

Highlights

Common pitfalls when processing an employee's accommodation request may include, but are not limited to, the following:

- Failing to recognize a request for accommodation;
- Assuming an employee's medical condition is not limiting enough to be a covered disability;
- Failing to engage in the interactive process, including considering alternative accommodations;
- Misunderstanding which job functions are essential and/or eliminating essential functions;
- Assuming that any difficulty constitutes an undue hardship;
- Mixing performance or conduct issues with an employee's disability;
- Failing to properly keep records, including maintaining confidentiality; and
- Failing to consider other laws.

ADA Accommodations: Traps for the Unwary

Title I of the federal Americans with Disabilities Act (ADA) generally requires private-sector employers with 15 or more employees to provide reasonable accommodation to qualified employees or applicants with disabilities, unless to do so would cause undue hardship. Reasonable accommodations include (among other things) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.

The ADA accommodation process can be very complex and fraught with pitfalls for employers unfamiliar with their legal obligations. Even experienced, well-intentioned employers may make major mistakes, resulting in costly lawsuits and reputational harm. This Compliance Overview highlights common traps that employers may fall into when processing an employee's accommodation request.

Links and Resources

- [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA](#), from the U.S. Equal Employment Opportunity Commission (EEOC)
- [Disability Discrimination and Employment Decisions](#), from the EEOC
- [Applying Performance and Conduct Standards to Employees with Disabilities](#), from the EEOC

Trap #1: Failing to Recognize a Request for Accommodation

If an employer is not attentive, it may inadvertently fail to recognize an individual's request for reasonable accommodation. When an individual decides to request accommodation, they or their representative must let the employer know they need an adjustment or change at work for a reason **related to a medical condition**. To request accommodation, an individual may use plain English and need **not** mention the ADA or use the phrase "reasonable accommodation."

Example #1: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

Example #2: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

Example #3: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does **not** link his need for the new chair with a medical condition.

While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an **informal, interactive process** between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer **needs to determine if the individual's medical condition meets the ADA definition of "disability,"** a prerequisite for the individual to be entitled to a reasonable accommodation.

Trap #2: Assuming an Employee's Medical Condition Is Not Limiting Enough to Be a Covered Disability

Under the ADA, a person has a disability if the person:

- ☒ Has a physical or mental condition that **substantially limits** a major life activity (e.g., walking, talking, seeing, hearing or learning; or operation of a major bodily function, such as brain, musculoskeletal, respiratory, circulatory or endocrine function);
- ☒ Has a history of a disability; or
- ☒ Is subject to an adverse employment action because of a physical or mental impairment the individual actually has or is perceived to have, except if it is transitory (lasting or expected to last six months or less) and minor.

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When an employee with a medical condition requests accommodation, employers may question whether the employee's medical condition meets the criteria above. Not everyone with a medical condition is protected from disability discrimination.

That said, the ADA directs that the definition of disability is **construed broadly, in favor of extensive coverage, to the maximum extent** permitted by the law. A medical condition **does not need to be long-term, permanent or severe to be substantially limiting**. Also, if symptoms come and go, what matters is how limiting the symptoms are when they are active.

Key Points: An impairment need **not** prevent or severely or significantly limit a major life activity to be considered substantially limiting. The primary focus of the ADA is on whether discrimination occurred. The determination of disability **should not require extensive analysis**.

Trap #3: Failing to Engage in the Interactive Process, Including Considering Alternative Accommodations

After receiving a request for reasonable accommodation, an employer and the individual with a disability **should engage in an informal process** to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation.

Key Points: While the individual with a disability does not have to be able to specify the precise accommodation, they do need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer is not familiar with possible accommodations, there may be public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.

An employer should respond expeditiously to a request for reasonable accommodation. Unnecessary delays can result in a violation of the ADA. Also, employers should not reject an employee's request because it seems unreasonable or impractical. Employers should still engage in an interactive dialogue with the employee to see if a solution can be reached.

When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about their disability and functional limitations. The employer is entitled to know that the individual has a covered disability for which they need a reasonable accommodation.

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In addition, the duty to provide reasonable accommodation is ongoing. Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then, at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, they are entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

An employer **must consider each request** for reasonable accommodation and determine:

- ☑ Whether the accommodation is needed;
- ☑ If needed, whether the accommodation would be effective; and
- ☑ If effective, whether providing the reasonable accommodation would impose an undue hardship.

Key Points: If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer **must consider whether there would be an alternative reasonable accommodation** that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which they are qualified, unless to do so would cause an undue hardship. Other potential accommodations may include, but are not limited to, modified/part-time schedules or a leave of absence.

Trap #4: Misunderstanding Which Job Functions Are Essential and/or Eliminating Essential Functions

The ADA requires employers to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. A “**qualified individual with a disability**” is a person who meets legitimate skill, experience, education or other requirements of an employment position that they hold or seek, and who can perform the essential functions of the position with or without reasonable accommodation. The “**essential functions**” are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important.

Key Points: Requiring the ability to perform essential functions assures that an individual will not be considered unqualified simply because of the inability to perform marginal or incidental job functions. Job restructuring as a reasonable accommodation includes modifications such as **reallocating or redistributing marginal job functions** that an employee is unable to perform because of a disability and altering when and/or how a function, essential or marginal, is performed.

It is important for employers to determine which job functions are essential and which are marginal, as they may need to reallocate or redistribute marginal job functions as a reasonable accommodation. However, employers should be cautious about simply taking a manager’s word that a function is, in fact, essential, as this might be contested if an issue goes to court. Employers should carefully examine each job to determine which functions or tasks are essential to performance.

