



**U. S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

**REASONABLE ACCOMMODATIONS UNDER THE
AMERICANS WITH DISABILITIES ACT**

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**REASONABLE
ACCOMMODATIONS
(APPLICATION PROCESS)**

**WHAT DOES
BEN DO?**

Ben is an accounting manager for a mid-sized manufacturing firm. He is interviewing applicants for an accounts payable analyst. The job involves reviewing billing, preparing payable reports and spreadsheets on the computer, and physically auditing purchases for accuracy at the receiving docks. Many of the tasks typically involve visual examination of reports, parts and supplies and the ability to prepare documents on the computer. Sue has 15 years experience at this sort of work and several positive recommendations. Sue comes in for her interview. She is seeing impaired, and she walks with probing cane. The interview process typically involves having the applicant work through various accounting situations. The scenarios are written on sheets of paper. The interview process also involves a tour of the receiving docs and manufacturing facility, which is very noisy and has many large fabricating machines operating at high speeds.

WHAT ARE SOME OF BEN'S OPTIONS?

- Conduct the interview as he does with every applicant
- Skip the written portion of the interview
- Give the tour as he would with every applicant (and look back from time-to-time to see if Sue is still there)
- Ask Sue if she needs a reasonable accommodation to go through the application process
- But, what is the big elephant in the room?

CAN BEN ASK SUE IF SHE NEEDS A REASONABLE ACCOMMODATION TO DO THE JOB?

- What do we tell our hiring managers to do?

▪ **Don't ask**

PRE-OFFER/PRE-EMPLOYMENT

CAN'T ASK!!

- o Do you have a disability? (Exception for federal contractors and subcontractors (§503 of Rehabilitation Act) and other compliance with federal affirmative action programs)
- o What is the nature of your disability/condition/disease?
- o How severe is your disability/condition/disease?
- o Have you ever been hospitalized?
- o Have you ever been treated for mental illness?

PRE-OFFER/PRE-EMPLOYMENT

CAN'T ASK!!

- Have you ever been addicted to drugs?
- Are you, or have you ever been an alcoholic?
- Have you ever filed a worker's compensation claim or suffered an injury on a previous job?
- Will you need time off for medical treatment or other reasons associated with your disability?
- Will you need an accommodation to perform this job?

PRE-OFFER/PRE-EMPLOYMENT

CAN ASK!!

- Can you perform the job with or without an accommodation?
- Are you currently using drugs illegally?
- Do you drink?
- How many days did you take off from work last year?
- Will you be able to meet the requirements of our work hours, overtime work, attendance policy?
- The employer may test the ability of all applicants to perform the duties of the job (must be job-related and consistent with business necessity), such as aptitude tests, agility tests, job demonstrations

PRE-OFFER/PRE-EMPLOYMENT

- Employer may ask applicant if he or she needs a reasonable accommodation to go through the job application process
- If the impairment is obvious, or if the applicant self-discloses an impairment, and the employer has reason to believe the impairment may affect the person's ability to perform the job, then the employer may ask the applicant if he or she will need a reasonable accommodation to perform the job
- But, the employer cannot ask further questions about the nature of the impairment

EVALUATING APPLICANTS

When an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. An applicant's disability would be a "known disability" either because it is obvious (for example, the applicant uses a wheelchair), or because the applicant has voluntarily disclosed that s/he has a hidden disability.

- In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability
- However, when an employer could reasonably believe that an applicant will need reasonable accommodation to perform the functions of the job, the employer may ask that applicant certain limited questions. Specifically, the employer may ask whether s/he needs reasonable accommodation and what type of reasonable accommodation would be needed to perform the functions of the job. The employer could ask these questions if:
 - the employer reasonably believes the applicant will need reasonable accommodation because of an obvious disability;
 - the employer reasonably believes the applicant will need reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
 - an applicant has voluntarily disclosed to the employer that s/he needs reasonable accommodation to perform the job.

