



# THE ADA TITLE I INTERACTIVE PROCESS AND REASONABLE ACCOMMODATIONS

Jeanne Goldberg, Attorney Advisor, Office of General Counsel,  
U.S. Equal Employment Opportunity Commission (EEOC)  
Tracie DeFreitas, Director of Training, Services, and Outreach,  
Job Accommodation Network (JAN)

Virtual ADA Conference for State and Local Governments  
May 2023

# ACCOMMODATION & ADA CHALLENGES

- Requests for Medical Information
- Evaluating Medical Information
- Selection of Accommodation
- Addressing Performance Issues
- Modifying Workplace Policies
- Leave and Attendance
- Unexpected Implementation Challenges





# REQUESTS FOR MEDICAL INFORMATION

## REQUESTS FOR MEDICAL INFORMATION: COMMON SCENARIOS

- Employee balks at employer's request for medical information
- Employee thinks employer does not have a right to ask, or need for, the requested details
- Employer waiting a long time for medical information requested
  - No communication from employee
  - No communication from health care provider
  - Employee says health care provider requires a medical appointment first
  - It's taking the health care provider a long time to prepare/send the requested information

## REQUESTS FOR MEDICAL INFORMATION: KEY LEGAL POINTS I

- ADA permits employer—if it chooses—to request supporting medical information **only if it is not obvious or already known** that requestor has:
  - **disability** (physical or mental impairment that substantially limits a major bodily function or other major life activity, or history of one)
  - **current need for accommodation**
- Employer permitted to request supplemental information if initial response unclear or incomplete
- EEOC: [Enforcement Guidance on Reasonable Accommodation and Undue Hardship](#) (Q&A ##5-9)

## REQUESTS FOR MEDICAL INFORMATION: KEY LEGAL POINTS 2

- How? Employer may ask employee:
  - **to bring information from health care provider, or**
  - **to sign limited release** allowing employer to contact provider directly
- Explain what information is needed (e.g., type of impairment, limitations, how accommodation would help employee)
- Describe job duties, if relevant, to increase likelihood of getting accurate/complete information
- Only permitted to seek medical information reasonably necessary to determine has disability and needs accommodation

## REQUESTS FOR MEDICAL INFORMATION: TAKE-AWAYS I

- As part of interactive process, explain to employee what employer is permitted to request under ADA and why the information is needed
- Tailor the information sought to the accommodation request
  - Determine what medical information is necessary to provide accommodation
  - Don't ask for the entire medical record, or for records from unrelated providers
- Incomplete or unclear medical information received?
  - Explain to employee what additional information/clarification is needed and allow opportunity to provide it, or re-contact provider directly

## REQUESTS FOR MEDICAL INFORMATION: TAKE-AWAYS 2

- Considering alternative accommodation to what employee requested?
  - If it's not clear, ask employee and/or employee's health care provider whether alternative accommodations to the one employee requested would also meet disability limitations
    - Example: Where employer considering accommodations that would enable employee to work onsite instead of a request for telework
- Is extending deadline feasible? Document dates, communications/efforts to obtain information, and any interim accommodations provided
- JAN's [Avoiding "The Waiting Place" After Requesting Medical Information](#)



## EVALUATING MEDICAL INFORMATION: COMMON SCENARIOS

- Supervisor/manager receives medical note but not sure what their responsibilities are, or who to contact
- Person assigned to process request –
  - denies the request because the medical information is incomplete or unclear rather than notifying employee/provider what more is needed/asking follow-up questions
  - not trained on ADA, including definition of disability as amended
  - disregards health care provider's assessment based on their personal experiences, subjective opinions

## EVALUATING MEDICAL INFORMATION: KEY LEGAL POINTS

- Definition of disability is to be construed broadly
  - Need not be significant or severe restriction
  - Duration is one factor but need not be permanent or long-term
  - Determined without benefits of any mitigating measures used
  - If episodic or in remission, would it be substantially limiting when active?
- Reasonable doubts about employee's health care provider's conclusions?
  - Employer permitted to discuss with employee's health care provider and/or have evaluation (at employer's cost) by provider selected by employer

