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LEGAL RIGHTS AND PROTECTION OF PEOPLE WITH DISABILITIES IN THE WORKPLACE

**Australia, Austria, Canada, France, Germany, Italy,
The Netherlands, New Zealand, Norway, Spain, Sweden, United Kingdom,
United States**

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I. BACKGROUND AND QUESTIONS

A. Mandate

In February 2019, the Swiss Institute of Comparative Law was requested by *the Eidgenössisches Büro für die Gleichstellung von Menschen mit Behinderungen* (EBGB) to conduct a comparative law study of various jurisdictions with regard to the measures for eliminating inequality of persons with disabilities and for encouraging their integration in the workplace. The scope of the study is intended to include an examination of these measures before and during and at the end of employment, looking at both the public and private sectors. The focus of the study concerns the legal rules and programmes put in place to guarantee equal treatment of persons with disabilities in the workplace.

The study features reports on the following legal systems: Australia, Austria, Canada (Ontario), France, Germany, Italy, The Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom, and the United States.

B. Questions

The following questions/points will be addressed in the respective country reports:

1. Introduction

- 1.1. Provide a brief demographic/legal/historical overview of the country
- 1.2. Describe the legal and policy framework in the country with regard to people with disabilities in the workplace

2. Regulatory framework

- 2.1. What is the legal basis for protection/rights of employees with regard to those with disabilities?
- 2.2. What is the scope of the protection?
- 2.3. How is disability defined in order for rights/protections to arise?
- 2.4. What forms of non-discrimination protection are provided for?

3. Integration of people with disabilities in the workplace

- 3.1. What duties exist for the employer to accommodate people with disabilities?
- 3.2. What incentives or other assistance are available to employers to accommodate people with disabilities?

4. How are rights enforced?

5. How does the legal framework operate in practice?

II. COMPARATIVE SUMMARY

The approaches taken by governments to the employment protection of persons with disabilities and the promotion of their integration in the workplace vary considerably among the featured legal orders. Although there are similarities in the forms of discrimination protected (particularly among those European states subject to EU law in this area)¹, there are, nevertheless, significant variations in the level of protection provided and the types of measures implemented to improve employment rates among persons with disabilities.

Despite adoption of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) by all of the jurisdictions examined save for the United States, significant disparities can be seen with regard to definitions of disability, approaches to accommodation of disabled workers and the options for enforcing rights, and their effectiveness.

1. Regulatory Framework

The regulatory framework governing the employment rights and protections of persons with disabilities is generally established through legislation or legislative instruments in all of the featured jurisdictions.

For some countries, such as Austria, Germany, Spain and the Netherlands, the prohibition of discrimination against persons with disabilities is enshrined in the constitution. Legislation may take the form of a single Act or legislative instrument establishing equality and anti-discrimination measures across a range of protected characteristics (such as age, gender, race, sexual orientation etc.), including disability and in a range of areas in addition to employment, such as housing, education, goods and services. Examples of this can be seen in the UK, Sweden and Norway. This may be complemented by other legal measures not aimed at anti-discrimination, but rather about promoting the integration of persons with disabilities in society.

Other states, like the Netherlands, may have a single specific law dedicated to the elimination of inequality for persons with disabilities. In most of the countries examined, however, the legal framework is set out across a variety of legislative instruments, sometimes overlapping and often fragmented in nature. This may be due to the way in which the framework has evolved over time, reflecting legislative amendments and initiatives particularly since the 1990s, or on account of the legal system itself, which may be federal in nature (such as that in Australia, Austria, Canada, the US and Germany) and/or partly divided between the public administration and private institutions. Alternatively, different legislative instruments may serve different purposes, with disability equality legislation sitting alongside disability rights provisions in employment laws, social security laws or more general social inclusion regulations. France’s Labour Code, for example, is complemented by a number of other laws and ordinances which enhance disability rights and demand inclusion measures, and which also reflect additional duties applying to public sector employers and institutions.

All of the countries examined, save for the United States, have adopted and ratified the CRPD. However, its impact on national legal frameworks has been varied, and a number of states continue to be strongly criticised by the CRPD Committee for failing to give effect to its provisions. Germany, for example, is reported as having made amendments to 13 laws and 4 ordinances since adopting the CRPD, whereas the UK has implemented no specific changes to domestic legislation, relying instead on compliance being brought about through judicial interpretation of existing law consistent with the

¹ In particular, Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

provisions of the CRPD. Limited amendments to existing domestic frameworks means that most countries stand accused of failing to adhere to certain aspects of the CRPD. In particular, domestic definitions of “disability”, continue, in most cases, to rely on a medical model, rather than the social or ‘human rights’ model espoused by the CRPD. Other weaknesses identified by the CRPD Committee concern, more generally, the absence of directly enforceable rights under the CRPD in domestic legal frameworks, and failings in efforts to promote the integration of persons with disabilities in the workplace.

2. Forms of protection and scope of application

In most of the legal orders examined, measures designed to guarantee the rights and protection of disabled workers broadly apply in the same way to public and private sector employers. Where differences do exist, these are usually in the form of more stringent requirements on public sector employers designed to encourage greater integration of disabled workers. However, some countries, such as France and Canada, operate an entirely separate legal regime for employees of the State.

Broadly speaking, forms of protection, including rules against direct and indirect discrimination and duties to make reasonable adjustments for persons with disabilities apply at all stages of the employment relationship, including advertising, hiring, during employment and termination of employment. They also apply, regardless of the size of the employer, and it is generally the case that job applicants, and temporary and part-time workers are covered alongside permanent full-time employees. Self-employed contractors will also benefit from discrimination protection in most countries, although definitions of this status vary. As will be seen below, however, certain measures, notably quota requirements imposed on employers to engage workers with disabilities, generally only apply to larger employers.

One of the key delimitations on the scope of protection is that such rules will only apply in relation to individuals who fall within the relevant definition of a person with disabilities. Each jurisdiction adopts its own definition of disability, many deriving from social security law rather than anti-discrimination law. Unlike the CRPD, these generally rely on a medical model referring to a person’s physical, mental or physiological impairment and do not take into account interaction with various barriers for the person concerned. Some countries, such as New Zealand and Norway, avoid a fixed definition with reference to severity and duration, but most states include a requirement that any such impairment will last: Austria and Germany expect that impairments must be likely to last for more than six months, the UK – 12 months, and Sweden requires that the impairment be indefinite in duration. Certain protections only arise in some countries where a person has already been formally designated as “disabled” or “severely disabled”, and in some cases according to a minimum percentage reduction in capacity. Examples of this can be seen in France, Italy, the US, Austria and Germany.

Workers with disabilities can generally expect to be protected against direct and indirect discrimination, as well as harassment and victimisation and, as discussed below, all jurisdictions examined impose some form of duty on employers to take steps to accommodate employees. For EU Member States, these forms of protection are required to be implemented in domestic frameworks by Directive 2000/78/EC on equal treatment in employment and occupation (the “Employment Equality Directive”). In New Zealand, Norway, Italy, and to some extent, in the UK, forms of affirmative action, whereby disabled candidates and employees may be given favourable treatment over non-disabled individuals, are not prohibited. The US’s *Rehabilitation Act 1973*, which applies to federal contractors and sub-contractors, goes further and requires that qualified minorities, including persons with disabilities, be given the benefit of affirmative action. Other countries prescribe in their legislation specific measures, rights and forms of protection for disabled workers. Germany, for example, provides for extra days’ holiday, dispensation from overtime demands, entitlement to part-time employment

and pre-approved authorisation for dismissal of severely disabled employees. Austria, France and Italy have similarly detailed legislative measures.

One specific legal measure which has been adopted in a number of countries and which appears to be gaining in popularity as a tool for improving employment rates of persons with disabilities is that of minimum quota requirements. In Germany, Austria, Italy, Spain, France, and the Netherlands, employers of a certain size are subject to a requirement to employ a minimum percentage or number of disabled workers. The size of an employer is determined by the total number of staff, and quotas for disabled workers are generally set at around 2 to 5 percent of all positions in an organisation. Higher quotas may apply to even larger employers, and different requirements may apply as between public and private sector employers. From the beginning of 2020, existing quota requirements in the public and private sectors in France will be extended to the State. Employers who fail to meet quotas may be subject to fines and other sanctions.

3. Accommodating people with disabilities in the workplace

Legal duties on employers to take measures to accommodate individuals with disabilities in the workplace can be found in one form or another in each of the examined jurisdictions. In EU Member States, the Employment Equality Directive places a duty on employers to:

“take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”²

This provision has, however, been transposed inconsistently among those EU Member State countries featured in the present study. In some EU countries, such as Austria, the Netherlands, France, Norway and the UK, there is a clear and distinct duty to provide reasonable accommodation which can be said to approximate to that required by the EU Directive. Italy, on the other hand, which requires public and private employers to provide for reasonable accommodation, makes express reference to the CRPD definition rather than that contained in the Employment Equality Directive. However, it does not provide any guidance to employers on how to apply this duty, nor does it treat its violation as a form of discrimination. Sweden revised its law in 2014 to introduce a new form of discrimination termed ‘inadequate accessibility’, which shares characteristics with the duty to make reasonable accommodation, but does not apply to job applicants; and in Germany, the legal provision guaranteeing the right of persons with disabilities to be provided with reasonable accommodation is complemented by a range of duties on employers which require them to tailor the workplace to those with severe disabilities.

Outside of Europe, duties to provide reasonable accommodation may be distinct and far reaching (as is seen in the Canadian province of Ontario), forming part of broader prohibitions on direct and indirect discrimination (as in the US) or arising as a condition of being permitted to rely on exceptions to what would otherwise amount to discriminatory behaviour (as is the case in New Zealand).

Whether a failure to provide reasonable accommodation is a distinct form of discrimination in itself also varies from country to country. In the UK, for example, it amounts to a specific form of discrimination as well as leading to a finding of direct discrimination; in France, it is said to constitute unlawful discrimination, but it is not clear if this is direct or indirect discrimination, in Sweden, failure to provide reasonable accommodation will amount to ‘inadequate accessibility’, this being a separate form of discrimination; in Austria, failure to provide reasonable accommodation is said to constitute a

² Council Directive 2000/78/EC of 27 November 2000, *op. cit.*, Article 5.

breach of the principle of equal treatment, which is broader than the prohibition of discrimination and includes the duty to adopt measures to prevent discrimination.³ Australia's federal Disability Discrimination Act, which includes obligations to make reasonable adjustments not as a stand-alone obligation, but as part of definitions of direct and indirect discrimination, has been criticised for poor drafting, leaving it open to narrow and limiting interpretations; a different model in the state of Victoria is said to be more effective, providing a stand-alone right to reasonable adjustments for people with disabilities and including the reasonable adjustments duty in the assessment of reasonableness of indirect discrimination.

The extent to which an employer can be expected to take measures to accommodate a worker with disabilities, as well as the extent of any such measures will usually depend on the language of the domestic rule creating the duty, as well as legislative and judicial guidance on its scope. The duty itself is commonly subject to the limitation that it should not create a 'disproportionate' or 'unreasonable' burden for the employer. Some form of this limitation is seen in all of the European states featured. In Canada, it is only where 'undue hardship' will result for the employer that such accommodation will not be required. Similarly, US law refers to an 'undue burden' on the employer as excusing a failure to accommodate a person's disability.

The factors to be taken into account in the practical application of the reasonable accommodation duty may be set out in the law itself and/or accompanied by principles from case law and other guidance. The reasonableness of a particular measure is commonly determined with reference to a range of criteria, including the financial and other costs, the scale and financial resources of the employer itself and the possibility of obtaining public funding or any other assistance. France's Labour Code, on the other hand, makes it clear that the focus is entirely on the financial aspects of any potential adjustments to working and other conditions. A typical difficulty is that limited legislative and judicial guidance is available to employers who will usually be expected to address individual situations on a case-by-case basis. The law in Austria and Germany is characterised by relatively prescriptive legal provisions on the kinds of measures which should be adopted to accommodate individuals with disabilities in the workplace. In countries such as Italy and New Zealand, on the other hand, legislation provides little or no criteria on how the duty should be implemented in practice. In other countries, like the UK and the US, where there is limited legislative elaboration of the basic duty, there is instead considerable guidance and advice available to employers, often aided by a significant body of case law in which judicial interpretation has provided clarity. Legislation in Ontario includes 'Employment Standards' which impose detailed accommodation requirements on employers, and which are subject to public inspections, as well as a duty on employers with at least 50 employees to document their process for developing individual accommodation plans.

The incentives and other assistance available to employers for accommodating individuals with disabilities in the workplace vary significantly among the legal orders examined. In most of the European jurisdictions, limited public funding is made available to finance, in part or in full, measures taken by employers to fulfil their duty. In France, in particular, a detailed framework of financial aids, incentives and other assistance has been established, applying differently to private employers and public sector employers, as well as organisations operating sheltered workshops.

Funding may be in the form of subsidies or grants and will usually be subject to annual caps, or up to a maximum of a fixed number of years employment. This can extend to funding for an assistant to the

³ See Isabelle Chopin and Catharina Germaine, *A comparative analysis of non-discrimination law in Europe*, prepared for the European Network of legal experts in gender equality and non-discrimination, European Union, 2017, available at <https://op.europa.eu/en/publication-detail/-/publication/36c9bb78-db01-11e7-a506-01aa75ed71a1> (30.10.2019), p. 28.

disabled worker; noted examples of this include France, Sweden and the Netherlands. Funds are commonly overseen by social security agencies or other public bodies and programmes established for this purpose. In countries such as France, Italy and Austria, it is noted that these are, in part, financed by penalties or contributions imposed on employers who fail to meet quota and other requirements designed to promote the integration of workers with disabilities. In some countries, such as the UK, a single body or program exists to ensure that financial assistance is centralised and available through a single point of contact; other jurisdictions operate a number of public sources of funding, and, as is reported in New Zealand and Spain, employers and concerned individuals may also appeal to charities and other privately-run programs for assistance. In the US, reasonable accommodation efforts are more usually encouraged by tax incentives, including tax deductions, and for small businesses, tax credits to cover up to half of the costs of reasonable and necessary accommodation expenditure.

In addition to funding, it is reported in relation to most jurisdictions that technical aids and other equipment may be made available directly to workers with disabilities to better enable them to carry out their duties. This is often implemented at the regional level, as is seen in Ontario and Sweden. There are also various examples of employers being encouraged to educate themselves of their responsibilities in relation to the integration of disabled workers, with various publications and other online materials made available by public authorities to inform employers of their legal responsibilities with regard to the provision of reasonable accommodation and how this can be implemented in practice. One example is the UK, where a government-run scheme, known as 'Disability Confidence' provides a form of certification for employers who demonstrate that they are actively committed to promoting the better integration of people with disabilities. The province of Ontario in Canada goes even further, giving statutory footing to its certification scheme under which employers may be exempted from reporting requirements where they demonstrate that they exceed accessibility obligations.

4. Enforcement of rights

Enforcement mechanisms across the jurisdictions examined can be said to broadly fall into the categories of individual enforcement, institutional or state enforcement and, finally, enforcement through trade unions.

In most of the countries featured, individuals can issue legal proceedings in the relevant tribunal or civil court, either with or without legal representation from a lawyer or support from a trade union. However, certain countries make court action with regard to discrimination complaints conditional on other forms of resolution having first been pursued. Examples of this can be seen in Austria and New Zealand, and the US, where courts (or their equivalent) will expect to have seen certain dispute resolution procedures exhausted before legal proceedings are pursued.

In a number of countries, it is enforcement by state agencies, rather than individual enforcement, which is principally relied on to identify and punish employers who breach the law. Examples of this can be seen in Ontario, Australia, New Zealand, and the United States, where the respective legal frameworks require complainants to turn to state agencies in the first instance in resolving discrimination complaints. Where complaints are not upheld or resolved satisfactorily, there may be the possibility for the complainant to pursue legal proceedings either individually or with the support of the agency itself. Likewise, where an employer fails to comply with a determination or recommendation of the state agency, the agency may pursue further action on the employee's behalf. In other countries, such as France and the Netherlands, employees may have a choice from the outset between going to court, or alternatively, seeking some form of institutional enforcement.

In countries where dispute resolution is required or encouraged as an alternative to legal proceedings, there is evidence of discrimination claims being resolved with a relatively high degree of success. In Austria, where nearly half of all conciliation procedures end with agreement, it is said that conciliation is successful because discrimination can be concretely eliminated, compared to compensation as the sole judicial remedy. The institutional support offered by the involvement of state agencies in early conciliation proceedings in Austria, combined with the threat of legal action where disputes cannot be resolved or where employers fail to respect the outcome of conciliation, also serve to help avoid court proceedings and its associated risks.

Where court action is necessary, the most commonly reported remedy is compensation for the victim. In the United States and Canada, this can include special or “punitive” damages if malice is involved or the discrimination was reckless. In these jurisdictions, reference is made to caps on damages, but in the UK, where awards can be made for “injury to feelings” in successful discrimination claims, compensation is unlimited. Where the discriminatory act constitutes, or has led to, termination of employment, a number of countries provide for orders for reinstatement to be made and the termination rendered void. In France, discriminatory behaviour can even lead to criminal sanctions, including imprisonment, and in Germany, intentional or negligent discriminatory conduct can result in a fine. Other reported remedies seen across the states examined include injunctions to bring an end to particular conduct, declarations or recommendations and the imposition of an anti-discrimination plan.

III. COUNTRY SUMMARIES

There is no single comprehensive disabilities law in the field of employment in **Australia**. Instead, federal, state and territory anti-discrimination laws impose overlapping prohibitions on discrimination, and grant rights of action to victims. The national labour law, the *Fair Work Act*, provides general employment rights and some specific limited protection against disability discrimination, but it is anti-discrimination laws, including the *Disability Discrimination Act* (“DDA”), which have greatest reach – covering both direct and indirect discrimination across a wide range of fields beyond employment and at both federal and state/territory levels. The DDA has, since 2009, included an obligation to accommodate people with disabilities. This exists as a stand-alone obligation as well as being incorporated into definitions of direct and indirect disability discrimination, but judicial interpretation of the duty is however said to have weakened its application. Moreover, the DDA is more limited than the *Fair Work Act* in terms of enforcement, with only victims able to bring claims, and remedies from courts being limited to redress or compensation; the *Fair Work Act* regime, on the other hand, provides for a wider range of enforcers (including victims, unions and a public ombudsman), and a range of sanctions, including penalties, reinstatement orders and injunctions.

The legal framework for the protection of disabled workers in **Austria** is composed of a number of different employment protection, anti-discrimination and disability equality laws. In addition to EU-inspired protections against discrimination, victimisation and harassment, disabled workers with longer service benefit from strong protections against dismissal, and employers with 25 or more staff are required to hire at least one severely disabled person or face a penalty tax. Disability is still defined by reference to the health status of the person concerned, namely, an impairment which has lasted for at least 6 months. Various adjustments to the working environment and practices of disabled workers and applicants are required under the law to the extent that they are proportionate. These are financed through the fund contributed to by penalty taxes for employers who fail to meet quota requirements. Although court action is ultimately possible, this cannot be undertaken before mediation has been pursued. Indeed, mediation and conciliation mechanisms are encouraged by the legal framework, and nearly half of all mediations end with agreement.

Workplace protections and rights for those with disabilities in **Canada** is split between those dealing with federally-regulated employers on one hand, and private and public employers in the provinces and territories, on the other. Both frameworks have broad application. Certain provinces have introduced accessibility legislation for people with disabilities, imposing specific accommodation duties on employers. In Ontario, the *Accessibility for Ontarians with Disabilities Act* includes employment standards which set out detailed accommodation requirements throughout the employment process. These are subject to public inspections and include a duty on employers with at least fifty employees to document their process for developing individual accommodation plans for employees with disabilities. Both federal and province level legislation permit exceptions to the duties to accommodate a disabled person if his or her needs can't be accommodated without imposing undue hardship on the employer. Various government funds can be relied on to support accommodation duties. Victims of discrimination have different options to enforce their rights at the federal and provincial level, and nearly half of all discrimination complaints concern disability.

In **France**, the Labour Code provides protection against discrimination, including in relation to disabled persons, in both the public and private sectors. This is complemented by other laws, including a 2005 disability equality law with application in a variety of fields, such as education and housing, and a 2012 circular requiring that all draft laws introduced by the executive be subject to a “diagnostic-handicap” to take into account the interests of persons with disabilities. Employers with at least 20 employees in both the private sector and public bodies having an industrial or commercial character are subject to quotas with regard to disabled employees, and this will be extended to the French State from the

beginning of 2020. Detailed provisions set out the definition of disability, with workers being specifically designated as “disabled” by a public commission. Similarly, duties to accommodate disabled workers are prescribed in detail by the Labour Code, and, in addition to a requirement to take appropriate and proportionate measures, these include obligations on large employers to re-train and re-educate sick and injured employees, to double notice periods for employment terminations and to maintain employment quotas. Other detailed provisions are aimed at integrating disabled people into the workforce more generally. Various financial and other aids are publicly available. A range of enforcement mechanisms exist, and even the Penal Code punishes certain discriminatory actions by way of prison and fines.

In **Germany**, where the prohibition against discrimination on grounds of disability is recognised at the constitutional level, a range of laws and ordinances place considerable duties on employers to ensure that people with disabilities are not disadvantaged. Individuals can obtain the status of “severely disabled” following medical assessment, and in light of ratification of the CRPD, the definition in its Social Code IX has been modified to allow some recognition of the CRPD concept of disability. Both public and private employers are subject to minimum quotas of severely disabled staff which depend on the size of their workforce. Public authorities at the federal level have additional duties to make workplaces more accessible for disabled applicants and employees. A range of obligations apply to organisations to tailor the workplace for those with disabilities, including the making of adjustments that do not place an unreasonable burden on the employer. These are reinforced by various public subsidies to support individuals at work, according to their level of disability. Rights are generally enforced through court action, with collective actions and representative associations available as alternatives to individual claims.

Italy has developed a comprehensive legal framework concerning the protection of persons with disabilities, based on constitutional equality principles. The legal framework concerning disabled workers has a wide scope of protection combining EU-inspired anti-discrimination provisions with a quota system. Law 68/1999 places a duty on public and private employers to hire people designated as disabled according to a variable quota. Smaller employers with at least 15 members of staff must employ at least one disabled person, while those with disabilities who work for the largest employers must represent at least 7% of the entire workforce. The duty to make reasonable accommodation is defined with reference to the meaning given by the CRPD, but further guidance is limited. The reasonableness of an accommodation is determined with reference to its relevance, appropriateness and effectiveness for the person with a disability. Various public resources are made available for making reasonable accommodation, financed, in part by financial penalties paid by employers who fail to comply with quota requirements.

The **Netherlands’** ratification of the CRPD in 2016 has led to the development of various initiatives aimed at reducing the obstacles faced by disabled workers. This complements existing protections against discrimination for disabled employees of public and private employers, and includes the introduction in 2018 of quotas in the public sector, with a requirement on larger employers that at least 1.93% of their posts are filled by workers with disabilities. This will be enforced from 2020 with a fine of 5,000 Euros per unfilled post. Employers are under a duty to make reasonable adjustments, and a variety of public subsidies and other aids are available from the *Uitvoeringsinstituut Werknemersverzekeringen*, the public agency with responsibility for social security. This includes the provision of a « job coach » to assist an employee with disabilities for up to three years, to enable them to carry out their professional duties. Complaints may be addressed, in the first instance, to a College of Human Rights, which will investigate and decide on the outcome, with the possibility to make recommendations and to initiate judicial proceedings in the absence of action by the employer. In 2018, prohibited behaviour was adjudged to have taken place in 41% of complaints made to the College with regard to disability or long-term illness.

In **New Zealand**, two overlapping pieces of legislation - the Human Rights Act and the Employment Relations Act - serve to protect those with disabilities from discrimination in the workplace. Disability is listed as one of a number of protected characteristics in relation to which direct and indirect discrimination as well as victimisation and harassment are prohibited. A special feature of disability as a protected characteristic is that there is an additional overriding duty to accommodate the needs of employees and job applicants with disabilities, but only to the extent that it is reasonable to expect the employer to do so. Workers and job applicants with disabilities who need adjustments may apply for public funding to cover the additional costs as a direct consequence of their disability, when undertaking the same job as a person without a disability. The terms “disability” and “reasonable adjustments” are not extensively defined, and so are interpreted broadly by courts.

Discrimination on various grounds, including disability, and in various areas of society is prohibited in **Norway** in its Gender Equality and Anti-Discrimination Act (GEADA). This applies to public and private sectors and comprises all aspects of an employment relationship. It does not rely on a specific definition of disability, and the prohibition of discrimination is referable to actual, assumed, former and future events. A duty to accommodate persons with disabilities in the field of employment includes job seekers and workers, and it must not impose a disproportionate burden on the employer. Most tools and measures aimed at supporting accommodation are provided and funded by the Labour and Welfare Service. Other initiatives to promote the integration of persons with disabilities in the workplace are set out separately as part of a 2012 jobs strategy which has, in part, been implemented through an existing type of memorandum of understanding between the government and social partners, known as the Agreement on more Inclusive Working Life. Applying to all employers, the Agreement contains several specific agreements encouraging employers to use different existing labour market instruments or measures in order to increase employment for people with reduced working capacity. Rights under GEADA may be enforced through the ordinary courts, or more usually, through the Equality and Anti-Discrimination Tribunal, which is free of charge. In practice, most cases are resolved with the assistance of trade unions before recourse to legal proceedings.

The **Spanish** constitution prohibits disability discrimination and places a duty on public bodies to establish an integration policy with regard to people with disabilities. All employers with at least 50 employees must ensure that disabled employees represent at least 2% of their posts, or provide alternative measures. The legal framework broadly applies to private and public employers alike, although public administration bodies are under a duty to reserve at least 7% of their advertised posts for those with disabilities until the 2% quota is met. Subsidies, tax incentives and other support for training of disabled workers is provided. The definition of disability refers to a foreseeably permanent deficiency and requires a threshold of 33% incapacity, which is said to be assessed mainly according to medical factors, but also complementary social factors. The duty to accommodate people with disabilities was incorporated into law following EU Directive 2000/78/EC. The availability of grants and subsidies for employing persons with disabilities is taken into account in assessing the burden on the employer in taking what are referred to as “appropriate measures”. Claims in by victims of disability discrimination are dealt with by social courts who have responsibility for all employment law cases.

Sweden's 2008 Discrimination Act has wide-ranging scope, prohibiting discrimination in relation to a range of protected characteristics, including disability, in all sectors of public and private employment. “Disability” is defined with reference to a person’s functional capacity deriving from illness or injury that is of a permanent nature – taken to mean that it must last at least 12 months. The legal duty on employers to accommodate people with disabilities is referred to as the concept of inadequate accessibility. This duty, contained in the 2008 Discrimination Act, sits alongside a similar duty in earlier legislation which regulates the duties an employer must take in relation to a worker who has been absent from work due to injury or illness. In neither case, does the duty apply to job applicants, but

only to those already in employment. The “reasonableness” of measures is determined on a case by case basis, and a variety of incentives and other support is available to facilitate such measures, including capped financing for aids and funding for a personal assistant to support an employee. Rights are primarily enforced in the labour courts, and although class actions are not permitted for employment discrimination claims, cases can be brought by the public Discrimination Ombudsman on behalf of victims by non-profit organisations. Compensation is the usual remedy, but average awards are typically low.

The Equality Act 2010 provides the **United Kingdom’s** single legal framework for protecting individuals from discrimination. It covers different protected characteristics, including disability, and in different fields of activity, including employment. It applies to all aspects of the employment relationship, from hiring to termination, and makes no distinction between public sector and private sector employment. Employment tribunals, in their interpretation of the Act’s provisions, may refer to the Code of Practice on Employment (issued by the Equality and Human Rights Commission), as well as binding case law. Disability is defined with reference to an impairment, which must have a substantial effect on day-to-day activities and be likely to last at least 12 months. Alongside the forms of discrimination prohibited in relation to other protected characteristics, persons with disabilities are also protected from ‘discrimination arising from disability’ as well as benefiting from the duty on employers to make reasonable adjustments. Such a duty is determined on a case by case basis, and a publicly funded employment support programme, *Access to Work*, provides generous grants to help those with disabilities to stay or start in work. Victims must promptly bring claims before an employment tribunal, and can usually expect compensation as a remedy. 2018 saw a 37% increase in disability discrimination claims, said to have possibly been driven by an increased willingness to bring claims related to mental health issues.

Albeit not a party to the UN CRPD, the **United States** has a comprehensive legislative framework to regulate the treatment of persons with disabilities. Its Rehabilitation Act of 1973 specifically aims to encourage the employment of persons with disabilities by the federal government and programs funded by the federal government, while its Americans with Disabilities Act (ADA) is aimed more broadly at prohibiting discrimination by the US legislative branch, States, municipalities, and, private sector employers with at least 15 employees. The ADA permits individual States to establish their own legislation requiring stronger protections to persons with disabilities than its own non-discrimination provisions. Adopting a medical model for the definition of disability, the ADA prohibits discrimination over the entire employment lifecycle, and includes a failure to make reasonable accommodation measures as a form of discrimination in itself. Measures by the employer must not amount to an undue burden. Beyond the duty to make reasonable accommodation, the Rehabilitation Act requires federal contractors and subcontractors to have affirmative action programs in place. Assistance for employers in making reasonable accommodation includes information and guidance, as well as financial support in the form of tax incentives. Employment discrimination provisions are mainly enforced by the United States Equal Employment Opportunity Commission, which will attempt informal resolution before pursuing legal proceedings against a non-governmental employer. Remedies are mainly of an injunctive nature, although compensation is possible and will be limited according to the size of the employer.

IV. COUNTRY REPORTS

A. AUSTRALIA

1. Introduction

1.1. Country overview

Australia is a constitutional monarchy, with a **federal Westminster parliamentary style of government**. Inhabited by Aboriginal and Torres Strait Islander people for over 65000 years,⁴ it was invaded by British fleets in 1788, who treated the land as ‘terra nullius’ (‘no-one’s land’) thereby assuming ownership and sovereignty of the land. Recognition of Indigenous inhabitants and reconciliation has been a slow, halting and troubled process since then. Established originally for the transportation of convicts, the colonies gradually developed as settlements and eventually federated to form the Commonwealth of Australia as an independent country in 1901.⁵ Australia is a large country with a **relatively small population of approximately 25 million**, based primarily in coastal cities.⁶

There are estimated to be over 4 million people in Australia, or **one in five, with some form of disability**.⁷ Australia **ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* on 18 July 2008**.⁸ As a key initiative to reflect and coordinate Australia’s implementation of this convention and generally support people with disability, the governments of all jurisdictions in Australia established the *2010-2020 National Disability Strategy: An initiative of the Council of Australian Governments*.⁹

In addition to the two federal houses of parliament, each state and territory has its own parliament and can make laws for peace, order and good government for the jurisdiction. **Each state has its own constitution, and court system**, culminating in a supreme court from which appeals can be taken to the nation’s highest court, the High Court of Australia. This Court also hears appeals from the federal courts and thus represents the highest source of judicial precedent for all jurisdictions.

Being a federal system, **Australia has laws enacted by the federal parliament** (the Commonwealth), **as well as in each State and territory**. The Commonwealth Constitution technically limits the legislative powers of the Commonwealth, but power of the Commonwealth has grown significantly over the past century (due to expansive interpretations and the Commonwealth’s greater taxing power). Federal laws prevail to the extent of any inconsistency with state (or territory) laws.¹⁰

⁴ For more information on Aboriginal and Torres Strait Islander people, see Indigenous Australians, Wikipedia, and sources.

⁵ The Commonwealth of Australia Constitution Act 1900 (Imp).

⁶ Main Features, 3218.0 - Regional Population Growth, Australia, 2017-18 Australian Bureau of Statistics <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3218.0>.

⁷ Australian Network on Disability, ‘Disability Statistics’ <https://www.and.org.au/pages/disability-statistics.html>

⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008), Australian Treaty Series 2008 No 12, [2008] ATS 12.

⁹ Commonwealth of Australia, *2010-2020 National Disability Strategy: An initiative of the Council of Australian Governments*, 2011. https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf

¹⁰ Commonwealth Constitution, s109.

1.2. Overview of legal and policy framework

There is **no single comprehensive disabilities legislation in the field of employment** in Australia. A number of different laws operate to enable and protect people with disability in respect of employment. The **two main ones** are: the ***Fair Work Act 2009 (Cth)*** which is the general labour law that supports all workers and has some specific disability provisions; and **anti-discrimination laws that prohibit disability discrimination**. These laws are the focus of this chapter, but for context, two other important elements of the legal and policy framework for people with disability are first noted here: work health and safety laws; and the system of social security.

Work health and safety laws are relevant to the support and protection of employees with disability not because they are targeted at employees with disability but because they are designed to protect all workers against injury, illness and exacerbation of any existing conditions. These laws are relatively uniform across the country, with a model Work Health and Safety Act being adopted in seven of the nine jurisdictions.¹¹ The WHS Acts impose a number of general and specific criminal duties on ‘persons who control businesses or undertakings’ to ensure, ‘so far as reasonably practicable’, the health and safety of workers (and, to some extent others users and visitors of a worksite).¹² All employers are required to hold no-fault insurance to compensate and rehabilitate workers who suffer workplace injuries or illness.¹³

Workplace laws operate in a context of a system of social security income support payments for those who are unable to engage in employment. In respect of people with disability who are unable to access work due to disability, the federal government provides income support payments. Importantly, Australia’s social security system is not based on a social insurance model, but paid for out of the federal government’s general tax revenue. Eligibility for any social security payment is means tested, and based on specified criteria not previous work, contributions or earnings; and payments are made at a relatively low, flat rate (rather than as a proportion of past earnings). The Disability Support Pension is payable to those who have a permanent, diagnosed disability or medical condition that prevents them from working at least 15 hours a week, a test that can be very difficult to satisfy. Other relevant types of payments are available for temporary injury or illness, caring for a person with disability or illness, and unemployment benefit.¹⁴

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

In respect of disability the main type of law that provides protection in employment in Australia is **anti-discrimination legislation**, which has been **enacted at both federal and state/territory levels**. The national labour law, the ***Fair Work Act***, also provides general employment rights and some **limited protection against disability discrimination**. These two types of law operate concurrently but reflect different and separate regulatory frameworks. The **anti-discrimination laws have a much wider reach** – covering both direct and indirect discrimination across a wide range of fields beyond employment –

¹¹ See, eg Work Health and Safety Act 2011 (NSW). Victoria and Western Australia have different Acts.

¹² See eg s19 Work Health and Safety Act 2011 (NSW) for this general duty.

¹³ See, eg, Workers Compensation Act 1987 (NSW).

¹⁴ See Department of Social Security: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/benefits-payments>

but are **more limited than the *Fair Work Act* in respect of enforcement**, with only victims able to bring claims, and remedies from courts being limited to redress or compensation.¹⁵

2.1.1. Anti-discrimination laws

Anti-discrimination laws prohibit discrimination in respect of disability among other attributes.¹⁶ Across the country **federal, state and territory anti-discrimination laws impose overlapping prohibitions** on discrimination, and grant rights of action to victims. These laws **apply in employment and other fields**, including education, accommodation and the provisions of goods and services. At the federal level, **covering all of Australia, the *Disability Discrimination Act 1992* (Cth) (DDA)** operates alongside three other substantive discrimination Acts – *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth). The *Australian Human Rights Commission Act 1986* (Cth) establishes the Australian Human Rights Commission and the enforcement regime for these four federal Acts. **Each state and territory has its own anti-discrimination statute**¹⁷ that operates similarly and applies concurrently with the federal laws.

The **federal anti-discrimination laws** were enacted primarily relying upon constitutional power to legislate for ‘external affairs’ by giving effect to international human rights conventions that Australia has ratified in respect of eliminating discrimination and promoting equality.¹⁸ When enacted, the *DDA* rested upon a patchwork of international instruments, but now refers explicitly to the *Convention on the Rights of Persons with Disabilities*.¹⁹ It is now **generally accepted that the federal laws operate in conjunction with state and territory laws** rather than in conflict,²⁰ although there is ongoing uncertainty about potential inconsistency between the federal and state laws. Generally, for an employee, the federal laws will apply in addition to the relevant state or territory law and the **employee will have a choice of legal avenues in the event of a discrimination claim**.

The **DDA is structured and operates similarly to the other anti-discrimination laws**, as described below, but it has a few unique features indirectly relevant to employment: ‘disability standards’; and ‘action plans’. The **DDA provides for the establishment of Disability Standards**, binding statutory instruments that complement the Act.²¹ While there is power to make standards in respect of employment, efforts to this end have stalled.²² The standards that have been enacted, in respect of public transport, education and access to premises,²³ each have some indirect implication for enabling people with disability to access and retain employment. The **DDA also provides for the establishment**

¹⁵ For further detail see Belinda Smith, ‘Anti-Discrimination Law in the Workplace’ Chapter 15 in C Sappideen, et al *Macken’s Law of Employment* (Lawbook Co., 8th ed, 2016), 617-649 (Smith, *Macken*). For further commentary on discrimination law applicable to employees, see Andrew Stewart et al, *Creighton and Stewart’s Labour Law*, 6th edn, Sydney, Federation Press, 2016, especially chapter 20.

¹⁶ For further details on anti-discrimination law in Australia see: Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia* (Cambridge University Press, 2017); Neil Rees, Simon Rice, & Dominique Allen, *Australian Anti-discrimination and Equal Opportunity Law* (Federation Press, 3rd edn, 2018).

¹⁷ *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

¹⁸ For example, the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (18 December 1979) 1249 UNTS 13.

¹⁹ *Disability Discrimination Act 1992* (Cth), s12.

²⁰ *University of Wollongong v Metwally* (1984) 158 CLR 447.

²¹ *Disability Discrimination Act 1992* (Cth), Division 2A, ss 31-34.

²² Rees, Rice and Allen, above n 16 at [7.10.11].

²³ *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth); *Disability (Access to Premises-Buildings) Standards 2010* (Cth).

of ‘action plans’.²⁴ These could also indirectly support employment of people with disability but they are quite different to standards, being voluntary initiatives of duty-bearers, such as businesses, rather than statutory instruments. They are a **mechanism by which an organisation can identify barriers** to equality for people with disability, and **develop a plan of initiatives** to address these. If such an action plan meets requirements under the DDA and is lodged, the AHRC makes it public. These **plans have no legal status**,²⁵ but many organisations have made and lodged one.²⁶

2.1.2. Labour law

In respect of labour laws, the Commonwealth government largely covers the field of workplace relations through the *Fair Work Act 2009* (Cth). **The Fair Work Act provides for a set of of labour conditions, and mechanisms for their enforcement**, that apply generally to workers including employees with disability. In tiers, the Act provides: a minimum safety net of labour rights and conditions; a framework for industrial awards that sit above this minimum; and mechanisms for enterprise agreements to be created by collective bargaining above that. Employers and employees may negotiate better conditions above these legislated or collectively bargained conditions.

The *Fair Work Act* establishes a government institution, **the Fair Work Ombudsman**, that has powers and resources to enable and enforce compliance with this law. In this way, workers with different capacities for enforcing their own rights personally, are supported. Some guidance materials are also provided in different languages and formats (including Australian sign language, Auslan), recognising and supporting some differences among employees and employers.

There are **only a few provisions in this Act that are specifically directed at employees with disability**: protections against discrimination; provision for supported or subsidised wages; and rights to request flexible work arrangements. Firstly, the discrimination protections, discussed further in parts 2.2 and 2.3 below, **prohibit discrimination against employees on the ground of ‘physical or mental disability’** and render inoperative discriminatory provisions in industrial awards and enterprise agreements. Second, the national minimum wage regulations in the Act specifically allow for employees who have a disability that affects their capacity to perform a job **to be paid under a modified wage order that takes account of capacity and productivity**.²⁷

Finally, the Act provides various categories of employees, including employees with a disability (and workers with ‘caring responsibilities’), with the **right to request flexible work arrangements**.²⁸ Subject to a 12 month eligibility rule, an employee can request flexible work arrangements in respect of hours of work, patterns of work or locations. It is, however, only a right to request, not a substantive right to be granted flexible work arrangements; the **employer is ostensibly only allowed to refuse on ‘reasonable business grounds’** but this is not enforceable. While this provision may promote inclusion, the lack of enforceability renders it very soft.

2.2. Scope of protection

The **scope of anti-discrimination laws is much wider than the scope of discrimination provisions in the Fair Work Act**. The *Fair Work Act* discrimination protections are limited to the legal relationship

²⁴ *Disability Discrimination Act 1992* (Cth), Division 3, ss 59-64.

²⁵ Although the existence and content of an action plan can be a relevant circumstance in determining ‘unjustifiable hardship’ under the DDA: s11(1)(e).

²⁶ AHRC Register of Action Plans <https://www.humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans>

²⁷ As detailed below in section 3.2. of this country report.

²⁸ *Fair Work Act 2009* (Cth), s65.

of employment and do not even extend to all employees, while anti-discrimination Acts apply to all work relationships and beyond the sphere of work.

2.2.1. Anti-discrimination laws

The *DDA* is one Act in a suite of federal anti-discrimination laws that are administered by the Australian Human Rights Commission and operate concurrently with state and territory anti-discrimination laws. The Act prohibits discrimination in work and other fields on the basis of disability,²⁹ while other Acts provide protection in respect of other attributes, such as race³⁰ sex, pregnancy and sexual orientation;³¹ and age.³² The Act **prohibits discrimination at all stages of work**, including hiring, setting terms and conditions of employment, determining promotions, termination and subjecting workers 'to any other kind of detriment'.³³ The Act also expressly prohibits disability harassment in work and other fields.³⁴ The Act explicitly applies to having a carer, assistant, assistance animal or disability aid in the same way as it applies to a disability, and **applies similarly to a person who is an associate of a person with disability**.³⁵

The *DDA* covers all employers, corporate or otherwise, of any size, public and private.³⁶ It is notable that the regulation of discrimination in work under anti-discrimination Acts is not at large; it is focussed on relationships between duty-bearers and rights-holders, but is not limited to the relationship of employment. The **discrimination prohibitions also protect job applicants and independent contractors**, and extend to partnerships, contract workers, commission agents, superannuation payments and other work related organisations such as qualifying bodies, unions and employment agencies.³⁷ There are a few exceptions that explicitly relate to the size of an organisations; for example excepting small partnerships³⁸ or small businesses.³⁹ Other exceptions, such as unjustifiable hardship⁴⁰ and reasonableness,⁴¹ may implicitly take account of the size of a business or operation.

2.2.2. Fair Work Act

This *Fair Work Act* regulates **employment obligations and protections for nearly all private sector employees in the country and those employed by the Commonwealth government**;⁴² employment conditions for state public servants are governed by state legislation.⁴³ This Act does not cover all types of workers; it **applies primarily to those in an employment relationship** (defined by common law),⁴⁴ although some provisions extend to independent contractors.

²⁹ *Disability Discrimination Act 1992* (Cth), s15 (employment).

³⁰ *Racial Discrimination Act 1975* (Cth), ss 9 (general), 15 (employment).

³¹ *Sex Discrimination Act 1984* (Cth), s 14 (employment or superannuation).

³² *Age Discrimination Act 2004* (Cth), s18 (employment).

³³ *Disability Discrimination Act 1992* (Cth), s 15.

³⁴ *Disability Discrimination Act 1992* (Cth), ss 35, 37 and 39.

³⁵ *Disability Discrimination Act 1992* (Cth), ss 7-9.

³⁶ *Disability Discrimination Act 1992* (Cth), s 15.

³⁷ See e.g. *Disability Discrimination Act 1992* (Cth), Part 2, Division 1.

³⁸ Eg *Disability Discrimination Act 1992* (Cth), s18 only applies to partnerships of 3 or more partners.

³⁹ Eg *Anti-Discrimination Act 1977* (NSW) s 49D(3)(b).

⁴⁰ See e.g. *Disability Discrimination Act 1992* (Cth) ss 11, 21B and 29A.

⁴¹ See e.g. *Disability Discrimination Act 1992* (Cth) s 6(3).

⁴² Each part of the *Fair Work Act 2009* explains which employees the part applies to, which may be all 'employees' in Australia (in the common law sense) or a subset of those employees, excluding some who are employed by state governments and a constitutionally complicated array of other employers. See Stewart et al, above n 15, 6.1.

⁴³ Eg *Industrial Relations Act 1996* (NSW).

⁴⁴ This is a multifactorial test, focussed on control. See Stewart et al above n 15, 8.2.

The *Fair Work Act* prohibits discrimination by employers on the ground of disability or 12 other attributes, against employees and potential employees throughout the employment relationship. It does this in a way that is different to anti-discrimination legislation, and definitions and caselaw under anti-discrimination law are not generally imported. Firstly, what it prohibits (as a 'general protection' in Part 3-1 of the Act)⁴⁵ is 'adverse action' 'because of' 13 attributes, subject to some exceptions. Section 351, entitled 'Discrimination' provides that, subject to exceptions:

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The detriment, or 'adverse action', defined in section 342(1), covers a broad range of circumstances. In respect of employees these include: (a) dismissing the employee; (b) injuring the employee in his/her employment; (c) altering the position of an employee to their prejudice; and (d) discriminating between an employee and other employees. In respect of prospective employees adverse action includes: refusing to employ the person; and discriminating with respect to terms and conditions on which employment is offered. In both cases, it includes threatening to or organising to take such action.⁴⁶ However, it does not include action authorised under the *Fair Work Act*, another Commonwealth law or a State or Territory law prescribed by the *Fair Work Regulations*.⁴⁷

Exceptions limit the scope of this protection. Firstly, discrimination is not unlawful if it is taken because of the inherent requirements of the particular position.⁴⁸ An inherent requirement is something necessary or 'essential to the position',⁴⁹ not limited to physical tasks.⁵⁰ A second exception, not often relevant to disability, pertains only to religious institutions.⁵¹ A third exception highlights the complex interaction between the prohibition in s 351 and anti-discrimination laws. The protection under this section is only available for action that is unlawful under an anti-discrimination law in that place.⁵² In this way s351 does not expand the scope of protection afforded by anti-discrimination laws; it merely provides protected employees with more options to enforce their rights using either anti-discrimination laws or the *Fair Work Act* enforcement regime.

2.3. Definition of disability

In the definition of disability, as for the scope of protection, the anti-discrimination laws are significantly wider than the *Fair Work Act*.

The *DDA* defines disability very widely: In relation to a person, disability means:

(a) total or partial loss of the person's bodily or mental functions; or

⁴⁵ For guidance on caselaw and how the Fair Work Commission interprets these provisions, see the Fair Work Commission, *General Protections Benchbook*, July 2019 at <https://www.fwc.gov.au/resources/benchbooks/general-protections-benchbook>

⁴⁶ *Fair Work Act 2009* (Cth), s 342(2).

⁴⁷ *Fair Work Act 2009* (Cth), s 342(3).

⁴⁸ *Fair Work Act 2009* (Cth), s 351(2)(b).

⁴⁹ *QANTAS Airways Limited v Christie* (1998) 193 CLR 280, 284 (Brennan CJ)

⁵⁰ *X v Commonwealth* (1999) 200 CLR 177.

⁵¹ *Fair Work Act 2009* (Cth), s 351(2)(c).

⁵² *Fair Work Act 2009* (Cth), s 351(2)(a). Note that the *Fair Work Act* (ss723, 772) also retains an old protection against discriminatory termination, but this has limited operation. See Smith, Macken above n 15; Stewart et al, above n 15.

- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:
 - (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.⁵³

There are **no requirements that the impairment be permanent, of any 'degree' or severity**; nor is the term defined in terms of the ways or extent to which an impairment limits activities or quality of life. In this way, the **definition is very wide and inclusive**; the protections afforded are more limited.

In contrast, the **Fair Work Act does not define disability** for the purposes of protecting against discrimination. As noted above, the Act prohibits adverse action by employers against employees or potential employees 'because of physical or mental disability' among other things. The absence of a definition for 'physical or mental disability' allowed for a wide interpretation, but this has not eventuated: the courts have explicitly stated that the ordinary meaning is to be adopted, not the extended meaning given to disability under the DDA.⁵⁴ The definition is particularly important to the question of whether any adverse action was taken 'because of' the disability.⁵⁵ This issue raised the question of **whether related behaviours or manifestations of an impairment were considered part of the disability**; if manifestations were included then action taken because of the behaviour could be characterised as action taken because of the disability. However, the courts have not always taken this approach, often separating the applicant's disability from behaviours,⁵⁶ **significantly limiting the protection of these provisions**.

2.4. Forms of discrimination protection

The form of discrimination protection under the *Fair Work Act* is significantly narrower than discrimination prohibited in anti-discrimination laws. While the DDA defines discrimination to include at least direct and indirect discrimination, the **Fair Work Act** does not explicitly define discrimination and it **has been interpreted to extend only to intentional direct discrimination**.

⁵³ *Disability Discrimination Act 1992* (Cth), s 4(1).

⁵⁴ *Hodkinson v Commonwealth* (2011) 248 FLR 409, [145].

⁵⁵ The definition is also relevant for applicants who have struggled to establish that they have a disability. The court has asserted that the word "disability" should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person's movements, activities or senses.' *Hodkinson v Commonwealth* (2011) 248 FLR 409, [146].

⁵⁶ *Stephens v Australian Postal Corporation* (2011) 207 IR 405, [86]-[90]. See also *Pavolvich v Atlantic Contractors Pty Ltd* [2012] FMCA 1080.

2.4.1. Anti-discrimination laws

Australian anti-discrimination legislation proscribes both ‘direct’ and ‘indirect’ forms of disability discrimination.⁵⁷ The distinction between direct and indirect discrimination is usually described as one of treatment versus impact. To determine which kind of discrimination is at play the question is whether the person was excluded because they were treated differently (focussing on what the perpetrator did and why) or because uniform treatment impacted them differently.

These two forms of discrimination are **treated as mutually exclusive**.⁵⁸ This confines direct discrimination to treatment that explicitly categorically excludes people with disability or implicitly does so by being based on assumptions or prejudice. Consistent treatment of behaviours, even those that are clearly manifestations of disability, generally are not challengeable as *direct* discrimination. This means that the direct discrimination protections only require duty bearers to be consistent, to treat people with disability no worse but no better than a non-disabled comparator who *behaves the same way*. The implication is that no adjustments for people with disability are required under these provisions and, as discussed below, express reasonable adjustment provisions have been interpreted very narrowly.

Set out below is further detail about **how direct and indirect discrimination are defined and interpreted** under the DDA.⁵⁹ Firstly this section outlines the traditional definitions of direct and indirect discrimination, in sections 5(1) and 6(1). In 2009 **reasonable adjustments obligations were introduced not as a stand-alone obligation** but oddly inserted into the definitions of direct and indirect discrimination – as sections 5(2) and 6(2). As will be explained, the poor drafting of these additional provisions left them open to narrow and limiting interpretations.

2.4.1.1. Direct Discrimination

Direct discrimination corresponds most closely with the common understanding of discrimination whereby likes are not treated alike. The **different treatment is unfavourable or less favourable and can manifest in various ways**. The first and most blatant example is that of categorical or blanket exclusion; this approach underpins segregation and implicitly categorises people with disability as different and other. It might be less common than in the past, but still persists. In addition to categorical exclusions, direct discrimination also covers different treatment that reveals more subtle prejudices (even unconscious ones) or assumptions. An example of this would be where an employer treats less favourably a job applicant who is blind, by not offering her the position because the employer *assumes* she would not be able to travel interstate for meetings while making no such assumptions about non-disabled applicants. It is the *assumption* about what the applicant can and can’t do that amounts to the less favourable treatment. It is the inconsistent treatment on the ground of disability of otherwise similarly qualified applicants that amounts to direct discrimination. Note that if the job does actually require interstate travel, then the employer would not fall foul of *direct* discrimination rules if it consistently, regardless of disability, asked every applicant about their capacity to undertake this travel and excluded all applicants who said they could not.

⁵⁷ See eg *Disability Discrimination Act 1992* (Cth), ss 5 and 6. For discussion of this distinction in Australian law see Belinda Smith ‘Rethinking the Sex Discrimination Act – Does Canada’s experience suggest we should give our judges a greater role?’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, Canberra, 2010), 235-259.

⁵⁸ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92. For discussion see Belinda Smith ‘From Wardley to Purvis: How far has Australian anti-discrimination law come in 30 years?’ (2008) 21 *Australian Journal of Labour Law* 3-29.

⁵⁹ For more detail see Smith, *Macken*, above n 15; Gaze and Smith, above n 16; Rees, Rice and Allen above n 16.

Most Australian Acts⁶⁰ define direct discrimination as per s5(1) of the DDA:

- (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

Summarising this section, **direct discrimination is commonly described as (a) treating someone less favourably than a comparator in the same circumstances, (b) because of the protected attribute of disability.** The complainant bears the onus of proving both elements, to the civil standard of ‘balance of probabilities’; there is no shifting burden of proof in Australian anti-discrimination law. The test requires an objective comparison of the treatment of two different employees; one being the complainant and the other an actual or hypothetical employee who does not possess the attribute that has allegedly been used unlawfully to discriminate. The comparator maybe be someone with a different disability or without any disability.

What can constitute ‘treatment’ links to the prohibitions in the Act. As noted above, the DDA, for instance, prohibits discrimination in employment at all stages.⁶¹ This means **prohibited discriminatory ‘treatment’** can range from **formal decisions** (about who is hired, promoted, disciplined, terminated, etc), other decisions about **what terms and conditions are offered to an employee** (pay, hours, benefits, car, window office etc) and less formal decisions about **recruitment arrangements and work arrangements** (such as the allocation of tasks, provisions of rewards, determinations of leave requests). The catchall category of **‘any other detriment’** means that employers can even be liable for the sum of minor or diffuse occurrences in workplaces that can constitute a hostile workplace culture.

Direct discrimination provisions do not prevent employers from using criteria that very closely connect or overlap with attributes that are protected by anti-discrimination laws.⁶² For example, while an employer may be prohibited from applying a blanket exclusion of a person with disability, **direct discrimination provisions allow the employer to choose the candidate who can work in particular ways**, for long hours, or pass a standard fitness test, will not need flexible work hours or take extended leave, or any other criteria that may have an normative ableist element but is not expressly ‘disability’. To comply with the *direct* discrimination prohibition, employers must avoid categorical exclusions, assumptions and stereotyping but are permitted to treat alike all employees who behave the same way, regardless of the reason or cause of that behaviour. The extent to which the indirect discrimination and reasonable adjustment provisions require some accommodation or justification is explored below.

For the second element of direct discrimination, the claimant must prove that **the attribute was at least one of the reasons for the respondent’s decision or conduct.**⁶³ It is often said that intention or motive need not be proven, simply that the ground was the ‘true basis’ for the decision.⁶⁴

⁶⁰ Contrast the model used in *Discrimination Act 1991* (ACT), s 8 with *Equal Opportunity Act 2010* (Vic), s 8.

⁶¹ *Disability Discrimination Act 1992* (Cth), s 15.

⁶² *Purvis* (2003) 217 CLR 92.

⁶³ *Disability Discrimination Act 1992* (Cth), s 10. Note that for the DDA and most other anti-discrimination Acts this reason need not be the sole or even dominant reason.

⁶⁴ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 (176-177 per Deane and Gaudron JJ, 184 per Dawson J, 208 per McHugh J); *Waters v Public Transport Corporation* (1991) 173 CLR 349 (359 per Mason CJ and Gaudron J, 400 per McHugh J); *Purvis* (2003) 217 CLR 92.

2.4.1.2. Direct Discrimination by not providing reasonable adjustments

In 2009 the DDA was amended to include an explicit reference to reasonable adjustments.⁶⁵ The amendments inserted into the **definitions of direct and indirect discrimination** a provision that on their face **extend discrimination to the case where ‘reasonable adjustments’ are not provided**. ‘Reasonable adjustments’ are those that do not impose an ‘unjustifiable hardship’ on the provider,⁶⁶ with relevant factors listed in section 11 of the Act. They were thus **designed to balance the costs and benefits of providing adjustments for employers**, employees and other affected people. However, drafting of the definition allowed for conflicting interpretations of the test, and the **prevailing interpretation is one that renders the provision ineffective**.

The amendment appeared to extend direct discrimination, in section 5(2), to cover situations where the failure to provide reasonable adjustments has the *effect* of disadvantaging the disabled claimant.⁶⁷ This interpretation, would **require duty-bearers to do more than merely ignore disability and treat everyone consistently**. But this interpretation has been rejected, holding that the claimant must prove that the respondent did not provide reasonable adjustments, and, critically, that the reason the respondent did not provide the adjustments was ‘because of’ the claimant’s disability.⁶⁸ There is no likely scenario that would satisfy this test. There has been little public debate about how this case reduces legal rights for people with disability, possibly because of the general acceptance that reasonable adjustments should be provided, but disability advocates are pushing for reform of this provision.

2.4.1.3. Indirect Discrimination

Indirect discrimination is concerned with impact and specifically the **disproportionate impact of an apparently neutral rule on those who share a protected attribute**, such as disability.⁶⁹ If a requirement, condition or practice operates to exclude a group, even if it does not exclude every member of that group, the law of indirect discrimination implicitly requires employers to examine **whether the requirement is reasonable in all the circumstances**.

In the DDA indirect discrimination is defined:

s6 Indirect disability discrimination

- (1) For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
 - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:

⁶⁵ *Disability Discrimination and Other Human Rights Legislation Act 2009* (Cth).

⁶⁶ *Disability Discrimination Act 1992* (Cth), s 4.

⁶⁷ *Watts v Australian Postal Corporation* [2014] FCA 370 (*Watts*), [241], [257] (Mortimer J).

⁶⁸ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

⁶⁹ Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Leichhardt, NSW, 1992).

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
 - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
- (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

Under the DDA standard definition of indirect discrimination (in s6(1)) there are three elements: a condition or requirement; that disproportionately impacts on a protected group; and an inability to comply by the complainant. This protection is designed to enable apparently neutral requirements and conditions to be challenged if they disparately impact on people with disability.⁷⁰ Examples include requirements to: work full-time, inflexible or long hours; comply with a strict behaviour or conduct code; be able to lift certain weights or perform other particular physical activities.

A condition that disproportionately impacts on a protected group will not amount to unlawful discrimination if the respondent establishes that it is 'reasonable, having regard to the circumstances' (see ss 6(3) and (4) DDA).⁷¹ In essence this is a defence of justification balancing all the circumstances of the particular case.⁷²

2.4.1.4. Indirect discrimination by failing to provide reasonable adjustments

The 2009 DDA amendments inserted reasonable adjustment provisions into the definition of indirect discrimination (s6(2)). On its face, this section suggests that **a duty-bearer will indirectly discriminate** if they impose a requirement or condition that disparately impacts people with disability, **when a reasonable adjustment would enable compliance but the adjustment is not provided**. Operating on its own, this is what s6(2) would provide, but the section operates in the context of s6 as a whole, which provides for the defence of 'reasonableness' (for both ss6(1) and 6(2)).⁷³ This means that the test of reasonableness can be applied, so that if a requirement or condition is reasonable, no adjustments are owed under s6(2), not even reasonable ones. **In this way, the new provision arguably adds nothing**. Legislative amendment would be required to reform.

⁷⁰ *Waters & Ors v Public Transport Corporation* (1991) 173 CLR 349 (360 per Mason CJ and Gaudron J, citing *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165).

⁷¹ The traditional formulation of indirect discrimination – still found in the *Racial Discrimination Act* and many of the state Acts – requires *complainants* to prove that the requirement or condition is not reasonable.

⁷² *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 395-396 (Dawson and Toohey JJ); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 110-111 (Sackville J); *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251 at 263 (Bowen CJ and Gummow J).

⁷³ Discussed and applied in *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

2.4.1.5. Exceptions

The DDA contains **important exceptions or defences to claims of discrimination** in work.⁷⁴ These include: compliance with a statutory obligation (s47); special provisions in respect of government pensions and allowances (s51), superannuation and insurance (s46); migration rules (s52), and defence force activities (s53), as well as infectious disease restrictions (s48). Three other provisions are worth specifically noting. The first is '**unjustifiable hardship**', which effectively permits discrimination if '**avoiding the discrimination would impose an unjustifiable hardship**' on the respondent, and this term is defined (in s11) to include weighing up of counterfactors.⁷⁵ A second, **defence** is that the person is '**unable to carry out the inherent requirements of the particular work**'.⁷⁶ As for this exception in the Fair Work Act, discussed above in 2.2, this means **disability discrimination would not be unlawful if a person was rejected for a particular position**, for example, if they could not perform a requirement that was necessary or 'essential to the position'⁷⁷ and such requirements are not limited to physical tasks, and can include the ability to perform the job safely.⁷⁸ Importantly though in assessing whether a person could carry out the inherent requirements of the particular work, under the DDA (but not the FWA), the **respondent must assume that 'reasonable adjustments' are provided**.⁷⁹ While this might have more normative than practical legal effect, it is **one way in which the notion of reasonable adjustments in the DDA still has some operation**. The third exception is for '**special measures**', whereby action that might otherwise appear to be discriminatory is not unlawful if taken to promote equality for persons with disability.⁸⁰

2.4.1.6. Harassment and victimisation

The DDA also prohibits disability harassment⁸¹ and other conduct. Under the Act, **disability harassment is not defined** but has been interpreted to cover **negative treatment related to the disability** and include an **element of repetition** in the few cases that have arisen.⁸²

Each anti-discrimination Act, including the DDA, **prohibits associated conduct** such as; accessorial liability for aiding, abetting or inciting unlawful action;⁸³ advertising an intention to unlawfully discriminate;⁸⁴ and victimising.⁸⁵ The anti-victimisation provisions are designed to ensure that people can freely exercise their rights under the legislation. **Victimisation means subjecting (or threatening to subject) someone to a detriment because they have used (or propose to use) the legislation**. Generally these criminal prohibitions can be protected through civil claims brought by victims.⁸⁶

2.4.2. Fair Work Act

As noted above, the **key prohibition on discrimination in the Fair Work Act** under s351 provides:

⁷⁴ *Disability Discrimination Act 1992* (Cth) see particularly Part 2, Division 5

⁷⁵ See s21B in respect of work and s29A in respect of other fields of protection.

⁷⁶ *Disability Discrimination Act 1992* (Cth) s 21A.

⁷⁷ *QANTAS Airways Limited v Christie* (1998) 193 CLR 280, 284 (Brennan CJ)

⁷⁸ *X v Commonwealth* (1999) 200 CLR 177.

⁷⁹ *Disability Discrimination Act 1992* (Cth), s21A(1)(b).

⁸⁰ *Disability Discrimination Act 1992* (Cth), s45.

⁸¹ *Disability Discrimination Act 1992* (Cth), s 35, 37 and 39.

⁸² *McCormack v Commonwealth* [2007] FMCA 1245, [75]; *Penhall-Jones v State of NSW* [2008] FMCA 832, [39].

⁸³ *Disability Discrimination Act 1992* (Cth), s 43.

⁸⁴ *Disability Discrimination Act 1992* (Cth), s 44.

⁸⁵ *Disability Discrimination Act 1992* (Cth), s 42.

⁸⁶ Conduct constituting an offence under the Federal Acts is included in the definition of 'unlawful discrimination' in s3 *AHRC Act* and can thus be the subject of a complaint by an individual victim.

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, ... physical or mental disability, ... or social origin.

This wording is arguably open to wide interpretation that includes both direct and indirect discrimination, intentional or otherwise, similar to anti-discrimination laws.⁸⁷

However, the s351 protection **has been interpreted very narrowly** as a small subset of discrimination: that is, intentional direct discrimination.⁸⁸ The combined interpretation of three particular provisions has confined the key words in this section 'because of'. Firstly, although the Act provides that the reasons for conduct need only 'include' the prohibited discriminatory reason,⁸⁹ the High Court has held that **the reason needs to be a 'substantive and operative' reason**.⁹⁰ Secondly, the Act provides a shifting burden of proof whereby, **it is 'presumed' that adverse action is taken for the prohibited reason, unless the respondent 'proves otherwise'**.⁹¹ However, the courts have allowed generous scope for employers to rebut the presumption: This question is one of fact, and 'direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer'.⁹² Importantly, a reason can be considered a legitimate one, thereby capable of rebutting the presumption, even when it is closely associated with the protected attribute or characteristics of an attribute.⁹³ This relates back to the third limiting interpretation, the narrow way in which 'disability' has been interpreted under s351. As noted above,⁹⁴ in key cases disability has been understood to exclude behaviours or the relevant 'practical consequences' of the disability.⁹⁵ Employer conduct based on behaviour, or the application of a behavioural code or condition, would not likely be covered by s351, which means that the provision does not effectively extend to indirect discrimination.

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

There are different ways in which a duty to accommodate people with disabilities can be imposed by law. In anti-discrimination legislation it can, for example, be legislated as a stand-alone obligation or embedded in the definition of discrimination. The DDA is the only federal Act in Australia to include such an obligation explicitly and it provided this by **amending the definitions of disability discrimination in 2009 to include reasonable adjustments obligations**.⁹⁶ This appeared to

⁸⁷ Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Discrimination Law' (2010) 23 AJLL 199; *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 at [88]-[102].

⁸⁸ Smith, *Macken*, above n 15 at [15.270]; Stewart et al, above n 15, at 20.77

⁸⁹ *Fair Work Act 2009* (Cth), s360.

⁹⁰ *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (*Barclay*) at [56]-[59], [104], [127]; *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41 at [91]-[93].

⁹¹ *Fair Work Act 2009* (Cth), s361.

⁹² *Barclay* at [45] (French CJ, Crennan J) (emphasis added); Gummow and Hayne JJ at [128]-[132] and Heydon J at [141].

⁹³ For further discussion see Stewart et al, above n 15, at [20.77]-[20.86]; and FWO Benchbook above n 45, Part 3.

⁹⁴ See infra n **Erreur ! Signet non défini**.

⁹⁵ *Hodkinson v Commonwealth* (2011) 248 FLR 409, [146].

⁹⁶ See section 2.4. of this country report, above.

fundamentally change the scope of the discrimination provisions, but as explained above, both of these amendments have been construed by the courts in ways that nullify their effect.⁹⁷

Holding more promise, but **limited to the state of Victoria**, are reasonable adjustment provisions under the ***Equal Opportunity Act 2010 (Vic)***. This Act brought in some very significant advances in relation to reasonable adjustments to ensure as far as possible that the individual needs of workers with any of the protected attributes are considered and accommodated where possible. This could enable challenges and transformation of norms that favour only mainstream individuals, although Australian courts have often not proven to be very progressive in giving effect to such ideals. The first change is the **inclusion of reasonable adjustments as a factor to be considered when assessing ‘reasonableness’ in indirect discrimination**. The second was to adopt an **explicit stand-alone right to reasonable adjustments for people with disabilities** in the context of work, education, and provision of services⁹⁸ (and an equivalent provision for workers who are parents or carers).⁹⁹ Finally, **unreasonable failures to provide those adjustments or accommodations is classified as discrimination**, independently of the need to prove direct or indirect discrimination.¹⁰⁰ All these provisions include paragraphs that define a wide range of factors that must be considered in assessing reasonableness.

3.2. Incentives or other assistance available to employers

Focused specifically on promoting employment of people with disability, a federal government hub called **JobAccess provides various financial and informational supports**. This central portal provides: information to employers, employees and those looking for work; links to disability recruitment and job placement and support services;¹⁰¹ and facilitation of a Supported Wage System.¹⁰²

The JobAccess portal also provides information about **funding for workplace modifications or adjustments** through an **Employment Assistance Fund**. In respect of these adjustments, the site provides a substantial amount of information designed to help employers firstly to understand the nature of a range of disabilities and how they might be relevant to work activities.¹⁰³ It then provides suggestions about steps employers could take to enable a person with disability to perform the activities, with suggestions about alternative ways of doing things and specific adjustments or modifications that might be needed. For modifications, adjustments or supports that need to be purchased, the Employment Assistance Fund provides financial support.¹⁰⁴ Free workplace assessments are provided for eligible people with disabilities to determine what modifications or equipment would support the worker. This funding could be used for a range of supports including: adjustments to the physical workplace, special equipment including information and communication devices, modifications to motor vehicles, sign language interpreting services, and training in the workplace such as disability awareness, or mental health awareness and first aid.

⁹⁷ See also Rees, Rice and Allen, *op. cit.*, at [7.6.13]-[7.6.35].

⁹⁸ *Equal Opportunity Act 2010 (Vic)* ss 20, 33, 40 and 45. Limitation provisions are at ss 23, 34, 41 and 46 respectively.

⁹⁹ *Equal Opportunity Act 2010 (Vic)* ss 17, 19, 22 and 32.

¹⁰⁰ *Equal Opportunity Act 2010 (Vic)* s 7(1)(b).

¹⁰¹ Disability Employment Services (DES) <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/disability-employment-services>

¹⁰² JobAccess <https://www.jobaccess.gov.au/>

¹⁰³ Disability and Adjustment, JobAccess: <https://www.jobaccess.gov.au/node/28181>

¹⁰⁴ Employment Assistance Fund (EAF), JobAccess <https://www.jobaccess.gov.au/employment-assistance-fund-eaf>

Disability Employment Services is a federal government service primarily designed to help people with disability obtain and maintain employment.¹⁰⁵ While the focus of this services is people with disability, in preparing for employment and finding suitable jobs, services can also be provided of ongoing support in a job and helping the worker and employer identify and fund any necessary modifications or appropriate wage subsidies.

In addition, and not specifically related to work, the **National Disability Insurance Scheme** is a new national system for disability support that is fundamentally changing they way in which disability support is provided in Australia.¹⁰⁶ Established under the *National Disability Insurance Scheme Act 2013* (Cth), the NDIS Act established an agency and a national scheme for funding and individualised packages of supports to promote the independence and social and economic participation of people with disability. This is incrementally being introduced and replaces a longstanding patchwork of federal and state supports, which were inconsistent, fragmented and underfunded.¹⁰⁷ The new scheme is experiencing significant challenges in being established, with individuals being assessed for support packages and services providers having to adjust to fundamental shifts in funding and service provision.¹⁰⁸

4. Enforcement of rights

Of the two regulatory schemes that prohibit discrimination in work in Australia – anti-discrimination laws and the Fair Work Act - **anti-discrimination laws provide wider protection, but softer enforcement**, as outlined below. The **Fair Work Act protections are significantly narrower**, prohibiting discrimination only in employment and effectively limited to intentional discrimination, **but this regime has more enforcement capacity** due to a wider range of enforcers (including victims, unions and a public ombudsman), and a pyramid of sanctions, including penalties.

4.1. Anti-discrimination laws

Anti-discrimination law rights across Australia are generally like civil common law rights in that they are **enforceable only by the person who has suffered the harm against the perpetrator**, not by a prosecutor, ombudsman or other agency. Consistent with this the remedies available are generally **compensatory**, being provided by the wrongdoer directly to the victim to compensate for the harm rather than punish or set an example. Given the similarity of the regulatory model used across the federation, the federal agency and process will be described here. The process has two stages after application: **conciliation by a government equality agency**, which is the **Australian Human Rights Commission (AHRC)** for federal matters, and, if this fails to settle the matter, a hearing and determination by a tribunal or court.¹⁰⁹

¹⁰⁵ About DES, JobAccess <https://www.jobaccess.gov.au/people-with-disability/about-des>

¹⁰⁶ See NDIS <https://www.ndis.gov.au/understanding> ; Luke Buckmaster, 'The National Disability Insurance Scheme: a quick guide' Parliament of Australia, Department of Parliamentary Services, Research Paper Series, 2016-17, 3 March 2017. https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/DisabilityInsuranceScheme

¹⁰⁷ Buckmaster, NDIS quick guide, above n106.

¹⁰⁸ See, for example, Helen Disckinson, Here's what needs to happen to get the NDIS back on track' The Conversation, 30 May 2019 <https://theconversation.com/heres-what-needs-to-happen-to-get-the-ndis-back-on-track-117835> .

¹⁰⁹ Note that Victoria has introduced a right for complainants to bypass conciliation at its equality agency and proceed directly to the tribunal: *Equal Opportunity Act 2010* (Vic), s 122.

The **process of resolving discrimination disputes** under the federal anti-discrimination laws, including the DDA, is set out in the *Australian Human Rights Commission Act 1986* (Cth) (Part IIB), with similar processes established in each state and territory. As noted above, the only person with standing to pursue an action for discrimination is someone who has been discriminated against; the **victim bears the onus of applying and the burden of proof in a hearing**. Further, at the federal level, the complainant faces the risk of an adverse costs order in the event they do not succeed at a hearing; generally the unsuccessful party is ordered to pay the litigation costs of the successful party, with some qualifications and court discretion.¹¹⁰ The original application process is reasonably accessible, but proceeding to a hearing, particularly with the risks of a cost order, presents a significant barrier to enforcement.¹¹¹ For federal laws, **complainants have six months to lodge their complaint**.¹¹² The Commission is then generally charged with investigating and seeking to resolve the matter through conciliation.¹¹³ This conciliation is confidential in the sense that it is private,¹¹⁴ the names of parties, allegations, admissions and resolutions are not made available by the Commission to the public,¹¹⁵ and settlement may be subject to non-disclosure agreements between the parties. **Conciliation is also compulsory**,¹¹⁶ the AHRC may require people to attend and compel the production of documents, and a complainant cannot apply to have the matter heard in court until the AHRC has finalised its role and terminated the complaint.¹¹⁷

If the matter does not settle and the AHRC terminates the complaint, the complainant has 60 days to apply for a **hearing and determination in either the Federal Circuit Court or Federal Court of Australia**.¹¹⁸ In states and territories, these matters are heard by tribunals. In some cases, a complainant must first be granted leave of the court to apply.¹¹⁹ At the hearing, the complainant bears the burden of proof to the standard of the balance of probabilities and the rules of evidence apply, although the courts are officially 'not bound by technicalities or legal forms'¹²⁰ for these matters.

If the court finds that the respondent has committed 'unlawful discrimination', it can **make 'such orders... as it thinks fit'**, including **compensatory damages, reinstatement, variation of a contract and declaration**.¹²¹ However, this power has **generally been interpreted in a narrow way** to limit orders to remedial or compensatory ones.¹²² Guided by the principles governing the assessment of damages in tort, **compensation can be ordered for both economic and non-economic loss**, such as pain and suffering (although orders for such damages have been traditionally low).¹²³ Generally the courts have

¹¹⁰ *Federal Court of Australia Act 1976* (Cth), s 43(2) and *Federal Circuit Court of Australia Act 1999* (Cth), s 79(3). In contrast, generally state and territory matters are dealt with by tribunals on a no-cost basis, which means that each party is required to bear its own costs: see eg *Civil and Administrative Tribunal Act 2013* (NSW), s 60; this is also the case with FWA claims – see infra n 136, below .

¹¹¹ See Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Sydney: Themis Press, 2010).

¹¹² *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1)(b), although the AHRC has discretion to investigate older matters. The limitation for complaints under state and territory Acts is 12 months.

¹¹³ *Australian Human Rights Commission Act 1986* (Cth), s 46PF and Part IIB Division 1 generally.

¹¹⁴ *Australian Human Rights Commission Act 1986* (Cth), s 46PK(2).

¹¹⁵ *Australian Human Rights Commission Act 1986* (Cth), s 49.

¹¹⁶ The President may require people to attend, compel the production of documents.

¹¹⁷ *Australian Human Rights Commission Act 1986* (Cth), ss 46PH, 46PO.

¹¹⁸ *Australian Human Rights Commission Act 1986* (Cth), s 46PO.

¹¹⁹ *Australian Human Rights Commission Act 1986* (Cth), s 46PO(3A).

