NAVIGATING THE ACCOMMODATION PROCESS

Brad E. Bennett

Attorney and Certified Specialist in Labor & Employment Law

Brad E. Bennett

Bricker&Eckler
ATTORNEYS AT LAW

- Over 20 years of experience as an employment and labor lawyer and former human resources professional.
- Represents public sector clients in litigation, collective bargaining, arbitrations, and administrative proceedings before the EEOC, OCRC, SERB, and SPBR.
- Assists public sector clients with HR compliance, including day-to-day employment issues, discipline, handbook policies, job descriptions, internal investigations, leave issues, FLSA compliance, and HR audits.
- Listed in Best Lawyers in America.
- Selected to “Super Lawyers” every year since 2015.
- OSBA Certified Specialist in Labor and Employment Law.

Best Lawyers®

Super Lawyers

OSBA Certified Specialist
in Labor and Employment Law

Certified Specialist

Agenda – Navigating the Accommodation Process

1. ADA and Accommodations
2. Covid-19 and Accommodations
3. Pregnancy Accommodations
4. Religious Accommodations

ADA/Disability Accommodations

NAVIGATING THE ADA

- Claims overview
- What is a Disability?
- The Accommodation Process
- Identifying Essential Functions
- Interactive Process

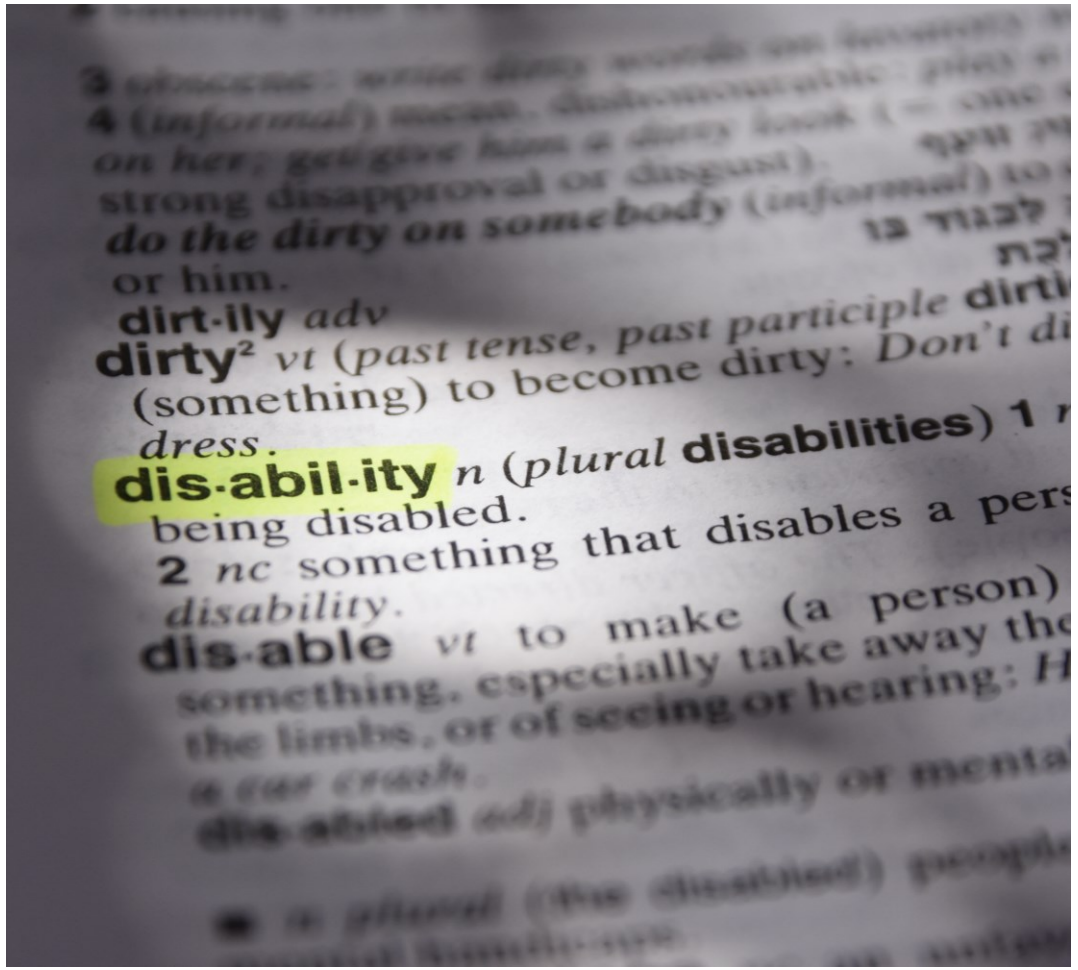
Overview of claims under the ADA

Bricker&Eckler
ATTORNEYS AT LAW

- **Discrimination.**
  - Includes "*failure to accommodate*"
- **Harassment.**
- **Retaliation**.

