

WORKING FROM HOME AS A
REASONABLE ACCOMMODATION UNDER
THE ADA

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REASONABLE ACCOMMODATION

A change in the way things are normally done that enables an individual with a disability to do a job, apply for a job, or enjoy the benefits and privileges of employment

WHO CAN GET ONE

- Job applicant or employee who has a current or past disability and who is experiencing a work-related difficulty because of it
- Not simply because the individual is older
- Not because the individual lives with or cares for someone (with a disability or otherwise)
- Not simply because the individual is pregnant, BUT—
 - Pregnancy-related medical conditions may be disabilities
 - PDA requires employers to treat people with pregnancy-related limitations the same way that they treat people who are not pregnant but who are similar in their ability or inability to work



“DISABILITY”

- A **mental or physical impairment** (medical condition) that substantially limits a **major life activity**
- A mental or physical impairment is just a medical condition
- Major life activities include, e.g.:
 - Walking, breathing, concentrating, communicating, sleeping...
 - Respiratory, lung, immune, or heart functions....





REQUESTING A REASONABLE ACCOMMODATION

- Employee must put employer on notice that he/she is having difficulty because of a medical condition
 - No “magic words”
 - No specific timing
 - Need not contain request for specific accommodation
- Employer must enter into “interactive process”

MEDICAL DOCUMENTATION?

- Optional
- Should contain enough medical information to establish whether requestor:
 - Has a disability
 - Needs an accommodation
- But no more!
 - Sometimes disability and need for accommodation are obvious—documentation therefore **SHOULD NOT BE REQUIRED**
- Might also contain suggested accommodations and restrictions and limitations

DISABILITY: WHO DECIDES?

- Documentation should contain information sufficient for the EMPLOYER to determine whether the requestor has a disability

DOCTORS ARE NOT LAWYERS

(well, usually)

- Best practice: do not ask doctor for legal conclusions
 - Do not ask whether the requestor has an “impairment”
 - Do not ask whether the impairment “substantially limits” the ability to perform a “major life activity”
 - Do not ask whether the requestor’s condition is a “disability”

INFORMATION RELEVANT TO DISABILITY

- If you aren't sure whether the requestor even has a medical condition ("impairment"), you can ask for confirmation
 - A simple diagnosis is sufficient
- If you are not sure whether the condition is a disability, you could ask:
 - "WOULD the requestor's condition, IN THE ABSENCE OF TREATMENT, MEDICATION, ASSISTIVE DEVICES, OR OTHER MITIGATING MEASURES, have an effect on his/her functioning DURING AN ACTIVE EPISODE (assuming that the condition has active episodes)? If so, describe the effect."

“SUBSTANTIAL LIMITATION”

- Based on the medical information, the employer must determine whether the individual's ability to perform a major life activity would, in this hypothetical scenario, be “substantially” limited in comparison to most people in the general population
 - The degree of limitation does not need to be high
 - The activity need not be prevented or severely restricted—it may be “substantially” limited if it is more uncomfortable or time consuming to perform, as compared to most people
 - Limitation need not be permanent or long term
- Practical consideration: Is it worthwhile requesting documentation for this purpose (especially if condition is on 29 CFR 1630.2(j)(3)(iii))?

INFORMATION RELEVANT TO NEED FOR ACCOMMODATION

- Confirmation that symptoms could be responsible for the requestor's work-related difficulty
- Suppose someone with PTSD is bothered by the noisy location of her workstation

“[Employee]’s PTSD causes hypervigilance, making it difficult for her to concentrate in noisy or crowded environments.”

