



Unburdening the Interactive Process: Reasonable Accommodations and Leave During COVID-19 and Beyond

VAIS

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Today's Agenda

- The Americans with Disabilities Act
 - What is a disability?
 - What does it mean to accommodate a disability?
 - What is an undue burden?
 - Interaction with the CDC High Risk Categories for COVID-19
 - Potential impact on COVID-19 vaccines
- Employee Leave
 - The Family and Medical Leave Act
 - The Families First Coronavirus Response Act

But First, A Scenario

After a remote start to the school year, Preparatory School is preparing to return students to in-person learning on a hybrid schedule.

- Ms. Johnson informs the HR Director that because she is pregnant, she would like to work remotely. Ms. Johnson teaches second grade.
- Mr. Smith informs the HR Director that his partner is immunocompromised, so he would like to work remotely. Mr. Smith works in the Advancement Office.
- Ms. Lee informs the HR Director that she plans on travelling during spring break so she would like to work remotely when she returns from travel. Ms. Lee teaches AP American History in the upper school.



The Americans with Disabilities Act

What Does It Really Mean to Accommodate?

ADA: Who Is Entitled to an Accommodation?

- “Individual with a Disability” means:
 - someone who has "a physical or mental impairment that **substantially limits** one or more major life activities or major life functions; has a record of such an impairment; or is regarded as having such an impairment."
 - Includes: immune disorders and any mental or psychological disorder, such as emotional or mental illness
- An employer is required to accommodate only a “known” disability
- While you have a duty to accommodate the employee’s or a student’s condition, there is no duty to accommodate because an employee or student lives with someone who has a disability
 - “association theory” under the ADA

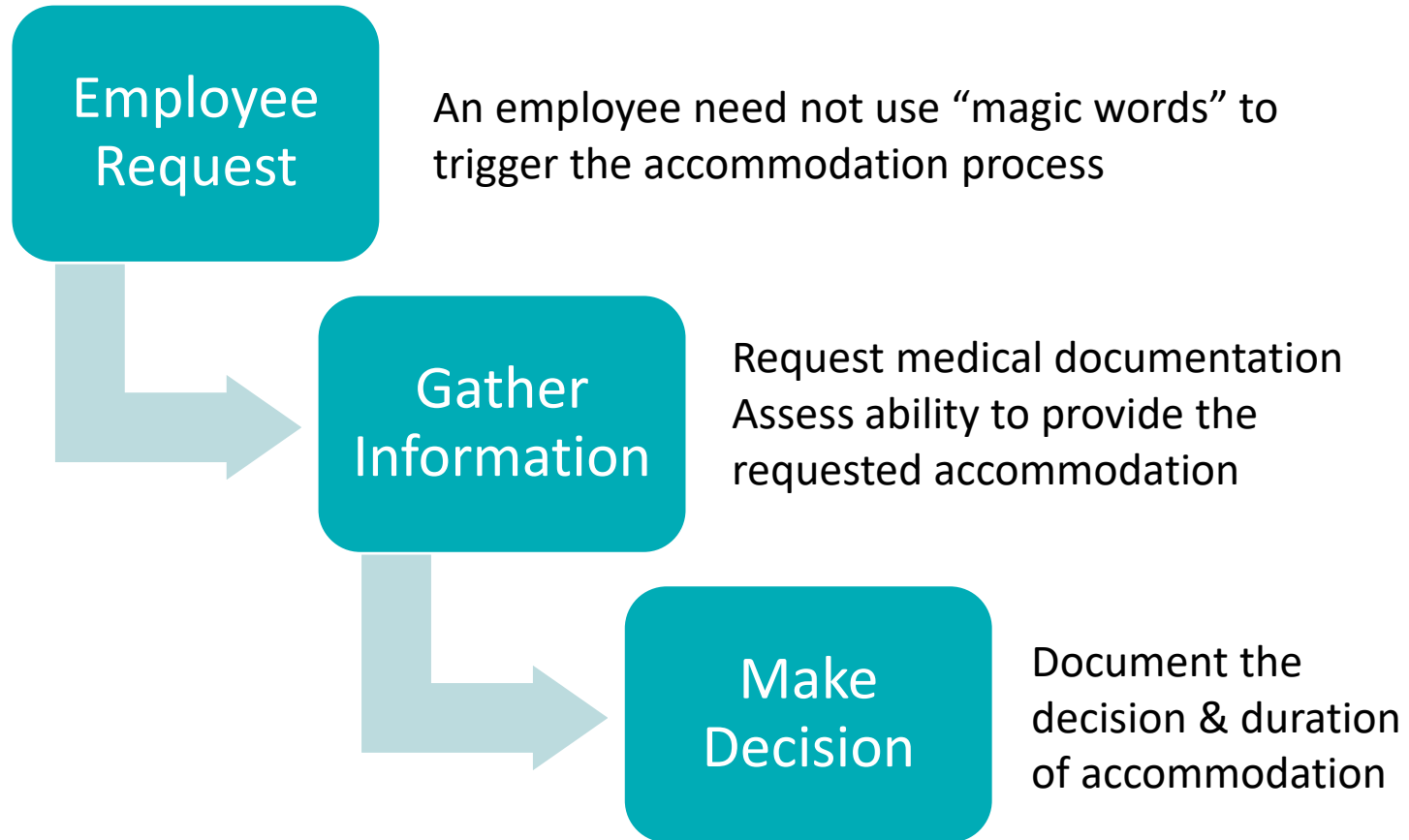
ADA: What is an Accommodation?

