

About the ADA

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When questions about employees' disabilities arise, finding the right answers can be complicated. This month, we've answered a few of your questions to help you recognize some disability-related issues commonly faced by employers. Of course, it's always best to consult your labor attorney before taking any action because Americans with Disabilities Act (ADA) issues are fact-specific, and courts rarely, if ever, recognize clear-cut rules in these cases.

How far do you have to go to accommodate a disabled employee?

Q: We have an employee who claims to have frequent migraine headaches and can't tolerate the overhead lighting in her office. We've made many accommodations over the years to help her keep her area of the office dimly lit. Our office is going to be restructured, and we want to make this employee the frontoffice receptionist. We want to move her workstation to the front lobby, but we want to know where our boundaries/obligations lie in dealing with her need for accommodations because of her headaches. What are we required to do legally in accommodating her in the new position? If we keep her in her current office, she won't be able to answer the phone or assist visitors in a timely manner.

A: To be protected under the ADA, an individual must have, have a record of, or be regarded as having a substantial impairment as opposed to a minor one. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning, or working. More information would be needed to determine whether your employee is or has been regarded as "substantially impaired" and thus entitled to a reasonable accommodation under the ADA. The fact that you've accommodated her in her current position doesn't necessarily mean that you regarded her as having a substantial impairment, so it still isn't clear that she's protected under the ADA. Furthermore, when an employee asks for a reasonable accommodation and the disability or need for that accommodation isn't obvious or you can't determine whether she's protected under the ADA, you may ask the individual for reasonable documentation about her disability and functional limitations. You're entitled to know she has a covered disability because a reasonable accommodation may be required. You may ask only for the documentation that's needed to establish an ADA disability and that the disability necessitates a reasonable accommodation.

Another requirement for protection under the ADA is that the individual must be able to perform the essential functions of the job at issue with or without a reasonable accommodation. The fact that you're changing her job could affect the answer to this question because she apparently is able to perform the essential functions of her current job with the accommodation. Are you eliminating her current job entirely, or is she being

transferred to the receptionist position for other reasons? Is the change a demotion? These issues could affect your exposure to potential liability. Are there any jobs she could perform in which you could continue the accommodation? While you aren't required to create a job or bump another employee from his job to accommodate a disabled employee, you may be required to offer her a job with duties she can perform if one is available. You should thoroughly examine whether it's necessary (and if so, why?) to move this employee, as opposed to another employee, to the receptionist job to avoid overlooking a solution that would allow you to continue the current accommodation.

Assuming this employee is in fact protected under the ADA and since you already know of her need for an accommodation, you should initiate a discussion with her about whether she also will require an accommodation in the new job. If so, perhaps you could discuss ways to adjust the lighting in the reception area to minimize her exposure to overhead lighting. For example, using dimmer lighting over her desk but regular lighting in the lobby area might be a solution. You don't, however, have to grant a request for accommodation that may cause "undue hardship" to your company. Undue hardship means that an accommodation would be unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business. You also don't have to provide the specific accommodation she requests. And if there are several options to choose from, you don't necessarily have to go with the one she wants. When there are two possible reasonable accommodations and one costs more than the other or is otherwise more burdensome, you can choose the less expensive option so long as it's effective.

Note that you also don't have to take away fundamental job duties as an accommodation, such as lowering production standards or excusing violations of conduct rules that are job-related and consistent with business necessity. And you aren't required to provide your employee with "personal use items" such as eyeglasses or other devices the employee needs both on and off the job. But in this case, if the employee is protected under the ADA, you should engage in the interactive process to see if a reasonable accommodation can be provided.

Who's responsible for saying an accommodation is needed?

Q: We have an employee who has been off since mid-December, and it may turn into a long-term disability. He hasn't asked about coming back to work. In fact, he doesn't think he'll be able to. Do we have to ask him if he would like us to look into an accommodation?

A: The initial responsibility for indicating that an accommodation is needed rests with the employee. You aren't required to speculate about the extent of the employee's disability or his need or desire for an accommodation. In this case, you've told us that the employee doesn't think he'll be able to return to work and hasn't asked about coming back to work. Under those circumstances, you aren't obligated to ask whether he needs an accommodation. If he requests an accommodation, however, you may be obligated to engage in an "interactive process" with him to determine if there's a reasonable accommodation that could help him do his job, such as additional time off from work to recuperate further or a job

modification. Permitting an employee to use accrued paid or unpaid leave can be a reasonable accommodation when leave is necessitated by an ADA-covered disability.