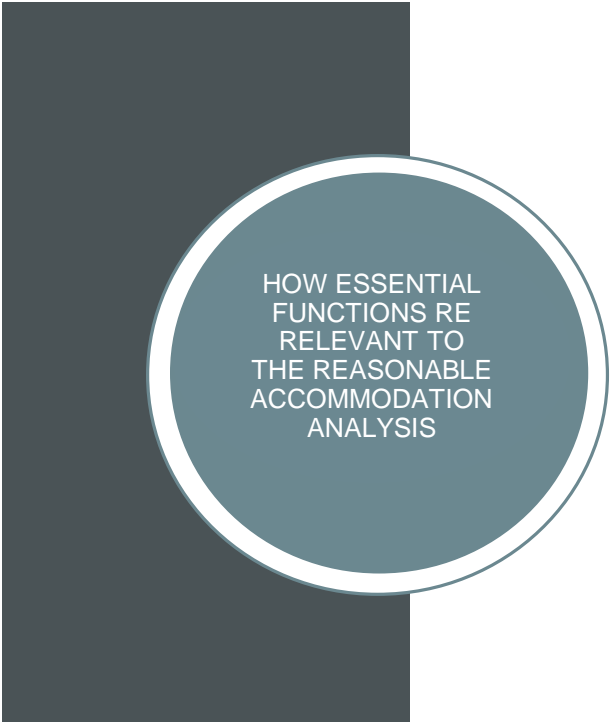
**UNDUE
HARDSHIP**

Significant difficulty or expense

Assessed relative to the resources of
a whole



ESSENTIAL JOB FUNCTIONS

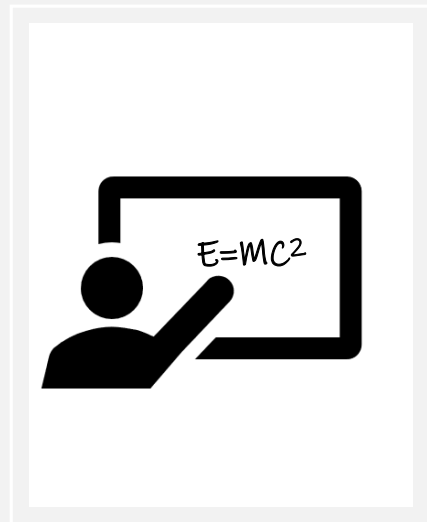


HOW ESSENTIAL
FUNCTIONS RE
RELEVANT TO
THE REASONABLE
ACCOMMODATION
ANALYSIS

- If a requested change would involve elimination of an essential function, then it's not considered a "reasonable accommodation" and the employer doesn't need to provide it

WAYS OF DESCRIBING JOB ACTIVITIES

- What is this person doing?
 - Pointing
 - Standing
 - Talking
 - Writing
 - Teaching



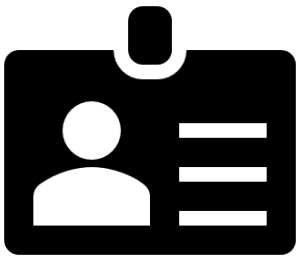
JOB FUNCTIONS



Generally a WHAT, not a
WHERE a WHEN or a HOW



An outcome to be achieved



JOB FUNCTIONS *(continued)*

“I have been hired to . . .”

- Generally NOT a bodily movement, a capacity, an ability, or a skill
- Generally NOT a place or a time
- (But, of course, some things can only be accomplished certain ways, at certain times, or at certain places)

ESSENTIAL JOB FUNCTIONS

- So far, just talked about what a job function is
- Which are essential?
- FUNDAMENTAL job duties
 - “The outcomes that must be achieved by the person in the position.”
- Distinguished from “marginal job functions”
 - Incidental job duties



ESSENTIAL JOB FUNCTIONS

- Relevant evidence
 - Whether the position exists to perform that function
 - Number of employees available to perform the function
 - Degree of expertise or skill required to perform the function
 - Whether or not incumbents or past employees actually completed the specific function
 - Time spent performing the function
 - Consequences of not performing the function
 - Terms of collective bargaining agreements

- During quarantine, employer may have suspended certain functions because everyone was on 100% telework
- This does not necessarily mean that the function was marginal—it might mean that the business chose to pay its workers the normal amount even though their workload was reduced
- Employers may require employees to perform essential functions again, even if they were temporarily suspended—the ADA cannot require them to be eliminated

