

Employment Law Basics for HR Professionals Series

Leaves and Other Accommodations

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Employers must
affirmatively accommodate
employees based on
disability, religion or
pregnancy/childbirth

Overview of the ADA

Americans with Disabilities Act

- Requires employers to make **reasonable accommodations** for the known physical or mental disabilities of otherwise **qualified** individuals unless the accommodation would cause an **undue hardship**
- To make reasonable accommodation, employer must engage in **interactive process**

Who is Protected by the ADA?

- Discrimination prohibited against any:
 - › Qualified individual with a disability
 - › Individual with record of disability; or
 - › Individual who is regarded as disabled
- If the employer is a covered employer, every employee who is disabled is covered
 - › No length of service threshold
 - › No hours threshold
 - › All employees, all positions

Who is Entitled to Reasonable Accommodation under the ADA?

- A **Qualified** Individual with a **Disability**
- A qualified individual with a disability means an employee who can perform all of the **essential functions** of the job they hold or desire, with or without reasonable accommodation
- An individual with a disability (defined very broadly)
 - › Focus your attention on the reasonable accommodation process rather than being overly concerned with whether an employee's impairment rises to the level of "disability"
- Who can perform the essential functions of the employment position that such individual holds or desires
 - › This includes applicants
- With or without reasonable accommodation

Examples of Reasonable Accommodations

Making physical facilities accessible, acquisition/modification of equipment or devices

Job restructuring

Reassignment to a vacant position

Part-time or modified work schedules
Work at home

Leave of absence

Appropriate adjustment or modification of examinations, training materials or policies

Limitations on Duty to Accommodate Disability

Undue hardship

- Very high standard - Unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business
- Consider: nature and cost of accommodation; overall financial resources of employer; number of employees; impact on operations of the facility
- Burden is on employer to prove undue hardship

