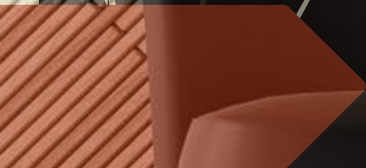




REASONABLE ACCOMMODATION UNDER THE ADA







To Be Reasonable:

- **To be reasonable, the proposed accommodation must enable the individual to be able to perform the essential functions of the job and, be feasible for the employer under the circumstances.**
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- This may include a cost / benefit analysis;
 - It usually includes asking whether the accommodation is feasible;
 - It may include analysis whether the accommodation is consistent with the doctor's restrictions or is medically necessary.

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- 9th Circuit: has held that an individual does not need to show that an accommodation (leave) “is certain or even likely to be successful to prove that it is a reasonable accommodation,” but rather that it could “plausibly have enabled” the employee to perform her job.
 - But the analysis does not include an accommodation that would violate a consistently applied provision of a collective bargaining agreement.




Remember, reasonable accommodation involves the removal of workplace barriers.

- It may include preference for the individual with a disability.
- It may include making exceptions for the individual with a disability.
- It may include removing work place barriers; physical obstacles, work place rules or procedures.




Reasonable accommodation may include:

- Job restructuring;
 - Modified work schedules;
 - Reassignment to a vacant position;
 - Acquiring or modifying equipment;
 - Changing exams, materials or policies;
 - Providing qualified readers.
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Unless the accommodation poses an undue hardship

- Significant difficulty or expense;
 - Unreasonably extensive, substantial or disruptive; or
 - Fundamentally alter the nature or operation of the business.
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Generally, it is the employee's duty to ask for an accommodation:


- While the employee need not make any formal request, they must make clear that they want assistance for their disability.
- However, if the employer knows both about the disability and the need for an accommodation, it may have an obligation to independently engage in the interactive process.

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- 9th Circuit: has held that an employer must explore possible accommodations once it becomes aware that a current accommodation is ineffective.
 - Essentially if you know or have reason to know, that an individual has a disability and is experiencing problems with performing the essential functions of the position, then you may have a duty to initiate the interactive process.
 - Once initiated, the communication is a two-way street.



Employers duty to engage in the interactive process:

- The “interactive process” is possibly the most important phrase to understand in the accommodation process.
- The interactive process is a continuing mandatory duty to participate in good faith to explore and find an accommodation that will enable the employee to perform the essential functions of the job.
- 9th Circuit: the interactive process requires employers **to analyze job functions to establish the essential and nonessential job tasks, to identify the barriers to job performance by consulting with the employee to learn the precise limitations and to learn the types of accommodations which would be most effective.**

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- It is essentially, a meaningful dialogue with the employee to find the best means of accommodating their disability.
 - The process allows you to ask for input from the employee and their doctor about their limitations and proposed accommodations.
 - The process may require the employer to make multiple attempts to find an accommodation.
 - If there is a breakdown in the interactive process due to the employees failure or refusal to participate in good faith, the employee may lose any rights to an accommodation. This would include an employee's (and their doctor's) refusal to respond to employer's requests for more detailed documentation about their conditions, limitations, and work restrictions.





Employer's right to choose the accommodation:


- An employer's obligation is to provide an effective accommodation – not necessarily the accommodation that the individual most wants.
- The choice does not have to be the best accommodation.
- Employee may no longer be qualified if they choose not to accept a reasonable accommodation that enables them to perform the essential functions of the job.


