



*Achieving Equal Employment Opportunities for People with Disabilities through Legislation
An Education and Training Guide*

Non-Discrimination Legislation



Learning Objectives

- Outline importance of disability non-discrimination.
- Understand potential scope of disability law.
- Explain different forms of discrimination.
- Define and provide examples of reasonable accommodation.
- Understand the concept of burden of proof.



Key concepts in non-discrimination legislation

- Discrimination
- Equality of opportunity
- Equal treatment
- Affirmative Action
- Reasonable Accommodation
- Disproportionate burden
- Burden of Proof



Disability non-discrimination in general laws: Examples (1)

- Canada – Human Rights Act, 1985.
 - Prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted.
- Canada – Employment Equity Act, 1986.
 - Applies to women, aboriginal peoples, persons with disabilities and members of visible minorities.



Disability non-discrimination in general laws: Examples (2)

- Ireland – Employment Equality Act, 1998.
 - Outlaws discrimination on the basis of gender, marital status, family status, sexual orientation, religious beliefs, age, disability, race, and membership of the traveller community.
- Namibia – Affirmative Action Act, 1998.
 - Applied to racially disadvantaged persons, women irrespective of race, and persons with disabilities (physical or mental limitations, irrespective of race or gender).



Disability-specific non-discrimination laws: Examples

- Costa Rica – Law 7600 on Equal Opportunities for People with Disabilities (1996).
- Ghana – The Disabled Persons Act (1993).
- Malta – Equal Opportunities (Persons with Disabilities) Act (2000).
- United States of America – Rehabilitation Act (1973) and the Americans with Disabilities Act (1990).



What obligations on employers?

- UK – Disability Discrimination Act:
 - Originally applied to employers with workforce of 20 or more employees.
 - Government review found that 95 per cent of employers and 4.5 million workers were excluded from coverage.
 - As a result the threshold was reduced to 15 or more employees.
 - Exemption for small employers was completely removed in October 2004.



What obligations on employers? (1)

- USA – Americans with Disabilities Act:
 - Firms with less than 15 employees excluded.
 - Reason: small employers not expected to engage in interstate trade relations, so federal legislature cannot regulate their employment policies.
 - Under State disability non-discrimination acts however, smaller employers are covered.



When is differentiation justifiable?

- When certain skills or competencies are essential to the job, or the job environment.
- Taxi Company Illustration:
 - A taxi company requires job applicants to have a driver's license.
 - Who might be excluded from driving a taxi because of this requirement?
 - The license requirement - legitimate and proportionate, and therefore constitutes a justifiable occupational requirement.
- Any other justifiable occupational requirements for specific careers?



Forms of Discrimination

- Direct.
- Indirect.
- Harassment.
- Instruction.
- Incitement.



Direct Discrimination

- When a person is treated less favourably than another similarly-situated person because of a particular characteristic protected by non-discrimination law, such as race or sex, without an objective justification.
- **Example: An employer advertises for a job and states in the advertisement that “no blind people should apply.”**



Indirect Discrimination

- When:
 - an apparently neutral criterion is applied with the effect that a group protected by non-discrimination law is disadvantaged compared to others; and
 - no objective justification can be demonstrated for the applied criterion.
- Example: **An employer advertises for a job and states in the advertisement that “only people with driver’s licenses should apply.” While at face value it does not expressly exclude people with disabilities - it does preclude those without licenses from applying, and if not a justified occupational requirement it indirectly discriminates.**



Harassment

- When unwanted conduct related to a protected ground takes place with the purpose or effect of violating the dignity of a person and/or of creating an intimidating, hostile, degrading, humiliating, or offensive environment.
- **Example: A co-worker of an employee with quadriplegia tells jokes about “wheelchair users”, thus degrading and humiliating the person with a disability.**



Instruction and Incitement

- When a person or institution demands that others treat a person less favourably than another similarly-situated person because of a particular characteristic protected by non-discrimination law, or encourages them to do so.
- **Example: A co-worker encourages or stimulates others in the workplace toward hatred or violence against another employee with a disability.**



Reasonable Accommodation

Optional Exercise

- Describe an occasion when accommodations were effectively implemented where you work or a place you know of.
 - What were the “reasonable accommodations”?
 - How were they implemented?
 - Who was involved in the process?
 - What about accommodations for employees without disabilities - what would they be and are they provided in your place of employment?
 - What about a time when they weren’t effectively implemented, what could have been done better?



Reasonable Accommodation (1)

- Necessary and appropriate modification and adjustments that do not impose a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms (UN CRPD).
- In employment:
 - modification or adaptation of a job, employment practice, or work environment so that a qualified person with a disability can apply for a job, perform an essential function of the job, or access a benefit of employment.
- Governments define what is ‘reasonable’ in the national context.
- Denial is generally considered discrimination.



Reasonable Accommodation (2)

Examples

- Adjusted office chair.
- Adapted working hours.
- Computer keyboard with Braille reader.
- Assignment of a job coach.



Reasonable Accommodation in Americans with Disabilities Act

- The obligation to make a reasonable accommodation is understood to mean any change in the work environment, or in the way a job is performed, that enables a person with a disability to enjoy equal employment opportunities.
- There are three categories of “reasonable accommodations”:
 - Changes to a job application/interview process;
 - Changes to the work environment or the way a job is typically done; and
 - Changes that enable an employee with a disability to enjoy equal benefits and privileges or employment, such as access to training.



Reasonable Accommodation and Affirmative Action

■ Reasonable Accommodation:

- Individualized measure;
- Duration – as long as it is required by the individual.

■ Affirmative Action

- involves favourable treatment of a large group of people (e.g. people with disabilities as a group).
- Lasts as long as government priority is given to this and is generally time-bound.



Claiming Reasonable Accommodation

- Applicant or worker must demonstrate that:
 - he/she is (otherwise) qualified for the job; and
 - the employer (or other party) was made aware of his/her needs; and
 - with an accommodation, he/she can (safely) perform the essential functions of that particular job.



Appealing for exemptions

- Employers must demonstrate that:
 - He/she was not aware of the need for an individual accommodation; or
 - An effective accommodation, enabling the applicant or worker with a disability to perform the essential functions of a job is not available; or
 - The requested accommodation imposes a ‘disproportionate burden’ on the employer.



Disproportionate burden

- Includes:
 - financial costs;
 - effects on overall work process;
 - number of disabled employees;
 - length of envisaged contract;
 - other practical implications.



Making discrimination law work in practice

Burden of proof

- Who has to prove that discrimination occurred, or not? The employer or person complaining?
- Original ‘burden of proof’ was on person bringing complaint.
- Many countries now place burden of proof on the person who allegedly discriminated.
- Reversal of ‘burden of proof’ makes non-discrimination law effective.



European Union Mandate

- The EU Directive of 2000 stipulates that disability discrimination cases are subject to burden of proof reversal in favour of applicants and workers with a disability from 2003 onwards.
- In 2003 the 15 EU member states were required to introduce laws or amendments to allow for reversal of the burden of proof in employment discrimination cases involving either direct or indirect discrimination.
- All new member states will also need to follow suit.

