AMERICANS WITH DISABILITIES ACT: POLICY UPDATE AND TRAINING

I. Welcome

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II.
ADA Policy and Process Overview

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WHY ADA?

Attitude is Everything

- Legislating societal change
- History of perceptions about competency of those with disabilities

- Wide variations- Plato in the Republic, recommended that the deformed offspring of both the superior and inferior be put away in some "mysterious unknown places."
- Africa – Range from severely mentally handicapped children being abandoned on riverbanks or near the sea so that such "animal-like children" could return to what was believed to be their own kind to the disabled being treated as the reincarnation of a deity.
- During the 16th century, Christians such as Luther and John Calvin indicated that the persons with mental and physical disabilities were possessed by evil spirits.
  - http://www.dsq-sds.org/article/view/3197/3068

Impact Of Attitude On How Compliance With Process Perceived

- Consider these two ways of asking the same Question to some with an obvious disability:

1. This Job requires “X”, can you do that?
2. This Job requires “X”, will you need anything to perform those duties?

- Discussion:

Which conveys the more positive message?

Basic Policy

- Title I of the ADA - 42 USC Sect 12111 et seq.
- RSA 354-A:6
- The right to obtain employment without discrimination on the basis of physical or mental disability.
- Applies to both application process and employment after hiring.

Updated State Policy

- Why needed: In the last 3 years we at the DOJ have had more requests for assistance with personnel issues involving disabilities than with all other types of potential discrimination.
- Prior policy and materials substantively correct but could do better - ongoing nature of requirements.
- New Policy in your materials.

Highlights of Updates to Policy

- Updated citations and links to reference materials.
- More guidance in Section 7 on the agency responsibility in responding to a request for accommodation - The "Interactive Process".
- More guidance in Section 7 on when and how to obtain documentation for disabilities that are not obvious.
- A whole bunch of new forms – you will not use them all in every case, but we tried to create templates for most of the possibilities.

Interactive Process

- Ongoing – Disabilities come in many variations and levels of severity and are not always static.
  - Temporary
  - Permanent
  - Progressive – either temporary
    or permanent
  - Existing, sudden or gradual

Goals for Update

- Fairness – Compliance with the laws is not only required but the right thing to do.
- What will be a reasonable accommodations is tailored to the facts.
- Documentation
  - When an employee claims a disability, it does not mean that they are exempt from further management or job performance expectations, but it does mean that you need to document the process.

Goals for Update

- Support your HR Role:
  - Provide guidance for you in training supervisors in your agency – get them to report, not ignore or handle inappropriately
  - Provide you with tools to be eyes and ears of agency.

III.
Where do we start?
The "Dos and Don'ts" of Disability-Related Inquiries

Jill Perlow
New Hampshire Dept of Justice
Assistant Attorney General

EEOC Enforcement Guidance

- https://www.eeoc.gov/policy/docs/guidance-inquiries.html

Why are we here?

- Historically, many employers asked applicants and employees to provide information concerning their physical and/or mental condition.

- This information often was used to exclude and otherwise discriminate against individuals with disabilities -- particularly nonvisible disabilities, such as diabetes, epilepsy, heart disease, cancer, and mental illness -- despite their ability to perform the job.

What did the ADA do?

- **Prior to an offer of employment:** the ADA prohibits all disability-related inquiries and medical examinations, *even if* they are related to the job.

- **After an applicant is given a conditional job offer, but before s/he starts work:** an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

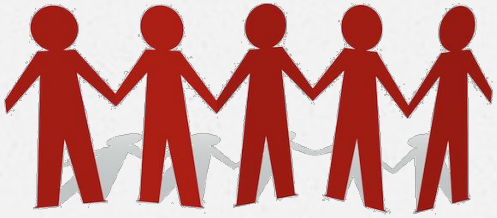
- **After employment begins:** an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity

Who? All employees

- The ADA states, in relevant part:

  A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be ***job-related and consistent with business necessity.***

- The ADA's restrictions on inquiries and examinations apply to **all employees**, not just those with disabilities.



- Goal is to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose.

But what does this mean at the office?

Two ways this presents in the office:

1) Employee requests an accommodation.

OR

2) Something else – those not so clear "gray" areas when we get tongue tied and do not know what we can say/do.

Starting the Conversation: Do What You Know

- **Questions that are not likely to elicit information** about a disability are *not* disability-related inquiries and, therefore, are not prohibited under the ADA.

DO

- Ask generally about an employee's **well being** (e.g., How are you?)
- Ask an employee who looks tired or ill if s/he is feeling okay
- Ask an employee who is sneezing or coughing whether s/he has a cold or allergies
- Ask how an employee is doing following the death of a loved one or the end of a marriage/relationship
- Ask an employee whether s/he can perform job functions
- Ask an employee whether s/he has been drinking
- Ask an employee about his/her current illegal use of drugs
- Ask a pregnant employee how she is feeling or when her baby is due

DON'T

- Ask an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability.
- Ask an employee's co-worker, family member, doctor, or another person about an employee's disability.
- Ask about an employee's genetic information.
- Ask about an employee's prior workers' compensation history.

