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37th Annual Workforce Management Briefing
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HR's Role in Protecting Your Brand's Reputation
Employee Accommodations:
When Equal Treatment Isn't Enough
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Agenda

What Is a Reasonable Accommodation?

New York City Law: Engaging in the Cooperative Dialogue

Common Accommodation Requests

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What Is a Reasonable Accommodation?
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Reasonable Accommodations: What is Reasonable?

Federal, state, and local laws require employers to provide "reasonable accommodations" to employees on the basis of a disability, pregnancy, sincerely held religious belief, and status as a victim of domestic violence to remove workplace barriers

- The standard for determining "reasonableness" is an objective analysis
- Reasonable accommodations may include:
  - making existing facilities readily accessible to, and usable by, those with disabilities
  - job restructuring
  - part-time or modified work schedules
  - reassignment to a vacant position
  - acquisition or modification of equipment or devices
  - appropriate adjustment or modifications of examinations, training materials, or policies
  - the provision of qualified readers or interpreters
  - leave

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Reasonable Accommodations: What is Reasonable?

While an employer must provide a reasonable accommodation to an employee because of a disability, pregnancy, religious belief, or status as a victim of domestic violence (that is not an undue hardship), it is not required to grant the specific accommodation requested by the employee

- An employer can select an accommodation of its choosing, provided that it is reasonable and effective
- Similarly, the employer is not required to provide every accommodation requested by the disabled employee, as long as the accommodation(s) the employer does provide is(are) reasonable and effective
  - However, "stacking" multiple accommodations may be required
- An employer need not provide a disabled employee with "personal use items needed in accomplishing daily activities both on and off the job" (e.g., wheelchair or hearing aid)

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Reasonable Accommodations

Employers need not grant a reasonable accommodation that:

Creates an undue hardship or

Eliminates an essential function of the job

- Essential functions" include fundamental job duties, not marginal or peripheral functions
  - – requires a job-specific, individualized inquiry

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The Interactive Process: Undue Hardship

An undue hardship may include any action that:

- would fundamentally alter the nature or operation of the business
- is extensive, substantial, or disruptive (unreasonableness)
- would cause significant difficulties
- is unduly costly

Note Employers should avoid arguing cost as an undue hardship unless there is no alternative

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The Interactive Process: Undue Hardship

Factors considered in determining "undue hardship" include:

- nature and net cost of accommodation
- financial resources of the entity and the facility
- impact on the facility and/or its operations
- type of operations of the entity, including the size, composition, structure, and functions of the workforce, the facility, and the overall business
- past practice

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The Interactive Process: Essential Functions

A function may be essential because:

- **the position exists to perform the function** (e.g., driving is the essential function of being a bus driver);
- **there are a limited number of employees available who may perform that function** (e.g., lifting may be an essential function of a librarian position when there are only two librarians at work at a time, and one function of the librarian position is to restock books on shelves); or
- **the function is so highly specialized that the individual was hired for his or her expertise or ability to perform that particular function** (e.g., the ability to program computers in a specific language would be an essential function of a computer programmer position when the person was hired specifically for his/her ability to program in that specific computer language)

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The Interactive Process: Essential Functions

Evidence of whether a particular function is essential includes, but is not limited to:

- the employer's judgment as to which jobs are essential,
- written job descriptions as prepared before advertising or interviewing applicants for the job or at the time of the employment decision,
- the amount of time spent on the job performing the function,
- the consequences of not requiring someone in the job to perform the function,
- the terms of a collective bargaining agreement,
- the work experience of past incumbents in the job, and/or
- the current work experience of incumbents in similar jobs

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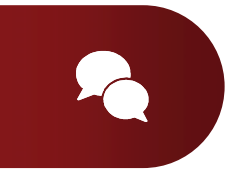
The Interactive Process: Good Faith Participation

Federal, state, and local laws describe an interactive process that requires good faith participation by both parties in determining the precise limitations from the disability and the potential reasonable accommodations that could overcome those limitations



Employers should **consult with the employee regarding:**

- the nature of the disability (except in California)
- limitations caused by the disability
- the anticipated duration of the limitations
- potential reasonable accommodations to overcome these limitations

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The Interactive Process: Triggers for the Interactive Process

