



Evaluating Telework as a Reasonable Accommodation

Alison Dobner
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Today's Topics

- Brief ADA Overview
- The Disability Interactive Process Hallway®
 - Short-Term accommodations
 - Long-Term accommodations
- Telework
- Q&A



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ADA



Title I of the Americans with Disabilities Act

“Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against **qualified individuals with disabilities** in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.”



ADAAA



The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009.

The law made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA.

The ADAAA now more closely tracks the country’s strongest disability law, California’s Fair Employment and Housing Act.





ADA

Mandates:

1. Employers must engage in a Timely Good Faith Interactive Process, and
2. Employers must provide Reasonable Accommodation

Each is a stand-alone statutory obligation



Mandates of the Employer Breakout:

1. Employers must engage in a
 - **Timely:**
 1. When triggered, you know it and you start the process
 2. Don't intentionally or unintentionally delay – take the time that is needed to do good work and find the right answer
 - **Good Faith:** Do the work to find a YES, your goal is to find reasonable accommodations regardless of the person
 - **Interactive Process:** Engage in the steps needed to support you and the employee to understand each other's opinions and gather needed data to support decision-making. The "Hallway!"



How do you know when to start this process:

There are **THREE** typical ways an employer is triggered to start a timely good-faith interactive process....

What are they?



Eligibility / Triggers Overview

1. **Request** for Accommodation
 - Applicant or employee verbalizes concern, regardless of the specific words that they may use
2. **Perception** of disability / impacting work
 - Performance changes
 - Attendance problems / changes
 - Rumors, with an impact on work performance or availability
3. **Knowledge** of work restrictions / functional limitations impacting work
 - Health Care Provider Note listing work restrictions



Statutory Obligation # 1: Provide a timely good faith interactive process



Disability Interactive Process Hallway®



Interactive Process

Uniformly apply two interactive processes across the organization, regardless of how injury occurred:

**Short-Term Interactive Process
(Low Touch)**

**Temporary Work Restrictions /
Known Leave Needs**

**Long-Term Interactive Process
(High Touch)**

**Permanent Work Restrictions or
Leave / Chronic Conditions /
Unknown Duration of Leave or
Restrictions**

Same hallway... same doors... used efficiently





Short-Term vs. Long-Term: What does it Mean?

Short-Term Disability Compliance Programming: **LOW PROCESS**

- For temporary / short-term restrictions, process could reflect the risk
- You are not considering medical separation
- Process goals: Timely, Manageable and one that Produces Realistic Documentation

Long-Term Disability Compliance Programming: **HIGH PROCESS**

- For long-term / permanent restrictions, process must be robust
- If reasonable accommodations don't exist, you may be considering medical separation
- Process goals: Sufficient process to ensure proper data gathering to support a full ADA process, and higher levels of documentation



The Disability Interactive Process Hallway®

SHORT-TERM REASONABLE ACCOMMODATION
DECISIONS





Disability Interactive Process

Let's agree on vocabulary:

Light duty

(sometimes called temporary alternative)

- Performing some of the essential functions of the usual and customary position, and/or
- Performing less than the full workload of the assignment or working part-time, or
- Performing a different job assignment or set of tasks; regardless if the work is represented by a formal job description or assignment in the organization
- Not required to be offered, but is often a smart business decision. If you offer this to industrially injured employees, you must make available to all employees



Disability Interactive Process

Let's agree on vocabulary:

Temporary modified duty
(Different than light duty)

- Performing 100% of the essential functions of the position, same effectiveness and efficiency as all others in the position/class but with accommodations that are temporarily needed or temporarily reasonable to implement
- Determination has not yet been made if the accommodations would be reasonable to implement long-term, but they may be if they truly support employee to perform all of the work safely and fully



Temporary Modified / Light Duty Strategies

How long can temporary modified or light duty assignments last?

