



Reasonable Accommodations Under the ADA

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ADA is a BIG law

The Interactive Process:

Asking all the right questions

The Interactive Process (Key Principles)

- ▶ ADA is very adaptable to:
 - ▶ The disability
 - ▶ The job
- ▶ Very few bright lines
- ▶ Individualized assessment required
 - ▶ No one-size fits all approach

The Interactive Process (Key Principles)

- ▶ Key terms to know
 - ▶ Essential job functions
 - ▶ Undue hardship
 - ▶ Direct Threat
- ▶ Employers are promised a productive employee

Good Rules of Thumb

- ▶ **Good faith counts for a lot**
- ▶ Two more:
 - ▶ When in doubt, go through the interactive process
 - ▶ Don't draw arbitrary lines in the sand



The Balance:

When does the interactive process begin?

When does the interactive process begin?

- ▶ When requested by the applicant or employee
- ▶ When the need for the accommodation is obvious

The Balance

- ▶ An employer is should begin the interactive process when the need is obvious. But it is unhealthy, and simply wrong, to assume that every time an employee with a disability under performs, the under performance is caused by the disability.
- ▶ What are you basing your conclusion on?
 - ▶ Concrete connection or assumption?



Focus on the JOB
(Not on the disability)

Focus on the Job, Not the Disability

- **Focus on the job**
 - Focusing on the disability will make the process more difficult for you – You're not a doctor
 - You are promised a productive employee
 - Employee must perform essential functions of the job
 - Employee must meet performance and conduct standards
- **This is how you measure possible accommodation options**

What can the employer ask?

- ▶ **Information to confirm:**

- ▶ Employee has a disability
- ▶ Accommodation requested works
- ▶ Whether there are other possible accommodations which work equally well as the one requested
- ▶ Whether the accommodation needed creates an undue hardship

Sources of Information

- **THE EMPLOYEE!!!!!!**
 - What the employee can/can't do
 - The essential functions of the job
 - What accommodation may work best
- The employee's physician
 - What the employee can/can't do
 - The effectiveness of other possible accommodations
 - The disability

Sources of Information

- People who know the job (Supervisor/Employees)
 - The essential functions of the job
 - Evaluation standards
- JAN (Job Accommodation Network) www.askjan.org
 - Accommodation ideas



Who is Covered?

Who is Covered (as simple as I can make it)?

- ▶ For reasonable accommodations only
 - ▶ Rules are different for discrimination and harassment claims
- ▶ Is the person more impaired than **most** people?
 - ▶ Also includes bodily functions: ex) the employee's endocrine system doesn't work as well as **most** people's (Diabetes) = covered
- ▶ No duration requirement



Essential Job Functions/ Undue Hardship

Focus on the Job (Essential Job Function)

- 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.
- o **Focus on the “whats” not the “hows”**

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 is asked by HR to list the duties of the warehouse position he supervises. Among the duties he lists are: the ability to lift 40 lbs., and the ability to stand.

Is John correct?

Whats and Hows

Poorly prepared and worded job descriptions can quickly take your focus off the job and lead you and the employee down many unproductive rabbit holes.

Spend some time constructing accurate job descriptions.

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.

Standard is high.

Accommodations rarely denied because of cost. Mostly denied because overly disruptive or simply don't work.

The Legal Parameter: Things That Are Not Accommodations

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

Leave

FMLA vs ADA

- ▶ **FMLA v ADA (rigid v adaptable)**
- ▶ **FMLA**
 - ▶ A set of rules
 - ▶ Doesn't care about the disability
 - ▶ Doesn't care about the job
 - ▶ Doesn't care about undue hardship
- ▶ **Only cares about 12 weeks**

FMLA vs ADA

▶ ADA

- ▶ Adaptable
 - ▶ Cares about the disability
 - ▶ Cares about the job
 - ▶ Cares about undue hardship
-
- ▶ **No rule or bright line to tell you that you're done**

ADA Leave

- ▶ 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 (except for conditions related to pregnancy)
- ▶ Cannot penalize employee for being reasonably accommodated
- ▶ Must return employee to original position
- ▶ Must provide unless doing so creates an undue hardship

EEOC Guidance – ADA Leave

- ▶ **Two things important to remember:**
 - 1) No set number of days (ADA just isn't written that way)
 - 2) Can consider nature and impact of leave, not just length

Twenty days of leave to recover from injury or illness typically doesn't have the same impact as twenty days taken intermittently with no advanced notice and no predictable duration.

The Problem with Leave

(Doing the calculations)

The Problem

Conceptually, leave under the ADA is simple: The employee gets leave until you can no longer temporarily assign out their duties. Simple.

The hard part is in the calculation. On what day does undue hardship begin?

Sometimes employers punt on doing the calculations.

The Problem

- ▶ Don't wave at the calculation
- ▶ Have a rationale for the date – something concrete you can point to
- ▶ Sets a target for the employee and centers the interactive process (focus on the job)
- ▶ **Remember: Good faith counts for a lot**

Bob is one of five customer service representatives under your supervision. He has a covered disability and requests 90 days of leave. Based on the current staff level (four CSR's), you determine that you can grant Bob's request.

60 days into the leave, you lose two of your remaining four CSR's. This changes your calculations and now Bob's leave is creating an undue hardship for you. Can you call Bob and notify him that you are terminating his leave, or are you required to fill the two vacant CSR positions before you end Bob's leave?

Bob is an accountant. He has a covered disability and requests leave. You do the calculations and determine that you can give Bob 60 days of leave before it creates an undue hardship. On day 58 Bob requests two additional weeks of leave and provides supporting documentation from his physician.

Do you fire Bob on day 60? Or do you grant him the two additional weeks?

