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THIS WEEK'S E-TIP

Fragrance Sensitivity and the ADA Q&ABy [Robin Thomas, Managing Editor](#)Follow PPS on Twitter for daily updates -- [@ppshrpolices](#)

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**Editor's Note:** These question and answer HR Matters E-Tips articles are taken from real questions submitted by our subscribers, a unique feature of the HR Matters Tools and Resource Center online service. [See how it works.](#)  
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Important Form I-9 Update:

The updated Form I-9, the Employment Eligibility Verification form that you must fill out for every new employee, must be used beginning today, May 7, 2013. The new form, as well as the updated M-274 Handbook for Employers explaining how to fill out the form, was issued by the USCIS in March 2013.

For copies of the new Form I-9 and the M-274 Handbook, go to the [USCIS Web site](#).
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Do you have employees who complain about allergies to perfume or lotions used by coworkers in the workplace? Find out the potential ADA issues involved and four steps to address these complaints in a fair manner.  
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Q: One of our new employees has complained that her coworkers' perfume and hand lotions are causing her to have an allergic reaction. She claims she has a fragrance sensitivity that causes headaches and nausea and does not want the other employees to use any scented perfumes or lotions. Do we need to implement this policy?

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 Audio Conference: [HR Recordkeeping: Practical Strategies for Maintaining an Accurate and Efficient Records Trail](#). Learn what to keep, what to toss, and everything in-between.  
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A: Fragrance sensitivities in the workplace can be difficult to deal with since you may be faced with telling other employees what personal hygiene products they cannot use in the workplace in order to accommodate an employee who has a reaction. From a legal standpoint, you are only required to accommodate the employee with the fragrance sensitivity if the sensitivity is so severe that it is considered a disability under the Americans with Disabilities Act (ADA). However, even if the sensitivity does not rise to the level of a disability, you still should consider taking steps to address the employee's concerns.

[\(Download free Personal Appearance of Employees model policy including HR best practices and legal background.\)](#)

Employees with fragrance sensitivities, often referred to as "multiple chemical sensitivities" when they are severe, are not just bothered or annoyed by fragrances. Rather, they have a physical reaction to certain chemical compounds in fragrances that may be contained in a myriad of products, including lotions, shampoos, perfumes, aftershave, deodorants, cleaning products, pesticides, air fresheners, and even floorings and wall coverings. Symptoms can include headaches, nausea, runny nose, itchy eyes, and skin rashes, and in more serious cases, breathing difficulties, poor memory and concentration, muscle and joint pain, and sleeping problems.

To be considered a disability under the ADA, the fragrance sensitivity must be a physical impairment that substantially limits a major life activity. The ADA and its regulations explain that physical impairments are defined as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. A fragrance sensitivity resulting in any of the symptoms discussed above could meet this prong.

Major life activities under the ADA include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The ADA Amendments Act (which took effect in 2009) further expand the definition to include the "operation of a major bodily function, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The revised regulations (which took effect in May

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2011) also add to the list of major life activities sitting, reaching, and interacting with others, and further defines "operation of major bodily function" to include hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions. So, again, a fragrance sensitivity affecting an employee's breathing, skin, concentration, digestive system, or sleeping could be considered to affect a major life activity.

Audio Conference: [Creating a Payroll Manual: Putting Your Procedures into Writing](#). Given today's regulatory and litigation environment, you need to audit your payroll procedures and make sure your manual is up-to-date.

Of course, to meet the ADA disability definition, the impairment must be severe enough to "substantially limit" the identified major life activity. Prior to the ADA Amendments Act, courts often determined that the employees' allergies were not severe enough to be considered disabilities under the ADA. For example, in *Robinson v. Morgan Stanley & Co.*, 2007 US Dist. LEXIS 64624 (N. D. Ill. 2007), aff'd in unpublished opinion, 2008 US App LEXIS 6229 (7th Cir. 2008), the court determined that the employee's perfume reaction resulting in cold-like symptoms was not a disability under the ADA because it did not substantially limit her in any major life activity. And, in *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098 (8th Cir. 1999), a former employee with acute recurrent rhinosinusitis triggered by irritants such as smoke, nail polish, and perfumes had no claim under the ADA since his excessive absences made him unqualified to perform the essential functions of the job and the employer reasonably accommodated him by prohibiting use of nail polish and moving him to a work station with better ventilation.

However, in *McBride v. City of Detroit*, 2008 U.S. Dist. LEXIS 107424 (E.D. Mich. 2008), the court rejected an employer's motion for summary judgment to dismiss an ADA claim filed by an employee who complained that the city did not accommodate her fragrance sensitivity. The court determined that the employee presented sufficient evidence to go forward with her claim that she was substantially limited in the major life activity of breathing and that she raised legitimate issues of fact regarding appropriate accommodations that a jury should consider. News reports indicate that the case was subsequently settled in 2010 and that the employee received \$100,000 in damages and the city implemented a voluntary (not mandatory) scent-free policy asking employees to refrain from wearing scented products or using scented candles or deodorizers in the workplace.

