



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

A Practical Guide to Disability Accommodation in the Nonprofit Workplace

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Disability accommodation issues can be challenging in any workplace, including the nonprofit workplace. While this article provides some guidance about the process of accommodating disabilities in the workplace, please consult with your PBPA attorney or other legal counsel if you find yourself in a situation where an accommodation may be needed.

You have an employee who has an attendance problem. When you meet with her to give her a write-up, she shares that she has a medical condition that has occasional “flare-ups” that keep her from coming to work some days. She offers to bring you a doctor’s note.

What should you do? What can you do?

Your employee may be protected by the Americans with Disabilities Act (ADA), and/or the Family and Medical Leave Act (FMLA).

What is the ADA?

The ADA is a federal law requiring employers that have 15 or more employees to refrain from discriminating against qualified employees and applicants because of a disability. The ADA also may require employers to provide reasonable accommodations to individuals with a disability. Employers are covered if they have 15 or more employees on the payroll for more than 20 weeks in the current or previous year. The Equal Employment Opportunity Commission (EEOC) is the government agency that is tasked with enforcing the ADA. Georgia has a similar but less restrictive disability discrimination law, so compliance with the ADA will also typically result in compliance with Georgia law.

What is the FMLA?

The FMLA is a federal law requiring employers that have 50 or more employees to provide leaves of absence for medical or family care reasons. The FMLA will be referenced to the extent that it impacts a situation where an employee requests an accommodation of a disability under the ADA. [Please see this article for specific](#)

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[information about the FMLA, and consult your PBPA attorney if you have any questions about the FMLA.](#)

Who is protected?

Under the ADA, employers cannot discriminate on the basis of:

- Current disability - a physical or mental impairment that substantially limits one or more major life activities;
- Past disability - having a record or such impairment;
- Perceived disability - being regarded as having such an impairment; or
- Being associated with someone having a disability.

There are no length of service requirements. An employee could request an accommodation on the first day of work. Job applicants also are protected by the ADA.

How do you know if an employee or applicant is “disabled” or “impaired” under the ADA?

An impairment substantially limits one or more major life activities. Examples of major life activities are walking, seeing, hearing, speaking, breathing, learning, caring for one’s self, and working. No definitive list of “disabilities” exists but the ADA favors broad coverage, to the maximum extent permitted.

The determination of whether a condition is a disability is made by looking at its nature or severity, how long it will last or is expected to last, and its anticipated impact. Disabilities that are not open and obvious, like kidney failure, tuberculosis, or mental illness are covered. In some cases, temporary impairments can be covered, but it depends on the facts of the situation.

What is a reasonable accommodation?

A reasonable accommodation is a change in the work, workplace, or application process that helps make it possible for an individual with a disability to perform the essential functions of a job or to apply for a job. The ADA requires employers and employees to engage in an interactive process to determine the specific limitations created by the disability and how best to respond to the need for accommodation. There is no definitive list of accommodations, because the appropriate accommodation depends on the specific situation.

Key Questions: Is the employee able to perform the essential functions of the position with or without a reasonable accommodation? Is there a reasonable accommodation available without an undue hardship?

What is an essential job function?

Essential functions are tasks that are necessary to performance of the job. To determine those, ask: Do employees actually perform these job functions? If you remove these functions/requirements would you fundamentally change the job? *If the answer to both questions is “yes,” those requirements are by definition, essential.*

The way that a task is performed is usually not as important as the result. For example, if the task is to type letters, that is the essential function. The essential function could include a certain level of quality or accuracy, but the essential function generally would not include a requirement that the letters be typed while sitting.

The first step is to determine what job duties are essential and not marginal or nice to have. It is a good idea to look past any job descriptions to what is really happening in a typical work day. You can consider whether other employees in same position have similar requirements or not. For example, if an employee has a vision issue and can't drive, then she may not be able to drive to the post office to mail a package. Unless driving to the post office is an essential function of her job, you may need to reassign that task to someone else.

The Reasonable Accommodation Process, or the “Interactive Process”

First Step in the Process - The Accommodation Request

An employee has a general obligation to request a reasonable accommodation before the employer has a potential obligation to accommodate. The first step is to determine whether there was “notice” of a need for an accommodation.

