

The Amended ADA Conversing on Accommodations

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By Christopher Hogan

As the impact of the Americans with Disabilities Amendments Act begins to be felt in both workplaces and courtrooms around the country, no one can doubt that effective accommodation dialogues have never been more important. The Amendments Act’s regulatory and interpretive directives will more often than not ultimately require employers to set aside questions of whether an employee requesting an accommodation has a disability covered by the ADA and instead collaborate with that employee to identify accommodations that are effective, reasonable, and without undue hardship. What follows are some guidelines to help both employers and employees make accommodation dialogues win-win encounters.

The Interactive Process

When the employee’s disability or need for an accommodation is not obvious, an employee’s request for an accommodation requires employers and employees to engage in what the EEOC terms an “interactive process.” The EEOC describes the interactive process as an informal dialogue between the employer and the employee designed to identify the precise limitations resulting from the employee’s disability and potential accommodations that could overcome those limitations. Both parties have a stake in getting the interactive process right. An employer’s failure to engage in good faith in the interactive process or its premature

termination not only could result in the needless loss of a qualified disabled employee but also subject it to liability under the ADA. Similarly, an employee who is responsible for a breakdown in the interactive process will likely lose his or her job and the solicitude of the judiciary and the EEOC. While there is no one way to conduct accommodation dialogues, effective ones have the hallmarks outlined below.

Timely Requests. Serious Responses

Timely accommodation requests taken seriously benefit both employers and employees. An employee who makes an accommodation request only after a negative performance evaluation or disciplinary action becomes imminent risks creating the impression that the request is more of a job protection stratagem than an earnest request for accommodation. On the other hand, employers who react stridently to accommodation requests perceived as disingenuous risk creating a perception of unwelcomeness that chills legitimate requests. A welcoming environment permits employers and employees to address potential problems early – something that’s as good for employee morale as it is for risk management.

Employers and employees should demonstrate their commitment to a successful accommodation dialogue by meeting promptly. The purpose of this meeting should be to establish a cordial tone and to make an initial assessment.

Because these meetings can sometimes be emotional and the issues blurry, it’s in the best interest of both parties not to adjourn the meeting until there is a consensus as to open questions and next steps.

Consider Accommodating

Employers who believe additional information is needed to evaluate an accommodation request should nonetheless consider providing the employee with the requested accommodation on a provisional basis. Though not always appropriate, a provisional accommodation is one answer to the often awkward question of what to do with an employee during the information gathering phase. Both parties benefit if the employee is able to return to work or improve job performance during the information gathering process. Employers that carefully document the provisional nature of the accommodation face little danger of being required to provide the accommodation on a permanent basis solely by virtue of having provided it in the past. For their part, employees should not seek to punish good deeds; instead, they should accept the provisional nature of the accommodations, while moving quickly to provide the information needed for a final decision.

Understand the Job at Issue

The ADA does not require employers to delete or modify “essential functions” of a job as part of a reasonable accommodation, although the employer may nonetheless choose to do so. In the eyes of the EEOC, a job function is essential if its removal would “fundamentally alter” the position. The EEOC considers many factors – including the employer’s judgment – in determining whether a job function is essential. An intellectually honest, wide-angle view of a job is the Rosetta stone that unlocks its essential functions.

Assessing Potential Accommodations

A “reasonable accommodation” is one that is plausible or feasible and allows the disabled employee to perform the essential functions of the job in question. Examples of potential reasonable accommodations include modifying facilities, job restructuring, schedule modification, and time off. While medical information will no longer be as important in determining who’s covered by the ADA, it may assume added importance in fashioning accommodations. Given the likely increase in employees entitled to accommodations,

employers will now more closely scrutinize the precise limitations imposed by an employee's disability and how those limitations can be accommodated.

If potential accommodations are identified, attempt to achieve a consensus on a particular accommodation. If consensus cannot be achieved, the employer is entitled to implement any reasonable accommodation available, not necessarily the one the employee desires. However, it's always helpful to give the employee's requested accommodation singular and well documented consideration. If there are no reasonable accommodations, the employer should document this fact very carefully and have persuasive evidence to back it up. Handle these situations with empathy and care.

Once a reasonable accommodation is agreed upon or chosen by the employer, create an accommodation plan or similar document that outlines the accommodation and acknowledges any concerns the employee may have concerning the accommodation. Thereafter, the employer and the employee should work together to monitor the continuing need for and effectiveness of the accommodation.

Complying with the amended ADA makes actively discussing accommodations more important than ever. Employers and employees must work together to realize ADA's goal of opening workplaces to qualified individuals with disabilities without requiring businesses to change essential job functions or incur undue hardship.



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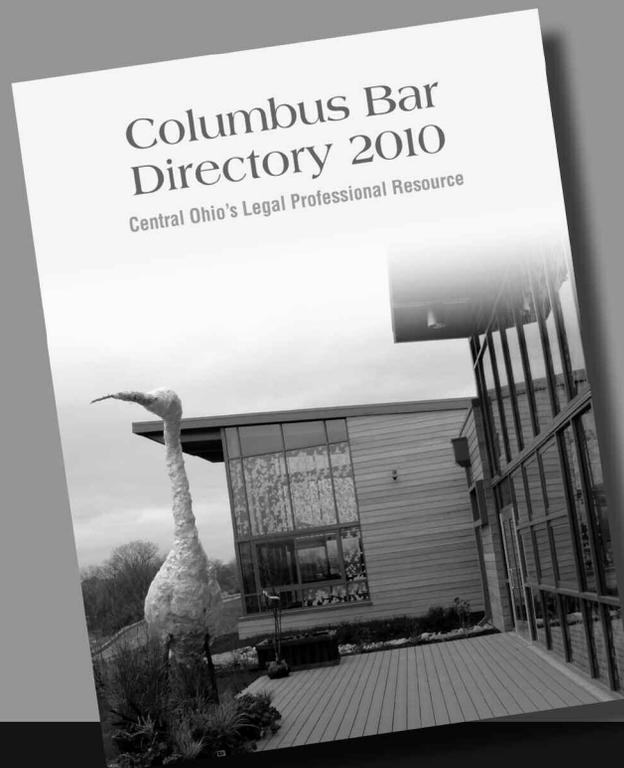
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