

**ADA/FEHA
NAVIGATING THE DUTY TO "REASONABLY
ACCOMMODATE" & ENGAGE IN THE
"INTERACTIVE PROCESS"**



LANDEGGER BARON LAW GROUP
EXCLUSIVELY REPRESENTING EMPLOYERS

Presented by:
**Roxana E. Verano, Esq. and
Kristina Kourasis, Esq.**

Landegger Baron Law Group, ALC
Employment Law

*Exclusively Representing Employers
Advice, Litigation and Solutions*

ABOUT OUR SPEAKERS

▶ **Roxana E. Verano, Esq.**

- ▶ Partner with the Landegger Baron Law Group
- ▶ A twenty-year veteran in employment law on behalf of management.
- ▶ Specializes in assisting businesses navigate complex employment law issues and avoid unnecessary litigation.
- ▶ Member of the Los Angeles County Bar Association and the Pasadena Bar Association.
- ▶ Received her J.D. from Pepperdine University School of Law.



**Kristina Kourasis, Esq.
Senior Associate**



- ▶ Senior Associate with Landegger Baron Law Group.
- ▶ Specializes in all phases of Employment Law.
- ▶ Represented employees for many years and can see things from both perspectives.
- ▶ Member of the Labor and Employment Section of the State Bar of California, the San Fernando Valley Bar Association, and the Eastern European Bar Association.
- ▶ Received J.D. from Southwestern Law School in 2011.

3

- Federal: Family and Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”)
- State: California Family Rights Act of 1993 (“CFRA”), FAIR EMPLOYMENT AND HOUSING ACT (“FEHA”), and Pregnancy Disability Leave (“PDL”)
- **Interactive Process and Reasonable Accommodation (FEHA and ADA)**
- State and Local Paid Sick Leave
- Workers’ Compensation

**LAWS PROTECTING
DISABLED EMPLOYEES**

- ▶ The ADA and the FEHA prohibit discrimination, harassment and retaliation on the basis of a disability.
- ▶ Require employers to make reasonable accommodations to enable a disabled individual to perform the essential functions of the job, unless it would cause an undue hardship.
- ▶ The ADA/FEHA do not provide job security (compare with FMLA/CFRA/PDL).

**THE AMERICANS WITH DISABILITIES
ACT (ADA) AND THE FAIR
EMPLOYMENT AND HOUSING ACT
(FEHA)**

5

What is a disability?

- ▶ Physical or mental impairment that substantially limits one or more major life activities,
- ▶ An individual with a record of such an impairment, or
- ▶ Being regarded as having such an impairment
- ▶ **This is broadly construed!!**

**ADA/FEHA – MANAGING A
DISABLED EMPLOYEE**

6

▶ California imposes a higher burden on the employer- Employers have a duty to engage in a timely, good faith, interactive process to determine effective reasonable accommodations.

▶ Duty arises when:

- ▶ Qualified individual with a disability requests a reasonable accommodation, or
- ▶ Employer has knowledge of the employee's disability and the employee's desire or need for an accommodation.

▶ "Qualified" individual with a disability is an employee who is able to perform the essential duties of the job, with or without a reasonable accommodation- No protection otherwise.

ADA/FEHA – MANAGING DISABLED EMPLOYEES

7

▶ Examples of what triggers the process:

- ▶ Doctor's Note
- ▶ Protected leave has exhausted
- ▶ "I have problems getting to work at my start time because of medical treatment I am undergoing."
- ▶ "I need time off to get treatment for a back problem."
- ▶ "My wheelchair does not fit under my desk."
- ▶ Employee's wife to tell employer employee has been hospitalized and needs time off.
- ▶ Employer observes employee with an obvious disability having difficulty performing essential functions of the job.

THE INTERACTIVE PROCESS

8

Begin the process when triggered – do not delay

- ✓ Employer is required to engage in a "timely, good faith, interactive" process.
- ✓ Process requires an individualized assessment of both the job and the specific physical or mental limitations of the individual.
- ✓ Meet with employee in person, if possible.

HOW TO EFFECTIVELY IMPLEMENT THE INTERACTIVE PROCESS

9

✓ **Steps of the Interactive Process**

✓ **Identify the Essential Functions of Job**

- ✓ Job Description
- ✓ Consult with employee and employee's supervisor
- ✓ The amount of time spent on the job performing the function
- ✓ Consequences of not performing the function
- ✓ Regular and punctual attendance as an essential function.

STEPS OF THE INTERACTIVE PROCESS

10

✓ **Identify limitations and abilities**

- ✓ Identify the specific medical conditions that affect the employee's ability to perform the essential functions of the job.
- ✓ Determine what specific job duties are impacted by the conditions described.
- ✓ Determine how, specifically, those job duties are impacted and how often the impact occurs.
- ✓ Request further information, if necessary, from employee's doctor
- ✓ Employee has a duty to cooperate with an employer's efforts by explaining his or her disability and qualifications for the job.

STEPS OF THE INTERACTIVE PROCESS

11

▶ **Questions to ask:**

- ▶ What are your job restrictions?"
- ▶ Do you have a doctor's note?
- ▶ What job functions are you unable to perform

▶ **Questions not to ask:**

- ▶ What is your diagnosis?
- ▶ What is your prognosis?
- ▶ Provide a list of current medications
- ▶ Bring me a copy of your medical file

STEPS OF THE INTERACTIVE PROCESS

12

- ✓ Brainstorm on accommodation ideas with employee – exchange of information.
 - ✓ Identify potential accommodations
 - ✓ What would enable the employee to perform the essential functions of the job?
 - ✓ Assess their effectiveness
 - ✓ What is the potential impact or cost to the employer?
- ✓ Assess the options and make a decision
 - ✓ Prepare a menu of options
 - ✓ Employer ultimately selects an effective accommodation.

