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Episode Title:	Tackling Difficult Accommodations Under ADA & FMLA
Host:	Dan Schwartz
Guest Speaker:	Keegan Drenosky and Claire Pariano

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Dan Schwartz: Welcome back to from lawyer to employer, a podcast about employment law. I'm your host, Dan Schwartz, a partner in employment law at Shipman and Goodwin. On today's podcast, we're going to talk about the ADA, the Americans with Disabilities Act, and the FMLA, the Family Medical Leave Act, and accommodations under both of those laws with my colleagues, Keegan Drenosky and Claire Pariano.

As part of the Shipman and Goodwin Fall Employment Law Webinar Series, we recently discussed some difficult scenarios that employers sometimes have to deal with. These scenarios are often complex and without simple solutions. And oftentimes these scenarios hinge on a particular fact that might be unusual.

So, I've asked Keegan and Claire to come back with me after the webinar as we briefly recap some of the items we talked about and then address some of the questions that came up at the webinar that we didn't have time to address. Keegan and Claire, welcome. Keegan, let me start with you.

We can set up our conversation today. Can you briefly talk about what the ADA and the FMLA require in terms of accommodating a disability or a serious health condition?

Keegan Drenosky: Sure. With the ADA, the basis of a disability. When we think about the ADA, we're really looking at reasonable accommodations for employees to enable them to perform the essential functions of their job.

And it has to be employees that have a qualified disability under the ADA. Then when we look at the FMLA, on the flip side, that's actually a job protection statute that's available for eligible employees who require leave for certain conditions, such as their own serious health conditions, to care for a family member with a serious health condition, or for something like the birth of a child.

And then on the other hand, we have state law equivalents as well, depending on where you have employees, and those will differ slightly in scope. For example, here in Connecticut, there are expanded reasons why someone can take a leave under the Connecticut FMLA, and the FMLA has a longer time worked eligibility requirement, whereas in Connecticut, it covers employees sooner into their job--after only three months.

There are limits, though, too, which is something to keep in mind. For accommodations, they need to be reasonable. It can't be, anything that an employee requests. And there also can't be an undue hardship on the employer as it's determined by the interactive process between the employer and the employee.

And then on the FMLA side, we have the time limits as well.

Dan Schwartz: Claire, let me bring you into this conversation. Keegan was just talking about the obligations, but one of the things she mentioned just now was this interactive process. What's the basic requirement here for employers to take away?

Claire Pariano: The interactive process is really dictated by the ADA and Connecticut state law.

And it means that there needs to be a conversation between an employer and an employee or an applicant. Discuss the employee's disabilities and the limitations that may affect his or her ability to perform the essential duties. So it's more of a relaxed conversation. It needs to be a bit of a tennis match, we like to think of it as.

So, the employee may propose one accommodation. The employer may respond and say, “Hey, we can't do that, but this is something else that we can provide.” And so on and so forth, but ultimately the employer's obligation is to provide a reasonable accommodation and it's not necessarily the accommodation that the employee wants and their first choice.

So, it's important to note that when there are one or more possible accommodations, the employer may choose the one that involves the least costs and difficulty. So, it's not as though the employee gets to dictate all of his or her preferred accommodations.

Dan Schwartz: All right. So, we've set the groundwork for a discussion on this.

And I know during our webinar we talked about some different scenarios. So, I want to bring up something that we talked about there and really delve into it a little bit more. The basic scenario, Keegan, is your employee is suffering from stress, anxiety, and PTSD, and they've submitted a note from their healthcare provider stating that they need a job coach in order to meet the expectations of the role.

How does an employer handle a sort of more unusual request like this?

Keegan Drenosky: It's a good question and we had a lot of questions come in when we did this scenario during the webinar on do we have to provide a job coach or something else that's a little bit more out of the ordinary or more onerous for the employer to provide.

I'd really look at it as first evaluating what the note says from the healthcare provider. Is it vague or is there actual information about why this employee needs the job coach in order to help them perform the essential functions of their role? Or is it something they're merely asking for to help them do better but it's not going to affect their ability to actually do the requirements of the job?

We can have the employee go back to the health care provider if more information is needed and you can go to the health care provider to see if there's other accommodations that the employer can propose, as Claire was discussing, that can be provided to reach the same goals of allowing the employee to be able to do those essential functions of the role.

