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Reasonable Accommodations for Attorneys with Disabilities

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Reasonable Accommodations for Attorneys with Disabilities

Abstract

[From Introduction] Diversity in the legal profession has been the subject of much discussion and study for a number of years. A 2003 report by the U.S. Equal Employment Opportunity Commission (EEOC), entitled *Diversity in Law Firms*, notes the significant role that lawyers play in social, economic, and political life and the influence that minorities and women have been able to attain as their numbers in the legal profession increase.

This fact sheet addresses the application of the reasonable accommodation obligation to attorneys and their employers. Attorneys with disabilities, both as applicants and employees, may need a range of accommodations in order to apply for and perform many types of legal jobs. Most of the accommodations that attorneys with disabilities may need are similar to those needed by other professionals with disabilities who work in an office setting. Thus, much of the discussion in this document will apply to a wide range of administrative and professional jobs.

Keywords

federal, U.S., EEOC, Equal Employment Opportunity Commission, disability, lawyer, workplace, attorney, accommodations, employer, employment, request, corporation, job, performance, duties

Comments

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REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES

INTRODUCTION

Diversity in the legal profession has been the subject of much discussion and study for a number of years. A 2003 report by the U.S. Equal Employment Opportunity Commission (EEOC), entitled *Diversity in Law Firms*, notes the significant role that lawyers play in social, economic, and political life and the influence that minorities and women have been able to attain as their numbers in the legal profession increase.¹

To date, individuals with disabilities generally have not been a part of the discussion about diversity in the legal profession. Yet, access to the profession is important for people with disabilities for the same reasons it is important to minorities and women. While there is little reliable data on the representation of individuals with disabilities in the legal profession, anecdotal evidence suggests that lawyers with disabilities face many of the same barriers to employment that people with disabilities face in other jobs.

Among the problems lawyers with disabilities have cited is lack of access to reasonable accommodations. Title I of the Americans with Disabilities Act of 1990 (ADA) requires private and state and local government employers with 15 or more employees to provide "reasonable accommodation" to qualified applicants and employees with disabilities, unless doing so would cause an undue hardship.² Section 501 of the Rehabilitation Act of 1973 imposes the same requirements on federal agencies, regardless of the number of employees they have.³

This fact sheet addresses the application of the reasonable accommodation obligation to attorneys and their employers.⁴ Attorneys with disabilities, both as applicants and employees,⁵ may need a range of accommodations in order to apply for and perform many types of legal jobs. Most of the accommodations that attorneys with disabilities may need are similar to those needed by other professionals with disabilities who work in an office setting. Thus, much of the discussion in this document will apply to a wide range of administrative and professional jobs.

This fact sheet reviews many of the most common types of reasonable accommodations that lawyers with disabilities may need.⁶ Some of these accommodations, such as modified schedules and telecommuting, are often used by legal employers generally to attract and retain attorneys. Many legal employers have recognized the importance of flexibility to remain competitive in hiring the best attorneys. For these employers, providing reasonable accommodation will be an extension of this approach. In addition, providing reasonable accommodation for qualified attorneys with disabilities serves the larger goal of enabling legal employers to diversify their workforce.

A. General Information About Reasonable Accommodation

Reasonable accommodation refers to any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

There are three categories of reasonable accommodation:

- modifications to the job application process
- modifications to the work environment or to the manner or circumstances under which the position held or desired is customarily performed
- modifications that enable an employee with a disability to enjoy equal benefits and privileges of employment (e.g., employer-sponsored training or social events).⁷

Reasonable accommodations remove workplace barriers that would otherwise impede qualified attorneys with disabilities from competing for jobs, performing jobs, or gaining access to the benefits of employment. As with so many ADA issues, reasonable accommodation decisions should be made on a case-by-case basis after discussions that allow the employer to understand the nature of the accommodation(s) requested and the precise aspect of the application process, job, or benefit that poses a barrier. In some circumstances, an employer may also request documentation of the attorney's disability.

B. Misconceptions Concerning Attorneys with Disabilities and Reasonable Accommodation

Some employers assume that all attorneys with disabilities will need reasonable accommodation or that accommodations will be too costly or difficult to provide. In fact, many attorneys with disabilities will never need reasonable accommodation and most accommodations can be provided at little or no cost.⁸ Employers also may mistakenly assume that if a person needs an accommodation, she is likely to be unable to meet expected performance measures – for example, satisfying a minimum number of billable hours. Indeed, managers in professions that require long hours, specialized skills, and stressful working conditions sometimes assume that persons with disabilities, or certain types of disabilities, are not capable of performing such work, especially if they request reasonable accommodation.

Example 1: Juan, an associate with a medium-sized law firm, has a learning disorder (low processing speed). Juan has been working successfully at the firm for six months, but he is concerned that his disability is starting to create some difficulties in performing his job. Juan finds that his disability can cause him to become distracted but that he can fully compensate for this problem by dictating his thoughts into a tape recorder instead of writing or typing. Therefore, he requests that he be permitted to have a secretary transcribe his recordings. This accommodation enabled him to work successfully at his prior firm. Juan's supervisor, a partner, denies the request, telling Juan that, "in a law firm these days, a competent lawyer has to be able to draft his own documents, not dictate them to someone else." Juan leaves the firm soon thereafter.

The firm may have violated the ADA. Even if the partner had questions about Juan's competence, he should have considered that Juan had used this accommodation to work successfully at his prior firm. This would be a strong indication that the accommodation enables Juan to perform his job effectively. The ADA permits employers to discuss how accommodations work and to ensure that an employee is qualified to perform the essential functions – the primary job duties. Here, the partner never discussed his concerns with Juan or gave Juan an opportunity to respond. If this accommodation would have permitted Juan to perform his job, without causing undue hardship to the firm, then the partner's denial is a violation of the ADA.

The need for reasonable accommodation does not signal an inability to do the job. The purpose of workplace accommodations is to enable attorneys with disabilities to perform their jobs and meet the employer's performance standards.

