

WHAT IS A REASONABLE ACCOMMODATION?

Presented by:

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Service Dogs and Emotional Support Animals

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Title I and Title III of the Americans with Disabilities Act (ADA)



▶ Title I covers employment

- Employers must provide reasonable accommodations to qualified applicants or employees.
- Service dogs and Emotion Support Animals (ESA's) may qualify as reasonable accommodations under Title I of the ADA.

Title III of the Americans with Disabilities Act (ADA) and Other Statutes

- ▶ Title III covers public accommodations
 - Title III directs businesses to make “reasonable modifications” to their usual ways of doing things when serving people with disabilities.
 - Service animals are defined under Title III as a reasonable modification
 - ESA’s are not defined.
- ▶ The Fair Housing Act
 - Emotional support animals (to be defined) do not qualify as service animals under the ADA, but they may be part of a reasonable accommodation under the FHA.
- ▶ If receiving federal funds, there are additional standards under Section 504 of the Rehabilitation Act.

What is a Service Dog?

- ▶ Specially trained to perform a function or job for an owner that has a physical, intellectual, or emotional disability.
 - Examples: guide dog, hearing or signal dog, seizure response dog.
- ▶ Notably, there is no specific required training program.
- ▶ Only very limited inquiry allowed.

What is an Emotional Support Animal (ESA)?

- ▶ An emotional support animal serves as a companion for the owner.
- ▶ An ESA doesn't need to be trained in any way, but must behave.
- ▶ The differences in how much proof you can require depends on the circumstances.

Does it Matter if it's an ESA or Service Animal? Under ADA not Much but Some

- ▶ The questions that we are legally allowed to ask the applicant differ depending on whether the request is for an ESA or a true service animal.
 - Service Animals: Many only question if the disability is not immediately apparent:
 - One-time certification – only 2 questions.
 - Is the animal required because of a disability?
 - What work or task has the animal been trained to perform?
 - Emotional Support Animals:
 - Can request documentation that might include a description of how the animal would help the employee in performing job tasks and explain how dog is trained to behave in the workplace.
 - Many require annual recertification by the applicant's qualified healthcare professional or other qualified provider for ESAs.
 - Law may change – stay tuned.

Dogs at Work

- ▶ Employers need a standard policy that they can follow consistently.
- ▶ If you are going to require documentation, you need to require the documentation of everyone.
- ▶ Some employers are requiring vet forms or certifications that state the animal is under control.

Recommendations for When an Employee Brings a Dog to Work

- ▶ Readily apparent disability
 - If you observe or have reason to believe that an applicant has a readily apparent disability (*i.e.*, blind or requires use of wheelchair) then you must grant the requested accommodation outright (provided its reasonable and not an undue burden or excessive cost on the employer).
 - In such circumstances, you can still require the owner to submit a confirmation of liability form (discussed later).

- ▶ Not readily apparent, then you can ask for more information:
 - Is the animal required because of a disability?
 - What work or task has the animal been trained to perform?
 - the employer can also request documentation to establish the existence of a disability and how the animal helps the individual perform his or her job.

Specific Documentation Recommended

- ▶ Reasonable accommodation/modification request form completed by employee
 - Include details and reason.
- ▶ Confirmation of Liability and Animal ID form
 - If any animal poses a threat to the health and safety of residents or the property itself, then the animal may be denied/prohibited.
 - Employee assumes liability for any damage that the animal creates.
 - Employee affirms that the animal has been vaccinated and has not presented any behavior concerns.
- ▶ Health provider certification
 - Establishes the existence of a disability and the need for an accommodation/modification.
 - We have examples of these that we can help you with, but remember, these forms cannot be required by law if an employee provides this information by another means, but they can be recommended/suggested.

Control Measures - Leash

- ▶ The ADA requires the animal to be under the control of the handler. This can occur using a harness, leash, or other tether. However, in cases where either the handler is unable to hold a tether because of a disability or its use would interfere with the service animal's safe, effective performance of work or tasks, the service animal must be under the handler's control by some other means, such as voice control.

Control Measures - Other Employees' Concerns

- ▶ Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. If employees or customers are afraid of service animals, a solution may be to allow enough space for that person to avoid getting close to the service animal.
 - Most allergies to animals are caused by direct contact with the animal. A separated space might be adequate to avoid allergic reactions.
 - If a person is at risk of a significant allergic reaction to an animal, it is the responsibility of the business or government entity to find a way to accommodate both the individual using the service animal and the individual with the allergy.
- ▶ If another employee asks why a dog is allowed, do not disclose the accommodated employee's disability. May suggest that if they have a disability they can apply for an accommodation.

