Disability Accommodation under the ADA

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A Note describing employer accommodation obligations under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA). This Note addresses federal law regarding employers’ duties to engage in the interactive process and provide reasonable accommodation to a qualified individual with a disability, absent undue hardship. For information on state law requirements, see the State Q&A Tools under Related Content.

The Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA) is the primary federal law protecting the rights of individuals with a disability (42 U.S.C. §§ 12101-12213). In the employment context, the ADA requires employers to refrain from discriminating against qualified individuals because of a disability, and to provide a reasonable accommodation to individuals with a disability. A reasonable accommodation is a change in the work, workplace or application process that helps make it possible for an individual with a disability to perform or apply for a job.

Because there are no bright line rules about when employers must provide an accommodation, employers often struggle to understand their legal obligations. This Note helps employers understand the accommodation requirements of the ADA and determine what they must do to comply. In particular, this Note addresses:

• The broadened definition of disability under the ADA, as amended, and the ADAAA final regulations (76 FR 16978-01).
• Employer obligations to engage in the interactive process.
• Circumstances that trigger employer accommodation obligations.
• How employers should respond to a request for a reasonable accommodation.
• Examples of reasonable accommodations.
• Legal exposure employers may face in addressing accommodation requirements.

For a model policy, see Standard Document, Disability Accommodations Policy. For information on discrimination under the ADA, see Practice Note, Disability Discrimination under the ADA. For information on the interactive process, see Practice Note, Interactive Process under the ADA.

Overview of Accommodation under the ADA
The ADA prohibits employers from discriminating in all aspects of employment against qualified individuals on the basis of a disability and requires employers to reasonably accommodate disabilities if they can do so without an undue hardship. While court decisions have helped define the boundaries of reasonable accommodation, what constitutes a reasonable accommodation in practice remains one of the most difficult determinations an employer must make.

To understand its accommodation obligations, an employer should determine whether it is covered by the ADA (see Which Employers Are Covered under the ADA?) and whether the individual in question is protected by the ADA (see Which Individuals Are Covered under the ADA?). Answering questions about individual coverage requires assessing whether the individual is qualified (see Definition of Qualified Individual) and whether the individual could experience discrimination on the basis of disability (see Definition of Disability).

Once employers have resolved questions of coverage and have become aware of the need for accommodation, they must respond (see Providing a Reasonable Accommodation). Examples of accommodation include making the facilities more accessible, restructuring the job and allowing a change in a work schedule (see Definition of Reasonable Accommodation).

Employers should never retaliate against an individual for requesting accommodation (see Prohibition Against Retaliation) and should familiarize themselves with the kinds of accommodation questions that arise regularly (see Common Accommodation Situations). Employers should also understand the circumstances under which they are not required to provide accommodation (see Employer Defenses to Accommodation Claims) and the potential for legal exposure (see Enforcement of Accommodation Claims).

Effect of ADA Amendments Act and Final Regulations
The ADAAA and its implementing regulations, issued by the Equal Employment Opportunities Commission (EEOC), do not change the basic requirements imposed by the ADA on employers to reasonably accommodate individuals with disabilities. The statute's wording as it describes "disability" also remains the same, but the definition of "disability" was drastically changed in favor of broad coverage. For a side-by-side comparison of the definition of disability before and after the ADAAA final regulations, see Disability Definition under the ADAAA Final Regulations Chart.
The ADAAA became effective on January 1, 2009 and is not retroactive according to a number of circuit courts and the EEOC. As a result, claims alleging failure to accommodate a disability (or discrimination on the basis of disability) before January 1, 2009 are subject to different standards with respect to the definition of disability than those arising after that date. The relevant date for determining the applicable law is when the alleged failure to accommodate or discrimination occurred rather than when the legal claim was filed. For more information about the non-retroactive application of the ADAAA, see Lytes v. DC Water & Sewer Auth., 572 F.3d 936, 942 (D.C. Cir. 2009), EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009) and EEOC: Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008: Question 1.

The ADAAA's implementing regulations became effective, by their terms, on May 24, 2011. Although it is unclear whether the final regulations are retroactive to January 1, 2009, some courts have considered the final regulations when analyzing discrimination that allegedly occurred between January 1, 2009 (when the ADAAA became effective) and May 24, 2011 (when the final regulations became effective) (see, for example, Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173 (E.D. Tex. 2011)).

Which Employers Are Covered under the ADA?
A private employer is covered under the ADA if it has 15 or more employees on its payroll for 20 or more calendar workweeks (which do not need to be consecutive) in either the current or preceding calendar year (29 C.F.R. § 1630.2(e)). Subject to certain exceptions, public employers are covered under the ADA regardless of how many employees they employ.

For more information about employer coverage for governments, labor unions, employment agencies and joint apprenticeship programs under the ADA, see the EEOC's website on coverage (EEOC: Coverage).

Which Individuals Are Covered under the ADA?
The ADA covers individuals who are qualified for the position in question and prevents discrimination on the basis of disability (42 U.S.C. § 12112(a)). Both employees and applicants are covered under the ADA. Courts have generally held that independent contractors and volunteers are not covered individuals under the ADA.

To understand individual coverage, employers must understand how the ADA defines disability. For purposes of accommodation, coverage nearly always requires that the individual have a physical or mental disabling condition. The ADA prohibits discrimination "on the basis of disability," which extends beyond individuals with actual disabilities, but does not necessarily require employers to accommodate those individuals, for example, who are merely regarded as having a disability. Specifically, in addition to individuals with actual disabilities, the ADA prohibits discrimination against individuals:

- With a record of disability, and the ADAAA regulations clarify that individuals with a record of disability are entitled to reasonable accommodation (see Definition of "Record of Impairment").
• Regarded as having a disability, however, the ADAAA clarified that individuals covered on this basis are not entitled to accommodation (see Definition of "Regarded As").

