

Effectively Handling Employee Accommodation Requests



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Disability Accommodations

- Is the individual a covered individual?
- Has the individual made an accommodation request?
- What are the possible accommodations?
- Can a reasonable accommodation be provided?

Disability Accommodations – Who is Covered?



- The Americans with Disabilities Act (ADA) provides that:
 - “No covered entity shall discriminate against a **qualified individual** on the basis of **disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”
- Under the ADA, covered employers must also provide **reasonable accommodations** to qualified individuals with a disability, absent an undue hardship.
 - An employer that fails to reasonably accommodate the known limitations of a qualified individual with a disability violates the ADA, unless providing the accommodation would be an undue hardship.
 - Very fact - and circumstance - specific.
- The New York State Human Rights Law (NYSHRL) creates similar obligations.

Disability Accommodations – Who is Covered?



- Qualified individuals with a disability are protected under both statutes.
 - This includes both existing employees and job applicants.
 - No minimum duration of service, minimum hours worked, or similar requirements.
- To determine whether an employee is a qualified individual, employers must consider whether an employee with a disability:
 - Satisfies the qualification requirements of the job (i.e., has the requisite skills, experience, education, licenses, etc.); and
 - Can perform the essential functions of the job, with or without reasonable accommodation.

Disability Accommodations – Who is Covered?



- Under the ADA, an “individual with a disability” is any person who **(1)** has a physical or mental impairment that substantially limits one or more major life activities; **(2)** has a record of such an impairment; or **(3)** is regarded as having such an impairment.
- Under the NYSHRL, disability means “a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”
 - Also includes having a record of such impairment or a condition regarded by others as such an impairment.

Recognizing a Disability Accommodation Request



- Generally, it is the employee's responsibility to request an accommodation from their employer.
- To be an adequate request for accommodation, the employee must provide enough information to make it clear to the employer that:
 - The employee needs an adjustment, change, or other assistance at work; *and*
 - The need is related to a medical condition.
- The employee does not need to use any special language or mention the ADA, NYSHRL, or "reasonable accommodation."
- A request for accommodation does not need to be written—can be verbal.

Recognizing a Disability Accommodation Request



- An employer is not expected to know or assume the:
 - Degree of impairment.
 - Impact on job performance.
 - Need for reasonable accommodation.
- An exception to the employee's burden to raise the need for an accommodation exists when the employer:
 - Knows that the employee has a disability;
 - Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; *and*
 - Knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

What might an accommodation look like?



- An accommodation is a modification or adjustment to the job application process, the work environment, or the manner or circumstance under which the position is customarily performed that enables a qualified individual with a disability to perform the ***essential functions*** of the position.
- Examples of potential reasonable accommodations:
 - Modified equipment
 - Modified work schedule
 - Reallocating marginal job functions
 - Service animals
 - Remote work
 - Excused intermittent absences
 - Leave
 - Reassignment to vacant positions

Leave as an Accommodation



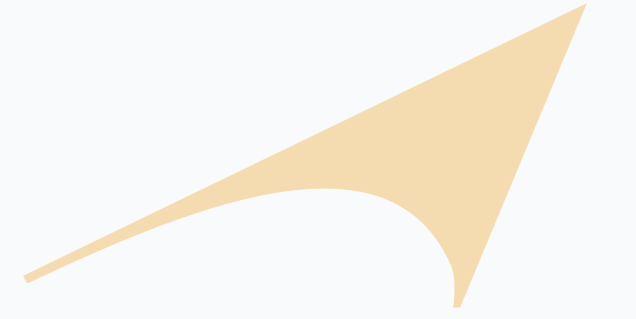
- Where an employee is seeking time off due to a medical issue, a key preliminary step is to confirm whether the employee is eligible for FMLA leave. If they are, the employer will likely be more constrained in how it can respond.
 - Strict leave entitlement for eligible employees.
 - No undue hardship defense.
 - Detailed rules around notices, certification forms, recertification, etc.
- We also must confirm that the employee does not have a specific leave entitlement under an employer policy and/or CBA.

Disability Accommodations – The Interactive Process



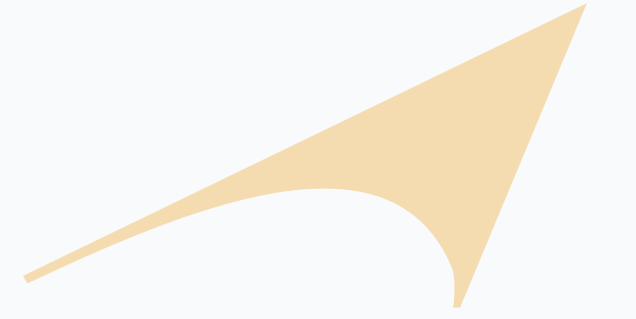
- Both the employee and the employer must engage in the interactive process to determine if an employee is a qualified individual with a disability, and if so, if there is a reasonable accommodation that does not create an undue hardship to the employer that allows the individual to perform the essential duties of their position.
- Generally, this process is led by Human Resources. Supervisors should have a general understanding because they may be consulted during the process AND so they have a better understanding of why it is so important to refer possible accommodation requests to Human Resources.

