

# ADA Accommodations: Part of an overall ADA policy

Employers often view disability accommodations as rare isolated events tailored to one employee's needs. This is understandable given the Americans With Disabilities Act's (ADA) requirement to evaluate each case individually. But making reasonable accommodations needs to be part of an orderly process set up *before* the accommodations request. A properly designed interactive process is essential. Many things can go wrong for the employer that lacks an overall ADA policy. Accommodating disabilities and making reasonable accommodations on the fly is a recipe for disaster.

## ADA disability definition

The ADA covers all employers with 15 or more employees. Covered employers must prepare for a disabled employee before advertising an open position. The ADA disability definition is:

- a physical or mental impairment that substantially limits one or more major life activities;
- a record of a substantially limiting impairment; or
- being regarded as having a disability.

Major life activities include, but are not limited to:

- performing manual tasks,
- walking,
- seeing,
- hearing,
- speaking,
- breathing,
- learning,
- thinking,
- concentrating,
- reading,
- bending, and
- communicating, as well as
- the operation of major bodily functions, such as:
  - functions of the immune system,
  - special sense organs and skin;
  - normal cell growth;
  - digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions; or
  - the operation of an individual organ within a body system.

Chronic conditions such as diabetes or epilepsy are disabilities even if they are episodic or in remission. Chronic conditions that are controlled with medication still fall within the ADA's impairment definition. Impairments do

not have to be permanent or even long-term conditions to warrant ADA coverage.

Employers may not discriminate against “qualified individuals with disabilities.” An applicant or employee meets this definition if:

- The individual has an impairment; and
- Can perform the job’s essential functions with or without accommodation.

The ADA bars employers from discriminating against individuals because they have a record of disability. For example, an employer advertises a job that requires heavy lifting. An applicant who had back surgery several years ago applies. That record of disability may not be considered in the hiring process. If the applicant can lift the required weight now, he or she is qualified.

Similarly, employers cannot regard someone as disabled when they are not. In many cases, employers have restricted the work pregnant employees may perform. Employers may only do this if the woman’s doctor has restricted her abilities.

You do not have to consider accommodations for workers with a record of disability with no current restrictions. That’s because they are not currently disabled.

Employers should follow some key rules:

- Employers have no obligation to accommodate an employee who does not request an accommodation, and
- Only medical professionals may place medical restrictions on employees. Employers who do so without medical justification violate the ADA.

## **The ADA and the hiring process**

Each step of the hiring process must be accessible for disabled applicants. For example, applicants may ask for accommodations to perform tests during the hiring process. Places where job interviews are held should be accessible for wheelchairs. Also, handicap accessible restrooms should be available.

The U.S. Access Board issues rules on building accessibility. More detailed information is available at <https://www.access-board.gov>. Employers who find they need physical changes to their workplace may be eligible for tax credits and deductions. The Disabled Access Credit is available to small businesses. The Architectural Barrier Removal Tax Deduction allows businesses to deduct in one year certain expenses that would normally be capitalized. Information about both credits is available at <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities>.

## **Online accessibility**

Company websites that advertise jobs should meet accessibility standards spelled out in Section 508 of the Rehabilitation Act. While detailed, these standards include compatibility for screen readers to assist the visually impaired among others. Website accessibility standards are available at <https://www.w3.org/WAI/standards-guidelines/wcag/>.

The U.S. Supreme Court recently reiterated that companies must meet accessibility standards online. It let stand a lower federal court decision that said online pizza ordering must be accessible to the blind. It’s a good idea to apply the accessibility standards you use for hiring to the rest of your website.

## Hiring non-discrimination

Employers may not discriminate against an applicant because he or she needs an accommodation. Hire the best qualified candidate without regard to any accommodation.

The ADA bars employers from asking applicants about their medical condition before making a conditional offer of employment. Similarly, employers may not require any medical examination until making the job offer.

