



22nd Annual EXamining Conflicts in Employment Law (EXCEL) Training Conference

ABC's of Disability Accommodation

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“Respect • Opportunity • Inclusion”



What is a Reasonable Accommodation?

A Reasonable Accommodation is a CHANGE in the way things are done at work that enables an individual with a disability to:

- Apply for a job;
- Do a job;
- Enjoy equal access to a job's benefits and privileges.

Employer Must Make Reasonable Accommodation To

Individuals who:

- Meet the definition of disability under the Rehabilitation Act. &
- Are Qualified for the job they have or want.

Who is a Person with a Disability?

Individuals who:

- 1) **HAVE** a physical or mental impairment that substantially limits a major life activity;
- 2) Have a **RECORD OF** a physical or mental impairment that substantially limits a major life activity; **and/or**
- 3) Are **REGARDED** as a person with a disability.

SUBSTANTIALLY LIMITED IN A MAJOR LIFE ACTIVITY

- Need not prevent, or significantly or severely restrict, a major life activity
- Includes major bodily functions
- Ameliorative effects of **mitigating measures** are not considered
- Impairments that are **episodic** or **in remission** are substantially limiting if they would be when active

Examples of Impairments that are Almost Always Covered

- Deafness
- Blindness
- Intellectual Disability
- Mobility Impairments requiring the use of a wheelchair
- Cerebral Palsy
- Diabetes
- Epilepsy
- Human Immunodeficiency Virus (HIV)
- Major Depressive Disorder
- PTSD
- Cancer

PREGNANCY

- Pregnancy is not an impairment under the Rehabilitation Act.
- However, pregnancy-related impairments may be covered (ie. gestational diabetes).

Who is Qualified?

Individuals who:

- ✓ Have the requisite skills, experience, education and other job related requirements of the position; **and**
- ✓ Can perform the essential (or fundamental) functions of the job she has or wants with or without an accommodation.

WHAT ARE THE ESSENTIAL FUNCTIONS?

Essential Functions of a job are duties that are so fundamental to the position that the individual cannot do the job without being able to perform them.

Function may be essential because:

- Job exists to perform the function
- Limited number of employees among whom the function can be distributed
- Job is highly specialized

Reasonable Accommodation Process

Step by Step Approach to
determine effective
accommodations

Obligation under Section 501 and EO 13164

- EO 13164 require agencies to submit RAP to EEOC every time the procedures are updated.
- RAP submission must include copies of forms used by agency.
- Agencies using online system may submit screenshots.
- Agency procedures must describe process for applicants.

- Explain relevant terms
- Provide that reassignment is a reasonable accommodation
- Easy to make a request (oral or written, made at any time, etc.)
- Provide forms
- Describe decision making process
- Explain how to recognize requests
- Early communication
- Explain confidentiality
- Explain medical documentation and review requirements
- Set deadlines
- Provide for expedited processing
- Provide interim accommodations
- Explain how to track requests
- Agency must inform requester about delays
- Encourage voluntary dispute resolution for denials
- Denial notices
- Point to Commission guidance

