

The Americans with Disabilities Act: Understanding the *Interactive Process* Used by Employers to Make Informed Decisions about Requests for Reasonable Accommodation

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Key to Understanding/Using the Interactive Process

- Purpose: Enable employers to obtain/use facts to make informed decision rather than basing decision on assumptions
- Not legally required
- Individualized Decision-making
 - Standardized questions for individuals and their health care providers problematic and increase chance employer will not get helpful information
- Flexible Process
 - Not one way of conducting this process BECAUSE it is supposed to be individualized

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Reasonable Accommodation

- Defined:
 - A reasonable accommodation is a change in the workplace, or in the ways things are usually done, that provides equal employment opportunities for individuals with disabilities
 - General rule: An employer provides a *reasonable accommodation* to a *qualified* individual with a *disability* if requested and if individual shows one is needed due to a disability-related limitation, and if doing so does not pose an *undue hardship*

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3 Areas Where Employers May Have to Provide Reasonable Accommodations

- Application Process
- Accommodations that enable an employee to perform her job or to gain access to the workplace (includes, e.g., bathrooms, cafeterias)
- Benefits and Privileges of Employment
 - Mandatory or voluntary training/staff meetings
 - Employer-sponsored parties: Even if off-site and outside business hours
 - Employer-sponsored programs/special events

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Employer Can First Determine If Request Can Be Handled Under Employer's Own Program

- Some requests for particular accommodations (e.g., leave, telework, altered schedule, ergonomic equipment) may first be addressed through an employer's own program without resorting to reasonable accommodation process
- Employees with disabilities entitled to same access to employer-provided programs
 - Example: Employer has telework policy permitting up to 3 days of telework per week. Employee requests 2 days per week due to disability. Handle request under employer's program.
 - Example: Employee with disability asks to arrive at 10 a.m. rather than 9 a.m. for next 2 weeks due to medical treatment and will make up time at end of the day. If such adjustments would be granted to *any* employee, for *any* reason, no need to handle as a reasonable accommodation issue.

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Interactive Process

- Process usually starts with a request from an applicant/employee
 - No "magic words" needed
 - Individual must tell employer that she needs something from the employer because of her medical condition
 - Need not be in writing (although employer's procedures may ask that you fill out a form)
 - Request may come from someone other than the individual needing the accommodation (doctor's note, family member)
- Employer entitled to obtain information to determine if the individual's medical condition constitutes a disability and/or to verify/understand the need for accommodation
- Critical for employer to obtain *relevant* information to make an *informed* decision
- Ideally, not a "cookie cutter" approach but individualized to address specific request
- **Cooperative Process!**

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Expect Questions Related to Whether a Disability Exists

- ADA has a broad definition of disability, so depending on the condition an employer may choose not to ask any questions to establish coverage under this law, or employer's questions may be minimal
- But, that does NOT mean an employer is prohibited from verifying that individual has been diagnosed with the medical condition (e.g., hidden disabilities such as epilepsy, diabetes, major depression, PTSD) or to determine if a medical condition meets the ADA's threshold for a "disability"
- Individual must identify the specific medical condition
 - Individual cannot refuse to identify the specific, diagnosed condition or use a vague description (e.g., a blood disorder or a gastrointestinal disorder) rather than reveal the actual medical condition

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Expect Questions Related to Why Accommodation is Needed

- Employer can (and often needs to) ask questions designed to understand the problem and how a particular accommodation would address it
- If question being asked is too general, try to answer with facts most relevant to request
- Better approach: Ask for clarification
- Example: Employers asks, "What limitations does the employee have as a result of the medical condition?"
 - Employee and/or health care provider can seek clarification about what employer is trying to learn (limitations necessary to establish "disability" can be different from limitations that necessitate accommodation)
 - Employer may want information that goes to both issues, but employee can ask for clarification if question is unclear about what employer is seeking

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Questions Related to Whether Accommodation Will Permit Performance of *Essential Function(s)*

- If reasonable accommodation required to perform “essential function,” important to focus on how requested accommodation (or an alternative accommodation) achieves this objective
- Possible for reasonable accommodation to address your medical limitation (e.g., need to telework, need for a different work schedule) but perhaps not permit satisfactory performance of an essential function
 - Must ensure that reasonable accommodation meets **BOTH** the employee’s disability-related needs and employee’s ability to perform the essential functions of their job
 - If reasonable accommodation cannot meet both needs, then employee may not be qualified for this job (but employer must then consider reassignment as reasonable accommodation of last resort if employee wishes this)

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How Long Does Employee Need an Accommodation

- Generally, accommodations should be given for a certain period of time after which they end or employee must ask to continue them (ideally, employer not imposing arbitrary renewal or end date but rather such dates stem from employer acquiring information during the interactive process on length of time accommodation needed)
 - If disability will last 6 months, with no lingering effects, then a reasonable accommodation generally should not be provided for a longer period (6 months is expiration date)
 - If it turns out disability will last longer than anticipated and employee requires accommodation to continue, employee must request extension and employer may ask what happened to change prognosis, basis of newest prognosis (e.g., will last only 2 additional months), and why this prognosis more likely to be correct than previous one
- Just because disability may be permanent or long-term does not necessarily mean need for reasonable accommodation is
 - Employer may ask length of time a requested accommodation is needed and basis for determining this timetable (how did employee/health care provider determine length of time accommodation needed)

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Employer Questions for an Individual's Health Care Provider (HCP)

