2024 EMPLOYMENT LAW Conference

Off to work we go!

The Challenges of Inconsistent Work Comp Work Restrictions and the Crossover Obligations between WC and FEHA/ADA

Fisher Phillips

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Welcome

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THE RIGHTS OF EMPLOYEES UNDER CA WORKERS' COMPENSATION AND THE REASONABLE ACCOMMODATION PROCESS – WHY IS IT IMPORTANT?

Because failure to accommodate both temporary and/or permanent work restrictions may result in benefits due to the employee under California's Workers' Compensation System.

WHAT ARE THESE BENEFITS AND WHEN ARE THEY TRIGGERED? GOING BACK TO BASICS!

The triggering of these benefits depends on whether the claims are:

- Denied Claims
- Accepted Claims

DENIED CLAIMS:

- When a claim is denied, it means *the claims administrator believes, in good faith, after conducting reasonable discovery, that the employee's injury or medical condition is not covered by workers' compensation*.

- Once the claim is denied in its entirety, no benefits are due. However, the potential of the benefits **can be accrued,** pending a full adjudication of the issues: injury, temporary disability, permanent disability, present and future medical care and a supplemental job displacement benefit.

ACCEPTED CLAIMS:

An accepted claim in California workers' compensation means that the insurance company has investigated the employee's claim for injury [partially or fully accepted] and found that it should be covered under their policy.

Once accepted the employee shall begin receiving benefits outlined by California law, which may include:

- medical expenses
- temporary or permanent disability benefits
- vocational rehabilitation
- supplemental job displacement benefits
- death benefits, if a person dies as a result of their workplace injury or illness.

GENERAL OVERVIEW OF REASONABLE ACCOMMODATIONS:

- In California, *it is unlawful for an employer to fail to engage in a timely, good faith, interactive process*. Most businesses in California have a duty to provide reasonable accommodations for their employees with known disabilities, unless doing so would cause the employer an undue hardship.

- The Americans With Disabilities Act (ADA) stipulates that an employer with over fifteen (15) employees must provide reasonable accommodations to a person with a disability, provided those accommodations do not result in an "undue hardship" on the employer.
- "Undue hardship" is a nebulous term, but it usually refers to any accommodation that is unreasonable, expensive, burdens other employees, or significantly impacts job performance.

GENERAL OVERVIEW OF REASONABLE ACCOMMODATIONS: Continued…

A *reasonable accommodation* is a change to an employee's job duties or work environment that can help give them the ability to perform the essential functions of the position. Common examples of accommodations include:

- Rearranging the employee's work space to make it accessible for people with disabilities.
- Permitting the employee time off to see a medical professional.
- Permitting an employee to work from home.
- Changing the time in which the duties of the employee's position must be completed.
- Allowing the employee to bring an assistive animal to the workplace.
- Modified work duties
- Transfer to vacant/open position to which Plaintiff is qualified for

GENERAL OVERVIEW OF REASONABLE ACCOMMODATIONS: Continued…

The following are examples of accommodations that are not generally considered "reasonable":

- Different supervisor (unless s/he is engaged in illegal/inappropriate behavior)
- Eliminating essential job function
- Excusing misconduct
- Creating a new position
- Lowering reasonable work expectations (quality or quantity of work)
- Indefinite leave

GENERAL OVERVIEW OF REASONABLE ACCOMMODATIONS: Continued…

There are, of course, many other types of accommodations to which an employee may have a right. The most appropriate type of accommodation will depend on the employee's specific situation.

Notably, the law protects employees and job applicants alike. It also prohibits California employers from discriminating against employees or applicants based on a disability or medical condition.

There are important caveats to these rules, you must be fully versed and aware of them and its applications when engaging in the reasonable accommodations process.

IMPORTANT: Reasonable accommodations must be conducted regardless whether the claim is accepted or denied or whether it is an industrial or non-industrial medical restriction. The only difference is the type of benefits that may be due to the employee.

MEDICAL OPINIONS IN THE CA WORKERS' COMPENSATION SYSTEM

- Primary Treating Physician (PTP)
- Secondary Treating Physician
- State Panel Qualified Medical Examiner (PQME)(s)
- Agreed Medical Examiner (AME)(s)
- Personal Primary Care Physician (PCP) – *Any accommodation non-industrial*
- There may be others.

Note: Navigating through different medical opinions to decipher the work restrictions can be complicated and tricky but it does not have to be. Discussed in detail below.

TYPES OF WORK RESTRICTIONS IN CA WORKERS' COMPENSATION SYSTEM THAT TRIGGER BENEFITS

- Temporary Modified work & Temporary Light Duty
- Permanent Work Restrictions

Note: each of the categories above carry a certain mandatory benefit due to the applicant if the employer is unable to accommodate. Discussed below.

WHAT IS TEMPORARY MODIFIED WORK & TEMPORARY LIGHT DUTY?

Light or modified duty is a temporary adjusted work assignment given to a worker injured on the job in order to accommodate his or her physical limitations while recovering from the injury. In workers' compensation cases, employees are expected to remain on the job if it is determined they can safely perform the modified duty.

