



**AUGMENTED
HR SOLUTIONS, LLC**

The Interactive Process The key To Compliance

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What the Class is About

- ▶ Defining the Interactive Process (IP)
- ▶ Understanding the benefits of the IP
- ▶ Importance of effective, consistent processes and procedures
- ▶ How the IP should be applied to most accommodation requests
- ▶ Key elements to consider before implementing an IP plan
- ▶ 7-step IP plan
- ▶ Flowchart through www.aughrs.com

Access Code: IPFLOWCHART (all caps)

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Why Use the Interactive Process?

Organization's first obligation is to comply with Title I of the ADA, according to the EEOC.

- Provides an understanding of what was done and why
- Helps both parties work together
- More effective decision-making
- Shows the effort the organization makes to accommodate
- Retains qualified employees who feel valued
- Improves performance and productivity

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Did You Know?

- 6 out of 10 adults have a chronic disease and 4 out of 10 adults have two or more
- Disability ranked 3rd out of the 10 of the most frequently alleged discrimination charges
- DMEC's 2019 survey - (44%) of respondents use a standard form to gather ADA information
- 58% of reasonable accommodations cost nothing while the rest typically cost only \$500

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Defining Title 1 of the ADA - Review

- Protects qualified individuals with disabilities from discrimination in employment in ALL areas of employment
- Protects individuals with ADA disabilities (IWD) from harassment, being fired, or disciplined for asserting their rights under the ADA
- Provides IWD the right to request a reasonable accommodation

A qualified individual with an ADA Disability (IWD)
 A current or history of such physical or mental impairment that substantially limits one or more major life activities, or is perceived by others as having such an impairment.

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Reasonable Accommodation - Review

Modifications or Adjustments

1. Job application process OR
2. Enables an individual to perform the essential functions of the job (EJF) OR
3. Enables an individual to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities

Designed to remove or mitigate the effect of physical, social or environmental barriers

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What is NOT a Reasonable Accommodation?

- **NOT** meant to justify or compensate for a person's lack of knowledge, skills, or abilities necessary to succeed in their jobs
- **NOT** meant to remove or eliminate
 - ❖ Essential job functions
 - ❖ Lower job production standards
 - ❖ Change supervisors
 - ❖ Change workplace policies



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What is The Interactive Process?

Is the informal dialogue between the organization and the IWD in which they identify the precise limitations resulting from their ADA disability and potential reasonable accommodation (RA) that could help IWD overcome those limitations.



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Engaging in the IP “Creates the Story”



1. How does the ADA disability create a limitation?
2. How will the accommodation requested effectively address the limitation? What are alternative options?
3. How would the proposed accommodation enable the employee to continue performing the essential functions of the OR engage in other benefits and privileges of employment OR enable the applicant to engage in the application process?
4. What accommodation did you implement? What is the outcome? Is it working? Do you need to try something else?



Effective Communication is the Cornerstone

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ADA Requirements *During* the IP



- ❖ Both parties to communicate
- ❖ Good faith effort
- ❖ Removing unnecessary barriers
- ❖ Flexibility on how things are performed and completed
- ❖ Individualized, documented assessment

EXCEPTION: Not required when accommodation is obvious and negotiation is not needed.

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From *Whom* Can the Need for an Accommodation Come From?



- ❖ Individual with an ADA disability (IWD)
- ❖ Individual's family, friends, Healthcare Provider (HCP), or other representative
- ❖ Notice to or observation from a supervisor, manager, HR, or any other organization representative
- ❖ Third party vendor who manages the organization's processes

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When Should the Organization Initiate the IP?



According to the EEOC.....

First, When the individual informs the organization that he or she has a disability and an accommodation is needed.

Second, When an organization has adequate or sufficient notice (without receiving a request) for the need for a reasonable accommodation from an employee:

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What is "Adequate or Sufficient Notice"?



- Knows the individual has an ADA disability
- When the employee is coming back from medical leave
- When the employee has exhausted medical leave and the HCP indicates that further accommodation is necessary
- Knows or has reason to know
 - that a disability prevents the employee from requesting an accommodation
 - that the employee is experiencing workplace problems because of an ADA disability or through observation

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Timeframe to Process Request



EEOC's Internal Guidance:



- Contact individual as quickly as possible up to a 10-day time frame
- The time frame begins when an oral or written request is made
- Total time frame for processing request (including providing an accommodation) is as soon as possible, but not later than 30 business days (including the 10 days) from the date the request is made
- Less time, if the accommodation is obvious or already known
- Extenuating circumstances – time frame longer?

