



DISCRIMINATION AND HARASSMENT SOLUTIONS LLC

Accommodations in the Workplace Disability Religious Pregnancy

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Agenda

- How do I handle a request for an accommodation for:
 - Disability
 - Pregnancy
 - Religion
- How do I navigate through the interactive process?

Discrimination

- Discrimination includes:
 - Disparate Treatment
 - Disparate Impact
 - Harassment/Hostile Work Environment
 - Retaliation
 - Failure to provide reasonable accommodations

ADA and G.L. Chapter 151 B

No employer shall discriminate against any qualified individual with a disability/handicap in regard to any aspect of employment

- Aspects of employment include:
 - Recruitment, Application Process, Hiring
 - Leaves, Layoffs
 - Training, Job Assignments, Promotions
 - Benefits, Employer-sponsored events
 - Discharges

Who is a “Qualified Individual?”

- A Qualified Individual is someone who:
 - Satisfies the requisite education, skill, experience, and other related requirements of the job held or desired; and
 - Can perform the essential functions of the job with or without reasonable accommodation

Exclusions from “Individual with a Disability”

- Current illegal drug user
- Direct threat to property or safety of self or others
- Pregnancy
- Personality traits such as “sensitive to stress”

What are Essential Functions of a position?

- Fundamental Responsibilities determined by the employer
- Not marginal tasks

Considerations:

- Employer's judgment
- The written description prepared before advertising or interviewing
- The performance of the function is the reason the job exists
- The consequences of the function not being performed
- The amount of time spent performing the function
- A limited number of employees among whom the performance of the function can be distributed
- The function is highly specialized such that the incumbent is hired for that expertise
- The terms of a union contract

What is a Disability?

An individual with a “disability” is someone who:

- Has a physical or mental **impairment** that **substantially limits** one or more **major life activities**
- Has a **record** of such an impairment
- Is **regarded as** having such an impairment

*ADA and MA recognize “associational disabilities” – those individuals who are associated with someone who has a disability

What is a Physical or Mental Impairment?

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; or
- Any mental or psychological disorder, such as intellectual disability, emotional or mental illness, and specific learning disabilities.

What are Major Life Activities?

Basic actions that the average person in the general population can perform with little or no difficulty

Examples of Activities include:

- Breathing
- Ingesting
- Sensing
- Thinking
- Reading
- Speaking
- Interacting with others
- Reaching
- Standing
- Bending
- Working
- Sleeping
- Caring for oneself
- Learning
- Concentrating
- Communicating
- Writing
- Sitting
- Manipulating
- Walking
- Lifting

What else are Major Life Activities?

Major Life Activities include the following Major Bodily Functions:

- Respiratory
- Circulatory
- Brain
- Immune
- Endocrine
- Musculoskeletal
- Genitourinary
- Bowel
- Reproductive
- Cardiovascular
- Neurological
- Special sense organs
- Lymphatic
- Hemic
- Normal cell growth
- Digestive
- Bladder

What is “Substantially Limited” in a Major Life Activity?

- Unable to perform a major life activity; or
- Significantly restricted in the condition, manner, or duration of performing the activity compared to most people in the general population

Other considerations:

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active

Examples of Episodic Impairments or Impairments in Remission

- Schizophrenia
- Depression
- Diabetes
- Epilepsy
- Multiple Sclerosis
- HIV/AIDS
- Cancer

Additional Factors in Determining Whether an Individual is Substantially Limited

The determination of whether an impairment substantially limits a major life activity **excludes** the ameliorative effects of mitigating measures, except for corrective lenses.

Mitigating Measures include:

- Medications and Medical Supplies or Equipment
- Low Vision Aids
- Hearing Aids and implantable hearing devices
- Prosthetics
- Mobility Devices
- Alternate devices, adaptive equipment, or assistive technology
- Auxiliary Aids and Services
- Learned Behavioral or Adaptive Neurological Modifications

Disability Related Questions & Medical Examinations

Pre-Offer

- Inquiries into a person's disability are **prohibited** at the pre-employment stage, which includes:
 - Application form
 - Interview
 - Physical Exam/Health History
 - Third Party Sources, e.g. previous employer, background checks
- Exceptions
 - Bona Fide Occupational Qualification ("BFOQ")
 - Affirmative Action Tracking & Selection (must be maintained separate from application)
 - Complying with other state and federal laws

Disability Related Questions & Medical Examinations

Hiring Process and Interviews

- May inform an individual of the requirements of the hiring process (e.g., interviews, written timed exams, or job demonstrations) and may ask if the individual will need an accommodation
- May ask if the individual can perform all essential functions with or without reasonable accommodation
- May ask the individual to demonstrate or explain how they would perform the essential functions as long as all applicants are asked
 - Exception: If a person has a known disability, one may ask how the individual will perform an essential function

Disability Related Questions & Medical Examinations

An employer may ask disability-related questions or require an employee to have a medical examination when it knows about:

- a particular employee's medical condition,
- has observed performance problems, and reasonably believes that the problems are related to the medical condition.