Modified work or light duty is a job with the same employer with fewer physical demands. It allows an injured worker to keep working while he or she recovers from an injury.

AAM

WHAT IS TEMPORARY MODIFIED WORK & TEMPORARY LIGHT DUTY? Continued…

If the doctor says the employee is able to work, the report should describe:

- Clear and specific limits, if any, on the job tasks while the employee is recovering. These are called "work restrictions." They should be based on full and accurate information from the applicant and employer about the activities and demands of the job. They are intended to protect the applicant from further injury.

  Examples:

  No lifting over 50 pounds at any time.

  No lifting over 30 pounds more than 10 times per hour.

  No lifting over 30 pounds more than 15 minutes per hour.

- Changes needed, if any, in employee's schedule, assignments, equipment, or other working conditions while recovering.

  Example:

  Provide headset to avoid awkward positions of the head and neck.

NOTE: If the doctor reports that an employee cannot work at all while recovering, applicant cannot be returned to work.

MULTIPLE DUALING REPORTS, WHICH REPORT, IF ANY, CONTROLS AND/OR WHICH REPORT DO YOU COMPLY WITH?

Only a doctor can determine the physical ability of an injured worker. Only the employer can determine if there is a job for the injured worker, based on his or her physical ability.

Employers usually prefer that an injured worker keep working in some role. Sometimes employers will offer jobs that are considered busywork, just so that they can keep an injured worker on the job.

In the California Workers Compensation System, we are constantly dealing with various reports from various doctors who all have a role to play in the case in their respective specialty. This makes sorting through all the reports very overwhelming and complicated. ***LET'S UNDERSTAND THEIR ROLES.***

AS MENTIONED ABOVE, WE NORMALLY SEE SEVERAL DOCTORS IN ONE CASE PROVIDING MEDICAL OPINIONS THAT ARE OFTEN CONTRADICTORY. LET'S UNDERSTAND THEIR ROLES:

- Primary Treating Physician (PTP)
- Secondary Treating Physician
- State Panel Qualified Medical Examiner (PQME)(s)
- Agreed Medical Examiner (AME)(s)
- Personal Primary Care Physician (PCP)
- There may be others.

PRIMARY TREATING PHYSICIAN (PTP)

Once there is an injury, the **primary treating physician** will examine the injured worker and write **reports** on the injured worker's **condition**.

The reports comment on the injured worker's medical treatment, temporary disability status, and permanent disability status.

The doctor will also decide whether the injured worker has restrictions on his or her ability to work and includes the work restrictions in the report.

The work restrictions are sent to the employer to decide if there is work within the restrictions. If there is work, the injured worker will be required to do that work until the doctor changes the restrictions.

PRIMARY TREATING PHYSICIAN (PTP) Continued…

Pursuant to Labor Code Sec. 4600 the injured Employee is entitled to receive any and all immediate and adequate medical treatment necessary to cure or relieve the effects of the injury BUT only from an authorized medical treatment provider. Applicant must either make a Labor Code Sec. 4600 designation of the primary treating physician or, in an accepted claim, continue to treat with the primary treating physician elected by the employer.

California Code of Regulation Title 8 § 9785 specifically states in (a):

(1) The **"primary treating physician"** is the physician who is primarily responsible for managing the care of an employee, and who has examined the employee at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter. The primary treating physician is the physician selected by the employer, the employee ….

(4) "**Medical determination**" means, for the purpose of this section, a decision made by the primary treating physician regarding any and all medical issues necessary to determine the employee's eligibility for compensation. Such issues include but are not limited to the scope and extent of an employee's continuing medical treatment, the decision whether to release the employee from care, the point in time at which the employee has reached permanent and stationary status, and the necessity for future medical treatment.

PRIMARY TREATING PHYSICIAN (PTP) Continued…

California Code of Regulation Title 8 § 9785 specifically states in (b):

(1) An employee **shall have no more than one primary treating physician at a time**.

(2) An employee may designate a new primary treating physician of his or her choice pursuant to Labor Code §§ 4600 or 4600.3 provided the primary treating physician has determined that there is a need for:

(A) continuing medical treatment; or

(B) future medical treatment. The employee may designate a new primary treating physician to render future medical treatment either prior to or at the time such treatment becomes necessary.

(d) The primary treating physician shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation …

PRIMARY TREATING PHYSICIAN (PTP) Continued…

California Code of Regulation Title 8 § 9785 specifically states in (f):

A primary treating physician shall, unless good cause is shown, within 20 days report to the claim's administrator when any one or more of the following occurs:

(1) The employee's condition undergoes a previously unexpected significant change;

(2) There is any significant change in the treatment plan reported…

(3) **The employee's condition permits return to modified or regular work**;

(4) The employee's condition requires him or her to leave work, or requires changes in work restrictions or modifications;

(5) The employee is released from care;

PRIMARY TREATING PHYSICIAN (PTP) Continued…

(6) The primary treating physician concludes that the employee's permanent disability precludes, or is likely to preclude, the employee from engaging in the employee's usual occupation or the occupation in which the employee was engaged at the time of the injury;

(7) The claims administrator reasonably requests appropriate additional information that is necessary to administer the claim. “Necessary” information is that which directly affects the provision of compensation benefits as defined in Labor Code Section 3207.