- Ask an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications.
- Ask an employee a **broad** question about his/her impairments that is likely to elicit information about a disability. (e.g., What impairments do you have?)

When can I ask about a disability?

JOB-RELATED

AND

CONSISTENT WITH BUSINESS NECESSITY

Job-Related and Consistent with Business Necessity

An employer needs to have a reasonable belief, based on objective evidence, that:

(1) an employee's ability to perform essential job functions will be impaired by a physical or mental medical condition;

or

(2) an employee will pose a direct threat due to a physical or mental medical condition.

Reasonable Belief & Objective Evidence

- An employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition.

- An employer also may be given **reliable information** by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.

Examples

For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate documentation for claimed deductions.

When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

Reasonable Belief & Objective Evidence?

Examples

A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath.

In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

Reasonable Belief & Objective Evidence?

Examples

Six months ago, a supervisor heard a secretary tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.

Reasonable Belief & Objective Evidence?

Reasonable Belief – Beware of Making Assumptions

- Such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions.

Is this a Reasonable Belief or an Assumption?

An employee who works in the produce department of a large grocery store tells her supervisor that she is HIV-positive. The employer is concerned that the employee poses a direct threat to the health and safety of others because she frequently works with sharp knives and might cut herself while preparing produce for display. The store requires any employee working with sharp knives to wear gloves and frequently observes employees to determine whether they are complying with this policy.

Available scientific evidence shows that the possibility of transmitting HIV from a produce clerk to other employees or the public, assuming the store's policy is observed, is virtually nonexistent. Moreover, the Department of Health and Human Services (HHS), which has the responsibility under the ADA for preparing a list of infectious and communicable diseases that may be transmitted through food handling, does not include HIV on the list.

Reasonable Belief or an Assumption?

Reliable Information

When is information learned from another person sufficient to justify asking disability-related questions or requiring a medical examination of an employee include?

Consider:

(1) the relationship of the person providing the information to the employee about whom it is being provided;

(2) the seriousness of the medical condition at issue;

(3) the possible motivation of the person providing the information;

(4) how the person learned the information (e.g., directly from the employee whose medical condition is in question or from someone else); and

(5) other evidence that the employer has that bears on the reliability of the information provided.

Reliable Information?

Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses.

Joe is reluctant to breach Bob's trust but is concerned that he and the other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.

Reliable Information?

Reliable Information?

Kim works for a small computer consulting firm. When her mother died suddenly, she asked her employer for three weeks off, in addition to the five days that the company customarily provides in the event of the death of a parent or spouse, to deal with family matters. During her extended absence, a rumor circulated among some employees that Kim had been given additional time off to be treated for depression. Shortly after Kim's return to work, Dave, who works on the same team with Kim, approached his manager to say that he had heard that some workers were concerned about their safety.

According to Dave, people in the office claimed that Kim was talking to herself and threatening to harm them. Dave said that he had not observed the strange behavior himself but was not surprised to hear about it given Kim's alleged recent treatment for depression. Dave's manager sees Kim every day and never has observed this kind of behavior. In addition, none of the co-workers to whom the manager spoke confirmed Dave's statements.

Reliable Information?

Reliable Information?

Several customers have complained that Richard, a customer service representative for a mail order company, has made numerous errors on their orders. They consistently have complained that Richard seems to have a problem hearing because he always asks them to repeat the item number(s), color(s), size(s), credit card number(s), etc., and frequently asks them to speak louder. They also have complained that he incorrectly reads back their addresses even when they have enunciated clearly and spelled street names.

Reliable information? YES

Can I ask about the disability when the employee requests an accommodation?

- Yes. The employer is entitled to know that an employee has a covered disability that requires a reasonable accommodation.
- When the **disability or the need for the accommodation is not known or obvious,** it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation.
- Forms for documenting requests

What can I ask for?

- An employer may require an employee to provide documentation that is **sufficient** to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation.

- This means that, in most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

What is Sufficient?

Documentation is sufficient if it:

(1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and,

(2) substantiates why the requested reasonable accommodation is needed.

Sufficient?

<u>Example</u>: An employee, who has exhausted all of his available leave, telephones his supervisor on Monday morning to inform him that he had a severe pain episode on Saturday due to his sickle cell anemia, is in the hospital, and needs time off. Prior to this call, the supervisor was unaware of the employee's medical condition.

The employer can ask the employee to send in documentation from his treating physician that substantiates that the employee has a disability, confirms that his hospitalization is related to his disability, and provides information on how long he may be absent from work.

Templates

- Letter to Health Care Provider
- Health Care Provider Certification Form
- Medical authorization and release
- Send with SJD!
- Remember: An employer is entitled *only* to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat.

Insufficient?

- **Documentation is insufficient** if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.
- Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or, (3) other factors indicate that the information provided is not credible or is fraudulent.
- If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.

Documentation is Insufficient

- Explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner.
- Consult with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.
- If an employer requires an employee to go to a health care professional of the employer's choice, the employer must pay all costs associated with the visit(s).
- Beware of retaliation claim! Need good faith basis for claiming insufficient.