• With a relationship with or associated with a person with a disability, however, individuals covered on this basis are not entitled to accommodation (see Definition of "Association With").

(42 U.S.C. §§ 12102(1) and 12112(b)(4)).

For more information on these listed categories of coverage, see ADA Protection for Individuals without Disabling Conditions.

Definition of Qualified Individual
To be a qualified individual under the ADA, one must:

• Have the skills, experience, education and other job-related requirements necessary for the position.

• Be able to perform the essential functions of the job with or without a reasonable accommodation.

(29 C.F.R. § 1630.2(m).)

Job Prerequisites
Determining the basic skills, experience, education and other requirements of the job is part of determining whether an individual is qualified. Employers have some discretion in identifying job requirements, but they must be legitimately related to performance of the job. For example, employers can require a CPA license for an accounting position.

Essential Functions
To be qualified under the ADA, an individual must be able to perform the essential functions of the job with or without a reasonable accommodation (29 C.F.R. § 1630.2(m)). Under the ADA, job functions are considered either essential or marginal, and only essential job functions are relevant to whether an individual is qualified under the ADA (29 C.F.R. § 1630.2(m) and (n)). EEOC regulations define essential functions as "fundamental job duties of the employment position the individual with a disability holds or desires" (29 C.F.R. § 1630.2(n)(1)).

Whether a job function is essential is determined by the employer but may be refuted in litigation. Identifying essential functions depends on the desired results of the job, not on the means of attaining those results. A job function may be considered essential for any of several reasons, including:
The reason the position exists is to perform that function (for example, a typist must be able to type).

There are a limited number of employees available to perform that job function.

The function is highly specialized so that the employee in the position is hired for a particular expertise or ability.

\( \text{(29 C.F.R. \$ 1630.2(n)(2).)} \)

Factors relevant to whether a job function is essential include the:

- Employer's judgment.
- Written job descriptions prepared before advertising or interviewing job applicants.
- Amount of time an employee spends performing the job function.
- Consequences of not requiring the existing employee to perform the job function.
- \textbf{Collective bargaining agreement} terms.
- Work experience of individuals who held the job previously.
- Work experience of individuals who hold similar jobs.

\( \text{(29 C.F.R. \$ 1630.2(n)(3).)} \)

\section*{Definition of Disability}

Part of the challenge of understanding ADA accommodation obligations is understanding the definition of disability. There are three definitions recognized under the ADA, which define a disability as any of the following:

- A physical or mental impairment that \textbf{substantially limits} one or more \textbf{major life activities} of an individual (that is, an actual disability).
- A record of this kind of impairment.
- Being regarded as having such an impairment.

\( \text{(29 C.F.R. \$ 1630.2(g)(1).)} \)

\section*{Physical Impairment}

A physical impairment is defined as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems, such as:
• Neurological.
• Musculoskeletal.
• Special sense organs.
• Respiratory, including speech organs.
• Cardiovascular.
• Reproductive.
• Digestive.
• Genitourinary (the urinary system and reproductive organs).
• Immune.
• Circulatory.
• Hemic (related to blood).
• Lymphatic (part of the immune system).
• Skin.
• Endocrine (involving glands and hormones).

(29 C.F.R. § 1630.2(h)(1).)

Mental Impairment
A mental impairment includes a mental or psychological disorder, such as:

• An intellectual disability (formerly called "mental retardation").
• Organic brain syndrome (reduced mental functions because of disease rather than psychological problems).
• Emotional or mental illness.
• Specific learning disabilities.

(29 C.F.R. § 1630.2(h)(2).)

Definition of Substantially Limits
The definition of disability depends heavily on the meaning of the terms "substantially limits" and "major life activities" (see Definition of Major Life Activity). The definition of “substantially limits” changed dramatically with the ADAAA and its final
regulations, but despite the changes, the precise definition remains unclear. The amended ADA clarified what "substantially limits" does not mean, but the term is not defined in either the statute or the regulations.

**Rules of Construction**

Although there is no firm definition of substantially limits, the ADAAA regulations provide nine rules of construction to help employers assess whether an impairment substantially limits a major life activity:

- Construe the term "substantially limits" broadly. Do not interpret it as a demanding standard.
- Judge the ability of an individual to perform a major life activity as compared to most people in the general population (see Limited Compared to Other People). To be substantially limiting, an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity.
- Focus on the employer's ADA obligations (to accommodate and to not discriminate), and do not extensively analyze the "substantially limits" test.
- Make assessments of impairment on an individual basis. Interpret and apply substantially limits to require a lower degree of functional limitation than before the ADAAA.
- Comparing an individual's performance of a major life activity to others should not require scientific, medical or statistical analysis (although this type of analysis is not prohibited).
- Do not consider mitigating measures (like hearing aids), with the exception of ordinary eyeglasses or contact lenses (see Limited Despite Medication and Other Corrections).
- An impairment that is in remission or reoccurs sporadically is a substantial limitation if it would substantially limit a major life activity when active.
- An impairment that limits one major life activity is sufficient; it does not need to limit more than one major life activity.
- Even if an impairment lasts six months or less, it can still substantially limit a major life activity.

(29 C.F.R. § 1630.2(j)(1)(i)-(ix).)

For more information, see Box, Substantially Limiting Conditions Under the Final ADAAA Regulations.

