

Reasonable Accommodation The Interactive Process

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Agenda

- How to Get it Right - Intersection of FMLA, ADA and PWFA
- Religious Accommodations
- Real World Scenarios



Disability Accommodations

Getting it Right: The
Interactive Process

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Examples of Requests for Accommodation

- Leaves of absence (both block leave and reduced schedule)
- Excused intermittent absences
- Light duty
- Work at home (for periods when employee is required to work at the worksite)
- Modified equipment (computer screen, phone etc.)
- Modified work schedule
- Relaxing performance requirements *while off work*
- Reallocating marginal job functions
- Reassignment to vacant positions
- Service and comfort animals

What is Not a Reasonable Accommodation?



- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping another employee from a job
- Creating another position or job
- Changing an employee's supervisor

Ask Yourself How Can We Make This Work?



“If we do it for one, we will have to do it for everyone.”

“We have never done that before.”

“That’s not the way we do things.”

Undue Hardship

- An employer does not have to provide a reasonable accommodation that would cause an "undue hardship."
- Generalized conclusions will not suffice.
- Requires "significant difficulty or expense."

Interactive Process



TALK

MEET

It's all about the
Interactive Process

LISTEN

CONSIDER

OFFER ALTERNATIVES

Does the FMLA And State Or Local Paid Sick Leave (PSL) Laws Impact The ADA Accommodation Process?

Yes, For Time Off Requests.

- Consider employee's jurisdiction for state or local paid sick leave (PSL) laws.
- If employee elects to use PSL, then follow applicable PSL laws.
- Determine employee's eligibility for Family and Medical Leave Act (FMLA).
- If eligible and FMLA is available, designate the time off as FML and adhere to FMLA regulations.

Pregnant Workers Fairness Act

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More Than Pregnant Employees

- PWFA applies to employees limited by pregnancy, childbirth, and related conditions.
 - post-childbirth recovery, Cesarean sections, and complicated deliveries.
 - post-partum depression and breaks to express breast milk.
 - PUMP Act also covers breastfeeding accommodations.
 - limitations due to fertility treatment limitations, miscarriage, and early pregnancy termination.

Other Highlights from the EEOC's Proposed Regulations

- “Related medical conditions” is not defined in the Act and EEOC’s interpretation is extremely broad.
- Lactation is covered as a related medical condition and must be accommodated subject to undue hardship. Accommodation obligation for lactation is broader than under the PUMP Act.

Can Employers Still Require Employees To Perform The Essential Functions Of The Job? Not Necessarily...



Unlike ADA, must accommodate employee if limited by pregnancy or related conditions, even if *temporarily* unable to perform essential job functions.

- Exception: *Undue hardship*.

Employees Who Cannot Perform Essential Functions May Be Entitled to Accommodation

ADA-Like Employees

- These employees can perform the essential functions of their job with or without a reasonable accommodation.
- The law does not require this ADA-Like employee to have a temporary limitation.
- If an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA).
- Employers must reasonably accommodate the ADA-Like employee subject only to the undue hardship defense.

ADA-Plus Employees

These employees **cannot perform the essential functions** of their position even with an accommodation.

ADA-Plus Employees

- **The Act says:**
 - These employees are qualified if (1) the inability to perform the essential job function is temporary, (2) the essential job function can be performed in the near future and (3) inability to perform the essential job function can be reasonably accommodated.
- **The EEOC says:**
 - **Temporary** = lasting for limited time, not permanent, may extend beyond “in the near future”
 - **In the near future** = ability to perform essential function will “generally resume within 40 weeks.”
 - **Reasonable accommodation** may be accomplished by temporarily suspending the essential job function(s) and performing the remaining functions, transfer, light duty, or other arrangements.

* Removing an essential function is not required if there is an undue hardship. **However, the employer must consider other alternative accommodations that do not create an undue hardship.**

No “One Size Fits All”

- PWFA mandates the interactive process for employers.
- Must Consider:
 - Employee's known limitations;
 - Requested accommodations;
 - Duties; and
 - Work environment.

The Magic 4

Four accommodations that are *almost always reasonable*:

1. Allowing an employee to carry water and drink, as needed;
2. Allowing an employee additional restroom breaks;
3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and
4. Allowing an employee breaks, as needed, to eat and drink.

Asking for medical documentation is not appropriate for these four and accommodations for lactation.