¹²⁰ *Australian Human Rights Commission Act 1986* (Cth), s 46PR.

¹²¹ *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4).

¹²² *Clarke v Catholic Education Office* (2003) 202 ALR 340, 360 [83] (Madgwick J).

¹²³ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, [27]. Some jurisdictions have caps on the damages that can be ordered, eg New South Wales (\$100,000): *Anti-Discrimination Act 1977* (NSW), s 108(2)(a).

not issued orders that are directed at punishing, such as punitive or exemplary damages,¹²⁴ nor non-monetary orders such as apologies, training, or systemic improvements.

4.2. Fair Work Act

As for alleged breaches of anti-discrimination laws, disputes about the general protections discrimination provisions of the Fair Work Act are **generally litigated first through a conciliation conference and then, if that fails, onto a hearing for determination**. There are, however, some differences particularly in respect of who can enforce the provisions, timeframes, remedies and costs.

Firstly, the **claims can be brought not only by the affected employee** but alternatively by unions, or a public agency, the **Fair Work Ombudsman (FWO)**¹²⁵ which has considerable inspection and enforcement powers and resources.¹²⁶ The **FWO has pursued a number of cases of discrimination** under s351,¹²⁷ with associated publicity used for educative and deterrence purposes. Second, in respect of time limitations for lodging claims, the rights are bifurcated into terminations and other types of adverse action, with terminations having much tighter time limits (21 days,¹²⁸ as opposed to 6 years).

Claims are lodged with the Fair Work Commission (FWC) and generally the FWC is required to conduct a private case conference to try to resolve the dispute¹²⁹ (in respect of non-dismissal matters the parties can bypass this stage).¹³⁰ If the conference does not resolve the dispute (or is bypassed), claimants can then apply to a federal court for the matter to be heard and determined¹³¹ (or arbitration by the FCA if the parties agree).¹³² If a court determines that a general protection has been breached, the **court is empowered to make ‘any order the court considers appropriate’** including compensatory damages and reinstatement.¹³³ Importantly, and in stark contrast to the anti-discrimination law regime, the **court can also make penalty orders**.¹³⁴ The **court can also issue injunctions** to prevent adverse action.¹³⁵

Finally, in contrast to anti-discrimination law litigation, the courts have only limited capacity to award costs against a party in relation to general protections claims.¹³⁶ This means that a **complainant faces a very low risk of a costs order**, but on the other hand, will need to cover their own costs even in the event of litigation success.

¹²⁴ Cf *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [162] Raphael FM awarded \$7500 exemplary damages for the respondent’s inappropriate conduct during the litigation. See also *Hill v Hughes* [2019] FCCA 1267.

¹²⁵ *Fair Work Act 2009* (Cth), s 539 (table item 11).

¹²⁶ Belinda Smith, ‘Fair and Equal in the world of Work: two significant federal developments Australian discrimination law’ (2010) 23 *Australian Journal of Labour Law* 3.

¹²⁷ See eg *FWO v WKO Pty Ltd* [2012] FCA 1129; *FWO v Theravenish Investments Pty Ltd* [2014] FCCA 1170.

¹²⁸ *Fair Work Act 2009* (Cth), s 366.

¹²⁹ *Fair Work Act 2009* (Cth), s 368.

¹³⁰ *Fair Work Act 2009* (Cth), s 374.

¹³¹ *Fair Work Act 2009* (Cth), s 370.

¹³² *Fair Work Act 2009* (Cth), s 369.

¹³³ *Fair Work Act 2009* (Cth), s 545.

¹³⁴ *Fair Work Act 2009* (Cth), ss 546, 539. Possible orders: up to 60 penalty units for an individual and 300 penalty units for a corporation; currently a penalty unit is worth \$210: 4AA Crimes Act 1914 (Cth).

¹³⁵ See *Jones v Queensland Tertiary Admissions Centre Ltd* [2009] FCA 1382 (an interlocutory injunction was issued to prevent termination on basis of alleged adverse action).

¹³⁶ *Fair Work Act 2009* (Cth), s 570.

5. Legal framework in practice

Australian law provides **some protections against disability discrimination in work**, in a complex array of federal and state anti-discrimination laws and labour laws, but they do **little to promote equality**. There is no clear positive obligation on employers to review their work criteria, arrangements, language and premises to remove prejudice and promote substantive equality in all its dimensions. There is ongoing advocacy about reforming the reasonable adjustment provisions of the DDA so that they do impose some obligation to provide adjustments. This is currently the site of considerable law reform advocacy and is likely to see at least some modest reforms in the near future.

What laws there are protecting against discrimination in Australia **are underenforced** because they depend upon individual victims to bring claims for individual remedies. There is a current national inquiry being undertaken by the Australian Human Rights Commission into Rights and Freedoms, including anti-discrimination laws.¹³⁷ This inquiry should do well to promote further discussion of human rights in Australia, including rights for people with disability, but there is little likelihood of any substantial reforms in respect of anti-discrimination protections or their enforcement.

The NDIS, when fully implemented, might provide a more wholistic system of supports for people with disability, but supports can only go some way to enable. Laws that require access and inclusion will still be needed to change attitudes, norms and structural barriers for people with disability.

¹³⁷ Australian Human Rights Commission, Rights and Freedoms <https://www.humanrights.gov.au/our-work/rights-and-freedoms>

B. AUSTRIA

1. Einleitung

1.1. Überblick über das Land

Mit einer Bevölkerung von **8,8 Millionen** Menschen hat Österreich laut einer Mikrozensus-Befragung der Statistik Österreich im Jahr hochgerechnet **1,3 Millionen Menschen mit Behinderungen**. Die meisten, der sich selbst als solche identifizierenden Personen, haben eine Mobilitätsbeeinträchtigung. Wie der Bericht zur sozialen Lage des Sozialministeriums ausweist, sind Menschen mit Behinderungen mit **Hürden am Arbeitsmarkt** konfrontiert und generell einem höheren Armutsrisiko ausgesetzt. Die **Arbeitslosigkeit** von Menschen mit Behinderungen wird **tendenziell** als **hoch** eingeschätzt: in den vergangenen 10 Jahren gab es für Menschen mit Behinderungen stetig steigende Arbeitslosenzahlen zu verzeichnen, bei Personen mit gesundheitsbedingten Vermittlungseinschränkungen gar Sprünge um mehr als 100%.

Beachtlich ist, dass knapp **20.000** Menschen mit Behinderungen, insbesondere mit Lernschwierigkeiten und mehrfachen Beeinträchtigungen in sogenannten **«Werkstätten»** tätig sind, wo sie einer tagesstrukturierenden Beschäftigung nachgehen, die jedoch **kein Gehalt** und keine sozialversicherungsrechtliche Absicherung bietet. Erwähnenswert ist die **Job-initiative «Spagat»** im westlichsten Bundesland, Vorarlberg; Menschen mit Behinderungen, insbesondere mit mehrfachen Beeinträchtigungen und hohem Unterstützungsbedarf werden, engmaschig begleitet, erfolgreich in den ersten Arbeitsmarkt integriert. Die dörfliche, niedrighschwellige gesellschaftspolitische Struktur Vorarlbergs spielt dabei eine Rolle.

Der **rechtliche Schutz** von Menschen mit Behinderungen **basiert** grundlegend auf einer Klausel im Bundesverfassungsgesetz (B-VG): der Gleichheitssatz in **Artikel 7** wurde 1997 erweitert: "Niemand darf wegen einer Behinderung benachteiligt werden. Die Republik (Bund, Länder und Gemeinden) bekennt sich dazu, die Gleichbehandlung von behinderten und nicht behinderten Menschen in allen Bereichen des täglichen Lebens zu gewährleisten."¹³⁸

Die **Darstellung** von Menschen mit Behinderungen in der **Öffentlichkeit** ist stark von medizinischen Zugängen geprägt, die Entmündigungsverordnung aus der Zeit der Monarchie wirkt vielerorts noch nach. Die **Spendenkampagne** des öffentlich-rechtlichen Rundfunks in der Adventszeit verstärkt ("Licht ins Dunkel") die **almsen-geneigte** Darstellung von Menschen mit Behinderungen. Gesamtgesellschaftlich sind Menschen mit Behinderungen unterrepräsentiert, Menschen mit Behinderungen in der Arbeitswelt sind vielfach einzelkämpfende PionierInnen; die Arbeitslosenzahl ist in den letzten Jahren konstant steigend.

1.2. Überblick über den rechtlichen und politischen Rahmen

Der rechtliche Schutz ist im Arbeitsrecht generell gegeben, Menschen mit Behinderungen werden vom **allgemeinen Arbeitsrecht** – Arbeitsverfassungsgesetz (ArbVG)¹³⁹ und Angestelltengesetz (AngG)¹⁴⁰ – erfasst. Mit dem Behinderteneinstellungsgesetz (BEinstG) gibt es eine **spezifische Regelung**, die in der

¹³⁸ BGBl. 87/1997; der erste Teil des Artikel 7 lautet «Alle Bundesbürger sind vor dem Gesetz gleich. Vorrechte der Geburt, des Geschlechts, des Standes, der Klasse und des Bekenntnisses sind ausgeschlossen.»

¹³⁹ i. d. F. BGBl I 2013/71.

¹⁴⁰ i. d. F. BGBl I 2010/58.

Zeit des ersten Weltkriegs als Versorgung von Kriegsinvaliden ihren Ursprung hat.¹⁴¹ Die Regelung wurde nach dem zweiten Weltkrieg formal angepasst und hernach sprachlich; in weiterer Folge wurde das, vor allem aus der Europäischen Union einflussende, Anti-Diskriminierungsrecht hinzugefügt.

Die gesetzliche Anerkennung von Selbstbestimmung wurde mit dem Erwachsenenschutzgesetz 2018 verstärkt. Die vorangehende Regelung, das Sachwalterrecht, hatte diese auch zum Ziel, scheiterte jedoch in der Praxis an Ressourcenmangel und einem veralteten, entmündigenden, Bild von Menschen mit Behinderungen.

Der **rechtliche Schutz von Menschen mit Behinderungen** ist im Behindertengleichstellungsrecht geregelt, zu dem neben dem **BEinstG** auch das Bundes-Behindertengleichstellungsg (BGStG)¹⁴² zählt. Das BGStG garantiert Schutz vor Diskriminierung in allen staatlichen und staatsnahen Bereichen: Versorgung und Zugang zu Gütern und Dienstleistungen (§ 2 BGStG).

Die **UN-Konvention** über die Rechte von Menschen mit Behinderungen wurde **2008 ratifiziert**. In ihrer Vorlage an das Parlament erklärte die Regierung, dass die darin verbrieften Rechte erfüllt seien und daher «kein Handlungsbedarf» bestünde.¹⁴³ Der Usance entsprechend, wurde die Konvention mit einem Erfüllungsvorbehalt im innerstaatlichen Bereich beschlossen: Aus dem internationalen Vertrag entstehen **keine direkten Rechte**, es bedarf dazu weiterführender nationaler Gesetze.¹⁴⁴ Nach Ratifizierung und insbesondere nach der ersten Staatenprüfung¹⁴⁵ im Jahr 2013 wurden politische Massnahmen gesetzt, insbesondere der **Nationale Aktionsplan für Menschen mit Behinderungen 2012-2020**. Dieser sieht in acht Schwerpunktbereichen insgesamt 250 Massnahmen vor.¹⁴⁶

Positiv zu erwähnen ist, dass das **Wahlrecht** in Österreich **keine Einschränkungen** für Menschen mit Behinderungen vorsieht.

2. Rechtlicher Rahmen

2.1. Rechtliche Basis für den Schutz und spezifische Rechte am Arbeitsplatz

Das Behinderteneinstellungsgesetz (BEinstG) wurde 1970 beschlossen¹⁴⁷ und **verpflichtet Dienstgeber**, die **mehr als 25 Personen** anstellen, einen Menschen mit Behinderungen einzustellen oder eine Abschlagszahlung – sogenannte **Ausgleichstaxe** (§ 9 BEinstG) – zu entrichten. Zweck des BEinstG ist die möglichste «Eingliederung» von Menschen mit Behinderungen am ersten Arbeitsmarkt.

Die zentralen **Säulen** des BEinstG, die «zu einander fein abgestimmt»¹⁴⁸ wurden, sind:

- Beschäftigungspflicht

¹⁴¹ Ausführlich: Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 116 ff.

¹⁴² BGBl. BGStG.

¹⁴³ BGBl. UN-BRK.

¹⁴⁴ Erfüllungsvorbehalt: Artikel 50 (2) B-VG.

¹⁴⁵ Committee on the Convention on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria // UN Fachausschuss zur Konvention über die Rechte von Menschen mit Behinderungen, Abschließende Bemerkungen zur Staatenprüfung Österreichs, 30. September 2013, CRPD/C/AUT/CO/1.

¹⁴⁶ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 36 f.

¹⁴⁷ BGBl 22/1970.

¹⁴⁸ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 127.

- Förderungen
- Erhöhter Kündigungsschutz

Die Beschäftigungspflicht sieht vor, dass Personen mit einer so-bezeichneten «**Minderung der Erwerbsfähigkeit**» von **mindestens 50%**, die als «begünstigte Behinderte» gelten, in Betrieben mit mehr als 25 Angestellten einzustellen sind. Die **Feststellung** der Zugehörigkeit zum Kreis der «begünstigt Behinderten» trifft das Sozialministerium-Service als Teil-Organisation des Bundesministeriums für Soziales auf Basis eines Antrags in Form eines Bescheides.

Wird diese **Beschäftigungsquote gar nicht oder nur teilweise erfüllt**, so ist die **Ausgleichstaxe** zu entrichten, die je nach Betriebsgrösse gestaffelt ist. Für Betriebe mit bis zu 99 ArbeitnehmerInnen sind 262 € pro Monat, für solche mit bis zu 399 ArbeitnehmerInnen 368 € pro Monat und Betriebe mit mehr als 400 ArbeitnehmerInnen 391 € pro Monat und pro nicht besetzter Stelle zu entrichten.¹⁴⁹

Die Ausgleichstaxe wird in den gleichnamigen **Fonds eingezahlt**, der für die Förderung von Eingliederungsmassnahmen am ersten Arbeitsmarkt zweckgewidmet ist. Das Sozialministerium-Service verwaltet diesen und stellt Förderungen für zusätzliche Lohnkosten, aber auch Ausbildungskosten, insbesondere für die Adaptierung von Arbeitsplätzen zur Verfügung.

Beachtlich ist auch der **erhöhte Kündigungsschutz** (§ 8 BEinstG), der bis 2011 die rechtswirksame Kündigung von «begünstigten Behinderten» nur nach Zustimmung des, bei der jeweiligen Landesstelle des Sozialministerium Service eingerichteten Behindertenausschusses, vorsah. Seit der Novelle 2011 tritt der erhöhte Kündigungsschutz erst **nach Ablauf des vierten Arbeitsjahrs** ein.

Weiters gibt es einen **Entgeltsschutz** (§ 7 BEinstG), d.h. das Entgelt darf nicht auf Grund einer Beeinträchtigung gemindert werden. Auch besteht die Möglichkeit, eine **Behindertenvertrauensperson** zu wählen (§§ 22a, 22b BEinstG). Beachtlich ist weiters eine erhöhte **Fürsorgepflicht** (§ 6 Abs. 1), die angemessene Vorkehrungen umfasst. Die Bestimmung hat insbesondere für die Beurteilung durch Behörden und Gerichte, vor allem im Fall einer Kündigung, Relevanz. Angemessene Vorkehrungen sind auch im Grundlagengesetz zur Gleichstellung: BGStG vorgesehen, § 7 sieht «**spezielle Massnahmen**» vor und orientiert sich damit an der Behindertenrechtskonvention (Artikel 5 Abs. 4). Für die rechtliche Durchsetzung ist eine Schlichtung – aussergerichtliche Mediation – zwingend vorgesehen.

Die Regelungen des Behinderteneinstellungsgesetzes (BEinstG) waren in ihren Grundzügen vom Beitritt Österreichs zur Europäischen Union unabhängig, es wurde ursprünglich als Invalideneinstellungsgesetz beschlossen und die Bezeichnung und der Personenkreis 1988 adaptiert.¹⁵⁰ **Supra-nationales Recht** hat sich indirekt auf diesen Bereich ausgewirkt, als Forderungen zu einem umfassenden Behindertengleichstellungsrecht im Kontext des **Europäischen Jahres** der Menschen mit Behinderungen der Europäischen Union 2003 gestellt wurden. In weiterer Folge wurde das Bundesbehindertengleichstellungsgesetz (BGStG) beschlossen, dessen umfassende Befassung mit Nicht-Diskriminierung sich auch auf den zentralen Bereich des Arbeitsmarkts ausgewirkt hat.¹⁵¹ Erwähnenswert ist, dass im Zuge dieser Novelle auch das Bundesverfassungsgesetz novelliert wurde und eine Bestimmung zur Anerkennung von Gebärdensprache eingefügt.

¹⁴⁹ Der Satz wird jährlich vorgeschrieben und leicht erhöht. Zum Vergleich: 2015 betragen die Sätze 248 €, 348 € und 370 € respektive.

¹⁵⁰ BGBl. 614/1987.

¹⁵¹ BGBl. 150/2002.

Die **Ratifizierung der UN-Konvention** über die Rechte von Menschen mit Behinderungen hat zentrale Fragen der Einstellung von Menschen mit Behinderungen wiederbelebt, darunter die Zulässigkeit von und mangelnde soziale Absicherung von therapeutischen Werkstätten; die Zulässigkeit und Höhe von Ausgleichszahlungen, wie auch die Wirkungsweise und Höhe von Beseitigungsansprüchen. Gesetzliche Konsequenzen hat es auf Bundesebene kaum gegeben: für Menschen in therapeutischen Werkstätten ist die Unfallversicherung vorgesehen worden. Auf Landesebene haben sich die Bemühungen verstärkt, Alternativen zu therapeutischen Werkstätten zu finden; eine umfassende, den Prinzipien der Inklusion gerecht werdende Regelung, insbesondere als Verzahnung zwischen Landes- und Bundeszuständigkeiten fehlt jedoch gänzlich.

2.2. Reichweite des Schutzes

Der Schutzbereich des Arbeitsverfassungsgesetzes (ArbVG) umfasst sämtliche ArbeitnehmerInnen und damit auch Menschen mit Behinderungen. Der spezifische Schutz für Menschen mit Behinderungen im Arbeitsleben ist im BEinstG geregelt, darüber hinaus gibt es für sämtliche andere Lebensbereiche – die an das Berufsleben anknüpfen – umfassenden Diskriminierungsschutz im Behindertengleichstellungsgesetz (BGStG). Für **ArbeitgeberInnen** gibt es eine **Mindestgrösse**: «alle Dienstgeber, die im Bundesgebiet mehr als 25» Personen anstellen (§ 1 Abs. 1 BEinstG, Beschäftigungspflicht). Spezifisch ausgenommen sind internationale Organisationen (zweiter Satz, § 1 Abs. 1 BEinstG), dies ist insbesondere mit der hohen Repräsentation derselben in der Bundeshauptstadt (Sitz der Vereinten Nationen, OSZE, OPEC et al) zu erklären.

Wie die Bestimmung zum Schutz vor Diskriminierung in der Arbeitswelt (§ 7a BEinstG) darlegt, erfasst der **Geltungsbereich** insbesondere:

- Dienstverhältnisse aller Art, die auf privatrechtlichem Vertrag beruhen (§ 7a Abs. 1 Z 1);
- Zugang zu allen Formen der Berufsberatung und Schulung (§ 7a Abs. 1 Z 2);
- Mitwirkung in der Interessensvertretung (§ 7a Abs. 1 Z 3);
- Bedingungen im Zugang zu selbständiger Erwerbstätigkeit (§ 7a Abs. 1 Z 4);
- Öffentlich-rechtliche Dienstverhältnisse zum Bund (§ 7a Abs. 2 Z 1);
- Ausbildungsverhältnisse aller Art zum Bund (§ 7a Abs. 2 Z 2);
- Heimarbeit (§ 7a Abs. 2 Z 3)
- Personen, die als arbeitnehmerähnlich einzustufen sind (§ 7a Abs. 2 Z 4).

Vom Schutzbereich ausgenommen sind Arbeitsverhältnisse mit den **Ländern** und **Gemeinden**; wobei erstere eigene länderspezifische Regelungen erlassen haben. Eine weitere Ausnahme sind Personen im **Land- und Forstwirtschaftlichen Betrieb**; dies ist mit einer Kompetenzzuständigkeit im Bundesverfassungs-Gesetz erklärbar, die vermutlich in der nächsten Legislaturperiode bereinigt wird. Eine weitere **Besonderheit** des Föderalismus ist die **Berufsgruppe der LehrerInnen**: diese fallen im Grundschulbereich in die Bundeskompetenz, die eigentliche Anstellung übernimmt jedoch die Landesverwaltung. Die Grundsatzbestimmungen finden sich im BEinstG (§ 24a ff); die Ausführungsbestimmungen und insbesondere die Vollziehung obliegen den Bundesländern.

Für **selbständige Personen** sind die «Bedingungen im Zugang» zur Unternehmerschaft geschützt (§ 7a Abs. 1 Z 4 BEinstG) und freie Dienstverträge sind ebenfalls erfasst (§ 7a Abs. 2 Z 4); darüber hinaus gibt es in diesem Bereich keinen spezifischen Schutz für freischaffende oder selbständig tätige Personen. In der Praxis ist dies insbesondere für Berufsgruppen in Selbstverwaltung relevant, so zum Beispiel Ärztekammer, Rechtsanwalts- und Notariatskammer.

Massgeblich für den Schutz ist «im Zusammenhang mit dem Diskriminierungsverbot nicht das Ausmass der Behinderung, sondern inwieweit **glaubhaft gemacht** werden kann, dass eine **Diskriminierung** auf Grund einer Behinderung **erfolgt** ist.»¹⁵²

2.3. Definition von Behinderung

Der **Behindertenbegriff** wurde aus Anlass der Anti-Diskriminierungsnovelle für das Behindertengleichstellungsgesetz und das BEinstG adaptiert und lautet nun «Behinderung im Sinne dieses Bundesgesetzes ist die Auswirkung einer nicht nur vorübergehenden körperlichen, geistigen oder psychischen Funktionsbeeinträchtigung oder Beeinträchtigung einer Sinnesfunktion, die geeignet ist, die Teilhabe am Arbeitsleben zu erschweren. Als nicht vorübergehend gilt ein Zeitraum von mehr als voraussichtlich sechs Monaten.»¹⁵³

Es gibt unterschiedliche Begrifflichkeiten und Definitionen von Beeinträchtigung bzw. Behinderungen, auch in den Regelungen der **Bundesländer**. Die gleichlautende Regelung im Behindertengleichstellungsrecht orientiert sich an den Forderungen der Menschen mit Behinderungen, die als ExpertInnen ihrer eigenen Anliegen auftreten (SelbstvertreterInnen) und beachtet Beeinträchtigungen auf Grund von «Sinnesfunktionen». Die Neuformulierung versteht sich «ausdrücklich als sprachliche Modernisierung» und nicht als eine Änderung des eingeführten Behinderungsbegriffs.¹⁵⁴

Für die **praktische Umsetzung** zentral ist die **Einschätzungsverordnung**, die die Grundlage der Feststellung von Beeinträchtigung und ihrem Ausmass ist. Die Einschätzung selbst erfolgt durch **medizinische Sachverständige**, die sich insbesondere auch an der Verordnung zur Ermittlung der Minderung der Erwerbsfähigkeit von Kriegsoffizieren orientieren. Folglich wurde die Einschätzungsverordnung 2010 überarbeitet, um den Schwerpunkt von Kriegsoffizieren hin zu psycho-sozialen Beeinträchtigungen (Sammelbegriff «Burn-out») zu verlagern.¹⁵⁵

Wie die GesetzesautorInnen betonen, ist die Novelle von neuen medizinischen Erkenntnissen und den «Anforderungen des jetzigen Arbeitsmarkts an durchschnittliche Arbeitnehmer» geprägt.¹⁵⁶ Es stehe also eine medizinische Einschätzung des **Grads der Behinderung (GdB)** «bezogen auf das allgemeine Erwerbsleben» im Mittelpunkt; eine Würdigung eines konkreten Arbeitsplatzes samt Umwelt ist ausdrücklich nicht gewünscht.¹⁵⁷

Interessensvertretungen verwiesen in der Begutachtung auf die Notwendigkeit das **bio-psycho-soziale Modell** der Internationalen Klassifizierung für Funktion, Gesundheit und Beeinträchtigung (ICF) umzusetzen und den Schwerpunkt auf die einstellungsbedingten und sozialen Barrieren (PP (e) i. V. m. Artikel 1 Behindertenrechtskonvention) vorzunehmen. Die Berücksichtigung dieser Kriterien wurde vom zuständigen Bundesminister für eine Evaluierung der novellierten Einschätzungsverordnung

¹⁵² So die Erläuternden Bemerkungen, siehe auch: Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 337.

¹⁵³ § 3 BEinstG. Die vorangehende Definition lautete: «Behinderung im Sinne dieses Bundesgesetzes ist die Auswirkung einer nicht nur vorübergehenden Funktionsbeeinträchtigung, die auf einem regelwidrigen körperlichen, geistigen oder psychischen Zustand beruht. Als nicht nur vorübergehend gilt ein Zeitraum von mehr als voraussichtlich sechs Monaten.» (§ 3 BEinstG, alte Fassung BGBl. 17/1999).

¹⁵⁴ Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 282.

¹⁵⁵ Einschätzungsverordnung, BGBl. II 261/2010.

¹⁵⁶ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 132.

¹⁵⁷ Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 284.

zugesagt. In weiterer Folge äusserte sich der Fachausschuss zur Behindertenrechtskonvention kritisch zum Verständnis von Beeinträchtigung.¹⁵⁸

2.4. Formen des Schutzes vor Diskriminierung

Diskriminierung ist – demonstrativ – in folgenden Situationen **nicht erlaubt**:

- Bei Begründung des Arbeitsverhältnisses (§ 7b Abs. 1 Z 1);
- Bei der Festsetzung des Entgelts (§ 7b Abs. 1 Z 2);
- Bei der Gewährung freiwilliger Sozialleistungen, die kein Entgelt darstellen (§ 7b Abs. 1 Z 3);
- Bei Massnahmen der Aus- und Weiterbildung, sowie der Umschulung ((§ 7b Abs. 1 Z 4);
- Beim beruflichen Aufstieg, insbesondere der Beförderung und der Zuweisung in eine höhere und höher entlohnte Verwendung (§ 7b Abs. 1 Z 5);
- Bei sonstigen Arbeitsbedingungen ((§ 7b Abs. 1 Z 6);
- Bei der Beendigung des Arbeitsverhältnisses (§ 7b Abs. 1 Z 7)
- Beim Zugang zur Berufsberatung, Berufsausbildung, beruflichen Weiterbildung und Umschulung ausserhalb eines Dienstverhältnisses (§ 7b Abs. 1 Z 8);
- Bei der Mitgliedschaft und Mitwirkung in einer Interessenvertretung, einschliesslich der Inanspruchnahme der Leistungen solcher Organisationen (§ 7b Abs. 1 Z 9);
- Bei den Bedingungen für den Zugang zu selbständiger Erwerbstätigkeit (§ 7b Abs. 1 Z 10).
- Diskriminierende Kriterien in Kollektivverträgen, Betriebsvereinbarungen oder im Dienstrecht der öffentlichen Verwaltung, insbesondere solche, die eine Ungleichbehandlung in der Entlohnung vorsehen könnten (§ 7b Abs. 2, 3).

Für Verletzungen des Diskriminierungsverbots durch **Bedienstete des Bundes** sind auch **disziplinarrechtliche Vorschriften** beachtlich (§ 7b Abs. 6).

Der Begriff der Diskriminierung spiegelt die Vorgaben der **EU-Rahmenrichtlinie RL 2000/78/EG** wieder. In der Beurteilung des Vorliegens einer Diskriminierung ist das tatsächliche Vorliegen einer Beeinträchtigung i. S. d. § 3 nicht relevant (§ 7b Abs. 4); «die abstrakte Möglichkeit der Beeinträchtigung einer Teilhabe am Leben in der Gesellschaft» ist ausschlaggebend.¹⁵⁹

In den **Schutz** des Gesetzes fallen auch Personen, die «auf Grund ihres **Naheverhältnisses zu einer Person wegen deren Behinderung**» diskriminiert werden (§ 7b Abs. 5). Nicht als unter dieses Naheverhältnis im Arbeitskontext fallend werden Persönliche AssistentInnen eingestuft, denen es an einer direkten Verbindung mit dem Arbeitgeber mangelt.¹⁶⁰

¹⁵⁸ Committee on the Convention on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria // UN Fachausschuss zur Konvention über die Rechte von Menschen mit Behinderungen, Abschließende Bemerkungen zur Staatenprüfung Österreichs, 30. September 2013; CRPD/C/AUT/CO/1. Deutsche Version, verfügbar unter https://www.sozialministerium.at/site/Service_Medien/Infomaterial/Downloads/Ausschuss_der_Vereinten_Nationen_ueber_die_Rechte_von_Menschen_mit_Behinderungen_Abschliessende_Bemerkungen_zum_Ersten_Bericht_Oesterreichs (17.09.2019).

¹⁵⁹ Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 339.

¹⁶⁰ Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 340.

Der Schutz vor **unmittelbarer** Diskriminierung ist in § 7c geregelt «wenn eine Person auf Grund einer Behinderung in einer vergleichbaren Situation eine weniger günstige Behandlung erfährt», (Abs. 1). Eine mittelbare Diskriminierung liegt vor «wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren sowie Merkmale gestalteter Lebensbereiche Menschen mit Behinderungen gegenüber anderen Personen in besonderer Weise benachteiligen könnten (..)» (§ 7c Abs. 2 BEinstG).

Als Barrieren, die **mittelbare** Diskriminierung bewirken, werden insbesondere bauliche und kommunikative Hürden gesehen. Unter «sonstigen Barrieren» werden Defizite in der Barrierefreiheit von anderen Serviceangeboten, z. B. mangelnde Einstiegshilfen in öffentlichen Verkehrsmitteln eingestuft.¹⁶¹

Belästigung ist eine Form von Diskriminierung (§ 7d Abs. 1 BEinstG): «eine unerwünschte Verhaltensweise (...) die die Würde der betroffenen Person verletzt oder dies bezweckt» (Abs. 2 Z 1), die für die betroffene Person unerwünscht, unangebracht oder anstössig ist (Abs. 2 Z 2) oder die ein einschüchterndes, feindseliges, entwürdigendes, beleidigendes oder demütigendes Umfeld für die betroffene Person schafft oder bezweckt (Abs. 2 Z 3). Die Betonung der **Verletzung der Würde** der betroffenen Person ist Ergebnis einer jüngeren Novelle (2013), um dem subjektiven Empfinden der Person besser Rechnung zu tragen und damit dem Kern des Belästigungsschutzes gerecht zu werden.¹⁶²

§ 7i BEinstG schliesslich sieht einen **Viktimisierungsschutz** vor: eine Reaktion auf eine behauptete Belästigung oder andere Diskriminierung soll für den Beschwerdeführer keine negativen Konsequenzen haben. Dieser Schutz gilt auch für jene Personen, die im Verfahren zur Durchsetzung des Diskriminierungsschutzes zentral sein können: ZeugInnen und Auskunftspersonen.¹⁶³

Beachtlich sind noch **Rechtsfolgen** im Falle der Diskriminierung bei der Begründung des Dienstverhältnisses und beim beruflichen Aufstieg (§ 7e BEinstG), die zum einen die Nichtberücksichtigung wegen einer Beeinträchtigung in jedem Stadium der Bewerbung erfasst und zum anderen, wenn eine Diskriminierung im Bewerbungsprocedere passiert ist und es deshalb zu keiner Anstellung kam. Als Schadenersatz sind zwei Monatsentgelte vorgesehen, wenn ein diskriminierungsfreies Procedere zur Anstellung geführt hätte. Wenn der potentielle Arbeitgeber beweisen kann, dass es lediglich eine Nichtberücksichtigung der Bewerbung war, ist eine Abschlagszahlung von 500 € vorgesehen.

In Zusammenhang mit der Beendigung des Dienstverhältnisses (§ 7f BEinstG) wiederum ist beachtlich, dass die Rechtsfolgen für Entlassung und Kündigung, aber auch die Probezeit – nach einer Erkenntnis des Obersten Gerichtshofs – gelten. Der Schwerpunkt der Sanktionen liegt auf dem Fortbestand des Dienstverhältnisses und nicht auf dem Ersatz des immateriellen Schadens.

Dienstgeber sind verpflichtet, «geeignete und konkrete Massnahmen» zu setzen um die Ausübung des Berufs zu ermöglichen. Die sogenannten **«angemessenen Vorkehrungen»** sind in § 6 BEinstG grundgelegt und entsprechen den Grundzügen von «reasonable accommodation» (Art. 2 Behindertenrechtskonvention). Darüber hinaus sind Förderungsmassnahmen vorgesehen, die vom Sozialministerium-Service als Bundesträger umgesetzt werden.

¹⁶¹ Günther Widy/Karl Ernst, Behinderteneinstellungsgesetz⁷, ÖGB Verlag, 344.

¹⁶² Siehe auch: Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 157.

¹⁶³ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 173.

3. Integration von Menschen mit Behinderungen am Arbeitsplatz

3.1. Rechtliche Pflichten von Arbeitgebern bei der Beschäftigung von Menschen mit Behinderungen

Dienstgeber haben je nach Betriebsgattung und Art der Betriebsstätte **angemessene Vorkehrungen** zu treffen, um dem Beschäftigten mit Behinderungen adäquate Arbeitsbedingungen zu ermöglichen (§ 6 BEinstG). In ihren Intentionen orientiert sie sich am Begriff der «angemessenen Vorkehrungen» nach Artikel 2 Behindertenrechtskonvention: «geeignete und im konkreten Fall erforderliche Massnahmen» (§ 6 Abs. 1a BEinstG). Die Bestimmung erwähnt spezifisch das Sozialministerium-Service das als Teil des Bundes-Sozialministerium konkrete Beratung und Förderungsmassnahmen in Form von finanziellen Zuschüssen und Schulungen, bereitstellt.

Zu den **geförderten Massnahmen** zählen die Kosten der technischen Arbeitshilfen, die Schaffung von Ausbildungs- und Arbeitsplätzen, die für Menschen mit Behinderungen besonders geeignet sind, sowie Einstellungshilfen, Kosten der Massnahmen beruflicher Assistenz, insbesondere Jugendcoaching, Berufsausbildungsassistenz, sowie Assistenzmassnahmen wie Persönliche Assistenz am Arbeitsplatz Ausgleichszahlungen und andere Kosten, die ursächlich mit der Beeinträchtigung des Beschäftigten mit Behinderungen verbunden sind (§ 6 Abs. 2 BEinstG).

Die Bestimmung vermittelt dennoch ein überkommenes Bild von Menschen mit Behinderungen Ausgangspunkt sind medizinische Parameter, da auf den «Gesundheitszustand» der Beschäftigten mit Behinderungen abgestellt wird. Darüber hinaus ist auf ebendiesen Gesundheitszustand «Rücksicht» zu nehmen (§ 6 BEinstG). Die Beratung hat das Ziel das «Absinken der sozialen Stellung» von Menschen mit Behinderungen hintanzuhalten (§ 6 Abs. 1 BEinstG).

Es sind auch **zukünftige** ArbeitnehmerInnen erfasst: die Bestimmung erwähnt explizit die Arbeitserprobung neben «Ein-, Um- und Nachschulungen, sowie beruflicher Weiterbildung» (§ 6 Abs. 2 lit. e).

Die Massnahmen werden aus dem **Ausgleichtaxfonds** finanziert; das sind jene Gelder die von Firmen gezahlt werden, die keine oder zu wenige Menschen mit Behinderungen einstellen. Die Frage der «**Verhältnismässigkeit**» insbesondere in finanzieller Hinsicht orientiert sich daher auch an den Möglichkeiten des Ausgleichtaxfonds. Konkret sind die «Belastungen nicht unverhältnismässig, wenn sie durch Fördermassnahmen nach bundes- oder landesgesetzlichen Vorschriften ausreichend kompensiert werden können» (§ 6 Abs. 1a BEinstG). Die GesetzesautorInnen halten fest, dass die Bestimmung als Erweiterung der Fürsorgepflicht nach § 6 BEinstG intendiert ist und ein Verstoss zwar keine Sanktionen nach sich zieht, sehr wohl aber als Teil der Zumutbarkeitsprüfung zu werten ist (§ 7c BEinstG).¹⁶⁴

3.2. Anreize oder andere vorhandene Unterstützung für Arbeitgeber

In Ergänzung der Massnahmen nach § 6 Abs. 2 BEinstG (siehe 3.1., oben), gibt es **Prämien** für die Beschäftigung von Lehrlingen mit Behinderungen, **steuerliche Erleichterungen** durch die Berücksichtigung von Beschäftigten mit Behinderungen in den Dienstgeberabgaben. Weiters gibt es zahlreiche unentgeltliche Dienstleistungen, darunter **Arbeitsassistenz**, Berufsausbildungsassistenz, Job Coaching, fit2work, die allesamt vom Sozialministeriumservice koordiniert und tlw. geleitet werden.

¹⁶⁴ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 133.

§ 10a BEinstG, der die Vergabe von Zuschüssen aus dem Ausgleichstax Fonds determiniert, ergänzt diese Anreize und Zuschüsse. Beachtlich scheint die spezifische Würdigung von Jugendlichen mit psychosozialen Beeinträchtigungen (§ 10a Abs. 3 BEinstG), die mit Ende der Pflichtschule (9. Schulstufe) einsetzt, da nach österreichischem Bildungsrecht eine weiterführende Schulbildung für Lernende, denen ein sogenannter „sozialpädagogischer Förderbedarf“ attestiert wurde, gesetzlich unmöglich ist.

Einige **Initiativen** zur Integration am Arbeitsmarkt gehen auch von **Privatbetrieben** aus. Erwähnenswert ist MyAbility, deren Fokus auf der Bewusstseinsbildung zu umfassender Barrierefreiheit in grösseren Betrieben liegt.¹⁶⁵ Konkret werden Schulungen und Coachings für Betriebe – darunter einer der größten Supermarktketten Österreichs, sowie eine der größten Banken – zum Umgang mit Menschen mit Behinderungen und dem umfassenden Verständnis von Barrierefreiheit angeboten.

4. Geltendmachung von Rechten

Die Geltendmachung von Rechten erfolgt über den **Rechtsweg**; wobei im Falle einer Diskriminierung verpflichtend eine sogenannte Schlichtung als aussergerichtliches Verfahren zur Konfliktbeilegung vorgesehen ist (§ 7k BEinstG). Für die zentralen Fragen der Diskriminierung in der Arbeitswelt sind hernach die **ordentlichen** Gerichte zuständig; für die arbeitsrechtlichen Ansprüche ist das spezialisierte **Arbeits- und Sozialgericht** zuständig.

Das Instrument der **Schlichtung** wurde im Behindertengleichstellungsgesetz (BGStG) vorgesehen und wird analog für die Diskriminierung von Menschen mit Behinderungen in der Arbeitswelt angewendet. Die Schlichtung ist eine **Zulässigkeitsvoraussetzung** für die **Klage**; es muss also eine Bestätigung über eine nicht erfolgte Einigung mit der Klagschrift beigebracht werden.

Das Schlichtungsverfahren (§ 14 BEinstG) wird von der **Landesstelle des Sozialministerium-Service** abgewickelt (Abs. 1). Die Person, die die Diskriminierung behauptet, hat ein entsprechendes Anbringen schriftlich oder mündlich protokolliert bei der Landesstelle einzubringen. Die Wahl des Sozialministerium-Service als Stelle wird mit der langjährigen Erfahrung der MitarbeiterInnen im Bereich der Integration von Menschen mit Behinderungen begründet.¹⁶⁶

Das Anbringen, mit dem die Schlichtung gefordert wird, muss den **inkriminierenden Sachverhalt und die vermeintliche Diskriminierung darlegen**. In weiterer Folge werden beide Seiten zur Durchführung der Schlichtung geladen. «Dem Sozialministerium-Service kommt im Rahmen des Schlichtungsverfahrens nicht die Aufgabe zu, eine Entscheidung über das Vorliegen einer Diskriminierung zu treffen. Das Amt hat lediglich Bedingungen zu schaffen, die geeignet sind, eine Einigung der Parteien zu ermöglichen.»¹⁶⁷

Ziel der Schlichtung ist eine **gütliche Einigung**, wobei dem Inhalt keine Einschränkungen auferliegen. Wünschenswert sind eine Verbesserung der Situation und eine Beseitigung der inkriminierten Barrieren. Dabei sind wiederum die Unterstützungsmöglichkeiten des Sozialministerium-Service auf Basis des Ausgleichstaxfonds (§ 6 BEinstG) beachtlich.

¹⁶⁵ Der Webauftritt von MyAbility, verfügbar unter <https://www.myability.org> (17.09.2019).

¹⁶⁶ Offizielle Homepage des Sozialministeriumservice, Schlichtung, verfügbar unter https://www.sozialministeriumservice.at/site/Menschen_mit_Behinderung/Gleichstellung/Schlichtung/ (17.09.2019).

¹⁶⁷ Hofer/Iser/Miller-Fahringer/Rubisch/Willi, Behindertengleichstellungsrecht², NWV, 108.

In den ersten 10 Jahren wurden **2.000 Schlichtungen** durchgeführt, wobei knapp die Hälfte auf das BEinstG und die anderen auf sonstige Lebensbereiche im Rahmen des Behindertengleichstellungsgesetzes fallen.¹⁶⁸ Ein Teil der Schlichtungen ist in einer Datenbank erfasst und einsehbar.¹⁶⁹ **Knapp die Hälfte** der Schlichtungen endet mit einer **Einigung** und trägt daher zum Regelungsziel, die Zahl der Klagen zu minimieren, signifikant bei. Positiv auffallend ist, dass das freiwillige Angebot zur Schlichtung stark angenommen wird, lediglich in 8% der Fälle kamen die Konfliktpartner der Einladung nicht nach.¹⁷⁰ In einer breit angelegten Studie 2012 wurde festgehalten, dass die Schlichtung im BEinstG in 45% eher keine oder gar keine Verbesserung gebracht hat; in 43% der Fälle jedoch schon.¹⁷¹

Schlichtungsverfahren werden gemeinhin als erfolgreich eingestuft, auch weil die **konkrete Beseitigung der Diskriminierung** in diesem Rahmen **möglich** ist. Anders hingegen die Situation im **Gerichtsverfahren**: es sind mitsamt allen Prozessrisiken lediglich die Geltendmachung von **Schadenersatz** möglich.¹⁷²

Die **Höhe** des Schadenersatzes ist «so zu bemessen, dass dadurch die Beeinträchtigung tatsächlich und wirksam ausgeglichen wird und die Entschädigung der erlittenen Beeinträchtigung angemessen ist sowie die Diskriminierung verhindert», § 7j BEinstG. Die Ansprüche von Beamten sind separat geregelt (§ 7l BEinstG).

Eine **Nebenintervention** durch die Österreichische Arbeitsgemeinschaft für Rehabilitation (nunmehr Österreichischer Behindertenrat), den Dachverband der Behinderteneinrichtungen in Österreich, ist möglich (§ 7q BEinstG). Weiters ist eine **Verbandsklage** nach § 13 BEinstG möglich, dieses Instrument wurde jedoch bis dato nicht eingesetzt; dies ist unter anderem mit der Bezogenheit der verschiedenen Akteure erklärbar.

5. Rechtlicher Rahmen in der Praxis

Die **Integration** von Menschen mit Behinderungen ist nach wie vor von **grossen Schwierigkeiten** begleitet. Die Zahl der Menschen mit Behinderungen, die arbeitslos sind, ist steigend.¹⁷³ Die Ursachenforschung ist sowohl im gesellschaftspolitischen Status von Menschen mit Behinderungen, als auch im mangelnden Wissen über Möglichkeiten der Arbeitsassistenz und anderen Formen der Unterstützung zu suchen. Dort, wo Diskriminierungen passieren, haben Schlichtungen gute Erfolge gezeitigt, auch weil sie den Beteiligten eine Lösungsmöglichkeit und einen gemeinsamen Weg nach dem Konflikt eröffnen.

¹⁶⁸ Frey/Ladstätter, Soft Law und gerichtliche Durchsetzung im Behindertengleichstellungsrecht, Juridikum 1/2015, 120; siehe auch Interview mit dem Leiter des Sozialministerium-Service: <https://www.bizeps.or.at/schlichtung-ist-ein-gutes-niederschwelliges-instrument-gegen-diskriminierungen/> (17.09.2019).

¹⁶⁹ Bizeps, Schlichtungsdatenbank, verfügbar unter <https://www.bizeps.or.at/schlichtungen/>.

¹⁷⁰ Frey/Ladstätter, Soft Law und gerichtliche Durchsetzung im Behindertengleichstellungsrecht, Juridikum 1/2015, 124.

¹⁷¹ Sozialwissenschaftliche Studie des Gleichstellungsrechts, verfügbar unter http://www.studienreihe.at/cms/Z02/Z02_2.a/1342538149004/bisherige-studien/studien-einzelband-uebersicht/band-10-evaluierung-des-behindertengleichstellungsrechts?d=Touch (17.09.2019).

¹⁷² Siehe ausführlicher: Frey/Ladstätter, Soft Law und gerichtliche Durchsetzung im Behindertengleichstellungsrecht, Juridikum 1/2015, 127.

¹⁷³ Bizeps, Jobsuche mit Behinderung: So sieht die Bilanz aus v. 21.08.2019, verfügbar unter <https://www.bizeps.or.at/jobsuche-mit-behinderung-so-sieht-die-bilanz-aus/> (17.09.2019).

Ein **spezifisches Problem** im Schritt in Richtung Erwerbsleben ist die **Anbindung an Sozialleistungen** verschiedener Provenienz: diverse Beihilfen (z.B. Familienbeihilfe), fallen mit Beginn der Erwerbstätigkeit weg. Die Angst, im Falle der Beendigung des Arbeitsverhältnisses ohne soziale Leistungen das Auskommen finden zu müssen ist gross. Da es sich um sowohl Bundes- als auch Landesleistungen handelt, ist eine **Lösung** dieses Problems politisch schwierig; die **mangelnde Priorität** und Sichtbarkeit des Problems verstärkt dieses.

Die **Judikatur** zum Thema ist überschaubar. Zuletzt haben jene höchstgerichtlichen Entscheidungen, die klar diskriminierende Bilder von Menschen mit Behinderungen propagieren weit mehr Aufsehen erregt, als Rechtsprechung zur Integration am ersten Arbeitsmarkt. Erwähnenswert ist eine Erkenntnis des Verwaltungsgerichtshofs aus 2007 zur Verpflichtung angemessener Vorkehrungen und der Abgrenzung zu den Fähigkeiten und Möglichkeiten des Arbeitnehmers.¹⁷⁴

Zum **Vorliegen einer Belästigung** hat der Oberste Gerichtshof (**OGH**) festgehalten, dass ein Merkmal einen «Zusammenhang» zur Belästigung hat, wenn «die konkrete Verhaltensweise der Tatsache, dass ein geschütztes Merkmal vorliegt, zugerechnet werden kann»; es sei daher auf bestimmte Eigenschaften, Handlungen, Verhaltensweisen oder einen Zustand abzustellen, der mit der Behinderung verbunden ist.¹⁷⁵

Der Fokus der zuständigen Abteilung im Bundesministerium für Soziales ist derzeit die **Überarbeitung des Nationalen Aktionsplanes**, sowie die, für **2020** in Aussicht genommene, zweite Staatenprüfung durch den Fachausschuss der Vereinten Nationen zur Konvention über die Rechte von Menschen mit Behinderungen. Bis zum Abschluss dieser Prozesse und der Neuwahl des Parlaments Ende 2019 sind potenzielle Reformen nicht einzuschätzen.

¹⁷⁴ VwGH 2006/12/0223, 17. Dezember 2007.

¹⁷⁵ OGH 80bA 8/09y, 2. April 2009.

C. CANADA

1. Introduction

1.1. Country overview

Canada has a **population of approximately thirty-seven million**.¹⁷⁶ It is a federalist state that is divided into ten provinces and three territories. Ontario, which is the most densely populated province, has a population of approximately 14.5 million.¹⁷⁷

Legal authority in Canada is split between the federal and provincial governments. The federal government has jurisdiction over matters such as criminal law, banking, broadcasting and telecommunications,¹⁷⁸ and the provinces have jurisdiction over matters such as employment, education and health care.¹⁷⁹ Quebec has a civil law system and the other provinces have common law systems. **Canada has a written constitution** that includes a *Charter of Rights and Freedoms*.¹⁸⁰

In 2017, **one in five Canadians (22%) aged 15 years or over had at least one disability**; this represents 6.2 million people.¹⁸¹ Twenty-four percent of women had a disability compared to 20% of men. The most common types of disability were related to pain (15%), flexibility (10%), mobility (10%) and mental health (7%). Over two-thirds of persons with disabilities had at least two or more types of disability.¹⁸² Over one-quarter reported that at least one of the underlying causes of their disability was work-related.¹⁸³

The **employment rates for working-age adults were 59% for those with disabilities** and 80% for those without disabilities. Seventy-six percent of those with mild disabilities were employed, whereas 31% of those with very severe disabilities were employed. Among people with disabilities who weren't employed and weren't in school, two in five (39%) had the potential to work; this represents nearly 645,000 people with disabilities.¹⁸⁴ The income of people with severe disabilities was half that of people without a disability.¹⁸⁵ Working age women without disabilities and those with mild disabilities had a median income that was about three-quarters that of their male counterparts.¹⁸⁶ Ten percent of those without disabilities were living in poverty, compared to 14% for those with mild disabilities and 28% for those with more severe disabilities. The rate of low income for working age adults with more

¹⁷⁶ Statistics Canada, Population Estimates, Quarterly, Table 17-10-0009-01, Ottawa, Statistics Canada 2019, available at www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901 (30.09.2019).

¹⁷⁷ Statistics Canada, Population Estimates, *op. cit.*

¹⁷⁸ *Constitution Act, 1867*, 30 & 31 Vict, c 3, s.91, available at <http://canlii.ca/t/lsw> (30.09.2019).

¹⁷⁹ *Constitution Act, 1867*, *op. cit.*, s.92.

¹⁸⁰ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, available at <http://canlii.ca/t/lsw> (30.09.2019).

¹⁸¹ S. Morris et al., A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017, Ottawa: Statistics Canada 2018, p.4, available at <https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm> (30.09.2019). This data excludes people living in institutions, on Canadian Armed Forces bases, on First Nations reserves and in collective dwellings.

¹⁸² Morris, A demographic, *op. cit.*, p.9.

¹⁸³ Morris, A demographic, *op. cit.*, p.13.

¹⁸⁴ Morris, A demographic, *op. cit.*, p.4.

¹⁸⁵ Morris, A demographic, *op. cit.*, p.17.

¹⁸⁶ Morris, A demographic, *op. cit.*

severe disabilities was double that of working age adults with milder disabilities and nearly triple that for those without a disability.¹⁸⁷

1.2. Overview of legal and policy framework

Canada's ***Charter of Rights and Freedoms*** protects the right to equality and prohibits discrimination on several grounds, including disability.¹⁸⁸ The *Charter* only applies to the government; it doesn't apply to private individuals, businesses or organizations. The ***Canada Human Rights Act*** protects people from discrimination when they are **employed by or receive services from the federal government**, First Nations governments or private companies that are regulated by the federal government such as banks, broadcasters and telecommunications companies.¹⁸⁹ Discrimination is also prohibited in the ***Canada Labour Code***, which governs labour relations and working conditions in **federally-regulated industries**.¹⁹⁰

The **provinces and territories have also adopted their own human rights laws** that apply to governments and private individuals, businesses and organizations. These laws, which have quasi-constitutional status, protect the right to equality of people with disabilities and prohibit disability discrimination in employment and services. **Ontario's *Human Rights Code* applies to public- and private-sector employers** as well as government contractors and subcontractors, trade unions and professional associations.¹⁹¹ The Ontario Human Rights Commission has adopted a *Policy on ableism and discrimination based on disability*.¹⁹²

People with disabilities are covered under the federal *Employment Equity Act*, which aims to achieve employment equality and correct disadvantage experienced by women, aboriginal peoples, people with disabilities and visible minorities.¹⁹³ This law **applies to public-sector employers and federally-regulated private-sector employers with at least one hundred employees**.¹⁹⁴ Employers must review their policies and practices to identify employment barriers for these groups.¹⁹⁵ They must adopt employment equity plans¹⁹⁶ and submit annual reports.¹⁹⁷ The Canadian Human Rights Commission enforces the *Act* through compliance audits.¹⁹⁸

The federal government has adopted a ***Policy on the Duty to Accommodate Persons with Disabilities*** that aims to create and maintain an inclusive, barrier-free environment in the federal public service.¹⁹⁹

¹⁸⁷ Morris, A demographic, *op. cit.*, p.19.

¹⁸⁸ *Canadian Charter*, *op. cit.*, s.15.

¹⁸⁹ *Canadian Human Rights Act*, RSC, 1985, c H-6, ss.7-10, available at <http://canlii.ca/t/52zkk> (30.09.2019).

¹⁹⁰ *Canada Labour Code*, RSC 1985, c L-2, ss.37, 69(2) and 95(f) and (g), available at <http://canlii.ca/t/53l61> (30.09.2019).

¹⁹¹ *Ontario Human Rights Code*, RSO 1990, c H-19, ss.5, 6 and 26, available at <http://canlii.ca/t/53kb6> (30.09.2019).

¹⁹² Ontario Human Rights Commission, *Policy on Ableism and Discrimination Based on Disability*, Toronto: Ontario Human Rights Commission 2016, available at www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability (30.09.2019).

¹⁹³ *Employment Equity Act*, SC 1995, c 44, s.2, available at <http://canlii.ca/t/532r5> (30.09.2019).

¹⁹⁴ *Employment Equity Act*, *op. cit.*, ss.3-4.

¹⁹⁵ *Employment Equity Act*, *op. cit.*, s.9(b).

¹⁹⁶ *Employment Equity Act*, *op. cit.*, s.10(1)(b).

¹⁹⁷ *Employment Equity Act*, *op. cit.*, ss.18 and 21.

¹⁹⁸ *Employment Equity Act*, *op. cit.*, s.22.

¹⁹⁹ Treasury Board Secretariat, *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service*, Ottawa: Treasury Board Secretariat 2002, available at: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12541§ion=html> (30.09.2019).

The policy requires that accommodations be built into workplace standards and facilities. **Employees with disabilities must be consulted** when designing or altering facilities or practices and when planning events. The government must provide, pay for and repair technical aids, equipment and services for employees with disabilities. Job opportunities must be advertised in accessible formats and work assessments must be adapted to the needs of candidates with disabilities.

The federal government has also adopted an **Accessibility Standard for Real Property** that aims to provide barrier-free access and use of facilities that it owns or leases.²⁰⁰ The Standard includes minimum requirements for elements such as entrances, signs, washrooms and parking.²⁰¹ Property acquired or undergoing major renovations must adhere to the Canadian Standards Association's *Accessible Design for the Built Environment* standard.²⁰²

In addition, **three provinces have adopted accessibility legislation.**²⁰³ Ontario adopted the **Accessibility for Ontarians with Disabilities Act (AODA)** in 2005,²⁰⁴ and it adopted accessibility standards for employment under the AODA in 2011.²⁰⁵

Canada ratified the UN Convention on the Rights of Persons with Disabilities in 2010. It acceded to the Optional Protocol to the *Convention* in 2018.

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

As mentioned above, the **equality rights of employees with disabilities are constitutionally protected** under the *Canadian Charter*, as well as under provincial human rights laws such as the Ontario *Human Rights Code*. **Three provinces (Ontario, Manitoba and Nova Scotia) have adopted accessibility legislation** to remove barriers facing people with disabilities. Regulations adopted under the *Accessibility for Ontarians with Disabilities Act (AODA)* and the *Accessibility for Manitobans Act* **include accessibility standards for employment**. These standards are legally enforceable secondary legislation.

In its jurisprudence, the **Supreme Court of Canada has developed a framework for the analysis of the duty to accommodate people with disabilities** under the *Charter* and human rights laws. This analytical framework is discussed below.

²⁰⁰ Treasury Board Secretariat, *Accessibility Standard for Real Property*, Ottawa: Treasury Board Secretariat 2006, available at www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12044 (30.09.2019).

²⁰¹ Treasury Board Secretariat, *Accessibility Standard*, *op. cit.*, s.5.1.

²⁰² Treasury Board Secretariat, *Accessibility Standard*, *op. cit.*, s.5.2; Canadian Standards Association, *Accessible Design for the Built Environment Standard*, CAN/CSA-B651, Toronto: Canadian Standards Association 2004.

²⁰³ Ontario, Manitoba and Nova Scotia.

²⁰⁴ *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, C-11, available at <http://canlii.ca/t/52pzh> (30.09.2019).

²⁰⁵ *Integrated Accessibility Standards*, Ontario Regulation 191/11, Part III, available at <http://canlii.ca/t/52rml> (30.09.2019).

2.2. Scope of protection

The *Canadian Charter* only applies to government actions, laws and policies. The *Canadian Human Rights Act* applies to people who are employed by the federal government, First Nations governments or private companies that are regulated by the federal government such as banks, broadcasters and telecommunications companies. The *Ontario Human Rights Code* applies to government and private employers. The *Code's* prohibition of employment discrimination is deemed to be a condition in every contract or subcontract entered into by or on behalf of the provincial government, and of every grant, contribution, loan or guarantee made by or on behalf of the government.²⁰⁶ The *Accessibility for Ontarians with Disabilities Act (AODA)* applies to all levels of government, non-profits and private businesses that have **one or more full-time, part-time, seasonal or contract employees**. Certain obligations under the *AODA's Employment Standards* only apply to organizations with at least fifty employees.²⁰⁷

2.3. Definition of disability

The *Canadian Charter* prohibits discrimination on the basis of “mental or physical disability”.²⁰⁸ The Supreme Court of Canada has **interpreted this ground of discrimination very broadly** to include real or perceived limitations that can result from prejudices and stereotypes.²⁰⁹ In doing so, the Court **adopted the social model of disability**, which aligns with the definition of disability in the *UN Convention on the Rights of Persons with Disabilities*.

Under the *Canadian Human Rights Act*, disability is “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”.²¹⁰ This definition reflects the medical model of disability.

The definitions of disability under the *Ontario Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act (AODA)* also reflect the medical model. **These laws define disability as:** “(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device; (b) a condition of mental impairment or a developmental disability; (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language; (d) a mental disorder, or (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*”.²¹¹ The *Ontario Human Rights Code* also prohibits discrimination on the basis of past or presumed disabilities.²¹²

²⁰⁶ *Ontario Human Rights Code, op. cit.*, s.26(1) and (2).

²⁰⁷ *Integrated Accessibility Standards, op. cit.*, ss.28-29.

²⁰⁸ *Canadian Charter, op. cit.*, s.15.

²⁰⁹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665, para.39, available at <http://canlii.ca/t/526r> (30.09.2019).

²¹⁰ *Canadian Human Rights Act, op. cit.*, s.25.

²¹¹ *Canadian Human Rights Act, op. cit.*, s.10(1); *Accessibility for Ontarians with Disabilities Act, op. cit.*, s.2.

²¹² *Canadian Human Rights Act, op. cit.*, s.10(3).

2.4. Forms of discrimination protection

The *Canadian Human Rights Act*, the *Ontario Human Rights Code* and the *AODA's Employment Standards* prohibit disability discrimination **before**²¹³ and **during employment**.²¹⁴

The *Canadian Charter* doesn't define equality or discrimination. However, The Supreme Court of Canada has affirmed that the *Charter* protects **substantive equality, not just formal equality**,²¹⁵ and that it **prohibits direct as well as indirect** (i.e. adverse effect) discrimination.²¹⁶

The *Canadian Human Rights Act* and the *Ontario Human Rights Code* explicitly prohibit **direct and indirect discrimination**.²¹⁷ The *Code* also prohibits "**constructive discrimination**", which is when "a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination".²¹⁸ The *Canadian Human Rights Act* and the *Ontario Human Rights Code* also prohibit **harassment** on the basis of disability as well as other protected characteristics.²¹⁹ **Retaliation** against people who assert their rights under these laws is also prohibited.²²⁰

The *Act* and the *Code* **explicitly require employers to accommodate the needs of people with disabilities** to the point of undue hardship.²²¹ The *Employment Standards* under the *Accessibility for Ontarians with Disabilities Act* requires **accommodations for people with disabilities** at various stages of the employment process, but the *Standards* don't specify a limit of undue hardship. The *Canadian Charter* doesn't mention the duty to accommodate, but the courts have interpreted the right to equality as including this duty.²²²

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

As stated above, the *Canadian Human Rights Act*, the *Ontario Human Rights Code* and the *Employment Standards* under the *Accessibility for Ontarians with Disabilities Act (AODA)* **explicitly require employers to accommodate people with disabilities**. These three instruments protect the rights of

²¹³ *Canadian Human Rights Act*, *op. cit.*, ss.7, 8 and 10; *Ontario Human Rights Code*, *op. cit.*, s.23; *Integrated Accessibility Standards*, *op. cit.*, ss.22-24.

²¹⁴ *Canadian Human Rights Act*, *op. cit.*, s.7; *Ontario Human Rights Code*, *op. cit.*, s.5; *Integrated Accessibility Standards*, *op. cit.*, ss.25-32.

²¹⁵ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, available at <http://canlii.ca/t/1ft8q> (30.09.2019).

²¹⁶ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras.60-61, available at <http://canlii.ca/t/1fqx5> (30.09.2019).

²¹⁷ *Canadian Human Rights Act*, *op. cit.*, s.7; *Ontario Human Rights Code*, *op. cit.*, s.9.

²¹⁸ *Ontario Human Rights Code*, *op. cit.*, s.11(1).

²¹⁹ *Canadian Human Rights Act*, *op. cit.*, s.14; *Ontario Human Rights Code*, *op. cit.*, s.5(2).

²²⁰ *Canadian Human Rights Act*, *op. cit.*, s.14.1; *Ontario Human Rights Code*, *op. cit.*, s.8.

²²¹ *Canadian Human Rights Act*, *op. cit.*, s.15(2); *Ontario Human Rights Code*, *op. cit.*, ss.11(2) and 17(2).

²²² For example, see: *Andrews v Law Society*, *op. cit.*, at p.169.

employees²²³ and potential employees²²⁴ with disabilities. Examples of accommodations include allowing flexible work schedules,²²⁵ modifying job duties²²⁶ and providing alternative work.²²⁷

The AODA's *Employment Standards* include detailed accommodation requirements throughout the employment process. They specify that **employers must notify their employees and the public about the availability of accommodations** for applicants with disabilities in their recruitment processes.²²⁸ Employers must also **notify selected applicants that accommodations are available upon request.**²²⁹ They must inform their staff about their **policies for supporting employees with disabilities.**²³⁰ Employers must provide information in alternate formats and communication supports upon request.²³¹ They must provide **individualized workplace emergency response information** to employees with disabilities who require them.²³² They must consider accessibility needs when assessing employee performance, providing career development opportunities or redeploying employees.²³³ **Employers with at least fifty employees must document their process** for developing individual accommodation plans for employees with disabilities,²³⁴ and they must **develop a return-to-work process** for employees who have been absent due to disability.²³⁵

The Supreme Court of Canada has determined that the **duty to accommodate has both procedural and substantive components.**²³⁶ The procedural component entails discussing the person's needs and exploring collaboratively how those needs could be met.²³⁷ The accommodation process is a shared responsibility; the person with the disability has a duty to cooperate and discuss potential solutions.²³⁸ The **duty is to accommodate the person's needs, not their preferences.**²³⁹

According to the Supreme Court, the **equality guarantee under the *Canadian Charter*** is aimed at preventing the "violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudices, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally

²²³ *Canadian Human Rights Act, op. cit.*, s.7; *Ontario Human Rights Code, op. cit.*, s.5; *Integrated Accessibility Standards, op. cit.*, ss.25-32.

²²⁴ *Canadian Human Rights Act, op. cit.*, ss.7, 8 and 10; *Ontario Human Rights Code, op. cit.* s.23; *Integrated Accessibility Standards, op. cit.*, ss.22-24.

²²⁵ For example, see: *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 (CanLII), available at <http://canlii.ca/t/1t8p9> (30.09.2019).

²²⁶ For example, see: *Hodkin v SCM Supply Chain Management Inc*, 2013 HRTO 923 (CanLII), available at <http://canlii.ca/t/fxqbr> (30.09.2019).

²²⁷ For example, see: *Hamilton-Wentworth District School Board v Fair*, 2016 ONCA 421 (CanLII), available at <http://canlii.ca/t/g51bt> (30.09.2019).

²²⁸ *Integrated Accessibility Standards, op. cit.*, s.22.

²²⁹ *Integrated Accessibility Standards, op. cit.*, s.23.

²³⁰ *Integrated Accessibility Standards, op. cit.*, s.25.

²³¹ *Integrated Accessibility Standards, op. cit.*, s.26.

²³² *Integrated Accessibility Standards, op. cit.*, s.27.

²³³ *Integrated Accessibility Standards, op. cit.*, ss.30-32.

²³⁴ *Integrated Accessibility Standards, op. cit.*, s.28.

²³⁵ *Integrated Accessibility Standards, op. cit.*, s.29.

²³⁶ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, para.66, available at <http://canlii.ca/t/1fqk1> (30.09.2019).

²³⁷ *Dulinas v York-Med Systems*, 2010 HRTO 1404 (CanLII), para.75, available at <http://canlii.ca/t/2b9cz> (30.09.2019).

²³⁸ Ontario Human Rights Commission, *Policy on Ableism, op. cit.*, p.41.

²³⁹ *Graham v Underground Miata Network*, 2013 HRTO 1457 (CanLII), para.31, available at <http://canlii.ca/t/g09mg> (30.09.2019).

capable and equally deserving of concern, respect and consideration”.²⁴⁰ The purpose of the duty to accommodate is “to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship”.²⁴¹

Under the *Canadian Human Rights Act* and the *Ontario Human Rights Code*, an exclusion or limitation in relation to employment is **not considered discriminatory** if the employer establishes that it is based on a “**bona fide occupational requirement**”.²⁴² A practice can only be considered a *bona fide* occupational requirement if the person’s needs can’t be accommodated **without imposing undue hardship on the employer**. Employers can be expected to experience some degree of hardship, but the hardship must not be “undue”.

Undue hardship is assessed **under the Canadian Human Rights Act** by looking at the factors of health, safety and cost.²⁴³ It is assessed **under the Ontario Human Rights Code** by looking at the cost, outside sources of funding, and health and safety requirements.²⁴⁴ The cost must be quantifiable, not just hypothetical.²⁴⁵ It must be so significant that it would alter the essential nature of the enterprise or substantially affect its viability. It isn’t necessary to accommodate the person’s disability if doing so would fundamentally alter the nature of the employment relationship.²⁴⁶

An **accommodation is considered appropriate** if it “results in equal opportunity to enjoy the same level of benefits and privileges experienced by others or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual’s disability-related needs”.²⁴⁷

In addition to prohibiting disability discrimination, the *Canadian Human Rights Act* and the *Ontario Human Rights Code* **prohibit discrimination on the basis of family status**.²⁴⁸ The *Canadian Human Rights Act* specifically recognizes intersectional discrimination.²⁴⁹ The *Ontario Human Rights Code* prohibits discrimination because of someone’s relationship, association or dealings with a person with a disability.²⁵⁰

3.2. Incentives or other assistance available to employers

The federal government’s **Opportunities Fund for Persons with Disabilities provides funding for organizations to help people with disabilities** prepare for, obtain and maintain employment. This program is open to non-profit and for-profit organizations as well as municipal and provincial

²⁴⁰ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at p.500, available at <http://canlii.ca/t/1fqh9> (30.09.2019).

²⁴¹ *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 SCR 561, para 14, available at <http://canlii.ca/t/1zhnr> (30.09.2019).

²⁴² *Canadian Human Rights Act*, *op. cit.*, s.15(1)(a); *Ontario Human Rights Code*, *op. cit.*, ss.11(2) and 17(2).

²⁴³ *Canadian Human Rights Act*, *op. cit.*, s.15(2).

²⁴⁴ *Ontario Human Rights Code*, *op. cit.*, ss.11(2) and 17(2).

²⁴⁵ *British Columbia v BCGSEU*, *op. cit.*, para 78.

²⁴⁶ *Hydro-Québec v Syndicat des employé-e-s*, *op. cit.*

²⁴⁷ Ontario Human Rights Commission, *Policy on Ableism*, *op. cit.*, p.34.

²⁴⁸ *Canadian Human Rights Act*, *op. cit.*, s.3(1); *Ontario Human Rights Code*, *op. cit.*, s.5(1).

²⁴⁹ *Canadian Human Rights Act*, *op. cit.*, s.3.1.

²⁵⁰ *Ontario Human Rights Code*, *op. cit.*, s.12. For example, see: *Knibbs v Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII), available at <http://canlii.ca/t/flmtr> (30.09.2019) (discrimination because of association with a person who had filed a disability discrimination claim) and *Giguere v Popeye Restaurant*, 2008 HRTO 2 (CanLII), available at <http://canlii.ca/t/1vgzm> (30.09.2019) (dismissal of an employee because her husband was HIV-positive).

governments. Funding can be used for training and skill development, wage subsidies, employment assistance services, employer awareness and self-employment. Funded projects can be local, regional or national in scope. **Funding recipients must leverage at least twenty percent of their project costs.** The Fund prioritizes projects that target youth or that include work placements in the private sector or with small or medium-sized employers.²⁵¹

The **federal government provides funding to provinces through Labour Market Agreements for Persons with Disabilities (LMAPD).** Provinces use this funding to design and deliver services aimed at improving employment among people with disabilities. Provinces set their own program priorities and approaches. Funding can support activities such as career counselling, skills training, wage subsidies and technical aids. Provinces must report annually on their progress in reaching performance goals.²⁵²

The **Ontario Disability Support Program provides employment supports** for people with disabilities.²⁵³ This program is partially funded through the province's LMAPD. It provides funding to third-party service providers who ensure that people with disabilities find and retain employment. Funding is based on achieving employment results. Employment supports can include providing software and mobility devices, interpreter or intervenor services, transportation assistance and assistive devices.²⁵⁴

Under the *Accessibility for Ontarians with Disabilities Act*, the government can enter into an agreement with an organization to encourage and provide **incentives for the organization to exceed the requirements of accessibility standards.**²⁵⁵ If an organization undertakes to exceed an accessibility requirement, the government can exempt the organization from having to file an accessibility report.²⁵⁶

4. Enforcement of rights

Federal or provincial government employees with disabilities **can file a lawsuit in the regular court system** if a law or government policy violates their right to equality under the *Canadian Charter*. However, this recourse is rarely used, in part because *Charter* litigation is long and expensive. Individuals and organizations can apply for funding for *Charter* litigation from the federal government's Court Challenges Program.²⁵⁷ If the court finds that there has been discrimination, **it can award any**

²⁵¹ Employment and Social Development Canada, Opportunities Fund for Persons with Disabilities, available at www.canada.ca/en/employment-social-development/programs/opportunity-fund-disability.html (30.09.2019).

²⁵² Employment and Social Development Canada, Labour Market Agreements for Persons with Disabilities, available at www.canada.ca/en/employment-social-development/programs/training-agreements/lma-disabilities.html (30.09.2019).

²⁵³ Ontario Ministry of Children, Community and Social Services, Ontario Disability Support Program - Employment Supports, available at www.mcsc.gov.on.ca/en/mcss/programs/social/directives/odsp/es/1_1_ODSP_ESDirectives.aspx (30.09.2019).

²⁵⁴ Ontario Ministry of Children, Community and Social Services, Employment Supports, available at www.mcsc.gov.on.ca/en/mcss/programs/social/odsp/employment_support/available_supports.aspx (30.09.2019).

²⁵⁵ *Accessibility for Ontarians with Disabilities Act*, *op. cit.*, s.33.

²⁵⁶ *Accessibility for Ontarians with Disabilities Act*, *op. cit.*, s.33(3)(a).

²⁵⁷ Court Challenges Program, available at <https://pcjccp.ca> (30.09.2019).

remedy that it considers “appropriate and just in the circumstances”,²⁵⁸ including damages.²⁵⁹ If the discrimination stems from legislation, the court can declare that the discriminatory law is of no force or effect.²⁶⁰

Employees who experience discrimination based on a protected characteristic, including disability, can **file a human rights complaint**. Those who work in federally-regulated industries, including private businesses such as banks, airlines and telecommunications companies, can file discrimination complaints with the **Canadian Human Rights Commission** under the *Canadian Human Rights Act*.²⁶¹ The Commission can also initiate a complaint.²⁶² The Commission investigates complaints.²⁶³ If it finds there has been discrimination, it can represent the complainant at a hearing before the **Canadian Human Rights Tribunal**. The Tribunal has **broad remedial powers**, including ordering the reinstatement of the complainant.²⁶⁴ It can order that the respondent cease the discriminatory practice and take measures to redress the practice or to prevent it from occurring in future.²⁶⁵ The Tribunal can also order that the respondent make available to the victim the rights or opportunities that were denied.²⁶⁶ In addition, it can order compensation for any lost wages or additional costs incurred as a result of the discrimination.²⁶⁷ The Tribunal can award damages of up to \$20 000 for pain and suffering.²⁶⁸ It can also order up to \$20 000 in “special compensation” if the discrimination was wilful or reckless.²⁶⁹

In **Ontario**, individuals and groups can file discrimination complaints, including disability discrimination complaints in the field of employment, directly with the province’s **Human Rights Tribunal** under the *Human Rights Code*.²⁷⁰ The Ontario Human Rights Commission can also file a complaint with the Tribunal if it is in the public interest to do so.²⁷¹ A Human Rights and Legal Support Centre provides free advice, assistance and legal services to people seeking to enforce their rights under the *Code*.²⁷² The **Human Rights Tribunal can order compensation and restitution** to the victim, including for injury to dignity, feelings and self-respect.²⁷³ The Tribunal can also order the respondent to do anything that it “ought to do to promote compliance” with the *Code*.²⁷⁴ While orders for reinstatement are not common, they are within the Tribunal’s jurisdiction.²⁷⁵

²⁵⁸ *Canadian Charter, op. cit.*, s.24(1).

²⁵⁹ For example, see: *Vancouver (City) v Ward*, [2010] 2 SCR 28, available at <http://canlii.ca/t/2bq8r> (30.09.2019).

²⁶⁰ *Constitution Act, op. cit.*, s.52.

²⁶¹ *Canadian Human Rights Act, op. cit.*, s.40.

²⁶² *Canadian Human Rights Act, op. cit.*, s.40(3).

²⁶³ *Canadian Human Rights Act, op. cit.*, s.43.

²⁶⁴ For example, see: *Canadian National Railway Company v Seeley*, 2014 FCA 111 (CanLII), available at <http://canlii.ca/t/g6sdq> (30.09.2019).

²⁶⁵ *Canadian Human Rights Act, op. cit.*, s.53(2)(a).

²⁶⁶ *Canadian Human Rights Act, op. cit.*, s.53(2)(b).

²⁶⁷ *Canadian Human Rights Act, op. cit.*, s.53(2)(c) and (d).

²⁶⁸ *Canadian Human Rights Act, op. cit.*, s.53(2)(e).

²⁶⁹ *Canadian Human Rights Act, op. cit.*, s.53(3).