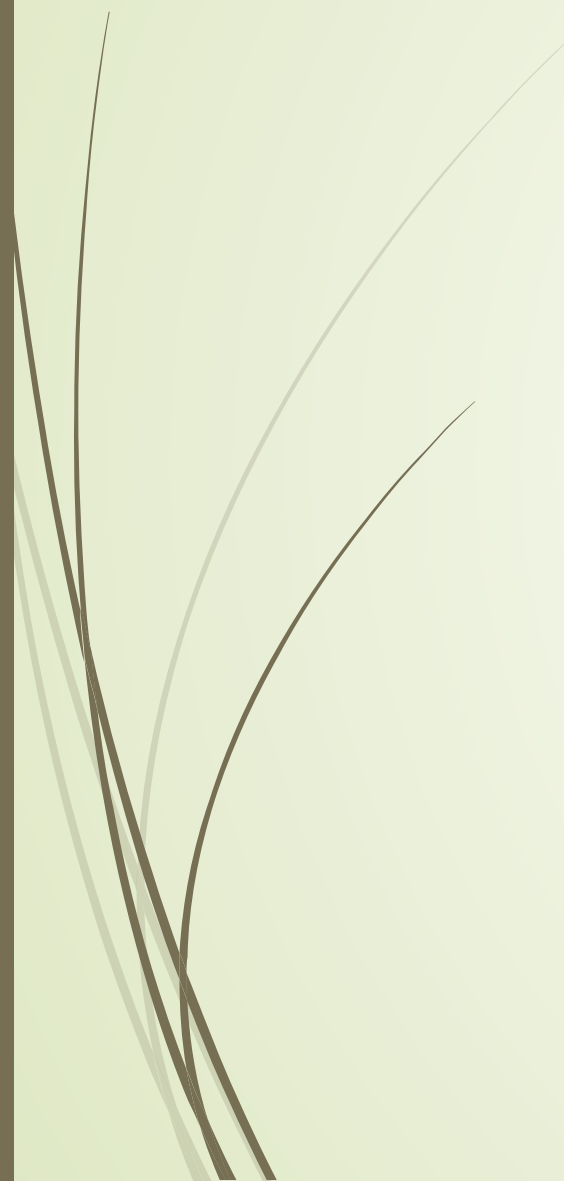




Types of reasonable accommodation:



- **Unpaid leave** after the employee has exhausted their accrued paid leave.
- Temporary leave to allow treatment or rehabilitation, maybe up to one year, unless an employer can show an undue hardship.
- Unpaid leave includes holding the employee's job open, unless doing so would cause an undue hardship.
- Indefinite leave is generally considered an undue hardship and not a reasonable accommodation.



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- 9th Circuit: has noted that reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected.
 - Employer is not required to provide an unlimited absentee policy.
 - While intermittent leave may be reasonable, Courts have held that a request for an open-ended schedule with the privilege to miss work without notice was unreasonable.


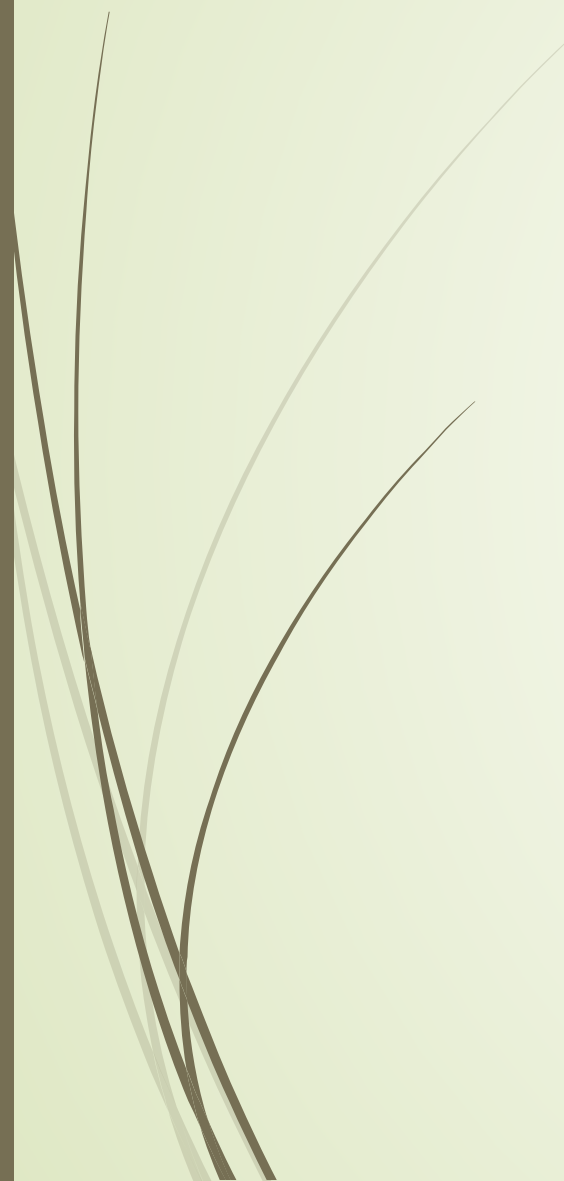
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- **Job restructuring** or modifying the nonessential job functions.
 - Job restructuring does not include reallocating the essential functions.
 - Employer does not need to lower quality or productivity standards; however, if taking this position, the standards must be with a reasonable accommodation, and based on concrete rather than speculative, evidence

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- **Transitional duty or creating a new job.**
 - Although reassignment is a required accommodation, an employer is not required to create a new job for an employee unable to perform the essential functions of the position.
 - Nor are you required to create a special (9th Circuit) light duty job as an accommodation if it eliminates the essential functions of the position.
 - If an employer wants to create a temporary light duty job as an accommodation, it should make this fact clear during the interactive process.

