

2021 Employment Law Annual Update: Part 11: Responding to Accommodation Requests

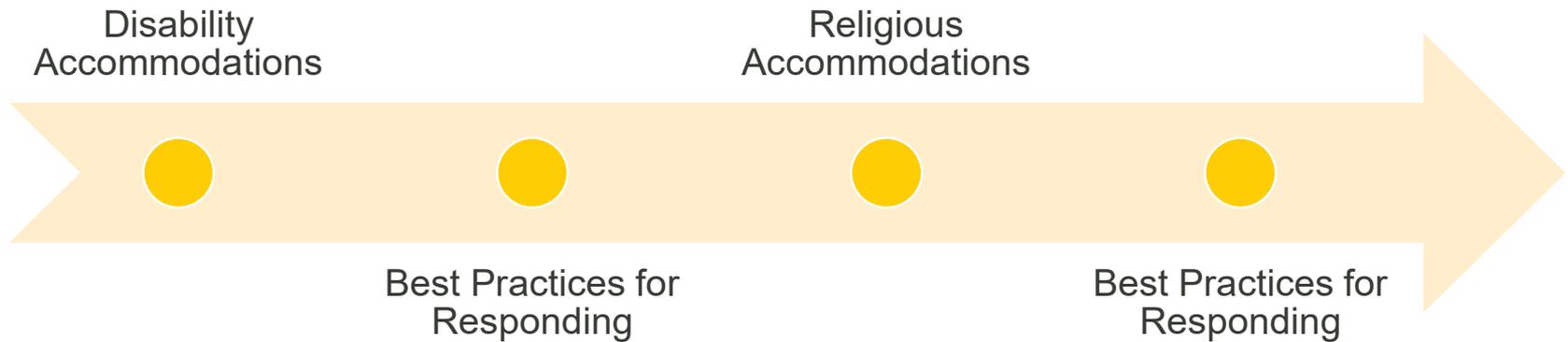
November 18, 2021

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Presentation Outline



Disability Accommodations

Americans with Disabilities Act, as amended

What is a disability

Accommodation requests

Americans with Disabilities Act – who is covered?

Employers with 15+ employees and who engage in interstate commerce

The ADA recognizes three classes of protected employees:

- Record of disability
- Regarded as disabled
- Associated with someone who is disabled

What is a disability?

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

Major Life Activities: ADAAA regulations contain an exhaustive list

Substantially limits: construe broadly and compare the individual to most people in the general population.

Exclusions from coverage (ex. current illegal drug use, unless in a supervised rehabilitation program completed the program or is otherwise rehabilitated).

Accommodation requests

- Employee asks, employer is on notice
- What if the employee doesn't ask? *There are no magic words to request an accommodation.*
- The employer does not have a duty to speculate.
- An employer may be required to provide an accommodation, even if the employee doesn't ask for one, if:
 - The employer already knows the employee has a disability
 - The employer knows or should know that the employee is experiencing workplace problems due to a disability
 - The employer knows or should know that the disability prevents the employee from requesting a reasonable accommodation

Interactive Process

- Once the need for an accommodation is recognized, the Employer should begin the interactive process.
- The Employee has the obligation to provide the Employer with enough information to determine a reasonable accommodation.
- The Employer has the obligation to consider and explore potential accommodations.
- Employers are not required to provide the specific accommodation requested by the employee.

Undue hardship and direct threat

- An Employer is not required to make reasonable accommodations that would impose an undue hardship on the Employer.
- An Employer is not required to make reasonable accommodations that would create a direct threat to the health and safety of individuals in the workplace.
- Both of these exceptions require a case by case in depth analysis to ensure the criteria are met.

Best Practices

- Ask for more information if you don't understand
- Understand the interactions between WC/ADA/FMLA and other leave laws
- Have strong, up-to-date, job descriptions
- Involve the health care provider in discussions concerning accommodations
- Be open-minded both as to the disability and to the possible accommodations
- Understand comparator data

Hypothetical 1

Mary is Maintenance Supervisor

COVID Policy requires all employees wear a mask at work

Mary has PTSD and a note from a doctor that she cannot wear a mask

Hypothetical 2

Injury

John was in a work-related car accident that has resulted in a back injury and placed him out of work.

Doctor Recommendation

Three week after the accident, John's doctor releases him to return to work at 20% capacity. Your WC provider asks you to return him to work.

Response

Returning John to work at 20% capacity will result in John not performing all of the essential functions of his position. Should you return him to work?

Accommodations Based on Religious Beliefs

Prohibition on Religious Discrimination
Accommodations for Religious Beliefs

Sources of Protections for Religious Beliefs

- **Title VII of the Civil Rights Act of 1964**
 - Prohibits religious discrimination in the workplace and
 - Requires employers to provide accommodation for sincerely held religious beliefs (absent undue hardship)
 - Covers employers with 15 or more employees
- **State law (Maine Human Rights Act)**
 - 5 M.R.S. sec. 4572(1)(A): Protects against employment discrimination based on religion
 - Covers all employers

What is a “Sincerely Held Religious Belief”?

- A "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God"
- Includes organized and unorganized religion and less common systems of belief
- Does *not* include all deeply held beliefs—for example, political or personal preferences are not included; must be tied to a broader religious faith

What is a “Sincerely Held Religious Belief”?

Church of the
Flying Spaghetti Monster?



Excerpt of painting by *Niklas Jansson*



Kozy Kat Kitten Food?

Is a Religious Belief “Sincerely Held”?

- As noted by the EEOC, sincerity of a religious belief is “largely a matter of individual credibility”
- What employers may consider:
 - Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief
 - whether the employee has behaved in a manner markedly inconsistent with the professed belief
 - whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons
 - whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons)
 - whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons

Is a Religious Belief “Sincerely Held”? (cont.)