What if I receive no response?

- When an employee's possible disability and **need for reasonable accommodation** are not obvious, and the employee fails to provide the requested documentation or if the documentation does not demonstrate the existence of a disability, the employer can refuse to provide the accommodation.

- Any discipline that the employer decides to impose should focus on the employee's **performance problems**. Thus, the employer may discipline the employee for past and future performance problems in accordance with a uniformly applied policy.

No accommodation will work

- Non-disciplinary Removal – Per 1003

Sufficient documentation- Now what?

- Interactive process

IV.
ADA
Interactive Process

Carol Jerry
Division of Personnel
Deputy Personnel Director

Preparation

- Do your homework
- Understand the disability
- Research possible accommodations
- Job Accommodation Network (JAN)

Job Accommodation Network

Google

jan

All Videos News Images Books More Settings Tools

About 3,300,000,000 results (0.42 seconds)

Job Accommodation Network: JAN
https://askjan.org/
JAN - Job Accommodation Network. ADA LIBRARY. PUBLICATIONS AND RESOURCES. SEARCH ACCOMMODATIONS DATABASE. A-Z OF DISABILITIES

Z of Disabilities
A to Z of Disabilities and Accommodations. Review JAN ...

For Employers
JAN provides free consulting services for all employers ...

About JAN
About JAN. Spanish/En español. Practical Solutions – Workplace ...

JAN: For Individuals
JAN provides free consulting services for individuals with ...

Accommodation Information
Learning Disabilities - Anxiety Disorders - Depression - ...

SOAR
JAN's Searchable Online Accommodation Resource ...

More results from askjan.org »

JAN: For Employers

Private Businesses

Federal Employers

State and Local Government Employers

Federal, State, and Local Resources

Other Resources

State and Local Government Employers

JAN provides free consulting services for state and local government employers, including one-on-one consultation about all aspects of job accommodations, ADA compliance assistance, and referral to helpful resources.

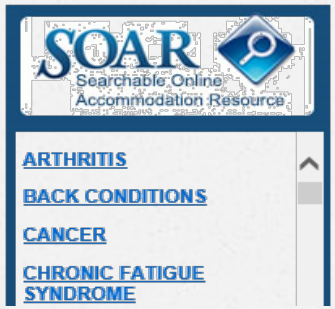
State and local government employers can access JAN services in a variety of ways:

- Telephone
- E-Mail
- Online Tools
  - SOAR (Searchable Online Accommodation Resource)
  - JAN on Demand
  - Employers' Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act (ADA)
- Publications
  - Accommodation Ideas
  - Products and Services
  - ADA Library

SOAR
Searchable Online Accommodation Resource

JAN's Searchable Online Accommodation Resource (SOAR) system is designed to let users explore various accommodation options for people with disabilities in work and educational settings. These accommodation ideas are not all inclusive. If you do not find answers to your questions, please contact JAN directly. The staff of experienced consultants is happy to discuss specific accommodation needs in a confidential manner. Start your SOAR search:

And, download JAN's SOAR Widget for your Website!



Step 1: Select the Impairment

JAN receives thousands of accommodation-related inquiries per year. The SOAR system allows users to obtain accommodation ideas. JAN consultants compile these accommodation ideas and post them to SOAR. If you need additional information on an accommodation situation that has not been posted, or if you would like to discuss the information presented here, contact JAN.

- Arthritis
- Back Conditions
- Cancer
- Chronic Fatigue Syndrome
- Cumulative Trauma Disorders (e.g., carpal tunnel syndrome and tendonitis)
- Deaf or Hard of Hearing
- Epilepsy/Seizure Disorder

SOAR
Searchable Online Accommodation Resource

Step 2: Select the Limitation

Back Conditions

Skip Intro

According to the National Institute of Health, eight out of ten adults will have a low back problem at some time in their lives. The human spine consists of several vertebra, small bones that are stacked on top of each other to form the spinal column. Between each vertebra is a cushion known as a disc. The vertebrae are joined by ligaments, and muscles are attached to the vertebrae by bands of tissue called tendons. Openings in each vertebra line up to form a long hollow canal. The spinal cord runs through this canal from the base of the brain. Nerves from the spinal cord branch outward and leave the spine through the spaces between the vertebrae. Any problem with the bones, muscles, ligaments, tendons, nerves, or bones in the back causes pain that is easily aggravated. Moving may cause just as much pain as remaining in a static position. A low back problem may come on suddenly or gradually. It is acute if it lasts a short time, usually a few days to several weeks. An episode that lasts longer than three months is often considered chronic. Many symptoms are from muscle tension or spasm, back sprains, ligament or muscle tears, and joint problems. Other impairments, such as arthritis and obesity, may also lead to back impairments or limitations typically associated with back impairments, e.g., lifting.

In addition, you can find more information at JAN's A to Z Web page at: http://askjan.org/media/atoz.htm.

Please select the limitation that corresponds with the individual needing an accommodation below.