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- **Changing an Employee's Supervisor.**
 - An employer is not required to change an employee's supervisor as a reasonable accommodation.
 - 9th Circuit: nor is an employee entitled to be restricted from visual or verbal contact with their direct supervisor.

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- **Providing a Job Coach, Assistant or Reader.**
 - An employer may be required to provide a reader or interpreter. (For example a deaf employee who is not proficient in written English).
 - Temporary job coach to assist with training may also be considered a reasonable accommodation.

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- **Discipline or prior misconduct.**
 - 9th Circuit: An employee's request that his employer not terminate for prior misconduct does not qualify as a reasonable accommodation. Particularly when the request for an accommodation is made for the first time after the misconduct has occurred.

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- **Work-at-Home.**
 - Certain jobs may allow working at home as a reasonable accommodation.
 - 9th Circuit: Working at home may be a reasonable accommodation when the essential functions of the position can be performed at home and the work-at-home arrangement would not cause an undue hardship.



- **Modified Schedule.**


- Modified schedule may be a reasonable accommodation if truly needed because of the disability.



- Generally employer's are not required to provide an open-ended schedule; however, the analysis is case-by-case.



- 9th Circuit: If attendance is an essential function, work-when-able schedule is not reasonable. (Example: Nurse)

- Nor is the creation of a part-time schedule reasonable if an employer does not have a part-time position available.

- Shift change may be a reasonable modification unless an undue hardship

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- **Alcoholism.**
 - Modified work schedule to attend Alcoholic Anonymous meetings or treatment is considered a reasonable accommodation.
 - ADA does not require an employer to excuse misconduct for poor performance, even it is related to alcoholism.
 - Nor is an employer required to accommodate a current user.

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- **Reassignment**
 - Employer must reassign an employee with a disability to a vacant position if available and the employee meets the minimum qualifications, with an accommodation if necessary. This means generally that the employee does not have to compete for the position. It also means the employee need not be the most qualified applicant for the vacant position; just qualified.
 - Reassignment is considered reasonable when an employee cannot be accommodated in their current job. This means when all efforts to accommodate have failed in their current job.

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- Reassignment is only available to current employees.
 - Employer does not have to bump an employee to create a vacancy.
 - Employer does not have to promote an employee as a reassignment.
 - In determining what is considered “vacant” the EEOC has stated that 6 months is beyond a reasonable amount of time. The employer must know that the job opening exists or will exist in the fairly immediate future.
 - US Sup Ct.: Notes that the ADA generally does not require that CBA seniority rights be compromised in order to reasonably accommodate a disability.




Reduction in Work Force.

- If in the restructure, the job of an individual with a disability is eliminated, the employer should treat the individual the same way it treats other individuals whose jobs are lost. Under this scenario, the 9th Circuit has said the employee would have to compete as any other employee for any available positions.



Undue Hardship

- If you believe a potential accommodation would pose a financial undue hardship, you may be required to open up the financial books during the course of discovery.
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**WHAT TO DO IF YOUR WORKER SHOWS UP WITH
A SLIP FROM THEIR DOCTOR AND REQUESTS
CHANGES OR MODIFICATIONS IN THEIR JOB
DUTIES OR FUNCTIONS.**



Sit down with your worker and discuss the slip.

Ask for specific information such as:

- Why are changes necessary;

- Are other alternatives available;

- Are there medical reasons for the requested changes.

If you need more specific information, obtain a release from the worker to contact their Doctor.



