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Navigating Professional and Caretaker Roles

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Thriving in the Legal Profession: Tools for Women Attorneys

Akron Bar Association

AGENDA

- **Brief overview of work-life integration challenges for women attorneys**
- **Pregnancy**
  - FMLA
  - ADA
  - Title VII
    - Pregnancy Discrimination Act (PDA)
- **Parental Leave**
  - FMLA
  - Ohio Administrative Code – “reasonable time”
  - ADA
- **Lactation**
  - ACA amendment to FLSA
  - Firm/company practice

Work-Life Integration Challenges for Women Attorneys

What is work-life integration?

- **Work-life integration**
  - Updated from work-life “balance”
  - These days, especially with technology and client/business expectations of immediate answers, attorneys cannot easily leave work behind when they leave the office, and caretaker attorneys cannot leave behind family obligations when they leave their home.
  - “Balancing” is not the issue – it is integrating and prioritizing both aspects of our identities as attorneys and caretakers (children, elderly parents, others) such we can effectively perform both areas of our lives.

What is work-life integration?

- **Examples of work-life integration for (women) attorneys**
  - Expressing breastmilk ("pumping") at work, including at the courthouse during a trial or during a break at a deposition…or driving (alone) down I-71 en route to a meeting
  - Calling into a parent-teacher conference during a break at the courthouse
  - Flexing your day to attend a school event
  - Working from home because of an ill child/elder
    - Attending meetings via conference or video calls
  - Working on your Company laptop during car line…with your work cell phone next to you
  - Taking time off work for fertility treatments, which can be hard to precisely schedule ahead of time
  - Bringing your (older) child to the office because their summer camp ended at 2:30pm and does not offer "after care"

Challenge: when to draw the line and acknowledge that you need special assistance or support?

- **What happens when you just cannot do both?**
  - Medical conditions or needs related to fertility issues, pregnancy, after-childbirth
  - Some issues just will not also pertain to men in your workplace
  - Feelings of having to bring attention to the fact that you're a woman (men do not typically become ill from pregnancy, give birth, or lactate)
  - Myra Cottrill will be speaking about how to go about asking for what you want; I am going to speak about some federal laws in place that you may be able to leverage when facing issues related to being a caretaker while working as a woman attorney.

Title VII

Title VII Basics

- **Title VII**
  - Prohibits most workplace harassment and discrimination, covering all private employers, state and local governments, and educational institutions with 15 or more employees.
    - ORC Section 4112 – 4 or more employees
  - Prohibits discrimination against workers because of race, color, national origin, religion, and sex
  - Prohibits associational discrimination
  - Prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups

Title VII Basics (cont'd)

- **Title VII (cont'd) - Harassment**
  - Prohibits unlawful harassment based on protected characteristics
  - (1) enduring the offensive conduct becomes a condition of continued employment or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
  - Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Title VII Basics (cont'd)

- **Title VII (cont'd) - Harassment**
  - Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.
  - EMPLOYER DEFENSE:
    - Employer can avoid liability if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

EEOC Enforcement Guidance on Pregnancy Discrimination

- **EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues – July 14, 2014**
  - Not a law but rather "guidance"
  - The Guidance relates to Pregnancy Discrimination Act (PDA)(a 1978 amendment to Title VII of the Civil Rights Act of 1964) and Americans with Disabilities Act as it applies to pregnant workers.
  - Amended the EEOC's 1983 Compliance Manual relating to investigation of PDA charges
    - The investigators' manual provides procedures and policies that EEOC investigators must follow when investigating charges filed by employees

Overview of Statutory Protections for Pregnant Workers

- **Pregnancy Discrimination Act – EEOC Guidance – pregnancy:**
  - Fundamental PDA Requirements: (1) an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions; and (2) women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work.
  - PDA prohibits discrimination based on: current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.
  - Can only be intentional pregnancy discrimination if those responsible for taking an adverse action knew the employee was pregnant.
  - Employment decisions based on stereotypes or assumptions violate Title VII.

