

# JAN

Job Accommodation Network

Practical Solutions • Workplace Success

## Accommodation and Compliance Series

# Employers' Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act

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A service of the U.S. Department of Labor's Office of Disability Employment Policy

## Preface

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# EMPLOYERS' PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

## Introduction

The Job Accommodation Network (JAN) is a free service of the U.S. Department of Labor's Office of Disability Employment Policy. JAN consultants have been providing job accommodation information to employers since 1983 when JAN was founded. In addition, JAN consultants have been providing information to employers about the Americans with Disabilities Act (ADA) since 1992 when the ADA went into effect. Over the years, JAN consultants have developed practical ideas to help employers provide job accommodations and comply with the ADA. The *Employers' Practical Guide to Reasonable Accommodation under the Americans with Disabilities Act* is a summary of some of the most frequent issues that employers have regarding accommodations and ADA compliance and JAN's practical ideas for resolving them. As new information is available or new issues develop, the *Guide* will be updated to reflect the changes. If you have an issue that is not addressed in the *Guide* or if you want to discuss an issue in more detail, please call JAN.

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## **I. ADA BASICS**

This section provides answers to basic questions about the ADA. Most of the answers come from formal and informal guidance from the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the ADA. When available, links to the EEOC guidance are provided.

### **What is the ADA?**

The ADA is a federal civil rights law that was passed in 1990 and went into effect beginning in 1992. Its purpose is to protect people with disabilities from discrimination in employment, in the programs and activities offered by state and local governments, and in accessing the goods and services offered in places like stores, hotels, restaurants, football stadiums, doctors' offices, beauty parlors, and so on. The focus of this guide is Title I of the ADA, which prohibits discrimination in employment and requires employers to provide reasonable accommodations for employees with disabilities.

For more information about the ADA, see the *ADA Handbook* at <http://askjan.org/media/adahandbook/handbook.html>.

For a copy of Title I of the ADA, see <http://www.eeoc.gov/policy/ada.html>.

### **Who must comply with Title I of the ADA?**

Only "covered entities" must comply with Title I of the ADA. The term covered entities includes employers with 15 or more employees, employment agencies, labor organizations, and joint labor-management committees. For simplicity, this guide will refer to covered entities as "employers."

For more information about covered entities, see <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B>.

### **Who is protected by Title I of the ADA?**

Title I protects "qualified employees with disabilities." The term qualified means that the individual satisfies the skill, experience, education, and other job-related requirements of the position sought or held, and can perform the essential job functions of the position, with or without reasonable accommodation.

For additional information about the definition of qualified, see <http://askjan.org/links/ADAtam1.html#II>.

The term employee means, "an individual employed by an employer." The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance.

For additional information about the definition of employee, see <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1>.

The term disability means: (1) a person who has a physical or mental impairment that substantially limits one or more major life activities, (2) a person with a record of a physical or mental impairment that substantially limits one or more major life activities, and (3) a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities.

For additional information about the definition of disability, visit *How to Determine Whether a Person has a Disability under the Americans with Disabilities Act (ADA)* at <http://askjan.org/corner/vol02iss04.htm>.

On September 25, 2008, the ADA Amendments Act (ADAAA) was passed. This Act changes the interpretation of the definition of disability. For additional information on the ADAAA, visit Accommodation and Compliance Series: The ADA Amendments Act of 2008, at <http://askjan.org/bulletins/adaaa1.htm>.

The term essential job functions means the fundamental job duties of the employment position that the individual with a disability holds or desires. The term essential functions does not include marginal functions of the position.

For additional information about essential functions, visit the EEOC's *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAtam1.html>, section 2.3(a).

### **What is a reasonable accommodation?**

A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average similarly-situated employee without a disability. The ADA requires reasonable accommodation in three aspects of employment: 1) to ensure equal opportunity in the application process, 2) to enable a qualified individual with a disability to perform the essential functions of a job, and 3) to enable an employee with a disability to enjoy equal benefits and privileges of employment.

Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

For additional information about reasonable accommodation under the ADA, visit *Reasonable Accommodation and Undue Hardship* (EEOC Guidance) at <http://www.eeoc.gov/policy/docs/accommodation.html>.

## **II. REASONABLE ACCOMMODATIONS FOR APPLICATIONS AND INTERVIEWS**

The ADA applies to all aspects of employment, including job advertisements, job applications, job interviews, and post-offer medical examinations. Although many of the ADA rules that apply to applicants and new-hires are the same as the rules for employees, there are some differences. This section discusses the differences.

### **A. Job Advertisements and Applications**

#### **1. What information do employers have to provide about the ADA on job advertisements and job applications?**

No specific information about the ADA is required on job advertisements or job applications. However, the EEOC advises employers to include information about the essential functions of the job in job announcements, advertisements, and other recruitment notices because specific information about essential functions will attract applicants, including individuals with disabilities, who have appropriate qualifications.

The EEOC also advises employers to consider including a statement in job advertisements and notices that they do not discriminate on the basis of disability or other legally prohibited bases. The EEOC provides the following example: "We are an Equal Opportunity Employer. We do not discriminate on the basis of race, religion, color, sex, age, national origin or disability."