Disability Accommodations – The Interactive Process



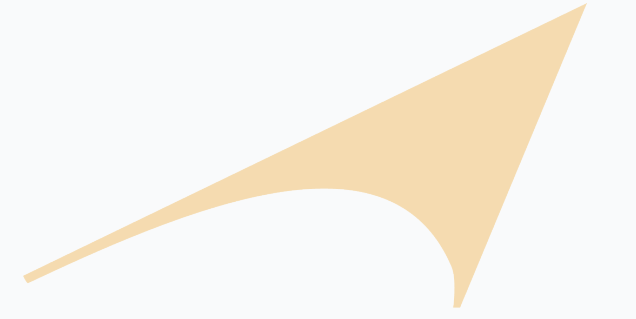
- The goals of the interactive process are for the employer and qualified individual with a disability to:
 - Identify the precise limitations caused by the disability.
 - Explore potential reasonable accommodations that could overcome those limitations.
- Both the employer and the individual seeking an accommodation must engage in the interactive process in *good faith*.

Disability Accommodations – The Interactive Process



- Employer's steps for the interactive process:
 - 1) Determine the job's essential functions.
 - Analyze the particular job and determine its purpose and essential functions.
 - 2) Establish the individual's limitations.
 - Consult with the individual with the disability to determine: (a) the individual's exact job-related limitations; and (b) how those limitations could be overcome with a reasonable accommodation.
 - 3) Explore potential accommodations.
 - Discuss with the individual to: (a) identify potential accommodations; and (b) assess their effectiveness in enabling the individual to perform the essential functions of the job.
 - 4) Select the most appropriate accommodation.
 - Consider the individual's preference but ultimately select and implement an accommodation that works best for both the employer and employee.

Disability Accommodations – The Interactive Process



- In many situations, the employer is permitted to request reasonable documentation from an appropriate health care provider.
- “Reasonable documentation” includes information that describes:
 - The impairment.
 - The nature, severity, and duration of the impairment.
 - The activity or activities that the impairment limits.
 - The extent to which the impairment limits the employee's ability to perform the activity or activities.
- An employer cannot:
 - Ask for documentation unrelated to determining the existence of a disability and the necessity for an accommodation.
 - Request an employee's complete medical records in most instances because it would contain unrelated information.
 - Request information about other disabilities an individual may have.

Disability Accommodations – The Interactive Process



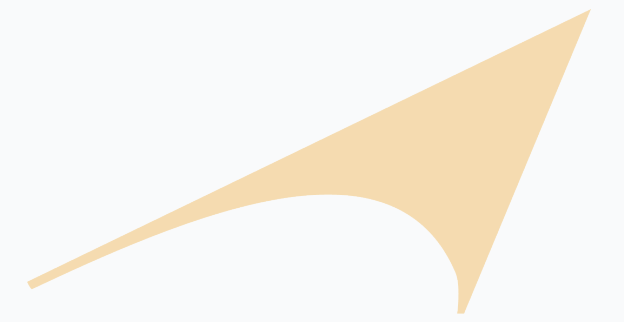
- An employer cannot ask for documentation in response to an accommodation request when either:
 - Both the disability and the need for reasonable accommodation are obvious.
 - The individual has already given the employer sufficient information to support that the individual has an ADA disability and needs the reasonable accommodation requested.

Disability Accommodations – The Interactive Process



- Employers should document their efforts at engaging in the interactive process and accommodating an individual with a disability. For example:
 - Consider using a log sheet to record every attempt at accommodation and the employee's corresponding response.
 - Memorialize conversations between the employer and individual requesting accommodation, including:
 - Sending a follow-up correspondence to the employee; or
 - Summarizing the conversation in a memo to the file.

Disability Accommodations – Potential Defenses



Breakdown in the Interactive Process

- An employer is not liable where the employee's unreasonable behavior causes a breakdown in the interactive process. For example:
 - Employer is not liable for failure to engage in the interactive process if the employee refuses to participate, withholds essential information, or fails to provide requested and necessary medical information.
 - Employee who insists on a single, unreasonable accommodation and causes the breakdown of the interactive process.
- If an individual refuses to provide reasonable documentation requested by the employer where the disability or need for accommodation is not obvious, then the individual is not entitled to a reasonable accommodation.