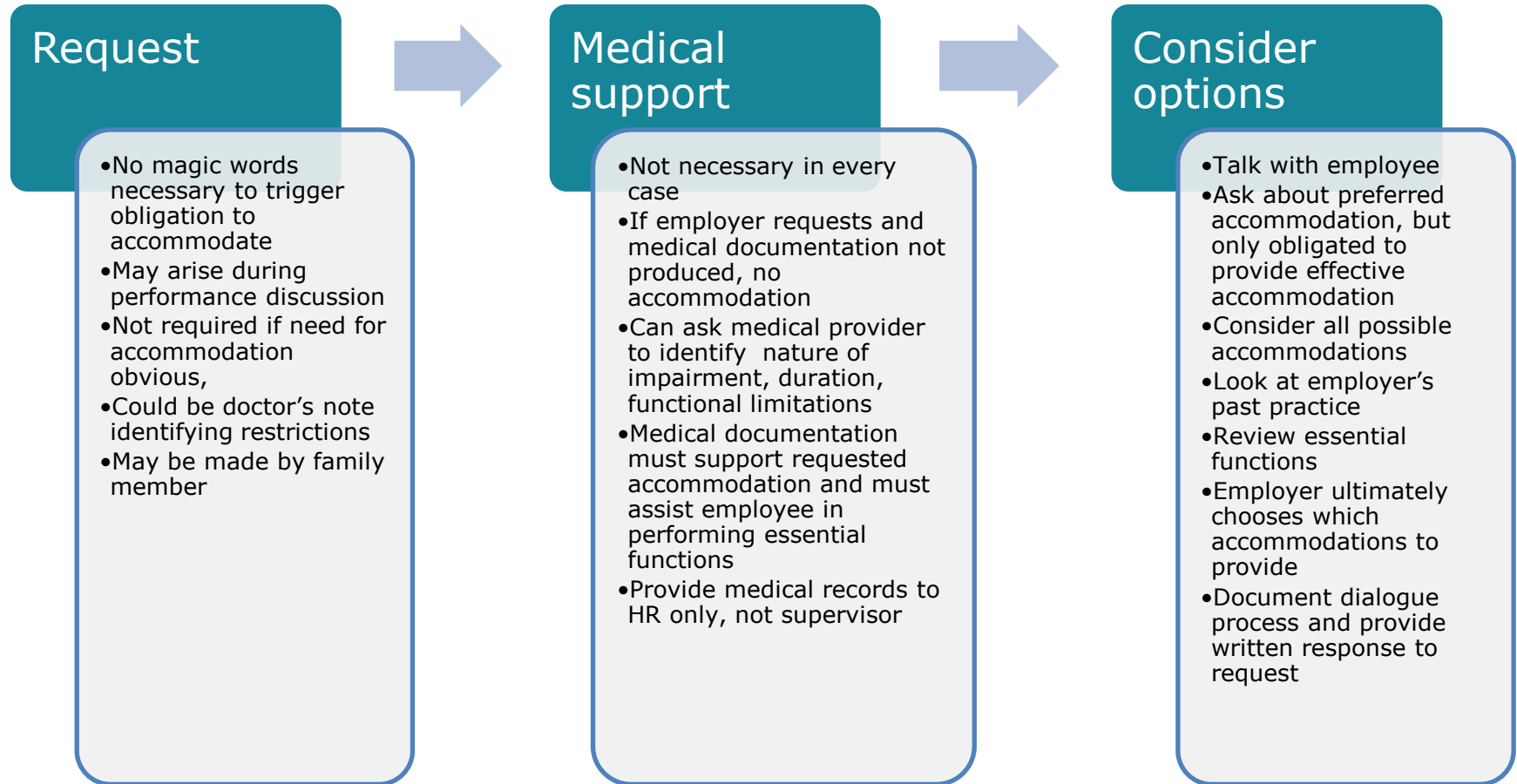
Significant risk of substantial harm

- If accommodation would pose a “direct threat” to employee or other’s health or safety, employer does not have to provide reasonable accommodation
- Also very high standard

ADA – What Is Not Required?

- Elimination of essential functions (as opposed to marginal ones).
 - › Just because a function appears on job description doesn't mean it's essential.
- Creating a position or bumping an employee from their position.
- Provision of personal use items also needed off the job (e.g. prosthetic limb, hearing aids).

Managing the Interactive Process



Interactive Dialogue

- When employee requests accommodation or is observed struggling in the job because of a medical condition, employer must engage employee in an interactive dialogue.
 - › What are the essential functions?
 - › What are the employee's limitations with respect to the essential functions?
 - › What are the range of things the employer might do to enable performance?
 - › Are these reasonable or would they impose an undue burden?
- Should be a give and take – the employee and employer share responsibility to work together to devise a solution, if possible
- Document interactive process and keep in confidential medical file, not personnel file
- **Process should generally be handled by HR, not employee's supervisor**

Interactive Dialogue

- Employer may request information from employee's medical provider regarding disability and its impact, seeking guidance on potential accommodations.
 - › If employee's provider provides insufficient information, employee should be notified and given a chance to provide missing info.
 - › Employer may ask employee to be seen by health care professional of employer's choice.

Burnett v. Ocean Properties, Ltd

987 F.3d 57, 63 (1st Cir. 2021)

- First Circuit affirmed \$500,000 jury award for plaintiff wheelchair user, in disability discrimination claim arising out of employer's failure to accommodate employee's request for an automatic door at its public entrance.
- The fact that plaintiff was able to open the door (despite difficulty and at the risk of bodily injury) did not necessarily mean he did not require an accommodation.
- Employer never responded to his request

Free On-Site Parking Spot?

***Feist v. State of Louisiana* (5th Cir. 2013)**

Court holding: Reasonable accommodations need not relate to the performance of essential job functions. May include providing free on-site parking space for employee with osteoarthritis of the knee.

