

**NAVIGATING EMPLOYEE
ACCOMMODATION REQUESTS UNDER
THE ADA, EDUCATION LAW §913, AND
CIVIL SERVICE LAW §§71-73**

**2025 WESTERN NEW YORK EDUCATIONAL LAW
CONFERENCE**

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AGENDA

- Overview of Employer Obligations Regarding Workplace Accommodations
 - Legal/practical considerations when navigating requests.
- Importance of Understanding the Legal Framework
 - Americans with Disabilities Act (ADA)
 - Foundation for disability rights and accommodation requirements.
 - New York State Education Law §913
 - Determining the physical or mental capacity of school employees.
 - Civil Service Law §§71-73
 - Employment in the event of a disability or illness.
- Q&A

WORKPLACE ACCOMMODATIONS DUE TO DISABILITY

- ***Consider school district policies/procedures***
 - Who will receive accommodation requests?
 - Who will respond to accommodation requests?
 - Who will document the conversation?
- ***Factors to consider when evaluating requests***
 - Does the employee have a qualifying disability?
 - Reasonableness of the workplace accommodation?
 - Expected duration of the workplace accommodation?
 - Potential for undue hardship if workplace accommodation is granted?
 - Effectiveness of the proposed solution?
- ***What constitutes a reasonable accommodation***
 - Consider the employee's limitations
 - What are the employees essential job functions?
 - What is the cost and impact?
 - Is the workplace accommodation effective in enabling the employee to perform their job?
- ***Engage In the interactive process***
 - Communication/discussion/explore options/monitor effectiveness/ongoing process.

AMERICANS WITH DISABILITIES ACT (“ADA”)

- Prohibits discrimination against qualified individuals with disabilities.
- An employee who is a “qualified individual with a disability” may be eligible for leave as a reasonable accommodation under the ADA.
- To be “qualified” under the ADA, the individual must:
 - Have the requisite skills, experience, education, licenses, etc. for the job; and
 - Be able to perform the essential functions of the job, either with or without reasonable accommodation.

ADA, CONT'D.

- Under the ADA, an “individual with a disability” is any person who:
 - (1) has a physical or mental impairment that substantially limits one or more major life activities,
 - (2) has a record of such an impairment, or
 - (3) is regarded as having such an impairment.”

“Major life activities” and “substantially limits” are interpreted quite **broadly** and do not impose a high bar for the individual.

* Note that NY Human Rights Law has a lower standard for an employee to be considered “disabled.”

ADA, CONT'D.

- An accommodation is defined as

“any change to a job, the work environment, or the way things are usually done that allows an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals in the workplace.”

- Examples: modified work schedule, extra break time, change in workspace location, exceptions from certain policies, job restructuring, reassignment, unpaid leave.

ADA, CONT'D.

- Unpaid leave also generally means holding the position open, unless doing so would create an undue hardship.
- If there would be undue hardship in holding the position open or if the position is eliminated, an employer must evaluate whether there is an equivalent alternative position for which the employee is qualified to which he or she could be transferred and then returned to after the leave.
- The courts generally agree that “indefinite” leave is not an appropriate reasonable accommodation.
- Note: If the employee cannot provide “regular and predictable attendance,” the employee may not be able to perform the essential functions of the job (even with an accommodation).

NEW YORK STATE CIVIL SERVICE LAW §§71-73

- Provides school districts – and other public employers – various methods by which they can remove civil servants who have been absent from work for long-term injuries or illnesses.
- These statutes also provide an alternative to disciplinary action pursuant to Section 75, which is generally based on charges of misconduct.

NEW YORK STATE CIVIL SERVICE LAW §71 (OCCUPATIONAL INJURY OR DISEASE)

- Employees who are out of work due to a Workers' Compensation-covered illness or injury are entitled to a leave of absence for at least one (*cumulative*) year.
 - Employees are entitled to 2 years if the disability results from an assault sustained in the course of employment.
 - *Exception:* If the disability is permanent, the employee may be discharged immediately under the Civil Service Law.
- After one year of leave, the employee may be terminated, subject to the right to apply for reinstatement within one year after termination if he or she recovers sufficiently to return to work. See *Allen v. Howe*, 84 N.Y.2d 665, 621 N.Y.S.2d 287 (1994).

