

FEHA/ADA Interactive Process Obligations of California Employers

The California Fair Employment and Housing Act (FEHA) prohibits discrimination based on disability and also requires an employer to engage in good faith Interactive Process of ongoing communication with an employee regarding a known disability. The Americans with Disabilities Act (ADA) contains similar, although not as specific, obligations. These obligations apply to both work related and non-work related disabilities or impairments. Also, this obligation is an “ongoing” one, not just a one-time responsibility.

Two recent court cases demonstrate how important compliance is, and how costly violations can be for employers.

Case Study #1

On September 29, 2009, the national retailer Sears settled a class action lawsuit with the Federal Equal Employment Opportunity Commission (EEOC) for \$6.2 million under the Americans with Disabilities Act, having been charged with maintaining an inflexible leave policy involving workers’ compensation injuries instead of providing them with reasonable accommodations for their disabilities. The Sears’ class action case demonstrates not only the importance of having a pro-active return-to-work policy, but also that an organization will be held financially responsible when they don’t follow the disability discrimination laws, such as ADA and in California FEHA, which apply at the same time and even as workers’ compensation benefits are being paid an injured worker.

The Sears’ case began with a service technician who was injured on the job, took workers’ compensation leave, and although remaining disabled by the injury, repeatedly attempted to return to work. Sears did not maintain an ongoing interaction with the employee and the company relied on the workers’ compensation system, which was unresponsive to the employee, and failed to protect the company from the ADA claims.

Case Study #2

Also in September 2009, a California case cost Albertsons, the grocery retailer, \$200,000 for failing to accommodate a checker who needed frequent trips to the bathroom, even though the failure to accommodate occurred on only one occasion. The checker, who had suffered cancer of the tonsils and larynx, had completed her chemotherapy and radiation treatment which in turn, affected her salivary glands. As a result, she needed to constantly drink water and thus go to the restroom more often. A supervisor, who was unaware of her condition, did not relieve her from checking duties in a timely manner with a very unfortunate result. Afterward, Albertsons did not engage in an Interactive Process to discuss the employee’s needs for therapy and released time from work leading to the jury’s award to the employee.

There are steps that companies can take to avoid these legal missteps. Companies with 5 employees or more should be certain that they are following these steps:

1. When you become aware that an employee is having some difficulty performing his/her job duties. This awareness could be triggered by more absences from work, an existing illness or injury, being late to work, poor work performance, comments of the employee, or comments of a supervisor or co-workers. The employee may or may not disclose that a physical or mental illness or injury is involved as a cause of his/her behavior.

Note: It is legally dangerous for an employer to wait for an employee accommodation request if it would be apparent later to a judge or jury that circumstances made it reasonably clear that the employer should have known the employee needed an accommodation by the employer. Failure to respond leads to the large damage awards, such as Albertsons and Sears have experienced, and is overall bad for employee morale.

2. Once an employer is aware of the need for an accommodation, whether or not the employee has asked for help, you have a duty to ask the employee to identify any job related limitations, and ask them what they suggest could be done to possibly accommodate them. Employers do not have to agree with the employee, but it's important that they do listen to the employee's suggestions.

3. At this meeting, always have two people from the company present and make notes of what the employee says and that you asked his/her opinion. If the employee will not or does not talk to you, document your effort to talk to him/her.

4. After meeting with the employee, evaluate what options exist in the company by analyzing that person's current job or any other position. What could work in this situation - shorter hours, fewer days a week, or having that person do only part of a job. Employers do not have to pay the person his/her regular pay or full pay if they are only doing a partial job or a lower paying job. The company only has to do what is reasonable considering its size and its resources, but it may have to do some inconvenient things.

5. If you have any questions about the medical ability of an employee pay to have your own doctor do an evaluation. Do not make a medical judgment yourself.

6. This interactive obligation applies to both workers' compensation and non-workers' compensation injuries or illnesses.

7. Take the energy and time to explain whatever final decision the company makes. Meet with the employee in person to discuss the company's decision and listen once again for any possible and reasonable way to resolve differences.

What is the Interactive Process?

