

**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 constitute 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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SPEAKER BIOS

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