



Hot Topics in
Reasonable
Accommodation
will begin at 2 pm ET

About Your Hosts...

- TransCen, Inc.
 - Improving lives of people with disabilities through meaningful work and community inclusion
- Mid-Atlantic ADA Center, a project of TransCen, Inc.
 - Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



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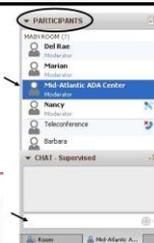
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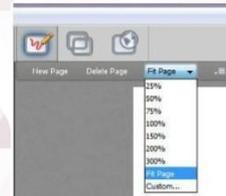
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Reasonable Accommodation Update

October 2016

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See new handout:

“Key ADA and GINA Documents Available from the U.S. Equal Employment Opportunity Commission on www.eeoc.gov”

Updated: July 2016

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New EEOC Resources of Special Note

- Employer-Provided Leave and the Americans with Disabilities Act (5/9/16) <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>
- Legal Rights for Pregnant Workers Under Federal Law www.eeoc.gov/eeoc/publications/pregnant_workers.cfm
- Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm
- What You Should Know About HIV/AIDS and Employment Discrimination www.eeoc.gov/eeoc/newsroom/wysk/hiv_aids_discrimination.cfm
- Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA www.eeoc.gov/eeoc/publications/hiv_individual.cfm
- Helping Patients with HIV Infection Who Need Accommodations at Work www.eeoc.gov/eeoc/publications/hiv_doctors.cfm

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Does the Individual Requesting Accommodation Have a Substantially Limiting Impairment?

- Employer is free to provide accommodations to anyone, but simply be sure not to engage in disparate treatment.
- If employer has determined not to provide accommodation unless individual is legally entitled to it, threshold issue is whether individual has or had an impairment that “substantially limits a major life activity,” and presently needs accommodation.

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Supporting Medical Information

- Accommodation request may be oral, and is simply a request for some type of change due to a medical condition.
- **Once accommodation request is made, when and how much medical information can the employer ask for in support of the accommodation request?**
- ADA has not changed the rule: If not obvious or already known, an employer may obtain reasonable documentation that an employee **has a disability and needs the accommodation requested.**

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Supporting Medical Information

- Employer may ask employee to obtain the supporting medical information from employee's treating health care provider, or ask employee to sign limited release allowing employer to contact the health care provider directly.
- For example, employer might seek to verify diagnosis and limitations, follow up to clarify limitations as well as what accommodation might be effective, and for how long it may be needed.

Assessing Medical Information

- Remember changes made by the ADA Amendments Act of 2008 (ADAAA).
- ADAAA: Definition of disability "shall be construed in favor of broad coverage" and "should not demand extensive analysis."
- **Definition much easier to meet.**

When it enacted the ADAAA, Congress made 4 changes to “substantially limited in a major life activity”:

--**Need not prevent, or significantly or severely restrict**, a major life activity

--Major life activities include “**major bodily functions**”

--Ameliorative effects of **mitigating measures not considered**

--Impairments that are “**episodic**” or “**in remission**” are substantially limiting if they would be when active

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“Substantially Limits” (cont’d)

- **No minimum duration:** impairment can be “substantially limiting” even if lasts or is expected to last fewer than 6 months. 29 C.F.R. § 1630.2(j)(1)(ix).
- Duration is a relevant factor, but **even short-term/temporary conditions can now be “substantially limiting”**
- Example: Back impairment that causes 20-pound lifting restriction lasting several months.

Most Common Examples of Accommodation

- Physical modifications
- Sign language interpreters and readers
- Assistive technology and modification of equipment or devices
- Modified work schedules
- Making exceptions to policies
- Job restructuring (swapping or eliminating *marginal* functions)
- Changing supervisory methods

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Examples (cont'd)

- Allowing job coach
- Telework
- Leave
- Accommodation of last resort: reassignment to *existing* vacant position for which individual is qualified and that is not a promotion

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Actions Never Required as Reasonable Accommodation

- Lowering production or performance standards (but pro-rate production requirements for period of leave as an accommodation)
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Removing an essential function
- Monitoring an employee's use of medication
- Providing personal use items
- Changing someone's supervisor (though changing supervisory methods may be required)
- Actions that would result in undue hardship (i.e. significant difficulty or expense)

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Undue Hardship Considerations

- Nature and cost of the accommodation ("significant difficulty or expense")
- Resources available to the employer overall (not just individual division or department)
- Impact of the accommodation on operations

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Keys to the Interactive Process

- Communicate, exchange information, search for solutions, consult resources as needed
- If requestor only knows the problem, not the solution, employer is still obligated to provide an accommodation if available. Search for possible accommodations.
- If requestor asks for a particular accommodation, but it is one that legally need not be provided (e.g., request to lower production standards), employer must provide an alternative if available. Search for and consider alternative accommodations.