- Typically, criteria are:
 1. Is the work supporting medical improvement, as evidenced by a reduction in restrictions every 90 days?
 2. Is EE performing meaningful work for the organization?
 3. Employee agrees to the terms of the TMLD and signs the agreement.
(Sample 1)



Temporary Modified / Light Duty Documentation

Temporary Modified/Light Duty Agreement Form (sample 1)



Shaw HR Consulting, Inc.
www.shawhrconsulting.com
Phone: 805-498-9400

ORGANIZATION NAME
DISABILITY INTERACTIVE PROCESS / REASONABLE ACCOMMODATION
Temporary Modified/Light Duty Agreement

Employee Name	
Classification/ Job Title	
Location	
Date of Injury/ Onset of Illness	
Date Assigned to Temporary Light Duty by Health Care Provider:	
Assignment Start Date:	Assignment End Date:
Description of Work Restrictions, per Health Care Provider (List specifically what is stated in medical note)	
Assignment Type Offered <input type="checkbox"/> Modified <input type="checkbox"/> Light Duty	
Description of Accommodation(s) Offered:	
Work Schedule <input type="checkbox"/> Unchanged <input type="checkbox"/> Changed	Work Hours per Day from _____ am/pm to _____ am/pm
Assigned Supervisor's Name, if different	
Assignment Not Available. Reason/Discussion Points	

I agree to follow and adhere to the temporary work restrictions as prescribed above by my treating Health Care Provider. I also understand if I am asked to perform any work assignments or activities that I believe are unsafe or exceed my work restrictions, I will immediately report the situation to my direct supervisor and Human Resources, and I will not perform these activities. I also agree I will immediately report to my direct supervisor and to Human Resources if any of the job activity causes me discomfort, is causing pain or makes my medical condition worse.

I understand my employer has offered me a TMLD assignment as a way to support me to maintain work patterns and income while I continue to medically improve. I understand TMLD assignments typically will not normally exceed a maximum of 90 days, and this TMLD Assignment does not imply entitlement to a permanently modified position. This TMLD assignment may be extended upon approval at 45-day intervals if I continue to medically improve, as evidenced by reduced restrictions. I understand it is my responsibility to provide Human Resources with a new medical notice at the conclusion of the initial approval period. I understand this approval period ends on the date listed above and will not be extended, and my TMLD Assignment may be ended, unless I provide additional needed medical certification. I also understand that this assignment will end immediately when my condition has reached permanent and stationary status and if I am provided with permanent work restrictions.

HR Signature:	Date:
Employee's Signature:	Date:
Supervisor's Signature:	Date:

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Disclaimer: This sample template/example should not be acted on without legal advice. Organizations are encouraged to contact their legal counsel prior to revising an any templates/examples.



Temporary Modified / Light Duty Documentation

Employee Name		
Classification/ Job Title		
Location		
Date of Injury/ Onset of Illness		
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Assignment Start Date:		Assignment End Date:
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Temporary Modified / Light Duty Documentation

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HR Signature: _____	Date: _____
Employee's Signature: _____	Date: _____
Supervisor's Signature: _____	Date: _____



Reasonable Accommodation

When an employee receives

1. permanent work restrictions,
2. has a permanent or chronic medical condition from the start of their disabling period, or
3. hits ____ months of TMLD or leave or a mix of both,

...the employee should be moved into the **Long-Term Disability Interactive Process**.



The Disability Interactive Process Hallway®

LONG-TERM ACCOMMODATION
DECISIONS





What is Long-Term?

- Permanent work restrictions
- Chronic medical conditions
- Long-Term work restrictions exceeding ____ months (Decide number of months and document your decision to ensure consistency)
- Long-Term leave extending past ____ months (Decide number of months and document your decision to ensure consistency)
- When employers are considering:
 - Removing someone permanently from their current job
 - Exploring if leave is reasonable to provide outside of FMLA/CFRA and District leave
 - Discussing alternative work placement
 - Considering medical separation / medical retirement



Disability Interactive Process Hallway®



Disability Interactive Process Hallway®

A **Successful** Disability Interactive Process for **Long-Term Accommodations/Leave Needs** will include the following key activities:

- **Two** Conversations
- **Four** Pieces of Paper
- **One** Meeting

Key Conversation

Key Document



So.... What is a “reasonable” accommodation anyway?

... FOR LONG TERM RESTRICTIONS



ADA Obligation

Statutory Obligation # 2:

Provide Reasonable Accommodations



Reasonable Accommodation

Reasonable accommodations include:

- Any appropriate measure that would allow the applicant or employee with a disability to perform the **essential functions** of the job, such as:
 - Facility modifications
 - Schedule changes
 - Equipment purchases
 - Modifying examinations
 - Changing policies



Reasonable Accommodation

An accommodation can be ANYTHING.