POST-OFFER/PRE-EMPLOYMENT

At this stage the employer may make medical inquiries or require individuals to take medical exams as long as the same inquiries or exams are required of every individual in the same job category. They do not have to be job related or consistent with business necessity

POST-OFFER/POST-EMPLOYMENT

At this stage medical exams and inquiries are allowed only if they are job related and consistent with business necessity.

POST-OFFER/POST-EMPLOYMENT

- o Needed to assist in determining reasonable accommodation
- o Medical condition may pose a threat to employee or others
- o Must be based on objective evidence
- o No fishing
- o Random drug testing ok

MEDICAL INFORMATION

- o Must be kept confidential and out of personnel files
- o Only limited access
- o Supervisors and managers related to accommodation request
- o First aid personnel
- o ADA investigations, insurance carrier, workers compensation

MEDICAL
INFORMATION

A hair stylist, who has been unable to eat regularly because he is undergoing chemotherapy for melanoma, has lost 30 pounds. His co-workers and other clients are gossiping about whether he is HIV-positive or has AIDS.

What do you do?

REASONABLE
ACCOMMODATIONS
(ON THE JOB)

REASONABLE
ACCOMMODATION

- o Modifications to the job application process, the work environment, or the privileges and benefits of employment
- o Must enable the employee to perform the essential functions of his or her position (qualified)
- o May not cause an undue hardship to the employer
- o Request may be made by the employee or be readily apparent
- o Accommodation process should be timely and cooperative

WHEN DOES IT START?

- o When a qualified individual with a disability makes a request
- o When the accommodation is readily apparent
- o Can be requested for job, but also for the application process

EXAMPLES

- o Modifying the job application procedures
- o Restructuring the job, reallocating or redistributing marginal job functions
- o Altering when and how an essential job function is performed
- o Part-time or modified work schedules
- o Flexible leave schedules
- o Obtaining or modifying equipment or devices
- o Reassignment to a vacant position

NOT ACCOMMODATIONS

- o Eliminate essential job functions
- o Lower productivity or quality standards
- o Provide new supervisor
- o Excuse bad behavior
- o Monitor medications
- o Most permanent light duty requests
- o Most indefinite leaves of absence

GOOD QUESTIONS

- o Does the employee have a disability?
- o Does the employee have a valid need for an accommodation?
- o What are the essential functions of the position?
- o Is the employee qualified?
- o Does the accommodation work?
- o Does the accommodation create an undue hardship?

WHAT CAN THE EMPLOYER ASK?

- o Medical records relating to the impairment
- o Exams relating to the impairment
- o Questions relating to the impairment
- o Shouldn't fish or ask for more than is required to make accommodation determination
- o Employee has the right to a quick process

WHAT DO YOU THINK?



Are there circumstances when an employer must ask whether a reasonable accommodation is needed when a person with a disability has not asked for one?

WHAT EMPLOYER SHOULD DO

The employer has to start the discussion when the employer...

- 1) Knows that the employee has a disability.
- 2) Knows or has reason to know, that the employee is experiencing workplace problems because of the disability; and
- 3) Knows or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

WHAT DO YOU THINK?



A flower shop employee with an intellectual disability is in charge of stocking the containers in the refrigerators with flowers as they arrive from the suppliers. Each type of flower has a designated container and each container has a specific location in the refrigerator. However, the employee often misplaces the flowers and containers. Does the employer have to initiate discussions?

WHAT EMPLOYER SHOULD DO

Ask the employee about the misplaced items and ask if it would be helpful to label the containers and refrigerator shelves.

When the employee replies that it would be helpful, the employer as a reasonable accommodation, labels the containers and refrigerator shelves with the appropriate flower name and/or picture.

REQUESTING
REASONABLE
ACCOMMODATION

No magic words needed

- May use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."
- Requests do not need to be in writing, though an employer may choose to write a memorandum or letter confirming the request.
- Someone else might make a request for the individual, e.g., a family member, friend, health professional, or other representative, such as a job coach.