For additional information, see the EEOC's *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAAtam1.html>.

#### **2. Does the ADA require affirmative action in the hiring of people with disabilities?**

No. The ADA is a nondiscrimination law. It does not require employers to undertake special activities to recruit people with disabilities. However, it is consistent with the purpose of the ADA for employers to expand their "outreach" to sources of qualified candidates with disabilities. Recruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.

For example: If an employer conducts recruitment activity at a college campus, job fair, or other location that is physically inaccessible, or does not make its recruitment activity accessible at such locations to people with visual, hearing or other disabilities, it may be liable if a charge of discrimination is filed.

For more information, see the EEOC's *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAAtam1.html>.

### **3. Does the ADA allow affirmative action in the hiring of people with disabilities?**

Employers may invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program if the employer is undertaking affirmative action because of a federal, state, or local law that requires affirmative action for individuals with disabilities, or the employer is voluntarily using the information to benefit individuals with disabilities.

According to the EEOC, if an employer invites applicants to voluntarily self-identify in connection with providing affirmative action, the employer must state clearly that the information requested is used solely for affirmative action purposes, that it is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

For additional information, see *Pre-Employment Disability-Related Inquiries and Medical Exams* at <http://www.eeoc.gov/policy/docs/preemp.html>.

### **4. Where can employers find qualified applicants with disabilities?**

According to the U.S. Department of Labor, Office of Disability Employment Policy (ODEP), qualified applicants with disabilities can be located through various resources, including Vocational Rehabilitation (VR). In addition, ODEP co-sponsors the Workforce Recruitment Program (WRP) to connect public and private sector employers nationwide with postsecondary students and recent graduates with disabilities and many colleges and universities have coordinators of services for students with disabilities who can be helpful in recruitment. Employers may also be able to locate qualified applicants with disabilities by contacting local independent living centers or organizations representing people who have specific disabilities.

For a list of VR offices by state, visit <http://askjan.org/cgi-win/TypeQuery.exe?902>.

For information about WRP, visit <http://www.dol.gov/odep/wrp/>.

For free consulting services and resources to support the recruitment and hiring of people with disabilities, visit the Employer Assistance and Resource Network (EARN) at <http://askearn.org>

### **5. What accommodations do employers have to provide during the application process?**

Employers have an obligation to make reasonable accommodations to enable applicants with disabilities to apply for jobs. For example, information about jobs should be available in a location that is accessible to people with mobility impairments. If a job advertisement provides only a telephone number to call for information, a TDD

(telecommunication device for the deaf) number should be included, unless a telephone relay service has been established. Printed job information in an employment office or on employee bulletin boards should be made available, as needed, to persons with visual or other reading impairments. Preparing information in large print will help make it available to some people with visual impairments. Information can be recorded on a cassette or read to applicants with more severe vision impairments and those who have other disabilities that limit reading ability.

For more information about making the application process accessible, see the EEOC's *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAtam1.html>.

## **6. Do employers have to make on-line application processes accessible?**

Employers must either make their on-line application processes accessible or provide an alternative means for people with disabilities to apply for jobs, unless they can show that doing so would cause an undue hardship.

For information regarding making on-line applications accessible, visit <http://askjan.org/topics/onlineapps.htm>.

## **7. What medical questions can employers ask on job applications?**

Employers cannot ask disability-related questions before an offer of employment is made. In general, this means that employers cannot ask questions on job applications that are likely to elicit information about a disability. For example, employers cannot ask whether an applicant has a physical or mental impairment, has received workers compensation, or was ever addicted to illegal drugs. For more examples, visit *Pre-Offer, Disability-Related Questions: Dos and Don'ts* at <http://askjan.org/media/preofferfact.doc>.

For additional information about pre-employment medical questions, see *Pre-Employment Disability-Related Inquiries and Medical Exams* at <http://www.eeoc.gov/policy/docs/preemp.html>.

## **8. How can employers accommodate applicants with disabilities during pre-employment testing?**

The method of accommodation depends on the individual applicant's limitations and the type of test involved, so each situation must be approached on a case by case basis. As a starting point, JAN put together a publication that provides a broad discussion of potential accommodations for testing. The publication is called *Accommodations for Testing* and can be viewed at <http://askjan.org/media/testingaccomm.html>.

## **9. Do employers have to have job descriptions?**

According to the EEOC, the ADA does not require employers to develop or maintain job descriptions. A written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence in determining essential functions along with other relevant factors. However, the job description will not be given greater weight than other relevant evidence.

The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job be evaluated in relation to the job's essential functions.

For more information about job descriptions, visit *Job Descriptions* at <http://askjan.org/media/jobdescriptions.html>.

## **B. Job Interviews**

### **1. What medical questions can employers ask during a job interview?**

Under the ADA, employers may not ask disability-related questions or conduct medical examinations until after they make a conditional job offer to an applicant. This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before employers evaluate an applicant's non-medical qualifications. Employers may not ask disability-related questions or require a medical examination pre-offer even if they intend to look at the answers or results only at the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they may do a wide variety of things to evaluate whether an applicant is qualified for the job, including asking about an applicant's ability to perform specific job functions, asking about an applicant's non-medical qualifications and skills, and asking applicants to describe or demonstrate how they would perform job tasks. For more examples, visit *Pre-Offer, Disability-Related Questions: Dos and Don'ts* at <http://askjan.org/media/preofferfact.doc>.