Overview of Statutory Protections for Pregnant Workers

- **EEOC Enforcement Guidance – pregnancy highlights:**
  - Past pregnancy:
    - Discrimination cannot be based on past pregnancy, childbirth, or related medical conditions.
    - If challenged action was due to employee's caregiving responsibilities, a violation of Title VII can be established where there is evidence that the employee's gender or other protected characteristic motivated the action.
  - Potential or intended pregnancy:
    - Cannot discriminate with regard to job opportunities or benefits because a woman might get pregnant
    - Cannot discriminate because of employee's intention to become pregnant
    - Employment decisions related to infertility treatments implicate Title VII in limited circumstances. Because surgical impregnation is intrinsically linked to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, a woman is penalized for taking time off for such a procedure.

Overview of Statutory Protections for Pregnant Workers

- **EEOC guidance pregnancy highlights (cont'd)**
  - Medical condition related to pregnancy or childbirth
    - Employers must provide same benefits for pregnancy-related medical conditions as for others conditions.
    - Protection for lactating employees
    - Title VII protects women from being fired for having an abortion or contemplating having one; also would prohibit adverse employment actions against an employee for not having an abortion.
      - Does not apply to religious organizations
  - Parental Leave
    - Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.
    - But parental leave must be provided to similarly situated men and women on the same terms. E.g., if employer extends leave to new moms beyond period of recuperation from childbirth, it must provide an equivalent amount of leave to new fathers for same purpose.

Overview of Statutory Protections for Pregnant Workers

- **EEOC pregnancy highlights (cont'd)**
  - Accommodations
    - On June 25, 2015, the EEOC released an updated *Enforcement Guidance* in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc*. in March 2015.
      - When an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it "is more expensive or less convenient" to do so.
      - The Court further held that when an employer's accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification for the policies that the employer offers, a jury can conclude that the employer is intentionally discriminating against pregnant workers.
      - Plaintiff can show this significant burden by presenting evidence that the employer "accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers."

Overview of Statutory Protections for Pregnant Workers

- **EEOC pregnancy highlights (cont'd)**
  - Accommodations (cont'd)
    - EEOC updated its guidance to reflect the Court's decision:
      - Women may be able to prove unlawful pregnancy discrimination if an employer accommodated some workers but refused to accommodate pregnant workers.
      - Even if the employer's policies are not intended to discriminate against pregnant employees, the policies may still violate the PDA if they impose significant burdens on pregnant employees without a sufficiently strong justification.

Overview of Statutory Protections for Pregnant Workers

- **EEOC pregnancy highlights (cont'd)**
  - Accommodations and leave issues originally addressed by EEOC - persons similar in their ability or inability to work:
    - Employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits.
    - Cannot refuse to treat pregnant workers the same as other employees similar in ability or inability to work by relying on policy that makes distinctions based on the source of an employee's limitation.
    - Can treat pregnant employee same as others with respect to other prerequisites for obtaining the benefit that do not relate to the cause of an employee's limitations (e.g., documentation, undue hardship)
    - Individual entitled to an accommodation under ADAAA is appropriate comparator for PDA purposes (e.g., someone with back impairment with 20-pound lifting restriction that lasts several months).

Overview of Statutory Protections for Pregnant Workers

- **Americans with Disabilities Act – EEOC pregnancy guidance**
  - Pregnancy is not itself a disability, but pregnant workers and job applicants are not excluded from ADA protection. The ADAAA made it easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to reasonable accommodations under the ADA.
  - Reasonable accommodation:
    - Pregnant employee may be entitled to reasonable accommodation under ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from interaction of pregnancy with an underlying impairment.
    - Examples of reasonable accommodations that may be necessary include: redistributing marginal functions the employee is unable to perform; altering how an essential or marginal job function is performed; modification of policies; purchasing or modifying equipment and devices; modified work schedules; leave; light duty.

