Workplace Accommodations for Disability, Religion and Pregnancy
2019: What employees, supervisors and managers need to know

Presented by Joseph Tam
Disclaimer

These materials were prepared as a general summary and teaching guide. The Technical Assistance For Employers program answers questions to inform the public regarding the policies and procedures of the Bureau of Labor and Industries and to generally inform the public regarding the law of employer-employee relations. The Technical Assistance For Employers program may not and does not give legal advice. In order to determine the legality of any matter or to protect your legal rights, you should obtain the assistance of a lawyer. Consult the yellow pages of your telephone directory or contact the Oregon state bar lawyer referral service at (503) 684-3763 or 1-800-452-7636.

THIS INFORMATION IS AVAILABLE IN AN ALTERNATE FORMAT.
Agenda

1. REASONABLE ACCOMMODATION: DISABILITIES
   • RELATED ISSUES:
     • Workers’ Comp Claims & Light-duty Restrictions
     • Family and Medical Leave (FMLA & OFLA)

2. PREGNANCY ACCOMMODATION

3. RELIGIOUS ACCOMMODATION
Session objectives

- Supervisors and Managers: Be aware of your legal obligations under the anti-discrimination laws
- Employees: Know your legal rights and responsibilities
- Employees, Supervisors, and Managers know where to go to get assistance
- Supervisors and Managers, realize that when an employee requests an accommodation, your next steps are critical
- Consider that these laws are rooted in removing barriers and stigmas for people who have protected status
1. Reasonable Accommodation

DISABILITIES
Disability protections

- **Americans with Disabilities Act**
- Oregon statutes and regulations
  - ORS 659A.103, et seq.
  - OAR 839-006-0200, et seq.
- Prohibit discrimination and/or harassment on the basis of disability, perceived disability or record of a disability
- Require employers to accommodate a qualified individual with a disability - employees and applicants with certain limited exceptions
Three types of employee claims:

1) **Failure to reasonably accommodate**

2) **Disparate treatment**
   - Protected class status
   - Adverse employment action because of that status

3) **Harassment/retaliation**
   - Conduct relating to an employee’s protected status
   - That is severe or pervasive
   - Unwelcome to the employee and
   - A reasonable person would also find it unwelcome
Overlapping laws on medical leave:

<table>
<thead>
<tr>
<th>Category</th>
<th>Details</th>
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<tbody>
<tr>
<td>Disability</td>
<td>• ADA and Oregon Disabilities Laws</td>
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<tr>
<td></td>
<td>• Prohibit discrimination, retaliation; require reasonable accommodation (unless undue hardship or direct threat).</td>
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<tr>
<td>Medical leave</td>
<td>• OFLA and FMLA 12 weeks for an employee’s serious (mental or physical) health condition (and much more).</td>
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<tr>
<td></td>
<td>• Prohibits interference, retaliation.</td>
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<tr>
<td>Workers’ comp</td>
<td>• Prohibits discrimination for invoking the workers’ comp system.</td>
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<tr>
<td></td>
<td>• Provides reemployment and reinstatement rights.</td>
</tr>
<tr>
<td>Oregon sick time</td>
<td>• Paid sick leave.</td>
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<tr>
<td></td>
<td>• Prohibits interference, retaliation.</td>
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</table>
Fundamentals:

A qualified individual is entitled to a **reasonable accommodation** under the law if the accommodation does not pose an **undue hardship for the employer** (and for the employee with a disability, if he or she does not pose a direct threat which cannot be mitigated by a reasonable accommodation).
What is a disability?

Definition:
• A physical or mental impairment
• That substantially limits someone in a major life activity

Note: Approximately 16% of the adult working age population has a disability

This could be none (or all) of us today but it could be any of us tomorrow!
Physical impairment:

- Physiological disorder or condition
- Cosmetic disfigurement
- Anatomical loss

Affecting bodily systems:

- Neurological
- Musculoskeletal
- Respiratory
- Cardio-vascular
- Reproductive
- Digestive
Mental impairment:

- Mental or psychological disorder
- Cognitive Impairment
- Intellectual disability
- Emotional or mental illness
- Traumatic brain injury
- Specific learning disabilities

Some examples: Major depression, bipolar disorder, anxiety disorder, panic disorder, obsessive-compulsive disorder, post-traumatic stress disorder, schizophrenia, personality disorders, etc.
What is a “major life activity”?

• Caring for oneself
• Performing manual tasks
• Seeing
• Hearing
• Eating
• Sleeping
• Walking
• Thinking
• Communicating
• Work
• Standing
• Lifting
• Bending
• Speaking
• Breathing
• Learning
• Reading
• Concentrating
• Major bodily functions
What does "an individual has a record of having a physical or mental impairment" mean?
Salem Hospital emergency room sees increase in illness linked to chronic pot use

Samantha Hawkins, Salem Statesman Journal  Published 8:00 a.m. PT Aug. 17, 2019

A marijuana-related illness has brought a surge of people into the Salem Health Hospital Emergency Room in recent years.
Example: Substance Abuse

Rehabilitated users have a history of impairment. They may need accommodation on their work schedule so that they can continue to attend out-patient group therapy.