For additional information, visit EEOC's *Pre-employment Disability-Related Inquiries and Medical Exams* at <http://www.eeoc.gov/policy/docs/preemp.html>.

### **2. Where can employers get information about disability etiquette?**

There are a variety of resources for information about disability etiquette. JAN provides a list of some of the available resources on its Website at <http://askjan.org/topics/disetiq.htm>.

### **3. What accommodations must be provided for job interviews?**

Employers have an obligation to make reasonable accommodations to enable applicants with disabilities to participate in the interview process. Accommodations for interviews may include: an accessible interview location for people with mobility impairments, a sign language interpreter for a person who is deaf, a reader for a person who is blind, and modified testing for a person with a learning disability.

For more information about making the job interviews accessible, see the EEOC's *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAtam1.html>.

## **C. Post Job Offer**

### **1. What constitutes a valid job offer?**

A job offer is valid if the employer has evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer. There may be times when an employer cannot reasonably obtain and evaluate all non-medical information at the pre-offer stage. If an employer can show that is the case, the offer would still be considered a real offer.

Employers do not have to limit offers to current vacancies; they can give offers to fill current vacancies or reasonably anticipated openings. Employers may also give offers that exceed the number of vacancies or reasonably anticipated openings, but must comply with the ADA when taking people out of the pool to fill actual vacancies. The employer must notify an individual (orally or in writing) if his/her placement into an actual vacancy is in any way adversely affected by the results of a post-offer medical examination or disability-related question.

If an individual alleges that disability has affected his/her placement into an actual vacancy, the EEOC will carefully scrutinize whether disability was a reason for any adverse action. If disability was a reason, the EEOC will determine whether the action was job-related and consistent with business necessity.

For additional information, visit EEOC's *Pre-employment Disability-Related Inquiries and Medical Exams* at <http://www.eeoc.gov/policy/docs/preemp.html>.

### **2. What medical questions can employers ask once a job offer has been made?**

According to the EEOC, once a conditional job offer is made and before an employee starts work, employers may ask any disability-related questions they choose and they may require medical examinations as long as this is done for all entering employees in a particular job category.

For additional information, visit EEOC's *Pre-employment Disability-Related Inquiries and Medical Exams* at <http://www.eeoc.gov/policy/docs/preemp.html>.

### **3. Can employers rescind a job offer without violating the ADA?**

In some cases employers may be able to rescind a job offer without violating the ADA. If an employer rejects an applicant after a post offer disability-related question or medical examination and the applicant files a complaint with the EEOC alleging discrimination, EEOC investigators will closely scrutinize whether the rejection was based on the results of that question or examination. If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is job-related and consistent with business necessity.

In addition, if the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.

## **III. REASONABLE ACCOMMODATION FOR EMPLOYEES**

One of the key non-discrimination requirements of Title I of the ADA is the obligation to provide reasonable accommodation for employees with disabilities. This section provides information about what policies and procedures might be useful, how to recognize and handle accommodation requests, how to determine effective accommodations, and what types of accommodations might be reasonable.

### **A. Policies and Procedures**

#### **1. Are there specific policies and procedures employers must follow when trying to accommodate an employee with a disability?**

There are no specific policies or procedures that employers must follow when trying to accommodate an employee with a disability. However, employers may want to develop formal policies and procedures for several reasons. First, if supervisors, managers, and HR professionals have formal policies and procedures to refer to, they are more likely to handle accommodation requests properly and consistently. Second, a formal policy that is shared with employees helps employees know what to expect if they request an accommodation and also helps them understand that other employees might be requesting and receiving accommodations. Finally, formal procedures help employers document their efforts to comply with the ADA.

#### **2. Where can employers get sample accommodation policies and procedures?**

JAN and the EEOC have sample accommodation policies and procedures on their Web sites at:

Sample policies at <http://askjan.org/links/adapolicies.html>

*Five Practical Tips For Providing And Maintaining Effective Job Accommodations at*  
<http://askjan.org/media/FivePracticalTips.doc>

*Establishing Procedures to Facilitate the Provision of Reasonable Accommodation at*  
[http://www.eeoc.gov/policy/docs/accommodation\\_procedures.html](http://www.eeoc.gov/policy/docs/accommodation_procedures.html)

*EEOC's Internal Accommodation Procedures at*  
[http://www.eeoc.gov/eeoc/internal/reasonable\\_accommodation.cfm](http://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm)

*EEOC's Practical Advice for Drafting and Implementing Reasonable Accommodation Procedures under Executive Order 13164 at*  
[http://www.eeoc.gov/policy/docs/implementing\\_accommodation.html](http://www.eeoc.gov/policy/docs/implementing_accommodation.html)

### **3. Do employers have any obligation to provide temporary accommodations while researching an employee's accommodation request?**

According to informal guidance from the EEOC, there is no definite answer to this question; it depends on the situation. In some circumstances, it may be a violation of the ADA for an employer to fail to make temporary arrangements to keep an employee working while the employer researches the employee's accommodation request. From a practical standpoint, employers should try to make temporary accommodations, even beyond the requirements of the ADA, because doing so demonstrates the employer's good faith efforts to accommodate. For example, if an employee cannot perform an essential function of his job and requests an accommodation that requires some research, the employer should consider temporarily removing the essential function until a permanent accommodation can be made. If an employer chooses to do this, the employer should make clear to the employee that the interim accommodation is temporary.