## EVALUATING MEDICAL INFORMATION: TAKE-AWAYS

- Not enough information, or unclear?
  - Explain to employee what additional information/clarification is needed and allow employee an opportunity to provide it
  - Or re-contact health care provider directly
- ADA training for any staff evaluating medical information
  - Amended ADA definition of disability and assessing need for accommodation
  - Don't "freelance" as a health care provider by disregarding treating provider's recommendation based on personal experiences/opinions
    - if bona fide doubts, could have follow up communication or contract review by another provider with relevant expertise



# SELECTION OF ACCOMMODATION

## SELECTION OF ACCOMMODATION: COMMON SCENARIOS

- Employer neglects to consult outside sources even though employee has not proposed particular accommodation and employer unfamiliar with possibilities
- Employer fails to communicate with employee about why considering or offering a different accommodation than what was requested
- Employer about to end interactive process without providing an accommodation
- Employee refuses accommodation offered by employer

## SELECTION OF ACCOMMODATION: KEY LEGAL POINTS I

- Employer has obligation to provide reasonable accommodation absent undue hardship even if requestor is only able to identify the disability-related need, but not a solution
- But if employee requested specific accommodation that is not feasible or would pose an undue hardship, employer must provide alternative reasonable accommodation if available
- Not required to eliminate essential functions as accommodation—if that is requested, determine if there is accommodation that would enable employee to perform; last resort: reassignment to vacant position?
- Employer must keep medical information confidential, including that employee requested/received accommodation—limited exceptions

## SELECTION OF ACCOMMODATION: KEY LEGAL POINTS 2

- Employer has discretion to choose among effective accommodations
- Want to know if alternative accommodation would be effective given employee's disability needs/limitations?
  - May ask employee and/or health care provider whether the alternative accommodation would meet needs
- Unpack the request: Example—disability impedes commuting to work:
  - No responsibility to transport employee, but explore reasonable accommodations to address the standing, sitting, vision, or other barrier (e.g., schedule change, telework, other)
  - JAN: [Accommodations Related to Commuting To and From Work](#)

## SELECTION OF ACCOMMODATION: TAKE-AWAYS I

- Search for solution even if employee doesn't have a specific proposed accommodation
- If employee's proposed accommodation ruled out, search for and offer alternative accommodation if available absent undue hardship
- If choose to go above and beyond what ADA requires, such as by eliminating essential function, document/communicate time frame/manage expectations
- Explore and implement reasonable accommodations to address specific issue
- Document! Including if accommodation(s) offered are ultimately refused
- Before concluding interactive process, make sure good faith effort has been made



## SELECTION OF ACCOMMODATION: TAKE-AWAYS 2

- Make sure any “undue hardship” denials are based on overall employer resources
- Although employer has discretion to choose among effective accommodations, consider employee preference if reasonable
- If providing alternative to employee, explain to employee why
- If employee refuses offered accommodation, find out why—if employee contends it would not meet disability needs, return to interactive process to determine if offering an alternative reasonable accommodation is warranted

## 100% HEALED RULES

**Common Scenario:** Employer instructs not to return from illness or injury until no restrictions

**Key Legal Point:** Violates ADA to require employee to take leave until 100% healed if able to perform essential functions (with accommodation if needed)

### Take-Aways

- Are there reasonable accommodations that would allow performing essential functions consistent with medical restrictions?
- If so, does accommodation pose an undue hardship?
- Make sure to consider reasonable accommodations that would enable continued work/return to work before involuntary leave

## EMPLOYEE REQUESTS RESERVED OR ACCESSIBLE PARKING SPOT AS ACCOMMODATION

**Common Scenarios:** Employer-provided parking has no reserved spaces, has limited accessible spaces, and/or landlord controls the lot

**Key Legal Points:** Accommodation may nevertheless be required to meet the needs of a particular employee

### Take-aways

- Can space be reserved? Can number of accessible spots be increased?
- If not, is there a different type of accommodation available?
- If needed, discuss with third party who controls? Document effort.
- JAN A to Z by Topic: [Parking](#)