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Key Factors to Consider When Setting up a 7-Step IP



- 1) Identifying an ADA Coordinator (ADAC) and data management system to manage the process
- 2) Anti-discrimination laws and other regulations
- 3) Policy, procedures, and forms for managing requests
- 4) Employment policies, laws, and regulations
- 5) Job Descriptions and job analysis
- 6) Confidentiality
- 7) Training
- 8) Other professionals to consider



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1. Identifying an ADA Coordinator (ADAC) and System to Manage the Process



- Person responsible for managing the process
 - Drives the process that supports ADA Compliance
 - Guides the employee through the process
 - Not the decisionmaker
- Back-up person
- Data management system (such as Optis ADA Interact) Or third-party administrator



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2. Anti-Discrimination Laws and Other Regulations



- ✓ COVID-19 Pandemic
- ✓ State Employment Laws – Anti-Discrimination Laws
- ✓ State Temporary Disability Plans
- ✓ Paid Family and Medical Leave Programs
- ✓ Sick Leave (state or local Paid Sick Leave)
- ✓ Family Medical Leave (FMLA)/State FMLA
- ✓ Pregnancy Disability Leave (PDL)
- ✓ Workers Compensation (WC)



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3. ADA & Accommodation Requests Policies, Procedures, & Forms

- Anti-Harassment, Discrimination, Retaliation Policy
- ADA Accommodation Policies
- Grievance/Complaint/Informal Dispute Resolution Policy (EEOC)
- Policy and procedures for supervisor's
- Forms and procedures for managing the process



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4. Employment Policies, Procedures, and Other Benefits

<ul style="list-style-type: none"> • Personal LOA • Return To Work (RTW) policies • Vacation /Paid Time Off (PTO)/sick leave • Employee Assistance Program (EAP) • Attendance 	<ul style="list-style-type: none"> • Remote work • Meal & Breaks • Employee Conduct • Drug-Free Workplace • Animals in the workplace • Safety and Accident Rules • Dress code
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4. Other Policies and Procedures To Consider

<ul style="list-style-type: none"> • Fragrance Free Workplace Policy • Bring Your Own Device (BYOD) • Relocation Policy and Procedures • Wellness Programs/Fitness Center 	<ul style="list-style-type: none"> • Onboarding Policy • Contingent Staff Policy • Short-term and Long-Term Disability • Benefit Policies – Health/Dental/HSA/FSA/401k
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5. Job Description and Analysis

- The purpose of the work
- Explains the tasks, duties, functions, and responsibilities
- Identifies essential job functions (EJF)
- Identifies marginal functions
- Explains time and frequency of work to be completed
- Identifies health and safety risks
- Physical and mental requirements
- Environmental Factors

(For help with JD or Job Analysis – can use my Making It Work: Employee Workbook or use Worksteps.com)

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6. Confidentiality

- Medical Information – On a “Need to Know Basis”
 - ❖ Supervisors and managers
 - ❖ First aid and safety personnel
 - ❖ Government officials investigating compliance
 - ❖ State workers compensation
 - ❖ Health and life insurance companies
- Information regarding the accommodation – separate from their personnel file

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7. Training

Managers, Supervisors, and Employees should receive training on:

- How to respond to requests or perceived needs
- Time frame to forward the request and to whom
- How to respond to “plain language request”
- What their role is in the 7-Step IP Plan

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8. Other Professionals to Consider During the IP

- In-house Support
- Job Accommodation Network (JAN)
- Regional ADA Centers
- Assistive Technology (AT) Specialists
- State Vocational Rehabilitation Agencies
- Disability & Health-Related Organizations
- Ergonomist or Physical & Occupational therapists
- Corada.com— ADA accessibility Standards/videos/guidelines for physical structure
- ADA Specialist and ADA Mediators
- Labor Attorneys



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Creating an IP Plan..... Why?

- Creates and documents the story:
 - ✓ What was done
 - ✓ Why it is done
 - ✓ How it made the parties feel along the way
- No "one size fits all"
- Modifications to the 7-Step IP Plan may be required



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7-Step IP Plan

1. Recognize, Identify, & Confirm
2. Initiate Dialogue
3. Gather Information
4. Explore Possible Accommodations
5. Choose Accommodation(s)
6. Notify and Implement
7. Monitor and Document



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1. Recognize, Identify, and Confirm the Need for an Accommodation



- Notice
 - From the IWD or their representative
 - Observation made by a manager or other employer representative
- Once confirmed, refer to ADAC
- Document



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2. Initiate the IP



1. ADAC contacts the individual
2. Engage in a timely manner
 - a. Confirm the need for a RA
 - b. Explain ADAC's role
 - c. Explain the accommodation process to the individual
 - d. What the law can and cannot do
 - e. Expectations
 - f. Information that may be requested
 - g. Timeline
 - h. Possible outcomes
3. Confirm the Individual *fully* understands the process and purpose
4. Document the good faith effort



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3. Gather Relevant Information



- ✓ Identify the type of limitations/challenges/barriers
- ✓ Identify what type of accommodations IWD is seeking
- ✓ Accommodation ideas from the IWD
- ✓ Analyze Job functions, if applicable to the request
- ✓ Identify what policies and procedures apply
- ✓ How long will the accommodation be needed?
- ✓ Does it need to be implemented periodically or in emergency situations?
- ✓ Medical documentation only when necessary!