(8) When continuing medical treatment is provided, **a progress report shall be made no later than forty-five days from the last report** of any type under this section even if no event described in paragraphs (1) to (7) has occurred. **If an examination has occurred, the report shall be signed and transmitted within 20 days of the examination.**

SECONDARY TREATERS

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California Code of Regulation Title 8 § 9785 in (a) specifically defines secondary treating physicians:

(2) A “secondary physician” is any physician other than the primary treating physician who examines or provides treatment to the employee, but is not primarily responsible for continuing management of the care of the employee.

SECONDARY TREATERS Continued…

California Code of Regulation Title 8 § 9785 specifically states in (e)

(3) Secondary physicians, physical therapists, and other health care providers to whom the employee is referred shall report to the primary treating physician in the manner required by the primary treating physician.

(4) The primary treating physician shall be responsible for obtaining all of the reports of secondary physicians and shall, unless good cause is shown, within 20 days of receipt of each report incorporate, or comment upon, the findings and opinions of the other physicians in the primary treating physician's report and submit all of the reports to the claims administrator.

SECONDARY TREATERS Continued…

NOTE: Secondary physicians can provide work restrictions, technically these reports are to be issued directly to the PTP, who is responsible for incorporating into a medical report and commenting on the secondary treating reports' opinion on work restrictions, Maximum Medical Improvement (MMI) status, etc.

Since the applicant can only have one primary treating physician, it is the primary treating physician's report that employers will need to review in the Workers' Compensation System to commence the reasonable accommodation process.

STATE PANEL QUALIFIED MEDICAL EXAMINERS (PQME) AND/OR AGREED MEDICAL EXAMINERS (AME)

California Code of Regulation Title 8 § 9785 specifically states in (b):

(3) If the employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute shall be resolved under the applicable procedures set forth at Labor Code sections 4060, 4061 4062, 4600.5, 4616.3, or 4616.4. If the employee objects to a decision made pursuant to Labor Code section 4610 to modify, delay, or deny a treatment recommendation, the dispute shall be resolved by independent medical review, pursuant to Labor Code section 4610.5, if applicable, or otherwise pursuant to Labor Code section 4062.

(4) If the claims administrator disputes a medical determination made by the primary treating physician, the dispute shall be resolved under the applicable procedures set forth in Labor Code sections 4060, 4061, 4062, and 4610.

This process in disputing the treating physician's report requires an objection to the report within the statutory requirements, and requesting a State Panel Qualified Medical Examiner list from the Medical Unit, if, in fact, the parties cannot agree to a physician as the Agreed Medical Examiner.

STATE PANEL QUALIFIED MEDICAL EXAMINER (PQME) VERSUS PRIMARY TREATING PHYSICIAN (PTP)

California Code of Regulations, Title 8, Section 10606, deals with physician reports as evidence. For our purposes, let us assume that all of the reports referenced conform to these requirements.

A Panel QME report when weighed against the report of the primary treating physician, the Appeals Board will follow the report considered most persuasive and found to be substantial medical evidence.

The Board has stated that "When faced with differing medical opinions from the Panel QME, the treating physician, and the utilization review physician on the issue of whether prescribed treatment is reasonably required to cure or relieve the effects of the employee's injury, the WCJ or Appeals Board need not rely on the opinion of a particular physician." (*Willette v. Au Electric Corp*) (2004) 69 CCC 1298, 1308 (Appeals Board en banc).

Some are under the misconception that once a party obtains a PQME report, the WCAB will favor that report. However, if a PTP report is better reasoned, a WCJ may very well follow the PTP report. It is important to remember that although there is no "treating doctor presumption," the treating doctor's report may still be relied upon in the face of a PQME.

WHAT DOES IT MEAN IF WE HAVE CONFLICTING REPORTS BETWEEN THE PTP VERSUS PQME? WHOSE REPORT DO YOU RELY UPON?

It means there is a medical dispute and the WCJ will ultimately decide.

For Example: PTP has the applicant back to work at usual and customary duties before reaching MMI status and the Panel QME has the applicant on work restrictions, which report do you follow?

From the California Workers' Compensation perspective, because there is no presumption between the two medical opinions and this is prior to the adjudication of issues before the WCAB, employers should always take the all-inclusive approach. This means, if the PTP finds the applicant is able to return to regular work, and the Panel QME returns the applicant to work with restrictions, the employer may consider placing the applicant off of work because there exists a dispute between two qualified professional medical opinions. We are not the trier of fact; therefore, we should not pick and choose which report we want to rely upon, and taking the all-inclusive approach presents a better safeguard. And the all-inclusive approach means applicant is off of work. Communicate with the employee that there are conflicting reports and both physicians' opinions are being considered and doing so you have chosen the safer path for the employee.

WHAT DOES IT MEAN IF WE HAVE CONFLICTING REPORTS BETWEEN THE PTP VERSUS PQME? WHOSE REPORT DO YOU RELY UPON?