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What if employee requests to be excused from performing job duty due to medical condition?

- **If it's a marginal function** – can it be swapped or eliminated without undue hardship?
- **If it's an essential function**, it need not be removed, but can employee be accommodated to perform it?
- **If employee cannot be accommodated in position**, he could still be qualified for a position to which he could be reassigned...is there a vacant position for which he is qualified (the accommodation of last resort)?

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What if Employee Asks to Have His Poor Performance or Misconduct Excused as an Accommodation?

- Employer is not required to lower production or performance standards, or to modify performance appraisal, as an accommodation.
- Employer is not required to excuse violations of uniformly-applied conduct rules that are job related and consistent with business necessity

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Performance and Conduct (cont'd)

- But if employee who requests and needs accommodation has a substantially limiting impairment and will continue to be employed (i.e., result of poor appraisal or discipline is not termination), the employer must offer an alternative *prospective* accommodation, if available, absent undue hardship.

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Performance and Conduct (cont'd)

- If penalty was not termination, was there an accommodation employer could have provided to assist the employee to meet the standard in the future?
- If accommodation was provided but problems continued, were they because of the disability (e.g., the accommodation provided was not effective, and a different accommodation or reassignment must be considered), or was it for reasons unrelated to the disability?

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What if Employee Requests Telework as a Reasonable Accommodation?

- As a reasonable accommodation for an individual with a substantially limiting impairment, an employer may need to permit more frequent telework than is otherwise allowed under its regular telework policy.
- Fact-specific determination based on particulars of position and workplace. Telework as accommodation need not be granted as an accommodation if not feasible or poses an undue hardship.

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Examples of Relevant Facts to Consider in Determining if Telework is Feasible

- Employer's ability to supervise the employee adequately
- Whether any duties require use of certain equipment or tools that cannot be replicated at home
- Whether there is a need for face-to-face interaction and coordination of work with other employees
- Whether in-person interaction with outside colleagues, clients, or customers is necessary
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

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Management Considerations

- NOTE: Teleworking employees can be held to same performance and production standards as working on-site. Managers can require daily accomplishment reports or use other management methods with respect to all employees.
- More information: ***Work From Home/Telework as a Reasonable Accommodation***, www.eeoc.gov/facts/telework.html

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Equally Effective Alternative?

Dones v. Brennan, et al.

2016 U.S. Dist. LEXIS 6887 (D. Md. Nov. 23 , 2015)

- Postal employee with herniated disc and related impairments had restriction of no twisting his neck; doctor recommended swivel chair for use while casing mail
- Agency instead provided rest bar and modified his job description to no twisting; he repeatedly requested the swivel chair, notifying the agency that the rest bar still required him to twist his neck when casing
- Held: summary judgment for agency denied
- Employer has discretion to choose alternative accommodation, but it must be equally effective
- No defense that supervisors honestly albeit mistakenly thought employee had to request chair himself through workers' compensation process

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Reyazuddin v. Montgomery County, Md.

789 F.3d 407 (4th Cir. 2015)

- County call center obtained new technology that was not compatible with the screen reader and other accommodations used by a blind employee
- **Cautionary tale about procurement and technology upgrades: ensure accessibility *before* purchase.** Fixing after the fact would cost \$125,000 or even more. County argued \$15,000 annual line item for accommodations.

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Reyazuddin (cont'd)

- **Cautionary tale about cost:** “Allowing the county to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue to the employer that failed to accommodate a employee with a disability....The County’s overall budget (\$3.73 billion in fiscal year 2010) and the [call center]’s operating budget (about \$4 million) are relevant factors. 42 U.S.C. Section 12111(10)(B)(ii)-(iii). But the county’s line-item budget for reasonable accommodations is not.”
- **Have similar employers accommodated employees with this limitation? Factually significant:** “we think it particularly relevant that other call centers have been able to accommodate blind employees”

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Note: Section 508 of the Rehabilitation Act

- Requirements for federal agencies on procuring accessible technology
- www.section508.gov

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Searls v. Johns Hopkins Hospital

2016 U.S. Dist. LEXIS 6887 (D. Md. Jan. 21, 2016)

- Nurse applicant who is deaf brought claim alleging ADA violation for hospital's refusal to provide full-time sign language interpreter.
- Held: **Providing full-time interpreter would not have reallocated essential job functions of communicating with others and responding to alarms.** Nurse would have performed essential job functions herself, given that she would have used her own medical expertise and training when speaking to patients, families, and hospital personnel, and she would have acted in response to alarms after interpreter communicated sound of alarm.
- Fact that interpreter could not act independently showed that providing interpreter would not be hiring someone else to perform the job.

