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New Age of 'Reasonable'

Accommodating Traditional & Pandemic-related FMLA & ADA Requests


Presented by
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Today's Presenters



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Introduction & Overview

- When it comes to compliance, Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) are two of the most difficult laws.
- This webinar will focus on what are “reasonable” accommodations under ADA (and Michigan’s Persons with Disabilities Civil Rights Act), especially related to COVID-19 and including remote issues and their interplay with FMLA.

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Introduction – ADA/MPDCRA

- Like other civil rights laws, the ADA and MPDCRA prohibit discrimination (or harassment) based on a protected status, specifically disabilities (actual, perceived or history of disability), or because of an association with someone with disabilities.
- Both ADA and MPDCRA require more of employers ... they require reasonable accommodations.
- Primary focus today is on the ADA.
- MPDCRA has explicit guidance in the statute.

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Introduction - Coverage

- MPDCRA - Michigan employer having one or more employees. Personal liability is possible.
- ADA - Employers engaged in industry affecting commerce, having 15 or more employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year. No individual liability.

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Introduction – Limitation Periods

- MPDCRA claims can be initiated in circuit court within three years of alleged violation. Employers can agree to shorten limitations period.
- In Michigan, ADA claims must be initiated with charge at Equal Employment Opportunity Commission (EEOC) within 300 days of alleged violation.
- After administrative process, 90 days to initiate lawsuit. Not clear if limitations period can be shortened.

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Introduction - Damages

- MPDCRA permits compensatory damages and attorney's fees, but does not allow for award of punitive damages. Wage loss damages are reduced by amount received for workers' compensation benefits.
- ADA allows for compensatory damages and punitive damages (with certain caps based on size of employer) and attorney's fees.

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Introduction – Requests for Accommodation

- MPDCRA requires applicant/employee with disability to request accommodation *in writing* within 182 days of day she knew or should have known that accommodation was needed, if employer provides notice of this requirement. (*Tip* - post notice of requirement; place on job application and in handbook).
- ADA - Requests for accommodation do not need to be in writing and may be made any time by employee, or by another person acting on behalf of employee.

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Introduction – Undue Hardship

- Both ADA and MPDCRA only require accommodations that do not result in undue hardship to employer.
- Types of accommodations under MPDCRA are specified in statute with undue hardship based on cost and size of employer.
- ADA is only limited by concept of undue hardship, which must be proven by employer.

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MPDCRA - Accommodations

- Burden of proof for failure to accommodate is specified - plaintiff/employee must prove by preponderance of evidence that accommodation would not cause undue hardship on employer.
MCL 37.1210(1)
- How much an employer must spend on accommodation is determined by number of employees.


Continued

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MPDCRA - Accommodations


- Statute lists types of accommodations that need to be provided.
- Accommodations that may be required: Purchasing devices or equipment, hiring readers or interpreters, restructuring job or altering schedule.

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FMLA-Overview


- Requires covered employers to grant eligible employees up to 12 weeks of job-protected, unpaid leave for:
 - Birth of a child
 - Placement of an adopted or foster child with the employee
 - Employee's own serious health condition
 - Serious health condition of the employee's spouse, parent or child

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FMLA-Overview


- FMLA amendments require leave also be given for:
 - Exigencies for family members of those in the military
 - Extended leave up to 26 weeks, if it is to care for seriously wounded or ill military members or veterans who served in the last five years

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FMLA –Covered Employers


- Private employers engaged in commerce with a minimum of 50 employees
- Public employers are covered regardless of number of employees.
- Covered employers only must grant leave to employees who work at a site with 50 or more employees within a 75-mile radius.

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FMLA – Eligible Employees

- Employees are eligible for leave after working for 12 months (which do not have to be consecutive) and working 1,250 hours in the 12 months immediately preceding the beginning of the FMLA leave.

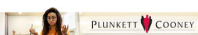
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FMLA - Benefits

- Employers must:
 - Maintain an employee’s health insurance during FMLA leave
 - Return the employee to their original job or an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment

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FMLA – Notice Requirement

- Employees are required to give their employer’s notice of the need for FMLA leave.
 - If foreseeable, at least 30 days notice
 - If unforeseeable, as soon as practicable - usually the same day the employee becomes aware of the need, or the next day; unless it’s an emergency
 - Notice can be verbal. “Sufficient” is not defined.

