

Managing Difficult Accommodation Requests

Kiley Belliveau, *Dana-Farber*
Alan Tannenwald, *Bitsight*
Kate Rigby, *Epstein Becker Green*

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Presented by



Kiley Belliveau

Associate General Counsel
Dana-Farber Cancer Institute



Kate Rigby

Member of the Firm
Epstein Becker Green
krigby@ebglaw.com



Alan Tannenwald

VP, Assistant General Counsel &
Assistant Secretary
Bitsight



Laying the Foundation

Disability Accommodation

Disability Defined

- Three ways an applicant or employee may meet the definition of “disability”:
 - **Actual Impairment:** A **physical or mental impairment** that **substantially limits** one or more **major life activities**
 - **Record of:** Having a **record of** such an impairment
 - **Regarded as:** Being **regarded as** having such an impairment
- “Disability” is construed broadly in favor of expansive coverage.

Today’s discussion will focus on accommodating actual impairments

“Major Life Activities” Examples

A physical or mental impairment that substantially limits one or more major life activities

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Communicating
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Working
- Major bodily functions
 - Immune system
 - Normal cell growth
 - Digestive system
 - Bowel
 - Bladder
 - Neurological system
 - Brain
 - Respiratory system
 - Circulatory system
 - Endocrine system
 - Reproductive system

Examples of Disabilities

Disabling “in virtually all cases”



- Deafness
- Mobility impairments requiring the use of a wheelchair
- Cerebral palsy
- Multiple sclerosis
- Major depressive disorder
- Post traumatic stress disorder
- Obsessive compulsive disorder
- Blindness
- Missing limbs
- Autism
- Cancer
- Diabetes
- HIV infection
- Epilepsy
- Bipolar disorder
- Schizophrenia
- Intellectual disability

Impairments that “may” be disabling



- Asthma
- High blood pressure
- Learning disabilities
- Back and leg impairments
- Carpal tunnel syndrome
- Anxiety and depression

Impairments that “usually aren’t” disabling



- Common cold or influenza
- Seasonal allergies
- Sprained joint / broken bone expected to heal



Reasonable Accommodations and the Interactive Process

Reasonable Accommodations

The ADA

- **Requires** employers to provide **reasonable accommodation** to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, unless doing so would constitute “**undue hardship**”
 - ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position that is context-specific
 - March 2011 EEOC ADAAA regulations direct employers to focus their efforts on reasonably accommodating employees with disabilities so long as the worker can perform the essential functions of the job
- Employers are not obligated to grant the employee exactly what is requested.
 - An employer can select an accommodation of its choosing, provided it is reasonable and effective



What Are “Essential Functions”?

- Essential functions are the fundamental job duties of the position the individual holds or desires.
- Function can be essential because:
 - The position exists to perform the function
 - A limited number of employees are available to perform the function
 - The function is highly specialized such that incumbents are hired for their expertise or ability to perform it
- Evidence of whether function is essential:
 - Employer’s judgment
 - Written job description prepared before advertising job or interviewing applicants
 - Amount of time spent performing function
 - Consequences of not performing function
 - Terms of collective bargaining agreement
 - Work experience of current or past incumbents

