

Accommodation Issues and Failure to Accommodate

Presented by:

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The goal of this presentation is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

Overview

- Laws protecting disabled applicants and employees
- Definition of a “disability”
- Managing employees with disabilities
- Interactive process and steps
- Reasonable accommodations
- Undue hardships
- Consequences for failing to accommodate adequately
 - Avoid disgruntled employees and unnecessary litigation
 - Create a smooth process for returns to work
- Best practice tips

Laws Protecting Disabled Employees

- Federal: Family and Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”)
- State: California Family Rights Act of 1993 (“CFRA”), Fair Employment And Housing Act (“FEHA”), and Pregnancy Disability Leave (“PDL”)
- Interactive Process and Reasonable Accommodation (FEHA and ADA)
- State and Local Paid Sick Leave
- Workers’ Compensation

ADA and FEHA

- The ADA and the FEHA prohibit discrimination, harassment and retaliation on the basis of a disability.
- Require employers to make reasonable accommodations to enable a disabled individual to perform the essential functions of the job, unless it would cause an undue hardship.
- The ADA/FEHA do not provide job security (compare with FMLA/CFRA/PDL).

Definition of a “Disability”

- Fair Employment & Housing Act (FEHA) definition of disability:
 - Physical disability
 - Physical condition or disorder that affects a major bodily system that limits a major life activity
 - Mental disability
 - Mental or psychological disorder or condition that limits a major life activity
 - Person with record of such impairment
 - Regarded as having an impairment
- **Limits** means simply that the condition makes achievement of the major life activity **difficult**.

Managing Disabled Employees

- California imposes a higher burden on the employer
- Employers have a duty to engage in a timely, good faith, interactive process to determine effective reasonable accommodations.
- Duty arises when:
 - Qualified individual with a disability requests a reasonable accommodation, or
 - Employer has knowledge of the employee's disability and the employee's desire or need for an accommodation.
- “Qualified” individual with a disability is an employee who is able to perform the essential duties of the job, with or without a reasonable accommodation- No protection otherwise.

Interactive Process

- Is a critical employer obligation
- Is a separate, “stand alone” obligation and violation of the law
- Triggers:
 - Employer is made aware of need for accommodation by TPA, employee, employee’s representative or by observation.
 - Employee specifically requests accommodation or provides a doctor’s note.
 - Employee with a disability exhausts leave under WC/CFRA/FMLA and the employee’s healthcare provider indicates further leave is needed.

Steps of the Interactive Process

- Step 1: Identify the essential functions of employee's job
 - Job Description
 - Consult with employee and employee's supervisor
 - The amount of time spent on the job performing the function
 - Consequences of not performing the function
 - Regular and punctual attendance as an essential function.

Steps of the Interactive Process

- Step 2: Identify limitations and abilities
 - Identify the specific medical conditions that affect the employee's ability to perform the essential functions of the job.
 - Determine what specific job duties are impacted by the conditions described.
 - Determine how, specifically, those job duties are impacted and how often the impact occurs.
 - Request further information, if necessary, from employee's doctor
 - Employee has a duty to cooperate with an employer's efforts by explaining his or her disability and qualifications for the job.

Steps of the Interactive Process

- Step 2: Identify limitations and abilities
 - Questions to ask:
 - What are your job restrictions
 - Do you have a doctor's note?
 - What job functions are you unable to perform
 - Questions **not** to ask:
 - What is your diagnosis?
 - What is your prognosis?
 - Provide a list of current medications
 - Bring me a copy of your medical file

Steps of the Interactive Process

- Step 3: Brainstorm on accommodation ideas with employee – exchange of information.
 - Identify potential accommodations
 - What would enable the employee to perform the essential functions of the job?
 - Assess their effectiveness
 - What is the potential impact or cost to the employer?

Steps of the Interactive Process

- Step 4: Assess the options and make a decision
 - Prepare a menu of options
 - Employer ultimately selects an effective accommodation
 - Communicate decision to employee, others who need to know
- Step 5: Implement the accommodation
 - An accommodation is reasonable if it appears to be feasible or plausible, and is effective in enabling the employee to perform the essential functions of the job
 - Communicate and document

Steps of the Interactive Process

- Step 6: Follow up regularly
 - Stay in contact with the employee.
 - Do not forget the process is “on going” and must be revisited
 - Calendar check ins: 30 days, 3 months, 6 months, 1 year
 - Does the work continue to be within the limitations?
 - Is employee successfully performing the essential functions of the job?
 - Is the accommodation still needed?

Interactive Process Meeting

- Interactive process meeting should occur as soon as possible and before return to work; should be as soon as employer has notice of return to work
 - Notice can be from employee or TPA
 - Can be done via phone/email/face-to-face
 - If verbal, document it in writing
 - Any delay can look retaliatory
 - Be proactive
- Best Practices for “check in” with employee:
 - Someone off work for extended length of time or significant injury
 - TPA communicates that work restrictions may be permanent
 - Employee communicates that work restrictions may be permanent
- TPA will provide notice of permanent work restriction and will assist with seeking any clarification from the physician for work related injuries

Interactive Process

- Employer does not need to create a job, but needs to look creatively at possible accommodations and broadly within organization for alternate positions.
 - Employer must provide a list of available jobs – if returning to same job is impossible.
 - Must be qualified and able to perform essential functions of any job
 - Can require documentation of qualifications for alternate job (education, experience, etc)
 - If equally qualified must give preference of open position to disabled employee
 - Employer must demonstrate exploration of accommodations within usual and customary occupations
 - Consequence is potential discrimination/retaliation

Interactive Process

- Interactive process must take into consideration the accommodation the employee prefers, but need not ultimately choose preferred option
 - Dialogue should occur between employee and employer
 - Interactive process discussion should be in writing and include efforts, agreement and options available

Reasonable Accommodations

- Reasonable accommodation is:
 - Effective in enabling employee to perform the essential functions of the job the employee holds or desires;
 - Effective in enabling employee to enjoy equivalent benefits and privileges of employment
 - It must overcome the limitation.
- Emphasizes the “affirmative” nature of the employer’s duty to provide reasonable accommodation
- Reasonable, meaning that the size of the employer, the type of business, and the positions available are taken into consideration.

