

# **Leave Laws, Accommodations and Their Impact on Management Processes**

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## Danielle M. Kays



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## Shannon Owen



Shannon Owen began at State Farm in October of 2015 in a Counsel position in the Law Department. Shannon provides legal counsel on various employment issues, including performance management, disciplinary actions, accommodation requests, and levy/garnishment matters. Shannon also provides legal counsel on State Farm Independent Contractor issues, including contract, compliance, and brand issues.

In addition to providing legal counsel at State Farm, Shannon is on the Ethics & Professionalism Committee and Continuing Legal Education Committee for State Farm Law Department.

Shannon and her family reside in Normal, Illinois.



# Introductions and Agenda

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- Americans with Disabilities Act (ADA)
  - Illinois Human Rights Act
  - Family and Medical Leave Act (FMLA)
  - Hot Topics in Disability Accommodations
  - Accommodations Laws For Pregnancy and Victims of Domestic Violence
  - Best Practices Related to the Interactive Process
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# **Accommodations & ADA**

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# Accommodations & ADA

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- Is the individual a qualified individual with a disability?
  - Accommodations – must engage in an interactive process
  - Think outside the box as to possible accommodations
  - Hot Topics
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# Americans With Disabilities Act (ADA)

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- Prohibits discrimination and harassment against a qualified individual with a disability
- Applies to both applicants and employees
- Requires reasonable accommodations to allow a **qualified individual** with a **disability** to perform the **essential functions** of his or her job, as long as the reasonable accommodation does not create an **undue hardship**
- Similar protections under the **Illinois Human Rights Act**





# Qualified Individuals

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- A qualified individual is one who satisfies the requisite skill, experience, education and other job-related requirements of the position, and who, *with or without reasonable accommodation*, can perform the *essential functions* of the job
- Determining whether an individual can perform the essential functions of the job with or without reasonable accommodation means assessing accommodations and abilities through an *interactive process*



# What is an “Essential Job Function?”

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- A job function is essential because:
  - The reason the job exists is to perform that function
  - There are a limited number of employees available among whom the performance of that function can be distributed
  - The function is highly specialized



# Essential Function Analysis

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- Essential vs. marginal job function analysis
  - Amount of time spent performing the function
  - Consequences of not performing the function
  - How past incumbents worked in same job
  - Experience of current incumbents in same or similar jobs
  - Essential job functions for the same position may vary depending on the location or business unit where the individual works
- Functions that are not essential are considered “marginal”



# Let's Not Forget The FMLA...

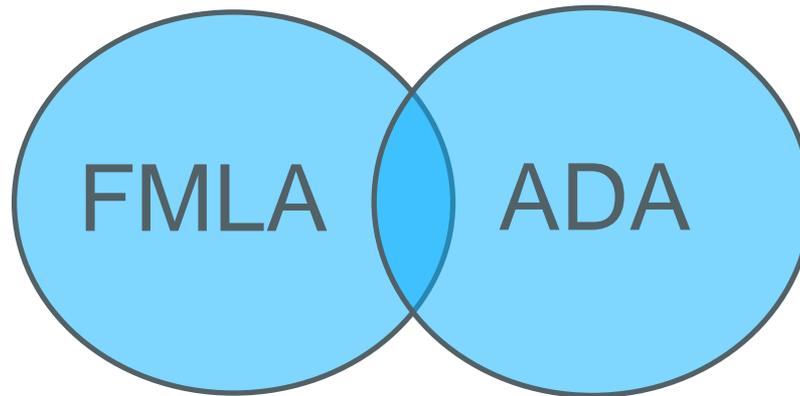
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- Employees with 12 months of service with the employer and 1,250 hours within 12 months prior to leave request
  - Provides 12 weeks of leave (job protection & benefit protection)
  - In a 12-month period, for
    - care for a child born/placed for adoption or foster care
    - serious health condition of an employee; or
    - care of an immediate family member (child, spouse or parent) with a serious health condition
    - qualifying exigency caused by deployment in Armed Forces
    - injured servicemember (up to 26 weeks)
  - Leave may be intermittent
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# Let's Not Forget The FMLA...