- Generally, questions for HCP should come after employer discusses request with the individual but no requirement for employer to talk to individual first
- Questions for HCP may focus on understanding exactly what the limitation/problem is, length of time a disability and/or specific limitation will last (and factual basis for the HCP's answer), how exactly a specific accommodation will eliminate/minimize the problem, and possible alternative accommodations
- Employer needs to get employee's permission (or employee's HCP needs to get their patient's permission) before the HCP will answer such questions
 - HIPAA does not prohibit employer from seeking information from your HCP, or prevent HCP from answering employer's questions AS LONG AS individual gives their consent
 - Think very carefully before denying HCP permission to answer questions

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Individuals with Disabilities Should Cooperate in Answering Questions

- Also cooperate in providing documentation employer requests and in having health care provider (HCP) fully answer any questions posed by employer
- Employees should think very carefully before refusing to answer questions (or refusing to allow their HCP to answer questions)
- If employee is legally wrong in refusing to answer questions (or having HCP answer questions), employee may have given employer a lawful reason to deny the request
 - ADA gives employers some latitude in questions they may ask about the medical condition (e.g., to determine if it's a disability) and about why a reasonable accommodation is needed and the disability-related limitations it will address
 - Sometimes what is obvious to employee may not be obvious to someone who doesn't have the disability

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Types of Reasonable Accommodations

- Almost unlimited possibilities
- May include:
 - Sign language interpreters
 - Modifications to existing equipment or purchase/lease of new equipment that is accessible to individual with a disability
 - Modifying workplace policies
 - Changes in the working environment (e.g., flashing warning lights for evacuations)
 - Telework/Remote Work
 - Changes in supervisory methods
 - Reassignment (last resort)

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Reasonable Accommodation

- Actions **not** required:
 - Removing an *essential function* (i.e., fundamental/critical job duty)
 - Lowering production/performance standards (quantitative and qualitative)
 - Excusing misconduct/performance deficiencies
 - Providing *personal use items*, such as hearing aids, service animals
 - Changing an employee's supervisor (where employee retains current job but gets new supervisor)

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Individuals Entitled to **Effective** Accommodation

- Employer must provide an accommodation that meets the individual's needs and removes a workplace barrier
- But individual is NOT entitled to accommodation of their choice
- If 2 or more accommodations would be effective, employer may choose between them
 - Employer can make counter-offers
 - Employer should explain why it believes its alternative will effectively meet the individual's limitation/problem
 - Listen with open mind and if you raise objections, be specific about what problems may exist and why/how your choice more effectively addresses problem
- Critical that employer understand exact nature of problem to determine all possible, effective accommodations, and then assess whether any/all possibilities constitute "undue hardship"

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Consider Testing A Possible Accommodation During a Trial Period

- Good option where employer (or employee) has doubts/concerns whether a proposed accommodation will work
- Employers should not use a trial period where clear an accommodation will or will not work (for example, do not need to test whether a sign language interpreter works)
- Accommodations where a trial period may be helpful: telework, modifying work schedules, use of emotional support dogs (legally unclear whether last example is a reasonable accommodation)
- Generally, a trial period should last 1 to 6 weeks
 - Long enough to really test whether accommodation works or not
 - Employer may need to tweak the accommodation, rather than revoking it, if minor issues/problems arise
 - If clear that accommodation not working, employer may cut short a trial period

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Undue Hardship

- **Significant** difficulty or expense
- Focus here is on resources and circumstances of employer as a whole (not on individual units), including impact on operations
- Undue hardship refers to denial of a specific accommodation and not accommodation in general (just because 1 accommodation causes undue hardship doesn't mean another one will)
- Undue hardship considers financial difficulty **as well as** reasonable accommodations that are extensive, substantial, or disruptive

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Not Done When Given an Accommodation

- Tell employer if it is working as intended!
 - Particularly where accommodation may impact job performance, attendance, or schedule want to let employer know ASAP if you think there is a problem
- If there is a problem, first step not necessarily revoking accommodation b/c assume it can't work
 - May need tweaking
- If, after reasonable period of time, accommodation is not working, and no modifications possible/have worked, then need to consider if any other accommodation might work, including reassignment if necessary

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Employer May Reassess Whether Accommodation Working as Intended Based on Reliable Information

- At any time employer may re-open interactive process if reliable, objective information suggests accommodation might not be working or is no longer needed
- Example: Supervisor reports that employee has not followed schedule given as a reasonable accommodation for 2 weeks: re-opens interactive process (may be a good explanation – or not -- but employer needs to find out)
- New “interactive process:” Focus is on discussion about why accommodation not working, whether there are ways to adjust it so it might work, whether another form of reasonable accommodation should be tried

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Subsequent Requests After Employer Provides or Denies Reasonable Accommodation

- Employees may make new request after receiving accommodation or denial of previous request
- Already received accommodation: What is being requested and why?
 - Is new request because current accommodation not working as intended, or is it to address a different limitation/issue (e.g., disability has gotten worse or job duties have changed, either resulting in a new problem requiring additional/different accommodations)
 - If appropriate, employer may ask why other accommodation(s) insufficient to meet needs
- Denied accommodation: What is now being requested and why?
 - Same request or something different?
 - How soon does current request follow denial of previous request? If employee essentially asking for same thing soon after denial issued, and can provide no additional information that might justify changing decision, employer may quickly deny latest request

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[EEOC Enforcement Guidance on Reasonable and Accommodation and Undue Hardship Under the ADA](#)
(www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada)

Many other ADA publications and information about filing a “charge of discrimination at the [U.S. Equal Employment Opportunity Commission](#) website (www.eeoc.gov/)

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- Please email the code above to ADAtesting@transcen.org by **5 PM E.T. on July 24, 2023**
- Certificates are emailed 1 – 2 weeks after the session

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