If your employee asks for additional leave as a reasonable accommodation, you'll be required to hold his position open so long as doing so is reasonable and doesn't impose undue hardship. You should consider your policies and past practices to make sure you're not treating this employee less favorably than a similarly situated employee. If you can't hold his position open during the entire leave period without incurring an undue hardship, you must consider whether you have a vacant, equivalent position for which he's qualified and to which he can be reassigned to continue his leave for a specific period of time after which he can be returned to work. There aren't any clear-cut rules about how much leave is "reasonable" under the ADA, and courts addressing ADA cases conduct a case-by-case, fact-specific inquiry into what's reasonable. Because employers covered by the Family and Medical Leave Act (FMLA) are obligated to provide eligible employees with qualifying FMLA conditions up to 12 weeks of leave in a 12-month period, however, some courts have held that 12 weeks of leave is a reasonable accommodation under the ADA in some cases.

Keep in mind that if the employee also is on FMLA leave, he'll have reinstatement rights to his job or an equivalent job on his return. If he's unable to perform the essential functions of his job or an equivalent job with or without a reasonable accommodation, you don't have to reinstate him or hold his job open.

Are you obligated to change the job's essential functions?

Q: One of our supervisors is requesting an ADA accommodation of telecommuting one day a week because of fibromyalgia (information she volunteered). Is that a reasonable request, and if so, what steps should we take to document the accommodation? Are there any federally required forms?

A: As an initial matter, it's impossible to determine from the facts whether your employee is eligible for ADA protection. The fact that she has fibromyalgia, by itself, doesn't make her substantially impaired as defined by the Act.

Assuming that she's substantially impaired within the meaning of the ADA, allowing an employee to telework may fall under the Act's reasonable accommodation requirement of modifying workplace policies, even if you don't allow other employees to telework. You're not obligated to adopt an employee's preferred or requested accommodation, however, and instead may offer alternative accommodations so long as they would be effective. You and the supervisor should discuss her request so that you understand why her fibromyalgia might necessitate working at home one specific day a week. She must explain what limitations from her disability make it difficult to do the job in the workplace and how her job could still be performed from her home. And you can require reasonable documentation from her health care provider to verify the need for the accommodation. You may wish to discuss other types of accommodations that would allow her to remain full-time in the workplace.

You'll also need to identify and review all of the supervisor's essential job functions. The essential functions or duties are the tasks that are fundamental to performing a specific job. You don't have to remove any essential job duties to permit an employee to work at home. You may, however, need to reassign some minor essential to the successful performance of a job) if they can't be performed outside the workplace and they're the only obstacle to permitting her to work at home.

After determining what functions are essential, you should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can be performed only in the workplace. Some factors to consider are whether any duties require use of certain equipment or tools that can't be replicated at home or if there's a need for face-to-face interaction between the supervisor and other employees or clients at a certain level each week. You may deny a request to work at home if another accommodation would be effective or if working at home will cause undue hardship, but consider whether you've allowed other similarly situated supervisors to telework and if you're treating this employee the same.

You aren't required to complete any special documentation or forms in connection with granting your supervisor's request to work from home. If you deny the request, however, you should document your consideration of her request and the reasons it wasn't feasible to grant it. As you know, good documentation can be useful if an employee challenges your decision in court.

What if a disability presents a safety or security risk?

Q: We recently had a report regarding misconduct by a public safety officer. While investigating the incident, the officer volunteered that he acted inappropriately because he hadn't taken his medication that day. The officer followed up the investigation by providing (on his own) a detailed list of the prescription medication he is taking. The medications are for mental health disorders. Is this officer fit for duty? A minor problem admittedly occurred because he didn't take his medication, but what happens if the situation worsens?

A: Rather than jumping to any conclusions, you first should gather information regarding the officer's ability to perform his job. If he suffers from a mental health disorder, he may be a qualified individual within the meaning of the ADA. Under the Act, a mental impairment that substantially limits one or more major life activities may qualify as a disability.

When a question arises about an employee's ability to perform the essential functions of his job or whether he can do the job without posing a direct threat to the health or safety of himself or others, you may make disability-related inquiries or require a medical examination if job-related and consistent with business necessity. A disability-related inquiry or medical examination is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat to the health or safety of himself or others because of a medical condition. In

addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

Because the officer has notified you that he takes these medications and that his failure to take them caused him to act inappropriately, you have objective evidence that his condition may affect his ability to perform his job. You may ask him to provide documentation regarding his abilities from his health care provider. Provide a job description or other information regarding the essential functions of his job so the health care provider can indicate whether his condition or medications prevent him from performing the job safely.

If you believe that the officer will pose a direct threat, you may require that he be examined by the company's health care provider. The health care provider you choose should have expertise with the medical condition at issue and be able to provide information that will allow you to determine the effects of his condition on his ability to perform his job. If your health care provider and the employee's health care provider disagree about whether the employee poses a direct threat, you should evaluate the conflicting medical information by considering, for example, the area of expertise of each medical professional, the kind of information each provided, and whether the information provided is consistent with your own observations or knowledge of the officer. ▀