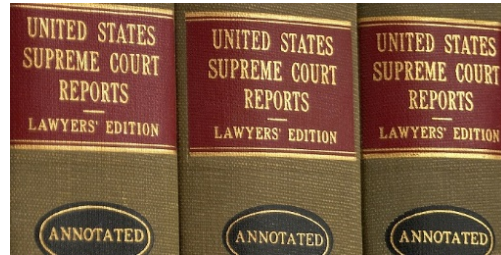




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WORKPLACE ACCOMMODATIONS AND VACCINE MANDATES

FACULTY

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DEGREES

- Juris Doctor, Hofstra University School of Law
- Masters of Public Health, Indiana University
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- Media legal analyst on several national and regional news stations including Fox 5 NY, CBS NY, TV 55, Pix 11, Newsy, News Nation, Black News Channel
- Author of book, 10 Strategies to Purchase Property Post-Pandemic: The Ultimate Guide to Real Estate Investing
- Past co-chair for The Suffolk County Bar Association, Real Property Law Committee
- Appointed committee member to New York State Bar Association Diversity and Inclusion section
- Published in the New York Law Journal, New York Real Estate Journal, American Bar Association Journal of Real Estate Litigation and Condemnation, Nassau Lawyer, Huffington Post, Avenue Magazine, Homes of the Hamptons, Homes of Eastern Long Island, Behind the Hedges Magazine, Dan's Papers, The Suffolk Lawyer, Long Island Business News
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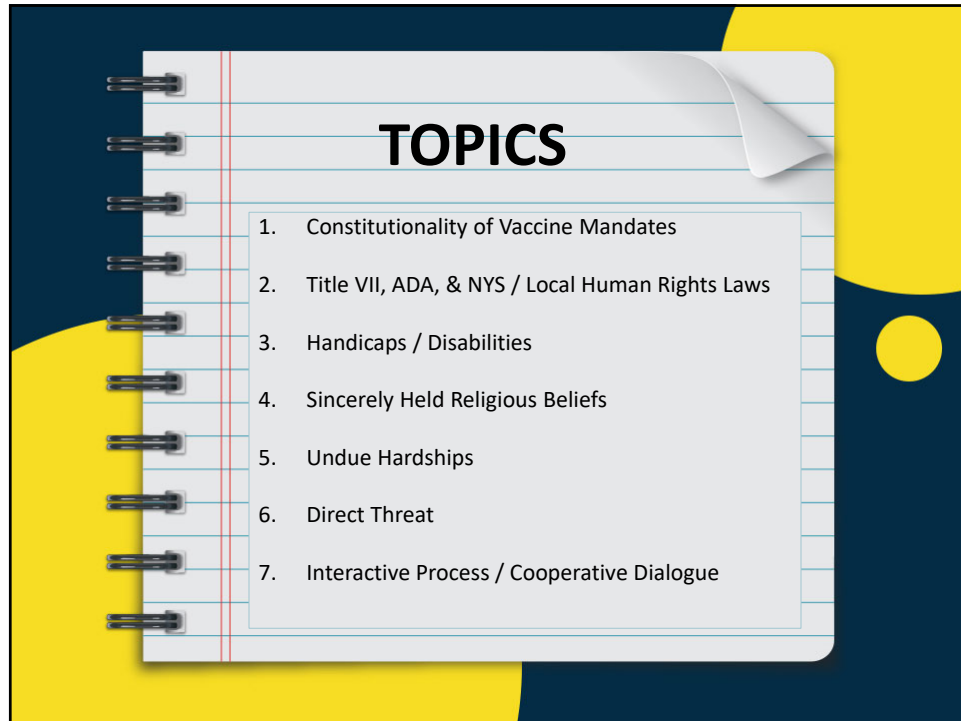
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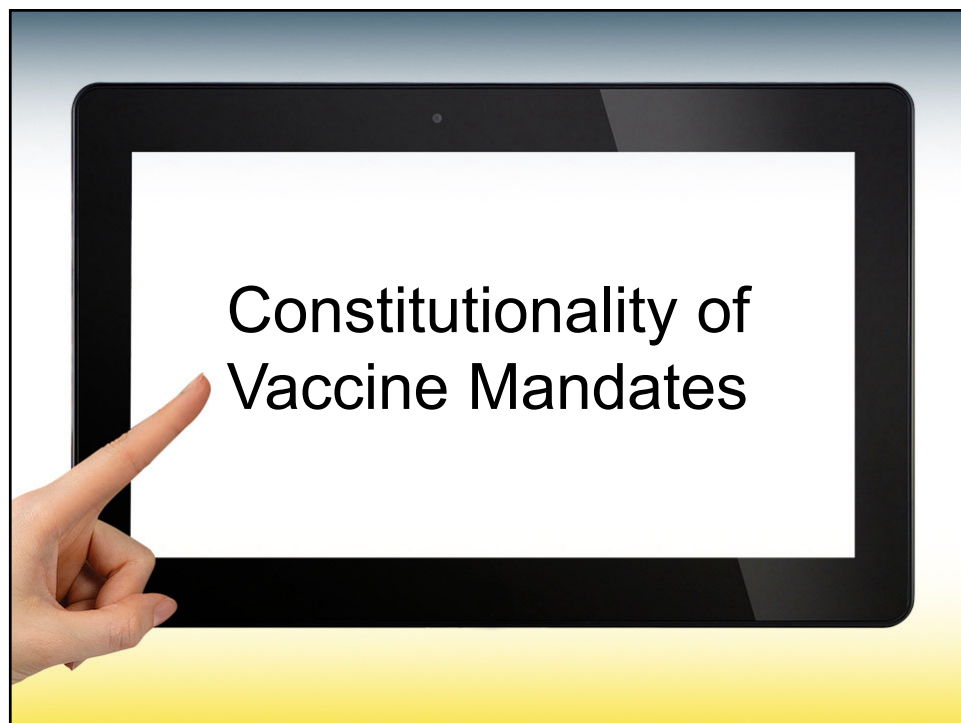


