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Obligation to Provide “Reasonable Accommodation” in Accordance with Amendments to Act for Eliminating Discrimination against Persons with Disabilities

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Introduction

The most recent amendments to the Act for Eliminating Discrimination against Persons with Disabilities¹ (the “**Disability Discrimination Act**”,²) require not only government agencies but also business operators to provide “reasonable accommodation” to persons with disabilities on and after April 1, 2024 (hereinafter referred to as the “**Amendments**”, the “**Amended Act**”; the “**Former Act**” and the “**Obligation of Reasonable Accommodation**”, as appropriate). In the

¹ Act No. 65 of 2013

² These amendments are based on the “Act to Partially Amend the Act for Eliminating Discrimination against Persons with Disabilities” (Act No. 56 of 2021), which was promulgated on June 4, 2021.

following, we will explain the key points of these Amendments and the details of the Obligation of Reasonable Accommodation in terms of the actions required by employers to meet their corresponding obligations.

I. Key Amendments

The Disability Discrimination Act, which was enacted in June 2013 and came into effect in April 2016, is one of the domestic laws developed in response to Japan's ratification in 2007 of the Convention on the Rights of Persons with Disabilities (the “**Convention**”).

The Former Act required not only government agencies³ but also business operators⁴ to prohibit “unfair discriminatory treatment” of persons with disabilities. However, it obliged only government agencies to provide persons with disabilities with reasonable accommodation and required business operators to make efforts to do so. The Amendments have made it mandatory for business operators as well as to provide reasonable accommodation (the “**Obligation of Reasonable Accommodation**”).

Since April 2016, business operators have already been required to provide reasonable accommodation to employees with disabilities during the recruitment process and after employment, in accordance with the Act to Facilitate the Employment of Persons with Disabilities⁵ (the “**PWD Employment Facilitation Act**”). The Amendments have expanded the scope of persons for whom business operators have the Obligation of Reasonable Accommodation, extending the applicability of said obligation from employees only to anyone involved in the business activities of the employer, including their clients and business partners.

³ Regarding the prohibition of unfair discriminatory treatment by government agencies, Article 7, Paragraph 1 of the Disability Discrimination Act provides that, “In the conduct of their administrative affairs or other work, government agencies shall not violate the rights or interests of persons with disabilities through disparate and unfair discriminatory treatment compared to persons without disabilities on the basis of disability”.

⁴ Regarding the prohibition of unfair discriminatory treatment by business operators, Article 8, Paragraph 1 of the Disability Discrimination Act provides that, “In the conduct of their business, business operators shall not violate the rights or interests of persons with disabilities through disparate and unfair discriminatory treatment compared to persons without disabilities on the basis of disability”.

⁵ Act No.123 of 1960

	The PWD Employment Facilitation Act	The Former Act	The Amended Act
Prohibition of the Unfair Discriminatory Treatment (beneficiaries)	Legal obligation, as set forth in Articles 34 and 35 (Employees with disabilities)	Legal obligation, as set forth in Article 8, Paragraph 1 (Persons with disabilities)	Legal obligation, as set forth in Article 8, Paragraph 1 (Persons with disabilities)
Provision of the Reasonable Accommodation (beneficiaries)	Legal obligation, as set forth in Articles 36-2 to 36-4 (Employees with disabilities)	Obligation to make efforts, as set forth in Article 8, Paragraph 2 (Persons with disabilities)	<u>Legal obligation, as set forth in Article 8, Paragraph 2 (Persons with disabilities)</u>
Environmental Improvement	-	Obligation to make efforts, as set forth in Article 5	Obligation to make efforts, as set forth in Article 5

II. Obligation of Reasonable Accommodation

The concept of the Obligation of Reasonable Accommodation was proposed in Article 2 of the Convention. That Article states that “ 'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”, and this discrimination “includes all forms of discrimination, including denial of reasonable accommodation⁶”.