Disability Accommodations – Potential Defenses



Undue Hardship

- Under the ADA, an employer is not required to make an accommodation that would place an undue hardship on that employer.
- Undue hardship is any action that fundamentally alters the nature or operation of the business or is:
 - Unduly costly.
 - Extensive.
 - Substantial.
 - Disruptive.

Disability Accommodations – Potential Defenses



Undue Hardship

- To determine whether an accommodation would place an undue hardship on an employer, the following factors are relevant to consider:
 - The nature and net cost of the accommodation.
 - The overall financial resources of the covered entity.
 - The overall size of the covered entity and the number of employees employed.
 - The number, type, and location of the covered entity's facilities.
 - The type of operation of the covered entity, including: (a) the composition, structure, and functions of the workforce; and (b) the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.
 - The impact of the accommodation on the operation of the facility making the accommodation, including the impact on:
 - The ability of other employees to perform their duties; and
 - The facility's ability to conduct business.
 - For accommodations provided by a specific facility:
 - The financial resources of the facility;
 - The number of employees at the facility; and
 - The effect of the accommodation on expenses and resources of the facility.

Disability Accommodations – Potential Defenses



Undue Hardship

- Employers should not claim undue hardship based on:
 - Fears or prejudices of employees, students, or stakeholders; or
 - Potential negative impact on employee morale.
- Employers should consider claiming undue hardship if, for example:
 - The accommodation is unduly disruptive to other employees' ability to perform their jobs (e.g., the employee cannot provide regular and predictable attendance); or
 - The employee seeking leave as an accommodation is unable to provide a fixed return date (e.g., a request for indefinite leave), and the employer cannot plan for the employee's return or permanently fill the position.
- Must assess undue hardship defenses on a case-by-case basis.

Religious Accommodations



- Title VII of the Civil Rights Act and New York State Human Rights Law
- Employer's Duty to Provide Reasonable Accommodations
- Undue Hardship
- Constitutional Protections



Title VII, Civil Rights Act of 1964

- It shall be an unlawful employment practice for an **employer** to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against** any individual with respect to his compensation, terms, conditions, or privileges of employment, **because** of such individual's . . . **religion**.

“Religion” Under Title VII



Religion: all aspects of religious observance and practice, as well as belief.

- Includes organized and unorganized or less common religions.
 - Ex: Christianity, Atheism, Judaism, Islam, Buddhism, and Hinduism.
 - Can include beliefs that are only subscribed to by small numbers of people or that may seem unreasonable to others.
- The Supreme Court has defined religion as a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God.”
- Does NOT include personal or political preferences.
 - Ex: Vaccination objections not connected to a religious belief.

New York State Human Rights Law



- Requires employers to make reasonable accommodations that allow employees to fulfill religious observance requirements unless to do so would be an undue hardship.
- Makes it unlawful to discriminate against an employee because the employee observes a particular Sabbath day or days in accordance with his or her religious belief.
- Prohibits discrimination against religious head wear and garb, or facial hair unless the employer cannot reasonably do so without undue hardship.

Duty to Provide a “Reasonable Accommodation”



- An employer must reasonably accommodate an employee’s religious practices or beliefs, unless doing so would cause the employer an undue hardship.
- Therefore, an employer must either:
 1. Accommodate the employee’s religious needs; or
 2. Show that the accommodation would impose an undue hardship on the conduct of the employer’s business
- Note: Even if an accommodation may seem “unreasonable” or implausible to the employer, this is an insufficient justification for refusing to accommodate an employee. Employers may not assess the reasonableness of the employee’s proposed accommodation.

How does the duty to accommodate arise?



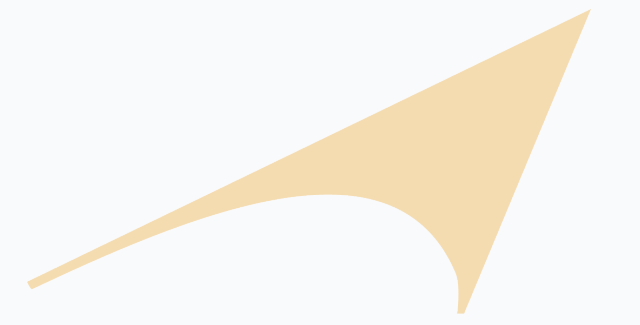
- An employee must notify their employer of the need for an accommodation.
- An employee does not need to use any specific or particular words to request an accommodation.
- The employee must simply make the employee's need for an accommodation known to their employer.
 - Without such notice, an employee's need for a religious accommodation may not be obvious to the employer.
- Employees must give enough information to show the employer that the need for an accommodation stems from a conflict between the employee's religion and work requirements.