- When an employee requests an accommodation

- If an employee with a disability exhausts the leave provided under some other law (such as Family and Medical Leave Act (FMLA), California Family Rights Act (CFRA), or pregnancy-disability leave) and remains unable to return to work

- When an employer becomes aware of the need for an accommodation through a third party or by objective observation

  - ***Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d Cir. 2008):** "[A]n employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonable should have known that the employee was disabled"

  - ***Stephenson v. United Airlines*, 2001 U.S. App. LEXIS 11400 (9th Cir. 2001) (unpublished):** "[An] employer is obligated to engage in an interactive process with employees when an employee requests an accommodation or if the employer recognizes that an accommodation is necessary"

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The Interactive Process: Steps

Request supporting medical documentation from the employee's doctor:

- It must be narrowly tailored to the purported disability
- If the information is suspicious, consider sending employee to company doctor
- *Remember California restrictions—no requesting diagnosis or medical information without employee consent*

Identify potential accommodations

- Consult with supervisory personnel about the job
- Contact outside organizations (e.g., Job Action Network or vocational experts)
- Utilize Internet resources
- Talk with the employee

Offer an accommodation that is reasonable and effective

- Be proactive: do not simply reject the employee's suggestions
- Consider both the employee's request and simpler & less costly alternative accommodations

Document these efforts

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New York City Law: Engaging in the Cooperative Dialogue
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“Cooperative Dialogue” Is the New “Interactive Process”

Effective as of October 15, 2018, the New York City Human Rights Law (NYCHRL) affirmatively requires employers to engage in a “cooperative dialogue”

- Employers must engage in a cooperative dialogue with anyone requesting an accommodation or anyone whom the employer has notice may require such accommodation
- **After** engaging in a cooperative dialogue, employers must provide a **written final determination** that identifies any accommodation that has been either granted or denied
- Failure to engage in the cooperative dialogue is a separate cause of action

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The New York City Legal Enforcement Guidance: Discrimination on the Basis of Disability (June 2018)

Initiating a Cooperative Dialogue:

Duty is imposed not only when an individual's disability is known but also when the covered entity should have known about the individual's disability

Engaging in a Cooperative Dialogue:

Employer must communicate with an individual in good faith and in a transparent and expeditious manner

1. Does the employer have a policy informing employees how to request accommodations based on disability?
2. Does the employer respond to the request in a timely manner in light of the urgency and reasonableness of the request?
3. Does the employer seek to obstruct or delay the cooperative dialogue or in any way to intimidate or deter the individual from requesting the accommodation?

Concluding the Cooperative Dialogue:

Such dialogue is ongoing until a reasonable accommodation is granted or the employer concludes that (a) there is no accommodation available that will not cause undue hardship; (b) a reasonable accommodation was identified, but the individual did not accept it and no reasonable alternative was identified; or (c) no accommodation exists that will allow the employee to perform the essential requisites of the job.

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Common Accommodation Requests: Leave as a Reasonable Accommodation: ADA vs. FMLA

"Whether the Employee Is Legally Entitled to Leave" Is a Separate Issue from "Whether the Employee Is Compensated While on Leave"

"Disability" vs. "Serious Health Condition"

- Americans with Disabilities Act (ADA) covers "disabilities"
- FMLA covers "serious health condition"

Family Leave

- ADA does not require reasonable accommodation because of disabilities of someone he or she associates with
  - Recent California case law creates California-specific issues
    - ***Luis Castro-Ramirez v. Dependable Highway Express Inc.,*** **Case Nos. B261165 and B262524 (April 4, 2016)**
    - The court ruled that an employer has a duty to reasonably accommodate an employee who is associated with a disabled person who needs the employee's assistance
- FMLA permits unpaid leave for the care of a covered family member

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Leave as a Reasonable Accommodation: ADA vs. FMLA

Reasonable Accommodation

- Required by the ADA, absent "undue hardship" (case-specific inquiry)
- Under the FMLA, employers are required to provide up to 12 weeks of unpaid job-protected leave. No "undue hardship" provision; only extremely narrow "key employee" exception

