Engaging in the Interactive Process

Navigating Your Way for Best Results AND Compliance

Presented by: Roberta Etcheverry, CPDM

Your Presenter

- Roberta Etcheverry
  - Certified Professional in Disability Management
  - Over 20 years experience working with employers on stay-at-work and return-to-work for injured/disabled employees
  - Trainer for EEOC Annual Seminar, DWC Annual Educational Conference, Disability Management Employer Coalition, Northern CA HR Association, Public Agency Risk Managers’ Association, etc.
  - Key contributor for State RTW Guide (w/CHSWC)
  - Extensive experience and education on identification of essential functions, job accommodations, job descriptions and ergonomics
  - Received my education at Stanford and United States Military Academy/West Point

Outline for Today

- Fundamental responsibilities
- The Six Steps of the Interactive Process
- Resources available
- Leave/time off as an accommodation
- Performance-Conduct-Disability
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The Law...
- State vs. Federal
- Relatively recent changes to both
  - Americans with Disabilities Act – Amendment Act
  - Revised California disability regulations
- Intent of BOTH:
  - Focus should NOT be on analysis of who does/does not have a disability
  - Emphasis is on whether or not employer can reasonably accommodate

Amended CA Regulations
- Detailed guidance on definitions
- Interactive Process Obligations
- Assistive animal – guidelines
- Post-offer medical examination guidelines
- Pregnancy disability laws align with disability regulations

FEHA – What is required?
- What does FEHA require of employers? (specific to disability issues and employment)
  - Must provide reasonable accommodations for applicants and employees who, because of disability, are unable to perform the essential functions of a job.
  - Must engage in a timely, good faith interactive process with applicants or employees in need of reasonable accommodation.
FEHA Protections

- Person recognized as “disabled” if he/she
  - Has physical or mental disability that limits one or more major life activities; or
  - Has history of such an impairment known to the employer; or
  - Is incorrectly regarded or treated as having or having had such an impairment; or
  - Is regarded or treated as having or having had such an impairment that has no presently disabling effects but may become a qualifying impairment in the future.

FEHA – Definition of Disability

- What constitutes “disability” under FEHA?
  - Physical Disability
  - Mental Disability
  - Medical Condition

- **AMENDED REGS**: provides list of conditions which “automatically” meet definition

Call it like it is...

- From DFEH Director Phyllis Cheng, NCERT presentation:
  “Almost any condition is a disability under the FEHA, except for those conditions expressly listed in the FEHA and/or regulations as being excluded”
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Temporary versus Permanent
- FEHA Case Analysis Manual
  - “When determining whether an employee is a person with a disability, emphasis should not be placed on the duration of the disability (i.e., whether it is permanent or temporary)”
  - Generally accepted that very short term situations are not covered (flu, sprained ankle)
- ADA
  - Analysis of whether disabled does include focus on duration; however, employee is not required to show that disability is permanent to be covered

Major Life Activities
- Term “major life activities” (in CA) is broadly construed and includes physical, mental and social activities and working.
- AMENDED REGS: further defined to include standing, sitting, reaching, lifting, bending, learning, reading, concentrating, thinking, communicating, and interacting with others

Define “limits” a major life activity
- How different from the ADA?
- The baseline to compare to is the individual without the impairment or the average “unimpaired” person.
- Amended REGS: “the condition makes achievement of the major life activity difficult”
Workers’ compensation

- Do ALL injured employee’s meet the definition of having a disability?
- Employees with PERMANENT work restrictions?

But let’s not forget...

- The law protects ALL of us
- Side step the frustration
- What would I want my employer to do for ME?

What IS Reasonable??
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Reasonable Accommodation
• Any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job
• Does not require an accommodation that would be an “undue hardship” to the employer
• NO BRIGHT LINE !!
• AMENDED REGS:
  • Must be EFFECTIVE to be reasonable

What is the Interactive Process?
• The Interactive process includes:
  • Consulting with an individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation
  • Identifying potential accommodations and assessing their effectiveness
  • Not “interacting” carries its own penalty under FEHA

Timely, Good Faith Process
• Employer and employee must communicate directly with each other to determine essential information
• Neither party can delay or interfere
• Employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation
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Getting the Interactive Process Started
I know what you are thinking...

Interactive Process for Dummies

What can or can’t employee do?

What does employer need employee to do?

What are the gaps?
Can we “bridge” the gaps?

What triggers the process?