C. Applicants and Reasonable Accommodation

Employers may need to provide reasonable accommodation for the application process. Common forms of reasonable accommodation needed may include using sign language interpreters and providing written materials in alternative formats, such as Braille or large print. Employers may find it helpful to note on applications that applicants may request reasonable accommodation for the hiring process and to specify a contact person.

Example 2: Using a relay service, Francesca, who is deaf, calls to schedule an interview with a law firm. She tells the secretary that she is deaf and will need a sign language interpreter. The secretary consults with the Human Resources Department which makes the arrangements.

Example 3: A law firm is interviewing several third year law students, one of whom uses a wheelchair. The firm practice is to take the students to lunch at a restaurant next door, but that restaurant has steps at the entryway. The managing partner instructs his secretary to change the reservation to an accessible restaurant down the street.⁹

Employers should consider whether their on-line recruiting and application systems afford access to the application process to individuals with disabilities who use specialized computer software (e.g., applicants with vision impairments who use screen reading or magnification software).

During an interview, employers may not generally ask applicants if they need reasonable accommodation to perform a job. However, if an employer knows a particular applicant has a disability, either because it is obvious or because the person has voluntarily revealed it, and the employer reasonably believes the disability might require accommodation to perform the job, the employer is entitled to ask the following two questions:

- Do you need reasonable accommodation to perform the job?
- If the answer is yes, what accommodation do you believe you need?¹⁰

Employers can assist applicants in assessing whether they will need an accommodation by making clear the job requirements, the duties to be performed, and the expected level of performance.

The need for reasonable accommodation is not a valid reason to reject an applicant.

D. Requesting Reasonable Accommodation

The ADA generally requires applicants and employees with disabilities to request reasonable accommodation, rather than requiring employers to ask if accommodation is needed.¹¹ A request is the beginning of the reasonable accommodation process, not the end. The employer may have questions about the nature of the impairment – , whether it is a “disability” – and the requested accommodation. Those questions are addressed as part of “the interactive process” that follows the request. The interactive process is discussed in section F.

To request a reasonable accommodation, an attorney must let the employer know that because of a medical condition he needs a change to the application process, to the job, or to a benefit of employment. An attorney does not have to mention the ADA, the Rehabilitation Act, or “reasonable accommodation” and does not have to provide evidence that the condition is a “disability” at the time the request is made. The attorney just has to make a “plain English” request for a change due to a medical condition. In some instances, a request for reasonable accommodation may come from a third party, for example a doctor’s note outlining work restrictions.

Some employers may not appear open to receiving requests for reasonable accommodation, and some lawyers with disabilities may be reluctant to ask for accommodation because they are concerned that the employer will perceive them as less competent – even when the employer has done nothing to suggest that it has such a perception. However, as in other workplace settings, employees in the legal profession who need accommodation must request it and employers should be prepared to respond appropriately.

Example 4: Omar, who has cerebral palsy, has recently been hired by a law firm. He finds that his physical limitations in using a computer keyboard, combined with the heavy workload and constant deadlines, are causing him to fall behind in his assignments. Omar is concerned about what the firm will think if he asks for a reasonable accommodation, but he talks to his supervising partner about voice-recognition software that would make it much easier to use a computer and therefore perform his work. The partner consults with the firm’s Information Technology department and the software is ordered and installed. Omar also receives specialized training in how to use the software.

Example 5: Mary, a senior attorney with a federal agency, has bipolar disorder. Her agency is aware of her disability and has provided an accommodation. Mary’s doctor has recently changed her medication, which is resulting in temporary problems with concentration. At the same time, Mary is trying to cope with a change in her workload, thus resulting in a significant increase in stress. Mary contemplates requesting a reasonable accommodation, such as temporarily altering her work hours or removing several marginal functions. But, because she is concerned that her employer will view her as unable to meet job requirements if she asks for too many accommodations, Mary decides not to ask for the additional accommodation.

Perhaps Mary can handle the change in medication, the changes in her workload, and the resulting increase in stress. However, if she cannot handle the stress and performance problems result, neither Mary nor her employer benefit. While it may be difficult for an attorney with a disability to ask for an accommodation, or multiple accommodations, it is better for both the attorney and the employer to deal with an accommodation request than to address performance problems that result from a failure to request a needed accommodation.

Employers can do a number of things to create a climate in which lawyers will request needed accommodation. For example:

- They can adopt policies and procedures on how requests for accommodation will be handled and ensure that these policies are well publicized and implemented.
- They can make sure that both employees and managers know that company policy supports full compliance with the ADA and the provision of reasonable accommodation.
- They can require adequate training of supervisors, managers, and human resources professionals on handling requests for accommodation and other requirements of the ADA.

E. When to Request a Reasonable Accommodation

Individuals with disabilities may request reasonable accommodation at any time during the application process or during their employment.¹² Some attorneys may choose to wait until they have a job offer before requesting a reasonable accommodation. Others may voluntarily raise the issue during the hiring process.¹³ And attorneys may develop disabilities during their employment, thus prompting a request for reasonable accommodation.

Example 6: Roger is General Counsel of a major corporation. He develops macular degeneration and, as a result, requests from the senior vice president the services of a reader as a reasonable accommodation. He explains that his eyesight no longer permits him to read and that he must review many documents and contracts. The senior vice president agrees to this request.

The ADA does not compel attorneys to ask for accommodations at a certain time. However, failure to request needed accommodation in a timely manner (or to accept a proffered accommodation) could affect job performance and result in discipline or termination based on poor performance or conduct.¹⁴

Example 7: An attorney at a nonprofit organization recognizes soon after she begins working that she is having difficulty following conversations at meetings because of her deteriorating hearing. While the attorney uses a hearing aid, it only helps her when talking directly to one person and not in a large room where many people participate in a discussion. The attorney believes that she would be able to hear if the employer provided a portable assistive listening device. The attorney brings the situation to her supervisor's attention and explains that a simple assistive listening system would include an FM transmitter and microphone that could be placed at the center of a conference table and an FM receiver and headset that she would wear. The system would amplify speakers' voices over the headset without affecting the way in which other meeting participants would hear the conversation. The employer provides the reasonable accommodation and the attorney now performs all of her job duties successfully.