# EMPLOYEE REQUESTS NEW SUPERVISOR AS ACCOMMODATION

## Key Legal Points:

- No ADA obligation to assign to a different supervisor as reasonable accommodation
- However, ADA may require alternative accommodation
  - e.g., changing supervisory methods based on disability-related needs

## Take-Aways

- Assigning a new supervisor may not be required—but not prohibited
- JAN: [Changing a Supervisor as an Accommodation](#)



# ADDRESSING PERFORMANCE ISSUES

## ADDRESSING PERFORMANCE ISSUES: COMMON SCENARIOS

- Last minute disclosure of disability/request for accommodation
- Unaddressed performance issues and new supervisor now wants to address
- Addressing behavior/conduct that seems strange
- Telework accommodation request from a poor performer

## ADDRESSING PERFORMANCE ISSUES: KEY LEGAL POINTS

- Employee with a disability must meet the same production standards as other employees in the same position
- Production standards refer to both
  - Quantitative Standards
  - Qualitative Standards
- Reasonable accommodation never requires lowering a production standard but may require accommodation to meet the standard
- Employer cannot refuse to consider or to provide reasonable accommodation because there is a performance problem

## ADDRESSING PERFORMANCE ISSUES: TAKE-AWAYS I

- Give benefit of feedback/evaluate job performance in same manner for all
- Lead with performance issue; don't assume it is related to disability
- EEOC: [Applying Performance and Conduct Standards to Employees with Disabilities](#)



## ADDRESSING PERFORMANCE ISSUES: TAKE-AWAYS 2

- If employee says disability caused performance issue, employer may still act in response to performance that already occurred
- If usual step is termination, then request too late for ADA to require accommodation
- If usual step is something less than termination:
  - may still proceed with usual consequences (e.g., unsatisfactory appraisal rating, warning, etc.), and document
  - but also engage in interactive process for prospective accommodation if needed to meet standards going forward
  - if placing on PIP, delay start date until any accommodations being provided are in place



# MODIFYING WORKPLACE POLICIES

## MODIFYING WORKPLACE POLICIES: COMMON SCENARIOS

- Decisionmakers rely on employer policy, not realizing ADA may require an exception as accommodation for one/some individuals based on disability
- Management opposed to making any exceptions to uniformly applied policies, afraid of “setting precedent” or that co-workers will request similar exception

## MODIFYING WORKPLACE POLICIES: KEY LEGAL POINTS

- ADA may require making an exception to a policy for an individual with a disability as a reasonable accommodation absent undue hardship
- Employer still permitted to maintain policy as to others
- EEOC: “[Modified Workplace Policies](#)” in Enforcement Guidance on Reasonable Accommodation and Undue Hardship

## EXAMPLE: EXCEPTIONS TO TELEWORK POLICY I

### **Common Scenarios:**

- Employee needs more telework as accommodation than policy allows
- Manager resistant to exceptions
- Employer concerned about allowing telework for poor performer

## EXAMPLE: EXCEPTIONS TO TELEWORK POLICY 2

### Key Legal Points:

- ADA may require telework as accommodation absent undue hardship, even if others aren't allowed to telework, or are only allowed less
- May be required even if poor performance or contrary to policy requiring certain performance level to be eligible for telework
  - But in some situations, the performance issue will make telework not feasible or an undue hardship
- EEOC: [Work at Home/Telework as a Reasonable Accommodation](#)

## EXAMPLE: EXCEPTIONS TO TELEWORK POLICY 3

- Fact-specific determination based on particulars of position and workplace. Examples of potentially relevant facts:
  - 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

## EXAMPLE: EXCEPTIONS TO TELEWORK POLICY 4

### Take-Aways:

- Make sure managers/supervisor know may have to make exception to usual rule to accommodate individual with disability
- Employer discretion to choose alternative **effective** reasonable accommodation if available—accommodate to work onsite instead?
- If unsure whether essential functions can be performed remotely, consider if helpful to implement as a trial or temporary accommodation at first
- Hold all those teleworking for any reason to same performance and production standards as others
- JAN: [Telework Accommodation Request Flowchart](#)