## **B. Accommodation Requests**

### **1. How can employers recognize an accommodation request?**

According to the EEOC, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation" when requesting an accommodation. Therefore, any time an employee indicates that he/she is having a problem and the problem is related to a medical condition, the employer should consider whether the employee is making a request for accommodation under the ADA. The EEOC provides the following examples:

Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

From *Reasonable Accommodation and Undue Hardship under the ADA* at <http://www.eeoc.gov/policy/docs/accommodation.html>

## **2. Who should handle accommodation requests?**

Initially, the person receiving an accommodation request should respond, even if the response is merely to explain the company's accommodation process and refer the employee on to the appropriate person to handle the request. Employers may want to designate a person to handle accommodation requests and then train all supervisors, managers, foremen, crew leaders, HR representatives, and others in positions that involve supervision of employees to consult with that designated person if they receive an accommodation request.

## **3. Can employers ask an employee whether he/she needs an accommodation?**

According to the EEOC, an employer may ask an employee with a known disability whether he/she needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if he/she needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if he needs reasonable accommodation.

## **4. Does the ADA have specific accommodation request forms that employers must use?**

No, there are no official request forms under the ADA. For employers that want to have a written request, JAN developed a sample request form located at <http://askjan.org/media/raemployersform.htm>.

## **5. What should employers do when they receive an accommodation request?**

According to the EEOC, the employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, he/she does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained. Employers can always contact JAN free of charge.

## **6. What medical information can employers ask for when an employee requests accommodation?**

Under the ADA, employers must limit the scope of a medical inquiry in response to an accommodation request. When the disability or need for accommodation is not obvious, an employer may require that the employee provide medical documentation to establish that the employee has an ADA disability, to show that the employee needs the requested accommodation, and to help determine effective accommodation options. Although the ADA limits the scope of medical requests, it does not include specific forms for requesting medical information. For employers who want to develop a form, JAN provides a sample format that employers can use as a guide. The form is located at <http://askjan.org/media/medical.htm>.

## **C. Determining Effective Accommodations**

### **1. How can employers determine effective accommodations?**

In most situations, employers should first consult with the employee who requested the accommodation to clarify what the individual needs and identify the appropriate reasonable accommodation. Often the employee will be the best resource for information about accommodation needs. When the employee does not have all the necessary information or when an employer wants to explore other options, the next step may be to request medical information from the employee's health care provider.

By talking with the employee who requested the accommodation and obtaining medical information if needed, the employer should be able to identify what the problem is, which is the first step in determining effective accommodation solutions. The employer needs to know what specific symptoms and functional limitations are creating barriers to accessing the workplace, performing job tasks, or benefiting from an equal employment opportunity. It may also be helpful to know if the employee's limitations are predictable, subject to change over time, stable, or progressive. While this information may not always be known, when available the information can be very helpful in selecting a long term, effective accommodation solution.

Once the employee's limitations and abilities are identified, the next step is to determine how they impact the employee's ability to perform the job. To make this determination, the employer needs to consider what specific job tasks, work environments, equipment, or policies are creating barriers to successful job performance. A good job description is a starting point, but does not always provide all the information needed. Sometimes it may be necessary to go beyond the traditional job description and consider other factors, such as what equipment is used to perform a task, where the work is performed, and why certain policies are being followed.

After the employer identifies the employee's limitations and abilities and determines how they impact job performance, the employer is ready to consider accommodation options.

For more information on the accommodation process, see:  
JAN's *Five Practical Tips For Providing And Maintaining Effective Job Accommodations* at <http://askjan.org/media/FivePracticalTips.doc> and JAN's *Interactive Process* at <http://askjan.org/media/interactiveprocessfact.doc>

## **2. Where can employers get information about the types of accommodations that might be useful?**

JAN provides free consulting services for employers seeking accommodation ideas. JAN also maintains an extensive Web site with accommodation idea publications and a Searchable Online Accommodation Resource (SOAR), which allows employers to independently search for accommodation solutions. JAN's Web site for SOAR is <http://askjan.org/soar>.

## **3. Who chooses an accommodation?**

According to the EEOC, employers get to choose among effective accommodation options. If more than one accommodation would be effective for the individual with a disability, or if the individual would prefer to provide his or her own accommodation, the individual's preference should be given first consideration.

#### **4. What accommodations are not considered reasonable?**

Reasonable accommodation does not include removing essential job functions, creating new jobs, and providing personal need items such as eye glasses and mobility aids. Nothing in the ADA prohibits employers from providing these types of accommodations; they simply are not required accommodations.