Disability Related Questions & Medical Examinations

At other times, an employer may ask for medical information when it has observed symptoms, such as extreme fatigue or irritability, or has received reliable information from someone else (for example, a family member or co-worker) indicating that the employee may have a medical condition that is causing performance problems.

Poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.

Disability-Related Questions and Medical Examinations

Prohibited Questions:

- Questions about an individual's impairment
- Questions about an individual's use of medication
- Questions about workers' compensation history
- Questions about mental health treatment

Disability-Related Questions and Medical Examinations

An individual applies to be a clerk for a law firm, a job that sometimes requires going out to purchase office supplies and picking up and delivering documents. When the interviewer explains that clerks typically walk, take a taxi, or occasionally use the company car to run errands, the applicant discloses that she does not have a driver's license due to MS and, therefore, would have to use some other form of transportation to run errands if she could not walk or take a taxi. Because there is no reason to believe that the applicant will need an accommodation to do the job, the interviewer may not ask the applicant follow-up questions about her MS, such as when she was diagnosed, whether her license was suspended because of the MS or whether anyone else in her family has MS

Disability-Related Questions and Medical Examinations

An experienced chef receives an offer from a hotel resort. During the post-offer medical examination, he discloses that he has had epilepsy for ten years. When the doctor expresses concern about the applicant's ability to work around stoves and use sharp utensils, the applicant explains that his seizures are controlled by medication and offers to bring information from his neurologist to answer the doctor's concerns. He also points out that he has worked as a chef for seven years without incident. Because there is no evidence that the applicant will pose a significant risk of substantial harm while performing the duties of a chef, the employer may not withdraw the job offer.

Reasonable Accommodations

An employer must provide a reasonable accommodation to individuals with disabilities in the workplace unless it would pose an undue hardship

A reasonable accommodation is any change or modification in the workplace or in the way work is done that provides equal opportunities for employees with disabilities.

Examples of Reasonable Accommodations

- Provision of alternative parking arrangements
- Alteration of available facilities to be physically accessible and usable
- Adjustment of the job application process
- Provision of an alternative format of work material
- Acquisition of alternate devices, adaptive equipment, or assistive technology
- Provision of qualified reader, writer, sign language interpreter, or other assistant
- Adjustment to testing or training
- Modification to policy, procedure, rule, or practice
- Restructuring of the job
- Permission for part-time or modified work schedule
- Provision of an alternative work area
- Permission for an extended medical leave
- Reassignment to a vacant job

Important things to know about Reasonable Accommodations

- Can be asked for at any time during the application process or the period of employment
- Begins with notice to the employer; no “magic words”
- Requires employer to engage in the interactive process
- Refer employee to the reasonable accommodation policy and procedure and HR:

Interactive Process

- When an employee has disclosed a disability, **what can you ask?**
 - Functional limitations in the job
 - Possible accommodations
- Involve HR
- **Do not:**
 - Make an inquiry about the diagnosis, prognosis, symptoms or manifestation of the medical condition
 - Make allusions to the situation
 - Make judgment about the consequent changed capabilities

When may a Reasonable Accommodation be denied?

An employer does not have to provide a reasonable accommodation where they can show an undue hardship.

- Is unduly costly or administratively burdensome
- Interferes with others' rights or safety
- Fundamentally changes the way we conduct business

Implementing an Accommodation

- Usually, a written request is submitted (Notice does not have to be written) – should go to HR
- Medical documentation is needed only for disabilities that are not obvious
 - Medical documentation is confidential and maintained by HR in a separate file

Implementing an Accommodation (cont.)

- Discuss accommodations with the appropriate persons designated in the policy
 - Implement accommodation with an employee and employer agreement
 - Accommodation agreement follows the individual in the supervisory file
- Follow-up; check in with the individual to ensure accommodation is effective

Poll Questions

When an employee makes a request for an accommodation, the employer may not ask which of the following:

- 1. Questions about workers' compensation history
- 2. Functional limitations of the employee in the job because of the disability
- 3. Possible accommodations needed by the employee

Poll Questions

Which of the following is not considered a disability:

1. Depression
2. Cancer
3. Illegal drug user
4. Diabetes

MA Pregnant Workers Fairness Act

- Effective April 1, 2018, the Massachusetts Pregnant Workers Fairness Act (“PWFA”) imposes new obligations on employers to accommodate an employee’s pregnancy or a condition related to pregnancy.
- **A new protected class:**
- Pregnancy and pregnancy-related conditions are now protected classes in Massachusetts.
- **Employee Rights:**
- No discrimination based on pregnancy or a pregnancy related condition;
- Reasonable accommodation must be provided in the same manner as it would be to a disabled employee.

