

HR Bootcamp for Healthcare Employers

Session 1: Handling Requests for Disability and Religious Accommodations

November 9, 2023

Presenter



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Today's Agenda

- Disability and Religious Accommodation Basics
- Recent Supreme Court decision impact on employee religious accommodation requests
- Lessons learned from the CMS and New York State healthcare vaccine mandates

Disability Accommodation Basics

- Employers are required to provide reasonable accommodations to qualified individuals with disabilities who are employees or are applicants for employment, unless to do so would cause undue hardship

Disability Accommodation Basics

- Categories of reasonable accommodations:
 - Modifications or adjustments to ensure equal opportunity to the application process;
 - Modifications or adjustments to enable a qualified individual with a disability to perform the essential functions of their position; and
 - Modifications or adjustments to enable an employee with a disability to enjoy equal benefits and privileges of employment

Disability Accommodation Basics

- Examples of reasonable accommodations:
 - Making existing facilities accessible
 - Job restructuring
 - Part-time or modified work schedules
 - Acquiring or modifying equipment
 - Changing tests, training materials, or policies
 - Providing qualified readers or interpreters
 - Reassignment to a vacant position

Disability Accommodation Basics

- What is not a reasonable accommodation?
 - Elimination of an essential function
 - Lowering of a production standard
 - Providing personal use items needed to accomplish daily activities on and off the job
 - Excusing a violation of a uniformly applied work rule

Disability Accommodation Basics

- Who is entitled to a reasonable accommodation?
 - Americans With Disabilities Act
 - An individual with a disability is entitled to a reasonable accommodation if he or she is a “qualified individual with a disability” (*i.e.*, meets all prerequisites for performing the essential functions of a job except those which cannot be met because of a disability)
 - New York State Human Rights Law
 - A disabled employee is entitled to a reasonable accommodation if he or she has the requisite job qualifications and can, with or without reasonable accommodation, attain “reasonable performance.”

Disability Accommodation Basics

- When is an employer obligated to provide a reasonable accommodation?
 - Employee or applicant notifies the employer that an accommodation is needed
 - This request:
 - Does not have to be in writing;
 - May be made in “plain English” and need not mention the ADA or use the phrase “reasonable accommodation”
 - May be made by a family member, friend, health professional or other representative

Disability Accommodation Basics

- When is an employer obligated to provide a reasonable accommodation (cont'd)?
 - Employer has an obligation to begin the interactive process without being asked if the employer:
 - Knows the employee has a disability
 - Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and
 - Knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation

Disability Accommodation Basics

- What to do once an accommodation is requested
 - Analyze the job at issue and determine its purpose and essential functions
 - Consult with the disabled individual to understand the precise job-related limitations and how those limitations could be overcome with an accommodation
 - In consultation with the disabled individual - Identify potential accommodations and assess how effective each would be in enabling the individual to perform the essential functions

Disability Accommodation Basics

- What to do once an accommodation is requested (cont'd)
 - Request documentation concerning the nature and extent of the disability and the need for an accommodation
 - Employer cannot ask for documentation when: (1) both the disability and need for accommodation are obvious, or (2) the individual has already provided the employer with sufficient information
 - Employer cannot ask for documentation that is unrelated to determining the existence of a disability or need for an accommodation
 - If an individual's disability or need for an accommodation is not obvious, and s/he refuses to provide reasonable documentation requested by the employer, then s/he is not entitled to a reasonable accommodation

Disability Accommodation Basics

- How to demonstrate good faith during the interactive process
 - Meeting with the employee
 - Requesting information about the individual's condition and limitations
 - Identifying what the employee is requesting
 - Showing some sign of having considered the employee's request
 - Offering and discussing available alternatives when the request is too burdensome

Disability Accommodation Basics

- How to demonstrate good faith during the interactive process
 - Employers should consider utilizing an Accommodation Request Form
 - Memorialize conversations regarding the accommodation
 - Summarizing process in a memo to your file

Disability Accommodation Basics

- What is an undue hardship?
 - Employer does not need to make a reasonable accommodation if it imposes an undue hardship on the operation of its business
 - An undue hardship is an action that requires “significant difficulty or expense”
 - Undue Hardship includes any accommodation that is unduly costly, expensive, substantial, disruptive, or would fundamentally alter the nature of the operation of the business

Disability Accommodation Basics

- What is an undue hardship? (cont'd)
 - Factors to be considered:
 - The nature and cost of the accommodation;
 - The overall financial resources of the facility making the accommodation; the number of persons employed at the facility; the effect on expenses and resources of the facility
 - The 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
 - The impact of the accommodation on the operation of the facility, including the impact on other employees

Disability Accommodation Basics

- What is an undue hardship? (cont'd)
 - Factors to be considered:
 - The terms of a collective bargaining agreement
 - **Employers cannot claim undue hardship simply because a proposed accommodation violates a CBA. Employers should determine if they could provide an accommodation without violating the CBA. If no such accommodation exists, the ADA requires the employer and union to negotiate in good faith over a possible variance to the CBA so that the employer can provide a reasonable accommodation
 - **Circumventing a collectively bargained seniority system typically constitutes an undue hardship

Disability Accommodation Basics

- Hypothetical:
 - Sue, a respiratory therapist in a hospital, is occasionally mandated to work overtime to cover staffing shortages. One day, Sue comes to HR and says that she has anxiety, and her doctor is telling her that she can no longer work overtime. How should HR handle Sue's request?