#### **5. If an employer provides an accommodation the ADA does not require, will that set a precedent for the next time an employee needs the same type of accommodation?**

The EEOC encourages employers to go beyond the requirements of the ADA if they choose and will not penalize them for doing so. However, if employers choose to do more than required under the ADA, they should do so in a non-discriminatory manner. For example, employers should not do more only for employees with physical disabilities and not for people with mental disabilities.

### **D. Accommodation Issues**

#### **1. Work-Site Accessibility**

##### **a. Do employers have to modify the work-site if they do not have an employee with a mobility impairment?**

Under Title I, an employer is not required to make its existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment related activities or benefits. However, private employers that occupy commercial facilities or operate places of public accommodation and state and local governments must conform to more extensive accessibility requirements under Title III and Title II when making alterations to existing facilities or undertaking new construction.

When making changes to meet an individual's needs under Title I, an employer will find it helpful to consult the applicable Department of Justice accessibility guidelines as a starting point. It is advisable to make changes that conform to these guidelines, if they meet the individual's needs and do not impose an undue hardship, since such changes will be useful in the future for accommodating others. However, even if a modification meets the standards required under Title II or III, further adaptations may be needed to meet the needs of a particular individual.

For example: A restroom may be modified to meet standard accessibility requirements (including wider door and stalls, and grab bars in specified locations) but it may be necessary to install a lower grab bar for a very short person in a wheelchair so that this person can transfer from the chair to the toilet.

Although the requirement for accessibility in employment is triggered by the needs of a particular individual, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will apply for jobs in the future.

From the EEOC's *Title I Technical Assistance Manual*, chapter 3, section 3.10 at <http://askjan.org/links/ADAtam1.html#III>.

For a copy of the ADA Accessibility Guidelines, visit <http://www.access-board.gov/adaag/html/adaag.htm>.

### **b. Do employers have to provide accommodations for emergency evacuation?**

If an employer has an emergency evacuation plan for employees, the plan should include employees with disabilities. If an employer does not have an evacuation plan for all employees, the employer must consider accommodations on a case by case basis for any employee with a disability who requests accommodations for emergency evacuation.

For information about accommodating employees during emergency evacuation, visit *Emergency Evacuation Procedures for Employees with Disabilities* at <http://askjan.org/media/emergency.html>.

For information about emergency preparedness and people with disabilities, visit <http://www.dol.gov/odep/programs/emergency.htm>.

### **c. Do employers have to provide parking as an accommodation?**

Parking is considered a benefit of employment. Under the ADA, employers must make reasonable accommodations that enable employees with disabilities to enjoy equal benefits of employment. Therefore, if an employer provides parking for all employees, then it must provide parking for employees with disabilities, unless it would pose an undue hardship to do so. A tougher question is whether an employer has to provide parking for employees with disabilities when it does not provide parking for other employees.

There are two ways to look at this issue. First, you could argue that an employer is only required to provide reasonable accommodations that eliminate barriers in the work environment and parking is outside the work environment. Therefore, an employer would not have to provide parking as an accommodation, unless parking is provided for other employees. Alternatively, you could argue that an employer is required to provide parking as an accommodation because otherwise some employees with disabilities would not be able to access the work-site, and therefore providing parking is a way to provide equal employment opportunities to employees with disabilities. Unfortunately, we cannot say which argument is right.

For more information, visit *Parking and the ADA, Act I* at <http://askjan.org/corner/vol01iss14.htm>.

**d. Do employers have to provide transportation to and from work as an accommodation?**

As mentioned in the prior section, an employer is required to provide reasonable accommodations that eliminate barriers in the work environment only, not ones that eliminate barriers outside of the work environment. Therefore, an employer would not be required to provide transportation as a reasonable accommodation for a commute to work, unless the employer generally provides transportation for its employees. However, where an employer's policy regarding work schedules creates a barrier for an individual whose disability interferes with his or her ability to commute to work, the employer must modify that policy as a reasonable accommodation unless it would impose an undue hardship. For example, an individual who uses a wheelchair and commutes by public transportation may need a later arrival time in inclement weather.

From an EEOC informal guidance letter dated June 15, 1997.

**2. Job Restructuring**

According to the EEOC, job restructuring includes modifications such as: reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and altering when and/or how a function, essential or marginal, is performed. An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

**a. How do employers determine what job duties are essential?**

JAN put together a publication called *Job Descriptions* at <http://askjan.org/media/jobdescriptions.html>, which includes a discussion about how to determine whether a job duty is essential.

The EEOC also provides information about determining essential functions at section 2.3(a) of its *Title I Technical Assistance Manual* at <http://askjan.org/links/ADAtam1.html>.

**b. Do employers have to provide light duty for employees with disabilities?**

The term "light duty" has a number of different meanings in the employment setting. Generally, "light duty" refers to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term "light duty" to mean simply excusing an employee from performing those job functions that he/she is unable to perform because of an impairment. "Light duty" also may consist of particular positions with duties that are less physically or mentally demanding created specifically for the purpose of providing alternative work for employees who are unable

to perform some or all of their normal duties. Further, an employer may refer to any position that is sedentary or is less physically or mentally demanding as "light duty."

