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# The Disability Interactive Process

Small Cities Organized Risk Effort—Joint Powers  
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# What Is The Disability Interactive Process?

- The requirement that employer promptly communicate with a disabled employee or applicant to explore:
  - Whether reasonable accommodation is needed to allow an individual with a disability to perform essential job functions;
- The process is ongoing!



# What Are the Relevant Laws?

- Federal
  - Americans with Disabilities Act (ADA)
  - Family and Medical Leave Act (FMLA)
  - Genetic Information Non Discrimination Act (GINA)



# What Are the Relevant Laws?

- State
  - Fair Employment and Housing Act (FEHA)
    - DFEH Regulations regarding Disability Discrimination and Interactive Process
  - California Family Rights Act (CFRA)
    - Pregnancy Disability Act
  - Public Employees' Retirement System Laws



# Disability Laws Apply to the Entire Range of “Employment”

- Hiring process
- Job assignments
- Benefits
- Employer – Sponsored activities
- Policy making



# Definitions of “Disability”



# What Is a Disability Under the ADA?

- Mental or physical condition
- Substantially limits a major life activity
- Ignore mitigating measures
- Even if impairment is episodic or in remission



# What Is a Disability Under the FEHA?

- Mental or physical condition
- Limits a major life activity
  - “limits” = “makes it more difficult”
  - Ignore mitigating measures when determining whether “limits”
- Temporary conditions are not excluded (so assume they are included)





# What Is a Major Life Activity

- Quote from regulations under FEHA:  
‘Major life activities’ shall be construed broadly and include physical, mental and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.”

– 2 Code of California Regulations 11065(I).



# Major Life Activity - Examples

- Major life activities include but are not limited to:
  - Standing, sitting, reaching, lifting, bending
  - Learning, reading, concentrating, thinking, working
  - Communicating, and interacting with others
  - Operation of bodily functions
  - Caring for oneself

**Is the Employee or Applicant Qualified  
for the Position?**



# Qualified Individual With a Disability

- An employee or applicant who:
  - Has the prerequisites and qualifications for the position
    - Education, skill, licenses, & job-related requirements
  - Can perform essential functions with or without reasonable accommodations



# What Are the Essential Functions?

- Several factors to consider:
  - Does the position exist to perform a particular function?
  - Are other employees available to perform function?
  - Degree of expertise or skill required to perform function?



# True, False or Maybe?

The essential functions of a position consist of whatever functions are described in the job description as essential functions.



# Evidence of Essential Job Functions

- Accurate, current written job descriptions
- What incumbents are actually doing
- Job functions described in an MOU
- Time spent performing the function
- Consequences of not requiring the function
- Employer's judgment
- Reference to the function in evaluations



# Is Job Description Accurate?

- Update job descriptions to include all essential functions
- Consequence of inaccurate job descriptions:
  - Inaccurate job description will not enable a fitness-for-duty exam doctor to understand essential functions.





# Beginning the Interactive Process



# What Triggers the Interactive Process?

- Employee/applicant requests accommodation
- Employer observes employee having difficulty performing essential functions of job & suspects disability is the cause
- Existing accommodation appears ineffective
- Periodic check-ins about existing accommodations
- Employee has exhausted workers' comp or family leaves



# Interactive Process Triggered

Process has been triggered. Now what?

1. Employer obtains/reviews doctor's note containing requested accommodations
2. Employer and employee meet to discuss requested accommodations and determine whether they are reasonable
3. Employer informs employee whether it will provide the accommodation



# Information Needed from Doctor

- Once the interactive process begins, employer needs enough information—from a health care provider—about the disability and requested accommodation in order to evaluate:
  - Whether the employee/applicant is a “qualified individual with a disability”
  - Whether the requested accommodation is reasonable

# Obtaining Info from Doctor

- How does employer get a medical note from a doctor?
  - Either employee brings a note from her own doctor;  
**OR**
  - Employer sends employee for a fitness for duty exam with a doctor employer retains
- There are pros and cons to each option

# Contents of Doctor's Note

- Whether employee has a disability
  - NOT what the disability is
- Whether employee can perform essential functions of job with/without accommodation
- What accommodation(s) doctor recommends
- Whether employee is a danger to self or others



# Fitness-for-Duty Exam

- Provide doctor with:
  - Detailed job description
  - List of essential functions
- Seek functional limitations and potential accommodations only
  - Do not request medical history, diagnosis, or treatment plan
  - See sample doctor's letter in appendix



# True, False or Maybe

Albert requests an accommodation for his disability. He provides a short letter from Dr. Cho, his regular doctor, which states only that Albert needs an accommodation. The City does not feel that Dr. Cho has provided enough information and therefore may request that Dr. Cho send all medical information about Albert to the Human Resources Department.





