

# **It Doesn't End with FMLA/CFRA: Disability Red Flags Most Employers Overlook**

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# Disclaimer

*The following presentation contains general information and is provided as a courtesy to our presentation attendees. It should not be relied upon in any particular factual situation without consulting your legal counsel for specific advice.*

# Introduction

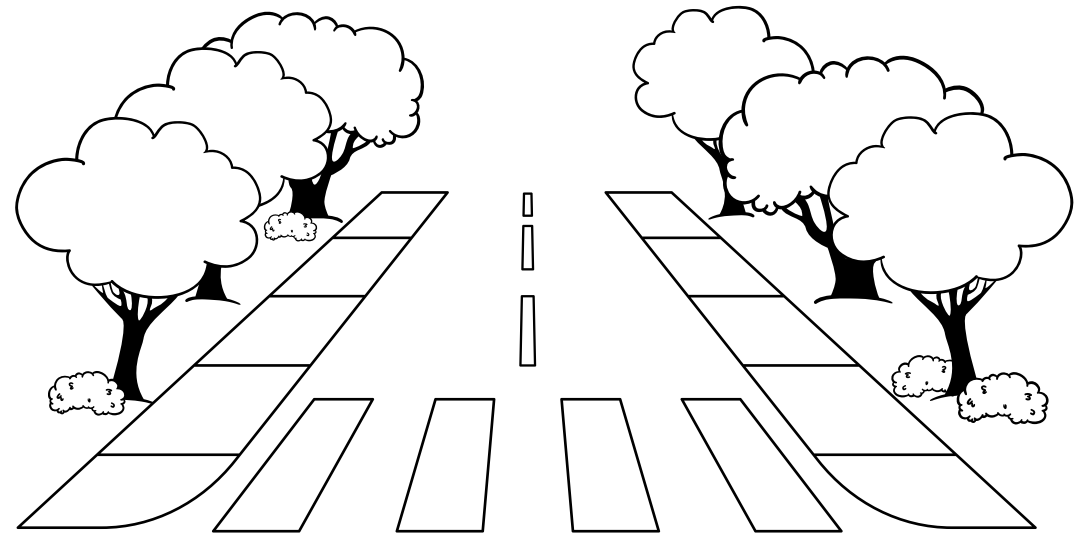
Obligations to prevent discrimination based on a physical/mental disability or medical condition:

- Workers' Compensation
- Family Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)
- Other leave-related laws (e.g., ADA, Title VII)

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## California Fair Employment & Housing Act (the FEHA)

- **Five or more** employees
- Engage in timely, good faith **interactive process**
- Effective **reasonable accommodation**
- **Undue hardship** (or other statutory exception)



# Agenda



- Most commonly occurring disability-related mistakes
- Understand how FEHA obligations intersect other disability/leave-related obligations
- Learn how FEHA's two most important obligations can be violated in multiple ways

# Misapplication of TTD

- Temporary Totally Disabled (TTD)
- Temporary Partially Disabled (TPD)
- Totally Permanently Disabled (TPD)

## **The Mistake:**

Applying a common dictionary definition to these terms-of-art.

# The Takeaway

No matter the WC designation an employer must:

- Engage in a timely good faith interactive process; and
- Reasonably accommodate the disabled employee (absent an undue hardship)

# “No Light Duty” Deflection

## The Mistake:

An automatic response by the employer that *“we do not offer light duty work.”*

1. Prohibits employee from RTW until most if not all the restrictions are removed.
2. Evidences a failure to engage in a timely good faith interactive process when presented with a request for accommodation.



# Remember!

- Doctor's note with restrictions *is sufficient* request for reasonable accommodation.
- **Interactive process:**
  - An interactive review of accommodation request
  - Gain an understanding of the restrictions
  - Compare restrictions to job or other available jobs
  - Brainstorm possible accommodation(s)

**The exception:** Undue hardship (other statutory defenses)

# Takeaway

- Don't shortcut the interactive process.
- Review current policies/practices to determine if this is a 'standard' response.
- Keep an open mind
- Invite the employee to suggest possible accommodation options

**Red Flag** – *Rote responses* could be an admission of a failure to consider modification of job description or job placement.