CSL §71, CONT'D.

- Section 71 is supplemented by detailed procedural regulations.
 - The employee is entitled to advance notice (30 days) of their right to a hearing and notice of other legal rights. 4 N.Y.C.R.R. § 5.9(c).
- Although these regulations provide that they are applicable only to employees of the State, several New York State court decisions have reversed public employer terminations under Section 71 for failing to provide employees with rights at least as extensive as those provided in the regulations. See e.g., *Cooke v. City of Long Beach*, 247 A.D.2d 538, 669 N.Y.S.2d 312 (2d Dept. 1998).

MATTER OF VAN DUNK V. ORANGE-ULSTER BOCES (SEP. 20, 2023)

- October 2018 – Elementary paraprofessional in classroom with students with severe developmental injuries was injured when a student attacked her. Initially able to return to work.
- End of September 2019 – Stopped coming to work.
- October 2020 - BOCES notified employee of intent to terminate under CSL §71.
 - Employee contested the termination on the basis that she was victim of assault at work and had at least 2 years of leave before employment could be terminated.
- November 2, 2020 - BOCES issued determination letter stating: “Your dispute of this matter has been reviewed and is being denied. Your position has been terminated effective October 30, 2020.”

MATTER OF VAN DUNK V. ORANGE-ULSTER BOCES, CONT'D.

- Court found that BOCES' determination to terminate the employee was conclusory and lacked a factual basis.
 - The only basis BOCES offered for its determination at the time it was made was that Van Dunk's dispute had been "reviewed and denied."
- Lower court properly granted the petition, annulled the determination, and directed BOCES to restore petitioner to her employment status as it existed prior to the effective date of the determination.

NEW YORK STATE CIVIL SERVICE LAW §72

- Section 72 is an employer's tool to require an employee to take leave when the employee is unable to perform their duties because of a non-work-related disability.
- Employers must follow detailed procedures before putting employee on leave.
 - *Exception:* Where the employer finds that there is "probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations."
 - The medical examination will take place after the employee has been removed from work. However, the employee is entitled to draw all accumulated unused sick leave, vacation, overtime and other time allowances available and is entitled to back pay, seniority, etc., lost if the employee is determined not to be physically or mentally unfit to perform the duties of the position.

CSL §72, CONT'D.

1. Employer must provide the employee and the civil service department with written notice of the facts providing the basis for judgment that the employee is not fit to perform their duties.
 - **Eff. 1/1/2025** – Employees must also receive copies of any written, electronic or other communication by the appointing authority to a medical officer or any other entity regarding the claim that the employee is unable to perform their duties.
2. Employee is submitted to a medical examination.
3. If medical officer certifies that the employee is not fit to perform their duties, the employer must notify the employee that they may be placed on leave and provide a detailed written statement of the reasons for such leave and of the employee's right to a hearing.

CSL §72, CONT'D.

- Employees placed upon Section 72 involuntary leave may appeal the decision and have the right to apply for reinstatement within one year, subject to a medical examination to determine mental or physical fitness.
- After one year, employees placed on leave pursuant to Section 72 are subject to termination in accordance with Section 73 of the law.

