

Employment and legal capacity

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Introduction

As a part of our 5E's plan (Empower, Elect, Educate, Employ, End segregation), Inclusion Europe focuses on the impact of denying legal capacity on **Employment**.



Read [all reports on Legal capacity impact](#).

Learn more about the 2021 [Employ campaign](#).

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) states that “*persons with disabilities enjoy **legal capacity** on an equal basis with others in all aspects of life*”¹. It is a condition to be independent and autonomous for people with intellectual disabilities. Nowadays, many European countries still have old laws which are incompatible with Article 12 of the CRPD². Criteria for the loss of legal capacity vary across the EU and that State Members laws are outdated³. Putting people with intellectual disabilities under guardianship remains the most used solution by the EU Member States, but Sweden and Germany can be considered as examples for

¹ UNCRPD, Article 12, <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

² FRA, <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>

³ FRA, <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>

providing “support to exercise legal capacity”⁴. Legal capacity is important because it is a condition to access many other rights.

So is **employment**, as it gives people with disabilities a sense of belonging to the community. Article 27 of the CRPD recognises the right of people with disabilities to access to work⁵. But many people with disabilities are still excluded from the labour market.

Only 50.8% of people with disabilities is in employment, while the rate of employed people without disabilities is 74.8%⁶. For people with intellectual disabilities specifically, the employment rate is much lower still⁷:

- In Ireland 36% of adults with an intellectual disability were engaged in some form of work; 29% in sheltered centres, and only 7.1% in the open labour market.
- In Scotland, only 6% of people with learning disabilities have a job.

Among the obstacles that people with intellectual disabilities face when looking for employment, the deprivation of their legal capacity definitely constitutes one of them.

How is legal capacity linked to the possibility for people with disabilities to have a job and how can employment improve people with disabilities abilities to make decisions?

⁴ FRA, <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>

⁵ UNCRPD, Article 27, https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf

⁶ Inclusion Europe, “Employment of people with intellectual disabilities. Before, during and after the Covid-19 pandemic”, https://www.inclusion-europe.eu/wp-content/uploads/2021/01/Covid-report-design-finalised_accessible.pdf

⁷ Employment and Covid impact, 2020. https://www.inclusion-europe.eu/wp-content/uploads/2021/01/Covid-report-design-finalised_accessible.pdf

1. Legal capacity as a condition to have a job

Legal capacity guarantees access to the right to choose and, therefore, to many other rights.⁸ Having legal capacity means being able to accept or refuse a work contract without a legal guardian⁹. The ability to have a job and to manage money is also fundamental to becoming independent and be able to make choices as member of a community.

Therefore, even if some people might need support to make decisions, this should not mean that their possibility to decide must be taken away. In the past and still nowadays, persons with intellectual and psychosocial disabilities faced more challenges worldwide.

Denial of, or restriction to, their legal capacity is usually justified based on:

- a medical condition (status approach),
- a previous decision perceived as poor (outcome approach),
- having decision-making skills perceived as deficient (functional approach).

⁸ Inclusion Europe, "The Right to Make Decisions", <https://www.inclusion-europe.eu/wp-content/uploads/2018/10/Legal-capacity-and-empowerment.pdf>

⁹ "Fact Sheet – Independent Living for People with Intellectual Disabilities", <https://inclusion-europe.eu/wp-content/uploads/2018/07/Fact-sheet-independent-living-for-people-with-intellectual-disabilities.pdf>

A. Legal capacity and autonomy

“Legal capacity is the ability to hold rights and duties (legal standing) and exercise those rights and duties (legal agency).”¹⁰

Legal capacity is the **right to have rights** and **the ability to exercise them**. On one hand, it means having the ability to hold rights and bear responsibilities; on the other, legal capacity allows the person to exercise, claim and defend rights and fulfil responsibilities on their own.

Legal capacity also means being able to make legally binding decisions.¹¹

Legal capacity acts “as a sword to enable one to make one’s own choices” and “as a shield fending off others when they purport to make decisions for us—even when well-intentioned”¹².

In life, everyone has the possibility to make mistakes and to learn from them. It should be the same for people with intellectual disabilities.

Here are some examples of aspects of life where legal capacity is needed:

- Managing, owning or inheriting property
- Accessing financial resources, including loans and mortgages

¹⁰ General Assembly, ‘Report of the Special Rapporteur on the rights of persons with disabilities’ A/HRC/37/56 (12 December 2017), 7 and Easy-to-Read version, 3.

¹¹ General Assembly, Report of the Special Rapporteur on the Rights of Persons with Disabilities A/HRC/37/56 (12 December 2017) 14.