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FMLA – Employee Notices

- Employers can require employees to comply with their usual and customary notice and procedural requirements for requesting leave, including:
 - Require notice in writing
 - Require notice be given to specific persons
 - Follow call-in procedures

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FMLA – Employer Notices

- It is always the employer’s obligation and right to designate leave, paid or unpaid, as FMLA leave.
- Regardless of whether employee asks for FMLA
- Even if employee asks that it not be designated as FMLA leave
- Within five business days of request

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FMLA – Employer Notice

- Must state whether eligible and if not, why
- Any requirements for medical certification and the consequences of failing to provide
- Any right or requirement to use paid leave
- Requirements RE: paying health insurance premium
- Right to maintain health insurance and return to same or equivalent job
- Key employee status, if applicable

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ADA/FMLA

- If an employee has been off on FMLA for his/her own serious health condition and has exhausted his/her available FMLA leave time, but is not able to return to work, an employer must consider whether the serious health condition qualifies as a disability.
- If so, the employer must engage in the interactive process with the employee to see if a reasonable accommodation exists or is necessary.
- Do not begin the interactive process until the FMLA leave has expired.

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ADA

- Under the ADA, a person has a disability if they have a physical or mental impairment that substantially limits a major life activity; a record of a substantially limiting impairment; and people who are regarded as having a substantially limiting impairment.

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COVID Accommodation Issues

- EEOC notes that limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting.
- Thus, restrictions that last several months may qualify.
- In addition, the treatments or mitigating measures used for COVID-19 may themselves have negative side effects that substantially limit major life activities or bodily functions.

Continued

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COVID Accommodation Issues

- Claims based on impairments resulting from COVID-19 and its after affects, especially but not limited to "long COVID"
- Employees are also bringing claims arising from the mitigating measures of treatments used for COVID-19, which can have negative side effects that substantially limit an individual's major life activities or bodily functions.
- Employers must assess whether a condition is a disability on a case-by-case basis.

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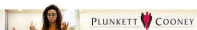
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COVID Accommodation Issues

- There is a rise in claims from employees with pre-existing conditions that were well managed and did not require accommodations, but may have caused serious illness and/or complications due to COVID-19, worsening an individual's pre-existing condition that was not substantially limiting, making that impairment now substantially limiting.

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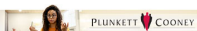


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COVID Accommodation Issues

- Increase in claims based on psychological and emotional impairments
- EEOC – employees with certain pre-existing mental health conditions may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.
- Working remotely and corresponding social isolation has had a negative effect on mental health, and some employees find it difficult to readjust to working in person with others.

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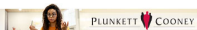


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ADA

- Employer's obligations under ADA are much broader than under state law.
- Key to determining obligations is first determining "essential functions of job."
- Hint: Ask on job app – Can you perform essential functions of the position you seek with or without a reasonable accommodation? (But, you don't get to know if its with or without an accommodation.)

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ADA – Essential Functions of Job

- “Essential function” means fundamental job duties, not marginal tasks. May be essential because:
 - It’s the reason the job exists.
 - Limited number of employees who can perform that function or
 - Function is highly-specialized and incumbent was hired because of that expertise.

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ADA – Essential Functions of Job

- Factors to consider when determining essential functions:
 - Employer’s judgment
 - Written job description (this is key and should be written before you advertise for job vacancy)
 - Amount of time function performed
 - Consequence of not performing function
 - Collective Bargaining Agreement (CBA)
 - Work experience of past and current incumbents

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ADA - Accommodations

- Kinds of accommodations required under ADA are not limited like they are under state law.
- Reasonable accommodation may be *any* change in work environment or how work is done that will help a disabled person apply for the job, perform “essential functions” of their position or enjoy all benefits and privileges of employment.
- As employees work through and past COVID, the “reasonableness of an accommodation” standards used prior to the pandemic may have to be re-evaluated.

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ADA - Accommodations

- For years, EEOC position was that ADA did not require employers to offer remote work options, but if it did, employers had to allow employees with disabilities an equal opportunity to participate in such a program.
- Employers were generally successful in convincing courts that reporting in person to a workplace was an essential function of most jobs.
- During the pandemic, many or most businesses were subject to lock down orders requiring remote work arrangements.

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ADA - Accommodations

- It may prove more difficult to deny a request for remote work as an accommodation for employers and employees who were able to work remotely during the pandemic but permitting telework during the pandemic is not irreversible (see *EEOC guidance*).
- Employers need to be prepared to base a decision to deny such a request, on a fact-specific examination of a job's essential functions.
- If employees are allowed to work remotely, employers need to consciously keep them engaged with the in-person workforce.