PLAIN
ENGLISH
WORKS

- An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to diabetes. The employee needed to be hospitalized therefore requires a few days off work to recover.
- ***Has an accommodation been requested?***
- ***If so, for what?***

THIS IS A REQUEST FOR SHORT-TERM
LEAVE AS AN ACCOMMODATION
ON BEHALF OF THE EMPLOYEE.

PLAIN
ENGLISH
WORKS

- An employee tells her supervisor:
"I am having trouble getting to
work at my scheduled starting
time because of side effects from
one of my medications. Can we
work something out?"
- **Has an accommodation been
requested?**
- **If so, for what?**

THIS IS A REQUEST FOR A MODIFIED
WORK SCHEDULE AS AN
ACCOMMODATION.


PLAIN
ENGLISH
WORKS

- An employee tells his supervisor:
"I need six weeks off work to get
treatment for cancer."
- **Has an accommodation been
requested?**
- **If so, for what?**

THIS IS A REQUEST FOR LONG-TERM LEAVE AS AN ACCOMMODATION.

THE INTERACTIVE PROCESS

THE REASONABLE ACCOMMODATION INTERACTIVE PROCESS



- A request for reasonable accommodation is the **first step** in an **informal, interactive process** between the individual and the employer.
- The ultimate goal of the interactive process is to find an accommodation that will allow the individual with a disability to perform the essential functions of the job up to the production standards of the employer or to enable an individual to meet a qualification standard.
- **Note: the interactive process should be informal -- not legalistic.**

ESSENTIAL JOB
FUNCTIONS

ESSENTIAL JOB
FUNCTIONS

- o The position exists to perform the function
- o There are a limited number of other employees available to perform the function, or among whom the function can be distributed
- o A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.

WHAT DOES EEOC
LOOK AT?

- Judgment as to which functions are essential
- Written job description prepared before advertising or interviewing
- Actual work experience of present or past employees in job
- Time spent performing a function
- Consequences of not requiring that function be performed

EXAMPLE

- Electrician – driving as an essential function
- An electrician may assemble, test or maintain electrical or electronic wiring, equipment, etc. They may diagnose systems and components using test equipment or hand tools. They wire circuit breakers, transformers or other components.
- The position of electrician does not exist to drive.

EXAMPLE

- Employer states that the position of a Data Entry Clerk requires the use of a computer to access, input and retrieve information from the computer.
- It is not “essential” that a person in this job enter information manually, or visually read the computer screen.
- Adaptive devices/software available that allows someone to perform these items. (Visually impaired person, person without arms)

ESSENTIAL JOB FUNCTIONS

John is a data entry clerk and spends roughly 95% of his time working at his desk. The data entry clerks are also required to assist in delivering mail if the mail clerk is out. There are twenty data entry clerks.

Is mail delivery an essential function of John’s job?

ESSENTIAL JOB
FUNCTIONS

John is a police officer. He has worked as a police officer for 20 years and has never once been required to fire a gun in the line of duty.

Is the ability to fire a gun an essential function of John's job?

ESSENTIAL JOB
FUNCTIONS

John looks through the job notices listed in the newspaper. He sees a warehouse position posted. The posting says that lifting 30 lbs. is an essential function of the position.

Is the posting correct?

POSITION DESCRIPTIONS

DEVELOPING POSITION DESCRIPTIONS

Understand	Understand essential job functions
Identify	Identify job requirements,
Write	Write the job description

EXAMPLES

PHYSICAL DEMAND	BETTER WAY TO SAY IT	EXAMPLE
Stand or sit	Stationary position	Must be able to remain in a stationary position 60% of the time.
Lift	Move, transport, position, put, install, remove	Frequently moves A/V equipment weighing up to 45 pounds across campus
Stoop, kneel, crouch or crawl	Position self (to)	Constantly positions self to maintain computers in the lab, including in server closets or under lab tables
Talk/Hear	Communicate, Convey, Express oneself, exchange information	Frequently communicates with clients who have inquiries about their billing. Must be able to exchange accurate information in these situations.