Control Measures - Consider an Agreement

Having the employee sign a liability and acknowledgment that the animal must be under control is really helpful here. If the animal poses any threat or acts in a way that threatens the safety of anyone at work, the animal can and should be removed permanently. Both service and emotional support animals may be excluded from the workplace if they pose an undue hardship in the workplace or misbehave. Must document. But like any other accommodation, must try.

Medical Marijuana and Reasonable Accommodations

Presented by:
Marc Sloane



Medical Marijuana – Overview

- ▶ 33 States and D.C. have legalized medical marijuana
- ▶ Almost 1/2 of those states provide explicit employment protections
- ▶ 11 States and D.C. have legalized recreational marijuana
- ▶ Big industry
 - In 2019, Colorado's marijuana sales (recreational and medical) totaled more than \$1.5 Billion.
 - California (recreational and medical) reported \$163.5 million in tax revenue from the cannabis industry during third quarter of 2019.
 - During FY 2019, Maryland's medical marijuana industry generated more than \$10 million in tax revenue.
- ▶ According 2019 Pew Research poll, 2/3 of Americans favor legalization

Conflict Between State and Federal Law

- ▶ Marijuana still considered a schedule 1 substance under CSA.
- ▶ Under ADA, the term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when employer acts on the basis of such use.
- ▶ Contrary rulings determining whether state laws are preempted under CSA, and whether accommodation required under state law.

Hypothetical

A marketing firm offers an entry level position based in Maryland to an applicant, pending the results of a drug test. Before taking the drug test, the applicant informs the firm that she is authorized to use medical marijuana for Crohn's Disease. The applicant assures the firm that she only uses marijuana in the evenings (after work), and will not possess marijuana or be under the influence at work. The applicant takes the drug test, and tests positive for marijuana. The firm has a zero tolerance policy.

What should the firm do?

- A. Rescind the job offer, as Marijuana is a Schedule 1 controlled substance under the Controlled Substances Act, so the firm cannot be required to accommodate its use.
- B. Engage in an interactive process with the employee to determine whether there is an alternative medication/accommodation that will be as effective in treating the employee's symptoms. If no such alternative exists, rescind the job offer.
- C. Overlook the positive test result.
- D. Engage in an interactive process with the employee to determine whether there is an alternative medication/accommodation that will be as effective in treating the employee's symptoms. If no such alternate accommodation exists, make an exception to the drug policy as a reasonable accommodation.

Duty to Accommodate Under State Law

- ▶ *Barbuto v. Advantage Sales & Mktg.* (Mass. 2017): decided under state anti-discrimination law, and medical marijuana statute providing that qualifying patient shall not be “denied any right or privilege.”
 - Noted that one would not ordinarily expect an employer to interfere with an employee taking a medication to alleviate a medical condition.
 - If the employer had a drug policy prohibiting the use of such medication, “the employer would have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of its policy.”
 - A number of employee-friendly rulings since then including NJ, CT, RI, DE and AZ.

Maryland's Statute

- ▶ MD statute also protects a qualifying patient from being “denied any right or privilege” for use/possession of medical cannabis.
- ▶ According to MD Medical Cannabis Commission, “Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).”
- ▶ **BUT . . .**

Maryland's Statute

- ▶ The Maryland Commission on Civil Rights (MCCR) is prepared to handle complaints by citizens who believe an employer refused to make a reasonable accommodation for their disability according to general counsel Glendora Hughes.

“I think our position is if someone comes and raises that they’re being discriminated against because of their disability, we would take that complaint and look into the facts,” she said. “We would analyze it just like we would any other disability case.”

— *The Daily Record*, December 3, 2019

Exceptions

- ▶ MD statute does not protect:
 - “Undertaking any task under the influence of marijuana or cannabis, when doing so would constitute negligence or professional malpractice.”
 - “Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or boat while under the influence of marijuana or cannabis.”
- ▶ Need not tolerate possession, use or being under influence at work.