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ADA - Accommodations

- EEOC guidance: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (Updated 3/14/22)
- **Q:** When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation?
- **A:** No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation.
 - If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.
 - Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

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ADA - Accommodations

- To extent employers are permitting telework to employees because of COVID-19 and are choosing to excuse employees from performing one or more essential functions, then a request—after workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse employees from performing an essential function.
- ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.
- Fact that employers temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for purposes of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that employers permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.

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ADA - Accommodations

- Employers have no obligation under ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under usual ADA rules.
- These are fact-specific determinations.

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Conaway v Detroit Public Schools Cmty. Dist., No. 21-cv-12253 (E.D. Mich. Dec. 17, 2021)

- Plaintiff requested an accommodation for "remote teaching from home" under the ADA. Defendant offered plaintiff the relief she originally sought—a virtual teaching position at DVS. The accommodation allows plaintiff to teach in the DVS program from a defendant-operated facility two days a week, while teaching from home the remaining three days. That accommodation falls within the ADA's reasonable accommodation definition. See 42 U.S.C. § 12111(9)(A).
- Plaintiff may share a classroom with another teacher until defendant provides additional space, but teachers sharing a classroom have discretion to wear masks or not while sharing their space.
- Plaintiff bears the burden of demonstrating the accommodation's unreasonableness but has not shown why teaching at the virtual school is unreasonable.

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Palmer v Michigan

No. 1:22-cv-90 (W.D. Mich. March 29, 2022)

- Plaintiff brought action for injunctive relief related to request to attend Community Mental Health Authority (CMHA) board meetings virtually as a board member. He has Cerebral Palsy, which significantly limits his ability to talk, speak, and breathe and puts him at higher risk for respiratory complications from COVID-19.
- CMHA argued it was not required to act until plaintiff formally requested an accommodation, and it is not required to give that accommodation until plaintiff provides medical documentation supporting the need for it.
- The court disagreed.

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Palmer v Michigan

- Even if plaintiff did not use the word “request” or “accommodation” in his email, it could be inferred from the context that plaintiff was requesting an accommodation based on his disability, his asserted difficulty communicating while wearing a mask, and the risks associated with exposure to COVID-19. Indeed, the CMHA’s Board Chair expressly recognized plaintiff’s concerns at the CMHA’s meeting on Jan. 20, 2022.
- Nevertheless, the CMHA did not allow plaintiff to fully participate at that meeting. It did not require plaintiff to provide medical documentation until March, after it received the attorney general’s letter informing it of what it should have already known, which is that the ADA obligated it to accommodate individuals with disabilities.

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Palmer v Michigan

- Thus, the court was satisfied that plaintiff had shown a substantial likelihood of success that the CMHA discriminated against him in the past. Accordingly, the court granted the preliminary injunction.

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Frederick v Allor Manufacturing, Inc.,

No 2:20-CV-12790 (E.D. Mich. Feb. 22, 2022)

- Plaintiff alleged his former employer discriminated against him in violation of federal and state law when it refused to allow him to use three weeks of vacation time to “self-quarantine” due to concerns about COVID-19, and instead terminated him for absenteeism.
- As a “conveyor chain specialist,” assembling rollers and chains as part of Allor’s industrial conveyor chain manufacturing business, plaintiff was required to stand most of the day and lift up to 70 pounds.
- Plaintiff was a smoker of 30 years, smoking a pack a day. He has had pneumonia twice – once in his 20s and again in 2017. When he was hired in 1987, he did not report any physical disabilities that would preclude his performing the responsibilities of his job.

Continued

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Frederick v Allor Manufacturing

- Allor was exempt from Gov. Gretchen Whitmer’s Stay at Home Executive Order as an essential business.
- Frederick left messages on Allor’s absence extension line multiple days, indicating that he would not be coming to work but without giving a reason. On the third day, he left a voicemail for Allor’s GM, indicating he wanted to use his remaining 112 hours of vacation time to “self-quarantine.”
- The same day, Allor’s HR Manager spoke with Frederick, advising that if he refused to come to work, Allor would regard him as having resigned. Frederick explained he was not resigning but wanted to use his remaining vacation time to self-quarantine and follow the Governor’s Stay at Home Order.