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This is the safest approach that prevents further injury to the employee and mitigates exposure to the employer down the line. However, this may trigger commencement of Temporary Total Disability Benefits. At this time, you engage the claims examiner and or the defense attorney to request clarification from both physicians but, in the meantime, the employee remains off of work, as the reasonable accommodation.

In the case of multiple Panel QMEs in different specialties, you must be all inclusive and make an itemization of each doctor, specialty and restriction and the PTP opinion and determine if you can accommodate all restrictions combined, if not, then leave of absence is the reasonable accommodation.

WHAT DOES IT MEAN IF WE HAVE CONFLICTING REPORTS BETWEEN THE TREATING PHYSICIAN (PTP) VERSUS THE AGREED MEDICAL EXAMINER (AME)

It means there is a medical dispute and the WCJ will ultimately decide, but more likely on the AME Report.

For Example: PTP has the applicant back to work at usual and customary duties before reaching MMI and the AME has the applicant on work restrictions, which report do you follow?

When the parties agree on a doctor to resolve the issues in dispute, the doctor is called an Agreed Medical Examiner. Because both parties agreed to use the particular physician, it is a forgone conclusion that both parties agree to be bound by the medical opinions, diagnosis, and reasoning of that agreed upon doctor. Because of this, as a general rule, the WCAB and the WCJ are required to rely more heavily on the reporting of an Agreed Medical Examiner.

WHAT DOES IT MEAN IF WE HAVE CONFLICTING REPORTS BETWEEN THE TREATING PHYSICIAN (PTP) VERSUS AGREED MEDICAL EXAMINER (AME) Continued…

In *Power v. WCAB*, the Board reversed a decision where the WCJ had given more weight to the Primary Treating Physician's report than to the AME's. The Board indicated, "We begin by presuming that the agreed medical examiner has been chosen by the parties because of his expertise and neutrality. Therefore, his opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive." (*Power v. WCAB*) (1986) 51 CCC 114, 117. The Court of Appeals upheld the decision by the Board to reverse the original ruling.

From a California Workers' Compensation perspective, AMEs are given great weight by Judges; historically you are safe to rely on the AME report as it relates to work restrictions, however, if an employer believes that the AME has it wrong, have your attorney object to the report and schedule the deposition or request clarification from the AME while you have the applicant off of work as the reasonable accommodation and Temporary Total Disability Benefits are being provided, if due.

TAKE AWAY 

Unless clear, be all inclusive when considering temporary work restrictions of medical opinions between PTP versus PQME.

Unless clear, give more weight to an AME report versus a PTP report, unless there is good cause to challenge the AME report, which will require a timely objection from claims and/or the defense counsel, and request clarification.

TEMPORARY MODIFIED WORK & TEMPORARY LIGHT DUTY CANNOT BE ACCOMMODATED, WHAT'S NEXT?

If there is no modified work or light duty available, an employee on an accepted claim shall immediately start receiving temporary disability benefits for his or her lost wages within statutory limits (i.e. 104 weeks) or until the employee reaches Medical Maximum Improvement (MMI) or Permanent and Stationary (P&S).

The employee remains an employee and should not be terminated unless you seek legal counsel versed in employment law [ADA & FEHA] to address the specifics of the case and the employer's need to terminate. Unlawful termination can give rise to a Labor Code Section 132a cause, and outside the Workers' Compensation Jurisdiction to ADA, FEHA, etc. violations.

NOTE: An employee who is offered modified work or light duty but refuses it, will not receive temporary disability benefits for the time he or she is not working.

SIDE NOTE: The 2024 minimum and maximum temporary total disability (TTD) rates will not change. The minimum TTD rate will remain $242.86 and the maximum TTD rate will remain $1,619.15 per week.

MMI / PERMANENT WORK RESTRICTIONS WHAT'S NEXT?

Severe or persistent injuries take months of rehabilitative therapy to heal and there is a **point where further treatment results in no additional improvement** of the condition. When an injured work is evaluated as 'permanent and stationary,' it means that the treating physician's medical opinion is that the condition is stable and likely permanent. In the state of California, a designation of 'permanent and stationary' is often called 'maximum medical improvement (MMI).

Permanent work restrictions are limitations placed on an employee's ability to perform certain tasks due to a work-related injury or illness. These restrictions are determined by a medical professional and are intended to protect the employee from further injury or harm.

For employees, permanent work restrictions mean that they may not be able to perform certain tasks that they were able to do before their injury or illness.

PERMANENT WORK RESTRICTIONS

Permanent work restriction refers to workers' inability to perform tasks permanently due to their bodily conditions. The assessment of modified work on a permanent basis is different than modified work on a temporary basis.

For employers, permanent work restrictions mean that they may need to commence the reasonable accommodation process to determine if the permanent work restrictions can be accommodated. These accommodations may include modified job duties, additional training, or the use of assistive devices.

ACCOMMODATING PERMANENT WORK RESTRICTIONS

In California, an employer or claims administrator must provide Notice of Offer of Work within 60 days of receiving the Physician's Report.

