

DISABILITY DISCRIMINATION: HOW DIFFICULT IS IT TO BE DISABLED AT WORK?

Disability discrimination is a growing concern in today's workplace. Disabled employees often find themselves in positions where they are not properly accommodated or too afraid to request an accommodation given the stigma involved. While the law aims to protect employees against disability discrimination, the law often falls short on the current realities that disabled employees face.

To start, far too often are employees unaware of the processes and protocols involved in requesting a reasonable accommodation. This is because companies do not always properly train their employees or make these policies readily available to ensure that employees can be informed on how to request an accommodation. During orientation or onboarding, employees typically sign off on a substantial amount of paperwork such as affirming that they are made aware of the company's discrimination policies and the policies regarding requesting reasonable accommodations. These policies rarely resurface and training is often lacking leaving employees with little to no knowledge as to the details of these policies. If you are looking for your company's discrimination or accommodation policies, the Company's handbook or the Human Resources Department are usually a good place to start. For companies without written policies or Human Resources Departments, managers or supervisors should be properly

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trained on these policies. Abiding by the company's policies is essential for ensuring that your requests for an accommodation are properly handled.

So, what accommodation should an employee request? The accommodation requested depends on the employee's disability and what is needed to allow the employee to perform their job duties. For example, an employee suffering a back injury may submit a doctor's note excusing them from heavy lifting. An employee who suffers from gout on their foot may request a stool to sit on when they have a gout flare up. By further example, an employee who suffers from cancer may request a modified work schedule to attend their chemotherapy appointments. There are endless accommodations that can be available for an employee depending on their needs and their disability.

Once an employee makes a request for an accommodation, the law requires that the

employer and the employee engage in an interactive process. This is an informal process that helps the employer better understand their employee needs and what reasonable accommodations the employer can make available. Depending on the disability and the request for accommodation, the employer may need to find out more about the employee's functional limitations and compare it to the primary job duties of that employee. For example, an employee with a back injury who can no longer perform heavy lifting may easily get their accommodation approved if they are a receptionist sitting at a desk all day and rarely has to lift as part of their job duties. However, if the employee is a construction worker where 90% of their job entails heavy lifting, then granting the accommodation request may not be as simple. The employer may even require medical documentation regarding the employee's disability.

There is no requirement under the law that the employer provides the employee with the exact accommodation requested. As a result, the interactive process is even more important and why this step cannot be missed. As Plaintiff's lawyers, we often speak to clients who request reasonable accommodations for their disability and the employer automatically rejects the accommodation without engaging in any further discussion. This is a clear violation of the law. The employee is now left without an accommodation and in a vulnerable situation at work. These accommodations are typically needed for the employee to perform their job. Without the accommodation, the employee

may be more likely to receive a negative performance evaluation or even be terminated for poor performance. The interactive process aims to protect the employee from a complete rejection of their accommodation request.

Unfortunately, employees are often scared to request reasonable accommodations for fear of being retaliated against. It is unlawful for an employer to demote or terminate an employee because they have requested a reasonable accommodation. However, despite this being illegal, disabled employees often suffer adverse employment actions or suffer a hostile work environment because of their disability. For example, employees who request reasonable accommodations may have their disability or accommodation request leaked at work and now have to suffer the ramifications of people in the office knowing about their private medical matters. Other times, employees are unlawfully terminated or demoted based on a physical or mental disability. In some instances, other employees make discriminatory remarks or comments about the employee's disability. All of these instances are unlawful. In fact, it is unlawful for an employer to create a hostile work environment surrounding an employee's disability. Discriminatory comments and unfair treatment could create a hostile work environment. All employees deserve to work in an environment that is free from discriminatory comments and unfair treatment. It is our responsibility as the Plaintiff's lawyers to ensure that this remains true for our clients.



COVID-19's impact on the disability framework of the law

COVID-19 has undoubtedly created a difficult time for employers and employees' relationships. Not surprisingly, disability discrimination has continued to rise during the COVID-19 pandemic. As more employees are required to physically return to work, companies are seeing a rise in accommodation requests from their employees to work remotely. Certain disabilities may put employees at an increased risk of infection and remote accommodation could protect that employee from being exposed to COVID-19. However, employers are not obligated to allow employees to work remotely. This is where the interactive process comes into play again. The employer may have a good

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argument that the essential functions of the employee's job require them to physically be at the workplace. For example, a cashier at a pharmacy will likely be unable to conduct their job remotely given that an essential function of their job requires them to be physically at work. The employer may also have a good argument that having the employee work remotely causes an undue burden on the employer. Often an employer may try to argue that the accommodation creates an undue burden on them because it is too expensive or too difficult for them given the company's size and finances. Many times, the employer's argument that the accommodation creates an undue hardship is inappropriate. An employer cannot refuse to accommodate the employee

solely because they may incur additional costs. Each employee and employer must go through an individual assessment as to what the employer can do to accommodate that employee.

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How Does the Law Protect the Employees?

It is unlawful for an employer to discriminate against an employee with actual or perceived disabilities under Federal, New York State, and New York City laws. The Americans with Disabilities Act (“ADA”) is the federal legislation that protects employees against disability discrimination but the federal law is not so accommodating. For example, the ADA defines disability as a “physical or mental impairment that substantially limits a major life activity”. This definition of disability raises the bar as to what can even be considered a disability. Luckily, states such as New York have developed their own laws that lower the standard of how a disability is defined and lowers the bar for employees to prove disability discrimination. New York law has recently amended its state laws to mirror the more lenient New York City laws. New York City laws are incredibly employee-friendly and better protect employees against unfair workplace harassment.



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Contact **Phillips & Associates** if you have been discriminated against based on your disability or retaliated against for requesting a reasonable accommodation. We are here to advocate on your behalf and fight for equality in the workplace.

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