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All Bets Are Off!

The Approaching Wave of Accommodation Claims

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I was . . .

umm . . .

wondering. . .

**Can I Work
Remotely?**



**I need a nondemanding, quiet
work environment separate from
coworkers with no noise-
exposure. Thanks.**



- Disability
 - Accommodations
 - Interactive Process
 - Undue Hardship
- Religion
- Pregnancy
- Evaluating Reasonable Accommodations
- Legal & Business Considerations in Accommodations
- Accommodation Hypotheticals

Accommodations under the ADA

- Generally, must provide a reasonable accommodation to an individual with a disability, if the disability prohibits the employee from performing the job or enjoying the benefits of employment
- Does not have to be an accommodation of the employee's choice, provided it is effective
- Accommodation is not required if:
 - undue hardship or
 - direct threat of harm to self or others (that cannot be reduced or eliminated with reasonable accommodation)

Who Is Eligible For Reasonable Accommodation?

- “Qualified individual with a disability.”
 - “Qualified” means the employee can perform the essential job functions of the position **with or without a reasonable accommodation**.
 - “Disability” (under the ADA) means a physical or mental impairment that substantially limits one or more major life activities.

What Triggers Reasonable Accommodation Obligations?

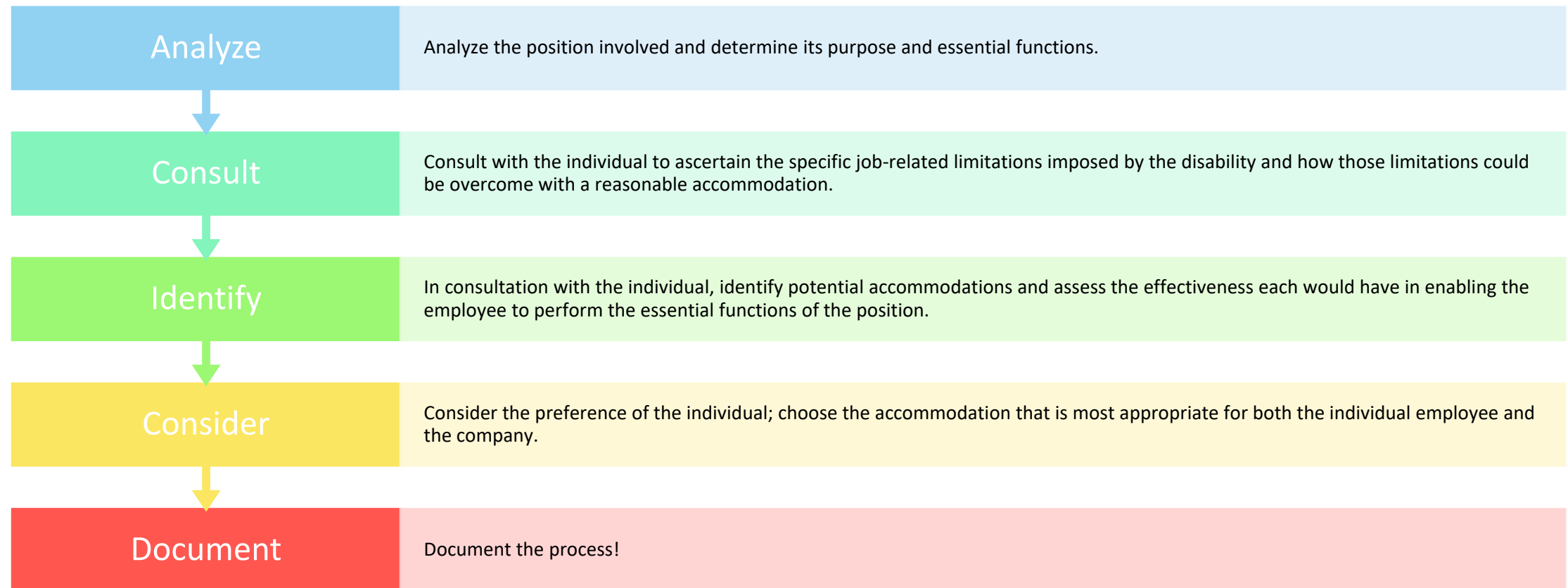
- Generally, the burden is on the employee to request an accommodation.
 - But the employee does not bear the burden of initiating the interactive process where the employer is aware of or recognizes the employee's need for accommodation or if the need for accommodation is "obvious."
- No "magic words."
- A request for a change in the work environment or policies/practices because of a health condition
- Raising a medical issue to explain a performance or conduct problem.