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Jacobson v. Massachusetts

- US Supreme Court / 1905
- **“It is within the police power of a State to enact a compulsory vaccination law”**

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Vaccination Law from Jacobson

General Law:

"the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars."

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Vaccination Law from Jacobson

Cambridge Law:

"Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated, and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated."

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Jacobson was a
criminal case
& Jacobson lost
by arguing that
vaccine
mandate is
unconstitutional

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Klaassen v. Indiana University

- 7th Circuit / 2021 (Justice Barrett denied application for injunctive relief)
- “Given Jacobson v. Massachusetts [citation omitted], which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2.”

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“People who do not want to be vaccinated may go elsewhere. Many universities require vaccination against SARS-CoV-2, but many others do not. Plaintiffs have ample educational opportunities.”

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New York Vaccine Rules Now

- NYC School Staff Arguments:
 - Equal protection violation because fire / police testing option
 - Due process violation because can't practice profession
- NYS Court Personnel Arguments:
 - Failure to collectively bargain under civil service law for vaccination requirement
- NYS Healthcare Arguments:
 - Must have sincerely held religious belief accommodation

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OSHA Regulation

- Application – Employers with ≥ 100 employees
- Vaccine mandate

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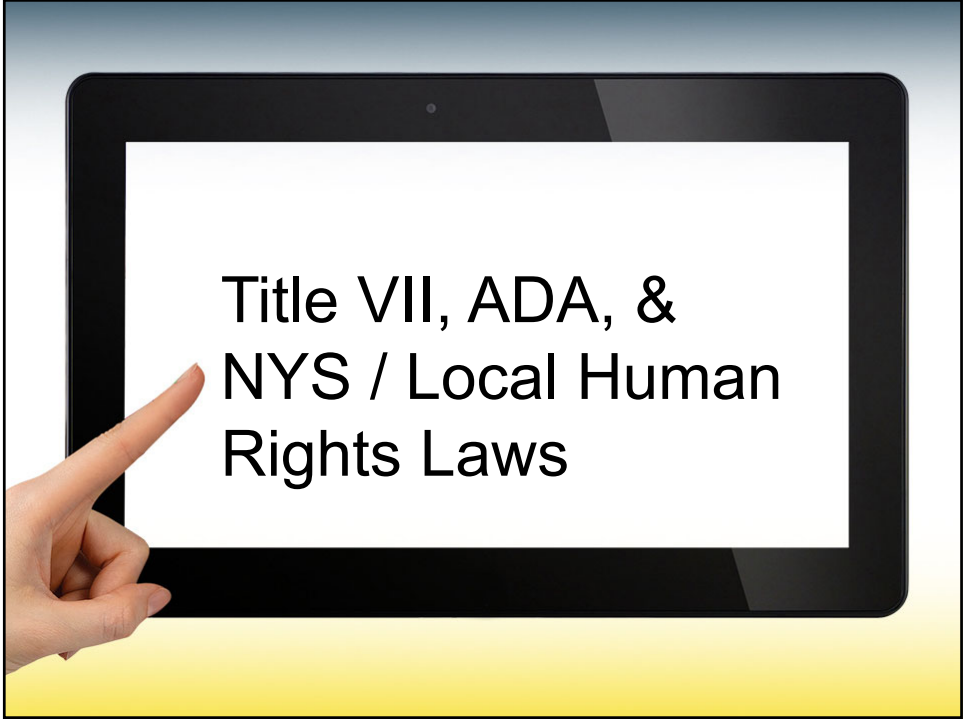
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The Flip Side of the Coin