The accommodation of permanent work restrictions must meet certain requirements:

For Dates of Injury After January 1, 2013:

1. Meets the work restrictions in the physician's report.
2. Offer of permanent modified work must last at least 12 months.
3. It is within a reasonable commuting distance from where applicant lived when injured.

ACCOMMODATING PERMANENT WORK RESTRICTIONS Continued…

(4) The offer could involve one of the following opportunities:

- Regular work—what the employee was doing at the time of the injury, complete with the same pay and benefits.
- Modified work— "regular" job but with restrictions, as outlined by the physician. The pay and benefits must be at least 85 percent of what was received at the time of injury.
- Alternative work—a different type of job, but one that meets the physician's work restrictions. The pay and benefits must be at least 85 percent of what was received at the time of injury.

If unable to accommodate benefits due:

- Permanent disability advances commence
- Supplemental Job Displacement Voucher is issued for $6,000.00

ACCOMMODATING PERMANENT WORK RESTRICTIONS Continued…

From Dates of Injury from 2004 through 2012:

Meet the work restrictions in the physician's report.

1. Lasts at least 12 months.
2. Pays at least 85 percent of the wages and benefits received at the time of injury.
3. Is within a reasonable commuting distance from where employee lived when injured.
4. That offer could involve one of the following two opportunities:
    a. Modified work— "regular" job but with restrictions as outlined by physician.
    b. Alternative work—a different type of job, but one that meets the physician's work restrictions.

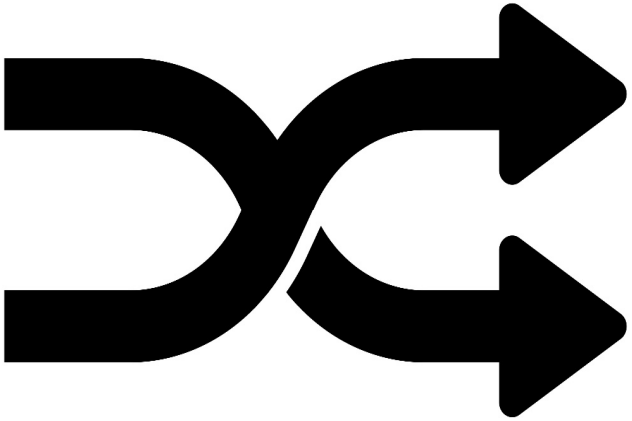
If unable to accommodate benefits due:

- Permanent disability advances commence.
- Supplemental Job Displacement Voucher is issued that ranges in amount from $4,000 to $10,000 depending on the permanent disability level.

TAKE AWAY

Unless clear, be all inclusive when considering permanent work restrictions of medical opinions between PTP versus PQME.

Unless clear, give more weight to an AME report versus a PTP report unless there is good cause to challenge the AME report, which will require a timely objection from claims and/or defense counsel and request for clarification.



CROSSOVER OBLIGATIONS BETWEEN WC and FEHA/ADA: FEHA REQUIREMENTS TO PROVIDE MODIFIED WORK

The workers' compensation scheme and FEHA often use different terms to describe the same concepts. Workers' compensation refers to "modified work." FEHA refers to "reasonable accommodations."

Simply put, however, the rule is that if an employer can "accommodate" an employee's disability, without it being cost-prohibitive, the employer is required to do so. This includes providing mechanical or personnel assistance, modifying hours, or even modifying job duties.

AMERICANS WITH DISABILITIES ACT("ADA") / FAIR EMPLOYMENT AND HOUSING ACT ("FEHA")

- The ADA / FEHA require employers to provide a reasonable accommodation to ***qualified individuals*** with ***disabilities***, unless doing so would cause an ***undue hardship***.
- There are similar accommodation requirements for **religion, pregnancy, lactation, domestic violence, stalking, and sex offenses.**
- There is no "one size fits all" reasonable accommodation. Employers can choose whatever reasonable accommodation they like, so long as it is effective. While an employee cannot be forced to accept a reasonable accommodation, the employee can be terminated if the employee cannot perform essential job functions without the accommodation.

WHAT IS A "DISABILITY" FOR THE PURPOSES OF FEHA?

To suffer a "disability," the employee must have a "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that affects a body system AND limits a major life activity. (See Govt. Code § 12926(k).)

FEHA broadly interprets this to include "physical, mental, and social activities and working." (See Govt. Code § 12926(k).) FEHA expressly includes "working" as a major life activity. (See Govt. Code §§ 12926(i)(1)(C); 12926(k)(1)(B)(iii).)

Finally, the condition must be *permanent*. Temporary ailments are not "disabilities" under FEHA. (See Govt. Code § 12926.1, defining disabilities as "chronic" or "episodic.") The permanence of the limitation is important in the context of workplace injuries, because the workers' compensation law uses the word "disability" in several different contexts. For instance, in the workers' compensation system the phrase "temporary disability" is used to describe the period of time an employee is recovering from a work-related injury. Although the word disability is used, it is not referring to the same standard of "disability" as is used in FEHA. Under FEHA, the employee either has a "disability" (i.e. permanent limitation) or not.

HOW TO HANDLE A REASONABLE ACCOMMODATION

Employers must enter into the interactive process with the employee when the employee requests an accommodation to determine what action should be taken.

