

FMLA & ADA Master Class

March 2026

Jeff Nowak

Day Three (March 5, 2026): ADA







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Where Are We Headed?

Day One (FMLA)

FMLA/DOL Trends

Coverage, Eligibility,
Reasons for Leave,
FMLA Year

Notice Issues

Performance and
FMLA clash

Prorating Bonuses

Day Two (FMLA/ADA)

Medical Certification

Protecting Against
FMLA Misuse

Disability Defined

Interactive Process

Day Three (ADA)

Reasonable
Accommodation

Leave of Absence

Remote Work

Neurodiversity

Reassignment

Pregnancy
Accommodations

Day Four (Wrap)

Fitness for Duty

Accommodation of
Family Member
Medical Conditions

Overlap Between
FMLA and ADA

Military Leave
Update

Questions!

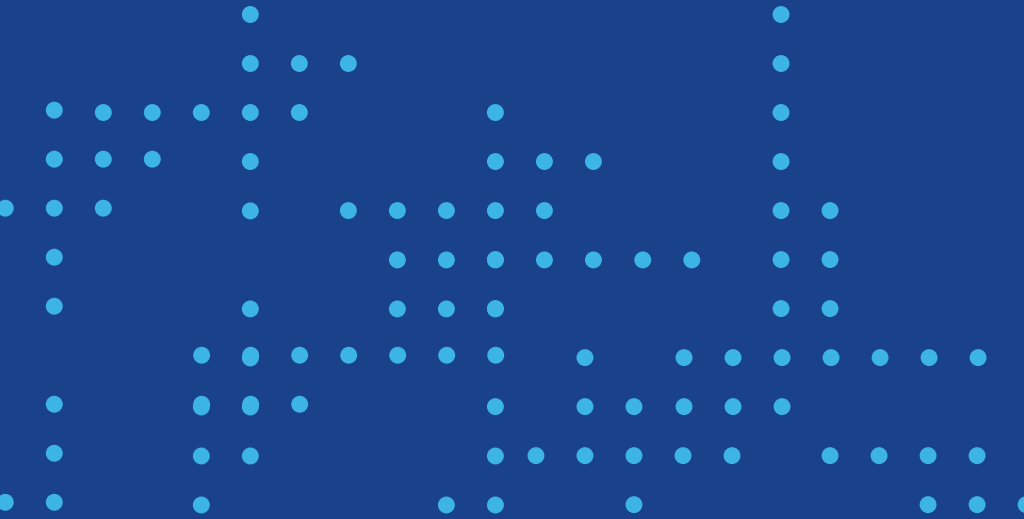
Agenda - Day Three

- Understanding Reasonable Accommodation
- Specific Accommodation Topics
 - Leave of Absence
 - Remote Work
 - Neurodiversity
 - Reassignment
 - Pregnancy Accommodations

Housekeeping

- Check your email for the links – ***Each day has its own link!***
- Please ask questions
- HRCI/SHRM and CLE credits are available! *But you need to pay attention (attendance prompts about every 45 minutes)*
- Two 10-minute breaks
- Survey at the end of each session – please respond to help us and to help you!
- Recordings available – six months!





Section Three

Understanding Reasonable Accommodations

Our Obligation

- To provide Reasonable Accommodations...
- To qualified individuals...
- With known disabilities...
- To enable them to perform the essential functions of the job...
- Unless it poses an **undue hardship** (a significant burden or expense)



Reasonable Accommodation Defined

- Sometimes called *workplace adjustments* or *modifications*
- Changes in the workplace, or the way job duties are customarily performed, that allows them to perform essential job functions
- Employer obligations triggered when an applicant or employee requests a ***change at work*** for a reason relating to a ***medical impairment***

Defining “Reasonable”

- EEOC guidance and SCOTUS (*U.S. Airways*)(2002): If it ordinarily “seems reasonable on its face . . . if it appears to be ‘feasible’ or ‘plausible.’”
- Need not change essential job functions
- Employee doesn’t get to pick!
- “Effective Accommodation”: In the end, an employer is obligated to provide an *effective* accommodation (one that enables person to perform essential functions)

Undue Hardship Defined

Requested accommodation is not required where it results in undue hardship

“Undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

29 C.F.R. pt. 1630 app. §1630.2(p)



***An Accommodation
Need Not Be Perfect!***

Ryan's Accommodations

- Ryan is an Anesthesiology resident; ADHD
- Poor performer; at the point of termination, Ryan requested a number of accommodations due to his neurodiversity
- Rather than terminate, the Hospital agreed to nearly all, including:
 - Assigning Ryan a mentor in the Department and in each rotation
 - Attending physicians to provide feedback in specific areas
 - A daily feedback form to evaluate Ryan
 - Allowing Ryan to use a checklist in the operating room
 - Sharing copies of non-confidential email feedback
 - Allow him a 30-minute lunch break and two 15-minute breaks

Employer's response

- These accommodations:
 - Sought to help Ray improve in areas in which he had previously struggled, such as by improving his organization and decreasing his anxiety
 - Were granted even though the Hospital had already decided to terminate Ray and had no obligation to continue his employment
- Evidence showed that the Hospital was diligent in providing the accommodations to Ryan
- But even if it didn't

“

Employers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee . . .

. . . The relevant inquiry is whether the accommodations enabled Ryan to perform the essential functions of [his] position.

*Whitney v. Montefiore Medical Center,
2025 WL 2101512 (2nd Cir. 2025)*

Accommodation: What are They?

Changes to the Workspace

- **Some accommodations relate to someone's workspace, equipment, devices or other aspects of where they perform their work**
 - Desks, chairs, monitors, amplifying devices, lighting, sound, height or width of spaces, wheelchair access, location relative to restroom or parking lot, service and comfort animals, etc.



How/When Job is Performed



- The order in which tasks are performed
- Sitting/standing/walking while working
- Where tasks are performed (working from home)
- Schedule adjustments like part-time work or late starts/early departures for medical reasons
- Involvement of co-workers in marginal tasks
- Temporary light duty, etc.

Not EVERYTHING Is Reasonable...

Employers Generally Do Not Have To:

- Reassign essential job duties
- Create new jobs
- Provide indefinite leaves of absence
- Change an employee's supervisor
- Bump another employee from his/her position
- Reduce conduct or performance expectations when the employee is at work
- Furnish items for an accommodation primarily for the employee's personal use (hearing aids, glasses, service animals, etc.)
- Excuse misconduct, even if caused by the disability (check with legal counsel on individualized basis on this issue)
- Maintain equivalent pay if assigned to a different job



Section Four

Leave as a Reasonable Accommodation

Leave as an Accommodation

Leave is one form of reasonable accommodation under the ADA

You have leave obligations to your employees under the ADA, regardless of FMLA eligibility (or state or local leave) and/or your policies and practices

Other Important “Leave” Considerations

- This is not FMLA, so leave as an accommodation potentially in play on *Day One* of employment
- When FMLA exhausted, doesn't meant “job no longer protected”; ADA must be considered
- Don't confuse leave under ADA with STD or WC benefits
 - Protection of position
 - ADA leave typically unpaid



Position Must Be Held Open

- EEOC:
 - Leave as a reasonable accommodation includes the right to return to the employee's original position. Obligated to keep position open.
 - If employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work

EEOC Guidance: Employer-Provided Leave and the Americans with Disabilities Act (2016)

- Our obligation:
 - Hold the job open
 - If we can't, we must show undue hardship and explain the hardship to employee; consider alternatives

Courts Generally Respond Like This . . .