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Searls (cont'd)

- All three of the hospital's expert witnesses in the litigation lacked experience with deaf healthcare professionals or deafness in general. Could not reliably testify about how nurse would have worked with interpreter to monitor and respond to alarms, and whether she could have done so safely.
- **Undue hardship defense rejected: Cost would be maximum \$120,000; this did not impose an undue hardship on hospital, as it was 0.007% of its \$1.7 billion operational budget. Not relevant what hospital had chosen to budget for accommodations.**
- Another medical center that subsequently hired the nurse was able to provide ASL interpreter.

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Osborne v. Baxter Healthcare Corp.,

798 F.3d 1260 (10th Cir. 2015)

- Plaintiff, who was deaf and relied primarily on lip reading, hired to work as plasma donation center technician. Offer was rescinded when HR received post-offer exam results and concluded she would be unable to hear alarms on plasmapheresis machines and donor call button, or communicate with donors in certain situations.
- Held: **material factual dispute whether plaintiff could be qualified with her proposed accommodation of installing visual/vibrating alerts and call buttons, and whether those were reasonable.**

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Osborne (cont'd)

- **Employer did not contact vendor to find out what was feasible, and what the cost would be.**
- Court noted that had employer inquired, it would have learned that there are a number of people with hearing impairments successfully employed as plasma technicians using adaptive technology.
- Also held: safety risk asserted by employer was to be minimis to meet the direct threat defense.

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Michael v. City of Troy Police Dep't,
808 F.3d 304 (6th Cir. 2015).

- Plaintiff evaluated by four separate doctors. Two concluded he posed a threat to safety, and two characterized the negative reports as flawed and reached opposite conclusion.
- Affirming summary judgment for the employer who elected to terminate based on the two negative reports, court found they were “**objectively reasonable medical opinions**” because: based on in-person evaluations lasting 7 hours and 90 minutes, respectively; were 11 and 7 single-spaced pages long, respectively; and discussed plaintiff’s essential job functions. One of the reports was also based on an analysis of test data that took 9 hours to perform.
- **Fact that the other reports may also have been objectively reasonable, the court held, was irrelevant.**

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Noll v. International Bus. Machs. Corp.,
787 F.3d 89 (2d Cir. 2015).

- Employee requested that all video files be captioned, and all audio files have transcripts at time of posting.
- Intranet had over 46,000 video files and 35,000 audio files. Generally provided transcripts within five days of posting a video, but occasionally it took longer, and sometimes links to transcripts did not work.
- **Employer met its reasonable accommodation obligation by providing immediate access to ASL interpreters capable of translating employee-posted files on corporate intranet.**

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Noll (cont'd)

- Employer did not violate ADA by failing to explore employee's preferred alternative accommodation
- Although employee found it confusing and tiring to look back and forth between a video and the interpreter, court held it was still an equally effective accommodation, observing that many accommodations for deaf people will tax visual attention to some degree.
- Employee conceded that interpreters were effective for live meetings and provided no evidence that they were less visually demanding on his attention in that setting than when used to translate videos.

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Do You Have the Available Facts?

Cannon v. Jacobs Field Services N. America, Inc., 2016 WL 157983 (5th Cir. Jan. 13, 2016)

- ADA claim against construction company that revoked job offer to field engineer after learning that due to prior unsuccessful surgery on a torn rotator cuff, he was unable to lift his right arm above the shoulder.
- Court held there was "ample evidence" to support conclusion he has a disability under the "more relaxed" post ADAAA standard.

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Cannon (cont'd)

- Court observed employer “may have been able to get to the bottom” of question based on post-offer medical exam findings about whether employee was able to climb a ladder by questioning the applicant or his doctor further, or simply asking the applicant to come in and do a demonstration.
- Similarly, employer could have clarified with the doctor whether applicant would be weaned off disqualifying pain medication by the time he would begin working.