Religious Accommodation Basics

- Employers are required to reasonably accommodate an employee whose sincerely held religious belief, practice or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship

Religious Accommodation Basics

- What is a sincerely held religious belief?
 - A belief that is religious
 - There must be some basis for the belief embedded in the employee's religion
 - Does not have to be a traditional religion, but typically involves some moral or ethical belief system that concerns “ultimate ideas” about life, purpose and death
 - Does not necessarily have to be a tenet of a particular religion, so long as the belief stems from something in the employee's religion
 - e.g., Someone who is Catholic may have a religious objection to vaccination, even though the Pope and other leaders have endorsed it

Religious Accommodation Basics

- What is a sincerely held religious belief?
 - A belief that is religious
 - Social, political or economic views are not religious beliefs
 - Personal preferences are not religious belief
 - e.g., I am exercising my God-given free will not to be vaccinated

Religious Accommodation Basics

- What is a sincerely held religious belief?
 - A belief that is sincerely held
 - Employer can request additional supporting information if the employer is aware of facts that provide an objective basis for questioning the sincerity of a belief, such as:
 - Where the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons
 - Where the employee has acted in a manner inconsistent with the professed belief
 - Where the timing of the request renders it suspect
 - Where the employer otherwise has reason to believe the accommodation is not sought for religious reasons

Religious Accommodation Basics

- Common methods of religious accommodation
 - Schedule changes, voluntary substitutes and shift swaps
 - Changing an employee's job tasks or providing a lateral transfer
 - Making an exception to dress and grooming rules
 - Use of work facility for religious observance
 - Accommodating prayer and other forms of religious expression

Religious Accommodation Basics

- Religious accommodation process
 - Employee notification that they have a religious belief that contradicts with some employer requirement
 - Employer engages in a dialogue with employee regarding the belief and how it conflicts
 - Religious Accommodation Request Form
 - Consideration of possible accommodations
 - Provide accommodation unless to do so would cause an undue hardship

Religious Accommodation Basics

- What is an undue hardship?
 - 1977 - June 29, 2023: undue hardship was more than a *de minimis* cost
 - Much less stringent standard than “undue hardship” for disability accommodations
 - *Groff v. DeJoy* – June 29, 2023
 - USPS employee whose religious beliefs prevented him from working on Sundays
 - USPS denied the employee’s request, claiming that it would result in an undue hardship based on the inconvenience to other employees and disruption in workflow

Religious Accommodation Basics

- What is an undue hardship?
 - *Groff v. DeJoy* (cont'd)
 - Employee sued and claimed a violation of Title VII based on failure to accommodate
 - Lower courts agreed with USPS, but Supreme Court reversed
 - Supreme Court held that the *de minimis* standard was inappropriate and should no longer be used
 - Instead, to establish undue hardship, employers must “show that the burden of granting an accommodation would result in ***substantial increased costs in relation to the conduct of its particular business.***”

Religious Accommodation Basics

- What is an undue hardship?
 - *Groff v. DeJoy* (cont'd)
 - Court did not provide specific parameters for evaluating substantial increased cost, but gave some guidance
 - Impact on coworkers alone was not sufficient
 - Impact must be on the “conduct of the business”
 - Employers are required to consider accommodations other than what is specifically requested by the individual

Religious Accommodation Basics

- What is an undue hardship? (cont'd)
 - Pre-*Groff* examples of undue hardship
 - Allowing an employee to use no Social Security number or a fake Social Security number
 - Violating a bona fide seniority provision in a CBA
 - Making an exception to a dress code policy that would allow employee to wear clothes inconsistent with applicable safety requirements
 - Allowing an employee to proselytize or impose their religious beliefs in a manner that discriminates against or harasses other employees

Religious Accommodation Basics

- Hypothetical
 - John, a registered nurse at a hospital, is required by his collective bargaining agreement to work every other weekend. One day, John comes to HR and says that he is a devout Christian and that his religion prevents him from working on Sundays. How should HR handle John's request?

COVID-19 Healthcare Vaccine Mandates

- New York State Healthcare Vaccine Mandate
 - Required covered health care employers to ensure their employees were fully vaccinated against COVID-19
 - Limited medical exemptions, no religious exemptions
- CMS Healthcare Vaccine Mandate
 - Required covered health care employers to develop policies to ensure all staff fully vaccinated against COVID-19
 - Both religious and medical exemptions available

COVID-19 Healthcare Vaccine Mandates

- Procedures for Responding to Accommodation Requests
 - Medical Accommodation Requests
 - Documentation of request and medical support for request
 - Documentation of process for reviewing medical basis for request
 - If request qualified, identifying potential accommodations
 - Documentation of outcome of request and communication to employee

COVID-19 Healthcare Vaccine Mandates

- Procedures for Responding to Accommodation Requests
 - Religious Accommodation Requests
 - Documentation of request
 - If objective basis to question sincerity of belief, request documentation
 - Consideration of potential accommodations and documentation of process
 - Documentation of outcome of request and communication to employee

COVID-19 Healthcare Vaccine Mandates

- Examples of Accommodations
 - Exemption
 - Masking
 - Social Distancing
 - Modified Shift
 - Testing
 - Telework
 - Reassignment

COVID-19 Healthcare Vaccine Mandates

- Claims from Employees
 - Improper denial of exemption/accommodation request
 - Failure to adequately engage in the interactive process before denying request
- Majority of cases dismissed
 - Federal courts v. State courts
 - Administrative Agencies (EEOC, Division of Human Rights)

COVID-19 Healthcare Vaccine Mandates

- Lessons Learned:
 - Clear process for receiving and processing requests
 - Documentation of process, communication, and consideration of request and accommodations
 - Consideration of accommodations (even when clearly unavailable)
 - Documentation of outcome