- Individual has gross motor limitations that cause difficulty lifting, carrying, moving, transferring, sitting, standing, walking, and climbing and accessing workstations and work-sites.
- Individual has difficulty reaching and bending.
- Individual experiences fatigue and weakness.
- Individual needs medical treatment allowances.
- Individual has difficulty with activities of daily living.

SOAR
Searchable Online Accommodation Resource

Step 3: Select the Job Function

Reaching and Bending

- Reaching materials overhead
- Reaching materials at waist height
- Reaching materials below the knee and at bending level

ASK A JAN CONSULTANT
JAN provides free, confidential technical assistance about job accommodations and the Americans with Disabilities Act (ADA). Send Us Feedback.

(800)526-7234 (Voice)
(877)781-9403 (TTY)
Live Help
Email

SOAR
Searchable Online Accommodation Resource

Step 4: Choose the Accommodation

Reaching Materials Overhead

An individual with a certain limitations may need to reach materials overhead. To help accommodate this limitation, a survey of materials and supplies should be performed first. This survey will identify frequently used items as well as heavy and awkward materials. Rearranging storage areas so that heavy and frequently used materials are accessed at waist levels is usually very helpful. Either raising individuals to meet comfortable working heights or lowering materials to comfortable working levels is preferable. Aerial personnel lifts, rolling safety ladders, reachers, and order pickers are products that can help.

ASK A JAN CONSULTANT

JAN provides free, confidential technical assistance about job accommodations and the Americans with Disabilities Act (ADA). Send Us Feedback.

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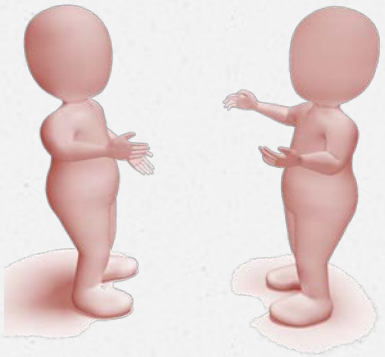
(877)781-9403 (TTY)
Live Help
Email

What it is

- Collaboration between employee and employer
- Typically face-to-face with HR Representative
- Parties discuss various ideas
- Parties agree to modifications/alternative work
- Once agreed, interactive process doesn't end
- Regular follow-up to determined continued need



- Discussion includes:
  - Review of essential functions of the job
  - Documentation from care provider outlining
    - Impairment, activity/activities that are limited, extent of limitation
  - Requested accommodation
  - Employer operation needs

- Various potential outcomes
  - Agree with the original request
  - Agree to an alternative
  - Employee refuses alternative
  - Deny the request

ADA Accommodation Agreed Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click here and select the date

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

The Americans with Disabilities Act (ADA) requires that employers engage in an interactive communications process when determining a reasonable accommodation which would enable an employee to perform the essential functions of their job. The purpose of this letter is to document your Click and select request or requests. for a reasonable accommodation and the Agency's Click and select response or responses. while we worked together to determine an appropriate reasonable accommodation that meets your needs while considering the operational needs of the Agency.

Outlined below is a summary of the reasonable accommodation Click and select request or requests. that you have made and the Agency's Click and select response or responses. to Click and select this or these. Click and select request or requests..

Date: Click and select date. Reasonable Accommodation Requested: Click and type accommodation requested.
Date: Click and select date. Agency Response: Click and type response.
To add more requests and responses, follow same format as above and type information. If there are no other requests and responses, press the space bar to delete this instruction.

As outlined in the Agency's initial response listed above, we have agreed to your original request for reasonable accommodation so that you are able to perform the essential functions of your job. The Agency will follow up in Click and type a number Click and select a time period, or on Click and select a date so that we can determine if you have a continuing need for this accommodation. In the meantime, if the circumstances around your request change and the agreed upon accommodation is no longer effective, please contact me at Click and type phone number.

Sincerely,

Click and type your name.
Click and type your title.

cc: Agency File

My signature below acknowledges that the information listed above accurately reflects the communications between me and the Agency's Human Resources Administrator.

(Employee's Signature)	**(Agency HR Administrator Signature)**
(Date)	**(Date)**

Original Request Agreed Upon

- Summarizes requested accommodation
- Documents agency's response and agreement with the request
- Communicates the follow up period

ADA Alternative Accommodation Agreed Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click and select date

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

The Americans with Disabilities Act (ADA) requires that employers engage in an interactive communications process when determining a reasonable accommodation which would enable an employee to perform the essential functions of their job. The purpose of this letter is to document your Click and select request or requests. for a reasonable accommodation and the Agency's Click and select response or responses. while we worked together to determine an appropriate reasonable accommodation that meets your needs while considering the operational needs of the Agency.

Outlined below is a summary of the reasonable accommodation Click and select request or requests. that you have made and the Agency's Click and select response or responses. to Click and select this or these. Click and select request or requests..

To add previous requests and responses, follow same format as below and type information. If there are no previous requests and responses, press the space bar to delete this instruction.

Date: Click and select date. Reasonable Accommodation Requested: Click and type accommodation requested.