Taking into account the concept of the Obligation of Reasonable Accommodation, the Amended Act aims to promote the elimination of discrimination on the basis of disability by providing basic matters concerning the promotion of measures to eliminate discrimination on the basis of disability at government agencies and business operators, thereby contributing to the realization of a society in which all citizens live together in mutual respect for each other's personality and individuality without being divided by disability. It prohibits unfair discriminatory treatment, and also requires that reasonable accommodation be provided.

With regard to the provision of the reasonable accommodation, Article 8, Paragraph 2 of the Amended Act states that if a person with a disability expresses a genuine desire to eliminate a

⁶ The Convention defines “Reasonable Accommodation” in Article 2 as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

given social barrier, the company, in carrying out its business, must provide reasonable accommodation to implement the elimination of the social barrier so long as the accommodation associated with the relevant implementation is not disproportionate, in accordance with the sex, age, and state of the disability of the person with a disability, so that the rights and interests of the person with the disability are not violated. The following is an explanation of when the Obligation of Reasonable Accommodation arises under the Act with a closer look at the content of this obligation.

1. When Obligation of Reasonable Accommodation Arises

According to Article 8, Paragraph 2 of the Amended Act, if a person with a disability⁽¹⁾ expresses a genuine desire to eliminate a social barrier⁽²⁾, the company, in carrying out its business, must provide reasonable accommodation to implement the elimination of the social barrier so long as the accommodation associated with the relevant implementation is not disproportionate (referred to in 3 below).

(1) “person with a disability”

A “person with a disability” refers to a person with a physical disability, a person with an intellectual disability, a person with a mental disability (including developmental disabilities and higher brain dysfunction), and other persons with disabilities affecting the functions of the body or mind (including disabilities caused by intractable diseases) (collectively, the “**Disability**”), and who are in state of facing substantial limitations in their continuous daily or social life because of a disability or social barrier, as defined in Article 2, Paragraph 1 of the Disability Discrimination Act.

(2) “if a person with a disability expresses a genuine desire to eliminate the social barrier”

The Obligation of Reasonable Accommodation is based on the individual's expression of a wish, i.e., the individual must express to the business operator, by any means of communication (not limited to language), that they currently wish to have the social barrier eliminated. (If it is difficult for the person to express their needs due to the disability, a family member or caregiver can help the person do so.)

However, if it is obvious that a person with a disability who has difficulty expressing their genuine desire does not have a caregiver, and does not express their genuine desire to eliminate the social barrier, it is advisable for the business operator to make voluntary efforts, such as encouraging a constructive dialogue to propose accommodations that are deemed appropriate for that person with a disability, as provided in Chapter 2-3(1)d of the Basic Policy for Eliminating Discrimination against Persons with Disabilities⁷ (the “**Basic Policy**”).

⁷ The Cabinet Office. “Basic Policy for Eliminating Discrimination against Persons with Disabilities”, which was approved by the Cabinet on March 14, 2023 and comes into force on April 1, 2024. (<https://www8.cao.go.jp/shougai/suishin/sabekai/kihonhoushin/r05/pdf/honbun.pdf>)

2. Details of Obligation of Reasonable Accommodation

When the requirements in 1 above are met, business operators are obligated to provide “reasonable accommodation to implement the elimination of the social barrier so long as the duties imposed on the employer are not disproportionately onerous, in accordance with the sex, age, and state of the disability of the person with the disability, such that that the latter’s rights and interests are not violated”.

It should be noted that the above reasonable accommodation, in light of the purposes, nature, and functions of the work or business undertaken, (i) is limited to an accommodation that is necessary for and attached to the original job, (ii) is designed to provide equal opportunities in comparison with persons without disabilities, and (iii) does not fundamentally change the purposes, nature, or functions of the work or business, according to Chapter 2-3(1)b of the Basic Policy.

What is specifically required as reasonable accommodation is diverse and highly individualized, depending on the disability characteristics of the person with disabilities and on the circumstances or situation in which the removal of social barriers is necessary. Therefore, business operators need to act flexibly to the extent necessary and reasonable: they need to consider the circumstances in which the person with a disability finds themselves; to respect their preferences regarding the process and method of such removal of social barriers; to take into account the elements described in the table in 3 below; and to achieve mutual understanding thorough **constructive dialogue between the parties** or by taking other alternative measures (Chapter 2-3(1)b of the Basic Policy).

