

Accommodating Employees with Disabilities

Introduction

An agency must reasonably accommodate the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it can show the accommodation would impose an undue hardship on its operations. 29 CFR 1630.9. Although federal employees are protected by the Rehabilitation Act of 1973, the standards applied are the same as those applied under the Americans with Disabilities Act of 1990. 29 CFR 1614.203(b).

Because employment law relating to individuals with disabilities can be complicated, it's important for managers to address the issues surrounding reasonable accommodation in a logical manner. This Checklist Plus+ allows you to guide managers through a step-by-step approach when they consider a request for reasonable accommodation.

The speed of the accommodation process depends on the circumstances of the case. A simple and obvious accommodation that requires no equipment, planning or cost should be available to an individual with a disability soon after it is requested. With regard to more complex accommodations, the key is diligence.

If an agency works with good faith and perseverance to achieve reasonable accommodation within a reasonable period of time, it should avoid a finding of liability for disability discrimination. An agency that drags its feet and makes only half-hearted attempts to achieve reasonable accommodation could be found liable for disability discrimination, including an award of compensatory damages, which could be quite high, depending on the complainant's evidence of pain and emotional distress.

You may work through the steps of this Checklist Plus+ in the order presented or use the summary of steps below to link directly to those areas that most interest you.

Summary of Steps

1. [Determine if the person is an individual with a disability.](#)
2. [Determine if the person is a qualified individual with a disability.](#)
3. [Consult with the individual about specific needs and consider accommodation possibilities.](#)
4. [Determine if the preferred accommodation is an undue hardship.](#)
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1. Determine if the person is an individual with a disability.

An individual with a disability is one who:

- Has a physical or mental impairment that substantially limits one or more of the person's major life activities.
- Has a record of having an impairment that substantially limits one or more of the person's major life activities.
- Or is regarded as having an impairment that substantially limits one or more of the person's major life activities. 29 CFR 1630.2 (g).

"Substantially limits" and "major life activity" are both terms of art that have been defined by regulation and case law. Except in the case of readily apparent disabilities, such as blindness, agencies should not make assumptions about whether or not individuals have disabilities. Instead, if an individual makes a request for reasonable accommodation, and the extent and impact of the claimed impairment are not obvious, an agency should promptly consider the following two questions. If the answer to both is "yes," the agency should move on to the next step in the analysis.

Question 1: Does the individual have an impairment? An impairment, according to the EEOC, is:

- Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.
- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 CFR 1630.2(h).

The appendix to the regulation adds this explanatory guidance:

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. 29 CFR App. 1630.2(h). **[Editor's note: To reach the appendix, scroll past section 1630.16.]**

EEOC regulations state that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities." 29 CFR App. 1630.2(j)). However, the EEOC also has indicated that an impairment does not have to be permanent in order to be considered a disability for the purposes of Rehabilitation Act protection. Conditions that are long-term, or of an indefinite duration, can constitute disabilities if they are so severe that they substantially limit a major life activity.

Question 2: Is the impairment substantially limiting to a major life activity? If the person at issue has an impairment, the agency must then determine if the impairment substantially limits a major life activity.

The answer to this question requires consideration of relevant regulations and case law, as well as documentation concerning the person's specific condition. General knowledge about a condition is insufficient for making an appropriate judgment about the abilities and limitations of an individual seeking accommodation because symptoms and limitations from an impairment can vary widely.

Substantially limits is defined as the inability to perform a major life activity, or significant restriction as to condition, manner or duration with which a person performs a major life activity compared to the average person. Factors to consider when assessing whether someone is substantially limited are the nature, severity and duration of the impairment, as well as the long-term or permanent impact of the impairment. 29 CFR 1630.2(j).

The U.S. Supreme Court has determined an individual with an impairment is not substantially limited in one or more major life activities if corrective measures mitigate the impairment sufficiently.

An individual must be presently disabled, the disability must substantially limit a major life activity, and an individual inquiry of the specifics of the current situation is required. Thus, individuals with medical conditions that can be substantially corrected through medication or other routine treatments (e.g., hearing aids, blood pressure medicine, glasses/contact lenses) may not be individuals with disabilities.

In making the assessment of an individual's condition in relation to corrective measures, a manager must be sure to take into account the negative effects of mitigating measures, as well as the positive effects. If corrective measures are not sufficiently effective or negatively impact the person's condition in a way that causes another substantial limitation, the person may still be considered an individual with a disability. Mitigation always must be analyzed on a case-by-case basis because the impact of medication and assistive device varies for each individual, even among those with similar conditions.

Major life activities include, but are not limited to:

- Caring for one's self.
- Performing manual tasks.
- Walking.