Users currently going through rehabilitation may be protected.

Current drug users are not protected as individuals with disability, including medical marijuana or recreational marijuana.

How current is “current?” Does an employee have to be caught smoking pot in the parking lot by the supervisor on a workday in order to be considered as a “current” drug abuser?

It requires case-by-case analysis. Supervisors and managers should check with their agency’s HR. If the illegal use of drugs is recent enough to justify employer’s reasonable belief that involvement with drugs is ongoing problem, it is current enough.
Permitted Employer Action

The Oregon disability laws do not affect the ability of an employer to do any of the following:

1. An employer may prohibit the transfer, offering, sale, purchase or illegal use of drugs at the workplace by any employee. An employer may prohibit possession of drugs except for drugs prescribed by a licensed health care professional.

2. An employer may require that employees not be under the influence of illegally used drugs at the workplace.

3. An employer may require that employees behave in conformance with the requirements established under the federal Drug-Free Workplace Act of 1988.

4. An employer may hold an employee who engages in the illegal use of drugs to the same qualification standards for employment, job performance and behavior to which the employer holds other employees, even if the unsatisfactory performance or behavior is related to the illegal use of drugs by the employee.

5. An employer may require that employees comply with all federal and state statutes and regulations regarding the illegal use of drugs. ORS 659.127
Example: Alcoholism

A former alcoholic has a record of impairment. They may need time off as an accommodation so they can continue to attend AA meetings.

Supervisors and managers: Enforce rules concerning alcohol in workplace, including:

• Prohibit use of alcohol at work
• Require employees not to be under influence of alcohol at work
• Hold alcoholic to same standard as non-alcoholics, even if unsatisfactory performance is related to alcoholism
  • Rules must apply equally in a non-discriminatory manner
  • If your office is easygoing on punctuality, supervisors and managers may not discipline alcoholic employee for similar tardiness
Alcoholism
COMMON ISSUES

Some alcoholics deny that they have a drinking problem – meaning they deny they have a disability.

If they deny they have a disability, there is no obligation for the employer to provide reasonable accommodation.
Disability protection: Necessary elements

Disability discrimination protections exist when an employee:

1. Has a **disability**,  
2. Is **qualified**, and  
3. Can perform the **essential functions** of the job, with or without **reasonable accommodation**.
Qualified individual

Individual satisfies job-related requirements and able to perform essential functions of job, with or without reasonable accommodation.
“Essential functions”

- Tasks that are **fundamental and not marginal**
- The position **exists to perform that function**
- A **limited number of employees is available** to carry out the essential function
- The function is **highly specialized**: the person is hired for the expertise or ability to perform the function
“Essential functions”

In determining whether a function is essential, courts consider things such as:

- Time spent performing the function
- Consequences of the function not being completed
- Number of people available to perform function
- The employer’s judgment
- Written job descriptions
Monika Samper v. Providence St. Vincent Med. Center
Samper appeals the district court’s summary judgment in favor of Providence on her reasonable accommodation claim under the Americans with Disabilities Act (‘‘ADA’’). Because regular attendance is an essential function of a neo-natal nursing position at Providence, we affirm.
Review the Position Description Periodically
SECTION 3. DESCRIPTION OF DUTIES

List the major duties of the position. State the percentage of time for each duty. Mark “N” for new duties, “R” for revised duties or “NC” for no change in duties. Indicate whether the duty is an “Essential” (E) or “Non-Essential” (NE) function.

<table>
<thead>
<tr>
<th>% of Time</th>
<th>N/R/NC</th>
<th>E/NE</th>
<th>DUTIES</th>
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<tbody>
<tr>
<td>%</td>
<td>R</td>
<td>E</td>
<td></td>
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<tr>
<td>N</td>
<td></td>
<td>E</td>
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<td>%</td>
<td>R</td>
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<tr>
<td>%</td>
<td>R</td>
<td>E</td>
<td>Other Duties As Assigned:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Other projects or duties as assigned</td>
</tr>
</tbody>
</table>
People first language

- Appropriate designation is **individual with a disability** or individuals with disabilities

- "**Handicapped**" is outdated and should not be used

- Referring to someone as "retarded" is never appropriate

- **Vision-impaired, hearing-impaired, cognitive disabilities.** Blind and deaf still used.
Duty to engage in a meaningful interactive process:

- An informal process between an employer and an employee (or applicant in the case of a disability) in an effort to find a reasonable accommodation

- This may be a series of structured communications as the situation evolves

- Explore options in good faith and document your efforts if you can or cannot meet the employee’s needs
Triggers

- Employee request (plain English)
- Employee illness
- Employee performance or attendance issues
- Workers’ compensation claim (whether allowed or denied)
- FMLA/OFLA request/expiration of leave
- Known off the job injury
- Changes in attitude or behavior
- Tension in the workplace
The Americans with Disabilities Act (ADA) protects qualified individuals with disabilities from employment discrimination. Reasonable accommodation is a key nondiscrimination requirement under the ADA. All requests are handled on a case-by-case basis.

