DISABILITY EMPLOYMENT MONTH AWARENESS CONFERENCE

2024 Seminar Material

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DISABILITY EMPLOYMENT MONTH AWARENESS CONFERENC

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JAN
Job Accommodation Network
Practical Solutions • Workplace Success

Accommodation and Compliance Series

Accommodation and Compliance Series: Service Animals as Workplace Accommodations

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JAN'S Accommodation and Compliance Series

Introduction

Because more people are using service animals, employers are receiving more requests from employees who want to use their service animals in the workplace. The following are some of the issues these employers face and practical guidance to address the issues. This guidance is based in part on information from the Equal Employment Opportunity Commission (EEOC), but does not represent the EEOC's formal position on these issues or legal advice.

Questions and Answers

Does the Americans with Disabilities Act (ADA) include a definition of service animal?

There is a definition of service animal and specific guidelines in parts of the ADA, but not in the part that deals with employment. Under the employment provisions (title I), there is no definition of service animal and no specific guidelines for employers to follow when an employee asks to bring a service animal to work.

- For additional information, see JAN's Just-In-Time Training Module: Service Animals and Emotional Support Animals in the Workplace.

Do employers have to allow employees with disabilities to use service animals in the workplace?

Because title I does not specifically address service animals, a request from an employee to bring a service animal to work can be processed like any other request for reasonable accommodation. This means that employers must consider the request, but do not have to automatically allow employees to bring their service animals to work.

What this means for employers: From a practical standpoint, a request to bring a service animal to work is really a request for an employer to modify its no-animals-in-the-workplace policy. If you do not have a policy and allow other employees to bring in animals, then you should allow employees with disabilities to bring in service animals without going through the accommodation process. For employers who have no-animal policies, you must consider modifying those policies on a case by case basis to allow an employee to use a service animal at work, unless doing so would result in an undue hardship.

What this means for employees: You should ask your employer before bringing a service animal to work unless the employer allows animals in the workplace in general.

Can employers opt to provide other accommodations instead of allowing an employee to use a service animal in the workplace?

The ADA allows employers to choose among effective accommodations so an employer might opt for another accommodation, although providing a substitute accommodation for a service animal could bring up other tricky issues. For example, the service animal may help with personal, medical issues. Service animals may also provide support that other types of accommodations cannot provide, such as a sense of security, independence, and confidence.

What this means for employers: In general, employers should not be involved in an employee's personal medical decisions so you should not insist that an employee take care of his medical needs in a different way. Because a service animal often helps with personal medical needs and provides supports that employers cannot provide, when possible you should give preference to an employee's request to use a service animal in the workplace.

What this means for employees: When requesting to use a service animal in the workplace, you may want to explain to the employer that the service animal also provides personal and medical support.

What kind of documentation can employers ask for related to a service animal? What if the employee's doctor was not involved in the acquisition of the service animal or the employee trained his own service animal and nobody else was involved?

Under the ADA, employers have the right to request reasonable documentation that an accommodation is needed because of an employee's disability. Documentation of the employee's disability and functional limitations typically comes from a health care provider. But what about documentation related to the service animal? In some cases, the doctor was not involved in the acquisition of the service animal so cannot provide documentation about the animal itself. In that case, documentation about the service animal may need to come from some other source, for example from whoever trained the service animal. The goal of an employer is to understand why the service animal is needed and what it does for the person. The employer also has the right to require that the service animal be trained to be in a workplace and capable of functioning appropriately in the work environment. An employee who trains his or her own service animal can be asked to document or demonstrate that the service animal is in fact appropriately trained and will not disrupt the workplace.

What this means for employers: When an employee with a disability requests to use a service animal at work, you have the right to request documentation or demonstration of the need for the service animal (when the need is not obvious) and that the service animal is appropriately trained and will not disrupt the workplace. However, while documentation demonstrating that an employee has a covered disability may come from a health care provider, you may need to consider documentation from other sources that explains the need for the service animal and that shows the animal is appropriately

trained. Another option is to have a trial period; allow the employee to bring in the service animal on a trial basis to see if allowing the animal is effective and does not pose an undue hardship. There is no set time frame for a trial period, but one to six weeks might be enough time to assess the situation.

What this means for employees: In addition to documenting they have a disability, employees who use service animals need to be able to show that the service animal is needed for disability-related reasons and that the service animal is trained to be in a work environment without disrupting the workplace or otherwise behaving inappropriately. If your doctor recommended the service animal, then your doctor should be able to verify that you need the service animal for disability-related reasons. Regarding your service animal's training, in some cases documentation from the service animal trainer would be helpful. In other cases, you may want to offer to demonstrate how the service animal behaves in the workplace.

Can employers require an employee to provide proof of certification, insurance, and vaccination before allowing an employee to bring a service animal to work?

Because title I of the ADA does not specifically address service animals as workplace accommodations, there is nothing that directly answers this question. However, employers may want to be cautious about asking employees to provide this type of information unless there is some indication of a problem with the service animal. Regarding certification, there often is not any certification that the employee can get; some groups that train service animals offer certification, but others do not. Also, there are bogus certifications available so even if you get a certification, it may not be helpful. Regarding insurance, does the employee having insurance relieve you of your liability should something happen with the service animal? If not, then why require it? Regarding vaccinations, how will you determine what vaccinations to require and will a vaccination record necessarily ensure that the animal is healthy?

What this means for employers: Perhaps the best approach to determining whether a service animal can be in the workplace without disruption and without posing a safety issue is to allow the employee to bring in the service animal for a demonstration. Then you can identify and try to address specific problems if they exist.

What this means for employees: Because the ADA does not address this specific issue, if your employer requests proof of certification, vaccination, or insurance, it might be easier to go ahead and provide it if you have it. If you do not have it, or prefer not to provide it, you might want to let the employer know and then offer to bring the service animal in for a demonstration of behavior and health.

Can an employer deny a request to bring a service animal to work if there are areas of the workplace that the service animal cannot go?

It might not be necessary to completely deny the request. In some cases, an employee can be without the service animal temporarily during the workday and the employer can provide a safe place for the service animal to stay during that time.

What this means for employers: Like any other accommodation request, you and the employee should work together to determine if there is a way to accommodate the employee and meet business and safety needs. Before granting or denying a request to have a service animal in the workplace, you can discuss concerns with the employee and try to find a solution.

What this means for employees: If your employer has a valid reason why your service animal cannot accompany you to all areas of the workplace, you might consider whether you can be separated from your service animal for part of your workday or whether there might be another way to perform your job without going to off-limit areas of the workplace.

What are employers allowed to tell coworkers when an employee with a disability is going to bring a service animal into the workplace?

Employers are often worried that coworkers will be allergic to the service animal or have a dog phobia so they often want to notify them before the service animal arrives. Also, coworkers may need to be educated about interacting with service animals so they do not interfere with the service animal's work. At the same time, the ADA has confidentiality rules that restrict employers from disclosing information to coworkers about an employee's disability and accommodations so it may not be wise to tell coworkers that an employee will be using a service animal.

What this means for employers: To balance these two concerns, you might want to start with talking to the employee who will be bringing the service animal to work and asking how the employee would like to handle educating coworkers. Hopefully, the employee wants to educate coworkers and is willing to do so. If not, you may want to simply let coworkers know that a dog will be present in the workplace and that they are not to interact with it. If a coworker indicates that he has an allergy or phobia related to the service animal, you should try to accommodate that employee. For example, see Service Animals and Allergies in the Workplace.

What this means for employees: If you are willing to educate your coworkers about your service animal, volunteer to do so. It most cases, educating the workplace can help you effectively use your service animal at work.

Who is responsible for taking care of a service animal at work?

The employee is responsible for taking care of the service animal, including making sure the animal is not disruptive, keeping it clean and free of parasites, and taking it out to relieve itself as needed.

What this means for employers: Employees are responsible for the care of their service animals, but you may have to provide accommodations that enable the employees to do so. When an employee is allowed to bring a service animal to work, you should consult with the employee to find out what accommodations are needed to

care for the animal. For example, an employee might need to adjust his break times to take his service animal outside.

What this means for employees: Remember that you are responsible for taking care of your service animal, but if you need accommodations in order to do so, you should let your employer know.

Do employers have to create a relief area for a service animal when an employee with a disability uses the service animal in the workplace?

There's nothing specific under title I that addresses this, but it should rarely be an issue because there is almost always a place outside, close to the work-site, where the animal can relieve itself. For example, the animal could relieve itself in an alley behind the work-site, a grassy area close to the work-site, or even close to a sidewalk leading to the building. The employer may want to talk with the employee about cleaning up after the animal when needed.

What this means for employers: From a practical standpoint, you might want to consider creating a relief area for a service animal when needed even though it is not clearly required as an accommodation under the ADA.

What this means for employees: If you are unable to find a place for your service animal to relieve itself during your work hours, let your employer know and try to work something out. However, be aware that this is a grey area of the law so be prepared to come up with your own solution if necessary. For example, maybe you could flex your schedule and take a longer lunch break to take your service animal for a relief break.

Do employers have to allow employees to train service animals in the workplace?

Under the ADA, only employees with disabilities are entitled to reasonable accommodations so if an employee without a disability is training a service animal for someone else, there is no accommodation obligation under the ADA. For employees with disabilities, an employer has a valid concern about the potential disruption a service animal in training might create so might not have to allow the employee to bring in the service animal until it is fully trained or at least until it can be in the workplace without disruption. Some states have laws addressing access for service animals in training, so employers also should check their state laws.

What this means for employers: When an employee asks to bring in a service animal in training, you should check state laws first. If state law does not address access for service animals in training, then you should next determine whether the employee who is making the request has a disability and needs the service animal because of the disability. If the employee does have a disability, then you need to get more information to determine whether the service animal in training will be disruptive (e.g., you could have the employee demonstrate the animal's behavior and current level of training).

What this means for employees: Because federal law does not address whether an employer must consider allowing an employee with a disability to bring in a service animal in training, it is unclear whether your employer has to consider allowing you to bring in a service animal that is not fully trained. If you decide to ask anyway, you should be prepared to show that your service animal is at least trained enough not to disrupt the workplace and that you will not be distracted from your work while continuing to train the service animal.

What about emotional support animals?

Because there is not a specific definition of service animal under title I, employers may have to consider allowing an employee to bring in an animal such as an emotional support animal. This is not clear cut under the ADA, but because we are talking about modifying a no-animal policy, not a no-service-animal policy, there is an argument that employers might have to consider emotional support animals as an accommodation. However, employers do not have to allow an employee to bring an animal into the workplace if it is not needed because of a disability or if it disrupts the workplace. For more information, see Emotional Support Animals in the Workplace: A Practical Approach.

Accommodating Employees who use Service Animals

Note: People use service animals for a variety of reasons, so their accommodation needs will vary. The following is only a sample of the accommodation possibilities available. Numerous other accommodation solutions may exist.

Questions to Consider:

- What limitations is the employee who uses a service animal experiencing?
- How do these limitations affect the employee and the employee's job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
- Has the employee who uses the service animal been consulted regarding possible accommodations?
- Once accommodations are in place, would it be useful to meet with the employee who uses the service animal to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
- Do supervisory personnel and employees need training regarding the use of service animals?

Accommodation Ideas

Using a service animal at work:

- Allow the employee with a disability to bring his or her service animal to work.
- Allow the employee to take leave to participate in individualized service animal training.
- Provide the employee with a private/enclosed workspace.
- Provide the employee with an office space near a door and/or out of high traffic areas.
- Establish an accessible path of travel that is barrier-free.
- Allow equal access to employee break rooms, lunchrooms, rest rooms, meeting rooms, and services provided/sponsored by the employer.

Caring for a service animal at work:

- Provide a designated area where the employee can tend to the service animal's basic daily needs, e.g., eating or bodily functions.
- Allow periodic breaks so the employee can care for the service animal's basic daily needs.
- Provide a designated area the service animal can occupy until the employee's shift ends if the employee only requires the service animal to travel to and from work or during times when the service animal cannot accompany the employee.
- Provide general disability awareness training on the use of service animals in the workplace.

Dealing with coworkers who are allergic to the service animal:

- Allow the employees to work in different areas of the building.
- Establish different paths of travel for each employee.
- Provide one or each of the employees with private/enclosed workspace.
- Use a portable air purifier at each workstation.
- Allow flexible scheduling so the employees do not work at the same time.
- Allow one of the employees to work at home or to move to another location.
- Develop a plan between the employees so they are not using common areas - such as the break room and restroom - at the same time.
- Allow the employees to take periodic rest breaks if needed, e.g., to take medication.

- Ask the employee who uses the service animal if (s)he is able to temporarily use other accommodations to replace the functions performed by the service animal for meetings attended by both employees.
- Arrange for alternatives to in-person communication, such as e-mail, telephone, teleconferencing, and videoconferencing.
- Ask the employee who uses a service animal if (s)he is willing to use dander care products on the animal regularly.
- Ask the employee who is allergic to the service animal if (s)he wants to, and would benefit from, wearing an allergen/nuisance mask.
- Add HEPA filters to the existing ventilation system.
- Have the work area - including carpets, cubicle walls, and window treatments - cleaned, dusted, and vacuumed regularly.

Interacting with a service animal:

- Address the person when approaching a person with a disability who is accompanied by a service animal.
- Remember that service animals are working and are not pets.
- Do not touch, pet, or feed treats to a service animal without the owner’s permission.

Situations and Solutions:

A state employee with a mobility impairment uses a scooter and a service animal.
The employer was concerned about how the employee would tend to the service animal's basic daily needs. JAN provided product information on a scooper with a long handle so the employee could use his scooter to go outside and tend to his service animal's "restroom" breaks.

A counselor with PTSD needed to use a service dog at work to decrease his anxiety.
Even as a veteran, his employer was concerned about having a dog present when clients were being counseled. The employer allowed the use of the service dog, but provided a separate area for the dog to stay in during counseling sessions with clients.

A building manager with post-traumatic stress disorder (PTSD) asked to bring an emotional support animal to work with her.
The employer was concerned about the behavior of the animal as the employee trained it herself. The employer and employee agree to a trial period to assess whether the animal could be in the workplace without causing a disruption.