- In general, an accommodation is **any change in the school environment** or in the way things are customarily done that allows an employee with a disability to perform the *essential functions* of their job or to participate in the program (if a student)
 - It is, by definition, a deviation from your policy
 - Essential job functions should be described in the job description
- The requested accommodation has to have some relationship to the underlying disability
- The school may choose among reasonable accommodations as long as the chosen accommodation is effective (*not entitled to the accommodation of their choice*)
- If the requested accommodation would pose a threat to the health or safety of the school community, that is not “reasonable”

ADA: What is an Undue Burden?

- Undue burden means:
 - significant **difficulty or expense**
 - focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation
 - Includes not only financial difficulty, but reasonable accommodations that are
 - unduly extensive, substantial, or **disruptive**
 - those that would **fundamentally alter** the nature or operation of the school or the program
- Practice Tip: Try to *avoid* focusing on the expense involved, to avoid putting the School's financial resources at issue in litigation

The Interactive Process: Handling Requests for Accommodation



Interactive Process: Practical Tips

- Train your supervisors to send accommodation requests to HR
- Documentation
 - Accommodation request form
 - Medical documentation form (to be completed by doctor or medical provider)
 - Medical diagnosis
 - How the accommodation would allow the employee to perform the essential functions of the job
 - Estimated duration
 - Granting or denying accommodation
 - Confirm accommodation in writing
 - Explain any terms and conditions (i.e., continued good performance)
 - Provide flexibility (set an end date, reserve ability to ask for updated medical documentation)

Pandemic Considerations & The CDC High Risk Categories

- What about older employees?
 - Older employees are covered by the Age Discrimination in Employment Act
 - Unlike the ADA, no duty to accommodate (does not mean you *cannot*, just that you *don't have to*)
- What about pregnant employees?
 - Pregnancy is not a disability under the ADA, however...
 - If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy, she must be treated as any other temporarily disabled employee (*i.e.* lifting restrictions)
 - Impairments resulting from pregnancy (for example, gestational diabetes) may be disabilities under the ADA
- What about employees or students who cannot wear masks?
- **Remember, requesting an accommodation is a form of protected activity**

COVID-19 Vaccination Considerations

- EEOC guidance states that employers can require employees to get the COVID-19 vaccination and/or show proof of vaccination
- Medical exemption
 - Must provide a reasonable accommodation unless doing so would pose a direct threat due to a significant risk or substantial harm to the health and safety of the individual or others
 - Can exclude the employee from physically entering the workplace, but does not automatically mean you can terminate the employee. Explore remote work, PTO or unpaid leave, FFCRA or FMLA leave.
- Religious exemption
 - Employee may claim that receiving the vaccination is against a sincerely held religious belief, practice, or observance.
 - Employer must provide a reasonable accommodation (more than a *de minimus* cost or burden on the employer)
 - Employer can question the sincerity of the religious belief or practice

Employee Leave

When Must We Allow Leave?