## EXAMPLE: EXCEPTIONS TO “NO ANIMALS” POLICY I

### Common Scenarios:

- Supervisor reflexively denies accommodation because of
  - “no animals” rule
  - concern about disruption
  - allergies of others
  - concern this will mean other employees can insist on bringing in animals

### Key Legal Point:

- “No animals allowed!” is like any other workplace policy: may need to modify rule for individual who needs animal due to disability, absent undue hardship

## EXAMPLE: EXCEPTIONS TO “NO ANIMALS” POLICY 2

### Take-Aways:

- Explore accommodation solutions to address individual needs, circumstances, job duties, whether undue hardship is actually posed
- JAN: [Service Animals as Workplace Accommodations](#)
- JAN: [Service Animals and Allergies in the Workplace](#)



# LEAVE AND ATTENDANCE

## LEAVE AND ATTENDANCE: COMMON SCENARIOS

- Employee requests leave but not eligible for FMLA or has used up all available FMLA and accrued leave
- Disability-related absences are frequent or unplanned/unpredictable
- Long-term leave needed for recuperation/treatment
- Indefinite leave requested; health care provider can't say whether/when employee able to return
- Estimated date of return extended; repeated extensions requested
- No communication from employee when absent or on leave
- Employer also covered by state and local leave requirements

## LEAVE AND ATTENDANCE: KEY LEGAL POINTS I

- Employee may be entitled to ADA (unpaid) leave as reasonable accommodation absent undue hardship even if already used FMLA or FMLA not available
- Employer may consider impact of FMLA or other leave already taken when determining whether additional leave as ADA accommodation would pose an *undue hardship* on the employer
- Employer must allow employee to use accrued paid leave before having to use ADA unpaid leave
- For ADA leave, employer must allow employee to return to same position if employee is qualified and holding position open during ADA leave is not undue hardship

## LEAVE AND ATTENDANCE: KEY LEGAL POINTS 2

- Does the leave requested as ADA accommodation pose an undue hardship? Relevant factors include:
  - length, frequency, unpredictability of the leave
  - impact of employee's absence on co-workers (ability to perform work in timely and appropriate manner)
  - impact on business operations and the employer's ability to provide timely and effective customer service or otherwise accomplish work objectives
- EEOC: [Employer-Provided Leave and the ADA](#)

## LEAVE AND ATTENDANCE: TAKE-AWAYS I

- Address leave request as one for reasonable accommodation IF employee not eligible for other leave options or exhausted them
  - Don't reject request for leave as reasonable accommodation ONLY because exhausted/ineligible for other forms of leave: can reject if undue hardship
  - May need to reinitiate interactive process if request for extension of leave, or after leave if employee is about to return to work but has restrictions
  - Cannot penalize employee for using leave granted as reasonable accommodation (e.g., may need to pro-rate end-of-year productivity measure)

## LEAVE AND ATTENDANCE: TAKE-AWAYS 2

- Train all those handling leave requests that employee may have right to ADA leave absent undue hardship if exhausted employer-provided accrued leave, FMLA, leave required under state/local law, etc.
- Must consider health care provider's revised date if reasonable accommodation/no undue hardship
- Accommodate if feasible, document the specific impact of leave when assessing undue hardship





# UNEXPECTED IMPLEMENTATION CHALLENGES

# UNEXPECTED IMPLEMENTATION CHALLENGES

## Common Scenarios:

- Equipment on back-order or supply chain delays in delivery
- Training needed to utilize accommodation granted
- Employee puts employer on notice that accommodation provided is not effective

## Key Legal Points:

- Might need to provide interim/temporary accommodation if delayed delivery
- Once on notice accommodation that has already been provided not effective, need to provide alternative accommodation absent undue hardship ... reinitiate the interactive process

## UNEXPECTED IMPLEMENTATION CHALLENGES: TAKE-AWAYS

- In event of delay providing an accommodation that has been granted (e.g., equipment on back order, supply chain delays, training needed), provide interim/temporary accommodation if possible
- Once accommodation is provided, check in with employee about whether accommodation effective, and return to interactive process if needed
  - Example: Employer agrees to make certain structural renovations; could permit individual to telework temporarily until facility is accessible



