

October 24, 2019

Reasonable Accommodation under the ADA and MHRA: Is that really reasonable?

Overview of the ADA/MHRA

- Prohibits discrimination against any:
 - Qualified individual with a disability
 - Individual with record of disability; or
 - Individual who is regarded as disabled
- Requires employers to make **reasonable accommodations** for the known physical or mental disabilities of otherwise **qualified** individuals unless the accommodation would cause an **undue hardship**

Who is Entitled to Reasonable Accommodation under the ADA/MHRA?

A **Qualified** Individual with a **Disability**

- An individual with a disability (defined very broadly)
 - Focus your attention on the reasonable accommodation process rather than being overly concerned with whether an employee's impairment rises to the level of "disability"
- Who can perform the essential functions of the employment position that such individual holds or desires
 - This includes applicants
- With or without reasonable accommodation.

Limitations on Duty to Accommodate

Undue hardship

- Very high standard - Unduly costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business
- Consider: nature and cost of accommodation; overall financial resources of employer; number of employees; impact on operations of the facility
- Burden is on employer to prove undue hardship

Significant risk of substantial harm

- If accommodation would pose a “direct threat” to employee or other’s health or safety, employer does not have to provide reasonable accommodation
- Also very high standard

Interactive Dialogue

- When employee requests accommodation or you observe an employee struggling in the job because of a medical condition, employer must engage employee in an interactive dialogue.
 - What are the essential functions?
 - What are the essential functions employee can't perform?
 - What are the range of things the employer might do to enable performance?
 - Are these reasonable or would they impose an undue burden?
- Should be a give and take – the employee and employer share responsibility to work together to devise a solution, if possible
- Document interactive process and keep in confidential medical file, not personnel file
- **Process should be handled by HR not employee's supervisor**

Common (but tricky) Accommodation Issues

The image features a teal background with a white geometric shape on the left side that tapers to a point. A thin orange horizontal line is positioned below the teal area. The text "Leave as a Reasonable Accommodation" is centered in white.

Leave as a Reasonable Accommodation

Leave (beyond FMLA) as Reasonable Accommodation

EEOC says

- Leave will almost always be a reasonable accommodation, unless the employer can prove undue hardship.

Case law says

- Courts often evaluate whether leave is a reasonable accommodation, not undue hardship.
- Will likely be reasonable if for a defined period of time and likely to enable employee to return to work, able to perform essential functions of the job, with or without additional accommodation.
- Purpose is to allow employee to return to work and perform essential job functions.
- Less likely to be reasonable if open ended, if repeated extensions are requested, and/or if there's little reason to believe it will be effective.

Leave under MHRA

- In 2017, Law Court held in Carnicella v. Mercy Hospital that MHRA provided a defense to leave as RA, because it specifically allowed discharge of employee “is unable to perform the duties...or is unable to be at, remain at, or go to or from” the place of employment.
 - Under MHRA, no leave is required as RA
- In September 2019, MHRA was amended to remove this language and insert new language specifying that the list of possible RAs includes a leave of absence.
- Maine courts likely to follow federal approach.
- Even under amended MHRA, leave is not required, only an option.

Evaluating Request for Leave as Accommodation

- What is purpose of leave?
 - Surgery, physical therapy, recovery from illness/injury/flare-up, repairs on assistive devices, training service animal
- Is leave necessary or are there other effective accommodations?
- How long is it expected to last?
- How will job be covered during leave?
- Will leave likely facilitate return to work?
- Does this leave create an undue hardship?

Leave as Reasonable Accommodation

Relevant to proving undue hardship:

- Can a temp step in to cover?
- Can employer pay existing employees OT?
- Are there impending deadlines / special projects?
- What special circumstances make it extremely difficult for the employer to continue holding the position?

The image features a teal background with a white geometric shape on the left side that resembles a folded corner or a stylized arrow pointing towards the center. A thin orange horizontal line runs across the bottom of the teal section. The text 'Job reassignment' is written in white, bold, sans-serif font on the right side of the teal background.

