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PRACTICAL STEPS IN DETERMINING "REASONABLE ACCOMMODATION" UNDER THE ADA [1]

Prepared for:

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1 Nothing in this paper is to be construed as legal advice from Mr. Fram nor the National Employment Law Institute. This paper is an excerpt from The Human Resource Guide to Answering ADA Workplace Questions (NELI May 2014).

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Excerpt from Fram, The HR Guide to Answering ADA Workplace Questions (NELI: May 2014)

Expanded Checklist C: Determining "Reasonable Accommodation"

The duty to provide reasonable accommodation to qualified individuals with disabilities is widely considered to be one of the most important ADA requirements. This responsibility has resulted in a great deal of ADA litigation.

In considering reasonable accommodation issues, it is most helpful to remember that reasonable accommodation involves the removal of workplace barriers. Therefore, non-workplace barriers are generally outside of the employer's reasonable accommodation obligations. Employers should keep in mind that workplace barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when or where work is performed, when breaks are taken, or how tasks are accomplished).

It also is important to recall that the U.S. Supreme Court has stated that reasonable accommodations include "preferences" for people with disabilities. In other words, an employer may have to give more to an individual with a disability than is provided to individuals without disabilities.

Of course, employers do not have to provide an accommodation that causes an undue hardship. "Undue hardship" means significant difficulty or expense in providing the accommodation. This analysis focuses on the particular employer's resources, and on whether the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business.

Since employers do not have to alter non-workplace barriers, they are not required to provide personal use items, such as equipment that helps someone in daily activities, on and off the job. This includes things like prosthetic limbs, wheelchairs, or eyeglasses if those items are used off the job. The EEOC also has said that an employer is not required to provide other personal use items,

such as a hot pot or refrigerator if those items are not provided to employees without disabilities. However, if the item is needed because of the particular workplace (for example, a scooter for a large, spread-out workplace, or specialized hearing aids because of a noisy workplace), it is likely that the object would not be considered a personal use item.

The Term "Reasonable": The U.S. Supreme Court has stated that an accommodation is required if it “seems reasonable on its face,” meaning “ordinarily or in the run of cases.” The Supreme Court rejected the EEOC’s contention that “reasonable” simply means “effective.”

A number of Courts of Appeals cases have stated that to be "reasonable," an accommodation’s costs should not greatly exceed its benefits. (Note: This is different from stating the the employer cannot afford the accommodation.) The EEOC, however, has expressly disagreed with the cost/benefit argument. Courts have also stated that to be “reasonable,” it must be likely that the accommodation would be successful.

What category of “disability” does the individual claim (“current,” “record of,” or “regarded as”) under Checklist A?

The law states that an employer does not need to provide a reasonable accommodation if an individual is only “regarded” as having a disability.

Has the reasonable accommodation process been triggered because the individual has requested a job modification because of a medical condition that could be a disability? Yes ___ No ___ (Describe)

Triggering the Reasonable Accommodation Process

In most caes, an individual must request an accommodation if s/he wants one. The EEOC has stated that, in general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Therefore, most courts have held that an employer could not be liable for failing to provide an accommodation if the employee never asked for anything.

Has the reasonable accommodation process been triggered because the employer knows the individual has a disability and has reason to know that the individual needs a reasonable accommodation? Yes ___ No ___ (Describe)

Employers should be aware that some courts have said that if the employer knows about the disability and has reason to know of the need for accommodation, it may have an obligation to provide the accommodation -- even without an express request.

Certainly, in cases where a disability truly prevents the individual from asking for a reasonable accommodation (for example, severe mental retardation) and the employer knows about the person's disability and need for accommodation, it is risky for an employer to fail to provide a needed accommodation that does not impose an undue hardship.

It also is possible that an employee may be entitled to a reasonable accommodation without an express request if it would be “futile” for the employee to make the request (for example, if a supervisor has

told employees that no exceptions are made to employer policies and procedures).