At the end of the day, though, the employer might have to get this job coach if that's really the only accommodation that's going to work. And it's not something that causes an undue hardship. So, we wouldn't look just at the cost to the employer, but in the context of their whole business, if it's something they're able to provide, if it's a coach for an hour a week, something that they already have a consultant on staff, or is this something that's really going to cause a hardship for the employer to do?

So, it's interesting, but at the end of the day, I do think you might have to do that if there's not another reasonable accommodation that could work.

Dan Schwartz: Ultimately, you have to be able to hold the employee accountable for their performance, right?

Keegan Drenosky: Absolutely. So, during this whole process, it's not as if, especially say this employee was on a performance improvement plan.

It's not as if they get to say, "Oh I don't have to perform because I have anxiety and I have a note from my doctor." You need to work with them on the accommodations and there might be a situation where you say, we're going to pause this performance plan for a week while we get that put in place, but ultimately, they have to be able to perform the job.

Dan Schwartz: Yes, it really came up in the context of the webinar. I think people get caught up that the first accommodation proposed by the employee has to be the one that needs to be followed when it is really a discussion. Claire, as you've mentioned, that's a back and forth. So, there might be something else that you can look at.

So good tip there. One of the other related questions that I thought came in that was really interesting is, does the note have to be from a certain kind of? Provider or like for mental health issues, for example, what if it's a clinical psychologist or something similar to that?

Keegan Drenosky: Yeah, it's a really good question, especially as we see more employees taking time to care for their mental health and these become bigger issues in the workplace.

The definition of what a healthcare provider is under the law actually is pretty broad. So, it would include a clinical psychologist or a therapist, even a dentist or an osteopath. Things that you wouldn't necessarily think would be covered really can be a doctor for purposes of does someone need a leave? Do they need an accommodation? So, although initially your reaction might be, why is there a note from someone's dentist? Really what you need to be looking at is—is there a qualified disability--if someone is eligible for leave under the FMLA or CT FMLA and if it qualifies rather than who is the healthcare provider.

Dan Schwartz: So ultimately look less perhaps at who the provider is and more to the content of the descriptions in the notes. And if you don't have enough information, I think you can go back to the doctor or go back to the employee and ask the doctor for more information right, under many of those circumstances?

Keegan Drenosky: Exactly.

And you want to let the employee know what's going on so that they are allowing you to do that. And you don't want to just go ask the doctor for someone's complete medical record unrelated to this. Of course, there's still some limits, but yeah, as part of this interactive process, you certainly can find out what the needs are of the employee.

Dan Schwartz: Yes, it should go without saying that an employee's medical information just needs to be kept confidential. You don't get to blab about it to co-workers in the course of these discussions. Be sure to treat that information confidentially. All right, so that's one scenario. Claire, let me give you something else, because we were talking about the FMLA at times.

And this is more of a procedural side of things. So, an employer gives Jill, an employee, 15 calendar days to provide medical certification supporting her requested two week FMLA leave. Jill doesn't provide the certification for basically a month and doesn't give you a reason for the delay, but Jill also has some paid time off days.

So, given that scenario, can the employer deny FMLA protections, and can the employer require her to use her PTO?

Claire Pariano: As you mentioned, this is more of a procedural question, but we think it's also a good display of having that open line of communication with an employee. So, under the FMLA, the federal FMLA, an employer is required to notify each time a certification is required from an employee.

So here it did that with the employee, Jill, and the employer must then allow Jill at least 15 calendar days from the date of receipt of the medical certification form to return it to the employer. So, if that 15-day timeline isn't practical for the employee here (Jill) the employer can grant an extension, but Jill must notify the employer of the need for the additional time.

Here it seems as though the employer can deny this request, but we want to stress here. It's important to have an open line of communication with employees. So, you'll want to go back to Jill and see what's going on, what the reason for the delay is, and see if there's trouble she's having on her end.

Dan Schwartz: So let me just stay there and then I'll get to the second question again, which is can an employer have a policy that says that if you fail to submit the documentation by X date, we will assume you're withdrawing the request because I know sometimes employers are just feel frustrated that they're trying to track down these employees.

Is this a viable option for employers to follow?

