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What all Municipal Lawyers Should Know

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One of the most common employment situations arises from an employee's medical condition and the need for medical leave or other accommodations in the workplace. These situations typically implicate the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), and various state laws related to leave and disability discrimination. This document addresses some of the most common issues, including issues that are more unique to municipalities, considering they employ law enforcement officers, firefighters, and other safety-sensitive positions.

Reasonable Accommodations Under the ADA:

Under the Americans with Disabilities Act ("ADA"), employers must provide employees with disabilities a reasonable accommodation so that the employees can perform the essential functions of the job. Under the ADA, reasonable accommodations may include:

> (A) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) Job restructuring, part-time or modification of equipment or devises, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 1211(9). *See also* 29 C.F.R. § 1630.2(o) (Equal Employment Opportunity Commission ("EEOC") further interpreting the statutory definition).

Unless an employer can demonstrate undue hardship, employers must provide reasonable accommodations to otherwise qualified individuals. 29 C.F.R. § 1630.2(o)(4).

1. Interactive Discussion:

In determining whether an employee's requested accommodation is reasonable, the EEOC's interpretations suggest "it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual." 29 C.F.R. § 1629.2(o)(3). The EEOC further articulates a process for this requirement in its analysis of the regulations under § 1630.9. 29 C.F.R. Appx. Part 1630.9.

Specifically, once an employee submits a request for accommodation, the employer "must make a reasonable effort to determine the appropriate accommodation. . . [which] is best determined through a flexible, interactive

process that involves both the employer and the individual with a disability." *Id*. The analysis then recommends the employer consider a four-part problem-solving process including:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and asses the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Id.

While such a process is advised, the EEOC notes that "[i]n many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the individual with a disability that it may not be necessary to proceed in this step-by-step fashion." *Id*.

It is not a per se violation of the ADA if an employer does not engage in an interactive process where there is no reasonable accommodation available for the employee. *Faulkner v. Douglas County Nebraska*, 906 F.3d 728, 733 (8th Cir. 2018) ("Thus, if Faulkner [employee] cannot show there was a reasonable accommodation available, DCDC [employer] is not liable for failing to engage in the good-faith interactive process."); *Minnihan v. Mediacom Communications Corp.*, 779 F.3d 803, 813 (8th Cir. 2015); *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 864 (8th Cir. 2006); *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015); *Rorrer v. City of Stow*, 743 F.3d 1025, 1046 (6th Cir. 2014); *Picard v. St. Tammany Parish Hosp.*, 423 Fed.Appx. 467, 470 (5th Cir. 2011) (citing *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 (5th Cir. 1999)); *Wilson v. Dollar General Corp.*, 717 F.3d 337, 347 (10th Cir. 2013).

<u>When should the employer engage in the interactive process?</u>

In some jurisdictions, the interactive discussion requirement is triggered once the employee requests an accommodation or assistance with their disability. *Rorrer*, 743 F.3d at 1045; *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 632 n. 6 (8th Cir. 2016) (interactive process is not triggered until the employee provides details about their disability and requests an accommodation).

However, generally as a best practice, employers should be proactive in engaging in the interactive process and exploring potential reasonable accommodations once they have any information that indicates a need for an accommodation. This is true even if the employee does not necessarily request an accommodation and even if a failure to engage in the interactive process is not a separate ADA violation in that jurisdiction. *See Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794, 799 (9th Cir. 2017) (employer was required to engage in the interactive process after becoming aware of the employee's job restrictions through viewing medical notes); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 316 (3d Cir. 1999) ("the employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation."); *Nebeker v. National Auto Plaza*, 643 Fed.Appx. 817, 824 (10th Cir. 2016) ("To request an accommodation, the employee may use plain English and does not need to specifically mention the ADA or use the phrase 'reasonable accommodation.'") (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999)).

2. Medical Leave

One of the most common potential reasonable accommodations is medical leave, especially in situations where it appears that there is no other accommodation available. This issue can be complex and confusing, especially as many employers overlook that they may be required to provide medical leave under the ADA, in excess of what they are required to provide under the Family Medical Leave Act ("FMLA") or even if an employee is not eligible for leave under FMLA or other laws.