You are not required to provide accommodations. You are required to provide REASONABLE accommodations.

What makes an accommodation REASONABLE:

1. Provides the employee/applicant with a **SAFE** work environment
2. Allow the employee/applicant to perform the **FULL** set of Essential Functions of their position.

Technically:

- **Undue Hardship** (29 CFR §1630 app. §1630.15(d)) (1996)
- **Direct Threat** (42 U.S.C. § 12113(b); see 29 CFR §1630 app. §1630.2(r))



Reasonable Accommodation: Long-Term Accommodation

1. Offer of **Modified Work**: Current classification, performing all of the essential functions, same efficiency and effectiveness

2. Offer of **Alternative Work**/Reassignment
 - a) Available and approved to be filled
 - b) Minimally qualified
 - c) Not a promotion
 - d) Only after a to c, physically appropriate with/without reasonable accommodation



Reasonable Accommodations

An employer is not required to:

- Lower quality or production standards
- Provide personal use items (such as glasses or hearing aids)
- Create a new position / create permanent “light-duty”
- Displace (bump/layoff) other employees



Making Decisions

When Accommodations are Reasonable:

- Document decisions in writing
- Accommodations are never permanent, goal is long-term
- Revisit, if needed or requested by any party



Making Decisions

Trial Accommodations: If you are unsure if an accommodation will support an employee to **FULLY** perform his job, don't be afraid to trial the accommodations

1. Clarify and document what a "successful accommodation plan will look like and/or produce
2. Identify when the plan will be reviewed / checked-in on
3. Discuss and document what happens if the accommodations don't work so there are no surprises

Note: Trials don't work when concerned for **SAFETY** of accommodation ideas



Making Decisions

When no accommodations are reasonable, employer must have documented the following evaluations and decisions:

1. What could the employee no longer do **FULLY** or **SAFELY** due to their permanent or long-term restrictions?
2. Extended leave of absence was for an **unknown duration** or was **not medically expected to support a return to work** at the end.
3. No appropriate vacant positions were available.



Making Decisions

When accommodation is not reasonable:

- Use of leaves, paid and unpaid (FMLA)
 - Did FMLA run? If not, run now
 - Sick Leave, Vacation Leave, PTO
- Medical Separation / Retirement
 - Long-Term Disability Benefits / Other Paid Options to Consider
 - Notice of Intent to Medically Separate



The Disability Interactive Process Hallway®

Requests for Remote Work





Whether You Call it
Telework, Remote Work,
Work from Home, or
Telecommuting...

... It Continues to
be a Complex
Accommodation
to Manage





Remote Work Evaluation: The Basics

- Employers must provide disabled employees and applicants with reasonable accommodations
- Remote *may* be a reasonable accommodation in some circumstances
- Employers have an obligation to ensure that they are making sound and data-based decisions when deciding if remote is a reasonable accommodation



Remote Work Evaluation: The Basics

- Employers cannot treat disabled persons worse than non-disabled persons.
 - If you have non-disabled persons who have been “allowed” to work fully remote, you may be required to do the same for disabled persons
 - Disabled persons will have preference over non-disabled persons with the same benefit of employment (a.k.a. remote work flexibility)



Remote Work Evaluation: The Basics

- An employer has a duty to make reasonable accommodation(s) for the disability of any individual applicant or employee
 - **Takeaway:** Engaging in the interactive process is required
- A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job
 - **Takeaway:** Reasonable accommodations can take many forms, even undesirable ones



Remote Work Evaluation: The Basics

- The Equal Employment Opportunity Commission (EEOC) has said that allowing an individual with a disability to work from home may be a form of reasonable accommodation under the Americans with Disabilities Act (ADA)



*Federal: EEOC, Work at Home/Telework as a Reasonable Accommodation;
<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation#:~:text=Yes.,allow%20other%20employees%20to%20telework>
California: Cal. Code Regs., tit. 2, § 11065(p)(2)(L)*



Remote Work Evaluation: The Basics

- The ADA do not require an employer to provide a specific accommodation if it causes undue hardship, i.e., significant difficulty or expense, or if it eliminates an essential job function
 - Meaning:
 - You can implement **alternative accommodations**, if they exist, that are more preferable to the employer
 - You **can deny remote work as an accommodation** if the employee cannot do their full job remotely, as long as you have not removed this essential function from others



Interactive Process

If remote request is for a **TEMPORARY** period, (total time needed is less than XX months) most employers will follow your current short-term/temporary accommodation process (use Sample 1 to document).

