

ACCESSING ASSISTIVE TECHNOLOGY

Chapter 6

Reasonable Accommodation in Employment

From a 17-Chapter Manual
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Written by:

DISABILITY RIGHTS CALIFORNIA

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ACCESSING ASSISTIVE TECHNOLOGY

Chapter 6

REASONABLE ACCOMMODATION IN EMPLOYMENT

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Chapter 6

REASONABLE ACCOMMODATION IN EMPLOYMENT

The right to assistive technology in employment is tied to the right to reasonable accommodation. The laws that make discrimination on the basis of disability illegal require employers to make changes and adjustments so that qualified people with disabilities can enjoy equal employment opportunities. Such changes and adjustments are called “reasonable accommodations.” These may include providing new devices or changing current equipment so that an employee with a disability can perform his job.

There are six main federal and state laws that protect people with disabilities from discrimination in employment. These are:

- The Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 and following;
- Sections 501, 503, and 504 of the Rehabilitation Act; Codified at
- 29 U.S.C. §§ 791, 793, and 794;
- The California Fair Employment and Housing Act (FEHA). Cal. Govt. Code § 12900 and following; and
- The California Government Code § 11135.

In this chapter, we will generally refer to the terms and provisions of the ADA unless other laws differ significantly. We will, however, explain other federal and state laws in a section in this chapter called OTHER DISABILITY LAWS so that you become familiar with the additional rights they may give you. Keep in mind that more than one law may apply in your case. In addition, the ADA does not apply to all situations. For example, the ADA does not cover employees of the federal government. Federal employees are protected by Sections 501 and 504 of the Rehabilitation Act, however.

OVERVIEW

1. What is the ADA?

The Americans with Disabilities Act (ADA) is a federal law that makes discrimination based on disability illegal. It gives civil rights protection to people with disabilities and prohibits discrimination in employment as well in public services.

The ADA has several titles that are like chapters in a book. Titles I and II of the ADA prohibit employment discrimination. Title I covers private employers and labor unions with 15 or more employees or members. Title II covers state and local government agencies regardless of the number of people they employ. The legal standards of Title I apply equally to Title II. Therefore, we will refer mainly to Title I provisions in this chapter. See question 35 for information on how to file an ADA complaint.

Some employers are exempt from the ADA. They are the Federal Government, the United States, Indian tribes, and some private membership clubs. 42 U.S.C. § 12111(5)(B).

2. Who is protected by the ADA?

The ADA protects “qualified individuals with a disability.” This means that you must:

- Be qualified to perform the *essential functions of the job* (in other words, with or without a reasonable accommodation). You must have the minimum requirements necessary to perform the job such as the necessary education, experience, or licenses; 42 U.S.C. § 12131(2); 29 C.F.R. § 1630.2(m) **and**
- Have a disability that is a physical or mental impairment that *substantially limits one or more major life activities* (such as working, learning, performing manual tasks, walking, seeing, hearing, speaking, breathing, and caring for yourself)¹,

¹In June 1999, the United States Supreme Court issued a series of decisions that affect this part of the definition of “qualified individual with a disability”: *Sutton v.*

United Airlines, Murphy v. United Parcel Services, and Albertson's, Inc. v. Kirkingburg. These three cases limit who is protected by the ADA.

In these decisions, the Supreme Court held that the effects of any “mitigating measures” taken by the individual to reduce the impact of the disability must be considered when determining whether a person has a disability under the ADA. “Mitigating measures” are things used to control or reduce the effects of an individual’s disability. Some examples of mitigating measures include the use of medication, therapy, or assistive devices (like eye glasses, hearing aids or prosthetic limbs). In *Sutton*, the court held that two individuals with severe vision limitations were not disabled. The court reasoned that because their vision was 20/20 or better with eyeglasses, they were not substantially limited in the major life activity of seeing. In *Kirkingburg*, the court found a truck driver with 20/200 vision in his left eye was not disabled. The *Murphy* case concerned a man with high blood pressure who used medication to lower his blood pressure. The court held that once Mr. Murphy took his medication, he was no longer a person with a disability under the ADA because his major life activities were no longer restricted.

In all these cases, the Supreme Court ruled that in deciding whether an individual is disabled, you should look at the person’s actual circumstances, with or without the use of mitigating measures. Thus, for example, if the person is taking medication, wearing eyeglasses, or has a prosthetic device, you must consider that in deciding whether he or she is a person with a disability. On the other hand, if the person was not using any mitigating measures at the time of the alleged discrimination, then whether he or she is disabled should be decided without considering the use of the mitigating measure.

As a result of these decisions, many people will have a more difficult time showing a court that they meet the definition of “qualified individual with a disability” and are protected against discrimination by the ADA. The Supreme Court did not say in these cases, however, that using a mitigating measure automatically means that you are not a person with a disability. It only means that you have to look more carefully to see if the definition of disability is met.

Even if you use mitigating measures, you still may be a “qualified individual with a disability.” If you can show that the side effects of a medication or other mitigating measure themselves result in a substantial limitation on your major life activities, you may still be “disabled.” The courts also recognize that sometimes mitigating measures do not fully control the effect of the disability. For example, even with medication, a person with a bipolar disorder may still have symptoms on occasion, resulting in periods of substantial limitation. In some situations, you may

- Have a record of such an impairment (such as a condition in remission);
or
- Be regarded as having such an impairment. For instance, if your impairment does not limit your ability to do your job, but your employer treats you as if it does, then you are regarded as having an impairment.
42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

The ADA also protects anyone discriminated against because he or she is associated with or related to someone who has a disability.

also argue that you have a disability when there are legitimate obstacles to your use of the mitigating measure. For example, although therapy may be a mitigating measure, we believe the court should not consider it in a circumstance in which a person with a mental health condition is prevented from using the mitigating measure because his or her employer refuses to provide a flexible work schedule to attend therapy as a reasonable accommodation.