Who is disabled under the ADA?

- ADA covers a “qualified individual with a disability”
- E.g., “***an individual with a disability*** who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”



"Individual with a disability" Defined

Bricker&Eckler ATTORNEYS AT LAW

1. Physical or mental impairment that substantially limits a ***major life activity***; *OR*
2. A "record of" such impairment; *OR*
3. Being "regarded as" having such an impairment.

What is a "Major Life Activity"?

Bricker&Eckler ATTORNEYS AT LAW

- caring for oneself,
- performing manual tasks,
- seeing,
- hearing,
- eating,
- sleeping,
- walking,
- standing,
- lifting,
- bending,
- speaking,
- breathing,
- learning,
- reading,
- concentrating,
- thinking,
- communicating,
- working,

- AND . . . . .

What is a "Major Life Activity"?

Bricker&Eckler
ATTORNEYS AT LAW

The ADA Amendments Act added "*major bodily functions*" to the definition of a major life activity.

"a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

ADA Accommodations – *Booth v. Nissan* (6th Cir.)

- Employer ***never*** has to modify the essential functions of a position.
- But may need to provide a "**reasonable accommodation**" to enable the employee to perform the job's "**essential functions**"

Questions are:

- What are the "essential functions" and
- What are "reasonable accommodations"

What are “Essential Functions”?

Courts/EEOC consider the following as to whether a job duty is an “essential function:”

- Written position description
- Amount of time spent performing the duty
- Employer’s judgment
- Terms of collective bargaining agreement
- Work experience of others who performed/are performing the job
- **“Regular and predictable attendance”?**

Is "regular and predictable attendance" an essential function?

- See EEOC v. Ford, 782 F.3d 753 (6th Cir. 2015) holding "regular, in-person attendance is an essential function of most jobs.
- *See also* Hostettler v. College of Wooster (6th Cir. 2018) clarifying Ford and stating, "on its own, however, full-time presence at work is not an essential function"

What if an accommodation imposes an Undue Hardship?

An employer is not required to provide a reasonable accommodation if doing so would impose an "***undue hardship***"

Means **significant difficulty or expense** in providing the accommodation.

Analysis focuses on the particular employer's resources—and on whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

How to Determine a "Reasonable Accommodation"

Bricker&Eckler ATTORNEYS AT LAW

Case law and the EEOC look at whether an "interactive process" was utilized between the employer/employee in order to determine whether a reasonable accommodation is available.

- **Utilization of an interactive process is helpful during the defense of ADA "failure to accommodate" claims**
- **Accommodation Policies are crucial!**

Failure to Follow Interactive Process is Fatal!

Bricker&Eckler ATTORNEYS AT LAW

Automatic Rejection of Deaf Applicant Without Discussing Accommodations Results in Lawsuit

- *EEOC v. Service Temps Inc. (2012)*

Navigating the Interactive Process

Bricker&Eckler ATTORNEYS AT LAW

1. Employee **requests** accommodation
2. Employer **examines** the job and determines essential functions
3. Employer consults with employee to **learn about physical/mental abilities** as they relate to the essential functions (may request medical verification)
4. Employer makes individualized determination whether employee poses **direct threat**, and if threat can be removed by reasonable accommodation

Navigating the Interactive Process

Bricker&Eckler ATTORNEYS AT LAW

5. Employer and employee identify potential accommodations (**interact**)
6. Employer considers whether the accommodation would impose an **undue hardship**, and other alternatives must be considered.
7. If reasonable accommodation is available, employer **provides** it in a timely manner.
8. Employer **follows up** after providing accommodation

What if an accommodation is requested after discipline started?

Parsons v. Auto Club Group, (6th Cir. 2014)

- "When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'"

ADA and Marijuana

Assistant Dog Warden has reported that his physician has recommended medical marijuana under Ohio law for his medical condition.