In the following discussion, the term "light duty" refers only to particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties.

An employer need not create a light duty position for a non-occupationally injured employee with a disability as a reasonable accommodation. The principle that the ADA does not require employers to create positions as a form of reasonable accommodation applies equally to the creation of light duty positions. However, an employer must provide other forms of reasonable accommodation required under the ADA. For example, subject to undue hardship, an employer must: (1) restructure a position by redistributing marginal functions that an individual cannot perform because of a disability, (2) provide modified scheduling (including part time work), or (3) reassign a non-occupationally injured employee with a disability to an equivalent existing vacancy for which he/she is qualified. Accordingly, an employer may not avoid its obligation to accommodate an individual with a disability simply by asserting that the disability did not derive from an occupational injury.

On the other hand, if an employer reserves light duty positions for employees with occupational injuries (does not create new light duty jobs when needed), the ADA requires it to consider reassigning an employee with a disability who is not occupationally injured to such positions as a reasonable accommodation. This is because reassignment to a vacant position and appropriate modification of an employer's policy are forms of reasonable accommodation required by the ADA, absent undue hardship. An employer cannot establish that the reassignment to a vacant reserved light duty position imposes an undue hardship simply by showing that it would have no other vacant light duty positions available if an employee became injured on the job and needed light duty.

Note that an employer is free to determine that a light duty position will be temporary rather than permanent.

For more information, visit *Workers' Compensation and the ADA* (EEOC) at <http://www.eeoc.gov/policy/docs/workcomp.html>.

### **3. Modified Work Schedules and Leave**

In its publication on reasonable accommodation and undue hardship, the EEOC discusses modified work schedules and leave as accommodations. The information is available at <http://www.eeoc.gov/policy/docs/accommodation.html>. However, some issues regarding work schedules and leave are not addressed in the guidance.

#### **a. Do employers have to change full-time jobs to part-time as an accommodation under the ADA?**

Although part-time work is a form of reasonable accommodation, employers probably do not have to change existing full-time jobs to part-time as an accommodation under the ADA. According to informal guidance from the EEOC, when an employee is asking to cut his/her hours in significantly, then, in essence, the employee is asking for a reassignment to an existing part-time job. The precise legal rationale will be debated in courts for awhile, but any way you look at it you fundamentally change a job when you significantly cut the hours (e.g., in half). One argument is that cutting a job in half necessarily entails cutting essential functions if “essential function” embodies the amount of work to be accomplished. You could also say that you would be cutting the production standard, which is not simply an hourly standard, but also a standard that measures how much should be produced in a full-day.

Another legal argument is to say that significantly reducing the hours of a job would be changing a qualification standard of the job; specifically, the ability to work full-time. The employer should always be able to show that it created a full-time position because there is sufficient work that requires working full-time. As such, the qualification to work full-time meets the business necessity standard, and thus it is not a reasonable accommodation to cut the hours in half.

That is why a request for part-time work by an employee often ends up really being a request for a reassignment to an existing part-time job. If there is only a minimal cut in hours, it might be possible to show that the essential functions, the productivity standard, and/or a qualification standard of the position will not be changed, despite the slight decrease in hours. In this case, an employer might need to eliminate marginal functions to permit the employee to complete all the essential functions.

**b. If an employer chooses to change a full-time job to part-time, does the employer have to maintain the employee’s full-time pay and benefits?**

No, not under the ADA unless the employer maintains pay and benefits for employees without disabilities whose jobs change from full-time to part-time. Employers should consider whether other laws apply, such as wage and hour laws.

**c. How much leave time must an employer provide as an accommodation under the ADA?**

Unlike the Family and Medical Leave Act (FMLA), which requires covered employers to provide up to 12 weeks of leave, there is no specific amount of leave time required under the ADA. Instead, leave time is approached like any other accommodation request: the employer must provide the amount of leave needed by the employee unless doing so poses an undue hardship.

For additional information regarding the interplay between the ADA and the FMLA, visit *FMLA, ADA, and Title VII* (EEOC Guidance) at <http://www.eeoc.gov/policy/docs/fmlaada.html>.

## **4. Modified Policies**

### **a. Can employers apply a no-fault attendance policy?**

No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

From *Reasonable Accommodation and Undue Hardship* (EEOC Guidance) at <http://www.eeoc.gov/policy/docs/accommodation.html>.

### **b. Can employers have 100% restriction-free policies?**

According to informal guidance from the EEOC, requiring an employee to be 100% restriction-free can violate the ADA when applied to an employee with a disability. Although some courts have characterized such policies as per se violations of the ADA, most courts require that the employee meet the definition of disability before being allowed to challenge the policy under the ADA. If an employee does not meet the first two prongs, he may be able to show that his employer regarded him as having a disability, typically by relying on evidence that the employer would not let him return to his regular job or any other job in a class of jobs or broad range of jobs in various classes.

### **c. Can employers enforce conduct rules?**

An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination. Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

From *Reasonable Accommodation and Undue Hardship* (EEOC Guidance) at <http://www.eeoc.gov/policy/docs/accommodation.html>.

For additional information, visit *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities* at <http://www.eeoc.gov/facts/performance-conduct.html>.