# What is required (Interactive)?

## Employee:

- Initiate and cooperate in good faith;
- If not obvious, burden is on employee to:
  - Notify employer of their specific need; and
  - Suggest reasonable accommodation(s)

## Employer:

- Engage with the applicant/employee
- Identify potential accommodations
- Assess the effectiveness of each accommodation
- Consider the preference of the applicant/employee

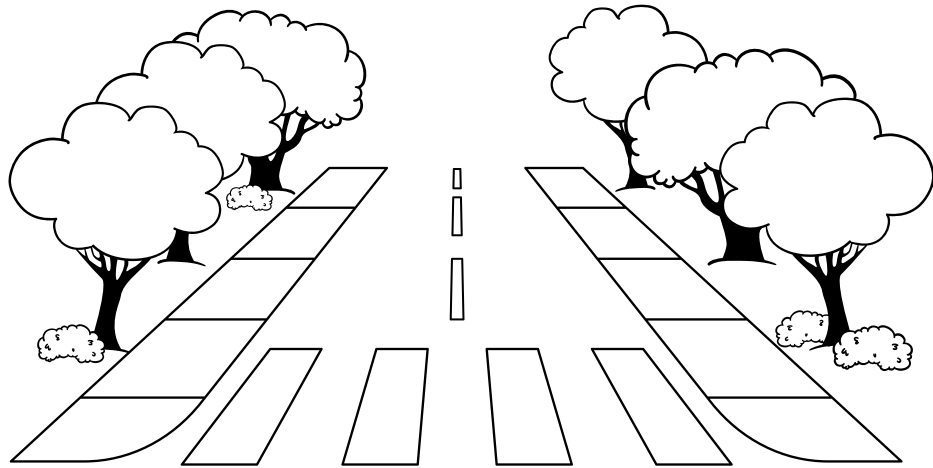
*Direct communication* (preferred for both)

# What is required (Accommodation)?

“*Any and all reasonable accommodations*” the employer is aware of or are brought to the employer’s attention (except ones that create an undue hardship).

- Paid or unpaid leave of absence
- Reassignment to a vacant position
- Job restructuring (reallocation, redistribution of non-essential functions)
- Part-time or modified work schedule
- Modifying employer policy
- Additional training
- Remote work
- “Other similar accommodations”

# FMLA/CFRA Blinders



FMLA/CFRA both require:

- Protected leave for qualified employees
  - 12 weeks in a 12-month period
  - Serious medical condition of an employee, family member, ('designated person' under the CFRA)
  - Worked 1,250 hours during the 12 months prior to the start of leave

**For these reasons both intersect with the FEHA**

# The Mistake

Limiting leave obligations to just FMLA/CFRA and nothing more.

FMLA/CFRA only part of employer obligations to prevent disability discrimination.

Obligation where employee:

1. Has exhausted FMLA/CFRA and still needs additional time to treat or some other type of accommodation; or
2. Does not yet qualify for FMLA/CFRA because they haven't worked enough hours yet.

# The Takeaway

## *Where an employee:*

- Exhausts leave; or
- Doesn't yet qualify for leave

## *Employer must still:*

- Engage in the interactive process
- Provide an effective reasonable accommodation (absent undue hardship)

Make sure company policies do not limit requests for leave - as a reasonable accommodation - to FMLA/CFRA.



# Termination Deadlines

Policy/practice that automatically terminates any employee off work for a specifically defined period of time.





# The Mistake

Failing to treat each employee's disability situation on a case-by-case basis.

What FEHA obligation(s) does this violate?

- *Timely, good faith, interactive process*

How does this discriminate under FEHA?

- *Does not consider possible temp disability*



# The Takeaway

Treat each disability situation:

- On a case-by-case basis
- On its own merits



Review company policies and procedures

# No Restrictions Policy

*“100 Percent Healed” or “Fully Healed”*

## The Mistake:

Refusing to allow an employee to return to work unless/until they are no longer subject to any restrictions.

Employer required to:

*Individually* assess employee's ability to perform essential functions with/without reasonable accommodation.

# Takeaway

Take each case on its own *merits*

Review any existing policies to remove “*no restriction*” language

*Train* managers/supervisors



# Withdrawal of Proven Accom.

## The Mistake:

Revoking a proven accommodation when presented with change in employee's status (e.g., permanent & stationary; intermittent leave).

# The Takeaway

Employer's reasonable accommodation duty is the same *regardless* of temporary or permanent restriction(s).

Accommodation with identical temporary restrictions for a *significant period of time* establishes there is a reasonable accommodation available.

## *Manage expectations:*

- Make clear a temporary accommodation is *temporary*
- Undue hardship analysis supports withdrawal

# Waiting for “Magic Words”

## The Mistake:

Two mistakes:

- 1) “Magic Word” obligation
- 2) Failing to actively engage with the employee

Dis!



**Failure to Engage in Interactive Process – Separate allegation under the FEHA.**

# The Takeaway

- *Train, train, train*

- Employer duty is triggered when:

- Qualified *individual requests* reasonable accommodation(s)

**Key Phrase: “What do you need and how can we provide it?”**

- Employer *becomes aware* of the need for an accommodation

- Employer *is aware* of the possible need for an accommodation

- *Don't be afraid to engage* with your employees.