- Seeing.
- Hearing.
- Speaking.
- Breathing.
- Learning.
- Working.
- Sitting.
- Standing.
- Lifting.
- Reaching.
- Concentrating.
- Interacting with others.
- Reading. 29 CFR 1630.2(h)(2)(i); 29 CFR App. 1630.2(i)

In its interpretive guidance on the ADA, the EEOC states that "major life activities" are "those basic activities that the average person in the general population can perform with little or no difficulty."

The major life activity of performing manual tasks has been scrutinized by the U.S. Supreme Court. According to the Court, "When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.*, 102 FEOR 90001 (U.S. 2002).

To determine whether an individual is substantially limited in a major life activity, it is crucial that an agency consider specific medical documentation. An employer may ask for reasonable documentation when the disability or the need for accommodation is not obvious.

The EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (2002) states that reasonable documentation is "only the documentation that is needed to establish that the person has an ADA disability, and that the disability necessitates a reasonable accommodation." The guidance goes on to point out that this means in most cases an employer cannot ask for an individual's entire medical record because it is bound to have information unrelated to the disability at issue and the need to accommodate that disability.

Individuals who have a record of having an impairment that substantially limits one or more of the person's major life activities and individuals who are regarded as having such impairments are also considered individuals with disabilities for the purposes of the Rehabilitation Act.

Having a record of a substantially limiting impairment means having a history of, or having been being misclassified as having, a mental or physical impairment that substantially limits a major life activity. 29 CFR 1630.2(k).

"Is regarded" as having an impairment that substantially limits a major life activity means:

- Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation.
- Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.
- Has none of the impairments defined in [the regulations] but is treated by a covered entity as having a substantially limiting impairment. 29 CFR 1630.2(I).

While individuals with a record of a substantially limiting impairment may be entitled to reasonable accommodation under certain circumstances, individuals who are only regarded as substantially limited in a major life activity are not entitled to a reasonable accommodation.

2. Determine if the person is a qualified individual with a disability.

After determining that a person is an individual with a disability, a decision-maker must next determine if the person in question is a "qualified individual with a disability: "

Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 CFR 1630.2(m).

Some limited exceptions to this definition can be found at 29 CFR 1630.3.

Direct threat. Further, an agency can require that the individual not pose a direct threat to health and safety in the workplace. A direct threat is defined as "a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." To determine if an individual poses a direct threat, the agency must conduct "an individualized assessment of the individual's present ability to safely perform the essential functions of the job." 29 CFR 1630.2(r).

Determining if a person is a qualified individual with a disability requires considerable attention to detail. A practitioner must determine the essential functions of the position at issue and whether this particular person can perform the essential functions **with or without** reasonable accommodation.

Warning: Practitioners can be tripped up if they:

- Fail to distinguish between essential and nonessential functions.
- Fail to conduct an individualized assessment of the individual's abilities.
- Fail to properly consider reasonable accommodation, including reassignment as an accommodation.

Essential functions of the position. "The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 CFR 1630.2(n). A job function may be considered essential for a number of reasons, including, but not limited to those outlined by 29 CFR 1630.2(n)(2):

- The function may be essential because the reason the position exists is to perform that function.
- The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
- The function may be highly specialized so that the incumbent in the position is hired for the expertise or ability to perform the particular function.

The type of evidence to be considered in making a determination concerning the essential functions of a position includes:

- The employer's judgment as to which functions are essential.
- Written job descriptions prepared before advertising or interviewing applicants for the job.
- The amount of time spent on performing the function.
- The consequences of not requiring the incumbent to perform the function.
- The terms of the collective bargaining agreement.
- The work experience of past incumbents in the job.
- The current work experience of incumbents in similar jobs. 29 CFR 1630.2(n)(3).

Reassignment as an accommodation. In considering whether a person is a "qualified" individual with a disability, an agency must take into account whether reasonable accommodation would allow the individual to perform the essential functions of the position. If other accommodations have been explored and determined to be unworkable, reassignment is an accommodation to be considered as a last resort. 29 CFR App.1630.2(o).

In seeking a position to which an individual can be reassigned as an accommodation, the agency is required to place the complainant in "an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time." However, an agency "may reassign an individual to a lower graded position if there are no accommodations that would enable to employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation." 29 CFR App. 1630.2(o).

3. Consult with the individual about specific needs and consider accommodation possibilities.

In addressing reasonable accommodation, the parties should engage in an informal and flexible interactive process to identify the precise limitations of the individual and what

accommodations could overcome those limitations. 29 CFR 1630.2(o)(3). The EEOC discusses this process in 29 CFR App. 1630.9. The process may be more or less intense depending on whether appropriate accommodations are obvious or more difficult to determine. The essential process, as outlined in the appendix, is as follows:

- Analyze the particular job involved and determine its purpose and essential functions.
- Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation.
- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position.
- Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

The interactive process requires the agency to assess both the particular job at issue, including its actual duties and purpose, and the specific abilities and limitations of the individual in need of reasonable accommodation.