Content of Employee's Request for Accommodation: Of course, the next question is what exactly does the individual have to say when asking for a reasonable accommodation? Courts have held that an individual does not need to use any magic or technical language, or even use the term "reasonable accommodation" in the request.

An employer should probably consider -- as a reasonable accommodation request -- any notification that the employee is having difficulty performing a job because of a condition that might be a disability. For example, if an employee asks for leave because s/he is undergoing “treatment,” or brings in a doctor’s note with workplace restrictions, these should be considered ADA requests for accommodation.

Employers also should be aware that many FMLA medical leave requests (because of the employee’s own serious health condition) likely provide enough notice to trigger the ADA interactive process.

On the other hand, if the individual simply says s/he needs a job modification (but does not say it is needed because of some condition), or if s/he simply says she has some condition (but does not say s/he is having trouble performing the job because of it), this is not likely to trigger the interactive process.

Did you engage in "interactive process" to identify an effective accommodation? Yes ___ No ___

Did you discuss accommodation with the individual? Yes ___ No ___

If yes, document discussions (include attachments, if necessary).

Did you request assistance in determining accommodation from any outside source (e.g., the Job Accommodation Network)? Yes ___ No ___

If yes, document discussions (include attachments, if necessary).

Components of Interactive Process

Employer's Duty to Engage in Interactive Process When Accommodation is Requested: Once an accommodation has been requested, the employer should initiate an interactive process with the individual to determine if an appropriate accommodation is warranted.

As a practical matter, many employers prefer to start the interactive process by simply asking the individual, "How can I help you?," without delving into the individual's medical condition or whether the condition is an ADA-covered disability. Employers frequently find that there is a simple, inexpensive solution that solves the employee's problem. Starting with this simple question also is useful in letting the employer know whether FMLA leave might be needed.

If there is no simple solution, it is necessary to fully engage in a more extensive interactive process. During this process, the employer would be entitled to find out if the individual's condition is an ADA-covered disability (Checklist A), and the extent of the individual's functional limitations. (Note: If the FMLA also is implicated, the medical information that the employer may request is limited by FMLA restrictions.) In addition, during this process, the employer should be analyzing the job to determine "essential" and "marginal" functions (Checklist B).

Courts have held that the employer also is entitled to analyze whether the employee's requested accommodation is "because of" his/her disability, not for other reasons (such as personal preferences).

In looking at possible accommodations, the employer should be sure to engage in discussions with the individual and with any other sources that might provide helpful input (such as the Job Accommodation Network, 1-800-526-7234). The employer should document all efforts undertaken in the interactive process, including communications to the applicant or employee, communications from the individual, and communications with third parties.

It is important to remember that courts have found that "unreasonable delay" in the interactive process can be evidence of discrimination. Therefore, courts and the EEOC have stated that the employer's responses should be "expeditious." The length of time may depend on issues such as whether the accommodation is completely within the control of the employer, or whether the employer is acquiring the accommodation (for example, modified hardware or software) from some outside vendor.

Demonstrating Good Faith in Attempting to Accommodate: The amount of effort an employer puts forth in attempting to accommodate bears a direct relationship to potential damages if it improperly fails to accommodate. For example, the Civil Rights Act of 1991 excludes punitive damages and certain compensatory damages in cases where

the employer can show "good faith" in attempting to accommodate.

Employee's Failure to Cooperate in Providing Medical Documentation and/or Identifying a Reasonable Accommodation: An individual's failure to cooperate with the employer's attempt to engage in the interactive process can be fatal to the individual's reasonable accommodation case. Courts have said that if the individual is responsible for the "breakdown" in the interactive process, s/he might lose the right to an accommodation. This "breakdown" can include the individual's refusal to document a non-obvious disability, refusal to show up for meetings with the employer to discuss accommodation, and refusal to try the employer's proposed accommodations to see if they would work. Courts also have suggested that if the individual's doctor is being uncooperative, this is the responsibility of the employee. For this reason, the employer should carefully document all of its efforts (and the individual's responses) in the interactive process.