Date: Click and select date. Agency Response: After careful consideration of your request, the Agency is denying your request for reasonable accommodation for the following reason(s):

Delete any that do not apply, then delete this instruction:

- Requestor does not have an ADA disability
- Medical documentation inadequate
- Accommodation ineffective
- Accommodation would cause undue hardship
- Accommodation would require removal of essential function
- Accommodation would require lowering performance or production standard

If the requested accommodation would be ineffective, cause undue hardship, or lower the performance or production standard, etc., explain specifically how it would in the space provided below. (Call Attorney General's Office with any questions.) After reading, delete these instructions from the final letter by pressing the space bar.

Click and type explanation. If not applicable, press space bard to delete.

Prior to listing a denial reason as "Other," below, please call the Attorney General's Office. After reading, delete these instructions from the final letter by pressing the space bar:

- Other (Please identify: Click and type other reason or type NOT APPLICABLE.

Alternative Accommodation Agreed Upon

- Summarizes original request for accommodation
- Documents agency's response with reason for initial denial
- Documents agreement to an alternative accommodation
- Communicates the follow up period

ADA Employee Refused Accommodation Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click and select the date.

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

The Americans with Disabilities Act (ADA) requires that employers engage in an interactive communications process when determining a reasonable accommodation which would enable an employee to perform the essential functions of their job. The purpose of this letter is to document your Click and select request or requests. for a reasonable accommodation and the Agency's Click and select response or responses. while we worked together to determine an appropriate reasonable accommodation that meets your needs while considering the operational needs of the Agency.

Outlined below is a summary of the reasonable accommodation Click and select request or requests. that you have made and the Agency's Click and select response or responses. to Click and select this or these. Click and select request or requests..

To add previous requests and responses, follow same format as below and type information. If there are no previous requests and responses, press the space bar to delete this instruction.

Date: Click and select date. Reasonable Accommodation Requested: Click and type accommodation requested.

Date: Click and select date. Agency Response: After careful consideration of your request, the Agency is denying your request for reasonable accommodation for the following reason(s):

Delete any that do not apply, then delete this instruction:

- Requestor does not have an ADA disability
- Medical documentation inadequate
- Accommodation ineffective
- Accommodation would cause undue hardship
- Accommodation would require removal of essential function
- Accommodation would require lowering performance or production standard

If the requested accommodation would be ineffective, cause undue hardship, or lower the performance or production standard, etc., explain specifically how it would in the space provided below. (Call Attorney General's Office with any questions.) ***After reading, delete these instructions from the final letter by pressing the space bar.***

Click and type explanation. If not applicable, press space bar to delete.

Prior to listing a denial reason as "Other," below, please call the Attorney General's Office. ***After reading, delete these instructions from the final letter by pressing the space bar:***

- Other (Please identify): Click and type other reason or type NOT APPLICABLE.

DAS-DOP-ADA-Employee-Refused-Accommodation-Agency-Form-Letter-SoNH Rev-SEPT-17 Page 1 of 2

Employee Refused Alternative Accommodation

- Summarizes original request for accommodation
- Documents agency's response with reason for initial denial
- Documents agency's suggested alternative
- Documents employee's refusal and reason
- Communicates agency willingness to consider other requests
- Requires employee initiating interactive process again
- Communicates ongoing work expectations

ADA Accommodation Denied Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click here and select the date.

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

The Americans with Disabilities Act (ADA) requires that employers engage in an interactive communications process when determining a reasonable accommodation which would enable an employee to perform the essential functions of their job. The purpose of this letter is to document your Click and select request or requests for a reasonable accommodation and the Agency's Click and select response or responses. while we worked together to determine an appropriate reasonable accommodation that meets your needs while considering the operational needs of the Agency.

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Date: Click and select date. Reasonable Accommodation Requested: Click and type accommodation requested.
Date: Click and select date. Agency Response: Click and type response.
To add more requests and responses, follow same format as above and type information. If there are no other requests and responses, press the space bar to delete this instruction.
After careful consideration of your request, as outlined in the final response listed above, the Agency is denying your request for reasonable accommodation for the following Click and select reason or reasons.:

Delete any that do not apply then delete this instruction:

- Requestor does not have An ADA disability
- Medical documentation inadequate
- Accommodation ineffective
- Accommodation would cause undue hardship
- Accommodation would require removal of essential function
- Accommodation would require lowering performance or production standard

If the requested accommodation would be ineffective, cause undue hardship, or lower the performance or production standard, etc., explain specifically how it would in the space provided below. (Call Attorney General's Office with any questions.) ***After reading, delete these instructions from the final letter by pressing the space bar.***

Click and type explanation. If not applicable, press space bar to delete.

Prior to listing a denial reason as "Other" below, please call the Office of the Attorney General. ***After reading, delete these instruction by pressing the space bar.***

- Other (Please identify): Click and type other reason or type NOT APPLICABLE.

Request for Accommodation Denied

- Summarizes requested accommodation
- Documents agency's response with reason for denial
  - Template provides several typical reasons for denial
- Communicates agency willingness to consider other requests
- Communicates ongoing work expectations

Request for Accommodation Denied (cont.)