In addition, you could focus on other parts of the ADA definition of disability by showing that you were discriminated against because you have a record of having an impairment that substantially limits one or more major life activities, or because you are regarded as being substantially limited, even though you are not.

In January 2002, the Supreme Court gave more guidance as to what constitutes disability under the ADA. In *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, the Court examined an assembly line worker's claim that she has an impairment that substantially limits her in the major life activity of performing manual tasks. Looking at the ADA's definition of disability, it said that "substantially" in the phrase "substantially limits" suggests "considerable" or "to a large extent" and thus precludes impairments that interfere in only a minor way with performing manual tasks. Impairments' impact must also be permanent or long-term. In addition, the Court stated that because "major" means important, "major life activities" refers to those activities that are "central to daily life." Under this ruling, an individual is disabled in performing manual tasks where she has an impairment that prevents or severely restricts her in performing tasks that are central to most people's lives. According to the Court, job-specific manual tasks do not fit into this category. Rather, household chores and caring for oneself are the type of tasks that are important in most people's lives. While this case arose in an employment context, the Court's decision applies to all disability determinations under the ADA.

The definition of a disability does not include transvestitism, sexual behavior disorders, or current illegal drug use.

3. What does “essential job functions” mean?

Essential job functions means job tasks that are important to the job. Important job tasks are necessary job duties of the position. Consideration is given to the employer's judgment about what parts of a job are essential. If an employer has prepared a written job description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job. Marginal functions are tasks that are not essential to the position. Often they are duties that are included in a job description as “other duties as assigned.” The employer must consider you for a job as long as you can do the important functions of a job with or without *reasonable accommodation*. Employers may not deny you a job simply because you cannot do marginal job functions if the inability to perform them is because of your disability.

4. What does “substantial limitation in a major life activity” mean?

The term substantial limitation in a major life activity means:

- Being unable to perform a major life activity that the average person in the general population can perform; or
- Being significantly restricted as to the condition, manner, or length of time under which you can perform a particular major life activity as compared to the condition, manner, or length of time which the average person can perform that same activity. For example, if you must rest for a long time after walking a few blocks, you are “substantially limited” in that major life activity.

5. What factors are considered in determining whether I am substantially limited in a major life activity?

The following factors are considered in determining whether you are substantially limited in a major life activity:

- The nature and severity of the impairment;
- The duration or expected duration of the impairment;

- The permanent or long term impact, or the expected permanent or long-term impact of or resulting from the impairment; and
- Whether the effect of the impairment can be reduced by “mitigating measures” such as the wearing of eye glasses.

6. What is a substantial limitation in the major life activity of “working?”

With respect to the major life activity of working:

Substantial limitation means being significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having similar training, skills, and abilities. The inability to perform a single, particular job or a narrow range of jobs does not constitute a substantial limitation in the major life activity of working. An example would be to show a meaningful reduction in employment opportunities as a result of impairments.

In addition to the factors listed, the following factors may be considered in determining whether you are substantially limited in the major life activity of working:

- The geographical area to which you have reasonable access;
- The number and types of jobs for which you are not qualified because of your impairment which require similar training, knowledge, skills, or abilities that are within that geographical area.

7. Does the ADA cover temporary disabilities?

No, the ADA does not cover temporary disabilities. One of the factors that may be considered to determine whether a disability is “substantially limiting” is the length of time the disability will continue. This is considered on a case-by-case basis. There are no set time limits for determining whether an impairment will last long enough or be considered substantially limiting. There are, however, a few basic guidelines.

Generally, conditions that last for only a few days or weeks and have no permanent or long-term effects on your health are not substantially limiting impairments. Examples of such short-term conditions are common colds, influenza, and most broken bones and sprains. The mere fact that you may have required absolute bed

rest or hospitalization for such a condition does not alter the fact that it is temporary. Even surgery, without more, is not enough to raise a short-term condition to the level of a disability.

Although short-term restrictions are not protected, a disability does not have to be permanent to be substantial. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute protected disabilities. Thus, if you have been blinded or paralyzed but are expected to recover at some time in the future, you should be protected by the ADA.

8. In what areas of employment does the ADA prohibit discrimination?

Under the ADA, employers may not discriminate because of your disability in application procedures, hiring, firing, promotion, pay, training and other terms and conditions and privileges of employment. This includes advertisements, tenure, layoffs, leave time, benefits, and all other employment-related activities. Refusing to provide a reasonable accommodation is also discrimination. See question 17. In addition, the ADA applies to contracts the employer may have with other businesses. 42 U.S.C. § 12112(a)(b); 29 C.F.R. § 1630.4(a)-(i).

9. Must my employer know I have a disability before I am protected by the ADA?

Yes. The ADA prohibits discrimination only on the basis of a **known** disability. 42 U.S.C. § 12112(5)(A); 29 C.F.R. § 1630.8. In order to request a “reasonable accommodation” or file a complaint against your employer for discrimination under the ADA, you must be able to show that your employer knew you had a disability. Once you tell your employer that you are disabled, you may request a reasonable accommodation. 42 U.S.C. § 12112(5)(A); 29 C.F.R. § 1630.9.

Employers will not be faulted for failure to accommodate a disability that they were not informed about. It is your responsibility to let your employer know you have a disability and to request a “reasonable accommodation” if needed. Disability Rights California recommends that you request accommodations for your disability in writing. A sample Reasonable Accommodation Request letter is included in the attachments to this chapter.