**d. Do employers have to modify dress codes or hygiene requirements as an accommodation?**

Most authorities (including EEOC) treat dress codes and hygiene requirements as "conduct rules," but classify them as the type of conduct rule that must be justified as job-related and consistent with business necessity before being enforced. Therefore, if a person with a disability requests modification of a dress code or hygiene requirement as an accommodation, an employer must consider allowing the modification unless the employer can show that the dress code or hygiene requirement is necessary for the job at issue.

For information about handling hygiene issues in the workplace, visit <http://askjan.org/media/employmenthygienefact.doc>.

For additional information, visit *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities* at <http://www.eeoc.gov/facts/performance-conduct.html>.

**e. Do employers have to consider allowing employees to work at home as an accommodation?**

Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective.

For more information about work at home as an accommodation, visit *Work at Home/Telework as a Reasonable Accommodation* at <http://www.eeoc.gov/facts/telework.html>.

## **5. Equipment and Services**

**a. If an employer requires work equipment, such as steel-toed work boots or stethoscopes, and an employee with a disability needs specialized equipment that costs more than the regular equipment (e.g., customized boots or amplified stethoscopes), does the employer have to pay the extra cost for the specialized equipment?**

If the equipment or device is a personal-use item, then the employer does not have to provide it. For example, if an employee has to wear a special type of boot all the time,

the employer does not have to pay for it. Common items that fall into this category are hearing aids, glasses, and medication.

On the other hand, if the boots are necessary only for work and constitute an accommodation, the employer would have to pay the entire cost of the boot, unless it would be an undue hardship to do so.

There is also a tool of the trade issue here. If the boots constitute a tool of the trade, that is the boots are necessary to get the job done, then the employer must pay for the specialized boot as a form of equal treatment if the employer provides the boots for other employees. However, if other employees buy their own boots and they own them, then an employee with a disability can be required to buy his own boots even if they cost more.

**b. If an employee has a limitation such as a hearing impairment, but chooses not to purchase a hearing aid, does the employer then have an obligation to provide a hearing aid at work?**

The fact that an individual chooses to forego personal use items at home (a wheelchair, hearing aids, protective clothing) does not mean that such items become work-related because they are needed on the job. The limitations prompting the need for the hearing aids exist on and off the job and thus they remain personal use items.

However, employers may still have to provide a reasonable accommodation even though they are not obligated to provide personal use items. For example, an employer might have to provide an amplified telephone or alternative means of communication for an employee with a hearing impairment who does not choose to use hearing aids.

**c. Do employers have to allow employees with disabilities to use personal need items (canes, walkers, wheelchairs, hearing aids) or services (personal attendant care, service animals) in the workplace?**

Allowing an employee with a disability to use a personal need item or service in the workplace is a form of reasonable accommodation. For example, it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.

From EEOC regulations for Title I at: <http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=29&PART=1630&SECTION=16&YEAR=2000&TYPE=TEXT>.

**d. Do employers have to provide personal assistance services (PAS) under the ADA?**

The term PAS can include a wide variety of services. The Ticket-to-Work and Work Incentives Improvement Act defines PAS as "a range of services provided by 1 or more persons designed to assist an individual with a disability to perform daily living activities on or off the job that the individual would typically perform without assistance if the individual did not have a disability." Under the ADA, reasonable accommodation can include PAS in the form of work-related assistance, but generally does not include PAS in the form of personal attendant care at the work-site. Work-related PAS can include task-related assistance at work, such as readers, interpreters, help with lifting or reaching, page turners, a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, and re-assignment of non-essential duties to co-workers.

For additional information, visit *Personal Assistance Services (PAS) in the Workplace* at <http://askjan.org/media/PAS.html>.

**e. Do employers have to provide personal attendant care for work-related travel?**

According to informal guidance from the EEOC, the ADA does not require employers to provide personal attendant care on the job because reasonable accommodation does not require employers to provide personal need items or services. However, when an employee travels for work and incurs personal attendant care expenses beyond his/her usual expenses when not traveling for work, there is a good argument that the employer must pay the added costs.

**f. What if coworkers voluntarily assist employees with disabilities with personal needs? For example, coworkers assist an employee who uses a wheelchair to transfer from her car into her wheelchair when she arrives at work. Do employers have to allow coworkers to assist or can they prohibit them from doing so?**

According to informal guidance from the EEOC, in general employers can decide how employees use their time at work. Therefore, employers can probably prohibit coworkers from providing personal assistance to employees with disabilities without violating the ADA outright. However, from a practical standpoint, the EEOC recommends that employers take a case by case approach and consider allowing coworkers to voluntarily assist employees with disabilities when the employer does not have any liability for resulting injuries and the assistance does not substantially disrupt the workplace.

