

## To Accommodate Or Not Accommodate? – A Complex Question Facing Employers Under The ADA

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Employers constantly find themselves in the following situation: employee tells you that he or she cannot perform certain job tasks because of a medical condition, or presents a note from his/her doctor identifying certain work restrictions. The employee insists he or she can work; you just need to modify the employee's job in some way in order to allow them to continue working. Situations like this are commonplace in today's work environment and determining your legal obligations can be quite daunting. Well, lucky for you, today's blog will provide some helpful suggestions for addressing accommodation requests. As we have suggested in a [previous blog post](#), when addressing FMLA issues it is useful to break down accommodation issues into a series of steps. *Step One* Educate yourself on the basics of the Americans With Disabilities Act, as amended (ADA). The ADA requires employers to make a reasonable accommodation to a qualified individual with a disability, unless doing so would impose an undue hardship on the operation of the business, 42 U.S.C. §12112(b)(5)(A). So, what does that mean in practical terms? When is an accommodation *reasonable*? When is an individual qualified, or better yet, not qualified? While these are often complex questions, the most important thing to remember is that nothing is uniform. Answering these questions requires a case-by-case, individualized inquiry. *Step Two* Actively engage in the interactive process with the employee. First, determine what the employee is actually requesting. What will be required to make the requested accommodation? Documenting that request is advisable. Second, why does the employee need the accommodation (*i.e.*, what's the underlying issue prohibiting him/her from performing certain job duties)? Third, do you have medical support for the request? If not, ask the employee to provide it. If you have it, does the doctor's note support the employee's request? Is this a short term condition or something that is expected to last more than a couple months? These are some of the questions you may face as you actively engage with the employee to determine the scope of his or her request. *Step Three* Now that you have identified the nature of the request and have medical support for the request, it's time to determine whether the requested accommodation is reasonable. Is the employee asking you to remove essential job functions? While the law does not require an employer to remove essential job functions to provide an accommodation, just because an employer says a job function is essential doesn't mean a court will always agree. Thus, your inquiry does not end here. Why do you believe the function(s) is essential to the position? Does the job description identify the job function as essential to the position? See *Crossley v. CSC Applied Technologies, LLC*, 2014 WL 2119156 (5th Cir. May 22, 2014) (finding aircraft mechanic with PTSD was not qualified individual with a disability where she was unable to travel due to her medical appointments and traveling was identified as an essential function in her job description). Does the supervisor believe the function is essential? If so, is there anything to support the supervisor's belief? For instance, did the supervisor discuss this function in the employee's last performance

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evaluation? References to the job function in an employee's performance evaluations can provide other good evidence that the function is truly essential. And, always consider whether you have removed this job function for anyone else in the past, including for the employee making this request. You do not want to explain why you were able to remove it in the past, but cannot now. See, e.g., *Hillman v. Costco Wholesale Corp.*, 2014 WL 3500131 (N.D. Ill. July 14, 2014) (refusing to dismiss failure to accommodate claim prior to trial because employer previously accommodated employee in the position for a short period of time).

**Step Four** Even if the job function is essential, and therefore the employee cannot remain in his or her position, your inquiry does not end here. An employer should consider whether the employee can be reassigned to another position that could accommodate his or her work restrictions. However, reassignment is only reasonable if there is an existing, vacant position. In other words, employers are not required to create a position or bump an employee in order to create a vacancy. See *Silva v. City of Hidalgo, Tex.*, 2014 WL 3511685 (5th Cir. July 17, 2014) (citation omitted) (finding reassignment to light duty or a desk job was not reasonable because plaintiff failed to identify any vacant positions); *Wells v. Chrysler Group LLC*, 559 Fed. App'x 512 (6th Cir. May 15, 2014) ("The ADA does not require [an employer] to have placed [the employee] in a position that was not vacant at the time. Nor does the ADA require [it] to shift responsibilities among other employees in order to create a position that is not already in existence at the time."). With that in mind, you should determine if there are any vacancies and then determine whether the employee has the necessary qualifications for the position. (Employers with a collective bargaining agreement covering the employee in question will want to consider the terms of that agreement before making any reassignment decisions.)

**Step Five** Consider whether leave time could be provided as an accommodation. Has the doctor suggested that the employee's condition will improve in the near term, such that providing the employee with leave could allow him or her to return to work without the restrictions? While an employer is not obligated to provide indefinite leave to an employee, providing leave for as long as six months to a year (and possible more) may be deemed reasonable. Again, making any determination of reasonableness requires a case-by-case, individualized inquiry. Following these suggestions will not make you immune to challenges from employees, but it will help you prepare your defense if you are challenged at a later date. And, the decisions you ultimately reach – to accommodate or not accommodate – will be the better for it.