10. Do I have to inform my employer of my disability during the hiring process?

No. In fact, a potential employer may not ask you if you have a disability during the hiring process. 29 C.F.R. § 1630.13. A potential employer may ask if you have the job skills necessary to perform the functions of the job for which you are applying. 29 C.F.R. 1630.14. This may be done by asking about your past work experience, job training, or other relevant skills. However, a potential employer may not ask you whether you have a disability at any time during the hiring process.

11. How do I prove to an employer that I have a disability?

Under the ADA you are disabled whenever:

- You have a physical or mental impairment that substantially limits one or more of your major life activities;
- You have a record of such an impairment; or
- You are regarded as having such an impairment. 42 U.S.C. § 12102(2).

Sometimes a disability will be obvious, such as when you use a wheelchair. Or it may not be obvious, such as a learning disability. When a disability is obvious, generally you will not need to prove you have a disability, although you must if your employer wants documentation. If your disability is not obvious, you will need to provide your employer with information from your doctor that describes your disability. A sample doctor's letter is included in the attachments to this chapter.

OTHER DISABILITY LAWS

12. I work for the federal government. What law protects me?

Section 501 of the Rehabilitation Act covers all federal departments and agencies. 29 U.S.C. § 791. It prohibits disability-based discrimination against federal employees and requires that reasonable accommodations be provided in the same manner as the ADA. In fact, Section 501 uses the same concepts and definitions as the ADA. But unlike the ADA, Section 501 does not prohibit discrimination against individuals because someone they are related to or associated with has a

disability. Section 501 also has its own complaint procedures which are different from procedures under the ADA. See Question 40 for when and where to file a Section 501 complaint.

Section 501 protections cover all aspects of employment within federal agencies and departments, including recruitment, hiring, promotion, benefits, and any other privilege of employment. Section 501 also requires employers to have affirmative action plans for hiring, placement, and advancement of people with disabilities. 29 U.S.C. § 791(b). Affirmative action requirements are separate from the requirement to make reasonable accommodations.

13. I work for an employer who has a contract with the federal government. What law protects me?

Section 503 of the Rehabilitation Act covers contractors and subcontractors who have contracts of \$10,000 or more with the federal government. 29 U.S.C. § 793(a); 41 C.F.R. § 60-741.1(b). Section 503 prohibits federal contractors from discriminating against their employees with disabilities. To avoid discrimination, federal contractors must, among other things, provide reasonable accommodations - including assistive technology - to those employees with disabilities who need such devices and services to perform the essential functions of their jobs. Section 503 has virtually identical provisions to the ADA. It does not, however, protect individuals who are discriminated against because someone they are related to or associated with has a disability. For information on when and where to file a Section 503 complaint, see question 41 in this chapter.

Section 503 protections cover all aspects of employment including recruitment, hiring, promotion, benefits, and any other privilege of employment. Section 503 also requires federal contractors with contracts of \$50,000 or more and 50 or more employees to use affirmative action plans for the employment and advancement of people with disabilities. 41 C.F.R. 60-250.40. Affirmative action requirements are separate from the requirement to make reasonable accommodations.

14. My employer receives funds from the federal government. What law protects me?

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by any agency or business receiving federal funds. Section 504 offers essentially the same protections as the ADA. It protects qualified individuals with disabilities employed by agencies or businesses that receive federal funding. It also

covers programs conducted by the federal government - such as the Medicare program, Social Security Administration, and federal housing programs. Section 504 has the same definitions for a “qualified individual” and for “disability” as the ADA, except Section 504 does not protect individuals from discrimination because of their association with or relation to a person with a disability.

Section 504 requires employers covered by Section 504 to provide reasonable accommodations, such as assistive technology, to employees with disabilities. Failing to provide reasonable accommodation is considered discrimination based on disability. See question 42 for filing Section 504 complaints.

The regulations to Section 504 of the Rehabilitation Act say that employees shall not be discriminated against due to the absence of “auxiliary aids for participants with impaired sensory, manual, or speaking skills.” (In employment or employment-related training programs, this section applies only to intake, assessment, and referral services.) Assistive technology that is included as part of *auxiliary aids* means Brailled and taped materials, equipment to make information available for persons with hearing impairments, equipment adapted for use by persons with manual impairments, and other similar services and actions. Employers are not required to provide individually prescribed devices and services or devices of a personal nature. 29 C.F.R. § 32.4(b)(7)(ii).

The Rehabilitation Act also requires that programs that receive federal funds take appropriate steps to ensure that communications with applicants, employees, and beneficiaries are available to people with impaired vision and hearing. 29 C.F.R. § 32.4(e). This may include telephones, TDDs, or equally effective telecommunications systems. (See Department of Labor regulations at 29 C.F.R. § 33.11(a)(2).)

15. Is there any California law that protects employees with disabilities?

Yes. There are two California laws that prohibit discrimination based on disability in employment. They are:

- The Fair Employment and Housing Act (FEHA); and
- California Government Code Section 11135 (Section 11135).

Under the FEHA, employers may not discriminate against a person with a disability in hiring, training programs, firing, compensation, or other terms and conditions of employment. Cal. Govt. Code § 12940. Section 11135 provides **at**

least the same protection as the ADA. See question 43 for filing complaints under FEHA and Section 11135.

While section 11135 uses the same standard as the ADA to determine if someone has a disability, the FEHA uses a more liberal standard. The FEHA requires that a disability cause only a limitation, and not a substantial limitation, (as is the case under the ADA) of a major life activity. This means the FEHA also protects those individuals whose disability has a lesser impact on their lives than those recognized by the ADA. There is one other important difference between these two laws. Under the FEHA, limitation of a major life activity is determined without regard to mitigating measures, such as medications or assistive devices unless the mitigating measure itself limits a major life activity. Cal. Govt. Code § 12926 (i)(1)(A) and (K)(1)(A-B)(i). Under the ADA, on the other hand, mitigating measures should now be part of the determination whether an individual has a disability. Reasonable accommodation is not, however, a mitigating measure under either of these laws, and cannot be considered in any disability determination.

