

# ACCOMMODATING SUCCESSFULLY: NAVIGATING THE ADA AND PWFA

By Mariel G. Newhouse, Esq.

## I. OVERVIEW

- A. Overview of the Americans with Disabilities Act interactive process
- B. Common types of requests and accommodations available
- C. How the Pregnant Workers Fairness Act fits into this framework, and where additional assessment is needed

## II. THE INTERACTIVE PROCESS

- A. The ADA requires employers to provide reasonable accommodations to employees with disabilities as long as the accommodations do not cause undue hardship.
- B. Steps in the Interactive Process:
  - 1. Recognize an accommodation request
  - 2. Request additional information, where necessary
  - 3. Engage in a discussion with the employee regarding potential accommodations
  - 4. Complete the process
- C. Recognizing an Accommodation Request:
  - 1. There is no key language.
    - a. You should not wait for an employee to explicitly state “I am requesting a reasonable accommodation.”
    - b. Listen for where an employee indicates they have a problem related to a medical condition.

### i. EXAMPLES FROM EEOC GUIDANCE

- (A) “I’m having trouble getting to work at my scheduled starting time because of medical treatments I’m undergoing.”
- (B) “I need six weeks off to get treatment for a back problem.”

(C) “My wheelchair cannot fit under the desk in my office.”

D. Requesting Additional Information

1. Determine whether additional information is necessary.
  - a. For example, if an employee is seeking an accommodation related to a wheelchair that the employee uses daily, additional documentation may not be necessary.
2. Assess what information you need:
  - a. Has the employee requested a specific accommodation? If not, you may need to engage with the employee to figure out what the employee has in mind for an accommodation.
  - b. If the employee provided medical documentation, did the physician have a copy of the job description? If not, you will likely need to ask the employee to provide a copy of the job description to their medical care provider.
  - c. Only ask for what is absolutely necessary. This typically means asking for the requested accommodation and approximately how long the employee will need the accommodation.

E. Engaging in the Interactive Process

1. If the employee asks for a specific accommodation, and you are able to grant it, then the process may end here.
2. If the employee did not ask for a specific accommodation, you will need to engage with the employee to assess what accommodations will assist the employee. You do not have an obligation to guess what the employee needs (if it is not obvious), but if you are aware that the employee has a disability and has requested some sort of accommodation, you must at least attempt to engage with the employee as to what accommodations can be made.
3. If the employee requested a specific accommodation, but you are unable to grant that specific accommodation, you should suggest an alternative arrangement.

F. Completing the Process

1. Ideally, you are able to find a mutually agreeable accommodation and you implement the accommodation as necessary.
2. In some cases, the requested accommodation will pose an undue hardship or is simply not available for an employee with certain job duties. In these scenarios, you should document the decision as to why an accommodation could not be made. When in doubt, seek legal counsel to ensure you have fully engaged in the interactive process.

### III. COMMON TYPES OF REQUESTS AND ACCOMMODATIONS

#### A. Leave

1. Typical situations in which an employer must offer leave:
  - a. There is no other effective accommodation;
  - b. The employee is not eligible under FMLA, but has a qualifying disability under the ADA;
  - c. The employee has exhausted their FMLA time, but needs additional time off; or
  - d. The employee has exhausted, or is not otherwise entitled to vacation/sick leave and the employee has a qualifying disability under the ADA.
2. What happens if an employee is eligible for leave under an employer's policies other than ADA?
  - a. According to the EEOC, if an employee requests leave due to a disability, but the leave falls within an employer's existing leave policy, the employee should be treated the same as an employee requesting leave for reasons other than disability.
  - b. According to the EEOC, if an employee requests leave that can be addressed by FMLA or workers' compensation program, the employer may provide leave under those programs first.

#### B. Reassignment

1. This type of accommodation is typically offered when an employee can no longer perform the essential functions of their current position with or without an accommodation, and an alternative position is available.
2. This does NOT require the employer to restructure a job for the employee or create a vacant position for an employee.

#### C. Modified Schedule

1. This is typically in the form of adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, or providing additional unpaid leave.
2. Like all accommodations, this must only be granted if it will not pose an undue hardship. If there is a certain position in which time is an essential function (e.g., a teacher may be expected to work during certain hours of the school day), it may cause an undue hardship on the employer to modify the schedule.