A psychiatric nurse with cancer was experiencing difficulty dealing with job-related stress.
He was accommodated with a temporary transfer and was referred to the employer's employee assistance program for emotional support and stress management tools.

An office worker with PTSD asked to use his service animal at work.
Part of the service animal's training included notifying the worker when someone was approaching from behind so the worker would not be startled. The employer wanted to explore other accommodation options so offered to set up mirrors in the employee's workstation so he could better see people approaching. The employer found that the employee could not concentrate on his work because he had to look up at the mirrors so often because he did not feel the sense of security he felt when his service animal was present. The employer decided to allow the service animal.

A public library employee who found it difficult to handle stress and emotions requested the use of an emotional support animal at work.
The employer agreed to the accommodation on a trial basis, but because the dog lacked proper training, the employer required the animal to be more fully trained before it could return to the workplace. Issues with barking, jumping up on patrons, and wandering around the library were the issues of concern.

An insurance agency employee with multiple sclerosis and anxiety requested that the employer permit her to use a service dog on the job for mobility and stress reduction.
The employer agreed to allow the employee to bring her service animal to work,

provided training to staff on service animals as workplace accommodations, and installed new doors that were easier for the individual to open.

A newly hired teacher with a seizure disorder used a service animal to alert her that a seizure was coming on. The school had a no-animal policy.
The school allowed the teacher to bring her service animal to work and to keep it with her in her classroom. She was also provided breaks to take the service animal outside and given the opportunity to educate coworkers about the use of service animals. The employer reported that the accommodation cost nothing and it was good for the students to see a service animal at work.

A truck driver who used a service animal requested that his dog be left in his truck during maintenance and cleaning, meetings, and the completion of paperwork.
Rather than leave the dog in the truck, the employer offered to purchase a dog kennel so the dog could stay safely in the office when needed.

A dental office hired a receptionist with a vision impairment to work in the front office.
The new employee had acquired a service animal, but did not yet have accrued vacation time that could be used for service animal training. The employer allowed the receptionist to take unpaid leave to attend service animal training.

A manager with muscular dystrophy was having difficulty with daily living needs.
The individual was allowed to bring her service animal to work and provided an accessible restroom.

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Case Name and *Citation*	Notes
Bosshard v. Hackensack University Medical Center *Bosshard v. Hackensack University Medical Center, 345 N.J. Super. 78, 783 A.2d 731, 2001 N.J. Super. LEXIS 408, 12 Am. Disabilities Cas. (BNA) 758*	Heroine addiction; no evidence of a request for accommodation or that the employer was aware of the addiction or hearing impairment; employee was terminated for altering medical records. Decision to terminate was made *before* the employee requested an accommodation for the drug problem. Trial court dismissed the case; App. Div. affirmed dismissal.
Dickson v. Community Bus Lines, Inc. *Dickson v. Community Bus Lines, Inc., 458 N.J. Super. 522, 206 A.3d 429, 2019 N.J. Super. LEXIS 46, 2019 WL 1474060*	Obesity discrimination-perceived disability; need to demonstrate ability to do the job with the accommodation. Plaintiff lacked evidence that the supervisors perceived obesity as a disability. The court sought evidence that the supervisors perceived the employee to be disabled by a medical condition which caused the obesity - dismissed the Plaintiff's claim.
Domurat v. Ciba Specialty Chemicals Corp. *Domurat v. Ciba Specialty Chemicals Corp., 353 N.J. Super. 74, 801 A.2d 423, 2002 N.J. Super. LEXIS 342, 13 Am. Disabilities Cas. (BNA) 512*	ADD, alcoholism and depression; jury entered judgment for employer, plaintiff appealed. Jury found that employee was not handicapped (good grades, performed job well, well liked and did job well for 17 years of employment). At time of termination, employee was unwilling or unable to perform his job responsibilities justifying employer's decision to terminate.
Grande v. St. Clare's Health System *Grande v. St. Clare's Health System, 230 N.J. 1, 164 A.3d 1030, 2017 N.J. LEXIS 746, 33 Am. Disabilities Cas. (BNA) 934, 2017 WL 2963024*	Plaintiff must prove (a) has a disability; (b) performing job at a level that met employer's expectations; (c) suffered a negative employment action; and (d) employer sought someone else without a disability to perform the job after employee was discharged. Then engage in McDonnell Douglas burden shifting analysis. Must show that can perform the essential functions of the job (with or without the accommodation.)
Raspa v. Office of Sheriff of County of Gloucester *Raspa v. Office of Sheriff of County of Gloucester, 191 N.J. 323, 924 A.2d 435, 2007 N.J. LEXIS 693, 19 Am. Disabilities Cas. (BNA) 591, 12 Accom. Disabilities Dec. (CCH) P12-257*	Corrections officer asked for an accommodation of no contact with inmates. Having inmate contact is an essential part of a corrections officer's job and hence, employer was justified in termination. Remanded to trial court for judgment in employer's favor.
Richter v. Oakland Bd. of Educ. *Richter v. Oakland Bd. of Educ., 246 N.J. 507, 252 A.3d 161, 2021 N.J. LEXIS 548*	Type 1 diabetic teacher; asked for her lunch period to be moved so that she could manage blood sugar better. No change was made to lunch schedule. Plaintiff had a low blood sugar event, had a seizure and passed out, hitting her head on a lab table. Don't have to show adverse employment action in a failure to accommodate action - just that the employer failed to engage in the interactive discussion or allow a reasonable accommodation.

Royster v. NJ State Police *Royster v. NJ State Police, 227 N.J. 482, 152 A.3d 900, 2017 N.J. LEXIS 12, 33 Am. Disabilities Cas. (BNA) 326*	Ulcerative Colitis disability; state trooper asked for accommodation of having immediate access to restroom facilities at work. Was assigned to conduct surveillance from a car - asked for a transfer, was denied.
Seiden v. Marina Associates *Seiden v. Marina Associates, 315 N.J. Super. 451, 718 A.2d 1230, 1998 N.J. Super. LEXIS 400*	Don't need to engage in the McDonnell Douglas burden shifting test for failure to accommodate cases.
Svarnas v. AT & T Communications *Svarnas v. AT & T Communications, 326 N.J. Super. 59, 740 A.2d 662, 1999 N.J. Super. LEXIS 368, 9 Am. Disabilities Cas. (BNA) 1777*	Chronic and sporadic excessive absenteeism for asthma and bodily injuries from a car accident. Reasonable and regular attendance at work is an essential job requirement - need not accommodate excessive absenteeism. Plaintiff failed to demonstrate that she would be able to do the job with the accommodation - as a phone operator for ATT, needed to be present at work to do the job.
Victor v. State *Victor v. State, 203 N.J. 383, 4 A.3d 126, 2010 N.J. LEXIS 834, 23 Am. Disabilities Cas. (BNA) 1089, 14 Accom. Disabilities Dec. (CCH) P14-133*	State trooper injured back at work; was required to return to work without accommodation. Plaintiff did not offer evidence of his disability or his request for an accommodation.

DISABILITY AND THE ONLINE WORLD

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TITLE II

- DOJ's final rules were published in the Federal Register on April 24, 2024
- They update Title II regulations to provide specific requirements about ensuring web content and mobile apps are accessible to people with disabilities

REGULATED COMMUNITY

- The rules apply to all state and local governments including agencies and departments as well as special purpose districts, Amtrak and other commuter authorities
- Organizations that contract with state and local government to run programs (eg: non profits running drug treatment programs) must comply
- Examples include schools, police, courts, election offices, libraries, parks and healthcare clinics

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GUIDELINES

- The Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA is the technical standard for web content and mobile apps
- The WCAG is developed by the World Wide Web Consortium
- Level AA is the state and local government standard in the Technical Standard Appendix and defines how web content is to be made available in accordance with the ADA
- Level AA is usually adhered to by private companies as well

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PRIVATE COMPANIES

- Private companies must comply with ADA requirements for their websites under Section 508 of the Rehabilitation Act of 1973
- Although not specifically stated ADA has taken the position since 1996 that Title III requires private companies to have web content in conformity with the ADA under Title III, the public accommodations section of the ADA which prohibits discrimination by businesses open to the public
- DOJ entered into settlements with Peapod LLC and H&R Block to enforce website compliance with the ADA

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FACITLITY TYPES

- Title III applies to public accommodations
- Private clubs do not have to comply with the requirements if membership is restricted and they are not generally open to the public at large
- Religious organizations such as churches, temples and mosques
- However, accepting federal funds negates the exemptions and creates the obligation to be ADA compliant

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SIZE

- Private businesses that operate for less than 20 weeks per year and employ fewer than 15 full-time employees daily may be exempt from the the physical requirements of ADA's Title III requirements. This potential exemption acknowledges the limited public impact and resource capabilities of very small or temporary operations
- However, the ADA does not specifically recognize a size exemption for websites and it is an open questions whether one may apply creating a hazard for companies that do not

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VIRTUAL ONLY

- If your business has no brick and mortar presence and operates solely through an online presence the question arises whether Title III's requirements can apply
- There is a split in the circuits
- The 3rd Circuit ruled in Peoples v. Discover Financial Services, 387 F. App 179 (3d Cir. 2010) that a physical presence is required to to invoke ADA requirements
- The issue remains controversial witness the H&R Block and Peapod settlements among others

CONTENT

- The specifics of ADA compliance for websites can sometimes enter a grey area, particularly for personal blogs or content that does not directly facilitate transactions. If a website is purely informational and does not conduct sales or services, it may not be required to comply, especially if it is not linked to a physical business that is a place of public accommodation

SUBSTANTIVE REQUIREMENTS

- The substantive requirements of accessibility under the ADA are detailed and extensive
- The DOJ relies on the Web Content Accessibility Guidelines established by the W3C protocol which provide extremely detailed requirements for website design
- The link is as follows:
- https://perma.cc/UB8A-GG2F
- https://digital.gov has numerous resources for compliance

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RECENT FILINGS

- Lawsuits alleging non compliance with ADA in company websites are on the rise
- Roughly 19,000 web accessibility lawsuits were filed from 2017-2023 with 4,605 filed in 2023 alone, a 42% increase from 2022
- Demand letters are similarly on the rise
- E-Commerce websites account for 82% of cases
- Many cases are moving to State Courts as States like California are enacting web accessibility legislation
- California and New York lead in cases file.

SPECIFIC CASES

- Gil v. Winn-Dixie, 257 F. Supp. 3rd 1340 (SK Fla 2017)-Foundational case in what was deemed the first trial of its kind. The judge ruled that because Winn-Dixie's website was so heavily integrated with its physical stores, it was subject to accessibility requirements outlined in the ADA-Reversed on appeal, 993 F.3rd 1266 (11th Cir. 2021)
- Access Now v.Blue Apron, 2017 DNH 236 (D.N.H. 2017)-Early lawsuit demonstrating that companies with no brick and mortar presence can vioate Title III
- Toro v. Whirlpool, 1:23-cv-00848, (S.D.N.Y.) was a 2023 lawsuit alleging that barriers for customers with visual disabilities on KitchenAid's website constituted discrimination because they forced customers to spend time and money visiting in-store locations to make purchases

SPECIFIC CASES

- Burbon v. Fox News Network, Case 1:18-cv-01662-Class Action resulting in settlement that Fox website constituted barriers to access by blind people by failure to have alt text for images and links
- Conner v. Parkwood Entertainment, (1:19-cv-00053)-Class Action that website selling Beyonce tickets to concerts could not be accessed by keyboard without a mouse
- Robles v. Domino's Pizza, 913 F.3d 898 (2019)-lawsuit resulted in a verdict in favor of blind plaintiff for being unable to order pizza
- Colak v. Sweetgreen2:24-cv-00198 is a 2024 lawsuit under ADA and NY law brought after 2016 settlement where company promised ADA compliance and was slow to act

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LAWSUIT AVOIDANCE TIPS

- Conduct an ADA website compliance audit
- Follow the WCAG guidelines
- Include people with disabilities in your accessibility testing
- Train your staff
- Monitor your website
- Have an accessibility statement
- Get professional assistance

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HELPFUL TECHNOLOGY FOR THE DISABLED

- There are a number of hardware and software technologies designed to assist people with disabilities
- The following are examples only and are neither an exhaustive list nor a recommendation of specific products for purchase or use

SCREEN READERS

- Software programs available to read text or understand imagery displayed on screen through audible response or braile
- Most can read either plain text or the alt text of images, charts, graphics or more
- Examples of popular programs are AWS and NVDA for Windows computers, VoiceOver for the Mac and iPhone, and TalkBack on Android
- Prices range up to approximately $1,200

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SCREEN MAGNIFICATION SOFTWARE

- Enlarges text, images and graphics on a user's screen
- Most move with you enlarging the display as you navigate through it
- In Windows to turn on Magnifier, press the Windows logo key + Plus sign (+)
- Other software includes iReader, MAGic, Supernova, EyePal and iMax
- Price varies widely from free to over $1,000

Footmouse

- A footmouse is a type of mouse operated by the foot rather than the hand
- Examples are Boomer, Footime and Ikkegol
- Usually less than $100

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ADAPTIVE SWITCHES

- Several different types which perform specific tasks by pressing a button
- Examples are Specs Switch, Pal Pad, Jelly Bean and Buddy Button
- Most are priced from $75 to $300

Alternative Keyboards

- Allow for different configurations
- Can fit over a standard keyboard pressing respective keys
- Compact to fit on wheelchair
- Large keyed for visually impaired
- Ergonomic for physical limitations or one handed
- Examples are Dragon, Wacom, Aegir or Tap
- $100 to $700

