

MAKING A DISCRIMINATION CHARGE

Note: Words and phrases in **bold** are explained in the glossary at the end.

The South Dakota Human Relations Act of 1972 prohibits discrimination on the basis of race, color, creed, religion, sex, national origin, ancestry or disability. You are protected under the law, if you have been discriminated against as

- an employee
- a labor union member
- a home or real property owner
- a tenant
- a student
- a recipient of public services from a government agency, **or**
- a customer of public accommodations, a private business or a bank because of your membership in one of these protected classes.

State law also prohibits discrimination on the basis of family status, but this applies only to housing accommodations. State law does not cover age discrimination as an employee. For that, you will need to use federal law.

Will South Dakota or the federal government be working with my discrimination charge?

Your charge will be filed with the state. In some employment-related cases, it may also be filed with the federal government.

Several federal laws prohibit discrimination in employment on the basis of race, color, religion, sex, national origin, disability or age. These laws include the

- Civil Rights Act of 1964, Title VII (race, color, religion, sex and national origin)
- Americans with Disabilities Act of 1990 (disabilities)
- Equal Pay Act of 1963 (unequal pay based on sex)
- Age Discrimination in Employment Act of 1967 (age)

The U.S. Equal Employment Opportunity Commission (EEOC) enforces these laws. If your case falls under the **jurisdiction** of both the state and federal laws, we will automatically notify the EEOC and your charge will in be **dual-filed** (as a state and federal charge). It is important to know that Title VII of the Civil Rights Act can be used only if the employer has 15 or more employees. The Age Discrimination in Employment Act can be used only if the employer has 20 or more employees.

At present, no federal law prohibits employment discrimination based on creed or ancestry. These aspects are covered, however, under South Dakota law.

Why is age discrimination different from other types of discrimination?

If you are claiming employment discrimination based on your age, South Dakota law does not cover you. Nevertheless, you need to send your information to us so we may help you in filing your charge. We will send your case to the EEOC, which enforces the Age Discrimination in Employment Act and will investigate your charge.

Note: In order to file a charge using this law, you must be at least 40 years old, the employer must employ 20 or more employees, and you must file a **charge of discrimination** within 180 days of the last date of discrimination. Age discrimination cases do not qualify for any deadline extensions.

INTAKE FORM

Before filling out the Charging Party Intake form, located at dlr.sd.gov/human_rights/forms, make a list of all witnesses and all important dates. If there are documents, gather them in one safe place. Documents and evidence from witnesses are both important in proving your case.

Fill out the Charging Party Intake Form as completely and truthfully as possible. This form is an important part of the process. However, it is not your charge and does not need to be **notarized**. Return the signed and dated form (and the Disability Intake Questionnaire, if necessary) to the South Dakota Department of Labor and Regulation (DLR) Division of Human Rights.

It is the duty of the Division, as a neutral independent fact-finder, to conduct an impartial investigation. We do not represent you in your complaint. You have the right to get a lawyer's advice at any time and at your own expense.

The Division of Human Rights will review the information on the form(s), decide if the claim can be handled under South Dakota and/or federal law, and draft a formal charge for your approval. Review this document to be sure it is correct. If you find mistakes, please call the human rights representative who drafted your charge to make corrections as needed. When you are sure the **Charge of Discrimination** is accurate and you want to move forward with your charge, find a **notary public** and sign and date the Charge of Discrimination in the notary's presence. The Charge of Discrimination is not valid if it is not **notarized**.

Deadlines

If you are making a charge under South Dakota law, the Division of Human Rights must receive your notarized **Charge of Discrimination** within 180 days from the last date of discrimination. If you return the Charge of Discrimination after 180 days, state law says we are not allowed to proceed with your case.

If your charge is **dual-filed** (as both a state and federal complaint), your federal deadline is 300 days from the last date of discrimination. This means that, if your charge is more than 180 days but less than 300 days old, the Division of Human Rights can assist you with making your formal charge. However, the Division will transfer the case directly to the EEOC.

Because South Dakota law does not prohibit age discrimination, such a case would automatically be filed only with the EEOC. The 180-day deadline applies.

What are my responsibilities once the formal charge is made?

You must keep the Division of Human Rights informed of your whereabouts and contact information. If we cannot find or contact you in some way, it is likely that your charge will be dismissed. If you fail to keep appointments, answer our letters or phone calls, or show up for a public hearing, your charge might be dismissed for lack of cooperation.