Establishing Impairment

- ▶ How does employer establish impairment?
 - Most common testing methods (blood, saliva, hair, urine) can result in positive reading weeks after last use.
 - Varies depending on body fat, amount and frequency of usage, and metabolism.
- ▶ No consensus on impairment window or threshold.
- ▶ California company has claimed to develop a breathalyzer that detects marijuana usage within 3-4 hours after smoking.

Establishing Impairment

- ▶ Slurred speech
- ▶ Glassy eyes
- ▶ Blood shot eyes
- ▶ Slow motor skills
- ▶ Impaired cognitive function
- ▶ Careless in operating safety equipment

Exemption for Federal Contractors?

- ▶ Drug-Free Workplace Act (DFWA) requires "good faith effort."
- ▶ *Noffsinger v. SSC Niantic Operating Co.* (D. Ct. 2018): "DFWA does not prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law."
- ▶ Fed contractors may not be excused from tolerating off-duty use.

Medical Marijuana and Safety Sensitive Positions

- ▶ Federal agencies (including DOT and FAA) establish drug testing requirements for employees in safety sensitive positions.
- ▶ Employees are disqualified from performing safety sensitive functions if discovered to have marijuana in their system.
- ▶ Medical marijuana will not be a valid explanation for positive drug test.

Takeaways

- ▶ Evaluate drug-free workplace and drug testing policies.
- ▶ Consider whether company can tolerate off-duty use of medical marijuana for an employee with a disability.
- ▶ Employees authorized to use medical marijuana likely have a disability that requires accommodation.
- ▶ Employers should consider interactive process and duty to accommodate under MFEPA and the Maryland medical marijuana statute.
- ▶ No surprises!

Religious Accommodation

Presented by:
Kraig Long



Religious Discrimination

Treating a person unfavorably because of the person's beliefs. Protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have **sincerely held religious, ethical or moral beliefs.**

Religious Accommodation

- ▶ Must reasonably accommodate an employee's **sincerely held** religious beliefs and practices, unless doing so would cause more than a **minimal burden** on the operations of the employer's business.
 - Sincerely Held – Includes “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Need not be endorsed by traditional religious group.
 - Minimal Burden – Lower bar than ADA standard. Undue burden is “more than de minimis” cost.

Hypothetical

A national retailer hires an employee who is a Seventh Day Adventist to work as an Assistant Manager at one of its stores. After accepting the offer, the employee informs his employer that he observes the Sabbath, and will be unable to work on Saturdays. The employer determines that accommodating the employee's request would lead to a lack of management coverage on Saturdays, which could lead to a loss in customer service and sales.

What should you do?

- A. Rescind the job offer because accommodating this employee will cause more than a minimum burden to your business and operations
- B. Rescind the job offer, and assist the employee in locating and applying for other jobs in the Company that do not require Saturday work.
- C. Hire the employee and reassign another employee to cover the shifts on Saturdays.
- D. None of the above.

Yes or No

The employer rescinds the job offer, and offers the employee assistance in locating and applying for other jobs that do not require Saturday work. Employee indicates that he should not have to re-apply for other positions.

Must the employer continue to explore other accommodations?

Examples of Religious Accommodations

- ▶ Making an exception to a dress policy so a Muslim employee can wear a hijab
- ▶ Changing the schedule so a Catholic employee can attend church services on Good Friday
- ▶ Excusing an employee who is an atheist from religious-based ceremonies or events at work
- ▶ Allowing an employee whose religious beliefs forbid working on the Sabbath to swap shifts with another employee

Emerging Issues in Employment Law

Presented by:
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Sexual Orientation and Gender Identity/Expression

- ▶ Title VII prohibits discrimination based on an individual's race, color, national origin, religion and sex.
- ▶ Sexual orientation and gender identity/expression are not specifically identified in Title VII as protected classes and therefore most courts have ruled that those claims are not covered under federal law.

Discrimination Based on Sex

Discrimination or harassment against an employee because the employee does not conform to gender-based expectations, preferences, or stereotypes.

- ▶ Intentionally failing to use the employee's preferred name and gender pronoun
- ▶ Firing an employee because he is planning or has made a gender transition.
- ▶ Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- ▶ Firing a male employee for dating another male employee but not firing a female employee who dates a male employee

The Supreme Court will decide three cases that should establish whether Title VII prohibits discrimination based on sexual orientation or gender identity and expression.

Time Off To Transition

While living and presenting as a man, David has worked as a manager for 15 years. David informs you that she intends to transition from male to female and will represent herself and dress as a woman while at work, and that she would like to be referred to as Dana. Dana also mentions that she will be having gender reassignment surgery in three months and will need time off. Dana has exhausted all of her PTO .