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This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing.

Factors to consider in determining if a function is essential include things such as whether the reason the position exists is to perform that function and the degree of expertise or skill required to perform the function. An employer's judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job, may be considered by the EEOC as evidence of essential functions. Other kinds of evidence that the EEOC may consider include the actual work experience of present or past employees in the job and the time spent performing a function.

Key Points: There are several modifications or adjustments that are not considered forms of reasonable accommodation. An employer **does not have to eliminate an essential function**. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a qualified individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards—whether qualitative or quantitative—that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard.

Eliminating essential functions may also make it harder to argue later that the function is essential for the employee with a disability or any employee. In addition, other employees may argue that the function should not be essential for them either or claim discrimination.

Trap #5: Assuming That Any Difficulty Constitutes an Undue Hardship

An employer does not have to provide a reasonable accommodation that would cause an **undue hardship** to the employer. Undue hardship means **significant difficulty or expense** and focuses on the resources and circumstances of the particular employer in relation to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operation of the business.

Key Points: An employer must assess on a **case-by-case basis** whether a particular reasonable accommodation would cause undue hardship. Generalized conclusions will **not** suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

A determination of undue hardship should be based on several factors, including:

- ☒ The nature and cost of the accommodation needed;
- ☒ The overall financial resources of the facility making the reasonable accommodation, the number of persons employed at this facility, and the effect on expenses and resources of the facility;

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- ☑ The overall financial resources, size, number of employees, and type and location of the employer's facilities (if the facility involved in the reasonable accommodation is part of a larger entity);
- ☑ The type of the employer's operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- ☑ The impact of the accommodation on the facility's operation.

Employers should consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the **net cost** to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if they will pay the difference.

Key Points: If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer **must provide the second accommodation**.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that the provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where the provision of a reasonable accommodation would be unduly disruptive to other employees' ability to work.

Trap #6: Mixing Performance and/or Conduct Issues With an Employee's Disability

If an employee with a disability is having performance or conduct issues at work, an employer may question whether it can mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so. Generally, **it is inappropriate for the employer to focus the discussion about a performance or conduct problem on an employee's disability**. The point of the employer's comments should be a clear explanation of the employee's performance deficiencies or misconduct and what the employer expects the employee to do to improve. Moreover, emphasizing the disability risks distracting from the focus on performance or conduct, and in some cases could result in a claim under the ADA that the employer regarded (or treated) the individual as having a disability.

That said, an employer may ask an employee with a known disability who is having performance or conduct problems if they need a reasonable accommodation. Alternatively, an employer may prefer to ask if some step(s) can be taken to enable the employee to improve their performance or conduct without mentioning accommodation or the employee's disability.

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Key Points: It is generally preferable that the employee initiate any discussion on the role of the disability. Ideally, employers should discuss problems before they become too serious in order to give the employee an opportunity as soon as possible to address the employer's concerns.

An employee who is on notice about a performance or conduct problem and who believes the disability is contributing to the problem should evaluate whether a reasonable accommodation would be helpful. An employee should not assume that an employer knows about a disability based on certain behaviors or symptoms. Nor should an employee expect an employer to raise the issue of the possible need for reasonable accommodation, even when a disability is known or obvious.

Trap #7: Failing to Properly Keep Records, Including Maintaining Confidentiality

Employers should start recordkeeping as soon as they receive an accommodation request. Employers should document every step of the process, including the request for accommodation, the individual's medical condition, the employer's interactions with the employee or applicant to discuss options, and why the employer selected a specific accommodation.

Key Points: Employers should also properly document a denied accommodation request. Documenting the process followed and the reason for denial might help an employer's defense in the event of litigation.

To comply with the ADA, the records noted above **must be kept confidential and stored separately from the employee's personnel file**. Medical information should be kept in a separate medical file that is accessible only to designated officials. Medical information stored electronically must be similarly protected (e.g., by storing it on a separate database).

With limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

Employers may sometimes have to disclose medical information about applicants or employees. The ADA contains certain exceptions to the general rule requiring confidentiality. Information that is otherwise confidential under the ADA may be disclosed:

- ☒ To supervisors and managers where they need medical information in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- ☒ To first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition;
- ☒ To individuals investigating compliance with the ADA and with similar state and local laws; and
- ☒ Pursuant to workers' compensation laws (e.g., to a state workers' compensation office in order to evaluate a claim) or for insurance purposes.

Trap #8: Failing to Consider Other Laws

When an employee with a disability requests accommodation, additional federal, state and/or local laws may be implicated. For example, an employee who requests leave may be covered by both the ADA and the federal Family and Medical Leave Act. If an employee's disability is the result of a workplace injury, workers' compensation law may apply.

As another example, if a pregnancy is involved, the federal Pregnant Workers Fairness Act (PWFA) may be implicated. Generally, the PWFA requires a covered employer to provide a reasonable accommodation to a qualified employee's or applicant's known limitations related to, affected by or arising out of pregnancy, childbirth or related medical conditions, unless the accommodation will cause the employer an undue hardship. Employers should confirm whether other laws apply to an employee's situation to ensure compliance with all legal obligations.

Employer Takeaways

The ADA accommodation process can be very complicated and full of pitfalls, even for experienced employers. Mistakes may result in expensive lawsuits and reputational damage. Employers should take the traps outlined above into consideration when processing an employee's accommodation request. Given the complexities involved, employers are strongly encouraged to consult with local counsel to ensure compliance with all applicable laws.