

My Rights in the Workplace

Reasonable Accommodations



Dear ALRP:

I am a 32-year-old HIV-positive man and I am currently employed at a job that I love. Until recently, I have been asymptomatic, but now I am beginning to get sick and have had to make additional doctor's appointments. I am worried that I will have to take too much time off of work to ensure that I will be able to attend all of my appointments. What do I say to my employer if he gets angry or tries to fire me because I am missing so much work?

Sincerely,

- Happily Employed at the Moment

Dear Happily Employed,

You can ask your employer for a reasonable accommodation to give you more flexibility with your work schedule. The employer may be required to permit you to attend doctor appointments and even reduce your hours if illness prevents you from maintaining your current schedule.

Many individuals with disabilities must work to live, including those who suffer from HIV and AIDS. Most employees fear that they will not be able to work for various reasons: their disabilities limit the tasks that they can perform, they become exhausted very quickly, or they fear that they will not be able to make their doctor's appointments due to work conflicts. Fortunately, there are protections that address these concerns.

The federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA) alleviate some of the stressors that trouble employees with disabilities. The laws' main purposes are to afford disabled individuals an equal opportunity to work and to prevent discrimination against disabled individuals in the workplace. In addition to preventing discriminatory employment practices, they also place a duty on employers to make reasonable accommodations for their disabled employees so that those employees are able to perform their job functions.

To whom do the ADA & FEHA apply?

Individuals

The ADA and FEHA protect individuals who have a disability and individuals who are perceived as having a disability. Courts have ruled that an individual is considered disabled if s/he has HIV, even if the individual is asymptomatic. The ADA and FEHA cover job applicants and current employees who are otherwise qualified for the job. An individual is "otherwise qualified" for the job if s/he, with or without the reasonable accommodation, can perform the essential duties and other job-related requirements of the position. If a non-disabled employee is working and becomes disabled during that employment (either on or off of the job), s/he may also ask for an accommodation.

Employers

Many employers are subject to the ADA and FEHA, but it is not all encompassing. Any private employer, state or local government, or educational institution that employs 15 or more individuals must follow the ADA's provisions. The ADA also binds private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training. FEHA, a California law, is more expansive. FEHA applies to employees with physical disabilities if their workplace employs five or more employees, and it applies to employees with mental disabilities if their workplace employs fifteen or more employees. FEHA does not apply to non-profit religious organizations.

What is a reasonable accommodation?

Reasonable accommodations are changes that an employer makes so that disabled individuals have an equal opportunity for employment. They allow disabled persons to perform the tasks and duties of the job. The specific accommodation will vary depending on the individual and the nature of the job, and not all people need the same accommodation. Here are some examples of reasonable accommodations:

- Altering of facilities to make them more accessible and usable
 - Ex: Providing a ramp to an office entrance so that an individual using a wheelchair may go to and from work
- Altering non-essential job duties
 - Ex: Allowing a cashier whose HIV/AIDS condition causes him to become quickly exhausted to sit on a stool instead of stand, as is required of other cashiers
- Providing additional unpaid leave for an employee once an employee has exhausted accrued leave time
 - Ex: Providing more work leave when complications from HIV flare up and an individual becomes sick and needs time to recover, as long as it does not pose an undue hardship on the employer
- Modifying work schedules
 - Ex: Allowing an employee who schedules doctor's appointments in the morning to arrive at 10:30 a.m. instead of 9 a.m. and stay until 6:30 p.m. instead of 5 p.m.

Failure of an employer to make a reasonable accommodation is a form of prohibited discrimination.

How do I request/receive an accommodation?

An employer does not have to automatically provide an accommodation, and it would be improper for them to suggest you need one. Often, an employee's disability is not evident. Therefore, it is the responsibility of the employee to request an accommodation or have a family member, friend, physician, or other health care worker request an accommodation on the individual's behalf. Do not assume that your employer knows you are disabled and need an accommodation.

Although you may request a reasonable accommodation orally, we recommend you request it in writing, like the sample provided below:

Dear Employer,

My doctor has advised me that I have a disability that substantially limits a major life activity. She has instructed me that I need the following reasonable accommodations so that I may continue to perform my job:

1. reduce my hours to 30 per week;
2. take a one-half hour nap each afternoon;
3. arrive at work two hours late every Friday so I can attend doctor appointments

Thank you in advance for your understanding and willingness to discuss my proposed accommodations. I look forward to creating an arrangement that works for everyone involved.

Are there limits to reasonable accommodations? When isn't an accommodation reasonable?

Undue Hardship:

While an employer has to provide a reasonable accommodation in good faith to a disabled employee who requests one, an employer does not have to provide an accommodation that would pose an “undue hardship” on the employer’s business. Determining what constitutes an “undue hardship” is very fact-specific. Generally, an accommodation will be considered an undue hardship only if it poses substantial difficulty or expense in the operation of the business.

For example, accommodations that would incur extremely high costs relative to the size of the business, despite the benefit of the accommodation to the employee, may be unduly burdensome. Employers do not have to lower production levels or standards as a reasonable accommodation, nor do they have to alter the essential functions of the position.

Outside the Scope of Employment:

Additionally, an employer does not have to provide an accommodation that would benefit the employee outside the scope of the employment. For example, providing eyeglasses to a vision-impaired individual would not be a reasonable accommodation.

Essential Job Functions:

The accommodation cannot interfere with the essential duties of the job. For example, a severely hearing-impaired secretary who asks that s/he not be required to answer the phone may be denied an accommodation because that task is an essential function of the position.

What if I request an accommodation and it poses an “undue hardship” to my employer?

Don't lose all hope! While the employer does not have to provide you with that particular accommodation, if you suggest another accommodation that is reasonable, the employer must consider the alternative. The employer is required to negotiate with you in good faith. This means you collectively brainstorm ideas until you reach one that works for both the employer and the employee.

If you are confronted with the situation described by Happily Employed, contact ALRP to see if these protections apply to you and for help in requesting an accommodation.

This Legal Q&A Guide was last revised in July 2011. It is intended to provide general legal information to people living with HIV/AIDS in California. However, because laws change frequently ALRP cannot ensure the complete accuracy of the information included. Please call ALRP at (415) 701-1100 to consult with an ALRP attorney about your legal rights in your particular situation.