Example 8: A county government attorney chooses not to disclose her hidden disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels the attorney about her deficiencies, but the problems persist. The supervisor warns that if her work does not show improvement within the next two months, she will receive a written warning. At this point, the attorney discloses her disability and asks for reasonable accommodation. The supervisor should discuss the request and how the proposed accommodation will help improve the attorney's performance. The two-month period to evaluate the attorney's performance should be suspended pending a decision on her request for reasonable accommodation.

Example 9: Same facts as in Example 8, but the supervisor's response to the request for reasonable accommodation is to deny it immediately, explaining, "You should not have waited until problems developed to tell me about your disability." The attorney, however, did not realize that she had any serious performance problems until her supervisor brought them to her attention, thus prompting her to request accommodation. The supervisor should not have summarily dismissed the request but instead should have discussed it, gathered more information if necessary, and determined whether a reasonable accommodation for a disability was needed. Then, as in Example 8, the two-month period could commence to measure whether the attorney's performance improved.

Example 10: An attorney with a small firm has a learning disability and does not request accommodation during the application process or when he begins working. Because the attorney had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations. Performance problems soon arise, and the attorney's supervising partner brings them to the attorney's attention. He tries to solve the problems on his own, but they persist and he is counseled on improving his performance. The firm follows its policy on counseling and disciplining attorneys who are failing to meet minimum requirements, but these efforts are unsuccessful. During this entire period, when the attorney is receiving counseling and warnings, he does not ask for reasonable accommodation. However, when the partner meets with the attorney to fire him, then the attorney reveals a disability and requests accommodation.

The attorney's request for reasonable accommodation is too late. Reasonable accommodation is always prospective. Therefore, an employer is not required to excuse performance problems that occurred prior to the accommodation request. While it may be understandable that the attorney's prior experience made him reluctant to ask for accommodation, his failure to do so was a mistake. The firm correctly responded to the attorney's performance problems and gave him sufficient opportunity to make changes and request accommodation. Once an employer makes an employee aware of performance problems, it is the employee's responsibility to request any accommodations to address and rectify them.

F. Discussing a Request for Reasonable Accommodation: The Interactive Process

The request for accommodation is the first step in an informal, interactive process between the attorney and the employer.¹⁵ This process will generally focus on two issues: whether the attorney has a "disability" as defined by the ADA and why the requested accommodation is needed. In many instances, a simple conversation between the employer and the attorney will suffice to clarify and resolve these issues. However, when the disability and/or the need for accommodation are not obvious, the employer may ask the attorney for additional information. The employer may also seek, if necessary, reasonable documentation from an appropriate health care or vocational rehabilitation professional about the attorney's disability and functional limitations.¹⁶ The employer is entitled to know that the attorney has a covered "disability" for which he needs a reasonable accommodation. But, the employer is not entitled to obtain all of an attorney's medical records, since they will contain far more information than is necessary to determine whether a "disability" exists and why there is a need for reasonable accommodation.

An employer that requests documentation should specify what types of information it needs regarding the disability, its functional limitations, and/or the need for reasonable accommodation. In some instances, the employer may obtain needed information by asking the attorney to sign a limited release allowing the employer to submit a list of specific questions to the health care or rehabilitation provider, or by requesting that the attorney submit the questions to the provider directly. These questions should avoid legal terminology and relate only to the condition for which the attorney is requesting accommodation and the job-related barriers she is experiencing. Asking the attorney or her health care provider vague questions increases the likelihood of receiving vague answers.

Unproductive approach: Does Jane Doe's condition substantially limit a major life activity?

Better approach: Please specify all activities that are limited by Jane Doe's asthma. For example, does Ms. Doe's asthma affect her ability to breathe? To walk? Any other activities? For all activities affected by Ms. Doe's asthma, please indicate: 1) the degree of limitation (e.g., under certain specified conditions she can have an asthma attack that will result in severe difficulty breathing and require that she go to the hospital; Ms. Doe experiences minor breathing difficulties during spring and fall allergy seasons) and 2) the frequency with which these limitations occur (e.g., constantly, every few weeks, every two months, only during certain seasons, when confronted with high levels of stress).

The employer should be clear about the purpose for asking such questions, i.e., a specific question should be designed to elicit information to enable the employer to determine if the attorney has an ADA "disability," why a reasonable accommodation is needed, or other possible accommodations that would meet the attorney's needs. Clearly, the employer must understand the nature of the problem, how it is connected to the disability, and how a suggested accommodation would resolve the problem before she can assess what accommodation might be appropriate.¹⁷

Example 11: Rebecca, an in-house attorney, asks her supervisor to make several changes to accommodate her chronic fatigue syndrome. She requests that she be allowed to arrive at work at 10:00 a.m. (and correspondingly work later in the evening), that meetings not be scheduled before 10:00 a.m., if possible, and that she be given a reclining chair in her office. The general starting time is 8:30 a.m. and no attorneys have reclining chairs. The employer asks for a more specific explanation regarding the connection between the chronic fatigue syndrome and the accommodations requested. The attorney explains that she has a condition closely associated with chronic fatigue syndrome which results in low blood pressure. This, in turn, results in lightheadedness, and she occasionally faints. After such episodes, she feels tired and groggy and experiences problems concentrating for at least a couple of hours. The low blood pressure is more likely to occur during the early morning hours and after prolonged periods of sitting. Rebecca explains that the accommodations she is requesting are designed to enable her to work a full day, uninterrupted by any symptoms, by starting work at 10:00 a.m. and by avoiding the need to sit or stand for prolonged periods. A reclining chair would enable her to avoid sitting upright, thus preventing the onset of the low blood pressure and enabling her to continue working. Since Rebecca's job involves numerous telephone conversations and significant amounts of reading, she can use the reclining chair when her symptoms prevent sitting at her desk. Her request to schedule meetings at a later hour, where possible, would enable her to avoid missing important work.