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- Distinctions and Overlaps Between the FMLA and the ADA



- FMLA is an entitlement where coverage applies
  - There is *no* “undue hardship” analysis
  - Specific enforcement scheme, regulations
  - **When FMLA expires or if it does not apply – consider ADA**
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# Examples of Potential ADA Accommodations

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- Making existing facilities readily accessible
- Job restructuring (as to non-essential duties)
- Part-time or modified work schedules
- Telecommuting/working from home
- Special equipment or devices
- Adjust examinations, training materials, policies, schedules
- Provide qualified readers or interpreters
- “Last Resort” Accommodations
  - Leave of Absence
  - Job Transfer (open positions, if qualified and no *bona fide* seniority system)



# Outer Limits of Accommodations

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## Undue Hardship

- Significant difficulty or expense (difficult for large or wealthy employers)
- Fundamental change in operations
- Where expense is unlikely to be accepted as undue hardship, consider instead at whether the accommodation would be unduly disruptive to other employees' ability to work, whether there is a significant disruption to business operations, or a significant impact on the ability to conduct business

## Direct Threat to Safety

- Can direct threat be eliminated by reasonable accommodations?
  - Must be objective
  - Cannot be based on stereotype
  - Cannot be future risk (must be immediate)
  - Increased cost is not sufficient by itself
  - Duration, nature, severity, likelihood, imminence
  - Threat to self is much harder to win on than safety of others
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# Hot Topics in ADA Accommodations

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## Indefinite Leave

- Indefinite, long-term leave of absence is **NOT** a reasonable accommodation in the Seventh Circuit [IL, IN, WI]  
(*Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7<sup>th</sup> Cir. 2017))
- But what is “indefinite?”
- What’s “long-term”?
- Intermittent leave, short extension, modified work schedule remain potential reasonable accommodations



# Additional Leave → Indefinite Leave?

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- When HR gets a request for further leave as an accommodation:
    - Consider whether FMLA and all other leaves have been exhausted
    - Consider how long individual has been out on leave
    - Consider how much additional leave is being requested
    - Consider whether it would be an undue hardship to grant additional leave; remember, an employee's job must be left open while out on leave unless an undue hardship
    - Remember: Case by case assessment necessary; cannot apply maximum leave policy
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# Hot Topics in ADA Accommodations

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- Regular, predictable, in-person attendance vs. telecommuting
    - Job Descriptions
  - Temporary to permanent accommodation requests
    - Losing “undue hardship” defense?
  - Medical Marijuana cardholders
  - Accommodations for transgender employees
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# Mental Disabilities

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- Identifying the disability
- Triggering the reasonable accommodation process
  - Non-obvious mental disabilities: duty on the employee to provide medical documentation substantiating accommodation needed
- Disruptive Behavior - Employers can enforce work rules, if employer honestly believed there was a violation, and the rule is s business necessity.
  - However, need uniform enforcement of the rule
- Poor work performance due to cognitive issues
  - What are the essential duties/acceptable performance levels, and what are reasonable accommodations for cognitive deficiencies?

# **Leaves and Accommodations For Pregnancy and Victims of Domestic Violence**

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# Leaves and Accommodations For Pregnancy and Victims of Domestic Violence

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## Pregnancy

- Requirements under the Law(s)
- Potential Accommodations
- Difference between State Laws and Federal Standards

## VESSA

- Domestic Violence
  - When and Why Leave May Be Needed/Used
  - Other Accommodations
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# Pregnancy Leaves and Accommodations

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## Federal Laws

- ADA
- FMLA
- PDA
  - *Young v. UPS*

## State Laws

- Illinois Pregnancy Accommodation Act (“Pregnancy Fairness Act”)

**“Medical conditions related to pregnancy”** may include symptoms such as back pain; disorders such as preeclampsia (pregnancy-induced high blood pressure) and gestational diabetes; complications requiring bed rest; lactation and the after-effects of a delivery.





# Illinois Pregnancy Accommodation Act

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## Eligibility

- Any employer employing 1 or more employee
- Applicants, full time, part time and probationary employees

## General Requirements:

- Illinois employee who needs reasonable accommodation due to pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth, unless undue hardship would result.