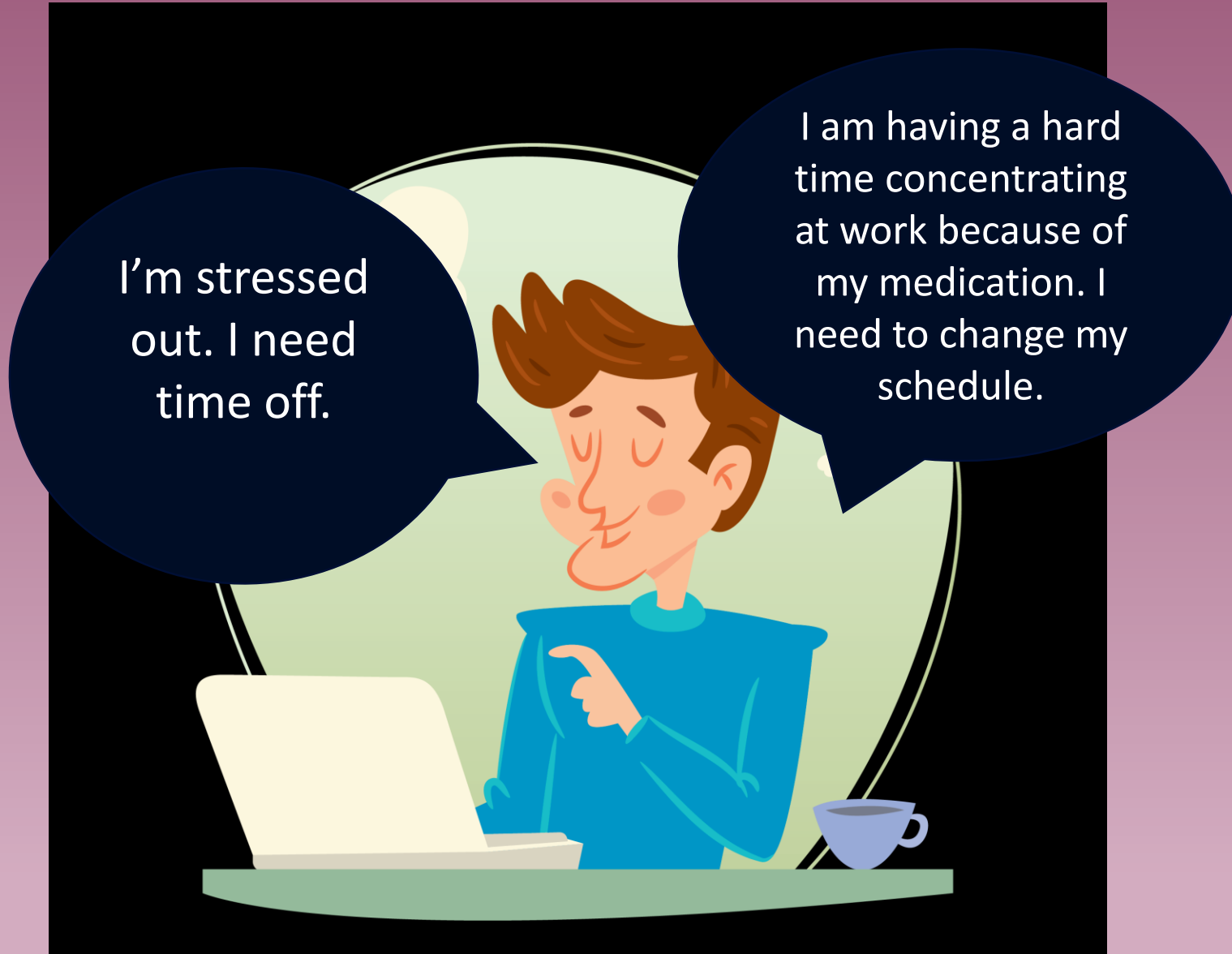
General Requirements

- RAP clearly states agency and/or component to which the procedures apply;
- RAP is posted on agency's external and internal website;
- RAP is available to job applicants and employees in written and accessible formats;
- Key terms are correctly defined;
- RAP is written in a way to promote employment opportunities for PWD; and
- RAP encourages flexibility.

Requests for Reasonable Accommodation

- Statement by individual (or his/her representative) that they need a change or adjustment at work for a reason related to a medical condition.
- Individual does not need to use special words such as “ADA” “Rehabilitation Act” “Reasonable Accommodation”.
- Request may be made in plain language.
- Request may be made at anytime.
- Request may be made orally or in writing.

Is this a Reasonable Accommodation Request?