The ADA lists offering "part-time or modified work schedules" as a potential reasonable accommodation. 42 U.S.C. § 12111(9). The list of potential reasonable accommodations listed in the statute is not exhaustive. 29 C.F.R. Appx. Part 1630.2(o). Within the non-exhaustive list, the EEOC states that "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment" might be reasonable. *Id.*

As such, an employer must consider medical leave as a reasonable accommodation, so long as it does not impose an undue burden on the employer. U.S. Equal Employment Opportunity Commission, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), *available at* https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

The EEOC makes clear that medical leave is to be considered even when an employer does not provide medical leave benefits, or where benefits are offered, leave should still be considered if the employee is not otherwise eligible under the policy. *Id.* Finally, medical leave should be an option where an employee is either ineligible or has exhausted FMLA leave. *Id.*

Employers may have to provide an extended medical leave, and bright line limits on leave run afoul of the ADA. *See* EEOC 2019 Press Release, *Connections CSP Will Pay $550,000 to Settle EEOC Disability Discrimination Suit*, available at, https://www.eeoc.gov/eeoc/newsroom/release/9-10-19a.cfm (EEOC reaches $550,000 settlement with CSP for unlawfully enforcing an inflexible maximum leave policy); EEOC Press Release, *Tallahassee Memorial Hospital to Pay $375,000 to Settle EEOC Disability Discrimination Suit*, available at, https://www1.eeoc.gov//eeoc/newsroom/release/9-29-19b.cfm?renderforprint=1 (EEOC filed claim that employer violated the ADA by maintaining an inflexible 12-week maximum leave policy, which failed to engage in the required interactive process); EEOC 2017 Press Release, *UPS to Pay $2 Million to Resolve Nationwide EEOC Disability Discrimination Claims*, available at, https://www.eeoc.gov/eeoc/newsroom/release/8-8-17.cfm (UPS settled with the EEOC for two million dollars after the EEOC claimed "UPS maintained an inflexible leave policy, whereby the company fired disabled employees automatically when they reached 12 months of leave, without engaging in the interactive process required by law.").

However, a general request for an indefinite leave of absence is not a reasonable accommodation under the ADA. *Walsh v. United Parcel Servic*e, 201 F.3d 718, 727 (6th Cir. 2000); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000); *Oestringer v. Dillard Store Services, Inc.*, 92 Fed.Appx. 339, 341 (7th Cir. 2004) (citing *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998)); *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537, 546 (8th Cir. 2018).

3. Light Duty Work

Another potential reasonable accommodation listed in the ADA is "job restructuring." 42 U.S.C. § 12111(9). This includes the possibility of reallocating or redistributing nonessential, marginal job functions, but does not require an employer to consider reallocating essential job functions. 29 C.F.R. Appx. Part 1630.2(o).

In responding to an employee's request for light duty work as a reasonable accommodation, employers should look for available light duty throughout the organization, not just the employee's specific department. *Shreve v. City of Romulu*s, 742 Fed.Appx. 97, 104-05 (6th Cir. 2018) (police officer that was injured during field officer training requested light duty assignment and was offered a dispatcher position).

Also, there is no requirement to create light duty work or a light duty position if one does not already exist. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Workers' Compensation and the ADA*, No. 915.002, at Q&A 27 (Sept. 3, 1996), *available at*, https://www.eeoc.gov/policy/docs/workcomp.html; *Otto v. City of Victoria*, 685 F.3d 755, 759 (8th Cir. 2012) (employee's requests to limit position to sedentary work, receive part-time job as an ice-hockey rink attendant, and receive assistance

from other employees was unreasonable because the ADA does not require an employer to create a new position or reallocate essential job functions); *Frazier-White v. Gee*, 818 F.3d 1249, 1256 (11th Cir. 2016).

Finally, an employer cannot reserve light duty work for only those employees with work-related injuries. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Workers' Compensation and the ADA*, No. 915.002, at Q&A 28 ("An employer cannot establish that the reassignment to a vacant reserved light duty position imposes an undue hardship simply by showing that it would have no other vacant light duty positions available if an employee became injured on the job and needed light duty.").

There are, however, instances where accommodating an employee's light duty work request is unreasonable. Generally, such requests are unreasonable because the request requires an employer to relieve the employee of performing the essential functions of the job. *See Pegues v. Mississippi State Veterans Home*, 736 Fed.Appx. 473, 477 (5th Cir. 2018) (nursing home care worker's light-duty request was unreasonable because it exempted the employee from an essential function of job, which required lifting patients); *Frazier-White*, 818 F.3d at 1256 (community service officer's request for indefinite light duty work was unreasonable where no such position existed); *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999) (firefighter's light duty request was unreasonable when there was no permanent light duty position available in the small department and modifying firefighter position to only light duty work would exclude essential job functions of fighting fires); *Hunt v. Monro Muffler Brake, Inc.*, 769 Fed.Appx. 253, 258 (6th Cir. 2019) (light duty request was an unreasonable accommodation because it would eliminate essential function to lift 50-lb).

4. Job Reassignment

Reassigning an employee to another vacant position when the employee no longer meets the essential functions of a job should be considered as a possible reasonable accommodation. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

Courts disagree as to whether the ADA requires an employer to automatically assign an individual with a disability to a vacant position they are qualified for, thereby reducing any competition for the position. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, No. 915.002, at Q&A 29 (Oct. 17, 2002), available at, https://www.eeoc.gov/policy/docs/accommodation.html ("Reassignment means that the employee gets the vacant position if s/he is qualified for it.").