²⁷⁰ *Canadian Human Rights Act, op. cit.*, s.34(1), (4) and (5).

²⁷¹ *Canadian Human Rights Act, op. cit.*, s.35(1).

²⁷² *Ontario Human Rights Code, op. cit.*, s.45.13(1).

²⁷³ *Ontario Human Rights Code, op. cit.*, s.45.2(1).

²⁷⁴ *Ontario Human Rights Code, op. cit.*

²⁷⁵ For example, see: *Hamilton-Wentworth District School Board v Fair, op. cit.*

In **civil proceedings before a regular court**, a party can claim that their equality rights have been infringed under Ontario's *Human Rights Code*.²⁷⁶ However, people can't bring a claim in civil court based solely on such an infringement.²⁷⁷ Concurrent civil and Tribunal applications are not permitted.²⁷⁸ If a court finds there has been discrimination under the *Code*, it can order compensation and restitution to the victim, including for injury to dignity, feelings and self-respect.²⁷⁹

In Ontario, **unionized employees** who experience discrimination can choose between filing a human rights complaint or filing a grievance under their collective agreement. Unionized employees in federally-regulated industries who experience discrimination are generally required to file a grievance before filing a human rights complaint.²⁸⁰

The ***Accessibility for Ontarians with Disabilities Act* doesn't include a complaints mechanism**. Organizations are expected to periodically report on their compliance with the *Act* and the accessibility standards.²⁸¹ **Inspectors can conduct inspections to ensure compliance**.²⁸² Accessibility directors can order organizations to comply with the law. They can also order administrative penalties of up to \$50 000 for individuals and up to \$100 000 for corporations that have failed to comply with the law.²⁸³

Employment agreements can contain clauses that require the parties to submit to **arbitration** or another dispute resolution mechanism prior to or instead of commencing a court action. In Ontario, if a party to an arbitration agreement commences a proceeding in court, the **court must stay the proceeding on the motion of another party**.²⁸⁴ However, employers and employees in Canada can't decide to "opt out" of human rights protections or employment standards.²⁸⁵

5. Legal framework in practice

Statistics indicate that **disability discrimination remains a pressing concern in Canada**. Forty percent of persons with disabilities report that their disability has limited their career options.²⁸⁶ More than 30% of persons with disabilities report that their **disability makes it difficult for them to change jobs or advance in their careers**.²⁸⁷ The most commonly needed accommodation for people with disabilities in the Canadian workplace is modified or reduced work hours. While this need is commonly met by

²⁷⁶ *Ontario Human Rights Code, op. cit.*, s.46.1(1).

²⁷⁷ *Ontario Human Rights Code, op. cit.*, s.46.1(2)

²⁷⁸ *Ontario Human Rights Code, op. cit.*, s.34(11)(a).

²⁷⁹ *Ontario Human Rights Code, op. cit.*, s.46.1(1).

²⁸⁰ *Canadian Human Rights Act, op. cit.*, s.41(1)(a).

²⁸¹ *Accessibility for Ontarians with Disabilities Act, op. cit.*, s.14.

²⁸² *Accessibility for Ontarians with Disabilities Act, op. cit.*, s.19.

²⁸³ *Accessibility for Ontarians with Disabilities Act, op. cit.*, ss.21(4) and 37(3).

²⁸⁴ *Arbitration Act, 1991*, SO 1991, c 17, s.7(1), available at <http://canlii.ca/t/52wr5> (30.09.2019). For example, see: *Morrison v Ericsson Canada Inc*, 2016 ONSC 3908, available at <http://canlii.ca/t/g57bz> (30.09.2019).

²⁸⁵ For example, see: *Heller v Uber Technologies Inc*, 2019 ONCA 1, available at <http://canlii.ca/t/hwqzt> (30.09.2019)

²⁸⁶ Canadian Human Rights Commission, *Left Out: Challenges faced by persons with disabilities in Canada's schools*, Ottawa: Canadian Human Rights Commission 2017, p.6, available at www.chrc-ccdp.gc.ca/eng/content/left-out-challenges-faced-persons-disabilities-canadas-schools (30.09.2019).

²⁸⁷ Canadian Human Rights Commission, *Roadblocks on the career path: Challenges faced by persons with disabilities in employment*, Ottawa: Canadian Human Rights Commission 2018, p.4, available at <https://www.chrc-ccdp.gc.ca/eng/content/report-roadblocks-career-path-challenges-faced-persons-disabilities-employment> (30.09.2019).

employers, it is also the reason most frequently cited for difficulty advancing in employment.²⁸⁸ Nearly 30% of persons with disabilities **report having asked for a workplace accommodation that was denied.**²⁸⁹ At least 40% of persons with disabilities report feeling that their employer considers them disadvantaged because of their disability.²⁹⁰

These statistics are reflected in the complaints filed with human rights commissions and tribunals. **Nearly half of all the complaints received across the country are about disability discrimination.**²⁹¹ Between 2009 and 2016, 44.1% of all the complaints received by the Canadian Human Rights Commission were disability complaints related to employment.²⁹² In the same time period, 38.2% of the complaints received by the Human Rights Tribunal of Ontario were disability complaints related to employment.²⁹³

Common examples of disability complaints related to employment include a **lack of physical workplace accommodation, a failure to facilitate a return to work process and a failure to approve a medical absence.** Many complainants allege that the accommodation measures proposed and/or implemented by an employer are **inadequate to address their limitations.**²⁹⁴

In 2018, **52% of the complaints** accepted by the Canadian Human Rights Commission involved **disability discrimination;**²⁹⁵ it is unknown how many of these complaints were related to employment. Over half of the disability complaints accepted by the Commission in 2018 were related to mental health, which represented 27% of all the accepted complaints.²⁹⁶ Of the 80 cases that the Commission referred to the Canadian Human Rights Tribunal that year, 89% were related to employment.²⁹⁷ One in five work-related complaints alleged harassment, although not all of these complaints involved disability.²⁹⁸ Intersectional discrimination is also a growing concern: 43% of the complaints accepted by the Commission cited more than one ground of discrimination.²⁹⁹

Similar trends have been observed in **Ontario.** In 2017-2018, 56% of the complaints handled by the province's Human Rights Tribunal involved disability discrimination.³⁰⁰ It is **unknown how many of these complaints were related to employment.** However, since 70% of all complaints involved

²⁸⁸ M. Till, et al., Canadian Survey on Disability, 2012: A Profile of the Labour Market Experiences of Adults with Disabilities among Canadians aged 15 years and older, Ottawa: Statistics Canada 2015, available at www.statcan.gc.ca/pub/89-654-x/89-654-x2015005-eng.htm (30.09.2019).

²⁸⁹ Canadian Human Rights Commission, Roadblocks, *op. cit.*, p.4.

²⁹⁰ Canadian Human Rights Commission, Roadblocks, *op. cit.*

²⁹¹ Canadian Human Rights Commission, The Rights of Persons with Disabilities to Equality and Non-Discrimination - Monitoring the Implementation of the UN Convention of the Rights of Persons with Disabilities in Canada, Ottawa: Canadian Human Rights Commission 2015, p.1, available at www.chrc-ccdp.gc.ca/eng/content/rights-persons-disabilities-equality-and-non-discrimination (30.09.2019).

²⁹² Canadian Human Rights Commission, Roadblocks, *op. cit.*, p.18.

²⁹³ Canadian Human Rights Commission, Roadblocks, *op. cit.*, p.18.

²⁹⁴ Canadian Human Rights Commission, Roadblocks, *op. cit.*, p.17.

²⁹⁵ Canadian Human Rights Commission, 2018 Annual Report to Parliament, Ottawa: Canadian Human Rights Commission 2019, p.40, available at www.chrc-ccdp.gc.ca/eng/content/annual-report-2018 (30.09.2019).

²⁹⁶ Canadian Human Rights Commission, 2018 Annual Report, *op. cit.*

²⁹⁷ Canadian Human Rights Commission, 2018 Annual Report, *op. cit.*, p.48.

²⁹⁸ Canadian Human Rights Commission, 2018 Annual Report, *op. cit.*, p.41.

²⁹⁹ Canadian Human Rights Commission, 2018 Annual Report, *op. cit.*

³⁰⁰ Social Justice Tribunals Ontario, 2017-2018 Annual Report, Toronto: Social Justice Tribunals Ontario 2019, p.26, available at www.sjto.gov.on.ca/documents/sjto/2017-18%20Annual%20Report.html (30.09.2019).

employment discrimination,³⁰¹ many disability discrimination complaints must have been employment-related. The tribunal only found in favour of the plaintiffs in 41% of the decisions it rendered in 2017-2018.³⁰²

To date, **very few penalties have been ordered for non-compliance with the *Accessibility for Ontarians with Disabilities Act (AODA)***. Only two penalties were ordered in 2016³⁰³ and only three were ordered in 2017.³⁰⁴ It is unknown whether these penalties were in relation to the AODA's *Employment Standards*.

In June 2018, the federal government tabled Bill C-81, the ***Accessible Canada Act***.³⁰⁵ One of the aims of this bill is to remove barriers to employment in areas within the federal government's jurisdiction.³⁰⁶ If this bill is passed, it could improve the employment prospects of people with disabilities across the country.

³⁰¹ Social Justice Tribunals Ontario, 2017-2018 Annual Report, *op. cit.*, p.26.

³⁰² Social Justice Tribunals Ontario, 2017-2018 Annual Report, *op. cit.*, p.25.

³⁰³ Government of Ontario, Accessibility compliance and enforcement report 2016, available at www.ontario.ca/page/accessibility-compliance-and-enforcement-report-2016#section-3 (30.09.2019).

³⁰⁴ Government of Ontario, Accessibility compliance and enforcement report 2017, available at www.ontario.ca/page/accessibility-compliance-and-enforcement-report (30.09.2019).

³⁰⁵ Bill C-81, *Accessible Canada Act* (42-1), available at <http://canlii.ca/t/53rfw> (30.09.2019).

³⁰⁶ Bill C-81, *op. cit.*, s.5(a).

D. FRANCE

1. Introduction

1.1. Vue d'ensemble nationale

Le régime politique de la République française comporte des caractéristiques du régime présidentiel et du régime parlementaire. La France est un Etat unitaire, membre de l'Union européenne. Sa population avoisine les 67 millions d'habitants, dont environ 2 millions résident dans les départements d'Outre-mer.

Selon une étude **statistique** menée en France en 2018, **les personnes disposant d'une reconnaissance administrative de leur handicap**, ayant entre 15 et 64 ans, sont considérées comme **actives (en emploi ou au chômage) à hauteur de 43 %** ; alors que le taux est de 72 % pour l'ensemble de la population dans cette même tranche d'âge. Les personnes dont le handicap est reconnu administrativement sont à **18 % au chômage**³⁰⁷ (contre 9 % pour l'ensemble de la population active). **3,7 % des personnes en emploi disposent d'une reconnaissance administrative de leur handicap**. Par ailleurs, si l'on intègre aux calculs les personnes ayant des problèmes de santé durable, accompagnés de difficultés depuis au moins six mois dans les activités quotidiennes, le taux de **personnes considérées « en situation de handicap »** passe à 10 % de la population en emploi.³⁰⁸

Le **paysage politique et juridique** de l'inclusion des personnes handicapées dans le marché de l'emploi se caractérise, en France, par un **foisonnement de sources normatives et d'organismes responsables**. On recense plusieurs codes pertinents, des lois spéciales, décrets et circulaires, faisant en outre régulièrement l'objet de réformes. Les compétences des autorités sont réparties entre les différents échelons de gouvernance (niveaux national, régional, départemental, etc.). Et de nombreux organismes se répartissent des compétences, dont l'enchevêtrement est parfois critiqué en ce qu'il résulte en un manque de clarté pour les personnes qui pourraient avoir recours à leurs services et soutiens. Si l'on devait ne retenir qu'une mesure pour distinguer le système français, on choisirait certainement le **système de quota** mis en place, et le paiement alternatif d'une taxe pour les employeurs ne le respectant pas.

La France s'est progressivement engagée dans une politique inclusive des personnes handicapées dans la société en générale, et dans le marché de l'emploi en particulier. L'évolution du vocable employé (abandonnant une terminologie aujourd'hui perçue comme péjorative et illustrant la relégation au rang de charité des premiers soutiens) et la prise de conscience incitant à une conception envisageant la société comme invalidante³⁰⁹, font écho à des politiques visant à favoriser l'accès à l'emploi en milieu ordinaire, ou à défaut en milieu protégé.

1.2. Vue d'ensemble du cadre légal et politique

Le droit commun du travail est applicable, pour toutes les questions non régies par des normes spéciales applicables aux travailleurs handicapés. Les normes pertinentes sont principalement

³⁰⁷ Contre 19 % en 2017, le pourcentage pour l'ensemble de la population active étant également à 9 % en 2017 ; INSEE, Emploi, chômage, revenus du travail, 2018, p. 112, disponible sous : <https://www.insee.fr/fr/statistiques/3573721?sommaire=3573876> (06.09.2019).

³⁰⁸ INSEE, Temps et conditions de travail - Emploi, chômage, revenus du travail, 2019, p. 138, disponible sous : <https://www.insee.fr/fr/statistiques/4182932?sommaire=4182950> (06.09.2019).

³⁰⁹ P. Doriguzzi, L'histoire politique du handicap. De l'infirme au travailleur handicapé, Paris 1994, notamment p. 151.

codifiées dans le **Code du travail, le Code de la sécurité sociale, le Code de la famille et de l'aide sociale, le Code de l'action sociale et des familles, le Code pénal**. De nombreuses autres normes, notamment des circulaires, les complètent.³¹⁰ Dans la fonction publique, une nouvelle loi du 6 août 2019³¹¹ vient modifier les **lois régissant la fonction publique** d'Etat, territoriale et hospitalière, pour y insérer de nouvelles dispositions relatives aux agents en situation de handicap.

Plus globalement, les droits des personnes handicapées ont fait l'objet d'un important travail législatif à travers la **Loi du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées**³¹². Cette loi couvre de multiples domaines tenant aux droits des personnes handicapées. Cette loi définit le handicap. Elle rappelle que toute personne handicapée a **droit à la solidarité** de l'ensemble de la collectivité nationale, l'accès aux **droits fondamentaux reconnus à tous les citoyens**, et l'égalité de traitement³¹³. La loi comporte des dispositions relatives à la **santé**³¹⁴ ; la **compensation** des conséquences du handicap et les **ressources** des personnes handicapées³¹⁵ ; l'accessibilité en termes d'**éducation, d'emploi, du cadre bâti**³¹⁶, ainsi qu'à **l'information ; l'évaluation de leurs besoins et la reconnaissance** de leurs droits³¹⁷ ; la **citoyenneté** et la participation à la **vie sociale**³¹⁸. La plupart de ses dispositions sont **codifiées** dans les codes susmentionnés et plusieurs réformes ont eu lieu depuis 2005.

En outre, de manière transversale, un « **diagnostic-handicap** » détermine systématiquement la nécessité d'introduire dans tout projet de loi des dispositions relatives aux personnes en situation de handicap et, le cas échéant, les moyens à prévoir pour leur mise en œuvre³¹⁹.

La France a ratifié la **Convention relative aux droits des personnes handicapées** et son Protocole facultatif et a accepté la procédure d'enquête le 18 février 2010³²⁰.

Pour la période 2017-2020, une **convention nationale pluriannuelle multipartite de mobilisation pour l'emploi des personnes en situation de handicap**, entre l'Etat et l'ensemble des acteurs concernés,

³¹⁰ M. Richevaux, Fasc. 8-10 : Travailleurs handicapés, JurisClasseur Travail Traité, dernière mise à jour le 07.06.2019, N 1.

³¹¹ Loi n° 2019-828 du 06.08.2019 de transformation de la fonction publique.

³¹² Loi n° 2005-102 du 11.02.2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, disponible sous : https://www.legifrance.gouv.fr/affichTexte.do?sessionId=605FC01C068EE71DFEA79E1F0611816C.tplgfr43s_2?cidTexte=LEGITEXT000006051257&dateTexte=20211007 (06.09.2019).

³¹³ Titre Ier de la loi.

³¹⁴ Titre II de la loi.

³¹⁵ Titre III de la loi.

³¹⁶ Titre IV de la loi.

³¹⁷ Titre V de la loi.

³¹⁸ Titre VI de la loi.

³¹⁹ Circulaire du 04.09.2012 relative à la prise en compte du handicap dans les projets de loi, disponible sous : <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026344613&fastPos=1&fastReqId=1466024016&categorieLien=id&oldAction=rechTexte> (06.09.2019). A noter que cette circulaire ne s'impose pas aux propositions de loi introduites par le Parlement, mais aux seuls projets de loi introduits par le pouvoir exécutif.

³²⁰ Nations unies Droits de l'homme, Haut-Commissariat, Base de données relative aux organes conventionnels de l'ONU, page relative aux engagements pris par la France, disponible sous : https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?Lang=fr (05.09.2019).

définit un cadre de référence des politiques dans le domaine. Les cinq grands objectifs portent sur l'accès et le maintien dans l'emploi, la formation professionnelle, l'amélioration de l'information.³²¹

2. Cadre légal

2.1. Fondements juridiques pour la protection au travail et des droits

Les personnes handicapées peuvent travailler en milieu ordinaire ou protégé. En principe, le régime des salariés de **droit commun** s'applique. Lorsqu'elles sont embauchées dans un **atelier protégé**, la convention collective applicable à l'organisme gestionnaire s'applique.

En outre, afin de faciliter l'accès à l'emploi, des **règles spéciales** sont prévues³²². Ainsi, en matière de protection contre les discriminations, le Code du travail³²³ et la Loi portant droits et obligations des fonctionnaires³²⁴ prévoient que, en milieu ordinaire, les employeurs³²⁵ sont tenus de garantir le respect du **principe d'égalité de traitement** à l'égard des travailleurs handicapés³²⁶. A cette fin, les employeurs doivent prendre les **mesures appropriées et proportionnées**. Le refus de prendre les mesures susmentionnées peut être constitutif d'une discrimination, réprimée par le Code pénal^{327, 328}. Par ailleurs, l'intégration des personnes dans le milieu du travail est favorisée par une **obligation d'emploi des travailleurs handicapés** en milieu ordinaire. Il s'agit d'une obligation, à la charge de certains employeurs³²⁹, d'employer des travailleurs handicapés à hauteur de 6% de leur effectif total, au minimum. Cette obligation peut aussi être acquittée à travers d'autres modalités.³³⁰

2.2. Champ d'application de la protection

L'interdiction de la discrimination et l'obligation d'aménagement raisonnable qui en découle sont imposées aux **employeurs privés et publics**³³¹.

L'obligation d'emploi des travailleurs handicapés est à la charge des **employeurs occupant au moins 20 salariés**. Déjà imposée aux **employeurs du secteur privé et aux établissements publics à caractère**

³²¹ Ministère du Travail, Signature de la convention nationale pluriannuelle multipartite de mobilisation pour l'emploi des personnes en situation de handicap (2017-2020), disponible sous : <https://travail-emploi.gouv.fr/actualites/presse/communiqués-de-presse/article/signature-de-la-convention-nationale-pluriannuelle-multipartite-de-mobilisation> (16.09.2019).

³²² Richevaux, Fasc. 8-10 : Travailleurs handicapés, *op. cit.*, N 162.

³²³ Code du travail, article L. 5213-6.

³²⁴ Loi n° 83-634 du 13.07.1983 portant droits et obligations des fonctionnaires (ci-après Loi portant droits et obligations des fonctionnaires), articles 6 et 6 sexies.

³²⁵ Cf. *infra* 2.2.

³²⁶ Cf. *infra* 2.2.

³²⁷ Cf. *infra* 2.4.

³²⁸ Cf. *infra* 2.4. et 3.1.1. notamment.

³²⁹ Cf. *infra* 2.2.

³³⁰ Cf. *infra* 3.1.

³³¹ Code du travail, article L. 5213-6 et Loi portant droits et obligations des fonctionnaires, articles 6 et 6 sexies.

industriel et commercial³³², cette obligation d'emploi sera également faite, **à compter du 1^{er} janvier 2020, à l'Etat**^{333 334}.

L'obligation d'emploi³³⁵ et l'obligation d'aménagement raisonnable³³⁶ bénéficient aux **travailleurs handicapés** énumérés : les travailleurs reconnus handicapés par la commission des droits et de l'autonomie des personnes handicapées ; les victimes d'accidents du travail ou de maladies professionnelles ayant entraîné une incapacité permanente au moins égale à 10 % et titulaires d'une rente attribuée au titre d'un régime de protection sociale obligatoire ; les titulaires d'une pension d'invalidité dont l'invalidité réduit au moins des deux tiers leur capacité de travail ou de gain ; les bénéficiaires mentionnés dans le code des pensions militaires d'invalidité et des victimes de guerre ; les titulaires d'une allocation ou d'une rente d'invalidité attribuée dans les conditions définies par la loi relative à la protection sociale des sapeurs-pompiers volontaires en cas d'accident survenu ou de maladie contractée en service ; les titulaires de la carte "mobilité inclusion" portant la mention "invalidité" ; et les titulaires de l'allocation aux adultes handicapés.

A compter du 1^{er} janvier 2020, les employeurs privés et les établissements publics à caractère industriel ou commercial s'acquitteront de leur obligation d'emploi en employant les travailleurs handicapés bénéficiaires de l'obligation d'emploi, « **quelles que soient la durée et la nature de leur contrat** »³³⁷. Pour tous les employeurs, même publics³³⁸, un acquittement partiel sera encore possible par l'accueil en **stage**³³⁹, ou pour des **périodes de mise en situation en milieu professionnel**³⁴⁰, ou encore par la **mise à disposition par les entreprises de travail temporaire** et par les groupement d'employeurs³⁴¹.

L'obligation d'aménagement raisonnable ne fait pas l'objet de dispositions similaires relatives au lien contractuel entre l'employeur et le travailleur handicapé.

³³² Code du travail, articles L. 5212-1 et suivants. Un établissement public à caractère industriel et commercial est une personne morale de droit public, largement régie par le droit privé et remplissant une mission d'intérêt général de manière autonome mais sous le contrôle d'une collectivité publique.

³³³ C'est-à-dire aux autres établissements publics de l'Etat que les établissements publics à caractère industriel et commercial, aux juridictions administratives et financières, aux autorités publiques et administratives indépendantes, aux groupements d'intérêt public, aux groupements de coopération sanitaires personnes morales de droit public, aux collectivités territoriales et à leurs établissements publics, et aux établissements publics hospitaliers ; Loi portant droits et obligations des fonctionnaires, articles 33 à 40 (au 01.01.2020).

³³⁴ Cf. *infra* 3.1.

³³⁵ Code du travail, article L. 5212-13.

³³⁶ Code du travail, article L. 5213-6 et Loi portant droits et obligations des fonctionnaires, article 6 sexies. Font exception, pour l'obligation d'aménagement raisonnable, les bénéficiaires mentionnés aux articles L. 241-3 et L. 241-4 du Code des pensions militaires d'invalidité et des victimes de guerre.

³³⁷ Code du travail, article L. 5212-6 (au 01.01.2020). Jusqu'au 31.12.2019, cette disposition prévoit qu'il est possible de s'acquitter partiellement de l'obligation d'emploi en concluant des contrats de fournitures, de sous-traitance ou de prestations de services avec des entreprises adaptées, avec des établissements et services d'aide par le travail ou avec des personnes handicapées exerçant leur activité comme travailleurs indépendants

³³⁸ Par renvoi de l'article 33 de la Loi portant droits et obligations des fonctionnaires (au 01.01.2020).

³³⁹ Code du travail, article L. 5212-7 ; voir Joly, Handicap, *op. cit.*, N 161 s.

³⁴⁰ Code du travail, article L. 5212-7-1 ; voir Joly, Handicap, *op. cit.*, N 165 s.

³⁴¹ Code du travail, article L. 5212-7 (au 01.01.2020).

2.3. Définition du handicap

2.3.1. Définition du handicap

Le Code de l'action sociale et des familles définit le **handicap** comme étant :

« toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d'une altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d'un polyhandicap ou d'un trouble de santé invalidant »³⁴²

Dans son Rapport initial au Comité des droits des personnes handicapées, la France estime que la définition du handicap dans son ordre juridique « permet d'**appréhender le handicap dans sa dimension sociale**, comme le fait la Convention [relative aux droits des personnes handicapées], en l'analysant au travers du prisme des relations d'un individu à la société. Toutefois, il est vrai qu'elle **désigne encore le handicap lui-même comme cause des difficultés** rencontrées par cet individu pour s'insérer dans la société »³⁴³. Dans le même sens, la Rapporteuse spéciale des Nations unies sur les droits des personnes handicapées estime que la définition française du handicap « est **axée sur la déficience et non sur l'interaction de la personne avec l'environnement et sur les obstacles existants**, et elle devrait donc être revue »³⁴⁴.

2.3.2. Définition du travailleur handicapé

Le Code du travail définit le **travailleur handicapé** comme étant :

« toute personne dont les possibilités d'obtenir ou de conserver un emploi sont effectivement réduites par suite de l'altération d'une ou plusieurs fonctions physique, sensorielle, mentale ou psychique »³⁴⁵.

Il est prévu que **la qualité de travailleur handicapé est reconnu** par la Commission des droits et de l'autonomie des personnes handicapées³⁴⁶. Une fois la qualité de travailleur handicapé reconnu, la personne est orientée vers un établissement ou service d'aide par le travail, vers le marché du travail ou vers un centre de rééducation professionnelle.³⁴⁷

A partir du 1^{er} janvier 2020, la qualité de travailleur handicapé³⁴⁸ et sa reconnaissance³⁴⁹ seront attribuées de façon définitive lorsque le handicap est irréversible. Jusqu'à cette date, et après dans les

³⁴² Code de l'action sociale et des familles, article L. 114.

³⁴³ Rapport initial soumis par la France en application de l'article 35 de la Convention, attendu en 2012, CRPD/C/FRA/1, 16.10.2017, N 31.

³⁴⁴ Rapport de la Rapporteuse spéciale sur les droits des personnes handicapées, Visite en France, A/HRC/40/54/Add. 1, 08.01.2019, N 18.

³⁴⁵ Code du travail, article L. 5213-1.

³⁴⁶ Cette commission est composée de représentants du département, des services et des établissements publics de l'Etat, des organismes de protection sociale, des organisations syndicales, des associations de parents d'élèves, des personnes handicapées et de leurs familles (pour au moins un tiers de ses membres), du conseil départemental consultatif des personnes handicapées, des organismes gestionnaires d'établissements ou de services (voix consultatives) ; voir les articles L. 241-5 et R. 241-24 du Code de l'action sociale et des familles.

³⁴⁷ Code du travail, article L. 5213-2.

³⁴⁸ Code du travail, article L. 5213-2 *in fine*.

³⁴⁹ Code de l'action sociale et des familles, article R. 241-31 alinéa 2.

cas où le handicap n'est pas irréversible, la **durée de validité** des décisions de la Commission est de minimum un an et maximum dix ans, sauf dispositions spécifiques contraires³⁵⁰.

Selon certains auteurs, la définition donnée par le Code du travail du **travailleur handicapé** est plus large que la « **qualité de travailleur handicapé** » ou de « **travailleur handicapé reconnu** » par la Commission des droits et de l'autonomie des personnes handicapées³⁵¹. Les normes pertinentes tantôt les distinguent, tantôt les confondent. Il est néanmoins important de noter que pour certaines mesures, comme en particulier l'obligation d'emploi des travailleurs handicapés, le bénéfice est ouvert plus largement. Ainsi, **la façon dont la détermination de l'éligibilité d'une personne donnée à des droits spécifiques est effectuée peut varier**. Par exemple, l'obligation d'emploi des travailleurs handicapés bénéficie, non seulement aux travailleurs reconnus handicapés par la Commission des droits et de l'autonomie des personnes handicapées, mais encore aux victimes d'accidents du travail ou maladies professionnelles ayant entraîné une incapacité permanente au moins égale à 10 % et titulaires d'une rente attribuée au titre de l'un des régimes de protection sociale obligatoire³⁵².

2.4. Protection contre la discrimination

Le Code pénal prévoit expressément que **le handicap est un fondement de distinction prohibé**, emportant discrimination. Il punit de **trois ans d'emprisonnement et de 45 000 euros d'amende** une discrimination consistant à refuser d'embaucher, à sanctionner ou à licencier une personne³⁵³. Les personnes morales reconnues pénalement responsables de ce délit encourent en outre des sanctions telles que l'interdiction d'exercer les activités dans l'exercice desquelles l'infraction a été commise, un placement sous surveillance judiciaire, la fermeture de l'établissement, l'exclusion des marchés publics ou encore l'affichage de la décision prononcée^{354, 355}.

Le Code du travail prévoit que le principe de non-discrimination s'applique à l'embauche, pendant la relation de travail et à l'occasion du licenciement. Il dispose en effet :

« Aucune personne ne peut être écartée d'une procédure de **recrutement** ou de nomination ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, **licencié** ou faire l'objet d'une **mesure discriminatoire, directe ou indirecte** [...], notamment en matière de **rémunération** [...]»³⁵⁶, de mesures d'intéressement ou de distribution d'actions, de **formation**, de reclassement, d'affectation, de qualification, de classification, de **promotion** professionnelle, de

³⁵⁰ Code de l'action sociale et des familles, article R. 241-31 alinéa 1 ; avant le 01.01.2019, cet article prévoyait que la durée de validité des décisions de la Commission des droits et de l'autonomie des personnes handicapées était de minimum un an et maximum cinq ans, sauf dispositions spécifiques contraires.

³⁵¹ Voir par exemple Joly, Handicap, *op. cit.* ; et *a contrario* Richevaux, Fasc. 8-10 : Travailleurs handicapés, *op. cit.*.

³⁵² Code du travail, article L. 5212-13.

³⁵³ Code pénal, article 225-2.

³⁵⁴ Code pénal, article 131-39, 2° à 5°, 8° et 9°, par renvoi de l'article 225-4 du même code.

³⁵⁵ A noter que la responsabilité pénale des personnes morales est limitée : voir Code pénal, article 121-2 .

³⁵⁶ Au sens de l'article L. 3221-3 du Code du travail: « Constitue une rémunération au sens du présent chapitre, le salaire ou traitement ordinaire de base ou minimum et tous les autres avantages et accessoires payés, directement ou indirectement, en espèces ou en nature, par l'employeur au salarié en raison de l'emploi de ce dernier. ».

mutation ou de **renouvellement de contrat** en raison de [...] de son état de santé, de sa perte d'autonomie ou de son handicap [...]. »³⁵⁷

Toute disposition ou tout acte pris à l'égard d'un salarié d'un employeur de droit privé ou employé dans des conditions de droit privé par une personne publique³⁵⁸ en méconnaissance de cette disposition est **nul**³⁵⁹. En outre, le défaut de mise en place de mesures appropriées peut ouvrir droit au versement de **dommages-intérêts**.³⁶⁰

Ainsi, il a pu être délibéré qu'un **refus d'embauche** fondé sur le refus de l'employeur de prendre les mesures appropriées pour permettre l'accès à l'emploi constitue une discrimination en raison du handicap³⁶¹. En outre, en raison de **l'obligation d'aménagement de poste**, un licenciement fondé sur le handicap est contraire à l'interdiction de discrimination si des mesures appropriées auraient permis la conservation d'un emploi³⁶².

Dans le domaine de la **fonction publique**, une disposition prévoit que :

« Aucune **distinction, directe ou indirecte**, ne peut être faite entre les fonctionnaires en raison [...] de leur état de santé, [...] de leur handicap [...] »³⁶³

Il est par ailleurs précisé que les mesures à prendre pour garantir le respect du principe d'égalité vise **l'accès à un emploi, sa conservation, le développement du parcours professionnel, l'accès à des fonctions de niveau supérieur et la formation**³⁶⁴.

Le principe de non-discrimination prohibe aussi bien les discriminations directes que les discriminations indirectes. Le droit commun définit ces deux concepts comme suit :

³⁵⁷ Code du travail, article L. 1132-1 (mise en évidence ajoutée).

³⁵⁸ Code du travail, article L. 1131-1.

³⁵⁹ Code du travail, article L. 1132-4.

³⁶⁰ Joly, Handicap, *op. cit.*, N 142.

³⁶¹ Haute autorité de lutte contre les discriminations et pour l'égalité, délibération n° 2009-128 du 27.04.2009, disponible sous : https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=16957 (10.09.2019). Dans le même sens, voir les délibérations n° 2005-34 du 26.09.2005, disponible sous, https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=1248 (10.09.2019) et n° 2006-183 du 18.09.2006, disponible sous : https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=4C6AC0D498E404F3E0E3722EC9DF2637.tpl_gfr43s_1?cidTexte=JORFTEXT000000270619&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000000005998 (10.09.2019).

³⁶² Voir Haute autorité de lutte contre les discriminations et pour l'égalité, délibération n° 2007-9 du 12.02.2007, disponible sous : https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=1064 (10.09.2019) ; Richevaux, Fasc. 8-10 : Travailleurs handicapés, *op. cit.*, N 169.

³⁶³ Loi portant droits et obligations des fonctionnaires, article 6 alinéas 2 et 3 (mise en évidence ajoutée).

³⁶⁴ Loi portant droits et obligations des fonctionnaires, article 6 sexies, I. Voir également l'article 27 de la Loi n° 84-16 du 11.01.1984 portant dispositions statutaires relatives à la fonction publique de l'Etat (ci-après Loi relative à la fonction publique d'Etat), qui précise qu' « aucun candidat ne peut être écarté, en raison de son handicap, d'un concours ou d'un emploi de la fonction publique, sauf si son handicap a été déclaré incompatible avec la fonction postulée à la suite de l'examen médical destiné à évaluer son aptitude à l'exercice de sa fonction » ; dans le même sens : Loi n° 84-53 du 26.01.1984 portant dispositions statutaires relatives à la fonction publique territoriale (ci-après Loi relative à la fonction publique territoriale), article 35 ; Loi n° 86-33 du 09.01.1986 portant dispositions statutaires relatives à la fonction publique hospitalière (ci-après Loi relative à la fonction publique hospitalière), article 27.

« Constitue une **discrimination directe** la situation dans laquelle, sur le fondement de [...] son état de santé, de sa perte d'autonomie, de son handicap, [...] une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.

Constitue une **discrimination indirecte** une disposition, un critère ou une pratique neutre en apparence, mais susceptible d'entraîner, pour l'un des motifs mentionnés au premier alinéa, un désavantage particulier pour des personnes par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens pour réaliser ce but ne soient nécessaires et appropriés. »³⁶⁵

Au titre de la **protection contre les discriminations**, les employeurs privés et publics³⁶⁶ en milieu ordinaire, sont tenus de garantir le respect du **principe d'égalité de traitement** à l'égard des travailleurs handicapés³⁶⁷. A cette fin, les employeurs doivent prendre les **mesures appropriées et proportionnées**, pour leur permettre d'accéder à un emploi ou de le conserver un emploi³⁶⁸.

Le refus de prendre de telles mesures peut être constitutif d'une **discrimination**, sauf à constituer une **différence de traitement autorisée**. Cette dernière est définie de la façon suivante :

« Les différences de traitement fondées sur l'inaptitude constatée par le médecin du travail en raison de l'état de santé ou du handicap ne constituent pas une discrimination lorsqu'elles sont objectives, nécessaires et appropriées. »³⁶⁹

Les notions de harcèlement et de victimisation ne sont pas apparues dans le cadre de nos recherches sur la protection contre la discrimination des personnes handicapées. On note seulement une affaire, ne concernant pas des travailleurs handicapés, mais dans laquelle il a été précisé que le non-respect répété des préconisations du médecin du travail peut constituer un harcèlement moral³⁷⁰. Cela étant, les activités du Défenseur des droits font apparaître un travail de sensibilisation et une tentative d'identification d'un harcèlement discriminatoire³⁷¹.

³⁶⁵ Loi n° 2008-496 du 27.05.2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations, article 1 alinéa 1 et 2 (mise en évidence ajoutée).

³⁶⁶ Code du travail, article L. 5213-6 ; et Loi n° 83-634 du 13.07.1983 portant droits et obligations des fonctionnaires (ci-après Loi portant droits et obligations des fonctionnaires), articles 6 et 6 sexies.

³⁶⁷ Cf. *supra* 2.2.

³⁶⁸ Code du travail, article L. 5213-6. La Loi portant droits et obligations des fonctionnaires, article 6 sexies, I. Cf. *infra* 3.1.

³⁶⁹ Code du travail, article L. 1133-3. L'article 6 alinéa 3 de la Loi portant droits et obligations des fonctionnaires précise que « des distinctions peuvent être faites afin de tenir compte d'éventuelles inaptitudes physiques à exercer certaines fonctions » (au 01.01.2020).

³⁷⁰ Cour de cassation, chambre sociale, 28.01.2010, n° 08-42616 ; Joly, Handicap, *op. cit.*, N 140.

³⁷¹ Voir notamment : Défenseur des droits, Discrimination - Le harcèlement discriminatoire au travail, Fiche pratique à destination des employeuses et des employeurs, disponible sous : https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/fiche_harcelement_discriminatoire.pdf (20.09.2019).

3. Intégration des personnes handicapées dans le milieu de l'emploi

3.1. Obligation d'aménagement des employeurs à l'égard des personnes handicapées

3.1.1. Mesures appropriées et proportionnées

En milieu ordinaire, les employeurs privés³⁷² et publics³⁷³ sont tenus de garantir le respect du principe d'égalité de traitement à l'égard des travailleurs handicapés³⁷⁴. A cette fin, les employeurs doivent prendre les **mesures appropriées** (obligation d'aménagement) pour leur permettre « d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée »³⁷⁵. Les logiciels doivent être accessibles et le télétravail doit être possible³⁷⁶.

Le Code du travail prévoit que **l'obligation d'aménagement raisonnable s'applique également au regard de l'accès à l'emploi** des personnes handicapées³⁷⁷. Ainsi, un employeur est « tenu d'aménager les modalités de recrutement pour permettre à la personne handicapée d'avoir les mêmes chances que les autres candidats, tout au long de la procédure de sélection. [Sous réserve que le candidat justifie de sa qualité de travailleur handicapé]. D'autre part, l'employeur doit prendre la décision de recruter ou non le candidat handicapé en ayant au préalable envisagé les mesures d'aménagement raisonnable susceptibles d'être mises en place pour lui permettre d'exercer l'emploi »³⁷⁸.

Dans la fonction publique, il est prévu que des conditions d'aptitude physique peuvent être exigées pour l'exercice d'une fonction ; toutefois il doit être tenu compte des **possibilités de compensation du handicap**³⁷⁹.

Le **caractère approprié et proportionné des mesures** attendues au titre de l'obligation d'aménagement raisonnable ne sont pas détaillés dans la loi.

Il apparaît néanmoins que l'objectif des mesures est de **permettre à la personne handicapée d'effectuer son travail sur un pied d'égalité avec les personnes non handicapées**³⁸⁰. L'obligation d'aménagement raisonnable « ne vise pas à conférer un traitement préférentiel aux personnes handicapées, [...] mais à garantir à chaque personne handicapée d'exercer son emploi à égalité avec les autres salariés »³⁸¹.

³⁷² Code du travail, article L. 5213-6.

³⁷³ Loi n° 83-634 du 13.07.1983 portant droits et obligations des fonctionnaires (ci-après Loi portant droits et obligations des fonctionnaires), articles 6 et 6 sexies.

³⁷⁴ Cf. *infra* 2.2. et 2.4..

³⁷⁵ Code du travail, article L. 5213-6. La Loi portant droits et obligations des fonctionnaires dispose : « d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de développer un parcours professionnel et d'accéder à des fonctions de niveau supérieur ainsi que de bénéficier d'une formation adaptée à leurs besoins tout au long de leur vie professionnelle » (article 6 sexies, I).

³⁷⁶ La disposition de la Loi relative aux fonctionnaires ne mentionne que l'aménagement des outils numériques.

³⁷⁷ Code du travail, article L. 5213-6 alinéa 1.

³⁷⁸ Joly, Handicap, *op. cit.*, N 103.

³⁷⁹ Loi portant droits et obligations des fonctionnaires, article 5, 5°, article 5 bis, 4°.

³⁸⁰ Joly, Handicap, *op. cit.*, N 114.

³⁸¹ Joly, Handicap, *op. cit.*, N 78.

En ce qui concerne le caractère raisonnable des aménagements que les employeurs sont tenus de mettre en place, ils n'ont l'obligation de prendre de telles mesures que « sous réserve que les charges consécutives à leur mise en œuvre ne soient pas **disproportionnées** »³⁸². Bien que le Code du travail ne comporte aucune définition de ce que représente une « charge disproportionnée »³⁸³, on peut relever que l'évaluation de proportionnalité s'effectue notamment au regard de l'aide financière du fonds de développement pour l'insertion professionnelle des handicapés attribuée par l'Etat aux entreprises soumises à l'obligation d'emploi de travailleurs handicapés³⁸⁴ ou d'autres aides pour le domaine public³⁸⁵. Sont également prises en considération **les ressources financières propres de l'employeur, les répercussions sur la contribution due au titre de l'obligation d'emploi** des travailleurs handicapés grâce à l'emploi de personnes handicapées³⁸⁶, **l'atteinte possible à la santé et à la sécurité** du travailleur handicapé et des autres salariés, **l'impossibilité technique** et **l'impact organisationnel** (atteinte au bon fonctionnement de l'entreprise).

3.1.2. Obligation de réentrainement au travail et de rééducation professionnelle

Le Code du travail prévoit que « tout travailleur handicapé peut bénéficier d'une réadaptation, d'une rééducation ou d'une formation professionnelle »³⁸⁷. L'éducation ou la rééducation professionnelle des travailleurs handicapés sont principalement assurées en dehors de la relation de travail et financées par des fonds publics³⁸⁸. Toutefois, **les établissements ou groupes d'établissements appartenant à une même activité professionnelle de plus de cinq mille salariés** ont l'obligation légale d'assurer, après avis médical, le **réentrainement au travail et la rééducation professionnelle de ses salariés malades et blessés**³⁸⁹. Le Code du travail indique que l'objectif du réentrainement au travail est de permettre au salarié de reprendre son travail et de retrouver rapidement son poste de travail antérieur ou d'accéder directement à un autre poste³⁹⁰. Le fait de ne pas respecter cette obligation de réentrainement de rééducation des salariés malades et blessés reconnus comme travailleurs handicapés³⁹¹, est puni d'une **amende de 750 euros** au plus³⁹². Par ailleurs, le manquement à cette obligation et le licenciement consécutif est susceptible d'ouvrir un droit à **réparation du préjudice causé**^{393, 394}.

³⁸² Code du travail, article L. 5213-6 alinéa 3 ; Loi portant droits et obligations des fonctionnaires, article 6 sexies, I, alinéa 1.

³⁸³ Pour une illustration de ce que cette obligation implique en termes d'objectif et de moyens, voir par exemple : Conseil de Prud'hommes de Rouen, section commerce, 27.01.2011, RG n° F 08/00390, disponible sous : https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=5158 (11.09.2019). offre une

³⁸⁴ Code du travail, article L. 5213-6.

³⁸⁵ Loi portant droits et obligations des fonctionnaires, article 6 sexies.

³⁸⁶ Joly, Handicap, *op. cit.*, N 126 à N 129.

³⁸⁷ Code du travail, article L. 5213-3.

³⁸⁸ Code du travail, articles R. 5213-9 et suivants.

³⁸⁹ Code du travail, article L. 5213-5 alinéa 1.

³⁹⁰ Code du travail, articles R. 5213-22.

³⁹¹ Cour de cassation, chambre sociale, 12.01.2011, n° 09-70.634 ; Richevaux, Fasc. 8-10 : Travailleurs handicapés, *op. cit.*, N 226.

³⁹² Code pénal, article 131-13.

³⁹³ Cour de cassation, chambre sociale, 16.05.2000 ; Richevaux, Fasc. 8-10 : Travailleurs handicapés, *op. cit.*, N 226.

³⁹⁴ Concernant les modalités de réalisation de son obligation par l'employeur, le rôle du médecin du travail, et la mise en demeure par l'inspection du travail, voir respectivement les articles R. 5213-23, R. 5213-24 et L. 5213-5 alinéa 2 du Code du travail.

3.1.3. Rupture du contrat de travail en milieu ordinaire de travail

Le Code du travail prévoit que la **durée du préavis de licenciement est doublée** à l'égard des travailleurs handicapés bénéficiant de l'obligation d'emploi. Néanmoins, cette durée ne peut excéder trois mois.³⁹⁵

3.1.4. Obligation d'emploi de travailleurs handicapés

Tous les employeurs du secteur privé, les établissements publics à caractère industriel et commercial et, à partir du 1^{er} janvier 2020, les employeurs publics, ont une **obligation d'emploi des travailleurs handicapés**, lorsque ces employeurs occupent au moins 20 salariés. Cette obligation d'emploi impose en principe que 6 % au minimum de l'effectif total des salariés soient des travailleurs handicapés ; et les bénéficiaires de cette obligation d'emploi des travailleurs handicapés sont listés dans le Code du travail.³⁹⁶ Les employeurs disposent néanmoins **d'autres modalités** pour s'acquitter de leur obligation d'emploi.

Tout d'abord, il est possible de s'acquitter **partiellement** de cette obligation, par exemple en concluant des **contrats de fournitures, de sous-traitance ou de prestations de services** avec des entreprises adaptées, avec des établissements et services d'aide par le travail ou avec des personnes handicapées exerçant leur activité comme travailleurs indépendants³⁹⁷ ; en accueillant des personnes handicapées pour des **période de mise en situation en milieu professionnel**³⁹⁸ ; ou encore, à compter du 1^{er} janvier 2020, par l'emploi des travailleurs handicapés bénéficiaires de l'obligation d'emploi **mis à disposition par les entreprises de travail temporaire** et par les groupement d'employeurs^{399, 400}

Ensuite, il est possible de s'acquitter **totalemment** de l'obligation d'emploi en mettant en place un **accord collectif** contrôlé⁴⁰¹ puis agréé par les autorités administratives⁴⁰². La conclusion d'un accord est un moyen d'assouplir la contrainte légale d'emploi de travailleurs handicapés, en valorisant les efforts déployés pour tendre vers les 6% de travailleurs handicapés dans les effectifs⁴⁰³. A compter du 1^{er} janvier 2020, cette alternative sera limitée dans le temps^{404, 405}.

³⁹⁵ Ces dispositions ne sont pas applicables lorsque des conventions, accords collectifs de travail, ou usages prévoient un préavis d'une durée au moins égale à trois mois ; Code du travail, article L. 5213-9.

³⁹⁶ Cf. *supra* 2.1. et 2.2..

³⁹⁷ Code du travail, article L. 5212-6 ; Joly, Handicap, in Répertoire de droit du travail, Dalloz, 2019, N 156 s.

³⁹⁸ Code du travail, article L. 5212-7-1 ; voir Joly, Handicap, *op. cit.*, N 165 s.

³⁹⁹ Code du travail, article L. 5212-7 (au 01.01.2020).

⁴⁰⁰ Voir également : Code du travail, article L. 5212-6 (au 01.01.2020) ; Code du travail, article L. 5212-7 (sur ce point, voir Joly, Handicap, *op. cit.*, N 161 s.) ; Loi portant droits et obligations des fonctionnaires, article 33 (au 01.01.2020).

⁴⁰¹ Voir Joly, Handicap, *op. cit.*, N 183.

⁴⁰² Code du travail, article L. 5212-8.

⁴⁰³ Joly, Handicap, *op. cit.*, N 170.

⁴⁰⁴ Code du travail, article R. 5212-18 au 01.01.2020.

⁴⁰⁵ Il est prévu qu'un accord comporte « un plan d'embauche en milieu ordinaire, un plan de maintien dans l'entreprise ainsi qu'une au moins des actions suivantes : 1° Un plan d'insertion et de formation ; 2° Un plan d'adaptation aux mutations technologiques » (Code du travail, article R. 5212-14). Le montant du budget à allouer pour la mise en œuvre de l'accord est encadré, et le bénéfice d'aides est réduit, sauf à atteindre le taux de 6 % d'emploi de personnes handicapées (Joly, Handicap, *op. cit.*, N 180). Il n'est pas prévu que cette possibilité soit ouverte en 2020 aux employeurs de droit public.

Enfin, le versement d'une **contribution annuelle** au fonds de développement pour l'insertion professionnelle des handicapés est une alternative permettant de s'acquitter partiellement ou totalement de l'obligation d'emploi⁴⁰⁶ (à compter du 1^{er} janvier 2020, la possibilité sera ouverte aux employeurs publics⁴⁰⁷). La contribution est calculée en fonction du nombre de travailleurs handicapés manquants, de l'accomplissement d'autres modalités d'acquittement de l'obligation d'emploi et du nombre de salariés de l'entreprise. Le Code du travail prévoit un accroissement du montant en l'absence d'emploi de personnes handicapées ou d'accord collectif après trois ans.⁴⁰⁸

Si un employeur du secteur privé ou un établissement public à caractère industriel et commercial ne remplit aucune de ses obligations, il est astreint à titre de **pénalité** au versement d'une somme dont le montant est égal à celui de **la contribution annuelle au fonds susmentionné, majoré de 25 %**⁴⁰⁹.

3.1.5. Aménagements spécifiques dans la fonction publique

Des dispositions propres à la fonction publique prévoient, en faveur des travailleurs handicapés, la **suppression des limites d'âge** supérieures fixées pour l'accès aux grades et emplois publics (ainsi que l'allongement égal à la durée des traitements et soins que les personnes qui ne sont plus travailleurs handicapés ont eu à subir, dans la limite de 5 ans), des **dérogations aux règles normales de déroulement du recrutement**,⁴¹⁰ le droit d'accomplir un service à **temps partiel**⁴¹¹, des **aménagements d'horaires**⁴¹², une **priorité en matière de mutations**⁴¹³, ou encore une procédure de recrutement par la **formation en alternance**⁴¹⁴.

3.1.6. Travail en milieu adapté

Les collectivités territoriales ou des organismes publics ou privés (y compris des sociétés commerciales) peuvent créer des **entreprises adaptées**. Ces dernières ont un **statut d'entreprises ordinaire**, avec une logique concurrentielle et une viabilité économique, mais avec des spécificités. Elles ont une **mission sociale visant à l'insertion professionnelle durable des personnes handicapées**. Elles emploient des proportions minimale (55 %) et maximale (100%) de travailleurs reconnus comme handicapés⁴¹⁵. Elles mettent en œuvre pour leurs salariés en situation de handicap « un accompagnement spécifique destiné à favoriser la réalisation de leur projet professionnel, la

⁴⁰⁶ Code du travail, article L. 5212-9.

⁴⁰⁷ La contribution sera versée au fonds pour l'insertion des personnes handicapées dans la fonction publique. Loi portant droits et obligations des fonctionnaires, article 38 (au 01.01.2020).

⁴⁰⁸ Code du travail, article L. 5212-10. Voir Joly, Handicap, *op. cit.*, N 195 s.

⁴⁰⁹ Code du travail, article L. 5212-12. Il n'est pas prévu que cette pénalité soit imposable en 2020 aux employeurs public.

⁴¹⁰ Loi relative à la fonction publique d'Etat, article 27 ; Loi relative à la fonction publique territoriale, article 35 ; Loi relative à la fonction publique hospitalière, article 27.

⁴¹¹ Loi relative à la fonction publique d'Etat, article 37 bis alinéa 2 ; Loi relative à la fonction publique hospitalière, 46-1 alinéa 3.

⁴¹² Loi relative à la fonction publique d'Etat, article 40 ter alinéa 1 ; Loi relative à la fonction publique territoriale, 60 quinquies alinéa 1 ; Loi relative à la fonction publique hospitalière, 47-2 alinéa 1

⁴¹³ Loi relative à la fonction publique d'Etat, articles 60 et 62 ; Loi relative à la fonction publique territoriale, article 54 ; Loi relative à la fonction publique hospitalière, article 38.

⁴¹⁴ Loi sur la fonction publique de l'Etat, article 22 bis ; Loi relative à la fonction publique territoriale), article 38 bis ; Loi relative à la fonction publique hospitalière, article 32-2.

⁴¹⁵ Code du travail, article L. 5213-13-1 alinéa 3 et article D. 5213-63.

valorisation de leurs compétences et leur mobilité au sein de l'entreprise elle-même ou vers d'autres entreprises »⁴¹⁶.

3.1.7. Travail en milieu protégé

Les personnes handicapées pour lesquelles la Commission des droits et de l'autonomie des personnes handicapées a constaté que « les capacités de travail ne leur permettent, momentanément ou durablement, à temps plein ou à temps partiel, ni de travailler dans une entreprise ordinaire ou dans une entreprise adaptée, ni d'exercer une activité professionnelle indépendante », sont accueillies dans des **établissements et services d'aide par le travail**⁴¹⁷. Ces personnes y ont un **statut d'usager et non de salarié** ; leurs conditions de travail sont éloignées du régime juridique de droit commun des salariés des entreprises privées. Des dispositions sont néanmoins prévues **pour faciliter le passage du travailleur handicapé en milieu ordinaire** par le biais de mises à disposition provisoires d'une entreprise afin d'exercer une activité à l'extérieur de l'établissement ou du service auquel il demeure rattaché⁴¹⁸.

Ces établissements médico-sociaux (publics ou privés) « offrent des possibilités d'**activités diverses à caractère professionnel**, ainsi qu'un **soutien médico-social et éducatif**, en vue de **favoriser l'épanouissement personnel et social** »⁴¹⁹. Ils « mettent en œuvre ou favorisent l'accès à des actions d'**entretien des connaissances**, de maintien des acquis scolaires et de **formation professionnelle**, ainsi que des **actions éducatives d'accès à l'autonomie et d'implication dans la vie sociale**, au bénéfice des personnes handicapées qu'ils accueillent »⁴²⁰.

Les travailleurs handicapés accueillis en établissements et services d'aide par le travail ont droit à une **rémunération garantie versée par cet établissement ou service**, dont le montant est compris entre 55,7% et 110,7% du salaire minimum de croissance⁴²¹.

3.1.8. Mesures d'aménagement pour les proches aidants

Le Code du travail prévoit un **congé de proche aidant**, d'ordre public, pour le salarié ayant au moins un an d'ancienneté dans son entreprise, lorsque, par exemple, son concubin, un enfant dont il assume la charge, un de ses ascendants ou de ceux de son concubin, ou encore une personne âgée à qui il vient régulièrement en aide, présentent un handicap ou une perte d'autonomie grave.⁴²² Ce congé ne peut

⁴¹⁶ Code du travail, article L. 5213-13-1. Voir les articles R. 5213-66 (parcours d'accompagnement individualisé), L. 5213-16 (mise à disposition provisoire d'un autre employeur en vue d'une embauche) et L. 5213-17 et D. 5213-86 (sécurisation du parcours d'insertion dans une entreprise ordinaire) du Code du travail.

⁴¹⁷ Code de l'action sociale et des familles, article L. 344-2.

⁴¹⁸ Code de l'action sociale et des familles, article L. 344-2-4. En cas d'embauche en milieu ordinaire, voir l'article L. 344-2-5 du Code de l'action sociale et des familles.

⁴¹⁹ Code de l'action sociale et des familles, article L. 344-2.

⁴²⁰ Code de l'action sociale et des familles, article L. 344-2-1.

⁴²¹ Code de l'action sociale et des familles, article R. 243.5. Le salaire minimum de croissance (SMIC) correspond au salaire horaire minimum légal qu'un salarié doit percevoir en France ; il est actuellement de 10.03 euros brut ; Service public, site officiel de l'administration française, Smic (salaire minimum de croissance), disponible sous : <https://www.service-public.fr/particuliers/vosdroits/F2300> (13.09.2019).

⁴²² Code du travail, article L. 3142-16.

excéder **un an**, pour l'ensemble de la carrière⁴²³. Avec l'accord de l'employeur, le salarié peut transformer ce congé en période d'activité à **temps partiel** ou le fractionner⁴²⁴.

Un salarié peut renoncer, anonymement et sans contrepartie, à tout ou partie de ses jours de repos non pris, pour qu'ils bénéficient à un autre salarié de l'entreprise qui vient en aide à un proche atteint d'une perte d'autonomie d'une particulière gravité ou présentant un handicap⁴²⁵.

Le congé de proche aidant est également prévu *mutatis mutandis* par des dispositions relatives à la **fonction publique**⁴²⁶. En outre, les fonctionnaires ont droit d'accomplir un service à **temps partiel** pour donner des soins à leur conjoint, à un enfant à charge ou à un ascendant atteint d'un handicap nécessitant la présence d'une tierce personne, ou victime d'un accident ou d'une maladie grave⁴²⁷ ; à un **congé de présence parentale** lorsque la maladie, l'accident ou le handicap d'un enfant à charge présente une particulière gravité, à hauteur de maximum 310 jours ouvrés sur 36 mois⁴²⁸ ; ainsi que des **aménagement d'horaires** pour leur permettre d'accompagner une personne handicapée, telle que leur concubin, un enfant à charge, un ascendant ou une personne accueillie à leur domicile⁴²⁹.

3.1.9. Accessibilité des lieux de travail

La réglementation générale en matière de conception des lieux de travail⁴³⁰ impose, **pour la construction de bâtiments neufs ou d'une partie neuve** d'un bâtiment existant servant de lieux de travail, l'aménagement propre à rendre les lieux de travail accessibles aux personnes handicapées, quel que soit leur type de handicap.⁴³¹ L'accessibilité est définie comme permettant aux personnes handicapées de **circuler, évacuer, se repérer et communiquer, avec la plus grande autonomie possible**⁴³². En outre, les lieux de travail doivent être conçus de manière à **permettre l'adaptation des postes de travail** aux personnes handicapées^{433, 434}.

⁴²³ Code du travail, article L. 3142-19.

⁴²⁴ Code du travail, article L. 3142-20. Voir également les articles L. 3142-21 et L. 3142-22 du même code sur la protection des droits du salarié.

⁴²⁵ Code du travail, article L. 3142-25-1.

⁴²⁶ Loi relative à la fonction publique d'Etat, article 34 ; Loi relative à la fonction publique territoriale, article 57, 10° bis ; Loi relative à la fonction publique hospitalière, article 41, 9° bis.

⁴²⁷ Loi relative à la fonction publique d'Etat, article 37 bis alinéa 3 ; Loi relative à la fonction publique territoriale, article 60 bis alinéa 2 ; Loi relative à la fonction publique hospitalière, article 46-1 alinéa 3.

⁴²⁸ Loi relative à la fonction publique d'Etat, article 40 bis ; Loi relative à la fonction publique territoriale, article 60 sexies ; Loi relative à la fonction publique hospitalière, article 41, 11°.

⁴²⁹ Loi relative à la fonction publique d'Etat, article 40 ter alinéa 2 ; Loi relative à la fonction publique territoriale, article 60 quinquies alinéa 2 ; Loi relative à la fonction publique hospitalière) 47-2 alinéa 2.

⁴³⁰ Applicable aux employeurs de droit privé, aux établissements publics à caractère industriel et commercial, aux établissements publics administratifs lorsqu'ils emploient du personnel dans les conditions du droit privé, aux établissements de santé, sociaux et médico-sociaux, et aux groupements collectifs sanitaire de droit public ; Code du travail, article L. 4111-1 et s..

⁴³¹ Code du travail, article R. 4214-26 alinéa 1.

⁴³² Code du travail, article R. 4214-26 alinéa 2.

⁴³³ Code du travail, article R. 4214-26 alinéa 3.

⁴³⁴ Voir par exemple : Code du travail, articles R. 4214-28 ; Arrêté du 27.06.1994 relatif aux dispositions destinées à rendre accessibles les lieux de travail aux personnes handicapées (nouvelles constructions ou aménagements) en application de l'article R. 235-3-18 du code du travail.

3.2. Incitations et assistance pour les employeurs

Sont ici présentées les principales aides à destination des employeurs de personnes handicapées, sans pouvoir prétendre à l'exhaustivité.

3.2.1. Dispositif de l'emploi accompagné

Le dispositif de l'emploi accompagné vise à permettre aux travailleurs handicapés d'accéder et de se maintenir dans un emploi rémunéré sur le marché du travail ordinaire. Il s'agit d'un **accompagnement médico-social et d'un soutien à l'insertion professionnelle**, pour le travailleur handicapé, mais qui bénéficie également à son employeur lorsque le travailleur est en poste. Au titre des prestations offertes, figurent une évaluation de la situation, et la détermination d'un projet professionnel et l'aide à sa réalisation. Le travailleur est assisté dans sa recherche d'emploi. En emploi, il est accompagné pour sécuriser son parcours professionnel, notamment en facilitant son accès à la formation, en proposant une intermédiation entre la personne handicapée et son employeur, ou encore des modalités d'aménagement de l'environnement de travail. Sont éligibles à ce soutien **les personnes reconnues travailleurs handicapés**, dès l'âge de 16 ans, et dont il est estimé qu'elles peuvent travailler en milieu ordinaire, dans le **secteur public ou privé**.⁴³⁵

3.2.2. Aides financières pour les employeurs du secteur privé soumis à l'obligation d'emploi des travailleurs handicapés

Les employeurs du secteur privé soumis à l'obligation d'emploi des travailleurs handicapés peuvent bénéficier d'aides financières lorsqu'ils embauchent un salarié handicapé. L'Association de gestion du fonds pour l'insertion professionnelle des personnes handicapées est principalement compétente pour l'allocation de ces aides. On dénombre : une **aide à l'accueil, à l'intégration et à l'évolution professionnelle** pour les contrats de travail d'au moins six mois (plafonnée à 3000 euros) ; une **aide à l'adaptation des situations de travail** pour l'employeur ou le travailleur handicapé indépendant, consistant par exemple en l'aménagement de poste, l'interprétariat, ou le tutorat (montant variable) ; une **aide à la recherche de solutions pour le maintien dans l'emploi** (montant variable) ; des **aides à l'embauche en contrat d'apprentissage ou de professionnalisation** pour une durée d'au moins six mois (plafonnée à 3000 ou 4000 euros selon le type de contrat) ; une **aide à l'emploi des travailleurs lourdement handicapés** pour l'employeur ou le travailleur handicapé indépendant (plafonnée à 10 818 euros) ; une **aide à la formation dans le cadre du maintien dans l'emploi** (montant variable).⁴³⁶

3.2.3. Travail en milieu adapté : aides financières de compensation des conséquences du handicap et des actions, et de contribution à l'accompagnement professionnel individualisé

Les entreprises adaptées reçoivent une aide financière de l'Etat « contribuant à **compenser les conséquences du handicap et des actions engagées liées à leur emploi** »⁴³⁷. Le montant de cette aide

⁴³⁵ Code du travail, articles L. 5213-2-1, D. 5213-88 s.

⁴³⁶ Site officiel de l'administration française, Aides financières pour l'embauche de travailleurs handicapés, disponible sous : <https://www.service-public.fr/professionnels-entreprises/vosdroits/F15204> (18.09.2019); références indiquées : Code du travail, articles L. 5213-6 à L. 5213-9, R. 5213-39 à R. 5213-51 ; Loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, *op. cit.* ; Arrêté du 09.09.2019 relatif aux modèles de formulaires de demande de reconnaissance de la lourdeur du handicap, aux modalités de calcul mentionnées à l'article R. 5213-45 du code du travail et au montant annuel de l'aide à l'emploi mentionné à l'article R. 5213-49 du même code.

⁴³⁷ Code du travail, article L. 5213-19.

est fixé contractuellement avec le préfet de région. Il varie afin de tenir compte de « l'impact du vieillissement de ces travailleurs » et de la revalorisation en fonction de l'évolution du salaire minimum de croissance⁴³⁸. Pour 2019, le montant annuel par poste de travail occupé à temps plein est d'environ 15 500 euros⁴³⁹.

Les entreprises adaptées sont éligibles à **l'ensemble des aides spécifiques à l'emploi des travailleurs handicapés**, sous réserve que ces aides portent sur un objet différent.

En cas de mise à disposition d'un travailleur handicapé auprès d'une entreprise ordinaire, une aide financière peut être versée pour **contribuer « à l'accompagnement professionnel individualisé** visant à favoriser la réalisation du projet professionnel et faciliter l'embauche » par l'entreprise ordinaire⁴⁴⁰ (4 100 euros pour un travailleur handicapé travaillant à temps plein⁴⁴¹).

3.2.4. Travail en milieu protégé : aide au poste

L'Etat verse une **aide au poste** aux établissements et services d'aide par le travail pour les aider à financer la rémunération garantie des travailleurs handicapés accueillis. Cette aide ne peut être supérieure à 50,7 % du salaire minimum de croissance et varie en fonction de la rémunération versée par l'établissement ou service⁴⁴².

3.2.5. Fonds pour l'insertion des personnes handicapées dans la fonction publique

Le Fonds pour l'insertion des personnes handicapées dans la fonction publique apporte des aides aux employeurs publics. Elles consistent en : une participation financière aux travaux d'**accessibilité aux locaux professionnels en relations avec l'aménagement de poste** (plafonnée à 15 000 euros, supprimée à compter du 1^{er} janvier 2020) ; des partenariats pour le **recrutement** avec des centres de gestion de la fonction publique et d'accompagnement des personnes en situation de handicap ; le financement de **l'accueil, l'aménagement du poste et de formations** avant et après le recrutement ; des aides financières et pratiques pour le **maintien dans l'emploi** d'agents dont le handicap s'aggrave ou survient (plafonnées à 10 000 euros pour le financement des aides techniques) ; participation financière aux **formations** des personnes en situation de handicap, à la fonction de tuteur ou destinées aux personnes susceptibles d'être en relation avec des travailleurs handicapés.⁴⁴³

3.2.6. Subvention d'installation pour les travailleurs handicapés ayant une activité indépendante

Les personnes handicapées orientées vers le marché du travail qui souhaitent exercer une activité indépendante peuvent bénéficier d'une subvention d'installation (5000 euros). Cette dernière

⁴³⁸ Code du travail, article R. 5213-76. Le salaire minimum de croissance (SMIC) correspond au salaire horaire minimum légal qu'un salarié doit percevoir en France ; il est actuellement de 10.03 euros brut.

⁴³⁹ Arrêté du 06.02.2019 fixant les montants des aides financières susceptibles d'être attribuées aux entreprises adaptées hors expérimentation, article 1.

⁴⁴⁰ Code du travail, article D. 5213-81.

⁴⁴¹ Arrêté du 18.02.2019 relatif aux critères des recrutements opérés soit sur proposition du service public de l'emploi, soit directement par les entreprises adaptées, et susceptibles d'ouvrir droit aux aides financières de l'Etat, article 2.

⁴⁴² Code de l'action sociale et des familles, article R. 243-6.

⁴⁴³ FIPHFP Emploi Handicap, disponible sous : <http://www.fiphfp.fr/> (18.09.2019) ; Décret n° 2006-501 du 03.05.2006 relatif au fonds pour l'insertion des personnes handicapées dans la fonction publique, article 3 en particulier.

contribue à l'achat et à l'installation de l'équipement nécessaire à cette activité.⁴⁴⁴ L'aide est cumulable avec les aides de droit commun et les autres aides de l'Association de gestion du Fonds pour l'insertion professionnelle des personnes handicapées.⁴⁴⁵

4. Application des droits

L'Etat assure le pilotage de la politique de l'emploi des personnes handicapées⁴⁴⁶. Pour ce faire, il conclue, avec Pôle Emploi (l'institution nationale publique chargée du placement et de l'accompagnement des demandeurs d'emploi), l'Association chargée de la gestion du fonds de développement pour l'insertion professionnelle des handicapés, le Fonds d'insertion des personnes handicapées dans la fonction publique et la Caisse nationale de solidarité pour l'autonomie, une **convention pluriannuelle d'objectifs et de moyens.**⁴⁴⁷

Afin d'assurer aux personnes handicapées un accès aux droits, les **Maisons départementales des personnes en situation de handicap** permettent la transmission, en un point d'accueil unique, des informations relatives aux droits, prestations, possibilité d'appui dans l'accès à la formation et à l'emploi et à l'orientation vers des établissements et services ainsi que de faciliter les démarches des personnes handicapées⁴⁴⁸.

Par principe, les différends s'élevant à l'occasion de tout contrat de travail entre les employeurs et les salariés qu'ils emploient relèvent de la compétence du conseil de **prud'hommes**. Ce dernier juge les litiges, lorsqu'une **conciliation** n'a pas abouti⁴⁴⁹ devant son bureau de conciliation et d'orientation⁴⁵⁰. Il pourra par exemple décider le versement d'indemnités et la réintégration dans l'entreprise. Les violations des droits relevant du droit pénal, telles qu'une discrimination fondée sur le handicap, peuvent faire l'objet d'un recours devant les **juridictions pénales**.

Le Code du travail ouvre aux **associations ayant pour objet principal la défense des intérêts des travailleurs handicapés une action civile**, lorsque cette inobservation porte un préjudice certain à l'intérêt collectif qu'elles représentent, fondée sur : l'inobservation des obligations des employeurs en matière d'obligation d'emploi des travailleurs handicapés⁴⁵¹ ; le non-respect du salaire minimum imposé pour des travailleurs handicapés⁴⁵² ; le non-respect de la durée spéciale de préavis en cas de licenciement⁴⁵³ ; ainsi qu'en matière d'aides financières par le Fonds de développement pour l'insertion professionnelle des handicapés⁴⁵⁴, et du concours à l'insertion professionnelle des personnes handicapées par les institutions et organismes chargés de cette mission⁴⁵⁵. L'association

⁴⁴⁴ Code du travail, article R. 5213-52 et suivants.

⁴⁴⁵ AGEFIPH, Aide à la création d'entreprise, disponible sous : <https://www.agefiph.fr/aides-handicap/aide-la-creation-dentreprise#precisions-utiles> (19.09.2019).

⁴⁴⁶ Code du travail, article L. 5214-1 A.

⁴⁴⁷ Les éléments constitutifs de cette convention sont notamment listés dans le Code du travail, article L. 5214-1 B.

⁴⁴⁸ Code de l'action sociale et des familles, article L. 146-3.

⁴⁴⁹ Code du travail, article L. 1411-1.

⁴⁵⁰ Voir Code du travail, articles L. 1454-1 et s. ; voir également l'article L. 1411-4 alinéa 1.

⁴⁵¹ Code du travail, article L. 5212-16.

⁴⁵² Code du travail, article L. 5213-21, par renvoi à l'article L. 5213-7.

⁴⁵³ Code du travail, article L. 5213-21, par renvoi à l'article L. 5213-9.

⁴⁵⁴ Code du travail, article L. 5213-21, par renvoi aux articles L. 5213-10 à L. 5213-12.

⁴⁵⁵ Code du travail, article L. 5214-4.

doit recevoir l'accord de la victime ou de son représentant légal⁴⁵⁶. En ce qui concerne la fonction publique, à compter du 1^{er} janvier 2020, de telles associations pourront exercer une action civile lorsque les employeurs publics ne respectent pas les prescriptions relatives à l'obligation d'emploi des travailleurs handicapés⁴⁵⁷.

En matière de discrimination, le législateur a élargi les possibilités d'action par le recours au **Défenseur des droits** et par l'action en justice en faveur des handicapés victimes de discriminations. Sous réserve de l'accord de la victime, les **associations** régulièrement constituées depuis au moins 5 ans et œuvrant dans le domaine du handicap peuvent exercer en justice toutes les actions qui naissent des textes destinés à lutter contre les discriminations. Ces possibilités s'ajoute à celle de l'action de substitution par un **syndicat représentatif** pour agir en justice à la place de la victime.⁴⁵⁸ En ce qui concerne l'action du Défenseur des droits, celui-ci peut tenter de régler à l'amiable les réclamations qu'il reçoit. Si un règlement amiable n'est pas possible, le Défenseur des droits peut formuler des recommandations. Afin d'assurer le suivi des recommandations, la personne mise en cause est tenue de rendre compte des suites qui ont été données. En l'absence de réponse ou en cas de réponse insuffisante, le Défenseur des droits dispose d'un pouvoir d'injonction pour imposer l'application de ses recommandations. Sans suite donnée à une telle injonction, le Défenseur des droits peut rendre public un rapport spécial nominatif. Par ailleurs, le Défenseur des droits peut demander aux autorités compétentes de prendre des sanctions disciplinaires (en particulier auprès de l'autorité administrative ayant donné l'agrément à la personne accusée, le cas échéant). Le Défenseur des droits peut encore intervenir devant toutes juridictions pour présenter ses observations.⁴⁵⁹ En ce qui concerne la fonction publique, un dispositif de signalement et d'orientation vers les autorités compétentes a été mis en place⁴⁶⁰.

5. Le cadre normatif en pratique

La Rapporteuse spéciale des Nations unies sur les droits des personnes handicapées rapporte que le ministère du Travail déclare que, **dans le secteur public, le taux de 6% d'emploi des personnes handicapées est presque atteinte dans les établissements soumis à cette obligation** d'emploi (avec 5,17 % des effectifs) ; alors que, **dans le secteur privé, les personnes handicapées ne représentent que 3,4 % des effectifs**. La Rapporteuse déplore que les « personnes handicapées à la recherche d'un emploi sont souvent **moins qualifiées** et plus âgées que les demandeurs d'emploi valides et n'ont **accès qu'aux emplois moins bien rémunérés nécessitant moins de compétences** »⁴⁶¹.

Le rapport annuel d'activité pour l'année 2018 du **Défenseur des droits** informe que « parmi les 5631 saisines reçues en 2018 mettant en cause une discrimination, **le handicap (22,8 %) reste, pour la seconde année, largement en tête des critères invoqués**, devant l'origine (14,9 %) et l'état de santé (10,5 %) »⁴⁶². Parmi les principaux motifs de réclamations traitées par l'institution dans le domaine de

⁴⁵⁶ Code de procédure pénale, article 2.8.

⁴⁵⁷ Loi portant droits et obligations des fonctionnaires, article 39 (au 01.01.2020).

⁴⁵⁸ Joly, Handicap, *op. cit.*, N 172 et N 173. Code du travail, articles L. 1134-2, L. 1134-3 et L. 1134-6 à L. 1134-10 ; Loi portant droits et obligations des fonctionnaires, article 8.

⁴⁵⁹ Défenseur des droits, Protection des droits, disponible sous : <https://www.defenseurdesdroits.fr/fr/institution/moyens/protection> (20.09.2019). Loi organique n° 2011-333 du 29.03.2011 relative au Défenseur des droits.

⁴⁶⁰ Loi portant droits et obligations des fonctionnaires, article 6 quater A.

⁴⁶¹ Rapport de la Rapporteuse spéciale sur les droits des personnes handicapées, Visite en France, 08.01.2019, A/HRC/40/54/Add. 1, N 41 et N 42.

⁴⁶² Défenseur des droits, Rapport annuel d'activité 2018, p. 42, disponible sous : <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf> (20.09.2019).

la lutte contre les discriminations, le critère du handicap s'élève à 3,9 % dans le domaine de l'emploi privé et à 4,3 % dans le domaine de l'emploi public⁴⁶³.

Une loi de 2018⁴⁶⁴ a mis en place plusieurs **expérimentations** visant principalement à favoriser les transitions professionnelles des travailleurs handicapés, des entreprises adaptées vers les autres entreprises. Ces expérimentation sont mises en œuvre avec le concours financier de l'Etat.⁴⁶⁵ Sont ainsi mis en place un contrat à durée déterminée dit « Tremplin », des entreprises adaptées de travail temporaire, et des entreprises adaptées dites « pro-inclusives » dont le principe est la mixité des profils et la parité dans les effectifs salariés entre travailleurs handicapés et valides.⁴⁶⁶

⁴⁶³ Défenseur des droits, Rapport annuel d'activité 2018, *op. cit.*, p. 43.

