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Navigating an Employee Request for Accommodation

CAPLAW's Conquering Employment Law Conundrums Webinar Series

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Presented by:
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Two Laws Require Accommodation

- Title VII of the Civil Rights Act of 1964
  - Accommodation for religious beliefs
- The Americans with Disabilities Act (and its amendments)
  - Accommodation for disability
EEOC Charge Statistics – FY 2012

Total charges filed - 99,412

Charges filed:
- Retaliation – 38.1%
- Race – 33.7%
- Sex – 30.5%
- Disability – 26.5%
- Age – 23%
- National Origin – 10.9%
- Religion – 3.8%
- Color – 2.7%
- Equal Pay – 1.1%
Religion
Religious Accommodation

Title VII’s definition of religion: "all aspects of religious observance and practice, as well as belief."

- Employers must accommodate sincerely held religious beliefs.
- That conflict with an employment requirement.
- Unless "undue hardship."
- Cultural, social and political beliefs do not qualify.
Religion in the Workplace

EEOC Guidelines:

• Religion defined broadly, can include lesser-known and “incomprehensible” beliefs
Religion in the Workplace

Accommodations, simplified:

- No “magic words” needed to trigger accommodation
- Interactive Process is recommended
- Fact-dependant analysis: look to nature of duties, cost of accommodation, number of employees affected, and other similar factors
- Undue hardship defense (easier to prove than ADA defense, but more than \textit{de minimus} cost): diminished efficiency, infringes on rights of others, or safety
Religious Accommodation

Dress or appearance accommodations:

- Hair and beard
- Veils
- Dresses v. pants
- Piercings
Religious Accommodation

Work schedule accommodations:
- Prayer time
- Religious holidays
- Sabbath observance

Religious practices:
- Prayers
- Modified job duties
- Telephone greeting
Disability
The Basic Rule

You must *reasonably accommodate* a *disabled employee or applicant* unless doing so is an undue hardship or creates a direct threat.
What Does “Reasonable” Mean?

The accommodation is reasonable on its face.
Who is “Disabled”? 

Virtually Everybody
Who is “Disabled”?

- ADAAA significantly expanded definition.
- Virtually all non-minor physical or mental disorders are likely to qualify as disabilities.
- Focus on the need for accommodation.
Reasonable Accommodations

- Equal opportunity to be considered for the job individual *holds or desires*.
- Enable employee to perform essential functions of job employee holds or desires.
- Has equal opportunity to enjoy equivalent benefits and privileges.
What Is the Interactive Process?

A timely good-faith exchange of information between employer and a disabled employee or applicant to explore:

- Necessity of accommodation, and
- Accommodation options.
What Is the Interactive Process?

• Neither party can take “my way only” position.

• You must solicit and consider the employee’s input.

• Employer may select among reasonable accommodations.

• If first accommodation doesn’t work, keep trying until all reasonable options exhausted.
Initiate the interactive process when the employee’s disability is *known or apparent*, e.g.,

- Requests an accommodation.
- Presents doctor’s note with work restrictions
- Employer otherwise becomes aware of need for accommodation, e.g., third party or observation.
- FMLA leave exhausted.
Requesting Medical Information

- May request medical documentation and information.
- If unclear, may seek clarification and give reasonable time to obtain.
- Entitled to know the nature and duration of restrictions.
- Not necessarily entitled to know diagnosis.
Interactive Process: Step 1

Determine the “essential functions” of the position.

- Position exists to perform function.
- Time spent performing.
- Job description.
- Collective bargaining agreement.
- Consequences if not done.
Interactive Process: Step 1

Obtain employee’s agreement regarding essential job functions.

• At first meeting, review list of essential job functions.

• Have the employee sign a statement acknowledging essential job functions.
Consult with disabled employee regarding limitations:

- Ascertain job-related limitations.
- Determine impact of limitations on ability to perform essential functions.
- Discuss how limitations can be overcome.
Interactive Process: Step 3

Identify potential accommodations:

- Ask employee and/or healthcare provider for proposed accommodations.
- Determine if other reasonable accommodations exist.
- Assess the effectiveness of proposed accommodations.
Interactive Process: Step 3

Identify potential accommodations:

- No accommodation in position held, any vacant positions available?
- Is employee qualified for position?
Interactive Process: Step 4

Select and implement accommodation that enables employee to perform essential job functions.

• Employee’s preference does not control.

• Provide written explanation why you selected a different accommodation.
What If It Doesn’t Work?

- Interactive process extends beyond the first attempt.
- Determine whether other reasonable accommodations are available.
- Document reason first accommodation failed; i.e., employee unable to do job.
When Are You Done?

- Accommodation no longer needed.
- Accommodation is successful.
- No reasonable accommodation exists.
- Employee fails to cooperate
  - Unresponsive to communications.
  - No show for meetings.
  - Does not provide requested medical documentation.
  - Rejects a reasonable accommodation.
  - Abandons or fails to show up for alternative work without valid explanation.
Documentation Is Essential!

You must thoroughly document:

- All meetings and communications with the employee.
- All accommodations considered.
- Search for alternate positions.
- Employee’s failure to cooperate.
Undue Hardship

- Nature and net cost of accommodation.
- Overall financial resources of the employer.
- Accommodation’s impact on employer’s operations or on coworkers.
Direct Threat

- Employee must not pose an imminent risk of substantial harm.
- Fear of a future harm is not sufficient.
- Evaluation of risk should be based on recent medical judgment and available objective evidence.
Job Restructuring

- Reallocation of nonessential job functions or when/how they are performed.
Potential Accommodations

Work-At-Home

- Reasonable when the essential functions can be performed at home.

- Not reasonable where the job requires close supervision, or the essential functions of the job involve teamwork and coordination with others at workplace.
Leave of Absence

- Unpaid leave for employee to seek treatment or to recover may be required if employee is expected to return following the leave.
- Additional leave after expiration of FMLA.
- Indefinite leave is not required.
- Tolerating erratic attendance is not a reasonable accommodation, but . . .
Misconduct

- Employer need not rescind or forego discipline for prior rule violations but must consider whether a reasonable accommodation would enable employee to comply with rule in the future.

- Need not permit employee to violate rules that protect health or safety, or where violation creates disruption to the operation of the business.
Transfer to a Vacant Position

- Only if cannot accommodation in current position.
- Must give qualified disabled employee preference over more qualified applicants.
- Need not create a new position.
- Need not violate seniority unless exceptions are commonly made.
Final Questions

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