

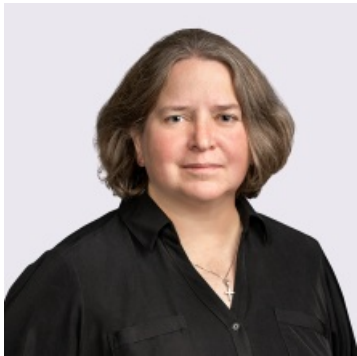
Podcast

Life Sciences and Real-World Accommodation Scenarios

By Patricia Anderson Pryor & Luke P. Breslin

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Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

The life science industry's diverse workforce encompasses manufacturing, laboratories, office workers, and a remote sales force, which may make it challenging for employers to respond to a broad array of requests for accommodations. On this episode of We get work™, we delve into the intricate world of leave and accommodation scenarios employers in the life sciences industry often face. We shed light on the unique state and local laws that employers must navigate, which can significantly impact their decisions to grant or deny a request.

Today's hosts are Patty Pryor and Luke Breslin, members of the Life Sciences and Disability, Leave and Health Management Groups. They leverage their experience working with life sciences clients to help employers design and administer their leave and accommodation policies and practices to comply with federal, state, and municipal obligations. Luke and Patty, the question on everyone's mind today is, what accommodations issues are life sciences employers often facing, and how does that impact my business?

Thank you, Alitia. I appreciate the introduction. My name is Luke Breslin. I'm a principal in the Berkeley Heights office of Jackson Lewis. And I'm joined here today with my colleague, Patty Pryor, a principal in our Cincinnati office. We're both members of the firm's Life Science Industry Group and the Disability, Leave and Health Management Practice Group.

We've been chatting lately about the challenges facing companies in the life science

industry, particularly because of the diverse workforce with respect to the kinds of environments the life sciences industry encompasses. Among other things, the life sciences industry has a manufacturing and lab contingency, an office contingency, and a remote sales team as well. Three very different work environments. So, Patty, what's the one thing that is the same about all employees in the life sciences industry, regardless of the work environment?

Well, Luke, they all want accommodations. I can hear that for certain. So that's certainly true across all industries these days.

So, what type of accommodation issues are you seeing for the remote sales team?

It seems as though they should be able to take care of themselves with respect to accommodations and potential issues that they're facing. And that's probably actually one of the issues. They are often on their own managing their work, kind of making it harder for the employers to assess what's really going on and harder for the employers to manage or control the work environment. For example, if they've got a home office and want a standup desk, does the employer have to provide it? Well, I think first they'd have to establish they have a disability, correct?

Well, or pregnancy or related medical condition. Don't forget about that.

Of course, yeah. But even then, it's not automatic. We can explore what the issue is that requires the standup desk and what other furniture options are available. For example, do they have a high-top table or a countertop or a bar where a computer can be placed on a small platform or raise the height rather than purchasing a full standup desk? But if ultimately there's a disability or pregnancy or related medical condition that required the use of a standup desk, that couldn't otherwise be accommodated, the company may have to pay for the desk for the employee, correct?

Yeah, yeah.

I mean, that's, you know, once one gets it, everyone wants it. You know, the other prevalent issue I think we see with some of these remote sales folks is that they're often spread out across the country, making their employment subject to different state leave laws or accommodation laws than the other company employees.

And that the company might not be as familiar with, right?

The company might be centered in one state, you know, a lot of them centered in the New Jersey area, for example, which has its own issues. But when their employees are spread across the country, the employer needs to be aware of the paid sick leave laws in effect for the jurisdictions where they're working, as well as the many other state leave laws that a jurisdiction might have, along with unique accommodation requirements or state law limits on the type of information the employers can request when dealing with certain accommodation requests. For example, 13 jurisdictions limit what, if anything, can be requested for a pregnancy accommodation request even beyond the limits placed by the new final PWFA regulations.

Yes, certainly the regulations you mentioned do add an added wrinkle to employers' obligations and analysis with respect to leave obligations and other accommodations. So, let's talk about an easier group, the office workers, not remote employees, just the

office workers. So, what are your thoughts in terms of accommodations for them?

My gosh, easier group. The office workers are the ones that all got that taste of working from home during COVID and many of them liked it. So, we're seeing lots of requests to work remotely, right? I want to work back from home. I want to work at home. I don't want to go back into the office. They liked being able to put a load of laundry in, pick their kids off the school bus, run local errands and start dinner all during the workday. Hopefully on legitimate breaks.