The employer requests documentation to substantiate Rebecca's medical condition, the symptoms she experiences, and the need for the accommodations she identifies. The doctor provides information that corroborates Rebecca's description of her chronic fatigue syndrome and low blood pressure, that explains how reclining, as opposed to sitting, can avoid the onset of low blood pressure, and that concludes that Rebecca should be able to work a full day with these accommodations. Assuming the lawyer has a "disability," and absent any undue hardship, the employer must provide these accommodations or alternative ones that address her limitations and enable her to perform the essential functions of her position.

In some instances, it will immediately be clear whether a proposed accommodation will be effective. In other instances, an employer may have to consider more carefully whether an accommodation will work. The attorney should inform his employer whether he has used a proposed accommodation before – for example, at a previous job or in school – and if so, how well it worked.

Changes in the disability or changes to a job may require an accommodation that the attorney has never before used. When this is the case, an employer should not simply dismiss the possibility that an accommodation may work. Depending on the type of accommodation, an employer in this situation may wish to propose providing the accommodation on a trial basis to determine its effectiveness.

G. Types of Reasonable Accommodations

Reasonable accommodations for attorneys may take many forms. Common examples¹⁸ include:

- making existing workplaces accessible (e.g., installing a ramp, widening a doorway, or reconfiguring a workspace)
- job restructuring (e.g., removing a marginal function)¹⁹
- part-time or modified work schedules
- unpaid leave once an employee has exhausted all employer-provided leave (e.g., vacation leave, sick leave, personal days)
- acquiring or modifying equipment (e.g., a TTY that would enable a deaf attorney to use a telephone relay service, or an assistive listening device that an attorney who is hard of hearing can use at a meeting)
- modifying workplace policies
- providing tests or training materials in an alternative format, such as Braille or large print or on audiotape
- providing qualified readers or sign language interpreters
- permitting telework, even if the employer does not have an established telework program or the employee with a disability has not met all the prerequisites to qualify for an existing telework program (e.g., length of service)²⁰
- changing the methods of supervision (e.g., supervising partner provides associate with critiques of his work through e-mail rather than face-to-face meetings)²¹
- reassignment to a vacant position.²²

This list of accommodations is not exhaustive. For example, lawyers with disabilities affecting arm strength and the ability to pull and push might require automatic door openers. A lawyer with a vision impairment may need a screen reading program for a computer, and a lawyer whose disability prevents typing may need voice-recognition software.

Example 12: Deborah required extensive leave due to leukemia. While the firm granted the leave, her

supervising partner wants to give her an unsatisfactory review because she did not bill the required number of hours due to her use of extended leave. Penalizing Deborah with a poor review would be a violation of the ADA because it would render the leave an ineffective accommodation and would constitute retaliation for her use of a reasonable accommodation.²³ The firm should evaluate Deborah's performance taking into account her productivity for the months she did work. It might also choose to delay her evaluation for several months or do an interim evaluation and allow Deborah to resume a normal workload, thus enabling the firm to do a more accurate review of her work.

Example 13: Jonathan, a trial attorney working for a federal agency, asks for a reassignment to a less-demanding position because he finds the long hours and constant deadlines increasingly difficult to handle due to Parkinson's disease. The agency has a vacancy for an attorney to draft agency policy directives and respond to legal inquiries from agency field offices and the public. The job does not require the same long hours as his current litigation position and he would have more control over the pace of work. Since Jonathan meets the qualifications for this position and the position is at the same grade level as his current job, the agency must reassign him unless it can show undue hardship.

Example 14: Emily has lymphedema which causes a buildup of lymphatic fluids in her right leg. The swelling is painful and makes it very difficult to walk more than very short distances, thus affecting Emily's ability to commute to work. She provides documentation from her doctor confirming that the lymphedema is a chronic condition that has worsened in the last few months. The doctor does not expect any improvement in the next several months. As a reasonable accommodation, Emily requests that she be allowed to work from home three days a week. Much of her work involves writing and reviewing documents which she can do using a computer. She also can communicate with clients and colleagues through use of the phone and e-mail. The doctor's letter explains that the three days working at home will ease the pain and make it tolerable for Emily to commute the other two days. Emily and her supervising partner work out an appropriate schedule and methods for ensuring that work is completed in a timely manner. Emily also agrees that, with notice, she can switch days working in the office if she needs to attend a meeting. The partner agrees to this schedule for four months as long as Emily's condition does not improve. After four months, the partner will request an update on Emily's condition to determine if she still requires telework as a reasonable accommodation or any modification to this arrangement due to any changes in her condition.

Sometimes employers are quick to provide items that they expect a person with a disability will need, while slow to grant requests for unexpected things. If employers are uncertain why something is needed, they should ask. Often, the unexpected items may be the easiest to provide (e.g., special office supplies may be necessary because of a disability, such as certain types of pens for attorneys with limited use of their hands).

In some situations reasonable accommodation is needed to make the working environment more accessible to attorneys with disabilities. For example, an employer might have to install flashing emergency lights or provide a personal digital assistant (PDA) to notify an attorney who is deaf of an emergency situation. Employers also might need to shift furniture to make it easier for an attorney who uses a wheelchair to navigate through the office.

While most forms of reasonable accommodation cost little or nothing to provide, some forms of accommodation may entail higher expenses. Before investing money for more expensive accommodations, the employer and the attorney may wish to explore whether a demonstration of the accommodation can be arranged. If an attorney has used an accommodation before, and can give a detailed explanation of how it will work, setting up a demonstration may not be necessary.

Employers that are concerned about an accommodation's cost may choose to explore the possibility that an accommodation can be provided through vocational rehabilitation agencies or other federal or state programs. However, an employer who can pay the cost of a reasonable accommodation without undue hardship cannot refuse to provide an accommodation because it cannot be obtained through some other source.²⁴

H. Actions Not Required as Reasonable Accommodation

Certain actions are not required as reasonable accommodations.