Job reassignment

Reassignment to Vacant Position

- Reassignment is an accommodation of “last resort” – not required if employee can be accommodated in current position.
- Employer does not have to create a new position, promote employee, or place employee in a position for which s/he isn’t minimally qualified.
- Circuits split on whether employer must prefer qualified disabled applicant over other, more qualified, applicants.
 - Supreme Court: employer does not need to reassign if it would violate disability-neutral seniority policy

Assessing Reassignment Requests

- Employer's obligation is to offer reassignment to a vacant position that exists at the time of the request, or that the employer knows will become available within a reasonable period of time.
- Employer may be required to assist employee in locating positions.
 - Consider size of employer, access to resources
- Must consider reassignment to other locations, shifts, or departments.

Reassignment to Temporary Jobs?

- EEOC's position is that reassignment must include temporary jobs if employee desires.
 - Only federal appeals court to address this directly has disagreed – if employee's disability is permanent or indefinite, reassignment to a temporary job is not reasonable
- Several courts have held that employer need not reassign to temporary light duty jobs that are specifically set aside for workers' compensation injuries.

Reassignment Example:

Susan, who works for a large, national employer, requires reassignment due to a disability. Her employer performs an initial job search on her behalf in her home facility, but finds no suitable vacancies. The employer notifies Susan by letter that it will continue to search weekly for vacant positions in her home facility for up to 90 days, in which she will be automatically placed, and provides contact information if she has questions. Susan is permitted to locate and apply for vacancies in other facilities of her choosing. To assist her search, Susan may access online job postings, call other facilities, visit other facilities in person to view specific vacancies on a computer terminal, or seek assistance in calling from her local HR and management. She can also call a central leave administrator in the corporate office with questions or additional help. Susan calls 3 other nearby facilities weekly, but there are no vacancies. The employer's weekly searches of her home facility also yields no results. After 90 days, Susan is allowed to remain on leave for 12 additional months and to continue to seek placement opportunities, after which she is terminated.

Service and Emotional Support Animals



A traditional service dog trained to help its owner perform tasks.



Primadonna, an emotional support duck, helps his owner cope with anxiety.



Yes, that's really an emotional support alligator.

Service Animals under ADA/MHRA

- MHRA defines “service animal” to include only “a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability” The ADA contains a similar definition but includes miniature horses.
 - Tasks include navigation, alerting to people, sounds, or allergens, pulling a wheelchair, retrieving items, or assisting during seizures.
 - Service animals are only explicitly protected in places of public accommodation, but may require accommodation in employment under a standard reasonable accommodation analysis.

Emotional Support Animals

- No legal definition, but generally understood to mean an animal that provides comfort and support in forms of affection and companionship for an individual suffering from various emotional or mental conditions.
 - Not required to perform specific tasks, and not limited to dogs or miniature horses.
- Not explicitly protected under ADA or MHRA
 - MHRA has a provision protecting “assistance animals” in housing, but not employment

Accommodating Animals in the Workplace

- Require employee to substantiate need, even for service animals.
- Employer must consider reasonable accommodation regardless of type or classification of animal:
 - Would this animal assist employee to perform essential job functions?
 - Is it reasonable on its face to allow?
 - Consider nature of workplace, safety/sanitation concerns, animal behavior, effect on other employees/customers
 - Would it cause undue hardship?
 - Consider whether there is a reasonable way to alleviate hardship by moving workspaces, space sharing arrangement, allowing additional breaks, use of air filters, etc.
 - But resist making assumptions; consider meeting animal, allowing trial period
- Consider written agreement with employee spelling out rules and expectations.

Questions?