UNDUE HARDSHIP

WHAT IS AN UNDUE
HARDSHIP?

An employer is not obligated to provide an accommodation if doing so is cost prohibitive to its on-going operation or overly disruptive.

UNDUE HARDSHIP
CONSIDERATIONS

- i. the nature and cost of the accommodation;
- 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; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- iii. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- iv. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

UNDUE HARDSHIP
CONSIDERATIONS

- v. “[t]he 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.” 29 C.F.R. § 1630.2(P)(2)(v).

LEAVE AS A REASONABLE ACCOMMODATION

LEAVE AS A REASONABLE ACCOMMODATION

- FMLA v ADA (rigid v adaptable)
- Current Guidance:
 - ADA obligation *may* go beyond FMLA 12 weeks
 - Employee only entitled to paid leave to the extent they have accrued paid leave
 - Employer has the prerogative to choose between equally sufficient reasonable accommodations
 - Cannot penalize employee for being reasonably accommodated
 - Must return employee to original position
 - Must provide unless doing so creates an undue hardship

LEAVE AS A REASONABLE ACCOMMODATION

- Emphasis on the interactive process and communication
- Some things to consider when determining undue hardship
 - The amount and/or length of leave requested
 - Frequency of leave
 - Whether there is any flexibility to the days on which leave is taken
 - Whether the need for intermittent leave is predictable or unpredictable
 - The impact on the co-workers
 - The impact on the operations

LEAVE AS A
REASONABLE
ACCOMMODATION

An employer's leave policy explicitly prohibits leave during the first six months of employment.

An employee who has worked for only three months needs four weeks of leave for treatment of a disability and the employer tells him that if he takes leave, he will be fired.

Has the employer satisfied its requirements under the ADA?

LEAVE AS A
REASONABLE
ACCOMMODATION

An employer is not covered by the FMLA, and its leave policy specifies that an employee is entitled to only four days of unscheduled leave per year. An employee with a disability informs her employer that her disability may cause periodic unplanned absences and that those absences might exceed four days a year. The employee has requested a reasonable accommodation.

What should the employer do?

LEAVE AS A
REASONABLE
ACCOMMODATION

An employer is not covered under the FMLA. An employee with a disability requires 16 weeks of leave as a reasonable accommodation. The employer determines that it can grant the request and hold open the job. However, due to unforeseen circumstances that arise after seven weeks of leave, the employer determines that it would be an undue hardship to continue holding the job open.

Can the employer now deny the leave?

LEAVE AS A
REASONABLE
ACCOMMODATION

An employee with a disability requests three months leave because of her disability. She provides all the need medical verifications and is granted the leave. Two weeks before she is scheduled to return to work, she calls the employer and states she now needs two additional months of leave because her condition has not improved as quickly as her doctor first thought. She states that she again can provide all the required medical verifications.

THE INTERACTIVE
PROCESS
TWO RULES OF
THUMB FOR
EMPLOYERS

- When in doubt, start the interactive process
- Don't draw arbitrary lines in the sand

UNDUE HARDSHIP:
CONFLICT WITH
OTHER FEDERAL
LAWS

Another Federal law or regulation may prohibit an action, including the provision of a particular accommodation, that would otherwise be required by the ADA.

Example: United States Department of Transportation

REASONABLE
ACCOMMODATIONS
AND COVID-19

REASONABLE
ACCOMMODATIONS
IN THE TIME OF
COVID

Dan works for a library. His job is to assist visitors in locating books and materials. He, along with everyone else who works for the library, was sent home in March 2020 when the city instituted a lock down. In May 2020, Dan was contacted by his supervisor, Betty, and told he would need to report back to work in the library on June 1. Dan told Betty that he has severe diabetes that places him at greater risk of complications due to COVID. He requested that he be allowed to work in the back checking in books and materials, away from direct contact with visitors. Betty said she would consult with HR. Two days later she called Dan and told him that HR declined his request and indicated that Dan must return to the library on June 1 and resume his old duties, which includes direct contact with visitors.

