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2018 EMPLOYMENT LAW CONFERENCE
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**A COMPREHENSIVE PERSPECTIVE ON
WORKPLACE ACCOMMODATION**
SESSION 1

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AGENDA

- The Interactive Process
- Reasonable accommodation related to the benefits and privileges of employment
- Reasonable accommodation related to job performance
- Conclusion



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INTERACTIVE PROCESS

- Employer's obligation to engage in the interactive process begins when a request for a reasonable accommodation is made to:
 - Employee's supervisor;
 - A manager or supervisor;
 - An EEO officer; or
 - An office designated by the employer to handle the reasonable accommodation process.

RECOGNIZING A REQUEST FOR REASONABLE ACCOMMODATION

- Employee tells supervisor, *"I'm having trouble getting to work at my scheduled start time because I'm undergoing medical treatment"*
- Employee tells supervisor, *"I need six weeks off to get treatment for a back problem"*
- New employee, who uses a wheelchair, informs the employer that the wheelchair cannot fit under the employee's desk
- An employee tells his supervisor that he would like a new chair because the current chair is uncomfortable

THE INTERACTIVE PROCESS

When engaging in the interactive process:

- Assess the nature of the condition;
- Determine the extent to which the condition imposes limitations on ability to perform essential functions of the job;
- Identify possible accommodations that may or may not overcome those limitations;
- Analyze the reasonableness of the accommodation; and
- Implement the most appropriate accommodation, if any.

WHAT ARE ACCOMMODATIONS?

- *Reasonable* accommodations entail the removal of workplace barriers to allow an individual with a disability to perform the essential functions of a job.
- Categories of accommodations include:
 - Changes to the job application process
 - Modifications to the work environment
 - Changes that allow an individual with a disability to enjoy equal benefits and privileges of employment



WHAT IS “REASONABLE”?

Choices

Accommodations must be *reasonable*:

- Effective – enables employee to perform the job
- Removes a *workplace* barrier (not a personal one)
- Seems reasonable on its face
- Need not violate seniority provisions of a CBA
- Need not be the employee's *choice* of accommodation:
 - Employer may select *any* effective accommodation
 - Give consideration to employee's preferred accommodation

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WHAT IS NOT “REASONABLE”?

Accommodation does not require employers to:

- Create a position for the disabled employee
- Hire another employee to perform the job functions
- Waive the requirement that the employee perform all essential functions of the job
- Lower production standards
- Promote the employee
- Bump another employee out of a position
- Provide personal use amenities (e.g., refrigerator)

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BENEFITS & PRIVILEGES OF EMPLOYMENT

Provide reasonable accommodations so that disabled employees can enjoy the **benefits and privileges of employment** equal to those enjoyed by non-disabled employees:

- Training
- Services
- Parties or other social functions



BENEFITS & PRIVILEGES OF EMPLOYMENT- EXAMPLE ONE

Example:

- Employer provides optional CPR training
- A deaf employee wishes to take the training and requests a sign language interpreter
 - *Does the employer have to provide the interpreter?*
 - *What if the training is provided by a vendor?*
 - *What if the training is unrelated to any job duties?*

BENEFITS & PRIVILEGES OF EMPLOYMENT – EXAMPLE TWO

Example:

- Blind employee asks for adaptive equipment for the computer that provides access to the employer's intranet and allows the employee to communicate via email
- Access to intranet and email is not necessary to perform essential functions of the position
 - *Does the employer have to grant the request?*
 - *Are there effective substitutes?*
 - *Written or telephone messages?*
 - *Inter-office mail?*

BENEFITS & PRIVILEGES OF EMPLOYMENT – EXAMPLE THREE

Example:

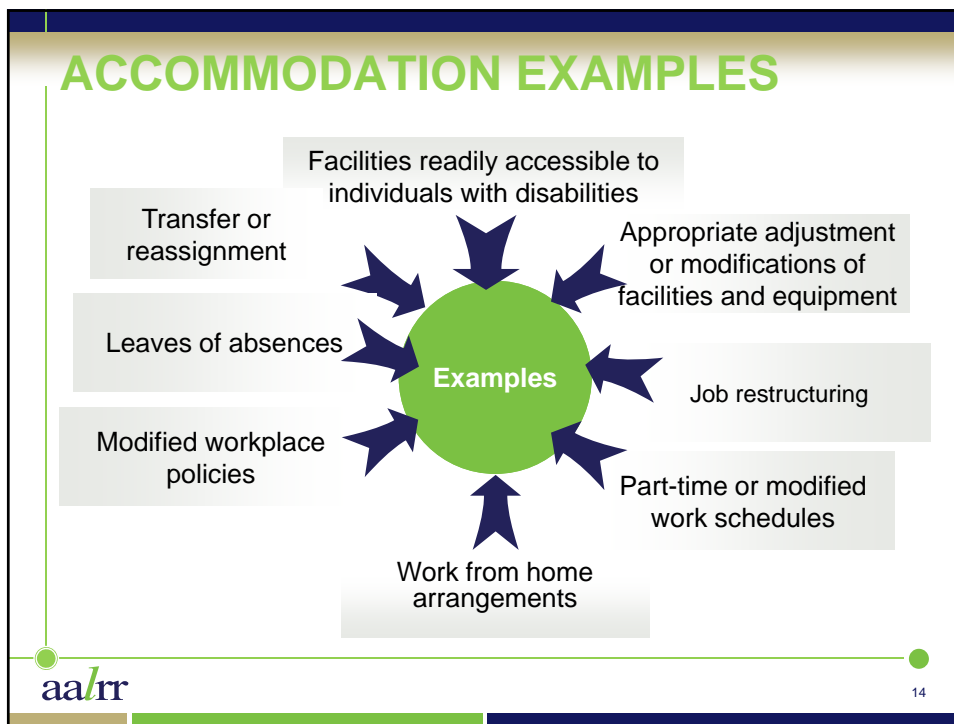
- A supervisor frequently schedules team meetings on a day's notice, often notifying staff in the afternoon that a meeting will be held the following morning.
- An employee with a disability has missed several meetings because they have conflicted with previously scheduled physical therapy sessions.
- The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions.

BENEFITS & PRIVILEGES OF EMPLOYMENT – EXAMPLE THREE

- *Is the employee's request reasonable?*
- *Can the employer ask the employee to provide information about the legitimacy of her need for therapy in order to assess the reasonableness of the accommodation request?*
- *Does the employer have to provide the requested accommodation?*

Accommodations Related to Job Performance





HYPOTHETICALS

Related to Job Performance

What If?

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ACCOMMODATING JOB PERFORMANCE – EXAMPLE ONE

Example:

- A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability that makes it difficult for the employee to adjust to alterations in his daily routine. The employee asks to be assigned to one floor.
 - *What should the employer do?*
 - *Does it matter whether the request is temporary or permanent?*
 - *What other accommodations could the employer consider?*
 - *What happens if the employee objects to the alternative accommodations?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE TWO

Example:

- A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult.
- The employee can perform essential functions of the position, but is unable to perform the marginal function of sweeping the steps located throughout the building. Another crew member's assignment does not involve sweeping steps, but rather cleaning a small kitchen in the employee lounge.
- The employee with a disability asks the employer to reassign his duties of sweeping the steps and assign him the duties of cleaning the kitchen.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE TWO

- *What are the employer's obligations?*
- *What happens if the other crew member objects to the reassignment of duties?*
- *What happens if employee morale drops because employees do not believe it is fair that the crew member does not have to sweep stairs?*
- *Does the evaluation of this scenario change if the sweeping of stairs is an essential function?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE THREE

Example:

- A crane operator, due to his disability, requests an adjustment to his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening.
- The crane operator works with three other employees who cannot perform their jobs without the crane operator.
- If the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00 a.m., or have the workers do nothing for that hour.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE THREE