Lactating Women in the Workplace

Why Should Employers Care about the Mothers in their Workplace?

- **Mothers in the labor force (2017)**
  - **Number has been gradually <u>rising</u>**
  - 71.1% with children under 18 years old
  - 75.7% with children 6-17 years old
  - 65.1% with children under 6 years old
  - Children under 3 years old:
    - Married status (opposite-sex marriages): 60.0%
    - Other marital status (never married, widowed, divorced, separated, married spouse absent, same-sex marriage): 67.5%

Data Source: Bureau of Labor Statistics, U.S. Dept. of Labor

Why Should Employers Care about the Mothers in their Workplace?

- **Benefits to employer's bottom line:**
  - Breastmilk keeps employees at work instead of at the pediatrician's office, and that means more productivity and more health care savings
  - Encourages loyalty and good employee morale
  - Higher retention of female employees
    - Mutual of Omaha's lactation support program resulted in a retention rate of 83% of female employees compared to the national average of 59%.
    - A study of multiple companies with lactation support programs found an average retention rate of 94.2%.
  - Needs of the pumping mom at work are (usually) minimal
  - Helps with diversity and inclusion goals

FEDERAL LAW

Affordable Care Act

- Signed into law by President Obama on March 23, 2010, amended the Fair Labor Standards Act (FLSA), and requires **all** employers to provide:
  - reasonable unpaid breaks…
  - to nonexempt employees…
  - each time a lactation employee needs to express breastmilk…
  - for up to one (1) year after the child's birth.
  - a place to pump that is not a bathroom…
  - and that is shielded from view and free from intrusion.
  - lactation breaks that are governed by the same rules as other breaks under the FLSA and/or other employer break policies
- Employers with less than 50 employees are exempt upon a showing that the requirements impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
- All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

FEDERAL LAW

Affordable Care Act, cont'd.

- *What is a "reasonable" break time?*
  - The DOL states that upon consultation with the Department of Health and Human Services, the CDC, and lactation experts, it believes that the actual expression of milk typically takes 15-20 minutes
  - However, it also states that the following factors should also be considered when determining what a "reasonable" break time:
    - (i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;
    - (ii) Whether the employee has to retrieve her pump and other supplies from another location;
    - (iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;
    - (iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);
    - (v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachments;
    - (vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.

FEDERAL LAW

- **Affordable Care Act, cont'd.**
  - ***What if an employer does not have any lactating employees?*** The statute requires employers to provide a space for a nursing employee "each time such employee has need to express the milk." If there is no employee with a need to express breastmilk, then the employer would not have an obligation to provide a space.
  - ***Is there a relationship between lactation breaks and the FMLA (Family and Medical Leave Act)?*** No. The DOL does not believe that breaks to express breast milk can be considered FMLA leave or counted against an employee's FMLA leave entitlement.

FEDERAL LAW

- **EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues – July 14, 2014**
  - Specifically addresses workplace discrimination based on lactating and breastfeeding
    - Can be sex discrimination
    - Expressly states that lactation is a "pregnancy-related medical condition": "Lactation, the postpartum production of milk, is a physiological process triggered by hormones."
    - "[B]ecause only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based."

U.S. STATE LAWS

- **State Laws in the U.S. Governing Nursing Mothers in the Workplace**
  - States can give more rights to lactating employees than what the ACA requires, but not less.
  - Twenty-nine (29) states, the District of Columbia, and Puerto Rico have laws related to breastfeeding in the workplace. OHIO DOES NOT.
    - You can find this and other information at http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx (last updated July 2018)
  - Seventeen (17) states and Puerto Rico exempt breastfeeding mothers from jury duty or allow jury service to be postponed. OHIO DOES NOT.