- Employers are never required to remove an "essential function" – i.e., a fundamental job duty. An attorney with a disability must be able to perform the essential functions of his position, with or without reasonable accommodation. Conducting legal research, writing motions and briefs, counseling clients, teaching a law course, drafting regulations and opinion letters, presenting an argument before an appellate court, drafting testimony for a legislative body, and conducting depositions and trials are examples of what may be essential functions for many legal positions.

Employers should be careful to distinguish essential functions from marginal functions -- duties that are tangential or secondary to the primary job duties. While essential functions never have to be removed from a position, marginal functions may have to be removed as a reasonable accommodation if a person cannot perform them because of a disability.

Example 15: A senior associate with multiple sclerosis practices trusts and estates law. The essential functions of her position include drafting wills, providing representation at probate hearings, and counseling clients on complex tax implications related to the transfer of property. In order to conserve the limited energy that results from her disability, the attorney requests that her employer no longer require that she serve on the firm's hiring committee. The attorney and firm determine that this is a marginal function and should be eliminated so that she can focus her limited energy on performing the essential functions.

- Employers are not required to lower or eliminate production standards for essential functions, either quantitative or qualitative, that are uniformly applied. For example, a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement.

Employers should make clear their expectations on production standards, the work that must be produced, and any timetables for producing it. If problems arise in any of these areas, supervisors should immediately discuss them with the attorney with a disability just as they would with any other attorney. On the other hand, if an attorney recognizes that a workplace problem is connected to a disability, the attorney should raise the issue of reasonable accommodation to correct the problem, thus enabling the attorney to meet the employer's expectations.²⁵

- Employers are not required to change an attorney's supervisor as a reasonable accommodation.²⁶ However, nothing in the ADA would prevent an employer and attorney from agreeing to a supervisory change for reasons related to a disability.
- Employers are not required to withhold discipline warranted by poor performance or conduct.²⁷ (See Example 10.)

- Employers do not have to provide “personal use” items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an attorney with a wheelchair, hearing aids, or similar devices if they are also needed outside of the workplace.

I. Management Should Respond Quickly to Requests for Accommodation

After receiving a request for reasonable accommodation, an employer should move expeditiously to respond to it, seeking any additional information that is needed, and make a determination.²⁸ In some cases, there will be an urgent need to make a determination.

Example 16: A law firm’s mergers and acquisitions department announces on Monday that all attorneys are expected to attend a staff meeting on Wednesday. A deaf attorney requests a sign language interpreter. The firm must move quickly to provide an interpreter for the meeting.

In other situations, time may not be as critical, but it is always best to make responding to a request a priority. This is especially true when there may be a need to obtain documentation on the disability and/or need for the accommodation or to consult with outside sources on possible accommodations. Employers should keep the attorney informed of developments and explain any delays in processing the request or providing the accommodation. Any unnecessary delay in responding to a request for reasonable accommodation could result in a violation of the ADA.

J. Management May Choose Between Effective Accommodations

In many situations, more than one possible accommodation may meet the needs of the attorney with a disability. The ADA requires that any accommodation chosen be reasonable and effective in eliminating the workplace barrier.²⁹ While the employer should give serious consideration to a specific accommodation requested by an attorney, the employer is not required to provide that accommodation. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective in eliminating the workplace barrier.³⁰ This means an employer is free to choose a less expensive or less burdensome alternative if it will still be effective in meeting the attorney’s needs. If an attorney has problems with an accommodation suggested by management, she should explain why it is ineffective, or less effective, in eliminating a workplace barrier, and not merely object to the alternative accommodation.³¹

Example 17: A deaf summer associate will accompany a litigator to an all-day deposition. He requests two sign language interpreters. The law firm suggests that one interpreter should be sufficient. The associate explains that a sign language interpreter cannot interpret for several consecutive hours. In order to avoid calling frequent breaks in the deposition, the associate believes that two interpreters are needed. The firm agrees and makes the arrangements.

Example 18: A law professor with a visual disability finds that the glare created from light coming through her office window makes it very difficult to read. She explains the problem to the head of her department and requests that she be moved to an office without a window. While such an office is available, the department head asks if curtains or shades would solve the problem. The professor agrees that they would and the department head makes arrangements for shades to be installed rather than moving the professor to a new office.

Sometimes the goal in the interactive process may be to identify several types of effective accommodations, to assess their relative merits, to get the attorney’s input on what he prefers and why, and then to have the employer make a decision. While employees often have suggestions for possible accommodations, employers should be actively involved in proposing ideas based on a thorough understanding of the workplace barrier. The employer may seek assistance from a variety of sources on possible accommodations, including the Job Accommodation Network, Disability and Business Technical Assistance Centers, disability organizations, and the EEOC.³²

K. Employers May Need to Provide More Than One Accommodation

Sometimes an attorney may need only one accommodation, while in other cases she may need two or more accommodations.³³ The need for reasonable accommodation also can change over time, particularly for degenerative disabilities.³⁴ Attorneys with disabilities should not assume that since they asked for accommodation once, the employer knows when a different accommodation is needed. To the contrary, attorneys should make a new request if a current accommodation no longer works or if an additional accommodation is required. If it is unclear why a new accommodation is needed, an employer should again engage in the interactive process. Generally, an employer should not ask for additional information to establish that the attorney has an ADA “disability” unless previous information suggested that the disability or its limitations would be of limited duration.³⁵

Example 19: A senior associate has multiple sclerosis. As a reasonable accommodation, he is allowed to work a flexible schedule as long as he coordinates his hours with other attorneys in his practice area. He also is allowed to work from home when his disability flares up and makes commuting to work more difficult. The attorney’s eyesight is beginning to deteriorate severely as a result of the disability. He raises the issue of his failing eyesight with the firm’s human resources department, which handles most accommodation requests, and asks if he might be assigned additional secretarial help. The human resources manager does some research and learns about equipment that he believes may enable the attorney to continue reviewing and drafting documents on a computer, including software that will read information on the screen and an optical scanner that can be used to convert printed material into an electronic format. The attorney agrees that this equipment should meet his needs. The firm purchases the equipment and provides the attorney with appropriate training on how to use it.