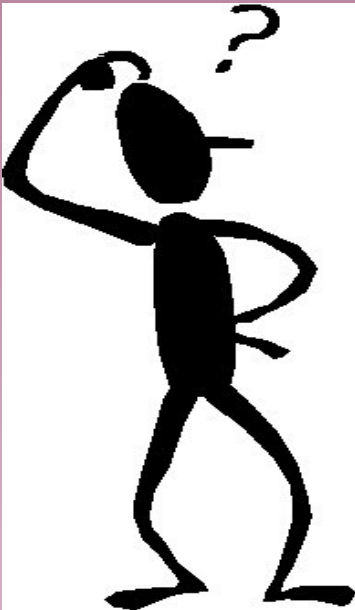


Received an Accommodation Request? Now What..

Employee or
Applicant
REQUESTS
Reasonable
Accommodation



Employer
Engages in
Informal Interactive
Process



Interactive Process

- Once a request for accommodation is made, employer must engage in an informal interactive process
- This process may involve determining whether the impairment that the employee has is a disability, what accommodation(s) would work, or both
- Employer may also need to assess whether accommodation will result in “undue hardship,” that is significant difficulty or expense for the agency

Step 1 – Job Analysis



1. Analyze the particular job performed by the employee.
 - What is the purpose of the job?
 - What are the essential functions of the job?

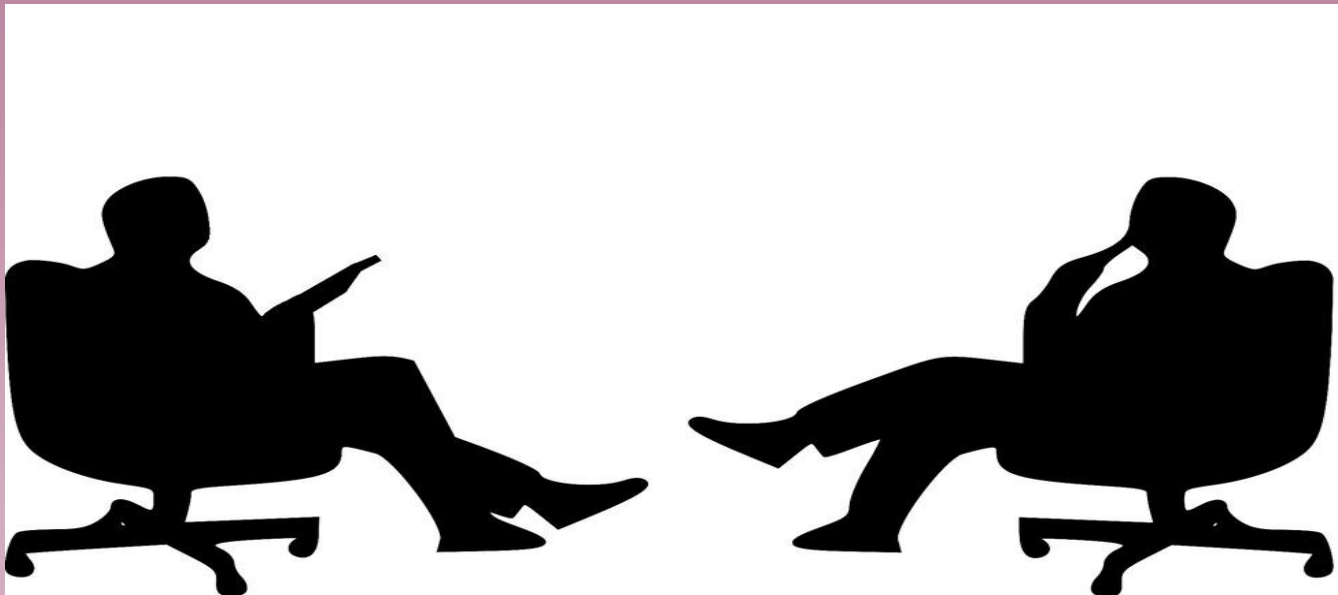
Evidence of Whether Function Is Essential

- Employer judgment
- Terms of a written job description
- Terms of a collective bargaining agreement
- Amount of time spent performing the function
- Consequences of not performing the function
- Experience of current and previous employees in the job

Step 2 – Communicate

Try to ascertain the precise limitations imposed by the individual's disability and those limitations can be overcome by a reasonable accommodation.