⁴⁶⁴ Loi n° 2018-771 du 05.09.2018 pour la liberté de choisir son avenir professionnel.

⁴⁶⁵ Loi n° 2018-771 du 05.09.2018 pour la liberté de choisir son avenir professionnel, articles 78 et 79.

⁴⁶⁶ Joly, Handicap, *op. cit.*, N 257 et s.

E. GERMANY

1. Einleitung

1.1. Überblick über das Land

Die **letzten offiziellen Zahlen** für den Anteil von Menschen mit Behinderungen, die in Deutschland leben stammen **aus dem Jahr 2017**. Diese betreffen jedoch nur Menschen, bei denen eine sogenannte **«Schwerbehinderung»** vorliegt. Dabei handelt es sich um einen durch das Gesetz definierten Begriff, der einen **Grad der Behinderung von wenigstens 50** bedeutet.⁴⁶⁷

Im Jahr 2017 lebten ca. **7,8 Millionen** Menschen mit Schwerbehinderung in Deutschland. Dies entsprach einer Quote von **9,4 % der Bevölkerung**. Im Jahr 2017 waren knapp **1,1 Mio. Arbeitsplätze mit schwerbehinderten Menschen besetzt**. Etwa 164.000 Arbeitgeber waren verpflichtet, Menschen mit Schwerbehinderungen zu beschäftigen, allerdings kamen dieser Pflicht nur 42.000 Arbeitgeber nach. Dies führte dazu, dass ca. **285.000 Pflichtarbeitsplätze unbesetzt** blieben.⁴⁶⁸

Deutschland ist ein **föderaler** Staat, in dem die **Gesetzgebungskompetenz** grundsätzlich bei den **Ländern** liegt, sowie sie nicht im Grundgesetz dem **Bund übertragen** wurde.⁴⁶⁹ Der Schutz behinderter Menschen am Arbeitsplatz fällt in die Kompetenz des Bundes⁴⁷⁰, und ist durch Bundesgesetze wie das 9. Buch des Sozialgesetzbuches (SGB IX) oder das Allgemeine Gleichbehandlungsgesetz (AGG) geregelt. **Ausgeführt** werden diese Gesetze jedoch im Rahmen ihrer **Verwaltungskompetenz** durch die Länder, die zum Sozialrecht diverse Ausführungsgesetze erlassen haben.⁴⁷¹

Das Verbot der Diskriminierung aufgrund einer Behinderung ist in Deutschland als besonderer Gleichheitssatz in **Art. 3 Grundgesetz (GG)** verfassungsrechtlich verankert.⁴⁷² Problematisch erschien jedoch inwieweit die gesetzliche Lage an internationale Standards und vor allem an die **Anforderungen der UN-Behindertenrechtskonvention (UN-BRK)** angepasst war, weshalb im Jahr 2016 das Bundesteilhabegesetz⁴⁷³ als umfassendes Gesetzespaket zur Umsetzung **der UN-BRK verabschiedet wurde**. Es brachte u.a. **weitreichende Neuregelungen des Schwerbehindertenrechts im SGB IX**.⁴⁷⁴

1.2. Überblick über den rechtlichen und politischen Rahmen

In Deutschland existiert **kein eigenständiges Regelwerk** für die Rechte von **Menschen mit Behinderungen** am Arbeitsplatz oder für Behindertenrecht allgemein. Die einschlägigen

⁴⁶⁷ N. Besgen, Schwerbehindertenrecht – Arbeitsrechtliche Besonderheiten, 3. Auflage, Berlin 2018, Teil 1: Geltungsbereich des SGB IX, Rn. 7.

⁴⁶⁸ Rehadat Statistik, Beschäftigungsstatistik schwerbehinderter Menschen, verfügbar unter https://www.rehadat-statistik.de/de/berufliche-teilhabe/Beschaeftigung/BA_Schwerbehindertenstatistik/index.html (02.08.2019).

⁴⁶⁹ Art. 30, 70 GG.

⁴⁷⁰ Die Bereiche der öffentlichen Fürsorge und des Arbeitsrechts sind gem. Art. 74 Abs. 1 Nr. 7 und 12 GG dem Bund übertragen; Schwerbehindertenschutz betrifft diese beiden Bereiche: BT-Drs. 18/9522, S.203ff.; T. von Roetteken, Auswirkungen des zum 1.1.2018 neu gefassten SGB IX auf den öffentlichen Dienst, ZBR 2018, 73.

⁴⁷¹ Art. 83 GG; BeckOK Grundgesetz/Suerbaum, 41. Ed. 15.5.2019, GG, Art. 83, Rn. 7-11.

⁴⁷² Art. 3 Abs. 3 S. 2 GG: «Niemand darf wegen seiner Behinderung benachteiligt werden.»

⁴⁷³ Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen (Bundesteilhabegesetz – BTHG) v. 23.12.2016, BGBl. 2016 Teil I Nr. 66, S. 3234ff.

⁴⁷⁴ J. Jousen in LPK-SGB IX, 5. Auflage 2019, Einführung, VI., Rn. 30; insgesamt Änderungen in 13 Gesetzen und vier Verordnungen.

Bestimmungen sind **über mehrere Gesetze** wie das Sozialgesetzbuch IX (**SGB IX**), das Allgemeine Gleichbehandlungsgesetz (**AGG**) und das Gesetz zur Gleichstellung von Menschen mit Behinderungen (**BGG**) verteilt. Sie gelten auch für das allgemeine Arbeitsrecht.

Das SGB IX wurde im Rahmen der aktuellen Gesetzesreform völlig neu gefasst. Die **Änderungen** treten **stufenweise bis 2023** in Kraft. Die wichtigsten **bereits gültigen** Neuerungen betreffen eine Neuausrichtung des Behindertenbegriffs sowie die Bereiche der Schwerbehindertenvertretung, der Inklusionsvereinbarungen, der Arbeitgeberpflichten, der Integrations- und Präventionsmassnahmen und der Berufsorientierung.⁴⁷⁵ Der neue **Teil II** gilt ab dem Jahr 2020 und regelt besondere Leistungen zur selbstbestimmten Lebensführung für Menschen mit Behinderungen (**Eingliederungshilferecht**). Hierdurch wird den betroffenen Menschen eine Möglichkeit gegeben in bestimmten Einrichtungen eine ihrer Behinderung angemessene Tätigkeit zu erbringen, sofern eine Beschäftigung am normalen Arbeitsmarkt wegen ihrer Einschränkungen nicht möglich ist. Dieses Eingliederungshilferecht ist bisher im SGB XII (Sozialhilferecht) geregelt. Durch die Verschiebung möchte man von einem einrichtungsorientierten Ansatz, der die Leistungen der Eingliederungshilfe in stationäre, teilstationäre und ambulante Leistungen aufteilt, hin zu einem mehr selbstbestimmten bzw. personenorientierten Ansatz wechseln. Das Teilhaberecht soll sich hierdurch mehr am **individuellen Bedarf** einer Person ausrichten und der Träger der Eingliederungshilfe soll mehr **Steuerungsmöglichkeiten** bekommen.⁴⁷⁶

2. Rechtlicher Rahmen

2.1. Rechtliche Basis für den Schutz und besondere Rechte am Arbeitsplatz

2.1.1. Rechtsgrundlagen zum Schutz von Arbeitnehmern mit Behinderungen

Die **zentralen Regelungen** zum Schutz von Menschen mit Behinderungen im Arbeitsbereich finden sich im **SGB IX**. § 1 SGB IX beschreibt die **wesentlichen Ziele** des Gesetzes:

- Förderung selbstbestimmter und gleichberechtigter Teilhabe am Leben in der Gesellschaft
- Vermeidung von Benachteiligungen
- mittelbar das übergreifende Ziel der Prävention nach § 3 SGB IX, soweit wie möglich den Eintritt von Behinderungen und chronischen Krankheiten zu vermeiden
- mittelbar die Abkehr von der Bevormundung behinderter Menschen.⁴⁷⁷

Die §§ 151ff. SGB IX enthalten spezifische Regeln zur **Teilhabe** schwerbehinderter und diesen gleichgestellter behinderter Menschen. Die Vorschriften beinhalten hauptsächlich Verpflichtungen für die Arbeitgeber zum Schutz der betroffenen Menschen und teils einklagbare Ansprüche der schwerbehinderten Arbeitnehmer, sofern die Arbeitgeber ihren Verpflichtungen nicht

⁴⁷⁵ J. Jousen in LPK-SGB IX, op.cit., Einführung, VI., Rn. 31.

⁴⁷⁶ Bundesarbeitsgemeinschaft für Rehabilitation, Bundesteilhabegesetz Kompakt, Teil 2 Eingliederungshilfe, S. 15, verfügbar unter <https://www.bar-frankfurt.de/fileadmin/dateiliste/publikationen/Sonstiges/downloads/BTHG.BF.05.pdf> (30.07.2019); 87. Arbeits- und Sozialministerkonferenz 2010, TOP 5.1 Weiterentwicklung der Eingliederungshilfe für Menschen mit Behinderungen, S. 32, verfügbar unter https://soziales.hessen.de/sites/default/files/HSM/beschluss_der_arbeits-und_sozialministerkonferenz_2010.pdf (13.08.2019).

⁴⁷⁷ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 1, Rn. 1; J. Jousen in LPK-SGB IX, op.cit., § 3, Rn. 2.

nachkommen.⁴⁷⁸ Bei all diesen Verpflichtungen haben die Arbeitgeber grundsätzlich mit den **Integrationsämtern** zusammenzuwirken, die auch deren Einhaltung überwachen. Die entscheidende Aufgabe der Integrationsämter liegt gem. § 185 Abs. 1-3 SGB IX in der begleitenden Hilfe im Arbeitsleben. Hiervon umfasst sind sämtliche Geschehensabläufe die mit der Berufstätigkeit oder Arbeitslosigkeit eines schwerbehinderten Menschen im Zusammenhang stehen.⁴⁷⁹

Das **Recht der Eingliederungshilfe** (aktuell noch in den §§ 53 ff. SGB XII) wurde durch die Reform des Schwerbehindertenrechts in die §§ 90ff. SGB IX verschoben.⁴⁸⁰ Die Eingliederungshilfe stellt eine **Sozialleistung** dar, die Menschen mit Behinderungen oder von Behinderung bedrohten Menschen helfen soll, die Folgen ihrer Behinderung zu mildern und sich in die Gesellschaft einzugliedern. Aufgabe der Eingliederungshilfe ist es, Leistungsberechtigten eine individuelle Lebensführung zu ermöglichen, die der Würde des Menschen entspricht, und die volle, wirksame und gleichberechtigte Teilhabe am Leben in der Gesellschaft zu fördern, § 90 Abs. 1 S. 1 SGB IX.

Darüber hinaus stellt das AGG ein **allgemeines Diskriminierungsverbot** aufgrund einer vorhandenen Behinderung auf.⁴⁸¹

Im Bereich des Schwerbehindertenrechts obliegt die Ausführung der einschlägigen bundesrechtlichen Normen gem. Art. 83 GG den Bundesländern. Diese haben nach der umfassenden Reform durch das Bundesteilhabegesetz neue **Ausführungsgesetze** zum Schwerbehindertenrecht erlassen.⁴⁸²

2.1.2. Einfluss der UN-Behindertenrechtskonvention und des Unionsrechts

Die **UN-BRK** hat nach Ratifizierung durch die Bundesrepublik Deutschland die Stellung eines **einfachen Bundesgesetzes**. Trotz dieses Umstandes musste auch sonstiges nationales Recht an die Konvention angepasst werden, da sich aus dieser grösstenteils keine **unmittelbaren** Rechte für die Bürger ergeben können.⁴⁸³ Nach der Rechtsprechung sind **nur** an den Stellen unmittelbare Ansprüche in der Konvention vorhanden, an denen sie **ohne weitere Zwischenschritte Rechte und Pflichten** zu erzeugen vermag. Viele Normen richten sich jedoch primär an den Gesetzgeber zur näheren innerstaatlichen Ausgestaltung.⁴⁸⁴

Die **Europäische Union** hat die Konvention verbindlich anerkannt, weshalb eine Art doppelter Schutz zur völkerrechtskonformen Auslegung besteht.⁴⁸⁵ Einschlägiges Sekundärrecht für das

⁴⁷⁸ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 151, Rn. 1ff.

⁴⁷⁹ B. Krämer in Feldes et al., Schwerbehindertenrecht, op.cit., § 185, Rn. 3.

⁴⁸⁰ BeckOK SozR, SGB IX, 53. Ed. 1.6.2019, § 90, §§ 90–93 (zukünftig in Kraft).

⁴⁸¹ Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung v. 14.08.2006, BGBl. 2006 Teil I Nr. 39, S. 1897ff.

⁴⁸² Umsetzungsbegleitung Bundesteilhabegesetz, Stand: Juli 2019, Ausführungsgesetze, S. 2ff., verfügbar unter https://umsetzungsbegleitung-bthg.de/w/files/umsetzungsstand/2019-07-18_umsetzungsstand-bthg.pdf (13.08.2019); Notwendige Umsetzungen in folgenden Bereichen: Bestimmung der zukünftigen Träger der Eingliederungshilfe, Bildung von Arbeitsgemeinschaften zur Förderung und Weiterentwicklung der Eingliederungshilfe, Abschluss von Rahmenverträgen zwischen Trägern der Eingliederungshilfe und Leistungserbringern, Bestimmung der Interessenvertretungen der Menschen mit Behinderungen, die an der Erarbeitung der Rahmenverträge mitwirken.

⁴⁸³ A. Euler in Boecken/Düwell/Diller/Hanau, Gesamtes Arbeitsrecht, Baden-Baden 2016, UN-BRK, Rn. 1.

⁴⁸⁴ OVG Lüneburg, Beschl. v. 16.9.2010, Az.: 2 ME 278/10 (**Kein** direkter Anspruch aus **Art. 24 UN-BRK**); Hess. VGH, Beschl. v. 12.11.2009, Az.: 7 B 2763/09 (**Keine** direkten Ansprüche aus **Art. 24, 31, 33, 35 UN-BRK**).

⁴⁸⁵ C. Rabe-Rosendahl, Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht- Artikel 5 der Richtlinie 2000/78/EG und seine Umsetzung in Deutschland und Grossbritannien, Studien zum deutschen und europäischen Arbeitsrecht Band 60, Baden-Baden 2017, Kapitel 3, B. I.

Antidiskriminierungsrecht ist vor allem die **Rahmenrichtlinie 2000/78/EG**.⁴⁸⁶ Deren Konzept der **angemessenen Vorkehrungen** wurde im Jahr **2000** u. a. durch Einführung des im heutigen § 164 Abs. 5 SGB IX enthaltenen Anspruch auf **Teilzeitbeschäftigung** sowie des **allgemeinen Diskriminierungsverbots** im heutigen § 164 Abs. 2 SGB IX i. V. m. den Bestimmungen des AGG im deutschen Recht umgesetzt.⁴⁸⁷

Nach dem Europäischen Gerichtshof (EuGH)⁴⁸⁸ muss zudem der **Anwendungsbereich** des rein personenbezogenen Behinderungsbegriffs im deutschen Recht **erweitert** werden. Demnach sind nicht nur unmittelbar von einer Behinderung Betroffene geschützt, sondern auch diejenigen die ohne eigene Behinderung eine Diskriminierung erfahren, weil sie ein Näheverhältnis zu einer behinderten Person haben. Entscheidend ist lediglich, dass eine **Diskriminierung aufgrund einer Behinderung** erfolgt.⁴⁸⁹

2.2. Reichweite des Schutzes

2.2.1. Unterscheidung nach Grad der Behinderung

Das SGB IX **unterscheidet** zwischen den Begriffen der **Behinderung**, der **Schwerbehinderung** und diesen **gleichgestellten behinderten** Menschen. Eine Schwerbehinderung tritt erst ab einem Grad der Behinderung von 50 ein und eine Gleichstellung kann ab einem Grad von 30 erfolgen.⁴⁹⁰ Die speziellen Schutzrechte der §§ 151ff. SGB IX gelten nur für diese beiden Gruppen.⁴⁹¹

2.2.2. Unterscheidung nach Art des Arbeitgebers

§ 154 Abs. 1 SGB IX schreibt **allen privaten und öffentlichen Arbeitgebern** die Beschäftigung einer **Mindestquote** bzw. Mindestanzahl von schwerbehinderten Menschen vor. Gesetzlich festgelegte Pflichten für Arbeitgeber gelten somit grundsätzlich für beide Formen von Arbeitgebern.

Für öffentliche Arbeitgeber⁴⁹² gelten zusätzlich spezielle Pflichten.⁴⁹³ Eine für Schwerbehinderte geeignete, neu zu besetzende Stelle, die nicht intern besetzt werden kann und nicht ausschliesslich intern ausgeschrieben wird⁴⁹⁴, muss der Bundesagentur für Arbeit gemeldet werden.

Das **Behindertengleichstellungsgesetz (BGG)** entspricht in seinen Zielen im Wesentlichen denen des SGB IX, gilt jedoch nur für Träger **öffentlicher** Gewalt auf Bundesebene. Es stellt eine einfachgesetzliche Konkretisierung von Art. 3 Abs. 3 S. 2 GG dar.⁴⁹⁵ Nach § 1 Abs. 3 BGG sollen Hoheitsträger darauf hinwirken, dass Einrichtungen des Privatrechts, an denen sie beteiligt sind, die Ziele des BGG einhalten. Somit sollen sie daran gehindert werden, ihre Verpflichtungen nach diesem Gesetz zu umgehen sowie ihre Grundrechtsbindungen durch Ausweichen auf privatrechtliche

⁴⁸⁶ RICHTLINIE 2000/78/EG DES RATES vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, Abl. L303 v. 2.12.2000, S.16 ff.

⁴⁸⁷ C. Rabe-Rosendahl, Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht, op.cit., Kapitel 3, C. I., II. 1.; Der heutige **§ 164 Abs. 4 SGB IX** mit seinem Anspruch auf fähigkeits- und behinderungsgerechte Beschäftigung existierte in seiner Grundform **bereits vor Erlass** der Richtlinie: BGBl. I S. 1421, Gesetz v. 26.8.1986.

⁴⁸⁸ EuGH v. 17. Juli 2008, C-303/06 («Coleman»).

⁴⁸⁹ C. Rabe-Rosendahl, Angemessene Vorkehrungen für behinderte Menschen im Arbeitsrecht, op.cit., Kapitel 3, B.IV.1; BeckOK BGB/Horcher, 50. Ed. 1.5.2019, AGG § 1 Rn. 8, 9.

⁴⁹⁰ § 2 SGB IX.

⁴⁹¹ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 151, Rn. 1ff.

⁴⁹² Definition in § 154 Abs. 2 SGB IX.

⁴⁹³ § 165 SGB IX.

⁴⁹⁴ F. Düwell in LPK-SGB IX, op.cit., § 165, Rn. 4f.

⁴⁹⁵ **Art. 3 Abs. 3 S. 2 GG:** «Niemand darf wegen seiner Behinderung benachteiligt werden.»

Handlungsformen aufzuheben:⁴⁹⁶ Nach Art. 1 Abs. 3 GG binden die Grundrechte alle drei Staatsgewalten.⁴⁹⁷ Institutionen des Privatrechts sind jedoch keine Träger öffentlicher Gewalt, weshalb die Ziele des BGG und die Grundrechte ihnen gegenüber nicht mehr gälten. Das BGG enthält **konkrete Ansprüche behinderter Menschen** innerhalb seines Anwendungsbereiches:⁴⁹⁸

- Benachteiligungsverbot für Träger öffentlicher Gewalt gem. § 7 BGG
- Herstellung von Barrierefreiheit in den Bereichen Bau und Verkehr gem. § 8 BGG
- Recht auf Verwendung von Gebärdensprache und anderen Kommunikationshilfen, § 9 BGG
- Bestimmung zur Gestaltung von Bescheiden und Vordrucken gem. § 10 BGG
- Verständlichkeit und leichte Sprache gem. § 11 BGG
- Bestimmungen für eine barrierefreie Informationstechnik gem. § 12 BGG

Extra aufgeführt werden die Verpflichtungen des Trägers öffentlicher Gewalt, Belange von Frauen mit Behinderung besonders zu berücksichtigen (§ 2 BGG) sowie die offizielle Anerkennung der Gebärdensprache (§ 6 BGG). Dies zielt vor allem auf besondere Schutzmassnahmen während einer Schwangerschaft ab sowie auf eine Stärkung der Kommunikationsmöglichkeiten.⁴⁹⁹

2.2.3. Unterscheidung nach Grösse des Betriebes

Der geschützte Personenkreis der §§ 151ff. SGB IX umfasst alle Menschen mit Schwerbehinderung, unabhängig von der Anzahl der Beschäftigten im Betrieb. Einzelne Pflichten wie die Erfüllung einer Beschäftigungsquote setzen jedoch eine Mindestanzahl an Arbeitnehmern voraus. Alle privaten und öffentlichen Arbeitgeber mit jahresdurchschnittlich monatlich **mindestens 20 Arbeitsplätzen** i. S. d. § 156 SGB IX müssen auf **wenigstens fünf Prozent der Arbeitsplätze** schwerbehinderte Menschen beschäftigen.⁵⁰⁰ Dabei sind schwerbehinderte Frauen besonders zu berücksichtigen. Diese Quote wird für **kleinere Betriebe herabgesetzt**. Bei weniger als 40 jahresdurchschnittlich Beschäftigten, gilt eine Mindestanzahl von einem schwerbehinderten Beschäftigten, und bei weniger als 60 Beschäftigten von mindestens zwei.⁵⁰¹ Im Rahmen dieser Beschäftigungspflicht sind bestimmte Gruppen von schwerbehinderten Menschen in angemessenem Umfang zu beschäftigen.⁵⁰² Jeder schwerbehinderte Beschäftigte auf einem Arbeitsplatz nach § 156 SGB⁵⁰³ wird auf einen **Pflichtarbeitsplatz angerechnet**.⁵⁰⁴

Von der Anrechnungsregel **können Ausnahmen** nach § 159 SGB IX **gewährt werden**: Die Bundesagentur für Arbeit kann die Anrechnung eines schwerbehinderten Menschen auf zwei oder drei Pflichtarbeitsplätze zulassen, soweit dessen Teilhabe am Arbeitsleben auf **besondere Schwierigkeiten**

⁴⁹⁶ D. Dau in LPK-SGB IX, Behindertengleichstellungsgesetz, op.cit., § 1 BGG, Rn. 3f.

⁴⁹⁷ Gesetzgebung, vollziehende Gewalt und Rechtsprechung, Maunz/Dürig/Herdegen, GG, 86. EL, Januar 2019, Art. 1 Abs. 3, Rn. 1.

⁴⁹⁸ D. Dau in LPK-SGB IX, Behindertengleichstellungsgesetz, op.cit., § 1 BGG, Rn. 2.

⁴⁹⁹ D. Dau in LPK-SGB IX, Behindertengleichstellungsgesetz, op.cit., § 2 BGG, Rn. 3, § 6 BGG, Rn. 2.

⁵⁰⁰ § 154 Abs. 1 SGB IX.

⁵⁰¹ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 154, Rn. 8.

⁵⁰² **§ 155 SGB IX** unterscheidet die schwerbehinderten Menschen danach, ob sie das 50. Lebensjahr vollendet haben oder nicht und verlangt bei Stellen für Auszubildende eine angemessene Quote; was genau unter den Begriff der Angemessenheit fällt, ist laut Kommentarliteratur völlig ungeklärt und kann nur den Statistiken der Bundesagentur für Arbeit über die Beschäftigungen von Menschen mit Schwerbehinderung entnommen werden: J. Jousen in LPK-SGB IX, op.cit., § 155, Rn. 6.

⁵⁰³ Nach dem Wortlaut der Norm fallen hierunter alle Stellen, auf denen Arbeitnehmer, Beamte, Richter, Auszubildende und andere zu ihrer beruflichen Bildung Eingestellte beschäftigt werden.

⁵⁰⁴ Siehe **§ 158 SGB IX**; Auszubildende und Referendare, die einen Rechtsanspruch auf Einstellung haben, zählen für die Berechnung der Mindestanzahl von Arbeitsplätzen und der Zahl der Arbeitsplätze, auf denen schwerbehinderte Menschen zu beschäftigen sind, nicht mit (**§ 157 SGB IX**).

stösst.⁵⁰⁵ Der Arbeitgeber muss dann nur einen statt zwei oder drei schwerbehinderten Arbeitnehmern einstellen. **Gründe** für besonderen Schwierigkeiten können unter anderem sein:

- Art und Schwere der Behinderung, soweit sie auf den konkreten Arbeitsplatz bezogen eine wesentliche Leistungsminderung zur Folge hat
- Hohes Alter
- besondere Ausstattung des Arbeitsplatzes
- Notwendigkeit der Einstellung einer Arbeitsassistentin
- Notwendigkeit des Transports für den täglichen Arbeitsweg.

2.2.4. Unterscheidung nach Beschäftigungsform

Auf die Beschäftigungsform kommt es für das Eingreifen des Schutzes der §§ 151ff. SGB IX **nicht an**.⁵⁰⁶ Nur in **seltenen** Fällen kann es passieren, dass diese eine **Rolle** spielt. Schwerbehinderte Arbeitnehmer können sich nur auf die Erfüllung der Mindestquote berufen, wenn ein **berücksichtigungsfähiger Arbeitsplatz** i. S. v. § 156 SGB IX vorliegt, auf den sie sich beworben haben.⁵⁰⁷

Für bestimmte Tätigkeitsformen **gilt die Mindestquote** dagegen **nicht**. Unberücksichtigt bleiben freie Mitarbeiter, die ihre Tätigkeit nicht in persönlicher Abhängigkeit leisten, Selbstständige, auch wenn im Einzelfall eine persönliche bzw. wirtschaftliche Abhängigkeit vorliegen kann, sowie Leiharbeiter. Diese sind immer dem Bereich des Verleiherbetriebes, also dem entsendenden Arbeitgeber, zuzuordnen. Der Entleiherbetrieb könnte sich ansonsten durch dauerhafte Beschäftigung von Leiharbeitern seiner Mindestbeschäftigungspflicht entziehen.⁵⁰⁸

2.3. Definition von Behinderung

Eine Definition von **Behinderung** findet sich in § 2 Abs. 1 S. 1 SGB IX. Demnach handelt es sich bei Menschen mit Behinderung um «Menschen, die körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, die sie in Wechselwirkung mit einstellungs- und umweltbedingten Barrieren an der gleichberechtigten Teilhabe an der Gesellschaft mit hoher Wahrscheinlichkeit länger als sechs Monate hindern können».⁵⁰⁹ Gem. § 2 Abs. 1 S. 2 SGB IX liegt eine Beeinträchtigung nach Satz 1 vor, wenn der Körper- oder Gesundheitszustand von dem für das Lebensalter typischen Zustand abweicht.⁵¹⁰ Von Behinderungen bedroht sind Menschen, wenn eine solche Beeinträchtigung zu erwarten ist, § 2 Abs. 1 S. 3 SGB IX.⁵¹¹

Der Begriff der Behinderung wurde mit der Gesetzesreform **sprachlich** weitestgehend an Art. 1 Abs. 2 UN-BRK **angenähert**. Vor der Änderung stellte die Definition auf ein rein medizinisches Modell ab. Die Behinderung wurde nur als Resultat körperlicher Beeinträchtigungen gesehen. Die Konvention sieht als Ansatzpunkt für die Behinderung jedoch äussere Faktoren, unabhängig von der Person. Sollten diese zu einer Hinderung der Teilhabe an der Gesellschaft führen, so liegt eine Behinderung vor. Auch nach der Anpassung des Gesetzeswortlautes wurden diese Kriterien nicht vollständig ins SGB IX

⁵⁰⁵ Die besonderen Schwierigkeiten müssen nicht notwendigerweise mit der Behinderung in Zusammenhang stehen, J. Jousen in LPK-SGB IX, op.cit., § 159, Rn. 11f.

⁵⁰⁶ Wie oben im Rahmen der Beschäftigungsquote bereits erwähnt gilt der Schutz für alle schwerbehinderten und diesen gleichgestellten behinderten Menschen.

⁵⁰⁷ J. Jousen in LPK-SGB IX, op.cit., § 156, Rn. 4.

⁵⁰⁸ J. Jousen in LPK-SGB IX, op.cit., § 156, Rn. 24, 25, 27.

⁵⁰⁹ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 2, Rn. 4.

⁵¹⁰ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 2, Rn. 14.

⁵¹¹ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 2, Rn. 16.

aufgenommen. Das Gesetz hat mithin eine Art «Zwitterstellung», da es weiterhin (auch) auf die in der Person liegende Beeinträchtigung abstellt.⁵¹²

Das Gesetz enthält zudem eine Definition des Begriffes der **Schwerbehinderung**. Nach § 2 Abs. 2 SGB IX sind Menschen schwerbehindert, wenn bei ihnen ein Grad der Behinderung von wenigstens 50 vorliegt.⁵¹³ Schwerbehinderten Menschen sollen solche Menschen mit Behinderungen **gleichgestellt** werden, die **einen Grad der Behinderung von wenigstens 30 aber unter 50** aufweisen und bei denen die übrigen Voraussetzungen des Abs. 2 vorliegen, wenn sie infolge ihrer Behinderung **ohne die Gleichstellung einen geeigneten Arbeitsplatz nicht erlangen oder nicht behalten** können.⁵¹⁴

Eine offizielle Gleichstellung durch die **Bundesagentur für Arbeit** erfolgt auf Antrag und aufgrund einer Feststellung des Grades der Behinderung durch die für die Durchführung des Bundesversorgungsgesetzes zuständigen Behörden.⁵¹⁵

Eine Gleichstellung **zur Erlangung eines Arbeitsplatzes** soll erfolgen, wenn der Arbeitnehmer aufgrund seiner Behinderungen nach wertender Betrachtung in seiner Wettbewerbsfähigkeit gegenüber anderen benachteiligt ist. Diese Alternative gilt nicht nur für zuvor Arbeitslose sondern auch für solche Arbeitnehmer, die eine Beförderung erreichen wollen.⁵¹⁶

Die Gleichstellung **zur Erhaltung des Arbeitsplatzes** soll hingegen erfolgen, wenn bei wertender Betrachtung gerade in der Art und Schwere der Behinderung die Schwierigkeit der Erhaltung liegt. Der Arbeitnehmer muss aufgrund seiner Behinderung am Arbeitsplatz einer Konkurrenzsituation ausgesetzt sein, wobei nicht erforderlich ist, dass eine Prognose ergibt, dass die Erhaltung des Arbeitsplatzes durch die Gleichstellung vollkommen sichergestellt wird. Ausreichend ist vielmehr, dass durch die Gleichstellung der Arbeitsplatz wahrscheinlicher behalten werden kann.⁵¹⁷

Die Definition umfasst **vier Arten** von Beeinträchtigungen: körperliche, seelische, geistige und Sinnesbeeinträchtigungen. **Körperliche** Beeinträchtigungen beinhalten alle Bereiche bezogen auf den Körper und nicht nur organische oder orthopädische Bereiche.⁵¹⁸ Eine Allergie fällt demnach ebenso unter diesen Begriff wie eine Querschnittslähmung. «**Seelisch** behindert ist derjenige, der infolge seelischer Störungen in seiner Funktionsfähigkeit beeinträchtigt ist», wobei dies nicht messbar ist, sondern durch einen Gutachter aufgrund subjektiver Beurteilungen und Wertungen bestimmt wird.⁵¹⁹

Geistige Beeinträchtigungen sind «solche der intellektuellen und kognitiven Fähigkeiten wie Wahrnehmung, Erkennen, Denken, Vorstellen, Erinnern und Urteilen» sowie des Bewusstseins und der

⁵¹² UN-Behindertenrechtskonvention, Menschen mit Behinderungen, verfügbar unter: <https://www.behindertenrechtskonvention.info/menschen-mit-behinderungen-3755/> (16.08.2019); Als **Vergleich**: § 2 Abs. 1 S. 1 SGB IX **alte Fassung**: «(1) Menschen sind behindert, wenn ihre körperliche Funktion, geistige Fähigkeit oder seelische Gesundheit mit hoher Wahrscheinlichkeit länger als sechs Monate von dem für das Lebensalter typischen Zustand abweichen und daher ihre Teilhabe am Leben in der Gesellschaft beeinträchtigt ist.»

⁵¹³ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 2, Rn. 17ff., § 156, Rn. 1.

⁵¹⁴ **§ 2 Abs. 3 SGB IX**; B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 2, Rn. 35.

⁵¹⁵ **§§ 151 Abs. 2, 152 Abs. 1 S. 1 SGB IX**; B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 151, Rn. 3f., § 152, Rn. 2.

⁵¹⁶ Rolfs in Erfurter Kommentar zum Arbeitsrecht, SGB IX, 19. Auflage 2019, Erfurt 1998, § 151, Rn. 10.

⁵¹⁷ Rolfs in Erfurter Kommentar zum Arbeitsrecht, SGB IX, op.cit., § 151, Rn. 12.

⁵¹⁸ J. Joussen in LPK-SGB IX, op.cit., § 2, Rn. 6.

⁵¹⁹ G. Kuhn-Zuber in Deinert & Welti, StichwortKommentar Behindertenrecht 2014, Baden-Baden, 130. Seelische Behinderung, Rn. 2.

«mentalen Funktion Bewegungshandlungen durchzuführen».⁵²⁰ Unter **Sinnesbeeinträchtigungen** sind Einschränkungen von Sehvermögen, Hörvermögen, Geruchs-, Geschmacks- oder Tastsinn zu verstehen. Darüber hinaus fallen hierunter Probleme des «Temperaturempfindens und der Empfindlichkeit gegenüber anderen Reizen oder gegenüber Schmerz».⁵²¹

§ 2 Abs. 1 S. 1 SGB IX legt fest, dass die Behinderung wenigstens eine Dauer von **sechs Monaten** erreichen muss um vorübergehende Störungen aus dem Anwendungsbereich auszuschliessen. Die Rahmenrichtlinie 2000/78/EG auf der diese Vorschrift basiert enthält keine solche zeitliche Mindestanforderung. Der EuGH geht allerdings von einer langfristigen Beschränkung als Erfordernis aus. Die Mindestanforderung von sechs Monaten im deutschen Recht begegnet somit keinen Bedenken.⁵²²

Der Wortlaut des § 2 Abs. 1 S. 1 SGB IX ist enger gefasst als der des Art. 1 Abs. 2 UN-BRK. Ersterer stellt auf «einstellungs- und umweltbedingte» Barrieren ab und nicht auf «verschiedene». Hierdurch sorgt der Wortlaut für eine gewisse Unklarheit hinsichtlich des Verhältnisses zwischen der Beeinträchtigung selbst und den einstellungsbedingten Barrieren. Er impliziert die Möglichkeit, dass auch nur eine unerhebliche Beeinträchtigung alleine aufgrund einstellungsbedingter Barrieren wie Vorurteilen der Definition unterfällt. Dieses Ausufern des Begriffs der «Menschen mit Behinderung» war jedoch nicht gewollt, weshalb man an die Auslegung nun sehr strenge Anforderungen stellt.⁵²³ So bringt der Wortlaut der Norm immer noch ein eher medizinisches Verständnis von Behinderung mit sich, weil er als Ursache für eine Teilhabebeeinträchtigung gerade nicht die Wechselwirkung von Funktionsbeeinträchtigung und gesellschaftlichen Barrieren sieht, sondern allein die Funktionsbeeinträchtigung.⁵²⁴ Die UN-BRK hingegen beinhaltet das **bio-psycho-soziale Modell**, das die Behinderung nicht als Defizit der Person sieht, sondern als **gesellschaftlich verursachtes Problem**.⁵²⁵

2.4. Formen des Schutzes vor Diskriminierung

Das deutsche Recht sieht für den Schutz der Menschen mit Behinderung in Beschäftigungsverhältnissen verschiedene Formen vor.

Ausgestaltet ist dies in verschiedenen **Ansprüchen** auf die sich die schwerbehinderten Arbeitnehmer berufen können wie etwa auf Zusatzurlaub, die Freistellung von Mehrarbeit oder Teilzeitbeschäftigung, wenn dies nach Art und Schwere der Behinderung erforderlich ist. Darüber hinaus unterliegen sie einem **besonderen Kündigungsschutz** und sind durch ein allgemeines Benachteiligungsverbot inklusive dem Verbot der Frage nach dem Grad der Behinderung geschützt. Bei einem Verstoß hiergegen steht den schwerbehinderten Menschen auch ein **Schadensersatzanspruch** gem. § 15 Abs. 1, 2 AGG zu. Sie können auch verschiedene **Sozialleistungen** wie etwa die Gewährung von **Eingliederungshilfe** im Bereich des Arbeitslebens durch die Träger der gesetzlichen Versicherungen beantragen.

2.4.1. Rechte vor einem Beschäftigungsverhältnis

§ 164 Abs. 2 SGB IX i. V. m. den Regelungen des AGG verbietet den Arbeitgebern jede Art der Benachteiligung und schützt den Arbeitnehmer auch schon vor Aufnahme einer Tätigkeit vor

⁵²⁰ J. Joussen in LPK-SGB IX, op.cit., § 2, Rn. 7.

⁵²¹ J. Joussen in LPK-SGB IX, op.cit., § 2, Rn. 6.

⁵²² EuGH v. 11.04.2013 – C335/11 und 337/11; EuGH v. 01.12.2016 – C395/15; J. Joussen in LPK-SGB IX, op.cit., § 2, Rn.9.

⁵²³ M. Benedix in Knickrehm et al., Kommentar zum Sozialrecht, op.cit., § 2 Rn. 2.

⁵²⁴ M. Banafsche in Deinert & Welti, Behindertenrecht, op.cit., 24. Behindertenrechtskonvention, Rn. 13.

⁵²⁵ M. Banafsche in Deinert & Welti, Behindertenrecht, op.cit., 24. Behindertenrechtskonvention, Rn. 11 f.

Diskriminierungen aufgrund seiner Behinderung. Der Begriff der Behinderung ist hier medizinisch-sozial zu verstehen.⁵²⁶ Erfasst werden grundsätzlich alle Einschränkungen, aber insbesondere die, die auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen sind und zu einer Benachteiligung bei der Teilhabe am Berufsleben führen.⁵²⁷

Verboten ist eine **unmittelbare Benachteiligung** («weniger günstige Behandlung des Betroffenen als eine andere Person in einer vergleichbaren Situation wegen eines der in § 1 AGG genannten Gründe»). Entscheidend ist hier die «objektive Beurteilung und nicht subjektive Sichtweise des Betroffenen» sowie ein «Vergleich mit einer real existierenden oder fiktiven Person».⁵²⁸ Die Behinderung muss für die benachteiligende Massnahme wenigstens mitentscheidend gewesen sein.⁵²⁹ Auch bei einer **mittelbaren Benachteiligung** ist ein solcher Personenvergleich durchzuführen. Diese Form liegt vor, wenn «Vorschriften, Kriterien oder Verfahren angewandt werden, die neutral erscheinen, bei denen aber durch § 1 AGG geschützte Personen im Vergleich zu anderen in besonderer Weise benachteiligt werden».⁵³⁰

Sollte gegen das Benachteiligungsverbot verstossen werden, so kann der Arbeitnehmer vom Arbeitgeber **Schadenersatz** verlangen. Darunter fallen solche entgangenen Vermögensvorteile, die aus einer Nichteinstellung resultieren und bis zum ersten hypothetisch möglichen Kündigungstermin hätten erzielt werden können. Erfasst sind auch alle immateriellen Schäden, die kausal aus der Benachteiligung herrühren.⁵³¹

Ein solcher Verstoss kann **gerechtfertigt** sein wenn die Behinderung «wegen der Art der auszuübenden Tätigkeit oder der Bedingungen ihrer Ausübung eine wesentliche und entscheidende berufliche Anforderung darstellt, sofern der Zweck rechtmässig und die Anforderung angemessen ist».⁵³²

Relevant wird in diesem Zusammenhang die **Zulässigkeit der Frage nach dem Grad der Behinderung**. Auch wenn man ursprünglich von deren Zulässigkeit aufgrund der rechtlichen, wirtschaftlichen und betrieblichen Bedeutung ausging, wenn sich die Behinderung auf die konkrete Tätigkeit auswirkt,⁵³³ so wird die Frage nun verneinend beantwortet.⁵³⁴ Begründet wird dies mit einem Vergleich zur Frage nach einer Schwangerschaft. Diese stellt eine Diskriminierung wegen des Geschlechts dar, die naturgemäss nur Frauen treffen kann.⁵³⁵ Dasselbe muss für die Frage nach dem Behinderungsgrad gelten, die eine Vorbereitungshandlung zur Diskriminierung darstellt und nur behinderte Menschen treffen kann.⁵³⁶ Möglicherweise damit einhergehende Belastungen für den Arbeitgeber aufgrund dieser Unkenntnis sind vom Gesetzgeber gewollt.⁵³⁷

⁵²⁶ EuGH NZA 06, 839

⁵²⁷ J. Ellenberger in Palandt AGG, 78. Auflage 2019, München, § 1 Rn. 6.

⁵²⁸ J. Ellenberger in Palandt AGG, op.cit., § 3 Rn. 2.

⁵²⁹ J. Ellenberger in Palandt AGG, op.cit., § 3 Rn. 2.

⁵³⁰ J. Ellenberger in Palandt AGG, op.cit., § 3 Rn. 3.

⁵³¹ W. Weidenkaff in Palandt AGG, op.cit., § 15 Rn. 5, 6.

⁵³² W. Weidenkaff in Palandt AGG, op.cit., § 8 Rn. 2.

⁵³³ BAG v. 01.08.1985 – 2 AZR 101/83, AP Nr. 30 zu § 123 BGB

⁵³⁴ Hess.LAG v. 24.3.2010 – 6/7 Sa 1373/09; LAG Baden-Württemberg v. 6.9.2010 – 4 Sa 18/10.

⁵³⁵ O. Deinert in Deinert & Welti, Behindertenrecht, op.cit., 56. Fragerecht des Arbeitgebers, Rn. 7.

⁵³⁶ O. Deinert in Deinert & Welti, Behindertenrecht, op.cit., 56. Fragerecht des Arbeitgebers, Rn. 16; M. Benecke in Münchener Handbuch zum Arbeitsrecht, Band 1: Individualarbeitsrecht I, 4. Auflage 2018, München, § 33, Rn. 24.

⁵³⁷ O. Deinert in Deinert & Welti, Behindertenrecht, op.cit., 56. Fragerecht des Arbeitgebers, Rn. 15.

Das Bundesarbeitsgericht (BAG) hat mittlerweile anerkannt, dass der Arbeitgeber ein **Fragerecht** hat, wenn das Arbeitsverhältnis bereits sechs Monate besteht und damit der Sonderkündigungsschutz gem. §§ 168, 173 Abs. 1 S. 1 Nr. 1 SGB IX greift.⁵³⁸

2.4.2. Rechte während und nach der Zeit der Beschäftigung

Schwerbehinderte Arbeitnehmer haben gem. § 208 Abs. 1 S. 1 SGB IX **während der Zeit ihrer Beschäftigung** einen Anspruch auf **Zusatzurlaub** von fünf zusätzlichen bezahlten Urlaubstagen im jeweiligen Urlaubsjahr. **Gleichgestellte** behinderte Menschen können sich **nicht** darauf berufen.⁵³⁹

Nach § 207 SGB IX sind schwerbehinderte Arbeitnehmer und diesen gleichgestellte behinderte Menschen auf ihr Verlangen hin **von jeglicher Mehrarbeit freizustellen**.⁵⁴⁰ Hierbei handelt es sich um solche Arbeitsstunden, die über die **gesetzliche** Arbeitszeit von acht Stunden am Tag **hinausgehen**.⁵⁴¹

Zudem besteht ein **Anspruch auf Teilzeitbeschäftigung**, sofern eine Reduzierung der Arbeitszeit wegen der Art und Schwere der bestehenden Behinderung notwendig ist. In der Folge besteht ein nach den **konkreten Umständen des Einzelfalles** zu bestimmender Anspruch⁵⁴², in einem der Behinderung Rechnung tragenden zeitlichen Umfang eingesetzt zu werden.⁵⁴³ Begrenzt wird dieser Anspruch durch den **Verhältnismäßigkeitsgrundsatz**.⁵⁴⁴ Demnach kann der Arbeitgeber ein entsprechendes Begehren bei für ihn unzumutbaren Aufwendungen ablehnen.⁵⁴⁵

Das Recht der **Eingliederungshilfe** gewährt Unterstützungen durch das Sozialamt, das verschiedene Kosten für Hilfen zur Teilhabe übernimmt. Nach § 53 Abs. 1 S. 1 SGB XII erhalten Menschen mit Behinderung derartige Leistungen, wenn und solange die Aussicht besteht, damit die Rehabilitations- bzw. Eingliederungsziele zu erreichen und die Leistungen hierfür auch notwendig sind. Berechtigt sind somit nur solche Menschen, die wesentlich in ihrer Fähigkeit an der Gesellschaft teilzuhaben beeinträchtigt sind.⁵⁴⁶ Zu diesen Leistungen zählen u.a. solche zur **Teilhabe am Arbeitsleben**. Inhaltlich wurde das Leistungsangebot der Eingliederungshilfe durch die Neuregelungen erweitert. Neben anerkannten Behindertenwerkstätten werden nunmehr auch andere Leistungsanbieter zugelassen und die Leistung «Budget für Arbeit» wurde neu eingeführt.⁵⁴⁷

§ 168 SGB IX regelt einen **besonderen Kündigungsschutz**. Hiernach bedarf die Kündigung eines schwerbehinderten Arbeitnehmers der vorherigen Zustimmung des Integrationsamtes. Eine vorher ausgesprochene Kündigung ist somit unwirksam.⁵⁴⁸ Der Arbeitnehmer muss sich allerdings im Falle einer erhaltenen Kündigung innerhalb von drei Wochen auf den Sonderkündigungsschutz berufen,

⁵³⁸ BAG v. 16.2.2012 – 6AZR 553/10; NZA 2012, 555.

⁵³⁹ N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 44.

⁵⁴⁰ BAG v. 3.12.2002 – 9 AZR 462/01.

⁵⁴¹ BAG v. 21.11.2006 – 9 AZR 176/06.

⁵⁴² § 164 Abs. 5 S. 3 i. V. m. Abs. 4 S. 1 Nr. 1 SGB IX.

⁵⁴³ BAG v. 17.3.2016 – 6 AZR 221/15; N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 56.

⁵⁴⁴ § 164 Abs. 5 S. 3 i. V. m. Abs. 4 S. 3 SGB IX.

⁵⁴⁵ N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 56.

⁵⁴⁶ R. Bieritz-Harder in LPK-SGB XII, 11. Auflage 2018, § 53, Rn. 3.

⁵⁴⁷ BeckOK SozR/Kaiser, 53. Ed. 1.6.2019, SGB XII, § 140, Rn. 1.

⁵⁴⁸ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 168, Rn. 1, 5; BAG v. 19.12.2013 – 6 AZR 190/12; Bei anderen Kündigungsgründen als der Behinderung existiert der besondere Kündigungsschutz gem. § 173 Abs. 1 S. 1 Nr. 1 SGB IX erst ab sechsmonatigem Bestand des Arbeitsverhältnisses.

sofern der Arbeitgeber zum Zeitpunkt der ausgesprochenen Kündigung noch keine Kenntnis von der festgestellten Schwerbehinderteneigenschaft hatte.⁵⁴⁹

Zu den **wesentlichen Pflichten eines Arbeitgebers** zählen vor allem die behindertengerechte Gestaltung des Arbeitsplatzes und Ausstattung mit den erforderlichen Hilfsmitteln, Präventionsmassnahmen zur Vermeidung einer Kündigung bei auftretenden Schwierigkeiten im Arbeitsverhältnis sowie die Wahl einer Schwerbehindertenvertretung.

3. Integration von Menschen mit Behinderungen am Arbeitsplatz

3.1. Rechtliche Pflichten von Arbeitgebern bei der Beschäftigung von Menschen mit Behinderungen

3.1.1. Anspruch auf behinderungsgerechte Arbeitsgestaltung

Schwerbehinderte Arbeitnehmer haben **Anspruch auf behinderungsgerechte Arbeitsgestaltung**.⁵⁵⁰ Der Arbeitgeber wird bei Beschäftigung schwerbehinderter Menschen verpflichtet jegliche Voraussetzungen zu schaffen, die eine dauerhafte Beschäftigungsmöglichkeit zulassen. Freie Arbeitsplätze müssen für einen schwerbehinderten Arbeitnehmer so umgestaltet werden, dass diese entsprechend der individuellen Fähigkeiten geeignet sind und darauf eine sinnvolle Tätigkeit ausgeübt werden kann.⁵⁵¹

Die **entscheidende Verpflichtung** des Arbeitgebers besteht darin, **den Arbeitsplatz bzw. die Organisation der Arbeit individuell** auf jeden Menschen mit Schwerbehinderung, der bei ihm beschäftigt ist, **anzupassen**. Hierbei ist immer die jeweilige Einschränkung des Beschäftigten zu berücksichtigen und die Barrierefreiheit am Arbeitsplatz sicherzustellen.⁵⁵² Zur Schaffung der geeigneten **räumlichen Voraussetzungen** gehören z. B. das Einrichten von Behindertenparkplätzen, barrierefreien Zugängen oder Aufzügen, Rampen für Rollstuhlfahrer, besondere Sitzgelegenheiten oder behindertengerechte Toiletten.⁵⁵³ Die **technische** Ausstattung muss behinderungsgerechte Werkzeuge und geeignete Transportmittel umfassen. **Organisatorische** Gestaltungspflichten betreffen den Bereich einer notwendigen Umgestaltung von Arbeitsabläufen. Hier kann jede einzelne Behinderung zu unterschiedlichen Anforderungen führen, wie etwa die Einrichtung von besonderen Pausen- oder Erholungsräumen.⁵⁵⁴

Die Lage und Verteilung der **Arbeitszeiten** und die Pausen- und Erholungszeiten müssen entsprechend der jeweiligen Belastungssituation gewährt werden. Hieraus kann etwa die Verpflichtung des Arbeitgebers folgen, den Arbeitnehmer nicht zur Nachtarbeit einzuteilen.⁵⁵⁵

Darüber hinaus hat der Arbeitgeber für **technische Arbeitshilfen** am Arbeitsplatz zu sorgen, sofern diese erforderlich sein sollten. Diese können wiederum je nach individueller Behinderung verschieden ausfallen. Möglich sind jegliche Arten von technischer Unterstützung wie etwa Stehhilfen, Hebehilfen,

⁵⁴⁹ BAG v. 09.06.2011 – 2 AZR 703/09; BAG v. 12.01.2006 – 2 AZR 539/05.

⁵⁵⁰ § 164 Abs. 4 S. 1 Nr. 4, 5 SGB IX.

⁵⁵¹ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 53f.

⁵⁵² BAG v. 14.3.2006 – 9 AZR 411/05; LAG Schleswig-Holstein v. 8.6.2005 – 3 Sa 30/05.

⁵⁵³ BAG NJW 1960, S. 1318.

⁵⁵⁴ F. Düwell in LPK-SGB IX, op.cit., § 164, Rn. 200; W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 55.

⁵⁵⁵ BAG v. 3.12.2002 – 9 AZR 462/01.

flexibles Büromobiliar, Lesehilfen oder eine Tastatur für blinde Menschen.⁵⁵⁶ Diese sollen auch leistungsabhängige Differenzierungen in der Bezahlung durch die Arbeitgeber vermeiden.⁵⁵⁷ Sofern die Arbeitgeber nicht ihren Verpflichtungen zur behindertengerechten Ausrüstung des Arbeitsplatzes nachkommen, so sind sie dem Arbeitnehmer im Falle einer leistungsabhängigen Bezahlung zum Schadensersatz verpflichtet, wenn dieser seiner Verpflichtung nicht vollständig nachkommen kann.⁵⁵⁸

Bei allen Formen der Gestaltung des Arbeitsplatzes ist durch den Arbeitgeber immer ein besonderes **Augenmerk auf den Aspekt des Gesundheitsschutzes** zu legen. Alle zu treffenden Vorkehrungen werden durch den **Verhältnismässigkeitsgrundsatz** begrenzt, § 164 Abs. 4 S. 3 SGB IX. Sollte eine der Verpflichtungen zu einer unzumutbaren Belastung des Arbeitgebers führen, die nur mit unverhältnismässigen Aufwand erreicht werden kann, so kann der Arbeitnehmer keine Anpassung seines Arbeitsplatzes verlangen. Ob ein Fall der Unverhältnismässigkeit vorliegt hängt jedoch von den konkreten Umständen des Einzelfalles ab. Entscheidende Kriterien bei dieser Feststellung sind: «der finanzielle Aufwand von Sicherungs- und Eingliederungsmassnahmen, mögliche Nachteile für andere Beschäftigte, der Erfüllungsgrad der Beschäftigungsquote und die Erfüllung der gegebenen arbeitsschutzrechtlichen Anforderungen.»⁵⁵⁹

3.1.2. Präventionsmassnahmen bei auftretenden Schwierigkeiten im Arbeitsverhältnis

Der Arbeitgeber hat mit der Schwerbehindertenvertretung im Vorfeld einer Kündigung gem. §§ 166, 167 Abs. 1 SGB IX über **Massnahmen zur Stabilisierung des Arbeitsverhältnisses bzw. zur Vermeidung einer Kündigung zu beraten**.⁵⁶⁰ Arbeitgeber müssen mit der Schwerbehindertenvertretung und den in § 176 SGB IX genannten Vertretungen⁵⁶¹ eine Inklusionsvereinbarung treffen. Diese soll Arbeitgeber verpflichten, auf den Betrieb zugeschnittene Inklusions- und Rehabilitationsziele festzulegen sowie diese zügig umzusetzen. Es handelt sich hierbei um einen verbindlichen kollektivrechtlichen Vertrag, der die Eingliederung schwerbehinderter Menschen fördern soll.⁵⁶²

Zudem hat der Arbeitgeber **frühzeitig** die Schwerbehindertenvertretung sowie den Betriebsrat und das Integrationsamt zu **informieren**, wenn personen-, verhaltens-, oder betriebsbedingte Schwierigkeiten im Arbeitsverhältnis entstehen bzw. sie dieses gefährden könnten. Um diese Präventionsmassnahmen einleiten zu können bedarf es konkret dargestellter Schwierigkeiten, sodass plausibel nachvollziehbar ist, dass sich ohne Prävention die Beschäftigungssituation der behinderten Person verschlimmern wird und mit einer Kündigung zu rechnen ist.⁵⁶³

Sofern der Arbeitgeber gegen diese **Pflichten verstösst**, so hat dies Auswirkung auf die Kündigung. Auch wenn sich dies nicht ausdrücklich aus den Normen ergibt, so beinhalten diese eine gewisse Fürsorgepflicht des Arbeitgebers gegenüber seinen Beschäftigten mit Schwerbehinderung. Zudem gilt im Kündigungsrecht grundsätzlich das Ultima-ratio-Prinzip, das dem Arbeitgeber auferlegt, vor Ausspruch der Kündigung alles Notwendige zu unternehmen, um eine Kündigung noch verhindern zu

⁵⁵⁶ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 56a.

⁵⁵⁷ LAG München v. 26.1.2017 – 3 TaBV 95/16, Rn. 48.

⁵⁵⁸ Dieser verschuldensabhängige Anspruch kann ein vertraglicher Schadensersatzanspruch aus § 280 Abs. 1 BGB oder ein deliktischer aufgrund einer Verletzung eines Schutzgesetzes aus §§ 823 Abs. 2 BGB, 164 Abs. 4 S. 1 SGB IX sein.; F. Düwell in LPK-SGB IX, op.cit., § 164, Rn. 203; BAG NZA 2010, S. 1119; N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 48.

⁵⁵⁹ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 59.

⁵⁶⁰ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 168, Rn. 13.

⁵⁶¹ Betriebs-, Personal-, Richter-, Staatsanwalts- und Präsidialrat.

⁵⁶² W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 166, Rn. 1, 11ff.

⁵⁶³ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 167, Rn. 1, 11, 12.

können. Sofern er gegen die Fürsorgepflichten verstößt, hat er jedoch genau dies nicht getan. Ein etwaiges nicht durchgeführtes Präventionsverfahren stellt jedoch nur einen formellen Mangel, der durch Nachholung geheilt werden kann.⁵⁶⁴

Im Rahmen jeder Kündigung ist jedoch auch unabhängig von der Erfüllung dieser Pflichten eine grundsätzliche **Interessenabwägung** durchzuführen. In deren Rahmen muss dem Aspekt des Schutzes vor einer Kündigung aufgrund einer Behinderung ein besonders hoher Stellenwert beigemessen werden. Dies muss das Integrationsamt in seine Entscheidung über die Zustimmung miteinfließen lassen.⁵⁶⁵

3.1.3. Wahl einer Schwerbehindertenvertretung

Den Arbeitgebern obliegt es zudem gem. § 177 Abs. 1 SGB IX dafür zu sorgen, dass in ihren Betrieben, in denen wenigstens fünf schwerbehinderte Menschen nicht nur vorübergehend beschäftigt werden, eine **Schwerbehindertenvertretung gewählt** wird. Diese soll aus einer Vertrauensperson und wenigstens einem stellvertretenden Mitglied bestehen.⁵⁶⁶

Die Wahl der Schwerbehindertenvertretung findet grundsätzlich alle vier Jahre statt.⁵⁶⁷ Ihre wichtigste und zentrale **Aufgabe** ist die Eingliederung schwerbehinderter Menschen in den Betrieb und den betroffenen Arbeitnehmern dabei beratend und helfend zur Seite zu stehen und Probleme die sich in der Arbeitswelt ergeben gemeinsam mit ihm zu lösen.⁵⁶⁸

3.1.4. Pflichten im Vorfeld eines Beschäftigungsverhältnisses

Die Pflichten der Arbeitgeber betreffend den Schutz der Menschen mit Schwerbehinderung nach den §§ 154ff. SGB IX unterscheiden zwar grundsätzlich nicht zwischen den Begriffen des «Arbeitnehmers» und des «potentiellen Arbeitnehmers» oder des «Bewerbers». **Arbeitssuchende** stehen jedoch trotzdem **nicht schutzlos** da, da diese Vorschriften auch einzelne Pflichten der Arbeitgeber enthalten die inhaltlich den Schutz potentieller Arbeitnehmer betreffen.

Den Arbeitgebern wird eine **Prüfung**, ob freie Arbeitsplätze mit schwerbehinderten oder diesen gleichgestellten, insbesondere arbeitssuchend gemeldeten, Menschen besetzt werden können, auferlegt.⁵⁶⁹ Diese Pflicht besteht unabhängig davon, ob zurzeit ein Bewerbungsprozess läuft oder ob der Grad der Behinderung bei der Bewerbung angegeben wurde.⁵⁷⁰

Durchzuführen ist die Prüfung vor jeder Ausschreibung und Neubesetzung.⁵⁷¹ Der Arbeitgeber muss eine Feststellung treffen, welche Anforderungen der neu zu vergebende Arbeitsplatz an den Bewerber stellt. Danach ist «die geeignete schwerbehinderte Person zu finden, die mit ihrer Behinderung und ihrer Qualifikation in der Lage ist, die Arbeit zu erbringen und eine entsprechende Leistung zu bringen».⁵⁷² Dabei sind auch mögliche Schwierigkeiten zu berücksichtigen, die dem Bewerber die Ausführung der Arbeit erschweren und etwaige Barrieren zu beseitigen oder generell geeignete Massnahmen zu ergreifen, damit der Bewerber den Anforderungen an den Arbeitsprozess gewachsen

⁵⁶⁴ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 167, Rn. 24, 25.

⁵⁶⁵ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 168, Rn. 20.

⁵⁶⁶ R. Rehwald in Feldes et al., Schwerbehindertenrecht, op.cit., § 177, Rn. 1.

⁵⁶⁷ § 177 SGB IX, Ausnahmefälle werden in § 177 Abs. 5 genannt.

⁵⁶⁸ § 178 Abs. 1 S. 1 SGB IX.

⁵⁶⁹ § 164 Abs. 1 SGB IX.

⁵⁷⁰ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 1-2.

⁵⁷¹ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 3a.

⁵⁷² W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 5.

erscheint.⁵⁷³ An diesem gesamten Prozess ist die Schwerbehindertenvertretung zu beteiligen. Diese und der Betriebs- und Personalrat sind jederzeit über Vermittlungsvorschläge der Bundesagentur für Arbeit sowie alle vorliegenden Bewerbungen zu informieren.⁵⁷⁴

Zudem verweist § 164 Abs. 2 SGB IX auf die **Vorschriften des AGG**, weshalb auch das dort normierte Diskriminierungsverbot aus den §§ 7, 3, 1 AGG⁵⁷⁵ während dieser Prüfungs- bzw. Feststellungsphase einzuhalten ist und eine Diskriminierung zu einem Schadensersatzanspruch aus § 15 AGG führen kann.

3.2. Anreize oder andere vorhandene Unterstützung für Arbeitgeber

Arbeitgeber stehen bei Beschäftigung von behinderten Menschen zahlreiche **Fördermittel** zur Verfügung. Beispielsweise können bei den Integrationsämtern **finanzielle Zuschüsse** beantragt werden, wenn ein behindertengerechter Arbeitsplatz inklusive technischer Ausstattung eingerichtet werden soll und ein Behinderungsgrad von wenigstens 50 vorliegt. Dies gilt auch für das Erfordernis der Betreuung des Beschäftigten oder etwa einer speziellen Ausbildung aufgrund der Behinderung.⁵⁷⁶ Derartige Fördermittel können auch bei der Bundesagentur für Arbeit beantragt werden.⁵⁷⁷

Rechtsgrundlage für diese Form der **Eingliederungszuschüsse** ist § 90 des Sozialgesetzbuches III (SGB III). Diese Vorschrift gilt grundsätzlich für alle Menschen mit Behinderung und ist somit unabhängig von der Feststellung der Schwerbehinderteneigenschaft.⁵⁷⁸ Sie unterscheidet jedoch zwischen den Menschen mit Behinderung und besonders betroffenen schwerbehinderten Menschen. Es wird eine Höchstgrenze von 70 Prozent des zu berücksichtigenden Arbeitsentgelts für die Förderung festgelegt. Diese gilt für beide Gruppen, allerdings werden unterschiedliche Voraussetzungen in Bezug auf die Förderdauer aufgestellt und ab welcher Beschäftigungszeit die Höchstgrenze zu mindern ist. Die Förderdauer beträgt bei Menschen mit Behinderungen bis zu 24 Monate und bei besonders betroffenen Schwerbehinderten höchstens 60 Monate. Sollten diese das 55. Lebensjahr bereits vollendet haben kann sie bis zu 96 Monate betragen.⁵⁷⁹

Diese Zuschüsse dienen vorrangig den neu geschaffenen Arbeitsplätzen. Sollte allerdings durch eine nachweisliche Verschlechterung des Gesundheitszustandes mit dauerhafter Verminderung der Leistungsfähigkeit der Arbeitsplatz konkret gefährdet sein, so kann auch ein bestehender Arbeitsplatz finanziell gefördert werden, wenn hierdurch eine dauerhafte berufliche Wiedereingliederung sichergestellt wird.⁵⁸⁰

⁵⁷³ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 8.

⁵⁷⁴ W. Feldes in Feldes et al., Schwerbehindertenrecht, op.cit., § 164, Rn. 3a, 12.

⁵⁷⁵ s.o. unter 2.4.

⁵⁷⁶ Offizielle Homepage der Integrationsämter, Finanzielle Leistungen an Arbeitgeber, verfügbar unter <https://www.integrationsaemter.de/Leistungen-An-Arbeitgeber/507c/index.html> (30.07.2019).

⁵⁷⁷ Behinderte Menschen einstellen – Die Vorteile für Arbeitgeber v. 24.07.2019, verfügbar unter <https://www.business-wissen.de/artikel/behinderte-mitarbeiter-einstellen-die-vorteile-fuer-arbeitgeber/> (30.07.2019).

⁵⁷⁸ BeckOK SozR/Utz, SGB III, 53. Ed. 1.6.2019, § 90 Rn. 1.

⁵⁷⁹ BeckOK SozR/Utz, SGB III, op.cit., § 90 Rn. 2, 3.

⁵⁸⁰ BeckOK SozR/Utz, SGB III, op.cit., § 90 Rn. 4.

4. Geltendmachung von Rechten

4.1. Bestimmung des Rechtsweges

Um den richtigen Weg zu bestimmen wie Rechte von schwerbehinderten Menschen eingeklagt werden können, kommt es entscheidend darauf an welches Recht gerichtlich eingeklagt werden soll bzw. auf die **Natur** des Sachverhalts und dessen **schwerpunktmässige Prägung**.⁵⁸¹ In diesem Kontext kommen die Arbeitsgerichtsbarkeit, die Verwaltungsgerichtsbarkeit oder die Sozialgerichtsbarkeit in Betracht. **Arbeitsgerichte** entscheiden vor allem über Streitigkeiten zwischen Arbeitgebern und Arbeitnehmern aus dem Arbeitsverhältnis⁵⁸² und **Sozialgerichte** u.a. über Streitigkeiten betreffend das Schwerbehindertenrecht.⁵⁸³

Öffentlich-rechtliche Streitigkeiten mit sozialrechtlichem Bezug können auch von den **Verwaltungsgerichten** entschieden werden, wenn es an einer ausdrücklichen Zuweisung an die Sozialgerichte fehlt.⁵⁸⁴ Hat der Rechtsstreit hauptsächlich einen **zivilrechtlichen** Charakter, so sind die **Arbeitsgerichte** zuständig. Eintreten kann dies, wenn die Frage der Behinderung nur eine von mehreren Voraussetzungen darstellt um das eigentliche Ziel wie beispielsweise die Feststellung der Unwirksamkeit einer Kündigung, zu erreichen. Arbeitsgerichte entscheiden auch über Schadensersatzklagen wegen Diskriminierung aufgrund einer Behinderung nach dem AGG.⁵⁸⁵

4.2. Klageberechtigung

Klageberechtigt sind die betroffenen **Arbeitnehmer** mit Behinderungen, die sich auf den Schutz des SGB IX oder des AGG bzw. des KSchG im Falle einer Kündigung berufen können.

Neben der individuellen Klagemöglichkeit eines jeden Arbeitnehmers gibt es gem. § 85 SGB IX auch ein **Klagerecht der Verbände**, die nach ihrer Satzung Menschen mit Behinderungen auf Bundes- und Landesebene vertreten und nicht selbst am Prozess beteiligt sind. Diese Prozessstandschaft setzt eine schlüssige Darlegung einer Verletzung von subjektiven Rechten aus dem SGB IX voraus.⁵⁸⁶ Ein klagefähiger Verband ist jede überörtliche, wenigstens auf der Ebene des Bundeslandes agierende «Art von Vereinigung die eine Satzung hat und satzungsmässige Ziele verfolgt», wobei diese nicht ausschliesslich in der Vertretung von Menschen mit Behinderungen liegen müssen.⁵⁸⁷ Notwendig ist auch das Einverständnis des Vertretenen das im Streit stehende Recht an seiner Stelle einklagen zu dürfen. Der Betroffene muss kein Mitglied des Vereins sein. Bei Vorliegen dieser Voraussetzungen tritt der Verband als Kläger an die Stelle des betroffenen Arbeitnehmers mit allen prozessualen Rechten.⁵⁸⁸

⁵⁸¹ BSG, Urt. v. 6.9.2007 – B 3 SF 1/07 R; P. Ulrich in Deinert & Welti, Behindertenrecht, op.cit., 117. Rechtsweg, Rn. 5, 10.

⁵⁸² **§ 2 Abs. 1 Nr. 3a, b des Arbeitsgerichtsgesetzes (ArbGG)**

⁵⁸³ **§ 51 des Sozialgerichtsgesetzes (SGG)**; P. Ulrich in Deinert & Welti, Behindertenrecht, op.cit., 117. Rechtsweg, Rn. 6, 8.

⁵⁸⁴ P. Ulrich in Deinert & Welti, Behindertenrecht, op.cit., 117. Rechtsweg, Rn. 11.

⁵⁸⁵ F. Düwell in LPK-SGB IX, Verfahren und Rechtsschutz, op.cit., § 2 ArbGG, Rn. 154.

⁵⁸⁶ Deutscher Bundestag – Drucksache 14/5074, S. 111; B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 85, Rn. 1-2; Solche Rechte können sein: Rehabilitationsansprüche aus Teil 1, Ansprüche auf Eingliederungshilfe nach Teil 2 und Rechte aus speziellen Regelungen für Schwerbehinderte in Teil 3; B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 85, Rn. 3-5.

⁵⁸⁷ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 85, Rn. 6.

⁵⁸⁸ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 85, Rn. 9, 13.

Darüber hinaus existiert auch in § 17 Abs. 2 AGG die Möglichkeit einer Verbandsklage in Form eines **kollektiven Beteiligungsrechts**. Der Betriebsrat oder eine im Betrieb vertretene Gewerkschaft können bei groben Verstößen des Arbeitgebers gegen das AGG diese gerichtlich geltend machen.⁵⁸⁹

Eine Verbandsklage ist auch bei einem Verstoß gegen das Benachteiligungsverbot aus dem BGG möglich. Ein vom Bundesministerium für Arbeit **anerkannter Behindertenverband**⁵⁹⁰ kann Klage auf Feststellung eines Verstoßes führen. Im Unterschied zu § 85 SGB IX bedarf es keinerlei Einverständnisses oder Nachweises des behinderten Menschen, dass die individuellen Rechte verletzt wurden.⁵⁹¹ Zur Zeit existieren ca. 30 anerkannte Verbände in Deutschland.⁵⁹²

Im Falle der Beschäftigung bei einem **öffentlichen Arbeitgeber** kann auch eine **Schlichtungsstelle** i. S. v. § 16 BGG eingeschaltet werden, wenn der Arbeitnehmer sich in seinem Recht auf Barrierefreiheit oder auf gleichberechtigte Teilhabe am Leben in der Gesellschaft verletzt sieht. Dies soll zu einer aussergerichtlichen Lösung führen. Auch ein nach § 15 Abs. 3 BGG anerkannter Verband kann bei der Schlichtungsstelle einen Antrag auf Einleitung eines Schlichtungsverfahrens stellen. Sofern die Schlichtungsstelle unzuständig ist, sucht sie geeignete Ansprechpartner zur Lösung des Problems.⁵⁹³

4.3. Rechtsbehelfe, Strafen und Schiedsklauseln

Verletzt ein Arbeitgeber seine unter Punkt 3.1 erwähnten Pflichten aus § 164 Abs. 4 S. 1 Nr. 4 und 5 SGB IX zur **Gestaltung des Arbeitsplatzes**, so gewähren diese Vorschriften einen einklagbaren Anspruch und die betroffenen Arbeitnehmer können die Vornahme der erforderlichen Massnahmen in einem arbeitsgerichtlichen Verfahren durchsetzen.⁵⁹⁴

Auch die bereits unter 2.4 genannten Ansprüche auf **Zusatzurlaub** aus § 208 SGB IX, Freistellung von Mehrarbeit aus § 207 SGB IX, sowie auf Teilzeitbeschäftigung aus § 164 Abs. 5 SGB IX gewähren einklagbare Rechtsansprüche. Sofern der Arbeitgeber die Begehren ablehnt kann der Arbeitnehmer ebenfalls Leistungsklage vor dem Arbeitsgericht erheben.⁵⁹⁵

Für Klagen aufgrund von **Diskriminierungen** nach dem Allgemeinen Gleichbehandlungsgesetz gewährt § 15 Abs. 1 und 2 einen Schadensersatzanspruch in Geld für materielle und immaterielle Schäden, die kausal durch die Benachteiligung entstanden sind. Diese Ansprüche sind grundsätzlich auf Naturalrestitution, also die Herstellung des ursprünglichen Zustandes vor der Diskriminierung, gerichtet.⁵⁹⁶ Nur wenn diese nicht möglich ist kann Ersatz in Geld verlangt werden.⁵⁹⁷

⁵⁸⁹ B. Westermann in Feldes et al., Schwerbehindertenrecht, op.cit., § 85, Rn. 17.

⁵⁹⁰ Aufzählung der Anerkennungs Voraussetzungen in **§ 15 Abs. 3 BGG**.

⁵⁹¹ J. Joussen in LPK-SGB IX, op.cit., § 85, Rn. 14.

⁵⁹² D. Dau in LPK-SGB IX, op.cit., § 15 BGG, Rn. 5; Hierzu zählen z. B. der «Allgemeine Behindertenverband in Deutschland e.V.», der «Bundesverband Selbsthilfe Körperbehinderter e.V.» oder der «Deutsche Gewerkschaftsbund», verfügbar unter <https://www.bmas.de/DE/Themen/Teilhabe-Inklusion/Zielvereinbarungen/zielvereinbarungen-anerkannter-verbände.html> (15.08.2019).

⁵⁹³ Offizielle Homepage des Beauftragten der Bundesregierung für die Belange von Menschen mit Behinderungen, Schlichtungsstelle BGG, verfügbar unter https://www.behindertenbeauftragter.de/DE/SchlichtungsstelleBGG/SchlichtungsstelleBGG_node.html (15.08.2019).

⁵⁹⁴ N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 48.

⁵⁹⁵ LAG Rheinland-Pfalz v. 12.4.2002 – 3 Sa 161/02; N. Besgen, Schwerbehindertenrecht, op.cit., Teil 3: Pflichten und Rechte im laufenden Arbeitsverhältnis, Rn. 57.

⁵⁹⁶ § 249 Abs. 1 BGB.

⁵⁹⁷ § 251 Abs. 1 BGB.

Kündigungsschutzklagen, die auf die Unwirksamkeit einer Kündigung wegen fehlender Beteiligung des Integrationsamtes gem. § 168 SGB IX gestützt sind, führen zur Unwirksamkeit der Kündigung von Anfang an, wie wenn das Arbeitsverhältnis nie beendet wurde. Eine besondere Verpflichtung des Arbeitgebers ergibt sich aus einem stattgebenden Urteil nicht, da es sich bei Kündigungsschutzklagen um Feststellungsurteile, dass das Arbeitsverhältnis nicht aufgelöst wurde, handelt. Das Arbeitsverhältnis und somit auch die Beschäftigungspflicht bestehen unverändert fort.

Grundsätzlich kann in allen Rechtswegen gegen Urteile mit der der Berufung vorgegangen werden.⁵⁹⁸

Sollten Arbeitgeber vorsätzlich oder fahrlässig gegen bestimmte Pflichten aus dem SGB IX verstossen, so stellt dies eine **Ordnungswidrigkeit** dar, § 238 SGB IX. Diese kann mit einer Geldbusse bis zu 10.000 Euro geahndet werden. Eine Ordnungswidrigkeit stellt im deutschen Recht eine tatbestandsmässige, rechtswidrige und vorwerfbare Handlung dar.⁵⁹⁹ Sie hat somit Ähnlichkeit mit einer Straftat, da sie ähnlich wie ein Strafprozess vor Gericht verhandelt wird. Eine Ordnungswidrigkeit beinhaltet jedoch einen deutlich milderen Grad der Vorwerfbarkeit.⁶⁰⁰ Erwähnenswert ist in diesem Zusammenhang vor allem § 238 Abs. 1 Nr. 1 SGB IX, der einen Verstoss gegen die Beschäftigungspflicht aus § 154 Abs. 1 S. 1 SGB IX zur Ordnungswidrigkeit erklärt.