“Because Additional Leave Wouldn’t Help” cases

“Must be Able to Work in Immediate Future” cases

“Because It’s just Too Long, at least in this Case” cases

“Do the Interactive Process, No Real Limits” cases

“Because Additional Leave wouldn’t help” cases

- 6 months unreasonable where no return date or demonstration she could work – *Minter v. D.C.* (D.C. Cir. 2015)
- 12 months unreasonable where leave not “likely enable her to return” – *Delgado-Echevarria v. AstraZeneca Pharm. LP* (1st Cir. 2017)
- Serial requests for extensions not reasonable; can’t keep job open indefinitely – *Williams v. AT&T Mobility Services* (6th Cir. 2017)

“Must be able to work in immediate future” cases

- Must identify a return date in the “near future” *Freeman v. City of Cheyenne* (10th Cir. 2024)
- Must provide estimated, credible date when he can perform essential job duties – *Cooley v. East Tenn. Human Resource Agency* (6th Cir. 2017)
- “Hoping” for a return in 8 weeks not good enough. *Herrmann v. Salt Lake City Corp* (10th Cir. 2022)
- Leave unreasonable if it will not lead to job performance in “present or immediate future” – *Luke v. Florida A&M* (11th Cir. 2016); *Robert v. Bd. of Cnty. Comm’rs of Brown Cnty.* (10th Cir. 2012) (“near future”)

“Because it’s
just too long,
at least in
this case” cases

- Inability to work for a multi-month period of time renders employee unqualified under ADA – *Severson v. Heartland Woodcraft, Inc.* (7th Cir. 2017)
- Six month unreasonable here...but not as a rule – *Hwang v. Kansas State Univ.* (10th Cir. 2014)
- Six-week leave after a six-month leave = not reasonable – *Billups v. Emerald Coast Util. Auth.* (11th Cir. 2017)

“Do the interactive process, no real limits” cases

- Series of extensions doesn't render the request unreasonable. *Ruiz v. ParadigmWorks Group* (9th Cir. 2019)
- ADA requires a fact-specific, individualized inquiry – *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999)

Leave as an Accommodation

- Lee, Account Executive at local news station
- Pregnant with twins; diagnosed with placenta previa and placed on bedrest
- Employer approved remote work during late pregnancy
- Delivered twins in February, 12 weeks of FMLA leave
- Complications from childbirth, surgery just weeks after childbirth; caused severe pain and limited standing, walking, and driving;
- In June, one month after FMLA ended, HR rep, Cyndi, contacted Lee to ask about her recovery; Lee: “They’re extending my STD benefits.”
- After call, Lee texted Cyndi, “Please do not contact me regarding a return to work date when I have been classified as unable to return and still have short-term disability plus bonding leave.” In the same message, Lee provided her lawyer's contact information.

HR's Response

HR's response in late July:

“You have been on leave from work since February 23, 2022. You were provided with 12 weeks of leave under our FMLA policy which expired on May 17 You applied for and received benefits under our Short-Term Disability policy. This policy provides a money benefit, but it is separate from job-protected leave.”

The letter also highlighted Nexstar's earlier attempt to reach out and noted: “A directive not to contact you is not acceptable.”

Leave as an Accommodation

- Lee responded on August 4:
 - “Still under intense care” and had another surgery scheduled in a few days
 - Added that her recovery time would be about four-to-six weeks followed by another potential surgery in October
- On August 15, the employer terminated Lee: “Since you have been off work since February 23 and given the critical nature of the Account Executive position, we can no longer hold your job.”

Coffman v. Nexstar Media Inc., 2025 WL 2049058 (4th Cir. July 22, 2025)

Poll Question

Who wins?

A. Lee: She needed more time off, and it wasn't that much more, so the employer should have provided the leave.

B. Employer, Cause We Don't Know When Lee is Coming Back!



The News Station, and It Ain't Close

- Several important nuggets from the Court:
 - Accommodation not reasonable because, at the time of her termination, Lee had been absent for six months and could not provide an approximate return-to-work date
 - Court:
 - ADA leave is “that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question”
 - Debate concerns whether she can return at any point in the near future – five months into her absence, the best she could offer was: “I probably will be released in September or October.”

Near-perfect response from the Employer

- Provided Lee remote work for eight weeks leading up to childbirth
- Provided FMLA Leave/parental leave
- 6 weeks after childbirth, supervisor checks in with Lee, asks about her recovery
- On going dialogue with Lee about return to work
- By month 4, the employer is pressing for updated information
- By month 6, need a “return date”
- When employee still could not provide an estimate of a date in the *near future*, she was terminated

Other Key Aspects of the Case

- Dialogue about whether STD benefits constitute protected ADA leave
- Employees cannot delegate the interactive process to their attorneys



Break Time



*just
breathe*

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By Jeff Nowak of Littler

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Guidance & Solutions for Employers

Employers, Before You Pick Up the Phone to Call an Employee's Physician, Put it on Hold

By [Jeff Nowak](#) on July 17, 2025

POSTED IN [ADA](#), [FMLA](#), [MEDICAL CERTIFICATION](#)

There must be something in the water in EmployerLand, USA.

On multiple occasions lately, employers have confessed frustration to me with the lack of information provided by an employee's physician in an FMLA medical certification or in support of an ADA accommodation.



But their next line is always troubling: "So, Jeff, I just picked up the phone and called the doctor directly with a few of our questions about the form."

[Cringe]

Friends, whether it's an FMLA or ADA situation, employers must follow very specific rules when communicating directly with an employee's physician about the employee's medical condition. They start with these:

ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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Let's Get Practical Using Lee's Situation

Treat FMLA as Part of the Interactive Process

- Don't wait to start the interactive process!
- Stay in Contact
 - Particularly if RTW is unclear
 - If RTW is clear, employer can check on employee's progress
 - Don't let Employee Control the Timeline -- correspond as FMLA is nearing an end



At FMLA Week 10, Phone Call With Follow-Up Correspondence:

Dear Lee:

FMLA leave will be exhausted as of [DATE]. Based on current information, we anticipate that you will return to work on [DATE].

We want to help you return to work in any way we reasonably can. If you are not able to return to work by [DATE], please contact me by [DATE]. If you believe you could return to work, but may need assistance to help you perform your job, or if there is any other information about your return to work that you wish to call to our attention, please contact me as soon as possible.

Before returning to work, you will be required to provide a return-to-work certification from your health care provider confirming that you are able to perform the essential duties of your position with or without a reasonable accommodation.

Questions for the Physician

Request information responding to the following:

1. Limited information about medical condition (can't insist on diagnosis!)
2. The activities that the impairment limits (and the extent to which)
3. How impairment affects employee's ability to perform essential job functions and what job functions
4. Whether doctor can identify any accommodations that would help the employee perform job functions
5. If leave is necessary, what is the estimated date upon which the employee can return to work?
6. If physician cannot identify an estimated return date, why not?

EEOC Guidance: Reasonable Accommodation & Undue Hardship Under the ADA (Q. 6)

Letter to the Employee

Dear Lee:

On [DATE], you requested additional time off of work. As of [DATE], you have exhausted your FMLA leave and other leave available to you under our personnel policies. Thus, you have no other leave available to you.