If remote request is long-term, permanent or exceed XX months, we recommend you follow a robust **LONG-TERM** Interactive Process.

**Temporary Work Restrictions / Known
Leave Needs**



**Short-Term Interactive Process
(Low Touch)**

**Permanent Work Restrictions or Leave /
Chronic Conditions / Unknown
Duration of Leave or Restrictions**



**Long-Term Interactive Process
(High Touch)**



Keys to Evaluating Long-Term Remote Work Requests

1. Is In-Person Work Required to Complete an Essential Job Function?
2. Is Remote Work Medically Needed or are there Alternatives ?



Is In-Person Work an Essential Job Function?





Remote Work Evaluation: Essential Functions

Is Working In-Person an Essential Job Function?

- Employers **cannot** treat disabled persons worse than non-disabled persons
- If you have non-disabled persons who have been “allowed” to work fully remote, you will likely be required to do the same for disabled persons
- Disabled persons **will have preference** over non-disabled persons with the same benefit of employment (a.k.a. remote work flexibility)



Remote Work Evaluation: Essential Functions

Is Working In-Person an Essential Job Function?

- If you Answer:
 - **YES**, then you will be seeking alternatives to work remotely, because if you cannot discover alternatives, you will be looking at leave, alternative work exploration and possibly medical separation
 - **NO**, then you will want to have a very **robust medical clarification process** to ensure that ONLY people who have no alternative accommodation options are being accommodated to work fully remote (see sample 2)
 - When accommodations are **desirable**, more process is recommended to ensure that only those that truly need the accommodate, receive it.



Remote Work Evaluation

Is Working In-Person an Essential Job Function?

- Regardless if your answer is YES or NO, you will need a compliant and consistent ADA disability interactive process to confirm there is a medical need for accommodation and to seek alternative accommodations
 - IP must be consistently applied
 - IP must be documented



Is Remote Work Medically Needed, or are there Alternative Accommodations Available?





Remote Work Evaluation: Medical Need

Is Working In-Person Medically Required?

- Remote work is an accommodation. Employers must demand health care providers list the underlining **work restrictions / functional limitations** that the health care provider and/or employee, believe are best accommodated with a remote work assignment.
- You obtain this listing through Door # 1 of the ADA/FEHA Disability Interactive Process (sample 2)



Remote Work Evaluation: Medical Need

Is Working In-Person Medically Required?

- Establish Your Consistent Process:
 - Will you utilize a **Fitness for Duty Examination** (sample 3 and 4)?
 - For all employees requesting to work fully remote for more than 1-year?
 - Only when you have objective and spoken concerns that the request is not legitimate and/or if the questionnaire is not returned?
 - Establish your steps at the front end of the interactive process and communicate this
 - You may have fewer requests due to this
 - You will not have any surprises when/if this step is used later in the Hallway



Remote Work Evaluation: The Basics

- Employers must provide disabled employees and applicants with reasonable accommodations
- Remote may be a reasonable accommodation in some circumstances
- Employers have an obligation to ensure that they are making sound and data-based decisions when deciding if remote is a reasonable accommodation



Final Thoughts on Remote Work

1. **Open the Closets:** Know if you even can say NO, by researching the realities of who is working/has been working fully remote and why. If others have been allowed to work fully remote, you likely cannot have a blanket NO utilized to evaluate requests.
2. **Develop Your Process:** Identify from the start: 1) Will you allow remote work for Light Duty assignments? 2) How long will you allow remote for Modified Work BEFORE you start the long-term disability interactive process? 2) How will you utilize the Fitness for Duty tool?
3. Once you commit to # 2 above, you need to be consistent in applying it. **Consistently Apply it:**
4. **Document it:** Document everything

The above will ensure you make **good decisions organizationally and** find as many alternative accommodations as possible to best support your students and your campuses.



Thank you!

If you have any questions or need more sample documents,
please visit us at www.shawhrconsulting.com or email us at
training@shawhrconsulting.com