NEW YORK STATE CIVIL SERVICE LAW §73 (NON-OCCUPATIONAL INJURIES/ILLNESSES)

- Guarantees public employees a one-year leave of absence for non-work-related disabilities or disease.
- An employee who recovers sufficiently to return to work may make an application for reinstatement.
 - Such an application must be made within one year after the termination of the disability (not one year after termination of employment).
 - The employee will be subject to a medical examination to determine fitness to perform the duties of the employee's prior position.
 - If the medical officer certifies that the individual is fit to perform the duties of said employee's prior position, the individual is entitled to reinstatement to the position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which the employee was eligible for transfer.
 - If no vacancy exists, or if the workload does not warrant filling the vacancy, the individual must be placed upon a preferred list for said employee's former position, and they shall be eligible for reinstatement from such preferred list for a period of four years.
- For employees who are unable to return after one continuous year, Section 73 leave may be terminated – but they are entitled, as matter of federal due process, to some pre-termination notice and opportunity to be heard, in addition to post-termination procedures. *Prue v. Hunt*, 78 N.Y.2d 364, 575 N.Y.S.2d 806 (1991).

NEW YORK STATE EDUCATION LAW §913

- Section 913 is primarily aimed at ensuring fitness for duty, but it can also serve as a powerful tool to assess the legitimacy of absences.

“In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require *any person* employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician or other health care provider of his or her choice or the director of school health services of the board of education or trustees or board of cooperative educational services, in order to determine the *physical or mental capacity* of such person to perform his or her duties.”

NEW YORK STATE EDUCATION LAW §913, CONT'D.

- The employee may be placed on (paid) administrative leave pending the examination.
- Refusal to submit is insubordination, can result in leave without pay until the employee complies. See, e.g., *Strong*, 902 F.2d 208; *Kurzius v. Bd. of Educ.*, *Washingtonville CSD*, 81 A.D.2d 827, 438 N.Y.S.824 (2d Dept. 1981).
- The employee has the right to be accompanied by a physician or other person of his or her choice during the examination.
- “The determination based upon such examination... shall be reported to the board of education... and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.”

NEW YORK STATE EDUCATION LAW §913, CONT'D.

- Broad power, but with two important caveats.

1. Right to privacy under the Due Process Clause of the Fourteenth Amendment.

O'Connor v. Pierson, 426 F.3d 187 (2d Cir. 2005):

Although a teacher had a constitutionally protected privacy interest in his medical records, that does not mean that he need never disclose them; “it means that he need not disclose them unless the Board has a sufficient interest to justify its request.”

“Where a government employer has a reason to question whether an employee is medically fit to work, the employer may direct the employee to undergo a medical examination and provide the examining doctor with relevant medical records.”

“If the Board acted out of spite or to keep O'Connor from teaching by whatever means necessary, then the Board's actions intended to oppress O'Connor and having burdened his right to privacy, would shock the conscience.”

In *Strong*: (1) school district's strong public interest in protecting children; (2) request for medical records was limited and tailored in scope; and (3) records were to be produced directly to the school physician, not the Board.

NEW YORK STATE EDUCATION LAW §913, CONT'D.

2. ADA issues.

- Once employed, the ADA precludes the medical examination of employees unless the employer can demonstrate some **reasonable basis** for concluding that the inquiry is necessary.
- There must be a genuine reason to doubt whether the employee can perform essential job-related functions or poses a danger to the health and safety of the workplace.
- *Fountain v. NYS Dept. of Corrections Services*, 190 F. Supp. 2d 335 (N.D.N.Y. 2002): employer's policy permitted it to require a doctor's note with a diagnosis even for a single day of absence. The Court found that said policy violated the ADA, as "no reasonable factfinder could conclude that an inquiry triggered by a single day's absence from work is the type" of inquiry that is necessary to determine fitness to work.

NEW YORK STATE EDUCATION LAW §913, CONT'D.

Best practices:

- Before directing the examination, have the District doctor determine in writing that a fitness for duty examination is warranted based upon the facts provided.
- The District doctor is the appropriate person to dialogue with the employee's medical practitioner about prognosis and to discuss any underlying causes on the District's behalf.
- Do not have a medical doctor make a determination about mental competence. Reserve such determinations for a psychiatrist or other mental health professional.
- Permit employee to be examined by doctor of same gender if requested.
- Pay should only be cut off if the employee refuses to attend the examination or refuses to provide medical records to the District's doctor pursuant to a request that is limited in scope and narrowly tailored to determine the employee's fitness for duty.
- Medical records should be submitted to and reviewed by doctors, not administrators or board members.
- The purpose of the medical release should be solely to determine fitness for duty pursuant to Section 913 not to injure or spite the employee.