Telling Other Employees That an Employee is Receiving Accommodation: A difficult practical question that frequently arises in the workplace is what -- if anything -- an employer may tell other employees about one employee's reasonable accommodation. It is important to remind supervisors and managers that the ADA prohibits employers from disclosing an employee's "medical"

information (with limited exceptions). Disclosing that someone is being provided an ADA-reasonable accommodation is, therefore, risky because it could be considered a disclosure that the person has a disability. According to the EEOC, it is much safer for an employer to simply disclose that it has made a "modification" to comply with "federal law."

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. Although it is smart for an employer to give consideration to the individual's preferred accommodation, the employer is free to choose an effective accommodation that is less expensive or easier to provide. This means that an employer can choose between two accommodations that both allow the individual to perform his/her job functions. Likewise, an employer could choose to provide an accommodation that requires an employee to remain on the job despite the employee's request for "leave" as an accommodation (assuming the employee is not entitled to leave under the FMLA).

It is important to remember that, although an employer can choose among effective accommodations, it may not choose a less effective accommodation if a more effective one exists. For example, the EEOC has stated that an employer should not force an individual to take leave if an accommodation would allow him/her to continue working. Likewise, an employer should not reassign

an employee if an accommodation would allow the employee to remain in the original job.

Of course, an employee is free to refuse an accommodation offered by the employer. However, the employer has certainly met its ADA obligations by offering an effective accommodation. In addition, the EEOC has specifically stated that although an individual cannot be forced to accept a reasonable accommodation, if s/he cannot perform the job without it, s/he will not be considered "qualified" under the law. For this reason, the employer should document its offer of an accommodation and the employee's response.

What accommodation (if anything specific) was requested?

Equipment or Machinery ___
Reader ___
Interpreter ___
Modification of Policy (including Leave Policy) ___
Accessibility ___
Job Restructuring (Reallocation of Marginal Functions) ___
Modification to Work Schedule ___
Examinations/Training Materials ___
Reassignment ___
Other ___

Describe accommodation requested:

Types of Accommodation

Unpaid Leave as a Reasonable Accommodation: Unpaid leave is considered a form of reasonable accommodation. Unpaid leave may be an appropriate reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability, such as training a guide dog.

One question that arises is how much leave an individual must be given as a reasonable accommodation. This is very fact-specific, and depends on whether a particular amount of time imposes an undue hardship on the employer. Courts seem to be holding that an employer can likely hold lower-level, less-skilled jobs open for longer periods

(than higher-level, more highly-skilled jobs), especially where those lower-level jobs can be filled for long periods of time by temporary workers. An employer's size also appears to be a relevant issue. For example, courts seem to be suggesting that larger employers may be able to hold jobs open for longer periods of time.

In determining whether holding a job open for a particular period of time causes an undue hardship, courts also have looked at the amount of time it took to ultimately fill the job after the individual was terminated for requiring too much leave.

Employers frequently ask whether the individual is entitled to his/her actual position -- or merely to a similar position -- on the return from leave. Under the ADA, the safe approach is to return the employee to the original position unless holding that position open causes an undue hardship. In this respect, the ADA may well be more protective than the FMLA; therefore, the employer should analyze whether the employee might be protected by the ADA before simply returning the employee to an "equivalent" position under the FMLA.

Another question regarding unpaid leave is whether an employer is required to hold a job open for an indefinite period of time. This situation arises when an employee has no idea when when s/he can come back. The situation also surfaces if an employee continually requests more and more leave after the expiration of prior leave; this pattern arguably reflects

a request for indefinite leave. Most courts have held that indefinite leave is not a required reasonable accommodation. The EEOC has stated, however, that -- despite the court decisions -- it believes that indefinite leave is a possible accommodation unless the employer can show that providing such leave poses an undue hardship. Importantly, however, the EEOC has suggested that in many instances, an employer would be able to show that indefinite leave causes an undue hardship.

There seems to be broad agreement that since reliable performance is required for most jobs, an employer generally does not have to provide leave for an employee who will be unable to maintain reliable, predictable performance. For example, some courts have said that an employer does not need to provide a "work-when-able" schedule. (Note: Employers must, however, be aware of more generous FMLA intermittent leave entitlements if the employee is covered under the FMLA.)