NOTABLE CASES

- **EEOC v. Houston Funding**
  - EEOC alleged that Dannicia Venters suffered sex discrimination because she asked to pump breastmilk at work
  - Judge Hughes dismissed her lawsuit:
    - "She gave birth on December 11, 2008. After that day, she was no longer pregnant, and her pregnancy-related conditions had ended. Firing someone because of lactation or breast-pumping is not sex discrimination."
  - Appeals court reversed his decision:
    - "An adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not — indeed, could not — suffer."
    - "It is undisputed in this appeal that lactation is a physiological result of being pregnant and bearing a child."

NOTABLE CASES

- **Ames v. Nationwide Insurance**
  - On the Ames returned to work from maternity leave, she asked to pump immediately upon arrival
  - Was denied immediate access because she did not fill out required paperwork under the company's policy, which takes 3 days to process. She claimed she did not know about it.
  - Offered wellness room but had to wait as it was being used
  - While waiting, a supervisor told her no one had done her work when she gone on leave and that she had two weeks to complete it
  - Upset, she sought out another supervisor, who allegedly told her to "go home to be with your babies" and started dictating her resignation letter

NOTABLE CASES

- **Ames v. Nationwide Insurance, cont'd**
  - Ames claimed constructive discharge and a violation of the ACA's nursing mother provision
  - 3- judge appeals court panel denied her claims finding that she was not given access to the lactation room because she had not completed paperwork that was required of all lactating employees wishing to use the lactation room
  - Court also found that the 2 week deadline of completing her work was not unreasonable
  - Both EEOC and ACLU stepped in and asked the appeals court for a full panel reconsideration. This request was denied on June 26, 2014.
  - Cert. denied by SCOTUS, January 2015
  - **Lesson learned**: both parties need to follow company procedures (reminiscent of pre-ACA *Allen v. Totes/Isotoner Corp.* Supreme Court of Ohio case)

NOTABLE CASES

- **DOL investigation of McDonald's**
  - February 2012: fast food worker returned to her job after maternity leave at a McDonald's in Nebraska
  - At her manager's insistence, she obtained a doctor's note stating she needed to express milk for her child.
  - She was still denied access to a private room as required under the ACA.
  - The employee break room had no door or curtain, so she was forced to use the restaurant's public bathroom.
  - The worker filed a complaint with the DOL
  - A manager then prohibited her from pumping milk anywhere in the restaurant, according to the Labor Department investigator's findings

NOTABLE CASES

- **DOL investigation of McDonald's, cont'd**
  - She was forced to clock out and walk 15 minutes each way to a public library whenever she needed to pump milk.
  - Her manager dropped her hours from 20 to 7.25 for at least one week, a schedule change the investigator deemed an "apparent retaliatory action" in response to the worker's complaints.
  - McDonald's agreed to pay back wages to the worker and restore her hours.
  - The company also agreed to set up a portable tent in the break room to provide her with a space for pumping milk out of co-workers' view.
  - The investigator determined that the violations were not intentional, but were instead "due to naivety of the front line manager."

Best Practices for Employers – and you

- Employers should have a compliant lactation or lactation support practice that applies to all lactating employees.
- Employers can have a written, compliant lactation or lactation support policy that applies to all lactating employees.
- Effectively communicate policy to all employees

Best Practices for Employers – and you

- But you should also communicate:
  - Review your firm's/department's/organization's policy, if any, on lactation, and inform your managing attorney that you will be pumping upon returning to work
  - If none, address it with appropriate individuals prior to parental leave or during leave but before returning
- And you should also prepare for smooth work-life integration:
  - Buy a hands-free pumping bra (so you can work while pumping)
  - Buy a good breast pump (your insurance may cover the cost) with All. The. Accessories.
  - Know your rights…and what rights you don't have
  - Have a plan: where will you pump (do you need a lock? A curtain to cover windows?), where will you store your milk, how will your co-workers know you are pumping and not to disturb you?
  - Become comfortable with the idea of letting opposing counsel know that you will need pumping breaks for a long deposition day, letting bailiffs know about your need for a private place to pump during a trial, asking CLE coordinators where you can pump during a break or lunch.
  - ASK OTHER WOMEN ATTORNEYS WHO HAVE BTDT!!!