How Should This Be Handled?

- A. Inform Dana that because this is cosmetic surgery, she is not entitled to leave.
- B. Provide Dana leave as a reasonable accommodation.
- C. Tell Dana to apply for short term disability.
- D. It depends.

Transitioning in the Workplace – Legal Obligations

MAYBE

FMLA

- ▶ May not apply to cosmetic or plastic surgery
- ▶ However, if a HCP concludes that surgery is required, *e.g.* to alleviate depression, as well as inpatient care or continuing treatment, FMLA may apply

MAYBE

ADA

- ▶ Specifically excludes gender identity disorders as covered disabilities
- ▶ **Possible exception:**
 - “Gender dysphoria” could be a disability under the ADA

Americans with Disabilities Act of 1990 – 42 U.S. Code § 12211

The term “disability” shall not include—

- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, **gender identity disorders** not resulting from physical impairments, or other sexual behavior disorders;
- (2) compulsive gambling, kleptomania, or pyromania; or
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.

Prohibited in
California
New York
New Jersey
Montgomery County

MD, VA, WV, DE, PA*

What Does the Law Protect?

- ▶ CA and NY CROWN Act amended the definition of “race” in the state anti-discrimination law to include “traits historically associated with race,” including “protective hairstyles” such as “braids, locks, and twists.”
- ▶ Maryland’s Proposed Bill (SB 531) would similarly amend definition of race to include:
 - “traits historically associated with race, including hair texture, afro hairstyles, and protective hairstyles.”
 - “protective hairstyle” = “a hairstyle designed to protect the ends of the hair by decreasing tangling, shedding, and breakage, including braids, locks, and twists.”

Prohibited Practices

According to the NY law, employers:

- May not enact grooming or appearance policies that ban or require alteration of such hairstyles.
- May not enforce facially neutral grooming policies in a discriminatory fashion.
- May not harass, impose unfair conditions, or otherwise discriminate against employees based on aspects of their appearance associated with their race.
- May not ban, limit or otherwise restrict natural hair or hairstyles associated with Black communities to promote a certain corporate image, because of customer preference, or under the guise of speculative health or safety concerns.
- Where there are legitimate health or safety concerns, consider alternatives for addressing the concerns that do not ban or restrict such hairstyles.

Personal Appearance Bias

Prohibited in
Washington, D.C.
Prince George's County
Howard County

Watch out for ...

- ▶ Policies or practices that mandate conformity with cultural norms about what is professional, appropriate or neat.
- ▶ Policies or practices regarding length or look of employees' hair or beards.
- ▶ Policies or practices that prohibit certain hairstyles, styles of dress.
- ▶ Disciplinary action based on, or documentation or comments about, an employee's hair, grooming, personal appearance.

Political Affiliation/Opinion Protection

- ▶ No federal law protecting employees of private companies from discrimination on the basis of political affiliation.
- ▶ D.C. prohibits discriminating against any individual on the basis of **political affiliation**.
- ▶ Prince George's County and Howard County protect employees from discrimination on the basis of **political opinion**.
- ▶ Similar protections in NY, WV, CA, CO, MN, SC, and several localities.

Political Affiliation

Political Affiliation – defined by the D.C. legislature as “the state of belonging to or endorsing any political party.”

- Cannot satisfy the statute's definition of “political affiliation” by asserting discrimination for “political reasons” or “politics generally.”
- Political parties interpreted narrowly to include “only those groups that nominate candidates for recognized public elections.”
- *Blodgett v. University Club* (D.C. 2007): Political affiliation did not include membership in right-wing group that did not nominate candidates.
- *McCaskill v. Gallaudet Univ.* (D. D.C. 2014): Did not apply to claim of discrimination for having signed a petition to ban same-sex marriage.

Political Opinion

Political Opinion – defined by the Prince George’s legislature as “the opinions of persons relating to government, or the conduct of government; or related to political parties authorized to participate in primary elections in the State”

- Broader than D.C.’s definition of “political affiliation.”
- Same definition in Howard County, but adds opinions regarding “candidates for election” or “elected office-holders.”