Many employers have a "no-fault" attendance policy, where employees get a certain amount of leave (for example, one year) and then they are fired -- regardless of the reason for the absence. Although this no-fault policy arguably should not itself be considered an ADA violation, an employer should be prepared to give an employee additional unpaid leave (for example, two more weeks) if s/he is covered under the ADA, s/he requests such leave, and the additional leave would not impose an undue hardship. As a practical matter, it may be difficult for

an employer to show that providing additional short periods of leave would pose an undue hardship. Importantly, however, EEOC regional offices have been suing employers simply for having a no-fault policy, unless the policy contains an explicit provision saying that longer periods are available if needed as a reasonable accommodation.

Job Restructuring as a Reasonable Accommodation: The statute and regulations clearly state that an employer must "restructure" an employee's job as a reasonable accommodation. This generally means modifying the job to reallocate or redistribute marginal job functions, or altering when and/or how a function is performed. Of course, if an employer gives an employee's marginal functions to a second employee, the employer can give the second employee's marginal functions to the employee with the disability.

It is important to remember that an employer never has to reallocate essential functions as a reasonable accommodation. In fact, if the individual wants a reasonable accommodation so that s/he can perform the essential functions, it may be risky for the employer to unilaterally decide to give away the essential functions.

If the employer decides to go beyond the ADA by agreeing to an employee's request to be excused from essential functions on a temporary basis, courts (with very few exceptions) generally will not punish the employer by requiring that these functions be

given away on a permanent basis. If the employer wants to temporarily excuse performance of essential functions, however, it should make it clear to the individual that the functions are indeed "essential," that this is being done pursuant to the employee's request, and that it is only temporarily excusing these functions. In addition, the employer should not call this modification a "reasonable accommodation" (because, in fact, it goes beyond the ADA's accommodation requirement).

Light/Modified/Transitional Duty as a Reasonable Accommodation: Since an employer does not have to reallocate essential functions, it never has to create a new job -- such as a light, modified, or transitional duty job in which the employee is no longer performing the job's essential functions. For example, an employer would not have to create a light duty clerical position for someone in a heavy labor job who could no longer perform his/her job. If an employer has existing, vacant light duty jobs -- as many employers do -- it might have to reassign the employee with a disability (as discussed below) to one of those jobs if that is needed as a reasonable accommodation.

Courts and the EEOC have stated that an employer may voluntarily create a light duty job, and may do so for a temporary period. However, the employer should clearly indicate to the employee that the employee is not performing some or all of his/her "essential" functions and that the light duty job is only temporary in duration. In addition, the employer

should not call this temporarily modified job a "reasonable accommodation" (because it goes beyond the ADA's accommodation requirement).

Providing an Assistant as a Reasonable Accommodation: Reasonable accommodation can include providing a qualified reader or interpreter so that the employee can perform his/her job. However, an employer would not have to provide someone to actually perform the essential functions of the job for the employee with a disability. For example, if lifting is truly an essential function of someone's job, an employer would not have to hire someone to do the lifting for the employee.

Whether Employer Must Rescind Discipline as a Reasonable Accommodation: There is widespread agreement that reasonable accommodation does not include rescinding discipline. Rather, with few exceptions, courts have said that an employer may uniformly impose discipline, even if the employee later reveals that the misconduct was the result of a disability. The U.S. Supreme Court has suggested that it agrees with this approach. This is because an employer may hold all employees (those with and without disabilities) to performance and conduct standards that are essential to the job.

Although an employer does not need to forgive an employee for breaking rules, it may have to provide reasonable accommodation so that the employee does not break those rules in the future. For example, suppose an employee has been disciplined

for tardiness, and s/he later reveals that the tardiness has been because of morning treatments for a disability. The employer does not need to rescind the past discipline, but may have to modify the employee's future work schedule so s/he can get her treatments without being tardy.