Recognizing a Request for a Reasonable Accommodation

An employer may require written notice, *but* verbal notice is sufficient under the law. And no magic words need to be spoken. A “plain English” request is sufficient. An employee does not need to reference ADA or “accommodation.” In some circumstances, the request for an accommodation may come from family member, health professional, or other representative.

If it is unclear whether a request for a reasonable accommodation has been made, several options exist, with varied risk. An employer can make a limited inquiry to offer assistance (see below for some tips about how to discuss accommodations with employees). However, employers contemplating discipline or termination due to performance deficiencies should avoid making any medical inquiry as a part of the disciplinary discussion. It is also important to refrain from speculating about any medical diagnosis. One option, if an employee merely refers to “personal issues” without further details, is to make a general offer or reminder of the availability of the Employee Assistance Program or EAP if the organization has one.

You be the Judge: Examples of Requests for a Reasonable Accommodation

- Employee tells supervisor "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." Is this an adequate request for a reasonable accommodation? Does it make a difference if this conversation happens during attendance counseling?
Response: Most likely, this is a sufficient request for an accommodation, and should be considered even if discipline for attendance issues is pending.
- Employee tells supervisor he would like a new chair because the one he has is uncomfortable. Is this an adequate request for a reasonable accommodation?
Response: No, because the employee has given no indication that the request for the chair would help the employee do his job or is based on a medical condition.
- When counseled about the need to improve her performance, an employee tells her manager that she feels depressed, has difficulty sleeping and is unable to focus, but feels that she can do better. Is this an adequate request for a reasonable accommodation?
Response: Generally, no, because the employee has not asked for anything. The employer is now aware, however, that the employee may have a disability so may want to be sure that any future discipline is clear and based on appropriate documentation, and also pay attention to any further requests for help from the employee.

Second Step in the Process – Does this Situation Require Accommodating?

The applicant or employee must be qualified.

The employee or applicant must meet the legitimate skill, experience, education or other requirements for the position. You do not have to make exceptions to your job requirements, so long as you have not made exceptions for others.

The employee or applicant needs to be able to perform the “essential functions” of the job. It is imperative to understand what is essential with regard to each job in the workplace (as described above).

The applicant or employee must have a disability.

Only employees or applicants with disabilities must be accommodated. So the first question is whether there is a disability. You have the right to request medical documentation to support the need for the accommodation. It is best, however, not to spend too much time trying to determine whether the employee is disabled. Why? Because it is likely that, unless the issue is clearly short-term like the flu, you will need to consider an accommodation. The law defines disability broadly, and most often will find that a condition limiting an employee’s activities is a disability. If you are contemplating medical inquiries when a request for accommodation is made, it is a good idea to consult with legal counsel.

Third Step in the Process – Engaging in the Interactive Process

Once a likely disability is established, the employer must engage in an interactive process to determine its ability to provide the requested accommodation.

Ask about the person's ability to do the essential functions of the job. Is there anything that would assist in removing a barrier to an essential function? This should be a back and forth conversation. Engage the employee and, if necessary, the medical provider. That is why it is called the "interactive" process.

Many managers want to be dismissive or go straight to a "no" answer. Do not automatically deny any request. Be creative – request and consider the employee's ideas; consider management's ideas; consider past practices. Ask for ideas from employee's medical provider. Use all available resources to explore accommodation ideas. Then, even if the final answer is "no," the employee will be sure that you tried, and will be much less likely to challenge the decision not to accommodate.

Tips for conversations with employees:

Focus on the job tasks when talking to the employee.

- What particular parts of the job cause you to struggle?
- How can I help?
- Is there anything we could do for you to help make it easier for you to do the work (be specific to the job tasks)?

Requesting Additional Information

In order to help you understand what accommodations would allow the employee to perform the essential functions of the job, you may ask for documentation from an individual: (1) that describes work-related restrictions; and (2) that provides information about how an accommodation would enable the person to perform the job-related task. You should always treat medical information as confidential and private. File it in a secure place, don't allow those who don't have a need to know to have access, and only ask for information related to the work restrictions at issue, not for diagnosis information.