He requests that he be permitted to use it to relieve his condition and that he:

- Be excused from having marijuana in his system or from having it on his person for purposes of the Drug-Free Workplace Policy.
- Be provided with “any and all other reasonable accommodations”

ADA and Marijuana

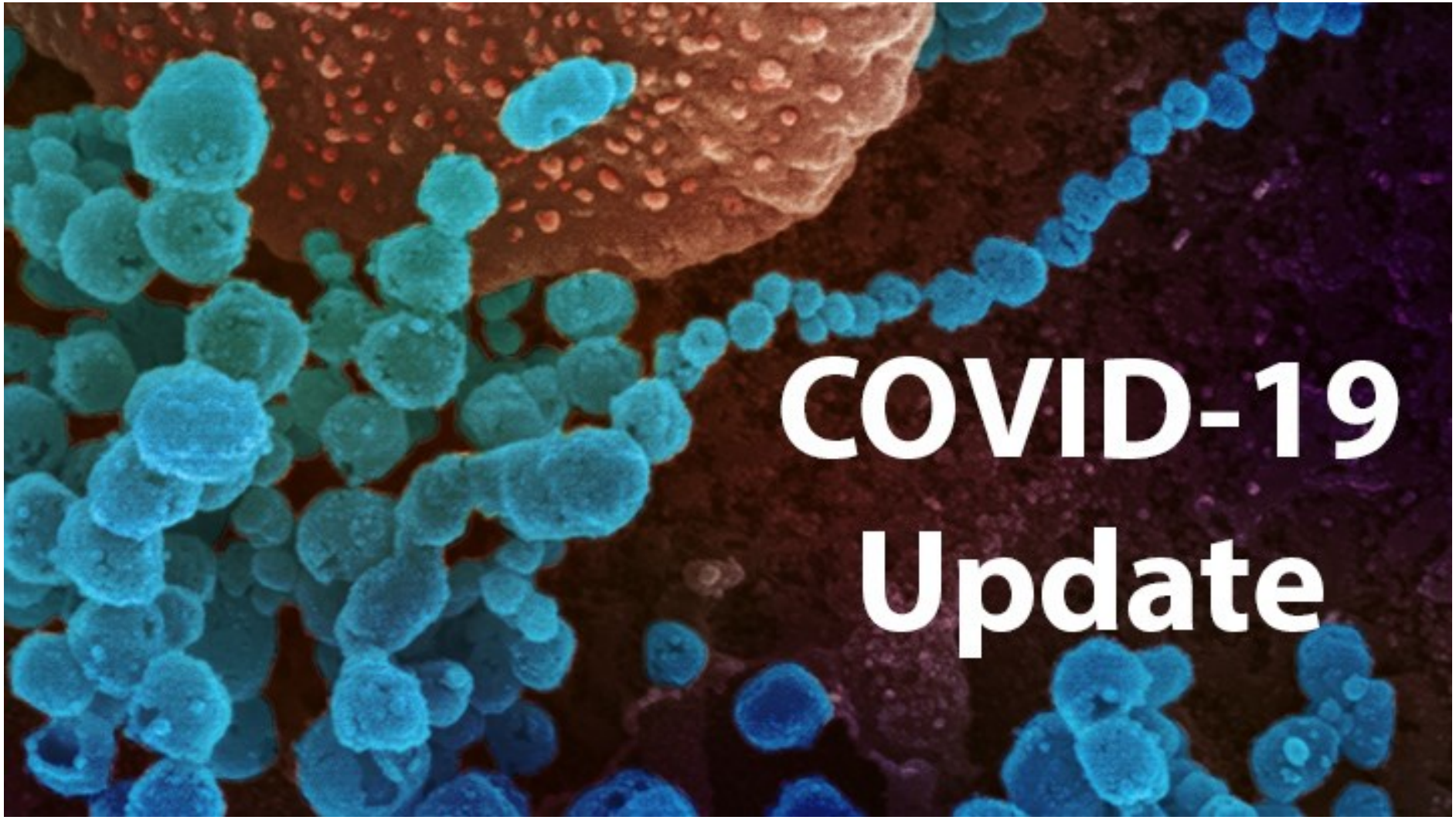
- Most courts that have addressed this issue have held that ADA does not protect medical marijuana because it remains illegal under federal law.
- Ohio's Medical Marijuana Law allows it to be prohibited under a drug free workplace policy.

ADA and Sick Leave Abuse

- **Can Employer terminate an employee for falsification of sick leave if they are disabled?**

Schwendeman v. Marietta City Schools, (S.D. Ohio, Jan. 31, 2020),

A sick leave abuse and/or falsification policy is important!



ADA, Accommodations and Covid-19

IS Covid-19 a “disability”?