Leave as a Reasonable Accommodation

- Unpaid leave may be a reasonable accommodation under the ADA, apart from any FMLA leave, if:
  - FMLA has already been exhausted
  - Employee has not met the eligibility requirements under the FMLA
- 12 weeks of leave under the FMLA vs. no set time/spectrum under the ADA
  - FMLA may be taken continuously, intermittently, or as a reduced schedule
  - Leave under the ADA is generally continuous or as a reduced schedule; intermittent leave would likely pose an undue hardship for employers
- Both provide for **unpaid leave** unless disability benefits or accrued leave apply

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Leave as a Reasonable Accommodation: Legal Landscape

Leave can be a reasonable accommodation under the ADA and state/local human rights laws, provided it does not create an undue hardship for the employer

- An "undue hardship" is not an annoyance, inconvenience, or another employee's being bothered by the accommodation

EEOC Guidance - Employer-Provided Leave and the ADA (2016)

- Leave can be a reasonable accommodation, unless it presents an undue hardship
- Employers may not apply maximum leave ("no fault") leave policies without making exceptions for those who need an accommodation
- Employers may not have leave policies requiring the employee to be "100% healed"
- Indefinite leaves are unreasonable; however, an approximate date range and/or modification of an initial return to work date does not automatically constitute an indefinite leave
- Employees must be treated equally in regard to other types of leave

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Leave as a Reasonable Accommodation: Indefinite Leave

- Most federal courts have held that an employer does not have to provide **indefinite leave** as a reasonable accommodation under the ADA

- Indefinite leave can be
  - a leave without an end date
  - numerous requests for an extension of a leave

- Many federal courts treat it as *per se* unreasonable and do not require an employer to demonstrate undue hardship

- Under the NYCHRL, employers must demonstrate an undue hardship even when considering requests for an indefinite leave
  - a leave without an end date
  - numerous requests for an extension of a leave

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Leave as a Reasonable Accommodation: Recent Case Law

Although several circuit courts and the EEOC have held that unpaid leave may be a reasonable accommodation, the U.S. Court of Appeals for the Seventh Circuit recently ruled to the contrary, holding that a long-term unpaid leave was not a reasonable accommodation, in ***Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) *cert. denied,* No. 17-1001 (U.S. Apr. 2, 2018)**

- Plaintiff suffered from a back-related disability and was out on FMLA leave when he sought additional unpaid leave of two to three months so that he could recovery from surgery
- The employer notified the employee that he would be terminated when his FMLA time had been exhausted but invited him to reapply when he was medically cleared to work
- The court found that long-term leave is not a reasonable accommodation; the court held that, otherwise, such extended leaves would transform the ADA into "a medical-leave statute – in effect, an open-ended extension of the FMLA"
- Additionally, the court stated that long-term medical leave does not enable an individual to perform the essential functions of the job and, therefore, cannot be considered a reasonable accommodation because, at the time it is required, the employee is not a "qualified individual" with a disability

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Leave as a Reasonable Accommodation: Recent Case Law

***Easter v. Arkansas Children's Hospital* (E.D. Ark. Oct. 3, 2018)**
How much leave, if any, is required as an accommodation under the ADA?

Plaintiff, a specialty nurse whose job duties included speaking on the phone with patients, insurance companies, and doctors, suffered from a condition in her esophagus

- Plaintiff exhausted her FMLA leave, claimed she could not return to work, and sought leave as an accommodation to visit a specialist to be further evaluated 20 days from the request
- The employer denied the request and terminated her employment

The court held that plaintiff's "request for additional leave amounted to a request for indefinite leave"

- The court reasoned that plaintiff did not know when she would be able to return and perform essential functions of her job

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Religious Accommodation: Requests for Days Off

EEOC Guidance – Questions and Answers: Religious Discrimination in the Workplace (2011)

- Blanket policies prohibiting time off for religious observance are unlawful
- Voluntary substitutions and shift swaps may be a reasonable accommodation for requests for days off, but an employer does not have to permit this if it would pose more than a *de minimis* cost or burden to business operations
- Removing only part of a religious conflict by requiring an observer to work on some days of worship and not others (such as allowing the employee to take off on alternate Sabbaths) is not a reasonable accommodation, unless entirely eliminating the conflict would pose an undue hardship

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Telecommuting: Legal Landscape

EEOC Guidance – Work at Home/Telework as a Reasonable Accommodation (last revised 2005)