Examples of Possible Accommodations:

- Workplace – ramps, doors, entranceways, parking spaces, restroom or equipment modifications (desk, chairs, computer screen), assistive technology
- Work schedule – job restructuring, flexible schedule, modifying work schedules or changing shifts, break frequency, start/end time adjustments
- Job structure – non-essential duty modification, co-workers' assistance, transfers or reassignment, telecommuting

- Unpaid or Additional Leave
- Changes to the Work Environment – “irritant-free” environment, providing parking spaces or commuting assistance

Specific Accommodation Issues: Essential Functions

An employer is not required to remove essential functions of the position. For example, an employer is not required to eliminate a production standard or job quota. There may be a potential obligation to accommodate the manner in which the standard or quota is met. For example, if an employee can't spend more than two hours a day in a car due to a back issue, then you may have to consider allowing him or her to attend certain non-essential meetings via phone rather than meeting in person.

Hypothetical – Lifting Limitations

An employee brings in a doctor's note that says she cannot lift more than 20 pounds. The job requires lifting 40 pounds. What do you do?

Response: First, discuss the situation with the employee. Find out how long the lifting restriction will last. Look at the job to determine whether lifting is an essential function. If it is, discuss possible options with the employee. You are not required to eliminate essential functions, but you may need to reassign non-essential functions. If lifting is only rarely required, could someone else do it until the employee is able to lift again? If the employee must be able to lift, is a leave of absence an option? (see below)

Specific Accommodation Issues: Direct Threats to Safety

An employer is not required to accommodate a direct threat to the safety of the employee or others in the workplace. However, it is important to deal with facts and not suspicion or rumor.

Hypothetical – Prescription Medication

You learn that an employee who drives is taking prescription medication that can impair safety. Can we ask the employee about it? Can we send him to doctor for a release to work?

Response: The relevant facts include whether the employee is able to perform his/her job safely. Employers can make inquires, but they need to be job related and consistent with business necessity. Discuss the situation with the employee first and, if necessary, you can ask the employee for information from his health care provider that indicates whether he can drive safely.

Leave of Absence as an Accommodation

A leave of absence could, under some circumstances be a reasonable accommodation under the ADA. This may seem illogical: how can an absence from work allow an employee to perform the essential functions of the job? Open-ended leave is not a

reasonable accommodation, but, for example, a leave of absence could allow an employee time to heal and be able to return to work.

It is unlawful *automatically* to terminate an employee who has a protected disability because the employee is not eligible for leave (even if the employee is new, is still in a probationary period, or has exhausted all existing leave rights). This does not mean that an employer can't ever terminate employees with attendance problems. However, if an employee who requests leave is protected under the ADA, it is important to engage in the interactive process to determine whether leave is a reasonable accommodation.

If an employer does offer leave as an accommodation, there is no bright line rule on how long the employer must hold the job open for employee's return. Again, the employer must conduct an individualized determination.

Types of Leaves of Absence

As a reasonable accommodation, employees may request a continuous leave, such as for surgery; a part-time or reduced schedule; or intermittent leave (e.g., arrive late, leave early). Intermittent leave or part-time work could also be combined with a request to work from home.

Is a Leave of Absence for Pregnancy Required?

Pregnancy itself is not typically an impairment constituting a disability within the ADA, but in light of the broad definition of disability, employers may have increased obligation to accommodate work-related restrictions stemming from pregnancy-related impairments, even where the impairments are temporary.¹

Examples of Leave as a Possible Accommodation

Example: Working from Home?

An employee working in a customer service role advises her supervisor that due to her medical condition, she needs to be able to work from home one day per week to adjust to her medication each week. Is the employer required to agree to this employee's limitations?

Response: The employer should first look at the job to see if working in the office is key to the job duties. Is the employee responsible for responding to walk-in questions or only telephone inquiries? Can in-bound phone calls be re-routed to allow the employee to receive them from home? The duration of the requested accommodation also could be important. If the response is that working from home would be an undue hardship (see below), have a discussion with the employee about other possible options.

¹ The Pregnancy Discrimination Act, prohibiting discrimination in employment based on pregnancy, childbirth or related conditions, may also give rise to some rights for a pregnant employee.

Example: Part-Time Work?

A supervisor advises the organization that due to her treatments for cancer, she needs to be able to work part time for a few months. Is her employer required to agree to this request?

Response: First, confirm whether part-time schedule must be provided as intermittent leave under the Family and Medical Leave Act (FMLA). There is no undue hardship defense for refusing available FMLA. Then, consider the job duties, the effect on other employees and the duration of the time needed. If there are others to cover, or a temp could be hired, then this may be a reasonable accommodation. If this is the sole employee in that position and others would have to work overtime for months to cover, then part time work may be an undue hardship.