- Typical reasons for denial
  - Not an ADA disability
  - Medical documentation inadequate
  - Accommodation ineffective
  - Accommodation would cause undue hardship
  - Accommodation would remove essential functions
  - Accommodation would require lowering performance or production standards
  - Other (Contact AG's Office)

V. Implementing Accommodations and Periodic Review

Steve Bunker
Division of Personnel
Personnel Appeals Board Administrator

Not all disabilities are evident—
but the accommodation
may be.

Best practice is to follow up with the employee on a regular basis to ensure that the accommodation is effective.

- It is not unusual that the first accommodation will not be effective and you need to try something else.

- Check in with the employee within a reasonable amount of time after the accommodation has been implemented.

Well, won't the employee tell me if the accommodation isn't working out? Why do I have to plan to follow up with her/him on a regular basis?

- Some may tell you but some may not—for whatever reason, so we recommend scheduling a follow-up with the employee on a regular basis and completing an Annual/ Periodic Review of the Reasonable Accommodation Form.

Annual/Periodic Review of Reasonable Accommodation Form

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Annual/Periodic Review of Reasonable Accommodation

Employee Name: _____

Employee ID: _____ Position Title: _____

Supervisor's Name: _____

Agency/Work Location: _____

Date: ___/___/___

Date Original Request for Accommodation Approved: ___/___/___

Date of Periodic Review: ___/___/___

After a review of the employee's Request for Reasonable Accommodation file, the following has been determined:

☐ New/Additional medical/diagnostic documentation is not required to continue the accommodation.

☐ Additional medical/diagnostic documentation is required.

☐ Other: _____

The employee is requested to provide the following documentation:

_____

Name and Title of Human Resources Representative: _____

_____

Continuation of reasonable accommodation: (Check one):

☐ Approved

☐ Agree to Discontinue

☐ Modification Needed* *Note: If modification is needed, restart the interactive process.

_____ _____
(Human Resources Representative Signature) (Date)

_____ _____
(Employee Signature Acknowledging Receipt) (Date)

After the review it's determined that the accommodation is still effective.

- If so, simply complete and provide the disabled employee with an Accommodation Effective – Periodic Review Agency Form Letter.
- You're done until the next periodic review!
- Even if the employee tells you s/he will tell you if/when the accommodation is no longer effective---still check in.

Accommodation Effective – Periodic Review Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click here and select the date

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

Per the provisions of The Americans with Disabilities Act (ADA), together with your health care provider, we worked to determine a reasonable accommodation which would enable you to perform the essential functions of your job. On Click and select agreement date we agreed that Click and type what was agreed to and it would enable you to Click and type the essential function being accommodated.

After assessing the effectiveness of this reasonable accommodation during the regular periodic review, Click and select I or we or you have determined that the accommodation is still effective.

The Agency will follow up in Click and type number months, or on Click and select a date for another periodic review so that we can determine if you have a continuing need for this accommodation. In the meantime, if the circumstances around your request change and the agreed upon accommodation is no longer effective, please contact me at Click and type phone number.

Sincerely,

Click and type your name
Click and type your title

cc: Agency File

My signature below acknowledges that the information listed above accurately reflects the communications between me and the Agency's Human Resources Administrator.

(Employee's Signature)	**(Agency HR Administrator Signature)**
(Date)	**(Date)**

But what if, after the review, it's determined that the accommodation is *not* effective?

- First, send the employee an "Accommodation Ineffective" letter.
- Second, start the interactive process all over again.

Accommodation Ineffective – Annual/Periodic Review Agency Form Letter

Delete the following instruction before printing by pressing the space bar:
PRINT ON AGENCY LETTERHEAD

Click here and select the date

Click and type employee's name
Click and type street address
Click and type city, state, zip

Dear Click and type employee's name:

Per the provisions of The Americans with Disabilities Act (ADA), together with your health care provider, we have worked to determine a reasonable accommodation which would enable you to perform the essential functions of your job. On Click and select agreement date we agreed that Click and type what was agreed to and it would enable you to Click and type the essential function being accommodated.

After assessing the effectiveness of this reasonable accommodation during the regular periodic review, Click and select I or we or you have determined that the accommodation is Click and select not or no longer effective for the following reasons:

Click and type a narrative with information as to why the accommodation is not or no longer effective.
After reading the following note, delete it by pressing the space bar: Lifting an accommodation is handled on a case-by-case basis. Generally an accommodation should remain in place until an effective accommodation is agreed upon.

We are willing to consider a different request for reasonable accommodation consistent with the Americans with Disabilities Act. The ADA Reasonable Accommodation Request form is attached if you wish to begin the interactive communications process again.

In the meantime, it is expected that you will continue to report to work as scheduled and perform the essential functions of your job. If you have any questions, please contact me at Click and type phone number.

Sincerely,

Click and type your name
Click and type your title

cc: Agency File
enc. Reasonable Accommodation Request Form

My signature below acknowledges that the information listed above accurately reflects the communications between me and the Agency's Human Resources Administrator.

(Employee's Signature)	**(Agency HR Administrator Signature)**
(Date)	**(Date)**

What do you tell staff who complain that an employee is unfairly getting "special treatment"—different work hours, shiny new equipment, or comfy-looking furniture?