Examples of Reasonable and Unreasonable Accommodations

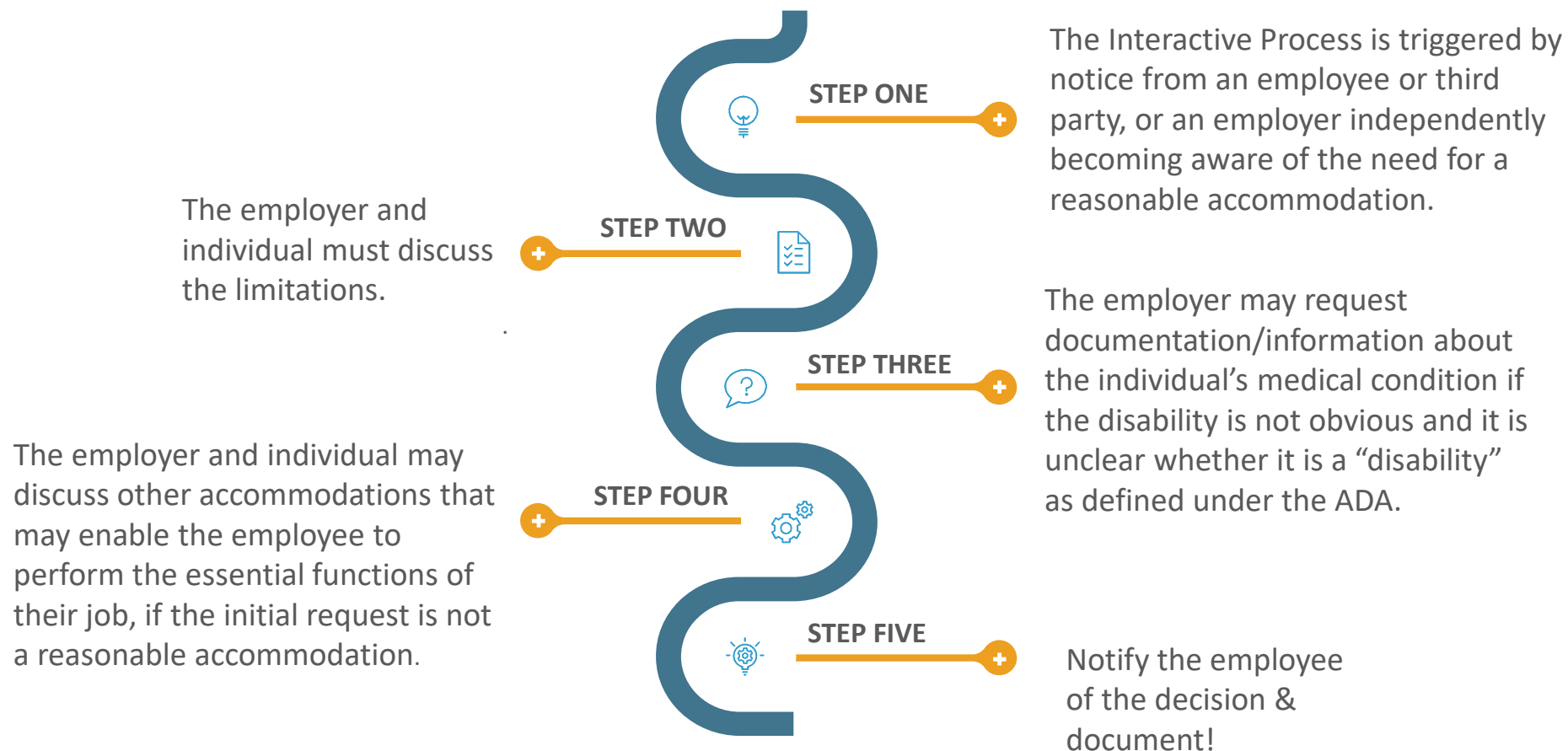
Reasonable

- Acquiring or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- *Providing leave of absence
- Reassignment to a vacant position
- Adjusting or modifying examinations, training materials, or policies
- Providing readers and interpreters
- Making the workplace readily accessible and usable

Unreasonable

- Eliminating essential functions
- Lowering qualitative or quantitative performance or productivity standards
- Providing personal use items or amenities
- Providing indefinite leave of absence
- Allowing unpredictable, erratic attendance
- Violating seniority rights
- Changing supervisor

The Interactive Process



The Interactive Process

When is the interactive process “triggered”?

- When does the “interactive process” begin?
 - When the employee “asks” for help.
 - When employer “learns” of limitation/need for accommodation. For example, when an employer becomes aware of the need for an accommodation through a third party or by objective observation.
 - If an employee with a disability exhausts the leave provided under some other law (e.g. FMLA or MA PFML) and remains unable to return to work.
- There are **no magic words** an employee must use to begin the accommodation process.