## Certification

- Can be required to the same extent documentation is required for disabilities if job-related and consistent with business necessity
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# Illinois Pregnancy Accommodation Act

## Additional Requirements

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- Cannot take adverse action against an otherwise qualified job applicant or employee if the denial or adverse action is based on the need of the employer to make reasonable accommodations to a pregnant employee;
- Cannot require a pregnant employee to accept an accommodation which the employee did not request and the employee chooses to decline;
- Cannot require an employee to take leave under any leave law or company policy if another reasonable accommodation can be provided to the employee;
- Must reinstate the pregnant employee to her original job or to an equivalent position with equivalent pay and benefits unless reinstating the employee will impose an undue burden;
- Must hang poster in a conspicuous location on the premises and include in any employee handbook containing information regarding an employee's rights under the Act.
- Cannot retaliate against an employee because the employee requested or was provided a reasonable accommodation.





# Illinois Pregnancy Accommodation Act

## Example of Accommodations

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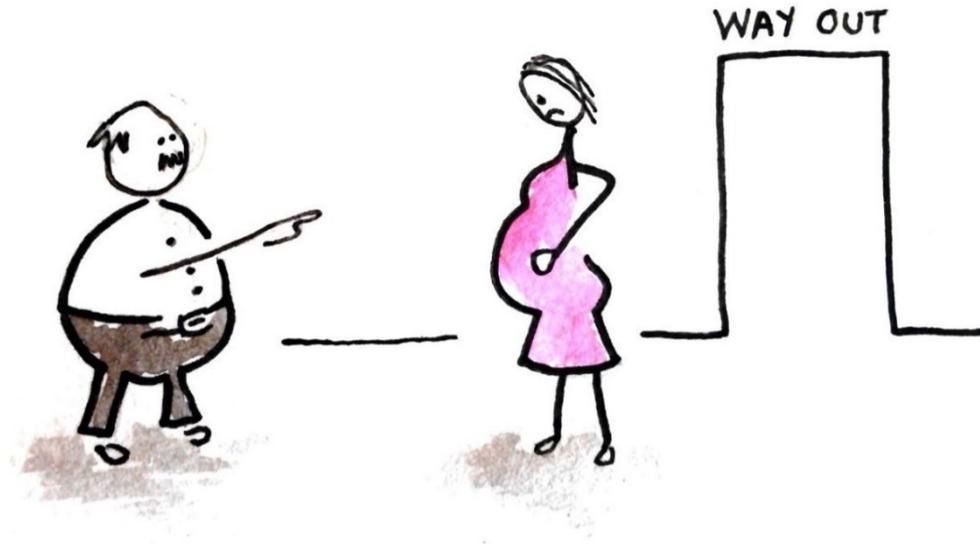
- More frequent or longer bathroom breaks
- Breaks for increased water intake
- Breaks for periodic rest
- Seating
- Assistance with manual labor
- Light duty
- Acquisition or modification of equipment
- Temporary transfer
- Job restructuring or part-time/modified schedule
- Private non-bathroom space for expressing breast milk and breastfeeding
- Appropriate adjustment of examinations, training materials, or policies
- Leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth and time off to recover from conditions related to childbirth



# Other Issues & Trends Related to Pregnancy and the Workplace

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- Lactation Accommodations
  - Shipping Breast Milk
- “Ramp Up” Period
- Parental Leave Policies



# Leave and Accommodations for Victims of Domestic Violence & Sexual Assault

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- State law
  - Sick and Safe Time Laws
    - Chicago / Cook County Earned Sick Leave
  - Laws that directly address domestic violence and sexual assault victims
    - Illinois - Victims' Economic Security and Safety Act ("VESSA")



# Illinois Victims' Economic Security and Safety Act (“VESSA”)

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## Overview

- Employers of **15 or more** employees
- Requires reasonable accommodations for **applicants and employees** who
  - are victims of domestic or sexual violence; or
  - have family or household members who are victims of domestic or sexual violence.
- Unlawful to discriminate against an employee/applicant
  - for exercising rights granted under VESSA;
  - because employee is or perceived to be a victim of domestic or sexual violence; or
  - who has family or household members who are victims of domestic or sexual violence.





# Illinois Victims' Economic Security and Safety Act (“VESSA”)

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- **Amount of Leave:**

- 15-49 employees: 8 weeks during any 12 month period.
- 50 or more employees: 12 weeks of during any 12 month period.
- May be taken intermittently or on a reduced work schedule.

- **Reasons for Leave:**

- Seek medical attention for, or recovery from, physical or psychological injuries.
- Obtain victim services.
- Obtain psychological or other counseling.
- Participate in safety planning, including temporary or permanent relocation or other actions to increase the safety of the victim.
- Seek legal assistance, including participating in court proceedings related to the violence.