In investigating rule violations, an employer would be wise to examine whether the employee notified the employer of his/her need for accommodation prior to the rule violation, and whether this notice was ignored.

Work-at-Home as a Reasonable Accommodation: Although there is a conflict in the courts, the vast majority of courts, as well as the EEOC, take the position that where the work is performed is just another policy that may have to be modified for certain jobs.

Of course, even if work-at-home is considered as a reasonable accommodation, it is still important to look at: (1) whether the individual needs to work at home because of his/her condition, and (2) whether the job can truly be performed at home. For example, courts have held that certain jobs involving manual labor or access to confidential information cannot be performed at home. However, other jobs -- such as telemarketing -- may be able to be performed at home.

Modified Work Schedule as a Reasonable Accommodation: An employer may, in certain circumstances, have to modify an employee's work schedule if this is needed as a reasonable accommodation. There seems to be general agreement that a modified work schedule can include a number of changes, such as altering arrival/departure times, providing a flex-time schedule, providing periodic breaks during the day, or changing when certain functions are performed.

The key -- in all cases -- is whether there is a nexus between the disability and the requested schedule. In other words, a court would ask whether the modified schedule is truly needed because of the disability. As noted earlier, however, courts have held that an employer is generally not required to provide an "open-ended" work schedule as a reasonable accommodation unless the employee's schedule is unimportant to the tasks the individual is performing.

Shift Changes as a Reasonable Accommodation: If the "shift" is considered an essential part of an individual's job, the shift would not need to be modified as a reasonable accommodation (since reasonable accommodation does not include reallocating essential functions). The limited number of court decisions on this issue have suggested that the shift (or the ability to work rotating shifts) may be essential for many shift jobs. The EEOC has conceded that for some jobs, the time during which

the tasks are performed may be integrally tied to those tasks.

Therefore, if the shift is essential and if someone could not work the shift because of a disability, the employer would generally look at reassignment as a possible reasonable accommodation.

"Irritant-Free" Environment as a Reasonable Accommodation: Employers must, of course, consider modifying a workplace as a reasonable accommodation. Sometimes, an employee asks the employer to provide a workplace free of all irritants, such as perfumes or other scents. The limited number of court and EEOC decisions on this issue have generally held that an employer need not create a completely irritant-free workplace. Of course, the employer should still explore other accommodations, such as an office with better ventilation. If the individual requests an environment free of one particular irritant (such as a particular perfume, or microwaved popcorn) because of a disability, it is possible that this could be considered a required reasonable accommodation (unless it poses an undue hardship for the employer).

Requiring Medication or Treatment as a Reasonable Accommodation: An employer cannot force an employee to take medication or to get treatment as a reasonable accommodation. However, if an individual wants to take medication or get treatment, a reasonable accommodation can include providing the individual with time off to take such medication or

to get treatment. Although an employer cannot require medication or treatment, in some cases, an individual might not be qualified for a job (even with an accommodation) unless s/he takes the necessary medication or gets treatment. Of course, an employer never has to keep someone in a position for which s/he is not qualified.

Providing Parking Spaces/Commuting Assistance as a Reasonable Accommodation: Although some courts recently have taken a different position, employers have an argument that reasonable accommodation does not include providing commuting assistance for employees. This is because barriers in getting to work are arguably not workplace-created barriers. In fact, the EEOC has said (informally) that "an employer would not be required to provide transportation as a reasonable accommodation for an individual whose disability makes it difficult or impossible to commute to work." The EEOC's position is based on the rationale that an employer "is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside of the work environment."

Certainly, if an employer offers commuting assistance to employees generally (such as a van pool or employer-provided parking), there is widespread agreement that the employer must make sure the perk is accessible to and usable by individuals with disabilities. For example, if the employer provides parking to employees, it would be

a reasonable accommodation to provide a reserved space for someone with a mobility impairment who needs to park next to a curb cut.

There is general agreement that an employer may have to eliminate workplace-created barriers (such as requirements concerning scheduling or where work is performed) for someone who cannot get to work because of a disability. For example, as noted earlier, an employer may sometimes have to provide a modified work schedule or allow the employee to work at home.