Reasonable Accommodations

- Employer must accommodate if not an undue hardship
- Examples:
 - Leave of Absence:
 - Burden on employee to show that leave will be effective in allowing employee to return to work within a reasonable time period.
 - FEHC refused to establish a bright line test on how long leave must be and instead relied on “undue hardship” standard on case by case basis
 - Reassignment to vacant alternative position:
 - Employers are required to give preference to disabled employees (except employer is not required to ignore bona fide seniority system).
 - Can be lower grade position if the individual is qualified and there are no comparable positions available.

What is Not Reasonable Accommodation

- Offering a temporary job (an employee may reject it without his or her ending of the interactive process).
- Creating a new position.
- Transforming a temporary light duty position into a permanent one.
- Lowering its quality and quantity of work standards as an accommodation, but employer may need to accommodate an employee with a disability to enable him to meet its standards for quality and quantity.
- Reassignment to a position that is not vacant
 - Although an employer is not obligated to compensate an employee at the same rate of pay if they are moved to a lower paid position as an accommodation, employers can avoid retaliation claims if they maintain the same level of compensation.

Employers Obligations & Rights

- If the disability or need for accommodation is not obvious, the employer may require reasonable medical documentation.
 - Not permitted to ask about the underlying medical cause of the disability but may require additional information.
 - Sufficient for employee's health care provider to state employee has a disability or medical condition that limits a major life activity and requires accommodation
 - Can request clarification of nature of accommodation and expected duration
 - The employer must provide additional time for the employee to clarify information if clarification is needed to assess the request.
 - For reasonable accommodations lasting more than a year, the employer may seek medical substantiation on a yearly basis.
- Either grant the accommodation or, after due consideration, reject it and initiate discussion regarding alternate accommodation. Experts may be consulted.

Employee's Obligation

- Cooperate in good faith
- Provide reasonable medical documentation confirming:
 - Employee has physical/mental condition that limits a major life activity
 - Description of why the employee needs a reasonable accommodation
 - Must provide concise list of restrictions
- Provide educational or experience information if reassignment is considered

Undue Hardship

- The employee need only show that a requested accommodation is generally reasonable
- It is the employer's obligation to demonstrate specifically that a request would create an undue hardship
- Undue hardship is an accommodation that requires significant difficulty or expense when considered in light of many factors

Undue Hardship Factors

- Nature and cost of the accommodation
- Overall financial resources at the facilities involved
- Number of employees/size of business
- Impact of the accommodation on the operation of the facility or work environment
- The number, type and locations of its facilities.
- Type of operations, including the composition, structure, and functions of the work force of the entity
- The geographic separateness, administrative, or fiscal relationship of the facility or facilities

Failure to Accommodate

- To prevail on a claim based on failure to accommodate under the ADA, an individual must show:
 - 1. the individual had a "disability"
 - 2. the individual suffered an adverse employment action;
 - 3. the individual was able to perform the essential functions of his/her job, with or without reasonable accommodation; and,
 - 4. the employer was aware that a reasonable accommodation was necessary and possible, but failed to provide one.

Failure to Engage in Interactive Process

- Often alleged with disability discrimination and failure to provide reasonable accommodation.
- Employee can be successful on this claim if there is a possible reasonable accommodation and the employer fails to go through the process
- Examples:
 - Communication between the employer and employee completely breaks down
 - The employer refuses to discuss possible accommodations
 - The employer rejects a possible accommodation without reason
 - The employer rejects a proposed accommodation that obviously does not constitute an undue hardship for the employer

Employer Best Practices

- Update leave and reasonable accommodation policies/forms:
 - Leave of absence policy
 - Leave request forms, flowcharts, etc.
 - Reasonable accommodation request forms
 - Job descriptions and performance reviews that track the JDs
 - Post and disseminate notices
- Include perceived disabilities in harassment/discrimination policies
- Train HR, employee health, managers/supervisors on triggers for interactive process, reasonable accommodation and leave obligations.

Employer Best Practices

- Worker's Compensation
 - If an employee reports 1) an injury that 2) occurred at work (that requires more than First Aid), the employer should:
 - Provide a Claim Form to the employee within 1 working day
 - Offer medical treatment within the MPN
 - Document the process and discussions in writing
 - Once the Employee Returns a signed Claim Form the employer should:
 - Complete the employer portion of the Claim Form
 - Notify TPA immediately so they can open a claim
 - Conduct an Employer level investigation to determine witnesses, how the injury occurred, any suspicious circumstances and report back to TPA with the information.
 - Attempt to make reasonable accommodations for an injured worker with work restrictions promptly and Document, Document, Document!

Documenting Interactive Process

- Identify participants
- Identify all documents reviewed
- List work restrictions
- List essential functions of the job
- List all accommodations suggested and considered (even the unreasonable ones)
- List all alternative positions considered
- Employee comments
- Everyone signs
- Complete this form every time a new restriction is provided

Questions?

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