Examples of a “Reasonable Accommodation”



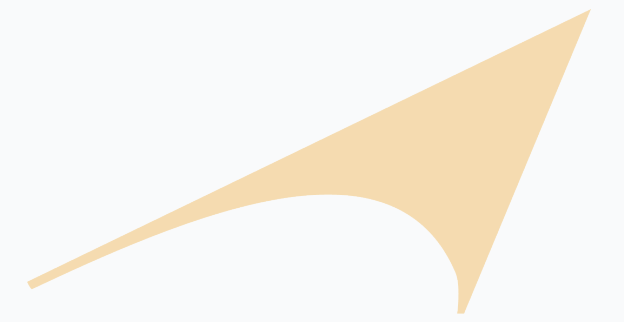
- A reasonable accommodation is an accommodation that will resolve the specific conflict between the employee’s religious beliefs and the job requirements.
- An employer can generally satisfy this requirement by:
 1. Changing the employee’s working conditions; or
 2. Transferring the employee to a comparable position where the conflict is less likely to arise.
- Note: Reasonableness is determined on a case-by-case basis.

Examples of a “Reasonable Accommodation”




- Modifying an employee’s work schedule to permit religious observances and practices (e.g., allowing voluntary schedule swaps or job reassignments).
- Permitting religious expression in the workplace including proselytizing or the display of religious symbols, unless it becomes disruptive or harassing.
- Making exceptions to dress and grooming policies to allow employees to wear certain attire or symbols.
 - Note: An employer may require the covering up of certain symbols or garb so long as the individual’s religion does not prohibit it.
- Addressing a sincerely held religious objection to vaccinations by requiring masking, testing, distancing, and other necessary health protocols.

Absences for Religious Accommodations



- Both federal and state law require employers to accommodate employee absences for religious observance unless the employer shows such absences create an undue hardship.
- Example: It would not be reasonable to require an employee to work after religious services on the Sabbath.
 - In this case, it would be reasonable to create a schedule that eliminates or replaces work on the Sabbath with a weekend or overnight shift.

Religious Observance for School Employees



- Except in emergencies, a school district may not require an employee to work on a Sabbath or holy day.
- Districts must allow teachers time to travel to his or her place of religious observance on the Sabbath or holy days.
- Termination of a school employee who refuses to work on their Sabbath for religious reasons without a good faith effort to accommodate the employee's beliefs constitutes unlawful discrimination.
- This is the case even if the collective bargaining agreement impedes the ability to grant such leave.

Undue Hardship Under Title VII – *Groff v. DeJoy*, (June 29, 2023)



- Pre-*Groff*: Any cost to the employer that was more than *de minimis* could be sufficient to claim that a requested accommodation posed an undue hardship.
- *Post-Groff v. DeJoy*, 600 U.S. 447 (2023):
 - An undue hardship is shown when a burden is substantial in the overall context of the employer's business.
 - This is a fact-specific inquiry and comports with the ordinary meaning of what an undue hardship is.
 - A cost must be excessive or unjustified to constitute an undue hardship.

Applying the New Standard from *Groff v. DeJoy*



- Courts must now apply this new test by considering all relevant factors to determine the impact of the accommodation, including:
 - The particular accommodations at issue;
 - The accommodation's practical impact on the conduct of the employer's operations; and
 - The effect on co-workers impacting the conduct of the employer's operations.
- Courts should not consider employee animosity toward a particular religion or religious practice.
 - "If bias or hostility . . . provided a defense to a reasonable accommodation claim, Title VII would be at war with itself."

Undue Hardship – NYSHRL



- NYSHRL defines undue hardship to mean an accommodation requiring significant expense or difficulty including a significant interference with the safe or efficient operation of the workplace or violation of a bona fide seniority system.

Relationship Between Constitutional Protections and Reasonable Accommodations

- The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"
 - Claims under the First Amendment in schools will generally involve a balancing between the Free Exercise and the Establishment Clauses.
- In *Kennedy v. Bremerton Sch. Dis.* (2022), the Supreme Court held that private religious expression on school property by school employees on school time is permissible as long as the activity does not cause students to feel coerced into participating and is engaged in while the employee is not actively performing their job duties.
 - However, a school district does not have an obligation to accommodate or allow such private speech where the school employee may be encouraging or allowing religious practice to occur.

Religious Beliefs in Instruction



- School districts may impose limitations on teacher references to religion in the classroom and during instruction.
 - Teachers have been lawfully directed to stop using references to religion in instruction unless it is a required element of a course and the teacher has obtained prior supervisor approval.
 - Teachers have been lawfully asked to remove posters with biblical quotes and other religious imagery from their classrooms.
- It is permissible for teachers to acknowledge religious holidays in their programs as long as these programs also contain educational value or purpose.
- Teaching about a religion is permissible; teaching it as fact is not.
- Teachers may *never* require class participation in daily prayers.

Association with Student Groups



- School personnel may attend student group meetings where the students openly pray or conduct Bible studies, but personnel cannot serve as an advisor or participant.

Questions?



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