

Trisha Route, PHR

ePlace Solutions, Inc.

- Trisha Route has over 13 years' experience working in human resources. As an HR Professional for ePlace Solutions, Mrs. Route provides HR guidance and advice to both small and large employers from a wide array of industries, including hospitality, retail, fast food, medical, construction, agriculture, transportation, distribution and logistics.
- Prior to joining ePlace Solutions in 2014, Mrs. Route worked as a human resources generalist for a large retail employer and as an HR Director for a large agricultural employer. In both positions, Mrs. Route handled all aspect of HR including developing HR policies, recruiting and training new employees, managing employee relations, administering benefits, investigating employee complaints, and overseeing disciplinary action.
- Mrs. Route graduated from the University of California, Santa Barbara with a bachelor's degree in Sociology and is a certified as a Professional in Human Resource (PHR) by the HR Certification Institute (HRCI).

Consuelo Martinez, SPHR, SHRM-SCP

ePlace Solutions, Inc.

- Consuelo Martinez, SPHR and SHRM-SCP certified, and has over 13 years of experience in human resources, including her 3 years with ePlace and 10 years with a large international manufacturing company. She has specialized in performance improvement, managing leaves of absence, conducting background checks, and KPI reporting for 1500+ employee company. She has experience as an HR Generalist, a mentor, an advocate for change, a facilitator for goal achievement and improved employee relations sessions, and overall HR department operations. Consuelo is currently responsible for managing the HR function at ePlace as well as providing practical HR advice to clients on how to best minimize risk when making employment and business decisions.

Agenda

- **Review ADA Requirements**
- **Interactive Process**
 - How-To's
 - Examples of Documentation
- **Examples of Reasonable Accommodation**
- **Follow-up and Revisiting the Interactive Process**
- **Reminders**
- **Resources**

Obligations Under State & Federal Law

- Employers are prohibited from discriminating against a qualified individual with a disability in job application procedures, hiring, firing, advancement, compensation, job training and other terms, conditions and privileges of employment.
- The ADA requires employers to provide a “reasonable accommodation” to an employee (or job applicant) with a physical or mental disability in order to enable the employee to perform the essential functions of the job.
- ADA applies to employers with 15+ employees
 - Some states have an ADA equivalent that may have lower thresholds
 - You are expected to comply with the law that is most beneficial to your employee
- Highest area of claim – Retaliation and Disability claims made the top 3 list of claims received last year from the EEOC

Helpful Definitions

Disabled means having:

- 1.** A physical or mental impairment that substantially limits one or more major life activities;
- 2.** A record of a physical or mental impairment that substantially limited a major life activity;

A claim can arise when:

- a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment**
 - Current Disability**
 - Past Disability**
 - Association with someone that is disabled**

Reasonable Accommodation Requirement

- Reasonable accommodation is a change in the work environment, or in the application process, that would enable a person with a disability to enjoy equal employment opportunities.
 - (1) changes to a job application process to permit people with disabilities to be considered for jobs;
 - (2) changes to enable people with disabilities to perform the essential functions of a job; and
 - (3) changes to give people with disabilities equal access to the benefits and privileges of employment.