Presenter

Daniel R. Strader
dstrader@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

PH / 207.791.1202

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New Developments



Changes in Northern New England

Federal

- New salary threshold under overtime rules
- Service animals

Massachusetts

- SJC decision on commission pay

Maine

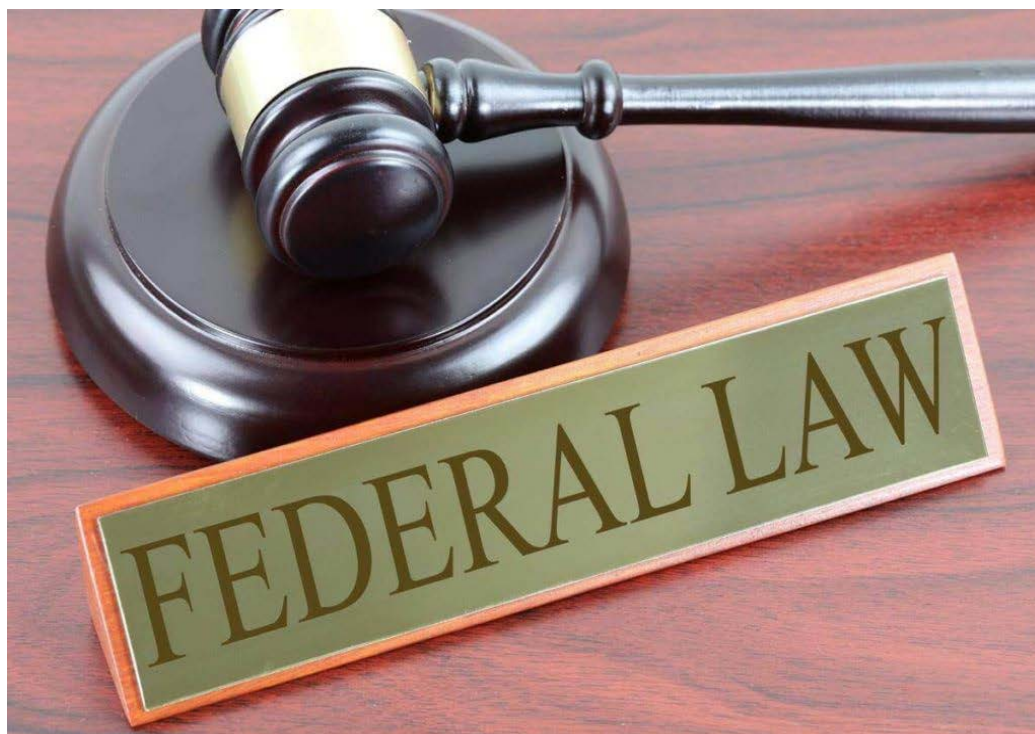
- Applicant privacy of SS#
- Pregnancy accommodation
- Volunteer emergency responder leave
- Mini-WARN
- Unemployment disqualification
- Restrictions on use of non-compete agreements
- Labeling single-user restrooms

New Hampshire

- Restrictions on use of non-compete agreements
- Reimbursement for medical marijuana
- Child labor
- Breastfeeding in the workplace



FEDERAL LAW UPDATE



New Salary Threshold

- Effective **January 1, 2020**
- **\$35,568 annually (\$684 per week)**
 - Currently \$23,660 annually (\$455 per week)
- No practical impact on employers in Maine because Maine requires higher threshold than federal law
 - The Maine salary threshold is set to increase to \$36,000 in 2020 (up from \$33,000 in 2019), subject to annual cost of living adjustment starting on January 1, 2021.
- Significant impact on employers in Massachusetts and New Hampshire
 - No state salary threshold and follow the federal salary threshold
- Takeaway
 - Consider whether to increase employees' pay to meet the new threshold or reclassify them as non-exempt and eligible for overtime



Service Animals in Places of Public Accommodation

- Places of public accommodation are generally required to permit service animals to accompany people with disabilities anywhere members of the public are allowed to be.
- “Service animal” means:
 - ADA, Maine, and New Hampshire: dogs that are individual trained to do work or perform tasks for people with disabilities
 - Massachusetts: a dog that accompanies “any blind person, deaf or hearing handicapped person, or other physically handicapped person”
- The law does not require formal service dog training program or any certification or identification for a service dog
- Place of public accommodation:
 - May not ask for documentation of a disability or to answer questions regarding disability
 - Generally permissible to ask:
 - Is the dog a service dog required because of a disability?
 - What task or service is the animal trained to perform?

Note: The law requires the place of accommodation to take the individual at their word.