ADA regulations indicate reasonable accommodation standard is broader and can include “modifications or adjustments that enable a covered entity’s employee with a disability to *enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.*”

Detailed Instructions, Increased Supervision

Kinghorn v. Mass. Gen. Hosp. (D. Mass. 2014)

- Employee with Asperger's Syndrome, not disclosed when hired.
- Employee struggled with following direction, loses temper and has difficulty getting along with others.
- When counseled, employee produced a letter, disclosing diagnosis and requesting accommodations, including "specific, detailed instructions of his work assignments."
- Detailed instructions took significant time to prepare, and still employee struggled to stay on task.

Kinghorn v. Mass Gen. Hosp. (D. MA 2014)

Relevant considerations for the Court in granting Summary Judgment to the employer:

- Job description said position required “strong communication skills” and the ability “to work independently on projects with limited supervision.”
- Employer implemented requested accommodation, even while maintaining it wasn’t feasible on a long term basis.
- Employer was able to identify numerous examples of employee failing to follow directions.

Kinghorn takeaways

- While not the “be all, end all,” the job description remains strong evidence of essential functions.
- Willingness to work with the employee is key: sometimes, trying an accommodation that seems on its face unreasonable will best position employer for litigation.
- Simple, conscientious documentation of performance deficiencies is key.

Employer Determines Which Accommodations to Implement

Employer is not required to provide the specific accommodation requested, as long as it can identify an equally effective alternative.

Ex. Employee has ADD and his health care provider says he needs quieter area to concentrate. Employee demands reassignment to the corner office now occupied by the CHRO. Employer offers to provide a cubicle and noise cancelling headset.

Leave for Individuals with Disabilities

- Federal and state fair employment laws
 - › Americans with Disabilities Act (ADA)
 - › Maine Human Rights Act (MHRA)
 - › New Hampshire Law Against Discrimination
 - › Massachusetts Law Against Discrimination
- Covered employers:
 - 15+ employees under Federal law
 - 1+ employees under ME law
 - 6+ employees under NH law
 - 6+ employees under MA law
 - Other states vary from 1 to 15

Leave as Reasonable Accommodation

Relevant to proving undue hardship:

- Can a temporary employee step in to cover?
- How many other employees in the group are on leave?
- Can employer pay existing employees for additional hours? Will this entail substantial overtime?
- Will existing employees be required to forego planned vacations or perform more heavy lifting?
- Are there impending deadlines / special projects that need to be completed during employee's absence?
- What special circumstances make it difficult for the employer to continue holding the position?

- “The key to avoiding trouble under the Americans with Disabilities Act is to be constantly asking the question, ‘Can we get this employee back on the job with a reasonable accommodation?’ and certainly not to be asking only, ‘Has this employee been on leave long enough for us to get rid of him?’”

John C. Hendrickson, EEOC Regional Attorney, commenting on February 11, 2014 decision in US District Court decision in *EEOC v. UPS*

Scenarios in Which Questions of Leave as a Reasonable Accommodation Arise

- Employee not eligible for FMLA requests 2 months leave for cancer treatment
- Employee exhausts FMLA but requests continuation of leave because of heart condition
- Employee calls out of work periodically when depression symptoms flare up

Extended Leave as Accommodation

***Garcia-Ayala v. Lederle Parenterals,* 212 F.3d 638 (1st. Cir. 2000)**

- First Circuit held that employer's policy of terminating employees after 12 months of disability leave unlawful in the absence of a showing of undue hardship.
- Employer was able to cover plaintiff secretary's duties with temporary employees. No evidence replacements resulted in increased cost, inefficiencies or lack of effectiveness.

Q. Does the ADA require an employer to provide indefinite intermittent leave?

A. No, part time or modified work schedules may be reasonable accommodations, but only if they will enable plaintiff to perform the essential functions of the job.

- *Mecca v. Florida Health Services,*
- (M.D. FL. February 3, 2014)
- “An employer does not have to wait indefinitely for an employee’s medical condition to be corrected, especially when it is uncertain whether the condition will improve.”