16. What employers are covered by the state laws?

Under the FEHA, an employer may not discriminate against individuals with disabilities when it employs five or more people, in the State of California or any political/civil subdivision of the state, or in a city. Cal. Govt. Code § 12926(d). The FEHA does **not** apply to religious organizations and corporations not organized for private profit.

Section 11135 covers any employer that is funded directly by the state, that receives funds from the state, and that has five or more employees. The employer must receive a total of \$10,000 per year from the state or at least \$1,000 per arrangement. Cal. Govt. Code § 11135; 22 C.C.R. § 98010.

REASONABLE ACCOMMODATIONS

17. What is a “reasonable accommodation?”

Under Title I of the ADA, “reasonable accommodation” includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their job. 42 U.S.C. § 12111(9). Some examples of possible accommodations include:

- Providing assistive technology;

- A wheelchair accessible work site;
- A sign language interpreter;
- Materials in alternative formats;
- Allowing an employee to take time off from work for doctor appointments or visits to a therapist;
- Allowing an employee a flexible work schedule so that the employee may work more hours when possible and fewer hours when necessary;
- Changing the job duties to eliminate non-essential functions; or
- Simply educating and changing co-worker attitudes.

See Appendix to 29 C.F.R. § 1630.2(o).

Finally, the company may offer you a job transfer. Transfers to other positions should be the last option to be considered. The new position must be equal to your current position in all respects such as pay, benefits, status, and opportunity for promotion.

Your employer cannot offer you an inferior position unless that is the only one available. You cannot ask to be transferred to a superior position either. You also cannot require your employer to create an entirely new position in order to accommodate you.

The ADA does not require employers to hire a set number of people with disabilities. It only requires that employers give qualified people with disabilities employment opportunities equal to those given employees without disabilities. 42 U.S.C. § 12101. You must be able to perform the essential functions of your job, either with or without reasonable accommodation to be protected under the ADA. 42 U.S.C. § 12111(8). Employers are not required to hire or keep a person who cannot perform the essential functions of a job with reasonable accommodations.

(1) Limitations to granting a reasonable accommodation

It is helpful to be aware that employers are not required to approve every request for an accommodation. Employers are required to provide “reasonable accommodations”, not the “best” accommodation. The reason for this is an

accommodation is meant to put people with a disability on equal ground with people without disabilities, not in a better position. However, the employer must make reasonable efforts to determine the appropriate accommodation for you by listening to you and seriously considering your needs and preference. The employer may select a less expensive alternative as long as it is appropriate. Also, the reasonable accommodation must be related to the job and not be for personal use.

(2) Undue Hardship

Employers are not required to provide an accommodation if it would be an “undue hardship” to the employer. 42 U.S.C. § 12111(10). Determinations of “undue hardship” are based on a balancing of factors including the size of the employer, the number of employees, and the cost of the accommodation requested. 42 U.S.C. § 12111(10)(B). An accommodation that could be provided by a larger employer with little or no hardship might be a substantial hardship for a smaller employer.

For example, for an employer with more than one receptionist, it might present no hardship to allow one receptionist to take a longer lunch or arrive later. For a small employer with only one receptionist, the same request could create a more substantial hardship. A court might find in the second case that allowing the receptionist to arrive late or take a longer lunch on a regular basis would create an “undue hardship.” The court would probably find that being at work and able to answer phones from 9:00 a.m. to 5:00 p.m. is an essential function of the job. It is impossible to predict with certainty how a court would rule in a case like this or, for that matter, how flexible or creative your employer will be in working with you to devise a reasonable accommodation. However, it will be to your advantage in a situation where you think your disability is impairing your work performance, to inform your employer of your disability and try to negotiate a “reasonable accommodation.” Once you have been fired, it is too late to ask for a reasonable accommodation or claim that you were fired because of your disability unless you can show that your employer knew of your disability.

18. How do I ask for a reasonable accommodation?

You need to tell your employer:

- That you have a disability;
- How your disability interferes with your ability to do your job functions; and

- What accommodations you need in order to do your job functions.

You may make your request orally or in writing. However, if your employer does not respond in a reasonable amount of time to an oral request, you should then make a written request.

A sample reasonable accommodation letter is included at the end of this chapter. You should ask your employer to give you a response within a specific amount of time because you will need to take further action if your request is denied.

19. I need an assistive device to do my job. May I ask my employer to provide it?

Yes. The ADA says that one of the ways your employer may accommodate you is by providing new equipment or modifying existing office equipment. 29 C.F.R. § 1630.2(o)(2)(ii). If you need a special device to be effective in your work, you may request it as an accommodation. Like other forms of accommodation, your request for equipment must be reasonable. The equipment you want should be consistent with the nature and the operations of the business you are working for, and it should be affordable in light of the resources of the business. 29 C.F.R. §§ 1630.2(p), 1630.15(d).

20. I know what equipment meets my work-related needs. Am I entitled to it?

If you know exactly what you need, you should suggest it when discussing your needs with your employer. Finding the right accommodation should be a cooperative process in which you and your employer consider different options together. 29 C.F.R. § 1630.2(o)(3). Your employer should always consult you and must give primary consideration to your preference. Appendix to 28 C.F.R. 1630, et seq. But it doesn't have to provide the precise item or brand you ask for. In fact, the ADA gives your employer discretion on how it chooses to help you. Of course, whatever it offers as accommodation must be effective. It should help you overcome the limitations caused by your disability so you can do your job. If the offered device works in the sense that you will be able to do your job to your employer's satisfaction, it need not do more. You can turn down the offered equipment, but you may face the prospect of being disqualified if you cannot perform without it. 29 C.F.R. § 1630.9(d).