SOMETHING
THAT'S
CONFUSING

PUTTING IT TOGETHER

I. DISABILITY: EASILY BE DETERMINED TO BE DISABILITIES

- Intellectual Disability
- Partially or Completely Missing Limbs
- Mobility Impairments
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV Infection
- Multiple Sclerosis
- Muscular Dystrophy
- Major Depressive Disorder
- Bipolar Disorder
- Posttraumatic Stress Disorder
- Obsessive-Compulsive Disorder
- Schizophrenia
- But many others will be disabilities, depending on limitations imposed in the absence of mitigating measures

I. DISABILITY: COVID-19 INFECTION

- COVID-19 is a physical impairment
- Major life activities possibly affected:
 - caring for oneself, eating, sleeping, walking, breathing, concentrating, thinking, or interacting with others
 - functions of the immune system, special sense organs (e.g., for smell and taste), digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions, or the operation of an individual organ (e.g., lung, heart, or kidney)
- Must perform an individualized assessment
- Possible mitigating measures to ignore: supplemental oxygen, mechanical ventilatory support, antiviral drugs, steroid medications, physical therapy, psychotherapy

I. DISABILITY: DON'T FORGET DISABILITIES CAUSED BY COVID-19

- E.g., a mild case of COVID-19 causes myocarditis (heart inflammation), which may be a disability
- Could worsen a pre-existing condition, making it substantially limiting even if before the virus it was not.

2. NEED FOR ACCOMMODATION

- Remember: Just looking for confirmation that the condition could be responsible for the problem

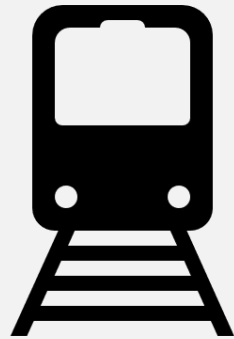
“[Employee]’s HIV Infection would put her at significant risk of serious illness from COVID-19 if she were to work in a crowded setting such as her place of work”

2. NEED FOR ACCOMMODATION: “HIGH-RISK” CONDITIONS

- Cancer
- Chronic Kidney Disease
- Chronic lung diseases
 - Chronic Obstructive Pulmonary Disease)
 - Asthma (moderate-to-severe)
 - Interstitial Lung Disease
 - Cystic Fibrosis
 - Pulmonary Hypertension
- Diabetes
- Down Syndrome
- Solid organ or blood stem cell transplant
- Heart conditions
 - Heart failure
 - Coronary Artery Disease
 - Cardiomyopathies
 - Hypertension
- HIV Infection
- Immunocompromised State
- Liver Disease
- Sickle cell disease or thalassemia
- Stroke or cerebrovascular disease, which affects blood flow to the brain
- Substance Use Disorder

2. NEED FOR ACCOMMODATION: COMMUTING

- Employer does not have to *provide transportation* to the employee as a reasonable accommodation
- However, it may need to allow the employee to work elsewhere (e.g., home) if a disability makes it difficult or dangerous to commute
- If an individual uses public transportation to get to work, but using public transportation puts him/her at risk of serious illness, then he/she might be entitled to telework as a reasonable accommodation



2. NEED FOR ACCOMMODATION: MENTAL HEALTH

- The pandemic might have caused employees to develop mental health conditions, or worsened a mental health condition
- Someone might need an accommodation because, e.g., a mental health condition makes it difficult to concentrate at work, from fear of infection
- Conditions that might necessitate telework:
 - Generalized Anxiety Disorder
 - Specific Phobia
 - OCD
 - Major Depression





3. ESSENTIAL FUNCTIONS

- Attendance is not a job function—no one is hired to “attend”
 - “I’m a professional attender!”
- Telework is about where you do your work, not about what your work is
- Determine whether the employee could accomplish what he/she was hired to accomplish from home