**Limited Compared to Other People**

The ADAAA final regulations specify that when assessing whether an individual is substantially limited in a major life activity, employers must compare the individual to "most people in the general population," rather than to people similar to the individual. For example, when determining whether an 80-year old man is substantially limited in walking, one compares that man to the general population, not to other 80-year old men.
Factors employers may consider when comparing an individual with a limitation to most people in the general population include any or all of the following:

- The condition under which the individual performs the major life activity.
- The manner in which it is performed.
- The duration of time it takes.
- Difficulty, effort or time required.
- Pain experienced when performing the major life activity.
- Length of time the activity can be performed.
- The way an impairment affects the operation of a major bodily function.
- Negative side effects of medications the individual must take.
- Burdens associated with following a particular treatment regimen.

(29 C.F.R. § 1630.2(j)(4)(i) and (ii).)

Limited Despite Medication and Other Corrections

The kinds of medications and devices that help an employee overcome a disability cannot be factored into the determination of whether an individual has a disability. Before the ADAAA, employers could consider whether medication and other corrective action reduced or eliminated the disabling condition (often referred to as "the ameliorative effects of mitigating measures") (see Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)). In other words, individuals who could improve or eliminate their disabling condition with drugs or other aids might not be "disabled" under the ADA.

The ADAAA specifically rejects that standard. Employers cannot consider corrective measures when evaluating whether an individual has a disability (42 U.S.C. § 12102(4)(E)(i)). Examples of measures that cannot be factored into the determination include:

- Medication.
- Medical supplies, equipment or appliances.
- Low-vision devices (not including ordinary eyeglasses or contact lenses).
- Prosthetics including limbs and devices.
- Hearing aids and cochlear implants or other implantable hearing devices.
- Mobility devices.
- Oxygen therapy equipment and supplies.
- Use of assistive technology.
• Reasonable accommodations or auxiliary aids or services.
• Learned behavioral or adaptive neurological modifications.
• Psychotherapy.
• Behavioral therapy.
• Physical therapy.

(29 C.F.R. § 1630.2(j)(5).)

Analysis Limited to Activities that Cannot Be Performed
When assessing whether an individual is substantially limited in a major life activity, employers may only account for the things the individual cannot do (in other words, their limitations). Employers cannot attempt to argue that an individual is not substantially limited by pointing to the things an individual can do. For example, an individual may have a substantial limitation in learning as evidenced by the additional time it takes for that person to write, read and learn, but may nevertheless achieve academic success. The academic success does not negate the fact that the individual is substantially limited in the activity of learning. (29 C.F.R. § 1630.2(j)(4)(iii).)

Definition of Major Life Activity
The ADA defines disability as an impairment that substantially limits one or more major life activities. Courts regularly struggle to determine what tasks should be considered a major life activity. Under the ADAAA, major life activities include, but are not limited to:

• Caring for oneself.
• Performing manual tasks.
• Seeing.
• Hearing.
• Eating.
• Sleeping.
• Walking.
• Standing.
• Sitting.
• Lifting.
• Reaching.
• Bending.
• Speaking.
• Breathing.
• Learning.
• Reading.
• Concentrating.
• Thinking.
• Communicating.
• Working.
• Interacting with others.

(42 U.S.C. § 12102(2)(A) and 29 C.F.R. § 1630.2(i).)

In addition to general activities, the ADA specifies that major life activities also include the operation of major bodily functions such as:

• Functions of the immune system.
• Normal cell growth.
• Special sense organs and skin.
• Digestive functions.
• Bowel functions.
• Bladder functions.
• Genitourinary functions (the urinary system and reproductive organs).
• Neurological functions.
• Brain functions.
• Respiratory functions.
• Circulatory functions.
• Endocrine functions (involving glands and hormones).
• Reproductive functions.
• Cardiovascular functions.
• Hemic functions (related to blood).
• Lymphatic functions (part of the immune system).
• Musculoskeletal functions.
• Operation of an individual organ within a body system.

\((42\text{ U.S.C. § 12102}(2)(B)\text{ and 29 C.F.R. § 1630.2}(i)(iii)).\)

An individual does not have to be currently suffering from an impairment at the time of an employment action to be covered by the ADA. The ADAAA specifically provides that conditions in remission or episodic are evaluated as active \((42\text{ U.S.C. § 12102}(4)(D)).\) For example, diseases like lupus or epilepsy are disabilities even when not active.

**Specific Conditions Identified by the ADA as Disabilities**

There is no definitive list of disabilities under the ADA, but the statute and the final regulations provide guidance. For examples of specific conditions that "virtually always" meet the definition of disability under the final regulations, see *Box, Substantially Limiting Conditions under the Final ADAAA Regulations.*

Certain conditions are explicitly excluded from coverage, including:

• Current drug use, unless the individual is participating in a supervised rehabilitation program, successfully completed such a program or is otherwise rehabilitated.
• Transvestism.
• Transsexualism.
• Pedophilia.
• Exhibitionism.
• Gender identity disorders not resulting from physical impairments.
• Homosexuality.
• Bisexuality.
• Voyeurism.
• Compulsive gambling.
• Kleptomania.
• Pyromania.
• Psychoactive substance use disorder resulting from current illegal use of drugs.

\((29\text{ C.F.R. § 1630.3}(a), (b), (d) \text{ and (e))}.\)

**ADA Protection for Individuals without Disabling Conditions**
The ADA covers not only individuals who have actual disabilities, but also those who:

- Have a record of a disability.
- Are regarded as having a disability.
- Who associate with or have a relationship with individuals who have a disability.

Discrimination against these individuals is prohibited. Employers are not required to provide reasonable accommodation to individuals covered under the "regarded as" and the "associated with" definitions. However, employers are required to accommodate individuals with a record of impairment, absent undue hardship (see Definition of "Record of Impairment").

**Definition of "Regarded As"**

Individuals regarded as having a physical or mental impairment that substantially limits one or more major life activities are covered under the ADA. However, the ADAAA clarifies that individuals covered under the ADA because of the "regarded as" definition are not entitled to reasonable accommodation (42 U.S.C. § 12201(h) and 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(e)).