Return to Work after a Medical Leave

An employee who was on leave returns to work with a full release. Employer is concerned he may get hurt because the job is physically demanding. What can the employer do? While employers are not permitted to require employees to be 100% healed before returning to work, under the ADA, the employer can send the employee back to the doctor with job description showing physical demands and ask the doctor to state whether the employee is released to perform the specific functions of the job. If there is a direct threat to safety of the employee or others, the employer can require the employee to undergo a complete return to work evaluation medical exam. This is an option that should be carefully considered before using.

Undue Hardship

If an accommodation is an undue hardship, then the employer does not have to offer it. There are factors you can consider when deciding if an accommodation is an undue hardship. These include the cost of the accommodation as compared the size or budget of the organization; the hardship on other employees who would have to pick up extra work due the accommodation; the structure of the organization; and the structure and types of duties performed by the employee's job. Please keep in mind that there is a high standard for determining that an undue hardship exists, and it is a good idea to consult with legal counsel before making this determination.

Many employers want to consider how other employees will feel about the accommodation. It is permissible to consider whether these employees will pick up extra work, but employers are not to consider the jealousy or negative feelings others might have about whether the accommodated employee is getting away with something.

Example – Undue Hardship

An employee in accounting tells his supervisor that his medical condition, an anxiety condition, makes it difficult for him to concentrate and he has trouble meeting his

deadlines. He advises his supervisor that what would really help would be if he could have an assistant. Is this request reasonable?

Response: The employer should discuss the accommodation with the employee to understand the limitations, perhaps requesting medical documentation, but it is not likely that hiring an assistant where that position does not exist in the organization would be a reasonable accommodation. The employer and the employee could discuss whether some type of calendar system to remind the employee of deadlines is possible or practical. The employer must not go directly to “no” in this type of situation, but instead focus on possible solutions. At the end, however, if hiring an assistant is the only available accommodation that would allow the employee to perform the essential functions of his job, such a solution may not be feasible without undue hardship to the organization.

Providing the Reasonable Accommodation – Pointers and Best Practices

- Remember that the “best” accommodation is not required – only “reasonable” accommodation is required.
- The accommodation need not be “forever” What is manageable for a month may be an undue hardship if done forever. Set timelines to monitor and assess to make sure it does not become indefinite.
- After the accommodation is granted, monitor the effectiveness of accommodation. If it’s not working or is being abused, then reengage in the interactive process. It is best for all if the employee keeps the lines of communication open.

Common Interactive Process Mistakes

- Only engaging in reasonable accommodation process if employee uses the right words.
- Not considering an accommodation because others would be jealous.
- Refusing to consider an accommodation because the employee is not a good performer or a complainer.
- Failing to consider job description when focusing on essential job functions.
- Using an old or outdated job description.
- Dismissing unreasonable requests without exploring more reasonable ones.
- Assuming that burden is on employee and/or his/her doctor to make proposals and not evaluating independently other alternatives.
- Failing to consider other accommodation decisions in similar situations, including favorite workers or workers’ comp light duty.
- Eliminating essential functions temporarily without preserving legal position that employer is going beyond legal obligation.
- Failing to understand potential right of employee to leave of absence under not only ADA but also FMLA, if applicable.
- Sharing medical information beyond those who “need to know.”
- Having direct supervisors obtain medical information.

If You Deny an Accommodation Request

Any denial of an accommodation should occur only after some interaction and discussion. It should be approved by appropriate organizational officials (which may be the Board of Directors or its Executive or HR Committee in some instances) before being communicated to the employee. It is also a good idea to consult with legal counsel before communicating with the employee. All of these steps help show that the organization is taking the request seriously.

The employee should be informed verbally and notes should be taken in writing. Those communicating the decision should be prepared for discussion. The written notes should state the reasons for denial in an accurate and specific manner.

Conclusion

You have an employee who has an attendance problem. When you meet with her to give her a write-up, she shares that she has a medical condition that has occasional “flare-ups” that keep her from coming to work some days. She offers to bring you a doctor’s note.

What should you do? What can you do? Now you have some guidance about what to do. Determine if a disability exists. If so, engage in the interactive process and make a reasonable determination about whether there is an accommodation that allows the employee to perform the essential functions of the job.

Be sure to seek legal counsel to assist you in this process.