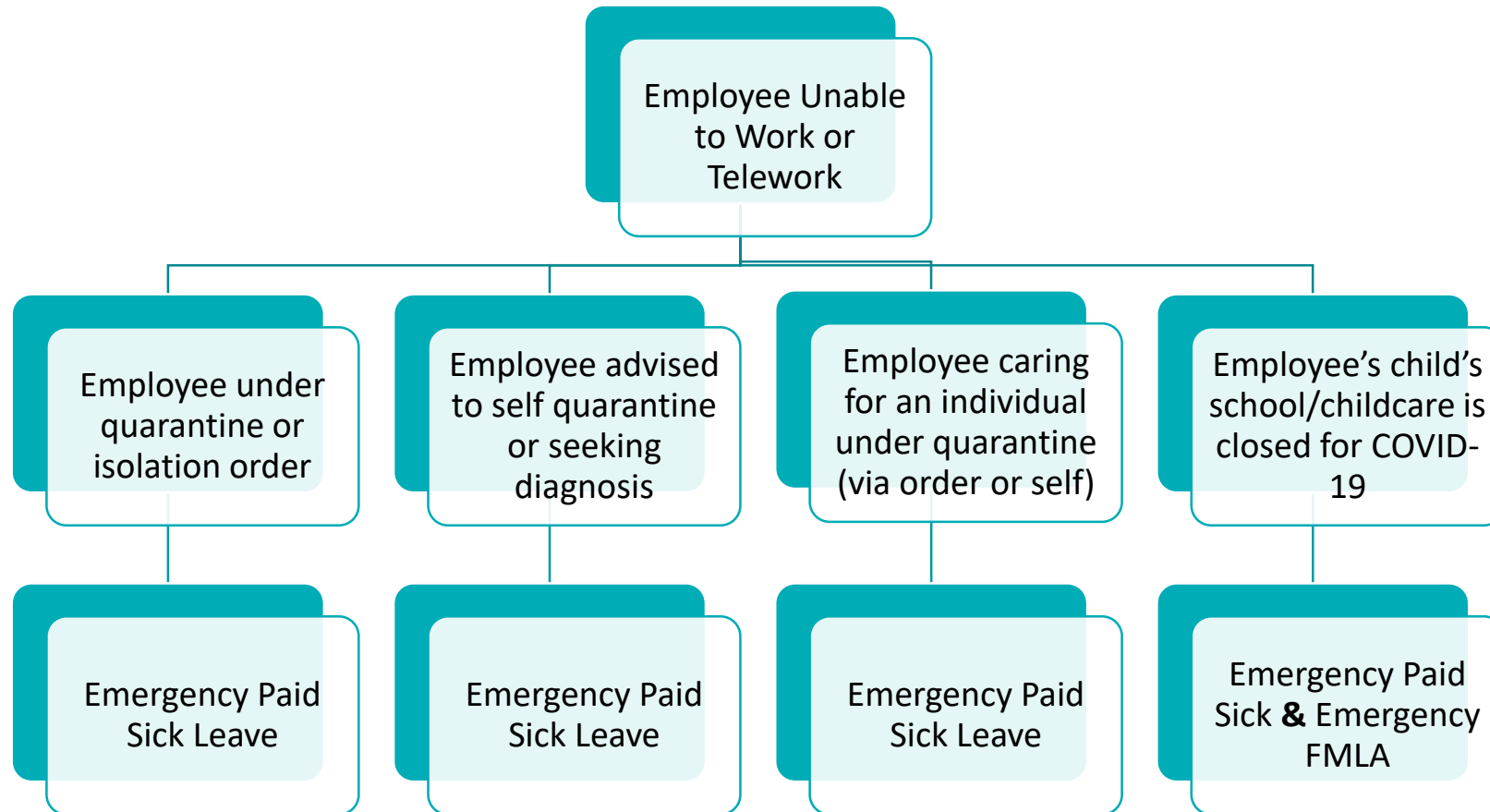
Family and Medical Leave Act

- Entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons.
 - FMLA leave is for “serious health condition”
- Having COVID-19 is not necessarily considered a “serious health condition” under the FMLA
 - *If complications arise* from having COVID-19, then the condition could be considered a serious health condition
 - *If employee must care for a family member with complications from COVID-19*, then employee may be eligible for FMLA

Families First Coronavirus Response Act

- A **covered employer** is required to provide **emergency paid sick leave (EPSL)** and **emergency FMLA leave (EFMLA)**
 - covered employer: fewer than 500 employees as of the date the leave is to be taken
 - EPSL: to all employees regardless of time in service
 - EFMLA: On the payroll for at least 30 **calendar days** immediately prior to the day leave would begin
- Must provide to employees who are **unable to work or telework** due to specified reasons
- **FFCRA expired December 31, 2020, but may be extended voluntarily through March 31, 2021**
 - Does not provide a new bucket of leave
 - EFMLA use calculated based on handbook policy (i.e., rolling back or calendar year)

FFCRA – Reasons for Leave



FFCRA – Amount of Leave and Rates of Pay

- **EPSL**

- 80 hours of leave (or PT employee two week equivalent)
- If the leave is taken for the employee's own illness:
 - 100% regular rate of pay, up to \$511 per day and \$5,110 total
- If the leave is taken to care for another illness or for childcare reasons:
 - 2/3 the regular rate of pay, up to \$200 per day and \$2,000 total

- **EFMLA**

- First ten days are unpaid
- Remaining 10 weeks
 - 2/3 the regular rate of pay, up to \$200 per day and \$10,000 total

FFCRA – Common Questions

- Isolation and Quarantine Orders for EPSL:
 - Shelter-in-place or stay-at-home orders issued by the federal, state, or local government **are** considered isolation or quarantine orders
 - What about travel isolation orders?
 - Only one two-week period of leave is FFCRA ESL
- What about Childcare Leave?
 - Fully Remote or Hybrid Schools – considered “closed” on the days of virtual instruction
 - each day of school closure constitutes a *separate reason* for FFCRA leave that ends when the school opens the next day, so not intermittent leave
 - Are there flexible solutions the school can provide (*i.e.* on site supervision//Section 139 of the Internal Revenue Code)

Back to Our Scenario..

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