



Intermittent ADA: How to Determine Whether or Not the Accommodation is Reasonable?

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Respected by industry leaders as a “strategic advisor,” Kimberly offers 20 years of private sector and public entity experience in ADA (Americans with Disabilities Act), Human Resources, Workers’ Compensation and Risk Management. Kimberly is considered a subject matter expert in ADA and has significant focus on FMLA and ADA program development. Kimberly provides educational and entertaining scenario-based training for new supervisors, experienced managers and human resource departments.

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Agenda

- Brief Summary:

 - ADA (Americans with Disabilities Act)

 - FEHA (Fair Employment & Housing Act)

 - Reasonable Accommodation

 - Interactive Process

 - Comparison of Intermittent FMLA vs. ADA

- Intermittent leave basics

- Tips for responding to Intermittent ADA requests

- Recommendations for suspicion of abuse

American with Disabilities Act - Summary

Americans with Disabilities Act:

- is a law that was enacted in 1990 and amended in 2008 (ADAAA) by Congress that prohibits discrimination based on disability. Under the ADA, employers are required to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would pose an undue hardship. (42 USC § 12101)
- It prohibits discrimination, retaliation and harassment of disabled persons

Definition of a disability

Disability is defined as by the ADA with a three prong definition:

- Physical or mental impairment that substantially limits one or more major life activities;
- A record of such an impairment; or
- Regarding as having such an impairment.”

See USC 12102 (2)

The determination of whether any particular condition is considered a disability is made on a case by case basis.



ADA Coverage & Qualification

Who is Covered?

- Anyone could be eligible for a reasonable accommodation.
- Employers who employ 15 or more employees including part-time employees.
- The ADA's definition of "employee" includes U.S. citizens who work for American companies, their subsidiaries, or firms controlled by Americans outside the USA. However, the Act provides an exemption from coverage for any action in compliance with the ADA which would violate the law of the foreign country in which a workplace is located.

Who Qualifies for an accommodation?

- Requisite skills and experience necessary to perform the job
- Able to perform the essential functions of the job with or without reasonable accommodation

FEHA (Fair Employment & Housing Act)

- FEHA provides **greater protection** in California
 - Covered Employers - California employment discrimination law covers nearly all employers. An "employer" for purposes of the FEHA includes anyone regularly employing **five or more persons**, whether full or part-time; any person acting as an agent of an employer, directly or indirectly; state and local governments; employment agencies; and labor organizations.
- The definition of "disability" under the FEHA includes both physical and mental disabilities.
- California statute uses "**a limitation**," rather than "a substantial limitation," to indicate that the legislature intends to provide broader coverage under California law than is available under the ADA.

Impairments:

What is an impairment?

1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
2. Any mental or psychological disorder, such as developmental disability, intellectual disability, (formerly termed “mental retardation” organic brain syndrome, emotional or mental illness, and specific learning disabilities).

Consistently meet the definition of a disability

- Autism
 - Deafness
 - Blindness
 - Intellectual Ability (formerly mental retardation)
 - Partially or completely missing limbs
 - Mobility impairments requiring the use of a wheelchair
 - Multiple Sclerosis and Muscular Dystrophy
 - Major Depression
 - Bipolar Disorder
 - Post Traumatic Stress Disorder
 - Morbid Obesity
- Cancer
 - Cerebral Palsy
 - Diabetes
 - Epilepsy
 - AIDS or HIV

Major Bodily Functions – Examples

Includes, but not limited to:

Functions of the immune system

Normal cell growth

Digestive

Bowel

Bladder

Neurological

Brain

Respiratory

Circulatory

Endocrine

Reproductive functions



Major Life Activities - Examples

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Walking
- Speaking
- Breathing
- Working
- Learning
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating (ADD, ADHD)
- Thinking
- Communicating



Brain Teaser



Brain Teaser



What is a Reasonable Accommodation?