- The EEOC during March webinar stated that the answer at this time is - “we don’t know.”
- However, EEOC guidance has not stated that Covid-19 is a disability either.
- Influenza interpretation relevant?

The flu/influenza, by itself, is not a disability as it does not “substantially limit a daily life activity” due, in part, to its limited duration.

- *Lewis v. Florida Default Law Group* (2011)

IS Covid-19 a “disability”?

- In 2009, during the H1N1 influenza pandemic, the EEOC issued guidance called, “*Pandemic Preparedness in the Workplace and the ADA*”
- https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

The EEOC has stated that this guidance should be followed during the current Covid-19 pandemic as well

EEOC has continued to update this guidance for Covid-19 (as late as May 7, 2020)

What has the EEOC's guidance told us?

"Direct Threat" analysis should be applied to Covid-19.

- EEOC states that, as of March 2020, Covid-19 meets this standard based upon CDC and public health authorities guidance.
- "If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA."

EEOC regulations identify four factors when determining whether an employee poses a direct threat:

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

What has the EEOC's guidance told us?

"Direct Threat" analysis caveat

- cannot be used to exclude an employee from returning to the workplace solely because the employee has a health condition that places them at higher risk for more severe illness arising from a potential COVID-19 infection.

Employer would need to show it conducted an individualized analysis of the four-factors of the direct threat test including:

- consideration of the severity of the pandemic in the geographic area;
- the employee's own health;
- the employee's job duties,;
- the likelihood they might be exposed to the virus at the worksite, and
- measures the employer is taking to protect all workers (like mandatory social distancing).

What has the EEOC's guidance told us?

Nevertheless, the new guidance encourages employers to continue to accommodate individuals with disabilities if they are subject to an increased risk for COVID-19 **when asked to do so.**

For example, the EEOC states employers should consider temporary job restructuring of marginal job duties or other accommodations such as:

- physical barriers, job restructuring, tele-commuting, or modified shift assignments.

What has the EEOC's guidance told us?

Even when considering an accommodation request during a pandemic**, the "undue burden" part of the accommodation analysis should not be overlooked**.

- EEOC explained that certain accommodations that might not otherwise pose an "undue hardship" (i.e., significant burden or expense) to employers may, during times of pandemic, pose one now.

For example, the EEOC explained it may be significantly more difficult to provide temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions during a pandemic.

Similarly, the EEOC acknowledged that a sudden loss of some or all revenue/funding due to the impact of the pandemic and stay-at-home orders is a relevant consideration.

What has the EEOC's guidance told us?

- Employers should continue to follow CDC guidelines (and infectious control guidelines)
- Employers may check employee temperatures during pandemic
- May delay starting applicants with Covid-19 symptoms /diagnoses
- If cant wait to fill the job, may withdraw job offer to applicant with Covid-19 as they currently pose a direct threat based upon CDC guidelines.

- Can require wearing of PPE (facemask/covering, gloves, gowns, etc.)
- Objections to wearing masks may be a request for accommodation if due to disability (e.g. COPD, claustrophobia, asthma, severe eczema) or due to a sincerely held religious belief.

What has the EEOC's guidance told us?

Is the essential function of "regular and predictable attendance" on-site forever lost if I have been allowing those employees to telecommute during the Covid-19 pandemic?

EEOC March 2020 webinar stated:

- Employers who implement teleworking to slow or stop COVID-19 are not required to automatically grant teleworking as a reasonable accommodation to employees who wish to continue this arrangement after the crisis passes.
- This is particularly true where the temporary teleworking arrangement excused an employee from performing all of the essential functions of his or her job.

What has the EEOC's guidance told us?

On the other hand, employees who requested teleworking as a reasonable accommodation before the COVID-19 crisis, and who were denied, may renew their request for teleworking after employees are allowed to return to the office.

****If telecommuting was less than ideal, take this opportunity ***now*** to document ***why*** remote work is not feasible for certain positions. Creating a written record may become critical evidence in the future if you no longer permit it.

Final ADA Case Example – J.A.N.

Bricker&Eckler ATTORNEYS AT LAW

Facts:

- Joe, a case worker, has been falling asleep recently at his desk (mgmnt has witnessed).
- You also hear from a trainer that Joe fell asleep during a one-hour training session several weeks ago.
- Another employee informed you that Joe was transporting a child during work and fell asleep at the wheel – almost causing wreck.

WHAT WOULD YOU DO?

Case Example – J.A.N. (cont.)