You can always offer to supply your own equipment. In that case, you can choose what it will be. You have the right to bring in your own equipment if it is compatible with the technology used at your office, does not interfere with the ability of other employees to do their job, and is not likely to need too much support. 29 C.F.R. § 1630.2(p)(2)(v) and Appendix to 29 C.F.R. § 1630.2(o) under *Reasonable Accommodation*.

21. I use my own computer for work. It is breaking down. Can I have my employer pay for its repair?

The ADA does not cover this issue directly. However, your willingness to use your own computer clearly confers a benefit on your employer. You can make a strong argument that as an accommodation, your employer should at least provide the necessary support such as cost of maintenance and repair of your equipment. Once again, cost is a factor. If repairing your computer is too expensive, your employer may not be responsible for it. To assure that your employer is clear as to its obligations, you should write out the terms of your agreement with the employer. The agreement should include a statement reflecting the employer's duty to repair your technology.

22. In what areas of employment can I ask for an assistive device?

The right to special equipment is available in all stages of a job - recruitment, employment, and benefits. 29 C.F.R. § 1630.2(o)(1). Naturally, each phase dictates different needs. Given the uncertainty of the hiring process, the employer is not likely to purchase costly technology in this phase. It can use other ways to meet your needs. Enjoyment of benefits and privileges of employment generally does not require equipment either. However, you need to be aware that the ADA makes this right available in case you can show a need in these circumstances.

You are most likely to get special equipment for the core job duties you are hired to complete. The ADA calls these duties "essential functions of the job." On the other hand, there are often tasks that are marginal to the work you do. The ADA provisions do not apply to such tasks. Therefore, your employer is not required to furnish adaptive equipment so you can perform nonessential functions of your job.

23. What types of assistive devices can I ask for?

The ADA doesn't rigidly limit the type of equipment you can ask for. Anything that helps you do your work may be a reasonable accommodation. It may be a

simple tool such as a one-handed typewriter for a person who can only use one hand. It could also be a high-tech device such as specially manufactured communication equipment that helps a person with a speech disability communicate.

To give you an idea of the range of equipment your employer may be expected to provide under the ADA, here is a list of the examples the Equal Employment Opportunities Commission (EEOC) has said are reasonable accommodations in its *Technical Assistance Manual*. This list is only illustrative. You may need something entirely different.

- TDDs (Telecommunication Devices for the Deaf) make it possible for people with hearing and/or speech impairments to communicate over the telephone.
- Telephone amplifiers are useful for people with hearing impairments.
- Special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision and/or reading disabilities.
- Tactile markings on equipment in Brailled or raised print are helpful to people with visual impairments.
- Telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities.
- Talking calculators can be used by people with visual or reading disabilities.
- Speaker phones may be effective for people who are amputees or have other mobility impairments.
- A timer with an indicator light allowed a medical technician who was deaf to perform laboratory tests – cost \$27.00.
- A clerk with limited use of her hands was provided a “lazy susan” file holder that enabled her to reach all materials needed for her job – cost \$85.00.
- A groundskeeper who had limited use of one arm was provided a detachable extension arm for a rake. This enabled him to grasp the handle

- A desk layout was changed from the right to left side to enable a data entry operator who is visually impaired to perform her job – cost \$0.
- A telephone amplifier designed to work with a hearing aid allowed a plant worker to retain his job and avoid transfer to a lower paid job – cost \$24.00.
- A blind receptionist was provided a light probe, which allowed her to determine which lines on the switchboard were ringing, on hold, or in use. A light-probe gives an audible signal when held over an illuminated source – cost \$50.00 to \$100.00.
- A person who had use of only one hand, working in a food service position could perform all tasks except opening cans. She was provided with a one-handed can opener – cost \$35.00.
- Purchase of a lightweight mop and a smaller broom enabled an employee with Down syndrome and congenital heart problems to do his job with minimal strain – cost under \$40.
- A truck driver had carpal tunnel syndrome, which limited his wrist movement and caused extreme discomfort in cold weather. A special wrist splint used with a glove designed for skin divers made it possible for him to drive even in extreme weather conditions – cost \$55.00.
- A phone headset allowed an insurance salesman with cerebral palsy to write while talking to clients – rental cost \$6.00 per month.
- A simple cardboard form, called a “jig,” made it possible for a person with mental retardation to properly fold jeans as a stock clerk in a retail store – cost \$0.

24. I have a mobility impairment and need to use a wheelchair. Can I ask my employer to make one available to me at work?

Generally, no. One important exception to the kind of equipment you can ask for is personal devices you use regularly for your daily activities. See EEOC’s *Technical Assistance Manual* Section 3.10.6. If you use a wheelchair every day whether you

are at work or not, your wheelchair is a personal item and your employer doesn't have to provide one so you can use it at the work place. But even in this case, there may be a situation where your employer would be responsible. For instance, let's assume you have sufficient upper body strength to use a manual wheelchair for your personal needs. But, the work environment, such as terrain or the texture and depth of the office carpeting, may prevent you from using your manual wheelchair. Your employer may have to provide a power wheelchair in such cases.

Most items that your physician prescribes for your health and normal living activity are personal devices. They include eyeglasses, hearing aids, canes, crutches, medical equipment, prostheses, and orthotic appliances. Nonprescription items such as wheelchair lifts are also personal in nature and are your own responsibility.

The line between personal items and work-related equipment is sometimes blurred. A hearing impaired person needs a telephone amplifier both for personal purposes and for talking to people on the phone at work. But as you can see from the list in the previous question, EEOC describes telephone amplifiers as reasonable accommodations. It would be safe to say that if you need equipment, a tool, some supplies, or an item of technology to carry out a specific work duty, your employer should provide it regardless of whether you may also need a similar device at home.