- Generally, no requirement for place of public accommodation to accommodate assistance animals (e.g., “emotional support animals”)

Housing / Employment

- Housing
 - A person with a disability may request a reasonable accommodation to keep an **assistance animal**.
 - Assistance animal a broad term that encompasses both service animals and emotional support animals.
- Employment
 - No law specifically addressing service animals in the employment context
 - As with all requests for an accommodation, we generally suggest engaging in an interactive process with the employee to determine whether the employee's request for use of a service dog is reasonable or undue hardship



Animals on Airlines

Documentation Requirements

Under the ACAA and its accompanying regulations, airlines must accept the believable “verbal assurances” of travelers with disabilities that their animal companions are service animals.

14 C.F.R. § 382.117(a), (d)

In the case of psychiatric service dogs and emotional support animals (which can be many kinds of animals), airlines may also require a recent, signed certification from a licensed mental health professional that the passenger:

- has a recognized mental or emotional disability
- needs the animal’s help in order to travel, and
- is a patient under the professional’s care.

14 C.F.R. § 382.117(e)

MASSACHUSETTS EMPLOYMENT LAW UPDATE



Sullivan v. Sleepy's LLC (May 8, 2019)

- Potentially significant impact on employers that pay employees fully or primarily by commission, especially in the retail context or in automobile sales where the court's ruling departs sharply from federal law
 - The FLSA permits alternative method of calculating overtime pay for employees engaged in the sale of retail products and services and automobiles. The SJC has now made it clear that no such exemptions apply under MA law
- Note: Sleepy's paid its commissioned employees a lump sum based entirely upon a draw and commission, the total of which exceeded what the employee would have otherwise earned under the Minimum Wage, Overtime and Sunday premium wage statutes



Sullivan v. Sleepy's LLC (May 8, 2019)

- Holdings:
 - SJC held that if a 100% commission inside sales employee works more than 40 hours in a work week, the employee is entitled to any additional compensation specifically for overtime hours worked when the employee's total compensation (through draws and commissions) for that workweek is equal to or greater than 1.5 the employee's regular rate or at least 1.5 times the minimum wage for all hours worked over 40
 - Employers are not permitted to "retroactively" apply commissions already earned to satisfy the obligation to pay overtime. Overtime pay and Sunday premium pay is owed above and beyond the total earnings in a prior week
- Takeaway
 - Review commission pay practice to ensure compliance

MAINE EMPLOYMENT LAW UPDATE



Privacy of Applicants' SSN

- Effective **January 1, 2020**
- Employers are prohibited from requesting a Social Security Number ("SSN") from an applicant or a prospective employee on an employment application or during the application process for employment
- Exception
 - If collecting the SSN for a substance abuse testing or a pre-employment background check
- This prohibition does not apply after an employee is hired.



Takeaway

- Review and revise, if necessary, application and job posting to ensure no question about salary history or SSN
- Ensure all applicants know that they are not required to disclose salary history (e.g., add a statement to job application, career landing pages, job posting)
- If conducting substance abuse testing or pre-employment background check, include question about SSN in document specific for such purposes (e.g., authorization/consent form for background check)
- Train personnel involved in the hiring process on restrictions imposed by the law

Pregnancy Accommodations

- Effective **September 19, 2019**
- Reasonable accommodation for **pregnancy, childbirth, or related medical conditions**, including but not limited to lactation, unless undue hardship on employer
 - A condition need not rise to level of “disability”
- Reasonable accommodations may include, but are not limited to:
 - More frequent or longer breaks
 - Temporary modifications in work schedules, seating or equipment
 - Temporary relief from lifting requirements
 - Temporary transfer to less strenuous or hazardous work
 - Break time to express breast milk for a nursing child
 - The Maine lactation law requires up to 3 years following childbirth



Takeaway

- Review and update reasonable accommodation policy to address the pregnancy accommodation requirements
- Review and consider making it explicit that “sex” includes “pregnancy, childbirth or related medical conditions”
- Train managers/supervisors on non-discrimination against a pregnancy-related condition

Volunteer Emergency Responder Leave

- Prohibits discharge or other disciplinary action because of the employee's absence to respond to an emergency as a firefighter (including volunteer firefighter)
 - Permits employers to charge the lost time against the employee's regular pay or against the employee's available paid leave
- Designation as essential
 - Permits employers to designate the employees essential to the employer's operations when the absence would cause significant disruption of the business
 - This designation must be made in writing and signed by both the employee and employer
- Amendment
 - Effective **September 17, 2019**
 - Extends protections to **emergency medical service personnel** (including volunteers).
 - **Prohibits discrimination** against an employee for taking leave to respond to an emergency as a firefighter or an emergency medical service personnel (including volunteers)