- TX Executive Order No. GA-40

“No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”

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Title VII, ADA, &
NYS / Local Human
Rights Laws

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Failure-to-Accommodate Disability Claim

1. The plaintiff is a qualified individual with a disability;
2. The employer was aware of her disability;
&
3. The employer failed to reasonably accommodate the disability

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Failure-to-Accommodate Religious Claim

1. Employee held a bona fide religious belief conflicting with an employment requirement;
2. Employee informed their employers of this belief; &
3. Employee was disciplined for failure to comply with the conflicting employment requirement

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What is Reasonable?

“requested accommodations are reasonable only if they ‘address a key obstacle preventing [the employee] from performing a necessary function of [his job.]’”

Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202 (6th Cir. 2010)

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What is Reasonable?

“necessary to enable the individual to perform the essential functions of the position held or desired”

29 C.F.R. § 1630.9

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Reasonableness Factors

1. The particular job involved, its purpose, and its essential functions;
2. The employee's limitations and how those limitations can be overcome;
3. The effectiveness an accommodation would have in enabling the individual to perform the job; and
4. The preference of the employee.

Keever v. City of Middletown, 145 F.3d 809, 812 (6th Cir. 1998)

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Potential Reasonable Accommodations

Requiring the employee to:

- Wear a mask,
- Work a staggered shift,
- Making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees),
- Permitting telework if feasible, or
- Reassigning the employee to a vacant position in a different workspace.



<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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Title VII / ADA Threshold

- Employer has ≥ 15 employees
- Charge must be filed with EEOC within 180 (300 if state has disc law) days from the date of the alleged violation

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NYS Human Rights Law Threshold

Employer has ≥ 4 employees requirement eliminated in 2020 (now, all employers regardless of # of employees)

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Disability Accommodations

- 29 CFR § 1630.9
- It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

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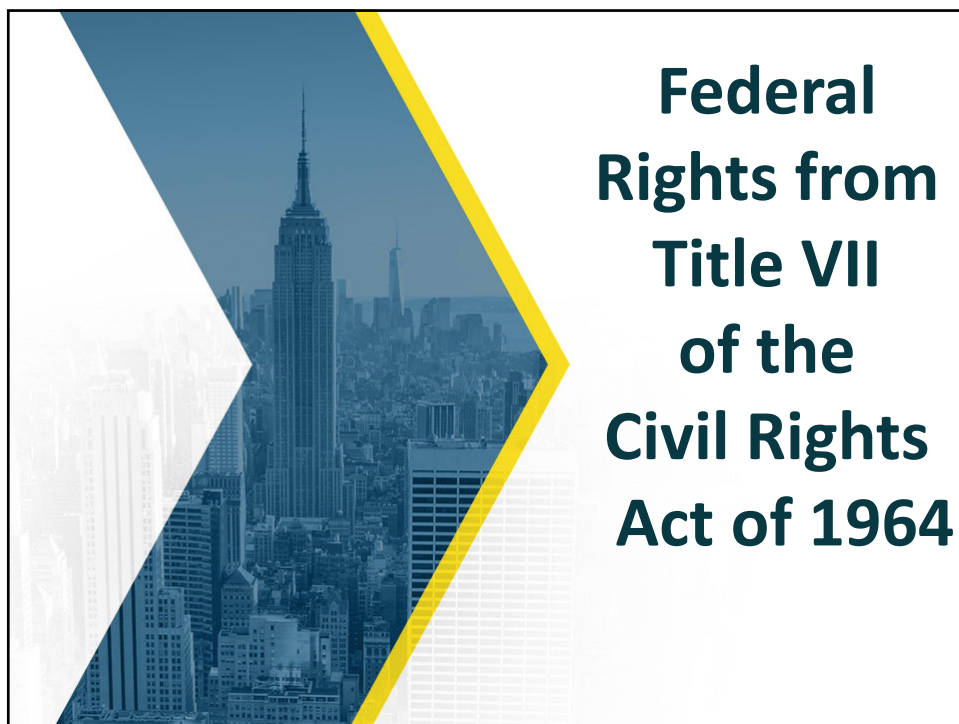
Sincerely Held
Religious Beliefs