We want to assist you in any way we can to help you perform your job; however, before we can consider you for an additional leave of absence, we need additional information from your treating physician. Currently, we are unable to determine the reason for an additional period of leave, how you are restricted in your ability to work, whether there is other assistance we can offer to help you perform your job, and when your treating physician believes you will be able to perform your job duties.

Hugs and kisses,

The Boss

Letter to the Employee (Continued)

Please ask your physician to review this letter and have him/her provide answers to the following questions:

1. What is [your medical condition] and how does it affect your ability to perform your essential job functions? [Except in CA!]
2. What essential functions of your position, if any, are you able to currently perform, and what essential functions are you currently unable to perform? (For your and your physician's benefit, we have attached a job description for your position. We anticipate that your physician will review this job description when answering this question.) **[ATTACH JOB DESCRIPTION!]**
3. Are there alternative accommodations other than additional leave that would be effective so as to help you return to work? If so, for how long does your physician anticipate that you will need the identified accommodation?
4. If additional leave is necessary, will you be able to return to work in the near future, and what is the estimated date that you will be able to return to work? If the physician is unable to provide an estimated date, please explain why.

Letter to the Employee (Finally!)

Please ask your physician to review the questions above and provide a report to us that answers them. We also request that your physician confirm that he/she has reviewed this correspondence. Please provide this report to me by [DATE]. [If you do not provide the report by this date, and we otherwise do not hear from you, you may be subject to disciplinary action for unexcused absences, up to and including termination].

Please contact me immediately if you have any questions, if you can identify any assistance we can provide to help you perform your job, or if you need further clarification on anything we have discussed. [Additional information about requesting an accommodation can be found in our employee handbook at page ____.]

We look forward to hearing from you.

Regards,

[NAME and TITLE]

Questions for Managers

What is the impact, if any, if we make the requested accommodation?

Are there any other adjustments that might make sense, given the employee's job duties?

If requested accommodation can't be granted, understand why and discuss alternatives (Be CREATIVE!)

If you had to cover the work without the employee, how would you do it? How have you done it in the past?

The Employer Three-Step

First Request for Extension: Granted, but immediately afterward, assess hardship



Second Request: Communicate hardship to employee, set date certain for return



Third Request: Leave denied

What Is Undue Hardship?



“Significant difficulty or expense”
to the employer

“Undue hardship” refers to any
accommodation that would be
unduly costly, extensive, substantial,
or disruptive, or that would
fundamentally alter the nature
or operation of the business.

29 C.F.R. pt. 1630 app. §1630.2(p)

Factors Establishing Undue Hardship

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Increased burden on management staff required to find replacement workers, cover employee's work, or readjust workflow or readjust priorities in light of absent employees
- Burden on other employees (e.g., increased workload)
- Deferred projects



Factors Establishing Undue Hardship

- Lower quality and less accountability for quality
- Less responsive client service and increased client dissatisfaction
- Lost sales/work
- *Increased stress on overburdened co-workers*
- *Lower morale*



2

Indefinite Leave

- Back to the facts: Extension after extension after extension: is this leave of indefinite duration?
- EEOC Technical Resource:

“Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so it does not have to be provided as a reasonable accommodation.”

What About Intermittent ADA Leave?

Back to Lee . . .

- Let's pretend that after taking all that leave, Lee returns a doctor's note stating the following:
 - Lee continues to suffer from anxiety and depression
 - She will continue to need time off as needed, and could be as much as 2 day/week

What do we do now?

It Depends . . .



Are these predictable intermittent absences where staffing could be more easily addressed?

OR

Are these sporadic, unplanned absences that are frequent and perhaps even occasionally unreported?

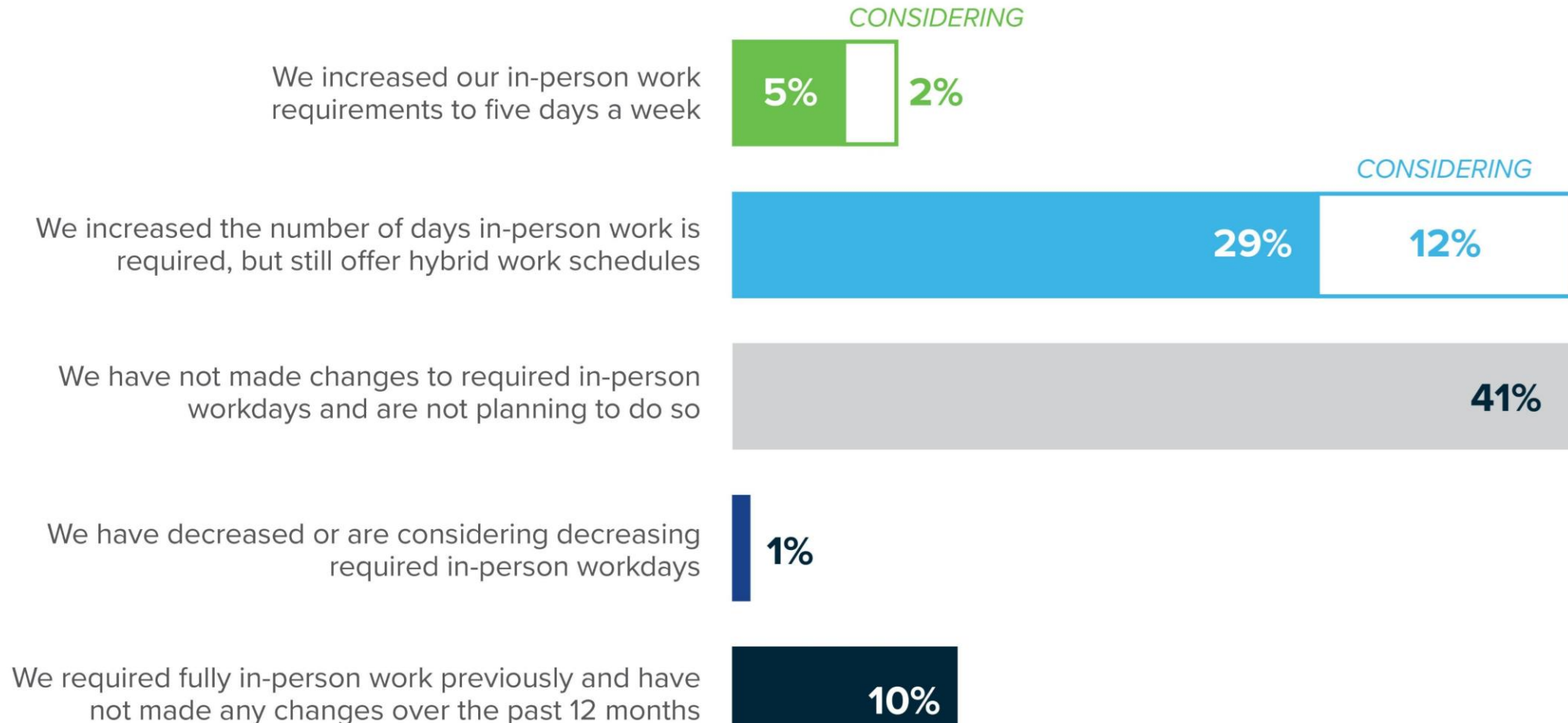
Communication to Lee

- Regular and predictable attendance is an essential requirement of your position.
- Based on the information we have from your physician, there are no accommodations the Company can provide that would enable you to perform your essential job functions and avoid being absent on the days when your medical impairment restricts your ability to perform essential job functions. If you and/or your physician believe that our understanding in this regard is inaccurate, please contact me immediately.
- As a result, your ongoing need for unpredictable absences that may cause you to miss an extensive amount of time during the workweek and renders you unqualified to perform your essential job requirement of regular and predictable attendance.
- Further, excusing your absences will continue to create an unacceptable operational hardship, as **[IDENTIFY IMPACT ON OPERATIONS]**.
- ***Tell the employee how you will process absences in the future***

Section Five

Remote Work

Which of the following best describes any changes your organization has made over the past 12 months to the number of days that employees are required to work in person at a fixed worksite or office?



