

## How To Respond To ADA Accommodation Requests

Law360, New York (May 21, 2012, 1:13 PM ET) -- With the amendment to the Americans with Disabilities Act (ADA) broadening the definition of "disability," the focus in ADA matters has, of course, turned more and more to accommodation issues.

Some accommodation requests are easy to deal with. However, it is often unclear not only whether an accommodation can be made that will solve the issue without undue hardship, but also whether an accommodation is even needed.

This article addresses the steps an employer should take to be sure it is properly responding to accommodation requests. Following these steps can help in finding a workable accommodation where one exists and also in defending against a failure to accommodate claim, when an accommodation will not or cannot be provided.[1]

An essential part of the accommodation process begins even before a request is received. Employers should make sure managers are trained to recognize an "accommodation request" when they see or hear it. Untrained managers could "deny" such a request without even realizing they are doing so.

Managers should be told that any time an employee asks for any type of change in how things are done or any other type of assistance due to a medical condition, including time off or schedule changes, such a request should be treated as an accommodation request.

The first step in responding to an "accommodation" request often involves determining if there is an actual medical need for an accommodation and, if so, how the requested accommodation would meet the need. How often does an employer receive a cursory note from the employee's doctor simply saying that the employee cannot work more than four hours a day, cannot work overtime or needs certain duties removed?[2]

Many times, these doctors' notes do not specify a time frame or say things like "indefinitely" or "until the next appointment." With such vague information, the employer may question if the requested, or any, accommodation is even medically necessary.

The employer does not need to just accept the doctor's conclusory statements. An employer has a right to get as much information as it needs from the employee's doctor to respond properly to the accommodation request. Sometimes a simple phone call to the doctor's office may work.

However, if the employer believes there may be a dispute with the employee as to the need for an accommodation, it is advisable to put the request for information to the doctor in writing and require a written response.[3] As appropriate under the circumstances, the letter to the doctor can ask for, among other things, any of the following information:

- A description of the medical condition requiring an accommodation and an explanation of why such medical condition requires an accommodation.
- How the specific accommodation identified by the doctor will solve the work-related issue created by the medical condition.
- The length of time the accommodation will be needed.
- The medical basis for the doctor's opinions on each of these issues.
- A more precise description of any vaguely worded accommodation requests, e.g., no heavy lifting, no overhead work.
- Whether any other accommodations might work.
- Any other information the doctor thinks the employer should know.

The doctor's failure to cooperate may be the basis for denying the requested accommodation, as the doctor's lack of cooperation may be imputed to the employee. See, e.g., *Vawser v. Fred Meyer Inc.*, 2001 U.S. App. LEXIS 21805 (9th Cir. Oct. 4, 2001).

If the doctor does not provide all the requested information, put the employee on notice in writing of the doctor's failure. Inform the employee that it is the employee's obligation to obtain their doctor's cooperation and that, if the doctor does not provide the requested information, the employee's accommodation request will not be processed further.[4]

If the employer questions the information provided by the employee's doctor, or the employee, the employer can require that the employee submit to a medical examination by a doctor of the employer's choice.

Any time a doctor is involved in providing any requested information — whether the doctor is the employee's and/or one selected by the employer — make sure the doctor has accurate and complete information about the job at issue and/or any other relevant workplace information related to the specific accommodation issue presented.

Consider, where appropriate, having the doctor come to the workplace and view the employee's job.

Once the employer has information establishing that an accommodation is medically needed, the employer must evaluate if it can provide the requested accommodation or a different accommodation. Under the ADA, if there is an alternative accommodation that the employer prefers, the employer does not have to provide the accommodation the employee requests. See *Gratzl v. Office of the Chief Judges*, 601 F.3d 674 (7th Cir. 2010).

This is true even if the employer could provide the employee's preferred accommodation without hardship. As long as the accommodation selected by the employer effectively deals with the work-related issue caused by the employee's disability, the employer has a right to choose the accommodation it will provide.

Certain accommodations never have to be granted under the ADA, regardless of medical need. An employer does not need to promote the employee, create a new job, violate a seniority system (in most cases)[5] or remove essential job functions.

However, if an employee requests an accommodation that the employer does not have to offer, the employer nevertheless must determine whether an alternate accommodation is available.

Throughout the accommodation process, the employer should talk to the employee to get the employee's perspective. This includes discussing both questions about the need for an accommodation as well as ideas for possible accommodations.

