

**REDUCING THE RISK OF COSTLY  
DISABILITY DISCRIMINATION CLAIMS  
– RECOMMENDATIONS FOR  
EMPLOYER BEST PRACTICES**



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## INTRODUCTION

**Welcome!**

**Disability discrimination claims continue to be one of the most common FEHA/ADA claims. These cases, are costly for employers to defend and resolve, and often evolve from workers' compensation cases. Let's take a closer look...**

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# AGENDA



INTERRELATIONSHIP  
BETWEEN  
WORK COMP  
AND  
FEHA/ADA



KEY POINTS ON  
THE  
INTERACTIVE  
PROCESS



EMPLOYER  
BEST PRACTICES  
AND  
COMMON PITFALLS



WHAT TO EXPECT  
AND HOW TO  
RESPOND IF SUED  
FOR DISABILITY  
DISCRIMINATION

## INTERRELATIONSHIP BETWEEN WORK COMP AND FEHA/ADA

## DISTINCTIONS BETWEEN WORK COMP AND FEHA/ADA

- **Focus**
  - Can no longer perform essential job functions
  - Can perform essential job functions with an accommodation
- **Purpose**
  - Compensate for loss of ability to perform job functions
  - Ensure ability to compete in labor market
- **Rules**
- **Requirements**

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## HOW DO THE DIFFERENT LAWS DEFINE DISABILITY DISCRIMINATION?

- **FEHA/ADA**
  - Includes any adverse job action based on disability
  - Employees with disabilities cannot be treated differently
  - Motivating factors
- **WC**
  - 132(a)
    - Discrimination due to filing (or intends to file) a claim for compensation
  - Causal connection

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## WORKERS' COMPENSATION INSURANCE - NO FEHA/ADA COVERAGE

- The insurance carrier/TPA, and defense attorney:
  - **Only defend on** workers' compensation issues;
  - Employers cannot rely on the work comp carrier for employment law information or defense;
- WC laws have different standards than FEHA/ADA;
- Employers should consider obtaining EPLI coverage.

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## LIMITED INFORMATION REGARDING DISABILITY

- Under FEHA/ADA employer is only entitled to:
  - Work restrictions - **not** the medical diagnosis
  - From either:
    - Medical certification or
    - Employee's assertions
- Caution: WC medical reports provide information an employer is not entitled to and thus should not be provided to the employer.

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## DEFENSES TO A DISABILITY DISCRIMINATION CLAIM

- Undue hardship
- Direct threat
- Harris: Mixed motive good faith personnel action (in California)

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## KEY POINTS ON THE INTERACTIVE PROCESS

## HOW DO THE AMENDED FEHA REGULATIONS DEFINE INTERACTIVE PROCESS?

- **Timely, good faith communication between the employer and the applicant or employee;**
- **To explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job; and, if so,**
- **To explore how the person can be reasonably accommodated.**

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## WHO SHOULD PARTICIPATE?

- **Employer**
  - **Two representatives from human resources (designate a "note taker")**
  - **Consider presence of the employee's supervisor or manager**
  - **Employer's attorney**
- **Employee/applicant**
  - **Consider if requested:**
    - Employee's attorney/union representative**
    - Employee's family member**

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## DOCUMENTATION

- Document the interactive process—use an IP form;
- The IP form must be kept in a confidential manner similar to medical records;
- Identify the dates of each IP meeting;
- Document accommodations offered/considered, and alternative vacant positions offered/considered;
- WHY? Evidence and best practices for HR.

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## ACCOMMODATION OBLIGATIONS

- An employer is required to consider all reasonable accommodations.
- Offer/Implement the reasonable accommodation.
- However, employer does not have to implement reasonable accommodation that imposes an undue hardship - What is an undue hardship?
- What if there are multiple effective accommodations available?
  - Employee and employer disagree on which to implement.

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## PROVIDE ACCOMMODATIONS THAT ARE APPROPRIATE

- Job modification or adjustment
- **Effective** in enabling an applicant or employee with a disability:
  - To perform the essential functions of the job.
- Employer is not required to:
  - **Eliminate** an essential function as an accommodation,
  - **Lower** quality or quantity **standards** which are essential functions,
- JAN (Job Accommodation Network) is an excellent source for employers. (<https://askjan.org/>)

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## IF NO EFFECTIVE REASONABLE MODIFICATION IS POSSIBLE FOR THE CURRENT JOB MUST CONSIDER

- **Transfer to Vacant Position**
  - Must be qualified for the position, with or without reasonable accommodation;
  - Entitled to preference over other applicants for the position;
  - However new position does not need to be created;
  - Reassignment does not include promotion or bypassing a seniority system.
- **Leave of Absence**
  - May be a reasonable accommodation provided that the leave is:
    - Likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and
    - Does not create an undue hardship for the employer.
  - An employer is not required to provide an indefinite leave of absence as a reasonable accommodation.