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Religious Accommodations

- 29 CFR § 1605.2
- It's an unlawful employment practice for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business

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EEOC – What You Should Know

- What You Should Know: Workplace Religious Accommodation
- <https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation>

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EEOC – What You Should Know Key Excerpts:

- *Religion Definition* – “includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people.”
- *Sincerely Held* – can qualify, “even if newly adopted, not consistently observed, or different from the commonly followed tenets of the individual's religion.”

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EEOC – Guidance

- Section 12: Religious Discrimination
- <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

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EEOC – What You Should Know Key Excerpts

Religion Definition:

- “religion typically concerns “ultimate ideas” about “life, purpose, and death.”
- “Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII.”

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Sincerely Held Religious Belief – Abortions

Dr. A v. Hochul, NDNY 2021

"vaccines [] were tested, developed or produced with fetal cells line derived from procured abortions."

- Johnson & Johnson/Janssen: Fetal cell cultures are used to produce and manufacture the J&J COVID-19 vaccine and the final formulation of this vaccine includes residual amounts of the fetal host cell proteins (≤ 0.15 mcg) and/or host cell DNA (≤ 3 ng).
- Pfizer/BioNTech: The HEK-293 abortion-related cell line was used in research related to the development of the Pfizer COVID-19 vaccine.
- Moderna/NIAID: Aborted fetal cell lines were used in both the development and testing of Moderna's COVID-19 vaccine.

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Fetal Cell Medicine

- | | | |
|----------------|-----------------|----------------|
| • Tylenol | • Ibuprofen | • MMR vaccine |
| • Pepto Bismol | • Maalox | • Claritin |
| • Aspirin | • Ex-Lax, | • Zoloft |
| • Tums | • Benadryl | • Prilosec OTC |
| • Lipitor | • Sudafed | • Azithromycin |
| • Senokot | • Albuterol | |
| • Motrin | • Preparation H | |

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29 CFR § 1605.2(e) – Costs

- “An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require ‘more than a de minimis cost’.”
- “Identifiable cost [determined] in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.”

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When Wages = Undue Hardship

- Regular Payment of Premium Wages = Undue Hardship
- Infrequent Payment of Premium Wages ≠ Undue Hardship
- Administrative Costs ≠ Undue Hardship
 - Administrative Costs = costs involved in rearranging schedules & recording substitutions for payroll

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29 CFR § 1605.2(e) – Seniority

- Undue Hardship = “variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system”
- NOT Undue Hardship = “voluntary substitutes and swaps”

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Note NYS Has Different Definition

- “significant difficulty or expense to the employer.”

