# Complying With 'Reasonable Accommodation' Requests

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This article by Myra Creighton was first featured in *Risk Management* magazine.

Employers must understand their accommodation obligations. Denying an accommodation request because the employee is not disabled is a risky proposition.

Under the Americans with Disabilities Act (ADA), disability is still defined as "an impairment that substantially limits a major life activity," but the meaning of those words is considerably different now. Major life activities now include major bodily functions and the term "substantially limits" is undefined. Further, the term "disability" is to be broadly interpreted, and the positive effects of mitigating measures such as medication, physical therapy, etc., cannot be considered in the disability analysis.

A "reasonable accommodation" is a change in the work environment or in the way a job is customarily done, or in the pre-employment process that gives a disabled individual equal employment opportunities. Employers must accommodate a disabled employee when the employee or his representative (e.g., a physician) tells the employer that he needs an adjustment or change at work because of his impairment.

Individuals do not have to mention the ADA or use the phrase "reasonable accommodation." They simply must connect the requested change to their impairments. An employer has to initiate the interactive process only if it:

- Knows the employee is disabled;
- Knows or has reason to know the employee's disability is causing the employee's work problems; and
- Knows or has reason to know that the employee's disability prevents him from requesting accommodation.

After an employee requests an accommodation, the employer must engage in an "interactive process" to determine what the disabled individual needs and the appropriate accommodation. There are four steps in the interactive process.

1. Identify the job's essential functions.

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2. Consult with the employee and/or employee's physician to determine the specific limitations at issue.

3. Consult with the employee and identify potential accommodations and assess each accommodation's effectiveness.

4. Select the accommodation that best serves the need of the employer and the employee.

In order to determine how to accommodate an employee, essential functions of his job must be determined. A function is "essential" to a job if it is a major or an important part of the job, as opposed to being secondary or merely desirable. Consider the following when deciding whether functions are actually essential to a position.

- Does the position exist primarily to perform that function?
- What duties are included in the written job description?
- If there is a collective bargaining agreement, what does it say about the duties of the job?
- Can the function be assigned to other employees?
- How often is the employee required to perform the function?
- What are the consequences of failing or being unable to perform the function?

**Common Forms Of Accommodation**

**Unpaid Leave**
Employers must provide unpaid leave and hold an employee's position during the leave unless doing so is an undue hardship. The employer may have an obligation to provide the employee leave under the FMLA, which grants eligible employees the leave regardless of whether it is an undue hardship. Indefinite leave, however, is not a reasonable accommodation because it does not enable the employee to return to his job.

An employer should not assume that a leave request without an estimated date of return or a leave request where the physician cannot immediately provide a fixed date of return is a request for indefinite leave. A leave is indefinite when the physician actually uses the word "indefinite" or indicates he does not know when the employee will be able to return. When an employee indicates that he does not know when he will be able to return to work, an employer should engage in the interactive process to determine whether the leave requested is indefinite. If the physician indicates the leave is indefinite, an employer may terminate the employee.

**Modified Work Schedule**
Accommodations relating to attendance or punctuality involve an intertwining of the notions of "essential function" and "reasonable accommodation." The courts have identified three analyses used in cases dealing with requests for modified schedules:

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1. whether a fixed schedule is an essential function of the job;

2. if it is, whether there is a reasonable accommodation; and

3. whether a modified schedule would enable the employee to perform the essential functions of the job.

Punctuality generally is an essential function of most positions because maintaining adequate manpower is critical to meeting construction needs. Modifying a start time in such a situation could significantly disrupt a job, which would be an undue hardship. Likewise, when a shift accommodation would cause other employees to have to do the disabled employee's work or would mean a shift did not have a supervisor on duty for part of the shift or that coverage would be indefinite, courts likely will find undue hardship.

**Reduced Work Schedule**

Generally, an employer is obligated to allow an employee to work part-time as a reasonable accommodation when the part-time schedule is not indefinite. For example, if an employee returning to work after having exhausted his FMLA leave needs to work part-time for four weeks, then an employer must allow it unless doing so is an undue hardship. In a construction environment, however, a reduced schedule may be an undue hardship if the employer cannot get adequate coverage for the hours the employee cannot work.

**Shift Changes**

An employee may request a shift change as an accommodation. If the shift is not an essential function and a position is available on the requested shift, the accommodation may be required. The ability to work a specific shift, however, can be an essential function of a job. For example, a shift can be an essential function if the work must be done at a particular time.

**Light Duty**

An employer never has to create a new job to accommodate an employee. Therefore, it is not required to create light-duty jobs or to eliminate essential functions for disabled employees. To the extent that a construction company decides to "create" light duty for employees injured on the job (e.g., by eliminating a lifting function), they should impose a temporal restriction on the period of time the employee can be in a created light duty job (e.g., three months).

An employer also may restrict its "created" light duty program to employees injured on the job as long as it also creates light duty for employees whose work injuries resulted in disabilities. In such a program, an employer would not be required to create light duty for a disabled employee who did not sustain a work injury.

Finally, to the extent a company sets aside a pool of positions for employees who need light duty, it also should restrict these positions to work-injured employees and indicate in writing that the

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position is temporary. Otherwise, employees may claim the light duty position is a permanent position.

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