The EEOC notes that if such an assessment and a consultation with the individual do not reveal appropriate potential accommodations, the agency should seek technical assistance from the EEOC, state or local rehabilitation agencies or private organizations.

Although the interactive process is considered a key component in achieving reasonable accommodation, recent EEOC decisions indicate an agency will not incur liability simply by failing to engage in the process. Instead, the complainant has the burden of showing that, more likely than not, if the agency had fulfilled its duty of actively working with the complainant to find a reasonable accommodation, an accommodation would have been found.

Types of reasonable accommodation. The term reasonable accommodation means:

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires.
- 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.
- 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. 29 CFR 1630.2(o)(1).

Warning: Most cases concerning reasonable accommodation are centered on 29 CFR 1630.2(o)(1)(ii) -- making adjustments to the work environment to enable an individual to perform the essential functions of a position. However, agency practitioners should be careful to remember there are two other areas where reasonable accommodation may be necessary - during the application process and in connection with the benefits and privileges of employment.

Because disabilities and the needs of individuals with disabilities vary so widely, agencies should be open to a broad variety of accommodation possibilities. According to the EEOC regulations, reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities.
- Job restructuring.
- Part-time or modified work schedules.
- Reassignment to a vacant position.
- Acquisition or modifications of equipment or devices.
- Appropriate adjustment or modifications of examinations, training materials or policies.
- Provision of qualified readers or interpreters. 29 CFR 1630.2(o)(2).

Other accommodations could include:

- Permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.
- Making employer-provided transportation accessible.
- Providing reserved parking spaces.
- Providing personal assistants, such as a page turner or travel attendant. 29 CFR App. 1630.2(o).

Job restructuring means reallocating or redistributing nonessential, marginal functions that an employee cannot perform due to a disability, or altering how and when work is performed. 29 CFR App. 1630.2(o).

Although it is crucial for the agency to work with the individual in finding a reasonable accommodation, and the individual's preference should be given primary consideration, it is important to note the agency has the final say. If there is more than one effective accommodation, the agency can make a choice, even if the choice is not the one favored by the complainant. The key is that the accommodation chosen must be effective.

4. Determine if the preferred accommodation is an undue hardship.

Undue hardship that would excuse an agency from providing reasonable accommodation refers to situations in which a proposed reasonable accommodation would result in an unduly

extensive, substantial or disruptive change or a fundamental alternation to the nature of the work.

Factors to consider include:

- Overall size of the agency's program with respect to number of employees.
- Type and number of facilities.
- Size of the budget.
- Type of agency operation.
- Composition and structure of the agency's workforce.
- Nature and cost of the accommodation.

If an undue hardship would result, the accommodation is not required. 29 CFR 1630.2(p).

The complainant has the initial burden of showing an accommodation seems reasonable on its face. Once the complainant has shown the accommodation is reasonable, the burden shifts to the agency to provide specific evidence establishing the accommodation would cause an undue hardship under the particular circumstances. *U.S. Airways, Inc. v. Robert Barnett*, 102 FEOR 90005 (2002).

In order to prove undue hardship, an agency must show accommodating an individual would cause it significant difficulty or expense. 29 CFR 1630.2(p). Whether "significant difficulty or expense" will be incurred is assessed according to the following factors:

- The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding.
- The overall financial resources of the facility or facilities involved.
- The number of persons employed at the facility.
- The effect on expenses and resources.
- The overall financial resources of the covered entity.
- The overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities.
- The type of operation or operations of the covered entity.
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business. 29 CFR 1630.2(p).

When considering issues of undue hardship, the agency should keep in mind it can require that the individual not pose a direct threat to health and safety in the workplace. A direct threat is defined as "a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 CFR 1630.2(r).

5. If it is not an undue hardship, implement the accommodation.

Once an accommodation has been agreed upon, it should be implemented as quickly as possible. Although an accommodation cannot be forced upon an individual, if an individual rejects an effective reasonable accommodation and cannot perform the essential functions of the position in question, the individual may be terminated.

6. Determine whether the accommodation chosen is effective.

Depending on the individual involved and the complexity of the accommodation provided, reasonable accommodation can be an ongoing process.

The accommodation agreed upon may ultimately prove unworkable or the individual's condition may change. In any case, the agency remains responsible to reasonably accommodate a qualified individual with a disability, absent a showing of undue hardship. Therefore, if an accommodation proves ineffective, for whatever reason, the agency should work promptly and diligently to make the changes necessary to achieve an effective accommodation.