Analysis for Disability Accommodation

- Is there a disability that prevents the employee from performing the essential functions of the job?
 - Information from healthcare provider
- Is there a reasonable accommodation?
 - modified shift
 - intermittent/continuous leave
 - remote work
 - reassignment
- Will it create an undue hardship (significant difficulty/expense)?
- Will the individual pose a direct threat of harm to self or others?

The Interactive Process

The 5-Step Interactive Process



Dealing with the Business Folks

- We don't do that . . .
- We can't do that . . .
- That employee is not good anyhow . . . (see about the performance documentation on this one)
- Well, my mother/brother/dentist has the same medical problem and
 - Doesn't need 15 minute breaks three times a day . . .
 - Doesn't need to take leave . . .
 - Doesn't need a modified work schedule . . .

Undue Hardship



Must show significant difficulty or expense

Factors:

- nature and cost of the accommodation;
- overall financial resources of the facility; number of persons and the effect on expenses and resources of the facility;
- overall financial resources, size, number of employees, and type and location of facilities of employer;
- type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- impact of the accommodation on the operation of the facility.

Direct Threat

Factors to consider:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

Religious Accommodation



- Title VII of the Civil Rights Act requires employers to accommodate sincerely held religious beliefs, observances, or practices unless doing so would cause an undue hardship on the employer.
- Title VII defines “religion” as including “all aspects of religious observance or practice, as well as belief”
- A belief is “religious” under Title VII if it is a sincere belief that occupies a place in the employee’s life parallel to that of a deity.

Undue Hardship for Religious Accommodations

- Easier to show undue hardship under Title VII:
 - An accommodation will be an undue hardship when it causes more than a *de minimis* cost or burden on the operations of the employer. **BOLO!**
- Some states/localities have higher standards

Analysis for Religious Accommodation

- Has the person indicated a sincerely held religious belief that qualifies for a reasonable accommodation?
 - Is it religious in nature?
 - Is it sincerely held?
- Does that belief conflict with an employer policy or requirement?
- What accommodation does the individual seek?
- Would the requested accommodation cause an undue hardship, and if so, are there any alternatives that would not?

When Do You Have to Accommodate Pregnant Workers?

If accommodate others similar in ability or inability to work (PDA)

If state/local pregnancy accommodation law

If pregnancy or related medical condition rises to level of disability

Evaluating Possible Reasonable Accommodations

- Whether an accommodation is reasonable is a fact-specific determination that will be made on a case-by-case basis.
- EEOC says an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment.
- The employee is not entitled to the accommodation of the employee's choice or preference. But note that an alternative accommodation is not reasonable if the accommodation causes the employee to lose pay or some other privilege/benefit or if a more favorable accommodation is provided to employees for non-religious purposes.

Practice

Accommodation Practice - Telework

- Set the Stage: In response to the COVID-19 pandemic, your company has allowed employees to work remotely since March 2020. On February 1, 2022, your company announced a “Back Together” policy requiring all employees to return to their assigned work locations on May 1, 2022.
- Scenario: Charlene is a manager who has requested an accommodation to work from home 3 days per week because of anxiety, depression, and back pain. She also has requested an accommodation to work only Monday through Friday because her religion – which she describes as a Bible-based, Christian religion not specific to any denomination – prohibits work from Saturday sunrise to Sunday sunset.
 - ** Is Charlene entitled to a remote work accommodation for her anxiety, depression, and/or back pain?
 - ** Is Charlene entitled to weekends off for a religious accommodations request?
 - ** What do you need to know to make the decision?
 - ** Can you deny the accommodation?

**Is Remote Work
Now Automatically a
Reasonable Accommodation?**

Remote Work

- Cases went both ways this year (still dealing with pre-COVID facts)
- Evidence of successful remote work during COVID may make it difficult not to allow unless business is careful with explanations
- Need to explain why being in person is important; what didn't work; or what is different now that requires in-person

**What Happens if Employee Asks for an
8-hour Day or a 4-hour Day**

Reduced or Part Time Position

- FMLA
 - If qualify for FMLA – the reduced hours could be FMLA leave
- ADA
 - Courts have found that a 40-hour workweek is not always an essential function of a job
 - Look at job description
 - Has job been performed in less than 40 hours?
 - What's not getting completed?
 - What's the undue hardship?

