the employer can request medical documentation of the claimed disability and the need for the accommodation. Any medical information provided to the employer is to be treated as confidential and kept in a record separate from the employee personnel file.

An employee need not provide all of his or her medical files. They must only submit medical information relevant to the claimed disability and potential accommodation.

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

- ▶ Changes in physical accessibility of the location or work site;
- ▶ Job restructuring;
- ▶ Modified work schedule;
- ▶ Acquisition or modification of work equipment;

- ▶ Modification of training materials or examinations;
- ▶ Modifications of policies;
- ▶ Altering how an essential function of the job is performed; or
- ▶ Reassignment to a vacant position.

Creating a reasonable accommodation is an individualized process and will vary from situation to situation, based on a person's limitations, the job, and the employer's business. Keep in mind that a reasonable accommodation is to be provided to enable the employee to perform the essential functions of the job.

An employee's request for a reasonable accommodation may, but need not, be written. The employer and employee should engage in a productive and interactive exchange to determine a reasonable accommodation appropriate to the needs of the employee. If a specific accommodation is requested, the employer should consider the specified request, but may provide an effective alternative.

9-4. Before Filing a Charge of Discrimination

If you suspect you have been the subject of employment discrimination covered by these federal or state laws, you have the right to file a complaint, known as a charge, with the Equal Employment Opportunity Commission (EEOC), or the Colorado Civil Rights Division (CCRD). Before doing so, you should consider whether there are routes to open lines of communication within your employment setting:

- ▶ Are you represented by a union that can advocate for your rights?
- ▶ Does your company employ an EEO or ADA coordinator or someone who monitors compliance with discrimination laws? (You might be able to find this information through your human resources department.)
- ▶ Are you a federal or state employee who may be required to enter into an internal process before filing a charge with the EEOC or CCRD?
- ▶ Is there an internal grievance procedure, an administrator with decision-making powers, or a board where your issues will be heard and addressed?
- ▶ Is there an opportunity to negotiate or mediate with your employer?
- ▶ Be aware of deadlines for filing charges, listed on the next page.
- ▶ Develop a plan to address employment discrimination.

9-5. Filing a Charge of Discrimination

Where to file a charge of employment discrimination:

Colorado Civil Rights Division (CCRD)
1560 Broadway, Ste. 1050
Denver, CO 80202
(303) 894-2997 or toll-free (800) 262-4845
TTY through Relay Colorado (711 plus regular phone number)

There are satellite offices in Pueblo and Grand Junction, but all intakes must be initiated by contacting the Denver office. The CCRD has jurisdiction over businesses regardless of the number of employees. The CCRD may offer either group or individual intakes about a complaint.

Equal Employment Opportunity Commission (EEOC)
303 E. 17th Ave., Ste. 510
Denver, CO 80203
(800) 669-4000
(800) 669-6820 (TTY)

The EEOC has jurisdiction for businesses with 15 or more employees.

Timelines for Filing to Protect Your Legal Rights

CCRD — six months from the date of employment discrimination.

EEOC — 300 days from the date of employment discrimination.

To protect your legal rights, you must contact the EEOC or CCRD within these timelines.

Federal, state, and/or union employees may have mandatory prerequisites to the deadlines listed above. Deadlines may be within a few days. Requirements may include filing with an internal EEO officer. Additionally, other employment claims may have different filing requirements and deadlines.

You generally must file a sworn written statement in order to file a charge with the EEOC or CCRD. Also, before a private lawsuit may be filed in court, you must exhaust administrative remedies with the agency. Prior to filing such a suit, you must receive a right-to-sue letter from the EEOC or CCRD (see “Filing a Charge,” below).

Filing a Charge

As the charging party, you should be prepared to provide the who, what, when, where, and how concerning your complaint:

- ▶ Your name, address, and telephone number.
- ▶ Employer’s name, address, and telephone number; number of employees, if known.

- ▶ A description and timeline of events, with any available documentation, to support your claim of discrimination.
- ▶ The names, addresses, and phone numbers of anyone who could support your claim of employment discrimination (witnesses).
- ▶ Documentation of your disability, if applicable.

When you file a charge of 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.

You may be offered the chance to mediate with your employer. This step is voluntary.

You may be requested to submit additional information related to your charge.

After the claim has been investigated, the EEOC or CCRD will determine if there is “cause” to your complaint that may initiate further agency action.

If the EEOC or CCRD finds that there is “cause,” it may require conciliation efforts, choose to pursue a lawsuit on your behalf, or provide you with a right-to-sue letter.

Even if the EEOC or CCRD does not find that there is “cause,” you will still be provided with a right-to-sue letter that enables you to file a lawsuit asserting discrimination in a federal or state court. You will lose your right to sue if you do not file the complaint in court within 90 days from the date of the letter, with additional time for mailing.

9-6. Resources

If you believe that a federal program has discriminated against you, file a complaint with the federal agency that funds the program. Your U.S. senator or representative’s office can tell you which federal agency to contact.

If you believe that your employer has discriminated against you, file a complaint with the Equal Employment Opportunity Commission (EEOC) or the Colorado Civil Rights Division (CCRD). (See discussion in section 9-5.)

CCRD

(303) 894-2997

(800) 262-4845 (toll-free, bilingual Spanish/English)

www.dora.state.co.us/civil-rights/index.htm

Colorado Department of Labor and Employment

Unemployment Benefits

(303) 318-9000

(800) 388-5515

www.coworkforce.com/UIB/

EEOC

Headquarters:
U.S. Equal Employment Opportunity Commission
131 M St., NE
Washington, D.C. 20507

(800) 669-4000
(202) 663-4900
(800) 669-6820 (TTY)
info@eoc.gov
www.eoc.gov

To be automatically connected with the nearest EEOC field office, call:
(800) 669-4000
(800) 669-6820 (TTY)

Denver District Office:

303 E. 17th Ave., Ste. 510
Denver, CO 80203
(800) 669-4000
(800) 669-6820 (TTY)

Fair Housing Laws

www.civilrights.org/issues/housing/fairhousing/

Social Security Administration

(800) 772-1213
(800) 325-0778 (TTY)
www.ssa.gov

United States Department of Justice

950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001
(202) 353-1555 or (202) 514-2000
AskDOJ@usdoj.gov
www.usdoj.gov

* This chapter was originally reviewed by Valerie L. Corzine, Esq., Legal Center for People with Disabilities and Older People.