

HANDLING EMPLOYEE REQUESTS FOR REASONABLE ACCOMMODATION

When you receive a reasonable accommodation request, you should immediately **contact your servicing Civilian Personnel Office (CPO) or NAF HR Office (HRO)** and work with them to address the request.

- **The Rehabilitation Act of 1973** protects qualified employees and applicants with disabilities in the Executive Branch of the Federal Government from employment discrimination based on disability. It requires federal agencies to provide reasonable accommodation for known physical or mental disabilities to qualified employees and applicants, unless to do so would cause an undue hardship.
- **Step 1—Employee Makes a Request for a Reasonable Accommodation (RA)**—A person with a disability can make the request orally or in writing to their supervisor. There are no “magic words” required and an employee need not use the term “reasonable accommodation.” This triggers an “interactive process.” The supervisor must acknowledge receipt of the request and enter into an interactive dialogue process within 10 business days of the request.
- **Step 2—Interactive Process**—Supervisor and employee discuss employee limitations and identify what accommodations might be helpful in working around those limitations. This may include the supervisor asking relevant questions that enables the supervisor to make an informed decision. Supervisors may only request sufficient medical documentation to support or confirm the disability and the need for the requested accommodation.
- **Step 3—Proposing RA to Employee**—The first level supervisor decides what, if any, RA will be made. Best practice is for supervisors to notify employees in writing on their decision to make an RA and what RA will be made, but they are required to inform employees in writing if the RA is denied and no alternative accommodation is offered. The denial must include specific reasons for the denial and the employee or office that made the decision. Supervisors should consult with their CPO and their servicing legal office before denying an accommodation.
- **Step 3.5—Undue Hardship**—Supervisors are not required to implement an RA that creates an undue hardship on the operation of the agency. This refers to RAs that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. The cost to the organization will rarely, if ever, be a permissible basis for denying a reasonable accommodation.
- **Step 4—Implementing an RA**—The DoD Computer/Electronics Accommodations Program (CAP) office provides much of the special equipment, devices, and assistive technology that constitute an RA. Work with the employee and CPO on implementing the RA, and periodically check-in with the employee to ensure that the RA is meeting the employee’s needs.

After each step, **inform the CPO or HRO** of your progress and ensure that you clarify any issues as you make your way through the RA process.

Reasonable Accommodation and Return to the Workplace During COVID-19 Pandemic

Frequently Asked Questions and Answers – June 4, 2020

The Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act (ADA), protects applicants and employees from disability discrimination and is relevant to pandemic response in at least three major ways. First, the Rehabilitation Act regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have disabilities. Second, the Rehabilitation Act prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation). Third, the Rehabilitation Act requires reasonable accommodation for individuals with disabilities (absent undue hardship) even during a pandemic. These answers are based on Air Force Instruction 36-205, *Affirmative Employment Program (AEP), Special Emphasis Programs (SEPS) and Reasonable Accommodation Policy*, 1 Dec 2016 and existing EEOC guidance regarding reasonable accommodation, disability-related inquiries and medical examinations, and direct threat.

A. Reasonable Accommodation

1. During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's reasonable accommodation obligation to individuals with disabilities continues during a pandemic. If an employee with a disability needs the same reasonable accommodation at a telework site that he/she had at the workplace, the employer should provide that accommodation, absent undue hardship for the employer. In the event that the employer decides that the reasonable accommodation creates an undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extenuating circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

2. If a job can only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19?

Yes. There may be reasonable accommodations that could offer protection to an individual whose disability puts the employee at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. For example, if not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between coworkers whenever feasible, per CDC guidance, or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of non-essential job duties, temporary transfers to a different position, or modification of a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting. In addition to reasonable accommodation, the employer should be aware of the entitlements provided in the Families First Coronavirus Response Act (FFCRA), which authorizes employee sick leave or expanded family and medical leave for specified reasons related to COVID-19. The employer should also be aware of the employee's leave entitlements under the Family Medical Leave Act (FMLA).

- 3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?**

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. However, advance approval is not a requirement. You should be mindful of the timelines addressed in AFI 36-205, paragraphs 8.4 and 8.5. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

- 4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?**

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer should discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed. This discussion may be initiated by the employee. However, if the employer is aware of the employee's disability and need for an accommodation to perform the essential functions of his/her position, then the employer should discuss the need for a reasonable accommodation with the employee.

- 5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability?**

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a

physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

When the disability or need for the requested accommodation is not obvious, AFI 36-205, paragraph 8.7 states that supervisors or managers may request from the employee, sufficient medical documentation to support or confirm the disability, identify functional limitations, and determine appropriate accommodations. Sufficient documentation is documentation describing the disability; its nature, severity, and duration; and the extent to which it limits the employee's ability to perform a major life activity or activities. The supervisor may also request from the employee a medical release and medical documentation to support the requested accommodation.

6. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" and grant the request. In addition, when government and installation restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process – to include scheduling end dates for the accommodation - to suit changing circumstances based on public health directives. The scheduled end date should prompt a continued discussion as to whether the accommodation or different accommodation is needed.