- Working from home may be a reasonable accommodation
- Employer may need to provide additional accommodations for an employee who works from home

- Various factors should be considered, such as the employer's ability to adequately supervise the employee; whether there is a need for face-to-face interaction and coordination of work with other employees; and whether in-person interaction with outside colleagues, clients, or customers is necessary
- Consider work-at-home agreements

***EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc)**:

- The court held that a telecommuting request was not reasonable because regular and predictable attendance was an essential function of the job as it required teamwork and regular face-to-face interactions

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Attire and Grooming: Religious Accommodations

EEOC v. Abercrombie & Fitch Stores, Inc. **135 S. Ct. 2028 (2015)**

- Abercrombie & Fitch's "Look Policy" governing employee dress prohibited employees from wearing "caps"
- Plaintiff, a Muslim, who was seeking a position working in an Abercrombie retail store, interviewed wearing a headscarf
- The company decided not to hire the plaintiff because the headscarf would violate the "Look Policy"
- The court held that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions"
- **Takeaways:**
  - Policies must be open to religious accommodation exceptions
  - Notice of religious practice or need for accommodation is not absolutely required
  - Key is the employer's motive – not actual knowledge

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Light Duty: Overview

Generally, employers do not have to create light-duty jobs under the ADA

However, if the employer already has light-duty jobs (e.g., for pregnancy or workers' compensation injuries), then reassignment to such a job may be a reasonable accommodation

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Light Duty: Pregnancy Accommodation

***Young v. UPS*, 135 S. Ct. 1338 (U.S. 2015)**

- Plaintiff worked as a part-time delivery driver and was required to be able to lift up to 70 pounds
- When plaintiff became pregnant, she asked for light duty
- The company denied the request and also denied her return to work on the basis that lifting more than 20 pounds was an essential function of her job
- Because her request was denied, plaintiff remained on unpaid leave
- The court held that a pregnant employee can establish a prima facie case by alleging the employer denied a request for an accommodation and the employer accommodated others "similar in their ability or inability to work"
- The court held that the plaintiff had established a prima facie case based on UPS's three separate accommodation policies (on-the-job, ADA, and DOT) which, when taken together, demonstrated a genuine dispute as to whether UPS provided more favorable treatment to some categories of employees under similar circumstances