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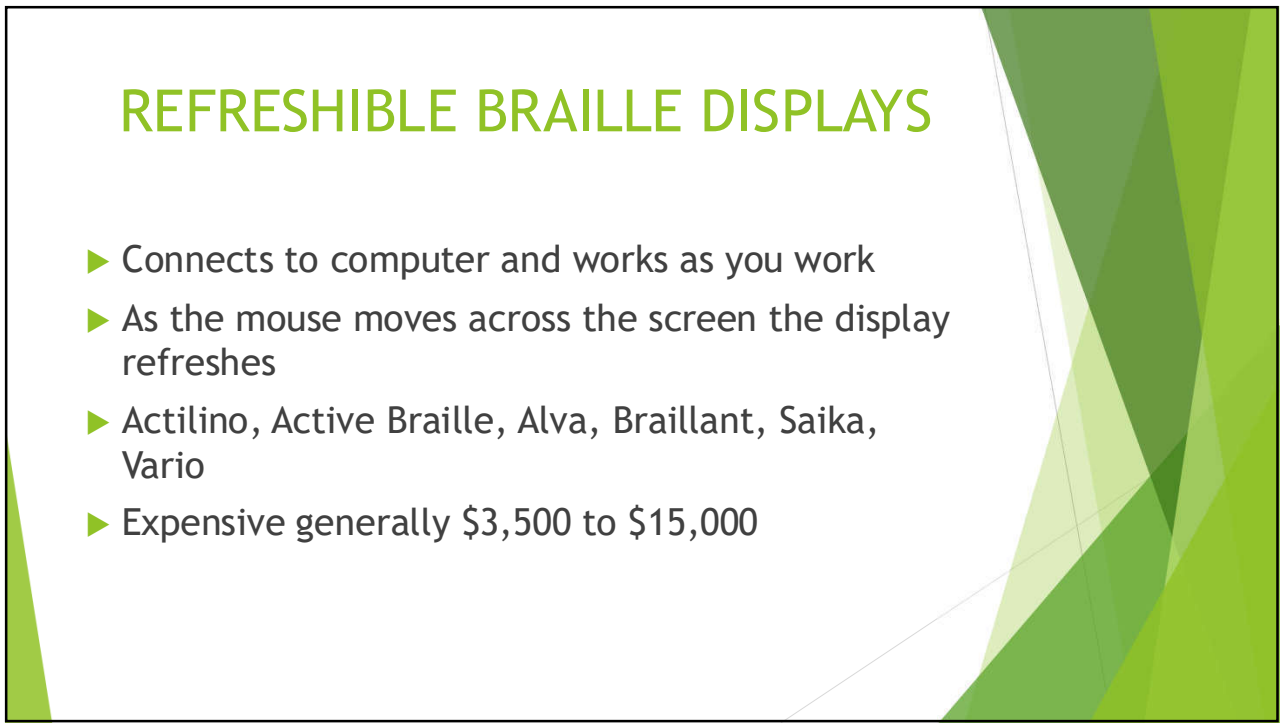
BRAILLE EMBOSSERS

- Printers that print documents using braille
- Instead of using ink paper is embossed with raised dots
- Perkins, Romeo, IRIE, Braillo
- Usually more than a printer
- Up to $10,000


REFRESHIBLE BRAILLE DISPLAYS
Connects to computer and works as you work
As the mouse moves across the screen the display refreshes
Actilino, Active Braille, Alva, Braillant, Saika, Vario
Expensive generally $3,500 to $15,000

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Text to Speech Software

- Processes written text and reads it to the user in a synthesized voice
- AWS, Polly, Transcribe, Balabolka, Microsoft
- Many examples available for free

TRACKBALLS

- Used instead of a mouse
- Moves in any direction by rolling the hand instead of moving the mouse
- For limited hand mobility
- Most major mousemakers make them such as Logitech, Kensington or Elecom
- Priced similarly to mouse

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https://www.dol.gov/agencies/whd/fmla

Family and Medical Leave Act

Downloading Forms Notification

In order to access a form you **MUST** select the form name and then select the Save link as... to save it to your documents folder. Then edit from there.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

- Twelve workweeks of leave in a 12-month period for:
    - the birth of a child and to care for the newborn child within one year of birth;
    - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
    - to care for the employee's spouse, child, or parent who has a serious health condition;
    - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
    - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or
- Twenty-six work weeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

www.ada.gov

The Americans with Disabilities Act (ADA) protects people with disabilities from discrimination.

Disability rights are civil rights. From voting to parking, the ADA is a law that protects people with disabilities in many areas of public life.

Section 504, Rehabilitation Act of 1973

Section 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date of which such regulation is so submitted to such committees. See also 29 CFR Part 32 and 29 CFR Part 37.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (l), (2) or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services is available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections related to employment.

Section 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706 (k) [42 U.S.C. 2000e-5(f) through k)] shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and

the availability of alternative therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq)shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistant under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Workforce Innovation and Opportunity Act

WIOA is landmark legislation that is designed to strengthen and improve our nation's public workforce system and help get Americans, including youth and those with significant barriers to employment, into high-quality jobs and careers and help employers hire and retain skilled workers.

The Workforce Innovation and Opportunity Act (WIOA) was signed into law on July 22, 2014. WIOA is designed to help job seekers access employment, education, training, and support services to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy. Congress passed the Act with a wide bipartisan majority; it is the first legislative reform of the public workforce system since 1998.

Improving the Workforce System

WIOA requires states to strategically align their core workforce development programs to coordinate the needs of both job seekers and employers through combined four-year state plans with greater flexibility than its predecessor program (WIA). Additionally, WIOA promotes accountability and transparency through negotiated performance goals that are publicly available, fosters regional collaboration within states through local workforce areas, and improves the American Job Center system.

WIOA Agency Partners

The U.S. Department of Labor (DOL), in coordination with federal partners at the U.S. Departments of Education (ED) and Health and Human Services (HHS), collaborated to provide information and resources for states, local areas, non-profits and other grantees, and other stakeholders.

Information on these programs is located on the respective WIOA partner agency websites below.

Professional Ethics and Attorney Advertising in a Digital Era

1

Rules of Professional Conduct

- Full context of the RPC's available online at Judiciary's website

10/31/2024

2

RPC 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- (3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey".

* * *

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

- **Official Comment by Supreme Court (November 2, 2009)**

  A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

RPC 7.2 Advertising

- (a) Subject to the requirements of RPC 7.1, a lawyer may communicate information regarding the lawyer's services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication.

- (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

- (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

RPC 7.4 – Communications of Fields of Practice and Certification

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.
- (d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

RPC 7.5 Firm Names and Letterheads

- (a) Subject to the requirements of RPC 7.1, a lawyer may communicate information regarding the lawyer's services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication.
- (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.
- (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Internet Domain Names

Opinion 32 – Committee on Attorney Advertising

- **Keyword domain names** permitted subject to following limitations:
  1) May not be false or misleading. RPC 7.1(a)
  2) May not communicate false or misleading information about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. RPC 7.1(a).
  3) May not create an unjustified expectation, state or imply results that can be achieved by means that violated the RPCs, or compare the lawyer's services with other lawyer's services. RPC 7.1(a)(2), (3)
  4) May not state or imply recognition or certification of a specialty other than authorized by RPC 7.4
  5) Firm may not convert Internet domain name to the formal name of the firm or use that name in lieu of the formal name as required by RPC 7.5 (Example: Cohn Lifland – www.njlawfirm.com)
- **Home Page Requirements**
  1) Actual, formal name of the firm or attorney must appear
  2) Bona fide street location and telephone number
  3) Disclaimers and advisories required by RPC 7.1, 7.2, 7.7 and 7.4

Client Endorsements and Testimonials
(Committee on Attorney Advertising Opinion 33)

- Client endorsements or testimonials which extol in any manner the professional efficiency or effectiveness of a lawyer are prohibited.
  - ✓ May create unjustified expectations as to results which the lawyer can achieve. RPC 7.1(a)(2).
- Endorsements do not furnish relevant information to be considered in the selection of counsel. RPC 7.2(a).
- Endorsements and testimonials that address the client's satisfaction based on interaction between the client and lawyer are permitted if:
  - (a) the endorsement or testimonial as to these matters is, in fact, that of the client is truthful in all respects and does not compare one lawyer with another.
  - (b) does not describe the work or quality of the work which the lawyer has performed for the client; and
  - (c) the client consents to the use of such an endorsement or testimonial in the marketing or advertising program of the attorney.
- ,**Appropriate examples include**: **Lawyer was sympathetic or concerned; lawyer returned phone calls; lawyer communicated frequently; lawyer was prompt in responding to client request; lawyer was professional.**

Displaying Honors & Accolades (Super Lawyer, Best Lawyers in America, 201 Best of Bergen)

Super Lawyers

Supreme Court Notices to the Bar

- May 4, 2016 Committee on Attorney Advertising
- May 5, 2021 Committee on Attorney Advertising
- **Onus on Lawyers to do their due diligence**
  - Must ascertain whether the organization conferring the award has made "inquiry into the attorney's fitness." Official Comment to RPC 7.1
  - Rating or certifying methodology must have included inquiry into lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion. (Entails more than just a simple tally of the lawyer's years of practice and lack of disciplinary history.)
  - Basis for comparison must be substantiated, bona fide, and verifiable.

Referencing/Displaying Badges and Logos on Attorney Websites

- 2016 Bar Notice established that every reference to an award, honor or accolade, including use of a badge or logo must include the following information:
  - A description of the standard or methodology (can be referenced by citing the website or hyperlinking to the page of the conferring website (**Ex: For the comparison standards employed by the various lawyer rating companies, please visit superlawyers.com, bestlawyers.com, bestlawfirms.usnews.com, societyoflegaladvocates.org, and avvo.com.)**
  - The name of the comparing organization that issued the award
  - The statement "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"
- **Proximity**: The above information must appear in proximity to the display of the award, badge or logo, should not be obscured in tiny font, or placed on a separate page of the website.
- Must include **actual name of the comparing organization that issued the award** (which is often different from the name of the award or the name of the magazine where the award results were published)
- Superlative awards such as "preeminent," "distinguished," "super," "best," "top," "superior," "leading," "top-rated," must only state that the lawyer was included in the list with that name, and not suggest that the lawyer has that attribute

Judicial Photographs

Committee on Attorney Advertising – Opinion 31

- Including the image of a judge on an attorney's website is improper because "it is likely to create an unjustified expectation." RPC 7.1(a)(2).
- Picture of a judge would represent an implicit endorsement of the attorney.
- A commercial appropriated judicial image "may imply an ability to influence improperly a governmental agency or official or to achieve results by means that violate the RPCs or other law."

- **Held: An attorney may not include on a professional or personal website, either directly or through a link, an image of a judge if the purpose of the site is to advertise or market the attorney's practice."**

In the Matter of Ty Hyderally
208 N.J. 453 (2011)

- Attorney displayed "New Jersey Certified Civil Trial Attorney" seal on his website.
- He was NOT a certified civil trial attorney.
- OAE charged him with violating RPC 8.4(c) – conduct involving dishonesty, fraud, deceit, or misrepresentation.
- Respondent attorney hired his cousin to design the website. Cousin added civil trial attorney seal to 16-pages of the website based on erroneous assumption that if an attorney practice in New Jersey, it meant he was certified by the NJ Supreme Court.
- Attorney never looked at the website content in detail and did not learn of the presence of the seal until 2 years later when a grievance was filed. Hyderally immediately removed the seal from his website.
- Held: (1) No clear and convincing evidence that Hyderally either intentionally included the certified trial attorney seal on his website or approved its continued presence on his website.

  (2) Prospectively, are responsible for monitoring the content of their websites to ensure the communications are consistent with the RPCs. Attorneys should frequently review the language or design of their websites. Attorneys who do not qualify as certified civil trial attorneys under Rule 1:39 and thus not authorized to display the certified civil trial seal will be subject to discipline.

Other Digital Ethical Dilemmas

- **Friending Litigants on Facebook**

- IMO John J. Robertelli
  (DRB 19-266, April 30, 2021)

Copying Litigant's on "Reply All" Emails

Opinion 739 Adv. Comm. Prof. Ethics

TicTok'ing in the Courthouse

- Bergen County Judge Suspended 3 Months After Inappropriate TikToks
- The Complaint
- 10/8/24 Decision

AI Podcasts via Notebook LM

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About the Panelists…

Melissa Allman, J.D. is Advocacy and Government Relations Specialist at The Seeing Eye in Morristown, New Jersey. Joining The Seeing Eye in 2018, she advocates for the access rights of Seeing Eye graduates and other guide dog handlers by providing direct assistance to people who contact The Seeing Eye for guidance on access to public places, housing or transportation.

Ms. Allman works to promote the rights of guide dog handlers in the legislative context and by engaging in education and outreach to the public; and is working with a yellow Labrador/golden cross Seeing Eye dog named Luna. She has a multi-faceted law and advocacy background focusing on social justice issues.

Ms. Allman received her undergraduate degree from Georgetown University, her master's degree from Ohio State University and her law degree from Temple University.

Christine A. Amalfe chairs the Employment & Labor Law Department at Gibbons P.C., in the firm's Newark, New Jersey, office. She serves on the firm's Executive Committee and as its Human Resources General Counsel, and defends single plaintiff, multi-plaintiff and class action claims under state and federal employment laws, as well as state and federal whistleblower claims. Also defending actions before FINRA, the NFA and the AAA, Ms. Amalfe represents defendants in actions alleging trade secret misappropriation, breach of contract, intentional infliction of emotional distress, breach of fiduciary duty, violation of restrictive covenants, negligent supervision, fraud and negligent misrepresentation. She also conducts training for clients.

Ms. Amalfe is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern, Eastern, Northern and Western Districts of New York; the United States Court of Appeals for the Second and Third Circuits; and the United States Supreme Court. A founding member of the Academy of New Jersey Management Attorneys, Inc., she has been President of the National Association of Women Lawyers Foundation and a member of the New Jersey Women Lawyers Association and the New Jersey Council on Gender Parity, and has held the New Jersey State Bar Association's At-Large Trustee position reserved for a woman. President-Elect of the New Jersey State Bar Association, Ms. Amalfe has been a member of the American Bar Association's Labor and Employment Law and Women in the Profession Sections, has served on the New Jersey Supreme Court Advisory Committee on Expedited Civil Actions, has been a NJSBA Trustee for its Women in the Profession Section and has served on the Section's Task Force on Work-Life Balance. Dedicated to women's professional advancement, she co-founded the Catalyst Award-winning Gibbons Women's Initiative, which engages Gibbons women and guests in high-quality educational, networking, social, charitable and mentoring programs.