The Interactive Process

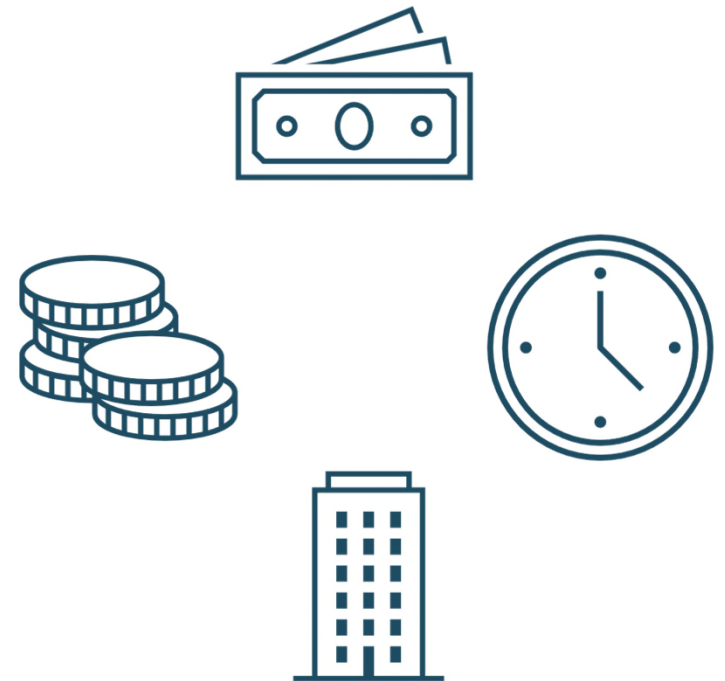
Examples of Triggers

- Employee Request
 - “I have cancer and will need to adjust my schedule for treatment”
 - “With my disc issues, I won’t be able to stand all day”
- Reading between the lines
 - “My migraines make it so tough to get into work by 8:30 am”
 - “I’ve been sneezing so much since they installed the new carpets”
- It may not always be the employee who makes the employer aware of the need – a family member of the employee or a co-worker may inform HR
 - “Raj has been sleeping at his desk this week”

The Interactive Process

Undue Hardship

- An undue hardship may include any action that:
 - Would fundamentally alter the nature or operation of the business
 - Is extensive, substantial, or disruptive (unreasonableness)
 - Would cause significant difficulties
 - Is unduly costly
- Note: Employers should avoid arguing cost as an undue hardship unless there is no alternative
- Factors considered in determining “undue hardship” include:
 - Cost (cost of accommodation, financial resources of the entity)
 - Impact on the facility and/or its operations
 - Size, composition, structure, and functions of the workforce, the facility, and the overall business
 - Past practice



The Interactive Process

Undue Hardship

Examples of Potential Undue Hardship

- Exempting employee from a rotating day/night shift schedule was an undue hardship because it would violate a collective bargaining agreement and would require coworkers to work more undesirable shifts.
- Granting a skilled technician a leave of absence was an undue hardship because many technicians were already out on leave and allowing another technician to take leave would put a significant burden on those who were actively working.
- Modifying a laboratory assistant's schedule was an undue hardship because it resulted in significant costs associated with keeping the laboratory open, such as extra hours for security and janitorial staff.
- Modifying an assistant showroom manager position to be remote.

Interactive Process

General Dos and Don'ts of the Interactive Process

- **Do** train managers to recognize an employee's request or need for an accommodation.
- **Do** train managers to engage HR to discuss reasonable accommodations.
- **Do** train managers to assess the true essential functions of the job.
- **Do** discuss reasonable accommodation options.
- **Do** try to get buy in from the individual.
- **Do** document!
- **Do not** immediately reject an accommodation request, no matter how unreasonable it may appear.
- **Do not** permit managers to make arbitrary reasonable accommodation decisions.