AI in Recruiting and Hiring

- ▶ **Saves time by automating high-volume tasks**
 - Screen applications and résumés to vet unqualified applicants and also to create a short list of qualified applicants
- ▶ **Improves quality of hire through standardized job matching**
 - Automated initial interviews with preset questions for candidates and with question progression based on the candidates' responses
- ▶ **Reduces downtime between candidate and recruiters**
 - Chatbots can be set up to answer applicant questions before they've even submitted their application

AI and Algorithmic Bias

- ▶ 2018 LinkedIn Report – 67% of recruiters and hiring managers surveyed indicate that AI is helping save time.
- ▶ Amazon – abandoned experimental AI used to review resumes after discovering bias for male applicants.
- ▶ HireVue FTC Complaint
 - Eye movement tracking can discriminate on basis of “neurological differences”
 - Darker applicants more likely be misclassified, and emotions analyzed differently depending on race
 - Technology also used to identify sexual orientation

Legislative Response

- ▶ **Illinois Artificial Intelligence Video Interview Act** – requires prior notice and information sheet explaining how AI is used.
- ▶ **Proposed New York City Bill** – would require that AI tools be audited for bias prior to sale and on a yearly basis; also requires that notice be provided to applicants within 30 days of use.

TRICKY, STICKY LEAVE ISSUES

Presented by:

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Laws We Will Discuss

- ▶ Family Medical Leave Act (FMLA)
- ▶ Americans with Disabilities Act (ADA)
- ▶ State leave laws
 - Paid sick leave
 - Paid family leave

Third Party Administrators (TPA)

Kim works for Dash, Inc. as a retail sales associate. One day after work, Kim is taking a selfie and falls, breaking her leg. With assistance from Dash's HR Manager, Kris, Kim applies for and receives approval for 12 weeks of FMLA from Dash's TPA. After 11 weeks, Kris reached out to Kim about returning to work. Kim told Kris that she needs more leave, but she already provided all her medical information to the TPA.

What should Kris do?

- A. Kris must contact the TPA because the Company cannot require Kim to submit paperwork twice.
- B. Kris must wait for the TPA to make their decision about Kim's request for extended leave and abide by that decision. She cannot contact either the TPA or the employee.
- C. Kris may require that Kim provide supporting documentation to her for any need for additional leave or other accommodations.
- D. None of the above.

Third Party Administrators

- ▶ Utilizing a TPA does not:
 - Eliminate the obligation of the employee to communicate with the employer.
 - Eliminate the employer's right to request documentation from the employee.
 - Shield the employer from liability for failure to abide by leave laws.

HIPAA

Dash, Inc. requires FMLA leave to be supported by a medical certification. Kris contacts the TPA, asking for a copy of Kim's medical certification. The TPA, citing HIPAA, refuses to provide it without written authorization from Kim. Is the TPA right about HIPAA?

Is the TPA right about HIPAA?

- A. No, HIPAA does not apply to medical certifications required by FMLA.
- B. Yes, a TPA is acting as a business associate of Kim's healthcare provider and is therefore subject to HIPAA
- C. No, medical information provided by Kim is not protected by HIPAA.
- D. None of the above.

Benefits During Leave

Before going on FMLA leave, Kim contacts Kris and asks about what happens to her healthcare coverage during leave. Which of the following policies is legal?

Which Policy Is Legal?

- A. Kim can choose between cancelling or continuing coverage.
- B. Kim can be required to continue coverage, but she must be allowed to stop paying premiums.
- C. Both A and B.
- D. None of the above.

Paying for Coverage

Kim continues healthcare coverage during FMLA leave. How can she pay her portion of the premiums?

Paying for Coverage

- A. Kim can prepay for coverage for the entire period of FMLA leave.
- B. Kim can pay for coverage by pay period.
- C. Kim can pay for coverage for the entire period of FMLA leave when she returns.
- D. All of the above.

Categorical Policies

Kim provides documentation to Kris saying she needs leave for 7 more months. Kris approves the leave, but tells Kim that the Company will terminate her during this leave because they have a uniform policy that states if an employee is out on leave for 6 months then the employee will be terminated.

Did Kris do anything wrong?

- A. Yes, she should not have told Kim that the Company would terminate her during the leave because it would interfere with Kim's right to the leave.
- B. Yes, the Company's policy to terminate after 6 months may violate the ADA.
- C. No, Kris was just being upfront about the reality of Kim's situation.
- D. No, because seven months of additional leave after FMLA is per se unreasonable.