Ein generelles **Verbot von Schiedsklauseln** in Arbeitsverträgen ist **nicht** bekannt. Sie müssen jedoch die Anforderungen von Treu und Glauben gem. § 242 BGB und dem Verbot der unangemessenen Benachteiligung im Rahmen von Allgemeinen Geschäftsbedingungen gem. § 307 BGB Stand halten.⁶⁰¹

5. Rechtlicher Rahmen in der Praxis

5.1. Aktuelle Lage

Die **Umsetzung** der Konvention in den Vertragsstaaten wird vom UN-Fachausschuss über die Rechte von Menschen mit Behinderungen überwacht. Auch wenn es seit 2009 viele positive Änderungen gab und Menschen mit Behinderungen nicht mehr an den Rand der Gesellschaft gedrängt werden, so besteht immer noch viel Handlungsbedarf.⁶⁰² In der **Arbeitssituation** sieht man in der verhältnismässig geringen Ausgleichsabgabe eine günstige Möglichkeit, sich von der Verpflichtung Menschen mit Schwerbehinderung zu beschäftigen freizukaufen. Zudem ergreifen die Behindertenwerkstätten noch keine ausreichenden Massnahmen, um ihren Beschäftigten eine realistische Möglichkeit zu verschaffen, am allgemeinen Arbeitsmarkt Fuss zu fassen. In den meisten Fällen sei die Werkstätte das höchste erreichbare Ziel.⁶⁰³

Zwischen 2007 und 2017 ist die **Beschäftigungsquote** schwerbehinderter Menschen um **33%** auf insgesamt 1,07 Mio. Menschen **gestiegen**, die Zahl der Auszubildenden mit Schwerbehinderung sogar

⁵⁹⁸ §§ 64ff. des Arbeitsgerichtsgesetzes (ArbGG), §§ 124ff. der Verwaltungsgerichtsordnung (VwGO) und §§ 144ff. des Sozialgerichtsgesetzes (SGG).

⁵⁹⁹ BeckOK OWiG/Gerhold OWiG, § 1, Rn. 21.

⁶⁰⁰ W. Mitsch, Grundzüge des Ordnungswidrigkeitenrechts (Teil 2), JA 2008, S. 409ff.

⁶⁰¹ C. Grüneberg in Palandt BGB, § 242, Rn. 81ff., § 307, Rn. 129ff.

⁶⁰² Bundeszentrale für politische Bildung, Eine Dekade UN-Behindertenrechtskonvention in Deutschland v. 1.2.2019; verfügbar unter <http://www.bpb.de/apuz/284888/eine-dekade-un-behindertenrechtskonvention-in-deutschland?p=all> (15.08.2019).

⁶⁰³ Barrierefrei Planen Bauen Wohnen, Die UN-Behindertenrechtskonvention und ihre Umsetzung, verfügbar unter https://www.dgvt.de/aktuelles/details/?tx_ttnews%5Btt_news%5D=3122&cHash=b0fd5e7839326c83fff97cba43699272 (19.08.2019).

um 40%. Ein Grossteil der Menschen ist im verarbeitenden Gewerbe sowie im öffentlichen Dienst tätig. Die aktuellen Statistiken der letzten zehn Jahre zeigen zwar einen Rückgang der Arbeitslosenquote von 6% bei schwerbehinderten Menschen. Bei Menschen ohne Schwerbehinderung ist dieser Rückgang gemessen an der Quote jedoch immerhin viermal so hoch.

Aktuelle Berichte zeigen, dass es schwerbehinderte Menschen bei der **Arbeitsplatzsuche immer noch schwer** haben.⁶⁰⁴ Trotz vieler Reformen zum ihrem Schutz und des Verbots der Diskriminierung werden sie bei der Auswahl der Bewerber oft gegenüber anderen Menschen benachteiligt. Kritiker sehen die mangelnden Informationen für Arbeitgeber über die Unterstützungsmöglichkeiten Schwerbehinderter als einen der Hauptgründe für diese Vorkommnisse und plädieren für mehr Aufklärungsarbeit. Viele Arbeitgeber setzen den Behindertenstatus mit der fehlenden Fähigkeit gleich, gleiche Leistungen erbringen zu können und zahlen lieber die Ausgleichsabgabe.⁶⁰⁵

5.2. Reformpläne für die Zukunft

Angesichts der gerade erfolgten umfassenden Reformen auf dem Gebiet des Schwerbehindertenrechts sind aktuell keine grösseren Reformen mehr geplant. Überarbeitet wird zurzeit die **Versorgungsmedizin-Verordnung**.⁶⁰⁶ Diese enthält Grundsätze der ärztlichen Begutachtung im Schwerbehindertenrecht und im Recht der sozialen Entschädigung, die für die Feststellung des Behinderungsgrades bzw. für die Beantragung eines Schwerbehindertenausweises relevant sind.⁶⁰⁷

Der Gesetzgeber möchte durch die Änderungen eine einzelfallbestimmte und teilhabeorientierte Ausrichtung der Verordnung erreichen. Dies führt zu einer Berücksichtigung von Aspekten, die bisher kaum eine Rolle gespielt haben, wie beispielsweise dem Therapieaufwand. Etwaigen Gesundheitsbeeinträchtigungen soll zukünftig bei gleichem Ausmass eine höhere Relevanz zukommen, da viele Fähigkeiten in der heutigen Zeit von höherer Bedeutung sind. Dazu zählen etwa die **Anforderungen der modernen Kommunikationsgesellschaft**. Hierbei sind die Feinmotorik und die Lesefähigkeit entscheidender geworden. Teilhabeorientierte Begutachtungskriterien erlauben eine stärker individualisierte Begutachtung im konkreten Einzelfall.⁶⁰⁸

Als weitere entscheidende Änderung sollen künftig alle **Hilfsmittel** bei der Berechnung des Behinderungsgrades **berücksichtigt** werden, die eine vorhandene Schwäche ausgleichen sollen. Bisher bleiben manche medizinischen Hilfsmittel, die einen vollkommenen Ausgleich erreichen, für die

⁶⁰⁴ Süddeutsche Zeitung, Behindert wird oft mit leistungsgemindert gleichgesetzt v. 06.12.2018, verfügbar unter <https://www.sueddeutsche.de/muenchen/ebersberg/behinderung-jobsuche-landkreis-ebersberg-agentur-fuer-arbeit-1.4242712> (05.08.2019).

⁶⁰⁵ Süddeutsche Zeitung, Behindert wird oft mit leistungsgemindert gleichgesetzt. op.cit., verfügbar unter <https://www.sueddeutsche.de/muenchen/ebersberg/behinderung-jobsuche-landkreis-ebersberg-agentur-fuer-arbeit-1.4242712> (05.08.2019).

⁶⁰⁶ Versorgungsmedizin-Verordnung vom 10. Dezember 2008 (BGBl. I S. 2412), die zuletzt durch Artikel 18 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2541) geändert worden ist.

⁶⁰⁷ Offizielle Homepage des Bundesministeriums für Arbeit und Soziales, Überarbeitung der Versorgungsmedizin-Verordnung v. 19.12.2018, verfügbar unter <https://www.bmas.de/DE/Themen/Soziale-Sicherung/Versorgungsmedizin/ueberarbeitung-der-versorgungsmedizin-verordnung.html> (05.08.2019).

⁶⁰⁸ Offizielle Homepage des Bundesministeriums für Arbeit und Soziales, Informationen und häufige Fragen zum Entwurf der 6. Verordnung zur Änderung der Versorgungsmedizin-Verordnung (VersMedV) v. 14.02.2019, S.2-3, verfügbar unter https://www.bmas.de/SharedDocs/Downloads/DE/Thema-Soziale-Sicherung/informationpapier-zur-6-verordnung-zur-aenderung-der-versorgungsmedizin-verordnung.pdf?__blob=publicationFile&v=3 (05.08.2019).

Feststellung unberücksichtigt. Führt beispielsweise eine Brille zur vollständigen Kompensation einer Sehschwäche, so erhält der betroffene Mensch keinen Schwerbehindertenausweis.⁶⁰⁹

⁶⁰⁹ Offizielle Homepage des Bundesministeriums für Arbeit und Soziales, Informationen und häufige Fragen, op.cit., S.2-3, verfügbar unter https://www.bmas.de/SharedDocs/Downloads/DE/Thema-Soziale-Sicherung/informationspapier-zur-6-verordnung-zur-aenderung-der-versorgungsmedizin-verordnung.pdf?__blob=publicationFile&v=3 (05.08.2019).

F. ITALY

1. Introduction

1.1. Country overview

Italy's **demographic** trend is consistent with other European countries which experience a steady decline in the birth rate, migration inflows and outflows and a rise in the number of elderly people. On 1 January 2019, the total resident **population amounted to 60,391,000** of whom about 5,234,000 were foreigners⁶¹⁰ and **3,167,000 were disabled people**.⁶¹¹

Italy has been a **parliamentary Republic** since 1946. On 2 June 1946, after the end of the Second World War, Italy held an institutional referendum to choose its form of state and for the first time women were allowed to vote. The Italian Constitution, enacted on 27 December 1947 and entered into force on 1 January 1948, enshrines this new form of state.

The **Constitution is the fundamental law of the Italian legal system**. It lays down civil, political, social, and economic rights and duties and provides for the separation of the legislative, executive and judiciary powers. The Constitution also establishes the formation, composition and the term of office and powers of the supreme bodies of the State (Parliament, President of the Republic, and Government).

Under Article 131 of the Constitution, **Italy is divided into twenty regions, each conferred with legislative powers** in accordance with Article 117 of the Constitution. Moreover, under Article 116 of the Constitution, five Italian regions have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.⁶¹²

The Italian legal order falls within the **civil law systems governed by a codified law**. The sources of law are arranged hierarchically having the Constitution and the constitutional laws a higher rank than the ordinary legislation.

1.2. Overview of legal and policy framework

Italy has developed a **comprehensive legal framework concerning the protection of persons with disabilities** rooted in the constitutional principles of non-discrimination, substantive equality, and social solidarity.

At the national level, **Law 104 of 5 February 1992**, "Framework Law for assistance, social integration and rights of handicapped people" is the main regulatory act concerning disability rights and is still

⁶¹⁰ These data are provided by the Italian National Institute for Statistics (ISTAT). See ISTAT, Demographic Indicators, Press Release (07.02.2019), available at <https://www.istat.it/en/archivio/226922> (22.05.2019); EUROSTAT, Migration and migrant population statistics, Statistics Explained (22.03.2019), available at <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf> (23.05.2019).

⁶¹¹ ISTAT, Disabilità in cifre (2013), available at [http://dati.disabilitaincifre.it/dawinciMD.jsp?a1=u2M2H2H0&a2=-&n=\\$\\$\\$\\$9\\$\\$\\$\\$\\$\\$\\$&o=2C&v=1UT0909J09OG00000&p=0&sp=null&l=0&exp=0](http://dati.disabilitaincifre.it/dawinciMD.jsp?a1=u2M2H2H0&a2=-&n=$$$$9$$$$$$$&o=2C&v=1UT0909J09OG00000&p=0&sp=null&l=0&exp=0) (27.05.2019).

⁶¹² The five regions are the following: Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige and Valle d'Aosta. The Trentino-Alto Adige Region is composed of the two autonomous provinces of Trento and Bolzano.

today the cornerstone of the Italian disability legislation.⁶¹³ The purposes of this Law include the guarantee of respect for human dignity, as well as the rights of freedom and autonomy of persons with disabilities, and the promotion of their integration into families, schools, work and society to overcome marginalization and social exclusion (Article 1). **Law 104/1992 has a broad scope of application**, covering several areas (education, work, care and rehabilitation, information and communication, mobility and transport, health and social assistance, legal and economic protection, tax benefits, architectural barriers, cultural, leisure and sport activities) with the aim to remove accessibility barriers, improve access to services and facilities, and ensure that disabled people enjoy civil, political, economic and social rights. Under Article 8 of Law 104/1992 the **integration into work and the protection of the workplace are considered fundamental measures** addressed to a full social inclusion of persons with disabilities. Specific provisions provide for vocational training and integration of disabled people into labour market, including through job placement (Articles 17-22).

Over the years, the Italian legal framework on disability protection has evolved due to the development of anti-discrimination legislation and the strengthening of human rights of disabled people. This legal framework has therefore developed over time, creating a **complex system of regulatory acts governing specific fields**.⁶¹⁴

Concerning employment, **Law 104/1992 has been complemented by Law 68 of 12 March 1999**, “Norms for the right to work of disabled people”⁶¹⁵ which repealed previous legislation on compulsory employment based on a “passive and charitable” approach to work placement of disabled people.⁶¹⁶ Law 68/1999 has **introduced into the Italian legal system the concept of “targeted employment” (“collocamento mirato”)** grounded on the assessment of the ability to work and professional skills of disabled people in order to include persons with disabilities into the most appropriate workplaces (Article 2).

Italy had therefore developed very complete disability legislation prior to the **ratification of the Convention on the Rights of Persons with Disabilities (CRPD) of 2006, and its Optional Protocol, by Law 18 of 3 March 2009**.⁶¹⁷ The CRPD ratification has **not led to deep changes** in the Italian legal system, though some legislative interventions would have been necessary to conform national law to

⁶¹³ Legge 5 febbraio 1992, n. 104 “Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate”, published in Gazzetta Ufficiale No. 39 of 17.02.1992.

⁶¹⁴ See, among others, Law 328/2000 “Framework law for the creation of an integrated system of social services and measures”; Law 4/2004 “Provisions to facilitate the access of disabled people to IT tools” amended and supplemented by several subsequent acts; Law 67/2006, “Measures for the judicial protection of people with disabilities who are victims of discrimination”; Law 112/2016, “Provisions on assistance benefitting persons with serious disabilities who are deprived of family support”; Legislative Decree 66/2017, “Rules for the promotion of school inclusion of students with disabilities”. Accessibility of physical environment and transportation are also regulated.

⁶¹⁵ Legge 12 marzo 1999, n. 68 “Norme per il diritto al lavoro dei disabili”, published in Gazzetta Ufficiale No. 57 of 23.03.1999.

⁶¹⁶ Law 482 of 2 April 1968, “General rules governing the compulsory hiring by public administrations and private companies” (Legge 2 aprile 1968, n. 482 “Disciplina generale delle assunzioni obbligatorie presso le pubbliche amministrazioni e le aziende private”, published in Gazzetta Ufficiale No. 109 of 30.04.1968) required private and public employers to hire a certain number of disabled workers, irrespective of their residual working capacities.

⁶¹⁷ Legge 3 marzo 2009, n. 18 “Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell'Osservatorio nazionale sulla condizione delle persone con disabilità”, published in Gazzetta Ufficiale No. 61 of 14.03.2009.

the Convention obligations.⁶¹⁸ As a result of Law 18/2009, since 2010 a **National Observatory on the Status of People with Disabilities** has been established aiming, among others, to promote the implementation of the Convention and to monitor disability policies in Italy. In compliance with Article 3, para. 5, of Law 18/2009 the National Observatory drafted **two Biennial Action Plans** for the Promotion of the Rights and the Integration of Persons with Disabilities which were adopted by Presidential Decrees, respectively on 4 October 2013 and on 12 October 2017.

The **second Biennial Action Plan** takes account of the priorities identified by the first Plan and is structured around eight lines of action: recognition of disability conditions, policies, services and organizational models for independent living and inclusion in the society; health, right to life, habilitation and rehabilitation; inclusive education; work and employment; accessibility and mobility; international cooperation;⁶¹⁹ development of the statistical system and monitoring of the implementation policies. It is **aimed at implementing the CRPD and the European Disability Strategy 2010-2020** through the identification of specific policy actions to be applied by the State, local authorities, and stakeholders, including disabled people's organizations (DPOs). It also tries to fill the gaps in the existing legal framework concerning disability by proposing some legislative interventions in specific fields, including work and employment.⁶²⁰

The **second Biennial Action Plan** is currently the **main disability policy strategy** at national level.

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

Labour is the foundation of the Italian Republic (Article 1, para. 1, of the Constitution) and the right to work is recognized with regard to every citizen, who “has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society” (Article 4, para. 2, of the Constitution).

Under the first clause of Article 4 “all citizens” enjoy the right to work that is intended as the right to access and maintain a job without being subject to unlawful or discriminatory interferences on the part of the State or private individuals.⁶²¹ The **constitutional right to work**, conceived as a social right

⁶¹⁸ In 2008, the Institute for International Legal Studies (ISGI) of the Italian Research Council (CNR) prepared a report on the compliance of Italian national and regional legislation with the CRPD. The report contains a set of recommendations in order to make domestic legal framework fully compliant with the Convention, but the suggested legislative interventions have been adopted only partly. The text of the report is available at http://www.didaweb.net/handicapw/norme/convenzioni/ISGI_Rapporto%20finale_Convenzione%20ONU%20diritti%20persone%20con%20disabilit%E0%20%281%29.pdf (28.05.2019).

⁶¹⁹ In 2013, the Directorate-General for Development Cooperation of the Italian Ministry of Foreign Affairs and International Cooperation adopted a “Disability Action Plan” in order to mainstream disability in the Italian development agenda in conformity with the CRPD. The text is available at https://www.esteri.it/mae/resource/doc/2016/07/b_01_piano_azione_eng.pdf (07.06.2019). In 2015, as implementing measure of the Disability Action Plan, the Directorate-General for Development Cooperation adopted the “Accessibility Standard Guidelines for Buildings”, available at https://www.esteri.it/mae/resource/doc/2016/07/a_03_linee_guida_accessibilita_eng.pdf (07.06.2019).

⁶²⁰ See Chapter 7, Intervention line 5, “Work and Employment”, available at <http://www.handylex.org/stato/d121017.shtml#cap7> (03.06.2019).

⁶²¹ M. D’Antona, The Right to Work in the Italian Constitution and in the European Union, *Working Paper Centro studi di diritto del lavoro europeo “Massimo d’Antona”* 2002 (1) p. 2 et seq, pp. 4-5.

and a cornerstone of human development, implies the guarantee of formal and substantial equality between individuals both in the labour market and in the workplace, as set out in Article 3 of the Constitution.⁶²² In order to exercise this right effectively, **specific anti-discrimination measures** as well as measures designed to compensate for disadvantages among individuals are necessary.

Article 4 of the Constitution, which sets forth **the right to work and the conditions** to promote its effective enjoyment, must be read in conjunction with Article 35 under which “the Republic protects work in all its forms and practices” (para. 1) and Article 38 that provides for both social assistance (para. 1) and security protection (para. 2) in cases of involuntary unemployment, also due to disability.⁶²³ In addition, Article 38, para. 3, states that “disabled and handicapped persons are entitled to receive education and vocational training”.⁶²⁴

National legislation on employment of persons with disabilities is the result of the implementation of these constitutional norms.⁶²⁵ As previously mentioned, **Law 68/1999 is the main legislative act aimed at the integration of disabled people into labour market.**⁶²⁶ It promotes and supports the individualized integration of persons with disabilities into work grounded on the assessment of their educational and professional history and their skills. This Law was substantially amended by **Legislative Decree 151 of 14 September 2015**, adopted in implementation of Law 183 of 10 December 2014 (the so-called “Jobs Act”), in order **to simplify its operability, to increase its effectiveness**, and to further **foster work integration** of disabled people.⁶²⁷ Even Legislative Decree 150 of 14 September 2015 on labour market reform affected Law 68/1999 since it entrusted regions and the autonomous provinces of Trento and Bolzano **to establish “employment centres”** also responsible for the targeted placement of disabled people.⁶²⁸

⁶²² Article 3, para. 1, sets forth the principle of formal equality establishing that “all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.” Under para. 2 substantive equality is also guaranteed in these terms: “It is the duty of the Republic to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country”.

⁶²³ Social assistance applies to all citizens in need, while security protection presupposes an employment relationship. See T. Bazzani, *European Employment Policies: Active and Passive LMPs, Domestic Implementation, Current Challenges*, Berlin 2017, p. 137.

⁶²⁴ This provision refers to people who cannot perform a job but, in compliance with Articles 3, 4, 35, para. 2, of the Constitution, they enjoy the right to education and professional training in order to allow them to participate in the economic and social development of the country. The Constitutional Court has clarified the scope of this norm, ruling that it applies not only to physical disabilities but also to mental ones (see Constitutional Court, judgments no. 163 of 1983 and no. 50 of 1990).

⁶²⁵ P. Digennaro, *Right to Work and Placement of the Disabled in the Labour Market: the Italian Legal Framework*, *Revista Derecho Social y Empresa* 2015 (1) p. 143 *et seq.*, pp. 149-151.

⁶²⁶ See also Presidential Decree 133 of 10.10.2000 “Implementing regulation for the implementation of the law of 12 March 1999, n. 68 laying down rules for the right to work of disabled people” (Decreto del Presidente della Repubblica n. 333 del 10.10.2000, “Regolamento di esecuzione per l’attuazione della legge 12 marzo 1999, n. 68 recante norme per il diritto al lavoro dei disabili”).

⁶²⁷ Legislative Decree 151/2015 revised, among the others, the incentive system under Article 13 of Law 68/1999, strengthened the individualized support for people with disabilities and tightened penalties against defaulting employers.

⁶²⁸ Legislative Decree 150/2015 repealed Legislative Decree 469/1997 which established the “employment centres” as organs of the Italian provinces. The Ministry of Labour in the circular 34/2015 has clarified that in order to guarantee the minimum service levels throughout the national territory and to facilitate compliance to Law 68/1999 by employers, regions are required to establish an office, having a territorial provincial basis, with the specific competence of targeted placement of disabled persons. See D. Garofalo, *Jobs Act e disabili*, *Rivista della sicurezza sociale* 2016 (1) p. 89 *et seq.*, p. 93.

Regions also play a role in the definition of the criteria and procedures for the formation of the ranking list of unemployed disabled people under the directives established by the President of the Council of Ministers in 2000 (Article 8, para. 4).⁶²⁹ Moreover, under Article 14 of Law 68/1999 **regions are required to establish the Regional Fund for the Employment of Disabled People** to finance the regional job placement programs and related services. The Fund's operating procedures and its organs are governed by regional laws. Article 9, para. 6-bis, also lays down the obligation of regions and the autonomous provinces of Trento and Bolzano to feed the "Targeted employment database" with **information on incentives and subsidies on the placement of persons with disabilities** provided on the basis of regional provisions as well as the Regional Fund.

Italian regions play a key role in the implementation of Law 68/1999. Their legislative powers have been enhanced over time, especially following the reform of the Article 117 of the Italian Constitution in 2001 which **entrusted regions with legislative competence in fields strictly linked with the realization of the right to work**.⁶³⁰ As a result of this reform and in implementation of Law 68/1999, the majority of the Italian regions and the two **autonomous provinces of Trento and Bolzano have enacted laws on employment of disabled people**.⁶³¹

2.2. Scope of protection

The Italian legal framework concerning disabled workers has a wide scope of protection since it **combines a quota system with anti-discrimination provisions**. As already pointed out, **Law 68/1999** is the main legislation governing the employment of disabled workers and guarantees the right to work of persons with disabilities by **providing a set of tools aimed at integrating them into the labour market**. This piece of legislation is supplemented by other regulatory acts that protect disabled people against discrimination in the field of employment with the objective of implementing the principle of equality set out in Article 3 of the Constitution.⁶³²

Legal protection of disabled workers, victims of discrimination, is ensured by Law 300/1970 (the so-called "**Workers' Statute**") and, in particular, by **Legislative Decree 216 of 9 July 2003** transposing Council Directive 2000/78/EC which establishes a general framework for equal treatment in employment and occupation. This last mentioned regulatory instrument protects disabled people against "direct" and "indirect" discrimination as well as "harassment" and "victimization" both in the public and private sectors. Legislative Decree 216/2003 applies to **employees, self-employed workers, people who carry out vocational training activities and professional traineeships, members of trade unions, organizations of employers or other professional organizations**. In accordance with EU Directive, the material scope of Legislative Decree 216/2003 covers a wide set of fields in order to protect disabled people during access to employment until the end of their work relationship. In 2013, the anti-discrimination law in the field of employment was further strengthened by an amendment of Legislative Decree 216/2003 that introduced the **duty to provide reasonable accommodation to disabled people in the workplace for public and private employers**.⁶³³

⁶²⁹ See Decree of the President of the Council of Ministers 13.01.2000, "Act of address and coordination for obliged employment of disabled people, accordingly to art. 1, para. 4, of Law 12 March 1999, n. 68" (Decreto del Presidente del Consiglio dei Ministri 13 gennaio 2000, "Atto di indirizzo e coordinamento in materia di collocamento obbligatorio dei disabili, a norma dell'art. 1, comma 4, della legge 12 marzo 1999, n. 68, published in Gazzetta Ufficiale No. 43 of 22.02.2000).

⁶³⁰ Digennaro, Right to Work, *op. cit.*, p. 164.

⁶³¹ For regional legislation, see Camera dei deputati, Relazione sullo stato di attuazione della Legge recante norme per il diritto al lavoro dei disabili (anni 2014-2015), Doc. CLXXVIII, no. 2, Annex 1, available at http://www.condicio.it/allegati/340/Relazione8_68.PDF (06.06.2019).

⁶³² On these acts see, *infra*, para. 2.4 of the Report.

⁶³³ See, *infra*, paragraphs 2.4 and 3.1 of the Report.

Alongside the anti-discrimination law that has a broad scope of protection, the main objective pursued by the legislative scheme embedded in Law 68/1999 is to facilitate access of disabled people to the labour market through targeted employment that under Article 1, para. 1, of Law 68/1999 **applies to the following beneficiaries: a) people of working age** suffering from physical, mental or sensory impairments and persons with intellectual disabilities, resulting in a **reduction of working capacity greater than 45%** assessed by the commissions for the certification of civil disability as well as people whose ability to work is permanently reduced to less than one third due to illness, physical or mental impairments; **b) industrially disabled people** with a degree of **disability greater than 33%** certified by the National Institute for the Insurance against Accidents at Work (INAIL); **c) blind or deaf-mute people**, except for blind telephone operators, masseurs and physiotherapists, rehabilitation therapists and teachers;⁶³⁴ **d) disabled ex-servicemen**, registered disabled civilians and legally disabled persons with impairments as per Presidential Decree 915/1978.

A core element of Law 68/1999 is the **obligation for public and private employers to hire people** belonging to the abovementioned categories in a **variable quota** that depends on the total number of employed workers⁶³⁵ regardless of the need of new hires.⁶³⁶ Under Article 3, para. 1, for public and private **employers with more than 50 employees** the quota is 7% of workers employed;⁶³⁷ two disabled workers if they employ **from 36 to 50 employees**; one disabled person if they have **between 15 and 35 employees**.

The reserve quota **also applies to political parties, trade unions and non-profit organizations** which operate in the field of social solidarity, assistance and rehabilitation, solely with regard to technical and administrative staff (Article 3, para. 3). For police and civil protection services, the placement of disabled people is intended exclusively for administrative personnel (Article 3, para. 4).

Law 68/1999 provides for the **suspension of the obligation to hire** due to particular circumstances. Pursuant to Article 3, para. 5, the duty to employ disabled people is *temporarily suspended* if the company is under restructuring, corporate reorganization, declared bankrupt or in liquidation, or if the company has requested the intervention of the extraordinary treatment of salary integration.⁶³⁸

⁶³⁴ Under Article 1, para. 2, blind people are those who are affected by absolute blindness or have a residual vision of no more than one tenth in both eyes, with a possible correction. Deaf-mute people are those who are affected by deafness from birth or before learning the spoken language.

⁶³⁵ The criteria to calculate the reserve quota are regulated in Article 4, as last amended by Legislative Decree 185/2016. Article 4, para. 1, establishes that for the purposes of determining the number of disabled persons to be employed, all employees hired by an employment contract must be considered as a basis for the calculation, except for some categories (listed in Article 4) that are excluded from calculation.

⁶³⁶ The “Clarifications and guidelines on mandatory placement of protected categories” (Circular 1/2019) adopted by the Presidency of the Council of Ministers, Ministry for Civil Service, on 24.06.2019 specify that the recruitment of disabled people must be carried out by way of derogation from the prohibition of new hires foreseen for public administration, even if restrictive rules on recruitment due to difficult economic and financial situation remain in force (see p. 15). The text is available at http://www.funzionepubblica.gov.it/sites/funzionepubblica.gov.it/files/Direttiva_1_2019.pdf (04.07.2019).

⁶³⁷ Public and private companies that employ from 51 to 500 employees are also obliged to hire 1% of family members of disabled ex-servicemen, registered disabled civilians, legally disabled persons with impairments and Italian returnees (Article 18, para. 2, of Law 68/1999).

⁶³⁸ Other grounds of suspension are established in acts adopted by the Ministry of Labour see <https://www.superabile.it/cs/superabile/lavoro/collocamento/sospensione-degli-obblighi-di-assunzione-di-persone-disabili.html> (20.07.2019). The suspension lasts for the duration of the intervention the company is subjected to.

The obligation to employ is further mitigated by Article 5 which regulates cases of exclusions and exemptions. Under Article 5, paragraphs 1-2, **public and private employers that operate in specific sectors** such as building (staff working on construction sites) as well as air, rail, sea and land transportation, and road haulage are **excluded from the application of reserve quota** for on-board and travelling personnel. Exemptions are provided for private employers and economic public bodies⁶³⁹ that, due to “special conditions of their activity” or high-risk activities cannot hire the overall percentage of disabled workers (Article 5, paragraphs 3-3-bis).⁶⁴⁰

In order to have access to targeted placement, **persons with disabilities** who fall into the categories referred to in Article 1, para. 1, of Law 68/1999 and are unemployed **must enroll in specific lists managed by the targeted employment services** in the place of residence, or in other services of the territory of the State (subject to cancellation from the list in which the person was previously enrolled), in conformity with Article 8.⁶⁴¹ For each enrolled person with disabilities, a form containing his/her working skills, competences and inclinations, as well as the nature and degree of disability has to be filled out by a technical committee, composed of experts in social and health sectors, which is set up at the targeted employment services. **Employers are instead required to submit a request of employment** to the competent offices within sixty days from the moment the obligation to hire disabled people has arisen or they can electronically send the information sheet with the request by January 31 of each year (Article 9, paragraphs 1, 3 and 6). **Public and private employers are subject to penalties in case of failure** to fulfil this obligation (Article 15).

As regards to the **recruitment procedures**, Article 7 of Law 68/1999 states that, for the purpose of fulfilling the obligation referred to in Article 3, private employers and economic public bodies can hire disabled workers by “direct appointment” (“chiamata nominativa”) or by conclusion of agreements (“convenzioni”) pursuant Articles 11.⁶⁴² Legislative Decree 151/2015 has generalized the use of the **“direct appointment” in order to allow the employer to directly choose disabled persons to hire** who are enrolled in the abovementioned lists and to overcome the negative effects of previous numerical placement system.⁶⁴³ Article 9, para. 4, states that the introduction to work of mentally disabled people takes place through “direct appointment” in the framework of the agreements concluded under Article 11 of Law 68/1999 and employers are entitled to incentives pursuant to Article 13.

Law 68/1999 provides for the conclusion of different types of agreements (“convenzioni”) between the competent offices and public and private employers containing a **wide range of options to integrate-disabled people into work with the aim of permanent employment**, even if Law 68/1999 allows fixed-term contracts whose duration cannot be less than six months. These agreements,

⁶³⁹ Article 3, para. 6, of Law 68/1999 extends the application of reserve quota to economic public bodies, which are entities that carry out business activities but are related to the public administration.

⁶⁴⁰ These employers may request an exemption and choose to pay a contribution to the Regional Fund for the Employment of Disabled People (30.64 euros for each disabled person not hired and for each working day) instead of entirely meeting their compulsory quota.

⁶⁴¹ To enroll in the list, disabled people must have unemployment status pursuant to Article 19 of Legislative Decree 150/2015, release the declaration of availability for work and have a minimum age of 16 years for private sector, while the minimum age to enter the public service is 18 years.

⁶⁴² Specific provisions of Law 68/1999 regulate the recruitment of disabled people in the public administration (Articles 7, para. 2, and 16). The “Clarifications and guidelines on mandatory placement of protected categories” (Circular 1/2019), cit., have clarified the application of Law 68/1999 in this sector.

⁶⁴³ Such system is however partially maintained in Article 7, para. 1-bis, under which in case of failure to recruit through “direct appointment”, the targeted employment services shall provide disabled workers according to the order of the ranking list for the qualification required or other qualification agreed with the employer based on the available qualifications.

regulated in Articles 11, 12 and 12-bis, and the “direct appointment” have been conceived by the Italian legislator to foster the work placement of people with disabilities, even those with intellectual or mental disability who require greater support in the workplace.⁶⁴⁴

2.3. Definition of disability

In the Italian legal order, a **unitary definition of disability is missing**. In the domestic legislation several terms such as “invalidity”, “handicap”, “impairments”, and “disability” are used depending on the scope of each act.

Law 104/1992 defines “handicapped person” as a person “having a permanent or a progressive physical, mental or sensory impairment that determines difficulties in learning, in social relations and work integration in such a way as to determine a process of social disadvantage or marginalization” (Article 3, para. 1). This definition focuses on the elements that have a negative impact on the life of persons with disabilities such as the limitations of faculties (impairments) and the social disadvantage (handicap).⁶⁴⁵ It is clearly **based on a medical model of disability**⁶⁴⁶ which does not comply with the concept of disability developed at the universal level following the WHO International Classification of Functioning, Disability and Health (known as ICF) of 2001.⁶⁴⁷

This **new approach to disability, which has been embedded in the CRPD**, focuses on the skills of disabled people and the obstacles they encounter for their inclusion and participation in the society (the so-called “biopsychosocial” model of disability).⁶⁴⁸ It also involves a different terminology using terms such as “disability” and “persons with disabilities”, and the definitive abandonment of the terms “handicap” and “handicapped” which focus on disadvantages. Following this new understanding of disability, under the CRPD “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1).⁶⁴⁹

As already mentioned, **the concept of “handicapped person” contained in Law 104/1992 does not comply with the CRPD**, also with regard to terminology.⁶⁵⁰ However, the Italian legislator has to some

⁶⁴⁴ On the agreements provided by Law 68/1999, see Digennaro, *Right to Work*, *op. cit.*, pp. 159-164. Pursuant to Article 14 of Legislative Decree 276/2003, targeted employment services can stipulate framework agreements both with cooperatives and consortia of cooperatives aimed at the employment of people with severe disabilities against work contracts from the companies subject to the obligations of Law 68/1999. However, these agreements are rarely stipulated.

⁶⁴⁵ See the initial report of Italy to the Committee on the rights of persons with disabilities (CRPD Committee), CRPD/C/ITA/1, para. 2.

⁶⁴⁶ The medical model considers disability as a feature of the individual caused by disease, trauma or other health condition. Disability is seen as a deviation from normal health status and an individual problem which calls for medical treatment or assistance interventions.

⁶⁴⁷ See World Health Organization (WHO), *Towards a Common Language for Functioning, Disability and Health – ICF*, Geneva 2002.

⁶⁴⁸ In this model, disability and functioning are viewed as outcomes of interactions between “health conditions” (diseases, disorders and injuries) and “contextual factors”, such as external environmental factors (e.g., social attitudes, architectural characteristics, legal and social structures, and others) and internal personal factors (such as gender, age, coping styles, social background, education, profession, past and current experience, and others).

⁶⁴⁹ See V. Della Fina, Article 1 (Purpose), in V. Della Fina, R. Cera, G. Palmisano (eds.), *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, Cham 2017, pp. 97-99.

⁶⁵⁰ The CRPD Committee recommended Italy to adopt a concept of disability in line with the Convention and to ensure that legislation will incorporate the new concept in a homogeneous manner across all levels and regions of government and territories (CRPD/C/ITA/CO/1, para. 6).

extent anticipated the terminological innovations in Law 68/1999 using the terms “disabled people/persons with disabilities” and marginalizing those of “handicap and handicapped”, mentioned only in Article 1, para. 1. **Law 68/1999 does not contain a definition of disability** but identifies a list of beneficiaries on the basis of their physical, mental, intellectual, and sensory impairments and the severity of disability which compromises their ability to work (Article 1, para. 1).⁶⁵¹ **This act, therefore, indirectly defines disability through the identification of pre-set categories** to be applied to specific individual cases according to schematic “in or out” criteria.⁶⁵²

However, Law 68/1999 reflects a development in the general understanding of disability in the Italian legal order for the **emphasis placed on the skills of persons with disabilities which is in line with the CRPD**. Even the different types of impairments (physical, mental, intellectual, and sensory impairments) mentioned in Law 68/1999 seem to comply with those identified in Article 1 of the CRPD. In addition, Law 68/1999 presupposes a condition of disability that lasts over time and not the one of temporary nature. The **commissions of the local health authority (ASL) are required to assess disability** and the permanence of the disability condition although they still perform this assessment mainly following a medical approach that does not comply with the ICF.

An overall revision of the procedures concerning the assessment of disability is envisaged in the **Legislative Decree 151/2015 which provides for the adoption of Guidelines** on targeted employment of persons with disabilities to be based on a set of principles, including the evaluation of disability grounded on a biopsychosocial approach in conformity with ICF. The Guidelines should also define the criteria for job placement projects that have to take into account barriers and enabling factors of working environments. To date, **however, the Guidelines have not yet been adopted** and the assessment of disability continues to be anchored to criteria that have long been recognized as outdated at the international level.

2.4. Forms of discrimination protection

As already mentioned, the protection of disabled people against discrimination at work is guaranteed by Article 15, para. 1, of Law 300/1970 (the so-called “**Workers’ Statute**”) and by Legislative Decree 216 of 9 July 2003 implementing the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive).⁶⁵³

Legislative Decree 216/2003 protects disabled people against discrimination **from access to work until the end of the employment relationship**. Under the terms of Article 3 the principle of equal treatment irrespective of religion, personal belief, disability, age or sexual orientation, applies to all persons, **both in the public and private sectors**, in relation to the following areas: **a) access to employment and work**, both self-employment and wage employment, including selection criteria and recruitment conditions; **b) employment and working conditions**, including career advancement, remuneration and dismissal conditions; **c) access to all types and all levels of vocational guidance**, vocational training, advanced vocational training and retraining, including professional traineeships; **d) membership of, and involvement in, an organization of workers or employers**, or other professional organizations, including the benefits provided for by such organizations.

Legislative Decree 216/2003 **protects disabled workers against “direct” and “indirect” discrimination** as well as “**harassment**” whose definitions are formulated on the same terms as those contained in Article 2 of Council Directive 2000/78/EC.

⁶⁵¹ See, *supra*, para. 2.2 of the Report.

⁶⁵² Digennaro, *Right to Work*, *op. cit.*, p. 149.

⁶⁵³ Article 15, para. 1, of the Workers’ Statute establishes the nullity of any act or pact aimed at discriminating a worker also on the basis of disability.

According to Article 2, para. 1 (a), of Legislative Decree 216/2003, “**direct discrimination**” occurs when due to religion, personal belief, disability, age or sexual orientation, a person is treated less favourably than another person who is, has been or would be treated in a comparable situation. The same provision, in para. 1 (b), defines “**indirect discrimination**” as a situation where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons having a particular religion or any other ideology, a disability, a particular age or sexual orientation, at a particular disadvantage compared with other persons. Article 2, para. 3, has introduced into the Italian legal system the statutory definition of “**harassment**” which indicates a form of discrimination when unwanted conduct related to any of the grounds covered (religion, personal belief, disability, age or sexual orientation) takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.⁶⁵⁴ Finally, ***an instruction to discriminate against*** persons on the grounds covered by the Employment Equality Directive is also considered to be a form of discrimination under Article 2, para. 4, of Legislative Decree 216/2003.

Disabled people working for public administration are further protected by Article 7, para. 1, of Legislative Decree 165/2001 as amended in 2010, which strengthens the protection against discrimination, including direct and indirect discrimination, to access to work, labour treatment and working conditions, vocational training, promotions and safety at work.⁶⁵⁵

In the Italian legal system a **form of protection is also provided for “victimization”** in conformity with Article 11 of Council Directive 2000/78/EC. Victimization was mentioned in Article 4, para. 6, of Legislative Decree 216/2003 only as an element that judge had to take into consideration for the purpose of liquidating damages. In 2011, this norm was repealed and a new Article 4-bis was introduced into the Legislative Decree 216/2003 in order to guarantee a **judicial protection against any prejudicial behaviour** addressed to a person affected by direct or indirect discrimination or “to any other person” **as a reaction against any activity aimed at obtaining equality of treatment.**

The duty to provide reasonable accommodation in workplaces is also strictly linked with the protection of disabled people against discrimination. In the Italian legal system, this duty was introduced into Legislative Decree 216/2003 following the sentence of the Court of Justice of the European Union (CJEU) which ruled that Italy failed to fulfil its obligations under Article 5 of Council Directive 2000/78/EC.⁶⁵⁶ In order to execute this judgment, in 2013 a new paragraph (3-bis) was added to Article 3 of Legislative Decree 216/2003 to include this duty.⁶⁵⁷

The **obligation of the employers to provide reasonable accommodation has been reinforced** by subsequent legislative acts that have strengthened this obligation, especially in the public administration sector. Article 39-bis and Article 39-ter of Legislative Decree 165/2001 have established respectively the “National council for integration into the workplace of persons with disabilities” (“Consulta nazionale per l'integrazione in ambiente di lavoro delle persone con disabilità”) and the “Responsible for the inclusion processes of persons with disabilities” (“Responsabile dei processi di

⁶⁵⁴ The definition of harassment is also contained in Legislative Decree 215/2003 implementing Council Directive 2000/43/EC on the principle of equal treatment between persons irrespective of racial or ethnic origin. Law 67/2006 on discrimination against disabled people in fields outside employment also protects against direct and indirect discrimination, and harassment.

⁶⁵⁵ Under Article 57, para. 2, of Legislative Decree 165/2001 public administration has the duty to take all measures to implement EU directives on gender equality and non-discrimination.

⁶⁵⁶ CJEU (Fourth Chamber), Case C-312/11, *Commission v. Italy*, judgment of 4 July 2013. The CJEU ruled, among the others, that the duty to provide reasonable accommodation is not laid down in Law 68/1999 as this act, while providing incentives and benefits, applies only to specific categories of disabled people and the obligations set forth therein affect only some employers (paragraphs 31-34).

⁶⁵⁷ The new paragraph was added by Decree Law 76/2013 as converted into Law 99/2013.

inserimento delle persone con disabilità”) entrusted, among the others, with the task to implement the duty to provide reasonable accommodation in workplace under Article 3, para. 3-bis, of Legislative Decree 216/2003.⁶⁵⁸

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

Article 3, para. 3-bis, of Legislative Decree 216/2003 establishes that “in order to guarantee compliance with the principle of equal treatment of persons with disabilities, **private and public employers shall provide for reasonable accommodations**, as defined by the UN Convention on Rights of Persons with Disabilities ratified by Law 18/2009, in workplaces to ensure disabled persons full equality with other workers. Public employers must provide for the implementation of this provision without new or greater burdens for public finance and utilizing the available human, financial and instrumental resources under current legislation”.

This provision **does not define reasonable accommodation** but refers to the concept contained in the CRPD (Article 2)⁶⁵⁹ rather than to the definition under Article 5 of Council Directive 2000/78/EC.⁶⁶⁰ In addition, it **does not give any guidance to employers on how to apply this duty** nor does it consider its violation a form of discrimination against disabled people. This latter issue leaves room for judicial interpretation, as the Employment Equality Directive does not provide for the denial of reasonable accommodation to be a form of discrimination unlike Article 2 of the CRPD.⁶⁶¹ However, it has been observed that Article 5 of Council Directive 2000/78/EC is clearly framed in terms of equality paradigm, therefore, EU Member States that have ratified the CRPD (like Italy) **should ensure that the denial of reasonable accommodation amounts to a discrimination on the grounds of disability**.⁶⁶²

⁶⁵⁸ Article 39-bis and Article 39-ter were introduced into Legislative Decree 165/2001 by Legislative Decree 75/2017. The Responsible is appointed by public administrations with more than 200 employees, on his role see the “Clarifications and guidelines on mandatory placement of protected categories” (Circular 1/2019), cit., pp. 4-6.

⁶⁵⁹ Article 2 of the CRPD states: “Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. In addition, Article 27, para. 1 (i), of the CRPD requires States parties to “ensure that reasonable accommodation is provided to persons with disabilities in the workplace”.

⁶⁶⁰ Article 5 provides: “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”.

⁶⁶¹ In the definition of “discrimination on the basis of disability” contained in Article 2 of the CRPD it is specified that “it includes all forms of discrimination, including denial of reasonable accommodation”.

⁶⁶² L. Waddington, A. Broderick, *Combatting Disability Discrimination and Realising Equality. A Comparison of the UN Convention on the Rights of Persons with Disabilities and EU Equality and Non-discrimination Law* (2018), p. 71, available at https://ec.europa.eu/info/sites/info/files/combating_disability_discrimination.pdf (10.07.2019). In some Member States, failure to provide reasonable accommodation constitutes discrimination (mostly considered as direct discrimination), and this tendency is also visible in national case law. See, European

As a result, the norm on the duty of reasonable accommodation introduced into the Italian legal order **has to be interpreted so as to reconcile the obligations** under the **Employment Equality Directive** with **those deriving from the CRPD**. Moreover, national case law confirms the relevance of supranational sources to interpret Italian legislation in this specific area.⁶⁶³

The **case law of the CJEU** and the remarks made by the Committee on the rights of persons with disabilities (**CRPD Committee**) on this matter **also provide support for Italian courts**, especially to identify employers' duties in the domestic legal order. In this regard, the CJEU ruled that "in accordance with the second paragraph of Article 2 of the UN Convention, '**reasonable accommodation**' is a **necessary and appropriate modification** and adjustments **not imposing a disproportionate or undue burden**, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".⁶⁶⁴ In addition, the CRPD Committee clarified that **reasonable accommodation duties are "individualized"** and are addressed to meet the needs of a particular individual with disabilities.⁶⁶⁵

In conformity with these interpretations, in the Italian legal order, reasonable accommodation measures in workplaces are intended to accommodate exclusively the needs of disabled employees, once an **individual case** appears, and are **not addressed to adapt all workplaces** with a view to potentially employing disabled persons.⁶⁶⁶ For employees who assist a disabled relative, other measures are envisaged such as work permits under Article 33 of Law 104/1992.

As already mentioned, Legislative Decree 216/2003 **does not provide indications on the requirement of reasonableness** as it only makes reference to the definition contained in the CRPD. Moreover, national settled case law helping to define the concept of reasonableness is missing.⁶⁶⁷ Accordingly, the term "reasonableness" **must be interpreted in the light of the Convention obligations** as clarified by the CRPD Committee. This body pointed out that "the concept of 'reasonableness' should not act as a distinct qualifier or modifier to the duty. [...] Rather, the reasonableness of an accommodation is a reference to its **relevance, appropriateness and effectiveness for the person with a disability**. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability".⁶⁶⁸ It follows that the

Parliament, The Employment Equality Directive - European Implementation Assessment (2016), p. 31, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU\(2016\)536346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU(2016)536346_EN.pdf) (10.07.2019).

⁶⁶³ See, for example, the order of the Tribunal of Pisa of 16 April 2015 concerning a worker who had been fired without a justified reason because her inability to continue to perform the duties carried out within the company due to a supervening disability. The Tribunal ruled that the company had the obligation to provide reasonable accommodation under the terms of the Council Directive 78/2000/EC as implemented by Article 3, par. 3-bis, of Legislative Decree 216/2003. The Tribunal expressly referred to the notion of reasonable accommodation contained in Article 2 of the CRPD and to recitals 20 and 21 of the EU Directive. The text of the Tribunal's order is available at

http://www.questionegiustizia.it/doc/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf (26.06.2019).

⁶⁶⁴ CJEU (Second Chamber), Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, judgment of 11 April 2013, para. 53.

⁶⁶⁵ General Comment No. 6 (2018), cit., para. 25 (a).

⁶⁶⁶ Domestic case law on this matter confirms this approach. See, among others, Tribunal of Pisa, order of 16 April 2015, cit.; Tribunal of Bologna, order of 30 October 2013; Tribunal of Ivrea, order of 24 February 2016. Texts available at <https://www.studiolegaleassociato.it/la-disciplina-antidiscriminatoria-fattore-handicap/> (03.07.2019).

⁶⁶⁷ INAIL Circular 51 of 30.12.2016, available at <https://www.inail.it/cs/internet/docs/allegato-circolare-51-del-30-dic-2016.pdf> (10.07.2019).

⁶⁶⁸ General comment No. 6 (2018), cit., para. 25 (a).

“reasonableness” is **not linked with the costs of the accommodation** or the availability of resources, as financial aspects concern a possible assessment of “disproportionate or undue burden”.⁶⁶⁹

In the Italian legal order, the duty to provide reasonable accommodation is a non-discrimination obligation **aimed at achieving *de facto* equality of disabled people in conformity with the CRPD**.⁶⁷⁰ In workplaces, **examples of reasonable accommodation** emerging from domestic case law include not only technical adjustments such as modifying equipment and reorganization of the work station, but also organizational measures, such as reduction or remodelling of work timetable, change of shifts working patterns and different distribution of working tasks (equivalent or inferior).⁶⁷¹ This last accommodation measure is also laid down in Article 4 of Law 68/1999 and Article 42 of Legislative Decree 81/2008, “Consolidated Law on Health and Safety at Work”. Such measures are, to a great extent, in line with those contained in recital 20 of the Equality Employment Directive which states that “appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”.⁶⁷²

In the Italian legal system **“affirmative action measures” are also provided for challenging systemic barriers and inequalities** that encounter disabled people in the field of employment. These are “specific measures”, as required by Article 5, para. 4, of the CRPD, that differ from reasonable accommodation as they do not follow a case-by-case approach but they are general measures implying a preferential treatment in favour of disabled people to redress discrimination and exclusion. Targeted employment and quota system provided for in Law 104/1992 and Law 68/1999 fall within this kind of measures.

3.2. Incentives or other assistance available to employers

Law 68/1999, as amended by Legislative Decree 251/2015, establishes **the allocation of public resources to provide reasonable accommodation in the workplace**. Under Article 14, para. 3, the Regional Fund for the Employment of Disabled People is **financed by funds arising from the financial penalties** provided for by Law 68/1999, contributions paid by the employers pursuant to Law 68/1999 not deposited in the Fund for the Right to Work of Disabled People established at the Ministry of Labour and Social Policy as per Article 13, as well as by contributions of foundations, private institutions and subjects however interested. Pursuant to Article 14, para. 4, **the Regional Fund provides financial contributions** for the partial flat-rate reimbursement of the expenses necessary for the adoption of

⁶⁶⁹ A different interpretation was given by the CJEU which held that, in accordance with Article 5 of the Employment Equality Directive, the accommodation measure which a disabled person is entitled to “must be reasonable, in that it must not constitute a disproportionate burden on the employer”, see CJEU (Second Chamber), Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, cit., para. 58. On this issue, however, the Court should adopt an interpretation of the term “reasonable” in line with the CRPD and the remarks of the CRPD Committee in order to avoid tensions between EU law and the Convention. See Waddington, Broderick, *Combatting Disability*, *op. cit.*, p. 72.

⁶⁷⁰ General Comment No. 6 (2018), cit., para. 25 (c).

⁶⁷¹ See the abovementioned order of the Tribunal of Pisa of 2015, and the case law cited above, *supra.*, See, among others, Tribunal of Pisa, order of 16 April 2015, cit.; Tribunal of Bologna, order of 30 October 2013; Tribunal of Ivrea, order of 24 February 2016. Similar measures were indicated by the CJEU in the *Commission v. Italy* ruling, see CJEU (Fourth Chamber), Case C-312/11, *Commission v. Italy*, cit., para. 60. See S. D’Ascola, *Disabilità e diritto del lavoro: istantanee dall’Italia e dall’Europa*, in *Associazione Italiana di diritto del lavoro e della sicurezza sociale* (ed.), *Legge e contrattazione collettiva nel diritto del lavoro post-statutario*, Milano 2017, pp. 456-459.

⁶⁷² In the *HK Danmark (Skouboe Werge and Ring)* ruling, the CJEU held that the list of measures in recital 20 is not exhaustive and other measures can also amount to an accommodation, see CJEU (Second Chamber), Joined Cases C-335/11 and C-337/11, *HK Danmark (Ring and Skouboe Werge)*, cit., para. 49.

reasonable accommodation in favour of workers with a reduction in work capacity of more than 50 percent, including the provision of teleworking technologies or the removal of architectural barriers that limit in any way the work integration of the disabled person, as well as to establish a responsible for the inclusion processes of persons with disabilities.⁶⁷³

In addition, the **Finance Act of 2015 entrusted INAIL with new tasks** concerning job reintegration and work integration of persons with disabilities, including the **financing of reasonable accommodation** provided by employers.⁶⁷⁴

4. Enforcement of rights

Directive 2000/78/EC requires Member States to establish judicial and/or administrative procedures allowing individuals to enforce their rights guaranteed under the Directive (Article 9, para. 1). In compliance with EU law, Article 3, para. 1, of **Legislative Decree 216/2003** states that **judicial protection against discrimination** on the grounds covered by the Employment Equality Directive applies for both public and private sectors under the terms of Article 4.

This latter provision, in para. 2, states that in the event of discriminatory acts and conducts falling within the definitions of Article 2 (direct and indirect discrimination, harassment, and instruction to discriminate), civil proceedings are regulated in Article 28 of Legislative Decree 150/2011. The norm on fast-track procedure **allows victims of discrimination to bring an action (even in person) before the ordinary civil tribunal** of the place of domicile.⁶⁷⁵ Civil proceedings before tribunals are granted also in the event of victimization (Article 4-bis of Legislative Decree 216/2003).⁶⁷⁶

In order to demonstrate the existence of discriminatory behaviour, the applicant can bring factual evidence (including statistical data related to hiring, contributory schemes, job assignments and qualifications, career progressions and dismissals related to the company concerned) from which the existence of discriminatory acts or behaviours can be presumed. For discrimination cases, national law allows a shift of the burden of proof from the complainant to the respondent. Pursuant to Article 28, para. 4, of **Legislative Decree 150/2011** it shall be to the defendant to prove that no discrimination occurs.

⁶⁷³ See, *supra*, par. 2.4 of the Report.

⁶⁷⁴ See Article 1, para. 166, of Law 190/2014, and INAIL Resolution 2/2017 available at <https://www.inail.it/cs/internet/docs/delibera-civ-2-2017.pdf> (12.07.2019).

⁶⁷⁵ **Legislative Decree 150/2011**, “Additional provisions to the Code of Civil Procedure concerning reduction and simplification of civil proceedings under Article 54 of Law 18 June 2009, No. 69” (Decreto Legislativo 1 settembre 2011, n. 150, Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69”, published in Gazzetta Ufficiale No. 220 of 21.09.2011).

⁶⁷⁶ Civil proceedings do not apply to some specific categories falling within “personnel under public law regime” listed in Article 3, para. 1, of Legislative Decree 165/2001. Under Article 4, para. 8, of Legislative Decree 216/2003 these workers can submit a complaint to administrative judges. This is an exception to the general principle laid down in Article 63 of Legislative Decree 165/2001 that provides for the jurisdiction of the ordinary judge for all disputes relating to employment relationships with the public administration.

The judge's order becomes final if it is not appealed within thirty days of its communication or notification (Article 2909 of the Italian Civil Code).⁶⁷⁷ In second instance, the civil proceedings will take place before the competent Court of Appeal. Against the sentence rendered on appeal, it will be possible to appeal to the Court of Cassation (third instance).

Under Article 4, para. 3, of Legislative Decree 216/2003 the victims of discrimination can also resort to **non-judicial dispute resolution procedures**, such as conciliation procedures provided for in collective labour contracts. As an alternative, the **victims can promote an attempt at conciliation** pursuant to Article 410 of the Code of Civil Procedure or, in the case of employment relationships with public administrations pursuant to Article 66 of Legislative Decree 165/2001 (Conciliation Committee),⁶⁷⁸ also through local trade union representatives under the terms of Article 5 of Legislative Decree 216/2003.

This latter provision has implemented Article 9 of the Employment Equality Directive which requires Member States to engage **associations or legal entities** in proceedings, either on behalf or in support of any victim. Article 5, para. 1, entitles trade unions, associations and organizations representing the rights or interests affected to **act in support or on behalf of victims** of discrimination under the terms of Article 4.⁶⁷⁹ The legal standing is granted to these entities with no special register, however they must have a power of attorney provided by the victim in written form.⁶⁸⁰ Under Article 5, para. 2, the same **entities can bring a claim before the tribunal** in the event of collective discrimination when victims cannot be identified in a direct and immediate way (in this case, obviously, the power of attorney of victims is not needed).

In addition, Legislative Decree 198/2006 (the so-called “**Equal Opportunities Code**”) provides for equal treatment between men and women with regard to all aspects of employment, such as access to employment, promotion, training, employment conditions including remuneration and social benefits. **The Code sets forth specific judicial protection** against direct and indirect discrimination, harassment and victimization, as well as **compensation for possible damages** and grants legal standing to Councillors for Equal Opportunities.⁶⁸¹

In the Italian legal order another tool to enforce rights in the labour field is to resort to **arbitration** pursuant to Article 806 of the Code of Civil Procedure which, however, sets forth some limits. First of all, in the event of employment disputes the parties may resort to arbitration **only if it is provided for by law or collective labour agreements**. Secondly, it is not possible to resort to arbitration for disputes concerning inalienable rights (such as those on status, health, physical integrity, and freedom) and for

⁶⁷⁷ Article 2909 of the Italian Civil Code on “final judgments” states: “Findings made in judgments which have acquired the force of *res judicata* shall be binding on the parties, their lawful successors and assignees”.

⁶⁷⁸ With the reform introduced by Law 183/2014 (the so-called “Jobs Act”), the attempt at conciliation governed by Article 410 of the Code of Civil Procedure has become optional and therefore parties can freely decide whether to resort to the conciliation procedure or apply directly to the judicial authority.

⁶⁷⁹ In the employment field, trade unions have right to legal standing on behalf or in support of victims of discrimination according to Article 18 of Legislative Decree 1970/300 (on unlawful dismissal) and Article 43, para. 10, of Legislative Decree 1998/286.

⁶⁸⁰ Conversely, Law 67/2006 grants legal standing only to associations identified by a joint decree of the Ministries of Labour and Equal Opportunities. This means that associations acting against discrimination in the field of employment enjoy a much broader right to legal standing, see C. Favilli, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Italy (01.01.2014), available at <https://www.refworld.org/pdfid/541ac2584.pdf> (02.07.2019).

⁶⁸¹ Article 57 of Legislative Decree 165/2001 set up a Central Guarantee Committee for equal opportunities, enhancement of workers’ wellbeing and against discrimination within public administration.

any other litigation that the law expressly forbids to submit to this procedure. Due to these legal limits, **arbitration is not a widely used procedure for employment claims**, especially for disabled workers to whom specific statutory safeguards and remedies are granted when discrimination in the field of work occurs. Moreover, the Court of Cassation in the judgment No. 25011 of 2014 ruled that in discrimination cases, civil actions under the special procedure of Article 28 of **Legislative Decree 150/2011 apply**.⁶⁸² **Therefore, civil proceedings against discrimination prevail over any other special procedure provided for in labour law.**

With regard to remedies, Article 28, para. 5, of **Legislative Decree 150/2011**, states that with the decision concluding the civil proceedings, the judge can order the defendant to pay **compensation**, including non-pecuniary losses, and the **cessation of the discriminatory behaviour**, conduct or act, if still undergoing. The judge can also adopt any other measure to remove the effects of the discrimination, even in respect of the public administration.⁶⁸³ In order to prevent discrimination being repeated, the judge can **order the perpetrator to adopt an anti-discrimination plan** within a deadline established in the judgment. When discriminatory collective behaviour occurs, the plan is adopted after hearing the opinion of the association that brought the case before the tribunal.

The judge can also **order the reinstatement of the worker** with the ruling declaring the nullity of the dismissal as discriminatory according to Article 15 of Law 300/1970 which states the nullity of discriminatory dismissal based, *inter alia*, on disability.⁶⁸⁴ The nullity of discriminatory dismissal grounded on physical or mental disability of the worker is also provided for in Article 2 of Legislative Decree 23/2015 which has been adopted also pursuant to Articles 4, para. 4, and 10, para. 3, of Law 68/1999.⁶⁸⁵

5. Legal framework in practice

Law 68/1999 is monitored by the Ministry of Labour and Social Policies which reports to the Parliament on its implementation every two years. The last report, presented to the Parliament in 2018, covers the years 2014-2015, a period characterized by the persistence of the economic and employment crisis with a high incidence of temporary work and long-term unemployment, in particular among women.⁶⁸⁶ In this context, a **comprehensive labour regulation reform was adopted through Law 183/2014** (the so called “Jobs Act”) and its implementation decrees.⁶⁸⁷ As already mentioned, these acts significantly affected Law 68/1999 while maintaining the basic structure of the regulatory framework. The reform

⁶⁸² See para. 2.7, text of the judgment available at <http://3.flcgil.stgy.it/files/pdf/20141127/sentenza-25011-della-corte-di-cassazione-del-25-novembre-2014-garanzia-di-sostegno-all-alunno-disabile.pdf> (11.07.2019). See also the judgment of the Court of Appeal of Naples of 13 September 2018, available at <http://www.osservatoriodiscriminazioni.org/index.php/2019/03/29/1047/> (20.07.2019).

⁶⁸³ Article 4 of Legislative Decree 216/2003 establishes that in the event of ascertained discriminatory acts or conducts, Article 44, para. 11, of Legislative Decree 286/1998 applies. This norm provides for the revocation of any public benefits granted to companies that have committed discriminatory acts.

⁶⁸⁴ Article 18, para. 1, of Law 300/1970 provides for the reinstatement of the worker dismissed due to discrimination and the compensation for damages suffered by the worker for the void and ineffective dismissal.

⁶⁸⁵ Articles 4, para. 4, and 10, para. 3, of Law 68/1999 regulate respectively cases of workers who become unable to perform their duties as a result of injury or illness and cases of aggravation of disabled worker’s health conditions or significant changes in work organization.

⁶⁸⁶ Camera dei deputati, Relazione, *op. cit.*, p. 11.

⁶⁸⁷ D. Pinelli, R. Torre, L. Pace, L. Cassio, A., Arpaia, The Recent Reform of the Labour Market in Italy: A Review (2017), available at https://ec.europa.eu/info/sites/info/files/economy-finance/dp072_en.pdf (22.07.2019).

of Law 68/1999 had a **positive impact on the employment of disabled people**, as shown in the report to the Parliament.

The report pointed out that in absolute terms the **overall number of introductions to work increased compared to the previous two-year period**, reaching almost 28,000 units in 2014 (an increase of more than 50% compared to 2013) and over 29,000 in 2015.⁶⁸⁸ Moreover, starting from September 2015 when Legislative Decree 151/2015 entered into force, the introductions to work increased from an average of 2,000 units per month to an average of 3,000 units, with an increase of 44.6%.⁶⁸⁹ This percentage most likely increased thanks to the generalized use of the “direct appointment”.

Other important data concern the **percentage of fixed-term contracts** with respect to permanent contracts. The share of fixed-term contracts over the total recruitment rose from 57.7% in 2013 to 71.7% in 2014, and then **decreased to just over 63% in 2015**. These data confirm a trend that has emerged since 2010 when the percentage weight of fixed-term contracts had exceeded permanent contracts, above all among private employers.⁶⁹⁰ The report however highlighted that, compared to the previous two years, a **lower percentage of disabled people having difficulties in entering ordinary work cycle had been employed** (5.6% of the total number disabled people employed in 2014, 6.9% in the first period of 2015 and 7.1% after the entry into force of Legislative Decree 151/2015). Even the percentage of agreements stipulated with social cooperatives for the employment of people with severe disabilities was also very limited (3.8% in 2014 and 4.1% in 2015).

It emerges from the report that, despite some positive developments produced by Law 68/1999, there is **still the need to support the placement at work of disabled people in a more effective way**, especially of persons with intellectual and mental disabilities and, on the other side, to improve the activities of targeted employment services.⁶⁹¹ The **second Biennial Action Plan** for the Promotion of the Rights and the Integration of Persons with Disabilities of 2017 contains a set of measures under Action 2 (“Interventions on the activity of targeted employment”) and Action 3 (“Technical and organizational interventions for improvement the targeted employment activity”) that go in this direction. Moreover, Article 1 of Legislative Decree 151/2015 provides for the **adoption of Guidelines on targeted employment of persons with disabilities** on the basis of some principles, including the promotion of an integrated network of territorial social, health, educational and training services along with INAIL’s services to foster work integration of disabled people, the promotion of territorial agreements among trade unions, employers, social cooperatives, associations of persons with disabilities and their families to facilitate their job placement, and the analysis of the jobs to be assigned, also with reference to reasonable accommodation that the employer is required to provide. **To date the Guidelines have not been adopted**, although they were envisaged in 2015 as part of the reform of Law 68/1999.

Concerning the implementation of Legislative Decree 216/2003 on the protection of disabled people against discrimination in the field of employment, the last report of the National Office against Racial

⁶⁸⁸ Introductions to work in private employers accounts for over 92% of the total in 2014 and just under 96% in 2015. Camera dei deputati, Relazione, *op. cit.*, p. 12.

⁶⁸⁹ Such increase was significant for both genders with a higher percentage among men (47.4%) than women (41.1%).

⁶⁹⁰ Camera dei deputati, Relazione, *op. cit.*, p. 12.

⁶⁹¹ The implementation of Law 68/1999 requires an effective supervision by targeted employment services and well-trained specialized operators in order to guarantee the correct use and operation of its instruments. However, the public budget constraints and the institutional changes concerning the role of provinces led to a reduction in the targeted employment services staff with increasing difficulties in carrying out their role. See N. Orlando, Peer Country Comments Paper – Italy, The Role of Targeted Employment Services for People with Disability, Brussels 2018, pp. 5-6.

Discrimination (UNAR) presented to the Parliament in 2018 and relating to the year 2017, pointed out that a **total of 158 complaints, concerning discrimination based on disability, were received** at its **contact centre**.⁶⁹² In percentage terms there was a **sharp decrease compared to the previous year**, from 16.4% in 2016 to 4.4% in 2017.⁶⁹³ In the field of work, **UNAR received 24 complaints concerning discrimination on the grounds of disability** of which 9 concerned access to employment, 8 with regard to working conditions, one concerning mobbing, four on dismissal conditions, one for permits, expectations and leave, and one on other things. The follow-up of these cases is not available. Moreover, in Italy a **coherent and systematic approach to equality data collection**, as recommended by the Subgroup on Equality Data, is missing and, as a result, any proper assessment of the effectiveness of national equality legislation in the field of employment of disabled people cannot be made.⁶⁹⁴

⁶⁹² UNAR is set up within the Department for Equal Opportunities at the Presidency of the Council of Ministers. UNAR's tasks include providing concrete assistance to the victims of discrimination through its contact centre, investigating about the existence of discriminatory phenomenon in accordance with the legal authority prerogatives and performing studies, researches and training activities about discrimination.

⁶⁹³ UNAR, *Relazione al Parlamento sull'effettiva applicazione del principio di parità di trattamento e sull'efficacia dei meccanismi di tutela* (2017), p. 18 (table 4) and p. 19 (table 5), available at <http://www.unar.it/wp-content/uploads/2019/01/Relazione-al-Parlamento-2017-1.pdf> (23.07.2019). See also European network of legal experts in gender equality and non-discrimination, *Country report, Non-discrimination, Italy* (2018), available at <https://www.equalitylaw.eu/downloads/4687-italy-country-report-non-discrimination-2018-pdf-2-02-mb> (24.07.2019).

⁶⁹⁴ High Level Group on Non-discrimination, Equality and Diversity, Subgroup on Equality Data, *Guidelines on improving the collection and use of equality data* (2018), available at https://ec.europa.eu/info/sites/info/files/final_guidelines_4-10-18_without_date_july.pdf (24.07.2019).

G. NETHERLANDS

1. Introduction

1.1. Vue d'ensemble nationale

Le Royaume des Pays-Bas compte environ 17 millions d'habitants pour une surface de 37'000 km². Le Royaume des Pays-Bas est une monarchie constitutionnelle, avec une démocratie parlementaire, impliquant que les membres du gouvernement répondent au Parlement.

L'économie des Pays-Bas est connue pour sa stabilité, sa force de travail qualifiée et son infrastructure développée. Elle est classée dix-huitième au monde en termes de GDP (2012) et cinquième économie de la zone Euro. En 2012, les Pays-Bas présentaient une population économiquement active d'environ 7,5 millions de personnes. Le droit du travail comprend les règles juridiques qui gouvernent la relation entre l'employeur et le travailleur ainsi que leurs organisations respectives, et vise tant les travailleurs et leurs organisations dans le secteur privé comme dans le secteur public.

La culture juridique aux Pays-Bas se caractérise par un équilibre entre **deux approches dans la régulation des problématiques sociétales**: celle de l'adoption de lois strictes pour les matières où cela est nécessaire d'une part, et une approche de « *soft law* » pour résoudre les questions qui le permettent d'autre part (« *zacht waar het kan, hard waar het moet* »). La protection des personnes handicapées au travail et l'emploi de ces personnes a fait l'objet d'une telle approche mixte.

1.2. Vue d'ensemble du cadre légal et politique

La Convention des Nations-Unies relative aux droits des personnes handicapées (ci-après, la « Convention ») a été signée par le gouvernement des Pays-Bas en 2007 déjà, mais n'a été **ratifiée que le 14 juin 2016**, pour entrer en vigueur le 14 juillet 2016 aux Pays-Bas.

La mise en œuvre de la Convention s'est faite par le biais de modifications apportées à plusieurs lois, dont en particulier, la loi nationale qui vise à lutter contre les discriminations des personnes souffrant d'un handicap ou d'une maladie chronique, c'est-à-dire la **loi sur le traitement égalitaire pour les personnes handicapées et souffrant d'une maladie chronique** (« *Wet gelijke behandeling op grond van handicap of chronische ziekte* », ci-après « **WGBH/CZ** »)⁶⁹⁵. Comme la Convention, **la loi WGBH/CZ couvre une série de thèmes différents** : le travail, les biens et services, le logement et les transports publics. Cette loi, qui date de 2003, était à l'origine destinée à mettre en œuvre la Directive européenne 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail⁶⁹⁶. Avec la ratification de la Convention, les dispositions anti-discrimination de la WGBH/CZ ont été étendues à la fourniture de biens et services et une obligation générale d'accessibilité a été ajoutée à la loi.

Après la ratification, **le gouvernement a développé plusieurs initiatives** en vue de mettre en œuvre les dispositions de la Convention. Des plans d'action dans plusieurs domaines ont été préparés sous la coordination du Ministère de la Santé et sont en cours de mise en œuvre. En particulier, le programme « *Onbeperkt meedoen!* » du gouvernement vise à diminuer les obstacles dans la vie des personnes

⁶⁹⁵ Wet gelijke behandeling op grond van handicap of chronische ziekte van 3 april 2003, Staatsblad 2003, 206.

⁶⁹⁶ Directive européenne 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, *Journal officiel* n° L 303 du 02/12/2000 p. 0016 – 0022.

souffrant d'un handicap. Ce plan concerne tant les transports, l'immobilier que l'éducation, le secteur des soins et celui de l'emploi. En ce qui concerne le monde du travail, suivant un accord social en 2013, la *Participatiewet* est entrée en vigueur le 1^{er} janvier 2015 et a pour but d'augmenter les chances, **pour les personnes handicapées** et/ou qui reçoivent une allocation invalidité, **d'accéder à un emploi régulier**. Cette loi vise à augmenter l'accès des personnes souffrant d'un handicap à l'emploi, en créant d'ici 2026, 125.000 nouveaux emplois pour les personnes handicapées et en aidant ces personnes à y accéder **par le biais de formations, d'un accès à des services de *jobcoaching* et à des aménagements sur le lieu de travail**. Pour chaque année, la loi prévoit des taux de création d'emplois nouveaux jusqu'en 2026. Il ressort des rapports périodiques sur la mise en œuvre de ce plan que les taux d'accès à l'emploi ont été atteints pour le secteur privé mais pas pour le secteur public. Au printemps de 2018, le dispositif a dès lors été modifié afin **d'introduire notamment des quotas d'emplois pour les personnes handicapées dans le secteur public** à partir du 1^{er} janvier 2018, avec un report d'une année pour lever les sanctions en cas de non-respect du quota⁶⁹⁷. Si le quota n'est pas atteint en 2019, une pénalité de 5.000 Euros par emploi non rempli pourra être appliquée.

2. Cadre légal

2.1. Fondements juridiques pour la protection au travail et des droits

La protection des personnes souffrant d'un handicap ou d'une maladie chronique dans le cadre d'une relation de travail est basée sur des **dispositions légales**. Il s'agit essentiellement de la Constitution et en particulier l'article 1^{er} de la Constitution qui prévoit :

« Tous ceux qui se trouvent aux Pays-Bas sont, dans des cas égaux, traités de façon égale. Nulle discrimination n'est permise, qu'elle se fonde sur la religion, les convictions, les opinions politiques, la race, le sexe ou tout autre motif. »

La lutte contre les discriminations des personnes souffrant d'un handicap ou d'une maladie chronique repose en particulier sur les dispositions qui interdisent les discriminations directes et indirectes ainsi que celles qui obligent de faire les aménagements nécessaires telles que prévues dans **la loi WGBH/CZ**. Les dispositions de la WGBH/CZ découlent en effet de la mise en œuvre de la directive européenne 2000/78/CE et de la Convention.

Le **code pénal** contient aussi des dispositions pertinentes. Les articles 137c à 137f du code pénal protègent les personnes handicapées des insultes ou des incitations à la haine ou à la discrimination sur la base de leur handicap physique, psychique ou mental ; en outre, l'article 429quater paragraphe 2 du code pénal néerlandais punit ceux qui, dans l'exercice de leurs fonctions, de leur profession ou de leur activité entrepreneuriale, empêchent ou portent atteinte à la jouissance d'une façon égalitaire, par une personne souffrant d'un handicap physique, psychique, ou mental, de ses droits humains et libertés fondamentales sur le terrain économique, politique, social, culturel ou sur tout autre terrain de la vie en société.⁶⁹⁸

⁶⁹⁷ See section 2.2. of this country report below for more information.

⁶⁹⁸ “Met [hechtenis van ten hoogste twee maanden of geldboete van de derde categorie] wordt gestraft hij wiens handelen of nalaten in de uitoefening van een ambt, beroep of bedrijf zonder redelijke grond, ten doel heeft of ten gevolge kan hebben dat ten aanzien van personen met een lichamelijke, psychische of verstandelijke handicap de erkenning, het genot of de uitoefening op voet van gelijkheid van de rechten van de mens en de fundamentele vrijheden op politiek, economisch, sociaal of cultureel terrein of op andere terreinen van het maatschappelijk leven, wordt teniet gedaan of aangetast.”