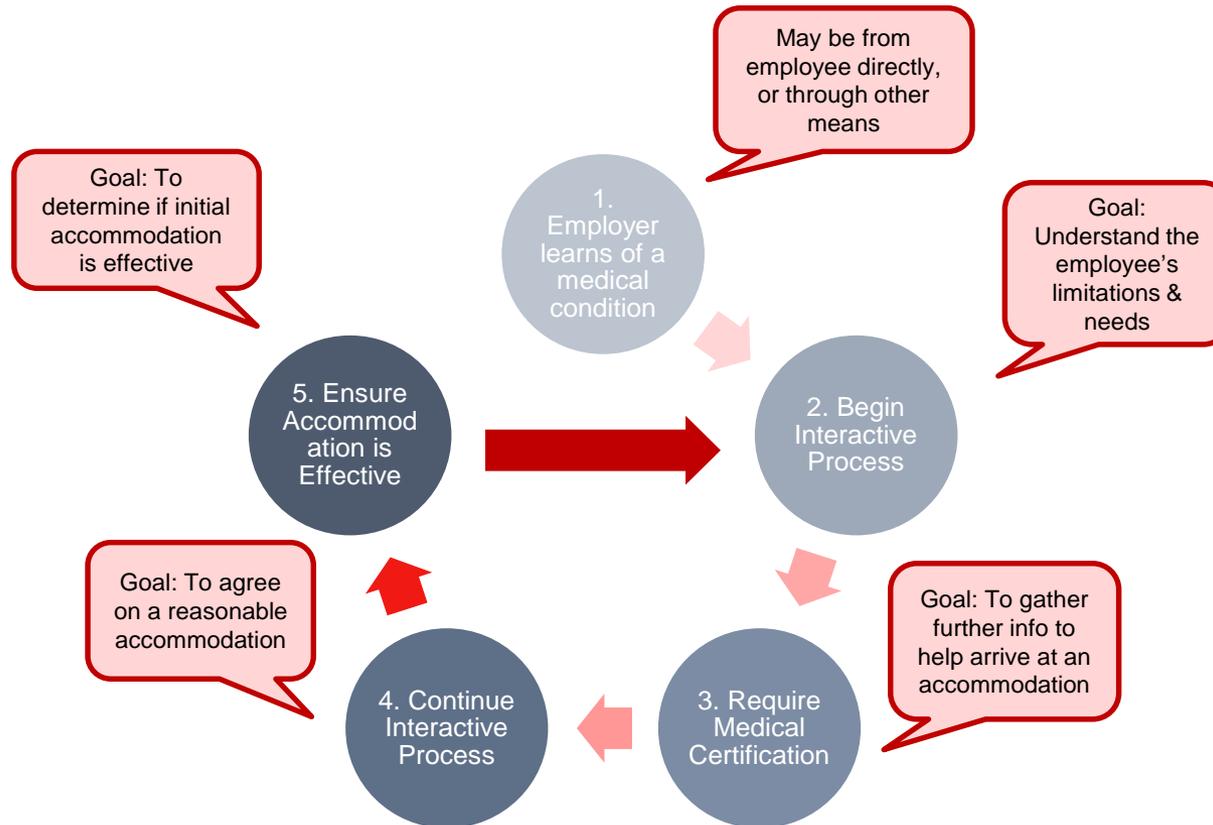
Exception: Undue Hardship

Employers need not make accommodations that would require undue hardship.

- Undue hardship means that an accommodation would be too costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.
 - factors you may consider:
 - the cost of the accommodation
 - the employer's size
 - financial resources and
 - the nature and structure of its operation
- If a particular accommodation would be an undue hardship, you must try to identify another accommodation that will not pose such a hardship.

Proving an undue hardship is difficult and an employer considering this stance should consult with legal counsel.

The Interactive Process



*****Document the entire process*****

When to Engage in the Interactive Process?

1.
Employer
learns of a
medical
condition

- When an employee requests an accommodation
- When an employee provides a doctor's note with restrictions
- When an employee suddenly begins having attendance or performance issues
- When an employee makes you are aware of a medical condition
- When you have reason to believe that the employee's condition may be interfering with their ability to do their job

What is a Disability?

1.
Employer
learns of a
medical
condition

What is a Disability?

- Diabetes
- Cancer
- AIDS, and its symptoms
- Past drug/alcohol addiction
- Asthma
- Depression
- Migraine Headaches
- Heart Disease
- Complications from Pregnancy**

* *Not an exhaustive list*

What is Not a Disability?

- Common cold/flu
- A sprained joint
- Minor & non-chronic gastro intestinal disorders
- Compulsive gambling
- Old age
- Lack of education
- Poor judgement
- Bisexuality or homosexuality
- Pregnancy**

What is the Interactive Process?