Reasonable Accommodation for Employees with Alcoholism: The primary reasonable accommodation for an employee with alcoholism would be a modified work schedule so the employee could attend Alcoholics Anonymous meetings, or a leave of absence so the employee could get treatment for the alcoholism. The ADA does not require an employer to provide an accommodation that "enables" the individual's addiction. For example, an employer never has to provide a flexible schedule to accommodate weekend drinking binges. In addition, courts have held that the employer does not have to excuse misconduct caused by the alcoholism (assuming the employer uniformly enforces its workplace conduct rules).

Of course, the employer cannot disparately treat an alcoholic by more stringently enforcing workplace rules for that employee.

Reasonable Accommodation for Smokers: Whether smokers are covered by the ADA -- and therefore potentially entitled to reasonable accommodation -- is open to debate. The mere fact that an individual smokes does not mean s/he has a disability because many people who smoke do not even have a physical or mental impairment. However, if someone can show s/he is "addicted" to nicotine, this addiction might well be an impairment. The individual still would be required to show that s/he is substantially limited in a major life activity (to be entitled to ADA protection).

Assuming an individual with nicotine addiction was covered under the ADA, an employer arguably would be required to provide reasonable accommodation, such as a flexible schedule so the employee could get treatment for the addiction. However, like the situation with alcoholism, the employer arguably would not have to provide a reasonable accommodation that simply "enables" the individual to stay addicted, such as providing smoking breaks or a room for smoking. In addition, the ADA specifically says that the law does not prohibit an employer from restricting smoking in the workplace.

Reassignment as a Reasonable Accommodation: The vast majority of courts say that reassignment is a form of reasonable accommodation when the person cannot be accommodated in his/her original job. Although there are legitimate questions about

the scope of an employer's reassignment obligation, some points are clear.

First, reassignment is available only for employees (which can include employees during a “probationary” period), but reassignment is not available for applicants.

Second, an employer does not have to bump any employee from a job in order to create a vacancy.

Third, an employer does not have to promote an employee as a reassignment, but, if an equivalent position is not available, may have to look at lower-level jobs.

Fourth, an individual must only be reassigned to a job for which s/he is qualified (with an accommodation if necessary).

In general, reassignment is considered when the employee cannot be accommodated in his/her current job, or if both the employer and the employee agree that reassignment is desired. In fact, an employer likely would be found liable under the ADA if it reassigns someone who wants to stay in his/her original job and who is qualified for that job (with an accommodation, if needed).

The reassignment must be to a vacant position that is as equivalent as possible (in terms of pay, status, geographic location, etc.) if the employee is qualified for the position. "Vacant" means that the position is

available when the employee asks for reasonable accommodation, or that it will soon be available (for example, it will be available within the next month). As noted above, if there is no vacant, equivalent position, the employer must reassign the employee to a vacant, lower level position for which the individual is qualified.

The U.S. Supreme Court has held that if another employee is entitled to an open job because of seniority (pursuant to a collective bargaining agreement or company policies), it would not generally be a required reasonable accommodation to violate seniority rights by reassigning someone with a disability to that job. However, if "special circumstances" exist (such as frequent exceptions to the seniority policies), an employer may be required to reassign the individual with a disability over the individual with seniority. It also is possible that if seniority is just one of a number of factors considered in determining who is entitled to the vacancy, the employer may not be able to rely on seniority in filling the position.

Another question is how widely the employer must search for a vacant position. In other words, can the employer limit its search to specific departments or facility locations? Because the statute has no restrictions on how far an employer should search, an employer should look at all of its locations and facilities.

An employee must be qualified to perform the job to which s/he is reassigned. Therefore, it does not appear that an employer would have to train an employee for the new job unless it trains employees without disabilities for reassignments. If an employer does train others when they are reassigned, it should do so for individuals with disabilities. Otherwise, it may be engaging in disparate treatment.

