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ADA
TAKE THE RIGHT STEPS
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Golden Rule In Employment Law

- Must be able to prove good faith, fairness, and consistency.
- Maintain written documentation.

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Americans With Disabilities Act Amendments Act (2008)

- Applies to employers with 15 or more employees
- Passed September 2008 – intended to return to original purpose of ADA
- Effective since January 2009
- Proposed regulations issued September 2009
- Final regulations issued March 2011
- The question is no longer coverage – shifted focus to merits

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More Exposure for Employers

Definition of "disability" relaxed

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"Substantially limits" now means "moderately limits"

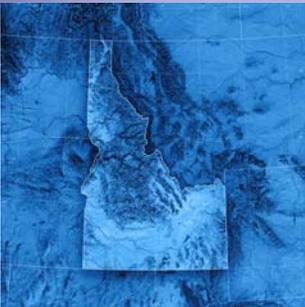
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Expanded lists of "major life activities"

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More exposure for employers

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2013 STATISTICS - IDAHO HUMAN RIGHTS COMMISSION: Breakdown by basis

Many charges allege more than one basis so the percentage adds to more than 100%

Basis	Fiscal	Total	Percentage	Breakout	Breakout	Breakout
State and Federal	Year		of all claims			
Total claims filed:		FY2013	463			
		FY2012	491			
		FY2011	524			
		FY2010	480			
Disability:				Accommodation	Discharge	
	FY2013	204	44%	101 (49%)	136 (66%)	
	FY2012	188	38%	90 (48%)	59 (31%)	
	FY2011	190	36%	69 (36%)	125 (65%)	
	FY2010	175	36%	93 (53%)	97 (55%)	

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ADA Flow Chart



IS THE EMPLOYER COVERED BY THE ADA?

- Does it employ 15 or more employees?

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ADA Flow Chart



DOES THE INDIVIDUAL HAVE A DISABILITY?

- A physical or mental impairment that substantially limits one or more major life activities? or
- A record of such an impairment? or
- Regarded as having such an impairment?

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“Impairments”



Threshold issue:

- Covers almost any physical or mental condition.
- Language of statute and regulations remain the same, but

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Not Everything is an Impairment

- Pregnancy*
- Old age
- Height
- Weight*
- Hair color
- Hand preference (left vs. right)
- Personality traits (temper)
- Environmental or cultural characteristics

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“Disability”

- Disabilities include:
 - Drug addiction;
 - Alcoholism;
 - Diabetes;
 - Heart Disease;
 - Speech Impairments; and
 - HIV.

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“Substantially Limits”

- **Old ADA:** “Substantially limits” must “be interpreted strictly to create a demanding standard for qualifying as a disability.” (*Toyota*)
- **ADAAA:** Act should be construed in favor of broad coverage and inquiry into whether an impairment “substantially limits” should not demand extensive analysis.
- **ADAAA:** “Substantial limitation” need only be greater than “moderate.”

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“Major Life Activity”



- **Old ADA:** A “major life activity” must be one of “central importance to most people’s daily lives.” (*Toyota*)
- **ADAAA:** Whether an activity is a “major life activity” is *not* determined by reference to whether it is of “central importance to daily life”
- Provides two non-exclusive lists of major life activities.
 - Traditional activities (expanded)
 - Major bodily functions (new)

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List of Traditional Activities Expanded



•Under the ADAAA and Regulations, “major life activities” include (but are not limited to):

– Caring for oneself	– Lifting
– Performing manual tasks	– Bending
– Seeing	– Speaking
– Hearing	– Breathing
– Eating	– Learning
– Sleeping	– Reading
– Walking	– Concentrating
– Standing	– Thinking
– Sitting	– Communicating
– Reaching	– Interacting with others
	– Working
	– Using computer
	– Texting?!