Remote Work Considerations

1. Why is in-person presence critical to the job, and how do we prove it? How do you communicate it to employees?
2. Danger ahead!
 - Inconsistent approaches to in-person requirement (we say it, but we don't really mean it or enforce it)
 - You are treating the same positions differently
 - Radius policies (if you live within “x” miles from HQ, you need to report in-person)
 - Managers who undermine your approach
3. What alternatives are you willing to offer, and will you fight for them?
4. What if the commute seems to be the sole/main issue?

EEOC FAQs on Remote Work (for Federal Employees)

EEOC Guidance – Effectiveness, Re-evaluation

- Effectiveness—not employee preference—controls telework decisions:
 - Telework is required only if it effectively enables the employee to perform essential job functions
 - Requests based on convenience, generalized anxiety, or quality-of-life concerns—without a functional limitation tied to job performance—do not require telework under the ADA
- Telework accommodations *may be reevaluated* as circumstances change
 - Employers may reassess or modify previously granted telework arrangements when there are material changes in job duties, operational needs, medical information, or legal standards

EEOC Guidance – Pandemic Impact, Employee has to Attempt!

- Pandemic remote work did not redefine essential job functions
 - *Temporary suspension of in-person work during COVID-19 does not establish that physical presence is non-essential*
 - Employers may require in-person attendance where current operational realities show it is necessary for *supervision, collaboration, teamwork, or other interactive responsibilities*, provided *job descriptions* and documentation support that conclusion
- Telework not required if in-office accommodations are effective
 - If an employee can perform essential functions successfully in the workplace with reasonable in-office accommodations, telework is generally not required
 - Employers *may use trial or temporary accommodations, not required to accept unsupported assertions that an in-office accommodation will fail without first attempting the accommodation before rejecting it as ineffective*

EEOC Guidance – Accommodating the Commute

- There is *generally no duty to accommodate commuting* itself
 - The ADA *typically does not require employers to accommodate how employees commute to work*
 - While employers may need to adjust work conditions (e.g., schedules, parking) in some cases, telework is required only if it is the only effective accommodation
 - Employers may scrutinize requests and deny or rescind telework if evidence undermines the claimed need, so long as the process is individualized and non-retaliatory

EEOC FAQs, “Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities” (page 28)

***In-Person Presence Must Be
Critical to Job***

Kimberly . . . Again?

- Kimberly procurement agent for New Mexico General Services Department (GSD)
- Purchasing, contract admin, vendor coordination, procurement compliance, largely computer- and document-based
- Plaintiff diagnosed with MS and chronic migraines
- During pandemic, GSD implemented an agency-wide telework policy; Kimberly performed 100% of her procurement duties remotely for more than three years
- GSD hailed everyone back to the office, Kimberly requested intermittent remote work on days when migraine medication temporarily impaired safe driving
- GSD denied request, asserting that 100% in-person attendance was an essential function, relying on a blanket policy prohibiting telework for non-managerial employees
- Request was rejected without individualized analysis of her job duties

Problems . . .

- Court: All kinds of problems here
 - GSD's HR director admitted she could not identify any essential function of the procurement agent role that required in-person presence
 - Kimberly's successful remote work for more than 3 years weighed heavily in her favor
 - GSD simply made mechanical application of its return-to-office policy without job-specific analysis

Decision

- Reasonable jury could find in-person work not essential to job, intermittent remote work could be reasonable accommodation
- Court emphasized that telework "cannot be presumed unreasonable" under the ADA, case-by-case assessment is critical
- Summary judgment denied

Hunt-Brown case (page 41)

Navigating the Commute

Issue with the Commute to Work

- Allison, Director of Career Services at dental school, MedQuest
- Diagnosed with generalized anxiety disorder with panic attacks, migraines
- Medical documentation:
 - Her condition interfered with concentration and caused mental distress
 - Could render her incapacitated, specifically triggered by driving/commuting
 - Remote work would reduce panic and improve concentration
- Instead of fully remote work, MedQuest proposed:
 - Relocating Allison to a more private office and providing a sound machine
 - Allowing remote work after off-campus appointments
 - Permitting use of PTO, sick leave, or unpaid leave as needed
 - Offering transportation expense reimbursement during anxiety “flare-ups” if campus presence was required

Poll Question

Allison: Your proposed alternatives don't address my commute, and that's the problem. *Who wins?*

A. Allison: The employer offered no accommodations for her commute

B. Dental school: Employers are not responsible for the commute to/from work



It Comes Down to the Commute

- Here, interactive process was thorough, but came down simply to the issue of the commute:

“None of the proposed accommodations, however, would have relieved Allison of the need to commute to work five days per week.”

- Previous remote work has an impact on the court:
 - Allison successfully worked remotely for an extended period = request for remote work as “facially reasonable”
 - Temporary COVID-era arrangements do not automatically redefine essential functions, but they weaken arguments that remote work is infeasible
- Focus on “why” remote work is requested: Pay close attention to whether the employee identifies a specific trigger (here, commuting/driving) that interferes with job performance

***Here's Your Opening toward
Compliance Success, Friends!***

Taylor

- Taylor employed as Patient Services Rep in call-center: verified patient demographics and insurance, billing assistance, and document scanning
- Role required prolonged seated work at a fixed workstation and continuous phone use
- Plaintiff had various conditions, including rheumatoid arthritis and lupus: chronic, lifelong, and affected stamina, pain levels, and immune function
- Plaintiff took FMLA leave due to worsening symptoms
- Upon return, physician:
 - Stated Taylor could not sit in office workstation due to pain
 - Recommended working from home in a recliner and cited immunosuppressed status

Taylor

- IHC offered alternative accommodations:
 - Reducing her exposure to others by removing a shared appliance from her office to increase privacy, and
 - Allowing her to select a chair (at IHC's expense) to address her pain while at her workstation
- Taylor refused to select a chair, claiming it “was not her responsibility” and stating that she was holding off because she hoped to be approved for remote work instead
- Court: ADA claims dismissed:
 - Taylor's refusal to provide necessary input prevented IHC from evaluating whether the chair would adequately accommodate her condition
 - Demanding a single, preferred accommodation and then halting discussion was inconsistent with an employee's obligations under the ADA
 - Even assuming remote work might have been reasonable in some circumstances, Taylor's failure to participate in the process foreclosed further exploration of alternatives

Taylor case (page 43)

Jolene!

