

ADA/FEHA

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



LANDEGGER BARON LAW GROUP

EXCLUSIVELY REPRESENTING EMPLOYERS

Presented by:
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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.

- **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)

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

- ▶ 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

- ▶ **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

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**

- ✓ **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

- ✓ **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

- ▶ **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

- ✓ **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

- ✓ **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

- ▶ **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

- ▶ **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

- ▶ Typically sought when there are no reasonable accommodations that permit the 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

- ▶ **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 the job.**

**LEAVE OF ABSENCE AS A
REASONABLE ACCOMMODATION**

- 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

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?

- ▶ **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**

- ▶ **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

- 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

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

THANK YOU FOR ATTENDING!

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