Best Practices for Complying with Section 501 of the Rehabilitation Act


JAN is a service of the U.S. Department of Labor’s Office of Disability Employment Policy.
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I. WHO’S COVERED?
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Scenario: Contractors

A federal agency uses a federal contractor to run its cafeteria. The supervisor of the cafeteria has diabetes that was worsening over time so he asked the federal agency for a modified schedule until he could get his diabetes under control. The federal agency contacted the federal contractor and asked that the supervisor be replaced.

- Does the federal agency have any legal obligation to accommodate the supervisor?
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Are your “contractors” actually “employees” for purposes of the EEO laws?

- Consider your obligation to respond to accommodation requests and provide accommodation.
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**Complainant v. Dep't of Transp., EEOC Appeal No. 0120133049 (January 28, 2014).**

- Complainant, who worked for a contracting company serving DOT as a Senior Site Supervisor (Captain) performing security work, filed a formal EEO complaint alleging his termination was discriminatory. Agency dismissed, finding complaint untimely and that he was not a DOT employee.

- On appeal, the Commission vacated the dismissal and remanded. Complainant had attempted to file a private sector charge against the contractor with an EEOC field office. It was unlikely that Complainant knew of the potential availability of the federal EEO process given his formal employment by the contracting company.
Complainant v. Dep't of Transp.,
EEOC Appeal No. 0120133049 (January 28, 2014).

- There may be circumstances where the agency and the staffing firm (contractor) are “joint employers.” Relevant factors include: amount and type of control each has over the complainant's work. Agency incorrectly dismissed complaint simply because contractor, not DOT, provided complainant’s pay and benefits. Agency EEO office should have conducted an inquiry to determine whether the agency had sufficient control over Complainant's position to be considered his joint employer, and if so, accepted the complaint.
Complainant v. Dep't of State, EEOC Appeal No. 0120132731 (January 24, 2014).

- Vacating dismissal of complaint and remanding for investigation on the merits, the Commission held agency was complainant’s joint employer.
- Decision noted that complainant worked on agency premises using agency equipment, received his assignments from agency personnel, and the agency controlled the details of his performance.
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Scenario: Substantially Limited

An employee has a hernia and has been unable to return to work. His job involves a lot of walking and he is still experiencing pain when he walks very far. He has asked to be reassigned to a sedentary job. The employer is trying to determine whether this employee has a disability.

- How might an employer make this determination?
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Does the Individual Have a Substantially Limiting Impairment?

- When considering if an individual who has requested accommodation has or had an impairment that “substantially limits a major life activity,” remember the changes made by the ADA Amendments Act of 2008 (ADAAA).

- ADAAA: The definition of disability “shall be construed in favor of broad coverage” and “should not demand extensive analysis.”

- Definition is much easier to meet; apply broadly.
When it enacted the ADAAA, Congress made 4 changes to “substantially limited in a major life activity”:

- Need not prevent, or significantly or severely restrict, a major life activity
- Major life activities include “major bodily functions”
- Ameliorative effects of mitigating measures not considered
- Impairments that are “episodic” or “in remission” are substantially limiting if they would be when active
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Don’t Rely on Pre-ADAAA Case Law on Definition of Disability

Use Resources on new ADAAA standards:

- Revised EEOC ADA regulations: 29 C.F.R. Part 1630
- Notice of Rights Under the ADAAA: www.eeoc.gov/laws/types/adaaa_notice_of_rights.cfm
- Question and Answer Guide: www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm
How have courts been interpreting and applying the ADAAA?

- For the most part, courts are applying the ADAAA to easily find that individuals with a wide range of conditions previously unprotected now meet the “substantially limited” standard.
- The turn-around in the case law is especially notable with respect to impairments such as cancer, diabetes, HIV, multiple sclerosis, and psychiatric conditions.
Scenario: Pregnancy

A delivery driver is 5 months pregnant and has been placed on light duty restrictions by her doctor. The doctor indicates that the employee has a high risk pregnancy due to her age and a previous miscarriage. Her employer is questioning whether she is entitled to accommodations.

- Is pregnancy a disability?
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Pregnancy and ADA

- Pregnancy itself is not an impairment, but medical conditions or complications caused by the pregnancy may be covered under the ADA.

- Under the ADAAA’s expanded rules of construction and definitions, many more pregnancy-related conditions now may be “physical impairments” supporting claims based on “actual” disability” or “record of” a disability.

- For example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting.
Pregnancy-Related Impairments May Be Subject to Accommodation Under ADA


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- Fact Sheet for Small Businesses: Pregnancy Discrimination
  - [www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm](http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm)
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Pregnancy Discrimination Act (PDA) Case Pending in the U.S. Supreme Court

- Separate and apart from the ADA, the PDA additionally provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.”