- An oral or written request for an accommodation by an employee (does not need to refer to ADA, FEHA or use the phrase “reasonable accommodation”)
- “My wheelchair does not fit under my desk”
- “I have problems getting to work at my start time because of medical treatments I am undergoing”
- “I need time off to get treatment for a back problem”
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**What triggers the process?**

- A request is made or the employer otherwise learns of a request for accommodation from a third party (spouse, friend, doctor...)
  - Employee's wife calls telling the employer that employee had a medical emergency due to MS, is hospitalized, and therefore needs time off
  - Employee given restrictions related to W.Comp claim
  - Employer observes employee with an obvious disability having difficulty performing the essential functions of the job

**AMENDED REGS:**

- “Employee with a disability exhausts leave under WC/CFRA/FMLA and the employee’s healthcare provider indicates further leave is needed”

**In a “nutshell”**

- Whenever an employer knows or reasonably should have known that an employee may need assistance performing the essential job functions due to difficulties related to a physical, mental or medical condition – that triggers the start of the Interactive Process.
Six Steps of the Interactive Process

1. Identify the Essential Functions
2. Identify limitations and abilities
3. Brainstorm on accommodation ideas
4. Assess the options and make a decision
5. Implement the accommodation
6. Follow up regularly

Criteria for what is “Essential”

- EEOC and DFEH both offer guidance
- CA Code: “The fundamental job duties of the employment position”
- When to apply the criteria:
  1. Establishing job descriptions in your organization
  2. Conducting the Interactive Process and making decisions regarding accommodations
  3. Defending decisions already made

Essential Functions Criteria

- The position exists to perform the function
- There are a limited # of employees to perform the function
- The function is highly specialized and the person in the position is hired for his/her special expertise or ability to perform the function
- The employer’s judgment as to which functions are essential
- Based on business or operational necessity
- Written job descriptions include the function as essential
- The amount of time spent on the job performing the function
- The consequences of not performing the function
- Terms of collective bargaining agreement
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Obtaining the information you need

- Go back to “IP for dummies” – second half of that equation
  - DO have the right to get documentation that employee qualifies for protection under the law (UNLESS…disability is obvious or employee has already provided)
  - DO have a right to job-related limitations/restrictions
  - ALWAYS keep the focus on the job-related limitations and not the nature of the disability
  - AMENDED REGS: The employer must provide additional time for the employee to clarify the information if clarification is needed to assess the request

Routing requests for information

- BEST practice: route requests for information to the doctor through the employee
  - Provide employee with specific form and language
  - Express your intent to consider accommodations
  - Make clear what specific information is needed
  - Hold employee accountable
  - Do not insert yourself in the doctor-patient relationship

Requests for information

- “Our organization provides equal employment opportunities…”
- “Our goal is RTW”
- “Please provide us with what we need to engage in dialog with the employee about accommodations”
- First – ask about limitations
- Second – ask for accommodation ideas
Mental / “Intellectual” Disabilities

- Do not be afraid to seek clarification
- Be careful when asking questions
  - Focus on limitations and the effect of the impairment on the performance of essential functions

Step 3: Brainstorm for Accommodation Ideas

Let your good faith efforts shine!

- Do not be afraid to generate ideas, even if you have concerns that you might not be able to implement them
- The more ideas, the more you show you tried
- Great time to use resources – also shows good faith effort and generates more ideas
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Resources

• JAN – Job Accommodation Network
  www.askJAN.org
  • Searchable database of accommodation ideas sorted by impairment
  • “A to Z” of disabilities – “Accommodation and compliance series”
  • JAN “On Demand” (under “contact us”)

Resources

• Employer Assistance and Resource Network
  www.askEARN.org
  • EARN is a service of the National Employer Technical Assistance Center (NETAC) based at Cornell University’s Employment and Disability Institute, funded by the Office of Disability Employment Policy, U.S. Department of Labor
  • EARN’s vision is to increase employment and workplace inclusion for people with disabilities by engaging and empowering employers to be leaders in this effort.

Accommodation Ideas

• Job restructuring (move non-essential functions or how/when essential function performed)
• Leave / time off
• Flexible schedule / start time
• Ergonomic evaluation
• Telecommuting
• Assistive devices
• Modification of the workstation, tools, equipment
• Accessibility enhancements at the job site
• ETC, ETC, ETC

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Accommodation “Hot Spots”
- Leave / time off
- Conduct, performance, attendance, policy

Leave / Time off
- When is enough ENOUGH?
- Can be extremely effective/beneficial
- No bright lines
- Cannot “hide” behind policies
- Indefinite leave not required
  - Hanson v. Lucky Stores
- Paid leave not required (outside existing practices)
- Is providing more time an undue hardship?
- Is providing more time likely to result in RTW?

Leave / Time Off
- Length of Leave Considerations
  - Medical necessity
  - Difficulty replacing employee
  - Skill set of the position
  - Ease of redistribution of duties
  - Cost of temporary replacement
  - Resources of the employer
  - Time already provided v. duration expected
  - Likelihood employee can perform essential functions
FMLA Issues
- Must still comply with FMLA/CFRA statutes – if employee qualifies for protected leave
- Intermittent leave – OK under FMLA, but not required as “permanent accommodation”
- You are able to provide accommodations during protected leave time – can you deny continued FMLA leave?
- What about when protected leave expires?