2. Begin
Interactive
Process

- **Simply: Meeting with your employee to identify reasonable accommodations that enable an applicant or employee with a known disability to perform the essential functions of his or her job.**
- **May take several meetings to arrive at an effective reasonable accommodation**
- **Mutually agreed upon reasonable accommodation**
- **Should be well-documented**
- **Employer may request medical certification for further information to help determine a reasonable accommodation**

How to Engage in the Interactive Process

2. Begin Interactive Process

- **Arrange a meeting in a confidential setting**
- **Discuss:**
 - Have a current job description you can refer to during the meeting
 - Set the stage of the reason for the meeting (attendance, performance, doctor's note, specific request)
 - Ask the employee what their needs/limitations are
 - What, if anything, can the employer do
 - What, if anything, can the employee do
 - Request medical certification

What Not to Ask, Say, Do

2. Begin
Interactive
Process

- **Don't ask for a Diagnosis**
- **Don't make assumptions**
- **Don't have to create a job**
- **Don't have to provide an accommodation that hasn't been requested**
- **Don't take the employee off work unnecessarily**
- **Don't request information about other possible disabilities that the employee has not shared**
- **Don't make any promises or final agreements in the initial meeting**
- **Don't retaliate**

Examples of Confirmation of Meeting

REQUEST FOR REASONABLE ACCOMMODATION

TO: *Insert Employee Name*

FROM: *Insert Name*

DATE: *Insert Name*

Dear (*Insert employee name*),

The purpose of this memo is to discuss our meeting on (*insert date*) where we discussed your request for an accommodation due to a *disability/medical condition*.

At that time, I advised you that the Company wished to engage in the interactive process with you to determine whether there was a reasonable accommodation that could enable you to perform the essential functions of your position. I also told you that the Company was prepared to accommodate you, but to do that, I needed more information from your physician.

I then provided you with copies of the following documents (copies of which are attached hereto):

- Authorization to Release Medical Information form
- Physician/Health Care Provider Form,
- GINA Notice and
- Your job description.

As we discussed during the meeting, please complete the enclosed "Authorization to Release Medical Information" form and take that form to your doctor, along with the "Physician/Health Care Provider" Form, GINA Notice and your job description. Have your doctor review the job description and complete the Physician/Health Care Provider form. Return the completed form to me as soon as possible, but no later than (*15 days from the day the memo is issued to the employee*).

Keep in mind, if you fail to provide medical certification supporting your need for accommodations, you will be expected to perform all duties of your job (see enclosed job description) and your failure to do so will subject you to disciplinary action, up to and including termination.

If you have any questions or concerns, please do not hesitate to contact me at (phone).

Sincerely,

Importance of Documentation

3. Require
Medical
Certification

- **Medical Certification** – serves as a starting point and justification for the accommodation request
- **Meetings/Conversations** – formal memos, informal emails, confirming agreements/requests, specific deadlines given
- **Helpful to have a log of all conversations relating to the accommodation process**
- **If a leave is provided as a reasonable accommodation, determine if the employee qualifies for any federal or state leave and follow those documentation procedures (FMLA)**

Example of a Medical Certification

Physician/Health Care Provider Form

DIRECTIONS: To be completed by patient's health care provider.

Patient Name: _____

Describe the functional limitations of the patient that may constitute a disability (e.g. hearing loss, learning, etc.). Do not include diagnosis:

Does the condition substantially limit a major life activity of the patient? (The Americans with Disabilities Act's definition of "disability" and a non-exhaustive list of major life activities and functions are attached.)

Yes No Comments:

If yes, what activity or function is substantially limited?

Is the patient able to perform work of any kind? If no, please comment on estimated duration.

Yes No Comments:

Answer after reviewing the employer's job description that includes the essential functions of the employee's position, or if none provided, after discussing with the employee. Is the employee able to perform the essential functions of the employee's position?

