



Edison Electric
INSTITUTE

Developing an ADA Reasonable Accommodation Process for Pre-employment Testing

IPAC 2018 Conference
August 1, 2018
Alexandria, VA

Introduction

- Presenters

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- Topic

- Reasonable accommodations in pre-employment testing

- Informal Poll

- How many of you are familiar with ADA legislation?
- How many of you have developed an ADA process or been involved in some way?

Outline

- Introduction to the Americans with Disabilities Act – 1990, 2008
 - Definitions
 - Guidance
- Reasonable accommodation process
 - Purpose
 - Legal implications
 - Practical implications
 - Considerations in evaluating requests
- Examples of Reasonable Accommodations
- Resources

Disclaimer

We are not lawyers. Always consult your legal counsel prior to establishing a reasonable accommodation process.

Section I: Americans with Disabilities Act

Americans with Disabilities Act of 1990

- Title I
 - Prohibits employment discrimination against qualified individuals with disabilities
 - Requires employers with 15 or more employees to provide reasonable accommodations (including during the hiring process) unless it imposes undue hardship
- Other titles included in the law are
 - Title II – Public Services
 - Title III – Public Accommodations
 - Title IV – Telecommunications

Americans with Disabilities Act Amendments Act of 2008

- Intended to make the ADA more broad and inclusive
 - Expands coverage of the law by adding to the definition of what qualifies as a disability
 - Addresses several U.S. Supreme Court decisions that narrowly interpreted the definition of disability
 - Sutton vs. United Air Lines, Inc., 527 U.S. 471 (1999)
 - Toyota Motor Manufacturing, Kentucky, Inc. vs. Williams, 534 U.S. 184 (2002)

Equal Employment Opportunity Commission (EEOC)

- Charged with enforcement of Title I of the ADA and other anti-discrimination laws in employment
 - Established in 1965, one year after President Johnson signed the Civil Rights Act of 1964
- Receives, investigates, and resolves charges of employment discrimination
- Provides guidance documents and interpretation of the law

Key Definitions – Impairment

- An individual with a disability is someone who
 - Has a physical or mental impairment that substantially limits one or more major life activities
 - Has a record of such an impairment
 - Is regarded as having such an impairment
- The ADAAA broadened this definition to include
 - bodily functions as a determining factor in whether a disability substantially limits major life activities
 - temporary disabilities
 - evaluation without regard to mitigating measures

Key Definitions – Impairment

- Some impairments will virtually always be considered a disability due to their inherent nature (e.g., deafness, blindness, missing limbs, mobility impairments, DSM disorders)
- Does not include coverage for individuals abusing alcohol or illegal drugs

Key Definitions – Substantially Limits

- According to the ADA, the term “substantially limits” refers to
 - “...an impairment that prevents or severely restricts the individual from doing activities that are of central importance to **most** people’s daily lives.”
 - Determination is made without regard to mitigating measures such as medication, hearing aids, mobility devices, use of assistive devices, etc.
 - Except for the effects of ordinary eyeglasses or contact lenses
- Requires an individualized assessment and acknowledges that not every impairment will constitute a disability

Key Definitions – Major Life Activities

- The ADA defines major life activities as including, but not limited to:
 - caring for oneself, performing manual tasks, seeing, eating, hearing, learning, thinking, communicating
 - bodily functions that limit major life activities including functioning of the immune system, normal cell growth, respiratory functions, reproductive functions, etc.
 - temporary disabilities that are episodic or in remission if it would substantially limit major life activities while active
- Does not include impairments that are transitory and minor

Key Definitions – Qualified Individual

- Someone who meets an employer's qualifications for the job and can perform the essential functions of the job
 - Employer qualifications can be requirements for education, training, employment experience, skills, or licenses
 - Essential job functions are those fundamental duties of the job that an individual must be able to perform with or without an accommodation

Key Definitions – Reasonable Accommodation

- Any modification or adjustment to a selection procedure to enable a qualified individual to be considered for employment
 - An individual must be covered by either having an actual disability or a record of disability to qualify for a reasonable accommodation
- Examples for the hiring process include:
 - A deaf applicant needing a sign language interpreter during an interview
 - An applicant with dyslexia needing additional time on a reading test

Key Definitions – Undue Hardship

- Undue hardship - “An action requiring significant difficulty or expense...”
 - Must be considered in relation to the employer’s size, financial resources, and the nature and structure of its operation

Key Statutory Provisions of Title I Relevant to the Hiring Process

- Prohibits use of selection criteria that tend to screen out a class of individuals with a disability
- Requires use of tests that reflect the skills, aptitudes, etc., they purport to measure
- Requires accommodation so a test-taker can demonstrate qualifications without measuring the impaired skill
- An accommodation does not include lowering qualification standards
- Only known disabilities must be accommodated

Application of the ADA

- Take 5 minutes to review the scenarios in the handout. We plan to discuss each one.

