Implementing the Interactive Process under the ADA
By Tiffani L. McDonough

The duty to provide a reasonable accommodation to a qualified individual with a disability is considered one of the most important statutory requirements of the Americans with Disabilities Act of 1990 (ADA). Under the ADA, an employer with 15 or more employees is required to provide a covered job applicant or employee with a reasonable accommodation, unless doing so would pose an undue hardship (i.e., significant difficulty or expense) or direct threat. A reasonable accommodation requires that steps be taken to enable a qualified individual with a disability to perform the essential functions of the position. Reasonable accommodation further includes the employer’s reasonable efforts to assist the employee and to communicate with the employee in good faith. In the reasonable-accommodation context, the ADA envisions an interactive process by which employers and employees work together to assess whether an employee’s disability can be reasonably accommodated. The interactive process is an informal practice in which the covered individual and the employer determine the precise limitations created by the disability and how best to respond to the need for accommodation.

**Employee’s Duty to Request an Accommodation**
Generally, courts have recognized that an employee must request an accommodation to trigger the interactive process. The request may be either oral or written. The Equal Employment Opportunity Commission (EEOC) takes the position that requests for accommodation do not need to be in writing. The employer may request, however, that the employee complete a written accommodation request.

The ADA does not require employers to speculate about the accommodation needs of employees and applicants; rather, the individual requesting the accommodation has an obligation to provide the employer with enough information about the disability to determine a reasonable accommodation. To state an adequate accommodation request, an employee must at a minimum request some change or adjustment in the workplace and must link that request to his or her disability, rather than simply present the request in a vacuum. Although courts endorse the view that an employer should not require an employee to use “magic” language, or even use the term “accommodation” in the request, an employee must be clear in indicating the need for an accommodation because of a medical condition.

**Duty to Provide an Accommodation Without an Express Request**
Although the general rule places the burden to request an accommodation on the employee or applicant, there are circumstances under which employers may have an obligation to provide an accommodation without a request to do so. Employers should be aware that some courts have suggested that if the employer knows both about the disability and the need for accommodation,
it may have an obligation to provide the accommodation—even without an express request that a modification is needed because of a disability. This often occurs in circumstances where the employee’s disability is obvious and it is clear that the disability is interfering with the employer’s performance expectations.

Further, the EEOC’s guidance suggests that accommodation should be provided without request if the employer

- knows that the employee has a disability,
- knows or should know that the employee is experiencing workplace problems because of the disability, or
- knows or should know that the disability prevents the employee from requesting a reasonable accommodation.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002), at Question 40. The EEOC clarifies that, under the latter circumstances, if the individual declines the offer of an accommodation, the employer will have fulfilled the accommodation requirement under the ADA.

**Employer’s Duty to Engage in the Interactive Process**

Once an accommodation has been requested or the need for an accommodation is obvious, the employer should initiate an interactive process with the individual. Courts generally have held that the interactive process requires employers to

- analyze job functions to establish the essential and nonessential job tasks,
- identify the barriers to job performance by consulting with the employee to learn the employee’s precise limitations, and
- explore the types of accommodations that would be most effective.

Employers can demonstrate a good-faith attempt to accommodate by meeting with the employee, requesting information about the limitations, considering the employee’s requests, and discussing alternatives if a request is burdensome.

Because the interactive process imposes mutual obligations on employers and employees, an employer cannot be liable for failure to accommodate if a breakdown in that process is attributable to the employee. Courts have consistently attributed the breakdown in the interactive process to the employee where the employee refuses to allow the employer to discuss the employee’s alleged disability with the employee’s doctor after attempts to accommodate the employee are unsuccessful. Further, courts have attributed the breakdown of the interactive process to the employee where the employee did not respond to the employer’s request for information about the employee’s abilities and the nature and extent of the restrictions. Finally, courts have held employees responsible for the breakdown in the interactive process when an employee uncompromisingly insists on a single accommodation that is unreasonable as a matter of law.
To the contrary, if the breakdown in the interactive process is attributable to the employer, courts have generally held this to be an adverse employment action. However, an employer’s failure to initiate the interactive process is not itself a “per se” violation of the ADA, where no accommodation is possible. The ADA requires the parties to engage in an informal, interactive process, to explore possible accommodations, but an employer’s failure to participate in the interactive process is not actionable unless the employee can demonstrate that the employee could have been reasonably accommodated but for the employer’s lack of good faith. If no accommodation would allow the employee to perform his or her job, the employer is not obligated to participate in the interactive process of accommodation required by the ADA.

**The Employer Is Not Required to Provide the Specific Accommodation Requested**

Finally, employers are not obligated to provide the *specific* accommodation requested by the employee; rather, employers are required to provide a *reasonable* accommodation. Although the ADA provides a right to a reasonable accommodation, it does not provide a right to any specific requested or preferred accommodation. Thus, an employee is not entitled to his or her “choice” accommodation but rather a “reasonable” accommodation. For example, an employer may choose to let an employee call off work without penalty as a reasonable accommodation, rather than provide the employee’s requested accommodation of working from home.

An employee may refuse an accommodation offered by the employer; however, if the employee cannot perform the job without the accommodation, the employee will not be considered “qualified” under the ADA. For instance, a court held that an employee was not “qualified” where she could not be around workplace fumes, and she refused the potential accommodation—use of a respirator—which was proposed by the employer.