¹² Legal capacity law reform: The revolution of the UN Convention on the rights of persons with disability by Gerard Quinn, Professor of Law, Director, Centre for Disability Law & Policy, NUI Galway <http://frontline-ireland.com/legal-capacity-law-reform-the-revolution-of-the-un-convention-on-the-rights-of-persons-with-disability/>

- Having a birth certificate and passport
- Making medical decisions
- Living independently
- Choosing where or with whom to live
- Getting married and found a family
- Accessing to justice
- Voting or standing for elections
- **Signing contracts, including employment contracts**

Safeguards for people with intellectual disabilities are interpreted as a form of protection for subjects who are judged as not having self-determination; this definition includes people with intellectual or psychological disabilities. For this reason, people with intellectual disabilities are often appointed a guardian, believed to be trustful and who assumes the power to make decisions because the person is considered *“incapable of caring for himself or herself”*¹³.

These **measures** are **grave**: an approach leading to restriction of the legal capacity is unacceptable.

*“[A]t all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.”*¹⁴

Where an individual’s choice cannot be certain, for example in case of complex support needs, the decision must be based on the best interpretation of the

¹³ Hofmayer Sarah & Chen Bo, “Denial of Legal Capacity as a Barrier to Inclusive Employment”, *Ars Vivendi Journal*, No.12, March 2020

¹⁴ General Assembly, ‘Report of the Special Rapporteur on the rights of persons with disabilities’ A/HRC/37/56 (12 December 2017), <https://www.ohchr.org/documents/hrbodies/crpd/gc/dgcarticle12.doc>

individual's will and preference not on the "best interest principle", as indicated through prior manifested preference or advanced directive.¹⁵

The Committee on the Rights of Persons with Disabilities expressly said that a disability can never be a reason for denying an individual their right to legal capacity.

Restrictions and limitations on legal capacity do not just deny the rights of people with disabilities, they also "*perpetuate discrimination and exclusion against persons with disabilities and pave the way to different forms of abuse, corruption, exploitation, coercion and institutionalisation.*"¹⁶

¹⁵ General Assembly, 'Report of the Special Rapporteur on the rights of persons with disabilities' A/HRC/37/56 (12 December 2017), 7 and Easy-to-Read version, 5.

¹⁶ General Assembly, Report of the Special Rapporteur on the Rights of Persons with Disabilities A/HRC/37/56 (12 December 2017) 16.

B. Consequences of denial of legal capacity on employment

Restrictions of legal capacity combined with social barriers such as prejudice and discrimination often prevent persons with intellectual disabilities from accessing employment, from the moment of concluding an employment contract.

Once legal capacity is limited, people with intellectual disabilities are normally put under a **substituted decision-making** regime or **guardianship**, where a legal representative (or guardian) is appointed to make decisions on their behalf.

In the more extreme cases, persons with disabilities are put under **plenary guardianship**, which means that the guardian assumes the right to make all decisions and totally supplants a person's self-determination. By contrast, when **partial guardianship** applies, the person maintains the right to make certain kinds of decisions; however, **the involvement of the guardian is necessary to take legally effective decisions on important matters, including employment.**

It is also important to highlight the role of the family as "informal guardianship". Because of the often limited social network of people with intellectual disabilities, they might easily find themselves "*victim of over-protection and isolation*"¹⁷.

All this represents a significant barrier to job opportunities for people with intellectual disabilities.

The person under guardianship cannot sign an employment contract on their own.

Contracts or agreements entered by a person whose legal capacity is limited **can be annulled** for being void and not enforceable.

¹⁷ Hofmayer Sarah & Chen Bo, "Denial of Legal Capacity as a Barrier to Inclusive Employment", *Ars Vivendi Journal*, No.12, March 2020, file:///C:/Users/Fabio/Downloads/2020-Chen-Hofmayer-AVJ12-final.pdf

So the validity of the employment contract often **relies on the guardian's approval**.

In the same way, any other important decisions impacting the relationship with the employer would depend on the guardian, including ending a work contract.

An employee is often asked to **do legally binding acts on behalf of their employer**. Thus, due to restrictions on the legal capacity, employers may be concerned about the lack of capacity of persons with intellectual disabilities to interact with third parties (clients) regarding private legal relationships. This aspect represents a further barrier to employment as it would prevent employers to hire a person whose legal capacity is limited.

Another aspect to consider concerns the person's to **manage and decide how to spend their own money**. The guardian could take over the management of the salary or wage of the employee with intellectual disabilities.

Persons with intellectual disabilities with limited legal capacity lack self-determination in this area. The CRPD requires abandoning the best interest principle, which consists of identifying the decision a "reasonable" average person in the same situation would take.

When the **best interest principle** applies, the guardian makes the decisions on the behalf of the person following an objective evaluation of the given circumstances aimed at identifying what is the best to do regardless of the aspirations, preferences, wishes, and overall subjective view of the person. However, what is considered to be the best for an average person may be at odds with what is considered to be the best by the person concerned. The best interest principle must be abandoned as it depersonalises the decisions that impact so greatly the life of the person with limited legal capacity.