Section 1. ACCOMODATION REQUEST

To be completed by the Employee. Please type or print clearly. Attach additional sheets if necessary. If you need help completing this form, contact (insert name), ADA Coordinator at (insert email address), (503) 000-0000, TTY users call (503) 000-0000

Document the Interactive Process
Medical inquiries: Three stages of employment

- **Pre-offer**: No questions regarding disabilities or medical conditions.

- **Post-offer, Pre-employ**: OK to require a medical exam, as long as this is required of all entering employees in the same job category and the medical information is kept confidential.

- **Job has started**: Inquiries or medical exams permitted only if “job-related and consistent with business necessity.”
Medical inquiries
ORS 659A.136(1)

Except as provided in this section, an employer may not require that an employee submit to a medical examination, may not make inquiries of an employee as to whether the employee has a disability, and may not make inquiries of an employee as to the nature or severity of any disability of the employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity.
Dear Dr. Last Name

We are seeking information on one of your patients, Employee Name, in response to his/her request for accommodation. We need your expert opinion to determine whether accommodation is necessary and to identify effective accommodations.

Attached is a position description that identifies Employee Name’s essential job functions. Please advise us whether Employee Name can perform the essential job functions of the position, with or without accommodation. If accommodation is necessary, please identify the accommodation(s) that would be effective to allow Employee Name to perform the essential job functions. If more than one accommodation would be effective, please identify the alternative accommodations.
Medical inquiries: Employer covers expenses

[If] Agency requires medical verification

[Then] Agency pays out-of-pocket costs associated with certification

[See ORS 659A.306]
ORS 659A.306

(1) It is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

(2) Notwithstanding subsection (1) of this section, it is not an unlawful employment practice for an employer to require the payment of medical examination or health certificate costs:

(a) From health and welfare fringe benefit moneys contributed entirely by the employer; or

(b) By the employee if the medical examination or health certificate is required pursuant to a collective bargaining agreement, state or federal statute or city or county ordinance.
Interactive process

- HR or manager initiates process with employee to determine accommodation
- May require input from care provider
- May require research regarding cost/impact
- Obligation to engage in good faith, but the employer doesn’t necessarily have to adopt the employee’s requested (preferred) accommodation...but should consider it!
- Is ongoing – if change in condition, request for change, or accommodation not working, must re-engage in process
Typical steps in the interactive process

- Trigger
- Employee fills out request form or makes supervisor/HR aware of need for accommodation
- Meet with employee
- Notify supervisor (no unnecessary detail)
- Generate/gather information and documentation
- If a disability, involve medical provider
- Discuss with management and HR
- Back and forth
- Prepare written plan (letter, email, document)
- Closure letter or email to employee with cc to manager and HR
## Discussion: Starting the “interactive process”

<table>
<thead>
<tr>
<th>Not so good</th>
<th>Better</th>
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<tbody>
<tr>
<td>How’s your health?</td>
<td>Need anything?</td>
</tr>
<tr>
<td>You seem depressed?</td>
<td>You don’t seem like yourself today.</td>
</tr>
<tr>
<td>Snap out of it!</td>
<td>Want to talk about it?</td>
</tr>
<tr>
<td>Don’t worry. I know exactly what you’re going through.</td>
<td>It’s hard to imagine what you’re going through. But I know that it’s bothering you.</td>
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</tbody>
</table>
DAS Example of an Accommodation Procedure

Step 1

Example of an Accommodation Procedure

Please note that timelines given in this example are not set by statute or regulation. The ADA and State law require agencies to respond to requests for accommodation in timely manner. What is “timely” will vary from agency to agency and from situation to situation.

<table>
<thead>
<tr>
<th>Who</th>
<th>Function or Activity</th>
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<tbody>
<tr>
<td>1. Agency Leadership</td>
<td>Identifies a position that will be the ADA Coordinator for the agency. In addition to coordinating the ADA accommodation requests for the agency, this position will be the agency's main resource on all ADA matters and will identify, and where necessary compile, outside resources for agency use.</td>
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## Step 2 and 3

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<tr>
<td>2.</td>
<td><strong>Supervisor/Manager and HR Staff/ADA Coordinator</strong></td>
</tr>
<tr>
<td>3.</td>
<td><strong>Employee, a family member or health professional</strong></td>
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</table>
Step 4

4. Supervisor/Manager

Upon receiving request for accommodation, contacts HR staff/ADA Coordinator.
5. Requesting Employee and Agency Officials

Through an informal, interactive process, explore potential accommodations that would overcome the limitations. At this stage, the following should occur:

- a. As appropriate, conduct a job analysis of the particular job involved and determine its physical and cognitive requirements.
- b. Consult with the requesting employee regarding the precise job-related limitation imposed by the employee’s disability and how those limitations could be overcome with a reasonable accommodation.
- c. The effectiveness of each accommodation is assessed to determine if the employee can perform the essential functions of the position.
- d. The supervisor confers with Human Resource Staff, requesting employee, managers/supervisors, ADA Coordinator and technical assistance, as necessary, to determine whether the accommodation is reasonable or would pose an undue hardship.
- e. If the accommodation(s) are deemed reasonable, consider the preference of the requesting employee and select and implement the accommodation that is most appropriate for both the employee and the employer.