Yes No Comments:

Does the employee require assistance or accommodation in performing essential functions of his/her job?

Yes No Comments:

Please provide any suggested accommodations only if the employee requires, in your opinion, a job accommodation.

Please estimate the period of time for which, based on your assessment, an accommodation would be required:

Estimate: _____

Does the patient pose a threat to himself/herself, or others?

GINA Notice

Notice to Employee/Health Care Provider In Conjunction with Request for Medical Certification

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Log of Accommodation Conversations

	A	B	C
1	Jane Doe		
2			Initials of
3	Date	Notes	Notemaker
4	Monday, 4/3/17	Jane came to my office at about 9 am letting me know she was had thrown out her back this weekend while gardening. She tried to come in to work, but she did not feel well enough to continue She is going to take the rest of the day off and try to get in to see her doctor.	CM
5		Jane called in at about 11 am letting me know her doctor was unable to see her today and had an appointment scheduled for 10 am tomorrow. She will be off at least in the morning and will call when she gets out.	CM
6	Tuesday, 4/4/17	Jane called at noon to let me know her doctor had taken her off work for the rest of the week. She said the doctor's office would be faxing me a note.	CM
7		Received Jane's note later in the afternoon.	CM
8	Friday, 4/7/17	Jane called at 3 pm to let me know she had been in to see her doctor again. The rest had helped, however she will need to be off a few more days off. Her next appointment is Wednesday the 12th and she will provide an update then. Let Jane know I would be sending her a letter confirming our accommodation of her leave request and that she continue to keep us abreast of her status.	CM
9		Mailed Jane medical leave confirmation letter.	CM
10			
11			
12			

Example of Email Follow-up

Hi Jane,

This email is to confirm our conversation regarding the doctor's note you recently provided. It indicates: "Please provide patient with light duty."

As discussed, this information is not clear. Attached is the job description you can take to your doctor for review. We request that he provide a list of which of these duties you can/cannot perform.

You indicated you could provide it by Friday. Once we receive this information, we will meet again to engage in the interactive process to review the new information provided and attempt to determine a reasonable accommodation. Let's plan to meet Monday at 9 am.

If you have any questions regarding this process, or if you cannot provide the documentation expected by Friday, please contact me right away to discuss.

Sincerely,

How to Engage in the Interactive Process - Continued

4.
Continue
Interactive
Process

- **Goal: agree on an accommodation that is reasonable and effective for both parties**
 - Doesn't have to be permanent
 - Try-out and revisit in a few weeks or a month
- **If employee fails to respond to the meeting request, suggest a new date and time. Document each attempt. This establishes you have made a good faith effort to engage in IP.**

What are Some Reasonable Accommodations?

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities,
- Restructuring the employee's position,
- Providing the employee with a reduced work schedule,
- Modifying the employee's job duties,
- Reassigning the employee to a vacant position,
- Making an exception to a policy or procedure,
- Modifying the employee's workstation,
- Acquiring or modifying equipment or devices,
- Adjusting or modifying examinations, hiring process, training materials, or policies,
- Providing the employee with qualified readers or interpreters, and/or
- Providing the employee with a leave of absence - usually last resort (NOTE: If a leave of absence is granted, at the conclusion of the leave you must restore the individual to their original position).

Real Examples of Reasonable Accommodations

- **Employee is a receptionist that requires her to greet customers and is deaf.**
 - Accommodation: Employer provided sign that was placed at the front counter: “Please look at me when speaking to me because I am deaf and I read lips”.
- **Employee works in the restaurant industry and has an airborne shrimp allergy. The restaurant has a seafood promotion that includes shrimp.**
 - Accommodation: Because of the severity of the allergy the employee is placed on a unpaid medical leave of absence until the seafood promotion ends.
- **Employee is 8 months pregnant and can still meet the essential functions of the job. You have noticed, and the employee admits, that she struggles to reach the shelf above her because of her growing belly.**
 - Accommodation: Employer provided a step stool for the employee to use when reaching overhead.
- **Employee works in the restaurant industry and has developed a skin rash on his hands.**
 - Accommodation: Employer provides disposable gloves to avoid aggravation of condition.
- **Employee is a line cook in a restaurant and has had seizures at work. He’s often near hot ovens and fryers.**
 - Accommodation: To prevent injury, both parties agree to a transfer to a position away from ovens and fryers.