DOES CIVIL SERVICE LAW OR EDUCATION LAW 913 PERMIT TERMINATION WITHOUT INTERACTIVE PROCESS?

- Given the plain reading of the Civil Service Law provisions, must a school district engage in the interactive process under the ADA to determine if an employee requires any leave beyond that proscribed by the NY Civil Service Law?
- Buffalo EEOC Office recently has taken the position that the ADA does require a district engage in interactive process – and may be obligated to grant a workplace accommodation, even if the period of an employee's leave has reached the statutory limit under the NY Civil Service Law.

TIPS FOR MANAGING LEAVE

- Tip 1: Adopt effective workplace (attendance) policies regarding notice of leave and scheduling of leave.
 - Specify notice requirements for absences.
 - For example: An FMLA policy should remind employees that when leave is needed to care for a family member or the employee's own illness and is for planned medical treatment, the employee must attempt to schedule treatment so as to minimize disruption to the school district's operations.

TIPS FOR MANAGING LEAVE

- Tip 2: Use certification and documentation requirements to your benefit.
 - Where leave is being considered as an accommodation, require the employee to provide a medical certification detailing their condition and need for accommodation.
 - This should not be a form document - it should be tailored to the particular circumstances.
 - If an employee is taking leave under Civil Service Law Sections 71 or 73, carefully consider the medical officer who will perform the examination.
 - Where leave is FMLA-covered:
 - Require a medical certification in all appropriate cases.
 - Challenge the certification where possible to ensure you are approving only legitimately qualified leave requests.
 - If the employee is taking intermittent leave and seems to be absent more frequently than anticipated in the medical certification or develops a suspicious pattern (e.g., Fridays and Mondays), consider whether circumstances have changed such that you may request recertification.

TIPS FOR MANAGING LEAVE

- **Tip 3: Conduct a robust reasonable accommodation analysis before deciding on leave.**
 - Where an employee has no independent right to leave (e.g., not eligible under Civil Service Law, NYPFL, FMLA, etc.), leave may be an appropriate reasonable accommodation – but it should be viewed as an accommodation of last resort.
 - Consider whether workplace modifications, adjusted schedule, specialized equipment, etc. would provide sufficient accommodation for the employee to work.
 - Working from home?
 - Is this something you are comfortable with?
 - Courts in New York are split on whether an employer can or has to consider this as a potential accommodation. See *Frontera v. SKF USA Inc.*, 2010 U.S. Dist. LEXIS 83460 (W.D.N.Y. July 29, 2010); *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 104 (2d Cir. 2010) (suggesting that employer had provided a reasonable accommodation by allowing employee to work from home, which was “necessary to maintaining his job”).

PRACTICAL CONSIDERATIONS

- Critical that supervisors ask “why” when an employee calls off.
- Do not request or require a medical diagnosis.
- Do ask questions and attempt to discern if the absence/lateness is protected.
- Document, document, document – and report to Human Resources so that leave balances can be accurately updated.
- Without taking this step, we cannot determine what absences to include/not include in a counseling memorandum – or, later on, what absences to include/not include in 3020-a charges, etc.

PRACTICAL CONSIDERATIONS, CONT'D.

- Taking a protected absence should not be the basis for counseling or discussed counseling memoranda.
- Includes all forms of job-protected leave including:
 - Family Medical Leave Act;
 - New York Paid Family Leave Law;
 - Civil Service Law;
 - Also includes ADA absences.

Employees with protected absences can still be counseled for:

- Absences that are not protected (e.g., my car broke down).
- Failing to adhere to notice rules for absences (protected or not).
- Failure to meet normal job/performance requirements.

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QUESTIONS?

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