2.2. Champ d'application de la protection

Les dispositions de la loi WBGH/CZ s'appliquent à **tous les employeurs de manière indistincte**, qu'ils soient actifs dans le **secteur public ou privé**, et à **tous les employés qui souffrent d'un handicap ou d'une maladie chronique sans distinction** quant au type de handicap ou de maladie chronique, et sans distinction non plus quant au type de travail, à durée indéterminée ou déterminée, à temps plein ou à temps partiel⁶⁹⁹. Elles s'appliquent aussi aux conditions d'accès aux **professions libérales**, aux possibilités d'exercer une telle profession et de la développer.⁷⁰⁰ La loi WBGH/CZ prévoit aussi l'interdiction de discriminer dans l'offre et/ou la fourniture de biens et/ou services et en ce qui concerne la conclusion, l'exécution ou la résiliation de conventions à ce propos, de même que la fourniture de conseils d'orientation professionnelle ou d'avis et/ou information concernant écoles ou choix professionnels si cela intervient dans l'exercice d'une profession ou entreprise, par le biais du secteur public, par des institutions qui sont actives dans le domaine du logement, bien-être, santé, culture ou éducation, et même par des personnes physiques qui n'agissent pas dans le cadre professionnel pour autant que l'offre intervient dans l'espace public.⁷⁰¹

En raison du taux de création d'emplois pour les personnes handicapées insuffisants dans le secteur public, le gouvernement a mis en place un **quota d'emploi des personnes handicapées pour le secteur public**. A partir du 1^{er} janvier 2018, le quota de taux d'emploi des personnes handicapées dans le secteur public a été fixé à **1,93% pour les employeurs qui emploient 25 ou plus employés**. Ceci dit, il n'y aura pas de sanction pour le non-respect de ce quorum avant 2020.⁷⁰²

2.3. Définition du handicap

La WBGH/CZ ne donne **pas de définition des termes handicap et maladie chronique**. Toute personne qui se sent discriminée sur la base de son handicap ou d'une maladie chronique dont elle souffre peut se fonder sur les dispositions de la loi susmentionnée. Toutefois, la WBGH/CZ ayant à l'origine mis en œuvre la directive européenne 2000/78/CE, le terme handicap dans la WBGH/CZ doit suivre l'interprétation qui est faite par la Cour de Justice de l'Union européenne de ce même terme dans le cadre de la directive susmentionnée. La jurisprudence a toutefois permis de préciser qu'un handicap requiert (i) la présence d'une déficience durable, qui soit physique ou mentale, et (ii) que cette déficience empêche une participation à la vie professionnelle qui soit complète, réelle et sur pied d'égalité avec les autres employés. Le handicap ne doit pas résulter des conséquences d'un accident mais peut également être la conséquence d'une maladie curable ou non, pour autant que la déficience est de nature durable. La cause du handicap n'est donc pas pertinente.⁷⁰³ Au sens de la WBGH/CZ le refus de procéder à des aménagements raisonnables, dont relève en toutes hypothèses la tolérance des chiens d'assistance, est constitutif d'une différence de traitement interdite⁷⁰⁴.

⁶⁹⁹ Art. 4 WBGH/CZ.

⁷⁰⁰ Art. 5 WBGH/CZ.

⁷⁰¹ Art. 5b WBGH/CZ.

⁷⁰² Jose Smits, European Semester 2018/2019: country fiche on disability, the Netherlands, disponible sous: <https://www.disability-europe.net/netherlands>; Kennisdocument Wet banenafsprak en quotum arbeidsbeperking, 2018, disponible sous : <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2015/03/06/kennisdocument/Kennisdocument20183.pdf>.

⁷⁰³ P.C. Vas Nunes, Gelijke behandeling in arbeid, 2018, p. 167-168 et les références citées.

⁷⁰⁴ Art. 2 WBGH/CZ.

2.4. Protection contre la discrimination

LA WGBH/CZ protège les employés souffrant d'un handicap ou d'une maladie chronique de toute inégalité de traitement. Elle interdit toute différence de traitement et fait une distinction entre **différence de traitement directe ou indirecte**. Au sens de la loi, il y a différence de traitement **directe** lorsqu'une personne souffrant d'un handicap ou d'une maladie chronique est traitée de manière différente qu'une autre personne placée dans une situation similaire ; il y a différence de traitement **indirecte** si un traitement ou une quelconque mesure en apparence neutre a pour effet de placer les personnes souffrant d'un handicap ou d'une maladie chronique dans une situation où elles sont particulièrement affectées.

L'interdiction de faire des différences de traitement comprend, au sens de la loi, également **l'intention de faire une différence de traitement**. Par intention on vise tout comportement qui concerne le handicap ou la maladie chronique et qui a pour but ou pour conséquence de porter atteinte à la dignité d'une personne et de créer un environnement menaçant, hostile, injurieux, humiliant ou blessant.

La différence de traitement concerne **tous les stades de l'emploi d'une personne, de la sélection à la définition des conditions d'emploi et la fin de la relation de travail**, en particulier: les conditions d'ouverture de l'offre d'emploi et les conditions dans lesquelles un poste est pourvu ; la définition des relations de travail et leur fin ; la désignation d'un fonctionnaire et la fin de ses fonctions ; les conditions de travail ; l'autorisation de suivre des formations avant ou pendant une relation de travail ainsi que la promotion⁷⁰⁵.

La WGBH/CZ prévoit que **la différence de traitement n'est pas interdite** si : elle est nécessaire pour la protection de la sécurité et de la santé ; elle constitue une mesure ou une pratique qui a pour objectif de créer ou d'entretenir des aménagements spécifiques et des facilités pour l'usage des personnes handicapées ou souffrant d'une maladie chronique ; ou encore si elle concerne une mesure spécifique ayant pour but d'octroyer une position privilégiée aux personnes souffrant d'un handicap ou d'une maladie chronique afin de diminuer ou de supprimer les effets négatifs qui résultent du handicap ou de la maladie chronique. Ainsi, en 2018, le Collège des droits de l'homme néerlandais a décidé que ne constituait pas une discrimination interdite le refus d'un hôpital de procéder au traitement de l'infertilité d'une femme souffrant de problèmes psychiatriques. Le Conseil a considéré que l'hôpital pouvait légitimement se fonder sur l'exception de sécurité en raison des risques élevés de dommages importants pour l'enfant à naître.⁷⁰⁶

La différence de traitement n'est pas interdite lorsqu'elle est **indirecte** et qu'elle est objectivement justifiée parce qu'intervenant **dans un but légitime** et que **les moyens** pour atteindre le but légitime sont **nécessaires et adaptés**.⁷⁰⁷

La WGBH/CZ prévoit aussi l'obligation pour l'employeur de procéder aux **aménagements efficaces nécessaires**, sauf si ceux-ci représentent une charge déraisonnable. La loi prévoit de manière expresse que les chiens d'assistance doivent en tout cas être acceptés à titre d'aménagement raisonnable⁷⁰⁸.

⁷⁰⁵ Art. 4 WGBH/CZ.

⁷⁰⁶ College voor de Rechten van de Mens, 2018-113, voir: *College voor de Rechten van de Mens, Monitor Discriminatiezaken 2018*, p. 26, disponible sous: <https://mensenrechten.nl/nl/publicatie/38794> (30.09.2019).

⁷⁰⁷ Art. 3 WGBH/CZ.

⁷⁰⁸ Art. 2 WGBH/CZ.

La WGBH/CZ prévoit aussi l'interdiction de **victimisation**, soit le fait de désavantager une personne au motif que celle-ci s'est – à tort ou à raison – fondée sur les dispositions de la WGBH/CZ ou a fourni de l'assistance à ce propos. Dans une telle hypothèse, le juge est compétent pour annuler la rupture du contrat de travail ou octroyer une indemnisation raisonnable.⁷⁰⁹

3. Intégration des personnes handicapées dans le milieu de l'emploi

3.1. Obligation d'aménagement des employeurs à l'égard des personnes handicapées

La WGBH/CZ prévoit une obligation générale pour toute personne d'être autonome par ses propres moyens. Plus spécifiquement, en ce qui concerne les arrangements raisonnables afin de permettre le travail d'un employé souffrant d'un handicap ou d'une maladie chronique, la WGBH/CZ prévoit que **l'employeur est tenu de procéder, selon les besoins, aux arrangements efficaces et nécessaires**, à moins que cela ne représente pour lui un coût/une charge déraisonnable. La loi prévoit de manière expresse que les chiens d'assistance doivent en tout cas être acceptés à titre d'aménagement raisonnable. Selon la loi, le refus de procéder aux arrangements raisonnables constitue une différence de traitement interdite. A ce titre, on peut considérer que l'obligation de procéder aux arrangements nécessaires **concerne les employés à tous les stades de l'emploi** d'une personne, de la sélection à la définition des conditions d'emploi et la fin de la relation de travail, comme prévu pour l'interdiction de discrimination.

La WGBH/CZ ne prévoit rien en ce qui concerne les personnes qui sont employées et qui sont des **proches de personnes souffrant d'un handicap ou d'une maladie chronique**. Après l'arrêt de la Cour de Justice de l'Union européenne *Coleman c. Attridge*⁷¹⁰, la Commission de l'égalité de traitement (l'institution prédécesseur du *College voor de rechten van de Mens*) a reconnu que le refus de l'employeur de prolonger le contrat de travail à durée déterminée d'un employé en difficulté en raison de la paralysie de son épouse, était en réalité dû au handicap, et que, partant, avait été pris en violation de la WGBH/CZ.⁷¹¹

La WGBH/CZ ne définit pas quels sont les **aménagements raisonnables**, auxquels l'employeur est tenu. Toutefois, il lui est possible de solliciter auprès du *Uitvoeringsinstituut Werknemersverzekeringen* (« UWV »), qui est l'institution en charge du bon fonctionnement des assurances sociales pour les employés et qui fournit aussi des services de données et relatifs au marché du travail, l'obtention d'une **subvention** afin de procéder aux aménagements nécessaires du lieu de travail en vue d'accueillir l'employé souffrant d'un handicap ou d'une maladie chronique. D'après les formulaires de demande de subventions, **les subsides ne sont octroyés que pour couvrir les frais concernant les aménagements nécessaires** du lieu de travail ou de l'entreprise sans autre précision ni plafond de montant. Ainsi, la possibilité d'obtenir des subventions pour les aménagements nécessaires du lieu de travail contribue à ce que la charge de ces aménagements reste raisonnable pour l'employeur ; il devient alors difficile de démontrer le cas échéant, l'impossibilité de procéder aux aménagements nécessaires.

⁷⁰⁹ Art. 9 et 9a WGBH/CZ.

⁷¹⁰ CJUE, 17 juillet 2008, C-303/06, disponible sous : [https://curia.europa.eu/jcms/jcms/j_6/fr/\(30.09.2019\)](https://curia.europa.eu/jcms/jcms/j_6/fr/(30.09.2019)).

⁷¹¹ CGB, 2011-90, voir aussi: P.C. Vas Nunes, *Gelijke behandeling in arbeid*, 2018, p62-63 et les références citées.

3.2. Incitations et assistance pour les employeurs

Le *Uitvoeringsinstituut Werknemersverzekeringen* (« UWV ») est l'institution en charge du bon fonctionnement des assurances sociales pour les employés et elle fournit aussi des services de données et relatifs au marché du travail. Parmi ses tâches, le UWV octroie des **subsidés et des moyens pour permettre aux personnes handicapées ou souffrant d'une maladie chronique de travailler**. Les demandes doivent être introduites par l'employé ou par l'employeur selon les cas. Diverses mesures sont proposées par l'UWV, outre l'aide financière pour l'accomplissement des aménagements nécessaires du lieu de travail. Ainsi, en vue de trouver du travail ou dans le cadre de son exécution, l'employé sourd ou muet peut faire appel aux **services d'un interprète**, subventionné par l'UWV selon sa décision. Ensuite, une personne handicapée ou souffrant d'une maladie chronique qui travaille en tant qu'employée, peut obtenir de UWV pendant 3 années des subsidés pour engager les **services d'un jobcoach**. Ce *jobcoach* aura pour mission d'assister l'employé souffrant d'un handicap ou d'une maladie chronique en vue de lui permettre d'effectuer ses tâches professionnelles comme toute autre personne : il sera présent lors de discussions préliminaires avec l'employeur, pour la mise au travail, l'accompagnement sur le lieu de travail, et pourra préparer un manuel personnel pour l'employé. L'employé peut faire appel à un *jobcoach* externe, mais l'employeur peut également arranger les services d'un *jobcoach* en interne, en faisant appel lui-même à l'UWV. L'UWV fournit également des **services intermédiaires**, par exemple d'aide à la lecture, ainsi que des ajustements portables, tels que chaussures orthopédiques, chaise de bureau spécifique ou règle de lecture en braille. L'UWV peut également fournir des subsidés **en matière de transport**, en particulier l'adaptation du véhicule ou autre moyen de transport, la fourniture d'une voiture de prêt, subvention pour l'utilisation du véhicule de l'employé ou encore les services d'un transport avec chauffeur (taxi).

En outre, lorsque le salaire de l'employé est plus bas que les indemnités qu'il recevait avant de reprendre le travail, **l'employé peut faire appel à UWV pour compenser, en tout ou en partie, la baisse de son revenu par l'obtention de subsidés complémentaires**⁷¹². Aussi, l'employeur peut engager l'employé souffrant d'un handicap ou d'une maladie chronique à l'essai pendant deux mois sans lui payer de revenu, l'employé continuant à percevoir son indemnité pendant la période d'essai⁷¹³. Enfin, dans certaines circonstances, l'employeur peut bénéficier de subventions pour le cas où son employé devait retourner en situation d'incapacité de travail après l'avoir engagé (*no-riskpolis*).

4. Application des droits

Les dispositions de la WGBH/CZ peuvent être soulevées dans le cadre d'une **procédure judiciaire** entre l'employeur et l'employé, par exemple dans le cadre d'une rupture de contrat de travail. En outre, en application de la WGBH/CZ, le **Collège des droits de l'homme** (*College voor de rechten van de mens*, ci-après le « Collège »)⁷¹⁴ a été chargé d'une mission d'enquête et de jugement sur les plaintes écrites individuelles qui lui sont remises concernant des allégations de non-respect des dispositions concernant l'interdiction de discrimination des personnes souffrant d'un handicap ou d'une maladie

⁷¹² Art. 3:67 Wet van 24 april 1997, houdende voorziening tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid voor jonggehandicapten (Wet arbeidsongeschiktheidsvoorziening jonggehandicapten), disponible sous: https://wetten.overheid.nl/BWBR0008657/2019-07-01#Hoofdstuk3_Afdeling5_Artikel3:67 (30.09.2019).

⁷¹³ Art. 2:24 Wet van 24 april 1997, houdende voorziening tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid voor jonggehandicapten (Wet arbeidsongeschiktheidsvoorziening jonggehandicapten), disponible sous: https://wetten.overheid.nl/BWBR0008657/2019-07-01#Hoofdstuk3_Afdeling5_Artikel3:67 (30.09.2019).

⁷¹⁴ Le Collège protège, promeut, surveille et met en avant les droits de l'homme aux Pays-Bas. Il est un organisme indépendant superviseur des droits de l'homme aux Pays-Bas.

chronique et l'obligation de procéder aux aménagements nécessaires et raisonnables. Les décisions du Collège sont motivées, et peuvent contenir des **recommandations** pour une bonne application des dispositions légales dans le cas d'espèce. Le Collège est en outre **compétent pour initier une procédure judiciaire** afin de mettre un terme à la différence de traitement interdite ou au refus de procéder aux aménagements raisonnables. En application de l'article 9 de la WGBH/CZ, le juge compétent peut, à la demande de l'employé, **annuler le préavis donné au contrat de travail ou ordonner le paiement à celui-ci d'une indemnisation raisonnable**.

Le droit néerlandais **reconnaît les clauses d'arbitrage** dans les contrats de travail⁷¹⁵ ; il ne semble pas y avoir de règles spécifiques en matière de plaintes pour traitement différencié interdit. Les clauses d'arbitrage paraissent toutefois peu fréquentes aux Pays-Bas, à tout le moins dans le cadre du règlement des conflits collectifs⁷¹⁶.

5. Le cadre normatif en pratique

En 2018, le Collège a enregistré 127 requêtes individuelles sur la base de la WGBH/CZ, chiffre qui est similaire à celui pour l'année 2017 et en augmentation par rapport à ceux de 2016 et 2015. En 2018, le Collège a rendu 149 décisions, dont la majorité portaient sur des discriminations liées au handicap ou à la maladie chronique. **Dans 41% des affaires** portées devant le Collège pour des motifs basés sur le handicap ou la maladie chronique, le Collège a confirmé en 2018 **l'existence d'un traitement différencié interdit**, un chiffre qui est stable sur les trois dernières années.

Selon les statistiques utilisées par le Collège dans son rapport concernant la participation des personnes handicapées dans le travail, les politiques mises en place dans le but de favoriser l'emploi chez les personnes souffrant d'un handicap ou d'une maladie chronique n'ont pas permis de constater d'importants changements depuis 2012.⁷¹⁷

Cependant, d'après les statistiques publiées par le gouvernement, si en 2015 le pourcentage des personnes handicapées au chômage était de 13,1% de l'ensemble des personnes actives (avec ou sans emploi), **en 2017, ce taux de chômage est baissé à 9,6%**.⁷¹⁸ Les chiffres restent toutefois plus élevés par rapport au taux de chômage chez les personnes non handicapées : si, en 2015, le taux de chômage des personnes non handicapées était de 6,5 % de la population active (avec ou sans emploi) ; en 2017, ce taux est passé à 4,5%.

Fin 2017, le **nombre de création de nouveaux emplois**, suivant l'accord social de 2013, a **été atteint pour le secteur privé mais pas pour le secteur public**. C'est pourquoi, le gouvernement a mis en place un système de quota, à compter du 1^{er} janvier 2018, pour forcer la création de nouveaux emplois pour les personnes souffrant d'un handicap ou d'une maladie chronique. Des discussions sont toujours en cours pour améliorer la situation, et notamment par l'amélioration et la simplification des procédures

⁷¹⁵ Voorzieningenrechter, Rechtbank Rotterdam, 24.04.2012, disponible sous: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2012:BW5070>

⁷¹⁶ A. Jacobs, Labour Law in the Netherlands, 2015, no. 345.

⁷¹⁷ College voor de rechten van de mens, Inzicht op Inclusie II, Utrecht, 2018, disponible sous: <https://publicaties.mensenrechten.nl/file/af753dd5-198f-4a9d-98ba-a674b259cc94.pdf> (02.09.2019).

⁷¹⁸ Tableaux pour 2015, 2016 et 2017 disponibles sous <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83322NED/table?fromstatweb> (02.09.2019).

dans le but de favoriser les personnes qui reprennent le travail malgré leur handicap ou maladie chronique.⁷¹⁹

⁷¹⁹ « *Breed offensief om meer mensen met een beperking aan werk te helpen* », Lettre du Ministère des affaires sociales et de l'emploi au président de la Deuxième Chambre du Parlement, 7 septembre 2018, disponible sous : *Breed offensief om meer mensen met een beperking aan werk te helpen* (02.09.2019).

H. NEW ZEALAND

1. Introduction

1.1. Country overview

New Zealand is an island country located in the southwestern Pacific Ocean. As of March 2019, it had a **population of 4,957,400**.⁷²⁰ Around 1 in 4 of its inhabitants is said to be limited by a physical, sensory, learning, mental health or other impairment.⁷²¹ **Around 22% of disabled people are in work**, compared to 70% of non-disabled people.⁷²² The unemployment rate of disabled people is 10.6%, more than twice that of non-disabled people.⁷²³

Discovered, and settled from Polynesia about 1,000 years ago, **New Zealand became a British colony in 1840**.⁷²⁴ Its practical independence from the United Kingdom became formalised after the second world war, and in the latter half of the 20th century, its reliance on trade links with the UK diminished, as trade with countries such as China, Australia and Japan grew dramatically. Neo-liberal reforms, implemented since the mid-1980s have been followed by a sustained period of economic growth and **low levels of unemployment**.⁷²⁵

Unsurprisingly, New Zealand's legal and political systems share many similarities with that of the UK, and it still maintains a constitutional monarchy with a **Westminster style of government**. After becoming a separate colony, one of the many legacies inherited from the colonial power was its legal system.⁷²⁶ It has a **common law based legal system** derived from that of England, with court procedures following the traditional common law adversarial model. Since the end of the Second World War, New Zealand has **tended to develop its own legislation or look for inspiration from jurisdictions beyond England**, while its courts show a willingness to consider legal authorities from other Commonwealth legal orders, including Australia, Canada and the United States.⁷²⁷

1.2. Overview of legal and policy framework

Like other common law countries, New Zealand makes a **clear distinction between labour law and other areas of law**, such as social welfare law.⁷²⁸ The purpose of labour – or 'employment' law – as understood in New Zealand, encompasses the regulation of relationships between employers and employees, determining who may be employed, how they should be engaged, their minimum employment terms and working conditions, the duties they owe and are owed and how the employment relationship can end. It also determines the status and rights of unions and sets the rules for collective bargaining.

⁷²⁰ Stats.govt.nz, available at <https://www.stats.govt.nz/> (25.07.2019).

⁷²¹ Office for Disability Issues, *Key facts about disability in New Zealand*, available at <https://www.odi.govt.nz/home/about-disability/key-facts-about-disability-in-new-zealand/> (25.07.2019).

⁷²² Stats.govt.nz, *Disabled people three times less likely to be in work*, 20th August 2018, available at <https://www.stats.govt.nz/news/disabled-people-three-times-less-likely-to-be-in-work> (25.07.2019).

⁷²³ *Ibid.*

⁷²⁴ Gordon Anderson, *Labour Law in New Zealand*, 2nd edition, 2015, Wolters Kluwer, Netherlands, p. 23.

⁷²⁵ *Ibid*, pp. 32-33.

⁷²⁶ *Ibid*, p. 38.

⁷²⁷ *Ibid*, p. 40.

⁷²⁸ *Ibid*, p. 63.

The **principal source of employment law is legislation**, including not just primary legislation in the form of Acts of Parliament (“statutes”), but also secondary legislation, including regulations and legislative instruments. Some of the more important Acts of Parliament which apply in the field of employment law are the ***Employment Relations Act 2000 (the “ERA”)***,⁷²⁹ the ***State Sector Act 1988***,⁷³⁰ which contains specific rules and requirements related to employment in public sector organisations, and the ***Human Rights Act 1993 (the “HRA”)***.⁷³¹

The **common law**, on the other hand – the system of legal principles and precedents based on court judgments – offers a framework and guidance for interpreting and applying statutes. Such jurisprudence often provides the tests for determining whether a worker is an employee benefiting from employment rights, for example. Many other traditional common law rights and duties have now been **codified in legislation**, while others survive as an interpretive aid to the written law.⁷³²

Other sources of employment law include **codes of practice**,⁷³³ the **employment contract** itself, **collective agreements** and **international law**.

Insofar as disability is concerned there is **no legislation exclusively aimed at the protection and rights of those with disabilities in the workplace**. Instead, the HRA lists prohibited grounds of discrimination and makes it unlawful to discriminate on these grounds in employment and other specified circumstances. The ***New Zealand Bill of Rights Act 1990 (“BORA”)***⁷³⁴ also specifically prohibits discrimination by the State on the prohibited grounds of discrimination identified in the HRA.⁷³⁵ Disability is listed at subsection 21(1)(h) of the HRA as a prohibited ground of discrimination. All of the prohibited grounds of discrimination are repeated in the ERA, reinforcing their application in the workplace as an important part of employment relations. Section 29 of the HRA effectively places a requirement on an employer to make reasonable accommodation to permit a disabled employee to undertake his or her duties.

It may be noted that the **HRA applies the prohibited grounds of discrimination to a range of other areas beyond employment**. These include the provision of goods and services, the provision of land, housing and other accommodation, access to educational establishments and the activities of industrial and professional associations, qualifying bodies and vocational training bodies.⁷³⁶

⁷²⁹ *Employment Relations Act 2000*, available at <http://www.legislation.govt.nz/act/public/2000/0024/109.0/DLM58317.html> (31.07.2019).

⁷³⁰ *State Sector Act 1988*, available at <http://www.legislation.govt.nz/act/public/1988/0020/126.0/DLM129110.html> (31.07.2019).

⁷³¹ *Human Rights Act 1993 (“HRA”)*, available at <http://www.legislation.govt.nz/act/public/1993/0082/latest/whole.html#DLM304491> (31.07.2019).

⁷³² See Richard Rudman, *New Zealand Employment Law Guide*, 2019, Wolters Kluwer, Auckland, p.2.

⁷³³ Codes of practice, issued or approved by the Minister for Workplace Relations and Safety, have varying degrees of legal status and force; they can carry significant weight and persuasive authority, not least because the ERA authorises employment courts to have regard to them.

⁷³⁴ *Bill of Rights Act 1990*, available at <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html> (31.07.2019).

⁷³⁵ It should be noted, however, that BORA is considered as having limited coverage: compared to bills of rights in other overseas jurisdictions, it does not secure many of the rights guaranteed by the *International Covenant on Civil and Political Rights (“ICCPR”)* and it cannot be treated by a court as having constitutional value such that it may invalidate other enactments; it is in fact subordinate to any other inconsistent enactment. See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act – A Commentary*, 2015, Lexis Nexis NZ Limited, Wellington, paras 1.3.2 and 1.3.3.

⁷³⁶ HRA, sections 36 to 60.

New Zealand ratified the *Convention on the Rights of Persons with Disabilities* (“CRPD”) in September 2008. Before ratifying the CRPD, it is said that the New Zealand Government reviewed its law for consistency with the CRPD and made necessary amendments. Independent monitoring mechanisms have been set up to review how New Zealand ensures compliance with the CRPD. The *Disability Action Plan 2014-2018* included an action plan to identify legislation that was inconsistent with the CRPD and to examine options for improving consistency. 2018 saw what is known as the combined second and third periodic review of **New Zealand’s implementation of the CRPD**. This reports that, among other things, following a change in Government in 2017, the Minister for Disability Issues now sits within Cabinet (the central body of ministers, headed by the Prime Minister, who are usually heads of government departments); significant additional investment has been allocated to disability services, supports and work programmes under the 2018 budget; the Cabinet agreed to begin the design of an approach to achieve what is coined “a fully accessible NZ, in collaboration with stakeholders.”⁷³⁷

The New Zealand government agency, the ***Office for Disability Issues* (the “ODI”)**, is responsible for the development and implementation of the ***New Zealand Disability Strategy 2016-2026***.⁷³⁸ This guides the work of government agencies on disability issues during this period. It refers to outcomes in the fields of education, employment and economic security, health and wellbeing, rights protection and justice, accessibility, attitudes, choice and control and leadership. In the field of employment, it sets out five actions:

- improve transition into employment;
- increase employment of disabled people;
- identify better alternatives to enable removal of wage exemption process;⁷³⁹
- increase employer confidence in employing disabled people; and
- work with private sector partners to progress employment of disabled people.⁷⁴⁰

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

As discussed above, the principal legal basis for the protection of employees with disabilities is established by **legislation**. The **ERA governs all contracts of service between employers and employees**, establishes the institutional framework and procedures for the negotiation of collective and individual agreements and the resolution of disputes, and sets minimum requirements for the

⁷³⁷ See Office for Disability Issues, *The New Zealand Government’s response to ‘the list of issues prior to submission of the combined second and third periodic review of New Zealand’*, available at <https://www.odi.govt.nz/assets/Uploads/2019-NZ-Governments-response-to-the-UN-CRPD-Committees-List-of-Issues-final.docx> (31.07.2019), p. 4.

⁷³⁸ See section 5. of this country report below for more information.

⁷³⁹ See section 5. of this country report below. ‘Wage exemption process’ refers to the possibility for employers, as permitted by the 2007 amendment to the *Minimum Wage Act 1983*, to apply for exemptions in respect of some or all of their disabled employees, to allow them to pay those individuals below the minimum wage at a rate that reflects their productivity for the work. This is reported by the ODI as being discriminatory and that it does not align with the CRPD: see ODI, *Outcome 2 – Employment and economic security*, available at <https://www.odi.govt.nz/nz-disability-strategy/employment-and-economic-security/> (31.07.2019).

⁷⁴⁰ *Ibid.*

contents of employment agreements. The **HRA prohibits discrimination in employment** on various grounds, and relevant provisions are repeated in the ERA with regard to discrimination taking place during employment. The **scope of the HRA is different in that it also deals with hiring practices**, whereas the ERA rather governs those already in employment relationships.⁷⁴¹

The HRA, as the central piece of anti-discrimination legislation, **includes⁷⁴² disability as one of the prohibited grounds of discrimination**. Other prohibited grounds of discrimination are: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, age, political opinion, employment status, family status and sexual orientation. These grounds are referred to and repeated at section 105 of the ERA with specific reference to employees being discriminated against during their employment.

The HRA also describes various employment-related situations in which discrimination on the prohibited grounds is not necessarily unlawful. These **'exceptions' to discrimination** are also specifically adopted by the ERA.⁷⁴³ With regard to disability, these refer to situations in which discrimination on grounds of disability may be justifiable for reasons of safety or practicability.⁷⁴⁴ However, an employer cannot use these exceptions to treat a person differently in a situation where some **reasonable adjustment of the employer's activities** would make different treatment unnecessary, or where the tasks that make the different treatment necessary could be assigned to another employee without unduly disrupting the employers activities.⁷⁴⁵ This is discussed in more detail in section 3 below.

Similar to other common law jurisdictions, such as England and Wales, **case law represents a further source of law** in this area. A number of cases, also referred to below,⁷⁴⁶ illustrate how courts establish binding precedent and other guidance for judges and employers on how provisions of the HRA and ERA on disability discrimination and exceptions should be interpreted.

Although New Zealand has ratified the CRPD, neither this nor any other supranational law can be said to directly represent the origin of New Zealand laws protecting disabled employees. Protection of those with disabilities was already recognised by New Zealand prior to ratification of the CRPD. Rather, New Zealand courts expressly **seek to apply New Zealand domestic law consistently with the CRPD**, notably in relation to reasonable accommodation, as defined at Article 2.⁷⁴⁷

2.2. Scope of protection

With a few exceptions, **employment protection laws apply to all employees across all sectors**. The employment relations framework, set out under the ERA, governs all employment agreements and covers all employees. Although it does not apply to independent contractors, such individuals are protected against discrimination under the HRA. As discussed above, the HRA includes all relevant provisions protecting those with disabilities in the field of employment against discrimination and **adopts a wider definition of 'employer' to include employers of independent contractors**, as well as

⁷⁴¹ See *McAlister v Air New Zealand Limited* [2009] Employment Reports of New Zealand 410.

⁷⁴² HRA, section 21(1).

⁷⁴³ ERA, section 106.

⁷⁴⁴ HRA, section 29.

⁷⁴⁵ HRA, section 35.

⁷⁴⁶ See section 3.1. of this country report, below.

⁷⁴⁷ See section 3.1. of this country report, below.

people for whom work is done by contract workers under a contract with a labour supply company, and people for whom work is done by unpaid workers.⁷⁴⁸

Protection and rights afforded to disabled employees are **not dependent on employers having a minimum number of employees**, although employees and other workers who are covered by the legislation must have or have had an impairment which meets the legal definition of a disability in order to avail themselves of the protection.

The state – or public – sector operates under the same legal structure as the private sector. The *State Sector Act 1988*⁷⁴⁹ repealed the separate system of state sector industrial relations, although **some legal differences remain**, reflecting the particular nature of the state sector, including obligations in relation to recruitment and equal employment opportunities programmes.⁷⁵⁰ BORA, which only applies to acts done by the State or branches of it (or others performing any public function), also contains a generally worded prohibition against discrimination on grounds of disability.

2.3. Definition of disability

‘Disability’ is defined in section 21(1)(h) of the HRA as follows:

- (i) physical disability or impairment;
- (ii) physical illness;
- (iii) psychiatric illness;
- (iv) intellectual or psychological disability or impairment;
- (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function;
- (vi) reliance on a guide dog, wheelchair, or other remedial means;
- (vii) the presence in the body of organisms capable of causing illness.

Limited guidance is available on what constitutes a ‘disability’, and *Employment New Zealand*, a part of the Ministry of Business, Innovation and Employment, states that **the term ‘disability’ covers a variety of situations**. In particular, there are **no hard rules** with regard to the duration or frequency of the impairment said to constitute a ‘disability’.

Statistics New Zealand has typically defined disability as, “an impairment that has a long-term, limiting effect on a person’s ability to carry out day-to-day activities”, where long-term is defined as six months or longer; the Ministry of Health defines a person as someone who has been identified as having a disability which is likely to continue for at least 6 months. There is, however, recognition, that **limiting disability in this manner is inconsistent with the social model of disability** required by the CRPD: the definition in the HRA featured prominently in the 2008 case of *Trevithick v. Ministry of Health*,⁷⁵¹ in which the court accepted that despite what it described as the exhaustive definition in the HRA, there

⁷⁴⁸ HRA, section 2.

⁷⁴⁹ *Op. cit.*

⁷⁵⁰ Gordon Anderson, *Labour Law in New Zealand, op. cit.*, pp. 54-55. In particular, the *State Sector Act 1988* (section 56) places a requirement on government departments to operate personnel policies which comply with the principle of being a ‘good employer’. This includes providing an equal opportunities programme and specific recognition of the employment requirements of persons with disabilities.

⁷⁵¹ *Trevithick v. Ministry of Health* [2008] New Zealand Administrative Reports 454 (HC).

was still room to argue that what constitutes ‘disability’, and this can include referring to applicable international standards to ensure that any interpretation of provisions of the HRA adopts or implements those standards.⁷⁵² In light of the absence of a specific temporal condition in the wording of the HRA, **an interpretation that is consistent with the social model of disability may accommodate both short and long term disabilities.**

2.4. Forms of discrimination protection

As discussed above, the HRA lists prohibited grounds of discrimination, including disability, making it unlawful to discriminate on these grounds in employment and other specified circumstances. The ERA, specific to discrimination during employment, follows the forms of discrimination protection provided in the HRA. These are:

- **Direct discrimination:** where, by reason of the protected characteristic (such as disability), a person is treated less favourably;⁷⁵³
- **Indirect discrimination:** defined in the HRA as behaviour, practices, requirements or conditions that might not appear to breach the legislation, but will do so if they have the effect of treating the person with the protected characteristic (e.g., a disabled person (or disabled people)) in a way that amounts to unlawful discrimination, unless good reasons for the different treatment can be shown;⁷⁵⁴
- **Victimisation:** where a person is treated less favourably than others, or is threatened with less favourable treatment, because that person uses, or intends to use, any of the rights available under the relevant legislation.⁷⁵⁵

As with all of the grounds of discrimination, protection extends not just to the person with the impairment, but also to **relatives or associates of that person who have suffered discrimination or victimisation**; moreover, it covers **current and past disabilities** as well as **perceived disabilities** (i.e., disabilities which are suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated).⁷⁵⁶

The HRA (and the BORA)⁷⁵⁷ also **allows for affirmative action**. Section 73 states that anything which would otherwise amount to an act of unlawful discrimination will not be unlawful if it is done or omitted in good faith for the purpose of helping or advancing persons or groups of persons who may need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.⁷⁵⁸

Given that the ERA specifically governs the protection of employees during the employment relationship, the broader scope of the HRA means that it **also includes hiring practices**, with specific

⁷⁵² See Sylvia Bell, Judy McGregor, Margaret Wilson, *The Convention on the rights of disabled persons: a remaining dilemma for New Zealand*, in *New Zealand Journal of Public and International Law*, Volume 13(2), December 2015, pp. 277-296 at p. 285.

⁷⁵³ HRA, *op. cit.*, section 22.

⁷⁵⁴ HRA, *op. cit.*, section 65.

⁷⁵⁵ HRA, *op. cit.*, section 66.

⁷⁵⁶ HRA, *op. cit.*, section 21(2).

⁷⁵⁷ BORA, *op. cit.*, section 19(2).

⁷⁵⁸ HRA, *op. cit.*, section 73(1).

reference to protection for applicants for employment as well as employees (and other workers covered by the HRA).⁷⁵⁹

There is also an **overriding duty on employers to accommodate the needs of employees with disabilities**. This duty – discussed below⁷⁶⁰ – arises under the HRA,⁷⁶¹ and is repeated under the ERA.⁷⁶²

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

There is **no law imposing a direct positive obligation** on employers to accommodate people with disabilities, and the term ‘reasonable accommodation’ is not used. However, **such a duty arises from the wording of the exception** to the general prohibition on different treatment based on disability, as set out at section 29 of the HRA. This says that different treatment based on disability is not unlawful where:

- a person with a disability could perform the duties of a position satisfactorily only with the aid of special services or facilities **and it would not be reasonable to expect the employer to provide those services or facilities**,⁷⁶³ or
- the working environment or duties are such that a person with a disability could be employed only with a risk of harm⁷⁶⁴ to that person or to others, including the risk of infecting others with an illness, **and it is not reasonable to take that risk**.⁷⁶⁵ This exception does not apply, however, if the employer could, **without unreasonable disruption, take reasonable measures** to reduce the risk to a normal level.⁷⁶⁶

Section 29(3) of the HRA clarifies that it is not unlawful to set different terms of employment or conditions of work which take into account any special limitations that a person’s disability imposes on his or her capacity to carry out work and any special services or facilities that are provided to enable or facilitate the carrying out of the work. Accordingly, **employers have an overriding duty to accommodate the needs of employees with disabilities**, whether it be by arranging for an employee to undertake some of the aspects of the job of a person with a disability, by providing special services or facilities or by taking steps to reduce the risk of harm to a person with a disability or to others.

In light of the wording of section 29, such a duty to accommodate the needs of employees with disabilities only applies to the extent that it is reasonable to expect the employer to do so.⁷⁶⁷ There is, however, **no explicit definition of ‘reasonable accommodation’ in the HRA**. It is said that the HRA

⁷⁵⁹ HRA, *op. cit.*, section 22(1) refers to applicants for employment, whereas the ERA (section 104) refers to ‘employees’.

⁷⁶⁰ See section 3.1. of this country report, below.

⁷⁶¹ HRA, *op. cit.*, section 29.

⁷⁶² ERA, *op. cit.*, section 106(1)(f).

⁷⁶³ HRA, *op. cit.*, section 29(1)(a).

⁷⁶⁴ It should be noted that case law has ruled that discrimination based on disability will be justified where the risk of harm to the employee is “*significant, appreciable or substantial*” and it is, “*not really possible or reasonable*,” to expect the employer to take the steps that are required to reduce it: *Proceedings Commissioner v. Canterbury Frozen Meat Co. Ltd.* (1999) 5 New Zealand Employment Law Cases (Digest).

⁷⁶⁵ *Ibid*, section 29(1)(b).

⁷⁶⁶ *Ibid*, section 29(2).

⁷⁶⁷ See Richard Rudman, *New Zealand Employment Law Guide, op. cit.*, pp. 622-623.

rather provides for an individual proportionality analysis on a case by case basis, with a focus on the type of accommodation requested against the requisite burden on the individual.⁷⁶⁸

The **overriding duty of reasonable accommodation has been confirmed by jurisprudence**, most notably in the case of *Smith v. Air New Zealand*.⁷⁶⁹ Here, guidance was provided on the concept of ‘reasonableness’ as part of an examination by the court of similar wording in another section of the HRA on the duty of reasonable accommodation by providers of goods and services. The case itself concerned a complainant passenger who alleged that the airline had failed to reasonably accommodate her need for extra oxygen on flights. With reference to the concept of ‘reasonable accommodation’ in the CRPD and other common law countries, the Court of Appeal found that the **duty required an analysis of costs and benefits, evaluating the proportionality or reasonableness of the response of the service provider**.⁷⁷⁰ It noted that while excessive cost could justify a refusal to accommodate, decision-makers should not undervalue the accommodation of disability and rely on “impressionistic” evidence as to increase costs of accommodation.⁷⁷¹

In November 2015, New Zealand’s Independent Monitoring Mechanism for the CRPD (comprising the Office of the Ombudsman, the Human Rights Commission and the Convention Coalition Monitoring Group) published a **guide on reasonable accommodation of persons with disabilities**.⁷⁷² This covers reasonable accommodation in all areas, including education, employment, provision of information and services, access to facilities, the provision of goods and services, the built environment and housing. Although this **does not have legal force**, it contains practical guidance for organisations with regard to changes that can be made to accommodate people with disabilities, and may be relied on in evidence as part of formal proceedings brought by those claiming they have been discriminated against in the workplace.

In all areas where discrimination could occur, including in the provision of goods, services and facilities, as well as employment, the **purpose of making ‘reasonable accommodation’ corresponds to that set out in the CRPD**. Namely, ‘reasonable accommodation’ is about realising equal opportunities and substantive equality by levelling out the playing field and evening out barriers to full participation.⁷⁷³ The submission of New Zealand’s ODI to the thematic study by the *United Nations Human Rights Office of the High Commissioner* on the work and employment of persons with disabilities confirms that employees with disabilities will be given the additional job support or facilities that they require in order to enjoy equal opportunities and fulfil their job description.⁷⁷⁴ It states that, “*there is an acceptance that providers and employers may have to put in additional features to ensure people*

⁷⁶⁸ See departmental report prepared by the ODI with the *Ministry of Social Development* and the *Ministry of Justice* in relation to the *Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill 2008*, para. 83, as referred to in *Smith v. Air New Zealand* [2011] New Zealand Court of Appeal 20, at [24].

⁷⁶⁹ *Smith v. Air New Zealand*, *ibid*.

⁷⁷⁰ *Ibid*, at [61].

⁷⁷¹ *Ibid*, at [60].

⁷⁷² Office of the Ombudsman, the Human Rights Commission and the Convention Coalition Monitoring Group, *Reasonable accommodation of persons with disabilities in New Zealand*, undated, but published on 26th November 2015, available at https://www.hrc.co.nz/files/7814/4848/7923/imm_reasonable_accommodation_guide.pdf (12.08.2019).

⁷⁷³ CRPD, Article 5(3).

⁷⁷⁴ ODI, *Submission to the thematic study by the United Nations Human Rights Office of the High Commissioner on the work and employment of persons with disabilities*, undated, available at <https://www.ohchr.org/Documents/Issues/Disability/SubmissionWorkEmployment/ResponseNewZealand.doc> (12.08.2019).

with disabilities can access the same services “on an equal basis with others,” and that, “to get this equity of outcome, a higher level of services may be required.”⁷⁷⁵

Examples of the extent to which it may be reasonable to expect an employer to accommodate the needs of an employee with disabilities can be seen in **case law**.⁷⁷⁶

In *Lealaogata v. Timata Hou Ltd.*,⁷⁷⁷ a community support worker who had difficulty standing for long periods or walking any distance due to damaged knees and other health issues was dismissed. It was concluded that the exception⁷⁷⁸ to the prohibition on discrimination applied because the employee’s inability to undertake the full range of his position’s duties compromised his own safety and that of his co-workers. It was not a situation where the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level. In *Atley v. Southland District Health Board*⁷⁷⁹ on the other hand, an emergency department nurse whose bipolar disorder was confirmed by a psychiatrist as not being compatible with her intermittent night shifts did succeed in showing that her employer had failed to make reasonable accommodation. The employer ignored the psychiatrist’s suggestion to have her instead work morning and afternoon shifts, with colleagues covering her night shift, instead, removing her from the emergency department. It was determined that limiting the employee’s roster to day and afternoon shifts and arranging for other employee’s to cover her night shift duties would not have been an unreasonable disruption for the employer.

As to the **scope of the the duty to accommodate** the needs of persons with disabilities, the HRA, as mentioned above,⁷⁸⁰ has **broad application**. It covers employers of workers during employment, but also in relation to pre-employment, including job applicants and advertising practices. The ERA, which repeats provisions of the HRA on the duty to accommodate, applies to employees and other workers during their employment, but provides complainants with different options for enforcing their rights.⁷⁸¹

3.2. Incentives or other assistance available to employers

In most cases, support and funding for making adjustments or alternative work arrangements to accommodate the needs of workers or applicants with disabilities will not require financial resources or can be achieved through internal funding. There are, however, **three training and employment support funds available for people with disabilities in New Zealand**.⁷⁸² “*Training Support*” and “*Self Start*” concern support for disabled people undergoing training and seeking to set up their own business ventures, respectively. “*Job Support*” aims to assist a person with a disability to move into work or to stay in their job. Each fund is available only upon application.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ The following examples are drawn from commentary in Richard Rudman, *New Zealand Employment Law Guide*, *op. cit.*, p. 623.

⁷⁷⁷ *Lealaogata v. Timata Hou Ltd* [2013] New Zealand Employment Relations Authority Wellington 1.

⁷⁷⁸ See second bullet point above, referring to HRA, section 29(1)(b).

⁷⁷⁹ *Atley v. Southland District Health Board* (2010) 9 New Zealand Employment Law Cases 93, 427 (ERA).

⁷⁸⁰ See section 2.1. of this country report, above.

⁷⁸¹ See section 4. of this country report, below.

⁷⁸² Workbridge, Inc., *Your Guide to the Support Funds*, April 2017, available at <http://supportfunds.co.nz/assets/Uploads/WOR193-Support-Funds-Guide-minor-update-Dec-17.pdf> (13.08.2019).

Job Support uses public funds to help meet extra costs, such as workplace modifications, job coaching, mentoring, physical support, any special equipment and any additional costs of transport or parking.⁷⁸³ Although the disabled person applies for the funding, employers may be expected to explore such possibilities with the employee or applicant concerned as part of their duty to accommodate the needs of a person with disabilities.

The support funding is **administered on behalf of Work and Income** (a service of the Ministry of Social Development) by *Workbridge Inc.*, an independent non-profit organisation contracted by the New Zealand Government for the delivery of work-focused services. The Government sets the eligibility criteria and funding limits to access these funds.⁷⁸⁴ The funding is provided in the form of a 'Modification Grant', described as a **payment which helps people with disabilities pay for workplace changes or equipment** that makes it easier for them to stay in or get work. It can pay for things like: ramps and handrails, visual aids, computer equipment and other changes in the workplace.⁷⁸⁵

To be eligible to access Workbridge support funds, a person must be aged 16 to 64 years and have a disability or a health condition that has lasted, or is likely to last, more than six months. **Funds are used to cover the "cost of disability"** – the additional costs that the jobseeker or employee has a direct consequence of their disability, when undertaking the same job as a person without a disability. **All Support Funds are intended as last resort funding**, and assistance should be sought from other funding sources first.⁷⁸⁶

The maximum Job Support that a person can receive in one 52-week period is **NZ\$16,900**. Employment criteria apply, including that the job must be in open employment not just reserved for a person with a disability, there must be an employment contract in place, the employee must be paid the minimum wage or more, or at a rate the same as someone else without a disability doing the same sort of job and the business owner must work a minimum of 20 hours per week in their business and the business cannot be a hobby type business.⁷⁸⁷

Other support funds are available through a variety of Non-Governmental Organisations ("NGO") and charities, such as the *Royal New Zealand Foundation of the Blind* and the *National Foundation for the Deaf*.⁷⁸⁸ The New Zealand Lottery Grants Board also distributes the proceeds of state lotteries to the New Zealand community.⁷⁸⁹

In November 2011, the Government announced a new *Disability Innovation Fund*, making NZ\$500,000 available for innovative ways of getting disabled people into work or retaining them in work. This was said to be targeted at innovative projects from employers who wished to retain current employees in employment who have an existing disability or who have acquired a disability or chronic health or mental health condition, innovative projects designed to get disabled people into

⁷⁸³ See ODI, *Submission to the thematic study by the United Nations Human Rights Office of the High Commissioner on the work and employment of persons with disabilities*, *op. cit.*, question 8, p. 14.

⁷⁸⁴ *Ibid*, p. 2.

⁷⁸⁵ See Ministry of Social Development, Work and Income, *Modification Grant*, available at <https://www.workandincome.govt.nz/products/a-z-benefits/modification-grant.html> (15.08.2019).

⁷⁸⁶ *Ibid*, p. 6.

⁷⁸⁷ *Ibid*, p. 8.

⁷⁸⁸ See Support Options – Auckland & Northland, *Funding & Disability*, available at http://www.supportoptions.co.nz/support/funding_NG.aspx (13.08.2019).

⁷⁸⁹ *Ibid*.

employment and innovative projects from the NGO sector or disabled people organisations to support disabled people into employment.⁷⁹⁰

4. Enforcement of rights

The remedies available to a victim of discrimination on the basis of disability are the same as those that victims of discrimination on other grounds may choose. There are, broadly speaking, no differences between the private and public sectors in this regard. In practice, there are **two principal routes open to individuals seeking to enforce their rights** with regard to disability discrimination in the context of employment: employees may use the **personal grievance provisions of the ERA** to pursue a claim of unlawful discrimination against an employer or former employer; alternatively, a **complaint could be made under the HRA to the Human Rights Commission**. However, only one of those procedures may be used.⁷⁹¹ These are considered below.

Employees and others falling within the definition of employee in the ERA may bring a **personal grievance** on a range of grounds, as set out at section 103(1) of the ERA. These include that the employee has been discriminated against in employment. An employee who does not receive satisfaction after raising a personal grievance with the employer can **lodge an application for the matter to be heard by the Employment Relations Authority (the “Authority”)**. The Authority is established under the ERA as an investigative body with the role of resolving any employment relationship problem by investigating facts of a case, and – although not a court of law - then making an enforceable determination. The Authority has a chief and at least two other members (but operates, in practice, with about 15 members), appointed on the recommendation of government ministers.

As with all matters that come before it, the Authority must first consider whether to require the parties to seek mediation assistance. A **heavy emphasis is placed on mediation**, and the parties are generally encouraged to attempt to resolve problems through discussions among themselves. If the grievance cannot be resolved through mediation, the Authority will undertake an investigation according to its normal procedures, before making a ‘determination’ (a decision). An order made by the Authority in a determination may be enforced by a party or parties to the proceedings, and a failure to comply with an order may lead to the other party asking the Authority for a certificate which can be filed in the District Court. **Such order will then be enforceable as if it were made by the District Court.**

Where the Authority finds an employee has a personal grievance, it may order any or all of these **remedies**:

- **Reinstatement** of the employee in his or her former position, or placement of the employee in a no less advantageous position;
- **Reimbursement** of lost wages or other money;
- **Payment of compensation** for humiliation, loss of dignity, injury to feelings and loss of monetary or other benefits.⁷⁹²

⁷⁹⁰ See ODI, *Submission to the thematic study by the United Nations Human Rights Office of the High Commissioner on the work and employment of persons with disabilities, op. cit.*, question 8, p. 14.

⁷⁹¹ ERA, *op. cit.*, section 112, HRA, *op. cit.*, section 79A.

⁷⁹² ERA, *op. cit.*, section 123.

If the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, it **may make recommendations on actions the employer should take** to prevent similar problems in future.

If either party is dissatisfied by the decision of the Authority, it **may ask to have the matter re-heard by the Employment Court**, an institution established by section 186 of the ERA. The Court has exclusive jurisdiction in a range of areas under the ERA, but it is constrained by the exclusive jurisdiction conferred on the Authority. In particular, the Court can only deal with personal grievance claims if they come before it in a challenge to a determination by the Authority, or on a reference from the Authority. With regard to matters such as discrimination, leave may be sought on limited grounds to appeal to the Court of Appeal against the Court's decisions, and from there, to the Supreme Court.

Discrimination complaints may alternatively be submitted to the Human Rights Commission (the "HRC"). This may be to take advantage of the different procedures offered by this route, or because the individual concerned does not fall within the definition of an 'employee' under the ERA.

The HRC, an independent but government-funded institution, is established by section 4 of the HRA. One of its primary functions is dispute resolution. Complaints received by the HRC in relation to alleged discrimination are investigated, and the **HRC is under a duty to assist the parties to secure a settlement of their dispute**.⁷⁹³ If there is a failure to settle at this stage, the case could proceed to the **Human Rights Review Tribunal (the "HRRT")**. Also constituted under the HRA, the HRRT is separate from and independent of the HRC, and **has the powers of a court**: it may call for evidence and information, and examine witnesses. If the HRRT is satisfied that the defendant has committed a breach of the HRA, it may award the following remedies:

- **declare** that the defendant has breached the HRA or the terms of a settlement;
- **order the defendant not to continue or repeat the breach** or engage in the kind of conduct that led to the breach;
- **award damages** for pecuniary loss; loss of monetary or other benefit; or humiliation, loss of dignity or injury to feelings;
- **order the defendant to redress any loss or damage** suffered by the complainant or the aggrieved person;
- **declare any contract** that contravenes the HRA **to be an illegal contract**;
- **order the defendant to undertake a training or other programme**, or to implement a specified policy or programme;
- **provide relief** in accordance with the *Contract and Commercial Law Act 2017*;
- provide **any other relief** the HRRT thinks fit.⁷⁹⁴

As part of the human rights complaints process, a complainant, aggrieved person, or party seeking to enforce a settlement may refer a complaint to the Director of **the Office of Human Rights Proceedings (the "Office")**. This offers a form of institutional enforcement. The Office is part of the HRC but is required to act independently of it and Ministers. The Director, who is legally qualified, is appointed on the recommendation of the relevant Government Minister. Upon receiving a complaint, the Director must decide whether to represent the complainant in proceedings before the HRRT. In deciding whether, and to what extent, to provide representation, the Director must consider a number

⁷⁹³ HRA, *op. cit.*, section 83.

⁷⁹⁴ HRA, *op. cit.*, section 92I.

of factors, including: whether the complaint raises a significant question of law, whether resolution of the complaint would affect a large number of people and the level of harm involved in matters that are the subject of the complaint.⁷⁹⁵

A number of mechanisms are available to employers, unions and employees for resolving employment relationship problems or disputes, including **mediation and arbitration**. These may be agreed on an ad hoc private basis, but the employment agreement may already require parties to follow a dispute resolution procedure. However, this does not prevent any of the parties from making an application to the Authority or Employment Court for an order or remedy. In other words, **the parties can agree to use alternative dispute resolution procedures**, including in relation to disability discrimination issues, but they cannot contract out of their statutory right to use the procedures provided by the ERA (nor, it may be assumed, the HRA).⁷⁹⁶

5. Legal framework in practice

In 2018, the New Zealand Government submitted its response to UN Committee on the Rights Person with Disabilities on *'the list of issues prior to submission of the combined second and third periodic review of New Zealand'* with regard to its **implementation of the CRPD (the "Government Response")**.⁷⁹⁷ References in the response to legal reform designed to bring legislation in to compliance with the CRPD concern areas outside of the employment domain, such as education, social security and family care. Insofar as reasonable accommodation is concerned, the Government Response states:

*"The CRPD's definition of 'reasonable accommodation' is already recognised in NZ law and NZ courts have applied it consistently with Article 2, CRPD. NZ also has guidelines on reasonable accommodations."*⁷⁹⁸

With regard to work and employment under Article 27 of the CRPD, the Government Response refers to particular concerns surrounding the employment levels of persons with disabilities, particularly women and Maori and Pacific minorities.⁷⁹⁹ Although it admits that it **does not have any specific policies for increasing employment rates**, it highlights a number of **campaigns and government programmes** aimed at employers and service providers which are designed to improve outcomes. These include:

- Working with the New Zealand Disability Support Network on the Employment Support Practice Guidelines,⁸⁰⁰ launched in March 2018, which provide a "how to" guide for organisations working to get disabled people in employment;

⁷⁹⁵ HRA, *op. cit.*, section 92(2).

⁷⁹⁶ See Richard Rudman, *New Zealand Employment Law Guide, op. cit.*, p. 500. ERA, *op. cit.*, section 238.

⁷⁹⁷ Office for Disability Issues, *New Zealand Government's Response 'the list of issues prior to submission of the combined second and third periodic review of New Zealand'*, adopted by the Committee at its 19th session (14th February – 19th March 2018), available at <https://www.odi.govt.nz/assets/Uploads/2019-NZ-Governments-response-to-the-UN-CRPD-Committees-List-of-Issues-final.docx> (15.08.2019).

⁷⁹⁸ *Ibid*, p. 12.

⁷⁹⁹ *Ibid*, p. 72.

⁸⁰⁰ New Zealand Disability Support Network, *Employment Support Practice Guidelines: How to support disabled people to get the job they want*, March 2018, available at https://www.nzdsn.org.nz/wp-content/uploads/2018/03/F_7270-NZD_Employment_Guidelines_WEB.pdf (15.08.2019).

- Launching a ‘Disability confident’ campaign;⁸⁰¹
- Developing what is known as the Lead Toolkit,⁸⁰² which provides in-depth guidance to employers on employing disabled people (with a particular focus on the public sector)

An issue receiving particular attention is that of sheltered workshops⁸⁰³ and what is known as the **Minimum Wage Exemption**. It is reported that traditional sheltered workshops in New Zealand ended with the repeal of the *Disabled Persons Employment Act 1960*. Under this, operators of sheltered workshops were exempted from applying the same employment conditions as elsewhere. Those who continue to offer sheltered employment opportunities are known as Business Enterprises – which, states the Government Response – receive government funds to provide vocational and employment support for disabled people. However, employers who operate such organisations, as well as other employers taking on an employee with a disability, **may obtain a permit to pay such individuals a lower minimum wage rate for their specific job to reflect a disability** which limits them from carrying out the requirements of their work. The current political debate surrounds **how to remove the Minimum Wage Exemption** to enable disabled people currently under the exemption receive the minimum wage whilst not discouraging businesses from hiring disabled workers.⁸⁰⁴

Statistics indicate that in the **year ending 15th July 2018, the HRC received 370 complaints** of alleged unlawful disability discrimination; 35 of these allege unlawful discrimination on multiple grounds, including disability. In the **previous year, 419 complaints had been received**, with disability discrimination making up the largest proportion of complaints by unlawful grounds. Although most of these complaints were about how disabled people were treated by public service organisations, employment issues were the second most common complaint from people alleging unlawful disability discrimination.⁸⁰⁵

There are **no known specific future policy reforms** in the field of disability in the workplace. The **Government’s New Zealand Disability Strategy 2016-2026**⁸⁰⁶ does not provide specific policy details, but rather refers to desired outcomes for the future. The **outcomes with regard to employment and economic security** are that:

- disabled people are consulted on and actively involved in the development and implementation of legislation and policies concerning employment and income support;

⁸⁰¹ The ‘Disability Confident’ campaign is said to aim to highlight the many benefits of employing disabled people and to make it easy for employers to get the information they need to become ‘disability confident’. See Ministry of Social Development, *Disability Confident*, available at <https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/disabilityconfidentnz/index.html> (15.08.2019).

⁸⁰² New Zealand Government & Ministry of Social Development, *Lead Toolkit: a guide for employing disabled people*, published by Ministry of Social Development, November 2016, available at <https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/initiatives/disabilityconfidentnz/toolkit-employing-disabled-people.pdf> (15.08.2019).

⁸⁰³ ‘Sheltered workshop’ refers to an organisation or environment that employs people with disabilities separately from others.

⁸⁰⁴ See nzherald.co.nz, *Advocate: no one will hire disabled workers if made to pay minimum wage*, 23rd May 2019, available at https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12233659 (15.08.2019).

⁸⁰⁵ Office for Disability Issues, *New Zealand Government’s Response ‘the list of issues prior to submission of the combined second and third periodic review of New Zealand’*, *op. cit.*, p. 11.

⁸⁰⁶ Office for Disability Issues, *New Zealand Disability Strategy 2016-2026*, 29th November 2016, available at <https://www.odi.govt.nz/assets/New-Zealand-Disability-Strategy-files/pdf-nz-disability-strategy-2016.pdf> (15.08.2019).

- access to mainstream employment and income support services is barrier-free and inclusive;
- services that are specific to disabled people are high quality, available and accessible;
- all frontline workers, including case managers and employers, treat disabled people with respect;
- decision making on issues regarding employment and income support of disabled people is informed by robust data and evidence.

I. NORWAY

1. Introduction

1.1. Country overview

The Kingdom of Norway is the fifth largest country in Europe, but with around **5.3 million inhabitants** (2018), one of the least densely populated. GDP per capita in 2018 was 63,760 US\$ (3rd in Europe after Luxembourg and Switzerland). While the Norwegian population was for a long time very homogeneous, it has seen a sharp increase in immigration in recent decades and today about 17 % of the population are first or second generation immigrants.⁸⁰⁷

Norway declared its independence on 7 June 1905. The country was at the time in a union with Sweden (1814 to 1905), which preceded a union with Denmark lasting about 400 years. Norway is not a member of the European Union. Application for membership of the European Economic Community was filed in 1962 and 1967 and renewed in 1970, but in 1972, as well as in 1994, an advisory referendum resulted in a majority against membership. In 1973, a trade agreement (European Economic Area) with the EEC was concluded.

The **central administration consists of ministries and directorates**. To a large degree, the different ministries have been given authority to enact general regulations and to decide different cases. As regards labour law, special attention should be given to the Ministry of Labour and Social Affairs (*Arbeids- og sosialdepartementet*), which inter alia has administrative responsibility for the Working Environment Act (*Arbeidsmiljøloven*). Administrative authority is to a considerable extent also delegated to subordinate bodies, such as the Labour Inspectorate (*Arbeidstilsynet*), and the Labour and Welfare Service (*Arbeids- og velferdsetaten*) (NAV).

The Norwegian legal system is generally considered to belong to the **Nordic subfamily of “continental” (Romano-Germanic or ‘civil’) legal systems**, which also includes Danish, Finnish, Icelandic and Swedish law.⁸⁰⁸ These legal systems can be described as practical and pragmatically orientated and less conceptualistic than German and French law. Moreover, they lack comprehensive private law codifications similar to the German *Bürgerliches Gesetzbuch* or the French *Code civil* and they are not influenced by Roman law to the same degree as French and German law.⁸⁰⁹

Norway has a **three-level court system which handles both criminal and civil law**. Statutory provisions (formal legislation through acts and their regulations) interpreted through the legal preparatory works and case law are the primary sources of law invoked in Norwegian courts of law and in respect of Norwegian administrative agencies. However, international law, especially EU law, is increasingly being invoked in specific cases, including in discrimination cases.⁸¹⁰

⁸⁰⁷ Available at <https://www.ssb.no/befolkning/faktaside/befolkningen#blokk-2> (28.05.2019).

⁸⁰⁸ M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

⁸⁰⁹ M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

⁸¹⁰ E. L. McClimans, Country report Non-discrimination Norway, European Commission’s Directorate-General for Justice and Consumers 2018, p. 6. The report is available at <https://www.equalitylaw.eu/downloads/4793-norway-country-report-non-discrimination-2018-pdf-2-24-mb> (28.05.2019).

Data on the number of person with disabilities are difficult to find. The official employment statistics give a figure of 599,000 employable persons with a disability (16.8% of all persons aged 15-66) and of whom 263,000 are employed.⁸¹¹ This means that **44% of persons with disabilities aged 15-66 are employed.**

1.2. Overview of legal and policy framework

The main legal instrument on rights and protection for persons with disabilities is the **Gender Equality and Anti-Discrimination Act (*Lov om likestilling og forbud mot diskriminering*) (hereafter the GEADA)**.

The **GEADA covers several discrimination grounds**: gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age.⁸¹² Moreover, it covers **all areas of society** with the exception of family life and personal relationship. This means that the Act applies *inter alia* to employment, housing, school and education, and trade and services.⁸¹³ Moreover, the GEADA applies in principle to all sectors of public and private employment and occupation, including contract-work, self-employment, military service and holding statutory office⁸¹⁴ A duty on the employer to provide reasonable accommodation is included in the law. In addition to the protection under the GEADA, it may be mentioned that the **Working Environment Act (*Arbeidsmiljøloven*)** lays down a general duty for employers to provide reasonable accommodation for workers who, due to accident, sickness, fatigue or the like, are in need of such measures.

Norway signed the **UN Convention on the Rights of Persons with Disabilities** on 30 March 2007 and ratified it on 3 June 2013. The Ministry of Children and Equality is the national contact point for the Convention and has the overall responsibility for implementing its provisions throughout Norway.

In 2012, the Norwegian government launched a **Jobs Strategy for People with Disabilities (*Jobbstrategi for personer med nedsatt funksjonsevne*)**.⁸¹⁵ The stated **aim is to include more people with disabilities in employment** and to reduce the number of benefit recipients. The strategy is aimed primarily at young people with disabilities (under the age of 30) with a particular focus on the transition between school and employment. It identifies four main barriers for people with disabilities to enter the labour market: (1) Discrimination barrier (people with disabilities may be exposed to discriminatory attitudes and actions when seeking employment); (2) Cost barrier (employers may incur costs from hiring people with disabilities such as the costs of practical and physical adaptation, supervision and training); (3) Productivity barrier (the target group may include people with reduced or variable capacity for work; and (4) Information and attitudinal barrier (a lack of information about instruments (e.g. subsidies) to facilitate employment, but also the prevalence of certain attitudes may prevent employers from hiring job-seekers with disabilities).⁸¹⁶

⁸¹¹ <https://www.ssb.no/en/arbeid-og-lonn/statistikker/akutu> (28.05.2018).

⁸¹² GEADA, section 6.

⁸¹³ Government bill Prop.81 L (2016-2017) Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven, p. 311.

⁸¹⁴ E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, *op. cit.*, p. 9.

⁸¹⁵ <https://www.regjeringen.no/no/dokumenter/jobbstrategi/id657116/> (06.06.2019). The Jobs Strategy is also available in English at https://www.regjeringen.no/contentassets/ff70f517a68040f5b52bc374f94b1855/ad_jobbstrategi_engelsk.pdf (06.06.2019).

⁸¹⁶ Ibid, Chapter 9.

The 2012 Jobs Strategy for People with Disabilities contains specific initiatives on how to reduce these different barriers, such as offering wage-subsidies for employers hiring people with reduced work capacity and facilitation guarantees to clarify what type of support job-seekers and employers are entitled to and when such support can be provided. The various initiatives should also serve to counteract early retirement from the labour market on a disability pension.⁸¹⁷

A new strategy for equality for people with disability for the period 2020-2030 was presented by the government in December 2018.⁸¹⁸ It contains general statements supporting a more inclusive working life for people with disabilities such as the need of provision of assistance and tools and facilitating for employers to employ persons with disabilities.⁸¹⁹ According to the government, the strategy presented will be followed up by a concrete action plan in 2019.⁸²⁰

A key instrument to achieve the goals in the Jobs Strategy is the so-called **Agreement on more Inclusive Working Life** (*Inkluderande arbeidsliv*), hereafter the IA Agreement. The IA Agreement can be characterized as a form of **memorandum of understanding (*intensjonsavtale*) between the government and the social partners** (the major employers' organisations and trade unions) with the overall aim of achieving high employment and mobilising the workforce by reducing sick leave and withdrawal from working life.⁸²¹ Signed in 2001, the IA Agreement has been amended on several occasions and the latest version was signed in the end of 2018.⁸²² The 2018 Agreement includes all employers which is an important difference from previous agreements that only applied to the companies having signed the agreement.⁸²³ This means that all employers and employees can benefit from the tools and support schemes provided in the IA Agreement.

As regards persons with reduced working capacity, the **IA Agreement encourages employers to use different existing labour market instruments or measures in order to increase employment** for these groups. One example is the scheme governing subsidization of workplace facilitation for job-seekers with reduced working capacity. Generally, the IA Agreement emphasizes the importance of coordinating existing labour market instruments more effectively.⁸²⁴ The Norwegian Labour and Welfare Administration (*Ny arbeids- og velferdsforvaltning*) offers companies various kinds of support and subsidies in order to achieve the goals of the IA Agreement.⁸²⁵

⁸¹⁷ Ibid.

⁸¹⁸ Et samfunn for alle - Regjeringens strategi for likestilling av mennesker med funksjonsnedsettelse for perioden 2020–2030, available at https://www.regjeringen.no/contentassets/72fec3af41cf438b8cb8131ecac4dcd2/bld_et-samfunn-for-alle.pdf (08.10.2019).

⁸¹⁹ Ibid, p. 26.

⁸²⁰ United Nations Committee on the Rights of Persons with Disabilities – Replies of Norway to the list of issues in relation to the initial report of Norway, available at <https://digitallibrary.un.org/record/3793238> (08.10.2019).

⁸²¹ The IA Agreement is available in English at <https://www.regjeringen.no/contentassets/fc3b4fed90b146499b90947491c846ad/the-ia-agreement-20192022.pdf> (06.06.2019).

⁸²² https://www.regjeringen.no/no/tema/arbeidsliv/arbeidsmiljo-og-sikkerhet/inkluderende_arbeidsliv/id947/ (06.06.2018).

⁸²³ <https://arbeidsgiver.difi.no/nyhet/2018/12/slik-blir-den-nye-ia-avtalen> (03.09.2019)

⁸²⁴ This was clearly expressed in the 2014 IA Agreement, available at https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2016/ia_agreement_-2014_18.pdf. (06.07.2019).

⁸²⁵ Information about the support measures are described on the Norwegian Labour and Welfare Administration website <https://tjenester.nav.no/veiviserarbeidsgiver/samleside> (06.07.2019).

The 2018 IA Agreement has been criticized by interest groups for people with disabilities on the grounds that it does not include the specific goal of increasing employment of people with reduced functional ability.⁸²⁶ Instead, it merely sets up general targets to reduce sick leave and withdrawal from working life.

The Norwegian government has set a target that “5 % of new government employees should be a person with disability or gaps in their CV”.⁸²⁷ Central government agencies have in their annual reports for 2018 provided data regarding this target. These figures show that the Ministry of Labour and Social Affairs is the best performing entity having 4.5 % of all new employees corresponding to the criteria.⁸²⁸

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

The main legal basis for workplace protection and rights is the **Gender Equality and Anti-Discrimination Act (*Lov om likestilling og forbud mot diskriminering*) (hereafter GEADA)**. It entered into force on 1 January 2018 and replaced a number of specific laws: the Gender Equality Act, the Anti-Discrimination Act covering ethnicity, religion and belief, the Anti-discrimination and Accessibility Act covering disability, and the Sexual Orientation Anti-Discrimination Act.

The **Working environment Act (*Arbeidsmiljøloven*)** lays down a general duty for employers to provide reasonable accommodation for workers who, due to accident sickness, fatigue or similar, are in need of such measures. This duty is often invoked in courts in conjunction with the duty to provide reasonable accommodation regulated in the GEADA, as they have an overlapping application.

The UN Convention on the Rights of Persons with Disabilities is not incorporated into domestic law. According to the Norwegian government, the requirements and obligations in the Convention are already safeguarded in existing domestic legislation.⁸²⁹

2.2. Scope of protection

The GEADA’s provisions on workplace protection and rights apply with regards to those with disabilities apply in principle to all employers. Accordingly, **the public and private sector are subject to the same legal obligations under the Act**.⁸³⁰ However, an employer within the public sector can - in order to facilitate employment of persons with disabilities - derogate from the general principle to employ the best qualified candidate. Accordingly, government agencies can employ a person with disability even if another candidate has better qualification. The person with disability benefitting from the derogation must however have the basic qualifications required for the position in question.⁸³¹

⁸²⁶ See for example <https://www.handikapnytt.no/funksjonshemmede-er-ikke-nevnt-i-den-nye-ia-avtalen/> (08.10.2019).

⁸²⁷ See communication from the Norwegian government available at <https://www.regjeringen.no/no/aktuelt/tiltak-for-enklere-inkludering-i-staten/id2663161/> (10.10.2019).

⁸²⁸ Ibid.

⁸²⁹ Government bill Prop. 106 Samtykke til ratifikasjon av FN-konvensjonen av 13. desember 2006 om rettighetene til mennesker med nedsatt funksjonsevne, p. 25.

⁸³⁰ E. L. McClimans, Country report Non-discrimination Norway, European Commission’s Directorate-General for Justice and Consumers 2018, p. 9.

⁸³¹ Government Ordinance to the Civil Service Act (*Forskrift til lov om statens ansatte mv*), section 6.

Protection against discrimination comprises **all aspects of an employment relationship**: the announcement of a position, appointment, relocation, promotion, training and other forms of competence development, wages and working conditions and termination of employment.⁸³² The scope of protection is not limited to employees but includes employers' selection and treatment of self-employed persons and hired workers.⁸³³

2.3. Definition of disability

There is **no definition of disability laid down in the GEADA**. The concept is discussed in the Preparatory Works to the Anti-discrimination and Accessibility Act (now replaced by the GEADA) and identified as **"reduced functional ability either regarding physical, mental or cognitive abilities"**.⁸³⁴ In relation to professional life, the definition has been subject to discussion by the Equality and Anti-Discrimination Ombudsman. In its 2014 Report on the right to reasonable accommodation, the Ombudsman comments on the CJEU joined cases 335/11 and C-337/11 *Skouboe Werge and Ring*, stating that the extended definition of disability in those cases are more in line with the Norwegian interpretation of the concept.⁸³⁵

There is **no clear indication as regard the requirements for severity and duration of the reduced functional ability** in order to be considered as a disability. The Preparatory Works to the Anti-discrimination and Accessibility Act states that any closer definition of the severity and duration requirements is not recommendable as disability often can vary in both severity and duration. However, it excludes any reduced functional ability that is merely transient or trivial to be considered as a disability under the law.⁸³⁶

The Norwegian concept of disability has been criticized by the United Nations Committee on the Rights of Persons with Disabilities for the "slow progress in replacing the medical model of disability with the human rights model of disability".⁸³⁷

2.4. Forms of discrimination protection

The GEADA prohibits several forms of discrimination. The different concepts of discrimination are laid down in Chapter 2 of the Act and apply to all discrimination grounds. Section 7 labels **direct discrimination** as "direct differential treatment" and defines it as "treatment of a person that is worse than the treatment that is, has been or would have been afforded to other persons in a corresponding situation on the basis of factor specified in section 6 [the different discrimination grounds]".

Indirect discrimination is labelled as "indirect differential treatment" and defined in section 8 of the GEADA as treatment of a person that is worse than the treatment that is, has been or would have been afforded to other persons in a corresponding situation, on the basis of factors specified in section 6 [the different discrimination grounds]".

⁸³² GEADA, section 29.

⁸³³ Ibid.

⁸³⁴ NOU 2005:8 Likeverd og tilgjengelighet, p. 162.

⁸³⁵ Forbudet mot diskriminering på grunn av nedsatt funksjonsevne - Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne en oppsummering, 2014 p. 33. Available at <http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf> (07.06.2019).

⁸³⁶ Ibid, p. 163.

⁸³⁷ See the Committee's Concluding observations on the initial report of Norway (2019) p. 2, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNOR%2fCO%2f1&Lang=en (10.10.2019).

Prohibition against **harassment and sexual harassment** is regulated in section 13 of the GEADA. It states that “employers and managers of organisations and educational institutions shall prevent and stop harassment and sexual harassment in their area of responsibility”. Harassment is defined as “acts, omissions or statements that have the purpose or effect of being offensive, frightening, hostile, degrading or humiliating”.

Prohibition against retaliation is regulated in section 14 of the GEADA. There are also provisions prohibiting against instruction a person to discriminate, harass or retaliate (section 15 GEADA) and against participating in discrimination, harassment, retaliation or the issuing of instructions (section 16 GEADA).

The **non-discrimination provisions apply to all aspects of an employment relationship**, ranging from actions taken by the employer before the employment until the termination of the employment.⁸³⁸

Employers’ duty to make adjustment in the work place to **accommodate persons with disabilities** is regulated in section 22 of the GEADA.

Finally, it should be mentioned that the **prohibition of discrimination covers actual, assumed, former or future events**. Moreover, the prohibition includes the **discrimination of a person on the basis of his or her connection with another person** when such discrimination is based on one of the grounds laid down in section 6 of the GEADA (gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age).⁸³⁹

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

In the GEADA, employers’ duties to accommodate persons with disabilities is regulated in section 22. Its scope of protection **covers both employees and potential employees**. The provision contains the term “individual accommodation” (*individuell tilrettelegging*) and reads as follows:

Section 22. Right to individual accommodation of job seekers and workers

Workers and job seekers with disabilities have a right to suitable individual accommodation in respect of recruitment processes, workplaces and work tasks, to ensure that they have the same opportunities as other persons to secure or sustain employment, benefit from training and other skills development measures, and carry out and have the opportunity to progress in their work.