Any **change** in the **work environment** or in the way things are customarily done that enables an individual with a disability to **enjoy equal employment opportunities**

29 C.F.R. pt. 1630 app. § 1630.2(o) (1997)

- Modifications to increase facility accessibility
- Job restructuring
- Flexible scheduling
- Acquiring new equipment
- Providing qualified readers and interpreters
- Modification of application and testing procedures or training materials

Categories of Reasonable Accommodations

- Accommodate restrictions within the position
- Accommodate with a leave of absence
- Accommodate with job reassignment

Undue Hardship

- "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.
- An employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business.

Essential & Marginal Functions

- **Essential functions** are those that are fundamental and central to the purpose of the position
 - **Marginal functions** are useful responsibilities, but are not central to the purpose of the position
- ✓ Look at the Job Description. It will tell you which functions are essential functions.

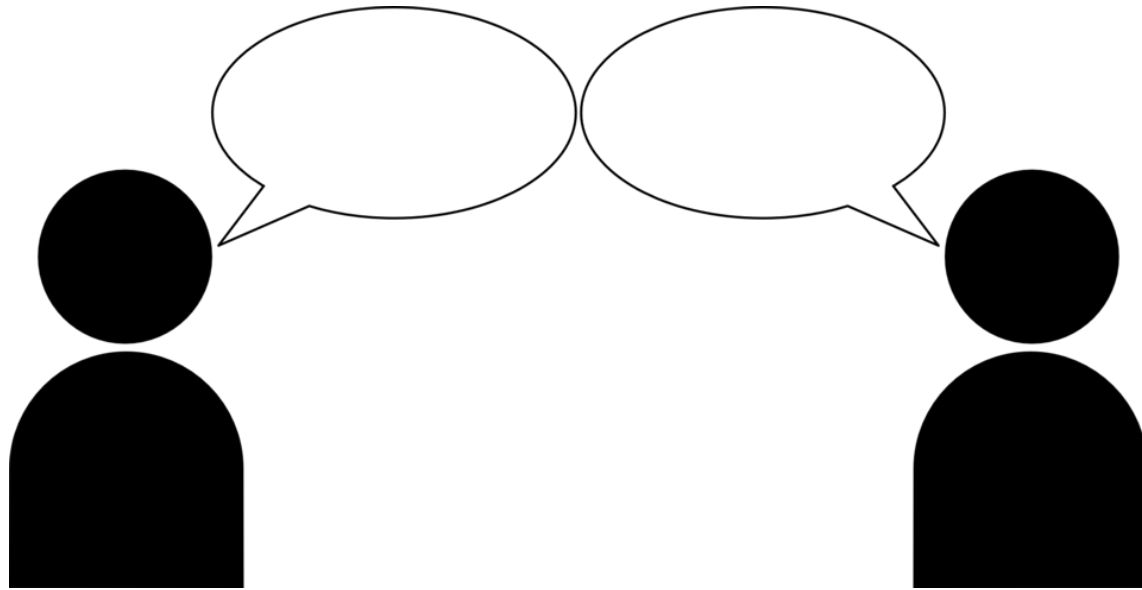
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The Interactive Process



The Interactive Process

What is the interactive process?

Defined as: A process developed where the employer and the employee show they are making a good faith effort to comply with the ADA.

Purpose: To determine whether for employees who, due to a disability, have limitations that prevent them from performing the essential functions of their job - a reasonable accommodation exists which will allow them to be able to perform the essential functions of their job.

Key Parts:

- Communication between the employer or employer's representative and the employee
- Review of Essential Functions and Claimed Restriction/Limitation
- Review of Potential Accommodations
- Documented

The Interactive Process: Six Steps

Figure 1:
THE INTERACTIVE PROCESS



Comparison

FMLA & ADA Intermittent leave

FMLA	ADA
Eligible once worked 1 year & 1250 hours.	Eligible day 1 no requirement for time worked.
Allowed 12 weeks of unpaid leave, but must have in bank at the time of request.	No bank of time is required.
EE must have a serious health condition for themselves or a family member.	EE has a disability and is the only eligible person for a reasonable accommodation.
EE has the absolute right to Intermittent FMLA for serious health condition for themselves or family member.	Intermittent ADA leave may be a reasonable accommodation but employer has an undue hardship defense. The employee does not have the absolute right to such a leave.