If the disability or need for an accommodation is not obvious, documented or not already known to the supervisor/manager, ADA Coordinator, or the HR staff, it may be necessary for the employee to provide documentation about the disability and/or functional limitations. In this situation, the Agency will request medical documentation, along with a signed Release of Information form directly from the requesting employee. If the information submitted does not clearly explain the disability or the need for the accommodation, the Agency has the right to request supplemental medical information. The Agency also has the right to have the medical information reviewed by a medical expert. A description of the essential functions and working conditions of the job needs to be provided.

All medical information will be kept confidential and in locked files, separate from personnel files.
### Step 6

<table>
<thead>
<tr>
<th></th>
<th>Agency Official</th>
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<tbody>
<tr>
<td>6.</td>
<td>Within thirty (30) days from receipt of request, notifies the employee requesting accommodation of the agency's determination in writing and of the specific accommodations it proposes to make. The Agency is not expected to adhere to this time frame if needed documentation is not provided in a timely manner, if the employee requests alternative accommodations (see Step 7 below), or if other extenuating circumstances arise.</td>
</tr>
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### Step 7 and 8

<table>
<thead>
<tr>
<th>Step</th>
<th>Role</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>7.</td>
<td>Requesting Employee</td>
<td>Accepts or rejects the proposed accommodation based on its effectiveness, and may propose different accommodation(s). An employee who rejects an effective accommodation and is unable to perform the essential functions of the job may not be qualified for the position.</td>
</tr>
<tr>
<td>8.</td>
<td>Agency Official</td>
<td>If alternative accommodations are proposed, refer to Steps 5, 6 and 7, above.</td>
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</tbody>
</table>
### Step 9

<table>
<thead>
<tr>
<th>Requesting Employee</th>
<th>If dissatisfied with the Agency’s reasonable accommodation decision, the requesting employee may submit a written complaint. The complaint shall be submitted to the ADA Coordinator within 30 days from the date of the alleged violation. Exceptions may be granted in special circumstances.</th>
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<tr>
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<td>The ADA Coordinator and/or Human Resource official, under the direction of the appropriate Appointing Authority, shall promptly investigate any complaint received, and shall send a written response to the complainant within fifteen (15) days following receipt of the complaint. The complainant may be given the opportunity to meet with the ADA Coordinator and the Human Resource Analyst, whenever feasible in an effort to resolve the complaint. The written complaint and response shall be distributed to the complainant, to any relevant parties (Supervisor, HR, Final Decision Maker) to the alleged action(s), and the Agency officials. The results of this internal review are final.</td>
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<tr>
<td></td>
<td>If the complainant is dissatisfied with the decision, they may file a complaint with:</td>
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</tbody>
</table>
|                     |   a. Affirmative Action Director  
Governor’s Office  
155 Cottage Street NE  
Salem, OR 97301  
503-373-7444 (voice) |
|                     |   b. Oregon Bureau of Labor and Industries  
800 NE Oregon St, Suite 1045  
Portland, OR 97232  
503-673-0761 (voice) |
|                     |   c. Equal Employment Opportunity Commission  
1301 L Street NW  
Washington, D.C. 20507  
202-663-4600 or 1-800-669-4000 (voice)  
202-663-4596 or 1-800-669-8820 (TDD) |
Reasonable accommodation

• Are facilities readily accessible to and usable by individuals with disabilities?
• Can the job be restructured?
• Can the work schedule be modified?
• Is there a vacant position?
• Can we acquire or modify equipment?
Reasonable accommodation

• May or may not be the accommodation the employee prefers
• Can include equipment, schedule modification (allowing extra leave, tardies, absences) and/or a facilities change, etc.
• Can include reassignment to different position if no accommodation possible in current position

• Does not include:
  • Eliminating essential functions
  • Lowering production standards (compare “workload”)
  • Providing personal use items: hearing aids, glasses, prosthetic limb, etc.
Reasonable accommodation

More on leave as a reasonable accommodation:

• ...for a broad range of purposes, such as treatment, recovery, avoiding temporary adverse conditions in the work environment, training a service animal, receiving training to cope with disability, etc.
• Do you have to hold a position open?
• What if they cannot give an expected duration or a fixed date of return?
Undue Hardship

An accommodation imposes an undue hardship on the operation of the business of the employer if the accommodation requires significant difficulty or expense. ORS 659A.121.
What represents an undue hardship?