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Major Bodily Functions Are “Major Life Activities”



•ADAAA and Regulations: Now includes the operation of a major bodily function, including individual organ function:

– Functions of the immune system	– Brain Functions
– Normal cell growth	– Respiratory Functions
– Digestive Functions	– Circulatory Functions
– Bowel Functions	– Endocrine Functions
– Bladder Functions	– Reproductive Functions
– Neurological Functions	

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Employer's Focus Should Be on the Interactive Process

- **ADA:** focus on coverage (disability)
- **ADAAA:** focus on merits
 - qualified individual
 - interactive process

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ADA Flow Chart

IS THE INDIVIDUAL QUALIFIED TO PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB, WITH OR WITHOUT A REASONABLE ACCOMMODATION?

- Does the individual have the required skill, education and experience for the job?
- Can the individual perform the essential functions, with or without a reasonable accommodation?

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Employee Evaluations



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Interactive Process



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The Interactive Process

- An informal exchange between employer and employee to:
 - Identify employee's limitations;
 - Determine whether employee can perform essential job functions;
 - Identify potential accommodations;
 - Determine whether accommodation is reasonable; and
 - Engage in good faith to solve problem.

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ADA Flow Chart



WHAT REASONABLE ACCOMMODATION IS NEEDED? ENGAGE IN INTERACTIVE PROCESS WITH INDIVIDUAL.

- What essential function(s) of job needs accommodation?
- What accommodation, if any, was requested?
- Is input needed from health care provider or others?

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Accommodations



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Accommodation



- Any change in work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.
- Remove barriers for individuals with disabilities.

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Accommodation



Must be provided to qualified employees regardless of whether part time, full time, or probationary.

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Undue Hardship



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Undue Hardship



Only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such modification is required if it would cause undue hardship to the employer.

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Undue Hardship



Means significant difficulty or expense and focuses on the resources and circumstances of a particular employer in relation to cost or difficulty of providing a specific accommodation.

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Undue Hardship



Not only financial difficulty but to accommodations that are extensive, substantial, or disruptive or that would fundamentally alter the nature or operation of business.

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Documentation



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Written Documentation



- Employer may require documentation needed to establish that a person has an ADA disability and that disability necessitates a reasonable accommodation.
 - Should come from an appropriate health care or rehabilitation professional.
 - Can't request if disability and need for accommodation are obvious or if individual has provided employer with sufficient information.
 - Keep it separate.

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Properly Navigating a Request for Accommodation



- Promptly respond to all requests for accommodations.
- Keep accommodation requests confidential.
- Request written documentation of employee's impairments.
- Consider a test run.
- If the employee rejects accommodation, have them sign acknowledgement.
- Conclude the interactive process with a defensible response to last request.

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Types of Reasonable Accommodations:



1. Making facilities accessible.
2. Job restructuring.
3. Part-time or modified schedules.
4. Reassignment to vacant position.
5. Work from home.
6. Acquisition or modification of equipment or devices.
7. Provision of readers or interpreters.
8. Use of leave (accrued or unpaid).

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BEWARE:



No duty to create a new position!

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In Some Cases, No Duty to:



1. Reassign to permanent light-duty position.
2. Reassign employee to position they are not qualified to perform.
3. Reassign where it would be a promotion.
4. Allow employee to work at home.
5. Hire an assistant.
6. Assign employee only to day shift.

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Examples:



1. Call center employee with Type I diabetes refused to answer calls during peak period because it caused blood sugar to rise.
2. Employee who had emergency surgery quit coming to work.
3. Employee who was in car accident wanted part-time schedule during recovery.

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Part-Time Work as Accommodation

- Is attendance an essential function of position?
- If so, as a general rule, part-time work may not be an appropriate accommodation.
- However, employers must consider it.
- Case-by-case inquiry.

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Other Factors:

- How long will it take to train front office person?
- Does employee do more than answer phones; make appointments?
- Is cost of temporary worker more than hourly rate?
- If substitute worker costs more, undue burden?
- Are there other members of staff who can cover duties?
- Length of need to work part time.

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Reasonableness



- Is it reasonable for an employee to request part-time accommodation?
 - Depends on employee's duties.
 - Depends on size of company.
 - If smaller company, bigger burden.
 - Do **NOT** rely on cost alone.