- The ADA prohibits employers from disclosing medical information about employees.
- Disclosing that an employee is receiving a reasonable accommodation amounts to disclosing that the individual has a disability.

But staff—or unions—may insist on knowing why one person is being treated differently than everyone else.

- Tell staff that you are complying with all laws and regulations.
- Point out that many of the workplace issues encountered by employees are personal and, in these circumstances, it is the State's policy to respect employee privacy—just as you would similarly respect their privacy.
- Stick to the above "script" to avoid ADA liability and don't go beyond the script without prior approval of the employee.

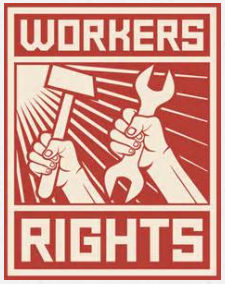
Stick to the script like paper clips and coffee stains

What if the employee tells coworkers about his/her disability and/or the fact that s/he is receiving a reasonable accommodation?

- As long as there is no coercion by the employer, an employee with a disability may voluntarily choose to disclose this information to coworkers.

Can I prohibit coworkers of the disabled employee from then telling other employees or his/her union representative about the employee's disability and/or accommodation?

- No. Employers should tread carefully on restricting discussion among coworkers whose jobs are affected by the accommodation, particularly in a unionized environment.



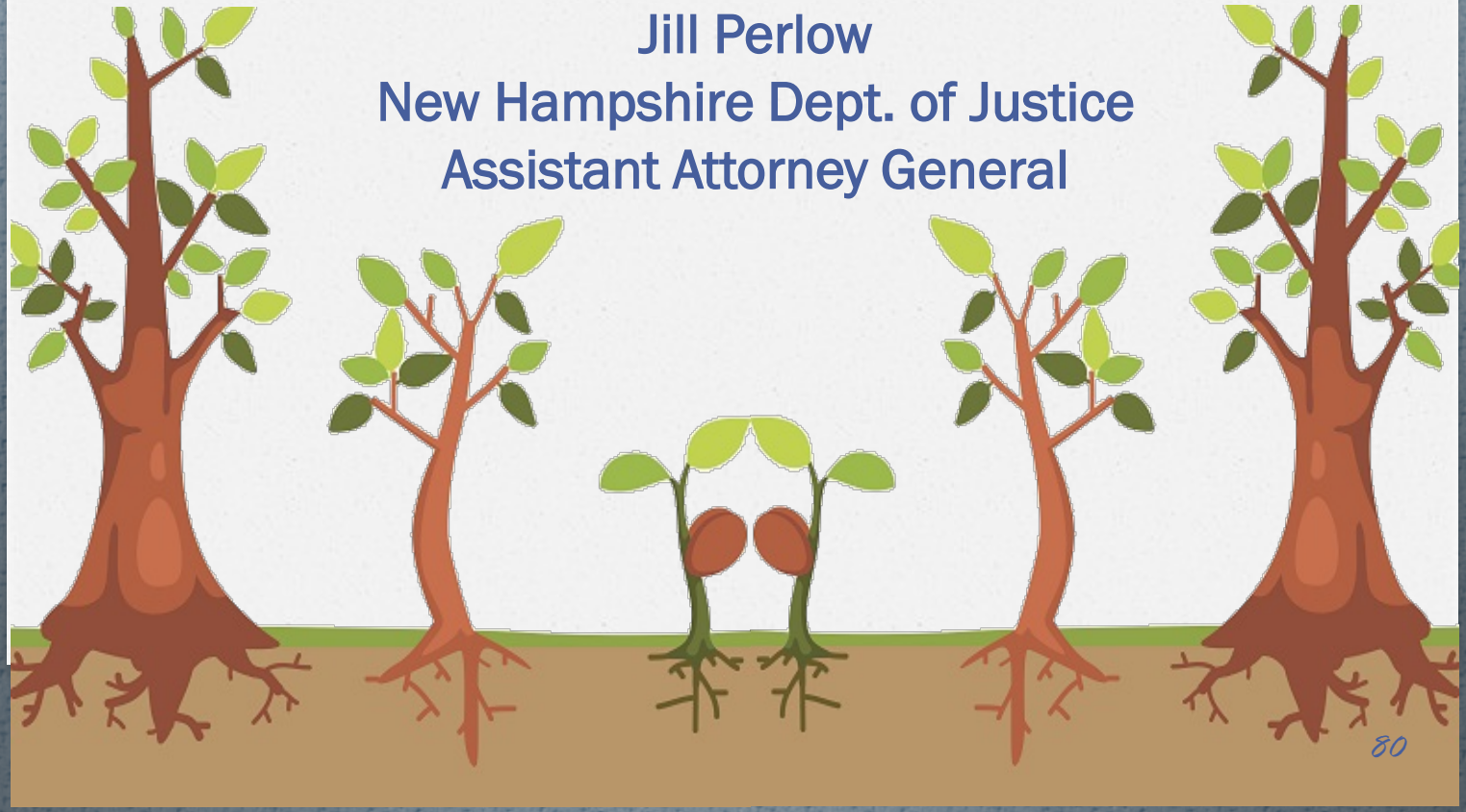
Since I have an employee with a disability, do I have to tread lightly?

