



## **Addressing Reasonable Accommodations – One Question at a Time**

Employers are required under the Americans with Disabilities Act (ADA) to provide disabled employees with reasonable accommodations in the workplace. Simply put, this means employers cannot discriminate against an employee because of a disability. In fact, it's the duty of the employer to help provide an accessible working environment that allows a disabled employee the same opportunities to succeed and advance just as employees without disabilities.

There is a wide range of perceptions and misconceptions of what a disability is and what must be done to accommodate a person with a disability. At Guinasso Law we're addressing these issues through a typical Q&A with fictitious employer, Widgets and Services, Inc.

**WSI:** "Hi, this is HR Director from WSI. I have some questions about a recent request for a reasonable accommodation. Can you help me?"

**Guinasso:** "Yes, I can. I have extensive experience with ADA issues. I would be happy to answer your questions. But first, can you tell me how many employees you have?"

**WSI:** "We have 110 employees. Why?"

**Guinasso:** "Well, whether you are a covered employer is a threshold question. Because you do employ more than 15 employees, you are considered a covered employer. Because of this the ADA requires an employer with 15 or more employees to provide reasonable accommodation for individuals with disabilities, unless it would cause your company an undue hardship."

**WSI:** "I have an employee who has chronic back pain. He had surgery to address the back pain, but now has permanent work restrictions. Would my employee be considered disabled?"

**Guinasso:** "Yes, it appears that the back pain and restrictions related to it substantially limit one or more of your employee's major life activities. This means your employee has a disability as defined under the ADA. As a matter of fact, the definition of what constitutes a disability must be interpreted broadly in favor of finding a disability under the ADA. You may have heard that, on September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008. The Act, which became law at the beginning of 2009, emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of the EEOC's ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that they have a disability within the meaning of the ADA.

**WSI:** "Okay, well, now that I understand that my employee is disabled can you tell me what is considered a reasonable accommodation?"

**Guinasso:** "A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations":

- Changes to a job application process.
- Changes to the work environment, or to the way a job is usually done.
- Changes that enable an employee with a disability to enjoy equal benefits and privileges of employment (such as access to training.)

Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, workplace barriers may keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how job tasks are performed). A reasonable accommodation removes workplace barriers for individuals with disabilities.

**WSI:** "My employee has requested that we accommodate his permanent work restrictions. What do we need to do to respond to the employee's request?"

**Guinasso:** "When the disability or the need for accommodation is not obvious, you may ask the individual for reasonable documentation about the disability and functional limitations. The both of you should engage in an informal process called "the interactive process" to clarify what your employee needs and to identify the appropriate reasonable accommodation. You may ask them questions that will enable you to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed."

**WSI:** "How long do I have to respond to the request for a reasonable accommodation?"

**Guinasso:** "You should respond promptly to a request for reasonable accommodation. If you need to engage in an interactive process, this should also proceed as quickly as possible. Additionally, you should act promptly to provide the reasonable accommodation."

**WSI:** "Does the ADA mandate that I consider restructuring my employee's job as a reasonable accommodation?"

**Guinasso:** "Yes. Job restructuring is a reasonable accommodation under the ADA. Job restructuring includes: (1) shifting responsibility to other employees for minor job tasks that an employee is unable to perform because of a disability; and (2) altering when and/or how a job task is performed. If your employee is unable to perform a minor job task because of a disability, you can require your employee to perform a different minor job function in its place.

**WSI:** "Do I have to consider a modified or part-time schedule a reasonable accommodation?"

**Guinasso:** "Yes, unless this is an undue hardship to your company. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain job tasks are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave."

**WSI:** "My employee has specifically requested to be transferred to a vacant position in another department within our company. Is reassignment to a vacant position to an employee who can no longer perform their job because of a disability reasonable under the ADA?"

**Guinasso:** "Yes, unless reassignment would result in an undue hardship to your company. The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of their current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship. If a disabled employee cannot be reasonably accommodated in their current job, then the ADA requires an employer to consider reassignment of that employee to a vacant position that the employee is qualified to perform. Significantly, the obligation to consider reassignment as a reasonable accommodation exists even where an employer has no policy providing for such reassignments for non-disabled employees. "Reasonable accommodation" includes reassignment to a completely different job where such position is vacant, the employee satisfies an employer's legitimate prerequisites for job, and that employee is capable of performing the alternative job's essential functions, with or without reasonable accommodation.

**WSI:** "Sheesh! Sounds like anything qualifies as a reasonable accommodation. Are there certain things that are not considered reasonable accommodations and are therefore not required?"

**Guinasso:** "Yes, the ADA is designed to provide individuals who have a disability, such as your employee, with equal opportunities for employment. While this places a significant burden on employers, the ADA assumes that this burden is outweighed by the benefit of keeping disabled employees in the work force.

That said, the ADA does not require that you eliminate a primary job responsibility. Moreover, the ADA does not require you to lower production standards that are applied to all employees (although you may have to provide reasonable accommodation to enable your employee with a disability to meet the production standard). The ADA does not require you provide personal use items, such as a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices.

Furthermore, you never have to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that you never have to tolerate or excuse violence, threats of violence, stealing, or destruction of property. You may discipline an employee with a disability for engaging in such misconduct if you would impose the same discipline on an employee without a disability.

Finally, you never have to provide any reasonable accommodation under the ADA that causes undue hardship to your company. In general, the term "undue hardship" means an action requiring significant difficulty or expense. The ADA contains a detailed set of criteria to consider in determining what constitutes an "undue hardship."

**WSI:** "Well, thank you for answering my questions. It sounds like I have some work to do. I will ask my employee to provide me with a report from his physician outlining his physical limitations, consider the

employee's request for reassignment, and make a determination. Can you meet with my HR team and me after we receive my employee's physician report?"

**Guinasso:** "Absolutely. I would be happy to help you facilitate the interactive process with your employee so you can make a decision on whether you can accommodate his request to be reassigned to another department within your company."