Whatever the reason for shortening or adapting the interactive process, an employer may choose to place an end date on the accommodation (for example, either a specific date such as July 30, 2020, or when the employee returns to the workplace part- or full-time due to changes in installation restrictions and conditions). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts him or her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension of the temporary accommodation that an employer must consider, particularly if current restrictions are extended or new ones adopted.

7. May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?

Yes. Employers may ask employees with known disabilities to request accommodations that the employee believes they may need when the workplace re-opens. Employers may begin the "interactive process" now - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

8. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation and refers to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business or organization." An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an effective alternative that could be provided that does not pose such problems. In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. The Department of the Air Force budget overall, not individual unit or installation funding, determines whether an accommodation is too expensive. Therefore, supervisors and managers may not use the cost of the accommodation to claim undue hardship.

Denials of requests for reasonable accommodation should only be made after consultation with the local servicing legal office. For more information on the Air Force reasonable accommodation process, see AFI 36-205, Chapter 8.

9. Does the Rehabilitation Act apply to applicants or employees who are classified as critical infrastructure workers or essential critical workers by the CDC or emergency employees by the DoD?

Yes. These designations, or any other designations of certain employees, do not eliminate coverage under the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the Rehabilitation Act from employees falling into these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

B. Returning to the Workplace

1. As installation restrictions and government stay-at-home orders are modified or gradually lifted, how will organizations and supervisors know what steps they can take consistent with the Rehabilitation Act to screen employees for COVID-19 when entering the workplace?

The Rehabilitation Act permits employers to make disability-related inquiries and conduct medical examinations if job-related and consistent with business necessity. Inquiries and reliable medical

examinations meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.¹

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the Rehabilitation Act as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. Specifically, the Equal Employment Opportunity Commission (EEOC) has stated that employers may take employee temperatures and ask questions about symptoms (or require self-reporting) for all those entering the workplace to determine if they have or may have been exposed to someone who has the COVID-19 virus. Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols). However, where an employee with a disability needs a related reasonable accommodation under the Rehabilitation Act (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading), the employer must discuss the request and engage in the interactive process. Provision of the requested modification or an effective alternative is to be provided in the absence of undue hardship to the employer.

3. How should an employee request reasonable accommodation if he/she has a medical condition that may put him/her at a higher risk for severe illness from COVID-19?

An employee who wishes to receive reasonable accommodation may make an oral or written request to their immediate supervisor. Keep in mind that the employee (or his/her representative) does not need to use the term “reasonable accommodation” or reference the Rehabilitation Act. The request should be processed in accordance with AFI 36-205, Chapter 8, para. 8.4. The employee or his/her representative should communicate that he/she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the supervisor/manager must acknowledge receipt of the request and enter into an interactive dialogue process with 10 business days of the request. AFI 36-205, Chapter 8, paragraph 8.4 explains the requirements of the interactive process in detail.

4. Does an employee at higher risk under the CDC classification have a right to extended telework, even if other employees have been recalled to work?

Maybe. It depends on the ability of the employee to safely perform their job at the worksite. By law, the request for accommodation requires an individualized assessment of the facts and circumstances (both medical and job) of the particular requesting employee. The statute broadly defines the term “disability” and includes virtually all of the conditions (other than age) identified by the CDC as

¹ Although recent EEOC guidance allows medical inquiries and examinations of individuals posing a direct threat to the workplace, any inquiry and examination must be conducted in compliance with other laws and Office of Personnel Management (OPM) regulations and guidance.

qualifying an employee as being at higher risk for serious complications from COVID-19 (<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>). An employee with a disability that puts them at higher risk from COVID-19 may well be entitled to continued telework as an accommodation.

The EEOC has specifically deemed telework, including full-time telework, to be a potential reasonable accommodation, even in situations where employees without a disability are not permitted to telework.

Denials of requests for reasonable accommodation should only be made after consultation with the local servicing legal office.

5. The CDC identifies a number of medical conditions that might place individuals at higher risk for severe illness if they get COVID-19. If the supervisor/manager knows that an employee has one of these conditions and is concerned that his/her health will be jeopardized upon returning to the workplace, should the manager/supervisor ask the employee if he/she will require an accommodation?

Not necessarily. AFI 36-805, para 8.4 requires the employee to initiate the interactive process to request a reasonable accommodation. If the employee has not requested an accommodation, the Rehabilitation Act does not mandate the supervisor/manager take any action. More importantly, if the supervisor/manager is concerned that the employee's health will be jeopardized by returning to the workplace, the regulation does not allow the supervisor/manager to exclude the employee *solely* because the employee has a disability that the CDC identifies as placing the employee at higher risk for serious complications from COVID-19. The exception would be if the employee's disability poses a "direct threat" to his/her or other employees' health or safety that cannot be eliminated or reduced by reasonable accommodation.

The direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his/her own or another employee's health or safety under 29 C.F.R. section 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's present ability to safely perform the essential functions of the job, using the most current medical knowledge and/or on the best available objective evidence. The Rehabilitation Act regulations require an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health, and his/her particular job duties. If the risk cannot be eliminated or reduced through a reasonable accommodation at the physical work office, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself or other employees that cannot be reduced or eliminated by reasonable accommodation. If it is necessary to bar an employee, the supervisor should adhere to AF/A1 guidance, which provides that an employer may approve Weather and Safety Leave for an employee who cannot safely perform his/her duties at an approved work duty station.