



# Loss Control TIPS

## Technical Information Paper Series

*Innovative Safety and Health Solutions<sup>SM</sup>*

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# The Americans with Disabilities Act: What is a Reasonable Accommodation?

## Introduction

The Americans with Disabilities Act requires that employees or candidates for employment be provided reasonable accommodations. Review the following scenarios and determine your response to the questions. The answers to these questions are found at the end of this article.

1. An employee with a severe learning disability has great difficulty in reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. However, the supervisor proposes to provide the messages via a tape recording. Would the supervisor's proposal violate the ADA?
2. An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, which generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. Absent undue hardship, must the employer grant this request?
3. An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has learned that an employee in an equivalent position plans to retire in six months. Since the employer knows that the employee with the disability is qualified for the position, is the employer required to offer the position?
4. A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. Must the employer offer such a reassignment if there is a vacant position?
5. An employee with cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that the employee may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Is the employer in compliance by making this accommodation?



## Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (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 to the employer. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities [29 CFR pt. 1630 app. 1630.2 (0) (1997)]. There are three categories of reasonable accommodations:

1. Modifications or adjustments to a job application process that enables a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
2. 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; or
3. Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

An employer may have to provide any of a number of possible reasonable accommodations in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- Making existing facilities accessible
- Job restructuring
- Part-time or modified work schedules
- Acquiring or modifying equipment
- Changing tests, training materials, or policies
- Providing qualified readers or interpreters
- Reassigning to a vacant position

An employer does not have to eliminate an essential function; i.e., a fundamental duty of the position. Nor, is an employer required to lower production standards—whether qualitative or quantitative—that are applied uniformly to employees without disabilities. Such accommodations are not considered to be reasonable.

## Undue Hardship

Additionally, the EEOC defines “undue hardship” to mean 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 also to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. 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
- The effect on expenses and resources of the facility
- The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)

- The type of operation of the employer, 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
- The impact of the accommodation on the operation of the facility

Keep in mind that the cost to the employer for an accommodation is net cost. This means that the employer must consider all possible sources of outside funding, such as funding from a state rehabilitation agency, eligibility for tax credits or deductions, and any cost the affected employee would be willing to undertake.

## **Reasonable Accommodation and Job Applicants**

Employers are required to make a reasonable accommodation to job applicants with qualified disabilities to afford such persons equal opportunity in attempting to secure employment. Examples of such accommodations may include:

- Provide an accessible site for applicants with disabilities to complete the necessary application and interview processes
- Provide necessary equipment to adequately communicate, such as TTY, computer equipment, assistive listening devices, open and closed captioning, qualified readers or interpreters
- Provide appropriate media for applicants to complete any necessary questionnaires or pre-employment tests, such as Brailled materials, materials on computer disk, or large print materials

## **Reasonable Accommodation and Job Benefits and Privileges**

Employers are required to provide reasonable accommodations so that employees with disabilities can enjoy the benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities. Benefits and privileges may include:

- Employer-sponsored training programs
- Employer-provided services, such as employee assistance program (EAPs), credit unions, cafeterias, lounges, gymnasiums, auditoriums, and transportation
- Parties or other social functions, such as parties to celebrate retirements and birthdays, and company outings

## **Reasonable Accommodation and Job Performance**

Employers are also required to provide reasonable accommodations related to job performance, such as:

- Job restructuring
- Leave
- Modified or part-time schedule
- Modified workplace policies
- Reassignment

## Job Restructuring

Job restructuring 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. An employer never has to reallocate essential functions as a reasonable accommodation.

## Leave

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. An employer does not have to provide paid leave beyond that which is provided to similarly situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. Employees with disabilities may need leave for a number of reasons related to their disabilities, including, but not limited to:

- Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- Recuperating from an illness or episodic manifestation of the disability;
- Obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- Training a service animal (e.g., a guide dog); or
- Receiving training in the use of Braille or learning sign language.

## Modified or Part-Time Schedule

An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. For certain positions, the time during which an essential function is performed may be critical. Employers should carefully assess whether modifying the hours could significantly disrupt their operations (i.e., cause undue hardship) or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs. If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

## Modified Workplace Policies

It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. However, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees. It would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship. Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.

## Reassignment

The ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. A “vacant” position is one that is currently unfilled or that will be open within a reasonable amount of time. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

An employee must be “qualified” for the new position. An employee is “qualified” for a position if s/he:

1. Satisfies the requisite skill, experience, education, and other job-related requirements of the position, and
2. Can perform the essential functions of the new position, with or without reasonable accommodation. The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that:

1. There is no effective accommodation that will enable the employee to perform the essential functions of his/her current position, or
2. All other reasonable accommodations would impose an undue hardship.

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors, (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Reassignment does not include giving an employee a promotion. Therefore, an employee must compete for any vacant position that would constitute a promotion. Additionally, employers cannot deny a reassignment to an employee solely because s/he is designated as “probationary,” as long as the employee adequately performed the essential functions of the position, with or without accommodation, before the need for reassignment arose.

## Additional Issues

Several other reasonable accommodation issues should be noted. An employer does not have to change a person’s supervisor as a form of reasonable accommodation, absent harassment or discrimination on the part of the supervisor. A reasonable accommodation may be to allow the employee to work at home, but only if the accommodation would be effective and would not cause an undue hardship. An employer never has to withhold discipline or termination of an employee who, because of a disability, violates a conduct rule that is job-related and consistent with business necessity. For example, this means that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property.

## Answers to Questions On Page 1

1. No, as long as the alternative proposal is effective. As in all cases of reasonable accommodation, the employer should discuss alternative solutions with the employee. If more than one solution is considered to be effective, the employer has the right to choose the one that will have the least cost or least negative impact on the operation.
2. Yes. This is a reasonable accommodation.
3. No. Because six months is beyond a “reasonable amount of time.” (However, if, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)
4. No. The employer does not have to provide a reassignment (even if there is a vacant position) because the individual was never qualified (i.e., the individual was never able to perform the essential functions of the position for which he was hired, with or without reasonable accommodation).
5. Yes. Since the accommodation does not involve a significant disruption to the operation, there is no undue hardship. However, keep in mind that the assignments that were transferred were marginal to the job. Should the employee require that essential functions be transferred, this could indicate that the employee is no longer qualified and such a transfer could be unreasonable.

Note: Most of the material for this article was adapted from the EEOC’s document *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*. For additional insight, consult the entire document at <http://www.eeoc.gov/docs/accommodation.html>.

For more information, contact your local Hartford agent or your Hartford Loss Control Consultant. Visit The Hartford’s Loss Control web site at <http://www.thehartford.com/corporate/losscontrol/>

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