Some courts broadly impose the duty to automatically reassign an employee to another position, so long as the employee is qualified, and the position is vacant.

See EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012) (overruling prior precedent by holding "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer."); *Shapiro v. Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154 (10th Cir. 1999*)*; *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998).

Other jurisdictions interpret the duty more narrowly and hold an employer is not required to automatically reassign an employee to a vacant position without competition with other qualified applicants. *See United States Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333, 1346 (11th Cir. 2016); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007) ("We agree and conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.").

In either case, however, the duty to reassign an employee to another vacant position is not interpreted to require an employer to violate an established seniority system in a collective bargaining agreement. *See U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 403 (2002); *Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160, 1165 (9th Cir. 2001); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000); *Faulkner v. Douglas County Nebraska*, 906 F.3d 728, 734 (8th Cir. 2018). *See also* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, No. 915.002, at Q&A 31 (Oct. 17, 2002).

5. Telecommuting

Most courts agree that maintaining a regular, physical presence at work is an essential function for most jobs, especially where a position entails a significant amount of collaboration. *Credeur v. Louisiana Through Office of Attorney General*, 860 F.3d 785, 793 (5th Cir. 2017); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015) (quoting *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001)); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237-38 (9th Cir. 2012); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122-24 (10th Cir. 2004). However, this may be one area of the law that is affected by the COVID-19 pandemic.

In 2003, the EEOC issued guidance recommending telework as a reasonable accommodation when an employee can perform parts of the job at home, without causing an undue hardship on the employer. U.S. Equal Employment Opportunity Commission, *Work at Home/Telework as a Reasonable Accommodation* (Feb. 3, 2003), available at, https://www.eeoc.gov/facts/telework.html.

Recently, the Seventh Circuit, in *Bilinsky v. American Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019), cautioned litigants that the employer's previous arguments against allowing employees to work from home have notably changed with new technological advancements. *Id.* (citing *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995)). The Court specifically noted:

> Technological development and the expansion of telecommuting in the twenty-four years since *Vande Zande* likely means that such an accommodation is not quite as extraordinary as it was then. That inquiry is context-specific; a work-from-home arrangement might be reasonable for a software engineer but not for a construction worker.

Bilinsky, 928 F.3d 565 at 573.

The Sixth Circuit concluded that a telework request was unreasonable when the request conflicted with the essential function of regular and predictable job attendance. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763 (6th Cir. 2015). The Court reasoned that the employee requested up to four days per week of teleworking, when other employees were only authorized two days, the employee was not willing to physically show up when needed, and predictable and regular job attendance was an essential function of the job. *Id*. at 764. The Court further noted that nothing in the record supported the EEOC's position that technological advances would allow the employee to perform the essential job functions remotely. *Id*. at 765. *See also Mosby-Meachem v. Memphis Light, Gas & Water Division*, 883 F.3d 595, 605 (6th Cir. 2018) (distinguishing *from Ford Motor Co.*, employee's request to work remote for 10-weeks was reasonable since the employee successfully performed the essential functions remotely in the past with no issues and the request was only for a limited period of 10-weeks.).

In *Brunckhorst v. City of Oak Park Heights*, the Eighth Circuit concluded that an employee's request to work from home was not a reasonable accommodation. 914 F.3d 1177, 1183 (8th Cir. 2019). There, the Court determined the employee did not have medical restrictions requiring remote work and the employee failed to prove that he could perform the essential functions of the job remotely. *Id.*

Employer Defense: Undue Hardship

Once an employee requests an accommodation that is otherwise reasonable, the employer will not be liable for failing to provide the requested accommodation if it can demonstrate the accommodation poses an undue hardship on the operation of the business. 42 U.S.C. 12112(b)(5)(A); *U.S. Airways v. Barnett*, 535 U.S. 391, 400 (2002); *Peebles v. Potter*, 354 F.3d 761, 768 (8th Cir. 2004). An undue hardship is a "significant difficulty or expense" when evaluated under four factors:

(i) The nature and cost of the accommodation needed under this chapter;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 1211(10). Even though an employee's requested accommodation poses an undue hardship, the employer must still provide an alternative accommodation, if one is available. 29 C.F.R. Appx. Part 1630.2(p).

In *McMillian v. City of New York*, the Second Circuit held the City of New York failed to demonstrate that an otherwise reasonable accommodation would pose an undue hardship on the City. 711 F.3d 120, 128 (2d Cir. 2013). The employee requested that the employer accept the accommodation of allowing the employee to allocate extra hours worked each day to make up for the employee's late arrivals. *Id*. The Court concluded this did not pose an undue hardship because the employer did this for other employees, so long as they received pre-approval before they arrived late. *Id*. *See also Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001) (holding it was not an undue hardship on the employer to diverge from a collective bargaining agreement that did not contain a bona fide seniority system – an employer's concern about other employees' resentment over a disabled employee's reasonable accommodation is not a factor in the undue hardship analysis.)