Ms. Amalfe has served as a member of the Editorial Board of the Gibbons *Employment Law Alert* blog and is a former Adjunct Professor of Legal Writing and Advocacy for Seton Hall University School of Law. She has lectured for ICLE and other professional organizations, and her articles have appeared in the *New Jersey Law Journal* and other publications. Elected a Fellow of the College of Labor and Management Lawyers, she is the recipient of the Essex County Bar Association's Civil Trial Attorney Award and several other honors.

Ms. Amalfe received her B.S., *magna cum laude*, from Seton Hall University and her J.D., *magna cum laude*, from Syracuse University College of Law, where she was a member of the Order of the Coif and Senior Editor of the *Syracuse Law Review*.

Steven J. Eisenstein is a member of the Business Group of Lum, Drasco & Positan LLC in Roseland, New Jersey, where he concentrates his practice in environmental law, transactional matters, business law and real estate tax appeals. He has appeared before planning and zoning boards throughout New Jersey as well as the Tax Court of New Jersey and county boards of taxation.

Mr. Eisenstein is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, and the Second and Third Circuit Courts of Appeal. A Trustee of the New Jersey State Bar Association, he is Chair of the Association's Business Law Section, Past Chair of the Internet and Computer Law Committee and a member of the By-Laws Committee. He is Past Chair of the Essex County Bar Association Committee in Environmental Law, a former member of the NJSBA Nominating and COVID-19 Committees and serves on the District Fee Arbitration Committee and the Editorial Board of *New Jersey Lawyer* Magazine.

The author of the *Pro-Se Guide to the New York Court System*, Mr. Eisenstein has authored two articles which have appeared in the New Jersey Lawyer as well as *The Successful Transaction*, published by Aspatore Books as part of its "Inside the Minds" series. He has lectured for ICLE on business law topics.

Mr. Eisenstein received his B.A., *summa cum laude*, from Montclair State University and his J.D., *cum laude*, from Brooklyn Law School, where he was President of the Moot Court Honor Society and an editor of the *Brooklyn Law Review*. He was a judicial clerk to the Honorable Harry Bramwell, United States District Court for the Eastern District of New York.

Yvette Gibbons is the owner and President of Employment Compliance Strategies®, LLC in South Orange, New Jersey, where she has counseled clients in all aspects of employment law and related litigation. She has represented numerous clients in federal, state and administrative courts and counseled clients in wrongful discharge with Title VII, the *American with Disabilities Act*, the *Family and Medical Leave Act*, the *Equal Pay Act*, the WARN Act, civil rights violations and other federal and state employment legislation. She has also served as a federal arbitrator for the District of New Jersey and the New Jersey State Board of Mediation, and has served on the District of New Jersey's Mediation Panel.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, and the Third Circuit Court of Appeals, Ms. Gibbons is Past President of the Essex County Bar Association and has been a member of the American Bar Association's Labor and Employment Law Section and the New Jersey Association of Professional Mediators (NJAPM). She has been a Director and member of the Board of Trustees of the Essex County Legal Aid Association as well as a member of the Federal Historic Society of the United States District Court for the District of New Jersey. She frequently conducts in-house employment training for management, supervisory and non-supervisory employees, on topics including litigation avoidance, employment compliance, discrimination, harassment, gender-based issues, workplace violence and bias training.

Ms. Gibbons received her B.S from Montclair State University, attended Rutgers Business School and received her J.D. from the University of Virginia School of Law, where she served on the Editorial Board of the *Virginia Law Review.* She was Law Clerk to the Honorable Joseph A. Greenway, Jr., U.S.D.J., District of New Jersey, the Honorable Ronald J. Hedges, U.S.M.J., District of New Jersey, and the Honorable Leander J. Shaw, Jr., Justice, Supreme Court of Florida.

Ayesha Krishnan Hamilton established the Hamilton Law Firm, P.C. in Princeton, New Jersey, and concentrates her practice in business and employment law, including commercial litigation and business transactions. She is experienced in all phases of litigation, including conducting depositions, mediations, arbitrations and trials.

Ms. Hamilton is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey, the Southern and Eastern Districts of New York and the Eastern and Middle Districts of Pennsylvania. She has been a Trustee of the New Jersey State and Mercer County Bar Associations, and has served on the NJSBA Diversity Committee and Commission on Racial Equity in the Law. Past Chair of the NJSBA Solo Small Firm Section, Ms. Hamilton has been Chair of the Mercer County Bar Association's Diversity Committee, Co-Chair of the Association's Civil Practice Committee, and a member of the Employment Law Committee of the New Jersey Association for Justice. She is a member of the National Employment Lawyers Association and the National Association of Women Business Owners. In 2020 Ms. Hamilton was appointed to serve on the State Bar's Judicial and Prosecutorial Appointments Committee (JPAC), vetting candidates for the New Jersey Governor's Office. She was named the NJSBA Solo/Small Firm Attorney for the Year in 2021.

Ms. Hamilton received her B.A. from Case Western Reserve University and her J.D. from Case Western Reserve University Law School.

Honorable Harriet Farber Klein, J.S.C. (Ret.) is Of Counsel to Wilson Elser in the firm's Madison, New Jersey, office. Having spent 15 years and 2 additional years on recall as a Superior Court Judge, she is an arbitrator and mediator, and provides judicial insight to her colleagues.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Judge Klein is a Trustee of the New Jersey State Bar Association Women in the Profession Section, Co-Chair of the Association's Judicial Administration Committee and a member of the Dispute Resolution and Business & Commercial Litigation Sections. She is a Trustee of the Essex County Bar Association and the New Jersey Women's Lawyers Association, and a member of the Justice Garibaldi American Inn of Court for Dispute Resolution.

While on the bench Judge Klein was a faculty member for the training of new judges and law clerks assigned to the General Equity Part. She has lectured as bar association programs and continuing legal education seminars.

Judge Klein received her B.A. from Douglass College, Rutgers University, where she was elected to *Pi Sigma Alpha*, and her J.D. from Rutgers School of Law, where she was a member of the Rutgers Moot Court Board and the Order of Barristers. She clerked for the Honorable Irwin I. Kimmelman, Chancery Division, General Equity Part.

Christopher J. Manente, Ph.D., BCBA is the founding Director of the Rutgers Center for Adult Autism Services (RCAAS) in New Brunswick, New Jersey, and an Assistant Professor of Clinical Practice at the Rutgers Graduate School of Applied Professional Psychology.

Dr. Manente's former roles include serving as an Assistant Professor of Education at Caldwell University, as a consultant supporting students with ASD in schools throughout New Jersey and serving as the Senior Program Coordinator of Adult Services at the Douglass Developmental Disabilities Center at Rutgers University. He has authored articles in peer-reviewed journals, co-authored book chapters and lectured at numerous local, national and international conferences.

Dr. Manente received his B.A., his M.Ed. in Elementary/Special Education and his Ph.D. in Education from Rutgers University.

Beth C. Manes is a Partner in Manes & Weinberg, LLC with offices in Mountainside, Paramus and Bridgewater, New Jersey. She concentrates her practice in special education law, guardianships, estate planning and special needs planning.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Ms. Manes is a member of the New Jersey State Bar Association's Elder and Disability Law and Solo-Small Firm Sections, and Education Law Committee, and the New Jersey Special Education Practitioners. She is a Trustee of the Union County Bar Association, serves as Co-Chair of the Association's Trusts, Estates and Elder Law Committee and has been a member of the Union County Probate Early Settlement Panel. A member of the Board of Directors of Don't Hide It, Flaunt It!, Ms. Manes is Past President of the Planned Lifetime Assistance Network of New Jersey, Inc., which provides lifetime advocacy for people with special needs, and has been Chair of the NJSBA Solo and Small Firm Section. She has been a member of the Special Needs Alliance, a national organization of attorneys who work with families with special needs.

Ms. Manes served as a hearing panel chair for the State of Delaware Department of Education, overseeing special education hearings. She has lectured on special needs children in divorce topics for CLE courses and for community groups, and has raised puppies for The Seeing Eye since 2012. She is the recipient of several honors.

Ms. Manes received her B.A., *cum laude*, from Brandeis University, where she was the recipient of several awards and inducted into *Pi Sigma Alpha*. She received her J.D. from the University of Michigan Law School, where she was a member of the Environmental Moot Court Team, won the Best Oralist award and was the Coordinating Editor of Production of the *Michigan Journal of Gender and Law*.

Tracy E. Miller is Executive Vice President and General Counsel to the Catholic Health System of Long Island in Rockville Centre, New York.

Jennifer Marie Mohamed is a Member of The Bayne Law Group LLC in Princeton, New Jersey, and advises public and private clients on business, employment and environmental law matters.

Ms. Mohamed is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Northern Districts of New York. President *Emeritus* of the Princeton Bar Association, she formerly worked for the New York State Department of Environmental Conservation as Counsel to the Division of Solid & Hazardous Materials.

Ms. Mohamed has lectured domestically and Internationally on attorney ethics and professionalism, environmental and climate change law, and international human rights law topics, including those with business law implications. She is the author of "Silent Spring +55: The Human Right to a Clean Environment" which was published by *Environs*, the environmental law and policy journal of the University of California Davis School of Law.

Ms. Mohamed received her B.A. from the State University of New York at Albany and her J.D. from Albany Law School, Union University, where she was the recipient of the Gary M. Peck Award, served as an Associate Editor of the *Albany Law Journal of Science and Technology*, and participated in intra-school Moot Court competitions. She has also studied at the Harvard Extension School and trained professionally with the United Nations Institute for Training and Research.

Andrew M. Moskowitz is a Partner in Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. in Springfield, New Jersey. An attorney for 25 years, he has focused in employment law as well as commercial and personal injury litigation and appellate work.

Mr. Moskowitz has been a member of the NELA-NJ Board of Directors and a Co-Chair of the NJAJ Employment Law Section. He was involved in the precedent-setting case *Goldfarb v. Solimine*, 245 *N.J*. 326, a 2021 Supreme Court case which permitted the plaintiff, who had quit his prior job on an oral promise of employment, to recover "reliance damages" based on the salary and benefits he gave up at his previous employer. He is the recipient of several honors.

Mr. Moskowitz is a graduate of Duke University and received his law degree from Fordham University School of Law, where he graduated in the top 25% of his class.

Jody Litwin Paul, M.A., CCC-SLP is a speech language pathologist in Westfield, New Jersey, where she specializes in speech, language and swallowing disorders in patients; and evaluates, diagnoses and treats patients with communication and swallowing troubles. These conditions may be due to developmental delay, brain injury, hearing loss, autism, stroke, or other diseases and injuries.

Ms. Paul received her B.A. from the University of North Carolina at Chapel Hill and her M.A. in Communication Sciences and Disorders from the University of North Carolina at Greensboro.

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Admitted to practice in New York and New Jersey, Mr. Sattiraju is a former in-house employment counsel with extensive experience in employer counseling, investigations and anti-harassment/discrimination training. He is a member of the Executive Committee of the New Jersey State Bar Association's Labor and Employment Law Section and has been a member of the Board of Directors of the South Asian Bar Association's New Jersey Chapter, where he has served as President. He has lectured for ICLE, the National Employment Lawyers Association (NELA) and other organizations, and has published on employment law topics.

Mr. Sattiraju received his B.A. from the University of Colorado at Boulder and his J.D. from Rutgers University School of Law-Newark.

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where she worked to secure appropriate educational services and interventions for students with special needs.

Ms. Sheiman received her B.F.A. from the University of Miami and her J.D. from New York Law School.

Jessica Weinberg is a Partner in Manes & Weinberg, LLC with offices in Mountainside, Paramus and Bridgewater, New Jersey. An attorney and mediator with more than 25 years of experience, she concentrates her practice in special education law, including advocating for victims of bullying or those accused of committing an act of harassment, intimidation or bullying, or a disciplinary infraction.

Ms. Weinberg is admitted to practice in New Jersey and before the United States District Court for the District of New Jersey. She is a member of the New Jersey State Bar Association School Law Committee, the JCC Special Needs Committee, the Board of Friends Connect Foundation and the Hearing Panel for the Delaware Department of Education. She is also a trainer and attorney for Volunteer Lawyers for Justice.

Ms. Weinberg received her B.A. from Hofstra University and her J.D. from Widener University.

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DISABILITY EMPLOYMENT MONTH AWARENESS CONFERENCE

EMPLOYMENT LAW FOR NON-EMPLOYMENT LAWYERS

OCTOBER 31, 2024

PRESENTED BY

YVETTE GIBBONS, ESQ.
EMPLOYMENT COMPLIANCE STRATEGIES, LLC
WWW.ECSYG.COM

AND

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AGENDA

1. Title VII – Yvette Gibbons
2. EEOC and the New Jersey Division of Civil Rights – Andrew Moskowitz
3. Conscientious Employee Protection Act ("CEPA") – Andrew Moskowitz
4. New Jersey Law Against Discrimination ("NJ LAD" or "LAD") – Andrew Moskowitz
5. Workplace Postings – Yvette Gibbons
6. Workplace Investigations: In-house v. Outside Counsel – Yvette Gibbons
7. Employee Handbooks – Andrew Moskowitz
8. A.I. Hiring – Yvette Gibbons
9. Workplace Accommodations – Andrew Moskowitz
10. Website Accommodations – Yvette Gibbons

TITLE VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e

Protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin.

Applies to employers, and other entities, who are "engaged in an industry affecting commerce who has fifteen [varies with the entity] or more employees . . ."