- You are not required to lower standards of conduct for employees with disabilities, including mental disabilities.
- An employee with a mental impairment is not entitled to get away with misconduct that may be caused by the disability, such as stealing, threatening other employees, violence, harassment, profanity, destruction of property, etc.
- You are allowed to enforce conduct rules as long as they are job-related and consistent with business necessity.

- You can also hold disabled employees to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation.

VI.
Emerging Topics

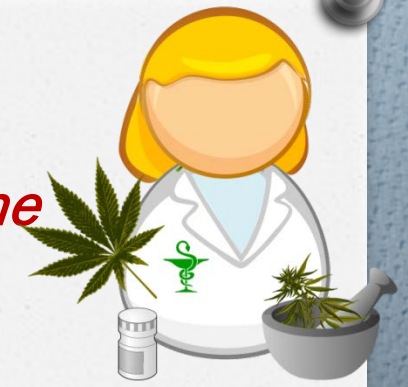
Jill Perlow
New Hampshire Dept. of Justice
Assistant Attorney General



Emerging Topics

- Medical Marijuana
- Service and Companion Animals
- Telecommuting as an Accommodation

Medical Marijuana



Callaghan v. Darlington Fabrics and the Moore Company (May 23, 2017)

- The Rhode Island Superior Court ruled an employer is prohibited from refusing to hire a prospective employee because the employee would potentially fail a pre-employment drug test due to the employee's use of medical marijuana.
- The court held the state's Hawkins-Slater Medical Marijuana Act (the "Medical Marijuana Act"), which prohibits discrimination against medical marijuana users, also protects the cardholder's actual use of marijuana.
- The case does not require employers in the state to make accommodations for medical marijuana *use in the workplace.*

Medical Marijuana

Noffsinger v. SSC Niantic Operating Company LLC, d/b/a Bride Brook Nursing & Rehabilitation Center (August 8, 2017)

- If your workplace drug and alcohol-testing policies take a *zero tolerance* approach to medical marijuana because the use, distribution, or possession of marijuana is unlawful under *federal law*, a recent federal court decision out of Connecticut interpreting state law could be a game-changer.
- The Court held that various federal laws prohibiting use and sale of marijuana do not preempt Connecticut's Palliative Use of Marijuana Act (PUMA), which protects employees and job applicants from employment discrimination based on medical marijuana use permitted under state law
- Takeaway: Federal law does not prohibit employment of illegal drug users.

Medical Marijuana

Barbuto v. Advantage Sales and Marketing, LLC (July 17, 2017)

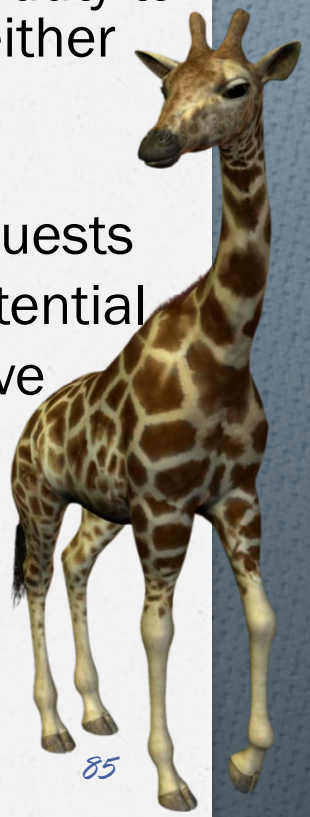
- Massachusetts Supreme Judicial Court has allowed an employee to pursue a State disability discrimination claim based on her off-duty use of medical marijuana.
- Court held: Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.
- Before you get too excited about this decision, it's worth noting that other states have reached the opposite conclusion based on the federal illegality of marijuana, and that *Barbuto* appears to stand as a lone wolf on this evolving issue.

Service and Companion Animals

- Title I does not define the term "service animal," and there is no administrative guidance concerning an employer's duty to accommodate an employee by permitting the use of either service or emotional support animals.

- Both federal and state law require you to consider requests for service and/or emotional support animals as a potential reasonable accommodation. Courts and the EEOC have at times found employees' use of emotional support animals to be a form of reasonable accommodation.

- Key is to gather necessary information and engage in the interactive process



Telecommuting

Equal Employment Opportunity Commission v. Ford Motor Company (April 10, 2015)

- Very fact-specific decision – always the case with ADA
- Whether telecommuting was reasonable depended on whether regular and predictable on-site job attendance was an ***essential function of the job***
  - Employer's words, policies and practices
  - Job related, uniformly-enforced and consistent with business necessity
- Court found that, given the nature of the job, telecommuting up to 4 days per week was unreasonable because it removed an essential function of the job

Telecommuting

- EEOC guidance: https://www.eeoc.gov//facts/telework.html
- Telework MAY be a reasonable accommodation
- Need to engage in interactive process - intensive, fact specific, case-by-case inquiry
- Be clear and consistent with the essential functions of the job