**Can We Require Employees To Show
up to Work?**

Regular & Predictable Attendance

- Courts still find that this is usually an essential function of most jobs
- However, they will consider
 - Employer policies
 - Do you allow for exceptions for other things?
 - Past practice
 - Statements from supervisors
 - Consistency of approach
 - Type of position
 - Hardship if not there or not there on time
 - How frequent are the absences or how long

Extended Leaves of Absence

- Cases still limiting lengthy leaves of absence
- Indefinite is not reasonable – be careful at what point you call it “indefinite.”
- A four-month extended leave, on top of the employee’s initial two and a half month leave, was not a reasonable accommodation. (7th Cir.)

**What is not a reasonable
accommodation?**

What is Not a Reasonable Accommodation?

- Removing essential job functions
 - Make sure in job description
- Diluting uniformly-enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Creating a job-sharing position where one doesn't already exist
- Hiring an assistant
- Changing an employee's supervisor (as compared to changing supervisory techniques)
- Allowing urine sample tampering

Can You Change Accommodations?

You Be the Judge

Retail employer changed long-time schedule of employee with down syndrome

Employee requested that schedule be adjusted back 60-90 minutes to what it was before

Request was denied

What amount did the jury award?

What amount did the jury award?

- A. \$25,000
- B. \$150,000
- C. \$2,125,000
- D. \$25,150,000
- E. \$125,150,000

\$125,150,000

Other Accommodations

You Be the Judge

- Legally blind employee asked for a flexible schedule.
- She lived 60 miles from work and because she could not drive herself, she had to rely on friends and family to drive her
- Public transportation was not available
- Employer rejected her request to telecommute but allowed her a flexible schedule for 15 months and then concluded it was too unpredictable.
- Does employer have to continue to accommodate?

Poll

- Does the employer have to continue to accommodate?
- Yes
- No

Transportation (10th Cir.)

- Court determined transportation to and from work was not an essential function of the employee's position and the employer was under no legal obligation to accommodate the employee's transportation difficulties.
- "The ADA does not require an employer to accommodate employees' non-work related barriers created by personal life choices."

You Be the Judge

Employee had Asperger's Syndrome/High Functioning Autism

Employee felt he was not receiving the time and patience from his supervisor that he required to succeed, and requested a different supervisor, which was denied

Employee was placed on indefinite administrative leave after an emotional episode at work related to his discontent with the supervisor and expressed thoughts of suicide

Was employer required to accommodate request for a new supervisor?

Poll

- Was employer required to accommodate request for a new supervisor?
- Yes
- No

New Supervisor (3d Cir.)

- A proposed accommodation away from individuals who caused the employee prolonged and inordinate stress is unreasonable as a matter of law because a disabled employee is not entitled to a supervisor ideally suited to his or her needs.

You Be the Judge

- Employee with mental-health disability requested telework, weekend work (instead of working all hours during the week), and a supervisor reassignment
- Although employee was able to perform job with other accommodations, he sought reassignment to reduce stress
- **Was employer required to provide the reassignment?**

Poll

- Was employer required to provide the reassignment?
- Yes
- No

Reassignment (10th Cir.)

- Employee requested reassignment even though he was able to perform the essential functions of the job.
- Employee sought reassignment to reduce stress not for medical reasons.
- Court refused to expand the circumstances requiring accommodations to include reassignments that allow an employee to live a “normal life.”

Religious Accommodation

- Employer claimed that accommodation offered to Muslim woman was reasonable because another Muslim woman had previously accepted a similar offer
- Court rejected this as dispositive because two members of the same religion may have varying religious practices and forms of religious observation

What **Not** To Say

Comments in cases this year remind employers what not to say:

- Supervisor told employee that if she “wanted to take time off to be a mother, then this wasn’t the job for [her] and [she] should quit.”
- Employer asked applicant whether a gap in his employment was related to a medical reason
- “It’s not healthy for you, your health isn’t good”
- Supervisor stated that doctor’s notes were “fake as sh%&”
- Supervisor said “needed someone who was going to be there and was not going to be out sick on FMLA all the time”

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Thank **you.**