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4. Explore Accommodation Options

- Specific ideas given by the IWD and/or HCP?
- Manager or supervisor's ideas?
- Does medical leave (paid or unpaid) or extended leave need to be considered?
- Is there an Undue Hardship or Direct Threat concern?
- Medical examination or testing?
- Does light duty need to be considered?
- What policies and procedures would need to be modified?
- Does reassignment need to be considered?
- More clarification needed?
- Help from other organizations or professionals?



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5. Choose Accommodation(s) – Is it Reasonable?

- Is the specific request from the IWD reasonable?
- If not, will the chosen accommodation be just as effective as the one the IWD requested?
- How will it help the IWD?
- What modifications would need to be implemented?
- How will the effectiveness be measured?
- How will it enable the IWD to return to work if on medical Leave?
- If extended leave requested, is it reasonable?
- If reassignment is the ONLY option, are there vacant positions now or in the near future?



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6. Notify the employee and Implement the RA

- ✓ Notify the IWD
- ✓ Details of the RA and anticipated start date
- ✓ What the accommodation is expected to do
- ✓ RA must be agreed upon with the IWD
- ✓ Ask the IWD to document how the accommodation is or is not working for them



If temporary, be clear that the specific accommodation is temporary, why and for how long.



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7. Monitor RA – Ongoing

- Early as possible up to 30 days
- Is it working effectively?
- Does the RA need to be modified? If so, how?
- Repeating steps 4, 5, 6 (**NOT UNCOMMON!**)

Important You may need to **TRY, TRY, and TRY AGAIN!**

COVID-19 – New, additional, or different request because some health conditions are at higher risk of severe illness from the Coronavirus

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1st Exception - No Longer Qualified

No reasonable accommodation available in current position

- Why & what attempts have been made?

FAIR USE!

KNOW THE RULES!!!

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2nd Exception – Undue Hardship

Significant difficulty or expense on the operation of the organization

Factors to Consider:

- The nature and cost of the accommodation needed – *be careful here!*
- The impact of the accommodation on the operation of the facility
- Overall financial resources of the facility, size, # of employees, and type and location of facilities of the organization
- How the accommodation would be unduly extensive or disruptive
- How would it fundamentally alter the nature or operation of the job or business

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Undue Hardship – COVID-19



- COVID-19 -- As a result of pandemic may be allowed, at the current time
 - Decline in revenues and cash
 - Significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers.

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3rd Exception – Direct Threat



A significant risk of substantial harm to the health or safety of the IWD or others

Should consider -

- The duration of the risk that an IWD poses to themselves or others
- The nature and severity of the potential harm
- How likely it is that the potential harm will occur?

Specific Risk - Must be current and identified based on medical objective evidence.

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Direct Threat – COVID-19



A Direct Threat would be posed by having an individual with COVID-19, or symptoms of it, present in the workplace at the current time.

Other Considerations:

- Severity of the pandemic in a particular area
- Employees own health condition and particular job duties
- Likelihood of exposure to the virus at the worksite
- Employer measure to protect all workers - Mandatory social distancing, face masks, gloves

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What are the Organization's Options?



First:

- If they cannot perform the EJP, could temporary light duty or medical leave enable them to return to their current job within a reasonable amount of time?

Second:

- Is Reassignment an option? If not now, in the very near future?

Third:

- Medical Separation –

Helping the employee through the transition

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- ✓ Proves to the EEOC that you are "Efforting" to comply with the ADA
- ✓ Demonstrates that organization documented the story and made a good faith effort
- ✓ Employees feel valued and taken seriously
- ✓ Treats individuals in the workplace equally and fairly
- ✓ Effective communication and understanding between the employee and the organization
- ✓ Provides effective accommodations, if available

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Other Considerations



1. Interactive Process Flow Chart

Access Code: IPFLOWCHART (all caps)

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2. Covid-19 Pandemic Guidance

CDC, OSHA, Local/State Health Authorities, and EEO Laws (ADA and Rehabilitation Act)

A. https://www.eeoc.gov/facts/pandemic_flu.html

B. <https://www.eeoc.gov/coronavirus>

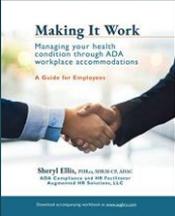
C. <https://www.litfler.com/publication-press/publication/bouncing-back-ljst-statewide-return-work-protocols>

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Questions for Sheryl Ellis?



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QUESTIONS



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