- *What should the employer do?*
- *Does the evaluation change if the supervisor regularly allows employees to arrive late and make up time after work?*
- *What should the employer do if it determines it cannot reasonably accommodate the employee's request for a later start time?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE FOUR

Example:

- A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments.
- It is through habit, not by necessity, that they have often worked together first thing in the morning.
- The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE FOUR

- *Is the employee's request reasonable?*
- *What happens if the other employees object to the change?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE FIVE

Example:

- An employee with major depression is often late for work because of side effects of medication, which make the employee extremely groggy in the morning.
- His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 a.m. on any given day.
- His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE FIVE

Example, continued:

- The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment.
- The individual then explains that he was late because of a disability and needs to work a later schedule.
 - *What should the employer do?*
 - *What happens if the employer changes the start time to 10:00 a.m. as a reasonable accommodation, and then the employee begins showing up at 10:30, 11:00 or 11:30 a.m. on any given day?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SIX

Example:

- An in-house attorney for a Company requests to work from home for 10 weeks while she was on bed rest from pregnancy complications.
- The Company wants to deny the request because the Company's strict policy requires employees to be in the office from 8:30 a.m. to 5:00 p.m.
- The Company does not have a telecommuting policy and the attorney's job description states that physical attendance at the office is an essential function of the position.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SIX

- *What should the Company do?*
- *Does this change if the attorney previously worked remotely for two weeks several years ago?*
- *What impact does it have if the job description has not been updated for over 10 years?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SEVEN

Example:

- Alan is a Custodial Supervisor at Bow & Arrow, a large discount store company. He oversees custodians assigned to three store locations. Alan's work shift coincides with that of the day custodians, beginning at 7:00 a.m. and ending at 3:30 p.m.
- If a day custodian is absent, Alan is responsible for opening the parking lot gates and the front entrance of the store, shutting off the alarms, and unlocking the doors to employee-only areas like the storage room and the employee break room.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SEVEN

- Alan’s work is generally satisfactory, but every so often he is late arriving to work. Bow & Arrow’s management is not certain how often he is late because no one monitors his arrivals and he does not keep a timecard. Three times over the past year, Alan has been late opening a store when a day custodian was absent.
- The Director of Maintenance, Alan’s supervisor, rates Alan’s performance “Needs Improvement” on his year-end evaluation in 2017, citing frequent tardiness.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SEVEN

- Alan explains that he has developed “dry eyes” and needs to take eye drops in the morning to allow him to see properly. After using the eye drops upon waking in the morning, he has to wait 60 minutes before driving. The next day, Alan brings a note from his doctor confirming his dry eye condition, his use of eye drops, and the need for 60 minutes to elapse between using the eye drops and driving to work.
- Alan requests that his start time be adjusted to 8:00 a.m. so he can use his eye drops and arrive at work on time. Alan does not request any other accommodation.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE SEVEN

- *Is Alan requesting a reasonable accommodation? Why or why not?*
- *If Bow & Arrow concludes the requested accommodation is not reasonable, what should Bow & Arrow do?*

ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

Example:

- The National Children’s Museum (NCM) hired Martina Anderson to work at its Los Angeles location as a Program Assistant on November 1, 2017. NCM employs 75 staff members at the Los Angeles location and on any given day has 400 visitors aged 5 to 12.
- The next day, Martina announced to her supervisor, the NCM Director, that she suffers from a neurological disorder that causes cognitive problems and allergic reactions. Martina said her illness is triggered by exposure to certain chemicals and fragrances.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

- Martina began job training at NCM's Orange County Headquarters on November 7, 2017. The supervisors at the Orange County Headquarters were notified of the need for special accommodations. Employees and attendees were advised to limit or eliminate the use of chemicals and fragrances.
- During the training period, NCM worked with the Orange County Headquarters to improve air quality and eliminate scented products. Martina was given special seating, special restroom access, and additional breaks. She was permitted to use a fan and an air purifier.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