3. Disproportionately Onerous Accommodation

If it would be “disproportionately onerous” for a business operator to provide reasonable accommodation, the business operator is not required to do so.

The business operator needs to judge comprehensively and objectively whether the relevant accommodation is “disproportionately onerous” by considering the following elements and the specific circumstances and situation, as set forth in Chapter 2-3(2) of the Basic Policy.

Elements for Judging the Characterization as “Disproportionately Onerous”
<ul style="list-style-type: none">• Influence on work and business (whether it interferes with the purposes, nature, and functions of the work and business)• Feasibility (physical or technical constraints, or personnel or organizational constraints)• Amount of Expenses and cost• The scale of work and business• Fiscal and financial situation

In addition, if the business operator judges that the accommodation is disproportionate, it is advisable for the business operator to endeavor to gain the understanding of the person with a disability by explaining the reason.

III. Actions Required of Companies

The Amended Act requires each business operator to consider the circumstances in which it will need to provide reasonable accommodation in light of its business, and to prepare in advance the actions and measures that are feasible, but not disproportionate, for it in order to solve the problem.

1. Specific Examples of Reasonable Accommodation Provided by Business Operators

The Basic Policy suggests the following specific examples of reasonable accommodation in Chapter 2-3(1)c:

- To develop a physical environment, such as placing portable access ramps on steps for wheelchair users and means for helping them pick up items displayed on a high shelf;
- To communicate through writing, by reading aloud, sign language, communication boards, or by easy-to-understand expressions with reading aids that show the pronunciation of *kanji* words (*furigana*), photos, or illustrations;
- To be flexible with rules and practices depending on the disability characteristics, such as adjusting break times and allowing the use of digital devices as needed; and
- To provide shopping assistance to persons with disabilities who have difficulty moving around a store alone or locating items.

The following are examples of what would or would not be considered a breach of the Obligation of Reasonable Accommodation. The applicability of a breach will be determined comprehensively and objectively according to the specific situation and circumstances, taking into consideration the above elements for judging the applicability of the concept of “disproportionately onerous”.

Examples of what would be considered a breach of the obligation to provide reasonable accommodation:

- If a business operator **uniformly refuses a request** from a person with writing difficulty to use a digital device on an exam **without making the necessary accommodations** merely because there is no precedent for allowing anyone to bring in a digital device;
- If a business operator **refuses a request** from a person with a disability to help that person move around an event venue **without considering the possibilities of specific assistance due to the excuse that it does not want to get into any trouble**;
- If a business operator **refuses a request** from a person with difficulty using a

telephone to allow that person to use means other than a telephone call for various procedures, **without considering alternative measures**, including e-mail or telephone relay service, because the company's manual allows its staff to take the procedures only by the user's telephone call; and

- If a business operator **refuses a request** from a visually impaired person to attend an upcoming open seated seminar in a seat close to the screen or display board **because it cannot give special treatment to a particular person**, without for example considering the option of reserving such seats in advance.

Examples of what would not be considered a breach of the obligation to provide reasonable accommodation:

- If a restaurant refuses a request to provide an eating aid because it does not offer the service as part of its business (from the perspective that Reasonable Accommodation is limited to those necessary for and incidental to the original job);
- If a business operator refuses a request to separately secure limited-edition products sold by lottery from a person who has difficulty completing the lottery application process (from the perspective that Reasonable Accommodation is designed to provide equal opportunities for persons with disabilities in comparison with persons without disabilities);
- If a business operator that offers only online courses refuses a request for in-person private instruction from a person who has difficulty understanding when participating in an online group class, because that service differs from the purpose and type of its business and it does not have sufficient human resources or equipment for in-person private instruction (from the perspective that reasonable accommodation does not fundamentally change the purposes, nature, or functions of the business); and
- If a store clerk refuses a request from a visually impaired person to escort that person to help them in their shopping during peak hours, but instead offers to make a shopping list and offers to prepare the items themselves (from the perspective of disproportionately onerous, especially in terms of personnel and organizational constraints).