Before January 1, 2009, there was a split in the circuits over this issue, with most courts declining to recognize accommodation on the basis of "regarded as" coverage. However, the US Courts of Appeals for the Third, Tenth and Eleventh Circuits reached the opposite conclusion, which may be relevant to pre-2009 accommodation claims arising in those circuits.

The ADAAA final regulations clarify a number of points specific to 'regarded as' coverage, including:

- The concepts of "major life activity" and "substantially limits" are not relevant to evaluating ADA "regarded as" coverage. Instead, individuals making regarded as discrimination claims must show that they have or were perceived by the employer to have an impairment and were subject to discrimination because of the impairment or perceived impairment (29 C.F.R. § 1630.2(l)(3) and app. § 1630.2(j)).
- Individuals are not regarded as having a disability if their condition is objectively both transitory (lasting or expected to last six months or less) and minor (42 U.S.C. § 12102(3)(B), and 29 C.F.R. §§ 1630.2(g)(1)(ii)(1) and (j)(2) and 1630.15(f)).
- It does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment (29 C.F.R. § 1630.2(g)(3)).

For more information on disability discrimination, see *Practice Note, Disability Discrimination under the ADA*.

**Definition of "Record of Impairment"**

Individuals are also covered under the ADA if they either:
• Have a history of having a physical or mental impairment that substantially limits one or more major life activities.
• Have been properly or improperly classified as having such a history.

Cases decided before the ADAAA suggest that there is no duty to accommodate individuals covered because of a record of impairment (see, for example, Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 n.6 (7th Cir. 1998) and Gilday v. Mecosta County, 124 F.3d 760, 764 n.4 (6th Cir. 1997)). However, the ADAAA regulations clarify that individuals classified as having a "record of impairment" are entitled to reasonable accommodation (29 C.F.R. §§ 1630.2(k)(3) and 1630.9(e)). The regulations provide examples of what it means to be covered under the "record of impairment" definition, including:

• An individual treated for cancer ten years ago but who is now medically determined to be cancer-free.
• An individual misclassified as having a learning or intellectual disability.
• An individual misdiagnosed as having bipolar disorder and hospitalized as a result of a temporary reaction to medication for that disorder.

An example of an accommodation for these individuals would be allowing a schedule change to permit an employee to attend follow-up or monitoring appointments with a heath care provider (29 C.F.R. § 1630.2(k)(3)).

**Definition of "Association With"**

The ADA prohibits discrimination against individuals who are associated with or have a relationship with persons with a disability. Associations may include:

• Family.
• Business.
• Social.
• Other relationships.

(42 U.S.C. § 12112(b)(4) and 29 C.F.R. § 1630.8.)

The provision prohibiting associational discrimination is not part of the definition of disability, but a distinct form of discrimination barred by the ADA. There is no duty to provide reasonable accommodations to individuals associated with a person with a disability (see, for example, Stansberry v. Air Wis. Airlines Corp., 651 F.3d 482, 486-87 (6th Cir. 2011)).

For more information on disability discrimination, see Practice Note, Disability Discrimination under the ADA.
Providing a Reasonable Accommodation
Covered employers must provide reasonable accommodations to qualified individuals with disabilities, including both applicants and employees, unless doing so would cause an undue hardship. Examples of accommodation include making the facilities more accessible, restructuring the job and allowing a change in a work schedule (see Definition of Reasonable Accommodation). Examples of undue hardship include excessive cost, substantial scope and major disruption (see Undue Hardship).

Employer Response to Request for Accommodation
An employer's obligation to provide an accommodation is generally prompted by a request from a covered individual for an accommodation. The ADA does not require employers to speculate about the accommodation needs of employees and applicants. The EEOC indicates that "[g]enerally, it is the responsibility of the employee to inform the employer that an accommodation is needed" (EEOC: The ADA: Your Employment Rights as an Individual With a Disability; see also Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008), Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998) and Hedberg v. Ind. Bell Tel. Co., Inc., 47 F.3d 928 (7th Cir. 1995)).

Alternatively, the request may come from a third party asking for accommodation on behalf of the covered individual (see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 2).

An accommodation request may be made in writing or delivered orally. There are no specific forms or words that must be used to make the request (see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Questions 1 and 3; see also Smith v. Henderson, 376 F.3d 529, 535 (6th Cir. 2004)). For example, there is no obligation to reference the ADA or use the term "accommodation."

For more information, see Practice Note, Interactive Process under the ADA.

Employer Obligation When There is No Request for Accommodation
Although the general rule places the burden to request an accommodation on the employee or applicant, there are circumstances under which employers may have an obligation to provide an accommodation without a request to do so. The EEOC's guidance suggests that accommodation should be provided without request if the employer:

- Knows that the employee has a disability.
- Knows or should know that the employee is experiencing workplace problems because of the disability.
• Knows or should know that the disability prevents the employee from requesting a reasonable accommodation.

(2010) EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 40; see also, for example, Barnett v. U.S. Air, Inc, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391 (2002)). The EEOC clarifies that under these circumstances, if the individual declines the offer of an accommodation, the employer will have fulfilled the accommodation requirement.

For more information, see Practice Note, Interactive Process under the ADA.

Engaging in the Interactive Process

The interactive process is an informal practice in which the covered individual and the employer determine the precise limitations created by the disability and how best to respond to the need for accommodation (29 C.F.R. § 1630.2(o)(3)). An employer should promptly engage in the interactive process once the need for accommodation has been recognized.

The individual requesting the accommodation has an obligation to provide the employer with enough information about the disability to determine a reasonable accommodation. An employer has an obligation to explore potential accommodation and provide the employee with an appropriate reasonable accommodation. Both the employer and the individual seeking accommodation must participate in the interactive process in good faith.