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Service Dogs



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Pregnancy



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Pregnancy



- EEOC guidelines suggest an employer must accommodate.
- Light duty? Yes, if employer allows other disabled employees to work light duty.

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Reassignment to Vacant Position



- Employee must be qualified.
- Employer need not bump other employees, create a position, or promote employee.
- Should be to a position equal in pay and status.
- Last resort.

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Key Issues With Accommodations



1. Determine scope of alleged disability – doctor's note.
2. Engage in interactive process.
3. Identify essential functions.
4. Is requested accommodation reasonable?
5. Are other accommodations available?
6. Send written communication granting or denying.
7. Document, Document, Document!

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Steps an Employer Can Take Today

- Centralize decision-making process.
- Get buy-in from employees as to essential job functions.
- Update job description.
- Update handbooks and training materials.
- Perform honest evaluations.
- Train supervisors.

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- Drawing.
- Upcoming presentations.
- More information is at www.eeoc.gov.
- Thank you.

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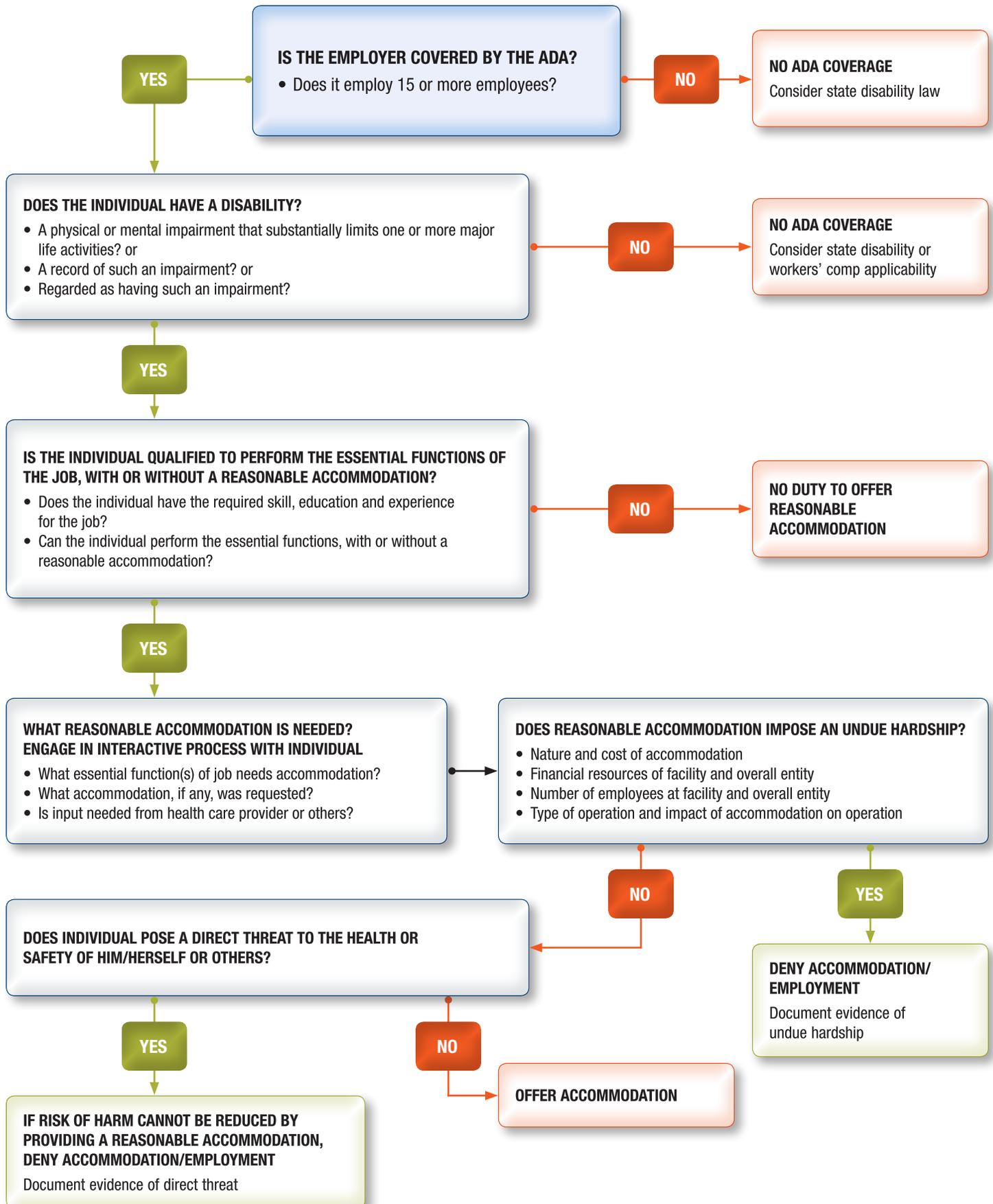
<http://www.linkedin.com/groups/Holland-Hart-Labor-Employment-Law-4714382/about>