Employers may not ask questions likely to elicit disclosure of a disability. For example, you can't ask applicants about medications taken. Unless the applicant has an obvious impairment, employers may not ask whether the applicant needs an accommodation. Applicants are free to disclose their disability and request an accommodation. The employer and employee should then begin the interactive process needed to find a reasonable accommodation. Keep medical information confidential and in separate files.

Establish any medical conditions before you advertise the job. Those conditions must apply to all jobs in the same class. Each job must have an up-to-date job description detailing which job functions are essential and which are not. You can only reject conditional hires for medical reasons that are consistent with job necessity. For example, you may revoke an offer to a commercial driver who doesn't pass the Department of Transportation medical screening.

## What is a reasonable accommodation?

Employer failure to navigate the accommodation process is a leading cause of ADA lawsuits. The ADA requires employers and employees to engage in an "interactive process" to find the right accommodation. Interactive means ongoing discussions back and forth aimed at identifying possible accommodations. If an employee refuses to participate, document it. She then can't sue for failure to accommodate.

Employers have the right to choose from among all available reasonable accommodations. For example, if there is an expensive accommodation and a simpler, less expensive one, you can choose the later. It's your choice, not the employee's.

Employers have the right to refuse accommodation they believe are unreasonable. There is no bright line for what is and is not reasonable. Accommodation costs are measured relative to the employer's size and the impact on the workplace.

## Backing up accommodation decision

Where most employers fail is in the reasonability analysis. Anytime an employer refuses an accommodation, it must explain how granting the accommodation would be an undue hardship. You may cite cost as the reason for refusing an accommodation but must justify that decision based on resources. However, accommodations that fundamentally change the way a business operates would also be unreasonable. Accommodations that are too disruptive to the employer's business are as well.

The federally funded Job Accommodation Network (JAN) provides resources to employers seeking accommodations. Its Searchable Online Accommodation Resource (SOAR) walks employers through possible accommodations for various disabilities. JAN is online at <https://askjan.org>. Employers should document their SOAR search and, if necessary, use it as part of the reasonability analysis.

Current employees may request accommodations, too. An employee whose health changes may require accommodations on a temporary or permanent basis. Follow the same process as for applicants who seek accommodation help.

## **Managing reasonable accommodations**

Employers that discontinue reasonable accommodations do so at their own peril. Accommodations should only be withdrawn if the worker requests it or some other circumstance has changed. If the worker says the accommodation is no longer working, start the process over again. If a manager wants to remove an accommodation, it's essential the employer conduct a thorough review. Put simply, if an accommodation has been working well, removing that accommodation requires a good, solid business reason. That reason must focus on undue hardship.

Do not allow individual managers to grant, refuse or discontinue a reasonable accommodation without additional review. The Human Resource (HR) department, legal counsel, or some other party familiar with the ADA's requirements should have the final word. Discontinuing a reasonable accommodation can be expensive. For example, a jury recently awarded a Wal-Mart cart pusher with developmental disabilities over \$5.2 million in damages. A new store manager removed an accommodation in place for 16 years without engaging in the interactive process. The cart pusher's condition or job had not changed.

## **Training and managing ongoing accommodations**

Managers should know how to recognize and handle accommodation requests. This means training. In most organizations, line managers will not be making accommodation decisions. They typically do not understand the nuances of the ADA disability definition. Some may be quick to deny a worker's disability claim.

However, managers are often the first point of contact and should know where to steer the disabled employee. Make sure they know who to call and that they cannot casually approve or deny a request. They should not discourage the employee from seeking an accommodation, nor speculate on what accommodations are possible.

Your handbook should also include a section on requesting reasonable accommodations. Every employee should know exactly how to request one and who to talk to.

The HR professional or legal counsel or some combination should ultimately identify possible accommodations. The same person/group will determine which accommodations, if any, are reasonable.

Accommodations should be reviewed from time to time to ensure the accommodation in use is the best one. They should also be reviewed if the worker's health changes or if the job description changes. Either of these events may trigger a new search for the right accommodation.