Navigating Mental Health Accommodations & Performance

Mental Health

Addressing mental health in the workplace may look different for many

Mental health may include our emotional, psychological, and social well-being. The following disorders are typically reported in the workplace:



Anxiety



Depression



ADHD/ADD

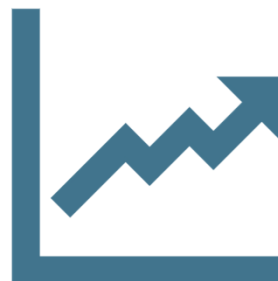


Post-traumatic stress disorder (PTSD)

Mental Health

Rise in Mental Health Employment Bias Claims

- Mental health discrimination accounted for about 40% of ADA-related charges in fiscal year 2023 according to statistics from the EEOC
 - FY21 this was 30% of all charges
- The leading conditions contributing to that trend (accounting for nearly 70% of all mental health charges and 29% of ADA charges in 2023) were:
 - Anxiety (13.5%)
 - Depression (8.5%)
 - PTSD (7%)



Is the request credible?



Mental health support has transitioned from a pleasant perk to a business necessity, given the heightened awareness of workplace factors that could contribute to mental health concerns. Employers must gauge the integrity and legitimacy of employee requests for mental health accommodations to ensure productivity.

Mental Health Accommodation Requests

- Employers must remember to accommodate mental disabilities, in addition to physical disabilities.
- EEOC guidance stresses that employees may use “plain English” when seeking mental health related accommodations.
 - As one example, the EEOC states an employee asking for time off because he is “depressed and stressed” is sufficient to put the employer on notice that the employee is requesting a reasonable accommodation.
- If the need for an accommodation is not obvious, an employer can request reasonable documentation regarding the disability and functional limitations.
- Appropriate reasonable accommodations may include: flexible workplace arrangements, scheduling adjustments, leave, breaks, private office space, and/or technologies to minimize workplace stimuli.

Mental Health Accommodation Requests and Performance

- Mental health disability causing performance issues
- Difficulty in handling accommodations related to anxiety/depression allegedly triggered or exacerbated by performance management, supervisory style/approach
 - Accurate assessment of performance
 - Accurate and timely documentation
 - “Do you have any suggestions for how I or the company can help you perform your job duties, meet these performance metrics, meet these deadlines, etc.”

DOL Suggested Management/Supervision Accommodations

- Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations.
- Additional forms of communication and/or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings.
- Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities.
- Development of strategies to deal with problems before they arise.
- Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards.
- <https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities>

Remote Work as an Accommodation

Remote Work

The elephant in the room



Highly divisive topic

- Job-specific inquiry
- Focus on collaboration

*Important to **understand the specific underlying need/limitation***

- Being around crowds
- Stress/anxiety around commuting
- Sensitivity to lighting, noise, or smells
- Diminished immune system
- Specific long COVID symptoms

***Investigate** the broader impact of the alleged need/limitation*

- Obtain further, more precise, information from a health care provider
- Explore the impact on other areas of life

***Consider alternative accommodations** that address the limitation—be creative and flexible*

- Changing the days the employee works in the office
- Changing working hours outside of peak commuting hours
- Paying for parking/alternative transportation
- Changing seating to a less crowded area of the office

Document and manage the accommodation

- Consider a trial/temporary period
- Clearly set forth performance and conduct expectations
- Document, document, document
- Maintain proper levels of confidentiality
- Reassess as needed

Scenario Regarding the Interactive Process & Remote Work

Example

- Declan is a therapist who was recently diagnosed with chronic migraines, and as a result experiences nausea and has problems commuting. Declan requests an accommodation to work remotely. How should his employer proceed?
- Declan's employer should request information from Declan's medical provider regarding the medical condition and any limitations.
 - If it is public transit that is triggering migraines (due to too much stimuli), an employer could consider providing a car service as an alternative accommodation.
- The employer should consider whether in-person attendance is an essential function of the role, and whether any of its therapists meet with patients remotely.
- His employer should consider whether they can re-arrange Declan's patients and schedule so he can regularly meet with patients remotely.