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ADA Flow Chart

This flow chart is designed to assist employers in determining when the federal ADA applies and to provide steps for managing requests for reasonable accommodations.



MAJOR LIFE ACTIVITIES: A covered disability includes a physical or mental impairment that substantially limits one or more major life activities, including but not limited to:

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Thinking
- Concentrating
- Reading
- Bending
- Communicating
- Interacting with others
- Working
- Major bodily functions (e.g., immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions)

ESSENTIAL FUNCTIONS: The term “essential functions” means the fundamental job duties, not the marginal functions of the position. A job function may be considered essential for reasons including but not limited to the following:

- The position exists to perform that function;
- A limited number of employees are available to perform that function; and/or
- The function is highly specialized so that the individual is hired for his or her expertise or ability to perform that particular function.

REASONABLE ACCOMMODATION: Modifications or adjustments to the job application process or work environment, or to the manner or circumstances under which the position is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position. Examples include but are not limited to:

- Accessibility to facility
- Equipment or devices
- Readers or interpreters
- Modification of work schedule
- Examinations, training materials or application procedures
- Modification of policies
- Job restructuring (e.g., reallocation of marginal functions)
- Reassignment

ADA Attorney Contact



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Sample Disability Accommodation Process Form

Employee Name: _____

Job Title: _____

Dept./Office: _____

TASK	PERSON RESPONSIBLE	DATE COMPLETED
1. Request rec'd ___ Verbal ___ Written	Received by:	
2. Accommodation request file opened		
3. Evaluation of employee's impairment: ___ Not a covered disability ___ Insufficient medical information ___ May be eligible for a reasonable accommodation		
4. Send letter acknowledging receipt of request for accommodation; include request for medical information/supporting documentation, if needed		
5. Medical information and/or supporting documentation received		
6. Essential job functions identified: _____ _____ _____ _____		
7. Schedule meeting with employee; date, time and location of meeting: _____		
8. Describe reasonable accommodations identified: _____ _____ _____ _____		
9. Consult with employee's supervisor, company health and safety, etc. on viability of suggested accommodations: [names] _____ _____ _____		

Questions? Contact
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Sample Disability Accommodation Process Form

TASK	PERSON RESPONSIBLE	DATE COMPLETED
10. If needed and with employee authorization, consult with employee's health care provider on possible accommodations and employee's ability to perform essential functions: [name] _____ _____ _____		
11. Evaluate accommodations: <input type="checkbox"/> Employee cannot perform essential job function(s) of _____ <input type="checkbox"/> No reasonable accommodation due to undue hardship <input type="checkbox"/> Accommodation selected: _____ _____		
12. Schedule accommodation meeting with employee; date, time and location of meeting: _____		
13. Accommodation meeting held <input type="checkbox"/> Employee accepts accommodation <input type="checkbox"/> Employee rejects accommodation <input type="checkbox"/> Informed cannot perform essential functions <input type="checkbox"/> Informed no reasonable accommodation		
14. Provide written notice of decision to employee		
15. Close file		

Questions? Contact Pam Howland



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Additional comments: _____

This checklist is designed to provide general information for educational purposes only. It does not constitute legal advice and is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.