

Guardians of the Qualified: Clarifying Disability & Religious Accommodations

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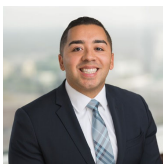


Speaker Introductions



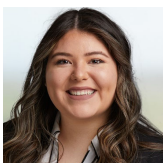
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Clarifying Disability & Religious Accommodations

1. “Ain’t No Mountain High Enough” – The Basics
2. “Go All the Way” – Medical Accommodations
3. “Spirit in the Sky” – Religious Accommodations



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“Ain’t No Mountain High Enough”

The Basics





Common Exemptions

- An employer *may* require COVID-19 vaccines for employees and exclude from the workplace those with COVID-19 or COVID-19 symptoms
- But... federal and state laws require employers to reasonably accommodate employees' requests to be exempt from the COVID-19 vaccine
- Two common exemptions from the COVID-19 vaccine and return-to-office mandates are/will be:
 1. a medical reason that rises to the level of a "disability" under federal, state, or local laws; or
 2. a "sincerely held religious belief," practice, or observance

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Federal Laws May Provide Employees with Protections

- The Americans with Disabilities Act (ADA)
- The Rehabilitation Act of 1973 (sometimes referred to as "Section 504" or the "Rehab Act")
- Title VII of the Civil Rights Act of 1964 (Title VII)
- The Age Discrimination in Employment Act (ADEA)
- The Genetic Information Nondiscrimination Act (GINA)
- Other federal, state, or local laws

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“Go All the Way”

Medical Accommodations



What does the ADA require?



- Employers must provide “reasonable accommodations” to “qualified employees with disabilities” to allow them to perform the “essential functions” of their positions, unless doing so would cause “undue hardship” to the employer
- Once the employer is aware (or should be aware) that an employee may have a disability that impairs their ability to perform their job, the employer must initiate the dialogue referred to as the “interactive process” to determine whether any reasonable accommodations are available



What is a disability?

- To be protected from discrimination, a person must have a disability as defined by the law and be qualified for the job
- A person can show that they have a disability in one of three ways:
 1. a physical or mental condition that substantially limits a major life activity
 2. a history of a disability
 3. subject to an adverse employment action and are believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if they do not have such an impairment)

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What does it mean to be a “qualified” employee under the ADA?

- An employee must have the “requisite skill, experience, education, and other job-related requirements” of the position and be able to perform the “essential functions” of the position—with or without reasonable accommodations
- Employees experiencing disabilities are entitled to reasonable accommodations, if needed, to perform their essential job functions
- If an individual is unable to perform an essential job function—even with a reasonable accommodation—by definition the person is not “qualified” for the position

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What is the “essential function” of a position?

- An “essential function” is a fundamental job duty of the position, not an employee’s marginal duties
- An employer may consider a function essential because:
 - it is the reason that the position exists
 - only a limited number of employees can perform that function
 - it is a specialized function and the employee was hired because of their expertise or ability to perform that function
- Essential functions may or may not include those specified in the written job description, or the duties that occupy a majority of the employee’s time

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What is the interactive process?

- As soon as the employer learns that an individual may need an accommodation, an employer must engage in an “interactive process” to determine the appropriate accommodation
- As part of the interactive process, the employer:
 - should document **in writing** its awareness of the possible need for, or receipt of the request for, accommodation
 - may request medical documentation of the employee’s condition as it relates to job duties
 - must confer with the individual, and at times, their healthcare provider, to discuss the person’s job-related limitations and potential accommodations, including the employee’s preferred accommodation(s)

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When does an accommodation pose an undue hardship under the ADA?

- Under the ADA, undue hardship means that the accommodation would cause “significant difficulty or expense” for the employer
- THINK: Too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business
- BUT REMEMBER: An employer may not refuse to provide an accommodation just because it involves some cost or other burden
- At the same time, an employer does not have to provide the **exact** accommodation the employee or job applicant wants
- If more than one accommodation works effectively, the employer may choose which one to provide

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What are NOT “reasonable accommodations” under the ADA?

- Some accommodations are, by their nature, not reasonable and never required
- Examples include:
 - eliminating essential job functions
 - creating a new job
 - transferring another employee against their will
 - jeopardizing employee safety or health
 - lowering work performance standards

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What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic?

- During the COVID-19 pandemic, it may be significantly more difficult to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking
- It may be significantly more difficult
 - to provide employees with temporary assignments
 - to remove marginal functions
 - to readily hire temporary workers for specialized positions
- If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems

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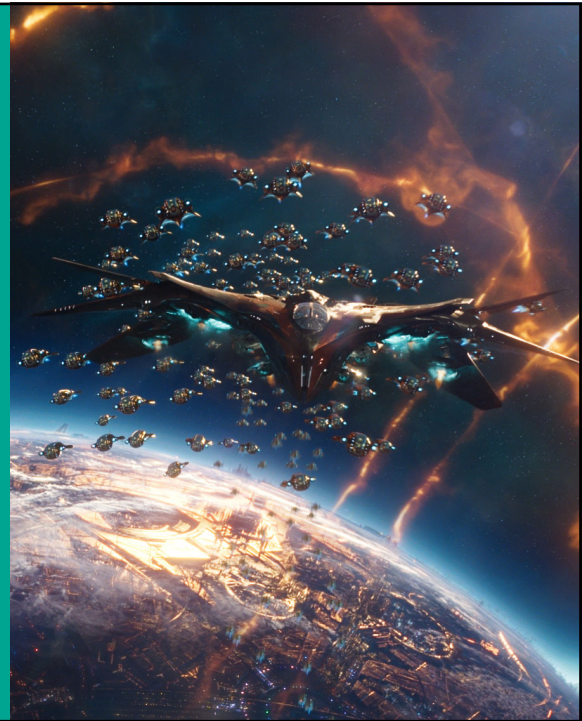
What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic?