Engaging in the interactive process is mandatory. The duty is triggered when an employee, or an employee's representative, gives notice of the employee's disability and the desire for an accommodation, **or when the employer otherwise learns of the employee's need for an accommodation.**

Employers should start the interactive process even if the employee did not specifically mention the ADA/ FEHA or state that the employee needs an accommodation.

Supervisors should be vigilant and recognize when engaging in the interactive process is necessary.

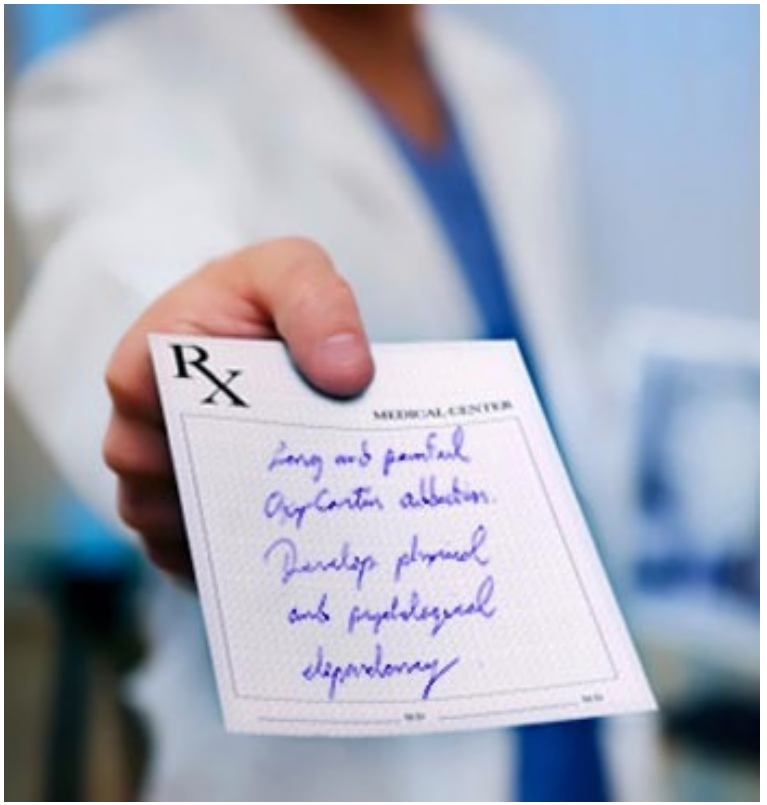
AD

HOW TO HANDLE A REASONABLE ACCOMMODATION

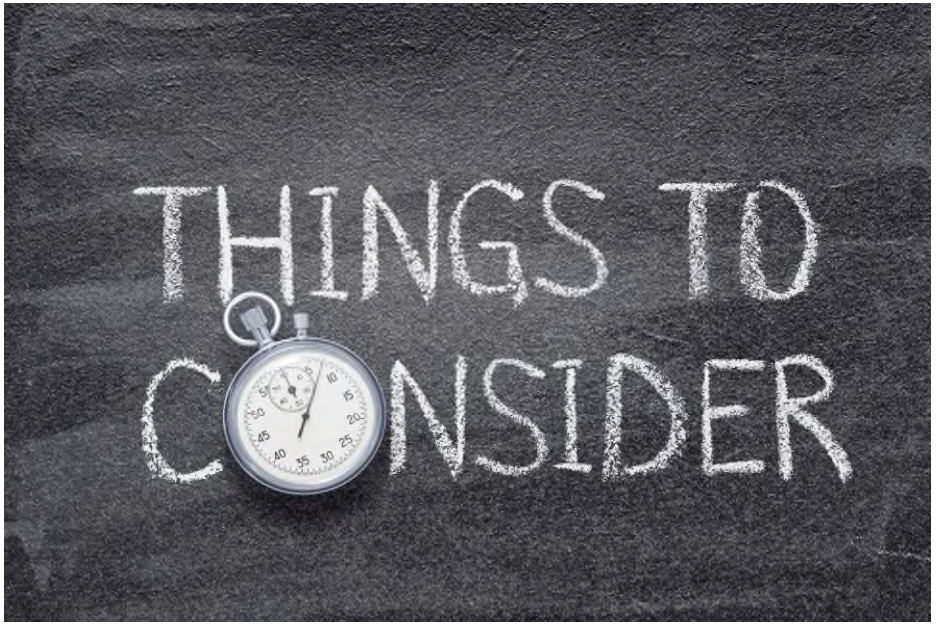
- The request for an accommodation need not be formal. The words "accommodation" or "reasonable" need not be included in the conversation.
- Sometimes the need for accommodation is alluded to during ordinary workplace conversations; notes from a healthcare provider that excuses absences for a medical reason or places restrictions on an individual's ability to perform certain job tasks; calls from a spouse or caregiver.
- In many situations, there is no clear sign, no flashing light, indicating that the ADA/FEHA is triggered. This is why it's important for management staff to recognize the flags.
- ***NOTE: An employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer.***

POTENTIAL SIGNS FOR NEED OF AN ACCOMMODATION

- An employee indicates that a medical condition is causing a work-related problem.
- An employee requests days off work due to medical reasons.
- An employee notes their child is suffering from a condition that does not permit them to work a certain shift.
- An employee provides a doctor's note containing work restrictions.
- An employee informs you they have trouble standing due to their pregnancy.
- An employee mentions they cannot work on Fridays after sundown due to religious reasons.