# Illinois Victims' Economic Security and Safety Act (“VESSA”)

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- **Notice Required by EE:**

- At least 48 hours' advance notice except where not practicable.

- **Required Posting:**

- <http://www.state.il.us/agency/idol>

- **Certification:**

- Yes.

- **Use of Paid Time:**

- Employee may elect to use available paid leave during the up to 12-week leave period



# **Helpful Tips for Working Through Employee Accommodation Request**

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# Helpful Tips for Working Through Employee Accommodation Request

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- Discuss (with employee and supervisor)
  - Document (why or why not provided)
  - Determine (next steps)
  - Do! (Implement)
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# Keys to Reasonable Accommodations

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- Having a robust 2-way interactive process/dialog to evaluate accommodation requests
- Communicating a decision and the reasons
- Process of on-going check-ins and adjustments
- Ensuring no retaliation against those who make an accommodation request

# Hallmarks of a Good Interactive Process

- ✓ Timely, no obstruction or delay
- ✓ Good faith
- ✓ Direct exchange between employer and employee or applicant
- ✓ Information gathering
- ✓ Technical assistance secured as needed
- ✓ Preferences considered, alternative or options offered as appropriate
- ✓ Decisions reached and communicated, no guesswork
- ✓ Follow-ups and check-ins to see if accommodation is effective or conditions have changed
- ✓ Time limits on some accommodations where appropriate



# Interactive Process Documentation Opportunities

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- **Request** for accommodation or employer's reason for initiating process
- **Confirmation** of accommodation request, request for further **information**, explanation of process
- Documentation of **analysis**, including facts gathered, collect other documents such as job descriptions, technical assistance





# Interactive Process Documentation Opportunities

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- Documentation of *potential* accommodations suggested/considered
- Documentation of *subsequent interactive steps* (e.g., request for preferences, consideration of options)
- Documentation of contacts with outside *resources* (if applicable)



# Interactive Process Documentation Opportunities

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- Documentation of employer's *decisions* (including reasons if denied)
- Documentation of *communication of decision* to employee (can be e-mail or written confirmation of a verbal conversation)
- Extra: some organizations keep an *accommodation log* or database to track and ensure consistency and above steps

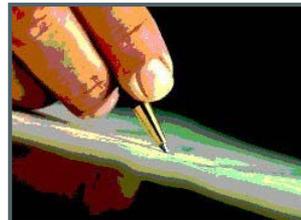
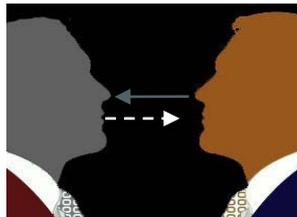




# Using A Problem Solving Approach

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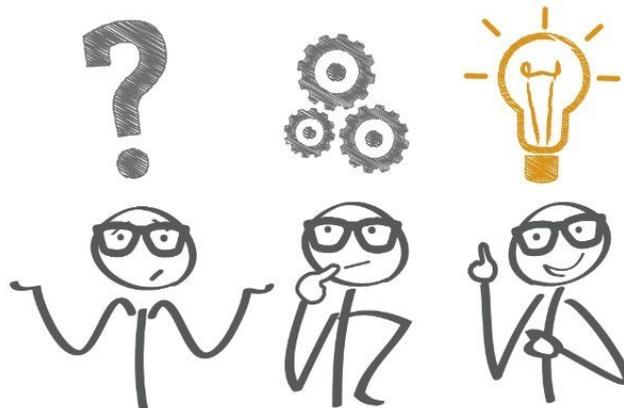
- **Consult** with the individual to ascertain individualized needs, or limitations, and how to best work with them.
- **Analyze** the particular job, pre-employment process or employment benefit
- **Identify** potential accommodations and assess effectiveness (again, by consulting with the individual and, if needed, with an expert)



# Using A Problem Solving Approach

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- **Consider** the preferences of the individual (again, by consulting with the individual)
- **Inform** the individual of accommodation options, explaining reasoning
- **Individualized assessment is key, as is a dialog or “back and forth” communication**



# Reasonable Accommodation – Common Mistakes

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- Automatic termination policy
- Failure to consider other job sites when looking for alternate positions
- Failure to consider additional leave after FMLA/state leave exhausted (disability)
- Failure to identify alternate positions for or with the employee
- Jumping to undue hardship
- Failure to consider job modifications



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**Questions?**

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