Claire Pariano: Yes. That's definitely something we would recommend to employers. We think it's important to have these sorts of policies that say, if you fail to submit this documentation by this date, we'll assume you're withdrawing your leave, and we'll treat it as such. I think this shows the need for these strong policies.

Dan Schwartz: Yes, so now getting back to the second question that I had posed. Can the employer in this situation require Jill, the employee who was taking the leave to use her paid time off?

Claire Pariano: Yes. So again, it's, this shows the importance of having these policies.

So, if it's the employer's policy to require available accrued paid time off to be used for an employee's leave, then yes, the employer here can require Jill to use it.

Dan Schwartz: Do they get to keep any of it in a state like Connecticut, for example?

Claire Pariano: Sure. So, if we're in Connecticut and she's applying for CT FMLA leave, she can retain two weeks of paid time off. CT FMLA allows for an employee to choose to preserve up to two weeks of their accrued paid time off.

Dan Schwartz: All right, awesome. So those were some of the questions that came up, but we had some others. I thought we'd take a few more minutes and go through a speed round of questions. So Claire, you're up first.

I'm not going to impose a buzzer or a game show timer here, but we've had multiple follow up questions regarding a discussion we had about service dogs in the workplace. So, what happens if the inclusion of dogs as a service animal causes a medical issue for another employee, such as, an employee who has an allergic reaction to the dog?

Claire Pariano: The employer here will want to consider other accommodations that allow the dog to be in the workplace. So, this can be having a private office that's secluded from these employees with medical allergic reactions. However, if that's not an option, then it's likely it'll be an

undue hardship on the employer. And they'll have to look for other reasonable accommodations that they can provide here.

Dan Schwartz: So, I think it goes back to the point you were raising earlier. It's really the interactive process. If something happens like this, you don't just give up. You keep looking to see what you can find. If you exhaust it, great. But I think to your point, it needs to be a tennis match back and forth.

Claire Pariano: Exactly. And we want to note that this is for service dogs. So, there's a difference, as we mentioned in our webinar about service dogs and therapy animals.

Dan Schwartz: All right. So Keegan, you're on the clock now. Here's your speed question: Do the federal FMLA qualifying guidelines trump state law? So you have the federal FMLA, and you've got CTFMLA, what controls?

Keegan Drenosky: I wouldn't say that the federal trumps the state. Really, these things are going to work together. An employee might be eligible for one or the other or both.

Really, whatever law gives the employee the greatest benefit is what the employee is going to get. So, what I mean by that is if they're eligible for FMLA because they've been working for a year and reached that threshold but they're also eligible for Connecticut leave, those two will run together.

But if it's a reason like an incapacity during pregnancy that would qualify for potentially additional leave under Connecticut law, then an employee would get that as well. So, while they can run concurrently, you're going to get the better benefit. So, if you're in Connecticut there might be more.

You also don't want to forget that even in a circumstance where an employee is not eligible for either of those types of leave, that's where we still would want to do an ADA type analysis to determine whether there might be some leave available under that law or other laws related to pregnancy. Really, there's a number of different things that work together to determine what, employees are able to take.

Dan Schwartz: All right. Claire, one more bonus question here. Are there any resources that you can recommend for our listeners if they want to learn more about this topic?

Claire Pariano: Yes. One big source that we used for this webinar was the Job Accommodation Network, or AskJan.org. Dan was actually the one who recommended this, but it's a guide for both employers and employees.

It's very helpful to get different recommendations and strategies for a specific disability. You can search by the actual disability. So, whether it's fragrance, sensitivity or anxiety, or different topics and accommodations, it's extremely helpful.

Dan Schwartz: Yes. And obviously our webinar that we gave is available at any time on the Shipman and Goodwin website.

And I hope we can put a link to it in the show notes. I think another great resource is obviously the blogs that we run as well, the employment law letter. and the Connecticut Employment Law blog. Each of those have discussed various topics in one way or another. I know on my blog, I've been doing it now over 15 years.

We've had almost everything you can imagine come up. So with that, I think time is coming to a close. I want to thank Claire and Keegan for joining me today. We'll have more recaps from our fall webinar series and some upcoming podcasts. So, watch for that in your podcast feed. Thanks again for joining, and we look forward to having you join us again on From Lawyer to Employer.

Take care.

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