- If there is an objective basis for questioning the religious nature or sincerity of a belief or practice, an employer may seek supporting information
- Points of caution:
 - An employee may have recently adopted a religious belief
 - The law does not require that an employee follow all tenets of a religion; they may follow some tenets but not others
 - An employee may engage in practices beyond the standard tenets of a religion

Assessing the Need for Accommodation

- Does an employee's religious belief interfere with their ability to perform their job?
 - *Does the employee have a sincerely held religious belief?*
 - *What is their job? What are the essential functions?*
 - *What is the policy that is in conflict?*
 - *What is the nature of the conflict?*
 - *Is there a reasonable accommodation to resolve this conflict?*
- Presumptions are functionally the same as actual knowledge
 - *EEOC v. Abercrombie & Fitch Stores, Inc.*

Examples of Reasonable Accommodations

- Dress code
- Modified schedules
 - Break times
 - Scheduled shifts/workdays
- Permitting religious displays

Unreasonable accommodations:

- Do not address the conflict
- Disadvantage the individuals' terms, conditions, or privileges of employment

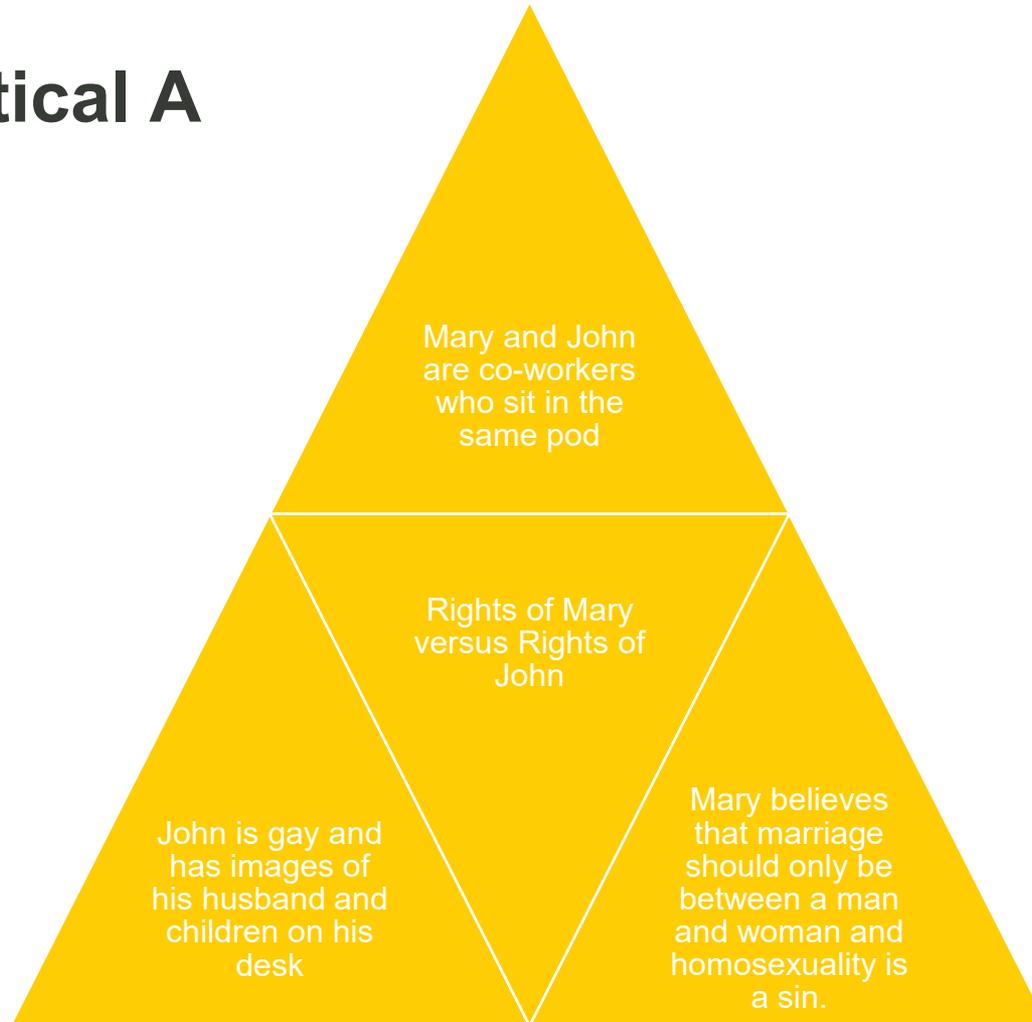
Exception for Undue Hardship

- Factors to consider:
 - Nature of workplace and employee's duties
 - Financial impact of accommodation (in relation to size and operating costs)
 - Burden on the employer's business operations
 - Whether the accommodation would infringe on the rights of other employees or compromise workplace safety
 - Whether other employees would have an increase in potentially hazardous or burdensome work resulting from the accommodation
 - The number of employees who need a particular accommodation
 - Whether the accommodation violates or conflicts with another law

Best Practices

- Ask for more information if you don't understand or have a reason to believe that a religious practice or belief may adversely interact with a policy or practice (*Abercrombie*).
- Have strong, up-to-date, job descriptions
- Have a religious accommodation policy that clearly sets out steps employees should take if they are seeking a religious accommodation
- Understand comparator data

Hypothetical A



Hypothetical B

- Your company has instituted a vaccine mandate. Employees must be vaccinated by December 20 unless they are granted a religious or medical accommodation.
- Mary has requested a religious accommodation noting that her religious beliefs foreclose use of drugs that are under an Emergency Use Authorization and that used fetal cells in their development. She believes that life begins at creation and that her higher power has provided her with an adequate immune system.
- How do you respond?

Questions?

Thank you