

Accommodations and the Interactive Process Under the FEHA

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- I. When AB 2222 (The Prudence Kay Poppink Act) went into effect on January 1, 2001, 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
 1. whether a limitation sufficient was determined after considering mitigating measures
 2. 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. but some acts that do not violate the ADA will violate the FEHA
 2. ADA provides the "floor"
 - B. Can no longer rely on ADA case law to eliminate impairments from coverage
 1. and there is little guidance in California case law
 - C. Disability defined as *any* limitation of major life activity
 1. without regard to mitigating measures
 2. 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
 3. employee is 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

1. 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. 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
 - (1) details are important
 - (a) record *when* you learned of the limitation
 - (2) if it is *not* a physical or mental impairment, there is no FEHA protection
 - (3) 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
 - (1) it need not use magic words: "reasonable accommodation"
 - (2) anytime an employee says he is limited, treat this as a request for accommodation
 - (3) 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 the employer has a duty to engage in the interactive process, then you should . . .
 1. act quickly
 - a) 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
 - (2) how her 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 her limitations
 - (1) what she *can't* do
 - (2) what she *can* do
 - (3) this 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 the employer can make without getting the employee's medical information
 - (1) if needed, there is nothing wrong with asking for this information
 - (2) but after the employer gets this information, it is more vulnerable to a claim that it regarded 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
 - (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
 - a) record *when* the employee requested an accommodation
 - b) record every way the employee says he is and is not limited
 - c) record all efforts to determine possible accommodations
 - d) document all communications with the employee
 - e) 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
 - 1. Act quickly
 - 2. Be thorough
 - 3. Communicate with the employee at every step
 - 4. Document Document Document