Factors to consider include:
Nature and the cost of the accommodation
The overall financial resources of the employer:
Size of the business
Number of locations
Type of operations
Composition, structure and functions of the workforce
Geographic separateness

[See ORS 659A.121 (2)]

Bottom line: A state agency will have to justify its position when it denies an accommodation. The more documentation and data, the better.
“Direct threat”

- An employer need not accommodate if placing the individual in the job would result in a direct threat to self or others.
  - An employer may terminate an employee that is direct threat to health and safety.
“Direct threat”

• Direct threat means **significant risk of substantial harm** that cannot be eliminated or reduced below the level of significant risk by reasonable accommodation.
  
  o Supervisors and managers need proof that the employee poses “significant risk of substantial harm” to themselves or others AND no reasonable accommodation would reduce the risk of harm.
  
  o “Significant risk” means highly probable.
  
  o “Substantial harm” means serious harm, permanent injury.
"Direct Threat" - Medical Judgment

- An employer may require that an employee submit to a medical examination if the examination or inquiry is shown to be job-related and consistent with business necessity. ORS 659A.136.
- Good faith belief that risk exists is not enough.
- Seek expert opinion.
Managing disability issues

- Supervisors and managers: Do not ask applicants for medical info or ask about a disability unless they request accommodation for the application/ interview process.
- Supervisors and managers: Allow to ask if applicants can perform the essential functions of the job, with or without an accommodation: refer to job descriptions.
- Supervisors and managers: Do not ask employee whether they are suffering from disability.
- Supervisors and managers initiate and actively pursue the interactive process – might be ongoing; both sides must act in good faith.
- Supervisors and managers check in with the employee periodically and document what was discussed.
- Rely on medical information from the employee’s doctor.
More disability tips

• Do not “diagnose” employees
• Maintain confidentiality of medical information
  • Separate files, lock and key, encrypted and password protected
  • HR may inform the supervisors or managers of necessary restrictions on the work or duties of the employee and necessary accommodations. Do not discuss the diagnosis or even the type of doctor; refer to the “provider”
• You may inform first aid and safety personnel, when appropriate, if the disability might require emergency treatment
More things to avoid:

Statements like these:

- “You must be able to perform 100% (or all) of your job duties.”
- “You must bring in a full release before you may return to work.”
- “You must be completely released before you return to work.”
Reasonable accommodations and mental health:

- Duty to engage in an “interactive process”
Reasonable accommodations and mental health:

Examples of what can be a reasonable accommodation:

• Time off/leave of absence
  • Part time or modified work schedule
• Adjusted schedules to time when likely to have fewer flare-ups
• Modified duty by restructuring the non-essential job functions
• New approach to coaching/feedback
  • Closer supervision for bipolar employee who needed input and encouragement
  • Job coach
• Reassignment (as a last resort)
• Other modifications in the workplace:
  • Breaks for taking medication or rest
  • Working from home if job functions allow
Episodic impairments:

Episodic impairments or “impairments in remission” qualify as disability if they would substantially limit major life activity when active,

Examples of episodic impairments:

- Bipolar disorders
- Major depression
- Schizophrenia
Mitigating measures:

Mitigating measures cannot be considered when determining whether one is disabled.

Applies to mental impairments and physical impairments.

Mitigating measures include:

- Medication
- Psychotherapy
- Behavioral therapy
- Learned behavioral or adaptive neurological modifications
We have an employee who has a doctors note for a Service Animal (not an Emotional Support Animal) to help with PTSD/Depression/Anxiety. The employee brought in a letter that the “dog” was federally registered; however, this is a 6-week-old puppy. How do we handle this request?
Other resources:

Job Accommodation Network (JAN)
In addition to DAS, free consulting services for all managers and supervisors: askjan.org/empl/index.htm

Northwest ADA Information Center
nwadacenter.org
(800) 949-4232
Related Issues

WORKERS COMPENSATION CLAIMS
DAS policy – reemployment of injured workers

State HR Policy

<table>
<thead>
<tr>
<th>SUBJECT:</th>
<th>Reinstatement and Reemployment of Injured Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>DIVISION:</td>
<td>Chief Human Resources Office</td>
</tr>
<tr>
<td>NUMBER:</td>
<td>50,020.03</td>
</tr>
<tr>
<td>EFFECTIVE DATE:</td>
<td>2/01/2019</td>
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APPROVED: Signature on file with the Chief Human Resources Office

POLICY STATEMENT: Oregon state government reinstates employees with compensable work-related injuries or illnesses to their former positions, reemploys them to available and suitable positions, and provides them preference to entry-level classifications in accordance with ORS 659A.043, 659A.046, and 659A.052.
Injured Workers Protections:

Three basic protections

• No discrimination (including applicants) and no retaliation
• Re-employment rights to available/suitable light duty with another agency within executive branch or the agency-at-injury
• Reinstatement to the former job at the agency-at-injury

Leave may be up to 3 years from the date of injury.
Injured Workers
Accommodations for Light Duty

Whether or not the workers’ claim is accepted by SAIF, when an injured worker is released for light-duty or restricted duty, the issues relating to accommodation may come up.
Related Issues
FMLA AND OFLA
OFLA/FMLA basics:

Eligibility:
- OFLA: 180 days of employment plus about 642.75 hours worked in the 180 days preceding leave (No hourly requirements for parental leave)
- FMLA: 1 year of employment plus 1,250 hours worked in the year preceding leave plus 50 employees within a 75 mile radius

Qualifying events:
- OFLA – Serious Health Condition of Employee or “Family Member”, Pregnancy related conditions, Bonding time with a New Child, Sick Child Leave, and Bereavement Leave
- FMLA – Serious Health Condition of Employee or Parent, Spouse or Child, Bonding Time with a New Child, Military Caregiver Leave and Qualifying Exigency Leave
Employee’s Own Serious Health Condition

FMLA
A **serious health condition** that makes the employee unable to perform the functions of his or her job.