- **Before the COVID-19 pandemic**, a lot of accommodations did not pose a **significant** expense when considered against an employer's overall budget and resources
- **During the COVID-19 pandemic**, the following factors are relevant:
 - the sudden loss of some or all of an employer's income stream
 - the amount of discretionary funds available at this time—when considering other expenses
 - whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted)
- But an employer can reject any accommodation that costs money
- An employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by the pandemic
 - For example, even under current circumstances, there may be many no-cost or very low-cost accommodations

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“Spirit in the Sky”

Religious Accommodations



May employees be exempted from a COVID-19 vaccination requirement because of their sincerely held religious beliefs?



- **Yes.** An employee may be entitled to a reasonable accommodation when the vaccination conflicts with their religious beliefs
- Ground Rules:
 - The burden is on the employee to request an accommodation for their religious belief, observance, or practice
 - The employer should assume the request is based on a sincerely held religious belief, absent an objective basis for questioning the sincerity of the belief
 - If the employer has an objective basis to question the employee's sincerity, the employer may make a limited factual inquiry and request supporting information
 - The employer may ask the employee how the vaccination requirement conflicts with their religious belief
 - The employer need not provide an accommodation that creates an undue hardship

May employees be exempted from a COVID-19 vaccination requirement because of their sincerely held religious beliefs? (cont.)



- Helpful pointers:
 - The employer may select from multiple reasonable accommodations
 - The employer may impose other reasonable health and safety restrictions
 - The employer may reasonably grant some requests and deny others
 - Each accommodation request must be considered based upon the circumstances at hand
 - Employers should confer with the requesting employee to find an effective and agreeable solution

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What is a religious belief?



- A theistic or non-theistic belief system that addresses fundamental questions of existence and morality
- Personal preferences and political, social, and cultural philosophies do not qualify as religious beliefs
- A religion need not be traditional, old, logical, or formally organized
- The individual believer's belief, observance, and practice need not be officially recognized by any particular organized religion

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When is a religious belief sincerely held?

- Sincerity is subjective, so in most circumstances an employer should presume the employee's belief is sincerely held
- Factors that may undermine an employee's credibility include:
 1. actions markedly inconsistent with a professed belief
 2. an attractive accommodation likely sought for secular reasons
 3. suspect timing of the request
 4. other reason to believe the accommodation is not sought for religious reasons

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When must a religious belief, observance or practice be accommodated?

- A religious accommodation is a modification to the work or the work environment which allows the employee to comply with their religious beliefs
- Reasonable accommodation should be granted for terms and conditions of employment that conflict with an employee's religious beliefs, observances, or practices unless the accommodation creates an "undue hardship"

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When does an accommodation pose an “undue hardship”?

- Under Title VII, an accommodation would pose an undue hardship if it would cause more than *de minimis* cost on the operation of the employer’s business or operations
- The following factors are relevant to determine whether an accommodation presents an undue hardship:
 - the type of workplace
 - the nature of the employee’s duties
 - the identifiable cost of the accommodation in relation to the size and operating costs of the employer
 - the number of employees who will in fact need a particular accommodation
 - increased risk of harm to the employee or others
 - increased security risk
 - increased burden on other employees
 - conflict with union seniority rules
- To prove undue hardship, the employer will need to demonstrate how much cost, burden, or disruption a proposed accommodation would involve

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Examples of requests for accommodation of a “religious” belief or practice

- A Catholic employee requests a schedule change so they can attend church services on Good Friday
- A Muslim employee requests an exception to the dress and grooming code allowing her to wear her headscarf
- An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony
- An employee who identifies as Christian but is not affiliated with a particular denomination requests accommodation of their religious belief that working on the Sabbath is prohibited

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Does an employer have to provide an accommodation that would violate a seniority system or collective bargaining agreement?



- **No.** A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA)

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What if co-workers complain about an employee being granted an accommodation?



- Religious accommodations that infringe on a co-workers' ability to perform their duties or subject co-workers to a hostile work environment will generally constitute undue hardship
- General disgruntlement, resentment, or jealousy of co-workers is not an undue hardship
- Undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work
- Coworker harassment or retaliation is prohibited

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What are common methods of religious accommodation in the workplace?

- Scheduling 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 the work facility for a religious observance
- Accommodations relating to payment of union dues or agency fees
- Accommodating prayer, proselytizing, and others forms of religious expression

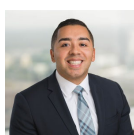
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Thank You!



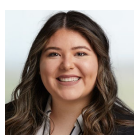
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