As part of the interactive process, and for each accommodation request, the employer:

• Should document in writing its receipt of the request for accommodation, providing a copy to the individual and retaining a copy for the employer's records. This allows the employer to show that it took the request seriously and responded promptly.
• Should determine whether the individual seeking the accommodation is a qualified individual with a disability (see Definition of Qualified Individual and Definition of Disability). After the passage of the ADAAA, the question of whether the individual has a disability is more likely to be resolved in favor of a finding of disability.
• May ask the individual for information about the extent of the impairment, including notes from doctors or other health care providers, and request medical testing relevant to the accommodation at issue (for more information on medical testing of employees and applicants, see Medical Examinations and Inquiries in Employment Checklist).
• Must confer with the individual to discuss accommodation alternatives, which includes listening to the individual's preference and the option to suggest alternatives (see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 9).
• Should document in writing the discussion about the accommodation and the final determination about how the accommodation request is resolved. The employer should provide a copy to the individual and retain a copy for its records.
Employers are not obliged to provide the specific accommodation requested by the individual seeking accommodation. Although the ADA provides a right to a reasonable accommodation, it does not provide a right to any specific requested or preferred accommodation (29 C.F.R. app. § 1630.9; see also Agro Distrib., LLC, 555 F.3d at 471).

Although employers should consistently engage in the interactive process when responding to accommodation requests, at least one court held that an employer's failure to participate in the interactive process was corrected by the employer's ultimately providing a reasonable accommodation (see Mobley v. Allstate Ins. Co., 531 F.3d 539, 546 (7th Cir. 2008)).

The obligation to provide a reasonable accommodation is ongoing. An employer may be required to provide more than one accommodation to a covered individual, and the employer may be required to provide a different accommodation if the disability or other circumstances change (see, for example, Ralph v. Lucent Tech., Inc., 135 F.3d 166, 171 (1st Cir. 1998)).

For more information, see Practice Note, Interactive Process under the ADA.

Definition of Reasonable Accommodation

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 C.F.R. app. § 1630.2(o)). The regulations clarify that reasonable accommodation means modifications or adjustments that are classified in three categories, as follows:

• To the job application process that enable a qualified applicant with a disability to be considered for the job.
• To the work environment or to the way the job is customarily performed that enable a qualified individual with a disability to perform the job's essential functions.
• That enable a covered employer's employee with a disability to enjoy benefits and privileges of employment equal to those of similarly situated employees without disabilities.

(29 C.F.R. § 1630.2(o)(1).)

Examples of accommodations include:

• Making existing facilities used by employees readily accessible to and usable by individuals with disabilities, for example:
  • break rooms;
  • lunch rooms;
  • training rooms; and
  • restrooms.
• Restructuring a job, for example:
• transferring some of the non-essential functions of the job to another position; or
• changing when or how an essential function is performed.

• Allowing part-time or modified work schedules.
• Reassigning an employee to a vacant position, however:
  • this accommodation is not available for job applicants;
  • reassignment to a lower graded position is acceptable if there are no accommodations that would keep the employee in the current position and there is no available equivalent vacant position; and
  • promotions are not required as reasonable accommodations.

• Acquiring or modifying equipment or devices.
• Adjusting or modifying examinations, training materials or policies.
• Providing qualified readers or interpreters.
• Providing leave.
• Providing accessible transportation.
• Allowing the use of reserved parking spaces.
• Providing personal assistants, for example:
  • to turn pages for employees with no hands; or
  • to assist with business travel for blind employees.

• Allowing the use of guide dogs for blind employees.

(29 C.F.R. § 1630.2(o)(2) and app. § 1630.2(o).)

Reasonable accommodations do not include:

• Eliminating or reallocating an essential function of a job.
• Lowering production standards of quality or quantity.
• Providing items for general daily living not specific to the requirements of the job for individuals with disabilities, such as prosthetic limbs or wheelchairs. However, it may be a reasonable accommodation to provide items required for undertaking tasks specific to the job.
• Promoting the individual with a disability.

(29 C.F.R. § 1630.9 and app. 1630.2(o).)
Prohibition Against Retaliation

Although failure to accommodate is the primary area of legal exposure for employers with respect to ADA accommodation, employers should also be mindful that the ADA also prohibits retaliation for requesting an accommodation (see Wright v. CompUSA, Inc., 352 F.3d 472 (1st Cir. 2003)). For more information about retaliation, see:

- Practice Note, Retaliation.
- Standard Document, Disability Accommodations Policy: Drafting Note: No Retaliation.

Common Accommodation Situations

Employers can learn more about their own accommodation obligations by reviewing judicial assessments of common accommodation requests. The following are common accommodation requests and a summary of how courts have evaluated them.

Attendance

Courts have recognized that regular attendance is an essential function of most jobs. An employee who does not attend work cannot perform any job functions, essential or otherwise. As a result, courts fairly consistently hold that employees with erratic and unreliable attendance are not qualified individuals under the ADA.

On the other hand, employers must reasonably accommodate an employee's disability, which may include changing their work schedules or granting a potentially lengthy leave of absence (see Modification of Work Schedule and Use of Sick Days and Leaves of Absence). As a result, while unlimited sick days at random intervals is not a reasonable accommodation, a 90-day unpaid leave period may be a reasonable accommodation. For a sampling of cases on attendance as an essential function, see Box, Cases on Attendance as Essential Function.

Modification of Work Schedule

Work schedule modification may be a reasonable accommodation depending on the nature of the job and the modification. A modified work schedule may include:

- Flexible start or stop times.
• Permanent shift reassignment.
• Temporary shift change.