2. Relationship between Accessibility Environment Improvement and the Obligation of Reasonable Accommodation

Since the Former Act, without amendments, Article 5 of the Disability Discrimination Act have obliged business operators to make efforts to achieve "Accessibility Environment Improvement" in order to appropriately ensure Reasonable Accommodation in the elimination of social barriers.

Accessibility Environment Improvement means taking of preliminary improvement measures primarily for an unspecified number of persons with disabilities in order to accurately provide all of them with the reasonable accommodation in individual circumstances, including barrier-free facilities and equipment, services, and human support by caregivers to assist in expression and communication between the parties, and the improvement of information accessibility to facilitate

the acquisition, use, and dissemination of information by persons with disabilities, according to Chapter 2-3(3)a of the Basic Policy.

The Basic Policy, in Chapter 2-3(3)b, provides the following as specific examples of this kind of Environmental Improvement and the Obligation of Reasonable Accommodation therewithin:

- As an example of Accessibility Environment Improvement, a business operator provides training to store staff on how to provide appropriate assistance to persons with disabilities in filling out application forms, so that they can proceed smoothly when asked to do so; As an example of reasonable accommodation, a staff member fills out an application form on behalf of a person with a disability, checking the person's needs, in accordance with what they have learned in their training, if asked to do so.
- As an example of reasonable accommodation, if a business operator receives a request for assistance from a person with a disability who needs to complete an online application process on its website that is difficult for that person to use, it will assist that person by telephone or email as needed, and as an example of Accessibility Environment Improvement, on the same facts as in the preceding example, the operator will also improve its website to make it easier and more useful for people with disabilities to complete the process in the future.

3. Use of Research Tools Provided by Government Agencies

The scope of duties and actions required for business operators due to existence of the Obligation of Reasonable Accommodation are not comprehensively and explicitly provided by the Amended Act and the Basic Policy, and these need instead to be interpreted by each business operator on a case-by-case basis. Research tools provided by government agencies, including the Cabinet Office, can be useful aides for business operators planning to provide reasonable accommodation to employees and other persons related to their business.

For example, the “Portal Site for Promotion of Understanding to Eliminate Discrimination against Persons with Disabilities”⁸ covers basic matters pertaining to the Obligation of Reasonable Accommodation, and the Government’s “Collection of Examples of Providing Reasonable Accommodation”⁹ and “Database of Examples for Elimination of Discrimination against Persons with Disabilities”¹⁰ provide the business operator with specific examples.

⁸ The Cabinet Office. “Portal Site for Promotion of Understanding to Eliminate Discrimination against Persons with Disabilities” (<https://shougai-sha-sabetukaishou.go.jp/>)

⁹ The Cabinet Office. “Collection of Examples of Providing Reasonable Accommodation” (https://www8.cao.go.jp/shougai/suishin/jirei/pdf/gouriteki_jirei.pdf)

¹⁰ The Cabinet Office. “Database of Examples for Elimination of Discrimination against Persons with Disabilities” (<https://jireidb.shougai-sha-sabetukaishou.go.jp/>)

IV. Penalties for Breach of Obligation of Reasonable Accommodation

There are no direct penalties for breaches of the Obligation of Reasonable Accommodation. However, if the competent minister deems it particularly necessary for the enforcement of the Obligation of Reasonable Accommodation and requires a business operator to report certain matters, and the business operator fails to make a report or makes a false report, the business operator will be subject to a non-criminal fine of not exceeding JPY 200,000 (as set forth in Article 8, Paragraph 2, Article 12, and Article 26 of the Amended Act).

V. Effective Date

The Amended Act came into force on April 1, 2024¹¹.

¹¹ Cabinet Order to Stipulate the Enforcement Date of Act to Partially Amend the Act for Eliminating Discrimination against Persons with Disabilities (Cabinet Order No. 60 of 2023)

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