Family and Medical Leave Act

FMLA

- **Applies only to employers with 50 or more employees**
- **Allows up to 12 weeks leave per year for:**
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee's spouse, child, or parent who has a serious health condition;
  - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
  - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness who is the spouse, son, daughter, parent, or next of kin to the employee (military caregiver leave).

FMLA (cont'd)

- **Allows for "intermittent leave" – leave that is taken in smaller increments**
  - If you have a pregnancy-related illness (ex. hyperemesis gravidarum), and your partner is eligible for FMLA coverage, have them fill out the paperwork for intermittent leave! Your OB should be familiar with what verbiage to use.
- **Under the ADA, absences in excess of allotted sick time or non-FMLA leaves of absences can be considered reasonable accommodation.**
- **FMLA absences can run concurrently with workers' compensation leaves of absence**
- **Fertility treatments are likely not protected by the FMLA unless the employee establishes absence of more than 3 consecutive days PLUS continuing treatment**

Americans with Disabilities Act

Americans With Disabilities Act (ADA)

It is unlawful to discriminate against a job applicant or employee because of an actual or even perceived physical or mental disability or medical condition. Employers must provide reasonable accommodations to the individual with a physical or mental disability or medical condition.

Applies to employers with **15 or more employees** (same as Title VII). Ohio – 4 or more under ORC 4112.

DEFINITION OF DISABILITY

- An impairment that substantially limits one or more major life activities
- A record of a substantially limiting impairment
- Being regarded as having a substantially limiting impairment

What changed with the ADAAA

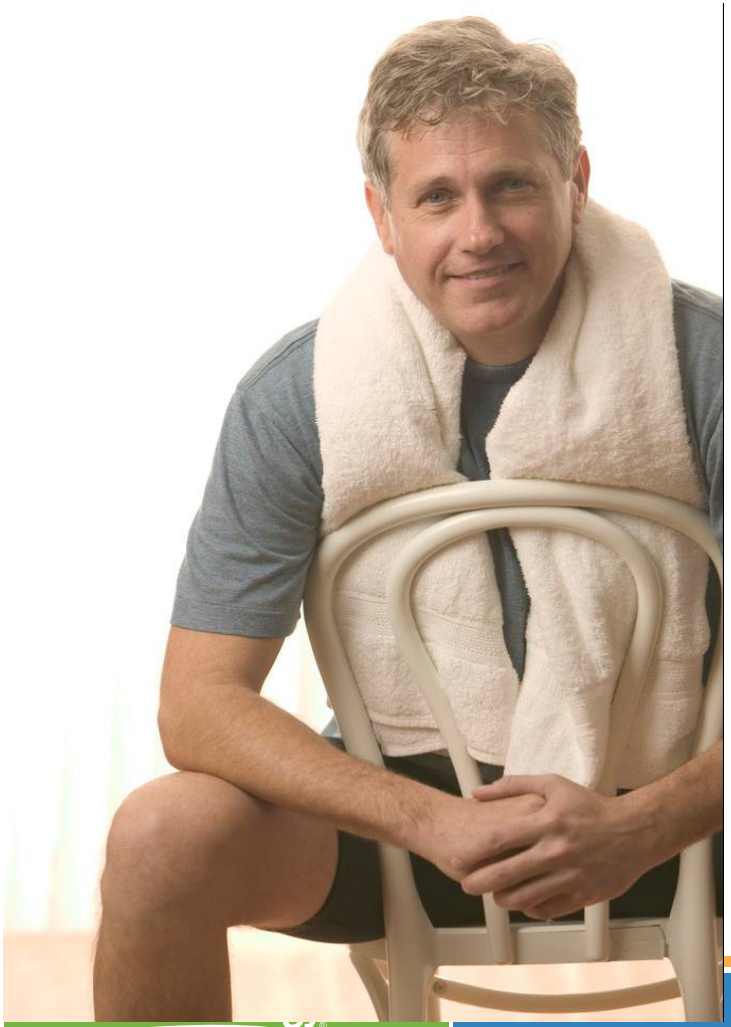
Americans with Disabilities Act Amendments Act