D. Telework

1. In a post-COVID era, employers may find it more difficult to claim that telework will pose an undue hardship.
2. If an employee requests to work from home as an accommodation, an employer is not required to accept that accommodation request. However, the employer must engage in the interactive process to see if there is another accommodation available.
3. The employer should review the existing job description to assess whether an essential function of the job must be performed in the office.
  - a. An employer does not have to remove an essential function from a job, but if it is a minor role, the employer may need to re-assign that task so that the employee with the disability can perform the work at home.

IV. HOW THE PWFA FITS INTO THE ADA DISCUSSION

- A. The PWFA provides for reasonable accommodations for qualified individuals who have known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
- B. PWFA and the ADA:
  1. As a preliminary matter, some pregnancy-related conditions under the PWFA may also be covered under the ADA. However, pregnancy itself is not a disability under the ADA.
  2. Just like the ADA, the PWFA requires employers to provide a reasonable accommodation for the known limitation of a qualified individual, unless the accommodation would cause an undue hardship.
- C. Documentation under the PWFA:
  1. Encourages employers to minimize documentation
  2. Self-confirmation – an informal process in which the employee provides the employer with information about their pregnancy
    - a. An employer must accept as sufficient an employee’s self-confirmation when: (1) the pregnancy is obvious; or (2) the employee seeks a “predictable assessment” accommodation.
  3. “Predictable Assessment” – four assessments that will not impose an undue hardship in ‘virtually all cases’
    - a. Allowing an employee to carry or keep water near to enable them to drink;

- b. Permitting an employee to take additional restroom breaks as needed;
  - c. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed;
  - d. Allowing an employee to take breaks to eat and drink as needed.
4. It is NOT reasonable to seek supporting documentation where:
- a. The limitation/adjustment/change is obvious and the employee provides self-confirmation;
    - i. e.g., the employee needs a bigger uniform
  - b. Employer has sufficient information to determine whether the employee has a qualifying limitation and needs an adjustment or change due to the limitation;
    - i. E.g., employer is aware of employee's morning sickness. The employer cannot ask for medical documentation each time the employee is sick due to morning sickness.
  - c. Employee is pregnant and requests a "predictable assessment";
  - d. The reasonable accommodation relates to time and/or place to pump/nurse during work hours and employee provides self-confirmation; or
  - e. The requested accommodation is available to employees without known limitations under the PWFA pursuant to a policy or practice without submitting supporting documentation.
    - i. E.g., employer does not seek medical documentation unless an employee is absent for three or more days; therefore, the employer should not seek documentation from a pregnant employee who is only absent for one day.
5. It IS reasonable to seek documentation to:
- a. Confirm the physical or mental condition;
  - b. Confirm the condition is related to, affected by, or arising out of pregnancy, childbirth or related medical condition; or
  - c. Describe the adjustment/change needed due to the limitation.
6. Definition of "undue hardship"

- a. When an employee can perform all of the essential functions of the job, undue hardship has the same meaning as under the ADA – significant difficulty or expense for the employer’s operation
  - b. If the employee cannot perform all of the essential functions, and the requested accommodation is a temporary suspension of an essential job function, then the employer must consider the ADA definition of undue hardship AND the following relevant factors:
    - i. Length of time the employee/applicant will be unable to perform the essential function(s);
    - ii. Whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise;
    - iii. The nature of the essential function, including its frequency;
    - iv. Whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions;
    - v. Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and
    - vi. Whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.
7. Examples:
- a. One month into her pregnancy, an employee at a paint manufacturing plant is told by her healthcare provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of her job involves regular exposure to these chemicals. The employee explains her limitation to her supervisor and asks that she be allowed to continue to perform her other tasks that do not require exposure to chemicals.
    - i. The employee’s need to avoid exposure to chemicals is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions; she needs an adjustment or change at work due to the limitations; she communicated this with her employer.
    - ii. If modifications that would allow the employee to continue to perform the essential functions of her position (e.g., enclosing chemicals or providing additional protective gear) are not effective or cause an undue hardship, the

employee can still be qualified under the definition that allows for a temporary suspension of the essential function:

- (A) Her inability to perform is temporary;
- (B) She can perform the essential functions in the near future because she is pregnant, and the suspension would be for less than 40 weeks;
- (C) This can be reasonably accommodated by suspending the essential functions and allowing the employee to do the remainder of her job.