But what we're seeing as a result now, as employers are kind of bringing them back in, maybe on a hybrid, maybe on a full time, and we're seeing more of it, the push to get people back into the offices, we're seeing a lot of requests claiming anxiety. It's probably the most frequent request that we're seeing of, because of my anxiety, I can't work back in the office, or maybe I've got IBS or whatever else. But we're seeing a lot about that.

What can we do about that?

Well, this is certainly becoming a headache for many employers, but I don't think employers need to get too stressed out over it. Like other accommodation requests, employers just need to be focused on engaging in the interactive process. That's the critical process that employers need to be aware of and certainly have employees trained on what that process looks like. So just because an employee wants an accommodation doesn't necessarily mean they're entitled to it.

We all know doctors will write a note and will essentially say whatever the individual really requests and they're very flexible in terms of what they would put on their doctor's note. So, we may need to ask some more specific questions of both the employee and the doctor. What are the limitations or the conflict with working in the office? Are there changes that could be made in the office that will address them? For example, does an employee need headphones? Will that address their medical issue that they might be facing? Do they need space away from others? Do they need a quiet room? If the employee has worked in the office before, then what has changed? Why can they not work in the office at this point? How does the home environment fix the issue? And, of course, ultimately, employers need to consider what is the undue hardship in allowing this accommodation or the requested accommodation?

I like to point out the problems with not being in the office, why the job cannot be performed effectively remotely, if that's true, and ask the employee to help them think through how it would work or be addressed remotely. How can somebody working in a remote environment perform their job duties more effectively than in the office? Then most importantly, actually manage them if they do end up working remotely, providing accommodations they need but hold them to the same standard as others. So, I think that presents unique challenges as well. How do we manage employees in a remote environment and obviously holding them to the same standards as they would be otherwise in the work office? If they need to take 20 calls per day, then the same is true at home. So obviously employers need to be cognizant and aware that and certainly hold employees to the same standard, whether they're in a remote environment or in a home environment.

So, with that being said, Patty, perhaps the manufacturing or lab employees, are they

an easier group to address because they're going to be in the physical office as opposed to a remote environment?

Yeah, I'm not sure any group is easy in today's world, but you're right. I mean, the manufacturing group, a lot harder to challenge and request remote work, right? They, one, didn't, for the most part, get the taste of it during COVID. And, two, it's hard to make the machine work from home or to test things from home. Almost certainly those roles requiring remote work or asking to work from home is going to eliminate an essential function. So, it would not be something that could be accommodated under the ADA. Although I guess just as fair warning, under the PWFA, they might ask for a temporary accommodation of this for pregnancy, childbirth, or related conditions. And so that'll be something that might come down the pike. Be aware you're going to see unique challenges in that regard.

But aside from that, the manufacturing group or the folks in the lab, they have their own conditions and requests. I would say their requests tend to be the typical ones that we're used to, more the physical restrictions to accommodate, lifting restrictions, things like that.

Certainly seeing more mental health accommodation requests just across the board and including in these settings and leaves of absence. I think leaves of absence become one of the frequent requests in more of that physical environment or the manufacturing environment. I need a leave of absence. I can't work remotely, so I need a leave of absence. And that's going to continue to be the big one. This group also, I think, tends to, and obviously we're talking in kind of broad strokes here, but you know that folks in like a manufacturing setting or a lab setting, they tend to stay out on leave longer.

So, one of the issues I think is just staying on top of the leaves for the employer, following up when more information is required. I've had a number of circumstances where employees sit out much longer than they should or kind of get forgotten. And then it comes time when the employer is looking at it going, well, what are we doing with Johnny? And they need to go back and have they made communications with them? Have they followed up to see if there's additional doctor's information? Have they adequately communicated if we're getting to the point of undue hardship and need to make a change? Making sure those kinds of communications are in order, I think, is a challenge and continuing to be an issue.

And obviously, in terms of when does that leave end, you need to look at when does it become an undue hardship. And so that's, I think, in the manufacturing setting, one of the things we see more often is that leave request or those physical requirement requests for accommodation.

Yeah, that's certainly an interesting point. And on that topic, I often get requests from clients as to an employee has been out on leave for say six months in the manufacturing space. And they ask, do I have to hold the position? So, in your perspective, is there a certain rule of thumb that employers should follow with respect to how long a leave can extend beyond the, say, FMLA statutory required leave? Is there a certain period of time that you'd guide employers to say, this is a reasonable amount of time, and beyond that, it would pose an undue hardship to extend beyond that?