The EEOC suggests the following approach:

When deciding whether to allow coworkers to provide personal assistance, employers may first want to determine whether they have any liability for resulting injuries. To make that determination, employers should check with appropriate legal advisors - the EEOC does not advise employers about the extent of their liability for on the job injuries. If an employer determines that it is liable for injuries, it can prohibit coworkers from providing the personal assistance. If, on the other hand, the employer determines it is not liable, then the employer should look at other factors such as how much disruption there will be to the workplace if coworkers are allowed to provide personal assistance. If not liable and little if any disruption would result, then the employer should consider allowing coworkers to assist an employee with a disability, at least with minor activities such as taking off and putting on a coat and eating. When more difficult assistance is needed, such as toileting transfers or administering medications, the employer may want to make sure that coworkers are properly trained before allowing them to provide this type of assistance.

In contrast, under the ADA's reasonable accommodation obligation employers must consider allowing employees with disabilities to have their own personal attendant in the workplace, absent undue hardship.

**g. Is it a reasonable accommodation to provide a job coach?**

Yes. An employer may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship. An employer also may be required to allow a job coach paid by a public or private social service agency to accompany the employee at the job site as a reasonable accommodation.

From *Psychiatric Disabilities and the ADA* (EEOC Guidance) at <http://www.eeoc.gov/policy/docs/psych.html>.

**h. Do employers have to provide accommodations for on-the-job travel such as driving to home visits?**

According to the EEOC, employers must consider accommodations such as alternative methods of transportation for work-related travel when driving is not an essential function of the job. For example, an employer must consider alternative transportation for a social worker who cannot drive due to vertigo; the essential function is completing the home visits, not driving.

**IV. REASONABLE ACCOMMODATION FOR EMPLOYEES ON LEAVE AND FORMER EMPLOYEES**

The ADA requires employers to provide accommodations to ensure that employees with disabilities receive equal benefits of employment. For employees on leave and former

employees, benefits of employment may include health and disability insurance, job protection, and bonuses and promotions.

## **A. Health and Disability Insurance**

### **1. Does the ADA apply to employer-sponsored benefits such as health insurance and short and long term disability?**

According to the EEOC, the interplay between the nondiscrimination principles of the ADA and employer-sponsored benefits such as health insurance and short and long term disability can be very complex. The EEOC has two publications that may help employers understand how the ADA applies to employer-sponsored benefits:

*Interim Enforcement Guidance On the Application of the Americans With Disabilities Act of 1990 to Disability-Based Distinctions In Employer Provided Health Insurance* at <http://www.eeoc.gov/policy/docs/health.html>.

*Employee Benefits* at <http://www.eeoc.gov/policy/docs/benefits.html>.

### **2. When employers offer long term disability insurance, can they condition the receipt of payments on termination of employment? Does this potentially violate the ADA's requirement that employers consider holding jobs for people who take leave as an accommodation (assuming the employee has a disability and plans to return to work at some point)?**

Generally this practice does not violate the ADA. Long term disability is a benefit of employment that employers are free to offer or not. As such, employers set the parameters of the benefit. An employer might violate the ADA if the employer's purpose was to evade its obligations under the ADA, but that would be difficult to prove since the employer did not have to offer the benefit in the first place.

### **3. Can an employer terminate or reduce an individual's health insurance benefits because he or she is working fewer hours due to a disability?**

Yes, according to the EEOC. The ADA does not prohibit the adoption of health insurance eligibility requirements that do not discriminate on the basis of disability, as long as such requirements are applied in the same manner to all employees. A requirement that employees work a certain number of hours to remain eligible for health insurance benefits does not discriminate on the basis of disability. It limits both individuals with and without disabilities. Thus, for example, an employee who works reduces hours for some other reason, such as attending school, would also be subject to a reduction or loss of health insurance benefits.

From an EEOC informal guidance letter dated January 4, 1995.

## **B. Bonuses and Promotions**

**If an employer bases bonuses or promotions on employee performance records and attendance, can the employer penalize an employee for work missed during leave taken as a reasonable accommodation?**

No, according to the EEOC, to do so would be retaliation for the employee's use of a reasonable accommodation to which he/she is entitled under the law. Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

From *Reasonable Accommodation and Undue Hardship under the ADA*, question 19, at <http://www.eeoc.gov/policy/docs/accommodation.html>.

**C. Reductions in Force and Layoffs**

**1. Does the ADA protect employees with disabilities from termination during a reduction in force or from being laid off when business is slow?**

Although the ADA protects individuals with disabilities against discrimination on the basis of disability, employees with disabilities are not protected against non-discriminatory layoffs. When deciding to terminate or layoff employees, employers need to make sure that their decisions are based on business needs, rather than on a desire to get rid of employees with disabilities. For example, employers can base their layoff decisions on such non-discriminatory criteria as productivity, seniority, or job category. However, if an employer bases its layoff decisions on productivity of employees, it cannot penalize employees for accommodations that were provided under the ADA. The EEOC gives the following example:

Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his disability. The company cannot count those five weeks in determining whether to terminate this employee.

From *Reasonable Accommodation and Undue Hardship under the ADA*, question 19, at <http://www.eeoc.gov/policy/docs/accommodation.html>.

**2. Are former employees covered by the ADA?**

Former employees are protected by the ADA when they are subjected to discrimination arising from the former employment relationship. For example, an employer cannot release confidential medical information about a former employee.

From *Threshold Issues (EEOC Guidance)* at <http://www.eeoc.gov/policy/docs/threshold.html>.

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