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Frederick v Allor Manufacturing

- During the call, Frederick did not mention any disability requiring accommodation, COVID-19 exposure or symptoms, or that he had a doctor’s appointment scheduled. During his doctor’s appointment, he informed his doctor he wanted to self-quarantine due to his underlying medical conditions – age, smoking habit and history of pneumonia.
- Frederick sent a note from his doctor stating it was “recommended that if possible he work from home.”
- Prior to that note, Allor had made the decision to terminate his employment shortly after his call with HR.

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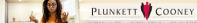


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Frederick v Allor Manufacturing

- Frederick sued for violations of ADA and MPDORA, alleging he was terminated on basis of a disability.
- The court granted summary dismissal to the employer based on the following findings:
 - His addiction to smoking is not a disability under the ADA/MPDORA.
 - His history of pneumonia was not a substantial impairment because it was of a temporary nature.
 - He failed to show that his smoking or pneumonia history place him at a higher risk of severe COVID-19 infection that might constitute a disability.

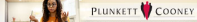
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Frederick v Allor Manufacturing

- Assuming he was disabled, Allor was never on notice of a disability.
- He was terminated based on a legitimate, non-discriminatory attendance issue and refusal to work.


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ADA – Accommodation Examples

- Modifying existing work environment to be accessible and usable by disabled employee; modification or purchase of equipment or devices.
- Job restructuring; part time or modified work schedules; reassignment to *vacant* position; modifications of examinations, training materials or policies; providing qualified readers, interpreters or coaches; remote work.

Continued

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ADA – Accommodation Examples

- Employer need not provide accommodation that is *primarily* for personal benefit of individual (i.e., assists individual with daily activities both on and off job, such as eyeglasses, wheelchair, prosthetic).
- Needs to provide accommodation that assists individual with performing duties of job (i.e., eyeglasses specifically designed to enable person to use office computer monitor).

Continued

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ADA – Accommodation Examples

- Employer does not need to provide accommodation that is an amenity or convenience and not job related (i.e., hot plate or refrigerator).
- Employer does not need to restructure job to “fit” abilities of individual who is not otherwise qualified (i.e., skills, experience, education etc.).

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ADA – Accommodation Examples

- Employer does not have to provide “best” accommodation or one preferred by employee.
- Employer needs to provide accommodation that is *sufficient* to meet job related needs of individual.

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ADA – Accommodation Examples

- Employer is not expected to accommodate a disability about which it is unaware.
- Generally, employee is obligated to inform employer when accommodation is needed.
- May ask whether accommodation is needed if: employer is aware of disability and that employee is struggling, or where employee is mentally challenged and doesn't know to ask.

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ADA – Process for Determining Accommodation

- EEOC “suggests” the following flexible, “interactive process”/problem solving approach that involves employer and employee:
 - Analyze job, its purpose and essential functions
 - Consult with employee to ascertain job-related limitations and how they can be overcome with accommodation

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ADA – Process for Determining Accommodation

- With employee, identify potential accommodations and assess effectiveness of each.
- Consider employee's preference and select and implement “most appropriate” for both employee and employer.
- Keep in mind state law.
- Michigan protects employees who require leave for COVID-19 related reasons, in addition to disability laws.

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ADA – Process for Determining Accommodation

- If individual provides own accommodation, employer not relieved of obligation in future should they choose to stop.
- Where obvious, should just provide accommodation without using step-by-step process above.
- Where additional assistance is needed, contact Job Accommodation Network (JAN):

1-800-ADA-WORK (1-800-232-9675)

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ADA – Process for Determining Accommodation

- Employer cannot require employee to accept accommodation where not requested or wanted.
- If accommodation refused and employee cannot perform essential functions, employee is not qualified for job.
- No accommodation is required where employee is “regarded” as disabled, but not.

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ADA - Medical Inquiries

- What if it is not clear that employee has a disability?
- EEOC Legal Counsel – Opinion Feb. 25, 2014, states that employer may inquire whether employee has disability and needs reasonable accommodation.
- Use plain English rather than legal standards and/or give examples.

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ADA - Medical Inquiries

- Concerning existence of disability, “may” be permissible to ask:
 - Nature of employee’s disability
 - Expected duration
 - Kind of activities affected
 - Use of mitigating measures and extent to which they eliminate or control impact of medical condition

Continued


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ADA - Medical Inquiries

- If asking about “major bodily functions” or “major life activities,” offer examples such as normal cell growth, endocrine, neurological, standing, lifting, concentrating, etc.
- If asking about mitigating measures, use examples such as medication, physical therapy, behavioral modifications, etc.