25. I have a visual impairment and cannot read print. Do I have a right to have the job application and other job information in an alternative format?

You have a right to be treated equally as others in all stages and all aspects of employment. This means you have a right to have an opportunity to read and fill out the job application. You have a right to know about and have access to other job information given to all applicants including information on employment policies, benefits, tax deductions, and so on. But the ADA does not obligate the employer to provide the information in the form you want. The employer may choose among the options that are effective in your case. Audio recording of the materials is one of the most typical choices. If this is not adequate, you need to explain why it isn't and suggest the best way to meet your needs.

For filling out the job application and other forms, the employer could offer you a personal assistant to read the information and complete the forms upon your instructions. 29 C.F.R. § 1630.2(o)(2)(ii). Given the sensitivity and personal nature

of some information, you can insist that the assistant be a person who would normally be able to see this information anyhow, such as someone from the Human Resources Department.

26. I work full time. To accommodate me, my employer lets me work from home for part of the time. Can I ask for special equipment to help me with the work I do from home?

In theory, yes. If you are permitted to work from home and need special equipment to do your job, your employer should provide it. Since you also work at the office, you presumably need the same supports there too. Providing the same accommodation in both locations may prove to be too expensive. The ADA does not force an employer to pay for an item or items that are too costly for that business. Your employer, by agreeing to alter your work schedule and allowing you to work from home, is not automatically bound to supply everything you need, regardless of how much it costs. If the equipment is portable, you may have a right to only one set and may need to take it back and forth.

27. My company is making a big change to our current computer system. As a result, I can no longer use my special equipment. What can I do?

You still have a right to reasonable accommodation. 29 C.F.R. § 1630.9(a). Your company should find other ways to enable you to do your work. There are many alternatives. It may be feasible to adjust the computer system so that you can continue working as before. The company may have to provide different equipment too. It may have to offer you support staff to assist you with your work. It could even modify your work responsibilities so you will no longer have to use a computer.

You also cannot expect the company to stay with the current system if the change is made because of business necessity. Generally, courts will accept the judgment of a business that the technological change is, in fact, necessary.

28. What do I need to do to get the right equipment for work?

The process begins with letting your employer know that you have a disability and need an assistive device to do your work. Then you should ask for a meeting to discuss the specifics of your needs. If you or your employer know enough about assistive technology, you can agree upon what meets your needs. You should document the contents of your discussion and the terms of your agreement

accurately. If you don't know enough or cannot agree on the same device, your employer should seek an assessment by an evaluator who can recommend an effective option. See Appendix to 29 C.F.R. § 1630.9 under *Process of Determining the Appropriate Reasonable Accommodation*.

Your employer is not required to purchase the most expensive or the most recently developed equipment. In fact, it doesn't have to purchase anything if your needs can be met some other way. If there is no reasonable choice because devices are all too costly for example, you should be given the chance to provide it yourself. Moreover, your employer cannot rely on the cost of an item as a reason to do nothing. When one option is ruled out, the employer should consider other reasonable alternatives.

29. I have a written evaluation by the Department of Rehabilitation which states the assistive devices I need. How can I use this evaluation?

Since such evaluations are fairly comprehensive, you can use them for different purposes. You can use them as proof of your disability and your functional limitations that affect the performance of your job. You can also use them as evidence of your need for assistive technology and the specific items you need. But the ADA does not require your employer to accept some other agency's assessment or conclusions. Your employer is free to make its own judgments based on the nature and resources of its business.

There may be a practical reason for accepting the Department of Rehabilitation's (DR) evaluation, however. Assessments done by DR are part of a rehabilitation plan in which DR is required to assure the achievement of its goals. This generally means that DR should financially help in the purchase of the assistive devices you have identified in the plan. If your employer agrees with DR's assessment results, it may be able to negotiate with DR to share the cost of the technology you need.

30. Can my employer require me to obtain a letter from my doctor stating what kind of equipment I need?

No. In most instances, a physician does not have adequate knowledge to recommend assistive technology. There are professional evaluators who assess technology needs of persons with disabilities. Depending on your disability and the place you live, you can find them in a variety of places. Some work in rehabilitation units of hospitals. Others can be found in disability organizations. There are also private companies that do technology evaluations. A counselor at

DR, a specialist at an independent living center, or a case manager at a regional center should be able to refer you to one. See Chapter 17 of this manual for a list of resources including technology centers.

Your employer should obtain an assessment that would reveal the equipment you need. Your employer is only entitled to know the physical and mental limitation you experience because of your disability. This may require some type of a statement from your doctor. However, your doctor need not and should not divulge all of your medical records and information. She should only state that you have a disability or medical condition and describe, with some specificity, the functional limitations that affect your ability to do your job. If you can provide this information through other reliable documentation, there is no need for your doctor to be involved at all.

INFORMATION ON FILING EMPLOYMENT DISCRIMINATION COMPLAINTS

31. Can the laws help me if I think my employer is discriminating against me because I have a disability?

Yes. The laws discussed in this chapter prohibit employment discrimination and allow you to file complaints and sometimes lawsuits in court. In most situations you must file a complaint before you can go to court. If you file a complaint or a lawsuit, you will have to follow through by appearing at hearings or court proceedings, writing statements, and being interviewed by your employer's representatives or lawyers.

32. How do I know whether to file a state or a federal complaint?

You must first figure out which law covers you, your employer, and your complaint. You may find that both state and federal law covers you and that you may file a complaint with a state or federal agency. You should talk to an advocate or an attorney to help you figure out which laws cover you and where to file your complaint. Sometimes, federal and state agencies have agreements about who will handle your administrative complaint if you can file with both. For example, often you can file a complaint with both the Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunities Commission (EEOC). The agencies should let you know who will investigate your complaint.