Conduct /Performance Issues
- EEOC - “Applying Performance and Conduct Standards to Employees with Disabilities”
- Can apply same requirements for quantitative and qualitative performance
- Lowering production standard not required
- Not required to withdraw performance critique, disciplinary actions
- CANNOT withdraw an accommodation offer based on poor performance evaluation overall

Performance and disability
- DO set performance and conduct expectations
- DO maintain those standards
- DO NOT “overlook” conduct violations or performance deficiencies
- DO consider reasonable accommodations that would eliminate conduct violations / support successful performance
- Might need to “pause” disciplinary actions
Performance and disability

- Group discussion – Example #1:
  - Employee works for a home inspection company
  - It is a requirement of the job that the inspectors complete a set amount of inspections per time period
  - This employee has limitations that impact their ability to keep up with the required number of inspections
  - What issues should we consider?

Performance and disability

- Group discussion – Example #2:
  - Blood bank/sourcing company
  - Issues: forgetting to record temperatures, losing/forgetting thermometers
  - Employee informs employer they have been diagnosed with depression that contributes to memory loss
  - What now ??

Performance and disability

- Group discussion – Example #3:
  - Employee is a security guard
  - Employee was observed on camera striking a visitor entering the building. The visitor did not make any report of the incident nor is there any way to track the Visitor’s identity.
  - When addressed about the issue, the employee states that they have been diagnosed with bi-polar disorder and have had difficulties with medication adjustments and feel the incident was a result of their disability
  - What do you do?

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Step 4: Assess options & make decision

- Does the accommodation have to be the employee’s first (only?) choice?
  - Prepare a menu of options
  - Give preference of the employee primary consideration
  - Employer ultimately selects an effective accommodation
- Examples:
  - Employee with vision impairment
  - Motorized cart v. hand dolly
  - Help taking notes

Selecting the accommodation

- Undue Hardship
  - High threshold
  - Factors such as:
    - Prohibitive expense
    - Eliminates essential function
    - Unduly disruptive for operations
    - Overload of other employees (not manageable)
    - Alters fundamental nature of organization
    - Conflicts with terms of Collective Bargaining

“Direct threat”

- ADA “Direct threat”
- FEHA “Health and safety of employee or others”
- Can deny accommodation if employer can show that employee’s disability prevents him/her from performing the essential job duties without facing identifiable, substantial and immediate danger to his/her own health safety (or that of others) AND no reasonable accommodation exists that would remove this danger. (not speculative concerns about what might potentially happen down the road)
“Direct threat”
- Is the threat (of harm/injury)
  - Identifiable: what would happen?
  - Substantial: How serious?
  - Immediate: What is realistic time frame?
  - Probably: How likely is it to happen?

Ongoing Process
- Must go “back to the drawing board” if not immediately successful
- Adjust to variables that present during the process
- For Workers’ compensation claims
  - FEHA not limited to 30 or 60 day “one-time” process

Step 5: Implementation
- Have an ACTION PLAN
  - Who is responsible for actions?
  - In what time frame?
  - Who is the “gatekeeper”?
  - What triggers intervention when implementation not going as planned?
  - COMMUNICATE and DOCUMENT.
Still Going....
• “It ain’t over ‘til it’s over”

Step 6: Follow up
• At 30 days, 3 months, 6 months, 1 year
  + Was action plan followed to completion?
  + Does the work continue to be within the limitations?
  + Is the employee successful at performing the essential functions?
  + Changes in the work environment – what impact?

“Successful accommodation is a beginning, not an ending”

Conclusions & Questions
• Going through this is not always easy
• Celebrate your victories
• Keep it simple
• Point yourself in the right direction
• Rely on your available resources
• Keep a sense of humor/humility
• What would you want your employer to do for you?
Questions?

Thank you!!
Roberta Etcheverry
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A. Questions to help determine whether an employee has a disability.

For reasonable accommodation under FEHA, an employee has a disability if he or she has an impairment that limits one or more major life activities or a record of such impairment. The following questions may help determine whether an employee has a disability:

| Does the employee have a physical or mental impairment? | Yes □ | No □ |

B. Questions to help determine whether an accommodation is needed.

An employee with a disability is entitled to an accommodation only when the accommodation is needed because of the disability. The following questions may help determine whether the requested accommodation is needed because of the disability:

What limitation(s) is interfering with job performance? (please do not include diagnosis)

What job function(s) is the employee having trouble performing because of the limitation(s)?

How does the employee’s limitation(s) interfere with his/her ability to perform the job function(s)?
### C. Questions to help determine effective accommodation options.

If an employee has a disability and needs an accommodation because of the disability, the employer must provide a reasonable accommodation, unless the accommodation poses an undue hardship. The following questions may help determine effective accommodations:

<table>
<thead>
<tr>
<th>Question</th>
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<tbody>
<tr>
<td>Do you have any suggestions regarding possible accommodations to improve job performance?</td>
</tr>
<tr>
<td>If so, what are they?</td>
</tr>
<tr>
<td>How would your suggestions improve the employee's job performance?</td>
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</tbody>
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### D. Other questions or comments.

Medical Professional's Signature  
Date

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.