Bricker&Eckler ATTORNEYS AT LAW

<u>Facts</u> (cont):

- Joe called in and given discipline by HR for the sleeping issues observed.
- Joe reports at that time that he has Restless Leg Syndrome and Sleep Apnea and they are causing him to get no sleep and resulting in extreme fatigue.
- He requests giving him time during the day to let him sleep at his desk and to have video of trainings supplied so he could go back to view areas he misses if he falls asleep.

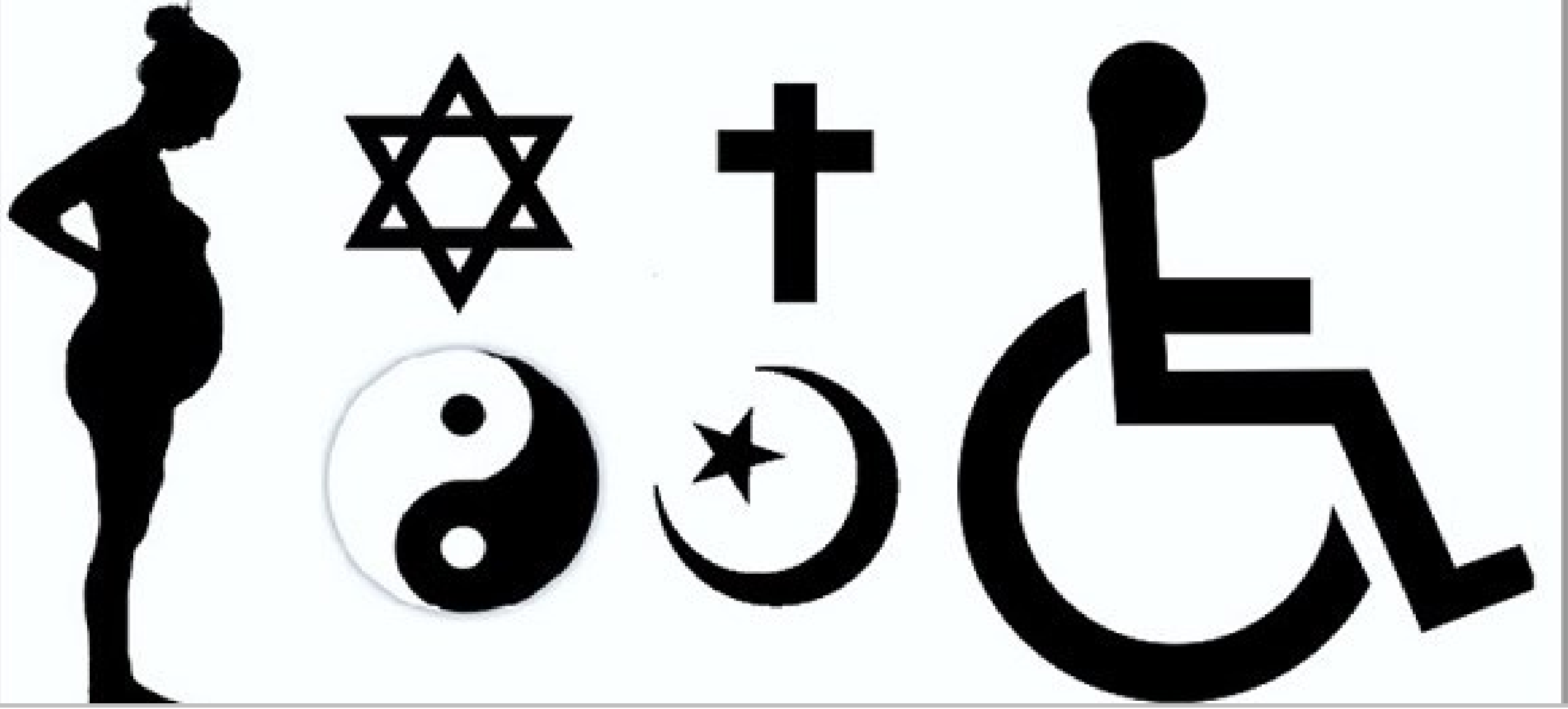
NOW WHAT DO YOU DO?

Job Accommodation Network

The Job Accommodation Network (JAN) is a free resource available to employers that is funded through the DOL.

- JAN's website (www.askjan.org)
- JAN's covid-19 specific: https://askjan.org/topics/COVID-19.cfm

JAN has **SOAR** (Searchable Online Accommodation Resource) that provides examples of "reasonable accommodations" that employers may consider for numerous physical and mental disabilities.