Leave as an Accommodation

Leave as a Reasonable Accommodation

Basics

■ ADA Leave as a Reasonable Accommodation

- Unpaid leave may be a reasonable accommodation, if:
 - FMLA, MA PFML, etc. has already been exhausted; or
 - An employee has not met the eligibility requirements under FMLA or MA PFML.
- No set time/spectrum under the ADA for a leave of absence
 - The leave is generally continuous or as a reduced schedule.
 - Intermittent leave could also be a reasonable accommodation absent an undue hardship for the employer.
 - EEOC Guidance – no “maximum leave” policies.

Leave as a Reasonable Accommodation

Indefinite Leave

- Most federal courts have held that an employer does not have to provide **indefinite leave** as a reasonable accommodation under the ADA
- Indefinite leave can be
 - A leave without an end date
 - Numerous extensive requests for an extension of a leave
- Many federal courts treat it as *per se* unreasonable and do not require an employer to demonstrate undue hardship

Leave as a Reasonable Accommodation

Extended Leave

- Each leave and extension must be analyzed on an individualized basis
- When is another extension unreasonable? Undue hardship?
- Example:
 - Employee exhausts 26 weeks of consecutive leave under the MA PFML.
 - Employee seeks 2 additional months of unpaid leave, which the employer allows.
 - Employee then seeks an additional 2 months of leave, with her healthcare provider citing complications and the need for additional physical therapy to “hopefully” get employee back to work.
 - Is this reasonable? Will it cause an undue hardship?
 - What factors will come into play?

Kiley Belliveau

Associate General Counsel
Dana-Farber Cancer Institute

Kiley is a trusted advisor and strategic partner to Dana-Farber Cancer Institute's leadership on the full range of legal issues arising out of the employment relationship. With her colleagues in the Office of General Counsel, she supports the mission of Dana-Farber by navigating complex legal and ethical issues while maintaining the highest standards of excellence.



Allen Tannenwald

VP, Assistant General Counsel & Assistant Secretary
Bitsight

Alan is a tested legal and risk executive with over 15 years of experience with guiding technology companies through periods of transformation and growth.

Alan strives to provide practical and actionable advice that helps Boards of Directors, management teams, and business stakeholders to achieve their business goals and solve their biggest challenges. Alan's colleagues describe me as practical, decisive, flexible, commercially-minded, and, most importantly, someone who leads with empathy.

In addition to his work for Bitsight, Alan is a member of the Programs Committee for the Association of Corporate Counsel - Northeast Chapter. He frequently presents at and moderates global and regional continuing legal education programs on topics such as IP issues in technology transactions, employment law, and mental health concerns for in-house counsel.



Kate Rigby

Boston, Massachusetts
krigby@ebglaw.com
+1 (617) 603-1091

Attorney Kate Rigby has devoted her entire legal career to representing employers in life sciences, technology, hospitality, and other industries in a broad spectrum of employment issues and disputes. Life sciences companies view Kate as their “go to” advisor, helping them confront employment law issues as they emerge from startups to growing enterprises.

Kate understands the unique challenges life sciences companies face with respect to talent acquisition and retention, protection of confidential information, incentive compensation structures, and performance management, among other issues. Kate helps clients ensure compliance with federal and state employment laws. Clients seek her practical counseling on all areas of human resources, including discipline and termination, hiring, reductions in force, EEO complaints, accommodation of disabilities and leaves of absence, wage and hour issues, employment agreements, restrictive covenants, handbooks, and policies. She regularly litigates employment and wage and hour claims before state and federal courts and agencies.

Employers also benefit from Kate’s significant experience handling investigations of internal employee complaints and providing employee and management training. Kate regularly conducts management and non-management equal employment and diversity/inclusion training courses for clients and has completed all MCAD-Certified Train-the-Trainer Courses.

Before becoming an attorney, Kate worked in the human resources field in recruiter, generalist, and management positions.