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## EMPLOYER - BEST PRACTICES

### | PRACTICAL TIPS

- Agencies and courts are finding many medical conditions to constituted protected disabilities;
- To be safe - initiate the interactive process;
- 132(a) Claim - look for FEHA/ADA implications;
- All work comp stress claims –
  - Evaluate for FEHA/ADA implications.
  - Scrutinize claims that some form of harassment caused the stress.
  - Evaluate throughout WC case, as these issues often surface during discovery.

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## COORDINATION BETWEEN WC AND DISABILITY/LEAVE MANAGERS

- A denial of injury under WC does not eliminate FEHA/ADA obligations;
- Employers are always required to initiate the interactive process when appropriate;
- Recognizing ADA/FEHA disability triggers and properly addressing those information.

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## PROPERLY TRAIN SUPERVISORS AND MANAGERS

- Supervisors and managers must understand their role in implementing a reasonable accommodation.
  - Following-up to make sure the accommodation is effective;
- Train supervisors and managers on an employers obligations regarding the interactive process.
- Train supervisors and managers on recognizing potential ADA/FEHA disability concerns and what to do with the information.

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## MAINTAIN CURRENT AND ACCURATE JOB DESCRIPTIONS

- Vital to conducting the Interactive Process.
- Must be up-to-date.
- Must contain all essential functions of the job.
  - The position exists is to perform that function; or,
  - Limited number of employees available among whom the performance of that job function can be distributed; or,
  - The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function;
  - The amount of time spent on the job performing the function.
- Should also specify non-essential functions.

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## CONSULT WITH AN EMPLOYMENT LAW EXPERT

- Obtain legal advice on FEHA/ADA Interactive Process obligations from an employment law HR expert or attorney;
- **Always** consult an attorney before terminating any disabled employee.

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## CLAIMS ADJUSTER - BEST PRACTICES

- Avoid giving legal advice, on any employment law issue;
- Cooperate with counsel for the employer and HR personnel, as required;
- If the **employee's** legal counsel contacts you:
  - Do not provide any information;
  - Refer them to the employer/employer's counsel.

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## COMMON EMPLOYER PITFALLS

## INCORRECT ASSUMPTIONS

- **Workers' compensation covers everything.**
- **100% permanent workers' compensation disability precludes duty to accommodate / return to work.**
- **One interactive process consultation is sufficient to comply.**
- **Only employees suffering from a work-related injury must be accommodated.**

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## TERMINATION PITFALLS

- **Termination due to fear of another work comp injury;**
- **Termination if no RTW after expiration of mandated leave, as opposed to considering additional extended leave as an accommodation;**
- **Inflexible reliance on Company rules;**
- **Terminating employee when first accommodation is ineffective, without considering a different accommodation, or alternative vacant position.**

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## FAILURES IN DOCUMENTATION

- No documentation or limited notes;
- No summary or follow-up documentation;
- No signature or agreement of employee;
- Not documenting follow-up meetings;
- Inaccurate or outdated job descriptions;

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## IP IS AN ON-GOING PROCESS

### REMEMBER:

- to initiate the interactive process when needed;
- an internal employer review of how to proceed is not an interactive process;
- a perfunctory interactive process may not be an interactive process conducted in good faith;
- employers must fully explore all available accommodations and alternative vacant positions, if applicable.
- to follow-up as needed.

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## ADDITIONAL COMMON IP MISTAKES

- Failure to adequately explore alternative **vacant** positions;
- **Obstructing the process-** (e.g. not allowing family member to be present- requiring the employee to come into the workplace);
- Failure to consider employee's suggested reasonable accommodation.

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## WHAT TO EXPECT (AND DO) IF YOU ARE SUED FOR DISABILITY DISCRIMINATION



## WHAT TO EXPECT?

- RIGHT TO SUE NOTICE - WHAT IS THIS?
- DFEH/EEOC COMPLAINT
- PRIVATE LAWSUIT
- REQUESTED DAMAGES

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## WHAT TO DO?

- RETAIN EMPLOYMENT LAW COUNSEL
- NOTIFY EPLI CARRIER
- DOCUMENTATION AND WITNESS PREPARATION
- CONSIDER EARLY RESOLUTION OF LAWSUIT
- ARBITRATION VERSUS COURT TRIAL

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## CONCLUSION

### BEST PRACTICES FOR PREVENTING A DISABILITY DISCRIMINATION CLAIM

- Develop **compliant policies** for all applicable disability related laws including WC, FEHA, ADA, FMLA/CFRA and PDL;
- Work injuries **should trigger** FEHA/ADA **considerations** and compliance procedures;
- Coordinate and integrate FEHA/ADA and WC policy and procedures.

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