Employers have a duty to reasonably accommodate qualified individuals with a disability under the Americans with Disabilities Act (ADA) and employees religious beliefs under Title VII of the Civil Rights Act of 1964. But what constitutes a reasonable accommodation? Employers struggle with this question every day.

Employers need to evaluate each situation individually, looking at several factors including if an undue hardship would be imposed on it if an accommodation is provided. While there are no bright line rules for employers to follow, a well-educated and proactive HR department, improved training and a clear understanding of the current state of the law will assist employers in maintaining a diverse workforce.

A. Discrimination Based on Disability

Title I of the ADA prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment -- including hiring, promotions, job assignments, training, termination, and any other terms, conditions, and privileges of employment -- because she has a disability, a history of having a disability, or because the employer regards her as having a disability. That means, for example, that it is illegal for an employer to refuse to hire a veteran because she has PTSD, because she was previously diagnosed with PTSD, or because the employer assumes she has PTSD.

The ADA prohibits employers from discriminating against qualified disabled individuals who are able to perform the essential job functions of the position, with or without reasonable accommodations. A person is considered a qualified disabled individual under the ADA if he is (1) substantially limited in at least one major life activity by a physical or mental impairment, (2) has a record of the impairment, (3) and is perceived as impaired. The ADA requires court construe the term “disability” to “the maximum extent permitted” under the law, so the definition of disability includes an impairment that is episodic or in remission. Therefore, a condition like cancer, that is not currently impairing the individual, would still be a disability if it would substantially limit a major life activity “when active.”

B. Discrimination Based on Religion
Religious discrimination claims are fraught with contradiction. On the one hand, it is illegal to treat applicants or employees differently based on their religious beliefs or practices – or lack thereof – in any aspect of employment. On the other, employers must take an employee’s religion into account when making certain workplace decisions and cannot deny a requested reasonable accommodation.

Title VII of the Civil Rights Act, gives some guidance in handling religious discrimination in the workplace. Title VII requires three things to establish a *prima facie* case for religious discrimination: (1) the employee holds a sincere belief that conflicts with a job requirement; (2) the employee informs the employer; and (3) employee was disciplined for failing to comply with the conflicting requirement. A sincere belief is generally not disputed, but it must be bona fide and deeply rooted in the person’s nature, past history, and beliefs. The employee has the responsibility to affirmatively inform the employer of the bona fide belief and a request accommodation. The employee must also provide an explicit explanation of the religious observation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011). If all the factors are established, the analysis turns to whether the employer can reasonably accommodate the request without causing an undue hardship. *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009).

C. How A “Reasonable Accommodation” and “Undue Hardship” Differ Under the ADA and Title VII

An employer discriminates under the ADA when it does not make a “reasonable accommodation” for the qualified employee’s known physical or mental limitations, unless the employer can show that the accommodation would impose an “undue hardship” on the employer’s business. Similarly, an employee discriminates under Title VII when it does not make a “reasonable accommodation” for an employee’s religious beliefs.

While both the ADA and Title VII require a “reasonable accommodation” unless it is an “undue hardship,” the undue hardship threshold under Title VII religious accommodation claims is lower than the standard for undue hardship under the ADA. Under the ADA, an undue hardship is defined as an action requiring significant difficulty or expense. Factors that may be considered in determining if an undue hardship exists include: (1) the nature and cost of the accommodation; (2) the financial resources of the business; (3) the overall size of the business, including the number and location of the facilities; and (4) the operation of the business, including the composition of its workplace.

Determining whether a requested accommodation would rise to an undue hardship requires a fact-sensitive analysis, and each situation needs to be looked at individually. Under the ADA, an undue hardship would cause significant difficulty or expense.
However, under religious discrimination claims, an undue hardship is a lower standard and requires only “more than de minimus cost.” Even under the “de minimus” lower standard, however, disgruntled or jealous co-workers or customer preference do not create an undue hardship.

D. Types of Reasonable Accommodations

Under the ADA, reasonable accommodations may include, but are not limited to, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the revisions or qualified readers or interpreters. *Hoskins v. Oakland County Sheriff's Dept.*, 227 F.3d 719, 728 (6th Cir. 2000), 42 U.S.C. § 12111(9)(B). Similarly, light duty work, or giving the employee additional leave may both be reasonable accommodations. *EEOC: Technical Assistance on Title I of ADA. 8 Fair Empl. Prac. Manual (BNA) § 9.4 at 405:7057-58 (1992).* However, the employer is not required to create a new position or go against a non-discriminatory seniority system that is in place. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Tobin v. Liberty Mutual Ins. Co.*, 553 F.3d 121 (1st Cir. 2009).