MA Pregnant Workers Fairness Act

- **Employer Responsibilities regarding accommodations:**
- Some examples of reasonable accommodations include:
- Provide a private, non-bathroom room for expressing breast milk;
- Provide light duty and schedule modifications (longer and/or frequent breaks);
- Provide a modified work schedule;
- Provide assistance with manual labor.

Pregnancy and Pregnancy Related Conditions

- In MA, the act requires employers to reasonably accommodate all pregnant employees, just as they are required to reasonably accommodate employees with disabilities.
- Second, in MA employers must accommodate employees with a need to express breast milk.
- ADA employers must: (a) provide nonexempt employees with reasonable break time to express breast milk for her nursing child for one year after the child's birth, and (b) provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

Pregnancy and Pregnancy Related Conditions (cont.)

- In MA, employers are required to go beyond this limited obligation under federal law and requires an employer to engage in the interactive process to find a reasonable accommodation based on the individual needs of an employee.
- As a result, employers may need to provide longer or more frequent break times or other accommodations not specifically required under federal law.

Pregnancy and Pregnancy Related Conditions (cont.)

- Employers are required to "engage in a timely, good faith interactive process to determine an effective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee's job or the position to which the prospective employee has applied."

Pregnancy and Pregnancy Related Conditions (cont.)

- May request documentation to support the need for an accommodation, except when requesting:
 - More frequent or longer paid or unpaid breaks
 - Time off to attend to a pregnancy complication or recover from childbirth with or without pay
 - Acquisition or modification of equipment
 - Seating
 - Temporary transfer to a less strenuous or hazardous position
 - Job restructuring (Cont.)
 - Light duty
 - Private non-bathroom space for expressing breast milk
 - Assistance with manual labor
 - Modified work schedules

Pregnancy and Pregnancy Related Conditions (cont.)

- Employers must provide employees with written notice of the Act, outlining the right to reasonable accommodations for pregnancy and related conditions. Written notice should be provided to:
 - New employees at time of hire
 - Within 10 days of any employee notifying the employer of her pregnancy

Poll Questions

Employer must provide employees with written notice of the Act, outlining the right to reasonable accommodations for pregnancy and related conditions within how many days of the employee notifying the employer of the pregnancy:

1. 1 week
2. 2 weeks
3. 10 days
4. At the time of hiring

Religious Accommodation

- Religious accommodations are any adjustments employers make to the work environment that allows an applicant or employee to practice their religion.
- Social, political, economic philosophies, or personal preferences aren't considered to be religious beliefs.

Religious Accommodation

- Title VII includes these religions:
- Christianity
- Judaism
- Islam
- Hinduism
- Buddhism
- Other traditional, organized religions
- New, uncommon, or informal religious beliefs

Religious Accommodation

- A religious practice may be sincerely held by an individual even if newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion.
- Required where an individual's religious beliefs or practices conflict with legitimate work requirements

Religious Accommodation

- Employers may not refuse to accommodate an employee's sincerely held religious beliefs or practices unless the accommodation would impose an undue hardship (more than a minimal burden on operation of the business).

Religious Accommodation

- An undue hardship is more than a minimal burden on a business. Some undue hardships include jeopardizing security, violating a seniority system, and causing a lack of necessary staffing.

Religious Accommodation Examples

- Company's dress and grooming code
- Time off to attend mass or pray;
- Avoidance of a religious invocation;
- Unpaid leave to attend a ritual ceremony.
- Vaccinations.

Retaliation

Employers are prohibited from retaliating against an applicant or employee who has engaged in protected activity, including making a request for an accommodation.

Poll Questions

Which are religions recognized under Title VII:

1. Catholicism
2. Judaism
3. Church of Body Piercing
4. All of the above

Retaliation

Taking an adverse action against a person because he or she has *opposed* a discriminatory employment practice (e.g., disability, religious or pregnancy and pregnancy related conditions), has *complained* about discrimination, or has *assisted* in the investigation of a complaint of discrimination.

Poll Questions

An example of retaliation may include::

1. Excluding the employee/witness from work related emails
2. Giving the employee a bad evaluation when their performance was positive
3. Not eating lunch with the employee
4. Piling on assignments to the employee after they file a complaint.