- Because Martina could not complete a full day in training, her days were shortened and her training period was extended by one week. She requested and received training materials she could review at home. Martina did well in the training, and began work on November 28, 2017. NCM gave her five days of paid leave while it prepared NCM for her arrival.
- NCM implemented a voluntary scent-free policy, and trained employees about chemical allergies and avoiding chemical use in the workplace.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

- NCM also created a scent-free restroom in the NCM administrative office and purchased a portable air purifier that Martina could move from room to room in the museum as she performed her duties.
- Nevertheless, Martina continued having allergic reactions.
- On January 30, 2018, at her doctor's insistence, and after eight weeks on the job, Martina took a 30-day medical leave of absence, from which she did not return.

ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

- While Martina is on leave, NCM communicates with her lawyer and her doctor in an effort to see whether additional accommodations are possible. Martina's doctor refuses to release her to work unless NCM improves the air quality in all of NCM's rooms, institutes a mandatory fragrance-free policy, provides Martina with an isolated work space, or allows her to work from home.
- Martina's lawyer sends NCM a letter threatening to sue for "failure to accommodate" if these demands are not granted.

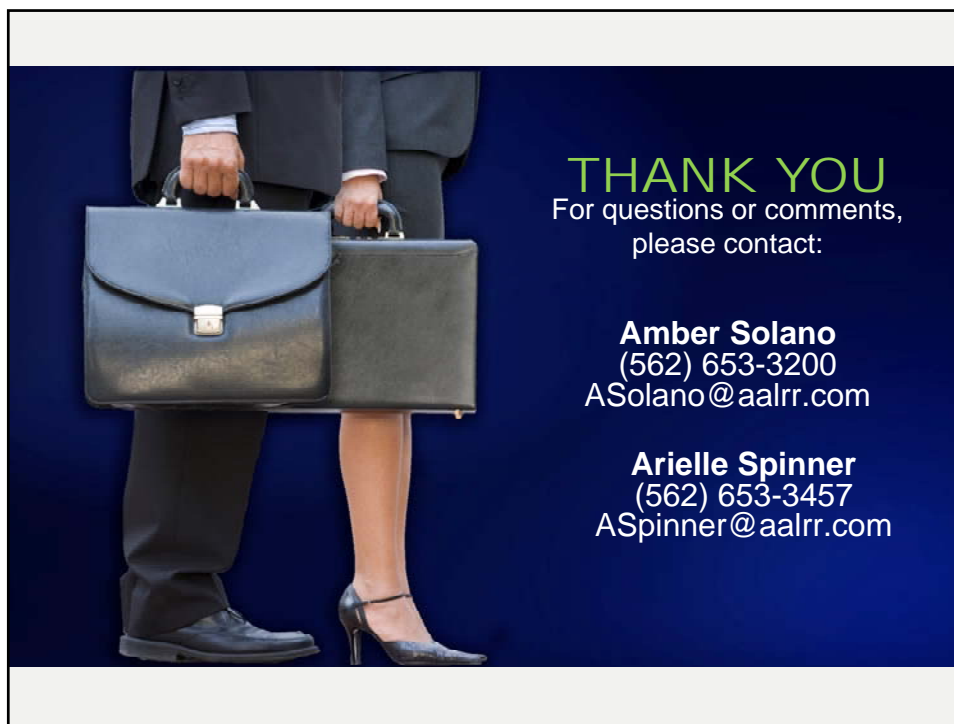
ACCOMMODATING JOB PERFORMANCE – EXAMPLE EIGHT

- *Did NCM reasonably accommodate Martina’s limitations?*
- *Are the additional accommodations Martina is asking for reasonable?*
- *If NCM cannot accommodate Martina, what happens next?*

CONCLUSION

- The duty to accommodate is *ongoing*.
- Follow up with the employee to ensure the accommodations are effective.
- Follow up with the supervisor to identify concerns.
- Hold additional interactive process meetings, if necessary.
- **Document! Document! Document!**
- Enforce rules and policies equally.





THANK YOU
For questions or comments,
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