OFLA
Serious health condition leave is leave taken to recover from or seek treatment for a **serious health condition**.

The vocabulary is different: “serious health condition” v. “disability.”
Not Yet Eligible for FMLA/OFLA Leave

If an employee has a serious health serious health, and the employee is not yet eligible for 12 weeks of FMLA or OFLA entitlement, their employer may want to go through the mandatory interactive process to determine if a disability leave may be a reasonable accommodation without creating an undue hardship on the agency’s operation.
Exhaustion of FMLA/OFLA Leave

If an employee takes FMLA or OFLA leave due to their own serious health, upon exhaustion of their 12 weeks of FMLA or OFLA entitlement, their agency may want to go through the mandatory interactive process to determine if additional disability leave may be a reasonable accommodation without creating an undue hardship on the agency’s operation.
Leave to Get Alcohol Treatment

Substance abuse may be a serious health condition if the employee’s health status meets the FMLA definition of a serious health condition. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

29 C.F.R. §825.119(a).

Providing leave is a reasonable accommodation for alcoholics to get treatment, unless treatment would be futile or prognosis is poor, Schmidt v. Safeway, 864 F. Supp. 991 (D. Or. 1994)
2. Pregnancy Accommodation
Pregnancy-Related Absences

Currently, in addition to using their accrued sick leave, vacation leave, personal leave, and comp time, a pregnant employee, if eligible for OFLA, may take up to 12 weeks of OFLA pregnancy disability leave. If necessary, they may take up to another 12 weeks of OFLA leave for pregnancy-related or childbirth-related conditions.

OFLA has a 6-month waiting period.

What if the employee is not yet eligible for OFLA due to length of service?
SUPREME COURT OF THE UNITED STATES

Syllabus

YOUNG v. UNITED PARCEL SERVICE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT


The Pregnancy Discrimination Act added new language to the defi-
nitions subsection of Title VII of the Civil Rights Act of 1964. The first
clause of the Pregnancy Discrimination Act specifies that Title VII’s
prohibition against sex discrimination applies to discrimination “be-
cause of or on the basis of pregnancy, childbirth, or related medical
conditions.” 42 U. S. C §2000e(k). The Act’s second clause says that
employers must treat “women affected by pregnancy . . . the same for
all employment-related purposes . . . as other persons not so affected
but similar in their ability or inability to work.” Ibid. This case asks
the Court to determine how the latter provision applies in the context
of an employer’s policy that accommodates many, but not all, workers
with nonpregnancy-related disabilities.
Case law: Young v UPS

- UPS refused to give pregnant worker light duty or let return to her job as a truck driver
- UPS had given other employees light duty as accommodation for disability
- US Supreme Court ruling says that to bring a claim, employees must:
  - Show that employer refused to make an accommodation
  - Demonstrate disparate treatment
80th OREGON LEGISLATIVE ASSEMBLY--2019 Regular Session

Enrolled

House Bill 2341

Sponsored by Representative POWER, Senator TAYLOR; Representatives BOSHART DAVIS, DOHERTY, FAHEY, HAYDEN, KENY-GUYER, KOTEK, NERON, SALINAS, SCHOUTEN, WILDE, Senator MONNES ANDERSON (Presession filed.)

CHAPTER ................................................

AN ACT

Relating to reasonable accommodation for pregnancy-related conditions; creating new provisions; and amending ORS 659A.885.

Effective 1-1-2020
Pregnancy accommodations: Legislative background

The 2019 Legislative Assembly passed House Bill 2341 to provide greater protection for pregnant employees:

• Agencies must make reasonable accommodations for pregnant employees unless they would impose an undue hardship
• Employee can’t be required to take OFLA, FMLA, or any leave if reasonable accommodations can be provided
• Employee can’t be required to accept accommodations if there’s no known limitation
• Unlawful practice to deny employment opportunity because of pregnancy accommodations
• No retaliation for accommodation requests

Effective 1-1-2020
The new law requires employers to accommodate pregnant employees.

Examples of accommodations include:

• **Modifying equipment**
• More frequent or **longer breaks and rest**
• **Help with manual labor**
• **Work schedule or job assignment adjustments**
Undue hardship

What represents an undue hardship?