Real Life Example Of Reasonable Accommodation Situation

4.
Continue
Interactive
Process

Employee works as an auto detailer in the automotive industry.

Employee presented a doctor's note stating that dust created at work aggravated his medical condition. Employer engaged the employee in the interactive process and was willing to accommodate.

Employer offered an alternative position at the same rate of pay. Employee declined because the new position would still aggravate his medical condition as he would still be exposed to dust, but on a less-frequent basis.

Employer confirmed with medical provider that a respirator provided by the company would be a reasonable accommodation for the employee as it would eliminate the dust.

Example Documentation:

Dear Joe,

The purpose of this letter is to discuss your reasonable accommodation request with XYZ Auto.

Over the past several weeks, the company has been engaging in the interactive process with you in order to determine a reasonable accommodation for your disability, which renders you unable to perform the essential functions of your position of Auto Detailer without a reasonable accommodation.

You first advised us of your disability on February 1, 2017, when you provided the company a note from your doctor stating that you were unable to perform your job because the dust created on the job aggravated your medical condition. We then engaged in the interactive process with you to find a suitable accommodation. The first accommodation offered to you was a position as a polisher for the same rate of pay. However, you declined this accommodation because it would still aggravate your medical condition, because you would still be exposed to dust, even if on a less-frequent basis.

On February 15th, we informed you that, as an accommodation for your medical condition, the company would provide you with a respirator to wear while performing your duties as an Auto Detailer, as your doctor advised us that you would be able to perform the essential functions of your position if you were provided a respirator.

On February 16th you agreed to the proposed reasonable accommodation and we plan to provide the respirator by February 20th.

If you return to the doctor and the doctor has indicated your restrictions have changed, please advise the company in order to determine an alternative accommodation.

Sincerely,

Importance of Follow-up

5. Ensure
Accommodation
is Effective

- **To assess effectiveness of accommodation provided**
- **If it's not effective you need to revisit the interactive process**
- **At this point assess :**
 - **Have the employee's restrictions changed**
 - **Ensuring employee is following restrictions**
- **Shows good faith from the employer to maintain open lines of communication with the employee.**

Reminders

- **Employer should demonstrate Good Faith by being cooperative**
 - Initiating the interactive process when you are put on notice
 - Being reasonable and considering the reasons for requirements/policies
 - Making the process easy for employees
 - Make time to meet with the employee and address their concerns
 - Train supervisors not to make employees feel that such requests are an unwelcome burden and know when they've been put on notice
 - Respond promptly to employees request for reasonable accommodation
 - Document each and every attempt made to engage the employee

Reminders - Continued

- **Medical & Accommodation should be kept confidential – need to know basis**
- **Be consistent!**
 - Continue discipline if employee is unwilling to cooperate or cannot provide medical certification after several attempts
- **This process applies to WC situations**
- **While past and present alcoholism, and past drug abuse is protected under the ADA, current illegal drug use is not**

Resources

■ JAN:

- **Job Accommodation Network:** <http://askjan.org/>
- **Searchable Online Accommodation Resource:**
<http://askjan.org/soar/index.htm>

■ EEOC:

- **Procedures For Providing Reasonable Accommodation:**
https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm
- **ADA discussion and links to guidance on specific disabilities:**
<https://www.eeoc.gov/laws/types/disability.cfm>

Questions & Answers

Call us at 800-387-4468



Thank You for Attending!

Help! I Have a Disabled Employee!