33. Where and when can I file an ADA complaint?

For violations of Title I of the ADA (private employers), you may file a complaint with the EEOC. Their telephone number is (800) 669-4000. A complaint must be filed with the EEOC within **300 days** of the discrimination. If the EEOC issues a right-to-sue letter (a letter saying you may file in court), you have **90 days** to sue in U.S. District Court. You must receive a right-to-sue letter from the EEOC before filing an action under Title I in court.

For violations of Title II of the ADA (public employers), the EEOC has a work-sharing agreement with the Department of Justice (DOJ). The DOJ is primarily responsible for investigating employment discrimination complaints against most employers covered by Title II. The telephone number of the DOJ is (800) 514-0301. Complaints must be filed with the DOJ within **180 days** of the discrimination. Courts have held that it is not necessary to obtain a right-to-sue letter from the DOJ before filing a Title II action in court. Such lawsuits should be filed within **one year** of the discrimination.

In California, you may also file an ADA complaint with the DFEH. The EEOC or the DFEH will let you know which agency will investigate your complaint.

34. I filed a complaint with the DFEH (or the EEOC). What can I expect to happen? How long will it take for the agency to help me?

DFEH

Once you file a complaint with the DFEH, a consultant decides whether the DFEH will accept the complaint or decline to accept it. If a complaint is accepted, DFEH will write a formal complaint and send it to you for signature within **one week**. When you have signed the complaint and returned it to DFEH, they will serve it on your employer. Your employer has **21 days** to respond to the complaint. When the response is received by DFEH, the consultant decides if there was cause for the complaint, that is, if your employer discriminated against you. DFEH makes this determination under both the state law which is the Fair Employment and Housing Act (FEHA) as well as the ADA. If DFEH finds discrimination, it will ask your employer if it is interested in settling the matter through the process of conciliation. If the employer does not want to settle, DFEH will file an administrative complaint against the employer under the FEHA. The administrative complaint is called an “accusation,” and is filed with the Fair Employment and Housing Commission (FEHC). The FEHC will hold a hearing and receive evidence from the DFEH and

the employer, and make a decision on your complaint. Once the administrative process begins, you may no longer file a formal complaint in court. If an accusation is not issued, DFEH will notify you that you may request a right-to-sue notice and sue in court within **one year** of the date the right-to-sue letter is mailed. If your employer loses at the administrative hearing, the FEHC can require your employer to compensate you for back and future pay, pain and suffering, and even emotional distress. When the DFEH finds discrimination under the ADA, it will refer the case to the EEOC.

EEOC

After you file a complaint with the EEOC, the employer charged with violating the ADA should receive written notification of the charge within **10 days**. The EEOC will investigate charges of discrimination. If the EEOC believes that the employer has discriminated against you, it will try to resolve the charge through conciliation and obtain full relief for you. If conciliation fails, the EEOC will file suit or issue a “right to sue” letter to you so that you may file an action in court.

35. What will happen if my complaint is found to be true?

Under the ADA you may get injunctive relief (an order to perform or not perform an act). That includes, for example, reinstatement, making a building accessible, hiring an employee to assist you, and back pay. You may also get compensatory damages (payment to compensate you) for any losses you may have experienced and for pain and suffering. You may also be able to get punitive damages (money to punish), depending on whether your employer’s discrimination was intentional.

36. Does it make any difference whether I am in a union or not?

No. If you are covered by a union, you may be entitled to representation by your union. Additionally, your union contract may also be violated by your employer’s actions, or violate laws other than the ADA. If you are a union employee, you should contact your union for help, in addition to filing complaints with the EEOC or DFEH.

37. What about mediation or conciliation? Is it a faster way to resolve my concerns?

The EEOC and DFEH complaint processes both include an attempt at “conciliation.” Through the conciliation process, the EEOC or DFEH consultant

will attempt to reach a settlement agreement between you and the employer. If the conciliation fails and no agreement is reached, you may still file a lawsuit. Conciliation may be much faster than litigation, which is often a very long process.

38. I work for a federal agency. Where and when do I file my Section 501 complaint and when can I file a complaint in court?

Under Section 501, governing federal departments and agencies, you must first consult with an internal EEO (Equal Employment Opportunity) counselor within **45 days** of the incident of discrimination and try to informally correct the discrimination. The 45 day period may be extended when you do not know of this time limitation or are prevented from contacting the EEO counselor by circumstances beyond your control. 29 C.F.R. § 1614.105. If it cannot be corrected within **30 days**, the EEO counselor will give you written notice. You may extend this period by an additional **60 days**. If your agency has a dispute resolution procedure and you agree to use it instead of contacting the EEO counselor, you have **90 days** to resolve the dispute.

If you want to continue your complaint, you must file a written complaint with the agency that discriminated against you within **15 days** of receiving the notice from the EEO counselor. 29 C.F.R. § 1614.106. The agency must conduct a fair investigation of your complaint within **180 days** from the date you filed your complaint unless you and the agency agree in writing to a longer period. Upon expiration of this period, your agency must inform you that the investigation is completed, provide you with a copy of the investigation, notify you of your right to request a hearing before an administrative judge within **30 days** of receiving the investigation file or receive the final agency decision. 29 C.F.R. § 1614.108.

If you request a hearing, you have a right to “discovery,” which means you can ask for relevant information from the agency relating to the facts of your complaint. The administrative judge will limit the appearance of witnesses to those with direct knowledge relating to the complaint and will regulate the proceeding. At the hearing, you can present your evidence and question the agency officials. The administrative judge will issue a decision regarding your complaint within **180 days** of the date you requested the hearing. Within **40 days** of the receipt of the hearing decision, your agency may reject or modify it and issue its own final decision. If your agency does not reject or modify the hearing decision within 40 days, then the hearing decision will become the agency’s final decision. 29 C.F.R. 1614.109 (i).