Leave as a Last Resort



- PWFA prioritizes alternatives to leave as primary accommodations.
- Explore temporary reassignment to suitable vacant positions within employee's limitations.
- Consider opening transitional or light duty programs to accommodate PWFA-eligible employee.



IF LEAVE...

- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified.
- Employers must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies. How much leave must be provided? *Up to the point of undue hardship.*

Documentation: Not the Same as ADA



- ADA focus on *disabilities or impairments*
- PWFA focus on *limitations*, a far lower standard.
- Using ADA forms for PWFA requests could be seen as overreaching, potentially lead to improper denials, and could be challenged under the ADA.
- *Do you need Documentation?* Consider reserving requests for documentation for more significant accommodations i.e. time off, transfers.

Impact of FMLA and State or Local Paid Sick Leave (PSL) Laws

- Consider state or local paid sick leave (PSL) laws.
- Follow applicable PSL laws.
- Determine eligibility for Family and Medical Leave Act (FMLA).
- If eligible, designate the time off as FML and adhere to FMLA regulations.
- Use FML certificate of health care provider form instead of PWFA medical certification form for requests for time off under PWFA that also are covered by FMLA.



Religious Accommodations

Getting it Right: The
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Groff decision

‘undue hardship’ - when a burden is *substantial* in the overall context of an employer’s business.”

“Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.”

The Court declined:

--to incorporate the undue hardship test under the Americans With Disabilities Act - “significant difficulty and expense.”

--to determine what facts would meet this new test



Undue Hardship Post *Groff*

Courts have found undue hardship in these situations:

- Allowing remote work where “fundamental aspect of the job was to be physically present” was an undue hardship.
- Hiring an extra employee for an indefinite period was an undue hardship.
- Vaccine exemption that posed a risk to the health and safety of other co-workers and would impact operations should the employer have to find substitutes for co-workers who fell ill was enough to establish undue hardship.
- Requiring employer to violate a state law is both "excessive" and "unjustifiable”.
- Inability to wear SCBA due to facial hair posed an undue hardship at fire department.

No Undue Hardship Post *Groff*

Courts have declined to find undue hardship in these situations:

- 1.5 days of leave was not an undue hardship.
- “A hypothetical policy reevaluation if *everyone* received an accommodation” did not show an undue hardship if the employer just grants one accommodation.
- Permitting a beard that might inhibit a correctional officer’s gas mask from sealing tightly was not an undue hardship.

Employer Takeaways

1

Consider **facts** surrounding an employee's request for a religious accommodation

2

Consider unique facts related to the **business**, including the size of the business

3

Assess the **actual** expense and hardship of implementing the request

4

Consider **reasonable alternatives** beyond what is requested, and the impact.

5

Sincerely held religious belief requirement is unchanged.

What Should An Employer Do?

1

Be prepared for an increase in religious accommodation requests.

2

Consider whether recently denied accommodations should be reconsidered.

3

Be cautious about non-privileged communications about the *Groff* decision.

4

Update company policies/practices on religious accommodations.

5

Assess requests under the new undue hardship standard.

6

Consider undertaking similar analysis as under ADA.

7

Consider interactive process.

8

Look for alternative accommodations.

9

Be aware of the risk of negative comments, frustration, and potential harassment.

10

Train HR and managers.

Workplace Scenarios

(Any resemblance to real persons, dead or alive, or events, past or present is completely coincidental.)

A Little Help From My Co-Workers

Nisha is a nurse assistant working at a skilled nursing facility. Four months into her pregnancy, Nisha's doctor restricts her from lifting more than 25 pounds for the rest of the pregnancy.

Assisting patients with dressing and bathing and moving them to and from their beds are essential functions of Nisha's position. These duties require lifting more than 25 pounds. There are other nurse assistants who could assist with lifting patients Nisha's patients.

Does the Company have to consider granting this request?

Carl was recently hired as a housekeeper and maintenance worker. Shortly after he was hired, he requested a transfer from the nightshift to the day shift. Carl explained that he has cataracts that cause night blindness which makes it dangerous for him to drive in the dark. Carl's treating healthcare provider submitted supporting paperwork and explained that Carl can perform the essential functions of his job, he just needs a different work schedule so he does not have to drive in the dark.

Does the Company have to consider accommodating Carl's disability related commuting difficulties?

