

JAN

Job Accommodation Network

Practical Solutions • Workplace Success

Accommodation and Compliance Series

Reassignment

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JAN'S Accommodation and Compliance Series

Introduction

Reassignment to a vacant position is expressly identified as a form of reasonable accommodation in part 1630 of the title I [regulations](#) of the Americans with Disabilities Act (ADA), and also in the Equal Employment Opportunity Commission (EEOC) formal enforcement guidance on [Reasonable Accommodation and Undue Hardship Under the ADA](#). According to the EEOC, this type of reasonable accommodation is to 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, or when both the employer and the employee voluntarily agree that reassignment is preferable to remaining in the current position with reasonable accommodation. Of course, under both circumstances, this accommodation is only required in the absence of undue hardship.

As part of the interactive process of exploring accommodations, reassignment is often considered when:

- An employee can no longer perform the essential functions of their current position, with or without accommodation
- An alternative position is a more effective solution for retaining a qualified employee, in light of their limitations and ability to perform essential functions, with or without accommodation
- An employee is on a leave of absence and the employer cannot hold the employee's position open during the entire leave period without incurring undue hardship, and when there is a vacant position to which the employee can be reassigned to continue the leave
- The location where work is performed causes a work-related barrier due to limitations affecting an employee's commute, or access to specialized healthcare

The duty to consider reassignment as a form of reasonable accommodation under the ADA is essentially well-defined, but still, questions arise about the level of responsibility employers have when exploring this type of accommodation. For example, questions related to whose responsibility it is to search for vacant positions; the duration of time the search should take; and to what extent the search should include vacancies outside of the employee's department, location, etc. The following information addresses these and many other questions related to reassignment and the ADA. For more information on this topic, or other ADA or accommodation issues, [contact JAN](#).

Questions and Answers

Are applicants or probationary employees entitled to reassignment as an accommodation?

Per the ADA regulations, reassignment is not available to job applicants as an accommodation because an applicant must be qualified for, and be able to perform the essential functions of, the position for which they seek to be hired. If an applicant is not qualified, there is no duty for an employer to consider assigning the individual to a different job.

Once hired, during the early probationary period of employment, individuals with disabilities are entitled to reasonable accommodation, which can include reassignment. According to the EEOC, a key factor in determining if a probationary employee is eligible for reassignment is whether the employee adequately performed the essential functions of the probationary position, with or without reasonable accommodation, before the need for a reassignment became apparent. If not, then the probationary employee is not entitled to reassignment. This is because the employee was not qualified for the original position.

Is there a duty to create a vacant position, by either creating a new job or bumping another employee from a job, in order to reassign an employee as an accommodation?

No. When reassigning an employee as an accommodation, there is no duty to create a vacant position. Reassignment is to a position that is vacant when the need for accommodation becomes apparent, or that will become vacant in a reasonable amount of time. A vacant position can be one that is unoccupied and posted, or not posted but the employer is aware it is, or will be, available.

Is an employee who is being reassigned as an accommodation required to compete for a vacant position?

According to the EEOC, provided the employee is qualified for the vacant position, reassignment means that the employee is given the vacant position; there is no requirement to compete for the position. An employee can be required to compete for any vacant position that would constitute a promotion. Promotion is not required as reasonable accommodation under the ADA.

Contrary to EEOC's interpretation of reassignment as an accommodation under the ADA, some United States courts (e.g., 6th, 8th, and 11th Circuits) have ruled that employers are not required to give employees with disabilities "preferential treatment" when considering reassignment as an accommodation. Employers may find it useful to seek-out relevant court rulings in their geographical area to learn more about reassignment.

Who is responsible for searching for vacant positions, the employer or the employee, and how long should the search take?

From a practical stand-point, the employer will generally be in the best position to know about available positions, and positions that may become vacant in a reasonable period of time. According to the EEOC, the employer is thus obligated to inform an employee about available vacancies. However, both parties can and should engage in the search for available positions.

The search for vacancies should proceed as expeditiously as possible, but the duration of the process will vary based on the circumstances (e.g., size of the employer and number of vacancies to review). The ADA imposes no required duration to search for vacant positions when exploring reassignment as an accommodation. Some employers search for vacancies for thirty or sixty days. This is not an ADA requirement, but rather, an employer policy or practice.

When no vacant position is available at the time the employee requests reassignment, but the employer knows an equivalent position for which the individual is qualified will become vacant in a reasonable period of time, the EEOC says the employer should reassign the individual to the position when it becomes available.

Does the ADA limit the obligation to offer reassignment as an accommodation only to positions within the employee's particular department or worksite location?

No language exists within the ADA to limit the obligation to reassign only to positions within an office, branch, agency, etc. This means that private employers may cast a wide net to find vacancies outside of the employee's current location, when applicable. It is possible that the only position that exists may be located in a different geographical area that will require the employee to relocate. When this is the case, the employee may be required to pay relocation expenses, unless the employer routinely pays such expenses for employees who voluntarily transfer.

When reassigning an employee as an accommodation under Section 501 of the Rehabilitation Act, a federal employer is not obligated to look federal government-wide, but must look at vacancies within its department (e.g., all agencies within the U.S. Department of Labor, etc.), absent undue hardship. The federal employer must search for available vacancies throughout the department. The employee does not have the burden of identifying open positions without the employer's assistance.

Must the employee be reassigned to an equivalent position?

Yes, if an equivalent vacancy exists. When implementing reassignment as an accommodation, an employee should be placed in an equivalent position, in terms of pay, status, benefits, etc., so long as the employee is qualified for the position. There is no duty to assist the individual to become qualified. For example, if the position requires a special license, the individual must possess the license to be qualified.