What is Intermittent Leave?

Unscheduled leave taken in multiple blocks of time because of a single qualifying reason.

Examples:

- 1) EE requests up to 4-6 breaks a day as needed lasting 30 minutes each due to Irritable Bowel Syndrome flare-ups.
- 2) EE requests to leave up to 3 days a week for outside counseling lasting up to 2 hours for each panic disorder episode.

Group Activity #1

Intermittent ADA leave

EEOC & ADA Intermittent Leave

EEOC Guidelines note that:

Under the ADA, a qualified individual with a disability may work part-time in his/her current position, or occasionally take time off as a reasonable accommodation if it would not impose an undue hardship on the employer.

Intermittent ADA Leave Basics:

- Medical documentation from a physician that specifies what the employee needs including frequency and severity (i.e. time off, breaks etc.), and length of time intermittent leave may be needed (i.e. 6 months).
- Clear communication with employee regarding expectations on following departmental and human resource policies (call-in policies, etc.).
- Focus on the needs of the employee while balancing the business needs of the organization.

When Is ADA Intermittent leave reasonable?

- When an employee can perform the essential functions of the job, but needs extra time to manage their condition.
- When an employee has exhausted their FMLA entitlement or is not eligible for FMLA and has a qualifying disability.
- When there is no undue hardship on the company in approving and implementing the reasonable accommodation for the employee.

Note: Indefinite or undetermined need for intermittent leave may not meet the reasonableness test.

Determination must be on a case by case basis

Group Activity #2

Intermittent ADA leave

Three Reasons Employees Request Intermittent leave:

- To attend medical appointments related to an episodic or chronic medical impairment (e.g., diabetes, bipolar disorder, asthma, etc.)
- To obtain medical treatment (e.g., chemotherapy, physical therapy, surgery, mental health counseling, in-patient substance abuse treatment, dialysis, etc.)
- To recuperate from an illness or surgery, or exacerbation of symptoms associated with an episodic or chronic medical impairment (e.g., flare-up of symptoms associated with multiple sclerosis, intestinal disorder, epilepsy, back condition, major depressive disorder, etc.)

Source: Job Accommodation Network (JAN)

Tips for Effectively Responding to Intermittent leave requests

- Read the health care provider's information to get a better understanding of the employee's limitations.
- Discuss with the employee what will help them perform the essential functions of their job.
- Explain what you can accommodate and what you can't accommodate.
- Find ways to work together with the employee that are mutually beneficial for both parties. (You don't have to accept their accommodation, you can choose the most effective).
- Don't be afraid to try accommodation on a trial basis.
- Repeat the agreed upon accommodation back to the employee.
- **DOCUMENT the interactive discussion and agreement.**

#1 Misconception

Intermittent leave is not a license to come and go as you please.

Group Activity #3

Intermittent ADA leave

Documentation

- Good record keeping is essential. Document the reason the EE calls in for an absence or is late.
- Document conversations you have with employees concerning their need or use of leave. The date and time of the conversation.
- Document exactly what the EE tells you specifically the reason for the leave.
- Document the dates of the leave.
- Request doctor appointments/treatments be conducted during off-hours if possible.
- Document performance and attendance issues separate from their ADA claim.

How to Curtain Abuse?

- Enforce all attendance policies especially call in policies.
- Hold employees accountable for absences that are unrelated to their condition.
- Make sure the employee has established a pattern of non compliance with frequency and duration limits before you discipline.
- If intermittent time is more frequent than health care provider notes – ask the employee for updated medical.
- If there is medical necessity associated with change in frequency and severity, determine if it is still reasonable to accommodate the intermittent ADA leave.

Takeaways

- Medical documentation from a physician that specifies what the employee needs including frequency and severity (i.e. time off, breaks etc.).
- Clear communication with employee regarding expectations on following departmental and human resource policies (Call-in policies, etc.).
- Focus on the needs of the employee while balancing the business needs of the organization.
- Partner with the employee and find ways for the reasonable accommodation to work for both parties.
- Document everything all the time.
- Don't immediately jump to abuse until you have established a pattern.

Questions