QUESTIONS TO CONSIDER IN DETERMINING WHETHER AN ACCOMMODATION IS BEING REQUESTED



- Is the employee talking about some type of medical condition that is impacting his or her work?
- Has the employee mentioned some sort of physical/intellectual/psychiatric challenge that is impacting his or her work?
- Is the person requesting an adjustment or change to the workplace?
- Has the employee openly disclosed a disability or medical condition?
- Has the employee stated that he or she needs assistance performing a job function?
- Has the employee's family member, friend, coworker, or health professional requested an accommodation on behalf of the person who is known to have a disability?

ACCOMMODATIONS DO'S

- Thank the employee for letting you know.
- Avoid asking for medical details (such as medications, the presence of disabilities, the outlook for a medical condition, etc.)
- Advise the employee of next steps
  - "I will report your request to Human Resources and they will be in contact with you."
- Refer the employee to the reasonable accommodation policy contained in the Handbook.
- **Immediately report the request for an accommodation to Human Resources**.
- Document your conversation.
- **Limit the sharing of medical information**. Employee medical information and/or accommodations ***should be shared with only those who are considered to be on a need-to-know basis***.
- Communicate respectfully and interact positively with employees who have or request accommodations.

ACCOMMODATIONS – DON'TS

- Don't ask medical or disability related questions.
  - HIPAA concerns/privacy in medical records.
- Do not promise any accommodations.
- Do not pass any judgment or opinion regarding the requested accommodation.
- Do not change the way you treat the employee.
- Do not eliminate an essential job function or duty for an employee if not instructed to do so by HR.
- Do not express opinions about an employee's mental, emotional, or physical health.

ACCOMMODATIONS – DON'TS

- **Do not tell other employees or anyone that is not on a need-to-know basis about other employees' accommodations, protected leave, or medical conditions.**
- Supervisors and managers *often* do not need to know an employee's specific medical impairment to implement accommodations. Details about the accommodation may be all that is needed.
- Don't perpetuate or tolerate harassment.
- Refrain from making negative or derogatory remarks in response to an accommodation request or questions from co-workers about accommodations.

HYPOTHETICAL

Patricia tells her supervisor she would like a new chair because her present one is uncomfortable. Is this a request for a reasonable accommodation?

HYPOTHETICAL

Francesca, who has arrived to work late several times in the past month, is counseled regarding attendance. In response, she states, "I'm having difficulty getting to work on-time because of the side effects of medication I'm taking for a recently diagnosed medical condition."

(1) Has Francesca requested an accommodation? Why or why not?

(2) What should you do?

THE DUTY TO PROVIDE REASONABLE ACCOMMODATION CONTINUED…

An employee will prevail on a claim against an employer for failing to reasonably accommodate, unless the employer can establish:

(1) reasonable accommodation was offered and refused;

(2) there was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or

(3) the employer did everything in its power to find a reasonable accommodation, but the informal, interactive process broke down because the employee failed to engage in discussions in good faith. (Jensen *v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245.)

THE DUTY TO PROVIDE REASONABLE ACCOMMODATION CONTINUED…

NOTE: The employee is not required to explicitly state that an "accommodation" is required. There are no "magic and required buzzwords."

An employee's request for a reasonable accommodation may use plain English and need not mention the ADA or use the phrase reasonable accommodation; both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process. (Rowe *v. City & County of San Francisco* (N.D.Cal. 2002) 186 F.Supp.2d 1047.)

NOTE: An employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer.

THE DUTY TO PROVIDE REASONABLE ACCOMMODATION – UNDUE HARDSHIP DEFINED

The only basis on which an accommodation might be denied is if it constitutes an "undue hardship" *to the employer*.

'Undue hardship' means an action requiring significant difficulty or expense." (Govt. Code § 12926(s).)

The burden is on the employer to show undue hardship, and a failure by an employer-defendant to show that accommodations sought would constitute undue hardship leads to liability for failure to accommodate.

(Ackerman *v. Western Elec. Co., Inc*. (N.D.Cal.1986) 643 F.Supp. 836; see also *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344.)

GOOD FAITH INTERACTIVE PROCESS

The basic process of providing accommodations is simple: the employer and the employee engage in an open exchange of information designed to collaboratively arrive at a reasonable accommodation.

The employer must engage in a good faith interactive process *to seek out accommodations*. (*Barnett v. U.S. Air, Inc.* (9thCir.2000) 228 F.3d 1105.)

Another court has described the process:

[C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. *A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith*. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility…. (*Beck v. University of Wisconsin Bd. of Regents*(7th Cir., 1996) 75 F.3d 1130, 1135-1136.)

