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Top 10 ways the interactive process breaks down

FEHA REQUIRES THAT AN EMPLOYER, WHEN FACED WITH AN ACCOMMODATION REQUEST, MUST ENGAGE IN A "TIMELY, GOOD FAITH, INTERACTIVE PROCESS" TO FIND A REASONABLE ACCOMMODATION

The Fair Employment and Housing Act (FEHA) creates an affirmative duty for employers to "make reasonable accommodation for the known physical or mental disability of an applicant or employee" so long as the accommodation would not create an "undue hardship." (Gov. Code, § 12926, subd. (m).) If an employer cannot grant the employee's requested accommodation, it must engage in a "timely, good faith, interactive process" to determine whether any effective reasonable accommodations exist. (Gov. Code, § 12940, subd. (n).) Far too often, this interactive process breaks down and employees are denied effective accommodations. The avoidable end result is litigation, with each side accusing the other of failing to meet its obligations.

Attorneys navigating disability-accommodations cases should closely review the Fair Employment and Housing Council (FEHC) disability regulations, at Cal. Code Regs., Tit. 2, §§ 11064-73, which explore in great detail the obligations of employers and employees when engaging in the interactive process. (Unless otherwise specified, all citations in this article will be to the disability regulations.)

The following are the top ten ways that the interactive process breaks down, with guidance for employees and their advocates:

1. Disagreements regarding (in)adequate notice.

Many employers mistakenly believe that an employee must use certain buzzwords or disclose a diagnosis to trigger the interactive process. That is not the case. An employer is considered to be on notice and must initiate an interactive process when: an employee with a known physical or mental disability or medical condition requests reasonable accommodations; the employer becomes aware of the need for an accommodation through a third party or by observation; or the employer becomes aware of the possible need for accommodation because the employee has exhausted medical leave under applicable leave laws but further accommodations remain necessary. (§ 11069, subd. (b).)

That said, "the employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443 (citations and internal quotation marks omitted).) An employee should "present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." (*Ibid.*) Thus, when possible, an employee should notify the employer in writing that they are seeking a reasonable accommodation for a disability (without naming the disability unless necessary), identifying the specific restrictions and accommodations requested.

2. Disagreements regarding (in)adequate information to evaluate a requested accommodation.

If possible, employees and employers should communicate directly throughout the interactive process. (§ 11069, subd. (d)(3).) However, an employee who is mentally or physically unable to do so has not breached their obligations, and a third party can communicate on their behalf – employers should not refuse to communicate with the employee's representative.

When an employee has sought an accommodation but the disability or need for a reasonable accommodation is not obvious, the employer may request, and the employee must then provide, "reasonable medical documentation" that "confirms the existence of the disability and the need for reasonable accommodation." (§ 11069, subd. (d)(1).)

Some employers claim that the employee's medical documentation is insufficient and impermissibly deny the request for accommodation without further discussion. However, if the documentation is insufficient, the employer must instead explain the deficiency and allow the employee reasonable time to provide supplemental information from their health care provider. (§ 11069, subd. (d)(5)(C).) If, even after that, the information is insufficient, the employer may require the employee to go to a medical provider for a second opinion, with an examination that is limited to determining the functional limitations that require accommodation. (*Ibid.*; § 11069, subd. (d)(7).)

Often, the process breaks down because employers overstep their boundaries and ask for documents and information that they are not allowed to request. An employer is not permitted to request disclosure of the diagnosis or nature of the disability. (§ 11069, subd. (d)(1).) Nor is the employer allowed to "ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records." (§ 11069, subd. (d)(5).) When faced with this situation, employees should be sure to provide the required information, and to gently push back against employers who seek information to which they are not legally entitled.