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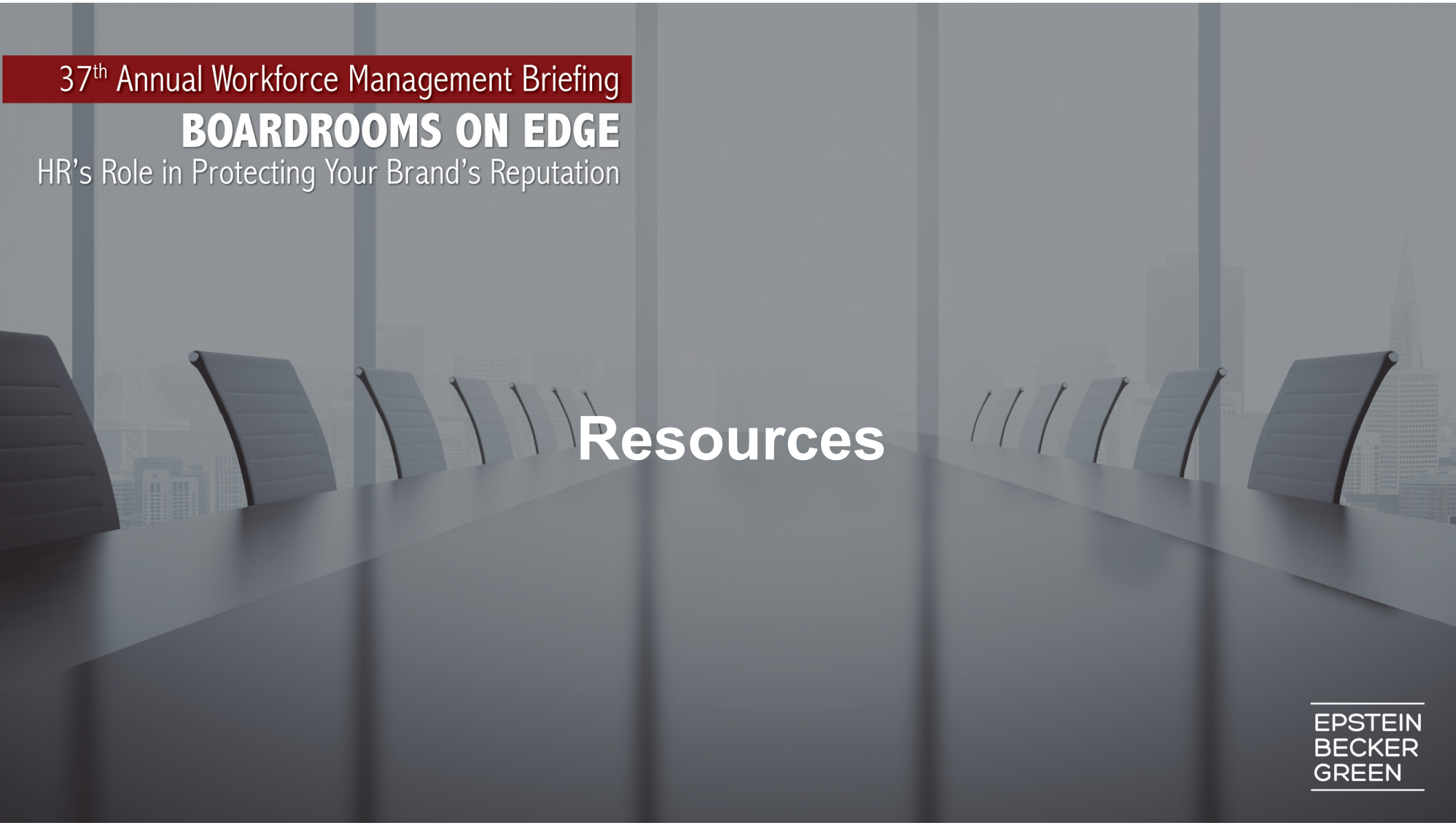
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Religious Accommodation: State & Local Laws

New York State Human Rights Law (NYSHRL)

- Requires employers to make a reasonable religious accommodation for an employee's sincerely held religious beliefs, unless doing so creates an undue hardship on the employer
- The standard for proving an undue hardship is higher than the federal de *minimis* standard

California Fair Employment and Housing Act (FEHA)

- Prohibits religious discrimination based on religious creed and requires reasonable accommodations unless doing so would create an undue hardship
- Amended by the California Workplace Religious Freedom Act of 2012 (California WRFA)

NYCHRL (as amended by the Workplace Religious Freedom Act (WRFA))

- Provides similar protections and was intended to require an even tougher standard for proving an undue hardship
- Effective as of 10/15/18, employers must engage in a "cooperative dialogue" and provide employees with a written final determination identifying any accommodations granted or denied

California WRFA

- Clarifies that religious dress or grooming (e.g., wearing religious clothing, a religious hairstyle, religious piercings) as a belief or observance is protected
- An accommodation for religious practices is not reasonable if it requires the employee to be separated from customers or the general public
- An undue hardship for purposes of religious accommodation requires a more stringent showing than the federal de *minimis* standard
- Overall, the protections in California are similar to those in New York

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Disability Accommodation: State & Local

NYSHRL

- "Disability" is defined more broadly under the NYSHRL than under the ADA:
  - "Disability" is "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment"
  - Disability is not limited to impairments that substantially limit a major life activity

NYCHRL

- "Disability" is defined even more broadly under the NYCHRL:
  - "[A]ny physical, medical, mental or psychological impairment, or a history or record of such impairment"
  - The burden is on the employer to establish a reasonable accommodation (even indefinite leave) is an undue burden
- Effective as of 10/15/18, employers must engage in a "cooperative dialogue" and provide employees with a written final determination identifying any accommodations granted or denied

DC Human Rights Act

- A "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities.