Themes in 2026 for Remote Work

- In-person presence is critical: like *Hunt-Brown* case, how do you show it? Tough to simply argue we're all "100% in the office, so that means you, too"!
- Some jobs just have to be done in person: supervisors, educators, hospitality, manufacturing, health care
- Evolving (and troubling) theme: If remote work done over an extended period, request for remote work facially reasonable
- Robust interactive process and alternative accommodations for the win! **Get to yes!**
- Performance issues may be a path to rein in remote work
- Even a top-notch interactive process doesn't insulate you from the lingering "commute" debate



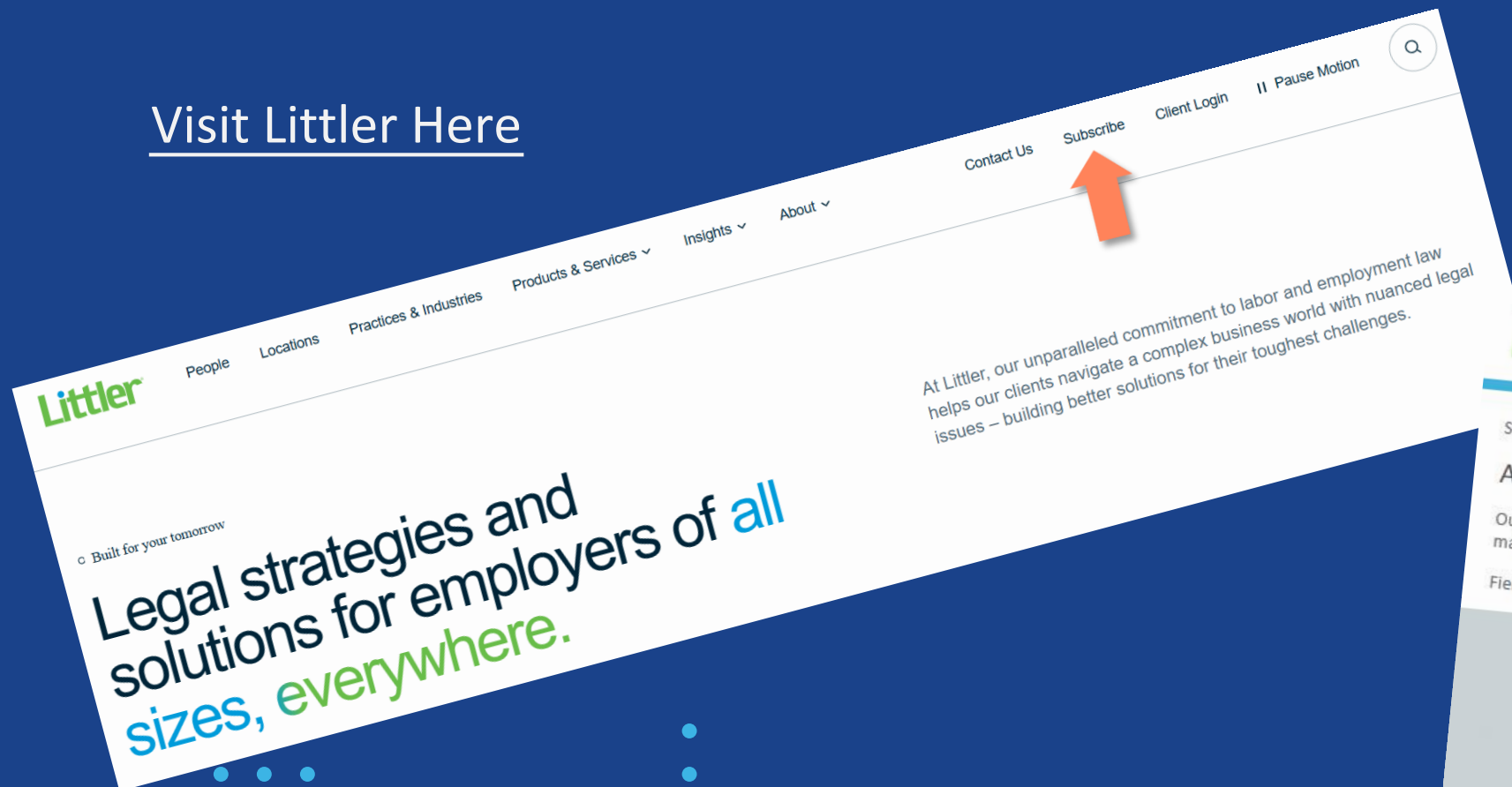


Break Time



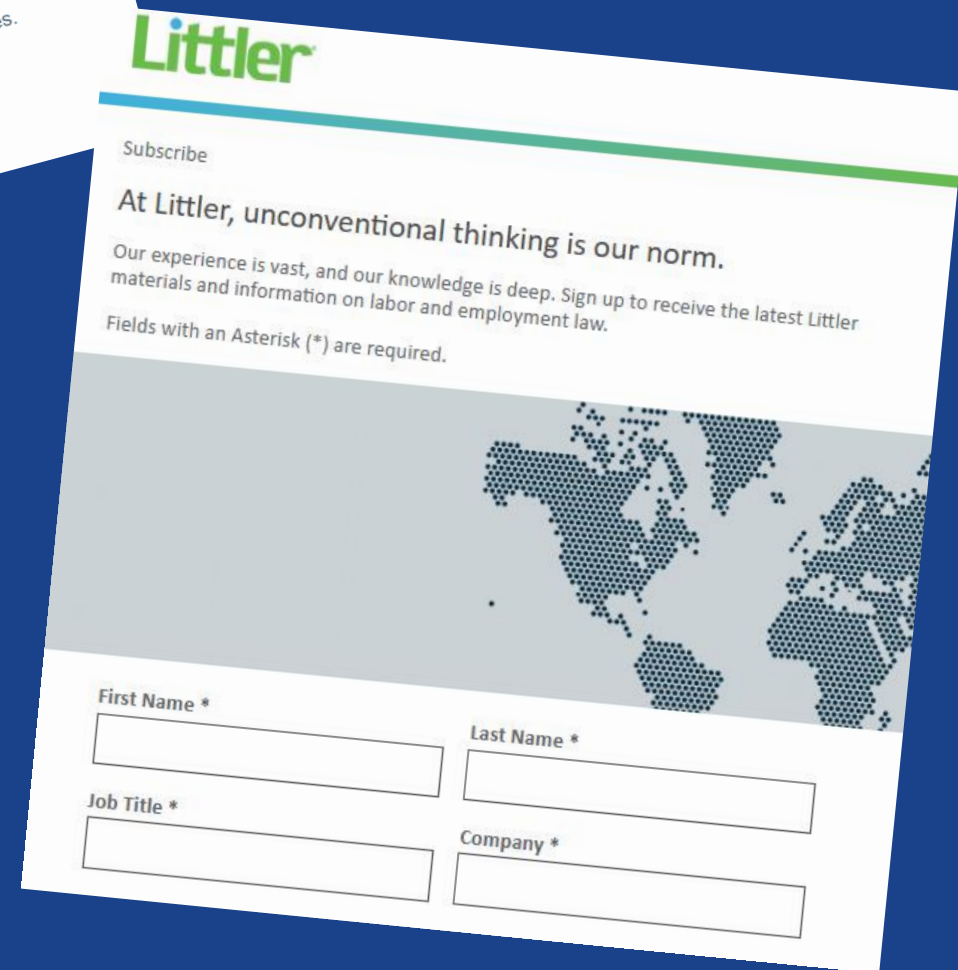
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breathe

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Section Six

Providing Accommodations to Neurodiverse Employees

Eric

- Eric was a Legislative Analyst supporting state reps with bill summaries and research
- Eric was diagnosed with Generalized Anxiety Disorder and ADHD, affecting concentration and coping with workplace stress, disclosed his disability and requested workplace accommodations to manage environmental stress and improve performance:
 - Quieter Workspace Request: Request to relocate or modify workspace to reduce noise and improve concentration during work hours
 - Telework During Low Activity: Remote work during interim sessions to better manage anxiety without disrupting workflow
 - Ergonomic Workspace Evaluation: Third-party ergonomic or environmental assessment to enhance workspace suitability and employee comfort
 - Access Control and Reassignment: Requests for controlled access door to reduce interruptions and reassignment to less demanding subject area
- Employer: NO!

