



THE AMERICANS WITH  
DISABILITIES  
ACT AMENDMENTS ACT:  
REASONABLE  
ACCOMMODATION

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### "Disability" Defined

A "disability" is:

1. A physical or mental impairment that substantially limits one or more of a person's major life activities;
2. A record of such an impairment; or
3. Being regarded as having such an impairment.

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### "Impairment"

1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; OR
2. Any mental or psychological disorder.

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# Reasonable Accommodation

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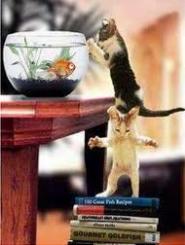
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## How Requests for Accommodation Should Be Handled ...

With the employee's participation and input, the employer must make a reasonable effort to determine an appropriate accommodation!

**The Goal:** To be able to show a good faith effort was made by the employer.



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## Keep in mind...

Employer is not obligated to seek out or guess at possible disabilities and/or accommodations.



Employee has an obligation to make the disability and the need for accommodation known.

**EXCEPTION:** If an employer is going to take an adverse job action based on a perception that the person is physically or mentally unable to do the job.

**NOTE:** No magic words are required. An employee only must make the employer aware of a difficulty or conflict between the employee's medical condition and the employer's rules, requirements, and job expectations.

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### "Reasonable Accommodation"

Any modification or adjustment:

1. To the job application process that enables a qualified individual with a disability to be considered for an employment position;
2. To the work environment or the manner in which the job is performed that enables a qualified individual with a disability to perform the essential functions of the position;
3. That would enable an employee with a disability to enjoy **equal** benefits and privileges of employment as a similarly situated employee without a disability



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### Examples of "Reasonable Accommodations"

- Making existing facilities readily accessible for use by disabled employees
- Job restructuring
- Part-time and modified work schedules
- Re-assignment to a vacant position
- Acquisition or modification of equipment or devices
- Adjustments of exams, training materials, and policies



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### When Reasonable Accommodations Are Not Required:

Employers do not have to make an accommodation if it will create an **undue hardship** on the operation of the business.

- Factors in determining if an undue hardship exists:
  - Nature and net cost of accommodation
  - Financial resources of the employer
  - Number of employees
  - Number of facilities
  - Accommodation's impact on employer's operations and other employees



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**What accommodations are not reasonable?**

- Eliminating *essential functions* of job
- Making other employees perform essential functions for employee
- Modifying work schedule if adversely affects other employees' ability to perform jobs
- Changes for the mere convenience or personal benefit of an employee
- Requests for employer to purchase personal items such as eyeglasses, hearing aids and walking canes

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**What are "essential" job functions?**

- A function is "essential" if:
  - the position exists to perform the function;
  - there are a limited number of employees who can perform the function; or
  - the function is highly specialized.
- Evidence of the essential nature of a function includes:
  - the employer's judgment;
  - the consequence of not requiring someone to perform the function;
  - a written job description;
  - the amount of time spent performing the function; and
  - the work experience of people in that position.

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**WARNING!**

Additional time off is often a "reasonable accommodation" required by the ADA.



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### Leave from Work: How Long is Reasonable?

- "There is no bright-line rule defining the maximum duration of leave that can constitute a reasonable accommodation." *Cleveland v. Federal Express Corp.*, 2003 U.S. App. LEXIS 24786 (6th Cir. 2003).
  - 6 months leave could be reasonable for a nurse to treat lupus. *Cleveland*, 2003 U.S. App. LEXIS 24786.
  - 6 months leave was not a required accommodation for a police officer in a small town. *Epps v. City of Pine Lawn*, 353 F.3d 588 (8th Cir. 1999).
- EEOC says "leave" means holding the job open, unless it would be an undue hardship



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### Definite vs. Indefinite Leave

A pattern of continually asking for more and more leave arguably constitutes a request for indefinite leave.