On the contrary, the decisions impacting any aspect of the life of a person with disabilities, including of course employment, should be anchored to their will and preferences, which refer to the subjective, individual choices and tastes of the specific person concerned.¹⁸

Decisions made according to the will and preferences of the person are decisions that take into account aspirations, wishes, overall personal outlook, and personality of the person in need of support.

The best interest principle may tend to focus on the financial aspects of employment, such as ensuring a continued income. However, this can be at the cost of personal wishes and preferences. There is more to an employment decision than the financial dimension, such as contributing to society, building personal identity, gaining self-esteem and respect, finding something interesting to do and belonging to a group, a social network. It is therefore hard, if not impossible to even determine what the objective best interest would be.¹⁹

¹⁸ Committee on the Rights of Persons with Disabilities, General comment No. 1 CRPD/C/GC/1 (2014) - Article 12: Equal recognition before the law.

¹⁹ Hofmayer, Sarah & Chen, Bo. (2020). Denial of Legal Capacity as a Barrier to Inclusive Employment. 12. 2-24.

In short, **restrictions to the legal capacity** of a person with intellectual disabilities represent a **barrier to employment** as the person would be deprived of:

- the capacity to sign the employment contract on their own;
- ability to carry out any tasks that require acting on behalf of the employer;
- the capacity to make the most important decisions regarding the relationship with the employer, including the termination of the contract;
- the opportunity to choose the job and make all the relevant decisions according to their wishes and preferences;
- the capacity to receive the salary and decide how to spend their own money

Instead, these decisions would be subject to the guardian's evaluation based on the best interest principle.

2. Employment as a possibility to be a part of the community

A. Employment of people with intellectual disabilities

There are several options and solutions to ensure employment of people with intellectual disabilities in the open labour market.

First, **existing legal capacity-related barriers should be eliminated** for persons with disabilities trying to access employment. This means recognising the full capacity of persons with intellectual disabilities by removing any form of restrictions, limitations, and provisions denying their legal capacity, in accordance with Article 12 of the CRPD.

Recognising the full legal capacity of the person is crucial for self-determination, taking autonomous and legally effective decisions, and accessing employment according to their wishes and preferences.

Removing restrictions to legal capacity also means abolishing substituted decision-making regimes that replaces the persons' capacity with the decisions of a third party. Plenary and partial guardianship should be overcome.

Access to employment as well as any job-related decisions should not be subject to approval, consent or veto of anyone. As with any other decision impacting the life of the person with intellectual disabilities, decisions concerning employment should be an expression of the person's choices, taste, subjective consideration and personal aspirations. **The national legal framework should therefore abandon the best interest principle along with guardianship.**

Of course, recognising full legal capacity of persons with intellectual disabilities does not mean denying the numerous challenges when it comes to making decisions. However, traditional legal capacity systems based on paternalistic views and stereotypes that disempower persons with intellectual disabilities must come to an end.

Persons with intellectual disabilities need **solutions that meet their needs** allowing them to overcome those challenges, all while leaving their autonomy and independence untouched.

On this point, UN CRPD affirms that States must *“take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”*²⁰.

Accordingly, as the CRPD Committee highlights, any form of substituted decision-making regime must be replaced with **supported decision-making mechanisms**²¹.

“Support” is an umbrella term that includes both informal and formal arrangements, of varying types and intensity. These should vary from one person to another due to the diversity of the needs (if any) of the person but, in any case, the various options must give primacy to a person’s will and preferences and respect human rights.

With regard to employment, support may and should entail what is known as supported employment.

Supported employment aims to give persons with intellectual disabilities the necessary support in order to increase their chance to obtain and/or maintain work.

²⁰ UNCRPD, Article 12(3).

²¹ Committee on the Rights of Persons with Disabilities, General comment No. 1 CRPD/C/GC/1 (2014) - Article 12: Equal recognition before the law.

Supported employment follows the idea of '**place, train and maintain,**' prioritising jobs that meet the criteria and wishes of the person and then focusing on maintaining employment.²²

The support needed is secured by the provision of a **work assistant** or a **job coach**.

"I will do whatever it takes to make the employment of our first person with intellectual disabilities work. I will call upon an external organisation to start with. In the beginning, I would very much appreciate the presence of a job coach at the workplace. Training for the employee with intellectual disabilities will be provided. All my staff gets training when they start in this company."²³

This role aims to offer the person with intellectual disabilities **ongoing support**, from the job search, the conclusion of employment contract, the day-to-day work-related issues to the possible termination.

The **support provided by the job coach is varied, depending on the the particular needs of the person. The coach should work with both the employer and the employee to create a successful partnership.** The objective is to facilitate long-term success.