It is always a good idea for an employer to consult with the attorney after providing a reasonable accommodation to ensure that it is working as expected. Sometimes, despite everyone’s best intentions, a reasonable accommodation does not work. In that case, the employer should consider whether there is another accommodation that would work and would not cause undue hardship.³⁶

L. Thinking Ahead Can Avoid Future Problems

Sometimes employers make major changes in the work environment that affect all employees but may have a particular impact on attorneys with disabilities, such as changes to information technology or relocation of physical facilities. Consulting with an attorney with a disability before making such changes can avoid problems and save money.

Example 20: A law firm intends to move into a building that is under construction. The firm has a mid-level associate who uses a wheelchair. The firm consults with the attorney about what questions it should ask the building owner and its architectural firm to ensure accessibility. The attorney provides a list of items addressing areas such as the entry to the building, the elevators, the restrooms, the parking lot, the stairwells (to ensure they are designed appropriately for emergency evacuation), and the firm's own space. The firm discusses the attorney's concerns with the building owners and the architectural firm, and continues to consult with the associate throughout the building process to ensure the new space is accessible. Involving the employee with a disability helps ensure compliance with Title III of the ADA,³⁷ which requires that newly constructed buildings meet certain accessibility standards. Moreover, the employee may require additional adaptations not mandated by Title III, but nonetheless required as a reasonable accommodation (absent undue hardship) under Title I. Ensuring that accessibility features are built into the new structure avoids the difficult and potentially more expensive situation of considering retrofits after the building's completion.

Employers also should include employees with disabilities when reviewing or making changes to emergency protocols.³⁸ This includes ensuring that employees with certain disabilities are promptly made aware of emergency situations (e.g., installing flashing lights in addition to alarm bells) and that appropriate plans are in place for the evacuation of anyone with a mobility impairment.

M. Reasonable Accommodation to Gain Equal Access to Benefits of Employment

The reasonable accommodation obligation extends to ensuring equal access to the "benefits and privileges of employment."³⁹ Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training that can lead to employee advancement (whether provided by the employer or an outside entity);⁴⁰ (2) services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation); and (3) social and professional functions (e.g., parties to celebrate retirements and birthdays, company retreats, and outings to restaurants, sporting events, or other entertainment activities). Benefits and privileges of employment also include access to information communicated in the workplace, such as through e-mail, public address systems, or during meetings, whether or not that information relates directly to performance of an attorney's essential job functions.

Example 21: A corporation provides parking for its employees. Parking spaces are unassigned. An attorney has severe emphysema and asks for a parking space next to the door. His disability requires constant use of a portable oxygen tank which, in turn, restricts him from walking even relatively short distances. The attorney is seeking an accommodation to use the employer-provided benefit. Therefore, the employer should reserve a parking space next to the door for use by the attorney as a reasonable accommodation, if there is no undue hardship, in order to provide him equal access to the parking benefit.

An employer's obligation to make a benefit accessible with reasonable accommodation does not require the employer to provide an alternative benefit.⁴¹

Example 22: A corporation subsidizes paid parking for its employees. A lawyer with epilepsy does not drive because of her disability. She requests that the employer provide her with the cash equivalent of the parking subsidy as a reasonable accommodation so that she can use the money to pay for her transportation. The employer does not have to grant this request because the attorney is asking the employer to provide her with a different benefit – subsidized use of public transportation. The employer has the right to choose to provide paid parking while not providing subsidies for use of public transportation. The fact that the lawyer's disability does not allow her to make use of the paid parking does not require the employer to provide her with a different benefit.

N. Limitation on Providing Reasonable Accommodation: Undue Hardship

An employer has no obligation to provide a specific form of reasonable accommodation if it will cause "undue hardship," i.e., significant difficulty or expense.⁴² Employers should not assume that because one accommodation would result in undue hardship, there would be undue hardship in providing any accommodation. Undue hardship must be determined on a case-by-case basis, taking into consideration the following factors:

- the nature and cost of the accommodation needed
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation
- the impact of the accommodation on the operation of the facility.⁴³

Example 23: A law firm based in New York has offices in four other cities. The firm has an executive committee comprised of partners from each office that sets salaries, establishes hiring policies, determines billing rates, and makes partnership decisions. The Atlanta office is considering hiring a blind attorney who has requested the following: a screen reader computer program that converts what is on the screen to speech; a computer program that scans written text and reads it aloud; a Braille printer; and a screen magnification program. In determining whether undue hardship exists, the Atlanta office must look at not only its resources but the resources of the entire firm. The Atlanta office is not an independent entity but maintains an integrated administrative and fiscal relationship with the head office in New York and the other offices; therefore, the resources of the entire firm must be taken into account in assessing undue hardship.

If the employer determines that the cost of a reasonable accommodation constitutes an undue hardship, it should consider whether some or all of the cost can be offset. In some instances, state rehabilitation agencies or disability organizations may provide certain accommodations at little or no cost.⁴⁴ An employer should also determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.⁴⁵ But, an employer cannot claim undue hardship solely because it cannot obtain a reasonable accommodation at little or no cost, or because it is ineligible for a tax credit or deduction.

An employer cannot claim undue hardship based on employees' fears or prejudices about the attorney's disability. Similarly, employers cannot base an undue hardship decision on the fears, prejudices, or preferences of clients or the public.⁴⁶ However, undue hardship may exist if a particular form of reasonable accommodation actually disrupts the ability of other attorneys and employees to do their jobs.

Example 24: Rachel, a city government attorney, seeks and is granted a modified work schedule because of her disability. Rachel's job requires that she work closely with department attorneys as well as other employees. Her new schedule means she often is not available when other attorneys and employees need her assistance, thus resulting in missed deadlines and incomplete work. Additionally, other attorneys are handling more requests for assistance because of Rachel's new schedule. Rachel's new schedule is causing an undue hardship on the agency because it adversely affects the ability of other employees to perform their essential functions in a timely manner.