- To be decided this term in Young v. UPS: Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations is required under the PDA to provide comparable work accommodations to pregnant employees who are “similar in their ability or inability to work.”
Scenario: Medical Marijuana Users

An employee working in a state that has legalized marijuana tested positive on a random drug test. The employee let her employer know that she is using the marijuana and wants assurance that it won’t affect her employment. The employer isn’t sure what its legal obligation is.

- Are people using medical marijuana protected under ADA from discharge for a positive test?
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Marijuana Use Not Covered

James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) (Title II ADA Case). Doctor-supervised marijuana use is “illegal use of drugs” excluded from disability protections under the ADA, and does not come within any exceptions.
II. REASONABLE ACCOMMODATION

- Choosing an Accommodation
- Interactive Process/Medical Documentation
- Accommodation Issues Relating to Schedules
- Accommodation Issues Relating to Telework
Scenario: Choosing an Accommodation

A nurse has a medical condition that makes her sensitive to cold temperatures. She has asked to be able to wear a fleece lined jacket over her uniform. Her employer does not want her to cover up her uniform, but said she could wear it under her uniform or use hand warmers in her gloves. The employee insists she be allowed to wear her jacket over her uniform as it will be easier for her and more comfortable and refuses to consider other options.

- What are an employer’s rights and obligations when choosing an accommodation?
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Choosing an Accommodation

- Primary consideration should be given to the employee’s requested accommodation
- However, an employer has the discretion to choose among equally effective alternatives, as long as the accommodation provided is effective
- Employer should act promptly to avoid undue delay
Recap: Actions the Employer is NOT Required to Take to Accommodate

- Lowering production or performance standards (though should pro-rate production requirements for period of leave as an accommodation)
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Removing an essential function
- Monitoring an employee’s use of medication
- Providing personal use items
- Changing someone’s supervisor (though changing supervisory methods may be required)
- Actions that would result in undue hardship (significant difficulty or expense)
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Examples: Common Types of Accommodation

- physical modifications to building or workspace
- sign language interpreters and readers
- assistive technology and modification of equipment and devices
- modified work schedules
- making exceptions to policies
- job restructuring (swapping or eliminating *marginal* functions)
- changing supervisory methods
- allowing a job coach to participate
- telework
- leave
- reassignment to a vacant position
Scenario: Interactive Process/Medical Documentation

A social worker with attention deficit disorder was having trouble keeping up with her paperwork. She provided a note from her doctor stating she has ADD and asked her employer to either lower her caseload or allow her more time to complete paperwork. Her employer said the medical information was insufficient, and placed her on leave pending more information. The employer says it will not grant those accommodations, but it needs more medical information to decide if there is an alternative it can provide.

- What is the best approach?
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Keys to the Interactive Process

- Communicate, exchange information, search for solutions, consult resources as needed.
- If requestor only knows the problem, not the solution, employer is still obligated to provide an accommodation if available. Search for possible accommodations.
- If requestor asks for a particular accommodation, but it is one that legally need not be provided (e.g., request to lower production standards), employer must provide an alternative if available. Search for and consider alternative accommodations.
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Supporting Medical Information

- Accommodation request may be oral, and is simply a request for some type of change due to a medical condition.
- Once accommodation request is made, when and how much medical information can the employer ask for in support of the accommodation request?
- ADAAA has not changed the rule: If not obvious or already known, an employer may obtain reasonable documentation that an employee has a disability and needs the accommodation requested.
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Supporting Medical Information

- Employer may ask employee to obtain the supporting medical information from employee’s treating health care provider, or ask employee to sign limited release allowing employer to contact the health care provider directly.

- For example, employer might seek to verify diagnosis and limitations, follow up to clarify limitations as well as what accommodation might be effective, and for how long it may be needed.
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Employee Must Cooperate in the Interactive Process


- Employee refused to provide clarifying information requested by the employer, so could not prevail on denial of accommodation claim.
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Interactive Process Does Not Have to Take a Particular Form

- The employer modifies the employee’s cleaning route to accommodate her initial restriction from exposure to bathroom cleaning chemicals.
- The employer also has follow-up conversations with employee's physician and the employee to explore any alternative accommodations.
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Interactive Process Does Not Have to Take a Particular Form

 The court in Horn held that the interactive process does not have to follow a particular format. Employer’s separate conversations with employee, her treating physician, and union representative were sufficient.
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Interactive Process

**EEOC v. Kohl’s Dept. Stores, Inc.,** 774 F.3d 127 (1st Cir. 2014)

- Due to effect of unpredictable schedule on managing her diabetes, sales associate sought set schedule instead of rotating and "swing shifts"

- "An employee's request for accommodation sometimes creates a duty on the part of the employer under the ADA to engage in an interactive process that involves an informal dialogue between the employee and the employer in which the two parties discuss the issues affecting the employee and potential reasonable accommodations that might
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address those issues, and that also requires bilateral cooperation and communication."