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Resources for Identifying Accommodations

- Job Accommodation Network,
www.askjan.org
- Department of Defense Computer/Electronic Accommodations Program (CAP),
www.cap.mil

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Sample EEOC Filings and Resolutions May-June-July 2016

- www.eeoc.gov/eeoc/newsroom/release/7-5-16.cfm (alleged termination from food service job due to HIV)
- www.eeoc.gov/eeoc/newsroom/6-28-16a.cfm (alleged denial of accommodation for intellectual disability and termination)
- www.eeoc.gov/eeoc/newsroom/release/6-16-16a.cfm (alleged termination because of multiple sclerosis diagnosis and leave request)
- www.eeoc.gov/eeoc/newsroom/release/6-9-16.cfm (alleged ADA and GINA violations – applicant health history form)
- www.eeoc.gov/eeoc/newsroom/release/5-19-16b.cfm (alleged discriminatory termination of an employee due to HIV, and retaliation against HR assistant for opposing employer’s refusal to hire people with disabilities)

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Sample EEOC Filings and Resolutions May-June-July 2016

- www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm (alleged systemic ADA violations due to no fault leave policy)
- www.eeoc.gov/eeoc/newsroom/release/5-12-16.cfm (alleged withdrawal of job offer due to wheelchair use)
- www.eeoc.gov/eeoc/newsroom/release/5-11-16a.cfm (alleged denial of accommodation for pregnancy-related disability)
- www.eeoc.gov/eeoc/newsroom/release/5-9-16a.cfm (alleged retaliatory termination for objecting to overbroad release for fitness for duty exam)

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Violations of the Requirement to Keep Medical Information Confidential

- [Buster D. v. Dep't of Agric., EEOC Appeal No. 0120141171 \(March 11, 2016\)](#). Agency disclosed employee's medical diagnosis to the Chief Union Steward who did not have a need to know during the agency's handling of Complainant's Notice of Proposed Removal.
- [Haydee A. v. Dep't of Homeland Sec., EEOC Appeal No. 0120132668 \(January 19, 2016\)](#). Employee sent email informing supervisor that she would be taking leave to see an orthopedic surgeon to discuss knee surgery. Supervisor forwarded to other managers because he thought the absence might affect assignment or processing of work, instead of just informing them that the employee would be unavailable without revealing information regarding her medical condition or surgical needs.
- [Arnoldo P. v. U.S. Postal Serv., EEOC Appeal No. 0120123216 \(January 8, 2016\)](#). Supervisor left employee's confidential medical information on his desk for approximately one week. Even though there was no proof that it was disclosed to an unauthorized person, failure to maintain it in a separate, secure medical file was unlawful.

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Denials of Reasonable Accommodation Held Improper – No Undue Hardship Shown

- [Melani F. v. Dep't of Homeland Sec., EEOC Appeal No. 0720150027 \(March 15, 2016\)](#). Denial of reader for examination requested by employee with dyslexia.
- [Latarsha A. v. Fed. Energy Regulatory Comm'n, EEOC Appeal Nos. 0120123215 & 0120131079 \(March 15, 2016\)](#). Delay in installing accessible door; interim accommodation during two years found to be inconsistent/unreliable.
- [Freddie M. v. Dep't of Def., EEOC Appeal No. 0120140976 \(January 8, 2016\)](#). Denial of reserved accessible parking space for disability-related limitations.

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Retaliation Under the ADA

- EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination, including harassment.
- Asserting EEO rights (called “protected activity”) includes requesting reasonable accommodation, even if it is not ultimately granted.
- Note: Sometimes there is retaliation before any “protected activity,” such as where an employment policy itself discourages exercising EEO rights.

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ADA Interference

- ADA prohibits both retaliation and also interference
- Interference provision is broader than retaliation
- Protects all individuals (whether or not with disabilities or qualified) from coercion, threats, intimidation, or interference with ADA rights
- Reaches even instances when conduct does not meet the “materially adverse” standard required for retaliation
- Many instances of employer threats or coercion might also be actionable under the ADA as a denial of accommodation, discrimination, or retaliation

Examples of ADA Interference

- coercing individual to relinquish or forgo accommodation to which otherwise entitled
- intimidating applicant from requesting accommodation for application process by indicating such a request will result in not being hired
- issuing policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason")
- subjecting employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation

More Information on Retaliation and Interference

- *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*,
<https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm>
- *Small Business Fact Sheet: Retaliation and Related Issues*,
<https://www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm>

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