Maine Mini-WARN

- Applies to any employer proposing to:
 - close or relocate a covered establishment (i.e., a facility that has 100 or more employees)
 - engage in a reduction in workforce, which results in an employment loss at a covered establishment for at least 6 months of at least: 33% of the employees and at least 50 employees; or 500 employees
- Notice requirements
 - In case of closing or relocating, written advance notice to affected employees, local government officials, and the Director of the Bureau of labor Standards
 - Effective September 17, 2019, **90 days' advance notice** (currently 60 days)
 - In case of mass layoff, advance notice to the Director as far in advance as practicable, but no later than within 7 days of the layoff
- Penalty
 - \$500 per day



Unemployment Disqualification

- Effective **September 17, 2019**
- The list of disqualifications is amended to include:
 - **Unauthorized use of marijuana while on duty**
- An employee using medical marijuana as authorized by the law is not disqualified from unemployment benefits.



Restrictions on Use of Non-Compete Agreements

- Effective **September 18, 2019**
 - Applies to non-compete agreements that are signed or renewed after September 18, 2019.
 - Significantly limits employers' use of non-compete agreements
 - Prohibits the use of mutual no-poaching agreements among employers seeking to keep their employees from jumping ship
- Covered non-compete agreements
 - Contract that prohibits an employee or prospective employee from working **in the same or similar profession or in a specified geographic area for a defined period of time** following termination of employment



New Restrictions

- Cannot require an employee to sign a non-compete agreement unless the employee makes in excess of **400% of the federal poverty level**
 - Currently at least \$48,560 per year (and \$49,960 in 2020)
- A non-compete agreement cannot take effect until **one year after the employee's start date or six months from the date the agreement was signed** (except certain physician agreements)
 - No protection if an employee leaves within their first year of employment
 - Consider addressing customer non-solicitation, nondisclosure, or confidentiality agreements separately
- Must provide **written disclosure** of the requirement to sign a non-compete agreement **prior to making a job offer**
 - Provide a copy of the agreement at least three business days before the required signing deadline
- A minimum of \$5,000 penalties for failure to meet the statutory requirements

Prohibition of No-Poaching

- The new law prohibits “restrictive employment agreement,” which is defined as:
 - Agreements between two or more employers, including through franchise agreements or contractor/subcontractor agreements that “prohibit or restrict one employer from **soliciting or hiring another employer’s current or former employees.**”
- A minimum of \$5,000 penalties for a violation



Takeaway

- Review standard non-compete agreements and onboarding procedures to ensure that agreements entered into after September 18, 2019 will meet the requirements of the statute and apply only to those against whom they can be enforced.
- Create procedures to ensure that appropriate disclosures are made in a timely fashion. Standard offer letter language may need to be revised to include the required notice.
- Review any non-compete agreements embedded in certain other documents (e.g., grant plans, severance agreements and cash bonus plans).
- Review agreements with other companies regarding any no-poaching provisions and reexamine those arrangements to ensure they do not run afoul of the statute.

Labeling Single-User Restrooms

- Effective **September 19, 2019**
- Prohibits **places of public accommodation** from designating a **single-occupancy toilet facility** as for use only by members of one sex
 - A single-occupancy toilet facility is a restroom for use by one user at a time or for family or assisted use and that has an outer door that can be locked by the occupant
 - A single-occupancy toilet facility may be identified by a sign, as long as the sign does not indicate that the facility is for use by members of one specific sex
- Place of public accommodation means “a facility operated by a public entity or private entity, whose operations fall within at least one of the following categories: ... **professional office of a health care provider, hospital, ... clinic...or other service establishment**”
- Takeaway
 - Identify restrooms that meet the definition of a single-occupancy toilet facility
 - Update a sign, if necessary, to comply with the new law