REASONABLE
ACCOMMODATION
AND COVID

- Employee may be entitled to accommodation for pre-existing disability that places employee at higher risk of serious illness from COVID-19, or that is exacerbated by current situation created by pandemic (particularly certain mental illnesses or disorders, e.g., including anxiety disorders, obsessive-compulsive disorders, and PTSD): WYSK questions D.1., D.2., and G.5.
- "Critical infrastructure workers" and "essential critical workers" have the same accommodation rights as other employees: WYSK question D.12
- ADA does not require accommodation of employee for association with an individual with a disability: WYSK question D.13
- NOTE: EEOC has not addressed whether someone with COVID-19 is an "individual with a disability" under the ADA

REASONABLE ACCOMMODATION AND COVID (CONT'D)

- Possible approaches for **inviting** employees – if they wish – to request disability accommodations, or flexibilities to meet other needs, due to pandemic: *WYSK question G.6*
- Employee still required to request accommodation: *WYSK question G.3*
- Employer still may conduct an interactive process, including requesting medical documentation, to determine if has disability and needs accommodation: *WYSK questions D.5. and D.6.*
- COVID-19 circumstances may delay usual processing of accommodation requests: *Pandemic Preparedness question III.B.14*
- Circumstances created by pandemic and workplace shutdown may be relevant to undue hardship: *WYSK questions D.9-D.11*

REASONABLE ACCOMMODATION AND COVID (CONT'D)

- Telework, leave, and reassignment may be reasonable accommodations for disabilities that require staying out of workplace: *WYSK question G.4*
- Examples of accommodations for disabilities to allow individuals to remain in the workplace: *WYSK questions D.1. and G.5*
- If employer recalls employee to work, continued telework need not be granted as accommodation unless ADA requirements met
 - Employer can restore essential functions if they were temporarily altered due to mandatory telework: *3/27/20 webinar question 21*
 - Whether telework was effective during pandemic conditions may be relevant to deciding employee's request for telework after workplace re-opens: *3/27/20 webinar question 22*

REASSIGNMENT

REASSIGNMENT

If an employee can not be reasonably accommodated in present position, then the employer must look to reassign the employee first to an equal and second to a lesser vacant position for which the employee is qualified (with or without a reasonable accommodation). The employee need not be the *best* qualified person for the position.

REASSIGNMENT

- o Known as the accommodation of last resort
- o Employer not required to create a position
- o Employer required to inform the employee of vacant positions
- o Vacant position not restricted to department or location
- o Does not apply to prospective employees
- o Employer does not have to assist the employee in becoming qualified

REASSIGNMENT

Mac has become impaired while working for XYZ Agency. He can no longer do the essential duties of his job with or without accommodation. The only job within the agency Mac has the physical ability to do, with or without an accommodation, is the help desk portion of a computer specialist job.

REASONABLE
ACCOMMODATION
EXERCISES

Sue, who is blind, has been working as an accounts payable analyst for ABC, Inc. for six months. ABC modified her workstation with devices designed to help Sue to have full access to her computer and be able to perform all the essential functions of her job. So, when Sue started coming into work late nearly every morning, Ben, her supervisor, did not know what to do. Considering all she had been through, confronting her about being late, seemed trivial to Ben. He felt uncomfortable about bringing it up to Sue.

WHAT SHOULD
BEN DO?