Accommodations are not limited to disability

Pregnancy and the ADA

The EEOC guidelines on pregnancy clarify that while pregnancy itself is not a disability - impairments related to pregnancy affecting major life activities are covered by the ADA.

- Complications
- Bed rest
- High Blood pressure

Pregnancy and Light Duty - *Young v. UPS*, (2015)

- An pregnant employee, who delivers light packages for UPS, is doctor-ordered not to lift more than 20 lbs.
- Even though rarely, if ever, required to lift heavy packages, UPS includes lifting up to 70 lbs as an essential job function.
- Employer policy accommodates lifting restrictions with temporary assignments only when: (1) the employee suffered an on-the-job injury; (2) the employee had a disability under the ADA; or (3) a driver lost their DOT certification.
- UPS required her to take unpaid leave and reinstated her after giving birth

Pregnancy and Light Duty - *Young v. UPS* (2015)

- The U.S. Supreme Court decided that UPS's rule that employees could be assigned to light duty only for on-the-job injuries discriminates against pregnant women.
- The Court's rationale is the same as the EEOC guidelines.

The EEOC's guidelines specify that employers must accommodate pregnant employees with light duty if the same is done for employees ***similar in their ability or inability to work.***

Pregnancy and Light Duty - *Young v. UPS* (2015)

Supreme Court's prima facie case for ***pregnancy accommodation***:

- affected by pregnancy, childbirth, related medical condition;
- requested accommodation;
- denied accommodation; and
- employer accommodated others similar in their ability or inability to work.

- Employer must then proffer its legitimate, nondiscriminatory reason (which cannot involve cost of including pregnant worker)
- Employee can overcome Employer's reason if she demonstrates that the employer's policies impose a "significant burden" on pregnant workers

Pregnancy and Accommodations

Takeaways

- Review/revise the following policies to ensure that they capture employees affected by pregnancy, childbirth, or related medical conditions:
  - Job accommodations, light duty, leave of absence, lactation breaks, discrimination/harassment.

Religious Accommodations

Covered under Title VII and ORC 4112 *et seq*.

- Generally, must provide a reasonable accommodation for the sincerely-held religious practices of employees unless it poses an undue hardship.

Religious Accommodations

Bricker&Eckler
ATTORNEYS AT LAW

Generally involves requests:

- To modify dress code/grooming policies
- For break time/schedule changes for prayer/observance

What is "religion"?

- The Supreme Court held that the definition of "religion" is not dependent on a belief in a "Supreme Being." A person's beliefs may be deemed "religious beliefs" if those beliefs occupy in the life of that individual a place parallel to that of God in traditional religions. *Welsh v. United States*, 398 U.S. 333 (1970).

Religious Accommodations

Bricker&Eckler
ATTORNEYS AT LAW

Does a request for religious accommodation trump the terms of a valid CBA?

- "Neither an employer nor a union is obliged to take steps inconsistent with a valid collective bargaining agreement to accommodate an employee's religious belief or practice under Title VII."
- An employer has no obligation to impose an undesirable shift on other employees, or to substitute or replace workers if such an accommodation would require more than a *de minimis* cost.
- *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

Religious Accommodations

Consider Religious Accommodations During the Interview Process

- *EEOC v. Abercrombie and Fitch*, 789 F.Supp.2d 1272 (2015)

Religious Accommodations

Bricker&Eckler ATTORNEYS AT LAW

- After 8 years as a police officer, a practicing Muslim requested permission to wear a traditional Muslim headcovering (a khimar or hijaab) while on duty and in uniform. The request was denied in light the department's very strict dress code.
- After officer's request was denied, she filed an EEOC complaint of religious discrimination. She then reported to work wearing the headscarf, refused to remove it, and was sent home. She was disciplined for insubordination and suspended for thirteen days.
- Officer then brought suit alleging religious discrimination.

Religious Accommodations

- The appeals court held that the City's refusal of her request did not amount to religious discrimination.
- Court focused on the interests of a governmental entity in maintaining the appearance of neutrality and impartiality.
- However – Court said where exceptions are made for medical or other reasons, employers must be able to **articulate a specific negative effect** that a similar exception on the basis of religion would have on the employer, **amounting to undue harm**.
  - *Webb v. City of Philadelphia*, 2009 U.S. App. LEXIS 7169 (3d Cir. Apr. 7, 2009).

THANK YOU!

Brad E. Bennett

bbennett@bricker.com

614.227.4849

www.bricker.com

Bricker & Eckler®
ATTORNEYS AT LAW