The right applies to accommodation that does not impose a disproportionate burden. In the assessment, particular weight shall be given to

a) the effect of accommodation in terms of dismantling barriers for persons with disabilities

b) the costs associated with accommodation

⁸³⁸ GEADA, section 29.

⁸³⁹ GEADA, section 6(2) and 6(3).

c) the resources of the undertaking.⁸⁴⁰

The right to accommodation **must not impose a disproportionate burden upon the employer**. In the assessment – as stated in the provision – particular weight shall be given to three specifics: the effect of accommodation in terms of dismantling barriers for persons with disabilities, the costs for the measure and the resources of the employer. According to the government proposal for GEADA, there must be a specific assessment based on the individual's actual needs before any accommodation measure is taken.⁸⁴¹ This assessment shall take into account if others may benefit from the measure and if public funding will cover parts of the costs for taking the measure.⁸⁴² The accommodation measure can take different types of character: organisational, such as modification of working time and tasks, or, adaptation of equipment such as modification of doors, desks and installation of lift.⁸⁴³

According to section 22 GEADA, the aim of the accommodation measure is to “**ensure that they have the same opportunities as other persons to secure or sustain employment**, benefit from training and other skills development measures, and carry out and have the opportunity to progress in their work”.

3.2. Incentives or other assistance available to employers

There are a number of tools and measures aiming to support people with disabilities in working life for which the employer can receive public funding. Most of them are funded and operated by **the Labour and Welfare Service (Arbeids- og velferdsetaten) (NAV)**.⁸⁴⁴ They include wage subsidies, so-called functional assistance within the workplace (*funksjonsassistanse i arbeidslivet*) and inclusion contribution (*inkluderingstilskudd*). These measures and support schemes are generally administered by the different local NAV offices (*NAV arbeidlivssenter*).⁸⁴⁵ Normally it is the employer that applies for the support and more exceptionally the employee herself. This depends on the specific type of measure and support scheme.⁸⁴⁶

The **functional assistance within the work place (*funksjonsassistanse i arbeidslivet*)** covers the costs for the salary of a person assisting an employee with disabilities. This type of aid is only available for persons with severely reduced functional disability or severely visual impairment and includes assistance for matters such as dressing and undressing and reading and secretary aid (in cases of visual impairment). The aid is granted by the NAV on a yearly basis following an estimation of the number of hours of assistance required in the individual case.⁸⁴⁷

The **inclusion contribution (*inkluderingstilskudd*)** aims to compensate employers for the costs linked to the adaption of the workplace for employees with disabilities. The measures for which funding can

⁸⁴⁰ Non-official English translation of the GEADA is available at <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> (30.08.2019).

⁸⁴¹ Government bill Prop.81 L (2016-2017) Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven, p. 328.

⁸⁴² Ibid, p. 327

⁸⁴³ Ibid, p. 328.

⁸⁴⁴ An overview of the different measures are listed at <https://www.regjeringen.no/no/tema/arbeidsliv/arbeidsmarked-og-sysselsetting/innsikt/arbeidsmarkedstiltak/hvilke-arbeidsrettede-tiltak-finnes/id2076683/> (30.08.2019).

⁸⁴⁵ <https://www.nav.no/no/Bedrift/Hjelpemidler/Kartlegging+og+radgivning> (30.08.2019).

⁸⁴⁶ Forskrift om arbeidsmarkedstiltak FOR-2015-12-11-1598.

⁸⁴⁷ See information from Labour and Welfare Service, available at <https://www.nav.no/no/Bedrift/Hjelpemidler/Funksjonsassistanse> (10.10.2019).

be given include costs for evaluation of needs by a third party, furniture, training sessions, IT programmes, etc.⁸⁴⁸

Many measures provided by the NAV are covered by the Agreement on more Inclusive Working Life.⁸⁴⁹ In particular, under the IA Agreement, an employer can ask for a contact person at the NAV in order to facilitate the work in assisting people with disabilities.⁸⁵⁰

4. Enforcement of rights

Rights under the GEADA can be enforced either by bringing a case before an **ordinary court or to the Equality and Anti-Discrimination Tribunal (*Diskrimineringsnemnda*)**.⁸⁵¹ Given that the vast majority of the discrimination cases are handled by the Anti-Discrimination Tribunal, the Tribunal plays a more important role than ordinary courts in the application of equality and anti-discrimination law.⁸⁵²

The members of the **Anti-Discrimination Tribunal** are appointed by the Ministry of Children and Equality for a term of 4 years and must fulfil the requirements prescribed for judges.⁸⁵³ A decision by the Tribunal can be appealed to an ordinary court within 3 months following the date of the decision. In the absence of any appeal within that time, the decision can be enforced in accordance with the rules applicable to judgments rendered by ordinary courts.⁸⁵⁴ As long as the case is pending before the Tribunal, the parties cannot take action in an ordinary court. If action has been initiated before an ordinary court and one of the parties request that it should instead be decided by the Anti-Discrimination Tribunal, the court may freeze the proceedings and await a decision from the Tribunal before deciding the case.⁸⁵⁵ **The Tribunal is free of charge for the parties and there is no requirement of having a legal representative.**⁸⁵⁶

Under the Act relating to mediation and procedure in civil disputes (*Lov om mekling og rettergang i sivile tvister*), NGO's such as associations and trade unions are entitled to take action in courts on behalf of victims of discrimination.⁸⁵⁷ As regards the Equality and Anti-Discrimination Tribunal, there is a specific provision (section 40 GEADA) on the right of organisations to act as authorised representatives. It provides that an **organisation that has anti-discrimination work as its sole or partial purpose may be used as an authorised representative**. In practice, there are few organisations apart from the trade unions that conduct strategic litigation on issues of non-discrimination.⁸⁵⁸

⁸⁴⁸ Available at:
<https://www.nav.no/no/Person/Arbeid/Oppfolging+og+tiltak+for+a+komme+i+jobb/Tiltak+for+a+komme+i+jobb/Relatert+innhold/inkluderingsstilskudd#chapter-1> (30.09.2019).

⁸⁴⁹ See this country report section 1.2 above.

⁸⁵⁰ Information about the service offered by the NAV is available at
<https://tjenester.nav.no/veiviserarbeidsgiver/samleside> (03.09.2019).

⁸⁵¹ GEADA section 40.

⁸⁵² E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, p. 79.

⁸⁵³ Lov om Likestillings- og diskrimineringsombudet og Diskrimineringsnemnda, section 6.

⁸⁵⁴ Ibid, section 16.

⁸⁵⁵ Ibid, section 17.

⁸⁵⁶ <https://www.diskrimineringsnemnda.no/hjem#> (06.09.2019).

⁸⁵⁷ Lov om mekling og rettergang i sivile tvister (Lov 2005-0617-90), section 1-4.

⁸⁵⁸ E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, p. 81.

Under Norwegian law, NGOs can act in the public interest on their own behalf, without a specific victim to support or represent (so-called **actio popularis**). This right is however limited to matters that fall within their purpose and activities (*forhold som det ligger innenfor organisasjonens formål og naturlige virkeområde*).⁸⁵⁹

Class actions are permissible for claims arising from the same event in accordance with the rules laid down in Chapter 35 of the Act relating to mediation and procedure in civil disputes. An action can be brought by any person who fulfils the conditions for class membership or by an organisation, association or a public body charged with promoting a specific interest, provided that the action falls within its purpose and general activities.⁸⁶⁰

As regards burden of proof, section 37 of the GEADA of requires a **shifting of the burden of proof**. It states that “discrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred and the person responsible fails to substantiate that discrimination did not in fact occur”. This rule of shifting or shared burden of proof applies to all grounds of discrimination. It should also be added that in cases concerning dismissal, the general labour law procedural law requires that the employer must demonstrate that the dismissal is based on valid grounds.⁸⁶¹

The rules and procedures for **enforcing the rights under the GEADA are essentially the same for the public and private sector**.

The **remedies available** are **compensation for non-economic loss (*oppreisning*)** and **damages (*erstatning*)** awarded to the victim.⁸⁶² Damages shall cover any economic losses resulting from the unlawful treatment and compensation for non-economic loss shall be set to an amount that is reasonable in view of the nature and scope of the harm, the relationship between the parties and the circumstances otherwise.⁸⁶³ In the employment area, employer’s liability exists irrespective of whether the employer can be blamed personally.⁸⁶⁴

Finally, it should also be mentioned that a person can ask the **Equality and Anti-Discrimination Ombudsman (*Likestillings- og diskrimineringsombudet*)** (the “*Ombud*”) for advice and guidance on discrimination issues. However, the *Ombud* does not make any assessment or declaration whether discrimination has occurred in a particular case.⁸⁶⁵

5. Legal framework in practice

The introduction of the GEADA and amendments to the Act relating to the Equality and Anti-Discrimination Ombudsman and the Anti-Discrimination Tribunal (*Lov om Likestillings- og diskrimineringsombudet og Diskrimineringsnemnda*) effective as of 1 January 2018, brought about a number of important changes to the existing legal framework. In particular, the *Ombud* no longer handles individual cases. Instead, individual complaints of breaches of the anti-discrimination law are

⁸⁵⁹ Lov om mekling og rettergang i sivile tvister (Lov 2005-0617-90), section 1-4.

⁸⁶⁰ Lov om mekling og rettergang i sivile tvister (Lov 2005-0617-90), Chapter 35 and section 1-4.

⁸⁶¹ E. L. McClimans, Country report Non-discrimination Norway, European Commission’s Directorate-General for Justice and Consumers 2018, p. 83.

⁸⁶² GEADA section 38.

⁸⁶³ Ibid.

⁸⁶⁴ Ibid.

⁸⁶⁵ <https://www.ldo.no/diskriminert/arbeidsliv/individuell-tilrettelegging/> (17.09.2019).

handled by the Tribunal that was vested with the right to award redress and financial compensation by legally binding administrative decisions. According to the previous rules, neither the *Ombud* nor the Tribunal could award damages or financial compensation. Where the other party did not voluntarily pay compensation, the victim of discrimination had to take action in an ordinary court.⁸⁶⁶

According to figures for 2019, the Anti-Discrimination Tribunal has decided 25 cases concerning disability. The vast majority of these cases concerned goods and services and only two concerned working life issues.⁸⁶⁷ We are not aware of any data for the number of anti-discrimination cases related to disability in regular courts. According to the 2018 Country report on anti-discrimination report prepared for the European Commission, **more than 95% of all discrimination cases are handled by the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal.**⁸⁶⁸ The reason for the low rate of litigation in ordinary courts has been identified largely as a result of the risks and costs involved in court litigation (loser pays rule), and the difficulties in obtaining free legal aid.⁸⁶⁹

The **United Nations Committee on the Rights of Persons with Disabilities** has criticized Norway for not having incorporated the Convention on the Rights of Persons with Disabilities into national law. As regards work and employment specifically, the Committee is concerned that **efforts to promote the inclusion of persons with disabilities in the open labour market have been limited and have had little impact** and, among other things, recommends Norway to extend the target for five per cent of new employees in the public sector to be persons with disabilities to the private sector.⁸⁷⁰

As regards non-discrimination, the Committee has expressed concerned that there is **poor access to legal aid in discrimination cases** and that there is a lack of effective legislation and mechanisms to address multiple and intersectional forms of discrimination against persons with disabilities, especially against persons with disabilities belonging to ethnic minorities.⁸⁷¹

To our knowledge, there are no major reforms planned of the rules discussed in this report.

⁸⁶⁶ E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, p. 83.

⁸⁶⁷ Statistics available at the Tribunal's website : <https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8klagesaker> (17.09.2019).

⁸⁶⁸ E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, p. 83.

⁸⁶⁹ E. L. McClimans, Country report Non-discrimination Norway, European Commission's Directorate-General for Justice and Consumers 2018, p. 1

⁸⁷⁰ See the Committee's concluding observations on the initial report of Norway (2019) p. 11, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fNOR%2fCO%2f1&Lang=en (10.10.2019).

⁸⁷¹ Ibid, p. 2.

J. SPAIN

1. Introduction

1.1. Country overview

Spain is a European country situated on the Iberian Peninsula. Its territory also includes the Canary Islands, the Balearic Islands and the Chafarinas Islands. With a population of about **47 million people**, Spain is the sixth largest in Europe. Spain is a member of the European Union and the Council of Europe. Its capital and largest city is Madrid.

The Spanish State is organised as a **parliamentary monarchy**. The exercise of the legislative power corresponds to the General Courts, which represent the Spanish people and control the action of the government. They are composed of two Chambers: Congress of Deputies and Senate.

Spain has **ratified all the major international human rights treaties**, with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Spain **ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 3 December 2007**.

According to the last Disability Survey, carried out in 2008, there were **3.85 million persons with disabilities in Spain**, which represented about 8.5% of the Spanish population.⁸⁷² 59.8% of persons with disabilities are women. Of Spain's disabled population, 67.2% have mobility impairments.

1.2. Overview of legal and policy framework

The 1978 **Spanish Constitution addresses the rights of persons with disabilities** from a double perspective: by prohibiting all forms of discrimination on the basis of disability⁸⁷³ and by establishing a mandate for the public authorities to carry out an integration policy of persons with disabilities⁸⁷⁴.

The main piece of legislation addressing the rights of persons with disabilities is the **Consolidated Text of the General Law on the Rights of Persons with Disabilities and their social inclusion (GLPD)** adopted in 2013.⁸⁷⁵ The GLPD revised and unified several laws and regulations, including Law No. 13/1982 of 7 April 1982 on social integration of persons with disabilities; Law No. 51/2003 of 2 December 2003 on equal opportunities, non-discrimination and universal accessibility of persons with disabilities; and Law No. 49/2007 of 26 December 2007 on the regime of infractions and sanctions.

The GLPD aims to guarantee the effective exercise of rights by persons with disabilities on an equal basis with others, in line with the CRPD. The **GLPD covers different areas and rights**, including equality and non-discrimination, accessibility, health, rehabilitation, education, independent living, employment and social protection. It also regulates the obligations of the public administration.

⁸⁷² INE, Panorámica de la discapacidad en España, Cifras INE, October 2009. Available at: https://www.ine.es/ss/Satellite?L=&c=INECifrasINE_C&cid=1259924962561&p=1254735116567&page_name=ProductosYServicios%2FPYSLayout

⁸⁷³ Constitution of Spain, article 14.

⁸⁷⁴ Constitution of Spain, article 49.

⁸⁷⁵ Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social, adopted by Royal Legislative Decree No. 1/2013 of 29 November 2013-

Prior to the adoption of the GLPD, Law No. 26/2011 of 1 August 2011 amended 20 ordinary laws in an effort to **adapt the Spanish legal system to the principles, values, and obligations of the CRPD**. An additional reform to amend civil and procedural legislation in relation to the legal capacity of persons with disabilities is being discussed.⁸⁷⁶

At the policy level, the **Spanish Strategy on Disability⁸⁷⁷ and its Action Plan 2014–2020⁸⁷⁸** are the main policy instruments guiding the implementation of the rights of persons with disabilities. The Action Plan covers five core areas: equality, employment, education, accessibility and revitalization of the economy. Other sectoral plans include measures aimed at persons with disabilities at the national level and at the level of the autonomous communities, which have sole responsibility for areas such as health, education and social services.

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

The **GLPD is the main piece of legislation** regulating the right to employment of persons with disabilities. It establishes that persons with disabilities have the right to work under conditions that **guarantee the application of the principles of equal treatment and non-discrimination**.⁸⁷⁹ Equal treatment is understood as the absence of any direct or indirect discrimination on the basis of disability in employment, vocational training, promotion, and working conditions.⁸⁸⁰

According to the GLPD, persons with disabilities can exercise their right to work through ordinary employment, protected employment, and self-employment.⁸⁸¹ **Ordinary employment** covers jobs in the open labour market, whether in companies or in the public administration. **Protected employment** covers "special employment centres" and "labour enclaves", which are special workspaces for people with disabilities. Self-employment refers to independent work.

The GLPD also **foresees accessibility measures**, reasonable accommodation, supported employment, subsidies and a quota system, which apply to the private sector and public administrations.⁸⁸² It also **provides for orientation, placement and registration services for workers with disabilities** to promote their labour inclusion.⁸⁸³

The rights of workers with disabilities are **also regulated by mainstream employment legislation** such as the Royal Legislative Decree 2/2015 of 23 October of 2015, which approves the Consolidated Text

⁸⁷⁶ In 2018, the Spanish Executive published a draft bill amending the Civil Code, the Civil Procedure Law, the Mortgage Law and the Civil Registry Law. Available at <http://www.nreg.es/ojs/index.php/RDC/article/view/375/291>

⁸⁷⁷ Ministerio de Sanidad, Política Social e Igualdad, Estrategia Española sobre Discapacidad 2012-2020. Available at: https://www.mscbs.gob.es/ssi/discapacidad/docs/estrategia_espanola_discapacidad_2012_2020.pdf

⁸⁷⁸ Ministerio de Sanidad, Política Social e Igualdad, Plan de Acción de la Estrategia Española sobre Discapacidad 2014-2020. Available at: https://www.mscbs.gob.es/ssi/discapacidad/docs/plan_accion_EED.pdf

⁸⁷⁹ GLPD, article 35.

⁸⁸⁰ GLPD, article 36.

⁸⁸¹ GLPD, article 37.

⁸⁸² GLPD, articles 39 to 42.

⁸⁸³ GLPD, article 38.

of the Law on the Statute of Workers, and the Royal Legislative Decree 5/2015 of 30 October 2015, which approves the Consolidated Text of the Law on the Basic Statute of Public Employees.

Several **autonomous communities of Spain have also adopted legislation** on disability and employment, which complement the national framework.⁸⁸⁴

The Spanish Constitutional Court and the Supreme Court have had the opportunity to develop **jurisprudence in relation to the right to work of persons with disabilities**. The Spanish Constitutional Court has validated the constitutionality of affirmative action measures to promote the employment of persons with disabilities.⁸⁸⁵ For its part, the Supreme Court has clarified the scope of the obligation to employ workers with disabilities and to provide reasonable accommodation.⁸⁸⁶

2.2. Scope of protection

In general, measures to promote the inclusion of persons with disabilities in the labour market **apply to both the private sector and the public administration**.

Public and private **employers with more than 50 employees are required to employ at least 2% of workers with disabilities**, regardless of the type of employment relationship they have (full time or part time). Employers **can be partially or totally exempted** from this obligation provided that alternative measures are applied.⁸⁸⁷ These measures include the following:

- The hiring of a "special employment centre" (a form of sheltered workshop) or an independent worker with disabilities;
- Monetary donations to promote the labour inclusion of people with disabilities; and
- The constitution of a "labour enclave", which is a contract between an open market employer and a "special employment centre" to outsource personal with disabilities.

In addition, the **public administration must reserve 7% of the posts** advertised in their public calls for persons with disabilities until the mandatory 2% quota of employees with disabilities is met.⁸⁸⁸

The Spanish **legislation foresees subsidies and tax benefits** for hiring persons with disabilities depending on the type of work contract and the personal characteristics of the employee.⁸⁸⁹ There are also **incentives for concluding traineeship and internship work contracts** with employees with disabilities.⁸⁹⁰

⁸⁸⁴ Law 4/2017, of September 25, on the Rights and Attention to Persons with Disabilities in Andalusia; Law 5/2019, of March 21, on the rights and guarantees of persons with disabilities in Aragon; Law 9/2018, of December 21, on the Guarantee of the Rights of Persons with disabilities (Cantabria); Law 16/2019, of May 2, on Social Services of the Canary Islands; Law 2/2013, of May 15, on Equal Opportunities for Persons with Disabilities (Castilla y León); Law 7/2014, of November 13, on the Guarantee of the Rights of Persons with Disabilities in Castilla-La Mancha; Law 12/2007, of October 11, on Social Services of Catalonia; Law 11/2003, of April 10, on the Statute of Persons with Disabilities; Law 13/2015, of April 8, on Public Function of Extremadura; Foral Law 12/2018, of June 14, on Universal Accessibility (Navarra).
⁸⁸⁵ Judgement No 269/1994, of October 3.

⁸⁸⁶ Judgement STC of 4 February 2002 (2620/1996) STC of 5 May 2008 [JUR\2008\185402]; STS of 19 May 2006 (RJ 2006\2372).

⁸⁸⁷ GLPD, article 42; Royal Decree 364/2005 of 8 April 2005.

⁸⁸⁸ Law on the Statute of Workers, article 59.

⁸⁸⁹ Law 45/2002 of 12 December 2002; Law 3/2012 of 6 July 2012; Law 43/2006 of 29 December 2006; and Law 27/2014 of 27 November 2014.

⁸⁹⁰ Law on the Statute of Workers, Additional Provision Twenty.

Additionally, the "**protected employment system**" regulates the functioning of "special employment centres" for persons with disabilities. The special employment centre is a type of "**sheltered workshop**" where the majority of the workforce is composed of persons with disabilities (at least 70% of the labour force) and its aim is to promote the inclusion of persons with disabilities in the labour market. They can be created by both public and private organizations and are **subject to a special employment regime**.⁸⁹¹ Some sheltered centres are subcontracted by non-sheltered workshop employers, which can fulfil their quota requirements by **outsourcing to sheltered workshops**.⁸⁹²

2.3. Definition of disability

Following the CRPD, the **GLPD defines persons with disabilities** as those "who have a physical, mental, intellectual or sensory deficiencies, **foreseeably permanent**, which, by interacting with various barriers, may impede their full and effective participation in society, on equal basis with others".⁸⁹³

However, **in addition, the GLPD establishes a threshold** to be considered a person with disabilities: to have a degree of disability equal to or greater than **33 per cent**.⁸⁹⁴ The recognition of the degree of disability is carried out at the level of the autonomous communities following the criteria established in the Royal Decree 1971/1999.⁸⁹⁵ While the **evaluation is mainly medical**, it takes into account **complementary social factors** such as the family environment, income and expenses, employment, participation and accessibility barriers.

The Royal Decree 1971/1999 also clarifies that "permanent" deficiencies should be understood as those **non-recoverable organic or functional alterations**, that is, those "without reasonable possibility of restitution or improvement of the structure or function of the affected organ".⁸⁹⁶

2.4. Forms of discrimination protection

The Spanish legislation **prohibits all forms of discrimination** on the basis of disability.

Article 35 of the GLPD **prohibits both direct and indirect discrimination** against persons with disabilities in employment, which cover access to employment, conditions of work (including remuneration and dismissal), promotion, training, and affiliation and participation in unions as well as business and professional organizations.

According to the GLPD, there is **direct discrimination** when a person with disabilities is treated less favourably than another in a similar situation because of their disability.⁸⁹⁷ There is **indirect discrimination** when a legal or regulatory provision, a conventional or contractual clause, an individual agreement or a unilateral decision of the employer, apparently neutral, may cause a particular disadvantage to persons with disabilities with respect to other persons, provided that they objectively do not respond to a legitimate purpose and that the means for achieving this purpose are not adequate and necessary.⁸⁹⁸

⁸⁹¹ Royal Decree 1368/1985 of 17 July 1985.

⁸⁹² Royal Decree 290/2004 of 20 February 2004.

⁸⁹³ GLPD, article 4(1).

⁸⁹⁴ GLPD, article 4(2).

⁸⁹⁵ Royal Decree 1971/1999 of 23 December 1999, which was amended by the Royal Decree 1856/2009, of 4 December 2009.

⁸⁹⁶ Royal Decree 1971/1999, Annex 1A.

⁸⁹⁷ GLPD, article 35(3).

⁸⁹⁸ GLPD, article 35(4).

Harassment on the basis of disability is also considered as a discriminatory act.⁸⁹⁹ Harassment is defined as "any unwanted conduct related to a person's disability, whose objective or consequence is to attempt against their dignity or create an intimidating, hostile, degrading, humiliating or offensive environment".⁹⁰⁰ Any order to discriminate against persons because of their disability is also considered discrimination.⁹⁰¹

While the **obligation to provide reasonable accommodation** in employment, as regulated in the GLPD, does not expressly consider its denial a form of discrimination, this can be inferred from the general regulation on reasonable accommodation.⁹⁰²

According to the GLPD, all **discriminatory acts or provisions in the work environment are considered void**.⁹⁰³

Persons who are **self-employed or independent** are also covered by the prohibition of non-discrimination.

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

While the GLPD defines reasonable accommodation in similar terms to the CRPD,⁹⁰⁴ **Spanish legislation does not use the expression reasonable accommodation** in the context of employment. Instead, the GLPD refers to "**appropriate measures for adapting the job and the accessibility of the company**".⁹⁰⁵ This is because the latter was incorporated following the EU Council Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation.

Public and private employers are obliged to provide reasonable accommodation to persons with disabilities in order to allow them to access employment, perform their work, being promoted and access training, unless these measures place an excessive burden on the employer.⁹⁰⁶ These accommodations are considered by the law as specific measures designed to prevent or compensate for disadvantages due to disability.⁹⁰⁷

According to the GLPD, the **costs of the measures and the size and volume of organization or company**, as well as the availability of grants or subsidies for employing persons with disabilities, have

⁸⁹⁹ GLPD, article 35(6)

⁹⁰⁰ GLPD, article 2(f).

⁹⁰¹ GLPD, article 35(7).

⁹⁰² GLPD, article 63(1)).

⁹⁰³ GLPD, article 35(5).

⁹⁰⁴ GLPD, article 2(m).

⁹⁰⁵ GLPD, article 40. The term "reasonable accommodation" is referred and defined by the GLPD in relation to other areas beyond employment.

⁹⁰⁶ GLPD, article 40; Royal Legislative Decree 5/2015, article 59(2).

⁹⁰⁷ GLPD, article 40.

to be taken into account to determine the excessive burden.⁹⁰⁸ Employers can receive subsidies for job adaptation.⁹⁰⁹

Workers who are relatives of persons with disabilities can also benefit from job adaptations. According to the Law on the Statute of Workers, employees can request job adaptations, including with respect to the duration and distribution of the workday, organization of working time and the form of provision, to conciliate work and family life. Such adaptations must be reasonable and proportionate.⁹¹⁰

In addition, **employees who by law have under their direct care a person with disabilities** who does not perform a paid activity are entitled to a reduction in the daily workday, with the proportional decrease in salary.⁹¹¹ They are also entitled to a period of leave of no more than two years, unless a longer period is established by collective bargaining.⁹¹²

3.2. Incentives or other assistance available to employers

Spanish legislation contemplates a series of incentives for hiring persons with disabilities, including **subsidies and tax benefits**. These incentives depend on the type of the work contract (long-term, short term, part time, traineeship) and the personal characteristics of the employee (sex, age, impairment).⁹¹³

Employers who hire a person with disabilities on the basis of a **permanent work contract** are entitled to a **bonus reduction on their social security contribution tax**. The amount of this bonus ranges from 4,500 to 6,300 euros depending on the profile of the employee. In addition, employers are entitled to a wage subsidy of 3,907 euros for each full time contract; a grant up to 901 euros for job adaptation; and a deduction of 6,000 euros on their Corporate Income Tax. If the employer hires a person with disabilities part-time, the wage subsidy will depend on the number of working hours but other benefits may still apply.

Employers who hire a person with disabilities on the basis of a **temporary work contract** are also entitled to a **bonus reduction on their social security contribution tax**. The amount of the bonus ranges from 3,500 to 5,300 euros per year depending on the profile of the employee. These employers may also access a grant to adapt the job position. Additional incentives may apply for the transformation of temporary work contract into a permanent work contract.

Employers who hire a person with disabilities on the basis of a **traineeship work contract** are entitled to up to a **50% bonus on their social security contribution tax per trainee**. These employers may also access a grant to adapt the job position. Additional incentives may apply for the transformation of the traineeship into a permanent work contract. Similar benefits are established for internships.

⁹⁰⁸ GLPD, article 40.

⁹⁰⁹ Law 43/2006 of 29 December 2006, and Royal Decree 1451/1983 of 11 May 1983. The obligation to provide reasonable accommodation is also foreseen in article 15 of the Law on Occupational Risk Prevention.

⁹¹⁰ Law on the Statute of Workers, article 34(8)).

⁹¹¹ Law on the Statute of Workers, article 37(6).

⁹¹² Law on the Statute of Workers, article 46 (3).

⁹¹³ Law 43/2006 of 29 December 2006; Royal Decree 1451/1983 of 11 May 1983; Royal Decree 170/2004 of 30 January 2004; Royal Decree 1368/1985 of 17 July 1985; and Royal Decree 2273/1985 of 4 December 1985; Royal Decree 488/1998 of 27 March 1998. See also: http://www.mitramiss.gob.es/es/Guia/texto/guia_5/contenidos/guia_5_12_1.htm

Employers **who hire a person with disabilities through labour enclaves** are also entitled to a bonus reduction on their social security contribution tax, a wage subsidy and a grant to adapt the job position.

Additional **benefits are contemplated for sheltered employment centres and self-employment.**

Many **private and non-profit organizations support the integration of persons with disabilities** in employment. There is a wide range of national and local entities that provide specialised employment services for persons with disabilities, including job placement, job adaptation, training and support. Some of the most important are the following:

- Fundación ONCE
<https://www.fundaciononce.es/es/pagina/empleo-y-formacion>
- Adecco
<https://www.adecco.es/>
- Fundación Randstad
<https://www.randstad.es/>
- Fundación Integra
<https://fundacionintegra.org/>
- Obra Social “la Caixa”
<https://www.incorpora.org/>
- Fundación Integralia DVK
<https://dkvintegralia.org/fundacion-dkv-integralia/>

4. Enforcement of rights

Law no 36/2011 of 10 October 2011 regulates the procedures and remedies related to **individual and collective claims against private and public employers including discrimination** and disputes over contracts, conditions of work, social benefits, collective bargaining and dismissals. The Social Courts (**Juzgados de lo Social**) are responsible for hearing **cases dealing with employment law.**

In order to intervene in court, the **parties may appear on their own or confer their representation** to a lawyer, solicitor, collegiate social graduate or any person who is in the full exercise of their civil rights.⁹¹⁴ Those who are restricted in their exercise of rights must be represented by their guardians.⁹¹⁵

Workers' unions can act on behalf of and for the interest of workers who are affiliated to them for the defence of their individual rights. In the petition, the union must prove the affiliation of the worker or employee and the existence of the communication by the affiliate of their willingness to initiate the procedure.⁹¹⁶

In order **to sue the public administration**, individuals are required to first exhaust the administrative route, when appropriate, in accordance with the provisions of the applicable administrative procedural regulations.⁹¹⁷ However, it is not necessary to exhaust the administrative route for the protection of fundamental rights against acts of the public administration.⁹¹⁸

⁹¹⁴ Law 36/2011, article 20.

⁹¹⁵ Law 36/2011, article 16.

⁹¹⁶ Law 36/2011, article 20.

⁹¹⁷ Law 36/2011, article 69.

⁹¹⁸ Law 36/2011, article 70.

Under the Law on the Statute of Workers, **dismissal of a worker based on discriminatory grounds is considered void** and the worker must be immediately reinstated and will be entitled to unpaid wages.⁹¹⁹ In addition, the worker will be **entitled to compensation**.⁹²⁰

Significantly, in discrimination cases, when the existence of grounds of discrimination can be deduced on the basis of the allegations of the plaintiff, the **burden of proof is reversed**. Thus, the defendant will be requested to provide an objective and reasonable justification, sufficiently corroborated, of the measures taken and their proportionality.⁹²¹

5. Legal framework in practice

According to the latest report of the Spanish National Institute on Statistics (INE),⁹²² in 2017 there were **1,860,600 people with disabilities of working age** (from 16 to 64 years old), which represented 6.2% of the total population of working age. Only 35.0% of them were economically active, which is 42.7 points lower than the population without disabilities.

The **unemployment rate of persons with disabilities was 26.2%**, with a decrease of 2.4 points compared to 2016. This rate was 9.1 points higher than that of the population without disabilities. For its part, the employment rate of persons with disabilities was 25.9% (64.4% for people without disabilities), with an increase of 0.8 points compared to 2016. 89.1% of employed persons with disabilities were salaried and, of these, 74.4% had an indefinite contract. Women with disabilities showed a slightly less active presence in the labour market and higher unemployment rates. People with hearing impairments had the highest activity rates (58.1%) and those with psychosocial conditions, the lowest (31.1%). A significant number of persons with disabilities work in special employment centres.⁹²³

With regard to compliance with the quota, the **percentage of employees with disabilities in companies with 50 or more private sector workers has been estimated as 2.3%**.⁹²⁴ Nevertheless, some studies have estimated lower rates of compliance.⁹²⁵

In relation to the reservation of positions in the public administration, an **increase on number of positions advertised has been reported**. During 2018, for example, 779 places were reserved for persons with disabilities (210 for persons with intellectual disabilities), 662 positions for the internal promotion of persons with disabilities (120 for persons with intellectual disabilities), and 386 for persons with disabilities in interim positions.⁹²⁶

⁹¹⁹ Law on the Statute of Workers, article 55.

⁹²⁰ Law on the Statute of Workers, article 183.

⁹²¹ Law 36/2011, article 96.

⁹²² INE, Employment of Persons with Disabilities, updated on 11 March 2019, available at https://www.ine.es/prensa/epd_2017.pdf

⁹²³ In 2013, workers with disabilities in special employment centres reached 64,079. See: https://www.odismet.es/sites/default/files/import/reports_and_publications/27_2.pdf

⁹²⁴ INE, Employment of Persons with Disabilities, 2019.

⁹²⁵ A study of Inserta & Fundación ONCE estimated a 51,8% compliance rate. See: Inserta & Fundación ONCE, Social Economy, Executive summary, 2015, available at: https://www.fundaciononce.es/sites/default/files/economia_social_resumen_ejecutivo_fdigital.pdf

⁹²⁶ CERMI, Human rights and disability. Alternative report Spain, 2018. p. 73, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNHS%2fESP%2f33561&Lang=en

In order to **reinforce the implementation of the quota system**, several measures have been also implemented in recent years. Law 9/2017 of 8 November 2017, on Public Sector Contracts, established incentives to contract with employers that hire persons with disabilities, as well as a limitation to those that do not meet the 2% reserve quota for workers with disabilities.

Moreover, the **services of the Labour and Social Security Inspectorate have been strengthened** to monitor the implementation of the quota system. The General Directorate for Labour and Social Security Inspections issued the Technical Guideline No. 98/2016 on the activities of the Inspectorate in connection with the quota system for persons with disabilities. Similarly, the Strategic Plan for Labour Inspection and Social Security for the 2018-2020 period included a specific line of action.

Beyond the quota system, the relevant policy instruments to promote the employment of persons with disabilities are the Spanish Employment Activation Strategy 2017–2020 and the Annual Plan for Employment Policy. The Strategy includes **actions aimed at encouraging recruitment, job creation and job retention**, especially for those groups that have greater difficulty in accessing or remaining in employment, with special consideration for the situation of persons with disabilities. The Annual Plan for Employment Policy, which sets out programmes and services that apply to the country as a whole, as well as those specific to each autonomous community, has also promoted the creation of a coordinated framework for the employment of persons with disabilities at all levels.

Against this background, the **Committee on the Rights of Persons with Disabilities expressed concern** this year due to the lack of progress of Spain in increasing the low employment rate of persons with disabilities in the open labour market.⁹²⁷ They were also **concerned by the lack of information on the application of anti-discrimination laws**, including provisions on direct and indirect discrimination and denial of reasonable accommodation, in the workplace; as well as by the failure to comply with the quota set out for public sector contracts.⁹²⁸

In this regard, the **Committee on the Rights of Persons with Disabilities recommended** that Spain take the following action:

- a) **Analyse and modify legislation**, regulations and policies to promote the employment of persons with disabilities in the public and private sectors, with particular emphasis on women with disabilities and persons with disabilities living in rural areas;
- b) **Ensure that reasonable accommodation is available and accessible** for persons with disabilities with administrative safeguards, especially in cases of accidents that have led to disabilities in the workplace; and
- c) Adopt concrete measures to **fully implement the legal quota** established in the revised text of Law No. 9/2017 on public sector contracts.

⁹²⁷ Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Spain, CRPD/C/ESP/CO/2-3, 13 May 2019, para. 50.

⁹²⁸ Ibid.

K. SWEDEN

1. Introduction

1.1. Country overview

The Kingdom of Sweden is a country of about 450,000 square kilometres and **approximately 10 million inhabitants**. The GDP per capita in 2018 was about 49,000 US\$, placing Sweden at 7th place among the European countries. Since 1 January 1995, Sweden has been a member of the European Union. The Swedish population was for a long time very homogeneous, with only small minorities of Finnish and Sami peoples. In 1940, about 1 per cent of the Swedish population was born outside Sweden. In 2018, the same figure amounted to more than 19 per cent, or almost 2 million people.⁹²⁹

Sweden is divided into 20 county council/regions, in particular, for the administration of the public health services, and 290 primary municipalities for local government. Elections to county and municipal councils are held every 4 years at the same time as general elections for the Parliament (*Riksdag*). The counties as well as the municipal councils raise local taxes for their expenditure.

The Swedish legal system is generally considered to belong to the Nordic subfamily of **“continental” (Romano-Germanic or ‘civil’) legal systems**, which also includes Danish, Finnish, Icelandic and Norwegian law.⁹³⁰ These legal systems can be described as practical and pragmatically orientated and less conceptualistic than German and French law. Moreover, they lack comprehensive private law codifications similar to the German Bürgerliches Gesetzbuch or the French *Code civil* and they are not influenced by Roman law to the same degree as French and German law.⁹³¹

A noteworthy feature in Swedish law is the **importance in the adjudication process of the *travaux préparatoires*** to the law in question. The reasons given, particularly by the minister in charge of the preparation of the government bill and by the Parliament committee in its statement of opinion on the Bill, and the reasons for proposed alterations therein, are often referred to in judgments given by the courts.

The **courts are divided into two parallel and separate systems**: The general courts (*allmänna domstolar*) for criminal and civil cases, and general administrative courts (*allmänna förvaltningsdomstolar*) for cases relating to disputes between private persons and the public authorities. Each of these systems has three instances, where the highest court of the respective system only hear cases following the grant of a leave to appeal. In addition, a number of **special courts** have been established, meeting the need to provide special expert knowledge in certain areas of law. One of these special courts is the **Labour Court (*Arbetsdomstolen*)**, established in 1929.

Generally the Swedish labour market is characterized by a high overall rate of labour force participation, as well as a high rate of women’s labour force participation, and relatively low unemployment rates.

⁹²⁹ Official data from the Government Agency Statistiska Centralbyrån (Statistics Sweden) available at <https://www.scb.se/hitta-statistik/sverige-i-siffror/manniskorna-i-sverige/invandring-till-sverige/> (11.06.2019).

⁹³⁰ M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

⁹³¹ M. Bogdan, Concise Introduction to Comparative Law, 1st ed., Groningen: Europa Law Publishing, 2013, p. 76.

1.2. Overview of legal and policy framework

The current goal and focus areas of Swedish disability policy were adopted by the Parliament on 30 November 2017. Referred to as the national goal and focus on disability policy (*nationellt mål och inriktning för funktionshinderspolitiken*), it aims **to achieve equality in living conditions and full participation in society for people with disabilities**, with the UN Convention on the Rights of Persons with Disabilities and its Committee's recommendations as a starting point. The 2017 policy programme is also in line with the goals regarding disability laid down in the UN 2030 Agenda for Sustainable Development.⁹³² Moreover, it includes the promotion of greater gender equality and shall ensure that the rights and interests of the child are respected.⁹³³ In order to achieve these objectives, the implementation of disability policy focuses on the four main areas: (1) the principle of 'universal design'; (2) existing shortcomings in accessibility; (3) individual support and solutions for the individual's independence; (4) preventing and counteracting discrimination.⁹³⁴ Sweden **ratified the UN Convention on the Rights of Persons with Disabilities in 2008**.

Labour market policy is one of ten priority areas identified in the disability policy. Within that area, the government proposes different specific measures such as putting in place more flexible measures (for example so-called *flexjobb*) in order to improve the possibility for persons with disabilities to be employed.⁹³⁵

The competent authority for labour market policies supporting people with disabilities is the Public Employment Service (*Arbetsförmedlingen*) - PES. The PES coordinates various kinds of support benefitting people with disabilities, such as **various aids in order to adapt the workplace**, personal support, **sheltered employment** at Samhall⁹³⁶, **wage subsidies and other financial support to employers**, etc.⁹³⁷ These support schemes are governed by different laws and ordinances.⁹³⁸

The Swedish Agency for Participation (*Myndigheten för delaktighet*) is a knowledge based authority in the field of disability. The overall aim of the Agency is to ensure that disability policy has an impact in all areas of society. To that end, it is tasked with disseminating knowledge, monitoring and analyzing developments, initiating research and providing support and proposing measures to the government.⁹³⁹

The main pillar of the legal framework is the Discrimination Act (*Diskrimineringslagen (2008:567)*), prohibiting discrimination of persons with disabilities. Its scope of application is wide-ranging,

⁹³² Government bill prop. 2016/17:188 Nationellt mål och inriktning för funktionshinderspolitiken, p. 35 referring to Goal 8 of the UN Agenda 2030.

⁹³³ Government bill prop. 2016/17:188 Nationellt mål och inriktning för funktionshinderspolitiken, p. 22.

⁹³⁴ Government bill prop. 2016/17:188 Nationellt mål och inriktning för funktionshinderspolitiken, p. 26.

⁹³⁵ Government bill prop. 2016/17:188 Nationellt mål och inriktning för funktionshinderspolitiken, p. 40.

⁹³⁶ Samhall AB is Samhall is a state-owned company with a mandate to create work that furthers the development of people with functional impairment causing reduced working capacity.

⁹³⁷ <https://arbetsformedlingen.se/other-languages/english-engelska/stod-och-ersattning/for-dig-med-funktionsnedsattning> (03.05.2019).

⁹³⁸ See for example Ordinance on Certain Support for Persons with Work Impairment (Förordning (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga).

⁹³⁹ Förordning (2014:134) med instruktion för Myndigheten för delaktighet. See also the description of tasks on the Agency's website <http://www.mfd.se/om-mfd/uppdrag-och-verksamhetside/> (07.06.2019).

including *inter alia* employment and education. The Act includes the concept of **inadequate accessibility** as a form of discrimination.⁹⁴⁰

General obligations on accessibility and accommodation measures are laid down in the 1977 **Working Environment Act (*Arbetsmiljölagen*)** and the 1982 **Employment Protection Act (*Lagen om anställningsskyd*)** and apply to both the public and private sector.⁹⁴¹

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

Workplace protection and rights for persons with disabilities are laid down in different legal instruments. The main piece of legislation is the **2008 Discrimination Act (*Diskrimineringslagen* (2008:567))**, which lays down rules on non-discrimination of persons with disabilities. Its scope of application is wide-ranging, including *inter alia* employment and education. The Act replaced the former Equal Opportunities Act (*Jämställdhetslag* (1991:433)) and six anti-discrimination acts that regulated a specific discrimination ground, thereby concentrating the non-discrimination legislation in a single piece of legislation. Many of the definitions and concepts in the Discrimination Act are introduced as part of the framework of the implementation of the **EU anti-discrimination Directives**.⁹⁴²

General obligations regarding accessibility and accommodation measures are laid down in the 1977 **Working Environment Act (*Arbetsmiljölagen*)** and the 1982 **Employment Protection Act (*Lagen om anställningsskyd*)**.

2.2. Scope of protection

Specific rules on the prohibition of discrimination and reprisals at the workplace are laid down in Chapter 2 of the Discrimination Act. The Act applies to **all sectors of private and public employment**, including contract work, self-employment, military service (with the exception of provisions on age discrimination) and holding statutory office. With regard to employment, the main provisions are laid down in Chapter 2 Sections 1-4 and - with regard to self-employment - Chapter 2 Sections 10-11.⁹⁴³

Chapter 2 section 1 states the following:⁹⁴⁴

An employer may not discriminate against a person who, with respect to the employer,

- 1. is an employee,*
- 2. is enquiring about or applying for work,*

⁹⁴⁰ For more information on the Discrimination Act, see section 2.4. of this country report, below.

⁹⁴¹ For information on this, see in particular section 3.1. of this country report, below.

⁹⁴² Directive 2000/43/EC against discrimination on grounds of race and ethnic origin and Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.

⁹⁴³ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 66. The report is available at <https://www.equalitylaw.eu/downloads/4796-sweden-country-report-non-discrimination-2018-pdf-2-49-mb> (07.05.2019).

⁹⁴⁴ A non-official English translation of the 2008 Act that includes subsequent amendments until 2014 is available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf (05.03.2019).

3. is applying for or carrying out a traineeship, or

4. is available to perform work or is performing work as temporary or borrowed labour.

The prohibition of discrimination in the form of inadequate accessibility does not apply to a person enquiring about work.

A person who has the right to make decisions on the employer's behalf in matters concerning someone referred to in the first paragraph shall be equated with the employer.

The protection covers all actions taken by the employer in relation to the individual employee, applicant, or person performing work as temporary or borrowed labour.⁹⁴⁵ This means that the **individual is protected both before and during the employment**. However, a limitation of the scope is that the prohibition of discrimination in the form of inadequate accessibility does not apply to a person enquiring about work (inadequate disability will be discussed below).

While there are no thresholds as regards the size of the company (i.e. number of employees), the features of the company in question is important when assessing the *reasonability* of accommodation measures requested under the rules on inadequate accessibility.⁹⁴⁶

Self-employed people are not covered by the specific provisions on prohibition of discrimination in working life. They can however be protected as natural persons and enforce their rights in that capacity, for example when starting or running a business and as regards professional recognition.⁹⁴⁷ Moreover, there is a specific provision prohibiting discrimination by professional organisations where the scope of protection includes both employed and self-employed persons.⁹⁴⁸

The obligations on accessibility and accommodation measures in **1977 Working Environment Act (Arbetsmiljölagen)** and the **1982 Employment Protection Act (Lagen om anställningsskyd)** apply to both the public and private sector. Similar to the rules on inadequate accessibility in the Discrimination Act, the assessment of the reasonableness of accommodation measures requested depends on the concerned employer's financial and practical conditions for taking the measures in question.⁹⁴⁹ It should be noted that the rules on accessibility and accommodation measures in these Acts concern only those already in employment.⁹⁵⁰ As regards dismissal of a person who, because of disabilities, cannot carry out the work (i.e. dismissal due to personal reasons), the employer is obliged to first examine whether rehabilitation and accommodation measures could remedy the situation and enquire whether the person can be transferred to another position within the organisation.⁹⁵¹

Section 22 of the **Employment Protection Act** lays down specific protection for persons with disabilities reducing their work capacity and who therefore **have been granted special tasks or other accommodation measures (särskild sysselsättning)**. The provision applies in cases of dismissal on grounds of redundancy (i.e. not personal reasons) and provides that the **persons subject to protection must be given priority for continued work**, regardless of the general rules on priority laid down in the

⁹⁴⁵ Diskrimineringslagen (2008:567) Chapter 2 section 1.

⁹⁴⁶ Inadequate accessibility is a form of discrimination that will be discussed below, see section 2.4. of this country report, below.

⁹⁴⁷ Diskrimineringslagen (2008:567) Chapter 2 section 10.

⁹⁴⁸ Diskrimineringslagen (2008:567) Chapter 2 section 11.

⁹⁴⁹ H. Blyme, Kommentar til Arbetsmiljölagen (1977:1160), Karnov 2019, commentary no 22 to Chapter 3 section 3 of the Act.

⁹⁵⁰ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 58.

⁹⁵¹ Lagen om anställningsskyd section 7. See also A. Jyrwall Akerberg, Diskriminering på grund av funktionsnedsättning, 1st ed., Stockholm: CKM Förlag 2018, p. 323.

Act. However, protection is only given to the extent it can be accomplished without serious inconvenience to the employer.

2.3. Definition of disability

In the Discrimination Act, disability (*funktionsnedsättning*) is defined as “**permanent physical, mental or intellectual limitation of a person’s functional capacity that as a consequence of an injury or illness that existed at birth, has arisen since then or can be expected to arise**”.⁹⁵² It should be noted, however, that disability is defined differently in different pieces of legislation such as the Planning and Building Act and legislation in the social sphere.⁹⁵³

There is **no threshold of “severity” or a reference to the ability to engage in “normal life activities” or “professional life”**.⁹⁵⁴ As regards the area of employment, the provision covers any kind of disability that has an impact on the employee’s tasks. This means that a visual impairment could be covered in some situations, but not in others.⁹⁵⁵

That the injury or illness is *permanent* requires that it must be expected to last for a longer period of time. The exact period of time required is not defined, but **legal scholars have suggested that 12 months suffices**.⁹⁵⁶ The definition of disability includes persons having progressive illnesses such as cancer and multiple sclerosis.

2.4. Forms of discrimination protection

Rules on non-discrimination are laid down in the **2008 Discrimination Act** (*Diskrimineringslagen (2008:567)*). The Discrimination Act is comprehensive, covering all the grounds in the EU anti-discrimination Directives⁹⁵⁷ as well as discrimination due to sex or transgender identity and expression.

The prohibition of discrimination covers both direct and indirect discrimination. **Direct discrimination** is defined in Chapter 1 section 4 as follows: “that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age”.⁹⁵⁸

Indirect discrimination is defined in the same provision as follows: “that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people

⁹⁵² Diskrimineringslagen (2008:567) Chapter 1 section 5.

⁹⁵³ Sweden’s report to the Committee on the Rights of Persons with Disabilities, 2011, p. 5.

⁹⁵⁴ Government bill Prop. 2007/08:95 Ett starkare skydd mot diskriminering, p. 123. It should be noted that laws granting persons with disabilities rights to certain support and services generally require that the disability must be of a serious character.

⁹⁵⁵ S. Fransson & E. Stüber, *Diskrimineringslagen – En kommentar*, 2nd ed., Stockholm: Norstedts Juridik AB 2015, p. 110 f.

⁹⁵⁶ S. Fransson & E. Stüber, *Diskrimineringslagen – En kommentar*, 2nd ed., Stockholm: Norstedts Juridik AB 2015, p. 112.

⁹⁵⁷ Directive 2000/43/EC against discrimination on grounds of race and ethnic origin and Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.

⁹⁵⁸ A non-official English translation of the 2008 Act that includes subsequent amendments until 2014 is available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf (05.03.2019).

of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose".⁹⁵⁹

Harassment, sexual harassment and instructions to discriminate are addressed in the Discrimination Act as forms of prohibited discrimination.⁹⁶⁰ The obligation of an employer to investigate and to take measures against harassment is regulated in Chapter 2 section 3 of the Discrimination Act:

If an employer becomes aware that an employee considers that he or she has been subjected in connection with work to harassment or sexual harassment by someone performing work or carrying out a traineeship at the employer's establishment, the employer is obliged to investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future.

*This obligation also applies with respect to a person carrying out a traineeship or performing work as temporary or borrowed labour.*⁹⁶¹

Victimisation is prohibited in Chapter 2 section 18 and 19 of the Discrimination Act. In the government bill, victimisation (*repressalier*) is defined as acts, statements and omissions to act which lead to a disadvantage or a sense of discomfort for the individual.⁹⁶² The prohibition of victimisation protects all persons involved in an investigation, including witnesses and persons reporting discrimination or those who have helped the victim in other ways.⁹⁶³

Introduced in 2015, **inadequate accessibility** is a rather new form of discrimination in the Discrimination Act.⁹⁶⁴ It applies when an employer, education provider or merchant fails to **provide support and accommodation measures** that would create a situation for a person with a disability that is similar to that for persons without such a disability, and the employer/education provider/merchant may reasonably be required to implement such measures. The reasonableness is assessed on the basis of accessibility requirements in laws and other statutes, and with consideration *inter alia* of the financial and practical conditions for the measure as well as the duration and nature of the relationship or contact between the parties.⁹⁶⁵

In addition to the concept of inadequate accessibility, Chapter 3 of the Discrimination Act lays down a number of **active duties**.⁹⁶⁶ Since 2016, the general active duties apply to all discrimination grounds.⁹⁶⁷

⁹⁵⁹ A non-official English translation of the 2008 Act that includes subsequent amendments until 2014 is available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf (05.03.2019).

⁹⁶⁰ Diskrimineringslagen (2008:567) Chapter 1 section 4(4-6)

⁹⁶¹ A non-official English translation of the 2008 Act that includes subsequent amendments until 2014 is available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf (05.03.2019).

⁹⁶² Government bill prop. 2007/08:95 Ett starkare skydd mot diskriminering, p. 531-532.

⁹⁶³ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 103.

⁹⁶⁴ SFS 2014:958 Lag om ändring i Diskrimineringslagen (2008:567).

⁹⁶⁵ Diskrimineringslagen (2008:567) Chapter 1 section 4(3).

⁹⁶⁶ See section 3.1.2. of this country report, below.

⁹⁶⁷ Lag 2016:828 om ändring i diskrimineringslagen.

However, many specific duties still only apply to sex/gender and therefore appears to be of principal relevance to gender discrimination.⁹⁶⁸

Finally, it should also be mentioned that there are **provisions with respect to discrimination in the Instrument of Government (Regeringsformen (1974:152))**, which is a part of the Swedish constitution. According to its Chapter 1 section 2, the public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual. However, the provision is to be considered as a general declaration (*programförklaring*) and does not grant any legally enforceable rights for the individual.⁹⁶⁹

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

The legal duty on employers to accommodate people with disabilities are primarily laid down in the Discrimination Act. The duty is defined in the Act as **the concept of inadequate accessibility (*bristande tillgänglighet*)**. Moreover, Chapter 3 of the Discrimination Act contains a number of specific active measures that employers must take.

Obligations of employers to accommodate persons with disabilities **are also laid down in general legislation**: the Working Environment Act and Employment Protection Act (as regards unlawful dismissal). The duties in these different acts (that to some extent overlap) will be discussed below.

3.1.1 Inadequate accessibility In the Discrimination Act

Inadequate accessibility is a form of discrimination defined in Chapter 1 section 4(3) of the Discrimination Act:

Inadequate accessibility: that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to

- *the financial and practical conditions,*
- *the duration and nature of the relationship or contact between the operator and the individual, and*
- *other circumstances of relevance.*

The scope of protection covers employees, including persons performing work as temporary or borrowed labour. However, it **does not apply to persons enquiring about or applying for work.**⁹⁷⁰ Introduced on 1 January 2015 as a specific form of discrimination, the provision on inadequate disability replaced the previous provision on accommodation obligations for employers.⁹⁷¹ Given that the duties in many aspects remain the same, older case law concerning employment is still of

⁹⁶⁸ See Diskrimineringslagen (2008:567) Chapter 3.

⁹⁶⁹ A. Jyrwall Akerberg, *Diskriminering på grund av funktionsnedsättning*, 1st ed., Stockholm: CKM Förlag 2018, p. 22.

⁹⁷⁰ Diskrimineringslagen (2008:567) Chapter 2 section 1.

⁹⁷¹ SFS 2014 :958 Lag om ändring i diskrimineringslagen (2008 :567).

relevance.⁹⁷² However, a novelty is that since 2015 the protection is extended to trainees in basic and secondary education.⁹⁷³

The Discrimination Act does not give any closer guidance on accessibility measures that are “reasonable”. Some examples of accommodation measures are mentioned in the Government bill: improvements related to physical accessibility, the acquisition of technical support, changes in work tasks and time schedules or working methods.⁹⁷⁴ Moreover, the **reasonableness of requiring measures to be undertaken can vary, depending on the employer** and will hang on factors such as the company’s ability to bear the costs, the ability to undertake a measure, the problems caused for the employer by the measure and the expected length of the employment.⁹⁷⁵ The employer’s duties to accommodate an employee with disabilities is independent of whether the employer has a possibility of obtaining a subsidy for the accommodation. However, if it during the recruitment process becomes apparent that a subsidy will be received, this element must be included in the reasonability assessment.⁹⁷⁶

When deciding on the *reasonability*, **accessibility requirements in other laws and statutes must be taken into account.**⁹⁷⁷ The main laws in that regard are the 1977 Working Environment Act (*Arbetsmiljölagen*) and the 1982 Employment Protection Act (*Lagen om anställningsskyd*).⁹⁷⁸ These Acts regulate the employer’s duty of undertaking of accommodation and rehabilitation measures for the already employed. The duties are in some aspects more far-reaching than those stemming from the inadequate accessibility concept in the Discrimination Act. However, they only apply in circumstances where the worker is absent from work due to injury or illness and if the worker has a good chance of returning to work for the employer in question.⁹⁷⁹

In a case from 2017 concerning a **university refusing to hire a lecturer who was deaf**, the Labour Court (*Arbetsdomstolen*) dismissed the Equality Ombudsman’s claim of discrimination.⁹⁸⁰ While the Equality Ombudsman and the university agreed that an interpreter between sign language and spoken language was needed, the cost for the employer was disputed with regard to, inter alia, how much could be financed with employment policy allowances. The estimated costs of SEK 520,000 (approximately EUR 49,000) per year as a net cost for the education provider was considered excessive and therefore not a *reasonable* measure.

A case decided by the Labour Court in 2014 concerned a bus driver who – due to a stroke – could not drive during peak hours, i.e. early mornings and late evenings.⁹⁸¹ Allowing him to work during the daytime at off-peak hours would have required someone else to work the morning and afternoon peak

⁹⁷² H. Gabinus Göransson & N. Del Sante, *Diskrimineringslagen – En lärobok*, 1st ed., Stockholm: Norstedts Juridik 2018, p. 80.

⁹⁷³ Government bill prop. 2013/14:198 Bristande tillgänglighet som en form av diskriminering, p. 74 and 115.

⁹⁷⁴ Government bill prop. 2007/08:95 Ett starkare skydd mot diskriminering, p. 148.

⁹⁷⁵ Government bill prop. 2007/08:95 Ett starkare skydd mot diskriminering, p. 152.

⁹⁷⁶ P. Lappalainen, Country report Non-discrimination Sweden, European Commission’s Directorate-General for Justice and Consumers 2018, p. 58.

⁹⁷⁷ H. Gabinus Göransson & N. Del Sante, *Diskrimineringslagen – En lärobok*, 1st ed., Stockholm: Norstedts Juridik 2018, p. 80.

⁹⁷⁸ See section 3.1.3. of this country report, below.

⁹⁷⁹ P. Lappalainen, Country report Non-discrimination Sweden, European Commission’s Directorate-General for Justice and Consumers 2018, p. 58.

⁹⁸⁰ Labour Court’s judgment on 11.10.2017 in case AD 2017 nr 51.

⁹⁸¹ Labour court’s judgment on 23.10.2013 in case AD 2013 nr 78.

hours with a long break in between. The court found that such a schedule could not be required of the employer, and the dismissal of the bus driver did therefore not amount to an unlawful discrimination or a violation of the requirements of accommodation laid down in the Employment Protection Act and the Working Environment Act. The case shows that the Labour Court is reluctant to ask the employer to permanently change a fellow worker's tasks to the detriment of that person in order to provide an accommodation measure for a person with a disability.⁹⁸²

3.1.2 Active measures under Chapter 3 of the Discrimination Act

Chapter 3 of the Discrimination Act imposes positive duties - called active measures - on employers and education providers. Active measures are defined in general terms as preventive and promotional work carried out in order to counteract discrimination.⁹⁸³ This active duty has a public law character requiring that employers continuously work with these issues in a goal-oriented way.⁹⁸⁴

The more specific active measures relate only to gender, such as those in section 8 to 10 requiring employers to carry out compensation or pay gap surveys in order to detect, remedy and prevent unreasonable differences in pay and other terms of employment between men and women.

Generally, enforcement of active measures are rare and it is therefore difficult to assert the limits of the duties.⁹⁸⁵ We are **not aware of any enforcement of these rules in the area of disability.**

3.1.3 Rehabilitation and work adaptation obligations in the Working Environment Act and Employment Protection Act

The 1977 Working Environment Act (*Arbetsmiljölagen*) and the 1982 Employment Protection Act (*Lagen om anställningsskydd*) contain rules requiring the employer to take accommodation and rehabilitation measures for the already employed. As mentioned above, such duties are **imposed only if the worker has a good chance of returning to work for the employer** (following an injury or illness) but are in some aspects more far-reaching than those stemming from the inadequate accessibility concept in the Discrimination Act.⁹⁸⁶

The general obligation of accommodation measures are laid down in Chapter 3 section 3 of the Working Environment Act. It states that the **employer must take into account the capability of the employee to perform the work by adapting the working conditions** or taking other appropriate measures. As regards the planning and the organisation of work at the workplace, it states that due account must be taken of the fact that people's capability to carry out work differs. This means that for a person with disabilities, an estimation of the tasks suitable for that person must be made in order to assess if specific measures can be taken. Such measures could be the adaptation of work equipment, the provision of specific instructions or guidance, or special working hours.⁹⁸⁷ The general objective of

⁹⁸² P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 58.

⁹⁸³ Diskrimineringslagen (2008:567) Chapter 3 section 1 and 2.

⁹⁸⁴ Diskrimineringslagen (2008:567) Chapter 3 section 1 to 3.

⁹⁸⁵ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 121.

⁹⁸⁶ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 58.

⁹⁸⁷ H. Blyme, Kommentar til Arbetsmiljölagen (1977:1160), Karnov 2019, commentary to Chapter 3 section 3 of the Act.

the provision is that each workplace must be organised so that large groups of the working force are not excluded.⁹⁸⁸

3.2. Incentives or other assistance available to employers

There are a number of different support schemes in which public funding or assistance is available for an employer in order to adjust the workplace to accommodate individuals with disabilities. The Public Employment Service (PES), the competent authority for labour market policies supporting people with disabilities, coordinates various kinds of support benefitting people with disabilities, such as various aids in order to adapt the workplace, personal support, sheltered employment at Samhall,⁹⁸⁹ wage subsidies and other financial support to employers, etc.⁹⁹⁰

As regards workplace adaptation for persons with disabilities, support in terms of assistive devices or physical adaptation can be provided up to a certain threshold. The PES can provide physical adaptations and assistive devices in recruitment, placement, employment training, or in starting own business. The legal basis for these measures is the **Ordinance on Certain Support for Persons with Work Impairment (Förordning (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga)**. **Both the employee and the employer can apply and receive funding for aids and facilities** in order for the employee to be able to carry out his or her work. The general rule sets a limit of SEK 100,000 per year (approximately EUR 9,400) for the individual and for the employer respectively. However, a higher amount can be granted if there are special reasons motivating this.⁹⁹¹ The aid is also available to self-employed.⁹⁹²

Financial support for a **personal assistant supporting the employee** in question can also be granted to an employer. The general rule sets a SEK 60,000 limit (approximately EUR 5,500) or SEK 120,000 if the disabilities involves significant difficulties as regards communication abilities.⁹⁹³

Under the Health and Medical Service Act (Hälso- och sjukvårdslag (2017:30)), the **county governments (landsting)** and the **municipalities (kommuner)** have a general duty to provide technical aids directly to persons with impairments regardless if the person is employed or not. A key provision in the Act is Chapter 8 section 7 stating that the county government must offer aids to person with disabilities. The provision specifically indicates that interpreting services must be available to hearing impaired and deafblind persons. It should however be pointed out that the provision does not limit the obligations that an employer or any other party may have to accommodate individuals with disabilities. The cost for technical aids varies among the counties: some counties provide all equipment free of charge while others charge minimal fees.⁹⁹⁴

⁹⁸⁸ Ibid.

⁹⁸⁹ Samhall AB is a state-owned company with a mandate to create work that furthers the development of people with functional impairment causing reduced working capacity.

⁹⁹⁰ <https://arbetsformedlingen.se/other-languages/english-engelska/stod-och-ersattning/for-dig-med-funktionsnedsattning> (03.05.2019).

⁹⁹¹ Förordning (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga, section 14.

⁹⁹² <https://arbetsformedlingen.se/for-arbetssokande/stod-och-ersattning/stod-a-o/hjalpmedel-pa-arbetsplatsen> (21.05.2019).

⁹⁹³ Förordning (2000:630) om särskilda insatser för personer med funktionshinder som medför nedsatt arbetsförmåga, section 18.

⁹⁹⁴ J. Gustafsson, DOTCOM: the Disability Online Tool of the Commission, p. 17 (F3. Workplace adaptations), available at <https://www.disability-europe.net/country/sweden> (21.05.2019).

The **social insurance agency (Försäkringskassan)** can **provide grants for work aids to employees returning to work after a longer period of sick leave**. Both employees and employers can apply for the grants. The employer applies for grants concerning work aids or adaptations at the work place, such as the modification of a machine or a building. If the aid is individual in nature, it is the employee who applies for the grant. So-called soft adaptations (e.g. reduced workload, slower pace) are not covered, but it is assumed that the wage subsidy covers such costs.⁹⁹⁵

4. Enforcement of rights

4.1. Procedure

The enforcement varies depending on *inter alia* the type of right at stake and any involvement of trade unions and/or the Discrimination Ombudsman (DO). As discussed above, the main rights are laid down in the Discrimination Act and in the Work Environment Act combined with the Employment Protection Act. However, there are also various rights to assistance and grants under schemes administered by the Public Employment Service (PES). **The enforcement of rights are essentially the same for the public and private sector.**

Procedural rules for civil proceedings regarding working life under the **Discrimination Act** are laid down primarily in the **Labour Disputes Act (Lag (1974:371) om rättegången i arbetstvister)**.⁹⁹⁶ The competent court is either the **Labour Court (first and last instance) or the district court as a first instance**.⁹⁹⁷ The district court's decision can always be appealed to the Labour Court.⁹⁹⁸

A case can be brought on behalf of an individual **by either the trade union** (if the person is a member), **the DO** or **certain non-profit organisations**. An individual also has the possibility to represent him or herself or by means of a legal counsel.

If the applicant is a member of a trade union, the union has a "first shot right" (*primär talesrätt*) to initiate proceedings. It means that the right of the Ombudsman or a non-profit organisation to initiate proceedings on behalf of an individual is subsidiary to that of the trade union.⁹⁹⁹ If proceedings are initiated by a trade union, there is a duty upon the parties to first negotiate in accordance with the collective agreement or the rules laid down in the Act on Co-determination in the Workplace (*Lag (1976:580) om medbestämmande i arbetslivet*).¹⁰⁰⁰

As mentioned above, a **discrimination case can be brought by a non-profit organisation**. However, there are certain requirements that must be fulfilled in order for a non-profit organisation to have the right to act on behalf of victims of discrimination. The basic requirement is that the organisation's statutes state that they aim to protect their members' interests. Moreover, the association must be suited to represent the individual in the case, taking account of its activities and its interest in the

⁹⁹⁵ J. Gustafsson, DOTCOM: the Disability Online Tool of the Commission, p. 17 (F3. Workplace adaptations), available at <https://www.disability-europe.net/country/sweden> (21.05.2019).

⁹⁹⁶ Diskrimineringslagen (2008:567) Chapter 6 section 1.

⁹⁹⁷ This depends *inter alia* by whom the case is brought: if it is a trade union on behalf of its member or the Equality Ombudsman on behalf of the individual, the case is decided directly by the Labour Court.

⁹⁹⁸ Labour Disputes Act (*Lag (1974:371) om rättegången i arbetstvister*) Chapter 2.

⁹⁹⁹ Diskrimineringslagen (2008:567) Chapter 6 section 2.

¹⁰⁰⁰ Lag (1976:580) om medbestämmande i arbetslivet Chapter 4 section 7.

matter, its financial ability to bring an action and other circumstances. Finally, the organisation must have the consent of the individual concerned in order to act on him or her behalf.¹⁰⁰¹

Generally, the procedural rules regarding labour market litigation are based on an assumption that the employee is represented by his or her trade union. The trade union will cover **the costs for litigation** if the case is lost. The same applies if the case is brought by the DO. An individual who brings a claim on his or her own, risks however to pay the litigation costs should the case be lost. The costs include the winning party's lawyer's fees and can therefore be considerable.¹⁰⁰² This financial risk has been identified as an important barrier for access to justice for an individual who does not have the support of a trade union or the Ombudsman.¹⁰⁰³

Under Swedish law, organisations cannot act in the public interest on their own behalf, without a specific victim to support or represent (so-called **actio popularis**).¹⁰⁰⁴ Moreover, **class actions are not permitted** for discrimination claims in the employment area, however, it can be brought for violations of non-discrimination provisions in the Discrimination Act in other fields than working life.¹⁰⁰⁵

As regards burden of proof, Chapter 6 section 3 of the Discrimination Act requires a **shifting of the burden of proof** from the complainant to the respondent if the complainant "demonstrates reason to presume that he or she has been discriminated against". This means that the respondent then must show that one of the requirements are not fulfilled or that the unfavourable treatment was not associated with the discrimination ground invoked. This rule applies to all forms of discrimination, including inadequate accessibility.

Arbitration clauses in employment contracts are generally permissible under Swedish law. However, as regards claims related to discrimination (for instance on grounds of disabilities), an **arbitration clause is only valid if the parties have the right to challenge the arbitration award in court**.¹⁰⁰⁶

4.2. Remedies

Sanctions for violations of the non-discrimination provisions laid down in the Discrimination Act are regulated in Chapter 5 of the Act. An employer (natural or legal person) can be ordered to pay damages, so-called **discrimination compensation** (*diskrimineringsersättning*).¹⁰⁰⁷ The discrimination award has two aims: (1) to compensate the victim for the violation of his or her integrity and (2) to dissuade persons to discriminate (general prevention).¹⁰⁰⁸ Legal commentators have criticized the effectiveness of the sanction arguing that amounts awarded to the victim are too low.¹⁰⁰⁹

¹⁰⁰¹ Diskrimineringslagen (2008:567) Chapter 6 section 2.

¹⁰⁰² Sweden has a loser pays system. It means that if the claimant loses the case, he or she will be liable not only for their own lawyer's fees, but also for the winning party's lawyer's fees.

¹⁰⁰³ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 95.

¹⁰⁰⁴ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 98.

¹⁰⁰⁵ P. Lappalainen, Country report Non-discrimination Sweden, European Commission's Directorate-General for Justice and Consumers 2018, p. 98.

¹⁰⁰⁶ Labour Disputes Act (*Lag (1974:371) om rättegången i arbetstvister*) Chapter 1 section 3.

¹⁰⁰⁷ Diskrimineringslagen (2008:567) Chapter 5 section 1.

¹⁰⁰⁸ H. Gabinus Göransson & N. Del Sante, *Diskrimineringslagen – En lärobok*, 1st ed., Stockholm: Norstedts Juridik 2018, p. 169.

¹⁰⁰⁹ See for example L. Carlson, *Comparative Discrimination Law: Historical and Theoretical Frameworks*, 1st ed., Leiden: Brill 2017, p. 79. This is addressed in more detail in section 5. of this country report, below.

According to Chapter 5 section 3 of the Discrimination Act, the court can order that a **provision in an individual contract or in a collective agreement** found discriminatory under the Discrimination Act must **be modified or declared invalid**.¹⁰¹⁰ Under the same provision, a **dismissal that is discriminatory can be declared invalid**.

It should be mentioned that in **settlements outside court the parties can agree on remedies** beyond economic compensation. For instance, compensation can be combined with employment, which is something a court could not order (the court can merely declare a dismissal invalid, not order a reinstatement).

Provisions in other laws may apply in parallel to the Discrimination Act, such as the rules of the **Employment Protection Act** in cases of dismissal. According to section 34 of the Employment Protection Act, a dismissal without objective grounds shall be declared invalid. This means that a person with disability, in addition to the remedies available in the Discrimination Act, **can have the dismissal declared invalid and receive damages under the Employment Protection Act**.¹⁰¹¹

5. Legal framework in practice

As mentioned above,¹⁰¹² legal commentators have criticized the effectiveness of the discrimination compensation imposed on the discriminating party, arguing that **amounts awarded to the victims are too low**.¹⁰¹³ We are not aware of any data on the amount of damages in cases concerning disabilities/inadequate accessibility specifically. In a case decided by the Labour court in 2010, a woman who applied for a job was awarded SEK 75,000 (approximately EUR 7,500) as discrimination compensation on the grounds of age and gender discrimination.¹⁰¹⁴ In another Labour Court decision, 25 employees at the airline company SAS who “were forced to retire” at 60 years of age were awarded SEK 125,000 (approximately EUR 12,500).¹⁰¹⁵

As regards the general application of the non-discrimination rules (i.e. not limited to disability in working life), Lappalainen has in his 2018 Country Report on Non-Discrimination to the European Commission identified – in addition to the amount of discrimination compensation - the following key issues and needs:¹⁰¹⁶

- The Discrimination Ombudsman should be more active in taking legal action in courts thereby developing case law in the area.
- The development of public interest law firms that serve groups that are likely subject to discriminatory treatment is too slow.
- Reduction should be made of the financial risks placed on victims of discrimination who take cases to court on their own (i.e. changes should be made to the loser pays system).

¹⁰¹⁰ Diskrimineringslagen (2008:567) Chapter 5 section 3.

¹⁰¹¹ See for example case Labour Court case judgement in case AD 2005 nr 21.

¹⁰¹² Section 4.2. of this country report, above.

¹⁰¹³ See for example L. Carlson, *Comparative Discrimination Law: Historical and Theoretical Frameworks*, 1st ed., Leiden: Brill 2017, p. 79.

¹⁰¹⁴ Judgment of the Labour Court 15-12-2010 in case AD 2010 nr 91.

¹⁰¹⁵ Judgment of the Labour Court 04-05-2011 in case AD 2011 nr 37.

¹⁰¹⁶ P. Lappalainen, Country report Non-discrimination Sweden, European Commission’s Directorate-General for Justice and Consumers 2018, see in particular p. 13 and 139.

- Establish a “test case fund” controlled by NGOs in order to provide support in potentially strategic cases.
- The Labour Court applies the rules on the shifting of the burden of proof in the Discrimination Act in a more restrictive manner than the ordinary courts, thereby creating inconsistencies in the application of the law.¹⁰¹⁷

There are no statistics on the number of successful cases related to disability discrimination in the workplace. The Equality Ombudsman registers the number of complaints received and the inquiries undertaken in their Annual Report. According to the 2018 Report, most complaints concern the areas of working life and education. The discrimination grounds most frequently invoked are disability and ethnicity.¹⁰¹⁸

To our knowledge, there are no major reforms planned of the rules discussed in this report.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ The Annual Report for 2018 is available in Swedish at <https://www.do.se/globalassets/om-do/diskrimineringsombudsmannens-arsredovisning-20182.pdf> (30.07.2019).

L. UNITED KINGDOM

1. Introduction

1.1. Country overview

The United Kingdom is a unitary parliamentary democracy and constitutional monarchy, consisting of four constituent countries: England, Wales, Scotland (constituting Great Britain) and Northern Ireland. As at the time of the last (2011) census, it had an **estimated population of 63.7 million people**, with around 50 million residing in England.¹⁰¹⁹ The British constitution does not exist in a basic document or set of documents but has rather evolved over centuries and consists of **Acts of Parliament and other legislation, judge-made common law and general principles and practices** known as constitutional conventions.¹⁰²⁰

England and Wales, on one hand, and Scotland, on the other, have different systems of law, different legal professions and a different judiciary as well as different education systems and different local government organisation.¹⁰²¹ Since decision making powers were devolved to the Scottish Parliament and Welsh Assembly in Scotland and Wales, respectively, Acts of the UK Parliament do not extend to Scotland and Wales unless they are expressly stated to do so.¹⁰²² In practice, **almost all labour legislation does expressly extend to the whole of Great Britain**, and employment and industrial relations are described as a reserved matter and are therefore not devolved to the Scottish Parliament.¹⁰²³

According to latest statistics, **7.6 million people of working age reported that they had a disability** in January-March 2019, this representing 18% of the working age population. Of these, an estimated 3.9 million were in employment, representing an increase of 180,000 from a year previously. The unemployment rate for people with a disability in January-March 2019, was 8.0%, compared to an unemployment rate of 3.3% for people without disabilities.¹⁰²⁴

1.2. Overview of legal and policy framework

Legislation, in the form of the **Equality Act 2010**¹⁰²⁵ provides the UK's legal framework for protecting individuals from discrimination. It replaced and consolidated various pieces of separate legislation covering discrimination, including the *Disability Discrimination Act 1995*. **The Act lists nine protected characteristics** – age, **disability**, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation – on the basis of which discrimination, as defined in the Act, is unlawful.¹⁰²⁶ **Different areas of activity are covered** under different parts of

¹⁰¹⁹ See Mark Butler, *Great Britain*, Supplement 456, 2018, in Prof. Dr. Frank Hendrickx (ed.), *International Encyclopaedia for Labour law and Industrial Relations*, Wolters Kluwer, at para. 10.