Healthcare Coverage After FMLA

Kim asks Kris what will happen to her healthcare coverage once her FMLA leave expires. What should Kris tell her?

FMLA & COBRA

An employee must be offered COBRA...

- if a triggering event (there are 7) occurs; **AND**
- the triggering event causes a loss of health coverage.

Leaves of absence

- FMLA leave is **NOT** a triggering event.
- Non-FMLA leave **IS** a triggering event.

FMLA & COBRA

Non-FMLA Leave: Employer's choices

- COBRA begins at the end of FMLA leave; **OR**
- COBRA begins after the employee is no longer eligible for coverage under the health plan

Not having a policy is a bad policy!

- Disputes if employee does not return
- Potential discrimination
- Deadlines for COBRA notices

FMLA for Cosmetic Procedures

While home recovering from her fall, Kim meets and then marries Kanye, and convinces him to come work at Dash! Everything is going great, but they have one huge issue. Kanye feels insecure that Kim is slightly taller than him when she is wearing heels. Kanye decides to have cutting edge elective surgery that will make him taller. This cosmetic surgery requires Kanye to stay two nights in the hospital.

Can Kanye use FMLA for his medical treatment?

- A. No, FMLA does not cover cosmetic surgeries.
- B. Maybe, it depends on if there is a medical justification for his surgery.
- C. Yes, because it requires inpatient care.

FMLA for Cosmetic Procedures

- ▶ The federal regulations state, “Conditions for which cosmetic treatments are administered are not ‘serious health conditions’ unless inpatient hospital care is required or unless complications develop.”
- ▶ Since Kayne needs inpatient care for this surgery, then this surgery would qualify as a “serious health condition”

Paid Parental Leave

Now that Kanye feels happy and tall, Kim and Kanye decide to have kids. Kim hires a surrogate because she heard that having a baby might be painful. She knows that when her sister, Kourtney, had her baby, she received 12 weeks of paid leave from Dash, Inc. But now, Dash, Inc. is telling her that since she is not actually birthing the baby, she will only receive one month. Human Resources tells Kanye that he also will get 1 month of paid leave.

Is Dash, Inc.'s policy discriminatory?

- A. Yes, it doesn't matter if she birthed the baby.
- B. No, if the policy is labeled as "parental leave" and given as time to bond with the child.
- C. No, companies don't have to give more than 5 days of paid leave anyway.
- D. Yes, because Kim and Kourtney are treated differently under the policy.

Parental Leave

- ▶ “Maternity,” “pregnancy,” or “childbirth” leave should be covered as part of a short-term disability policy or a medical leave policy and limited to the period of a medical inability to work preceding or following childbirth.
- ▶ Leave for bonding should be offered to all parents regardless of gender.
- ▶ Leave for adoptive parents should be the same.
- ▶ Remember, Kim is still entitled to the full 12 weeks of FMLA, but only 1 month of paid parental leave .
- ▶ What about variable leave depending on parenting responsibilities (*i.e.*, primary vs. secondary caregiver)?

Paid Family Leave

Kanye is transferred to the DC office. His baby is due in August 2020. He tells Kris he intends to take 1 month of paid bonding leave under Dash's policy and 8 weeks under DC's paid family leave program. Can he do this?

Can he do this?

- A. Yes
- B. No
- C. It depends

Paid Family Leave

- ▶ Paid family leave benefits are funded by payroll tax.
- ▶ Benefit determinations and payments are issued to eligible individuals directly from the state government.
- ▶ Employers can require by policy that an employee use PTO during paid leave benefits.

Paid Sick Leave

Dash, Inc. hires Rob at the end of June. Usually, Dash frontloads 5 days of paid time off on January 1st each year to each employee. Since Rob is starting halfway through the year, they give him one-half of the PTO allotment, or 2.5 days of PTO. Rob is a salaried, full-time employee.

Has Dash, Inc. complied with Maryland law?

A. Yes

B. No

Paid Sick Leave

- ▶ If an employee starts mid-year, that employee should be awarded sick leave in proportion to the days the employee will accrue for the remainder of the year
- ▶ But, you can still make an employee wait 106 days before using any PTO.

Using PTO to Comply with Paid Sick Leave Requirements



Dash, Inc. uses a general PTO policy. Employees are given 5 days of paid leave to use for vacation, sick or personal leave. Kim used all 5 of these days during January for her annual family vacation. In July, Kim comes down with a stomach bug and requests to use Maryland Sick and Safe leave.