Factors to consider include:

• Nature and the cost of the accommodation
• The overall financial resources of the employer:
  • Size of the business
  • Number of locations
  • Type of operations
  • Composition, structure and functions of the workforce
  • Geographic separateness

[See ORS 659A.121 (2)]

Bottom line: A state agency will have to justify its position when it denies an accommodation. The more documentation and data, the better.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et
al. v. JOHNSON CONTROLS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 89-1215. Argued October 10, 1990 — Decided March 20, 1991

A primary ingredient in respondent’s battery manufacturing process is lead, occupational exposure to which entails health risks, including the risk of harm to any fetus carried by a female employee. After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by the Occupational Safety and Health Administration (OSHA) as critical for a worker planning to have a family, respondent announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the OSHA standard. Petitioners, a group including employees affected by respondent’s fetal-protection policy, filed a class action in the District Court, claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights
Sex-specific Policy is Unlawful

“Absence of a malevolent motive” does not matter

(a) By excluding women with childbearing capacity from lead-exposed jobs, respondent's policy creates a facial classification based on gender and explicitly discriminates against women on the basis of their sex under 703(a) of Title VII. Moreover, in using the words "capable of bearing children" as the criterion for exclusion, the policy explicitly classifies on the basis of potential for pregnancy, which classification must be regarded, under the PDA, in the same light as explicit sex discrimination. The Court of Appeals erred in assuming that the policy was facially neutral because it had only a discriminatory effect on women's employment opportunities, and because its asserted purpose, protecting women's unconcepted offspring, was ostensibly benign. The policy is not neutral because it does not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system. Also, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Cf. Phillips v. Martin Marietta Corp.,
Notice requirements

- Employers **must display a poster in a conspicuous and accessible place**, giving notice of the rights and responsibilities of the law.

- In addition, the employer shall provide a written copy of the notice to:
  - New employees at the time of hire
  - Existing employees (within 180 days after law takes effect)
  - An employee who informs an employer of a pregnancy (within 10 days of the info)

HB 2341, Effective 1-1-2020
Pregnancy accommodations: EEOC guidance

- EEOC Guidance: adverse treatment arises from assumptions about a woman’s capabilities and commitment to the job
- Evaluate capabilities just as you would for non-pregnant workers with health conditions: based on their ability or inability to work
- Would you provide a reduced schedule or light duty to an injured worker but not a pregnant woman? This might be a problem!
Pregnancy (cont.)

• “Maternity Leave” is an imprecise term under an OFLA analysis because an eligible employee who takes any pregnancy disability leave (any incapacity due to pregnancy or childbirth, including routine prenatal visits) is entitled to an additional 12 weeks for any OFLA purpose in the same calendar year.

• If an eligible employee takes 12 weeks of “maternity leave” that is covered by OFLA parental leave, the employee is entitled to take up to 12 weeks of OFLA sick child leave in the same calendar year.

• Employees: Communicate with your agency’s HR employee to find out when the incapacity ends and the bonding time begins. Communicate with the employee to find out when the incapacity ends and the bonding time begins.
Rest periods for expression of breast milk (HB 2593)

- All nursing employees are entitled to “reasonable” breaks to express breast milk and accommodations to (1) do so in a private location and (2) store it in an ice chest or freezer.

Effective 9-29-2019

- Furthermore, under HB 2341, it is an unlawful practice to deny an employee’s request for accommodation due to pregnancy, childbirth related conditions, including lactation, if the requested accommodation does not create an undue hardship on the agency’s operation.

Effective 1-1-2020
3. Religious Accommodation
OLD EUROPE - BRITISH INFLUENCE
HISTORICAL PERSPECTIVE
During the reign of Henry VIII, a law was enacted that made the English monarch the supreme head of the Church in 1534. In the same year, another law was passed that gave Henry VIII the authority to appoint the Church’s high officials.
The Puritans wanted religious freedom

The Puritans did not like the idea of being controlled by a national church dictated by the monarch. They sailed across the pond to the new world and established their colony in New England. They wanted to interpret and apply God’s teaching in their own ways, have their own religious ceremonies and rituals, and elect their own minister to preach.
NEW WORLD - US CONSTITUTION
Revolution has consequences

After the New England (later the United States of America) broke the political ties with England, the founders had to write a code of conduct on how to organize themselves and govern the new colony, hence the US Constitution. With their experiences of worship under the Church of England, they said no more. They did not want nor did they want the generations after them to have the possibility of establishing a national church. The First Amendment was introduced and adopted.
First amendment has two religion clauses

ESTABLISHMENT CLAUSE
“Congress shall make no law respecting an establishment of religion, or

FREE EXERCISE CLAUSE
prohibiting the free exercise thereof.”
Purposes of the two religion clauses

Under the Establishment Clause, the federal government was forbidden to “establish” a national religion every citizen must follow/believe in.

Under the Free Exercise Clause, each citizen is guaranteed the rights to follow whatever path that will provide them with the spiritual nourishment.