Not only is this "interactive process" required by the ADA, it is also just a good idea. The employee may have some workable solutions that the employer had not considered because the employer is unfamiliar with the disability or the work-related issues the disability causes.

And, it is better to hear the employee's ideas before the employer decides no accommodation is available and a claim is filed, because the employer is sure to hear about all the employee's great ideas at that point.

Though the employer can choose its preferred accommodation over the employee's preferred accommodation, the employer cannot consider transfer to a different position if there is a reasonable accommodation that enables the employee to do his/her current job, unless the employee agrees otherwise.

The employer must be prepared to remove any nonessential functions the employee cannot perform. If the employee is unable to perform the essential duties of the job, consider whether there is some reasonable accommodation the employer can provide to help the employee perform the functions.

As needed, involve managerial employees familiar with the job duties in this process. Such managers should be cautioned that all information regarding the employee's condition and the need for an accommodation must be kept confidential.

If needed, the employer should consult appropriate experts to determine whether and what accommodations are available. Such experts can be internal, e.g., operation managers, plant engineers, company medical personnel, or external, e.g., ergonomic experts, physicians, engineers, the Job Accommodation Network.

If there is no reasonable accommodation that will allow the employee to perform the duties of the employee's current job, the employer must then determine whether there are vacant positions, including at other locations, that the employee might be qualified to perform. Consider both hourly and salaried positions. The employer should first look at jobs with equal pay and benefits, then consider lower-paying jobs.

If there are vacant positions, the employer should determine whether the employee meets the job qualifications for any of them, and whether the employee can perform the duties of the position, with or without an accommodation. The employer should not assume the employee would not be interested in the position, even if it pays less or is perceived as having "less desirable" working conditions than the employee's current job.

Once an accommodation is tentatively selected, the employer should again meet with the employee to discuss the accommodation. If the employer selects an accommodation other than the accommodation requested by the employee, determine if the employee has any objections to the accommodation or suggestions for improving it. Consider what the employee has to say before making any final decisions.

If the employer decides either (a) that there are no accommodations available, or (b) that any available accommodations impose an undue hardship, document all reasons for this conclusion.

The employer should also again meet with the employee and inform the employee of the decision and the reasons for it. The employer should listen to anything the employee has to say. If the employee says he/she would like to provide the employer with further information that may change the decision, give the employee a reasonable amount of time to do so. The employer should be prepared to reconsider the decision based on any new information provided.

If the employer ultimately decides it cannot provide an accommodation that would keep the employee working, the employee should be placed on paid leave if the employee qualifies under the employer's normal leave policies. Also consider whether the employee has a right to leave, paid or unpaid, under state and/or federal family and medical leave laws.

If the employee does not have any right to leave, consider whether it makes sense to put the employee on an unpaid leave for a short period as an accommodation under the particular circumstances, e.g., the employee is in a healing period and condition should improve in a reasonable period of time, or new jobs are expected to open shortly.

If the employee is put on leave, tell the employee to contact the employer during the leave if there are any changes in the employee's medical condition.

While the employee is on leave, the employer should keep track of positions that become available and investigate them to determine if the employee may be qualified to perform, with or without accommodation, any of these positions.

At the end of the leave period, and before the employer moves to termination, the employer should talk to the employee again to find out if there have been any changes.

The employer should again go through the accommodation analysis to see if there are any open positions that the employee is qualified to perform. In other words, the employer should make it clear that it has left no stone unturned, and that it is terminating the employee only because the employer is out of options.

The goals in the accommodation process are to determine if there is a workable accommodation available and to put the employer in the position to be able to defend any decision that it could not — or did not have to — accommodate the employee. Following the steps listed above should assist in accomplishing these goals.

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[1] This article addresses accommodations only under the ADA. State laws requiring the accommodation of disabilities may vary.

[2] For ease of reference in this article, the employee's health care provider will be referred to as "doctor." All references to the employee's doctor apply equally to other types of health care providers.

[3] Remember to include the instruction required by the Genetic Information Nondiscrimination Act (GINA) telling the doctor not to provide any genetic information.

[4] If the employee has a mental disability that affects cognitive skills, the employer will likely need to take extra steps before simply rejecting a request based on the failure of the doctor to respond. See *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281 (7th Cir. 1996).

[5] Violating a seniority system is ordinarily not a reasonable accommodation, but the employee can try to show "special circumstances" justifying the reasonableness of a violation in a particular case. This usually means showing that the employer has regularly violated the system on its own prerogative or that the system contains numerous exceptions, such that adding one more exception is not burdensome. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

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