Extended Leave as Accommodation

***LaFlamme v. Rumford Hospital* (D. Me. 2015)**

- Injured nurse terminated after leave of 12 months, even though expected to return in “30-60 days”, which became about 75 days.
- Court, citing *Garcia-Alaya*, said nurse’s leave request not indefinite, even though date of return was not specific and kept being postponed.
- Hospital failed to show undue hardship in keeping nurse on unpaid leave.
- Jury verdict of about \$36,000, plus attorneys fees of \$140,000

Hwang v. Kansas State University

753 F.3d 1159 (2014)

• *Hwang* Court (Gorsuch): “Must an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act?”

Unsurprisingly, the answer is almost always no.

- “Unsurprisingly?”

Automatic Leave Cut Offs and 100% Cured Policies

EEOC v. UPS, Inc., (N.D. IL 2014)

- EEOC challenged UPS policy that results in administrative separation of employment after 12 months of leave. Individuals could not return to work following leave until 100% healed, even if employees could perform essential functions with reasonable accommodation.
- Court denied UPS motion to dismiss class action. Acknowledging that although regular job attendance can be an essential job requirement, plaintiffs' claims were not premised on attendance, but rather on UPS's imposition of a 100% healed requirement on those seeking to return.

Competing Duties of Employer



Duty to Provide
Leave for Known
Disability/Serious
Health Conditions

Duty Not to Make
Disability Related
Inquiries About
Reason for Absence

EEOC Says:

Asking Employees to Explain Medical Absences Violates ADA *EEOC v. Dillard's Inc.*, (S.D. California 2012)

Dillard's attendance policy stated that health-related absences would not be excused unless the employee submitted a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc.)". Four unexcused absences of any kind resulted in termination.

Employee brought in doctor's notes for absences indicating she was out for medical related reasons, but refused to disclose her condition. She was terminated for unexcused absences.

Question was whether the policy requiring employees to "state the condition being treated" constituted a prohibited inquiry under the ADA (42 U.S.C. §12112(d)(4)).

Court rejected Dillard's defense of business necessity.

In December of 2012, Dillard's settled class action for \$2 Million. Settlement also resolved claims for terminating employees who exceeded maximum leave policy.

HR Practice Pointers

- Immediate supervisors should not press for diagnosis or medical details when employee calls out sick, but should record reasons given for the absence when they call out.
- Each disability related request for leave requires individualized analysis.
- If leave is denied, employer needs to be able to articulate specific undue hardship. Supervisors should be trained to tell employees to contact HR if they need time off due to a disability or a serious medical condition of their own or family member.
- Email Meg LePage mlepage@pierceatwood.com and ask for her “Template for Determining Undue Hardship Caused by Extended Leave”

Highlights of EEOC ADA Leave Guidance 2016

Employer must grant equal access to leave under employer's leave policies; cannot require minimum service as condition to leave

Employer should engage in interactive dialogue if no leave available under policies

Employer can ask for updates if employee requests leave extension or return date uncertain

Employer cannot ask for updates if employee granted leave with fixed return date, but can check on progress

"Maximum leave" or "no fault" leave policies may have to be modified; generally unlawful under the ADA.

Employer should modify form letters to let employees on leave know they can get additional unpaid leave if they are disabled

Highlights of EEOC ADA Leave Guidance 2016

100% healed policies unlawful—Employer must reinstate and provide reasonable accommodations if that allows employee to perform job duties.