In the Dark

Rebecca, a data entry clerk, has glaucoma that impairs her vision and prevents her from seeing the computer clearly. She took FML for 12 weeks for eye surgery and then an additional 4 weeks of extended unpaid leave due to complications from the surgery. At the end of the 16 weeks, Rebecca's doctor says she needs 4 more weeks off work to recover.

Does the Company have to provide the additional 4 weeks of leave?

What if after the additional 4 weeks, the healthcare provider says Rebecca needs 4 more weeks off work?

Can the Company replace Rebecca while on leave?

Just 4 More Weeks

Ramping Up is Hard to Do

Bob has been diagnosed with multiple sclerosis and has unpredictable flare ups about twice a year. The flare ups render him unable to work for up to two full days. Bob is then able to work two half days and return to his normal full-time schedule by the 5th day. Bob is not FML eligible but asks the Company to accommodate his periodic absences due to flare ups and his need to work half days on the two days following a flare up.

Can the Company deny the request?

Would this be treated any differently under the FML?

Better Late Than Never

Sarah has been having major performance issues. Sarah's manager is at wits end and meets with Sarah to issue a final warning. As soon as they sit down, Sarah brings up (for the first time) that she has been poorly performing due to ADHD, anxiety and depression.

Can the manager proceed with discipline?

Carl was recently promoted to manager at his job. He is scheduled to work 10-hour shifts from Wednesday through Saturday. Shortly after taking on his new duties, he informed his supervisor that working from sundown on Fridays to sundown on Saturday conflicted with his religious practices. His supervisor informed him that he was aware of the schedule when he accepted the position, but if he needed to request a religious accommodation, he should contact HR for the appropriate paperwork. Carl continued to work the scheduled shift after that conversation and never mentioned a shift change to the manager again.

Has the Company appropriately addressed the Carl's concerns?

Has the company appropriately addressed Carl's concerns?

- A. Yes. His manager referred him to Human Resources. It's Carl's responsibility to follow up with them.
- B. No. The manager was required to check in with Carl on a weekly basis about his religious practices and ensure Carl submits his request in writing.
- C. Yes. Carl did not say he needed an accommodation and he continued to work his shift.
- D. No. The manager should have informed Human Resources of the conversation with Carl so the appropriate party can follow up with Carl and to determine whether an accommodation is needed.

Sarah, a chef, has been working for Cater-it-all, a small catering business with 7 employees for 5 years. Part of her duties include scheduling and participating in tastings with clients who are considering hiring the Company for events. Last month she informed manager she had recently converted to Islam, and during the month of Ramadan, she would not be able to participate in the tastings during work hours because she would be fasting during those times. The Company has several tasting events scheduled during the times Sarah has indicated she is unavailable to work, and there are no other employees who can cover all of Sarah's events. The owner tells Sarah because of the short notice, she cannot reschedule or cover the events, and Sarah will need to work during those times.

Can the owner refuse Sarah's request?

Can the owner refuse Sarah's request?

- A. No. Because Sarah said her request is based on her religious practices the owner cannot refuse.
- B. Yes. There is no one else to cover the events and the Company will lose business if Sarah does not participate in the business.
- C. Maybe. The owner needs to consider what options may be available to support Sarah during this time and protect her religious practices, while ensuring there is no undue hardship to the business.
- D. No. Sarah indicated this religious practice is recent, so it is not a sincerely held belief. The owner only has to accommodate sincerely held beliefs.

Sikha is a devout practitioner of her religion, and her religious beliefs require her to observe a 10-minute prayer ritual at noon each day, which she faithfully observes. She works at a large pharmaceutical company as a researcher in the lab testing vaccines. Since she began working at the Company the lab's schedule for experiments and breaks allowed Sikha to conduct her prayer ritual without any interruptions to work schedules. However, the Company recently instituted strict new protocols regarding observations of experiments, and Sikha found that her noon prayers conflicted with this essential task. She brought this to the attention of her supervisor and explained the significance of her religious observance. Her supervisor is unsure how to respond and has requested guidance from legal.

What are the obligations of the Company in this situation?

What are the obligations of the Company in this situation?

- A. The Company must continue to accommodate Sikha in the same way because they have been doing so for five years.
- B. Since the Company has adopted this new practice that applies to everyone, they are not required to accommodate Sikha's daily practices.
- C. The Company can accommodate Sikha if she finds another employee, with the same experience she has, to monitor her experiments during her daily prayer.
- D. The Company can discuss with Sikha whether there are ways to provide a reasonable accommodation even if it is not her preferred method.

Questions?

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Thank you.

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