How does an employee exercise their constitutional rights to follow their chosen spiritual path when work conflicts with their religious observance or practices?
Oregon Workplace Religious Freedom Act
ORS 659A.033

(1) An employer violates ORS 659A.030 if:

   (a) The employer does not allow an employee to use vacation leave, or other leave available to the employee, for the purpose of allowing the employee to engage in the religious observance or practices of the employee; and

   (b) Reasonably accommodating use of the leave by the employee will not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section.
(2) Subsection (1) of this section applies only to leave that is not restricted as to the manner in which the leave may be used and that the employer allows the employee to take by adjusting or altering the work schedule or assignment of the employee.
OR 659A.033

(3) An employer violates ORS 659A.030 if:

   (a) The employer imposes an occupational requirement that restricts the ability of an employee to wear religious clothing in accordance with the employee’s sincerely held religious beliefs, to take time off for a holy day or to take time off to participate in a religious observance or practice;

   (b) Reasonably accommodating those activities does not impose an undue hardship on the operation of the business of the employer as described in subsections (4) and (5) of this section; and

   (c) The activities have only a temporary or tangential impact on the employee’s ability to perform the essential functions of the employee’s job.
(4) A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense. For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered:

(a) The nature and the cost of the accommodation needed.

(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.

(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer’s facilities.
(d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer.

(e) The safety and health requirements in a facility, including requirements for the safety of other employees and any other person whose safety may be adversely impacted by the requested accommodation.

(f) The degree to which an accommodation may constrain the obligation of a school district, education service district or public charter school to maintain a religiously neutral work environment.
(5) A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation would constrain the legal obligation of a school district, education service district or public charter school to:

(a) Maintain religious neutrality in the school environment; or

(b) Refrain from endorsing religion.
Religious accommodations

Federal and state anti-discrimination laws require an employer to reasonably accommodate an employee whose sincerely held religious belief conflicts with a work environment, unless providing the accommodation would impose an undue hardship on the conduct of the employer’s business.
Religious accommodations

The need for religious accommodation most frequently arises where an individual’s religious belief, observances, or practices conflict with a specific task or requirement of the job or the application process.
Religious accommodations

The employer’s duty to accommodate will usually entail making a special exception from, or adjustment to, the particular requirement so that the employee or applicant will be able to practice his or her religion.
Religious accommodations

A claim for failure to accommodate will prevail if:

1. An employee has a sincerely held religious belief
2. Which conflicts with job requirements
3. And the employer does not provide a reasonable accommodation unless it is an undue hardship to do so
Religious accommodations: “Sincerely held belief”

What is a “sincerely held religious belief”?

- Very broad: Not necessarily traditionally religious (so long as moral or ethical as to right or wrong and held with the strength of traditional religious beliefs), needn’t be widely held; needn’t be logical
- Examples include vegetarianism, veganism, international church of body modification, wicca, druidry, satanism

Three types of risk/potential complaints:

1. Failure to accommodate
2. Disparate treatment
3. Harassment
Religious accommodations

These cases can be VERY expensive:

- Muslim truckers awarded $240,000 because their beliefs prevented them from transporting alcohol. (October, 2015)
- Evangelical Christian mine worker awarded nearly $600,000 after being forced to retire for refusing to submit to a biometric hand scanner (August 2015)
- Bend dentist ordered to pay $350,000 for imposing religious beliefs on an employee (BOLI 2012)
Exercise 1:

Diane requests that her employer schedule her for “fewer hours” so that she can “attend church more frequently.” The employer denies the request because it is not clear what schedule Diane is requesting or whether the change is sought due to a religious belief or practice. Diane files a complaint alleging denial of accommodation, and her employer asserts that her statement did not constitute an accommodation request.

What do you think?
Exercise 2:

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel only every other Saturday off.

Is the arena’s proposed accommodation reasonable?
Patrick is employed as a correctional officer at a state prison, and his brother William is employed as a grocery store manager. Both Patrick and William seek permission from their respective employers to wear a fez to work as an act of faith on a particular holy day as part of their religious expression. Both employers deny the request, citing a uniformly applied workplace policy prohibiting employees from wearing any type of head covering. The prison’s policy is based on security concerns that head covering may be used to conceal drug, weapons, other contraband, and may spark internal violence among prisoners. The grocery store’s policy is based on a stated desire that all employees wear uniform clothing so that they can be readily identified by customers.

If both brothers file complaints challenging the denial of their accommodation requests, what result?
Exercise 4:

Helen, an employee in a mental health facility that served a religiously and ethnically diverse clientele, frequently spoke with clients about religious issues and shared religious tracts with them as a way to help solve their problems, despite being instructed not to do so. After clients complained, Helen’s employer issued her a letter of reprimand stating that she should not promote her religious beliefs to clients and that she would be terminated if she persisted. She did continue and was terminated. She files a complaint alleging denial of accommodation because the employer did not permit her to engage in these discussions with clients, which she asserts her religious beliefs require her to do so.

Can the employer use “undue hardship” as the reason?
Exercise 5:

As part of a training program all trainees were required to read, memorize and recite passages from a motivational book entitled “The Greatest Civil Servant in the World.” Daphne, a trainee, refused to read the book because she found many of its ideas antithetical to her religious beliefs. Because she refused to read the book, she was removed from the training program and not hired.

Daphne files a complaint and alleges denial of reasonable accommodation, and the employer asserts undue hardship. What do you think?