EEOC AND THE DIVISION ON CIVIL RIGHTS

- **I. Administrative bodies that investigate claims of discrimination**
- **1. Equal Employment Opportunity Commission**
- **A. Basic process**
  - **1. The Charge**
  - **2. The Response**
  - **3. Request for Information (RFI)**
- **B. Why you should take the process seriously**
- **C. Length of Process**
- **D. EEOC determination**

5

EEOC AND THE DIVISION OF CIVIL RIGHTS

New Jersey Division on Civil Rights (DCR)

DCR is the state agency charged with enforcing the New Jersey Law Against Discrimination (LAD), the New Jersey Family Leave Act (NJFLA), and the Fair Chance in Housing Act (FCHA)

Complaints must be filed within 180 days of incident

Potential outcomes

1. **DCR determines there is sufficient evidence to support a reasonable suspicion that the law was violated, it will issue a "Finding of Probable Cause."**

2. **If DCR determines there is not sufficient evidence to support a reasonable suspicion that the law was violated in your case, it will issue a "Finding of No Probable Cause."**

CEPA AND THE NJLAD

(Some of) The Laws You Need To Know

1. NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA), N.J.S.A. § 34:19-1 et seq

Employee does not have to show an actual violation of the law, just reasonable belief

2. NEW JERSEY LAW AGAINST DISCRIMINATION (LAD)

A. Discrimination
B. Duty to provide a reasonable accommodation

<u>Trouble Spots for Employers</u>

1. Viewing 12-week leave provided by FMLA as limit of responsibility

2. Failing to engage in interactive process

WORKPLACE POSTINGS

In New Jersey employers are required to post certain information.

They **include** New Jersey Earned Sick Leave, Wage & Hour Law Abstract, Child Labor Laws, Reporting and Recordkeeping Requirements Under State Wage Benefit and Tax Laws , Payment of Wages, Schedule of Minors' Hours, Family Leave Insurance, Unemployment & Disability Insurance, CEPA (Whistle Blower), New Jersey SAFE Act, Gender Equity Notice, Gender Equity Notice, PEOSH Poster Public Employee Safety, NJ Law Prohibits Misclassification.

Here is the link - https://www.nj.gov/labor/wageandhour/tools-resources/forms-publications/employer-poster-packet/

Failure to post can result in fines and penalties.

WORKPLACE INVESTIGATIONS

In general, an employer should conduct a workplace investigation when an act of misconduct, or alleged misconduct, occurs. Misconduct can be a result of formal and informal complaints, whistleblowers, audits and lawsuits, among other things. Misconduct can be directed to, or from, an employee, customer, vendor and/or others.

The investigation may be conducted by in-house personnel or an outside investigator. Who conducts an investigation is specific to the alleged facts at issues. Considerations include cost, attorney-client privilege, litigation issues, and the seriousness of the alleged facts.

Consider costs of litigation, damages, reputation, liability, employee morale.

EMPLOYEE HANDBOOKS

Employee handbook

1. **Prominent disclaimer**
2. **Handbook is not a contract**
3. **Company documents**
4. **Anti-discrimination and anti-harassment policy**
5. **Absence policy**
   - **Policy #1: All instances of tardiness will lead to a deduction of 30 minutes from the employee's time worked. For example, if an employee were to clock in at 7:01am, their time clocked in for the system would be 7:30 a.m.**
   - **Policy #2: All instances of tardiness will lead to appropriate disciplinary action.**
6. **Paid time off**

Under New Jersey law, must afford one hour of earned "sick" leave for every 30 hours the employee work. The maximum amount employers are required to provide is 40 hours of leave per benefit year.

7. **Not just for illness.**

A.I. IN HIRING

Companies now use A.I. to streamline the hiring process. Important things to consider:

1. What is A.I. "searching for?" Know your terms.
2. Unknown bias based on age, race and other discriminatory issues
3. Loss of the "human element"
4. Where is A.I. searching?
5. Is the A.I. interview reliable?

ACCOMMODATIONS ON THE WEB

Title II and Title III of the Americans with Disabilities Act ("ADA")

Applies to the government and private companies open to the public.

Allows people with disabilities equal access to information

Most people use sight, hearing and touch to access the web. But what if you are blind, deaf/hard of hearing and/or without the use of your body, either in whole or part? Could you access the web?

Yes, screen readers provide sound, captions provide words, and adaptive mouses and voice commands provide access to those with limited bodily control.

Here's a link to a government accessibility guide. https://guides.18f.gov/accessibility/

Employment Law for Non-Employment Lawyers

by Andrew M. Moskowitz, Esq.

I. Administrative bodies that investigate claims of discrimination

1. Equal Employment Opportunity Commission

Will usually apply where the employer has 15 or more employees (for race, color, national origin, sex, religion, and/or disability claims) or 20 employees (for age claims)

A. Basic process

1. The Charge

Employee files a charge of discrimination with the EEOC. In New Jersey, charge must be filed within 300 days from date of alleged violation. Employer is supposed to be notified within 10 days.

Parties are offered to resolve the matter via mediation.

EEOC provides mediators free of charge

2. The Response

Employer then is given an opportunity to submit a position statement

3. Request for Information (RFI)

EEOC may serve an RFI and ask the Respondent to submit personnel policies, Charging Party's personnel files, the personnel files of other individuals and other relevant information.

EEOC may conduct interviews

B. Why you should take the process seriously

You are providing your client's position at a fairly early stage in the process. You may not have interviewed all relevant parties. Nevertheless, this statement can and will be used against you if the matter proceeds

C. Process will typically be lengthy

Several months and often more than a year.

D. EEOC determination

EEOC will make a determination as to whether there is reasonable cause to believe that discrimination occurred.

If it determines there is not, the Charging Party will be issued a notice called a Dismissal and Notice of Rights. This notice informs the Charging Party that they have the right to file a lawsuit in federal court within 90 days from the date of its receipt. The employer will also receive a copy of this notice.

2. New Jersey Division on Civil Rights (DCR)

DCR is the state agency charged with enforcing the New Jersey Law Against Discrimination (LAD), the New Jersey Family Leave Act (NJFLA), and the Fair Chance in Housing Act (FCHA)

Complaints must be filed within 180 days of incident

DCR then prepares a verified complaint form for claimant to sign. Will then serve the verified complaint on the employer

Employer must respond to the allegations in the complaint by filing an Answer and Position Statement and provide DCR with any evidence that supports its position.

In that case, same concerns:

1. You are providing your client's position at a fairly early stage in the process.
2. You may not have interviewed all relevant parties.
3. Nevertheless, this statement can and will be used against you if the matter proceeds

DCR investigator may conduct witness interviews, site visits, etc.

DCR also offers mediators at no charge

Potential outcomes

1. DCR determines there is sufficient evidence to support a reasonable suspicion that the law was violated, it will issue a "Finding of Probable Cause."
   a. Case then goes to mediation
   b. If no voluntary resolution is reached, DCR will appoint a Deputy Attorney General to prosecute the case
2. If DCR determines there is not sufficient evidence to support a reasonable suspicion that the law was violated in your case, it will issue a "Finding of No Probable Cause."

   Claimant can then appeal a Finding of No Probable Cause with the Appellate Division,

But if employee withdraws the claim prior to any finding then it can file a claim in the Superior Court

II. (SOME OF) THE LAWS YOUR NEED TO KNOW

1. NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA)

The Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 et seq, prohibits employers from retaliating against an employee who objects to an activity, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, including if the employee is a licensed or certified health care professional, constitutes improper quality of patient care.

Employee does not have to show an actual violation of the law, just reasonable belief.

2. NEW JERSEY LAW AGAINST DISCRIMINATION (LAD)

A. Discrimination

LAD prohibits discrimination on the race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital/civil union status, religion, domestic partnership status, affectional or sexual orientation, gender identity and expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability (including perceived disability, and AIDS and HIV status).

B. Duty to provide a reasonable accommodation

Unless the employer can demonstrate such an accommodation would impose an undue hardship, an employer must provide a reasonable accommodation to an employee including, among other things, modified work schedules or leaves of absence. N.J. Model Jury Charge 2.26 at 5 (citing Victor v. State, 203 N.J. 383, 424 (2010); N.J.A.C. 13:13-2.5(b)).

Fact pattern:

Employee, who is an IT Director, works for company for 7 weeks. Injures himself at work. Permitted to work from home for two days and then thereafter accommodation is denied (because, according to employer, had difficulty reaching employee)

Employee makes several requests to work from home. Request is denied even when employer closes its office on two occasions for several days due to COVID and permitted all of its employees to work remotely

Is terminated a few months later "[d]ue to the current global economic conditions."

What were duties under LAD?

Employer must provide an accommodation but employee must be able to perform the essential functions of the job

Unless employer can demonstrate an accommodation would impose an undue hardship, an employer must provide a reasonable accommodation to an employee including, among other things, modified work schedules or leaves of absence. N.J.A.C. 13:13-2.5(b).

Trouble spots for employers

1. **Viewing 12-week leave provided by FMLA as limit of responsibility**
2. **Failing to engage in interactive process**

"To determine what appropriate accommodation is necessary, the employer must initiate an informal interactive process with the employee." Tynan v. Vicinage 13 of the Superior Court of N.J., 351 N.J. Super. 385, 397 (App. Div. 2002)

III. Employee handbook

1. **Prominent disclaimer**

All employees are employees "at will," employment may be terminated at any time, with or without cause and with or without prior warning or notice,

2. **Handbook is not a contract.**

Does not create a contract, express or implied, guaranteeing you any specific term of employment, nor does it obligate you to continue your employment for a specific period of time.

3. **Company documents**

Company documents are proprietary to company and employees may not release any client,

employee or business information to any person outside the company

4. **Anti-discrimination and anti-harassment policy**

5. **Absence policy**

Example of a bad policy: "All instances of tardiness will lead to a deduction of 30 minutes from the employee's time worked. For example, if an employee were to clock in at 7:01am, their time clocked in for the system would be 7:30 a.m.'

Example of a good policy

In accordance with applicable Federal and State Family Leave law, all eligible Company employees who have worked for at least 1,000 hours within the past 12 months are entitled to take up to 12 weeks of unpaid leave; to care for a family member with a serious illness; or for the birth or adoption of a child within 1 year of the child's birth, adoption or foster care. In addition, in accordance with the Family and Medical Leave Law, employees who have worked for at least 1,250 hours over the past 12 months are eligible to take up to 12 weeks of unpaid leave when the employee is unable to work because of a serious health condition.

6. **Paid time off**

Under New Jersey law, must afford one hour of earned "sick" leave for every 30 hours the employee work. The maximum amount employers are required to provide is 40 hours of leave per benefit year. Not just for illness. Also covers

- Caring for a loved one's physical or mental illness
- Receiving "wellness care"
- Coping with domestic or sexual violence, or care for a loved one who is a victim/survivor
- Attending a child's school-related meeting, conference, or event, when requested by the school

2024

NAVIGATING YOUR RIGHTS TO VOCATIONAL REHABILITATION SERVICES

A Self-Advocacy Guide

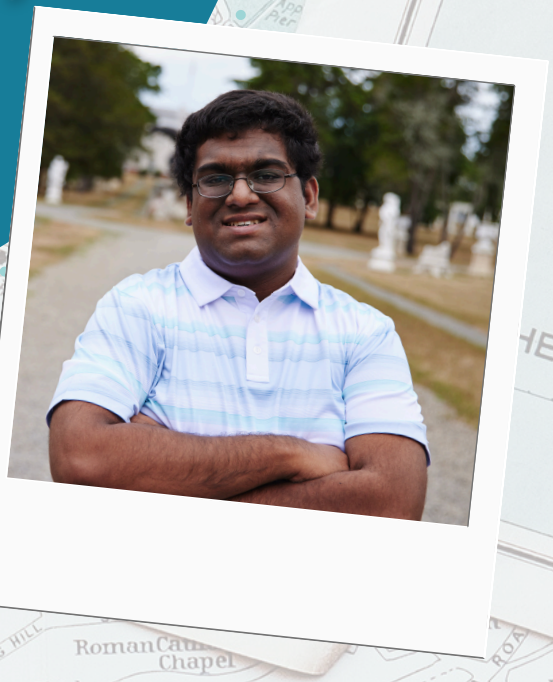

photo credit: Michael Mielcarz

DISABILITY RIGHTS NEW JERSEY

ADVANCING JUSTICE. ADVOCATING INCLUSION.

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photo credit: Michael Mielcarz

ABOUT

DISABILITY RIGHTS NEW JERSEY

Disability Rights NJ is the federally-funded, non-profit organization designated since 1994 to serve as New Jersey's protection and advocacy system for individuals with disabilities. This was granted pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, the Protection and Advocacy of Individuals with Mental Illness Act, the Protection and Advocacy for Individuals with Traumatic Brain Injuries Act, the Protection and Advocacy for the Beneficiaries of Social Security, The Protection and Advocacy for Voters Access, the Protection and Advocacy of Individual Rights, the Protection and Advocacy for Assistive Technology, and the Vocational Rehabilitation Act, where we serve as the Client Assistance Program (CAP) for Vocational Rehabilitation clients. Disability Rights NJ's mission is to advocate for and advance the human, civil and legal rights of residents of New Jersey with disabilities.

photo credit: Michael Mielcarz

CAP is a federally funded program designed to assist individuals seeking or receiving Vocational Rehabilitation (VR) services who need assistance. If you have questions or concerns about your rights to VR services, or you disagree with VR service decisions, you may contact Disability Rights NJ.

THIS ADVOCACY GUIDE IS DESIGNED TO HELP YOU UNDERSTAND YOUR RIGHTS TO VR SERVICES, AND TO WALK YOU THROUGH HOW TO REQUEST SERVICES, INCLUDING SPONSORSHIP FOR TUITION OR POST-SECONDARY TRAINING.

Photos included are stock photography unless otherwise noted.

FUNDING SOURCES

This guide is cosponsored by the New Jersey State Bar Foundation and made possible through funding from the IOLTA Fund of the Bar of New Jersey.

This guide is also cosponsored by and made possible through a grant provided by the New Jersey Council on Developmental Disabilities.

photo credit: Michael Mielcarz

YOUR RIGHTS TO VR SERVICES

Individuals with disabilities have a federal right to receive VR services. There are two statutes that govern these rights, the Rehabilitation Act of 1973, and the Workforce Innovation Opportunity Act ("WIOA").