- Held: "Empty gestures on the part of the employer will not satisfy the good faith standard," but here the employee failed to engage in interactive process. Once the manager told her corporate headquarters would not agree to the "9-5" schedule she requested, she resigned and would not reconsider despite manager's two attempts to ask her to discuss and consider alternative accommodations.

- Dissent: Employer did not engage in good faith; it had enough information, and should have offered no swing shifts.
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Interactive Process – 29 C.F.R. App. Section 1630.9

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
Interactive Process – 29 C.F.R. App. Section 1630.9

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.
Accommodation Issues Relating to Schedules
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Flexible Schedules

- **Solomon v. Vilsack**, __ F.3d __, 2014 WL 4065613 (D.C. Cir. Aug. 15, 2014). “Whether a ‘maxi-flex’ or other flexible workplace schedule is a reasonable accommodation for a given employee in a given position is a case-by-case factual inquiry…..”

- **McMillan v. City of New York**, 711 F.3d 120 (2d Cir. 2013). Schedule that employee needed as accommodation did not match manager’s hours; given that work was not contemporaneously supervised and schedule had been permitted for a number of years, court held it might not pose an undue hardship. “Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment.”
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Overtime

Petitioner v. Dep’t of Homeland Sec., EEOC Petition No. 0320110053 (July 10, 2014).

- Petitioner, a Customs and Border Protection Officer, notified the Agency that he had sleep apnea and asked to modify his work schedule so that he could consistently work the day shift.

- The Agency initially accommodated him by placing him on the overnight or “graveyard” shift. After a new Director took over, however, he was ordered to return to a regular schedule, apply for disability retirement, resign or request reasonable accommodation. Petitioner asked for a modified
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Overtime

work schedule or reassignment to a division that did not have a graveyard shift.

- The Agency concluded he was an individual with a disability due to his sleep apnea, but found that he was not qualified because it concluded rotating his shifts and performing substantial amounts of overtime were "essential functions." Petitioner was removed from his position when the Agency could not find a vacant, funded position for reassignment.

- On a petition for review from an MSPB decision in favor of the agency, the EEOC differed, finding he was qualified.
Overtime

- The Commission noted that there is a strong temptation to frame attendance or schedules as essential functions, but that represents a flawed understanding of the requirements and structure of the Rehabilitation Act. The fact that attendance can be a condition precedent to performing a function does not render it a job function in and of itself. Instead, attendance and timing are methods by which a person accomplishes the essential functions of a job.

- In this case, there was no question that Petitioner could perform the essential duties of his position
Overtime

when he was at work, and, as such, was qualified for the position.

- The employer was entitled to deny the accommodation if it would have posed an undue hardship, but here the evidence was undisputed that the Agency allowed employees at the facility to swap shifts with each other and exempted certain employees from working the graveyard shift.

- The facility employed about 700 Officers in petitioner's position, only a much smaller number of whom were on duty at a given time.
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Overtime

- Agency conceded no significant disruption occurred when it excused Petitioner from graveyard shift for the prior one and a half years.
- Also, Officers were allowed the flexibility to adjust their work schedules for various reasons, such as training, leave, an unexpected emergency, and pregnancy (the Agency exempted female officers, who were pregnant or breastfeeding, from working the graveyard shift for up to two years per child).
Overtime

- Commission rejected generalized assertions of Agency officials that unlike these temporary changes, permitting such a permanent schedule modification would lower morale. “An employer cannot claim undue hardship “based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees.” EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (2002). "Moreover, our Enforcement Guidance commands that, absent undue hardship, an employer must provide a modified schedule when required as a reasonable accommodation, 'even if it does not provide such schedules for other employees.' Question 22."
Accommodation Issues Relating to Telework
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Telework

- 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: need not be granted if not feasible or poses an undue hardship.
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Examples of Relevant Facts to Consider in Determining if Telework is Feasible

- 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
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Telework

- **Note:** An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.
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Telework

 **EEOC v. Ford Motor Co., 2014 WL 1584674 (6th Cir. April 22, 2014), rehearing pending.**

 Panel Opinion: Although managers contended plaintiff’s job required face-to-face interactions to facilitate group problem-solving, plaintiff’s experience was that even when present in the facility, most of her teamwork and internal as well as external communication was via telephone conference call and computer.

 For this job, critical to work at particular times to communicate with vendors, but not from a particular location.
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EEOC v. Ford Motor Co. (cont’d)

- With modern advances in technology and the increasing prevalence of telework agreements, “attendance at the workplace can no longer be assumed to mean attendance at the employer’s physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”
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Telework

- Teleworking employees can and should be held to the same performance and production standards as when working on-site.
- Managers can require regular accomplishment reports or use other management methods with respect to all employees.
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Resources for More Information

- Enforcement Guidance: Reasonable Accommodation and Undue Hardship
  - www.eeoc.gov/policy/docs/accommodation.html
- Q & A: Promoting Employment of Individuals with Disabilities in the Federal Workforce
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