3. Employers fail to conduct a proper undue-hardship analysis.

Reasonable accommodations are modifications or adjustments that allow an applicant to have an equal opportunity to be considered for a job, that allow an employee to perform the essential functions of a job, or that allow an employee to enjoy equivalent benefits and privileges of employment as others. (§ 11065, subd. (p)(1).) The disability regulations list over a dozen types of reasonable accommodations, including job modifications, assistive aids and

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services, job restructuring, remote work, policy modifications, and job leave. (§ 11065, subd. (p)(2).) If an employer denies an employee a reasonable accommodation, it bears the burden of demonstrating that the accommodation would constitute an "undue hardship" – that is, as "an action requiring significant difficulty or expense" when considered in light of the following factors:

> (1) The nature and cost of the accommodation needed.
> (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
> (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
> (4) The type of operations, including the composition, structure, and functions of the workforce of the entity.
> (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(Gov. Code, § 12926, subd. (u).)

All too often, employers fail to undertake this analysis. Instead, they simply defer to the judgment of a supervisor or weigh factors that cannot be considered. For example, an employer cannot claim undue hardship based on negative morale, or on the prejudices or fears of other employees. (See EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002).) Unfortunately, it is difficult to break an impasse here if the employer is not willing to properly consider the relevant factors.

4. Disagreements about the essential functions of the job.

An employee seeking an accommodation must be able to perform the essential functions of the job. A job function may be essential if: "the reason the position exists is to perform that function," there are a "limited number of employees available among whom the performance of that job function can be distributed," or because it is "highly specialized." (§ 11065, subd. (e).)

Often, when an employee requests a job modification as an accommodation, the employer insists that the job function is essential and therefore not subject to modification or elimination. When considering an accommodation, an employer is expected to analyze the particular job involved and the essential functions of the job, and is permitted to consult with experts. (§ 11069, subds. (c)(5), (6).) Many employers do not do so, but rather simply rely on the judgment of a supervisor. The parties may reach an impasse with litigation ensuing.

The disability regulations offer (some) guidance, as they point to the following as evidence of whether a job function is essential:

> (A) The employer's or other covered entity's judgment as to which functions are essential.
> (B) Accurate, current written job descriptions.
> (C) The amount of time spent on the job performing the function.
> (D) The legitimate business consequences of not requiring the incumbent to perform the function.
> (E) Job descriptions or job functions contained in a collective bargaining agreement.
> (F) The work experience of past incumbents in the job.
> (G) The current work experience of incumbents in similar jobs.
> (H) Reference to the importance of the performance of the job function in prior performance reviews.

"Essential functions" do not include the marginal functions of the position. "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way. (11065, subds. (e)(2), (3).) If any employer insists that a requested job modification would prevent the employee from performing an essential function of the job, the employee may be able to persuade the employer to reconsider by discussing these factors – but more likely this will be left for counsel to argue.

5. Employers do not consider vacant positions.

Even if a disabled employee is unable to return to their own position, an employer's obligations do not end there. If an employee with a disability is no longer able to perform the essential functions of their current job, even with accommodations, the requested accommodation would create an undue hardship, or the parties agree that reassignment may be preferable, the employer is obliged to offer the employee a vacant position for which they are qualified. (§ 11068, subd. (d)(1).) As employers consider an employee's potential reassignment to an alternate position, they may ask for, and the employee should provide, information about the employee's educational qualifications and work experience. (§ 11069, subds. (c)(9), (d)(2).)

If there is no vacant comparable position for which the employee is qualified, the employer must also consider "lower graded" or "lower paid" positions. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 377 [citing § 11069, subds. (d)(1), (2)].) However, an employer is not required to promote the employee or create a new position to a greater extent than it would for any other employee, regardless of disability. (*Ibid.* [citing § 11069, subd. (d)(4)].)

An employer must generally offer a disabled employee a vacant position without requiring the employee to compete against other employees. (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 265; § 11069, subd. (d)(5).) Further, even if there are currently no vacant positions, but openings are anticipated in the near future, the employer should extend an employee's leave until that time. (See *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.* (2008) 166 Cal.App.4th 952, 968.)

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Employers often direct disabled employees to check job postings; this is not adequate, as the burden is on the employer to search its open positions and make the offer.