Ouch!

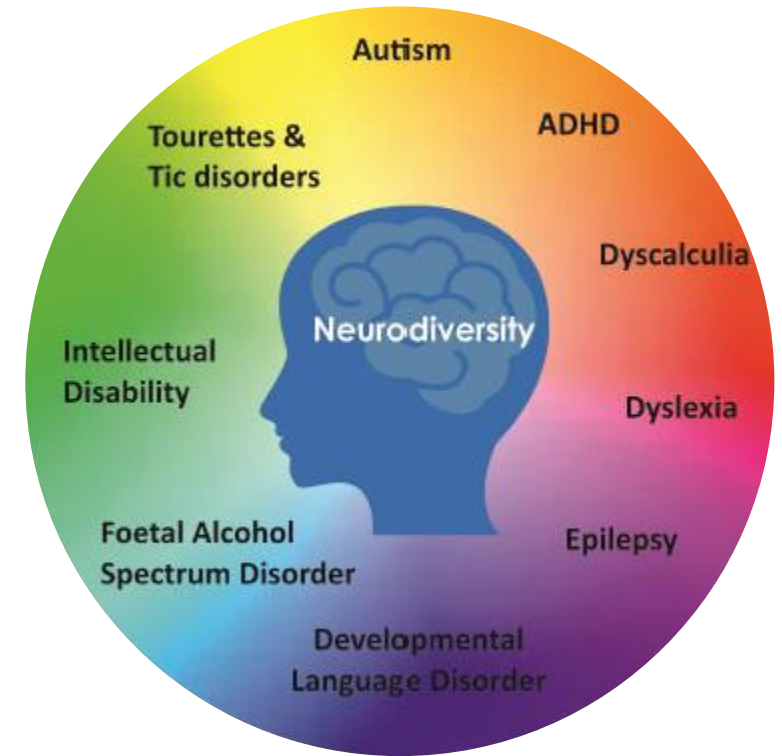
- Jury verdict affirmed: The appellate court upheld the jury verdict favoring Eric on disability claims
- Evidence of Job Performance: Eric demonstrated ability to perform job functions with or without reasonable accommodations, supported by positive work history
- Failure in Interactive Process: Employer did not engage in good faith interactive process or timely feedback as required by policy before termination
- Retaliation and Legal Outcomes: Immediate termination after accommodation request supported jury's retaliation verdict

Qualls case (page 53)

Neurodiversity Defined

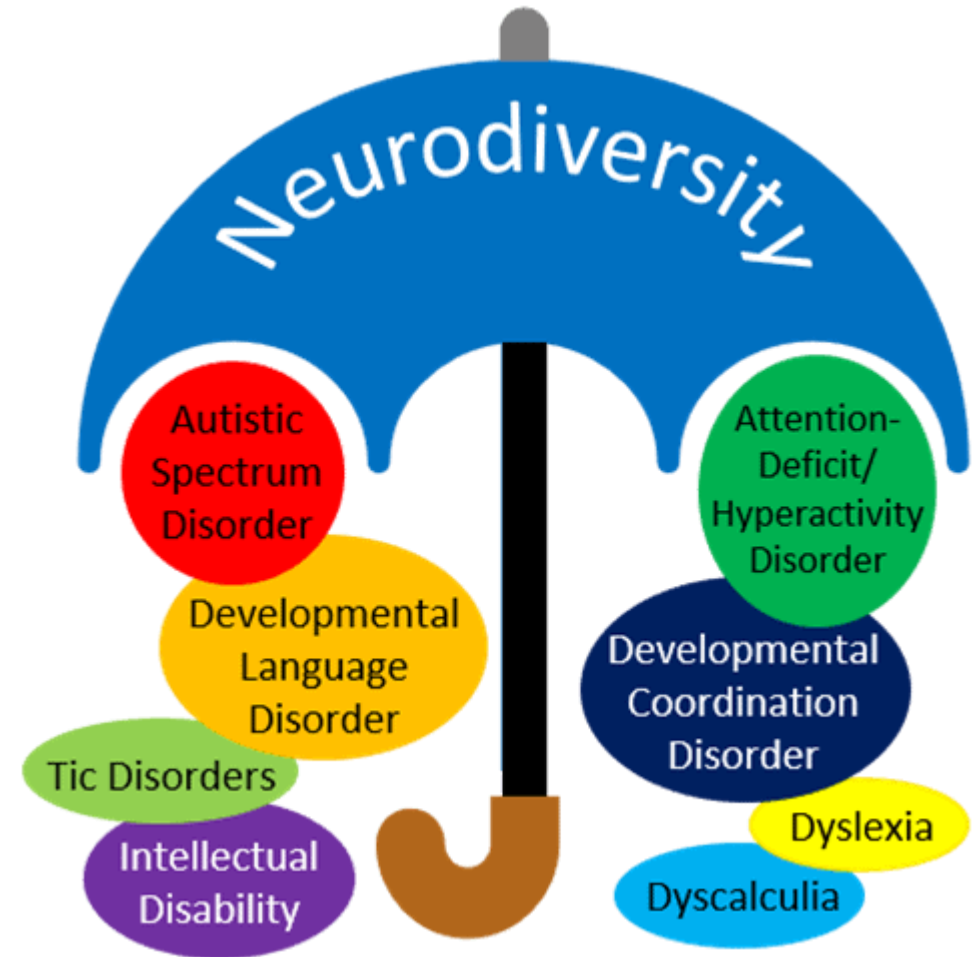
“**Neurodiversity**” is a word used to explain the unique ways people's brains work. Being neurodivergent means having a brain that works differently from the average or “neurotypical” person, usually regarded as a normal variation in the human population, including:

- Learning
- Information processing
- Thinking
- Behavior traits



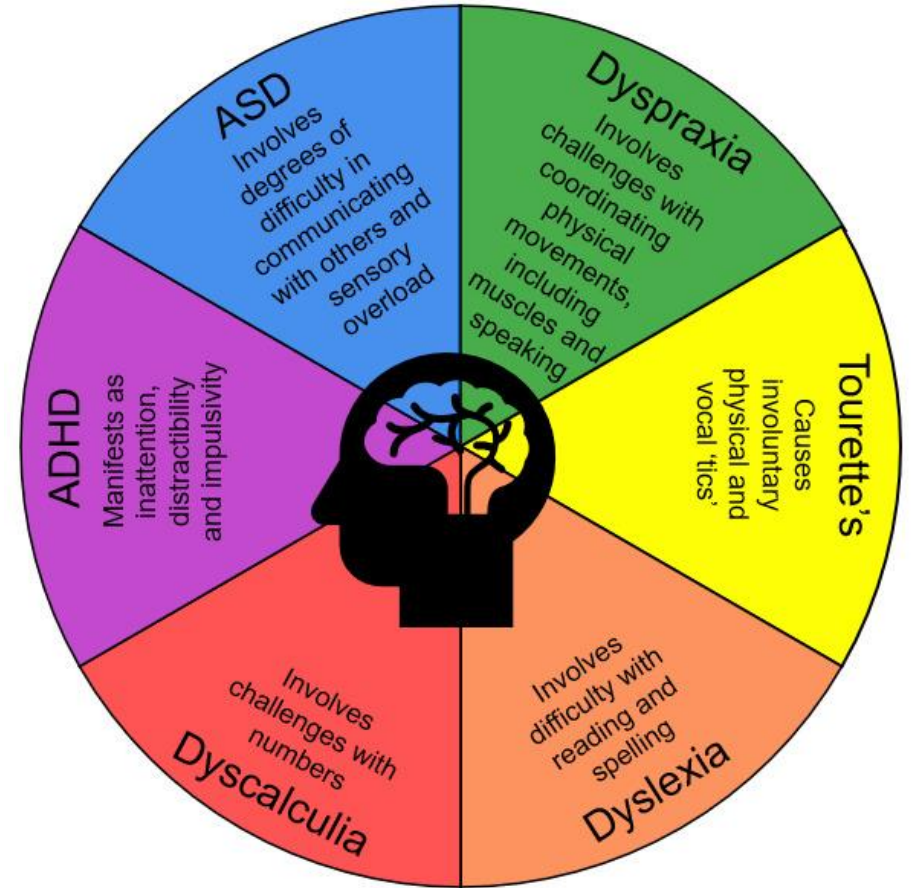
Not Limited to Autism Spectrum Disorders

- Workplace challenges for neurodivergent employees can vary greatly from person to person. Some common challenges include:
 - Social skills
 - Organization
 - Concentration
 - Sensory issues
 - Time management
 - Performing work effectively
 - Stress management
 - Interaction with coworkers
 - Speaking and communicating



Key Questions to Consider (Job Accommodation Network)

- What limitations is the employee experiencing?
- How do these limitations affect the employee and the employee's job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
- Once accommodations are in place, would it be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
- Do supervisory personnel and employees need training?



Accommodation possibilities

- Traditional and peer mentoring
- Frequent and ongoing manager feedback and positive reinforcement
- How information is communicated (written/verbal), checklists
- Remote work with needed assistive technology
- Job task restructuring
- Workplace policy modifications, including flexible breaks
- Workplace modifications for sensitivities involving light, noise, and temperatures
- Skills training

Section Seven

Reassignment as an Accommodation

Megan Transfer From the RN Position

- Megan was a long-tenured nurse, progressive condition causing pain, fatigue, and cardiac issues, which limited her ability to work long shifts
- Hospital initially accommodated Megan by reducing her schedule (from three 12-hour shifts to four 8-hour shifts) and approving intermittent FMLA leave, but later denied her request for a further reduction to three 8-hour shifts, citing undue hardship
- After the denial, Megan requested reassignment to a part-time role and applied for multiple vacant positions
- Although HR internally identified potential suitable roles, it did not share that information with her, and most hiring managers were not informed that she was seeking reassignment as an ADA accommodation
- She didn't secure a reassignment, terminated, filed suit

Megan Transfer From the RN Position

- The central issue:
 - Whether the hospital satisfied its ADA duty by merely allowing Megan to compete through the normal application process, OR
 - Whether it was required to affirmatively reassign her to a vacant, qualified position or provide meaningful assistance in identifying such roles
- Court:
 - ADA generally requires actual reassignment, not just the chance to apply
 - Fact disputes about:
 1. Megan's requests for assistance
 2. The hospital's failure to share identified vacancies, and
 3. Responsibility for breakdowns in the interactive process
 - Summary judgment denied

Beaumont case (page 37)

Reassignment

- When employee cannot be accommodated in current job or when both sides agree—must consider reassignment to another position
- The “accommodation of last resort”
- General rules:
 - Some obligation to assist employee in identifying open position
 - Position must be open now or come open in immediate/near future
 - No bumping allowed
 - No seniority systems violated
 - No promotions required



The Potholes

Does an Employer Have an Obligation to Help an Employee Identify Reassignment Opportunities?

- Employer has *some* obligation to assist the employee in identifying reassignment opportunities
 - *Smith v. Newport Utilities* (6th Cir. 2025): If the employee notifies the employer of this willingness to transfer, the employer must try to find an open position that the employee could perform
 - *Petti v. Ocean City Bd. of Health* (3d Cir. 2020): once an employee requests an accommodation, the employer must assist
 - *Pappas v. Dist. of Columbia* (D.D.C. 2021): employers have an obligation to help employees identify vacancies

The Potholes

Is a Disabled Employee Required to Compete for the Reassignment Opportunity?

- The Guidance is a mess!
 - EEOC: If employee is minimally qualified, the employee gets the opening
 - Courts:
 - Minimally qualified in 7th, 9th, 10th, DC
 - Compete for position in 2nd, 4th, 5th, 6th(?), 8th, 11th
- Employer response? A uniform approach that does not require competition may minimize risk

Reassignment: Process

- When evaluating reassignment to a vacant position, employer must first look for positions equivalent to the employee's current position in terms of ***pay, status, and geographic location***
 - Job functions of the position need not be the same as employee's current position if both/all jobs are otherwise equivalent and the employee is qualified for the vacant position
 - The vacant position need not be within the current department or job class either
- If no equivalent positions are available, then employer should look for lower-level vacant positions
 - Demoting employee to lower-level position can be a reasonable accommodation. *Stern v. St. Anthony's Health Ctr.* (7th Cir. 2015)
- What if no position is available?
 - Determine whether equivalent position will open immediate/near future? *Clark v. Coca-Cola Beverages* (2d Cir. 2022); *Faidley* (8th Cir. 2017)

Section Eight

Pregnancy Accommodations

Maddie the Manager Needs Remote Work, Less Stress

- Maddie: Customer Service manager; high-stress job, supervises 10-person team
- Developed pregnancy related hypertension in month 7; doctor advised 3-4 weeks of remote work, part-time work through childbirth
- Supervisor denied the accommodation despite others receiving work-from-home arrangements for non-medical reasons, though very infrequent
- Upon return from parental leave, Maddie asks for remote work again, citing the fact that her newborn won't take a bottle and she needs to nurse the child

Shelton v. Parkland Health, U.S. Dist. LEXIS 100740 (N.D. Tex. 2025)

Poll Question

What's covered by the Pregnant Workers Fairness Act?