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ADA - Medical Inquiries

- Concerning need for reasonable accommodation, “may” be permissible to ask:
 - How accommodation would assist person in applying for job, performing essential functions or position or enjoying equal access to benefits and privileges of employment.

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ADA - Medical Inquiries

- Letter should be tailored to specific circumstances (i.e., when disability is obvious, no need to ask if person has disability)
- Each question should be analyzed for its purpose to determine if it is appropriate.
- Lengthy form letters provide greater chance of violating ADA by making inappropriate inquiry.

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ADA - Undue Hardship

- It is employer's burden of proving accommodation is undue hardship.
- In general, it may be undue burden if disruptive to other employees or operations (i.e., turning thermostat up in July so that it becomes unduly hot to employees and customers).

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ADA - Undue Hardship

- Terms of Collective Bargaining Agreement are relevant (i.e., accommodation would violate seniority rights of other employees).
- However, negative impact on morale of other employees insufficient for undue hardship.
- Employer must not disclose to other employees that it is providing accommodation for a disability!

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ADA - Undue Hardship

- Analysis: It must be "significant" difficulty or expense when considering:
 - Nature and net cost of accommodation, taking into consideration tax credits and deductions and/or outside funding
 - Overall financial resources of *facility(ies)*, number of persons employed at facility and effect on expenses and resources

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ADA - Undue Hardship

- Overall financial resources of *employer*, number of employees and number, type and location of its facilities
- Type of operation(s) of covered employer, including composition, structure and functions of workforce and geographic separateness and administrative or fiscal relationship of facility(ies) in question to employer

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ADA - Undue Hardship

- Impact of accommodation on operation of facility, including impact on ability of other employees to perform their duties and impact on facility's ability to conduct business. 29 CFR 1630.2
- Cost must be undue as compared to employer's budget (not as compared to salary of disabled worker). If employee willing to cover portion of cost, only employer's portion is relevant to analysis.

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ADA - Undue Hardship

- Bottom line, more financial resources and employees the employer has, less likely employer will succeed in proving an undue hardship.
- Employers should consult with experienced employment attorney before denying an accommodation.

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COVID Accommodation

- Request for reduced contact – designate one-way aisles, use plexiglass, tables or other barriers to ensure minimum distances between customers and/or coworkers.
- Consider requests for altered accommodations, which may become necessary due to COVID.
- Consider short term accommodations.

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Leave As An Accommodation

- In *King v Steward Trumbull Memorial Hospital Inc.*, the U.S. Court of Appeals for the Sixth Circuit held that the plaintiff had presented a question of fact on her failure to accommodate case, sending the case back to the district court.
- The appellate court held that plaintiff, an RN with asthma, had presented a prima facie case; that she was a “qualified employee if given the reasonable accommodation of medical leave.”
- The focus in medical leave cases is on the reasonableness of the leave request:

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Leave As An Accommodation

- There is no bright line rule defining a maximum duration of leave as a reasonable accommodation.
- Indefinite leave is likely unreasonable.
- Requests for retroactive leave are not per se unreasonable.
- An employee doesn't have to use the word "disability" to put employer on notice.
- When employee requests accommodation, the employer must go through the interactive process and can't terminate an employee to avoid considering an accommodation.

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Questions?



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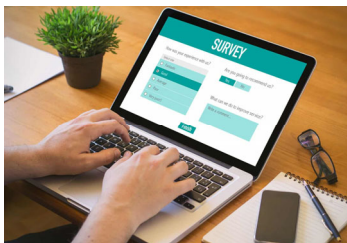
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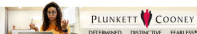


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Accommodating Traditional and Pandemic-related FMLA & ADA Requests


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Accommodating Traditional & Pandemic-related FMLA & ADA Requests
Date: May 18, 2022
Time: 11 a.m. to 12:15 p.m.
Cost: Complimentary

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DOJ Issues Guidance on ADA, Opioid Crisis Issues

Employees should take note of recent federal guidance on issues related to the Americans with Disability Act and opioid use disorder.

Continue Reading

Congress Passes Law, With Retroactive Effect, to Invalidate Forced Arbitration Provisions at the Employee's Election

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Have a Great Day!

Thank You

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