ER cannot refuse reinstatement b/c of “safety risk”; there must be a “direct threat” (significant risk of substantial harm that cannot be accommodated)

EEs who cannot return to current job must be placed in vacant position if qualified, without requiring EE to compete. (exception seniority systems)

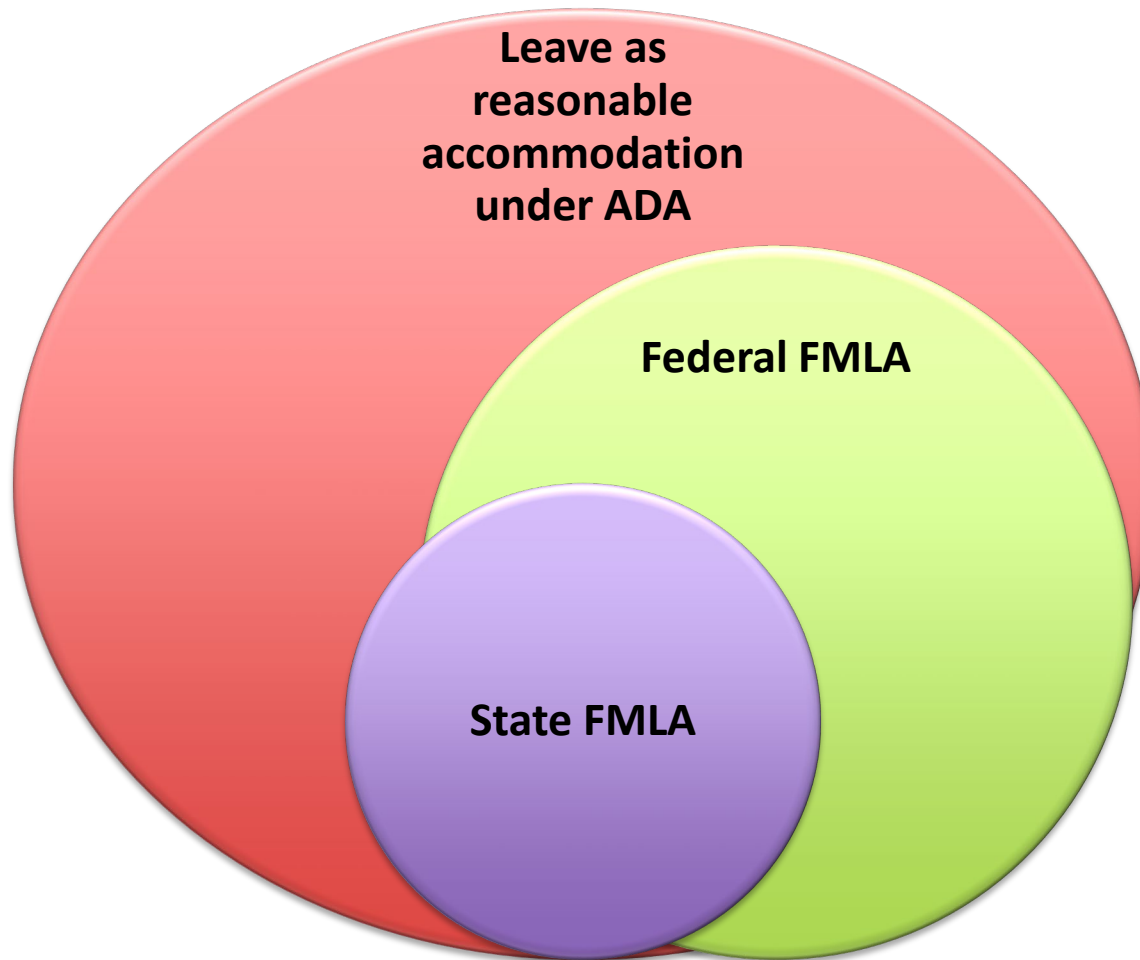
No undue hardship because return to work date not definitive or changes due to changed circumstances.

“Indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue hardship.”

Employee Not Entitled to Fixed Schedule if Rotating Schedule is Essential Function of Job

- Holding based on findings in *Sepulveda-Vargas v. Caribbean Restaurants*, 888 F.3d 549 (1st Cir. 2018) that:
 1. Accommodating Sepulveda permanently “would have had the adverse impact of inconveniencing all other assistant managers who would have to work unattractive shifts in response to [Sepulveda’s] fixed schedule.”
 2. Job application and newspaper ads listed need to work rotating shifts.
 3. Fact that Employer granted accommodation on a temporary basis did not mean it conceded that rotating shifts was non-essential function.”