One critical question with respect to work schedule modification is whether attendance during particular hours or shifts is an essential function of the job. Some work schedule modifications would negatively affect the services offered by the employer (for example, the sole management employee overseeing patients at a hospital, as described in Guice-Mills v. Derwinski, 967 F.2d 794 (2d Cir. 1992)). Other work schedule modifications are reasonable accommodations (for example, a wheelchair-bound mold polisher who works independently and not on an assembly line, as described in Holly v. Clairson Indus., L.L.C., 492 F.3d 1247 (11th Cir. 2007), and a data entry assistant whose job does not require constant supervision, as described in Ward v. Mass. Health Research Inst., 209 F.3d 29 (1st Cir. 2000)).

Even if adherence to a schedule is not an essential function of a job, schedule modification may not be reasonable if it prevents other employees from doing their jobs or makes the job of other employees more burdensome (see, for example, Turco v. Hoechst Celanese Chem. Group, Inc., 101 F.3d 1090 (5th Cir. 1996)).

**Job Restructuring**
A job may be restructured by reasonable accommodations such as:

• Reallocating marginal (non-essential) job functions.
• Changing when and how an essential function is performed.

However, an employer is not required to reallocate essential job functions (29 C.F.R. app. § 1630.2(o)).

**Reassignment**
Reassignment to a vacant position may be an appropriate accommodation if other efforts have not succeeded. The EEOC describes reassignment as an "accommodation of last resort" appropriate only if either:

• There are no effective accommodation options that allow the employee to perform the essential functions of the current position.
• All other reasonable accommodations would impose an undue hardship on the employer.

(29 C.F.R. app. § 1630.2(o) and EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24.)
If reassignment is offered, it must be to a position of equal status, pay and other terms and conditions of employment unless there is no equivalent position as a reasonable accommodation. Only then can the employer reassign an employee to a less senior position. Employers are not required to reassign employees to positions for which they are not qualified or to offer a promotion to a more senior position.

A position is vacant if it is available at the time of the request for accommodation or the employer knows that it will soon become vacant.

Generally, employers are not required to reassign employees when doing so would violate a seniority system. However, if the employer has the right to modify the seniority system and exercises that right fairly frequently or the seniority system accounts for exceptions, reassignment despite a seniority system may be appropriate (for more information, see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 31).

Telecommuting
Courts vary with respect to telecommuting as a reasonable accommodation. Courts largely focus on the nature of the work performed and are less concerned about an employer's preference for having workers physically on site. If employees without disabilities are permitted to telecommute (for whatever reason), it becomes much more difficult for an employer to argue that a particular employee with a disability with the same job should not receive a similar option as an accommodation.

Examples of telecommuting cases include court decisions:

- Rejecting an argument that telecommuting is a reasonable accommodation for a clerical employee's ulcers (Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995)).
- Rejecting an argument that telecommuting is a reasonable accommodation for a teacher's lupus (Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209 (4th Cir. 1994)). The court also noted that telecommuting is a reasonable accommodation only in extraordinary circumstances.

For a model telecommuting policy, see Standard Document, Telecommuting Policy.

Use of Sick Days and Leaves of Absence
Employee requests to use available sick or personal time to accommodate a particular disability (even with little or no notice) are routinely approved by the courts since these requests are usually a request to exercise rights employees already have. Consequently, granting this accommodation usually imposes little or no additional cost on the employer.
Examples of sick day and leaves of absence cases include court decisions:

- Recognizing that long-term abstention from illegal drug use coupled with need for leave for ongoing preventative treatment may constitute a valid accommodation, provided that the employee has refrained from drug use for "a significant period of time" (Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001)).

- Rejecting an argument that leave for an indefinite period of time is a reasonable accommodation (Walsh v. United Parcel Serv., 201 F.3d 718 (6th Cir. 2000)).

- Accepting an argument that an extension of an existing leave period is a reasonable accommodation for a sales associate (Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999)).

- Accepting an argument that a second two-to-four week leave of absence is a reasonable accommodation for a vice president's lupus (Haschmann v. Time Warner Entm't Co., 151 F.3d 591 (7th Cir. 1998)).

- Explaining that there are two limits on leave as a reasonable accommodation:
  - the employee must provide an estimated date for when he will be able to perform his essential job duties; and
  - the employee’s leave request must assure the employer that the employee will be able to perform his essential job functions in the "near future."

  (Robert v. Bd. of Cnty. Comm'r's of Brown Cnty., Kans., 691 F.3d 1211, 1218-19 (10th Cir. 2012).)

For more information about leave, see Employee Leave Toolkit.

Light-duty Jobs

Another kind of reasonable accommodation is providing a light-duty job to an employee whose disability has rendered that person unable to perform the more strenuous tasks of their regular position. Light-duty jobs may be a transitional step for a worker with a disability to return to a previous job, or may be a permanent change in job responsibilities. However, the employer is not required to transform a temporary light-duty job into a permanent position (see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 29; see also DeVito v. Chicago Park Dist., 270 F.3d 532 (7th Cir. 2001)).

The ADA also does not require employers to create light-duty jobs to enable a worker with a disability to return to the job. If a vacant light-duty job exists, however, the employer may be required to place the employee in the light-duty job as a reasonable accommodation. According to the EEOC, if an employer reserves light-duty positions for employees with occupational injuries, the ADA requires the employer to consider reassigning an employee with a disability who is not occupationally injured to such positions as a reasonable accommodation (see EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 28).
**Employer Defenses to Accommodation Claims**

Employers may be able to deny accommodation requests or defend against legal claims of failure to accommodate by citing to recognized defenses. The ADA and its implementing regulations recognize a number of defenses, but the most relevant to the question of accommodation are undue hardship and direct threat (for more information on ADA discrimination defenses, see Practice Note, Disability Discrimination under the ADA: Employer Defenses under the ADA).