- The Interactive Process is a dialogue between an employer and an employee or applicant with a disability to determine whether there is a reasonable accommodation that would enable the individual to perform the essential functions of the job.

- The Interactive Process should be Flexible, Timely, and in Good Faith.
- Participation in the Interactive Process is a mutual obligation. The employee must cooperate with the employer by participating in the process and responding to the employer's appropriate requests for information and guidance. Employers need to know whether or not a particular accommodation will allow the employee to perform the essential functions of his or her position.
- Understanding how the Interactive Process works and when it is triggered is very critical. Employers need to understand their obligations and responsibilities under the FEHA/ADA.
- Employers are required to engage in the "Interactive Process" to determine whether a "reasonable accommodation" is available for the injured worker.

What Triggers the Interactive Process?

- While an employee may trigger an employer duty to engage in the Interactive Process by directly asking for an accommodation, an employer also must engage in the Interactive Process if it recognizes the need for an accommodation. The employee or applicant does not need to use magic words, such as "reasonable accommodation" or "Interactive Process." Even ambiguous comments can be a request for accommodation. The process may be triggered by any one or a combination of the following situations:
 - An employee regularly misses work, telling the employer that he/she is ill.
 - An employee with a workers' compensation injury. The protections and obligations of FEHA and ADA apply to a workers' compensation injury just as it would to any non-work related injury. If an employee is receiving temporary disability benefits or other workers' compensation benefits, it does not relieve an employer of any obligations under FEHA or ADA.
 - A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.
 - The employee requests a reasonable accommodation, specifically or by reference to his/her limitations.
 - A manager or supervisor observes barriers to the employee's performance on the job.
 - The employer receives work restrictions from a medical provider or workers' compensation claims administrator.

- It is important to maintain contact with the employee from that person's first day of disability leave to ensure the Interactive Process commences as soon as appropriate.

Effective Reasonable Accommodation (Types of Accommodation)

- Reasonable accommodation is any effective measure that would enable an applicant or employee with a disability to perform the essential functions of his/her position. (This aspect of course, enables individuals with disabilities to enjoy equal benefits and privileges of employment.)
- Making existing facilities accessible to and useable by workers with disabilities.
- Job restructuring.
- Modifying work schedules.
- Reassignment to a vacant position.
 - {FEHA entitles an employee with a disability to "Preferential Consideration" in reassignment or transfer to a vacant position.}
- Adjusting or modifying exams, training, materials or policies.
- Acquiring or modifying equipment or devices.
- Providing qualified readers or interpreters.
- Alcohol or Drug Rehabilitation Programs
- Paid or unpaid leave, including reduced hours or leave coordination in conjunction with the California Family Right's Act (CFRA), which may exceed standard company rules.

On page 5 of this white paper, you'll find lists of employer Do's, Don'ts and Points to Remember.

Employers Need to Keep the Following in Mind:

Do...

- Be alert to spot situations that trigger the Interactive Process.
- Understand the critical distinctions between the workers' compensation claim process, including your separate duties as an employer under FEHA and ADA.
- Maintain effective, complete and defensible documentation throughout the Interactive Process.
- Enact and consistently enforce effective procedures for conducting the required "Interactive Process" when addressing a reasonable accommodation decision.
- Address potential required reasonable accommodations based on disabilities or limitations that are apparent or which the employee discloses in the pre-placement process.

Don't...

- Ask for non-job relevant information, such as physical or mental illness, record of disabilities, past treatment, diagnosis or prognosis for medical conditions.
- Ignore or inconsistently enforce policies – for any reason – to favor or disfavor an applicant/employee with a disability in hiring, placement and promotional decisions.
- Apply improper pre-employment selection criteria and interview questions.
- Apply inconsistent performance appraisal / promotion standards based on disability.
- Encourage improper "disability" stereotyping

Remember:

- Start communicating with your employee from the first day of his/her absence.
- Transitional assignments may be appropriate at any time.
- Continue communication and documenting from the first day.
- The Interactive Process is ongoing.
- Listen to the employee.
- Continue to document all interactions.
- Send follow-up letters as necessary to confirm what occurred.
- Keep an open mind.
- Document attendance, agreements, questions, and differences.

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