The Rehabilitation Act of 1973 was the first law that provided equal access to certain Federal services for individuals with disabilities, seeking to remove architectural, employment and transportation barriers. The Rehabilitation Act of 1973, as Amended (**Rehab Act**) prohibits discrimination based on disability in:

- Programs conducted by federal agencies (Sec. 501). These include any federal agency or program offered by the federal agencies.
- The employment practices of federal contractors (Sec. 503). These include any group or agency that accepts or operates under contract with the Federal government.
- Programs receiving federal financial assistance (Sec. 504). This includes universities and the VR agencies.

The Workforce Innovation and Opportunity Act of 2014 expanded these rights. WIOA requires that the VR agency have a unified plan for helping individuals with disabilities that have common goals of being employed. The WIOA also authorized the creation of the "one-stop" employment services system, which is another option available to help individuals with or without disabilities seeking employment. WIOA emphasizes working in and around the community, as the intended employment placement for all VR program participants, including those with the most significant disabilities.

Further, WIOA requires state VR agencies "to encourage eligible individuals to pursue advance training in the fields of science, technology, engineering, or mathematics (including computer science), law, medicine, or business." 34 CFR 361.48(b)(6). This authorizes a VR agency to sponsor undergraduate and graduate tuition, if it is necessary to work in the individual's chosen field, for an individual with disabilities.

NEW JERSEY STATE

VOCATIONAL REHABILITATION AGENCIES

New Jersey is an **Employment First State**. This means that employment in the general workforce should be the first and preferred option for individuals with disabilities receiving assistance from publicly funded systems. Simply put, Employment First means real jobs, real wages.

To aid this effort, the State Vocational Rehabilitation (VR) Services Programs are authorized by the Rehabilitation Act of 1973, as amended by Title IV of the Workforce Innovation and Opportunity Act (WIOA). In the state of New Jersey, there are two VR agencies:

- **Division of Vocational Rehabilitation Services** (DVRS) and,
- **Commission for the Blind and Visually Impaired** (CBVI).

DVRS provides services to individuals with physical, mental, and other forms of disabilities in seeking employment services. CBVI provides services to individuals classified as blind, deaf-blind, or visually impaired. The goal of Vocational Rehabilitation Agencies is to maximize opportunities for individuals with disabilities in:

1) employment
2) self-sufficiency
3) independence, and
4) inclusion and integration into society.

To achieve these goals, there are several services available through DVRS/CBVI, including (but not limited to):

- Job coaching
- Job accommodations
- Transportation
- College and vocational training
- Physical and mental restoration services
- Assistive technology
- Other goods and services that are determined necessary for the individual with a disability to achieve an employment outcome.
  34 C.F.R. § 361.48(b)(21)

PART ONE

OBTAINING VR SERVICES

ELIGIBILITY CRITERIA

Each VR agency has their own criteria for eligibility.

To qualify for VR services from DVRS, you must have a physical or mental impairment that is acting as a substantial impediment to employment, and you must require VR services to assist in preparing for, securing, maintaining, advancing in, or regaining employment.

To qualify for VR services from CBVI, you must be visually impaired or legally blind. You are visually impaired if, with the best correction, you have 20/70 vision in the strongest eye, which means you see at 20 feet what a person without a visual impairment sees at 70 feet. You are deemed to be legally blind if with the best correction your vision is 20/200 or less in the better eye, or that the person sees at 20 feet what a person without a visual impairment sees at 200 feet. Additionally, you are legally blind if you have a restricted visual field limitation of 20 degrees or less, meaning you see 20 degrees of all the objects in the field of vision when a person without a vision impairment would see 180 degrees.

With both agencies, once you have applied for services, the VR agency will review your application to determine if you meet the eligibility criteria. After determining that you meet the eligibility requirements above, the VR agency will perform an eligibility assessment. If you receive Supplemental Security Income ("SSI") or Social Security Disability Insurance ("SSDI"), you are presumed to need vocational rehabilitation services to prepare for, secure, retain, advance in, or regain employment. You will not need to go through the eligibility assessment for VR services.

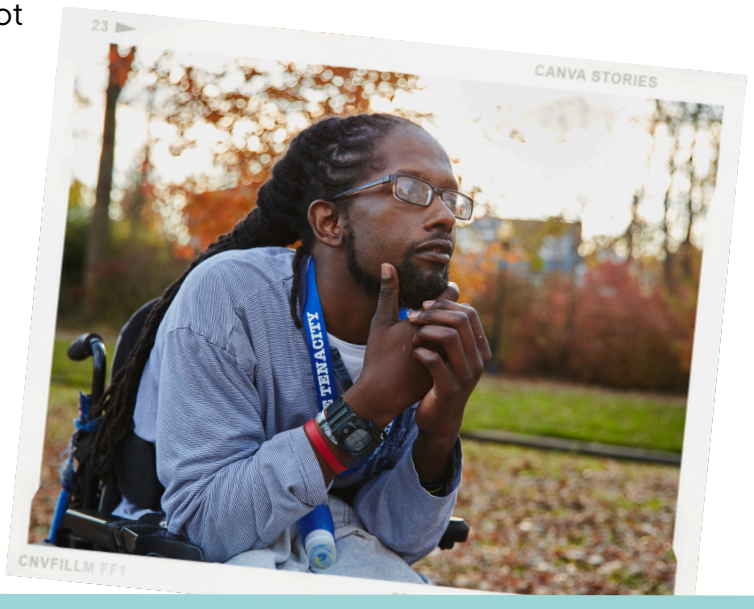


photo credit: Michael Mielcarz

OVERVIEW OF THE VR PROCESS

To apply for VR services, there is a specific process that you will undergo. This guide will help you through the application process and development of the Individualized Plan of Employment ("IPE"), and how to seek tuition sponsorship if it is necessary to achieve your employment goals.

The general steps on how to apply for VR services are:

1) Complete the referral.
2) Meet with the VR agency and receive the application for services.
3) The VR agency will make an eligibility determination.
4) Development of the Individualized Plan of Employment (IPE).
5) VR services provided.
6) Obtaining employment, which will lead to closure of the VR case.
7) Post-Employment Services, if necessary to assist you with employment.

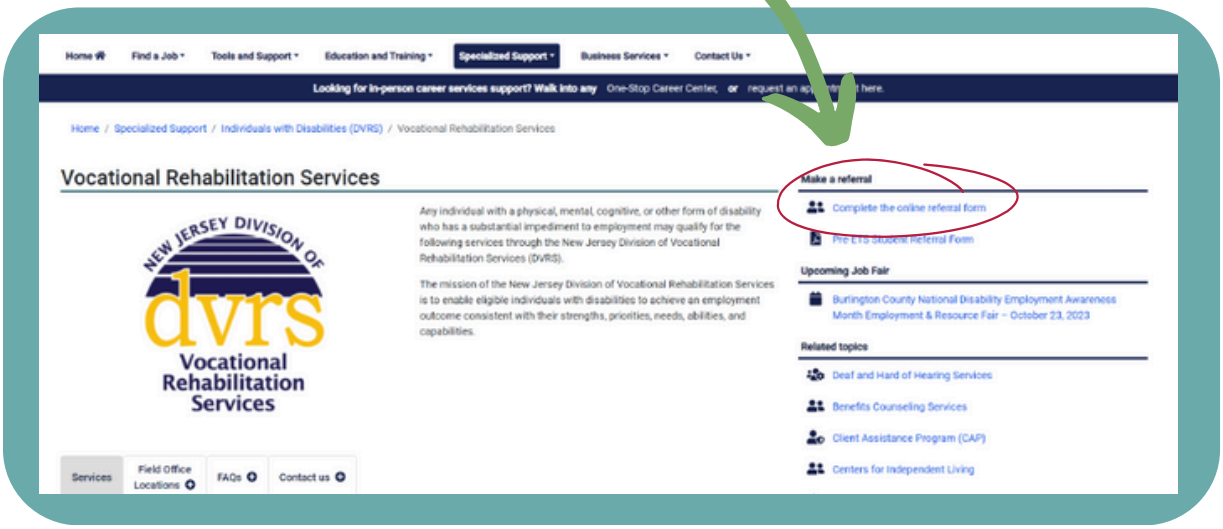
photo credit: Michael Mielcarz

APPLYING FOR SERVICES

Each agency has its own application process, which we will walk you through here.

DVRS PROCESS

DVRS has a referral form on its website that is the first step to applying for services. Although DVRS calls it a "referral form," the form could be completed by anyone: the individual seeking services, a friend, a service provider, a doctor, etc. When you first enter the website on the right side, there will be a box that says "Complete the Online Referral Form.



The DVRS website can be found at:
https://www.nj.gov/labor/career-services/special-services/individuals-with-disabilities

We are providing a copy of the referral form for you at the end of this guide so you can review and have the answers to the questions ready for when you complete the referral. The direct link for the referral form is:
https://forms.office.com/pages/responsepage.aspx?id=0cN2UAI4n0uzauCkG9ZCpzVnFpBuuFNArhLYruJEYsRUM0FOTFk1UTNVOVlEOTBZT000Tk5HWkI5TCQlQCN0PWcu

Once you or someone on your behalf has completed the online referral, DVRS should contact you within 14 days to set up the intake interview. If you have not heard from DVRS within 14 days, please contact your local field office to follow up.

APPLYING FOR SERVICES *continued*

CBVI PROCESS

For the Commission for the Blind and Visually Impaired, contact the central office for the referral. There are two numbers that you can reach CBVI through: (877) 685-8878 or (973) 648-3333. Either of these numbers will take you to the referral line. They will ask for some general information to complete the referral:

- Applicant's name and telephone number
- Applicant's address, including county of residence and zip code.
- Description of applicant's vision problem (optional)
- Description of services needed (optional)
- Name and address of eye doctor currently treating the vision problem (optional)

Additionally, you may need to provide current eye, ear and medical reports, financial information, and any other data CBVI needs to identify appropriate services.

The website for CBVI can be found at:
https://www.state.nj.us/humanservices/cbvi/

Once you speak with a representative of CBVI, they will inform you of any additional information and begin the eligibility analysis.

APPLYING FOR SERVICES *continued*

POST REFERRAL PROCESS FOR DVRS

Please note the referral form is not an application for DVRS services. Once you complete a referral, DVRS will contact you, either requesting documents or to set up an intake interview. After this request for documents or initial interview, DVRS will begin the eligibility assessment.

As part of this initial interview, DVRS will ask you what brought you to their agency and what employment goal you are considering. They will ask you questions about your disability and what limitations or challenges it causes you. Finally, they will want to ask you questions about your past education or work experience. At that time, DVRS will provide you with the application and ask for documents from you. The documents are used by the VR agency to establish the nature of your disability, potential barriers to employment, and potential cost-sharing. Documents that they typically ask for are:

- Tax documents
- Social security award letter
- Social Security Card
- Photo Identification, for example a Driver's license or govt issued ID.
- Mental Health Evaluation
- Authorization to Release Documents
- High School Diploma
- Resume
- General Basic Medical Examination (form they will provide for you to send to your doctor)
- Authorization to Release Documents from your doctor or school.
- Proof of Address
- FAFSA (Free Application for Student Aid) Student Aid Report (if seeking tuition sponsorship)
- Any other documents that will assist to move the case forward.

Once you return the signed application and the requested documents to the VR agency, the VR agency has 60 days (about 2 months) to make an eligibility determination.

ONCE YOU ARE FOUND ELIGIBLE

After you have been found eligible to receive services, the VR agency will assign a counselor to be your primary contact with the agency. The counselor will contact you to schedule a meeting to discuss your Individualized Plan of Employment, or IPE. The VR agency has 90 days (about 3 months) from the date of eligibility or the date that you request services to develop an IPE. At the IPE meeting, you and the VR counselor will discuss your employment goal, what supports you are looking for, what supports the counselor recommends, and you will establish a plan of services to help you to achieve your goals. If you have a career goal that requires additional training beyond high school, such as becoming a teacher, be prepared to discuss training options and locations to help you achieve that goal. The IPE meeting may take place either in person or virtually and would be a date agreed upon by you and your counselor. You will have the opportunity to invite others to be part of your meeting with notice to the VR counselor.

The VR agency may be able to pay for college or advance degree(s) if your employment goal requires it. This is called **tuition sponsorship**. We would like to note, to gain financial sponsorship for tuition, your career goal must require a degree, for example a teacher, a psychologist, a doctor, an accountant, etc. We will walk you through how to request tuition sponsorship in another section.

photo credit: Michael Mielcarz

THE IMPORTANCE OF THE IPE

The IPE is an important document that defines the services the VR agency agrees to provide you. The IPE is not a contract, but it is particularly important if disagreements occur between you and the VR agency. The IPE must be reviewed by you and your VR counselor at least annually and, if necessary, amended if there are significant changes to the employment goal, the VR services to be provided, or the service providers. Any changes made to the IPE do not take effect until agreed to by both you and the VR counselor. Both sides must agree on the services provided.

The most important part of the IPE is the statement of the employment goal, which should reflect your choice for employment. The services provided in the IPE must be designed to assist you in achieving that goal. The VR counselor may discuss the goal with you and propose alternatives or suggestions, but remember, the IPE is for you.

Once you have the employment goal established, all services and supports that the VR agency should or will provide are set forth in the IPE. Services can include such things as a job coach, assistive technology, training, transportation, personal assistance services. In addition, the IPE sets the timeline for services, the vendor responsible for providing the services, and the cost that the VR agency will be paying for the services and supports. Please note, you have the right to question and investigate any of the providers suggested to provide your support, and you have the right to discuss additional vendors with the VR agency.

POTENTIAL CONCERNS WITH IPE DEVELOPMENT

When developing the IPE, there are some situations that may arise to be aware of. An IPE is supposed to be developed with a career objective for every individual. Now sometimes, the IPE generated is for "guidance and counseling" to help the individual determine the proper employment goal. This is problematic because it gives the VR agency additional time to create an IPE that is appropriate for you. "Guidance and counseling" is a way of saying that they want to explore other career opportunities with you or send you for evaluations to determine what may be a good option for you, but the evaluations are supposed to be complete before the IPE is written. If the counselor feels they need additional information, you as the client can agree in writing to extend the 90-day timeline, to allow the evaluations to go forward.