- Effective as of January 1, 2009; final regulations were published on March 11, 2011
- ADAAA did not change definition of "disability"
- Rather, it broadened what is considered a "major life activity" and broadened meaning of "substantially limits"

Major Life Activities under the ADAAA

- **In general but not limited to:**
  - Caring for oneself
  - Performing manual tasks
  - Seeing
  - Hearing
  - Eating
  - Sleeping
  - Walking
  - Standing
  - Lifting
  - Bending
  - Speaking
  - Breathing
  - Learning
  - Reading
  - Concentrating
  - Thinking
  - Communicating
  - Working

Interpreting the Term "Disability"



- Interpretation of substantially limits
- One major life activity
- Episodic or in remission

Expanded definition of “major life activity” under ADAAA

- “Major bodily functions” now specifically recognized as major life activities
- **The operation** of a major bodily function, including functions of the:
  - Immune system
  - Special sense organs and skin
  - Normal cell growth
  - Digestive
  - Genitourinary (cont’d on next slide)

“Major bodily functions” cont’d.

- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive functions
- Operation of a major bodily function includes the operation of an individual organ within a body system
- Nonexhaustive list

ADAAA Broadens Meaning of "Regarded As" Disabled

- Adverse action "because of an actual or perceived physical or mental impairment"
- Regardless of whether the impairment limits or is perceived to limit a major life activity
- But employer need not offer accommodation to an impairment that is not a disability

ESSENTIAL FUNCTIONS

- **Evidence relevant in determining whether a function is essential includes:**
  - Employer's judgment
  - Terms of a written position description
  - Terms of a collective bargaining agreement
  - Experience of current or past employees
  - Amount of time spent performing the function
  - Consequences of not performing the function

What is a Reasonable Accommodation?

- **One that allows performance of the essential job functions**
  - of the current job; or
  - a vacant, equivalent position
- **One that provides an equal opportunity to succeed in the position**
- **A modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity**

What is “Reasonable?”

- Need only provide effective accommodation (one that enables person to perform essential functions)
- No requirement to provide every accommodation requested or the “best” accommodation
- Need not change essential job functions
- Requested accommodation that results in undue hardship is not reasonable
- May seek medical information when disability is not obvious or when not sure if disability requires requested accommodation

This May Include:

- Providing special equipment
- Part-time or modified work schedule
- Restructuring job duties
- Reassigning non-essential tasks
- Exchanging assignments with other employees
- Redesigning procedures
- Making existing facilities accessible
- Changing tests, training materials, or policies
- Reassignment to a vacant position
- For as long as employee is disabled and requires accommodation

Handling Requests For Leave/Time Off From Work – ADA-FMLA overlap

- The employer should make sure that it complies with the FMLA in dealing with requests for leave to which the employee is entitled under the FMLA.
- Employers have no obligation to provide non-FMLA leaves of indefinite duration. But indefinite leave is different from leave requests that give an approximate date of return or give a time period (such as a range of time) for return.
- Employers may have an obligation to provide intermittent FMLA leave.
- In dealing with the situation where an employee is unable to work and would need an extended non-FMLA leave of absence from work, the employer is not required to always grant that request. Courts have recognized that "an employee who does not come to work cannot perform the essential functions of his job" and that "[t]he ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." It appears, however, that courts will expect that the trigger will not be pulled too quickly; i.e., that it is the "[i]nability to work for a *multi-month period* [that] removes a person from the class protected by the ADA.

Questions & Answers

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