6. Disagreements about whether multiple effective accommodations exist.

Sometimes, there may be multiple effective accommodations. While employers are encouraged to take into account the preferences of the employee, the employer is ultimately entitled to select from among effective accommodations. (§ 11068, subd. (e).) When an employer selects an accommodation option different from the one the employee requested, it risks the employee insisting that the provided accommodation is not an effective one, and that they are therefore unable to work or are being deprived of the equivalent benefits and privileges as others have.

7. Employers fail to consider leave as a reasonable accommodation.

When an employee is currently unable to perform the essential functions of the job or needs time away from work for treatment or recovery, a job-protected leave is a reasonable accommodation. Leave as a reasonable accommodation becomes especially important when an employee does not qualify for medical leave under the California Family Rights Act (CFRA), Government Code section 12945.2, or has already exhausted such leave.

There are no bright-line rules on length of leave as a reasonable accommodation under the FEHA; the undue hardship analysis applies. "A disabled employee is entitled to a reasonable accommodation – which may include leave of no statutorily fixed duration – provided that such accommodation does not impose an undue hardship on the employer." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338.)
The only rule: leave cannot be indefinite. (§ 11068, subd. (c).)

Smaller employers often fail to provide leave as a reasonable accommodation because they are unaware that such a requirement even exists. Larger employers sometimes fail to do so because many outsource leave administration to a third party and are therefore unaware of the employee's accommodation needs (even while they have constructive knowledge).

8. Employers fail to take into account the interplay of various laws with concurrent obligations.

Each of the leave laws that protect California employees operate independently of each other. This means that "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees." (29 C.F.R. § 825.702(a).) This interplay can sometimes create different obligations. For example, the CFRA provides for return to "the same or a comparable position upon the termination of the leave" (Gov. Code, § 12945.2, subd. (a)), but the FEHA provides for return to the same position absent undue hardship.

An employee on a CFRA leave for their own serious medical condition is also generally deemed to have a disability that would entitle them to leave as a reasonable accommodation, and should be reinstated to their same position (not a comparable one) absent undue hardship.

To give another example, FEHA disability accommodations may include a temporary transfer to a part-time job with no health benefits, but if CFRA also applies, this would constitute a reduced-work schedule requiring maintenance of health benefits until the 12 weeks are exhausted. Some employers who are unsophisticated do not realize that they need to analyze all laws applicable to the employee who is requesting an accommodation for their disability.

9. Employers force employees to take leave when they can still work.

While leave is considered a reasonable accommodation, that is the case only when other reasonable accommodations do not exist (unless the employee specifically wishes to take leave). A forced leave of absence when an employee can work with a reasonable accommodation is no accommodation at all. (§ 11068, subd. (c).) This often happens when an employer incorrectly assumes that an employee cannot perform the essential functions of the job or the employer is not willing to offer the requested reasonable accommodation that would allow the employee to work. (See, e.g., *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 134 [holding the employer must face the consequences of its error when it placed a deputy sheriff on an unpaid medical leave of absence because it incorrectly determined that he could not safely perform his duties even with reasonable accommodation].)

10. Employers implement policies that violate the law.

Some employers implement rigid policies that, if not adapted to accommodate people with disabilities, violate the FEHA. These include:

- **100% healed policies.** Requiring an employee to be "100% healed" or "fully healed" after an illness or injury means that the employer has failed to engage in an individualized assessment to see if the employee can return to work before then with a reasonable accommodation. (§ 11068, subd. (i).)
- **Maximum-leave policies.** A policy that caps the amount of leave to a set amount of time (say, one year) fails to satisfy an employer's obligation to engage in the interactive process and provide a reasonable accommodation to an employee who needs additional leave. (See EEOC, Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016).)
- **Strict no-fault attendance policies.** "No fault" attendance policies in which employees are subject to discipline (and even termination) for reaching a certain number of absences, regardless of the cause of the absences, are unlawful. Such policies adversely affect people with disabilities, and can evidence a failure to accommodate if they do not make exceptions for individuals whose "chargeable absences" were caused by their disabilities.

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Conclusion

It is often difficult to prevent a breakdown in the interactive process. But an understanding of where it usually breaks down can help an employee prepare and advocate for the accommodation they need, and for an employer to do the right thing.

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