In the same vein, when you receive the IPE from your VR counselor, carefully read it over. There have been several instances where the career objective listed was not selected by the client. Typically, when this happens you will see that the job goal or career objective listed is "production worker," or "retail sales," or "general maintenance worker." You as a VR client have an right to informed choice, including the ability to have a say and choose an employment goal, in consultation with the VR counselor. A common concern though is the VR agency may seek to change a career objective to meet their plan rather than what you are seeking.

You can object to an IPE and refuse to sign it. You have the right to request corrections and ask for clarification of any item on your IPE. If you do not agree with any of the information contained in your IPE, **DO NOT SIGN IT**. Once you sign it, and the VR agency countersigns it, you are bound by what you have signed. If you have any questions about your IPE or any items contained in it, you can always contact the Client Assistance Program to go over the IPE and what you are seeking.

TUITION SPONSORSHIP

If your job goal requires advanced training, whether it is vocational school, trade school, an undergraduate degree or even a graduate degree, you can seek VR support and funding for this goal. This is called tuition sponsorship. **Please note, the VR agency will not pay tuition if a college degree is not a required credential for your chosen career goal.** Be sure that you discuss your career path and job goals with your VR counselor at your IPE meeting. If it is a field that requires this training, do not be afraid to ask for tuition support. Even if you are already attending school, you may not be able to get support for the semester that you are currently completing, but you may be able to get support for future semesters. The IPE will set forth the supported semesters and the rate that the VR agency will pay.

photo credit: Michael Mielcarz

COMPARABLE BENEFITS

WHAT ARE COMPARABLE BENEFITS?

When seeking services, especially tuition, the VR agency will review for comparable benefits that you may receive from other sources such as need-based scholarships and grants, insurance sponsorship of Assistive Technology or Personal Assistance provided through the Division of Disability Services. The IPE and its supporting budget should specifically outline what those comparable benefits are, the amount that they will provide, what costs are being covered by the VR agency, and what, if any, costs are to be covered by you. If a comparable benefit exists, the VR agency will provide less sponsorship and payment as all or part of the service is provided through another source.

There are two things that are NOT comparable benefits that you should be aware of:

The first is MERIT-based scholarships. These are scholarships awarded based on academic merit, as opposed to financial need. By federal regulation, the VR agency cannot consider them a comparable benefit. Second, student loans are not a comparable benefit. The VR agency cannot list that you will be receiving Stafford Loans or private education loans on your IPE as a comparable benefit.

The VR agency cannot require you to take out any loan to fund the services they provide. But, if the cost of your services, such as your tuition, exceeds the amount of funding available through the comparable benefits and VR sponsorship, you may be required to find alternative sources of funding, which may include student loans. Please note, however, that utilizing student loans should only be a consideration after you have received the breakdown of funding from the VR agency and have signed the IPE.

photo credit: Michael Mielcarz

COMPARABLE BENEFITS *continued*

THE FINANCIAL NEEDS TEST

Generally, VR agencies are NOT required by federal law to have a financial needs test; however, many do. In New Jersey, both DVRS and CBVI use financial needs tests to determine if an individual needs to contribute to the cost of their VR services based on a sliding scale by income. This is why it is so important that the IPE sets forth how much VR will be funding for each service so that you know how much of the cost you must pay.

When determining the financial needs test, you may be wondering what income the VR agency considers. For a student under age 22, the VR agency will consider the student's income and their parents' income in making its calculation. On January 1 of the year after the client turns 22, the VR agency can only consider the income of the client and spouse, if married. The income limits, based on household size, for DVRS are set forth below:

B) Allowable income and liquid assets will be as follows:

Number in Family	Annual Income**	Weekly Income	Liquid Asset Allowance
1	$45,080	$867	$40,000
2	$60,970	$1,173	$45,000
3	$76,860	$1,478	$50,000
4	$92,750	$1,784	$55,000
5	$108,640	$2,089	$60,000
6	$124,530	$2,395	$65,000
7	$140,420	$2,700	$70,000

As with the eligibility determination, there is a difference for individuals who receive SSI/SSDI benefits due to their disability. SSI/SSDI beneficiaries are EXEMPT from and NOT subject to a financial needs test pursuant to federal law. This means that if you are 18 and you are an SSI/SSDI recipient, you are automatically eligible for services and are NOT required to financially contribute for your VR services no matter what your family income is.

When you are seeking tuition sponsorship, please keep the two timelines in mind. The VR agency has 60 days (about 2 months) from the date of the application to determine if you are eligible for services, and then 90 days (about 3 months) from the date of eligibility to develop an IPE. This means it could be a combined 150 days or about 5 months, from the application to signing the IPE. If you are looking to start school in August, and are seeking VR sponsorship, it would be wise to begin the process in January or February before you intend to start school.

COMMON PROBLEMS YOU MAY RUN INTO

While this guide was created to help you with the application and IPE development process, we do want to make you aware of some potential issues that could arise while you are going through the process.

Long wait times during the application process

As we said before, the VR application process begins with the online referral. Unfortunately, however, there may be a prolonged period between submitting the referral and having your intake interview. There is supposed to be a written policy to address the timeline, however DVRS does not have a policy in place, and your wait may be unreasonably long. If you have not heard from anyone, and it has been more than two weeks since you submitted your referral, please contact your local field office to follow up. In addition, if you are not making progress with your local DVRS office, contact CAP, and we will be able to assist you in the process.

Improper requests for medical clearance

In addition, the VR agency may request a certification from your doctor that you are ready and able to work. However, whether you are ready and able to work is a determination made by the VR counselor. Rather, your doctor can provide information about your disability and what limitations it may cause. If the VR counselor asks you to get that letter from your doctor, ask the VR counselor if the doctor could provide a list of your limitations. Ask your doctor to provide your records and any letter directly to you, rather than the VR agency. You will then have to submit the information to your VR counselor.

photo credit: Michael Mielcarz

COMPARABLE BENEFITS *continued*

MORE COMMON PROBLEMS YOU MAY RUN INTO...

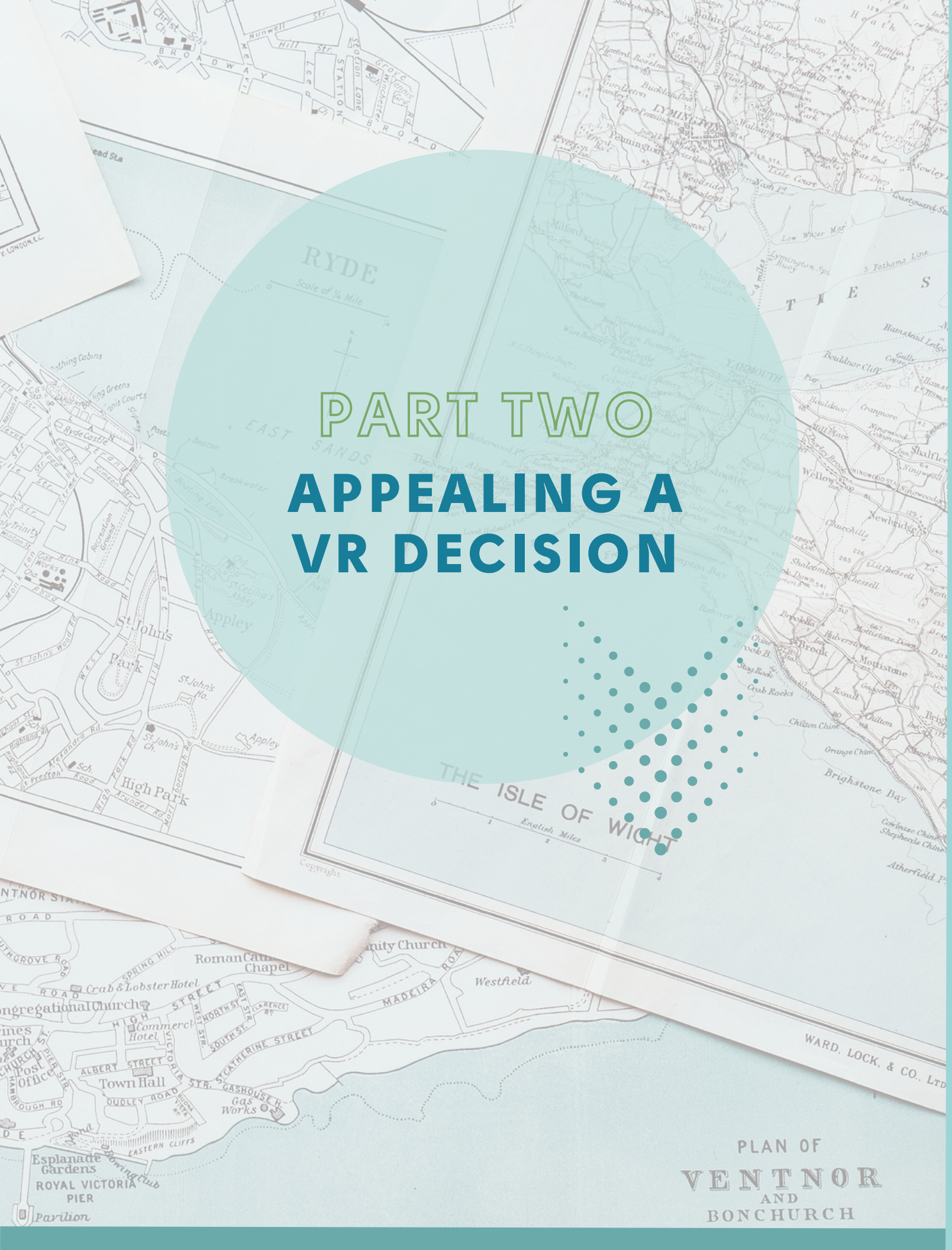
Closure without written notice

Another frequent problem is that VR may close your case without informing you. The VR agency may close your case if they think you have not responded to their requests or provided sufficient information. This may happen before you complete the full application for services. This is a problem because the VR agency's requirement to provide written notice of the closure is only after you have completed the application. If the VR agency closes your case before you complete the application, they may not inform you of the closure and you may not realize the agency closed your case. It is recommended that you stay connected with your VR counselor for updates.

Another frequent problem is that the VR agency does not send written notification of closing your case even if you do complete the full application for services. The written notice must include certain things like appeal rights, including the right to seek review from the Manager of the VR office, the Executive Director of the VR agency, or to pursue a Fair Hearing with the Office of Administrative law. Without the written notification, people often do not realize they can fight the closure of their case.

What can you do if there is a problem?

What can you do when a problem occurs? First, contact your VR counselor for an update. They would have the most current information on where they are in the process. Second, if you do not get a response from them, you can contact the manager of the VR office with whom you are working. Each VR agency has a supervisor and an office manager that you can contact for additional information. If that fails, or they cannot assist you, please contact Disability Rights NJ's Client Assistance Program for assistance.



PART TWO

APPEALING A VR DECISION

APPEALING A VR AGENCY'S DECISION

Embedded in the Rehabilitation Act and WIOA is the right to seek a review or appeal any adverse decision. You have the right to appeal whenever the VR agency takes one of the following actions:

- Denies eligibility for VR services when you first apply;
- Terminates your eligibility for VR services;
- Reduces or terminates a specific VR service in your IPE or
- Denies your request to add a new service to your IPE.

This guide is designed to help you appeal a decision from the VR agency that you disagree with.

NOTICE REQUIREMENTS:

The VR statutes require the VR agencies to notify you in writing about any adverse decision about your services. The notice must clearly state the action the agency is taking and the reason for the action. The notice should come with instructions about your right to appeal, and how to contact the Client Assistance Program for assistance.

A written notice is supposed to provide you with the information you need to understand an action and how to appeal if you disagree with it, whether administratively or through one of the formal appeal processes.

Common Problems with Notice

A VR agency may take action without providing written notice, or sometimes without telling you at all. While this situation is common, it is unlawful for the agency to take action without a written notice. Without the written notification, people often do not realize they can appeal a decision they disagree with. Because this happens frequently, you might not get a written notice when the VR agency makes a decision about your case. Check in regularly with your VR counselor to make sure you know about any adverse actions that might impact your services.

EVEN IF THE VR AGENCY FAILS TO NOTIFY YOU IN WRITING, YOU STILL HAVE THE RIGHT TO APPEAL ADVERSE DECISIONS.

STEPS IN THE APPEAL PROCESS

THE INFORMAL REVIEW

The first level of an appeal is an informal review. When you work with your Vocation Rehabilitation Counselor, they should inform you of who their supervisor is, and the name of the office manager for their location. If they don't provide you with this information, feel free to ask for it.

The first step to appealing a decision is to ask the supervisor and manager to review the decision. This request is typically made in writing by email to your counselor, the supervisor and the manager, asking them to please review the decision. You can send a formal letter if you would like, but for this level an email is fine and appropriate. This could be as simple as an email stating: "I disagree with the decision about _____, and ask that it be reviewed by your manager."

This is the most informal and casual of the review options. This is simply asking for another two sets of eyes on your case with the VR agency, reviewing your needs, employment goal, and the requested service or services being currently provided to evaluate whether they are needed or if the service is being removed.

It is always best to start with an informal review. This helps to build the client/counselor relationship, lets your feelings and needs be heard, and should start a discussion about your services and need for support. It may also begin a discussion about what supports are necessary to help support you in your career pursuit or plans, as long as it matches your Individualized Plan of Employment ("IPE").

You may still disagree with the VR agency's decision after the informal review. The supervisor and manager may agree with the VR counselor about the service being reduced or denied. You should receive an email with the results of the informal review from either your counselor, the supervisor or manager, informing you of their decision. In many cases, they do not provide any additional information about what the next steps would be, and it may often seem like that is the end of the line for appeals.

IF YOU STILL DISAGREE WITH THE DECISION AFTER INFORMAL REVIEW, YOU CAN CONTINUE YOUR APPEAL.

STEPS IN THE APPEAL PROCESS *continued*

There are **three levels of appeal** beyond the informal review. While we present them from least formal to most formal, you are not required to go through every level of appeal, or to go in order. You could seek to go to an administrative review before going to a Fair Hearing in the Office of Administrative Law. Or you could go straight to the formal Fair Hearing. We are presenting all three options to make you aware of them and provide information about what would occur at each level of review.