It is also important to know how to contact any witnesses. A witness that cannot be found cannot be used to support your claim.

Can someone retaliate against me for filing a charge?

South Dakota law protects you from retaliation. If you suffer any form of retaliation for making a complaint, contact the Division immediately at 605.773.4493.

DETERMINATION

After we investigate your claim, we will decide whether it shows enough evidence to say that discrimination happened. This is known as finding **probable cause** or finding **no probable cause**. We will send you a copy of our **determination** (decision) regarding probable cause, summarizing and analyzing the facts of your case.

Before we make a decision on your case, we may be able to resolve your complaint with a **no-fault negotiated settlement**. We would act as a facilitator for the two sides as you negotiate. Accepting a negotiated settlement is completely voluntary. You may refuse it if you think it is unfair. If negotiations fail, we will proceed with a full, fair and impartial investigation and issue a **determination**.

To make a determination, the Division of Human Rights uses the legal concept known as the **disparate treatment theory** of discrimination. This is to follow certain guidelines established in U.S. courts. These guidelines say each case must prove **disparate treatment** (discrimination) in three ways. These are:

1. The **charging party** (or **plaintiff**) you must establish a **prima facie case**. (See “burden of proof” below.)
2. The **respondent** (the party you are charging) must give a real nondiscriminatory reason for whatever action taken. (See the section on **burden of production** below.)
3. the **charging party** (or **plaintiff**) must show the respondent’s reason is **pretextual** (a false reason used to cover up a real reason). You may also be required to provide more proof that the respondent intended to discriminate against you.

BURDEN OF PROOF

As the charging party, you hold the **burden of proof**. This means you must prove that the discrimination happened. You must make a **prima facie case**. Be able to show you:

- are part to a protected class of people because of your race, color, creed, religion, sex, etc.;
- suffered harm; **and**
- why you believe your membership in the protected class was the reason for the harm.

After you have established your **prima facie case**, the **respondent** must respond to your alleged claim. This is called the **burden of production**, which means the respondent must give a nondiscriminatory reason for the action(s) taken. The respondent must present evidence that the action against you was based on legitimate nondiscriminatory reasons.

If the respondent is able to give an apparently acceptable reason, you must then show enough evidence to prove that the explanation given is a **pretext**, a false reason used to disguise the real reason. You will have to show that the respondent did intend to discriminate.

What happens if the Division of Human Rights finds no probable cause?

We will send you a written **no probable cause determination**.

What can I do if the Division of Human Rights decides I don’t have enough evidence to show probable cause?

A **no probable cause** decision may be appealed to the circuit court within 30 days of the date we issued a determination that dismissed your charge.

If your case involves employment discrimination, you may also request a **substantial weight review** from the EEOC if your case is **dual-filed** under Title VII of the Civil Rights Act or the Americans with Disabilities Act. You have only 15 days from the time you receive our **determination** to make this appeal to the EEOC, asking them to review your case. You may also request the EEOC to issue you a **right-to-sue letter**.

Right-To-Sue Letter

If your charge is **dual-filed** you may request that the EEOC issue you a **right-to-sue letter** so that you can pursue your case in federal court. A right-to-sue letter is just permission to sue in federal court.

Your request must be in writing. The EEOC may deny your request if it is made before your case is 180-days old because the matter will still be under investigation. They may issue the letter any time after 60 days from the date we received your charge. After they issue the letter, you have 90 days to begin your federal court suit.

What happens if the Division of Human Rights finds probable cause?

If we have found **probable cause** in your case, we will send you an official **Determination of Probable Cause** and a proposed **Conciliation Agreement**.

If we find **probable cause** in your case, we will propose a **conciliation agreement**. This agreement will state certain terms and conditions that the **respondent** must comply with, if both parties accept the agreement. These terms and conditions are intended to place you in the position you were in before the discriminatory action. This is known as **equitable** or **make-whole relief**, and might include back wages, cease-and-desist actions, specific training, policy changes, etc.

What will happen if my case cannot be settled by a conciliation agreement?

If we decide that **probable cause** exists and if reconciliation attempts fail, either you or the **respondent** may decide to take this matter to circuit court.

If neither of you decide to do this, the matter will automatically go to a public hearing in front of the South Dakota Commission of Human Rights.

What will happen if my case goes to a hearing?

Discrimination hearings are held by the five-member South Dakota Commission of Human Rights. The Commission will appoint a hearing examiner who hears the evidence, makes decisions on what evidence can be presented and decides whether objections are valid. The commission hearings are much like a civil trial. However, the rules for presentable evidence are not as strict. Before the hearing, we will send you at least two different guides that explain your rights during the hearing. If you haven't already, you will probably want to hire a lawyer.