4. UNDUE HARDSHIP

- In many cases, there will be no significant expense associated with telecommuting, because telecommuting is already possible
- In some cases, however, extra equipment may be required
 - Cameras installed in workplace
 - Meeting software
 - Screens
- Would allowing telework involve significant difficulty, apart from expense?
 - Not simply because it would require managers to supervise from afar
 - Some difficulty might result from the need to use meeting software or to use cameras, but difficulty must be significant to be an “undue hardship”

5. THE DETERMINATION

- If:
 - The employee has a disability;
 - Telework would help the individual overcome a disability-related problem with work;
 - Telework would not require elimination of an essential function; and
 - Telework would not involve an undue hardship (significant difficulty (or expense)), then
- Grant!



6. AFTER GRANTING THE REQUEST

Is the employer allowed to require periodic “recertification”?

- Yes, but only if it’s possible that the individual might no longer need telework as a reasonable accommodation
- Unnecessary paperwork might be retaliatory

Is the employer allowed to put a time limit on the telework?

- Sort of, in some cases
 - If it’s clear that the individual will always need telework, then no time limit
 - If the time limit expires, and the individual still needs telework as a reasonable accommodation, it must be provided absent undue hardship

6. AFTER GRANTING THE REQUEST: OTHER EMPLOYEES

Individual may be entitled to 100% telework as a reasonable accommodation even if others are not permitted (even if it is “against policy”)

Cannot tell other employees that the reason for the individual’s 100% telework is a disability

7. IF A DENIAL SEEMS NECESSARY

What do you do if the person seems to need the telework, but that would involve elimination of an essential function?

Or if telework would impose undue hardship?



7. IF A DENIAL SEEMS NECESSARY: LOOK FOR ALTERNATIVES

- Must determine whether there is an alternative change that would enable the individual to perform essential functions and that is consistent with his/her medical needs (and that would not impose undue hardship)
 - Job Accommodation Network
 - Follow-up with doctor
 - Talk to requestor



If you aren't sure what sort of accommodation would help, must cooperatively problem-solve with employee



May consult Job Accommodation Network (JAN)



May contact doctor for follow-up (assuming employee's permission) to ask whether a certain accommodation would help

7. IF A DENIAL SEEMS NECESSARY: IDEAS FOR ALTERNATIVES

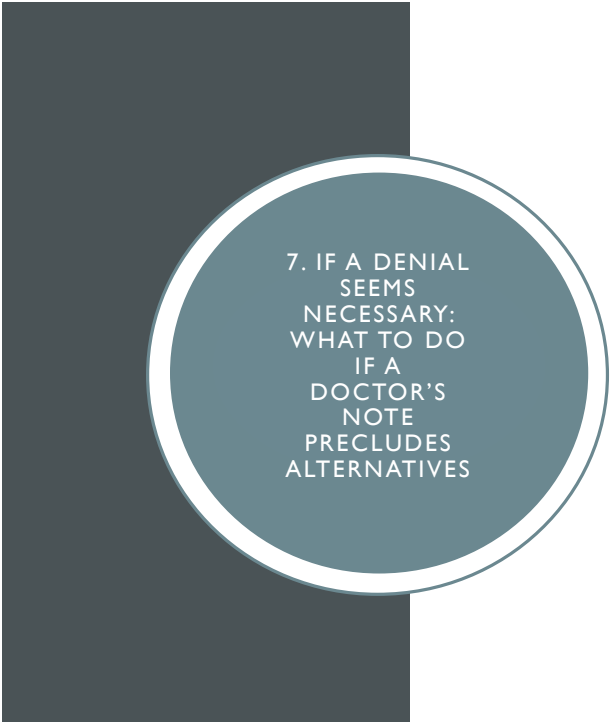
7. IF A DENIAL
SEEMS NECESSARY:
WHAT IF
DOCTOR'S NOTE
SAYS THAT
TELEWORK IS THE
ONLY POSSIBILITY,
BUT TELEWORK IS
IMPOSSIBLE?