If you disagree with the agency's final decision, you may appeal to the EEOC within **30 days** of receiving notice of the final decision on the matter. You must file a complaint with EEOC before you can file in court. The EEOC

- Will review the file on the complaint, may request additional information from either party and issue a decision. 29 C.F.R. § 1614.407. A private court action may be filed only:
- Within **90 days** of receipt of the final decision if no appeal is filed;
- After **180 days** from the date you filed your complaint if an appeal is not filed and a final decision is not issued;
- Within **90 days** of receipt of the EEOC's final decision on an appeal; or
- After **180 days** from the date of filing an appeal with the EEOC if there has been no final decision by the EEOC. 29 C.F.R. § 1614.407.

39. I work for an employer who has a contract with the federal government. Where and when do I file my Section 503 complaint?

Under Section 503, covering federal contractors, you must file your Section 503 complaint at a local office of the Office of Federal Contracts Compliance Programs (OFCCP) at the Department of Labor within **300 days** of the discriminatory event(s). 41 C.F.R. § 60-741.61(b). Courts have said that you cannot file a private lawsuit under Section 503. This administrative complaint is your only remedy. See attached list of local OFCCP offices at the end of this chapter.

40. I work for an employer who receives federal funds. Where and when do I file my Section 504 complaint?

Under Section 504, you can both file an administrative complaint and sue in court for the discrimination you have experienced. The time periods for these actions begin from the date of the discrimination and run simultaneously. To file an administrative complaint against an employer who receives federal funds, you should file with the Office for Civil Rights at the federal agency which provides funding to the employer. For example, for complaints of discrimination as an elementary school teacher, file with the Department of Education's Office for Civil Rights. An administrative complaint must be filed within **180 days** of the discriminatory conduct. If you also choose to file a lawsuit in court, you have one year from the date of the discrimination to file your suit in a federal district court.

It is not necessary to first file an administrative complaint under Section 504 in order to file a lawsuit against a federally funded employer. However, it is necessary to first file an administrative complaint under Section 501 if the complaint is against the federal government itself.

41. Where and when can I file my FEHA and Section 11135 complaint?

Under the FEHA you may file with the DFEH within **one year** from the discrimination. If the DFEH issues a “right to sue” letter, you may then file a private lawsuit in state court.

If you think you may have an ADA complaint in addition to the FEHA complaint, you should file with the DFEH or the EEOC within **300 days**, since the time line for filing an ADA complaint is **300 days**.

Under **Section 11135**, you must file a complaint within **one year** from the date of the discriminatory action with the state agency that administers the program involved. If you do not discover the violation until after the one-year period has ended, you may still file your complaint; however, you only have 90 days from the end of the one-year deadline to pursue your complaint. 22 C.C.R. § 98344. The state agency may stop funding to the program and may forward the complaint to the DFEH. The administering state agency has authority to investigate and resolve discrimination claims. In addition, you may bring a court action to force an administering state agency to comply with the requirement that it investigate and resolve complaints. Otherwise, individuals do not have a right to file an action in court under Section 11135. 22 C.C.R. §§ 98002, 98003; *Arriaga v. Loma Linda University*, 10 Cal. App. 4th 1556, 13 Cal. Rptr. 2d 619 (1993).

ATTACHMENTS TO CHAPTER 6

Sample Reasonable Accommodation Request

[Date]

Dear Employer:

I am a disabled employee. My disability is a physical disability that causes substantial limitations in my ability to work in that I am unable to [*You should describe here the limitations you are experiencing in your job because of your disability.* Example: reach high shelves or use current office building due to physical inaccessibility.].

In order to do the essential functions of my job I need a reasonable accommodation. The accommodation I need is: [*You should list here the accommodations you need and be as specific as possible. Remember that the accommodations must enable you to do the essential functions of your job; if they do not, then it is not a reasonable accommodation.* Example: using equipment within your reach and adding access features such as a ramp to the building.].

Please let me know in 10 days whether you will grant my accommodation request so that I may pursue other action as necessary.

Sincerely,

Sample Doctor's Letter Supporting a Need for an Accommodation

[Date]

Dear Employer:

[Your name] is my patient and has a physical disability that causes functional limitations. [Your name] has the following functional limitations: [Your doctor should list your limitations here that apply to your ability to work. Example: has limited reach or must use a wheelchair to get around.].

[Your name] may be accommodated for his/her disability in the following way: [Your doctor should list the accommodations you need here. Example: by using accessible buildings and equipment which he can reach and operate.].

Sincerely,

Your Doctor

OFCCP Offices in California

Los Angeles District Office

Ms. Sarah Nelson
District Director for ESA-OFCCP
U.S. Department of Labor
11000 Wilshire Blvd., Suite 8130
Los Angeles, CA 90024
310-235-6800

Greater San Francisco Bay District Office

Mr. Ron Hirada
District Director for ESA-OFCCP
U.S. Department of Labor
90 7th Street, Suite # 11-100
San Francisco, CA 94103
415-625-7828

San Diego District Office

Mr. Hector Sanchez
Acting District Director ESA-OFCCP
U.S. Department of Labor
5675 Ruffin Road, Suite 320
San Diego, CA 92123-1362
619-557-6489

San Jose District Office

Ms. Alice V. Young
District Director for ESA-OFCCP
U.S. Department of Labor
60 South Market, Suite 410
San Jose, CA 95113
408-291-7384

Orange Area Office

Hector Sanchez

Assistant District for ESA-OFCCP

U.S. Department of Labor

770 The City Drive, Suite 5700

Orange, CA 92868

714-621-1631