# The Takeaway

- ***Err on the side of caution:***
  - Unsure whether employee has requested an accommodation? Ask for clarification.
- ***Act quickly:***
  - Once request is identified, respond immediately.
- ***Assign responsibility:***
  - Assign at least one person to be responsible for processing accommodation requests.



# Return to Work Barriers

Employer processes create ambiguity and barriers that can delay an employee's return to work.

## The Mistake:

Failing to recognize the interactive process requires (*ideally*) more than just exchanging one letter/email after another.

# The Takeaway

- *Internal processes:*
  - Allow for most *effective* means of communication
  - Do not create *unintended barriers* (e.g., all requests must be in writing)
- Train employees responsible for return-to-work communications to *be flexible* in how they communicate; give them options (e.g., zoom, email, in-person).

# Reliance on Non-Essential Functions

Each position in organization should have an *accurate and up-to-date* job description.

Used by *both* employer and employee in making *informed* accommodation decisions.

# The Mistake

Denying a reasonable accommodation based on a requirement in the job description that is not actually part of the employee's job.

## *Scenario...*

**Job description** indicates employee should be able to lift 40+ pounds never, 30+ pounds rarely, 20+ pounds occasionally, and 10+ pounds often.

**Return to work note** restricts lifting not more than 30 pounds.

**Employer refuses** the return-to-work based on the job description's "30+ pounds rarely" job duty.

## 1<sup>st</sup> Point:

If employee's job has *never required* the employee to lift 30+ pounds, the job description is inaccurate.

- Denial based on inaccurate job description would likely be a violation of FEHA.

## 2<sup>nd</sup> Point:

Even if job description *accurately described* a rare or occasional requirement, employer must:

- Reasonably accommodate with modification of the job, method of performing the job or jobs of those around the disabled employee (exception for undue hardship).

# The Takeaway

- Make sure all job descriptions are *up-to-date and accurate*.
- Talk with other employee's *performing the same job* as the disabled employee.
- Talk with the disabled *employee* about how they perform the job.
- Understand what the job entails and what it doesn't *before* denying a reasonable accommodation.



# Undue Hardship without Analysis

## The Mistake:

- **Underestimating** what it takes to prove an undue hardship; or
- **Confusing** “undue hardship” with “inconvenience.”



This mistake takes two forms:

- 1) The failure to apply the *proper level of hardship* to the accommodation at issue; or
- 2) The failure to engage in any *real evaluation* of the hardship to the company and simply stating undue hardship based on assumption or justification.

# What is an undue hardship?

## "Undue hardship" means...

“An action requiring *significant difficulty or expense* incurred by an employer...when considered under the *totality of the circumstances* in light of the following factors:

1. The *nature and net cost* of the accommodation; taking into consideration the availability of tax credits and deductions, and/or outside funding;

2. Overall *financial resources of the facility*/facilities involved.
3. Overall *financial resources of the employer*, overall size of the business (i.e., number of employees, number/type and location);
4. The *type of operation or operations* (i.e., composition, structure, and functions of the workforce); and
5. Geographic *separateness*, administrative, or fiscal relationship of the facility/facilities.

# What is not an undue hardship?

- Extension of *finite* unpaid leave to complete healing or complete recovery.
- Allowing *remote* work.
- *Transferring* the employee to a vacant position.
- Giving the disabled employee *preference* over non-disabled employees in reassignments.

# The Takeaway

Threshold determination is relatively high.

Claiming undue hardship when *in reality* the accommodation is just *different from norm* or requires simple *departure from established policies/practices* violates the FEHA.

Before determining a requested accommodation poses an undue hardship, make sure someone at the company has engaged in a *good faith analysis* of the accommodation and can show the *true burden*.

# A word about Essential Functions

“*Essential job functions*” means...

The *fundamental job duties* of the employment position the individual with a disability holds or desires.

# What makes an essential function, “essential?”

- The reason the position exists is to perform that function.
- The limited number of employees available among whom the performance of that job function can be distributed.
- Highly specialized, so that the individual in the position is hired for their expertise or ability to perform the particular function.

# What might make an essential function, “essential?”

- The employer's judgment as to which functions are essential.
- Accurate, current written job descriptions.
- The amount of time spent on the job performing the function.
- The legitimate business consequences of not requiring the individual to perform the function.




- Job descriptions or job functions contained in a collective bargaining agreement.
- The work experience of past individual in the job.
- The current work experience of individuals in similar jobs.
- Reference to the importance of the performance of the job function in prior performance reviews.



# “Essential” is not...



Marginal functions of a job that...

- If not performed, would not eliminate the need for the job; or
  - Could be readily performed by another employee; or
  - Could be performed in an alternate way.
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**THANK YOU!**

**Q&A**

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