Section II: Reasonable Accommodation Process

Purpose

- Provide equal opportunity for individuals with disabilities to participate in the hiring process.
- Consistency across applicants.
- Good faith effort to abide by the law.
- Level the playing field for individuals with disabilities.

Legal Implications

- Employer must provide an accommodation if an individual is qualified for the job and their stated disability falls under the definition in the ADA.
- Employer can require medical documentation to make sure the disability is covered by the ADA.
 - Employer cannot ask specific medical questions prior to a job offer.

Legal Implications (cont.)

- Employer does not have to provide the applicant with their requested accommodation.
 - If it imposes an undue hardship, no obligation at all.
 - If there is an alternative, employer can offer that instead of the one requested.
- The employer must keep medical documentation submitted during the accommodation process confidential.

Legal Implications (cont.)

- If an applicant refuses a reasonable accommodation, the employer can apply the same requirement for hire as they do for non-disabled applicants.
- An applicant does not have to inform an employer during the application process that they will need an accommodation on the job.

Best Practices in a Reasonable Accommodation Process

- Develop an internal ADA accommodation policy
- Notify applicants of the opportunity to request an accommodation
- Provide information on the process to request an accommodation, including required documentation
- Review requests individually
- Determine appropriate accommodation
- Implement the accommodation
- Document the accommodation and outcome

Develop ADA Policy

- Develop a written internal policy outlining steps for handling reasonable accommodation requests
 - Include details on specific processes
- Becomes a legal document if a candidate files a complaint about the process
- Establishes consistency in the process

Step 1 – Notify Applicants

- Notification of the opportunity to request an accommodation can be made in several ways.
 - Form letter with information on scheduling applicants for an assessment
 - Application form
 - Assessment instructions
- It is the applicant's obligation to request an accommodation. An employer does not have to provide an accommodation unless it has been requested.

Step 2 – Provide Accommodation Process Information

- Provide information to the applicant about the company process for requesting an accommodation.
 - Request form
 - E-mail request to HR
- Applicant should be specific in their request.
- Include information about requirements for documentation of disability.
 - Do you require it pre-hire?
 - What type of documentation is sufficient?
 - How should the applicant submit it?

Documentation Considerations

- ADA states that documentation should be provided by individuals requesting accommodations.
 - Employers can require it if the disability is not obvious (e.g., learning disability vs. a missing limb) or already known
- Documentation can be of a medical, scientific, or statistical nature.
 - Medical professionals – physical evaluation, doctor’s note about treatment, psychologist’s evaluation
 - Rehabilitation/school professionals – Individualized Education Plan (IEP), rehabilitation assessment report

Documentation Considerations (cont.)

- Documentation should include
 - A formal, individualized assessment
 - A diagnosis of a disability and name of the disability
 - Explanation of how the impairment substantially limits major life activities
 - Interpretation of any test results from the individualized assessment
 - Information about the credentials of the evaluator

- Documentation can include
 - Specific recommendations for accommodations (“extra time” or “unlimited time” are not specific)

Documentation Considerations (cont.)

- Evaluate the information carefully and be watchful for:
 - Incomplete or inaccurate interpretation
 - Conflicting statements within documentation
 - Recommendations that don't fit the disability
- Can request more information from applicant if documentation isn't sufficient
 - Contact the evaluator directly with permission from the applicant
 - Require a formal evaluation if no documentation is available

Step 3 – Review the Request

- Requests should be reviewed on a case-by-case basis.
 - Individuals with the same diagnosed disability may not need the same accommodations
 - Review should be completed in a timely manner
- Ask applicants to tell you the exact accommodations they need (e.g., extra time, enlarged print).
 - Evaluate the nature of the request and the documentation provided in light of the assessment
- Engage with internal stakeholders, such as legal, occupational health group, disability office.

What is a Reasonable Accommodation?

- To be eligible for an accommodation under the ADA, an applicant must be:
 - Diagnosed with an actual disability
 - Have a record of having a disability
- The accommodation is intended to directly ameliorate the negative effects of the disability.
- The accommodation is appropriate to the setting (e.g., written test vs. interview).

What is NOT a Reasonable Accommodation?

- Accommodations that don't fit the setting
 - Accommodations that were provided in classroom settings are not necessarily appropriate on a pre-employment assessment (e.g., allowing a calculator, providing clarification on test questions, using notes during the test)
- Accommodations that fundamentally alter the purpose of the test
 - Reader on a reading comprehension test
 - Not having to take a portion of an assessment
 - No time limit on a timed cognitive ability test

What is NOT a Reasonable Accommodation? (cont.)

- The disability has no bearing on the person's ability to access the assessment.
 - A blind person sitting for an oral interview
 - A deaf person taking a written exam
- The accommodation could result in a breach of test security.
 - Having a relative be a reader
 - Using one's own laptop to display test content
 - Testing at home

What is NOT a Reasonable Accommodation? (cont.)