- EEOC's Position: If an employee cannot provide a fixed date of return, the employer can deny such leave only if it can show undue hardship because of this uncertainty.
- Courts have been a bit more clear, holding that an employer does not have to provide indefinite leave as a reasonable accommodation.



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### Light Duty as a Reasonable Accommodation

- *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006):
  - The ADA does not require *creating* a new sedentary position for an employee with a mobility impairment
  - As a result, the ADA does not require an employer to keep an employee in a created light duty position for any longer than it chooses
- But must make temporary status of position clear during interactive process



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**Other Possible Accommodations**

- Change in supervisor? Generally not reasonable.
- Providing an assistant or a job coach? Sometimes reasonable.
- Rescinding discipline? Generally not reasonable.
- Working at home? Depends.
- Modified work schedule? Generally reasonable to an extent.
- Shift change? Depends.
- Irritant-free environment? Depends.
- Parking space / commuting assistance? Depends.
- Reassignment? Yes, for current employees, not applicants or former employees. However, employer does not have to bump any employee from a job to create a vacancy, promote the employee, or reassign them to a job for which they are not qualified.

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**When Responding to an Accommodation Request**

- Document every conversation with the employee about the accommodation, and every option offered
- Develop a procedure/policy for requesting an accommodation
- Maintain employee confidentiality...especially with medical information
- Never say "we can't do that," "we can't afford that," or "we don't make exceptions" without confirmation

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**Responding to accommodation requests**

- You *can* ask for the employee's doctor's certification of health-related work restrictions.
- Make plans based on what the employee tells you.
- Employee must cooperate in the "interactive process" and cannot unreasonably refuse requests for information or accommodations offered.
- *Document all discussions and options!*

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**HR best practices in light of ADAAA:**

- Leave room for exceptions and individual treatment.
- Educate supervisors and managers on the need to accommodate.
- Begin interactive process immediately when asked.
- Review job descriptions.
- Reconsider past accommodation denials.
- Make sure there is no retaliation.

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**ESPECIALLY DIFFICULT: Mental Impairments:**

Defined broadly in regs to include "emotional or mental illness."

Per se disabilities include:

- Autism
- Major depression
- Bipolar disorder
- PTSD
- Obsessive compulsive disorder
- Schizophrenia

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**Drugs & Alcohol**

"Qualified individual with a disability" does not include any employee or applicant who is *currently* engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

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**Drugs & Alcohol**

- o **Safe harbor:** “[This provision] shall [not] be construed to exclude as a qualified individual with a disability an individual who—
- o **has successfully completed a supervised drug rehabilitation program** and is **no longer engaging in the illegal use of drugs**, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- o **is participating** in a supervised rehabilitation program and is no longer engaging in such use; or
- o is erroneously regarded as engaging in such use, but is not engaging in such use . . . .”

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**Drugs & Alcohol**

“Whether an employee is drug-free on the day of his termination is not dispositive of whether he has a ‘current’ addiction.”

- o *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 856 (5th Cir. 1999)
- o *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1997)
- o *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011) (one month ago too recent)

Question to ask: Was the drug use “sufficiently recent to justify the employer’s reasonable belief that drug abuse remained an ongoing problem?”

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**Factors to Consider**

Per the Fifth Circuit, look at:

- (1) the level of responsibility entrusted to the employee;
- (2) the employer’s applicable job and performance requirements;
- (3) the level of competence ordinarily required to adequately perform the task in question; and
- (4) the employee’s past performance record.

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### Direct Threat

Direct threat means a significant risk to the health, safety or well-being of individuals with disabilities or others when this risk cannot be eliminated by reasonable accommodation.

- "Qualification standards" for a position may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."
- Factors to consider include:
  - the duration of the risk;
  - the nature and severity of the potential harm;
  - the likelihood that the potential harm will occur; and
  - the imminence of the potential harm.



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### No Retaliation!

No employee will be retaliated against for complaining in good faith of disability based harassment or discrimination, or for pursuing rights under the ADA.



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