INTERACTIVE PROCESS

- When to Initiate? When the employee's disability is known or apparent.
  - Employee requests an accommodation.
  - Employee presents doctor's note with work restrictions.
  - Employee exhausts leave entitlement (e.g., PDL, workers' comp.)
  - Employer otherwise becomes aware of the need for accommodation through third party or observation.

INTERACTIVE PROCESS-FIVE BASIC STEPS TO "SHOW YOUR WORK"

- Step 1: Upon receipt of employee's request or other notice of a potential need for a reasonable accommodation, the Company should provide written communication inviting/opening an interactive process. The communication should include a summary of the reason for initiating interactive process, request meeting, and give employee reasonable time to respond.

- Step 2: Before meeting with the employee, the Company should determine essential functions of the position, and prepare/update the written job description

- Step 3: The Company and the employee should participate in an initial meeting: (1) get agreement on essential functions of the position; (2) explore/understand employee's requested accommodation(s); (3) request medical certification to support need for accommodation, if appropriate; and (4) send confirming communication to employee summarizing the meeting.
- Step 4: Both the employee and the Company are responsible to identify other/all potential reasonable accommodations, and continue communications regarding other potential reasonable accommodations.
- Step 5: Repeat as needed. If first accommodation does not work, the Company and the employee should consider other possible accommodations.

INTERACTIVE PROCESS

- Avoid unprofessional comments in written communications, including emails.
- NEVER make a unilateral decision based on your assumptions.
- Remain open-minded and consider all reasonable alternatives.
- Maintain communication.
- Do not drop the ball.

EMPLOYMENT LITIGATION AND POTENTIAL EXPOSURE

- In a recent case with similar claims, the California court of appeal upheld a jury verdict of $1,200,000 in damages for disability discrimination, failure to engage in the interactive process, and failure to prevent discrimination. The court also upheld the jury's verdict in favor of the employer on plaintiff's claims for failure to provide reasonable accommodation and retaliation.
- Plaintiff's counsel award of $870,000.00 in fees and costs was upheld on appeal.
- On August 24, 2023, a jury awarded $9,461,000 in damages in a failure to engage in the interactive process and failure to provide reasonable accommodations case, where the company eliminated the plaintiff's position and terminated employment after receiving the plaintiff's accommodations request, as opposed to attempting to relocate him or place him in contact with the company's talent acquisition team to explore open positions.
- A jury awarded $544,505.00 in damages in a failure to provide reasonable accommodations case, where the company conducted a flawed assessment and determined the plaintiff could not work within her restrictions and terminated her employment without offering reassignment or engaging in an interactive process to determine effective reasonable accommodations.

EMPLOYMENT LITIGATION IN CALIFORNIA – BE MINDFUL

- Communications between HR and operations are discoverable.
- Communications between HR, operations, risk/safety are discoverable.
- Communications between the Company and its workers' compensation carrier/third party administrator are discoverable.

BEST PRACTICES REGARDING REASONABLE ACCOMMODATION PROCESS

- An employer should focus on engaging in an interactive process and providing reasonable accommodations.
- Be patient with the process and think broadly about possible accommodations.
- Get agreement from the employee regarding job duties.
- Get employee input.
- Document meetings, process, and decisions.

TAKE AWAY / CONCLUSION:

The requirement of having an open discussion is often where employers run afoul of the law, particularly in work-place injury cases when attempting to apply workers' compensation rules in the FEHA context. In particular, under workers' compensation the employer only has unlimited time to offer temporary modified duty but under FEHA, it must be a permanent position, because of the very nature of the duty to provide accommodations.

Though in some circumstances accommodations may only need to be temporary, FEHA itself assumes they may need to be permanent, in that it assumes a permanent disability. (See Govt. Code § 12926.1, cited above.) Therefore, when accommodating temporary work restrictions, employers need to be made sure they are reviewing every work status report every 45 days to determine if work restrictions can be accommodated as the company is capable to do so as long as it is not an undue hardship.

EXAMPLE:

Real Facts: Employee, a truck driver for a bottling company, is injured on the job, resulting in a permanent knee injury. He can still drive, but can't load or unload. In an attempt to find him "modified duty" under the workers' compensation rules, he is allowed to drive only those loads which are unloaded by the recipient, and is given various clerical and clean-up duties to make up whatever time is left over. He then gets a letter from the employer, stating:

> You have utilized your full 90 days of transitional duty effective Friday, January 5th. Your last transitional day of work will be Monday, January 22, 2001. Should you be released to full duty, you may return to work the next day. If you have any questions regarding your workers' compensation benefits, please contact me.

What's wrong with this?

EXAMPLE:

Because the injury was on the job, the matter was being handled by the workers' compensation department. The employer's workers' compensation department did everything it was supposed to do – as far as it knew.

What it didn't know was just how badly it was botching the matter in terms of FEHA disability requirements to reasonably accommodate the disabled employee.

The workers' compensation department did not realize there was a duty to:

1) accommodate beyond 90 days in the first place,
2) discuss means of providing accommodations, and
3) provide any accommodations if possible.

<u>It is a clear case of the employer confusing the workers' compensation system and the FEHA requirements.</u>

QUESTIONS?

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Off to work we go!

THANK YOU

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