- Speak with Sue and give her an honest appraisal of her performance
- Listen for any reasonable accommodation requests
- Identify obvious needs for reasonable accommodations
- If reasonable accommodation is requested or if need is obvious, bring situation to the attention of the appropriate person in HR to begin interactive process
- Identify essential job functions
- Hold Sue accountable for her performance, consistent with past practice

Ben consulted with Helen, the diversity manager, and she told Ben to not say anything and just consider it an accommodation. Sue continued to come in late. Once she got to work, her performance was above average.

WHAT DID BEN DO WRONG?

- Didn't give Sue a fair appraisal of her work performance
- Didn't contact HR and advise them that he is now giving Sue an additional accommodation
- Violated Sue's privacy but discussing Sue's disability/possible accommodation with Helen
- Didn't correct the performance issue

However, Hannah, one of Sue's co-workers, began to notice that Ben never said anything to Sue when she was late but was quick to point it out when Hannah was late. Hannah complained to Ben about the unfairness of the double standard.

HOW COULD BEN
MESS UP EVEN MORE
THAN HE ALREADY
HAS?

- Please, please Ben, don't further violate Sue's privacy...

Ben told Hannah that allowing Sue to be late was a form of reasonable accommodation. Hannah challenged Ben to explain what being blind had to do with not being able to get to work on time.

TOP REASON FOR
PROMOTING HANNAH
TO BEN'S SOON TO BE
VACANT POSITION

- Hannah has a better understanding of the ADA than Ben does

After that incident, every time Sue was late, Ben became more agitated. Finally one morning Sue was over thirty minutes late and Ben simply exploded. Sue was surprised and confused. She stated that the bus she takes to work changed its schedule recently and now leaves 20 minutes later than it had.

Ben stated that he won't discuss any additional accommodations until Sue starts coming to work at her scheduled time. Sue then filed a Charge of Discrimination with the EEOC. Betty, head of HR, announced that she will personally investigate the matter. Hannah updated her resume and is considering how she will redecorate Ben's old office.

REASONABLE ACCOMMODATION EXERCISE - LARRY

Larry is a packing manager. His job description includes the ability to lift 70 lbs., but he is rarely required to lift anything. After an off-the-job injury, Larry underwent back surgery and doctors recommended lifting restrictions that affected his ability to return to his job. Larry exhausted his FMLA leave, but could not return to his job because of the no-lifting restriction. Larry requested his employer provide him a permanent light duty job or otherwise accommodate his back disability.

REASONABLE ACCOMMODATION EXERCISE - LARRY

The employer grants Larry's permanent light duty request, which involves filling out forms on a computer and acting as the inter-office messenger. But, a month later Larry is caught dozing on the job because of the side effects of his pain medication. The company gives Larry a written reprimand warning him that a repeat violation will result in termination.

REASONABLE ACCOMMODATION EXERCISE - LARRY

Larry's back pain persists. He asks to perform his light duty office work from home through e-mail and other electronic means. The company refuses his request, saying it does not have a telecommuting policy. Larry's doctor recommends Larry not work for at least six months due to the persistent pain. The company fires Larry, citing his exhaustion of available leave and his inability to perform the essential functions of his job.

WHERE DOES THE COOPERATIVE PROCESS BREAK DOWN?

- o Unreasonably slow
- o Unreasonably burdensome
- o Essential v marginal
- o Confusing "essential" with "how a typical person without a disability" does the job
- o Forgetting reassignment
- o Health and safety concerns
- o Multiple requests and arbitrary terms (don't draw arbitrary lines in the sand)

HOW IS THE RIGHT ACCOMMODATION DETERMINED?

*A good resource is
The Job Accommodation Network
1 800 526 7234*

- o Employer makes final determination for the best R.A. in compliance with the ADA.
- o Not required if it would impose an **undue hardship**

IF YOU REMEMBER
NOTHING ELSE,
REMEMBER THIS...

- When in doubt, start the interactive process
- Don't draw any arbitrary lines in the sand
- Employers that try don't often end up in court

QUESTIONS

**Contact
Information**

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