Overlapping Employee Protections



Federal FMLA: Serious Health Condition

Injury, illness, impairment or physical or mental condition that involves:

- Inpatient care (overnight stay) or
- Continuing treatment by health care provider

What is Continuing Treatment?

(1) Incapacity (> 3 days) plus treatment:

- 2 or more visits or
- 1 visit and regiment of treatment

(2) Pregnancy or prenatal care

(3) Chronic conditions

(4) Permanent or long term incapacity

(5) Conditions requiring multiple treatments

Intermittent Leave/Reduced Schedule

Increments of one hour or more

Required only when certified as medically necessary

Cannot compel more leave than necessary

Temporary reassignment allowed for planned treatment, not for unplanned absences

Reinstatement Rights

Same Position or

Equivalent Position

- “Virtually identical” in terms of pay, benefits, and working conditions, including privileges, status, etc.
- Must involve “same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.”

State law also provides job-protected leave.

**Don't forget to analyze
federal and state leave
separately**

Accommodating Religion

- Employers also required to make reasonable accommodations for sincerely held religious beliefs
- Interactive process required
- Typical accommodations:
 - › Leave to go on religious pilgrimage
 - › Change in schedule to permit religious observance
 - › Dress code/grooming
 - › Change in duties due to religious objections
 - › Time to pray at work
 - › COVID Vaccine exemption?

Davis v. Fort Bend County, (5th Cir. 2014)

- BONA FIDE RELIGIOUS BELIEF=SINCERELY HELD

“A court’s inquiry is limited to focusing upon the individual’s motivation. Specifically, a court’s task is to decide whether [the individual’s beliefs] are, *in his own scheme of things* religious.”

“Conversely, whether the belief itself is central to the religion, i.e., whether the belief is a true religious tenet, is ‘not open to question.’”

Employer's Focus Should be on Accommodation Efforts, Not Employee's Sincerity

- Just as in ADA leave cases, to win a religious leave accommodation case, employers must show that they made a good faith effort to cover the employee's shifts but could not provide coverage without undue hardship.

Undue Hardship Defense

- *TWA v. Hardison*, 432 U.S. 63 (1977)
- Sabbath accommodation case holding that employers not required to violate seniority rights under a collective bargaining agreement or incur more than “de minimis” costs in order to grant employee time off to attend religious services.
- Leaving the employer short-handed would involve costs in the form of lost efficiency.

Maine Human Rights Commission Caveat

- Plaintiff hired to run training room in gym on Saturdays and Sundays
- Existing employee works Monday to Friday
- After a couple of months, Plaintiff says he needs Sundays off to attend religious services
- Plaintiff told he could have Sundays off if he can find coverage among other employees
- Plaintiff gets coverage for some Sundays but not all
- Plaintiff quits and files claim for failing to accommodate
- MHRC finds reasonable cause to believe discrimination occurred

Accommodating Pregnancy

Women affected by pregnancy, childbirth or related medical conditions must be treated the same as other persons not so affected but **similar in their ability or inability to work.**

Because employers must accommodate employees due to disability and may choose to provide light duty to employees on workers' comp, they need to do the same on account of limitations due to pregnancy and childbirth.

Accommodations: Responsibilities of Managers

- No magic words required; pay attention to anything that sounds like an employee with a medical condition needs help to perform job functions
- Contact HR if you think an employee may need or has requested an accommodation
- Follow handbook accommodation policy unless advised otherwise by counsel
- Honor all approved accommodations, but review periodically to see if they are still needed or causing undue hardship to the organization or coworkers
- Address any burdens placed on co-workers
- Proactively address potential retaliation
- Maintain employee confidentiality



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