- Question! Remember:

DOCTORS ARE NOT LAWYERS

(usually)

- Do not necessarily understand that the alternative to the suggested accommodation is unemployment
- Used to arguing that something (e.g. a treatment or period of rest) is necessary so it is covered by insurance—will take rigid stance for benefit of patient



7. IF A DENIAL
SEEMS
NECESSARY:
WHAT TO DO
IF A
DOCTOR'S
NOTE
PRECLUDES
ALTERNATIVES

- Ask: Why telework? Is there anything we could do to help him/her work onsite?
- What about the possibility of additional equipment?
- An alternative entrance?
- Talk to the employee as well!

8. AFTER A
DENIAL: IF
THE
EMPLOYEE
REALLY
CAN'T WORK
ONSITE, BUT
DOING SO IS
NECESSARY
TO PERFORM
AN ESSENTIAL
FUNCTION

- The employee really can't work onsite, and onsite work is necessary to perform an essential function or telework would involve significant difficulty or expense
- Is the inability temporary? If so—
 - Employer is allowed to offer transitional work (meaning lowered production), but is not required to do so
 - If there is an open position for which the employee is qualified (such as a light duty position), and transferring him/her temporarily would not be an undue hardship, the employer may need to allow this as a reasonable accommodation

8. AFTER A DENIAL: LEAVE

- Even if the employee has run out of all leave, may need to provide extra unpaid leave as a reasonable accommodation, absent undue hardship
 - But, employer does not have to grant leave where there is no indication whether or when the individual will be able to return
 - Tentative dates and ranges of dates are OK

8. AFTER A DENIAL: IF REQUESTOR WILL NEVER BE ABLE TO DO ESSENTIAL FUNCTIONS

- Must consider reassignment as “reasonable accommodation of last resort”
- For the individual to be entitled to reassignment—
 - The alternative position must exist and be vacant somewhere within the agency (or be vacant in the near future)
 - The position is not at a higher level than current position
 - The requestor must be qualified
 - No violation of seniority system
- Employer does not have to pay cost of relocation, unless it does so for other employees who transfer voluntarily

8. AFTER A DENIAL: TERMINATION

- Termination may be warranted if:
 - Employee is unable to perform essential functions and is not expected to recover the ability to do so, even after a period of leave and even with reasonable accommodation

Or

- The only way the employee would be able to perform essential functions, or recover the ability to perform essential functions, would be to provide a reasonable accommodation that would pose an undue hardship

And

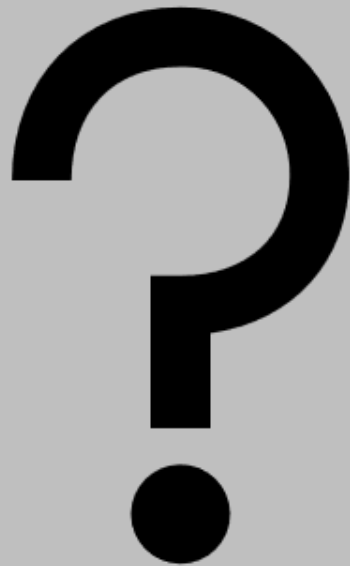
Reassignment is not possible or would pose an undue hardship

HYPOTHETICAL

ESTHER

- Esther, a Cyber Defense Infrastructure Support Specialist, has been on mandatory telework for three months
- Employer suspended normal duties related to building and installing dedicated cyber defense hardware during quarantine, so Esther has been concentrating on her software-related duties
- The employer now wants to bring “essential” workers back
- Cyber Defense Infrastructure Support Specialists are “essential”
- Esther says that she wants to keep working from home because her husband’s disability makes him “vulnerable,” and because, ever since the pandemic started, the idea of taking the Metro everyday and being “locked up like a sardine inside of a tin can with a bunch of strangers” has given her “bad anxiety”

QUESTIONS?



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