Bob is a librarian. He has a covered disability and requests leave. You do the calculations and determine that you can give Bob up to 120 days. You also know that it takes 30 days to on-board a new hire.

So, do you fire Bob if his leave extends past 120 days? Or do you fire him if his leave extends past 90 days (120 days – on-boarding time)?

Direct Threat

Direct Threat

An individual with a disability is not qualified if he or she poses a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.

Direct Threat (Factors Employers Must Consider)

- o Duration of the risk
- o Nature and severity of the potential harm
- o Likelihood that potential harm will occur
- o Whether the potential harm is imminent
- o Burden of proof rests with the employer
- o **Threat cannot be reduced or eliminated through a reasonable accommodation**



Reasonable Accommodation Scenarios

Jane is a newly hired employee. According to company policy she does not start accruing leave until she has been employed by the company for six months. Two months into her employment Jane learns she has cancer and must undergo weekly treatments, which will require her to periodically miss work.

Jane's supervisor does not want to give Jane the leave because it will violate the company's leave policy. The supervisor states that she has fired other employees who have violated the leave policy, and Jane should be held to the same standards.

Policy = Consistency

Accommodations are inconsistent by definition

So, citing policy as a reason for denying an accommodation will always fail.

Can deny a reasonable accommodation only if it creates an undue hardship.

Focus on the job

What are the essential functions of the position?

At what point does the intermittent leave Jane is requesting create an undue hardship?

Betty has worked as a security guard on the night shift at a commercial site for several years. There are three other security guards on the same shift. The four guards rotate duties during the shift in two-hour intervals, with two guards monitoring the building security surveillance and screening individuals entering the building, and two guards patrolling the facilities and surrounding grounds.

Shortly after beginning her shift one night, Betty becomes faint and loses consciousness for a short period of time - less than five minutes. When she regains consciousness, her supervisor instructs Betty to go home for the remainder of her shift, and to call her (the supervisor) the next day before her shift begins.

Betty states she fainted because of low blood sugar caused by her diabetes.

She says she has not fainted in several years. She also states that her supervisor has denied her short breaks to take her insulin at work, even though the injections are needed to control her blood sugar levels.

Betty's supervisor fears that because of her health condition, Betty poses a potential risk for which the company could be held legally liable.

Focus on the job

There are four security guards on the same shift. The four guards rotate duties during the shift in two-hour intervals, with two guards monitoring the building security surveillance and screening individuals entering the building, and two guards patrolling the facilities and surrounding grounds.

Bob is a packing manager. His job description includes the ability to lift 30 lbs., but he is rarely required to lift anything. After an off-the-job injury, Bob underwent back surgery and his doctor recommended that Bob not lift more than 5 lbs. This restriction was still in place even after Bob exhausted all his FMLA leave.

Bob requested his employer create a permanent light duty job for him or otherwise accommodate his back disability.

The employer created a permanent light duty position for Bob, which involved filling out forms on a computer and acting as the inter-office messenger. But, a month later Bob was caught dozing on the job because of the side effects of his pain medication. The company gave Bob a written reprimand warning him that a repeat violation will result in termination.

Bob's back pain persisted. He asked to perform his light duty office work from home through e-mail and other electronic means. The company refused his request, saying it does not have a telecommuting policy. The company then fires Bob, citing his exhaustion of available leave and his inability to perform the essential functions of his job.

You manage a day care facility, and you are hiring daycare workers. Maria applies and is the best qualified candidate, but you learn post-offer that she takes anti-seizure medication for epilepsy. You are concerned that she may not be able to safely supervise small children or transport them on field trips as sometimes required.

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.

Where Does the Interactive Process Break Down?

- Unreasonably slow
- Unreasonably burdensome
- No understanding of the “whats”
- Forgetting reassignment
- Health and safety concerns (waving at direct threat analysis)
- Ending the conversation

Disability Poker

(Richard Pimentel)

How to Have the Conversation (Performance and Reasonable Accommodations)

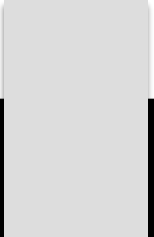
- Most employers are reluctant to talk to persons with disabilities about their impairments.
- When a person with a disability has a performance problem, most employers assume the problem has something to do with the disability.
- **Having the conversation correctly brings the focus back to the job.**

Performance Standards

- ▶ Employers establish job-related requirements
 - These include specific tasks or assignments
 - Critical and non-critical elements
- ▶ **Employers establish methods to evaluate job performance**

Performance Standards ADA

- ▶ Employee with a disability must meet the same performance standards as other employees in the same position
- ▶ “Production standards” refer to both
 - Quantitative Standards (e.g., produce 10 reports/month)
 - Qualitative Standards (e.g., annual performance review)
- Reasonable accommodation never requires lowering a production standard but may require accommodation to meet the standard



Company requires its sales staff to complete 10 sales each week. Jane's disability is worsening and causing increased fatigue, which in turn causes her increasing difficulty in meeting this standard. Jane's other job duties include training and contributing articles to a company newsletter.

Can the company require Jane to complete 10 sales each week?

What reasonable accommodations MAY be possible?

Providing accurate feedback and evaluations

- ▶ Supervisors should evaluate the job performance of an employee with a disability in the same manner that it would evaluate any other employee's performance
 - Failing to provide an accurate evaluation leaves the employee at a disadvantage to improve performance and, if necessary, request reasonable accommodation
- **May be the most difficult thing a manager does**

Good Rules of Thumb

- ▶ When in doubt, go through the interactive process
- ▶ Don't draw arbitrary lines in the sand
- ▶ Making a good faith effort goes a long way

Interactive Process

- Ask all the right questions
- Focus on the JOB
- "Whats" and "hows"
- Leave calculations
- Direct threat
- Disability conversations



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