**Undue Hardship**

Under the ADA, an employer is not required to make reasonable accommodations that would impose an undue hardship on the employer. Undue hardship is any action that is:

- Unduly costly.
- Extensive.
- Substantial.
- Disruptive.
- Fundamentally alters the nature or operation of the business.

*(29 C.F.R. app. § 1630.2(p)).*

The concept of undue hardship is not limited to financial difficulty *(29 C.F.R. app. § 1630.2(p)).* The ADA and EEOC regulations identify the following factors to consider when determining whether an accommodation would impose an undue hardship:

- The nature and net cost of the accommodation.
- The overall financial resources of the covered entity.
- The number of employees employed by the covered entity.
- The number, type and location of facilities.
- With respect to accommodations provided by a specific facility:
  - financial resources of the facility;
  - number of employees at the facility; and
  - effect of the accommodation on expenses and resources of the facility.
- The type of operation of the covered entity, including:
  - composition, structure and functions of the workforce; and
• geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.

• The effect of the accommodation on the operation of the facility making the accommodation.

(*42 U.S.C. § 12111(10)(B) and 29 C.F.R. § 1630.2(p).* )

Whether an accommodation will impose an undue hardship is determined on a case-by-case basis. For example, while an employer with 25 employees may legitimately claim an extended period of disability leave for one of its few warehouse workers would create an undue hardship, an employer with 10,000 employees that employs hundreds in a warehouse may be unable to argue convincingly that doing so would create an undue hardship.

Direct Threat
Some disabilities pose a direct threat to the health and safety of individuals in the workplace. Where there is no reasonable accommodation available to negate that threat, employers may cite the direct threat defense. The statute authorizes the defense in circumstances under which an individual poses a threat to the health or safety of "others" (*42 U.S.C. § 12113(b).*) The regulations define the term more broadly to include a threat to the health or safety of the individual in question and others (*29 C.F.R. § 1630.2(r).* )

Employers can take advantage of the direct threat defense only if the individual poses a significant risk that cannot be reduced or eliminated by accommodation. A speculative or remote risk is insufficient (*29 C.F.R. app. § 1630.2(r).* )

The assessment of whether an individual poses a direct threat is based on reasonable medical judgment that may be based on current medical knowledge or the best available objective evidence (*29 C.F.R. § 1630.2(r).* ). Factors considered in assessing whether an individual poses a direct threat include:

• The duration of the risk.
• The nature and severity of the potential harm.
• The likelihood that the potential harm will occur.
• How soon the potential harm may occur.

(*29 C.F.R. § 1630.2(r).* )

For example, consider a heavy machinery worker with sleep apnea and a pilot with dementia. The worker who operates heavy machinery and who has been suffering from sleep apnea spells might pose a direct threat to his or someone else’s safety. If no reasonable accommodation is available (for example, an open position to which the employee could be reassigned), the employer would not violate the ADA by laying the worker off. Similarly, the airline pilot who is experiencing bouts of dementia would pose a direct threat to herself and her passengers’ safety. It would not violate the ADA if the airline prohibited her from flying.
Enforcement of Accommodation Claims

Individuals who believe they were wrongfully denied accommodation can make a claim before the EEOC. The process begins with the filing of a charge. The charge may be filed directly with the EEOC or with a state Fair Employment Practices Agency. A claim cannot be brought in court without this preliminary step (also referred to as exhaustion of administrative remedies). The charge must be made in writing and signed under oath. It must identify the parties and describe the facts and circumstances alleged to be unlawful.

An employer that receives an EEOC charge should promptly conduct an internal investigation, assess potential defenses and determine whether the charge has merit. For more information on the internal investigation process, see Practice Note, Handling Employment-related Internal Investigations, Conducting an Internal Investigation Checklist and the resources available as part of the Conducting Internal Investigations Toolkit.

The EEOC will conduct its own investigation following receipt of the charge and issue a determination on whether there is reasonable cause to believe that discrimination (in the form of failure to accommodate in this instance) occurred. If the EEOC finds reasonable cause, it will attempt to resolve the situation through conciliation. Whether or not there was a finding of reasonable cause, the EEOC will ultimately issue a right-to-sue letter that authorizes the individual to file a suit in court. The EEOC has the option to bring its own lawsuit against the employer if conciliation efforts have been unsuccessful. For more information on the EEOC process, see Practice Note, Responding to Equal Employment Opportunity Commission Charges and the other resources in the Responding to an EEOC Charge Toolkit.

Remedies Available to Plaintiffs

Remedies potentially available to a successful plaintiff alleging failure to accommodate under the ADA include:

- Compensatory damages, including:
  - future financial losses;
  - emotional pain;
  - suffering;
  - inconvenience;
  - mental anguish;
  - loss of enjoyment of life; and
  - other non-financial losses.
- Punitive damages.
Disability Accommodation under the ADA, Practical Law Practice Note 9-503-9007 (2010)

- Back pay, front pay and interest on these.
- Injunctive relief (for example, creating policies, practices or programs).
- Attorneys' fees and costs.
- Employment, reinstatement of employment or promotion.

(42 U.S.C. §§ 1981a(b), 2000e-5(g) and (k) and 12117.)

Plaintiffs can seek these remedies in their own litigation action, but the EEOC also has the authority to seek these remedies on behalf of an individual plaintiff.

There is a cap on both compensatory and punitive damages that depends on the size of the employer. Statutory caps specify that for each plaintiff, the award for compensatory and punitive damages may not exceed:

- $50,000 for employers that employ 15 to 100 employees.
- $100,000 for employers that employ 101 to 200 employees.
- $200,000 for employers that employ 201 to 500 employees.
- $300,000 for employers that employ 501 or more employees.

(42 U.S.C. § 1981a(b)(3).)

To determine which damages cap applies, the number of employees is counted using the same method as when determining coverage under the ADA (see Which Employers Are Covered under the ADA?).