## QUESTIONS?

Jeanne Goldberg, Attorney Advisor,  
Office of General Counsel, U.S. Equal Employment  
Opportunity Commission  
[EEOC.gov](http://EEOC.gov)

Tracie DeFreitas, Director of Training, Services,  
and Outreach, Job Accommodation Network  
[AskJAN.org](http://AskJAN.org)

## ASKJAN.ORG RESOURCES

- **A to Z of Disabilities and Accommodations**  
[AskJAN.org/a-to-z.cfm](http://AskJAN.org/a-to-z.cfm)
- **Employers' Practical Guide to Reasonable Accommodation Under the ADA**  
[AskJAN.org/publications/employers/employers-guide.cfm](http://AskJAN.org/publications/employers/employers-guide.cfm)
- **Interactive Process**  
[AskJAN.org/topics/interactive.cfm](http://AskJAN.org/topics/interactive.cfm)
- **Recognizing an Accommodation Request**  
[AskJAN.org/articles/Recognizing-an-Accommodation-Request-Under-the-ADA.cfm](http://AskJAN.org/articles/Recognizing-an-Accommodation-Request-Under-the-ADA.cfm)
- **Providing Temp/Trial Accommodation Solutions**  
[AskJAN.org/topics/Temporary-Accommodations.cfm](http://AskJAN.org/topics/Temporary-Accommodations.cfm)

## ASKJAN.ORG RESOURCES 2

- **Accommodations Related to Commuting To and From Work**  
[AskJAN.org/publications/consultants-corner/vol08iss01.cfm](http://AskJAN.org/publications/consultants-corner/vol08iss01.cfm)
- **Avoiding “The Waiting Place” After Requesting Medical Information**  
[AskJAN.org/blogs/jan/2016/05/avoiding-the-waiting-place-after-requesting-medical-information.cfm](http://AskJAN.org/blogs/jan/2016/05/avoiding-the-waiting-place-after-requesting-medical-information.cfm)
- **Changing a Supervisor as an Accommodation**  
[AskJAN.org/articles/Changing-a-Supervisor-as-an-Accommodation-under-the-ADA.cfm](http://AskJAN.org/articles/Changing-a-Supervisor-as-an-Accommodation-under-the-ADA.cfm)
- **Out with the Old, In with the New...Supervisor**  
[AskJAN.org/articles/Out-with-the-Old-and-In-with-the-New-Supervisor.cfm](http://AskJAN.org/articles/Out-with-the-Old-and-In-with-the-New-Supervisor.cfm)

## ASKJAN.ORG RESOURCES 3

- **A to Z by Topic: Parking**  
[AskJAN.org/topics/parking.cfm](https://askjan.org/topics/parking.cfm)
- **Service Animals and Allergies in the Workplace**  
[AskJAN.org/publications/consultants-corner/vol02iss01.cfm](https://askjan.org/publications/consultants-corner/vol02iss01.cfm)
- **Service Animals as Workplace Accommodations**  
[AskJAN.org/topics/servanim.cfm](https://askjan.org/topics/servanim.cfm)
- **A to Z by Topic: Telework**  
[AskJAN.org/topics/telework.cfm](https://askjan.org/topics/telework.cfm)
- **Telework Accommodation Request Flowchart**  
[AskJAN.org/articles/Telework-Accommodation-Request-Flowchart.cfm](https://askjan.org/articles/Telework-Accommodation-Request-Flowchart.cfm)

## EEOC RESOURCES

- **Reasonable Accommodation and Undue Hardship Under the ADA**  
[EEOC.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada](https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada)
- **Applying Performance and Conduct Standards to Employees with Disabilities**  
[EEOC.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities](https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities)
- **Employer-Provided Leave and the ADA**  
[EEOC.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act](https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act)



## EEOC RESOURCES 2

- **What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws**  
[EEOC.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws)
- **Work at Home/Telework as a Reasonable Accommodation**  
[EEOC.gov/laws/guidance/work-hometelework-reasonable-accommodation](https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation)
- **Enforcement Guidance: Disability-Related Inquiries and Medical Exams of Employees**  
[EEOC.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees](https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees)