

ACCOMMODATION & THE INTERACTIVE PROCESS UNDER THE FEHA

California State and Federal laws define the “interactive process” as an on-going communication between the employer and the applicant or employee with a known disability in an effort to provide reasonable accommodation.

It is unlawful for employers to fail to engage in a timely, good faith, interactive process whether or not the interactive process would have resulted in an obligation to provide a reasonable accommodation.

State and Federal Law require that an employer provide reasonable accommodation for qualified applicants and employees who, because of their disability, are unable to perform the essential functions of their job.

I. HISTORY & PROCEDURE

When AB 2222 (*The Prudence Kay Poppink Act*) went into effect it changed employers' duties and employees' and applicants' rights under the FEHA.

- A. It expanded who is protected under the Act.
- B. It added cause of action for failing to engage in interactive process.

II. PRIOR LAW

- A. Most courts considered the FEHA to be co-extensive with the ADA.
- B. Disability required substantial limitation of major life activity. Whether a limitation sufficient was determined after considering mitigating measures. To be substantially limited in the major life activity of working, an employee had to be unable to perform a class or broad range of jobs.
- C. There was no separate violation for failing to engage in the interactive process.
- D. Employers could rely on ADA case law for guidance.

III. NEW LAW

- A. All ADA violations are FEHA violations;
 - 1. Some acts that do not violate the ADA will violate the FEHA; and,
 - 2. ADA provides the “floor.”
- B. You can no longer rely on ADA case law to eliminate impairments from coverage and there is little guidance in California case law.
- C. Disability is defined as any limitation of major life activity without regard to mitigating measures. An impairment limits a major life activity if it makes achieving that activity difficult.
- D. Definition of major life activities expanded;
 - 1. to be “broadly construed,”
 - 2. to include physical, mental, and social activities, and

3. employee is considered limited in working even if impairment only limits him in a particular job.

E. It is unlawful for an employer to fail to engage in the interactive process with an employee with a known disability. The employer's duty is triggered by a request for accommodation by an employee with a known disability.

IV. SO, WHAT IS AN EMPLOYER TO DO?

A. First, determine whether there is a duty to engage in interactive process.

- 1. An employer has no duty to engage in interactive process until it knows of disability;
 - a) Do not ask about limitations not tied to business necessity,
 - b) If you learn that an employee has a limitation, document it by recording when you learned of the limitation, other details are also important .
 - if it is not a physical or mental impairment, there is no FEHA protection
 - if it is a physical or mental impairment, you should consider it to be a disability under the FEHA
- 2. An employer has no duty to engage in the interactive process until the employee requests a reasonable accommodation;

a) Any request will do and it need not use magic words: “reasonable accommodation.” Anytime an employee says he is limited, treat this as a request for accommodation and train your managers to inform HR immediately any time an employee mentions a physical or mental limitation or otherwise requests an accommodation

B. If you determine that you have a duty to engage in the interactive process, then you should . . .

- 1. act quickly and meet with the employee as soon as possible;
- 2. insulate managers/supervisors from this process
 - a) i.e., people making employment decisions about this employee

b) you may need to get information from the employee's manager/supervisor to identify and evaluate possible accommodations:

- (1) what the employee's job involves; and,
- (2) how tasks could/could not be reassigned.

c) but the less you tell them about the employee's impairment the better.

(1) you may have to say more to the employee's managers later in order to implement an accommodation.

3. Interact with the employee:

a) Don't ask about his impairments; do ask about his limitations,

b) Ask for details about limitations

- what he can't do;
- what he can do; and
- inquiry should not be limited to work activities.

c) Ask for verification from a physician;

d) Follow up.

4. Investigate possible accommodations;

a) Determine if there are any easy accommodations you can make without getting the employee's medical information.

(1) If needed, there is nothing wrong with asking for this information, but after you get this information, you are more vulnerable to a claim that of regarding the employee as disabled.

b) Generally, possible accommodations may include:

(1) Modifying the employee's current job;

(a) eliminating non-essential job functions from current position; or,

(b) changing work schedule.

(2) Purchasing special equipment;

(3) Transferring the employee to vacant position;

(a) that he can do as is, or

(b) that he can do with accommodation (i.e., by eliminating non-essential job functions of that position).

(4) Placing the employee on leave.

c) Evaluate possible modifications to the employee's current position.

(1) Determine essential job functions of the position

(a) should all be linked to business necessity

(b) employer is not required to eliminate essential job functions

(c) best to document these functions for all positions in advance

(2) Determine how eliminating functions the employee cannot perform would affect the company

(a) economic impact

(b) workplace disruption, including effect on other employees (who will have to do tasks the employee can't do?)

(3) determine whether the employee could perform his job if non-essential functions were eliminated

(a) interact with the employee about this

(i) request further verification from his physician if necessary

(ii) solicit suggestions about what accommodations might enable the employee to perform the essential functions of his job

d) Determine what other jobs, at equal or lesser pay, exist which the employee could perform;

(1) if some modification would be necessary, evaluate essential job functions for the vacant position

e) Offer an available, reasonable accommodation;

(1) this does not have to be the employee's preferred accommodation

f) If you are unable to identify reasonable accommodation, communicate this with the employee;

(1) describe your efforts,

(2) ask for suggestions,

(a) follow up.

5. Document:

- record when the employee requested an accommodation,
- record every way the employee says he is and is not limited,
- record all efforts to determine possible accommodations,
- document all communications with the employee,
- get the employee to sign the documentation.

V. CONCLUSIONS

A. This is a new world!

1. Doing what an employer has done in the past may not be enough.

2. Employers will have to do a lot more.

B. Now, most impairments will be covered disabilities under the FEHA.

C. Now, employers must "actively interact" with employees who request accommodations .

- Act quickly;
- Be thorough;
- Communicate with the employee at every step; and,
- Document, document, document!