THE ADMINISTRATIVE REVIEW

This is often the first formal review that you can seek. Like any other appeal, however, it is not required. It can be a good place to start though, because it can be one of the quicker ways to get a decision. If the administrative review is in your favor, you can quickly receive an updated IPE with the service or support you are seeking.

What is it?

An administrative review is a review by a panel of staff from the VR agency. Typically for DVRS this panel will be your counselor, their manager, the supervisor of the office, as well as the two field chiefs for DVRS. For CBVI it will be a panel of three counselors and managers who are not part of your counselor team. Administrative reviews are typically held in person at the VR agency office in the county or regional office that you work with. The administrative review will result in a formal written decision that is reviewed and approved by the agency Executive Director.

How to Request an administrative review

You can request an administrative review in writing to your VR counselor. It is recommended that you make this request in a formal letter that is both emailed and mailed to your counselor. Once it receives your written request, the VR agency will contact you within about two weeks to schedule the administrative review.

This request can be simple or more detailed. You could request the review by stating "I disagree with the decision about _____, and that it be scheduled for an administrative review," or you could write a longer letter stating your reasons why you feel the decision was inappropriate, and that you are requesting the review. Either will work for beginning the scheduling process.

STEPS IN THE APPEAL PROCESS *continued*

How to prepare for the Administrative Review

Come into the meeting with a written list of the reasons you disagree with the VR agency. This will be useful when you are opening the review by stating why you are there, and why the VR agency should have decided in your favor. You will be able to have this list or any other document you want with you as a reference. Creating a list can also help prepare you for the review meeting by helping you think ahead about your arguments and points to raise. Dress appropriately for this meeting, it is advisable not to dress in sweats or clothing with holes in it.

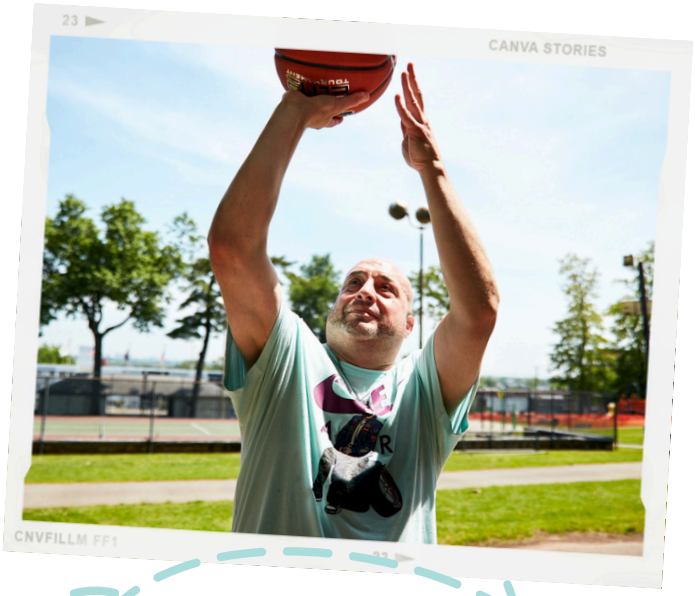
The conduct of the administrative review is fairly informal. You will be able to start by presenting the service or support that you are seeking, such as eligibility for VR overall, or specific services like tuition funding, a job coach, or an AT assessment. Next, set forth the reasons why you feel that this is necessary to help prepare you for your chosen career. You can bring documentation with you. If you have statistics for employment growth, reports from your doctors, prescriptions from your providers, or any other document that shows the VR agency made the wrong decision, bring those to the review. Bring extra copies for yourself and the review panel. You can bring supporters to help you during the review, and witnesses who can speak to your need for the services in question. The VR staff present will have the opportunity to ask you questions about the service or support and will review the documentation that you provide. You have the right to review any documents that they bring as well.

The administrative review will give you the opportunity to have a discussion with the VR staff about your needs, the support or service in question, and why you feel it would be appropriate or help you. There is no average length of time for these reviews, as it truly depends on the service or support at issue and any information that you bring with you to review. Be prepared to speak openly and honestly about your needs and wishes and answer any question that is raised by the VR staff in the review.

STEPS IN THE APPEAL PROCESS *continued*

Getting a decision from the Administrative Review

You will not receive a decision on the same day as the review. With DVRS, the panel will review their notes and the documents you provided before sending a recommendation to the Assistant Executive Director and Director for review. For CBVI, an initial finding will be drafted and sent by the panel to you and to the Executive Director. After the recommendations are sent to the Executive Director. The Executive Director will send you a decision in writing explaining the outcome and any next steps. If the administrative review is in your favor, your counselor will reach out to you to schedule a new IPE meeting to create the formal plan implementing the decision. If the administrative review decision finds against you, you have the option of appealing that decision further.



right only photo credit: Michael Mielcarz

STEPS IN THE APPEAL PROCESS *continued*

MEDIATION

Mediation is a more formal proceeding, with a Mediator appointed to listen to both sides to try and help reach a resolution. The Mediator is an outside person who is agreed to by both you and the VR agency and is not affiliated with either of you, to act as an unbiased decision-maker in the process. Participation in Mediation is voluntary, meaning that the VR agency may, but is not required, agree to Mediation. If the VR agency says no to participating in a Mediation, you would appeal to the Office of Administrative Law, which we will cover for you below.

VR agencies are not required to participate in Mediation, and both VR agencies typically decline to participate.

How to request Mediation

You must request a Mediation in a formal writing. This is a letter sent to the VR agency asking that your case be transferred to a Mediator for decision. Send a mediation request to either the DVRS or CBVI, whichever one provides your VR services.

DVRS

Assistant Director, Field Services
New Jersey Department of Labor and Workforce Development
Division of Vocational Rehabilitation Services
John Fitch Plaza, 12th Floor
Trenton, New Jersey 08625-0398

CBVI

Attention: Administrative Office
re: Appeals
New Jersey Commission for the Blind & Visually Impaired.
153 Halsey Street, 6th Floor
Newark, New Jersey 07102

Once Mediation has been requested and agreed to by the VR agency, the agency must retain a Mediator within 30 days of the written request. If the VR agency is unable to identify or secure a Mediator, the VR agency must notify you within 30 days of your initial request that mediation will not take place. The Mediation itself will be scheduled to be heard within 20 days of a Mediator being appointed.

STEPS

IN THE APPEAL PROCESS *continued*

Mediations are a more formal proceeding than the administrative review. These are typically held in the office of the Mediator, though you may select another location with the agreement of the VR agency. You will want to dress nicely for the Mediation, while it is not a "Court" proceeding, it is still a formal practice. Dress nicely, you do not need to wear a suit or a formal dress, but you should not dress in jeans or sweats for the Mediation.

A Mediation will begin with you and the VR agency meeting in one room with the Mediator. In some cases, the Mediator will ask for both you and the VR agency to submit your positions in writing before meeting with them, in other cases you will be making your initial statements in this joint meeting. Each of you will tell the Mediator why you are there, and what you believe the end results should be. The Mediator will then direct you to one room and the Agency representative to another room, and will proceed to go back and forth between the two rooms to discuss the pros and cons of the service you are requesting, and see if they can help you reach an agreement that both sides are ok with.

Preparing for Mediation

When going to the Mediation it may be helpful to prepare a list for your own reference of your points and reasons the VR agency made the wrong decision. This will be useful when you are opening the Mediation by stating why you are there, and why you are seeking that support or service. You can refer to your list throughout the mediation to stay on track. Creating this list can also help prepare you for the Mediation, helping you refine your arguments and points to raise.

Getting a decision

The Mediation will end either with an agreement with the VR agency or without an agreement. If you reach an agreement with the agency, you and the VR agency will draft a written agreement for both of you to sign. This agreement will act as the new contract and set forth the action or service to be provided by the VR agency regarding your request. If you end mediation without an agreement, or if the VR agency will not agree to mediation, you can still use the other methods of appeal.

STEPS IN THE APPEAL PROCESS *continued*

FAIR HEARING

A Fair Hearing is a proceeding filed with the Office of Administrative Law, and is the most formal of the appeals. While you are allowed to go to a Fair Hearing without an attorney, it would be wise to at least speak with an attorney or the Client Assistance Program before going forward. There are several steps in the Fair Hearing process that can be confusing or intimidating if you are not familiar with them.

How to request a Fair Hearing

To request a Fair Hearing, you must write a letter to the VR agency. The letter only needs to say that you disagree with the VR agency's decision and contain your name, address, and contact information, you do not need to put in every grievance or concern that you have. The following language would be enough to request a Fair Hearing.

> My name is _____, and I live at _____. My phone number is _____. I disagree with the decision of the VR agency regarding (name of service), dated (date), and request that this be referred to the Office of Administrative Law for a Fair Hearing as a contested matter.

This letter should be sent to your VR agency:

DVRS

Assistant Director, Field Services
New Jersey Department of Labor and Workforce Development
Division of Vocational Rehabilitation Services
John Fitch Plaza, 12th Floor
Trenton, New Jersey 08625-0398

CBVI

Attention: Administrative Office
re: Appeals
New Jersey Commission for the Blind & Visually Impaired.
153 Halsey Street, 6th Floor
Newark, New Jersey 07102

STEPS IN THE APPEAL PROCESS *continued*

Once the VR agency has received your request for a Fair Hearing, they are to review the request and refer it to the Office of Administrative Law as a Contested Action. An Administrative Law Judge, or ALJ, will be assigned after the referral. Once an ALJ has been assigned, the judge's clerk will write to you to let you know when the hearing is scheduled.

Before the hearing

During the Fair Hearing, the VR agency will be represented by a lawyer from the Office of the Attorney General. Any inquiries or correspondence with the agency regarding the proceeding must go through their lawyer. You will be provided written notice of the VR agency's lawyer through a Notice of Representation they send to the Court and to you.

Your first meeting with the Court will be in a status conference, which will typically be held by phone. This will be your opportunity to briefly discuss your issues with the ALJ, why you are there, why you disagree with the VR agency's decision, and a brief description of how you got to that point. At the status conference, the Court will ask if either side would like to conduct discovery. Discovery is the process of requesting documents and information from the other side that may help your case or provide you with more information about the VR agency's decision. If either side requests discovery, the Court will set a schedule and may then set another status conference to check on how the exchange is going.

If neither side requests discovery, the Court will work with both sides to set a date or dates that everyone would be available to proceed to the Fair Hearing.

At any point before the actual hearing starts, you can always enter into an agreement with the VR agency about the service, which would then end the Fair Hearing. This process is called settlement, and would be documented in a formal, written agreement between you and the VR agency. The settlement agreement will usually lead to the development of a new IPE. This would then end the hearing process, and you would not need to proceed to the formal hearing.

STEPS IN THE APPEAL PROCESS *continued*

At the hearing

On the day of the hearing, your case will be heard by an Administrative Law Judge (ALJ) that is assigned to your case. You will not have a jury. The ALJ's job is to hear the evidence from both sides, create a complete record of the appeal, and issue a recommended decision. Both sides begin by providing opening statements: what decision the VR agency made, what service or support is in dispute, and what each side would like to happen. You might give a broad overview of why the VR agency made the wrong decision, and the VR agency would have the opportunity to say why their decision was correct. Dress nicely, you do not need to wear a suit or formal dress, but do not dress in sweats or clothing with holes in it for an in-person hearing.

After the opening statements are completed, you will be able to present your case. This means that you would be able to provide testimony (statements made by you and other people under oath) and evidence such as documents to the Court to help them make its decision. You can call other people to testify on your behalf, typically this would be doctors or prescribers, assistive technology professionals, school staff, someone who can explain to the judge why the VR agency made the wrong decision. Before selecting someone to be a witness for you, make sure you know what they have to say about the service or support you want and how it would benefit you. Once you present all of your witnesses and documents to the ALJ, the VR agency will have the opportunity to ask your witnesses questions. You will have the chance to ask questions of any witness brough by the VR agency as well. The ALJ may also ask questions of any witness during the proceeding if there is any additional information that the ALJ wants to know.

After you and the VR agency have finished presenting your cases, the ALJ may ask if you want to make a closing statement. A closing statement is a short summary of the information both sides presented during the hearing and why it shows that the VR agency made the wrong decision. You do not have to make a closing statement if you do not want to. You can ask to make a spoken closing statement at the end of the hearing, or you can request to submit a closing statement in writing. The VR agency will likely request to submit their closing in writing.

STEPS IN THE APPEAL PROCESS *continued*

Getting the decision after a Fair Hearing

Once the ALJ receives any closing statements, the record will officially close. The ALJ has 30 days to issue an initial decision from the date that the record is closed, but they may take more time if needed. **The initial decision is not the final decision**.

The ALJ will submit the decision back to the Agency and the Department that it sits in, the Department of Labor for DVRS and the Department of Human Services for CBVI. The decision will be reviewed by the Director of the Agencies or someone they designate. The Agency may agree with the ALJ, disagree entirely, or agree to part of the decision and disagree with part of it. The Agency will then issue what is called a Final Agency Decision, which will become the final determination on your Fair Hearing. This Final Agency Decision will tell the VR agency what to do with the decision you appealed.

If you disagree with the Final Agency Decision, you can appeal to the New Jersey Superior Court, Appellate Division or to the District Court of New Jersey. Going to the Appellate Division or the District Court can be expensive, complicated, and difficult if you do not have a lawyer. If you want to take an appeal to the Appellate Division we highly recommend having a lawyer represent you. You can contact the Client Assistance Program to see if we can provide representation or help you find a different lawyer.

Any VR applicant or recipient can contact the Disability Rights New Jersey Client Assistance Program at any step in the process. We can answer your questions, provide legal advice to help you understand your rights, and may be able to provide legal representation at no cost to help you through the appeal process. Please do not hesitate to contact us for assistance. We are here to help.

Contact Disability Rights New Jersey at:
(609) 292-9742
(800) 922-7233 (NJ Only)
via email at *advocate@disabilityrightsnj.org*
or visit our website: **disabilityrightsnj.org**