The most difficult reassignment issue is whether the reassignment is "competitive" or "noncompetitive." In other words, must the individual with the disability be the best qualified person for the vacancy? The vast majority of the federal Courts of Appeals, as well as the EEOC, take the position that reassignment means actually transferring the individual to the new position, not simply letting the person compete for the new position. This position is even stronger in light of the Supreme Court's statement that reasonable accommodations include "preferences" for individuals with disabilities.

If someone is reassigned to a new position, s/he is generally paid the salary and benefits of the new position, unless the employer pays employees without disabilities their higher salary or benefits when they are reassigned to lower-level positions (for example, in connection with a plant closing).

When an employee's position is eliminated as part of a workforce restructuring, an employer arguably does not need to reassign someone with a disability if it does not do so for employees without disabilities.

The employer simply needs to treat the individual the same way it treats other individuals whose jobs are lost. For example, if displaced employees must compete for new positions, the individual with a disability can be required to compete for a new position. The rationale for this argument is that reassignment is available as a reasonable accommodation when an individual can no longer perform his/her job because of disability; an employee who is displaced as a result of downsizing is unable to perform his/her job because of the restructuring, not his/her disability.

Reasonable Accommodation as Part of Evaluation and/or Discipline Process: An employer's reasonable accommodation obligation is, of course, not limited to accommodations necessary to perform job functions. An employer also is required to provide accommodations necessary for an employee to effectively participate in performance evaluation meetings or discipline proceedings. For example, a deaf employee might need an interpreter when s/he is being disciplined so that s/he understands the reasons for the discipline.

Do you claim that providing reasonable accommodation would impose an undue hardship? Yes ___ No ___

What evidence exists to support undue hardship?

Nature and net cost of accommodation___

Overall financial resources of facility/facilities ___

Overall financial resources of covered entity, overall size of business of covered entity with respect to the number of employees and the number, type and location of facility/ facilities ___

Type of operation(s) of covered entity ___

Impact of the accommodation on the operation of the facility, including impact on other employees' ability to perform duties and facility's ability to conduct business ___

Terms of a collective bargaining agreement ___(Discuss how the accommodation would affect the rights of other employees, and whether you tried to negotiate a change to CBA)

Undue Hardship Issues

If an employer is unable or unwilling to provide a reasonable accommodation, courts require the employer to prove undue hardship. Therefore, the employer should make sure the facts support its position. An employer should not argue that an accommodation affects customer preferences or other employees' morale. Employers' most successful undue hardship arguments seem to focus on the effect of the accommodation on other employees' ability to fairly, properly, and safely perform their jobs. For example, if one employee's modified schedule (provided as a reasonable accommodation) requires others to have to work an inordinate amount of involuntary overtime, this could support an undue hardship argument.

Cost as an Undue Hardship: As a practical matter, if an employer plans to argue that the cost of an accommodation imposes an undue hardship, it might be required to open up its financial books during the course of litigation. In addition, in arguing such a defense, an employer might find itself in the uncomfortable position of being forced to justify to a jury why it pays certain expenses (for example, drivers or country club memberships for executives) while claiming it cannot afford the reasonable accommodation.

It is important to remember that "cost" really means "net cost." The EEOC has taken the position that the cost to be analyzed is the employer's real cost of

providing the accommodation, after taking into account other offsetting resources, such as tax credits or deductions.

Collective Bargaining Agreement as an Undue Hardship: Most courts say that an employer can show undue hardship if providing the accommodation would require the employer to violate a collective bargaining agreement.

The EEOC has stated that the ADA imposes a general duty to provide reasonable accommodation on both unions and employers. Therefore, the EEOC has maintained that the ADA requires unions and employers to negotiate a change to a collective bargaining agreement if no other accommodation exists and the proposed accommodation does not unduly burden non-disabled workers. The EEOC has acknowledged, however, that the terms of the CBA are relevant to determine the extent to which the proposed accommodation would burden other employees by disrupting settled expectations of those employees.

As a practical matter, it may be wise for an employer to at least try to negotiate with the union if the collective bargaining agreement prohibits a particular accommodation.