O. Legal Enforcement

Private Sector/State and Local Governments

An attorney who believes that his employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a "charge of discrimination" with the EEOC. The charge must be filed by mail or in person with a local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.⁴⁷

The EEOC will notify the employer of the charge and may ask for a response and supporting information. Before a formal investigation, the EEOC may select the charge for its mediation program. Participation in mediation is free, voluntary, and confidential. Mediation may provide the parties with a quicker resolution of the case.

If mediation is not pursued or is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination occurred. If reasonable cause is found, the EEOC will then try to resolve the charge. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a lawsuit. A charging party also can request a notice of a "right to sue" from the EEOC 180 days after the charge first was filed with the EEOC.

For a detailed description of the process, please refer to the EEOC website at http://www.eeoc.gov/charge/overview_charge_filing.html.

Federal Government

An attorney who believes that her employment rights have been violated on the basis of disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual may choose to participate in either counseling or in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days and ADR within 90 days. At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

In cases where a hearing is requested, the administrative judge issues a decision within 180 days. Where discrimination is not found, the agency must issue a final order before further action can be taken by the complainant. The complainant may appeal to EEOC an agency's final action within 30 days of receipt. Where discrimination is found, the administrative judge orders appropriate relief. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency. If the agency issues an order notifying the complainant that the agency will not fully implement the decision of the administrative judge, the agency also must file an appeal at the same time.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at <http://www.eeoc.gov/facts/fs-fed.html>.

Endnotes

¹ See <http://www.eeoc.gov/stats/reports/diversitylaw/index.html#intro>.

² See 42 U.S.C. §§ 12111(2) and (5), 12112(b)(5)(A); 29 C.F.R. §§ 1630.2(b), (d) and (e), 1630.9(a). Pursuant to Title II of the ADA, state and local government agencies with fewer than 15 employees must follow the same employment discrimination rules as found under Title I. 28 C.F.R. § 35.140(b)(2).

³ 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b). This document will use the term "ADA" to refer to both the Americans with Disabilities Act and the Rehabilitation Act.

⁴ In 1999, the U.S. Equal Employment Opportunity Commission (EEOC) issued a Comprehensive Enforcement Guidance addressing many legal, policy, and practical concerns involving the "reasonable accommodation" obligation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (rev. Oct. 17, 2002) at www.eeoc.gov/policy/docs/accommodation.html [hereinafter "Reasonable Accommodation"]. Readers who want more specific information about the topics discussed in this Fact Sheet should consult the Guidance.

In addition to the Guidance, the EEOC has published documents on many other ADA-related subjects, including specific disabilities or types of disabilities (e.g., psychiatric disabilities, cancer, and diabetes) and the rules regarding when employers may require applicants and employees to answer disability-related questions and undergo medical examinations. The ADA, the implementing regulations and its appendix, and all of the EEOC's ADA-related documents cited in this fact sheet (as well as others) can be found at EEOC's website, www.eeoc.gov.

⁵ Under some circumstances, partners may be considered employees entitled to the protection of the employment anti-discrimination laws. The position title is not determinative. Rather, whether a partner is considered an employee depends on the level of control the organization has over the partner. See *Clackamas v. Gastroenterology Assocs, P.C. v. Wells*, 538 U.S. 440, 448-51 (2003).

⁶ This fact sheet is not intended to be a basic primer on the legal requirements regarding reasonable accommodation; nor will it provide a full discussion of many important ADA terms and concepts, such as the definitions of "disability," "qualified," and "essential functions." See 42 U.S.C. §§ 2102(2), 12111(8); 29 C.F.R. §1630.2(g)-(n); 29 C.F.R. pt. 1630 app. §§ 1630.2(g)-(n). More information on these terms and concepts can be found in the appendix to the ADA regulations and EEOC's ADA-related documents referred to in note 4, supra. See also Section H, infra, "Actions Not Required as Reasonable Accommodation," for examples of possible essential functions of an attorney.

⁷ 29 C.F.R. § 1630.2(o)(1)(i-iii) (emphasis added).

⁸ The Job Accommodation Network (JAN) provides information about the costs of reasonable accommodation at www.jan.wvu.edu/portals/faqs.html#fund and www.jan.wvu.edu/media/LowCostHighImpact.pdf.

⁹ See section M, infra, "Reasonable Accommodation To Gain Equal Access To Benefits of Employment."

¹⁰ See pages 6-8 in the EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995) at www.eeoc.gov/policy/docs/preemp.html. While employers may ask a specific applicant with a disability about the need for reasonable accommodation, the employer may not ask questions about the disability (e.g., how long has the applicant had the disability, what treatment does he receive, what is the prognosis). Such questions are prohibited prior to making a job offer.

¹¹ See Questions 1-3 in "Reasonable Accommodation," supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004); Estades-Negrón v. Associates Corp. of N. Am., 377 F.3d 58 (1st Cir. 2004); Russell v. TG Mo. Corp., 340 F.3d 735 (8th Cir. 2003); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999); and Taylor v. Principal Fin. Group, 93 F.3d 155 (1996 5th Cir.).

¹² See Question 4 in "Reasonable Accommodation," supra note 4.

¹³ See Questions 5 and 16 in the EEOC Fact Sheet on Job Applicants and the Americans with Disabilities Act (2003) at www.eeoc.gov/facts/jobapplicant.html.

¹⁴ See 29 C.F.R. § 1630.9(d). See, e.g., Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003); Conneen v. MBNA Am. Bank N.A., 334 F.3d 318 (3d Cir. 2003). But see Fenney v. Dakota Minn. & E.R.R. Co., 327 F.3d 707 (8th Cir. 2003) (employer's motion for summary judgment denied where plaintiff showed that his repeated requests for reasonable accommodation were ignored, thus causing him to take a demotion to avoid termination).

¹⁵ 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9. See also Question 5 in "Reasonable Accommodation," supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Bartee v. Michelin N. Am., Inc., 374 F.3d 906 (10th Cir. 2004); Brown v. Tucson, 336 F.3d 1181 (9th Cir. 2003); EEOC v. United Parcel Serv., Inc., 249 F.3d 557 (6th Cir. 2001); Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

¹⁶ See Questions 6-8 in "Reasonable Accommodation," supra note 4. See e.g., Templeton v. Neodata Serv., Inc., 162 F.3d 617 (10th Cir. 1998).