Employer Defense: Direct Threat

As an employment qualification, employers can generally require – when such qualification is narrowly tailored to the specific position and is consistent with business necessity – employees not pose a direct threat to the health and safety of other employees in the workplace. 42 U.S.C. § 12113 (b); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002). Under the ADA, "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 1211(3). The EEOC Regulations interpreting the ADA expand the definition further to include "substantial harm to the health and safety of the individual or others." 29 C.F.R. § 1630.2(r); *Chevron*

U.S.A. Inc., 536 U.S. at 76. (EEOC regulation is valid even though it extends the defense to include an individual's own health and safety). Employees who pose a direct threat, which cannot otherwise be managed by use of a reasonable accommodation, will not receive the protections of the ADA. 29 C.F.R. Appx. Part 1630.2(r).

As an affirmative defense, employers invoking the direct threat defense bear the burden of proof. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-72 (8th Cir. 2007) (citing *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001)); *Dadian v. Village of Wilmette*, 269 F.3d 831, 841-41 (7th Cir. 2001).

The direct threat analysis must be individualized and focus on "the individual's present ability to safely perform the essential functions of the job." 29 C.F.R. § 1630.2(r); *Chevron U.S.A. Inc.*, 536 U.S. at 86; *Nall v. BNSF Railway Co.*, 917 F.3d 335, 344 (5th Cir. 2019); *EEOC*, 477 F.3d at 571; *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005). The assessment must be supported by "the most current medical knowledge and/or on the best available objective evidence." *Id*. Subjective perceptions involving stereotypes or patronizing attitudes about a disability should not be considered. 29 C.F.R. Appx. Part 1630.2(r); *Chevron U.S.A. Inc.*, 536 U.S. at 85-86. The EEOC provides four factors to guide the direct threat analysis:

> (1) The duration of the risk;
> (2) The nature and severity of the potential harm;
> (3) The likelihood that the potential harm will occur; and
> (4) The imminence of the potential harm.

29 C.F.R. § 1630.2(r); *EEOC*, 477 F.3d at 571; *Darnell*, 417 F.3d at 660.

Courts recognize that special circumstances are considered in the public sector – such as whether an employee is physically or psychologically fit for duty or whether an employee poses a safety risk – because of the nature of some public sector positions (i.e. police officers, firefighters, etc.). *Burroughs v. City of Springfield*, 163 F.3d 505, 508 (8th Cir. 1998) (reasoning "the risk of an armed patrol officer being unable to function in an emergency situation is not a risk we are prepared to force a police department to accept. The inherent and substantial risk of serious harm arising from such [hypoglycemic] episodes, given the nature of police work, is self-evident."); *Michael v. City of Troy Police Dept.*, 808 F.3d 304, 309 (6th Cir. 2015) (employee returning to work after a third brain surgery was a direct threat after independent assessment based on psychologist's report that employee's condition impacted ability to use lethal force and engage in high-speed driving.); *Lewis v. City of Union City, Georgia*, 934 F.3d 1169, 1184 (11th Cir. 2019); *Gonzales v. City of New Braunfels, Tex.*, 176 F.3d 834, 838 (5th Cir. 1999) (individualized assessment of medical condition revealed that diabetic neuropathy posed direct threat to employee's ability to safely handle a firearm).

Medical Examinations:

An employer may require a medical examination if the exam is job-related and consistent with a business necessity. 42 U.S.C. § 12112(d)(4)(A). A business necessity involves determining whether employees (1) can perform job-related duties; and/or (2) pose a direct threat to the health and safety of themselves and/or others. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c); *Wisbey v. City of Lincoln*, 612 F.3d 557, 673-74 (8th Cir. 2010) (fitness-for-duty exam of emergency dispatcher lawful); *Thomas v. Corwin*, 483 F.3d 516, 527-28 (8th Cir. 2007) (fitness-for-duty exam was appropriate where employer sought to ascertain whether employee was fit to return to work under same working conditions that allegedly caused her stress and anxiety).

Psychological fitness-for-duty exams and inquiries are job-related, particularly for police officers, because an employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position. *Wisbey*, 612 F.3d at 673 (psychological fitness-for-duty exam lawful where emergency dispatcher had depression); *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1305, 1311 (11th Cir. 2013) (exam lawful where employee banged fist on table and said someone was "going to pay for this"); *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010) (exam lawful where police officer exhibited emotional responses on numerous occasion); *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290-91 (11th Cir. 2002) (exam lawful where employee was hostile, made threats, and was insubordinate); *Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) (exam was reasonable, even responsible, where police officer was experiencing mental health issues).