- What limitations is the employee experiencing?
- How do these limitations affect the employee ability to perform the job?
- What specific job tasks are affected?



Step 3 – Identify Accommodations

Employer and Employee work together to identify potential accommodations and assess the effectiveness of proposed accommodations.

- What accommodations are available to reduce or eliminate barriers?
- Consult Disability Program Manager for ideas.
- Consult external resources – Job Accommodation Network, DoD CAP, EEOC.

Actions Not Required as an Accommodation

- Removing an essential function or hiring someone else to perform it
- Lowering performance or production standards
- Excusing misconduct in violation of uniformly applied rules that are job-related and consistent with business necessity
- Providing “personal use items,” such as eyeglasses, wheelchairs, or prosthetic limbs

Step 4 - Request Documentation

Agency **MAY** ask for documentation when –

- The agency **MAY** ask for **REASONABLE DOCUMENTATION** about the individual's disability and functional limitations.
- The agency **MAY** ask for **SUPPLEMENTAL DOCUMENTATION** when the information already submitted is insufficient to document the disability and/or functional limitations it causes.

Step 4 – Request Documentation

- Agency **MAY NOT** ask for documentation when:
 - ❑ Both the disability and need for accommodation are obvious; *or*
 - ❑ Individual has already provided sufficient information to substantiate that the individual has a disability and needs the requested accommodation.
- The agency **MAY NOT** request access to the individual's complete medical records.

Documentation

- **Providers professional qualifications and the nature and length of your relationship with the client.**
- **The nature of the client's condition.**
- **The client's functional limitations in the absence of treatment.**
- **The need for a reasonable accommodation.
Suggested Accommodation(s).**

EEOC FACT SHEET – The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work

Determining whether Documentation is Insufficient (continued)

- If Documentation is insufficient:
 - Explain what is needed to employee and why documentation is insufficient
 - Allow employee an opportunity to timely provide information
 - If documentation is still insufficient, employer may consult with employee's doctor (with employees consent)
 - If documentation is still insufficient, employer may require medical examination by health care provider of the employer's choice.
 - Employer must pay all costs associated with visit.

Remember – Medical Examination must be Job Related & Consistent with Business Necessity.

Disability Documentation

- Focus on the requested RA, less focus on disability.
- Standard forms to collect medical information may lead to violations.
- Avoid asking individuals to complete a form in order to request RA that asks for medical information.
- Avoid medical release forms to collect information. Release may be appropriate for supplemental request.

Confidentiality

Medical Information MUST be kept Confidential!

- Includes all medical information of all applicants and employees, from whatever source obtained.
- Includes fact that someone has requested or received an accommodation.
- Violation of the Rehab Act to disclose to other managers, co-workers, or even other employers unless exception applies.
- Documents containing confidential medical information cannot be kept in regular personnel files.

Step 5 – Implementation

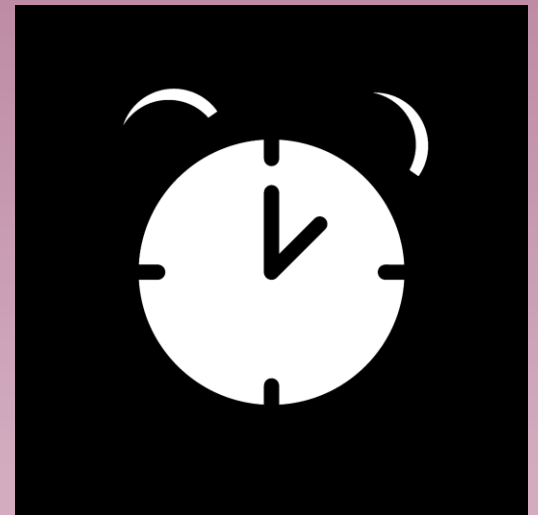
Select and implement the accommodation that works for both the individual and the employer.