# True, False or Maybe

The City plans to send Tara to Dr. Lopez for a fitness for duty exam, based on some bizarre behavior she has engaged in at work. Recently, Tara's treating physician sent the City a note stating that Tara "has a disability that needs to be accommodated." When the City followed up with Tara's treating physician for more information, he refused to provide any further information.

The City may describe for Dr. Lopez the behavior by Tara that is causing the concern about fitness for duty, but may not provide Dr. Lopez with the treating physician's note because it contains confidential medical information.



# What if Doctor Gives You TMI?

Q. What if fitness for duty doctor goes beyond scope of your requested information, and tells you, for example, what employee's disability is and what the treatment plan is?



# The Interactive Process Meeting(s) with Employee



# IP Meeting - Guidelines

Be creative and flexible – process counts!

- Schedule meeting at convenient time
  - Consider meeting by phone if employee unable to meet in person
  - Employee's inability to participate is not a breakdown in process
- Meet more than once, as necessary
  - Continuing obligation
  - Condition may change



# IP Meeting - Participants

- Employee/applicant
- Employee's union representative if the employee requests that
- HR person AND a manager **who has a detailed understanding of employee's duties**



# IP Meeting - Preparation

Before the meeting, HR and manager should discuss requested accommodations and develop an initial sense of how manageable it would be to provide them.

In some cases, you may need legal advice before the IP meeting.



# Interactive Process-Guidelines

- Consider everything
  - Preferences of employee
  - Recommendations of doctors
  - Input of family members and other representatives (if offered by employee)
- Create detailed record
  - Consider tape recording
  - Take notes
  - Prepare written summary to document agency's good faith



# What Is a Reasonable Accommodation?

- Elastic standard. Not a bright line definition
  - Any change in the work environment or in the way things are usually done that results in an equal employment opportunity and allows an individual with a disability to perform the essential functions of the job
  - It does NOT need to be inexpensive



# Examples of Reasonable Accommodations

- Modifying Workplace policy
- Reassigning some duties to other employees
- Making facilities accessible
- Job restructuring
- Modified work schedules
- Reassignment to a vacant position
  - Preferential consideration unless seniority system
- Paid or unpaid leaves of limited duration
- Allowing use of an “assistive animal”



# Teleworking during COVID-19: Reasonable Accommodation?

- The EEOC and DFEH Guidance both state that employers should consider telework as a reasonable accommodation during the pandemic
- **May** include persons at increased risk of severe illness under CDC guidelines
- Obligation to accommodate only triggered if employee has a “disability”

# What Is Not a Reasonable Accommodation?

- Creating a new position
- Transforming a temporary light duty position into a permanent one
- Lowering quality and quantity of work standards as an accommodation
- Offering a temporary job



# After the IP Meeting

- Consider employee's preference (but ultimately employer has the right to choose the accommodation)
- Decide whether to grant the accommodation and communicate that back to employee in writing.
  - In some situations, this decision can't be made after the IP meeting, because more information needs to be gathered/evaluated

# If Employee Cannot Be Reasonably Accommodated

- Decision to deny accommodation must be supported by specific, legitimate reasons
- Termination – follow due process procedures
- Disability retirement
  - Determination required prior to termination if employee has five or more years of service



# Due Process Considerations

- Employees with property interest must receive pre- and post-separation due process
- At-will employees must receive written notice of reasons supporting inability to accommodate
- Critical to prove that the release was NOT because of disability, but instead because of inability to accommodate



# Separation of Disabled Employee

- Is employee eligible for retirement?
  - Service
  - Disability
- Agency must receive determination before separation



# Employer Defenses to Disability Discrimination Claims





# Defenses – Direct Threat

- Direct threat to self or others
  - Factors
    - Duration of the risk
    - Nature and severity of the potential harm
      - Must be “significant”
    - Likelihood that potential harm will occur
    - Imminence of potential harm
    - Relevant information from employee’s past work history
- Rely on objective facts



# Defenses – Undue Hardship

- Undue hardship
- Very difficult burden for public employers
- Factors
  - Nature and cost of accommodation
  - Overall financial resources of employer
  - Number of employees impacted by accommodation
  - Terms of collective bargaining agreement



# Thank you!

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