That's a great question. Well, I mean, the typical lawyer responses, it depends, and it does. So first and foremost, obviously, you need to make sure your FMLA is expired, the 12 weeks have been expired or the individual is not eligible. Then you need to look at whether there's any other state or local law requirements for leave or otherwise. Are they entitled to a paid leave, a paid family leave, whatever that might extend beyond.

Then you need to look at what your policies provide. If by policy you have provided that employees will get up to six months of leave, well then you've said that you can provide six months of leave without any issue. So. You can't really argue and do hardship then. And then it's kind of beyond that. And I would say in general, if you've got a policy that provides for a certain amount of leave, keep in mind that accommodation is always something different, right? And accommodation is you're offering something different than what you normally provide. So don't just assume that because the policy says six months, that's the end of it. It might be, but then it is going to depend on the job. It's going to depend on the role. It's going to depend on, you know, is it a job that you've got to have people in there that you've got to recruit for, that you've got to fill? Who's been filling it in the interim? How long can that really last? So, the more important the job is, I think sometimes the easier to get to an undue hardship space. If it's one of those jobs that there's a lot of employees in it, that it's kind of a constantly churning situations, it might be easier to extend the leave longer because, you know, there might be, it might not be so much that you're holding the position that you're filling it, but with the knowledge that we may have to place him back in or find an opening for him at the end.

So it's always gonna be a challenge and it's always going to be a, it is a little bit of a juggle, right? In terms of you've got your business needs that you need to address and you gotta make the business run. And if it's a point where you can't run the business, you can't get the product created, you can't in the middle of testing something, whatever it might be, or you're in a sales position and someone's got to service that territory, the more you can show that, look, we're making Sally work twice as hard in order to cover for Patty, then you can start showing the undue hardship. But you want to be able to show why we can't hold it a little bit longer. And looking at what the employee, if the employee is only requesting another couple of weeks is it really an undue hardship to extend it for another couple of weeks?

Yeah. I think that's a great point, especially practicing in New Jersey. You know, there's an undue hardship standard under the Americans With Disabilities Act, as well as we have the New Jersey Law Against Discrimination. And they might be viewed a little bit differently from the federal perspective as opposed to the state perspective. So, I just think it's important for employers to be, especially in the life sciences space, to understand the high burden to demonstrate an undue hardship.

So, Luke, I think that's a great point. And I think I'm just going to end with my general advice to employers whenever we're talking about accommodation issues. It is so much about that interactive process. We went through a couple of kind of typical scenarios we're seeing in life sciences in particular. And when we did that, we talked about, you know, follow up questions to ask. I often talk about it as kind of tossing the ball back and forth. It might not be as important as whether or not you give them the accommodation they want as much as how you get to it. Did you go through the

process? Have you asked questions? Have you followed up? You know, they're asking for an accommodation. They've thrown the ball to you in some respect. We're gonna throw the ball back by asking them, well, what else could work? You know, are there other things we could do that would meet that? You know, assuming the combination is one that we think we created an undue hardship. But before we ever get to that, we're looking at what else can we do? Are there other ways to explore it, to fix the issue, to address the issue that maybe aren't as burdensome on us as the employer that allow us to work through the accommodation with them? And that's really where so many of these cases fall apart where there's an automatic no coming across. You never want to be an automatic no.

You want to look at the situation. It can be a pain. We get that. But look at the situation, open eyes of what could we do? What can we be creative about? Is there really an undue hardship? And if there is, let's identify it. Let's talk about it. Let's tell the employee, look, we can try that. And I always like to try it. But here's where we think the problem might be. So we need to figure out how we're going to address that, how we're going to address that hardship going forward. And I think if we keep all of that in mind with all of these issues, you know, we'll be in a much better spot to defend cases if they come up and really to keep that employee morale and that employee engagement involved across your group.

That's a great closing point, Patty, just to kind of close the loop on that. I think it's important for employers, obviously, to keep employee relations at that forefront and having that interactive dialogue to ensure that, you know, you're doing everything you can to address an employee's needs within the confines of what you're required to do as an employer with respect to accommodations in the interactive process.

And one closing point I would just make is for employers to keep in mind documentation with respect to the interactive process is critical to the extent a litigation does come out of a situation. Obviously, having everything documented, demonstrating that employers, you as the employer did everything you could to work with the employee to engage in that interactive process. And obviously having that documented in the event of a litigation is critical.

So, Patty, do you have anything else to add before we close up here? No, I think that's good. I appreciate everyone for accommodating us today.

All right. Well, thank you, Patty. I appreciate it. And hopefully everybody enjoys the rest of their day here. Take care.

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