FEHA

- FEHA only requires that the disability limit a major life activity; it does not have to be a "substantial limitation" as required under the ADA
- Working is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment; whereas, under the ADA, the mental or physical disability must affect a person's ability to obtain a broad class of employment
- Failing to engage in the interactive process can be a separate cause of action under FEHA

New Jersey Law Against Discrimination (LAD)

- "Disability" is defined more broadly under the LAD than under the ADA:
  - A physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness, or any mental, psychological or developmental disability, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques
  - Disability is not limited to impairments that substantially limit a major life activity

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Pregnancy Accommodation: Federal Law

ADA

- The ADA covers pregnant women who become disabled, though pregnancy in and of itself is not a disability under federal law (but it can be under state laws)

Pregnancy Discrimination Act (PDA)

- Prohibits discrimination against an employee on the basis of pregnancy, childbirth, or related medical conditions
- Requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not affected but similar in their ability or inability to work

EEOC Guidance (2015)

- Light duty may be a reasonable accommodation
- An employer may not force an employee to take leave because she is or has been pregnant, as long as she is able to perform her job

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Pregnancy Accommodation: Light Duty as a Reasonable Accommodation for Pregnancy: EEOC Guidance

EEOC Informal Guidance – Questions and Answers About the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015)

Employers may not deny an employee light duty because she is pregnant

Even if light-duty policies do not explicitly exclude pregnant employees, they may still violate the PDA if they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification

- Example: A pregnant employee could demonstrate a significant burden by showing that her employer accommodates a large percentage of non-pregnant employees while denying accommodations to a large percentage of pregnant employees
- Result: If the employer does not have a sufficiently strong justification for such a policy, an inference of discrimination would arise

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Pregnancy Accommodation: New York Law

NYSHRL

- Reasonable accommodation is required for a pregnancy-related condition, which is defined as "a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques"

NYCHRL

- Reasonable accommodation is required for pregnancy, childbirth, or a related medical condition regardless of whether the pregnancy constitutes a disability
- Effective as of October 15, 2018, employers must engage in a "cooperative dialogue"
- Employers must provide a notice of pregnancy rights upon hiring

New York Nursing Mothers in the Workplace Act

- Employers must provide reasonable breaks for mothers to express milk (although the breaks do not have to be paid)
- Employers must make "reasonable efforts" to provide a location near the employee's work area for the employee to express breast milk privately
- Employers must provide notice to employees who are returning to work, following the birth of a child, of their right to take breaks to express breast milk

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Pregnancy Accommodation: California Law

FEHA

- Prohibits discrimination based on sex, which includes:
  - Pregnancy, perceived pregnancy, or medical conditions related to pregnancy
  - Childbirth or medical conditions related to childbirth
  - Breastfeeding or medical conditions related to breastfeeding

California Pregnancy Disability Leave Law (PDL)

- Provides for up to four months of unpaid leave when the employee is actually disabled due to pregnancy
- May be taken intermittently for prenatal appointments and/or morning sickness

CFRA

- At the end of an employee's PDL leave, the employee may also take CFRA leave for up to 12 weeks for bonding with a child
- Bonding leave may be taken intermittently in increments of two weeks or more (with up to two requests for shorter periods) for up to one year from the birth

California Labor Code on Lactation Accommodations

- Similar to the New York provisions

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Religious Accommodation: Federal Law

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on religion, including disparate treatment, harassment, denial of reasonable accommodation, and retaliation

Unless it would be an "undue hardship" on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices

- An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work
- The standard for proving "undue hardship" is lower than it is for disability accommodation

To determine the appropriate accommodation, employers must engage in the interactive process

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Religious Accommodation: Religious **Attire and Grooming**

EEOC Guidance – Religious Garb and Grooming in the Workplace:
Rights and Responsibilities (2014)

- Employers may not automatically refuse accommodation based on policy
- Reliance on "image" of the company or customer preference can be unlawful or otherwise insufficient to establish undue hardship
  - This was reinforced by EEOC Guidance released in 2015 covering "Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern"
- Employers may request that an employee cover religious attire/items if the employee's religious beliefs permits this
- Exceptions may be made based on workplace safety, security, or health concerns

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Religious Accommodation: California Law

FEHA

- Prohibits religious discrimination based on religious creed and requires reasonable accommodations unless doing so would create an undue hardship
- Amended by California WRFA

California WRFA

- Clarifies that wearing religious clothing or a religious hairstyle as a belief or observance is protected
- An accommodation for religious practices is not reasonable if it requires the employee to be separated from customers or the general public
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