What must Kris do?

- A. Kim hasn't taken any sick leave, so Kris must provide her the full 5 days of paid sick leave.
- B. Kim must be allowed to take the day off, but it can be unpaid.
- C. Kris does not need to let Kim take the day off.
- D. None of the above.

Overall Takeaways

1. Review your policies

- Remember – not having a policy is the worst policy

2. Common sense ≠ the law

- “Tricky situations”

3. Seek help!

A DAY IN THE LIFE OF AN HR DIRECTOR

Presented by:

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Coronavirus in the Workplace – Help!

Rhonda Stopcallingme in HR gets a call from Sally Supervisor at one of the offices for an industrial manufacturing company. Sally reports that Connie is recently back from her 2-week honeymoon in Italy. Connie has been coughing and seems sluggish.

What should the company do?

- A. Nothing. Assume that the CDC did what it was supposed to do once she's back in the country; and even if we wanted to we couldn't do anything further.
- B. Ask her to work from home indefinitely.
- C. Ask her to take sick leave until she is free of symptoms for 24 hours without the use of medication and has seen a doctor. Provide the necessary additional paid or unpaid leave to cover the absences.
- D. Ask her to take sick leave until the 14-day incubation period has elapsed and dock her pay to account for the leave since she used up all of her PTO on her honeymoon.

What About Harassment?

After the employee is symptom free and returns to work, in light of the news about the impending public health crisis, colleagues are keeping their distance and spray Lysol when she walks by. The employee comes to Rhonda's office complaining that other employees are overtly using hand sanitizer and keeping their distance in an unusual way. The employee reported overhearing other employees say, "Corona Connie" should be wearing a mask.

Does HR need to address co-worker harassment or discrimination?

- A. No. It's cold and flu season after all – all of this behavior is normal! Consider making her wear a mask to work until people in the news stop using the word “pandemic.”
- B. No. This behavior is based on a legitimate health concern and not on a protected classification.
- C. Yes. Counsel the employee that the workplace is free from harassment and treat her concern as a legitimate harassment complaint. At the same time, remind all employees that if they are sick, they should stay home, and make sure there are plenty of hand sanitizer stations available.
- D. Yes. Encourage the employee to get tested so you can tell everyone she's safe.

Recommendations in Light of Current Risks

- ▶ Encourage sick employees to stay home until fever free for 24 hours.
- ▶ Take care to comply with confidentiality requirements under the ADA.
- ▶ Consider whether you are set up for employees to work remotely.
- ▶ Plan for increased absences - consider the impact if schools were closed for an extended period of time.
- ▶ Review sick leave policies to determine whether you will pay for additional leave or provide leave without pay to sick employees who have exhausted leave.

Recommendations in Light of Current Risks (*cont.*)

- ▶ Confirm sick leave policies are flexible when employees must care for sick family members.
- ▶ Review/add emergency closing policy.
- ▶ Circulate a letter advising that the company will comply with CDC recommendations, but plans for continued operations unless and until required to close.
- ▶ Make sure workplace is routinely cleaned and make available soap/tissues/hand sanitizer.
- ▶ Consider travel needs.

Romancing the Subordinate

Rhonda discovers that Missy Manager is dating Danny Direct Report. No one is married and no one complains, but the company has a non-fraternization policy prohibiting relationships between a supervisor and their subordinate. Rhonda calls Missy in to discuss, and Missy says they are in love and want to keep working and maintain the relationship, and are willing to take whatever steps are necessary to do so. Danny says the same thing. While Rhonda works to figure it out, a major new contract comes in from a Fortune 100 company that everyone wants to work on. Missy would normally work on the contract but thinks it would be showing favoritism to include Danny so she gives it to someone else. Any issues?

Warrants, Subpoenas and the Government – Oh My!

Rhonda gets a panicked call from Randy the receptionist saying that there is an FBI agent in the lobby. The FBI agent has shown Randy his badge and credentials and has requested a copy of an employee's personnel file. He is also asking questions about the employee's role and background.

What should Rhonda do?

- A. Tell Randy to comply and cooperate fully – after all the employing company has done nothing wrong and working with the Government demonstrates compliance.
- B. Instruct Randy not to speak to the officers, but that you will bring the file in question to them for review.
- C. Call the employee and instruct them to speak with the agent and address any open questions. They will be in the best position to answer the questions fully and honestly.
- D. Request that the agent provide proper documentation for the request, such as a subpoena.