¹⁰²⁰ *Ibid*, para. 13.

¹⁰²¹ *Ibid*, para. 17.

¹⁰²² *Ibid*.

¹⁰²³ *Ibid*.

¹⁰²⁴ Andrew Powell, *People with disabilities in employment*, Briefing paper no. 7549, 17th May 2019, House of Commons Library, available at <http://researchbriefings.files.parliament.uk/documents/CBP-7540/CBP-7540.pdf> (12.09.2019).

¹⁰²⁵ *Equality Act 2010*, available at <http://www.legislation.gov.uk/ukpga/2010/15/contents> (13.09.2019).

¹⁰²⁶ See Emily Haves, *Disability in the UK: Rights and Policy Debate on 28 June 2018*, House of Lords Library Briefing, 21 June 2018, available at <http://researchbriefings.files.parliament.uk/documents/LLN-2018-0071/LLN-2018-0071.pdf> (13.09.2019), para. 1.1.

the Act, as well as in the field of employment. These include discrimination in the sale, letting, management and occupation of premises, including housing, education, membership associations the provision of services and the exercise of public functions.

The UK signed the *Convention on the Rights of Persons with Disabilities* (“CRPD”) on 30th March 2007, and **ratified it on 8th June 2009**. However, the UN CRPD Committee published a report in October 2016, concluding that several elements of the way in which the UK Government was supporting disabled people were **not sufficient to meet its commitments under the CRPD**.¹⁰²⁷ In October 2017, the Committee published its Concluding Observations report. It expressed concern about multiple aspects of the treatment and rights of disabled people in the UK in all but five of the 30 areas of rights the CRPD addresses, and made 84 recommendations.¹⁰²⁸

For its part, the Government states that it is committed to improving employment outcomes for disabled people and those with long-term health conditions,¹⁰²⁹ and claims that there were 600,000 more disabled people in work in 2017 than in 2013. In November 2017, it published a **new strategy, setting out how it intends to get a million more disabled people into employment by 2027**. The strategy is said to be partly based on supporting disabled people and those with long-term health conditions to find work, as well as investment to support these people to stay in work. Other policies and proposals relating to employment support for disabled people include the following:

- The **‘Personal Support Package’**: rolled out from April 2017 onwards, this initiative offers tailored employment support for disabled people, delivered through job centres with the help of newly recruited disability employment advisers, ‘community partners’ recruited to provide expert knowledge of disability and small employer advisers – aimed to raise awareness with small employers of the support available to them when employing those with disabilities. Various other job centre staff training and funding has also been made available.
- The **Work and Health Programme**: launched in North West England and Wales in November 2017, this programme was rolled out across the rest of England in 2018. It provides support to help people find and keep a job. It is available, on a voluntary basis, to those with health conditions or disabilities, and to various groups of vulnerable people.
- **Support for young people**: employment support aimed specifically at young disabled people include the ‘Jobcentre Plus Support for Schools’ programme which provides targeted high quality careers advice for 12-18 year olds who, due to a health or disability issue, face a potential disadvantage in the labour market; supported internships for young people with learning difficulties and/or disabilities to help them move into employment.
- **Apprenticeship support**: the government has set a target of 11.9% for getting those with learning difficulties and/or disabilities in to apprenticeships by 2020 (11.2% of apprenticeship starts were by such people in 2017/18); in Autumn 2017, change were made to English and maths apprenticeship requirements for people with a learning difficulty or disability to make apprenticeships more accessible to disabled people.

¹⁰²⁷ *Ibid*, p. 7.

¹⁰²⁸ *Ibid*, p. 11.

¹⁰²⁹ Department for Work and Pensions and the Department for Work and Health, *Improving Lives – The Future of Work, Health and Disability*, Cm9526, Crown Copyright, November 2017, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663399/improving-lives-the-future-of-work-health-and-disability.PDF (13.09.2019).

- **Access to Work:**¹⁰³⁰ approved for 25,000 people in 2016/2017, Access to Work provides support and funding to meet the needs of disabled people in the workplace.¹⁰³¹

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

As stated above, the **Equality Act 2010 provides the legal framework for the protection of disabled people's rights in the UK**. Coming into force on 1st October 2010, the principal purpose of the Act was to consolidate the numerous individual pieces of legislation that had previously made up the patchwork of anti-discrimination laws, including the *Disability Discrimination Act 1995* ("DDA 1995").

The **DDA 1995 had repealed the quota system** which had previously operated under the 1940s legislation and had introduced a new framework of rights based on the then anti-discrimination model. It had also introduced the concept of the employer's duty to make reasonable adjustments to the arrangements on the basis of which employment was offered, and to 'any physical feature of premises' which placed a disabled person 'at a substantial disadvantage in comparison with persons who are not disabled'. Although the DDA 1995 does not derive from supranational law, certain provisions were subsequently adapted to implement requirements of the *EC Framework Directive on Discrimination in Employment (2000/78/EC)*, which was adopted by the UK in December 2000.

The UK's ratification in 2009 of the **CRPD is said to have little impact on the drafting of the 2010 Act.**¹⁰³²

Also **forming part of the legal framework for workplace protection and rights** of disabled people is the common law, particularly in the form of **case law** and judicial interpretation of provisions of the *Equality Act 2010*.

A **further legal source is the Code of Practice on Employment**¹⁰³³ of the *Equality and Human Rights Commission*, a non-departmental public body with responsibility for the promotion and enforcement of equality and non-discrimination laws in England, Scotland and Wales. The Code, which has the purpose of providing a detailed explanation of the Act, must be taken into account by tribunals and courts where relevant to any questions arising in proceedings.¹⁰³⁴ It is **not, however, to be considered as imposing any legal obligations**.

2.2. Scope of protection

Equality legislation, including that concerning those with disabilities, **applies to all aspects of the employment relationship**, from hiring through to termination (and, in some cases, even beyond

¹⁰³⁰ For more information, see section 3.2. of this country report, below.

¹⁰³¹ See Department for Work and Pensions and the Department for Work and Health, *Improving Lives – The Future of Work, Health and Disability*, *op. cit.*, pp. 11-15.

¹⁰³² Simon Deakin & Gillian S. Morris, *Labour Law*, 6th edition, 2012, Hart Publishing, Oxford, para. 6.123. For more information, see section 2.3. of this country report, below.

¹⁰³³ Equality and Human Rights Commission, *Employment – Statutory Code of Practice*, 2011, available at <https://www.equalityhumanrights.com/sites/default/files/employercod.pdf> (13.09.2019).

¹⁰³⁴ *Ibid*, para. 1.13.

this).¹⁰³⁵ It **applies to applicants for employment**,¹⁰³⁶ employees engaged under contracts of employment or apprenticeships, as well as those who are employed under contracts for services, where these give rise to an obligation ‘personally to do work’.¹⁰³⁷ Agency workers have the benefit of the protection of the legislation in their relationships with the agency or ‘employment service-provider’ and with the user or ‘principal’. Case law has clarified that the requirement that there be a contract for the exchange of personal service or services for remuneration means that **volunteers will generally not be covered**.¹⁰³⁸

The legislation makes **no distinction between those in private sector employment and those working in the public sector**, although public authorities and employers that exercise public functions are under an additional obligation to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the *Equality Act 2010*. **The ‘public sector equality duty’ imposes a requirement on public bodies to take positive action** to advance equality of opportunity between persons who share a relevant protected characteristic, such as disability, and those who do not.¹⁰³⁹

All employers have the same legal duties under the *Equality Act 2010*, and **no employer is exempt because of their size**. Equally, the duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer.¹⁰⁴⁰

2.3. Definition of disability

Section 6(1) of the *Equality Act 2010* states that:

“A person (P) has a disability if –
 (a) P has a physical or mental impairment, and
 (b) The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

The government has issued **guidance¹⁰⁴¹ (the “Guidance”) on the meaning of disability**, breaking down the elements of the statutory definition into the linked components of ‘impairment’, ‘substantial and adverse effect’, ‘long-term effect’ and ‘effect on normal day-to-day activities’.

‘Impairment’ is not defined in the Act, but the Guidance states that an impairment need not arise from an illness, and that its precise cause does not have to be established. **A long non-exhaustive list of**

¹⁰³⁵ Simon Deakin & Gillian S. Morris, *Labour Law*, *op. cit.*, para. 6.47.

¹⁰³⁶ *Equality Act 2010*, *op. cit.*, section 39.

¹⁰³⁷ *Equality Act 2010*, *op. cit.*, section 83(2). This means that determining whether an independent contractor is covered requires an examination of the facts of the case and the true nature of the relationship. The question is not whether the person in question has a business of their own, but whether he or she contracts to supply personal services, without, for example, the right of substitution (and whether such contractual right represents the ‘reality’ of the work relationship).

¹⁰³⁸ *X v. Mid-Sussex Citizens Advice Bureau and another* [2012] UK Supreme Court 59.

¹⁰³⁹ *Equality Act 2010*, *op. cit.*, section 149(1).

¹⁰⁴⁰ See Equality and Human Rights Commission, *Employment – Statutory Code of Practice*, *op. cit.*, para. 6.3.

¹⁰⁴¹ HM Government, Office for Disability Issues, *Equality Act 2010 – Guidance: Matters to be taken into account in determining questions relating to the definition of disability*, 2011, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf (18.09.2019).

impairments is set out in the Guidance,¹⁰⁴² derived, in part, from case law. This includes sensory impairments, impairments with fluctuating or recurring effects, progressive conditions, auto-immune conditions, organ-specific and respiratory conditions and cardio-vascular diseases, developmental conditions such as autistic spectrum disorders, learning disabilities, mental health conditions, mental illnesses such as depression and schizophrenia and conditions arising from an injury to the body. Secondary legislation, in the form of **Regulations,¹⁰⁴³ exclude a number of conditions from the definition of impairment:** addictions to alcohol, nicotine or any other substance; pyromania, kleptomania, a tendency to physical or sexual abuse, exhibitionism and voyeurism; and seasonal allergic rhinitis.¹⁰⁴⁴ On the other hand, **cancer, HIV and multiple sclerosis are automatically characterised as disabilities,¹⁰⁴⁵** and persons who are certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist are deemed to be disabled for the purposes of the Act.¹⁰⁴⁶

An effect is ‘substantial’ if it is more than minor or trivial.¹⁰⁴⁷ Case law has established that unless a matter can be classified as falling within the heading ‘trivial’ or ‘unsubstantial’, it must be treated as substantial.¹⁰⁴⁸

A ‘long-term’ effect is defined by the Equality Act 2010 as one which has either, “lasted for at least 12 months,” is, “likely to last for at least 12 months,” or, “is likely to last for the rest of the life of the person affected,” at the time the discrimination occurs.¹⁰⁴⁹

‘Normal day-to-day activities’ is not defined by the legislation, but the Guidance indicates that although it does not cover, “activities which are normal only for a particular person, or a small group of people,” it can include activities which are carried out, “by the majority of people”. In considering whether an activity is ‘day-to-day, account should apparently be taken of how far it is carried out by people on a daily or frequent basis, including work-related activities and those related to daily life outside of work.¹⁰⁵⁰

In addition to being ratified by the UK in 2009, the EU also ratified the **CRPD**, designating it a ‘Community treaty’ within the meaning of section 1(2) of the *European Communities Act 1972*. This means that **UK courts must give effect to its provisions**. In other words, the EU Framework Directive and domestic law on disability discrimination must be interpreted consistently with the CRPD as far as possible. It is recognised, however, that the **definition of disability under the Equality Act 2010 more closely follows the medical model** than the social model espoused by the CRPD. Commentators say that there may be limited scope for a move away from the medical model through judicial

¹⁰⁴² *Ibid*, para. A5.

¹⁰⁴³ *Equality Act (Disability) Regulations 2010, Statutory Instrument 2010/2128*, available at <http://www.legislation.gov.uk/ukxi/2010/2128/contents/made> (18.09.2019).

¹⁰⁴⁴ *Ibid*, regulations 3-5.

¹⁰⁴⁵ *Ibid*, Schedule 1, para. 7.

¹⁰⁴⁶ *Ibid*, regulation 7.

¹⁰⁴⁷ *Equality Act 2010, op. cit.*, section 212(1).

¹⁰⁴⁸ *Aderemi v. London and Southern Electric Railway Ltd.* [2013] Equality Law Report 198, Employment Appeals Tribunal.

¹⁰⁴⁹ *Equality Act 2010*, Schedule 1, para. 2(1).

¹⁰⁵⁰ The Guidance, *op. cit.*, paras D3-D5.

interpretation alone and that the ratification of the CRPD may lead to legislative reconsideration of the definition of disability.¹⁰⁵¹

2.4. Forms of discrimination protection

As with other protected characteristics covered by the *Equality Act 2010*, **persons with a disability are protected from direct discrimination, indirect discrimination, harassment and victimisation.** Additional protections are unique to disability however: persons with disabilities are also protected from **'discrimination arising from disability'** as well as there being a **duty on employers to make reasonable adjustments** to avoid substantial disadvantage to a disabled person. All such protections apply before, during and, in certain cases, after employment.

Direct discrimination is the requirement that disability should not, as such, form the basis for decisions taken in the context of employment. There is no defence of justification to a direct disability discrimination claim.

Indirect discrimination is concerned with cases where employers treat all of their employees in the same way, but there is a disparity in the effect of that treatment. Unlike direct discrimination, an employer has the opportunity to show that such treatment is justified, where it can show that the discriminatory 'provision, criterion or practice' represents a, "*proportionate means of achieving a legitimate aim.*"¹⁰⁵²

'Harassment' is defined by the *Equality Act 2010* as a situation in which a person (such as an employer) engages in unwanted conduct related to the protected characteristic (such as disability) and the conduct either has, "*the purpose or effect of (a) violating the other person's dignity, or of (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person.*"¹⁰⁵³

'Victimisation', probably better known as retaliation, is where A subjects a person (B) to a detriment because B has done a protected act or because A believes B has done, or may do, a protected act. A protected act refers to the act of doing something connected with the *Equality Act 2010*, such as bringing proceedings, giving evidence in connection with such proceedings or making an allegation that another person has contravened the Act.¹⁰⁵⁴

'Discrimination arising from disability' is a form of discrimination introduced under the *Equality Act 2010*, designed to cover those cases which might not be caught by indirect discrimination (on account of indirect discrimination placing an emphasis on the need to show adverse impact arising from group disadvantage). It is expressed as occurring where A (such as an employer), "*treats B unfavourably because of something arising in consequence of B's disability,*"¹⁰⁵⁵ and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.¹⁰⁵⁶

The **duty on an employer 'to make reasonable adjustments'** is treated below.¹⁰⁵⁷

¹⁰⁵¹ See Simon Deakin & Gillian S. Morris, *Labour Law, op. cit.*, para. 6.135 and Anna Lawson, *Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated*, *Industrial Law Journal* 40, 2011, pp. 359-383 at pp. 361-362.

¹⁰⁵² *Equality Act 2010, op. cit.*, section 19(2)(d).

¹⁰⁵³ *Ibid*, section 26(1).

¹⁰⁵⁴ *Ibid*, section 27(1).

¹⁰⁵⁵ *Ibid*, section 15(1)(a).

¹⁰⁵⁶ *Ibid*, section 15(1)(b).

¹⁰⁵⁷ See section 3.1. of this country report, below.

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

Section 20 of the *Equality Act 2010* imposes a “requirement” on an employer:

- (1) whose provisions, criteria or practices puts a disabled person at a “substantial disadvantage” in relation to a relevant matter in comparison with persons who are not disabled;
- (2) whose premises have a physical feature which puts a disabled person at a substantial disadvantage; or
- (3) whose disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid;

to “**take such steps as it is reasonable to have to take to avoid the disadvantage**” or to provide the auxiliary aid (as appropriate). A failure to comply with any of the requirements spelt out above is treated as a failure to comply with a duty to make reasonable adjustments,¹⁰⁵⁸ which, in turn, **amounts to an act of discrimination.**¹⁰⁵⁹

The duty to make reasonable adjustments **applies in recruitment and during all stages of employment**, including dismissal. It may also apply after employment has ended. The duty relates to all disabled workers of an employer and to any disabled applicant for employment. The duty also applies in respect of any disabled person who has notified the employer that they may be an applicant for work.¹⁰⁶⁰ **No duty arises where the employer does not know** and could not reasonably be expected to know of the person’s disability or that he or she is likely to be placed at the relevant substantial disadvantage.¹⁰⁶¹

The duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The *Equality Act 2010* does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take **will depend on all the circumstances of each individual case.**¹⁰⁶² The Code states that effective and practicable adjustments for disabled workers will often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to take.¹⁰⁶³ If making a particular adjustment would increase the risk to health and safety of any person, this will be a relevant factor in deciding whether it is reasonable to make that adjustment. The Code also provides a list of some of the **factors which might be taken into account in deciding what is a reasonable step** for an employer to have to take:

- whether taking any particular steps **would be effective** in preventing the substantial disadvantage;
- the **practicability** of the step;
- the **financial and other costs** of making the adjustment and the extent of any disruption cause;

¹⁰⁵⁸ *Equality Act 2010, op. cit.*, section 21(1).

¹⁰⁵⁹ *Ibid*, section 21(2).

¹⁰⁶⁰ See *ibid*, Schedule 8, paras. 4 and 5, and Equality and Human Rights Commission, *Employment – Statutory Code of Practice, op. cit.*, para. 6.8.

¹⁰⁶¹ See *ibid*, Schedule 8, part 3 and *Wilcox v. Birmingham Citizens Advice Bureau Services Ltd* [2011] Equality Law Reports 810.

¹⁰⁶² Equality and Human Rights Commission, *Employment – Statutory Code of Practice, op. cit.*, para. 6.23.

¹⁰⁶³ *Ibid*, para. 6.25.

- the extent of the employer’s **financial and other resources**;
- the **availability to the employer of financial or other assistance** to help make an adjustment; and
- the **type and size of the employer**.¹⁰⁶⁴

The **aim** of the duty is about **ensuring that disabled people can access and progress in employment**. The Code makes clear that this goes beyond simply treating disabled workers, job applicants and potential job applicants unfavourably and **means taking additional steps to which non-disabled workers and applicants are not entitled**.¹⁰⁶⁵ Various examples of reasonable adjustments in practice are provided at paragraphs 6.33-6.34 of the Code.¹⁰⁶⁶

3.2. Incentives or other assistance available to employers

The UK government operates a publicly-funded employment support programme, known as **Access to Work, aimed specifically at helping disabled people to stay or start in work**. Grants are available to both employees and the self-employed. The maximum annual amount than an individual can receive is uprated annually each April, and **currently stands at £59,200**.¹⁰⁶⁷ In 2016/17, Access to Work provision was approved for 25,000 people, including elements such as communication support for interviews, special aids and equipment, adaptations to premises and vehicles, help with travel costs, support workers and mental health support.¹⁰⁶⁸

Access to Work may assist an employer to decide what steps to take with regard to reasonable adjustments. If financial assistance is available from the scheme, it may also make it reasonable for an employer to take certain steps which would otherwise be unreasonably expensive. However, *Access to Work* does not diminish any of an employer’s duties under the *Equality Act 2010*. The Code emphasises that the **legal responsibility for making a reasonable adjustment remains with the employer** – even where *Access to Work* is involved in the provision of advice or funding in relation to the adjustment. Moreover, it is likely to be a reasonable step for the employer to help a disabled person in making an application for assistance from *Access to Work* and to provide on-going administrative support (by completing claims forms, for example).¹⁰⁶⁹

A government-run scheme, known as **Disability Confidence** aims to help organisations improve how they attract, recruit and retain disabled workers. As of May 2019, 11,703 employers had signed up to the scheme. There are **three levels of the scheme**:

- **Disability Confident Committed**: an employer needs to agree to the Disability Confident commitments (which are: (1) inclusive and accessible recruitment; (2) communicating vacancies; (3) offering an interview to disabled people; (4) providing reasonable adjustments; (5) supporting existing employees who develop a disability to stay in work) which they should be carrying out within 12 months of becoming Disability Confident. They also need to commit

¹⁰⁶⁴ *Ibid*, para. 6.28.

¹⁰⁶⁵ *Ibid*, para. 6.2.

¹⁰⁶⁶ *Ibid*, paras. 6.33-6.34.

¹⁰⁶⁷ Gov.uk, Department for Work and Pensions, *Access to work: factsheet for customers*, updated 17th July 2019, available at <https://www.gov.uk/government/publications/access-to-work-factsheet/access-to-work-factsheet-for-customers> (20.09.2019).

¹⁰⁶⁸ Andrew Powell, *People with disabilities in employment*, *op. cit.*, para. 3.5.

¹⁰⁶⁹ Equality and Human Rights Commission, *Employment – Statutory Code of Practice*, *op. cit.*, para. 6.37.

to offer a disabled person an opportunity within their organisation, and this should also be in place within 12 months.

- **Disability Confident Employer:** an employer needs to show that they are actively looking to attract and recruit disabled people, that they support disabled staff within their organisation and that they are making reasonable adjustments as required. They also need to commit to various actions to both encourage disabled people to join their organisation, and to develop the disabled people within their organisation.
- **Disability Confident Leader:** the employer will be independently validated in whether they are meeting the criteria for a Disability Confident Leader, and show that they are encouraging and supporting other employers to become Disability Confident.¹⁰⁷⁰

It is reported that of the **11,703 employers signed up to the scheme in May 2019**, 71% were Disability Confident Committed, 27% were Disability Confident Employers and 2% were Disability Confident Leaders (including all main government departments).¹⁰⁷¹

As part of its strategy on how to get million more disabled people into employment by 2027, the government published a policy document in November 2017, entitled '*Improving lives: the future of work, health and disability*'.¹⁰⁷² This **sets out a number of proposed initiatives**, including the introduction of a programme of work to encourage people to stay healthy. This includes a series of 'toolkits' to help employers support the mental and physical health of their employees.

4. Enforcement of rights

As with most other **employment-related claims**, complaints of discrimination in the workplace, both in the public and private sectors, **must generally be presented to an employment tribunal**. In particular, section 120 of the *Equality Act 2010*¹⁰⁷³ states that an employment tribunal has jurisdiction to determine a complaint relating to any contravention of discrimination in the field of work as well as in relation to relationships which have come to an end. Where an employee's termination of employment is found to be discriminatory or tainted by discrimination, the tribunal may order reinstatement of the employee. A complaint must be presented to a tribunal **before the end of the period of three months beginning when the act complained of was done**, although the tribunal has the power to hear a complaint which is out of time if it considers that it is just and equitable to do so.¹⁰⁷⁴

Claims are **usually made by an individual, with or without legal representation**. However, where many people have the same interest in a claim, a tribunal may order that two or more applications be heard together as part of what is generally referred to as **consolidation of the proceedings**. Moreover, if there are a large number of claims raising the same question, some may be selected as lead, or test,

¹⁰⁷⁰ Andrew Powell, *People with disabilities in employment*, *op. cit.*, para. 3.7, with reference to Disability Confident guidance, available at <https://www.gov.uk/government/publications/disability-confident-guidance-for-levels-1-2-and-3> (20.09.2019).

¹⁰⁷¹ *Ibid*, para. 3.7.

¹⁰⁷² Department for Work and Pensions and the Department for Work and Health, *Improving Lives – The Future of Work, Health and Disability*, *op. cit.*

¹⁰⁷³ *Equality Act 2010*, *op. cit.*

¹⁰⁷⁴ *Ibid*, sections 123(1)(a) and (b).

cases. This is part of the tribunal's general powers to regulate its own proceedings and to give directions.¹⁰⁷⁵

The three remedies which are potentially available to employment tribunals in respect of discrimination are a **declaration of rights, an award of compensation and a recommendation**. Provision is made by the *Equality Act 2010* for an application to be made to an employment tribunal for a **declaration of nullity in relation to any contractual term** which constitutes, promotes or provides for treatment of that or another person which is prohibited by the Act.¹⁰⁷⁶ A person with 'an interest' in the contract may apply to the county court¹⁰⁷⁷ for an order to have the term removed or modified.¹⁰⁷⁸ **Compensation** is payable according to the principles which would apply to a civil claim in tort,¹⁰⁷⁹ and this may include compensation for **injured feelings**. There is no longer a cap on the amount of compensation which a victim of discrimination may receive. The **remedy of a recommendation** allows the tribunal to recommend that, "*within a specified period the respondent takes steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate (a) on the complainant; [and] (b) on any other person.*"¹⁰⁸⁰ If the respondent (employer) fails to comply with the recommendation 'without reasonable excuse', the tribunal may order compensation to be paid or increase the amount of compensation it has already ordered to be paid.¹⁰⁸¹

Among its various functions, the *Equality and Human Rights Commission*¹⁰⁸² has the power to **institute or intervene in legal proceedings**, including employment tribunal cases.¹⁰⁸³ It is able to make grants to another person in pursuance of its duties and may assist an individual involved in the legal proceedings where those proceedings relate to the *Equality Act 2010*, including in the form of legal advice, legal representation, facilities for settlement of a dispute or any other form of assistance.¹⁰⁸⁴ It also has the power to undertake inquiries,¹⁰⁸⁵ and investigations¹⁰⁸⁶ and issue unlawful act notices,¹⁰⁸⁷ which can lead, among other things, to a requirement to adopt an action plan to avoid repetition of the unlawful acts in question.¹⁰⁸⁸

According to section 144(1) of the *Equality Act 2010*, a **term of a contract is unenforceable** by a person in whose favour it would operate **to the extent that it purports to exclude or limit a provision of (or one made under) the Equality Act 2010**. A clause requiring any disputes to be referred for alternative dispute resolution for final resolution was held by a court to preclude the continuation of sex

¹⁰⁷⁵ See *Employment Tribunals Rules of Procedure*, contained in *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004*, Statutory Instrument 1861 of 2004, available at <https://www.legislation.gov.uk/uksi/2004/1861/contents/made> (20.09.2019), Schedule 1, Rule 10.

¹⁰⁷⁶ *Ibid.*, sections 142(1) and section 146.

¹⁰⁷⁷ The 'county court' is, broadly speaking, a first instance civil court in England and Wales.

¹⁰⁷⁸ *Ibid.*, section 143.

¹⁰⁷⁹ *Ibid.*, section 119(2)(a).

¹⁰⁸⁰ *Ibid.*, section 124(3).

¹⁰⁸¹ *Ibid.*, section 124(7).

¹⁰⁸² See section 2.1. of this country report, above.

¹⁰⁸³ *Equality Act 2006*, available at <http://www.legislation.gov.uk/ukpga/2006/3/contents> (20.09.2019), section 30.

¹⁰⁸⁴ *Ibid.*, section 28(4).

¹⁰⁸⁵ *Ibid.*, section 16.

¹⁰⁸⁶ *Ibid.*, section 20.

¹⁰⁸⁷ *Ibid.*, section 21.

¹⁰⁸⁸ *Ibid.*, section 22.

discrimination proceedings in the employment tribunal, and was therefore void and unenforceable.¹⁰⁸⁹ However, **an exception to the rule against contracting out of anti-discrimination legislation** is that contracts or agreements settling or compromising a complaint relating to discrimination in employment will be binding on the complainant where such contract has been made with the assistance of a conciliation officer from the **Advisory, Conciliation and Arbitration Service (“ACAS”)**¹⁰⁹⁰ or where the contract is what is known as a **compromise agreement** meeting statutory conditions.¹⁰⁹¹

5. Legal framework in practice

Although the UK ratified the UN CRPD in 2009, the CRPD Committee’s 2017 report¹⁰⁹² criticised the UK for its social funding cuts and indicated that, **far from encouraging a social model of disability**, UK domestic law continues to support a system which is more consistent with the traditional medical model.

Some commentators argue that the UK’s failure to incorporate the CRPD into domestic law reinforces the medical model, and moreover, that the absence of a mechanism for complainants to directly rely on the Convention means that they must exercise their rights through the *Equality Act 2010* and persuade judges to interpret its provisions in line with the CRPD.¹⁰⁹³ Indeed, the **CRPD Committee has recommended that the UK incorporate the Convention into its legislation** in order to recognise access to domestic remedies for breaches of the Convention and to adopt legally binding instruments to implement the concept of disability consistent with Article 1 of the Convention.¹⁰⁹⁴

In the area of work and employment, in particular, the UN CRPD Committee criticises the UK for what it describes as:

*“the persistent employment gap and pay gap for work of equal value affecting persons with disabilities, especially women and persons with psychosocial and/or intellectual disabilities, as well as persons with visual impairments.”*¹⁰⁹⁵

It concludes, further, that there are **insufficient affirmative action measures** and provision of reasonable accommodation for allowing disabled people to access employment on the open labour market.

¹⁰⁸⁹ *Clyde & Co. LLP v. Bates van Winkelhof* [2011] Industrial Relations Law Reports 467, per Justice Slade. As summarised in Mrs Justice Slade (ed.), *Tolley’s Employment Handbook*, 27th edition 2013, Lexis Nexis, London, p. 330.

¹⁰⁹⁰ *Equality Act 2010*, *op. cit.*, section 144(4). ACAS is a non-departmental public body which takes an independent and impartial role in resolving employment-based disputes.

¹⁰⁹¹ *Ibid.*, and section 147(3).

¹⁰⁹² UN CRPD, Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland*, 3rd October 2017, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GBR/CO/1&Lang=En (23.09.2019).

¹⁰⁹³ See, for example, Toel Koyithara, *Law and Disability: How The UK is Still Reinforcing the Medical View of Disability*, 20th February 2018, Oxford Human Rights Hub, available at <https://ohrh.law.ox.ac.uk/law-and-disability-how-the-uk-is-still-reinforcing-the-medical-view-of-disability/> (23.09.2019).

¹⁰⁹⁴ UNCRPD, Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland*, *op. cit.*, para. 7.

¹⁰⁹⁵ *Ibid.*, para. 56.

According to statistics released in April 2019, there were 178,990 employment tribunal claims in 2018.¹⁰⁹⁶ Of these, **6,550 were disability discrimination claims**. This represented a 37% increase on the previous year. The growth in claims, which is eight times faster than the growth in all claims, has been reported as possibly being driven by an increased willingness of individuals to bring claims related to mental health issues.¹⁰⁹⁷

With regard to **Brexit**, under the terms of the European Union (Withdrawal) Bill, **all existing EU legislation**, including that related to disability rights, **will be preserved in the UK law** so that the same rules and laws will, as a general rule, apply on the day after the UK leaves the EU as before. Concerns have, however, been expressed that leaving the EU will nevertheless have a negative impact on legal protections for those with disabilities. Organisations such as *Disability Rights UK* fear that **directly applicable EU law could be 'corrected'** in such a way as to make it less effective or subsequently repealed, or that disability rights contained in EU directives which have not yet been implemented in the UK before the Brexit date are not subsequently implemented. The Government introduced an amendment to the Bill to address worries that powers given to ministers by the Bill could be used to weaken equalities legislation. This will require a minister who uses powers in the Bill to place secondary legislation before Parliament (namely, a statutory instrument) for the purpose of correcting deficiencies in legislation to also produce an explanatory statement indicating whether the secondary legislation will amend/repeal/ revoke equalities legislation and what the effect is, as well as indicating, among other things, **that the minister has had due regard under equalities legislation** to the need to eliminate discrimination under the *Equality Act 2010*.¹⁰⁹⁸

¹⁰⁹⁶ See Gov.uk, *Main Tables (January to March 2019)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808151/Main_Tables_Q4_2018-19.ods (23.09.2019).

¹⁰⁹⁷ Gabriella Swerling, *Workplace stress drives up disability discrimination claims by more than a third, employment law experts say*, Telegraph.co.uk, 28th April 2019, available at <https://www.telegraph.co.uk/news/2019/04/28/workplace-stress-drives-disability-discrimination-claims-third/> (23.09.2019).

¹⁰⁹⁸ See Emily Haves, *Disability in the UK: Rights and Policy Debate on 28 June 2018*, *op. cit.*, pp. 14-15.

M. UNITED STATES

1. Introduction

1.1. Country overview

The United States of America (hereinafter “US”) has been at the forefront of states legislating for the rights of persons with disabilities since the 1970s. A country of over **325 million persons**, the US also has a sizable population of persons with recognized disabilities. Recent estimates indicate that at least **20% of the overall population has a physical, intellectual, or psychological impairment**, although this figure masks the differences in frequency of disabilities among age groups (persons over 65 have a markedly higher than average rate of disability while minors and young children have rates of 5.6% and 0.7%, respectively)¹⁰⁹⁹, the type of disability that exists (the most common type of disability in the US is ambulatory - 6.6% of the population has difficulty walking, while only 2.4% suffer from visual impairment)¹¹⁰⁰, and the geographic, socio-economic, and social differences in the prevalence of disability. The statistical information can only offer glimpses of the extent of the phenomenon because disabilities can be genetic or acquired as well as partial or full, gradually developing or suddenly occurring. The numbers, therefore, can be used as a basis for assessing the need for regulation and offer a plausible insight into why the current regulations exist as they do, but statistics alone cannot offer policy prescriptions.

1.2. Overview of legal and policy framework

Not a state Party to the UN Convention on the Rights of Persons with Disabilities (CRPD), the United States nevertheless has a comprehensive legislative framework to regulate the treatment of persons with disabilities. The centerpiece of disabilities law is formed by **the Rehabilitation Act of 1973 (RA)**¹¹⁰¹ and the federal **Americans with Disabilities Act (ADA)**¹¹⁰² with its 2008 Amendment (AADA).¹¹⁰³

The RA and ADA are based on the principles of the Civil Rights Act of 1964.¹¹⁰⁴ These principles proclaim the freedom and equality of all Americans¹¹⁰⁵ – something ethnic minorities, women, and persons with disabilities are often denied. As civil rights legislation, together the RA and ADA prohibit discrimination by both public and private entities. Where the **RA specifically aims to encourage the employment of**

¹⁰⁹⁹ <https://www.statista.com/statistics/793952/disability-in-the-us-by-age/> (viewed 3.10.2019).

¹¹⁰⁰ <https://www.statista.com/statistics/793962/disability-in-the-us-by-type/> (viewed 3.10.2019).

¹¹⁰¹ Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. (2015).

¹¹⁰² For a summarized general history of the ADA, see Joseph Chandlee, ADA Regulatory Compliance: How the Americans with Disabilities Act Affects Small Businesses, 7 Univ. Baltimore J. Land & Dev. 37, 38-39 (2017).

¹¹⁰³ Americans with Disabilities Act of 1990, 42 U.S.C § 12101 (2008).

¹¹⁰⁴ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964). The Title VII of the Civil Rights Act was amended by the Equal Employment Opportunity Act of 1972 to strengthen the enforcement powers of the Equal Employment Opportunity Commission (EEOC). Whereas the Civil Rights Act as written only provided for the EEOC to investigate complaints, the Equal Employment Opportunity Act provides authority to the Commission to act directly against discrimination in the employment context by filing a claim against the employer in federal court.

¹¹⁰⁵ The words of President John F. Kennedy on 11 June 1963 (“this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free”) and Martin Luther King, Jr.’s “I have a Dream” speech (28 August 1963: “[...] the magnificent words of the Constitution and the Declaration of Independence [...] were] a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness”), capture the ideals behind the movement to promote civil rights.

persons with disabilities by the federal government¹¹⁰⁶ and programs funded by the federal government, the **ADA has anti-discrimination provisions** that aim more broadly, prohibiting direct and indirect discrimination by the US legislative branch, States, municipalities, and private sector employers. Materially, the ADA antidiscrimination provisions apply to a wide range of life activities, including governmental service offerings, public transportation, airline services, public accommodation, and telecommunications. The rules relating to employment are found in Title I ADA. These will be discussed more extensively below.

1.2.1. The Rehabilitation Act of 1973

The RA predates the ADA and **aims to prohibit discrimination on grounds of a person's disability** by the federal government. RA Section 503 requires any federal department to offer affirmative action to persons with disabilities¹¹⁰⁷ and Section 504 **prohibits discrimination by any federal program**, executive agency, or the postal service on the basis of disability¹¹⁰⁸. Together, these provisions prohibit employment discrimination of qualified persons with disabilities by federal legislative and executive employers, by federal contractors, and by subcontractors of the US government.

The employment provisions of the RA are tied to the ADA in terms of standards applied.¹¹⁰⁹ These will be discussed further below. The remedies for alleged violations of the RA are based on those available in the Civil Rights Act of 1964¹¹¹⁰, namely those of administrative inquiry or civil court charges.¹¹¹¹ The successful claimant may get compensation or relief in kind, and may be awarded attorneys' fees.¹¹¹²

1.2.2. Other federal laws

Other important laws protecting the rights of persons with disabilities **include those directed at certain industries or specific groups of people**.¹¹¹³ Specific legislation adds non-discrimination provisions for certain groups of persons or industries. The Architectural Barriers Act of 1968 mandates that any federal or federally funded (including leased) buildings be accessible to persons with disabilities. The Air Carrier Access Act of 1986¹¹¹⁴ prohibits commercial airlines from discriminating against passengers with disabilities. The Developmentally Disabled Assistance and Bill of Rights Act¹¹¹⁵ offers funds for centers and universities to support young persons who have a permanent developmental disability by

¹¹⁰⁶ Unlike the ADA, the RA applies to the Executive Branch as well as to the legislature.

¹¹⁰⁷ Rehabilitation Act, §503(a) ("Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and non-personal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. [...]"). This applies to subcontracts as well as contracts. Id.

¹¹⁰⁸ Rehabilitation Act, §504(a) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20), shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program of activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

¹¹⁰⁹ RA § 504(d).

¹¹¹⁰ RA § 505(a).

¹¹¹¹ See Civil Rights Act, § 706, 717.

¹¹¹² RA § 505(a)(1) and (b).

¹¹¹³ For an overview of the different laws and for relevant links, see <https://www.ada.gov/cguide.htm> (23 April 2019).

¹¹¹⁴ 49 U.S.C. § 41705.

¹¹¹⁵ Pub.L. 94-103.

the age of 18. The Individuals with Disabilities Education Act¹¹¹⁶ furthers rights of children with disabilities to “Free Appropriate Public Education” (FAPE). The latter includes free access to special education in public schools and the guarantee of a program tailored to their needs and abilities. The elderly and physically impaired are granted the right to access voting places by the Voting Accessibility for the Elderly and Handicapped Act.¹¹¹⁷ Veterans with disabilities are also provided for by a number of different programs.¹¹¹⁸

2. Regulatory framework

2.1. Legal basis for workplace protection and rights

Federal and State legislation exist in parallel as protections against employment discrimination based on an individual’s disability. The main piece of federal legislation to protect the rights of persons with disabilities in the US is the Americans with Disabilities Act, broadly prohibiting discrimination of persons on account of a disability.

The **ADA provides a minimum level of protection**, allowing the individual States to provide legislation that mandates stronger protections to persons with disabilities than those offered by the ADA. Indeed, **several states have more stringent rules than the federal government** on employers, whether by including broader definitions of what constitutes a “disability”¹¹¹⁹, by expanding the scope of coverage to include smaller employers¹¹²⁰, and/or by offering procedural advantages to plaintiffs¹¹²¹.

The ADA has several sections, covering **discrimination in employment, public services, public transportation, private services, buildings, and telecommunications**. While the employment protections are specifically regulated by Title I, the rules of the other sections may also have an impact on a particular employee.

¹¹¹⁶ Pub.L. 101-476.

¹¹¹⁷ P.L. 98-435, [42 U.S.C. §§ 1973ee–1973ee-6](#).

¹¹¹⁸ Eligibility for veteran disability benefits requires the veteran to have either acquired the disability while serving in the military (in service) or to have suffered a worsening of the condition while in serving (preservice), or had a disability that appeared after, but was caused by, serving (postservice). <https://www.va.gov/disability/eligibility/>. For an overview of the various programs available and the procedures, see <https://www.va.gov/disability/>.

¹¹¹⁹ E.g., California and Massachusetts both provide that a person can be considered as “disabled” without accounting for the use of aids (2 CCR § 11066(a); Massachusetts Commission Against Discrimination, MCAD Guidelines: Employment Discrimination on the Basis of Handicap, IIA(7) ()); California considers certain conditions (inter alia HIV, diabetes, heart disease) as disabling even if episodic (2 CCR § 11065(d)(2)(C)); Wisconsin permits discrimination “because of” a disability to be determined if the disability was one factor in the employer’s decision, not needing it to be the primary (“but for”) factor used by the ADA (see Dempsey Law, Differences between the Federal and State Disability Laws, 5 August 2013; available at <http://dempseylaw.com/blog1/item/36-differences-between-the-federal-and-state-disability-laws>).

¹¹²⁰ California disability discrimination rules apply to employers with five or more employees (CA Gov. Code Sec. 12926); Michigan law on employment disability is obligatory for all employers with at least one employee (see Persons with Disabilities Civil Rights Act, Act 220 of 1976, 37.1201, § 201(b)).

¹¹²¹ California, for example, has no cap on the recoverable damages from an employer who violated the statute and allows for backpay. See <https://www.shouselaw.com/CA-Employment-Disability-Discrimination#7> (viewed 2 August 2019).

Development of the ADA Title I provisions can and does occur by means of amendment of the law, regulatory rule-making by the United States Equal Employment Opportunity Commission (EEOC), or through jurisprudential interpretations of its provisions. In addition, the EEOC issues policy proposals and explains its views on legal issues in “subregulatory guidance” documents.¹¹²² While these guidance documents are legally non-binding, they can form the basis of a court’s review of administrative actions if the Commission is challenged in court.¹¹²³

2.1.1. International Law

The United States is **not a Party to the CPRD** and does not derive any direct binding international obligations in relation to rights of persons with disabilities from it. The US Department of State, however, promotes its International Disabilities Rights Team’s work as a branch of US foreign policy making.¹¹²⁴ On July 26, 2019, the US Department of State announced that it had “endorsed” the Charter on Inclusion of Persons with Disabilities in Humanitarian Action¹¹²⁵.¹¹²⁶ The Charter is a non-binding statement of commitment to “make humanitarian action inclusive of persons with disabilities”.¹¹²⁷

2.2. Scope of protection

Non-discrimination obligations of the RA **apply to programs or projects of the federal government that receive federal funding**.¹¹²⁸ This includes executive agencies, the legislative branch, and the US Postal Service¹¹²⁹, but also any State or local programs that receive money from the federal government, including universities and colleges.¹¹³⁰ The affirmative action obligations also apply to federal contractors and subcontractors that have contracts with a value of \$10,000 or more.¹¹³¹

The **obligations of the ADA Title I** apply to almost all non-federal employers.¹¹³² **All State and local governments** must comply with the non-discrimination and accommodation requirements, as do **private sector employers with at least 15 employees**, employment agencies, labor unions, and union-

¹¹²² See <https://www.eeoc.gov/laws/guidance/index.cfm> (viewed 26 July 2019).

¹¹²³ James M. Nicholas, EEOC Issues New Harassment Guideline, Foley Insights, 13 February 2017 (viewed 26 July 2019) (<https://www.foley.com/en/insights/publications/2017/02/eeoc-issues-new-harassment-guidance>; 26 July 2019).

¹¹²⁴ See US Department of State, Fact Sheet: Promoting the Rights of Persons with Disabilities (<https://www.state.gov/wp-content/uploads/2019/03/Promoting-the-Rights-of-Persons-with-Disabilities.pdf>; viewed 30 July 2019).

¹¹²⁵ The text of the Charter is available at <http://humanitariandisabilitycharter.org/the-charter/>.

¹¹²⁶ See <https://www.state.gov/on-anniversary-of-americans-with-disabilities-act-u-s-endorses-charter-on-inclusion-of-persons-with-disabilities/> (viewed 2 August 2019).

¹¹²⁷ <http://humanitariandisabilitycharter.org/the-charter/>.

¹¹²⁸ Rehabilitation Act, § 504.

¹¹²⁹ Rehabilitation Act § 504(a).

¹¹³⁰ Rehabilitation Act § 504(b).

¹¹³¹ Rehabilitation Act § 503(a).

¹¹³² See ADA, § 12111(5). The definition of “employer” is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks” per year. *Id.* at 5(A). It, however, does not include the US, Indian tribes, US-owned corporations, or “bona fide private membership club (other than a labor organization) that is exempt from taxation [...]”. *Id.* at 5(B)).

management committees.¹¹³³ Contractors of these covered employers are also covered by the law's obligations.¹¹³⁴

The protections of the ADA **apply to “qualified”¹¹³⁵ employees, whether permanently or temporarily subject to a disability**. Thus, to be covered, a person must first be an “employee” – that is hired by an “employer” as defined in the Act. The definition of “employer” indicates that persons hired by very small companies are not covered by the Act.¹¹³⁶

The question of whether someone is an “employee” is somewhat unclear. Generally, the **ADA will not apply to an independent contractor/self-employed person, volunteer**, or other individual performing certain tasks for a company without receiving wages. However, the characterization of “employee” is one to be made on the facts and circumstances of a particular case, and not on the job title.¹¹³⁷ The influence of decisions in cases such as *O'Connor v. Uber Technologies*, therefore, will be influential,¹¹³⁸ but not necessarily dispositive in any particular legal action.

2.3. Definition of disability

2.3.1. Rehabilitation Act

The RA defines “person with a disability” according to the definition found in the ADA. This will be discussed next. The RA specifies that certain individuals are excluded from falling within the scope of the term. These include individuals that are currently illegal drug users¹¹³⁹ as well as homosexual or bisexual persons (because homosexuality and bisexuality are not “impairments”)¹¹⁴⁰ and persons with the following disorders:

- (i) from physical impairments, or other sexual behavior disorders;
- (ii) compulsive gambling, kleptomania, or pyromania; or
- (iii) psychoactive substance use disorders resulting from current illegal use of drugs.¹¹⁴¹

2.3.2. ADA

The ADA covers **intellectual, physical, and psychiatric impairments that pose difficulties in engaging in one or more significant life functions**. The ADA contains definitions applicable to the entire Act and separate definitions for the individual Titles within the Act. The key definition, “disability”, and its

¹¹³³ ADA, § 12111(5)(A).

¹¹³⁴ Id. (“and any agent of such person”).

¹¹³⁵ For the meaning of “qualified”, see section 2.3. “Protections” below.

¹¹³⁶ ADA § 12111 (5) (definition of “Employer”). Moreover, non-citizens employed outside of the US are not within the scope of the protections of the ADA. ADA § 12111 (4) (definition of “Employee”).

¹¹³⁷ See EEOC Compliance Manual, 915.003, at 2-III(A)(1) (available at <https://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1>; viewed 31 July 2019).

¹¹³⁸ The O'Connor case has been brought by Uber drivers alleging that they have been misclassified as independent contractors when they should be recognized as “employees” of Uber and therefore enjoy the benefits of employment protections. See *O'Connor et al. v. Uber Technologies, Inc.*, 82 F.Supp 3d 1133 (ND Cal. 2015); *ibid.*, No. 14-16078 (9th Cir. 2018) (reversing district court decision to reject demand to arbitrate).

¹¹³⁹ Rehabilitation Act § 705 (C)(i).

¹¹⁴⁰ Rehabilitation Act § 705 (E).

¹¹⁴¹ Rehabilitation Act § 705 (F).

constituent terms, are defined in the general definitional provision of Section 12102. (Further guidance to interpretation of the individual terms is found in 29 C.F.R. § 1630.2.)

First, the ADA gives the definition of “disability” at 42 U.S.C. Section 12102 (1):

- (A) *a physical or mental impairment that substantially limits one or more major life activities of such individual;*
- (B) *a record of such an impairment; or*
- (C) *being regarded as having such an impairment [...].*¹¹⁴²

Thus, a covered person with a disability includes **those with a temporary disability**, those with **episodic disabilities** (even if in remission at the time of the alleged violation), those who have had a disability but no longer have it (or who were misdiagnosed with having had a disability¹¹⁴³), and **those who are perceived as having a disability**, even if there is no actual disability¹¹⁴⁴. As specified in the law’s “rules of construction”, the interpretation of “disability” is to provide for a broad coverage of the Act’s protections.¹¹⁴⁵

To be considered a disability, the impairment must not be minor in its impact on the individual’s life. The idea of “**significantly limits or restricts a major life activity**” is the language used in the ADA. Each of these terms has been extensively discussed. The following is based on the definitions of ADA and summarizes the voluminous literature and jurisprudence interpreting the terms.

Major life activity: the impacts of the impairment can be on activities or bodily functions. The significance of the activities can be regarded

Significantly limits or restricts: the impairment’s impacts on the person must not be “trivial”, although it may be on only one aspect of life. The degree of the disabling nature of the impairment, moreover, is to be measured “**without regard to the ameliorative effects of mitigating measures**” or accommodations.¹¹⁴⁶ That is, an employer cannot consider someone with a hearing aid not disabled by virtue of being able to hear with the use of the hearing aid.¹¹⁴⁷

2.3.2.1. Protections

The protections of the ADA Title I apply to **qualified individuals with a disability**. The term “qualified” indicates that the rights adhere to persons who are **able to perform the functions of the job with or**

¹¹⁴² 42 U.S.C. § 12102 (1). Note that this language is the same as in the 1990 version of the text. The jurisprudence, however, has broadened the scope of the definition.

¹¹⁴³ 29 CFR § 1630.2(k)(1).

¹¹⁴⁴ For the perceived disability, the impairment must not be thought to have existed for less than six months. ADA § 12102(3)(B).

¹¹⁴⁵ ADA § 12102(4)(A).

¹¹⁴⁶ ADA § 12102(4)(E).

¹¹⁴⁷ The question of the role of ameliorative instruments in determining the existence of a disability was highlighted in the passage of the ADA Amendment Act of 2008. That Act was passed largely in reaction to the Supreme Court’s narrow interpretation of “disability” in the ADA set out in a series of cases including *Sutton et al. v. United Airlines, Inc.*, 527 U.S. 471, 488 (1999) (holding “that disability under the Act is to be determined with reference to corrective measures”); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 200-201 (2002) (“When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job”); *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002) (“”); *Barnes v. Gorman*, 536 U.S. 181 (2002) (“”).

without reasonable accommodation of their disability. (Note, however, users of illegal narcotics are not considered qualified individuals with a disability for ADA Title I.¹¹⁴⁸) The restriction of the protections to qualified employees is the foundation for the government’s claim that the ADA is not an “affirmative action” law, and rather, simply an anti-discrimination law.

2.3.2.2. State Laws

As mentioned above, State laws to protect persons with disabilities in the employment context **may differ from the ADA standards, as long as they are no less protective.** The definition of “disability” is one area in which there is a substantial difference among States and should be carefully analysed in any particular case.¹¹⁴⁹

2.4. Forms of discrimination protection

Protections of the employee are supposed to be both comprehensive and active. Employers have passive non-discrimination obligations as well as positive duties to make adjustments to accommodate impairments from even before the first meeting with the individual.

The ADA non-discrimination **obligations extend over the entire employment lifecycle**, including the recruitment, interview, and hiring processes, the conditions of working, the benefits (such as pensions, insurance, or other services offered to all employees), promotion, and termination of the relationship.

The definition of “discrimination” found in ADA § 12112 sets out that a **discriminatory action is one that less favourably treats a person “on the basis of” his/her disability.** The employer may do this in a number of ways, including:

- (1) *limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status [...] because of the disability [...];*
- (2) *participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);*
- (3) *utilizing standards, criteria, or methods of administration—*
 - (A) *that have the effect of discrimination on the basis of disability; or*
 - (B) *that perpetuate the discrimination of others who are subject to common administrative control;*
- (4) *excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;*
- (5)
 - (A) *not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate*

¹¹⁴⁸ ADA § 12114(a).

¹¹⁴⁹ See reference to definitions of “disability” in California and Massachusetts in section 2.1. of this country report, above.

that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).¹¹⁵⁰

3. Integration of people with disabilities in the workplace

3.1. Legal duties on employers to accommodate people with disabilities

3.1.1. Reasonable Accommodation

The ADA (itself referred to as the standards to use by the RA) requires that employers make “**reasonable accommodation**” to ensure the person with a disability can carry out his/her work. As mentioned above, the requirement of reasonable accommodation is **part of the definition of discrimination** and **not regarded as** a requirement of **affirmative action**.¹¹⁵¹ The concept of reasonable accommodation is set out fully below.¹¹⁵²

Aimed at allowing the qualified individual to perform the functions of the job, the **particular actions required to fulfil the reasonable accommodation requirement** will be case specific. While some are matters of **physical infrastructure** (ensuring access to a workspace or the possibility of attending a meeting) or of **providing instruments** (such as special telephones or seating), others are **offering part time work or flexible schedules**, permitting **home office employment**, providing **helpers**, or even

¹¹⁵⁰ ADA § 12112(b). The Supreme Court held that it is not discriminatory for an employer to refuse to permit a person with a disability to work in a position that would endanger his/her own health. *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002).

¹¹⁵¹ But see *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), which allowed for a company’s seniority system to potentially be subject to the reasonable accommodation mandate. This, in the opinion of some, confuses the non-discriminatory element with affirmative action. See Georgetown Law Library, A Brief History of Civil Rights in the United States, <https://guides.ll.georgetown.edu/c.php?g=592919&p=4230126> (“this case gave the Court’s characterization of “reasonable accommodations” as special and preferential, which fuelled misconceptions that the ADA gave people with disabilities some type of advantage”; viewed 2 August 2019).

¹¹⁵² See infra at section 3.1.

“reallocating or redistributing marginal job functions”¹¹⁵³. The employee is permitted to suggest accommodations that would help him/her fulfilling the required tasks, but the employer need not choose the employees’ preference if the option selected is equally enabling.¹¹⁵⁴

The idea of “reasonable” accommodation means that if accommodating the person’s disability would place an “undue burden” on the employer, it would not be required by the law. The type of burden may be financial as well as involving a change in the essential functions of the job or the way the job is managed or organized.¹¹⁵⁵ **No employer will be required to change the nature of its business or create a new position within the company** to accommodate a person with a disability, nor will it need to make financial outlays that are disproportionate in order to accommodate an employee’s impairment. Whether an employer must hire a substitute to fill in for an employee’s disability-related absence is a question of fact. Usually, longer periods of absence will be considered unduly burdensome, but in some circumstances, even an absence of more than 12 months can be found reasonable. In *Garcia-Ayala v. Lederle*, for example, an employee was unable to work for long periods at a time due to repeated medical procedures related to her breast cancer.¹¹⁵⁶ When told her job reservation had ended, she requested a prolongation, but it was refused. Fired, the plaintiff alleged discrimination under the ADA, but the employer argued that bearing her long absence was an undue burden. On the facts of the case, the court disagreed. The absence was bridged by a temporary employee who was neither paid more nor performed less efficiently than Garcia-Ayala, meaning that the employer could not show any burden at all, “much less an undue burden”.¹¹⁵⁷ The court explained:

*“We stress that the Act does not require employers to retain disabled employees who cannot perform the essential functions of their jobs without reasonable accommodation. Applying this rule to the prolonged disability leave situation is tricky, however. An absent employee obviously cannot himself or herself perform; *650 still, the employer may in some instances, such as here, be able to get temporary help or find some other alternative that will enable it to proceed satisfactorily with its business uninterrupted while a disabled employee is recovering. In situations like that, retaining the ailing employee’s slot while granting unsalaried leave may be a reasonable accommodation required by the*

¹¹⁵³ Job Accommodation Network (JAN), Employers’ Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act (ADA) 16 (available for downloading at <https://askjan.org/publications/employers/employers-guide.cfm>; viewed 31 July 2019). The JAN emphasizes that core tasks are never subject to mandatory changes by the requirement of “reasonable accommodation”. Id.

¹¹⁵⁴ JAN, Employers’ Practical Guide at 13. See ADA § 12111(9) (definition of “Reasonable accommodation”, with inclusive list of actions).

¹¹⁵⁵ See ADA § 12111(10)(A) (“The term ‘undue hardship’ means an action requiring significant difficulty or expense [...]”). See also 29 CFR § 1630.2(p) (factors set forth by the EEOC to be considered in determining what is “undue” hardship, including: “(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding; (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business”).

¹¹⁵⁶ *Zenaida García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2017).

¹¹⁵⁷ Id. at 649.

ADA. If, however, allowing the sick employee to retain his or her job places the employer in a hardship situation where it cannot secure in some reasonable alternative way the services for which it hired the ailing employee, and yet is blocked from effecting a rehire, the ADA does not require the retention of the disabled person. Hence, where it is unrealistic to expect to obtain someone to perform those essential functions temporarily until the sick employee returns, the employer may be entitled to discharge the ill employee and hire someone else.”¹¹⁵⁸

Importantly, if the “burden” of accommodation is purely financial, the **employer is required to explore the possibility of acquiring supplemental external funds** before it denies a request as unduly burdensome.¹¹⁵⁹ Moreover, a court may consider the offsetting effects of tax deductions for accommodation measures in determining if the additional costs are “undue”.¹¹⁶⁰

The requirement to afford reasonable **accommodation**, as with the equality of treatment aspects of anti-discrimination, **apply from the beginning** of the employment cycle. Recruitment and application processes, therefore, must attend to accommodation requests. In addition, employers must make “a reasonable effort” to try to comply with a request for accommodation.¹¹⁶¹ This is true even if the employee does not make a direct request, but has made a clear indication of the need and desirability of accommodation.¹¹⁶²

Moreover, employers must agree to offer accommodations to covered employees who are disabled by means of having a **care-giving relationship with a person with an impairment**.¹¹⁶³ Thus, for example, an employer of a parent of a child with a physical or mental impairment must accept a request for a reasonable adjustment of a work schedule to allow for the employee to attend to the needs of that child.

3.1.2. Affirmative Action

The Rehabilitation Act¹¹⁶⁴ goes beyond non-discrimination obligations of reasonable accommodation and requires federal contractors and subcontractors to have affirmative action programs in place.¹¹⁶⁵ These programs are to be reported on, updated, and approved annually.¹¹⁶⁶

3.2. Incentives or other assistance available to employers

There is a substantial amount of assistance available to employers to comply with their responsibilities under the ADA. There are, first, **numerous publications, guidance statements, handbooks**, and on-line materials to inform employers of their legal responsibilities and to give examples of how these can

¹¹⁵⁸ Id. 649-650.

¹¹⁵⁹ See EEOC, The ADA: Your Responsibilities as an Employer 4 (text available at <https://www.eeoc.gov/facts/ada17.html>; viewed 31 July 2019).

¹¹⁶⁰ Id.

¹¹⁶¹ *Fjellestad v. Pizza Hut of America*, 188 F.3d 944, 951 (8th Cir. 1999).

¹¹⁶² *EEOC v. Crain* at 757 (citing *Fjellestad*; *Kowitz v. Trinity Health*, 839 F.3d 742, 748 (8th Cir. 2016)).

¹¹⁶³ ADA § 12112(b)(4) (prohibiting discrimination of “a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association”).

¹¹⁶⁴ See *supra*, notes 9-14 and accompanying text.

¹¹⁶⁵ Rehabilitation Act §501(b).

¹¹⁶⁶ Id.

be managed. The EEOC website itself¹¹⁶⁷, along with the Department of Labor, are first sources of information. The Job Accommodation Network (JAN)¹¹⁶⁸ (funded by the Department of Labor's Office of Disability Employment Policy) also has multiple handbooks available in its on-line "library" to give guidance to employers (as well as to others).¹¹⁶⁹ Besides its "library", the JAN has a page on its website directed at employers, with information directed to specific types of employers (private, federal, and State and local employers).¹¹⁷⁰ For private employers, for example, the JAN offers free one-on-one consultations to give employers ideas on, for example, how to accommodate employees with disabilities.¹¹⁷¹ The Searchable Online Accommodation Resource is another helpful tool for employers who need information on the law or practical implementation of reasonable accommodation.¹¹⁷²

Reasonable accommodation efforts may also be made financially more attractive by the offer of tax incentives for the costs of accommodating employees' needs.¹¹⁷³ One incentive, available to any business that has to spend money in altering the workplace to make it accessible or to accommodate an employee, is a **tax deduction** of up to \$15,000 per year.¹¹⁷⁴ This deduction for "Barrier Removal Costs" is subject to qualitative as well as the quantitative limit, with the IRS requiring the work to be approved by the Architectural and Transportations Barriers Compliance Board.¹¹⁷⁵

A separate incentive is a **tax credit** of up to \$5,000 for small businesses. The credit, covering up to half of the costs of "reasonable and necessary"¹¹⁷⁶ accommodation expenditures between \$250 and \$10,000, is available to businesses with a revenue of up to \$ 1 million or with 30 or fewer employees.¹¹⁷⁷

For persons with disabilities, there are also numerous sources of information and assistance. This includes help finding suitable employment opportunities (for example, the Workforce Recruitment Program at the Office of Disability Employment Policy or university offices for students with disabilities that often have career information) along with legal aid to help those who feel wronged seek relief.

¹¹⁶⁷ E.g., EEOC, "Disability Discrimination" at <https://www.eeoc.gov/laws/types/disability.cfm> (viewed 4 October 2019); EEOC, "Selected Enforcement Guidelines and Other Policy Documents on the ADA" (viewed 4 October 2019); EEOC, "Prohibited Employment Policies/Practices", <https://www.eeoc.gov/laws/practices/index.cfm> (viewed 4 October 2019).

¹¹⁶⁸ See <https://askjan.org/> (viewed 4 October 2019).

¹¹⁶⁹ For a list with links to the available materials, see JAN, "ADA Library", <https://askjan.org/ADA-Library.cfm#spy-scroll-heading-3> (viewed 4 October 2019). This list's section on ADA Title I includes numerous EEOC and DOJ publications as well as a case discussion. The JAN website also has a page directed at employers, with information divided by type of employer (private, federal, and State and local employers). See <https://askjan.org/info-by-role.cfm#for-employers> (viewed 4 October 2019).

¹¹⁷⁰ See <https://askjan.org/info-by-role.cfm#for-employers> (viewed 4 October 2019).

¹¹⁷¹ Id.

¹¹⁷² See <https://askjan.org/soar.cfm> (viewed 4 October 2019).

¹¹⁷³ See, ADA, «IRS Tax Credits and Deductions», <https://www.ada.gov/taxcred.htm> (viewed 4 October 2019).

¹¹⁷⁴ IRS Code, § 190. See 2018 IRS Publication 535, Chapter 7, « Barrier Removal Costs ».

¹¹⁷⁵ 2018 IRS Publication 535 at 27.

¹¹⁷⁶ IRS Form 8826 (Rev. 9-2017) at 2 ("The expenditures must be reasonable and necessary to accomplish the above purposes.") (viewed 4 October 2019).

¹¹⁷⁷ IRS Code, § 44; Form 8826, Disabled Access Credit. See Tax Benefits for Businesses Who Have Employees with Disabilities, <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> (viewed 4 October 2019).

4. Enforcement of rights

The ADA is a complex piece of legislation and as a result, its enforcement is **characterized by at times overlapping competences**. The United States Department of Justice (DOJ) is responsible for overall enforcement of the ADA, with the Disabilities Rights Section specifically focussed on its implementation.¹¹⁷⁸ The **employment discrimination provisions are mainly enforced by the United States Equal Employment Opportunity Commission (EEOC)**¹¹⁷⁹, which has District, Field, Area, and Local offices around the country.¹¹⁸⁰ State or local agencies may assist the EEOC in enforcement.

Individuals or groups who feel their rights have been violated must file a written complaint of alleged violation of their ADA-protected rights with the EEOC. The **EEOC will then notify the employer of the charge within 10 days and investigate**. If the investigation results in no grounds for the EEOC to see reasonable cause for further action, it may dismiss the charge and inform the parties. Until this point, the proceedings are to remain confidential.

If there is reasonable cause for the EEOC to believe the complaints, it may try to remedy the problem by “informal methods of conference, conciliation, and persuasion”.¹¹⁸¹ If no resolution can be reached within thirty days, the **EEOC may file a civil claim in federal court** against the (non-governmental¹¹⁸²) employer.¹¹⁸³ If the EEOC does not file a claim, it should notify the employee, and the employee (or a civil rights interest group that it permits to represent it) may file a civil claim in federal court against the (prospective) employer.¹¹⁸⁴ In either case, a **civil claim must ordinarily¹¹⁸⁵ be filed within 180 days of the incident** unless there is a relevant State law providing for a 300 day statute of limitations. It is important that the filing of a charge with the EEOC is regarded as an administrative prerequisite to filing a complaint against an alleged violator of the ADA¹¹⁸⁶ and even a strong case will be rejected if this has not occurred.

The plaintiff must prove four elements for a prima facie case of discrimination under the ADA, either:

“[...] that: ‘(1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability’”¹¹⁸⁷

¹¹⁷⁸ <https://www.justice.gov/crt/disability-rights-section>

¹¹⁷⁹ See <https://www.eeoc.gov/laws/other.cfm> (list of laws relating to discrimination that are not enforced by the EEOC; viewed 26 July 2019).

¹¹⁸⁰ See <https://www.eeoc.gov/field/> (listing the 15 District Offices currently in existence, along with the offices for which they are responsible) (viewed 26 July 2019).

¹¹⁸¹ 42 USC § 2000e-5(b).

¹¹⁸² Special rules apply for claimed violations of the Act by federal, State or local governments. See 42 USC § 2000e-5(c)-(d).

¹¹⁸³ 42 USC § 2000e-5(f). The jurisdiction will depend on where the alleged discrimination took place, where job would have been, or where the employer has its principal office. 42 USC § 2000e-5(f)(3).

¹¹⁸⁴ Id.

¹¹⁸⁵ Courts have held the time limit to be waivable. See e.g., *Josephine Cole Williams v. NC Administrative Office of the Courts*, 364 F.Supp.3d 596, 601 (ED NC 2018).

¹¹⁸⁶ See, e.g., id. (“the requirement to exhaust administrative remedies by filing a charge with the EEOC concerning the alleged discrimination before filing suit is jurisdictional; [...] a failure to file an EEOC charge at all concerning the alleged discrimination is a jurisdictional bar to filing suit under ADA concerning that claim”).

¹¹⁸⁷ *Rachel Marie Pineda v. ESPN, Inc.*, Case No. 3:18-cv-325(MPS), 2018 WL 5268123 (D.Conn. 2018) (quoting *McMillan v. City of New York*, 711 F.3d 120, 125 (2d Cir. 2013)).

or

*“[...] that (1) plaintiff is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations”.*¹¹⁸⁸

Remedies

Remedies under the ADA are **mainly “injunctive”**. That is, violations are usually remedied by being eliminated rather than strongly punished. There are compensation possibilities, though. If the elements are proven and the defendant cannot disprove or justify them, the plaintiff has a right to the legal remedies available for other violations of civil rights, that is, to compensation, to in-kind remedies (hiring, reinstatement, promotion, etc.), and “reasonable” attorneys’ fees.¹¹⁸⁹

The **permissible compensatory damages** include payment of costs arising from “for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses”.¹¹⁹⁰ A plaintiff may not, however, claim backpay for discriminatory compensation decisions based on the disability.¹¹⁹¹

Punitive damages are not available to a private claimant against the government in ADA cases.¹¹⁹² The US Code states that for employment discrimination by a private employer on the basis of disability, however, punitive damages are allowed if there was “malice or reckless indifference”¹¹⁹³:

*In an action brought by a complaining party [based on the ADA] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) [...] or the regulations [...] concerning the provision of a reasonable accommodation [...] the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.*¹¹⁹⁴

¹¹⁸⁸ Id. (quoting McMillan at 125-126). But see EEOC v. Crain Automotive Holdings, 372 F.Supp.3d 751, 754 (ED Arkansas 2019) (noting only three elements to prove in case of indirect evidence of discrimination: that the plaintiff was disabled, that the plaintiff was a qualified employee, and that the complained-about action was causally connected to the disability; the latter, causation, element falls away where direct evidence of discrimination exists).

¹¹⁸⁹ 42 USC § 2000e-5(k).

¹¹⁹⁰ 42 USC § 1981(b)(3).

¹¹⁹¹ 42 USC § 1981(b)(2).

¹¹⁹² 42 USC § 1981(b)(1). See also Barnes v. Gorman, 536 U.S. 181, 189 (2002) (in a case brought against a police department for injuries suffered by mistreatment during an arrest, the plaintiff requested punitive damages due to the egregious nature of the officer’s actions; the Court refused, arguing “[b]ecause punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act”). The Court noted, in reference to the Civil Rights Act Title VI remedies, that “wrong is “made good” when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.[...] Punitive damages are not compensatory, and are therefore not embraced within the rule [...]”. Id.

¹¹⁹³ 42 USC § 1981(b)(1).

¹¹⁹⁴ 42 USC § 1981(a)(2).

A main limitation on available remedies is that the **statutory framework limits the recoverable amount for each plaintiff**.¹¹⁹⁵ The maximum is **based on the size of the employer**.¹¹⁹⁶ According to the statute, the combined recovery to a particular plaintiff for all forms of compensation and punitive damages is between \$50,000 and \$300,000, the latter for companies employing over 500 employees.¹¹⁹⁷

5. Legal framework in practice

The ADA has been very successful in bringing greater attention to the difficulties faced by persons with disabilities and offering real remedies where discrimination persists. The ADA Amendments of 2008 were a step forward in this respect, overturning the Supreme Court's restrictive reading of the law¹¹⁹⁸ and underlining the bipartisan support for generous interpretation of the Act's intentions.

That is not to say that the framework is flawless. Indeed, there is still disagreement about numerous specific aspects of the ADA.

Open questions

Given the case-by-case differences, some of these interpretations are going to be challenging to address in a way that can be truly foreseeable. A brief list of questions needing answers includes:

- defining who has a disability, given the continuing vagueness of the concept of a "major life activity". The various courts have approached the question in ways that are not always logical. For example, while numerous courts have found that driving is not a major life activity, one court upheld the activity of "going to church";
- determining the rights of (and employers' obligations to) persons with temporary disabilities;
- whether to treat platform work, such as Uber drivers, as an "employee". As mentioned earlier, the definition of the term and its relationship to contractors is ambiguous in the realm of disabilities protection, as it is in other areas of labor protections;
- whether "reasonable accommodation" would include providing parking possibilities to an employee with a disability if the employer does not provide parking for other employees. While clearly an employer who did offer other employees parking would have to offer an employee with a disability accessible parking, there is no definitive answer currently on whether parking itself would be seen as a "reasonable accommodation" for employment or if it is outside the employment relationship, and therefore not required; and

¹¹⁹⁵ See Julian Cardillo, *The Americans with Disabilities Act: 25 Years Later*, 23 July 2015 (interview with Professor Susan Parish, who considers the ADA cap on awards a disincentive to comply) (<https://www.brandeis.edu/now/2015/july/parish-ada-qanda.html>; viewed 2 August 2019).

¹¹⁹⁶ Squire Patton Boggs, *Statutory Damage Caps Negate Substantial Jury Award – Save an Employer Millions*, 23 February 2016 (<https://www.employmentlawworldview.com/statutory-damage-caps-save-companies-millions/>).

¹¹⁹⁷ 42 USC § 1981(b)(3).

¹¹⁹⁸ The Act itself specifically points to *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) as interpreting Congressional intent too narrowly. ADA Amendments Act of 2008, PL 110-325, September 25, 2008 at §§ 2(a)(4), 2(a)(5), 2(a)(7). It then defines the Act's purposes as including "to reject" the reasoning and standards set out in these cases. *Id.* at §§ 2(b)(2)-2(b)(5).

- what kind of remedies are available for retaliatory acts by employers against employees who request reasonable accommodation.

Perhaps the greatest “problem” of the ADA is its **growing reputation as a “litigation monster”**.¹¹⁹⁹ The reason for such allegations is a combination of the overall amount of litigation with the perceived abusive nature of many of the claims. In recent years, the **annual number of federal civil lawsuits brought under the ADA alone is in the thousands**: in 2016, there were over 2000 claims filed on the ADA’s Title I (employment provisions) and over 7000 cases filed on the other Titles.¹²⁰⁰ While the number of employment cases is growing moderately (having only doubled since 2008)¹²⁰¹, the large jump in other ADA claims within the past decade (up from approximately 1500 cases in 2008)¹²⁰² has been pointed to as problematic.

This is particularly due to so-called “serial ADA suits” – cases brought by the same individual against multiple businesses.¹²⁰³ California plaintiffs Chris Langer and Martin Vogel have reportedly each been the plaintiff in more than 800 lawsuits¹²⁰⁴ and northern California attorney Scott N. Johnson has filed more than 2000 in his own name since 2004¹²⁰⁵, mainly on the basis of access to commercial establishments. Because many of the defendants are small business owners and the violations alleged may have been detected despite efforts of the owners to comply with applicable regulatory standards, the **claims are frequently characterized as abusive**.¹²⁰⁶

The ADA Title I provisions are less disparaged, but this might not be entirely positive. There are, for example, doubts about its real impact due to the **weakness of its enforcement**. ADA expert Professor Susan Paris explains:

*I think there are two major limitations of the ADA. First, the ADA is a voluntary compliance law. That is, employers are simply expected to voluntarily comply – they do not have any reporting requirements. This is different from other civil rights laws, in which employers must track and report their compliance, and in which compliance is mandatory. Second, the ADA provides only injunctive relief and attorney fees to plaintiffs who successfully sue and win their cases. [...] Employers may think it’s not worth complying with the law because the likelihood of a lawsuit is so small, and the amount of damages, even when an employer loses, are relatively low.*¹²⁰⁷

Parish feels that affirmative action for persons with disabilities needs to replace the non-discrimination-only framework of the current ADA.¹²⁰⁸

¹¹⁹⁹ E.g., Mark Pulliam, The ADA Litigation Monster, City Journal, Spring 2017 (<https://www.city-journal.org/html/ada-litigation-monster-15128.html>); NFIB, Slaying the Litigation Monster, 27 June 2017 (<https://www.nfib.com/content/legal-blog/legal/slaying-the-ada-litigation-monster/>).

¹²⁰⁰ TRAC, Americans with Disabilities Act Lawsuits Up 28 Percent in FY 2016 (27 October 2016) (available at <https://trac.syr.edu/tracreports/civil/444/>; viewed 31 July 2019).

¹²⁰¹ Id. at Figure 1 (using TRAC 2016 data).

¹²⁰² Id.

¹²⁰³ TRAC, Americans with Disabilities Act Lawsuits Up 28 Percent in FY 2016.

¹²⁰⁴ Id.

¹²⁰⁵ CBS News, 1 August 2018 (<https://www.youtube.com/watch?v=owQ5QBNZ1j4>).

¹²⁰⁶ See id.

¹²⁰⁷ See Julian Cardillo, The Americans with Disabilities Act: 25 Years Later, supra.

¹²⁰⁸ See Julian Cardillo, The Americans with Disabilities Act: 25 Years Later, supra.

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