¹⁷ See Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

¹⁸ 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); 29 C.F.R. pt. 1630 app. § 1630.2(o). See also "Reasonable Accommodation," supra note 4, which provides detailed information on a number of forms of reasonable accommodation, including job restructuring, leave, part-time or modified work schedules, modifying workplace policies, and reassignment.

¹⁹ See Section H, "Actions Not Required as Reasonable Accommodation," for information on the difference between essential and marginal functions.

²⁰ See Question 34 in "Reasonable Accommodation," supra note 4; see also EEOC Fact Sheet on Telework as a Reasonable Accommodation (2003) at www.eeoc.gov/facts/telework.html. See, e.g., Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004); Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

²¹ See Question 33 in "Reasonable Accommodation," supra note 4; see also Question 26 in EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997) at www.eeoc.gov/policy/docs/psych.html.

²² See section on 'Reassignment' in "Reasonable Accommodation," supra note 4. See, e.g., Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6 (1st Cir. 2004); Hedrick v. W. Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004); Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004); Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001).

²³ See Criado v. IBM, 145 F.3d 437, 444-45 (1st Cir. 1998); see also Question 19 in "Reasonable Accommodation," supra note 4.

²⁴ For more information on "undue hardship," see section N, infra, "Limitation on Providing Reasonable Accommodation: Undue Hardship."

²⁵ See section E, supra, "When to Request a Reasonable Accommodation."

²⁶ See Question 33 in "Reasonable Accommodation," supra note 4; but see Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999) (contrary to EEOC's Reasonable Accommodation Guidance, it is not *per se* unreasonable to change an employee's supervisor but there is a presumption that such an accommodation is unreasonable).

²⁷ See Questions 35-36 in "Reasonable Accommodation," supra note 4. Cf. Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000) (court upholds termination because plaintiff never requested reasonable accommodation despite repeated warnings about excessive absenteeism); Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

²⁸ See Question 10 in "Reasonable Accommodation," supra note 4.

²⁹ See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

³⁰ See Question 9 in "Reasonable Accommodation," supra note 4. See, e.g., Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003).

³¹ See, e.g., Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Webster v. Methodist Occupational Health Ctrs., Inc., 141 F.3d 1236 (7th Cir. 1998); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997).

³² Contact information for the Job Accommodation Network and the Disability and Business Technical Assistance Centers, as well as additional organizations that can assist in identifying accommodations, can be found in "Reasonable Accommodation," supra note 4. Individuals also may find helpful information on disability organizations and other resources in the EEOC's Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act/Resource Directory (1992), available free of charge by calling 1-800-669-3362 (Voice) or 1-800-800-3302 (TDD)

[hereinafter "ADA Technical Assistance Manual"]. To discuss possible forms of reasonable accommodation, individuals and employers may call the EEOC at 202-663-4691.

³³ See, e.g., Ralph v. Lucent Tech., Inc., 135 F.3d 166 (1st Cir. 1998).

³⁴ Cf. Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

³⁵ See Question 8, Example B in "Reasonable Accommodation," supra note 4.

³⁶ See Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

³⁷ 42 U.S.C. § 12183.

³⁸ See EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (2001) at www.eeoc.gov/facts/evacuation.html; "Preparing the Workplace for Everyone: Accounting for the Needs of People with Disabilities" at www.dol.gov/odep/pubs/ep/preparing/htm (although this is a blueprint for federal agencies on adopting and implementing emergency plans that address the needs of people with disabilities, most of the information is relevant to other types of employers). Employers also may find helpful information from the National Organization on Disability's Emergency Preparedness Initiative, www.nod.org.

³⁹ See footnotes 14 and 15 and accompanying text in "Reasonable Accommodation," supra note 4.

⁴⁰ See id. at Question 15.

⁴¹ Cf. Alexander v. Choate, 469 U.S. 287 (1985) (Tennessee's reduction in annual inpatient hospital coverage cannot be the basis of a disparate impact claim under §504 of the Rehabilitation Act because the statute does not require a state to alter its definition of a benefit to meet the medical reality confronting a disabled individual); see also section 7.12 in the "ADA Technical Assistance Manual," supra note 32 (an employer does not have to eliminate a benefit because an employee with a disability cannot use it); section (B) ("What is a Disability-Based Distinction") in EEOC Interim Enforcement Guidance on the application of the ADA to disability-based distinctions in employer provided health insurance (1993) at www.eeoc.gov/policy/docs/health.html (health insurance distinctions that are not based on disability and that apply to all insured employees do not violate the ADA even when the definition of a particular benefit may have an adverse impact on certain individuals with disabilities); Question 5 in EEOC Questions and Answers About the Association Provision of the ADA (2005) at www.eeoc.gov/facts/association_ada.html (same).

⁴² 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. pt. 1630 app. § 1630.2(p); see also section on 'Undue Hardship Issues' in "Reasonable Accommodation," supra note 4.

⁴³ 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2); 29 C.F.R. pt. 1630 app. § 1630.2(p).

⁴⁴ The Job Accommodation Network (JAN) website, www.jan.wvu.edu/links/funding.htm, provides information on possible funding sources or sources to obtain certain forms of accommodations. Employers may wish to check if any of these sources might be helpful, although many are limited to certain locations and serving certain clientele (e.g., low income individuals).

⁴⁵ Two tax incentives may be available to certain businesses to help cover the cost of making access improvements for persons with disabilities. The first is a tax deduction that can be used for architectural and transportation adaptations. The second is a tax credit for small businesses that can be used for architectural adaptations, equipment acquisitions, and services such as sign language interpreters. More information can be obtained at www.ada.gov/taxpack.html and www.irs.gov.

⁴⁶ See 29 C.F.R. pt. 1630 app. § 1630.15(d).

⁴⁷ Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will "dual file" the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will "dual file" the charge with the FEPA but usually will retain the charge for investigation.

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