A. Maddie's request for remote work because of her hypertension

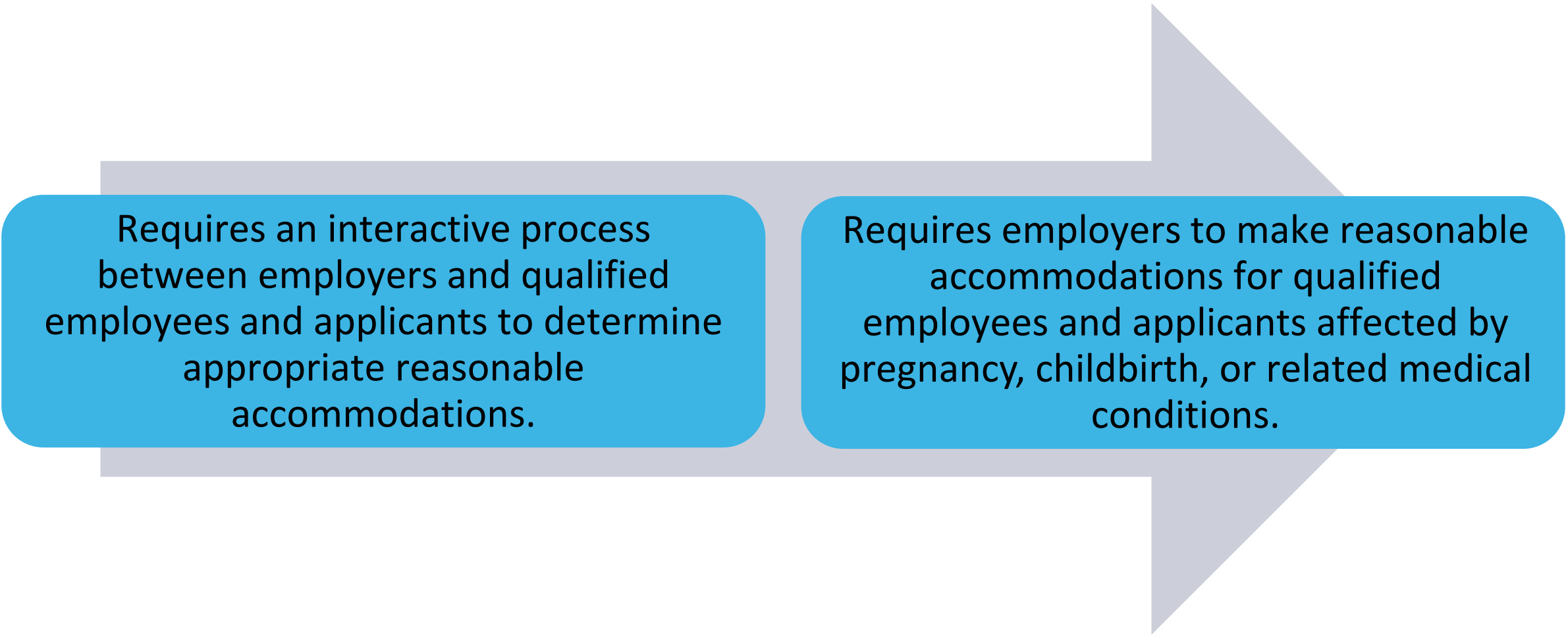
B. Maddie's request for remote work to nurse, since it's within one year after childbirth

C. Both

D. Neither



Pregnant Workers Fairness Act



Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions.

Is This Just Another Version of the ADA?

Similarities

- Interactive Process
- Reasonable accommodation
- Undue hardship

Distinctions

- No requirement of “impairment” that “substantially limits” a “major life activity” – covers *temporary* conditions
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available

KEY DIFFERENCE: the PWFA deems an individual impaired by pregnancy, childbirth, or related medical conditions “qualified” and entitled to reasonable accommodation, ***even if unable to perform essential job functions for a temporary period***, as long as that function can be performed ***in the near future*** and otherwise accommodated

Applying these Principles to Maddie

- **Hypertension:** Covered? YES
 - Limitation due to pregnancy
 - Reasonable on its face
 - Undue Hardship is the only answer
- **Baby won't take a bottle?**
 - Limitation due to pregnancy? NO
 - Not related to mother's limitations



FMLA Insights

Guidance & Solutions for Employers

Can an Employee Take Leave from Work for Lactation Breaks When the Baby Won't Take a Bottle?

By [Jeff Nowak](#) on July 23, 2024

POSTED IN [PREGNANCY](#)

The wheels are turning, aren't they?

This question is another arising out of a [webinar](#) I recently conducted with [EEOC Legal Counsel Carol Miaskoff](#) and [Tracie DeFreitas](#) (Job Accommodation Network) regarding the Pregnant Workers Fairness Act (PWFA).



A few weeks back, I addressed [whether FMLA medical certification could be requested from an employee who seeks leave due to pregnancy limitations](#).

Now, let's talk breaks for lactation. And bottles.

ABOUT JEFF



[Jeff Nowak](#) is a shareholder at Littler Mendelson P.C., the world's largest employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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Surely We Can Require Documentation, right?

- ***Can an employer require medical documentation?***

- Limited Opportunities to Request Documentation: Only seek medical documentation to support a request for accommodation if it is reasonable under the circumstances
- Reasonable documentation – confirms the physical or mental condition, confirms that it is related to, affected by, or arises out of pregnancy, childbirth or related conditions, and confirm that a change or adjustment is needed (and for how long?) – can ask for description of accommodation
- Cannot seek certification:
 1. When the limit and need for accommodation is obvious
 2. When the employer already has sufficient information
 3. When the request is for one of the four “Predictive Assessment” de facto reasonable accommodations, and
 4. When the request is for a lactation accommodation

Reasonable Accommodation: It's Comes Down to The Golden Rule



The reason for our success is no secret. It comes down to one single principle that transcends time and geography, religion and culture. It's the Golden Rule – the simple idea that if you treat people well, the way you would like to be treated, they will do the same.

Isadore Sharp

*Founder and Chairman,
Four Seasons Hotels and Resorts*

Resources

JOB ACCOMMODATION NETWORK

www.askjan.org



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A TO Z OF DISABILITIES AND ACCOMMODATIONS

[Home](#)

If you are looking for information on job accommodations, the Americans with Disabilities Act or Rehabilitation Act, or topics related to disability employment, see the listings below for various topics covered by JAN.

JAN provides the following A to Z listings by disability, topic, and limitation. This information is designed to help employers and individuals determine effective accommodations and comply with Title I of the Americans with Disabilities Act (ADA). You will find ADA information, accommodation ideas, and resources for additional information.

JAN's A to Z is a starting point in the accommodation process and may not address every situation. Accommodations should be made on a case by case basis, considering each employee's individual limitations and accommodation needs. Employers and individuals are encouraged to contact JAN to discuss specific situations in more detail. To get started, choose one to find what you are looking for.

[By Disability](#) [By Limitation](#) [By Work-Related Function](#) [By Topic](#) [By Accommodation](#)

By Topic - Find information on accommodations and other ADA issues.

Q Filter Topics

Begin typing search phrase to filter results

Accessibility	Disability Management	Laws	Service Animals
Accommodation Topics	Disability Statistics	Leave	Stay at Work (SAW)/Return to work (RTW) Topics
Americans with Disabilities Act	Educators	Light Duty	Students with Disabilities

Resources

- EEOC Guidance on reasonable accommodation:
<https://www.eeoc.gov/policy/docs/accommodation.html>
- Applying Performance and Conduct Standards to Employees with Disabilities:
<https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities>
- EEOC Technical Resource (Issued May 2016):
<https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>
- EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities:
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities>

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By Jeff Nowak of Littler

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FMLA Insights

Guidance & Solutions for Employers

Employers, Before You Pick Up the Phone to Call an Employee's Physician, Put it on Hold

By Jeff Nowak on July 17, 2025

POSTED IN [ADA](#), [FMLA](#), [MEDICAL CERTIFICATION](#)

There must be something in the water in EmployerLand, USA.

On multiple occasions lately, employers have confessed frustration to me with the lack of information provided by an employee's physician in an FMLA medical certification or in support of an ADA accommodation.



But their next line is always troubling: "So, Jeff, I just picked up the phone and called the doctor directly with a few of our questions about the form."

[Cringe]

Friends, whether it's an FMLA or ADA situation, employers must follow very specific rules when communicating directly with an employee's physician about the employee's medical condition. They start with these:

ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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