Hearings are **de novo**. This means that the commission has not seen our investigation files or decisions. All your evidence must be introduced during the hearing, when the commissioners will hear it for the first time.

What will happen if my case goes to circuit court?

A court case will be similar to a public hearing. You must present your evidence **de novo** to a judge and perhaps a jury. The rules for acceptable evidence are somewhat stricter, however. You have one year from the date that you give us your written notice that you want to take your case to circuit court to file your court case. If you haven't already, you will probably want to hire a lawyer.

Please call 605.773.3681 if you have any questions.

GLOSSARY

There are many terms and phrases used when describing or discussing discrimination claims. You may hear them from us, from hearing commissioners, and/or your lawyer (if you have one). The glossary below will help you understand most of them. However, you have a right to ask for an explanation of any term or phrase. If you have questions, contact 605.773.3681.

Allege—To allege something is to assert or claim it without proof or before it is proved. Until your case is decided, your claim is an allegation.

Burden of proof—This is your obligation to prove whatever you have claimed.

Burden of production—This is the obligation of the person or institution you have charged to give a non-discriminatory reason for the actions under dispute.

Charge of discrimination—A formal complaint allowing us to investigate your discrimination claim. Once you sign it and have it **notarized**, it is a legal document that allows us to proceed with an investigation.

Charging party—After you file your formal charge, you are then called the charging party or plaintiff.

Conciliation agreement—A proposed solution to the case, which describes our recommendations to resolve your charge after we have issued a **probable cause determination**.

De novo—A Latin phrase that means "once again." In a discrimination **hearing**, your charge will be presented "de novo," meaning that you will present your witnesses and documents again, because the commissioners have not heard your case yet. The reports and decisions we make during our investigation of your case cannot be used as evidence.

Determination—This is the conclusion reached by the Division of Human Rights when we have finished investigating your claim. It may or may not be in your favor.

Disparate treatment—This happens when one person is treated less favorably or differently than others in a similar situation because of that person’s race, color, creed, religion, sex, national origin, ancestry, disability, age or, in housing matters, family status.

Disparate-treatment theory—We use this legal concept to investigate your claim. The theory requires your proof to have several different elements in order to be valid.

Dual-filed—This describes your case if it is filed as both a violation of state and federal discrimination law.

Equitable relief—A solution to your case that is fair to you and that tries to put you in the same position you were in before the discrimination happened. A **conciliation agreement** may use this term or use **make-whole relief**.

Hearing—This is a meeting of all parties, held in front of the South Dakota Commission of Human Rights. It works like a court trial but has some different rules and procedures.

Jurisdiction—If a government agency, a commission or court has the authority to decide a case, it has jurisdiction. If a certain law applies to a case, we also say that it “has jurisdiction” or that the case “falls under its jurisdiction.”

Make-whole relief—A solution to your case that is fair to you and that tries to put you in the same position you were in before the discrimination happened. A **conciliation agreement** may use this term or use **equitable relief**.

No-fault negotiated settlement—If it is possible for us to resolve your case before we make a **determination**, we may suggest this type of settlement. We would act as a facilitator as the two sides of the case negotiate. Agreement to such a solution is voluntary.

No probable cause—If our investigation finds that it is not likely that discrimination took place, our **determination** will include a “finding of no probable cause.”

Notarized—A document that has been signed in the presence of a **notary public** is notarized. This document shows the notary’s seal and signature and is a valid document that can be used in a law court or hearing.

Notary public—A person who is authorized to certify documents with a legal seal.

Pretextual—This term describes a false reason used to hide the real one.

Prima facie case—A prima facie case means you can prove that 1) you belong to a protected class of people because of your race, color, creed, religion, sex, etc.); 2) you were qualified for the job/performing your job satisfactorily; 3) you suffered harm; and 4) your membership in the protected class was the reason for the harm.

Probable cause—If our investigation finds that it is more likely than not that discrimination took place, our **determination** will include a “finding of probable cause.”

Respondent—This is the person or institution you file your charge against.

Right-to-sue letter—If your case is **dual-filed** with the EEOC, you may request this letter, which gives you the right to have your case heard in federal court.

Substantial weight review—If your case is **dual-filed** with the EEOC, and if we have issued a **determination of no probable cause**, you may appeal to the EEOC for a review of your case.