- Consider employees preference when making decision.
- If more than one possible accommodation exists, employer has discretion to choose among equally effective alternatives
- Once accommodations are in-place consider following up with employee to determine effectiveness of accommodation.

Timeliness

Accommodation should be provided in as short a timeframe as possible.

- ❑ Expedite processing when necessary
- ❑ Identify and address any "extenuating circumstances" that may cause delay
- ❑ Notify the individual of the reason for any delay in responding to a request for or providing a reasonable accommodation, and that the individual be kept informed of the date on which the agency expects to complete the process.
- ❑ Investigate and implement temporary measures.



Defenses – Undue Hardship

Employer does not have to provide a reasonable accommodation that would cause an “Undue Hardship” to the employer.

Defense – Undue Hardship

Undue Hardship means that a specific accommodation requires significant difficulty or expense.

- Determination must be made on an individualized basis.
- Determination of Undue Hardship based cost **MUST** be based on the agency's budget as a whole.

Practical Tips

- ❑ Review and revise policies that may delay processing accommodation requests.
- ❑ Ensure individualized assessment of safety risks.
- ❑ Consult with an expert before denying a request.
- ❑ Be aware of the range of accommodation options.

Remember – The duty to accommodate is ongoing!

Common Themes / Issues Identified

- EO 13164 require agencies to submit RAP to EEOC every time the procedures are updated.
- RAP submission must include copies of forms used by agency.
- Agencies using online system may submit screenshots.
- Agency procedures must describe process for applicants.

EXAMPLES OF ACCOMMODATIONS

Reasonable Accommodations – Job Applicants

- Access to job application system
- Interpreting services or a reader
- Testing – Extra time, alternate formats
- Accommodations to meet qualification standards

Reasonable Accommodation – Change in Supervisory Style

Change in Supervisory Style or Management Techniques

- Providing materials in advance
- Scheduling time for Feedback / More frequent feedback
- Providing written instructions via email
- Providing Positive Feedback

Reasonable Accommodation – Change in Policy

- Flexible schedule / flexible start and end time
- Time for medical appointments
- Service animals
- Tele-work
- Leave
- Office/space assignments

TELEWORK AS A REASONABLE ACCOMMODATION

- As a reasonable accommodation for an individual with a substantially limiting impairment, an employer may need to permit more frequent telework than is otherwise allowed under its regular telework policy.
- Fact-specific determination based on particulars of position and workplace. Telework as accommodation need not be granted as an accommodation if not feasible or poses an undue hardship.

RELEVANT FACTORS TO CONSIDER

- Employer's ability to supervise the employee adequately
- Whether any duties require use of certain equipment or tools that cannot be replicated at home
- Whether there is a need for face-to-face interaction and coordination of work with other employees
- Whether in-person interaction with outside colleagues, clients, or customers is necessary
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

MANAGEMENT CONSIDERATIONS

- NOTE: Teleworking employees can be held to same performance and production standards as those working on-site, and can be required to be as available as when working on-site.
- Managers can require accomplishment reports or use other management methods to monitor productivity with respect to all employees.
- More information: Work From Home/Telework as a Reasonable Accommodation,
www.eeoc.gov/facts/telework.html

Reasonable Accommodation - Reassignment

Reassignment as an accommodation

- Only available to *Employees* (not applicants)
- Vacant position or position that agency knows will become open
- Individual must be qualified with or without an accommodation
- Equivalent position, if possible
- No promotion

Resources

- EEOC Factsheet: Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work: https://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm
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- EEOC Policy Guidance: Disability Related Inquiries and Medical Examinations under the ADA: <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>
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- Q&A: EEOC Policy Guidance: Disability Related Inquiries and Medical Examinations under the ADA: <https://www.eeoc.gov/policy/docs/qanda-inquiries.html>
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- EEOC Enforcement Guidance: Reasonable Accommodations and Undue Hardship under the ADA: <https://www.eeoc.gov/policy/docs/accommodation.html>

THANK YOU!

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