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An Employee Request for a Reasonable Accommodation Requires Employers to Engage in the Interactive Process and Assess if the Requested Accommodation Creates an Undue Hardship

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The New Jersey Law Against Discrimination ("LAD") requires employers, where needed, to provide reasonable accommodations to employees and job applicants with disabilities or religious restrictions unless doing so would create an undue hardship. The LAD is triggered when an employee tells an employer that he or she is having problems performing his or her work duties as a result of a disability or a religious restriction. The employer then **must engage in the interactive active process** with the employee. The interactive process is when the employer and employee communicate with each other to try to ascertain what reasonable accommodation will permit the employee to successfully perform his or her job. A more detailed blog post on the interactive process can be found here.

After the interactive process, if the only available reasonable accommodation creates an undue hardship, an employer is not required to provide the accommodation. An undue hardship is defined as a **significant** difficulty or expense that compares the resources and circumstances of the employer to the cost or difficulty of providing a reasonable accommodation. Generalized conclusions by employers, that a reasonable accommodation creates an undue hardship, are not enough to deny a request for a reasonable accommodation. Instead, an undue hardship must be based on an individualized assessment of the circumstances.

Factors that may be considered in determining if there is an undue hardship under the ADA include:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity); and
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer.

The U.S. Equal Employment Opportunity Commission has issued guidance for employers regarding undue hardship during the COVID-19 pandemic. The guidance can be found at the EEOC website.

The guidance explains which types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic, stating:

> An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular

> accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

The guidance also explains which types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic, stating:

> Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

Additionally, for employers who are starting to make arrangements for their employees to return to the physical workplace, the EEOC guidance explores whether an employer can invite employees to ask for reasonable accommodations that they may need at a future date when they are permitted or required to return to the workplace. The guidance states:

> Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. . . . If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request an accommodation in advance and instead requests it at a later time, the employer must still consider the request at that time.

If you have any questions about what constitutes an undue hardship, please contact Tracy Armstrong or any member of the Employment Law department.

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