A crucial moment of support is represented by **job matching**. It refers to the processes aiming to associate a candidate or employee with intellectual disabilities to the most appropriate set of tasks.

²² Hofmayer, Sarah & Chen, Bo. (2020). Denial of Legal Capacity as a Barrier to Inclusive Employment. 12. 2-24.

²³ Testimonial case 5, My Talent for Diversity MTFD Project _FINAL REPORT_19 June 2020, 24.

It includes job crafting which means "shaping" the job so that it better matches the interests, capacities and the employee's abilities and skills²⁴.

Job coaches also may:

- assist the person with the employment contract
- help the employee with intellectual disabilities acquire the skills for the job
- act as an advocate
- work with the employer to guarantee reasonable accommodations as required by law
- support employers in learning how to communicate effectively with the employee
- help the employee develop appropriate workplace behavior²⁵.

Besides the support on practical aspects, **the job coach would also support the employee in their decision-making as for any questions arising regarding the employment situation itself.**

Indeed, in the supported employment model, the job coach is this figure most familiar with the employment specifics and have the knowledge of the level of job satisfaction, stress and wishes of the person to explain the implications of potential changes and give relevant advice²⁶.

²⁴ MTFD_FINAL REPORT_19June2020, 12.

²⁵ See, Mentalhelp.net Supported Employment and Integrated Work Sites <https://www.mentalhelp.net/intellectual-disabilities/supported-employment-and-integrated-work-sites/>

²⁶ Hofmayer, Sarah & Chen, Bo. (2020). Denial of Legal Capacity as a Barrier to Inclusive Employment. 12. 2-24.

B. Employment as a means of inclusion

“Having a job is about being independent, it is about having co-workers and it makes me feel that what I do is important. I have been working for a long time and I am happy with my job. But I know not all people with intellectual disabilities have the opportunity to have a job.”

Soufiane El Amrani

Guaranteeing access to employment for people with intellectual disabilities is crucial to achieve an inclusive society where they are able to make their own choices and live independently. **Having a job lets people with disabilities have financial independence, feel valuable, and contribute their talents to society.**

Being employed also raises the social skills of people with intellectual disabilities, by encouraging them to form friendships in the workplace.

“Having a job is important. If you have a job and a salary, you can be financially independent. You also have colleagues and friends at work.” **László Bercse**

Having a job is also essential for the confidence, self-esteem and personal identity of all of us; and it is no different for people with intellectual disabilities. They also want and need to be useful by carrying out duties and completing tasks that are important for their employer. They see their skills are being put to good use.

However, due to the highlighted social and legal barriers, the great majority of people with intellectual disabilities are unemployed and are at risk of poverty. Creating the opportunity for financial independence is therefore life-changing for them.

Despite being excluded from employment opportunities, **people with intellectual disabilities are talented and skilled.**

*"My worker with intellectual disabilities is very active and dedicated. I would like 30 more workers like him."*²⁷

Offering work to people with intellectual disabilities is highly beneficial not only for the employees but also for the workplace and the open labour market as a whole.

Workers with intellectual disabilities are seen as typically stable, reliable and competent employees, and as such, they represent a potentially valuable resource for the workforce²⁸.

Offering work to people with intellectual disabilities is highly beneficial not only for the employees but also for the open labour market as a whole.

"My Talents for Diversity" tackles the issue of unemployment among people with intellectual disabilities by promoting diversity management amongst private and public employers. There are many companies and organisations that are now trying to change by employing more people with intellectual disabilities and encouraging their inclusion in the workplace through ongoing support.

²⁷ Testimonial case 2, My Talent for Diversity MTFD Project_FINAL REPORT_19 June 2020, 12

²⁸ Lysaght et al. (2010) - Canada

As the report underlines, active participation of people with intellectual disabilities in the organisation:

- can change processes and systems in a good way for all
- provides a different vision on things that can renovate the work environment
- boosts the pride of the employees with intellectual disabilities making them excellent ambassadors. They will be keen to show the outside world their employer cares for diversity and gives them chances. The company will benefit from it.
- increase tolerance and team spirit among colleagues²⁹.

Previous publications

Fundamental Rights Agency (FRA) [report](#) on legal capacity.

Mental Health Europe (MHE) [report](#) on exclusion.

Inclusion Europe position [paper](#) on safeguards for legal capacity.

Inclusion Europe [report](#) on employment and Covid-19.

Plena inclusión [Guidelines for employers](#) (.docx).

Antwerp Management School (AMS) [research](#) on inclusive employment.

Inclusion Europe [research](#) on laws and policies for inclusive employment.

European Union [Diversity Charters](#) on employment.

²⁹ My Talent for Diversity MTFD Project_FINAL REPORT_19 June 2020, 32



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**20 million people with intellectual disabilities and their families
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