When there is no equivalent vacancy for which the employee is qualified, the employee may be reassigned to a vacant lower level position in an effort to maintain employment. The employee's original rate of pay is not required to be maintained in the lower level position, unless the employer routinely transfers employees without disabilities to lower level positions and maintains their original pay.

If the only vacancy is perhaps a demotion involving a pay cut, or is located in another state, can the employee refuse reassignment as an accommodation?

We know that employers cannot force employees to accept any reasonable accommodation against their will, including a reassignment. The EEOC has informally explained that an employee can turn down a proffered vacancy for any reason, but if an employee turns down a valid accommodation offer, the employer's reasonable accommodation obligation ends once the offer is made. What this means is, assuming there are no other vacancies, and the demotion or a position in a different geographical location are closest to the employee's current position in terms of pay, status, etc., then the employer is offering a valid accommodation under the ADA. If the employee chooses to refuse the reassignment offer, the result could be termination if the employee is unable to perform their current job duties. The employer is under no obligation to keep looking until a vacancy occurs in a job that the employee prefers, but can.

Must an employee be reassigned if it will violate a seniority system?

The EEOC and some courts seem to agree that it will generally be "unreasonable" to modify a seniority system or violate seniority rules, whether collectively-bargained or not, to reassign an employee with a disability as an accommodation under the ADA. This is understood to apply in situations where there are expectations of consistent, uniform treatment under the seniority system. However, when special circumstances exist – where employers retain the right to make exceptions to a seniority system – then an employer may need to consider bypassing the seniority system in order to reassign a qualified employee as a reasonable accommodation.

Must an employee whose disability is exacerbated by conflicts with a supervisor or co-worker be reassigned as an accommodation?

Informally, the EEOC has shared the opinion that employers probably do not have to reassign an employee because the employee's disability is exacerbated by a bad working relationship with a supervisor or coworker. However, the answer could be different in limited situations where egregious behavior on the part of a supervisor or coworker is shown to have an effect on an employee's disability. The facts of the situation, such as evidence of harassing behavior, could lead to a responsibility to separate coworkers or to change an employee's supervisor through reassignment. Of course, there is a difference between the effects of a bad working relationship, because individuals are simply unable to get along, versus being on the receiving end of harassing behavior.

Another limited situation may be one where an employee is only having problems with one supervisor, perhaps due to the supervisor's appearance triggering PTSD symptoms because the supervisor resembles someone who assaulted the employee. Accommodations like changing supervisory methods will not work in this situation and so reassigning the employee to a job with a different supervisor may need to be considered. The nature of PTSD means that another supervisor most likely will not trigger the same response in the employee. This distinguishes the situation from other situations where the bad relationship with the supervisor is the issue.

Must an employer consider reassigning an employee to a position in a different location so the employee can receive medical treatment?

The EEOC has not clearly addressed this issue. An argument can be made that the employee's need for reassignment is not because the disability prevents the individual from performing the duties of the current job, but rather, the employee is seeking medical treatment elsewhere. In other words, treatment could be obtained closer to home and the employee is choosing to move elsewhere, which does not trigger an obligation for an employer to make a reassignment. Reassignment for medical treatment might be required in a situation where treatment facilities are limited and adequate treatment does not exist in the employee's current location. Of course, an employer is not precluded from considering a request for reassignment to enable an employee to obtain medical care elsewhere.

Is there an obligation under the ADA to consider reassigning an employee who is on extended leave to a vacant position when it poses an undue hardship to hold the employee's position?

According to the EEOC, in the event that holding an employee's position for an extended period of time creates an undue hardship on the employer, the employer should consider whether it has a vacant, equivalent position to which the employee can be reassigned for the duration of the leave period. When the employee is ready to return to work, the employee will then return to the new position.

Situations and Solutions:

The following situations and solutions are real-life examples of accommodations that were made by JAN customers. Because accommodations are made on a case-by-case basis, these examples may not be effective for every workplace but give you an idea about the types of accommodations that are possible.

Due to having a seizure, an automotive parts delivery driver could not operate a motor vehicle for six months.

He was unable to drive to deliver parts during this time, which was an essential function. The employee had extensive knowledge of automotive parts, and the business had a vacant parts stocking position available. The employer permanently reassigned the employee to that position.

A retail sales customer service representative developed dysphonia.

She experienced chronic hoarseness and required significant effort to speak, which limited her ability to effectively communicate with customers over the telephone for any period of time. The online retailer offered customer service by telephone, email, and live chat. Technology was explored to enable the employee to use a text to voice solution to communicate, but because there was a vacant equivalent position that only required chat and e-mail communication with customers, reassignment was chosen as an effective accommodation.

A nursing aid for a healthcare facility could no longer lift patients.

The employee requested to be reassigned to an alternative position. There were no available positions at the time of the request, but the employer was aware that a patient greeter position would be vacant in three weeks. The employee was excused from duties that required lifting patients for the temporary three week period, and then was reassigned to the greeter position.

An assembly line worker with diabetes had neuropathy in his feet that was affecting his ability to stand for long periods of time.

The employee's position required constant standing and moving. He tried taking breaks when possible, and had anti-fatigue matting, but the situation did not improve. A position became available on a different part of the assembly line that did not require constant standing and allowed sitting most of the time. The employee was reassigned to this position.

An employee working for an insurance company had been working successfully for nine months when she was in a severe motor vehicle accident.

After the accident, she was restricted from driving further than five miles for at least six months due to a severe shoulder injury and PTSD that resulted from the accident. She was able to return to work and perform the essential job duties, but her commute was forty-five miles, one way. The employer had a second location, located within the employee's driving restriction, where there was a vacant position that was similar to the employee's original job. The employer reassigned the employee to the position in the closer location.

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