STEPS OF THE INTERACTIVE PROCESS

13

- ✓ Implement the accommodation
 - ✓ An accommodation is reasonable if it appears to be feasible or plausible, and is effective in enabling the employee to perform the essential functions of the job
 - ✓ Communicate and document
- ✓ Follow up regularly- stay in contact with the employee. Do not forget the process is "on going" and must be revisited
 - ✓ 30 days, 3 months, 6 months, 1 year.
 - ✓ Does the work continue to be within the limitations?
 - ✓ Is employee successfully performing the essential functions of the job?

STEPS OF THE INTERACTIVE PROCESS

14

- ▶ The goal is to find the best match between the employee's capabilities and an available position.
- ▶ Do not disparage or discriminate against an employee who reports an injury, claim or disability
- ▶ Employer not obligated to choose the best accommodation or the specific accommodation that a disabled employee or applicant seeks.
- ▶ Accommodations must be reasonable, meaning that the size of the employer, the type of business, and the positions available are taken into consideration.

CONSIDERATIONS FOR REASONABLE ACCOMMODATIONS

15

- ▶ Job Restructuring (move non-essential functions or how/when essential functions performed)
- ▶ Part Time or modified work schedules
- ▶ Ergonomic evaluation
- ▶ Telecommuting
- ▶ Assistive devices
- ▶ Modification of workstation, tools, equipment
- ▶ Accessibility enhancements
- ▶ Leave of Absence
- ▶ Reassignment to vacant position

POTENTIAL ACCOMMODATIONS

16

- ▶ Typically sought when there are no reasonable accommodations that permit the injured employee to perform the essential functions of his or her job.
- ▶ When reassignment is sought, employers must determine whether the employee is qualified and able to perform the essential functions of the position to which reassignment is sought.
- ▶ Recent EEOC cases may require employers to reassign the disabled employee despite having another candidate with better qualifications. (*EEOC v. United Airlines, Inc.* (7th Cir., 2012).)

JOB REASSIGNMENT AS A REASONABLE ACCOMMODATION

17

- ▶ A leave of absence may be a reasonable accommodation.
- ▶ "Intermittent" leaves and modified schedules can be reasonable accommodation.
- ▶ After conclusion of FMLA/CFRA/PDL leave.
- ▶ An employee need not show that the leave is certain or even likely, only that it would plausibly enable the employee to return and perform his job

LEAVE OF ABSENCE AS A REASONABLE ACCOMMODATION

18

- Law does not provide a specific duration of leave.
- An employer is not required to provide an indefinite leave of absence.
- A leave request is not "indefinite" simply because the nature of the employee's condition is such that only an approximate return date is provided.

LEAVE OF ABSENCE AS A REASONABLE ACCOMMODATION

19

To be protected, individuals must be qualified to do their job!

- ▶ An employer is NOT required to create a new job
- ▶ An employer is NOT required to move another employee
- ▶ An employer is NOT required to promote the disabled employee, and
- ▶ An employer is NOT to violate another employee's rights in order to accommodate a disabled employee.
- ▶ The duty is to reassign a disabled employee *if* an already funded, vacant position *at the same level* exists or one will become available in the foreseeable future.
- ▶ Note: Although an employer is not obligated to compensate an employee at the same rate of pay if they are moved to a lower paid position as an accommodation, employers can avoid retaliation claims if they maintain the same level of compensation.

MUST THE EMPLOYER CREATE A NEW JOB?

20

- ▶ Employer does not need to eliminate essential job functions
- ▶ No duty to lower qualitative or quantitative standards
- ▶ Set performance and conduct expectations.
- ▶ Do not overlook conduct violations or performance deficiencies.

MORE ON REASONABLE ACCOMMODATION

21

▶ The employee need only show that a requested accommodation is generally reasonable; It is the employer's obligation to demonstrate specifically that a request would create an undue hardship

▶ Undue hardship is an action that requires significant difficulty or expense when considered in light of the following:

- ▶ Nature and cost of the accommodation
- ▶ Overall financial resources at the facilities involved
- ▶ Number of employees

UNDUE HARDSHIP

22

- The effect on expenses and resources or other impact of the accommodation on the operation of the facility.
- Overall financial resources of the covered entity
- Overall size of the business.
- The number, type and locations of its facilities.
- Type of operations, including the composition, structure, and functions of the work force of the entity.
- The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

▶ **VERY DIFFICULT TO PROVE**

UNDUE HARDSHIP

23

DOCUMENT THE PROCESS!!

- Identify participants
- Identify all documents reviewed
- List work restrictions
- List essential functions of the job
- List all accommodations suggested and considered (even the unreasonable ones)
- List all alternative positions considered
- Employee comments
- Everyone signs
- Complete this form every time a new restriction is provided

THE INTERACTIVE PROCESS AND DOCUMENTATION

24

THANK YOU FOR ATTENDING!

LANDEGGER BARON LAW GROUP

Roxana E. Verano, Esq.
Roxana@landeggeresq.com

15760 Ventura Blvd., Suite 1200
Encino, California 91436

751 Daily Drive, Suite 325
Camarillo, California 93010

Los Angeles Office: 818.986.7561
Ventura County Office: 805.987.7128

25