**Non-Disabled Employees Related to an Individual with a Disability**

An employer is only required to provide an accommodation that is for the disability of the employee or applicant. The association provision of the ADA does not obligate employers to accommodate the schedule of an employee with a disabled relative because the plain language of the ADA indicates that the accommodation requirement does not extend to relatives of the disabled individual. Specifically, the appendix entry for the association-bias provisions in the ADA’s implementing regulations (29 C.F.R. § 1630.8 (2013)) provides that “an employer need not provide the . . . employee without a disability with a reasonable accommodation because that duty only applies to qualified . . . employees with disabilities.”

**Can an Employer Lawfully Deny an Accommodation Request?**

Employers may be able to deny accommodation requests or defend against legal claims of failure to accommodate by citing to undue hardship or direct threat.

**Undue hardship.** Under the ADA, an employer is not required to make reasonable accommodations that would impose an “undue hardship” on the employer. The burden is on the employer to prove an undue hardship. Whether an accommodation will impose an undue hardship is determined on a case-by-case basis. For example, while an employer with 30 employees may legitimately claim that an extended period of disability leave for

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one of its employees would create an undue hardship, an employer with 25,000 employees, that employs hundreds of employees in the same position as the employee requesting leave, will have difficulty arguing undue hardship as a defense. Undue hardship includes any action that is

- unduly costly,
- extensive,
- substantial,
- disruptive, or
- fundamentally alters the nature or operation of the business.


The ADA and EEOC regulations identify several factors to consider when determining whether an accommodation would impose an undue hardship. See 42 U.S.C. § 12111(10)(B) (2013); 29 C.F.R. § 1630.2(p) (2013). For example, employers may consider the nature and net cost of the accommodation, the overall financial resources of the covered entity, and the number of employees employed by the covered entity. Employers asserting “cost” as the reason for undue hardship should note that the EEOC has routinely said that the cost that must be spent on an accommodation depends on the employer’s resources, not on the employee’s salary, position, or status within the company. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, supra, at Question 45.

Some general principles may be gleaned from cases evaluating whether an accommodation is an undue hardship:

- An accommodation that would result in other employees having to work harder or longer is not required under the ADA.
- Where an employer has waived certain requirements for other employees, the employer cannot claim that it would cause an undue hardship to waive those same requirements for an individual with a disability.
- An employer may assert that a modified schedule for an employee would be an undue hardship because of the significant cost of keeping the facility open, which may include additional hours for other personnel such as security personnel.
- An accommodation to one employee that violates the seniority rights of other employees in a collective-bargaining agreement is not reasonable because it would expose the employer to potential union grievances and costly remedies.

Direct threat. Some disabilities pose a “direct threat” to the health and safety of individuals in the workplace. Where there is no reasonable accommodation available to negate that threat, employers may cite the direct-threat defense.

Employers can assert the direct-threat defense only if the individual poses a significant risk that cannot be reduced or eliminated by accommodation. A speculative or remote
risk is insufficient. The assessment of whether an individual poses a direct threat is based on reasonable medical judgment that may be based on current medical knowledge or the best available objective evidence. Factors considered in assessing whether an individual poses a direct threat include

- the duration of the risk,
- the nature and severity of the potential harm,
- the likelihood that the potential harm will occur, or
- how soon the potential harm may occur.

See 29 C.F.R. § 1630.2(r) (2013).

For example, consider a heavy-machinery worker with epilepsy. The worker who operates heavy machinery and who has been suffering from seizures might pose a direct threat to his or her or someone else’s safety. If no reasonable accommodation is available (i.e., an open position to which the employee could be reassigned), the employer would not violate the ADA by terminating the employee.

**Best Practices**

As part of employer best practices regarding the interactive process, and for each accommodation request, the employer should do the following:

- Document in writing its receipt of the request for accommodation, providing a copy to the individual and retaining a copy for the employer’s records. This allows the employer to show that it took the request seriously and responded promptly.
- Ask the individual for information about the extent of the impairment, including notes from doctors or other health-care providers, and request medical testing relevant to the accommodation at issue.

The EEOC has specifically issued policy to this effect in its *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995). Specifically, the EEOC policy states that if someone requests a reasonable accommodation, and the disability and/or the need for accommodation is not obvious, an employer may ask for reasonable documentation about the individual’s disability and functional limitations. In its *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (Oct. 17, 2002) at Question 6, the EEOC reiterated that an employer may require documentation to establish that a person has an ADA disability and that the disability necessitates a reasonable accommodation.

- Confer with the individual to discuss accommodation alternatives, which includes listening to the individual’s preference and the option to suggest alternatives.
- Document in writing the discussion about the accommodation and the final determination about how the accommodation request is resolved, including any undue-hardship analysis.
The obligation to provide a reasonable accommodation is ongoing. An employer may be required to provide more than one accommodation to a covered individual, and the employer may be required to provide a different accommodation if the disability or other circumstances change. Because unique and challenging situations can arise with respect to disabilities in the workplace, employers must understand their obligations to engage in the interactive process and reasonably accommodate individuals with disabilities.

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