Under the expanded definition of a disability created by the recent ADA Amendments Act, more courts now could find an employee's fragrance sensitivity to be a disability. The ADA Amendments Act requires that "substantially limits" should be interpreted broadly to cover more impairments. The new ADA regulations implemented in 2011 provide nine rules of construction to help employers determine whether an employee's impairment is a disability. Among other things, the rules point out that the impairment does not have to prevent or significantly or severely restrict an individual from performing a major life activity to be considered substantially limiting. And, although not every impairment will be considered a disability, the issue of whether an impairment substantially limits a major life activity should not require extensive analysis. So, thanks to these new rules, the focus generally will be on whether an individual with an impairment has been treated properly under the ADA, and not as much on whether the person meets the legal criteria for being disabled.

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Accordingly, employees with more than just minor allergies may be considered disabled and entitled to an accommodation under the ADA. Potential accommodations for employees with severe fragrance allergies include implementing a policy limiting the use of fragrances in the workplace, moving the allergic employee away from the allergy triggers, installing more ventilation, or using different chemical cleaners in the workplace.

As a practical matter, though, even if an employee's sensitivity does not rise to the level of an ADA disability, if certain fragrances or chemicals are causing problems for one of your employees, you should try to address this issue. Most employees are sympathetic to their coworkers' discomfort and should be willing to assist, particularly if you can keep any restrictions on fragrances as limited (and easy to comply with) as possible.

(Note, however, because of the ADA's confidentiality requirements limiting dissemination of employee medical information, you should not discuss with other employees any medical information about a particular employee's fragrance allergies. Rather, you are better advised to indicate that "some" employees "may be" bothered by fragrances and chemicals and that you are implementing policy or workplace changes to help accommodate potential problems. However, according to the ADA regulations, you can tell an employee's supervisor about necessary restrictions on the work or job duties and about necessary accommodations.)

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Here are four steps you can take to address an employee's fragrance sensitivity. These steps also will satisfy the ADA regulations' recommended interactive process to determine appropriate accommodations.

1. Determine the nature and extent of the employee's problem. Discuss with the sensitive employee specifically what her triggers are and what type of reaction they cause. For example, you should ask what particular chemicals or types of products trigger the allergic reactions, and what symptoms the employee experiences as a result of the triggers. At this point, it would be appropriate to ask for medical certification of the employee's problems to help you understand the severity of the sensitivity. In addition, you should ask how the symptoms affect the employees work performance.

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2. Discuss with the employee what actions you can take to accommodate the sensitivities. Talk to the employee about what changes she needs to allow her to do her job and to help improve her symptoms. Assess the effectiveness the accommodations would have in enabling the employee to perform the essential functions of the position.

3. Select and implement the accommodation that is most appropriate for both the employee and your organization. Although you have wide discretion to set work rules, including a ban on fragrances in the workplace, this type of ban may be more than is needed to alleviate the employee's problems. For example, if only one coworker's perfume is triggering the employee's problems, you may be able to solve the problem by asking that coworker to refrain from wearing the fragrance. Or, if the employee does not have to work with the coworker regularly but is seated near her, you can consider moving the coworker to a work station farther away from the employee. Similarly, you should consider whether improving ventilation in the office would help prevent triggers.

However, if an employee's sensitivities are caused by several fragrances or chemicals, you may have to consider implementing a policy that bans these items. The Job Accommodation Network, a free consulting service of the Office of Disability Employment Policy of the U.S. Department of Labor, provides information and advice to employers on custom job accommodations, including information on fragrance sensitivities online at <http://askjan.org/media/fragrance.html>. That information also includes a discussion of what fragrance sensitivity is, what symptoms can occur, questions to consider about the sensitivity, and other accommodation suggestions.

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Remember, though, your obligation to accommodate is not unlimited. Any accommodation should allow the employee to perform the essential functions of the job without creating an undue hardship to your organization. And, courts often determine that a complete ban on all fragrances in the workplace is unreasonable and creates an undue burden under the ADA, for example in *Core v. Champaign County Bd. of County Comm'rs*, 2012 U.S. Dist. LEXIS 149120 (S.D. Ohio 2012).

4. Assess the accommodation periodically to ensure its effectiveness. The ADA accommodation process is an ongoing one, so if the employee continues to have problems, you should consider other accommodations.

Content for your HR Matters E-Tips newsletter is developed from our flagship publication, the [HR Matters Tools and Resource Center](#), featuring the **Personnel Policy Manual System** (PPMS). [See how it works.](#)

Subscribers to the PPMS and HR Policy Answers on CD can find more information on the ADA, appearance standards, perfume and other fragrance sensitivities in Personal Appearance of Employees, Chapter 802, notes 8 and 9.

If you don't have access to the PPMS, but would like to have a free, no-obligation 14-day review, go to: www.ppspublishers.com/ppm-ez.htm

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