Best Practices for FBI Requests

- ▶ Cooperation ≠ compliance.
- ▶ Need more than a badge to mandate production.
- ▶ Must have uniform application of response to law enforcement.
- ▶ Subpoena or other legally enforceable document required.
- ▶ Search Warrants can compel immediate production.

Nasty Non-Competes

Rhonda learns that the company has just hired a new manager that the CEO has been courting for a long time and is very excited about. On her first day of work she discloses to Rhonda that she is subject to a 1-year non-compete restricting her from working for a list of the prior employer's competitors, including the company. Any issues?

H-1B Blunders

Rhonda received a request from an employee for telework. The employee is in H-1B status and the company just obtained an approval for his status extension until 2023. The employee explains that he recently purchased a new house in Pennsylvania that is 150 miles away and it would be impossible for him to commute daily. The company's telework policy is very flexible, and similar requests from U.S. citizen employees have been routinely approved.

Should Rhonda approve the request?

- A. Sure no problem, the employee may start telework immediately – we're flexible.
- B. No, because it is OK to show favoritism to employees who are U.S. citizens.
- C. Yes, but only if the employee is willing to pay for legal and government filing fees for an amended H-1B petition to change his work location.
- D. None of the above.

Consider This:

If Rhonda does not approve his request, will that place the company at risk for discrimination claims?

Misclassification Mania

Marty Manager pops by Rhonda's office saying that he wants to hire a worker as an independent contractor to fill in after an employee suddenly resigns. Marty has been told not to re-fill the position and think this is a great solution. There are 4 other employees doing basically the same work. This person would work remotely whereas the rest come into the office. What should Rhonda say?

OIG Investigations – Oy!

Emeril Employee calls Rhonda saying that he got a letter from the Office of Inspector General (OIG) asking him to come in for an interview. Emeril is a high flier in Rhonda's office – it seems like he has a new issue every day. The letter advises Emeril that he may advise his direct supervisor about the letter but should otherwise keep it confidential and not discuss it or any underlying investigation with others. Emeril intends to speak with the agent and, in fact, has already left a message with the OIG agent to arrange a convenient time to meet.

What should Rhonda do?

- A. Thank Emeril for notifying her of the interview request and make a note of it in his file.
- B. Instruct Emeril not to attend interview because representations made to the OIG agent may expose him and the company to liability.
- C. Encourage Emeril to attend the interview and schedule a meeting for afterwards to get a debriefing of OIG's questions.
- D. Recommend that Emeril be accompanied to the meeting by legal counsel—either his own or a lawyer provided by the company.

Top Considerations for OIG Requests

- ▶ Interview request indicates that the OIG is conducting an investigation.
- ▶ Do not interfere with OIG's investigation.
- ▶ Obtain contact information for OIG agent.
- ▶ Availability of counsel at meeting is important.

Termination Trouble

Rhonda gets an email that a business unit wants to terminate Ian the IT Tech today by COB for poor performance. Ian has a company laptop and authorized access to sensitive information about employees and contracts at the company.

What should Rhonda do?

- A. Ensure timely collection of all company devices and disconnection from all remote access systems at the time of termination.
- B. Preserve logs of recent activity on remote devices.
- C. Escort Ian out and mail him a box to return the computer in so he has time to retrieve personal files off of the laptop.
- D. A & B.

Consider This: Does this Change if Ian is Leaving Voluntarily?

Best Practices for Data Security

- ▶ Follow data breach incident response plan.
- ▶ Data security reporting obligations are contractual, statutory, and regulatory.
- ▶ Notify contract managers if you have concerns that the employee breached confidences.

Sticky Social Media

Rhonda gets a call from a client that Emma Employee wrote a Facebook comment to an article about second amendment gun rights saying, “You NRA schizos are killing our children!!” Her Facebook profile lists where she works and in her picture she has a Bernie 2020 t-shirt on.

What should Rhonda do?

- A. Nothing – she is entitled to exercise her first amendment rights.
- B. Nothing – in DC political affiliation is a protected classification.
- C. Nothing – you can't terminate an employee for off-duty conduct.
- D. Terminate Emma for violating the company's anti-harassment and anti-discrimination policy.
- E. Discipline Emma for violating the company's social media policy that prohibits posting in a way that reflects poorly on the company.