NEW HAMPSHIRE EMPLOYMENT LAW UPDATE



Non-Compete Agreement for Low-Wage Employees Prohibited

- Effective **September 8, 2019**
- **Low-wage employees** means an employee who earns an hourly rate less than or equal to **200 percent of the federal minimum wage** (i.e., \$14.50 per hour or \$30,160 annually)
 - Cf. ME statute - 400% of the federal poverty level, currently at least \$48,560 per year (and \$49,960 in 2020))
- For purposes of this new law, a non-compete agreement means an agreement between an employer and a low-wage employee that restricts such low-wage employee from performing:
 - Work for another employer for a specified period of time;
 - Work in a specified geographical area; or
 - Work for another employer that is similar to such low-wage employee's work for the employer who is a party to the agreement.

Notice & Exclusion

- The law amends NH's prior non-compete statute, which created minimal notice requirements for employers
 - Must provide **a copy of a non-compete agreement prior to the applicant's acceptance of an offer of employment** if requiring an execution of such agreement as a condition of employment
- The restrictions do not apply to other types of employment agreements (e.g., non-solicitation, nondisclosure, trade secrets, intellectual property assignment, or confidentiality agreements)



Takeaway

- In light of ME and NH restrictions, consider what approach makes sense
 - e.g., a single standard agreement for both states v. separate standard agreements for each
 - if a single standard agreement, it must meet the state law requirements that provide greater benefits to employees
- Consider a NDA/Non-Solicit as an alternative option for law-wage employees

Reimbursement for Medical Marijuana

Panaggio v. NH Compensation Appeals Board (Mar. 2019)

- NH Supreme Court ruled that the Workers' Compensation Appeals Board was wrong to determine that worker's compensation insurance can't reimburse an employee for the cost of medical marijuana:
 - The NH medical marijuana law does not ban insurance carriers from reimbursing
 - The NH medical marijuana law entitles qualified patients to medical marijuana



Reimbursement (cont'd)

- The case was sent back to the Appeals Board for further consideration of the effect of federal law that makes possession or use of marijuana a federal crime.
- Although not final, the Court's holding indicates its inclination to support the reimbursement absent the showing that the insurance carrier would be in peril of federal prosecution for doing so.

Child Labor

- Effective **July 14, 2019**
- Employees under the age of 18 cannot work more than 8 hours per 24-hour period between the hours of 8 p.m. and 6 a.m. during any week during which they are working more than two nights



Breastfeeding in the Workplace

Frederick v. DHHS (Super. Ct. Dec. 2018)

- Wrongful termination case
- Lactation room was available for expressing breast milk
- Employee's request for break time to breastfeed her baby at a daycare facility was denied despite the medical note substantiating the need. Employee was eventually terminated
- Court denied employer's motion to dismiss on the ground that it is a jury question whether public policy encourages a mother to breastfeed her child, particularly where breastfeeding is imperative for the child's health



Breastfeeding in the Workplace

- NH does not specifically address lactation/breastfeeding in the workplace
 - Follows the FLSA (e.g., reasonable break time for up to 1 year after the birth; private area to express breast milk)
- NH generally makes it discriminatory to restrict or limit the right of a mother to breast-feed her child
- Question remains as to whether employers have duty to make reasonable accommodations (e.g., longer breaks to permit employees to leave the premises when a mother is required to breastfeed her infant)

WHAT IT ALL MEANS FOR 2019 AND BEYOND



Action Items

Policies and Practices to Review and Update

- Check for salary threshold issues
- Reasonable accommodation for service animal
- Commission pay
- SSN inquiries ban
 - Confirm no questions about SSN (*e.g.*, employment application, interview)
- Pregnancy accommodation policy
- Voluntary emergency responder leave
- Mini-WARN



Action Items

Non-Compete

- Evaluate overall strategy
 - Consider a NDA/Non-Solicit as an alternative option for law-wage employees)
 - Consider how you want to address ME v. NH requirements

Train managers and HR personnel

Monitor further updates



Questions



Presenters

Suzanne King

sking@pierceatwood.com

Pease International Tradeport
One New Hampshire Ave. #350
Portsmouth, NH 03801

PH / 617.488.8159

Meg LePage

mlepage@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

PH / 207.791.1382