- The accommodation puts the safety of proctors or test-takers at risk.
 - Asking a proctor to administer medication during the test
 - Asking a proctor to administer the test at a private residence
- The accommodation would disrupt normal business operations.
 - Turning off WiFi in the building
 - Taking the test really early in the morning or really late at night
 - Asking the employer to set up a new test site that is more convenient

Step 4 – Determine Appropriate Accommodation

- Both employer and applicant must engage in an interactive process when requesting an accommodation.
 - Initial requests might not be appropriate
 - Documentation might not support requested accommodations
 - Applicant might not provide enough information/documentation to evaluate request
- If more than one accommodation will work, the employer can choose the less costly or easier option.
 - If the request causes “undue hardship,” employer is not obligated to grant it.

Step 5 – Implement the Accommodation

- Employer determines how to implement accommodation.
 - Will almost always be an individual test session
 - Should be administered by an experienced proctor
- Employer can work with applicant on logistics of the session (e.g., how a sign language interpreter will interact with proctor).
 - Have the applicant arrive early for the session
 - Set up a separate meeting to review materials

Step 6 – Document the Accommodation and Outcome

- Document the approved accommodation and the applicant's agreement.
 - Secure database, separate from applicant tracking database or other official company personnel systems
 - Level of detail – enough so if you must refer to it later you will remember critical elements of process and decision
- Can track the result of the assessment (e.g., score, pass/fail)
 - Same separate, secure database; never flag scores as “accommodated” in official personnel files or systems
 - Do not share with hiring managers that applicant received an accommodation

Section III: Example Accommodation Requests

Reasonable or NOT?

- Applicant has carpal tunnel syndrome and requests an ergonomic keyboard for a typing test
 - Does not provide any documentation

Reasonable or NOT?

- Candidate says he has a learning disability and requests unlimited time on a written test and a calculator for any math portions
 - Provides documentation that alludes to a learning disability, but does not specifically diagnose it
 - Does diagnose ADHD and generalized anxiety
 - Previous accommodations received in school included “extended test time”

Reasonable or NOT?

- Applicant says she has test anxiety and requests 50% more time on a written test
 - Provides letter from university disability services stating she received 50% more time on tests and quizzes in college.
 - Provides a report from an evaluation of her test anxiety that described a discussion with a doctor about the condition.
 - The doctor noted the diagnosis as situational anxiety with a question mark and that her symptoms were only present when she is taking tests.

Reasonable or NOT?

- Applicant is completely deaf and is applying for a Customer Service Representative job.
- She requests a sign language interpreter for a work sample test that requires listening to audio and doing data entry
 - Did not submit documentation because of the obvious nature of the disability

Reasonable or NOT?

- Applicant has a learning disability and requests a paper version of a computer-based written test and 50% more time
 - Provides an evaluation from a clinical psychologist listing several diagnoses including ADHD, reading disorder, and math disorder.
 - No reference to the need for taking tests on paper rather than computer.
 - Did note that “his processing speed is significantly lower than expected.”

Reasonable or NOT?

- Applicant has a visual impairment caused by intracranial hypertension (swelling of the brain)
- Requests additional time on a written administrative test
 - She is taking medication for the condition, which is expected to be temporary.
 - The medication is improving her vision, but unsure how long symptoms will persist

Reasonable or NOT?

- Applicant states he has a traumatic brain injury and requests 50% more time on a written test
 - Provides discharge papers from the military with details about his trouble with short term memory and frequent migraine headaches.

Reasonable or NOT?

- Applicant requests to have the items of an administrative test explained to her because she has a disability of “comprehending math solving skills, reading is very low, and vocabulary and spelling are very low”
 - She provides no documentation to support this

Reasonable or NOT?

- Applicant says he has a mild learning disability in math and is requesting extra time to complete a written math test or, if that's not possible, the use of a calculator
 - He submits an IEP indicating a diagnosis of autism spectrum disorder and a history of receiving extra time and a calculator on assessments in school

Reasonable or NOT?

- Applicant has ADHD and neurofibromatosis, and requests double time and a calculator
 - Provides documentation from his doctor asking for these specific accommodations with little information to support it
 - You reach out to the doctor directly to ask for additional information about why the applicant needs these specific accommodations
 - You speak with the doctor's assistant who could not provide specifics about why those accommodations are needed and just states that anything we can grant would help

Reasonable or NOT?

- An applicant requests double time on a written test because he says English is his second language and he is a slow reader.
 - He also asks to have the test administrator explain words to him when he needs it.

Section IV: Resources

External Resources

- EEOC www.eeoc.gov
 - Contains guidance, questions and answers, and detailed interpretations of the law.
- DoJ – Civil Rights Division www.ada.gov
 - Includes information and technical assistance on the ADA
- Job Accommodation Network www.askjan.org
 - Free ADA consultation services provide through the DoL's Office of Disability Employment Policy
- Cornell University www.hrtips.org
 - From the Institute on Employment and Disability
- National Network www.adata.org
 - Provides information, guidance, and training on the ADA

Questions?