Includes factors to be considered at:

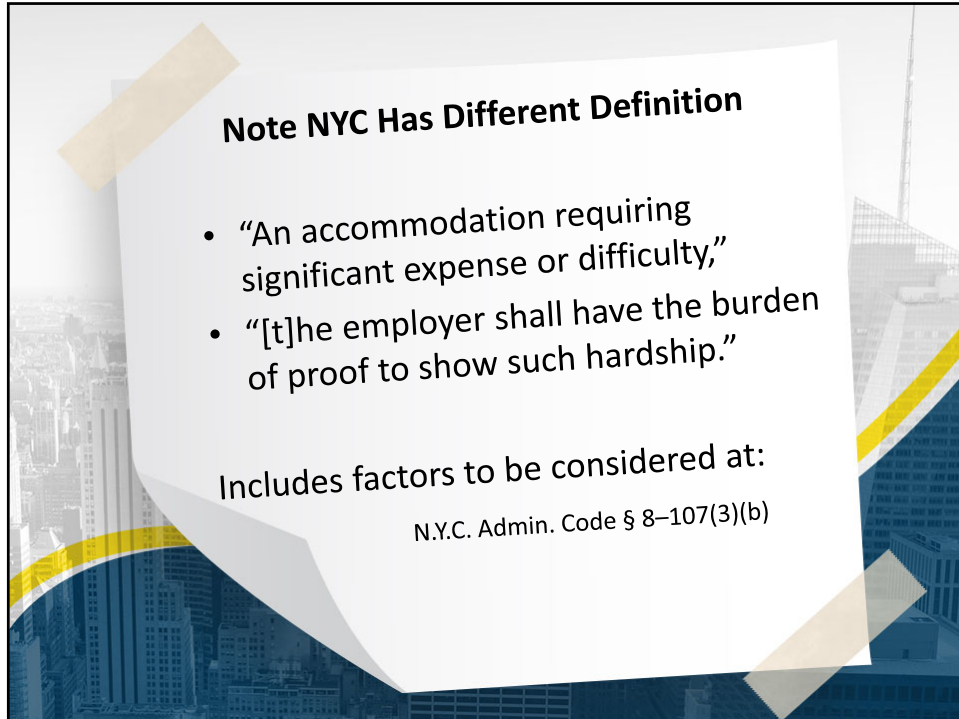
9 NYCRR § 466.11 &
Executive Law §296.3(b)

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Note NYC Has Different Definition

- “An accommodation requiring significant expense or difficulty,”
- “[t]he employer shall have the burden of proof to show such hardship.”

Includes factors to be considered at:
N.Y.C. Admin. Code § 8–107(3)(b)

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Disability

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EEOC Guidance

- Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA
- <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

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EEOC Guidance – Undue Hardship Factors

1. the nature and cost of the accommodation needed;
2. 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;
3. 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);
4. 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;
5. the impact of the accommodation on the operation of the facility.

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Individualized Assessment Required

- No stereotyping or generalization
- Must assess employee's present ability to safely perform the essential functions of the job
- Assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence

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Direct Threat Factors

1. Whether the employee works alone or with others or works inside or outside;
2. The available ventilation;
3. The frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees;
4. The number of partially or fully vaccinated individuals already in the workplace;
5. Whether other employees are wearing masks or undergoing routine screening testing; and
6. The space available for social distancing.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

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Forced Medical Examination

“Employer may want to have the employee examined by a health care professional of its choice who has expertise in the employee's specific condition and can provide medical information that allows the employer to determine the effects of the condition on the employee's ability to perform his/her job”

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>

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Medical Evaluation Limitations

“Must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation. An employer also must pay all costs associated with the employee's visit(s) to its health care professional.”

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>

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Conflicting Medical Information Factors

1. the area of expertise of each medical professional who has provided information;
2. the kind of information each person providing documentation has about the job's essential functions and the work environment in which they are performed;

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Conflicting Medical Information Factors

3. whether a particular opinion is based on speculation or on current, objectively verifiable information about the risks associated with a particular condition; and,
4. whether the medical opinion is contradicted by information known to or observed by the employer

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>

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Direct Threat

- Applies only to ADA (Disability)
- Does NOT apply to Title VII (Sincerely Held Religious Belief)

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29 C.F.R. § 1630.2(o)(3) – Disability

“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

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Thomas v. Nat'l Ass'n of Letter Carriers, (10th Cir. 2000) – Religion

“the [ADA] ‘interactive process’ rationale is equally applicable to the obligation to offer a reasonable accommodation to an individual whose religious beliefs conflict with an employment requirement”

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NYC - Local Law No. 59 (2018)

- Failure to engage in cooperative dialogue with individual requesting accommodation is an independent violation of NYCHRL
- Applies to both religious needs & disability

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