

INTERACTIVE PROCESS/WORKERS' COMPENSATION AND EMPLOYER'S POTENTIAL EXPOSURE TO 132(a), ADA, AND FEHA CLAIMS

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Employers are seeing a rising trend of injured workers filing ADA (Americans with Disabilities Act), FEHA (Fair Employment and Housing Act), and 132(a) claims based on the employers failure to engage in the "interactive process" and/or provide "reasonable accommodation" when faced with an employee who claims disability from an industrial injury. The following information is designed to assist the employer in minimizing that risk.

Which employer's are covered?

CA Labor

Code 132(a)- Applies to all California Employers. Employee's compensation shall be increased by ½ but in no event more than \$10,000, together with costs and expenses not to exceed \$250, and said employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the discriminatory acts of the employer.

ADA - Only applies to employers who have fifteen or more employees.

FEHA - Applies to all California employers with five or more employees.

Protected Individuals:

Not all persons considered disabled for workers' compensation purposes will qualify as disabled under the ADA or the FEHA.

For purposes of 132(a) claims, a disabled person would be any employee who suffered a workers' compensation injury and has some permanent disability necessitating permanent work restrictions.

Under the ADA, "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. (42U.S.C. §12102(2)(A))

FEHA defines "physical disability" as an impairment that "(1) limits an individuals ability to participate in major life activities" and "mental disability" as "any disabling mental or psychological condition not specifically excluded by the FEHA." "Limits" now is defined under FEHA to mean "makes achievement of the major life activity difficult." Government code §12926(I)(k) and §12926.1(c). Further, the FEHA definition of disability is to be "broadly construed."

Interactive Process:

With the passage of AB 2222, effective January 1, 2001, it added a cause of action for the employer's failure to engage in the "interactive process" when dealing with a employee who has a "disability."

Definition of Interactive Process:

The interactive process is simply an interaction between the employer and a disabled employee to determine whether the employer can make a “**reasonable accommodation**” to the employee that would enable the employee or applicant to either perform the essential functions of their current job and/or whether a permanent modified job can be made available **without imposing an undue hardship on the employer.**

When is the interactive process required?

The interactive process generally will be triggered by a request from an employee or potential employee with a disability who asks for an accommodation as a result of said disability.

In the case of an injured employee who has filed a workers’ compensation claim, the interactive process is most often triggered when the applicant is declared “permanent and stationary” or has reached “maximum medical improvement” and the doctor has provided certain “permanent work restrictions.”

Engaging in the interactive process:

1. Make sure you have clear and precise work restrictions from the doctor.
2. Identify the essential job functions and whether, based on the applicant’s permanent work restrictions, the employee would be able to perform said functions.
3. Act quickly and meet with the employee as soon as is reasonably possible. If you have a comprehensive job description, that should be provided to and discussed with the employee.

4. In addition, for workers’ compensation claims, pursuant to Labor Code §4658(d), if the employer offers permanent regular, modified, or alternative work within sixty days of a disability becoming permanent and stationary, the applicant’s permanent disability is decreased by 15% for each payment due and owing from the date the offer was made. If regular, modified, or alternative work is not offered to the employee within sixty days of a disability becoming permanent and stationary, then each permanent disability payment remaining to be paid to the injured employee from the date of the end of the sixty day period shall be increased by 15%. (This applies to any employer that employs more than fifty employees).

Therefore, there is further incentive for acting quickly in offering permanent modified work as the disability payments owed by the employer will be reduced by 15% as soon as the offer is made.

Reasonable Accommodation:

The employer and the individual should work together to identify a “reasonable accommodation,” if possible.

A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or perform essential job functions. Examples of reasonable accommodation include making existing facilities used by the employees readily accessible to individuals with disabilities, restructuring a job, modifying a work schedule, acquiring or modifying equipment, or reassigning a current employee to a vacant position for which the individual is qualified.

Limitations on the obligation to make a reasonable accommodation:

1. The employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employer’s business. Undue hardship is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. The factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation. Undue hardship is determined on a case by case basis. When the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization will be considered. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

An employer is not required to reallocate essential functions of a job as a reasonable accommodation. The term “essential functions” refers to the “fundamental job duties of the employment position the individual with a disability holds or desires.” It does not include the marginal functions of the position. Written job descriptions prepared previously by an employer coupled with consideration of the amount of time spent performing the functions, can be considered evidence of the essential functions of the job. 42 U.S.C. §12111(8), 29C.F.R. §1630.2(n)(3).

Three recent cases dealing with reasonable accommodation include the *Raine v. City of Burbank* (California Court of Appeals, 2nd Appellate District, Case #

B180615, filed January 25, 2006) which held that an employer is not required under FEHA to make a temporary, light duty position permanent, *Williams v. Genetech* (Court of Appeals, 1st Appellate District, Division 5, filed May 9, 2006, Case # A110611) which held that reasonable accommodation does not require an employer to wait indefinitely for an employee’s medical condition to permit a return to the job formerly held, and *Dark v. Currey County* (9th Circuit, July 6, 2006) which held that in considering reassignment as a reasonable accommodation to a disabled employee, the employer must consider contemporaneously available positions and positions likely to become available within a reasonable period.

The most important thing to remember is to document the employee’s request for accommodation, the employee’s work restrictions, all efforts to determine possible accommodations and all communications with the employee. Be thorough and communicate with the employee at every step. Having employees sign all documents regarding the interactive process is also recommended.

Finally, it is always recommended that you consult legal counsel in order to minimize the employer risk if the employee is going to be terminated or other action that may adversely affect the employee is contemplated.