



**2023 DMEC ANNUAL CONFERENCE**  
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## Leave and the Employee Lifecycle – A Simulation

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Unemployment Compensation

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### Common Scenarios in Employee Lifecycle

Pregnancy Accommodation	Remote Work Requests	Medical Inquiries and Exams	Direct Threat
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# Scenario 1

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## Pregnancy Accommodations

- Elise is hired by the company on May 15, 2023, into an outside sales position. Two months after her hire, she informs HR that she is pregnant, and is having issues with morning sickness. Elise asks that she be permitted to schedule and attend all morning meetings virtually. Elise says this will only be needed until her morning sickness subsides, which, she hopes, will be only a couple of months. HR consults with Elise's manager about the requested accommodation. The manager is concerned about Elise's ability to cover her territory and meet her quotas if she doesn't even leave the house before noon. The HR manager asks for your help in handling the situation.
- What issues should we consider?
- Can we require Elise to give us medical documentation to support her need for accommodation?



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## Federal Pregnant Workers Fairness Act

- Requires employers to provide reasonable accommodations for temporary limitations on ability to perform essential functions of the job due to pregnancy, childbirth, or related medical conditions, unless it would cause an undue hardship
- Prohibits employers from requiring employees to accept an accommodation other than a reasonable accommodation arrived at through the interactive process
- Prohibits placing an employee on paid or unpaid leave if there is another reasonable accommodation available that doesn't impose an undue hardship
- Incorporates ADA meaning of reasonable accommodation and undue hardship
- Prohibits retaliation
- Remember some state laws may provide more protection than the PWFA



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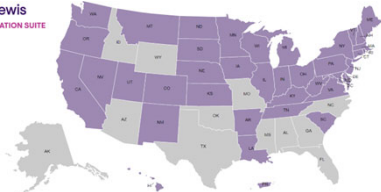

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## State Pregnancy Accommodation Laws

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# Scenario 2

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### Accommodation Requests To Continue Remote Work

- Corey has been successfully working from home since March 1, 2020. The company has announced that all remaining remote work employees will be required to return to the workplace in 1 month. Corey has informed HR that Corey has Cancer, and the radiation treatments make Corey immunosuppressed. Corey's radiation therapy ends in 6 months. Corey has requested permission to continue working remotely until the radiation treatments are completed.
- What issues should we consider?



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### Why Does the Employee Want to Continue to Work from Home?

Need to consider:

- ADA
- PWFA & PDA
- State Pregnancy Accommodation Laws
- Title VII (Religion)



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**If You Are Considering Denying the Request, How Will You Show What Changed?**

- The Job Duties While Working From Home?** Was the employee only required to handle some of employee's job duties while working from home and now employee will resume full duties?
- The Team Structure Upon Return?** Will the employee's team structure change upon return to work?
- The Performance?** Did employee have problems performing the job duties while working from home?
- What Would Your Documents and Employees Say?** What would your documentation show about employee's ability to do the job working from home? What would coworkers say about necessity of being in the office 100% to do the job?



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If employee's request potentially triggers the legal obligation to engage in the interactive process or the obligation to provide a reasonable accommodation due to disability ...

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**What types of things can you ask for disability requests?**

**Note: Consult counsel if worker is in California**

- Has this condition ever interfered with EE's ability to perform EE's job or access a benefit of employment? If so, please explain when and how.
- If this condition has not previously impacted EE's ability to perform the job, but you believe it will now, please explain the basis for this conclusion.
- Is EE able to come into the workplace for meetings as needed when planned in advance?
- Is EE able to come into the workplace and work a planned in advance schedule? If not, which essential job functions is EE unable to perform at work and why?
- If EE is unable to perform the essential functions of the job at work, explain how WFH enables EE to perform these same functions at home and how long WFH will be needed.



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**What types of things can you ask for disability requests?**

**Note: Consult counsel if worker is in California**

- Are there any accommodations (other than WFH) which would enable EE to safely and satisfactorily perform the essential functions of the job?
- In your opinion, what, if any, adverse effects might EE experience if EE were unable to WFH? Please explain the basis for this conclusion.
- In your opinion, is it possible for EE to work in the workplace on a trial basis? If not, please explain the basis for this conclusion.
- If your answer to the above question was "no," is there any accommodation that could be provided that would allow EE to work in the workplace?
- Did you receive and review EE's written job description? If you didn't receive the job description, please let us know and we'll provide a copy to you.



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If employee's request potentially triggers the legal obligation to engage in the interactive process or the obligation to provide a reasonable accommodation due to pregnancy ...

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**Can you ask for support for pregnancy accommodation?**

- Under the PWFA, the employee does not have to have a disability to be entitled to an accommodation.
- Employee request forms may need to be tailored to ask about an employee's limitations related to pregnancy, childbirth, and related medical conditions, an explanation of what type of accommodation is necessary to perform specific job functions and whether there are alternatives, and how long any accommodation will be necessary.
- Consider pros and cons of requesting support for more common types of accommodations.
- Some state/local pregnancy accommodation laws may restrict information that can be gathered to support request for pregnancy accommodation.
- ADA limits on medical inquiries apply.



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# Scenario 3

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### Medical Inquiries and Exams

- HR is interviewing lifeguards for the company recplex. After reviewing Corey's qualifications, HR conducted a telephone interview and offered Corey a job, pending passing a medical examination. In the medical examination, Corey disclosed that they are deaf. HR is concerned. How can Corey save someone who is drowning if Corey can't hear them call out for help? HR asks for guidance on next steps.
- What issues should we consider?



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### EEOC Guidance on Hearing Impairments

- [EEOC Technical Assistance: Hearing Disabilities in the Workplace and the Americans with Disabilities Act](#)
- EEOC discusses
  - Permissible medical inquiries/exams
  - Potential accommodations
  - How employers can address safety concerns



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**Medical Exams and Inquiries of Employees**

- The ADA permits medical exams and inquiries:
  - Required or necessitated by federal law or regulation (i.e., OSHA, DOT etc.)
  - Periodic exams of employees working in certain positions affecting public safety that are narrowly tailored to address specific job-related concerns
- Outside that context, all medical exams or inquiries must be job-related and consistent with business necessity and are permissible:
  - When an employee requests reasonable accommodation for a disability;
  - When objective evidence indicates an employee's ability to perform essential job functions is impaired by a medical condition;
  - As part of a voluntary wellness program; or
  - When objective evidence suggests an employee may pose a direct threat to their own or others' health or safety due to a medical condition.



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Scenario 4

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**Direct Threat?**

- Corey, a forklift driver in the warehouse, had a seizure while at work. VP of HR was in the warehouse that day and saw it. Understandably, it was frightening. EMS came and took Corey to the hospital. Corey has been out on leave (non-FMLA) for six weeks and just provided a doctor's note clearing Corey to return to work without restrictions. Corey wants to come back to work tomorrow! Having seen Corey have a seizure, VP of HR is not comfortable letting Corey return to the forklift job and asks for your guidance.
- What issues should we consider?



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**What is Considered a Direct Threat?**

- An employer need not employ individuals with disabilities if they pose a "direct threat."
- This is a high standard and requires an individual assessment.
- A "direct threat" means a "significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation."
- A finding of "direct threat" must be based on the best available objective medical evidence that relies upon the most current medical knowledge.
- Factors to consider in making direct threat determinations:
  - Severity of harm.
  - Likelihood of harm.
  - Imminence of harm.



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**Questions?**  
**Thank you.**



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