In addition, at least two circuit courts have held that compensatory and punitive damages are not available to plaintiffs alleging only retaliation under the ADA (see Alvarado v. Cajun Operating Co., 588 F.3d 1261 (9th Cir. 2009) and Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961 (7th Cir. 2004)).

Best Practices for ADA Accommodation

Employers must have procedures in place to adequately address situations implicating the ADA and the employer's obligation to provide a reasonable accommodation. The goal, particularly under the ADAAA, should always focus on compliance with the employer's affirmative duty to engage in the accommodation dialogue. Since most of the traditional limitations on defining conditions as "disabilities" were overturned by the ADAAA, courts rarely focus on whether an employee had a disability. Now, courts (and certainly the EEOC) start from the assumption that the employee has a disability and focus instead on how the employer handled the situation once the disability was made known. Therefore, employers should consider taking the following steps:
• **Train managers or supervisors.** The first point of contact for most employees is their immediate supervisor or manager. Consequently, it is likely that the first person to whom a employee with a disability will raise the need for an accommodation is that same supervisor or manager. Failing to properly train supervisors and managers to recognize the often vague requests for accommodation can lead to violations of the ADA without human resources’ knowledge. Therefore, managers and supervisors should be instructed on what to listen for in meetings with employees, how to identify potential requests for accommodations and who should be contacted (in other words, human resources) when an accommodation request is made to them.

• **Review and update policies.** The ADA has changed significantly since the ADAAA went into effect. It is crucial that employee policies accurately reflect the current state of the law and identify individuals who employees should contact when requesting an accommodation. Without such explicit instruction, a court is more likely to deem any report to any supervisor as adequate notice, even if no reporting relationship otherwise exists between the employee and the supervisor. For a model policy, see *Standard Document, Disability Accommodations Policy*.

• **Prepare accurate, detailed job descriptions.** Ensure that there are written job descriptions that accurately reflect the essential functions and other qualifications of the position. Essential job functions can include physical activity, such as sitting, bending, standing, walking, reaching and lifting.

• **Engage in the interactive process quickly.** Once put on notice of an alleged disability, an employer should schedule a meeting with the employee quickly to start the interactive process as required by the ADA. Ideally the meeting should be face-to-face. Whether the process can conclude with a single meeting or requires several, it should start quickly to allow the employer to show it takes disability concerns seriously.

• **Engage in meaningful interaction.** For the process to be effective, employers may need to request certain types of information, such as information from the employee's health care provider about work restrictions or availability, or both. Employers may need to talk with the employee's supervisor to better understand the requirements of the job.

• **Consider alternatives to the employee's proposed accommodation.** Just because an employee suggests an accommodation does not mean the employer must agree to it. If the employer can find an alternative accommodation that allows the employee to perform the job (and does not impose unreasonable conditions on the employee), the employer is free to implement its proposed accommodation.

• **Document the interactive process.** It is crucial that an employer keeps track of its ADA compliance efforts, including efforts at accommodation. The records will be crucial should the situation lead to litigation.

• **Monitor the situation.** Employers must monitor the employee's performance in light of the claimed disability and the chosen accommodation. If a particular accommodation is not effective, it may be necessary to engage in a further dialogue to determine if any additional accommodation is necessary.

• **Remember the FMLA.** While the ADA exists to keep employees with disabilities working, employers must not lose sight of the FMLA and its protections. If an employee requires leave as an accommodation, the FMLA may be implicated. Further, in situations where an employee exhausts their FMLA leave, the ADA may nevertheless require an employer to provide additional unpaid job-protected leave as an accommodation. For more information, see *Practice Note, Family and Medical Leave Act (FMLA) Basics* and *Disability Leave: Best Practices Checklist*.  


Substantially Limiting Conditions Under the Final ADAAA Regulations

The ADAAA final regulations identify conditions that "virtually always" create a substantial limitation on a major life activity, including:

- Deafness substantially limits hearing.
- Blindness substantially limits seeing.
- An intellectual disability (formerly called mental retardation) substantially limits brain function.
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function.
- Autism substantially limits brain function.
- Cancer substantially limits normal cell growth.
- Cerebral palsy substantially limits brain function.
- Diabetes substantially limits endocrine function.
- Epilepsy substantially limits neurological function.
- Human Immunodeficiency Virus (HIV) infection substantially limits immune function.
- Multiple sclerosis substantially limits neurological function.
- Muscular dystrophy substantially limits neurological function.
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia substantially limit brain function.

Cases on Attendance as Essential Function

Cases finding that attendance is an essential job function include cases holding:

- Because attendance is an essential function of the job of a neo-natal nurse, a hospital employer was not required to offer a waiver of the cap on five unplanned absences as an accommodation (Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012)).
• Employers are not required to authorize unlimited absenteeism (Brannon v. Luco Mop Co., 521 F.3d 843 (8th Cir. 2008), cert. denied, 129 S. Ct. 725 (2008)).

• The ability to work overtime is an essential function of manufacturing job, and an inability to work overtime means the employee is not qualified (Tjernagel v. Gates Corp., 533 F.3d 666 (8th Cir. 2008)).

• Regular attendance is an essential function of the job (Willi v. Am. Airlines, Inc., 288 Fed. Appx. 126 (5th Cir. 2008)).

• Holding that "in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs" (Waggoner v. Olin Corp., 169 F.3d 481, 482, 484-485 (7th Cir. 1999)).

In contrast, some cases decline to recognize attendance as an essential function. For example, in one case, the employer had informally accommodated a paraplegic employee's tardiness for 17 years, and when the employer began prohibiting tardiness and terminated the employee under the policy, the court determined that timely arrival was not an essential function of the job (Holly, 492 F.3d 1247 (11th Cir. 2007)).