

You may need to offer flex schedule as ADA accommodation

The Americans with Disabilities Act (ADA) says you must make accommodations to let disabled employees perform the essential functions of their jobs. But regular, on-time attendance is an essential job function, right?

Not necessarily.

You may need to offer a flexible, open-ended work schedule as an ADA accommodation. In fact, some workers may be more productive if allowed to work early, late or in private.

But realize this: All disabled employees can't automatically demand a flexible schedule. Examine each request on a case-by-case basis. You can snuff out a flextime request by showing it would create an "undue hardship" to your organization. That can include the significant cost of keeping your facility open at off hours or the disabled worker's need for direct supervision.

Another key point: If you've been informally accommodating a disabled worker in any way, don't try to withdraw that accommodation if the worker wants to formalize it in writing. As the following case shows, courts won't look kindly on organizations that retract accommodations.

Recent case: When hired as a computer programmer, Martin Varone told his employer about his sleep disorder. For the next 15 years, the organization allowed him to work an informal flexible schedule.

But when he asked to formalize the flex schedule in writing, and provided a doctor's note verifying his need for flexible hours, the employer responded by disciplining Varone and eventually firing him for excessive absenteeism.

Varone sued, claiming disability discrimination based on his employer's refusal to grant him a flexible schedule. The court sided with him, shrugging off the employer's claim that a fully flexible schedule would prevent Varone from performing the "essential functions" of the job. The court pointed to the fact that Varone had worked under such a flexible schedule for 15 years, receiving good evaluations the entire time. (Varone v. New York City, No. 02 Civ. 1089, S.D.N.Y., 2003)

How to respond to flex-schedule requests

As the case above shows, courts can mandate that you offer flexible schedules to certain disabled employees as an Americans with Disabilities Act (ADA) accommodation. But if your business operations or work rules make it difficult to accommodate a flextime request, take these steps:

1. Request a doctor's note. You can ask for medical evidence that the accommodation is necessary and that the employee has a disability. Be careful to follow the rules. For example, you can't ask medical questions during hiring.
2. Review your reasons. Think about why you don't want employees working outside regular hours or why you require their presence during specific working hours. If attendance at a certain time of day is essential, you don't need to modify the schedule. If the work demands close supervision, then everybody may need to share

the same schedule.

3. Apply your rule consistently. If you already offer flexible schedules, courts will frown if you resist offering them to disabled workers in similar jobs.