Reasonable accommodations based on religion under Title VII generally can be classified into three primary areas: (1) claims concerning conflicts between work requirements and holy day or Sabbath observances; (2) religious clothing requirements; and (3) grooming claims to meet a religious obligation.

Under the first category, employers must generally give time off for the Sabbath or holy days except in an emergency. There are exceptions to this general rule when the employee works in key health and safety occupations, when the employee's presence is critical to the company on any given day, or when doing so would create an undue hardship. *TWA v. Hardison*, 432 U.S. 63 (1977).

Under the second category, whether an accommodation for religious dress is reasonable or would cause an undue hardship hinges on whether the accommodation creates a safety, security, or health risk. A religious accommodation that creates a genuine safety, security, or health risk to the employee, his co-workers, or the public at large undoubtedly constitutes an undue hardship. *EEOC v. Geo Group*, Inc., 616 F.3d 265, 273 (3rd Cir. 2009); *Webb*, 562 F.3d at 261-62 (allowing police officer to wear religious symbol on uniform undue hardship due to safety, uniformity to public, and neutral policies); *EEOC v. Oak-Rite Manufacturing Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156 (S.D. Ind., August 27, 2001)(pants only policy for factory workers was neutral and based on safety concerns, no discrimination). Conversely, if the request to wear a certain article of clothing only jeopardizes the image or aesthetics of the business then it is less likely to be found an undue hardship.
Finally, under the “grooming” category, many employers prohibit and employee to present with an unkempt, unclean, or unfriendly appearance. This may require an employee not having any visible tattoos, nose piercings, beards, and/or long hair. However, the tattoos or other things may be indicative of the individual’s religion, and discrimination because customers or co-workers may be uncomfortable with that person’s religion or national origin is illegal, and employers may have to accommodate such things. For example, employers may request that an employee place band-aides over facial piercings, or wear long sleeves to cover tattoos. Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677 (W.D. Washington, August 29, 2005); Riggs v. City of Fort Worth, 229 F.Supp.2d 572 (N.D. Texas 2002).

E. Conclusion

Claims for failure to accommodate can cause great hardship on an employer, so it is important to guard against them. Unfortunately, there is no bright line rule for employers to follow. Rather, each depends on an individualized factual inquiry.

Overall, under both the ADA and Title VII, employers should implement neutral policies such as seniority systems for employees and ensure neutral, consistent application of all policies and procedures. A proactive approach to avoiding failure to accommodation claims requires employers to carefully draft (or review and, if necessary, revise) and enforce applicable Handbook policies that allow them to meet their increasing legal obligations without undermining their control over the workplace or negatively affecting their bottom lines. If the employer does not continually review its policies, and change them to be in conformance with the law, the result will be costly due to increased liability and/or litigation.

Additionally, employers should train HR personnel, supervisors and interviewers on accommodations under the ADA and Title VII and how they apply to their daily operation. For example, an employer cannot make a pre-employment inquiry about a disability or religion. It is also wrong to assume that just because a person wears a head dress in the interview that they will require a religious accommodation or days off for Sabbath. The employer, however, may ask questions about the ability to perform specific job functions and may, with limitations, ask an individual with a disability to describe or demonstrate how she/he would perform the job functions. Given the speed this landscape has changed, annual training is recommended.

Finally, employers are reminded to manage litigation risks proactively by consulting with your legal advisers when accommodation issues arise.
Employers are reminded that under the ADA, an employee who needs to extra leave time beyond the employee’s 12 weeks of FMLA leave, or who needs leave when the employee is not FMLA eligible, may be required to provide additional time under the ADA. Courts have generally held that an accommodation for an indefinite period of time is unreasonable as an undue hardship on the employer. Henry v. United Bank, 686 F.3d 50 (1st Cir. 2012); Robert v. Board of County Commissioners of Brown County, Kansas, 691 F.3d 1211 (10th Cir. 2012). An employer would be wise to document the employee’s absences, the hardships created by such absences, and the hardships that would endure if the absences continued. Undue hardship have been found to exist when there are significant losses in productivity, a need for temporary workers, overburdened employees working overtime to cover shifts, lost sales, less responsive customer service, deferred projects, and lower morale.