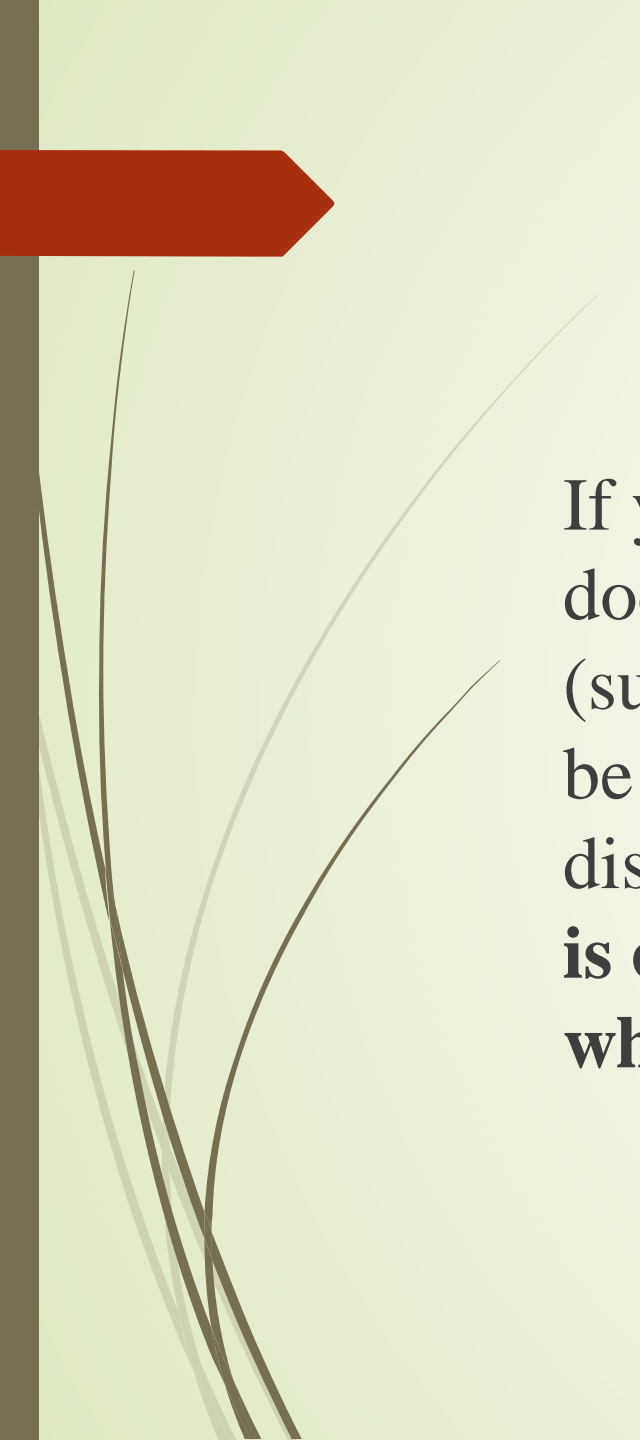
Provide the workers Doctor with a list questions to answer, relative to the workers

- (1) disability or medical condition;
- (2) ability to perform the essential functions of the job; and
- (3) accommodations necessary to perform the essential functions of the job.



Include the following questions in this letter:

- What is the medical condition that requires specific changes in the workers job;
- What specific limitations have resulted;
- Are alternatives available;
- Are there any safety issues;
- Is any ongoing treatment involved;
- Which essential functions of the job can the worker not perform.
- Are there any accommodations that will allow the worker to be able to perform the essential functions of the job. Here, it is critical that the Doctor be given a detailed job description which sets out the duties and physical tasks the worker performs.




If you are satisfied with the information you receive from the doctor, you then need to decide if there is a “disability” (substantial limitation of a major life activity) that **needs** to be accommodated and / or **can** be accommodated. If so, then discuss the accommodation with the worker. **Caution ... It is critical at this stage that you consult with an attorney who specializes in the ADA.**




Is there an accommodation that will allow the worker to be able to perform the essential functions of the job such as;


- Part time or modified work schedules;
- Reassignment to a vacant position;
- Acquisition or modification of equipment or devices;
- Adjustment or modification of the duties;
- Temporary light duty, though not on a permanent basis.

Does the worker have any ideas of potential accommodations that will enable them to perform the essential functions of the job.




Do you wish to accommodate or make job changes even without an actual disability. Remember, ADA does not actually require accommodation unless there is a “disability.”








If you are not satisfied with the response from the workers
Doctor, you may then want to consider sending the worker
for an independent medical examination to address the same
questions listed above.



If you distrust or don't believe the worker, then consider authorizing surveillance. Deceit or fabrication by a worker will usually defeat an ADA claim.





If the worker or workers Doctor fails to provide you with the requested information, then notify the worker that you are still waiting for a response and that you cannot evaluate the request for change or modification until you get a response.



**Consult with SDAO's pre-loss legal staff
before taking any final action.**

