



Fagen Friedman & Fulfroft LLP

# The Americans with Disability Act: Reasonable Accommodations



NAEN

March 13, 2019

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# Disability Defined

- A physical or mental impairments that limits one or more of the major life activities; or
- A record of such an impairment; or
- Being regarded as having such an impairment.
  - ADA requires a “substantial” impairment.
  - FEHA does not require a “substantial” impairment.



# Physical or Mental Impairment

- Types of impairments:
  - Physiological disorder
  - Disfigurement
  - Inability of one of major anatomical systems to function properly
  - Mental or psychological disorder.
- Determination must be made without regard to mitigating factors (e.g., medicine, assistive devices, etc.)
- Not every impairment is a disability. Disorder or condition must limit a major life activity to be a disability.



# Limits a Major Life Activity

- An impairment “limits” a major life activity if it makes achievement of the major life activity “difficult.”
  - Individualized assessment.
  - Usually does not require scientific, medical, or statistical analysis.
    - Analysis can be presented, when appropriate.



# Limits a Major Life Activity

- Implies degree of severity and duration.
- Specific to individual compared to average person (or to the individual prior to illness/injury).
- Consider the overall impact to individual.
- Mild limitations are not disabilities.



# Major Life Activity Defined

- Broadly construed to include physical, mental and social activities, including “working.”
- Functions such as caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, the operation of major bodily functions, and working.



# Limits Ability to Work

- Employee is limited if an impairment disqualifies him from a class of jobs or broad range of jobs.
  - Since 2001 FEHA amendments, disqualification from single job may be sufficient.
- Example: Back problems preclude individual from heavy lifting causing disqualification from performing heavy labor jobs.



# If a person is a “qualified individual with a disability”

- Employer cannot discriminate in:
  - Job application procedures, hiring, firing, promotion/advancement, compensation, job training, layoff/recall, testing, medical examinations, assignments, evaluation, compensation, disciplinary actions, leave, benefits, and other terms, conditions and privileges of employment.





# What Can An Employer Rely On?

- Name and credentials of the healthcare provider may be provided to verify the healthcare provider's qualifications in the area in question.
- Current/updated job descriptions and performance reviews can be relied on for determining essential job functions.
  - Job description should match what employee actually does & is required to do at work.



# When is Interactive Process Required?

- When there is a known disability:
  - Disability is obvious;
  - Employee notifies employer of disability;
  - Employer perceives it, mistakenly or otherwise; or,
  - Employer has information indicating presence of disability.
- When an employee requests reasonable accommodation.



# Do "Temporary" Impairments Count?

- It depends
- Duration is a key factor but not the only one
- Consider extent and impact of the impairment



# Do "Temporary" Impairments Count?

- Generally, short-term, temporary, non-chronic impairments, with little or no long term impact, do not count.
  - i.e. sprains, concussions, appendicitis, common colds, or influenza or a broken leg that heals normally within a few months
- However, broken leg with complications can become covered disability (e.g., significantly longer than normal to heal and during this period the individual cannot walk)



# What Do You Do?

- Employee has been out on a leave of absence for a month with a doctor's note that says "off work until..."
- Don't Wait for the Employee to Come To You!
  - Check In – Contact the employee and inform him/her that the District knows s/he has been out and ask if the employee believes s/he may be a qualified individual with a disability. Ask if s/he believes s/he could return to work with accommodations.
  - Follow-Up – Send a confirming letter to document your conversation and offer to meet with the employee to discuss the potential accommodation provisions.



# Request for Accommodation

- No magic words are necessary - any request is sufficient.
- If employee says s/he is limited, treat as a request for accommodation.



# The Interactive Process

- Identify barriers to equal opportunity.
- Consider possible accommodations.
- Assess reasonableness of accommodations, in terms of effectiveness and equal opportunity.
- Implement reasonable accommodation.



# The Interactive Process – Who Should Be Included

- Employer
- Employee/Applicant
- Employee's representative (if necessary because of disability or other circumstances)





# The Interactive Process

- What should you do if:
  - Employee wants union representative present?
  - Employee wants an attorney present?
  - Employee's direct supervisor wants to be present?



# Engaging in Interactive Process

- Question employee:
  - Ask about functional abilities and limitations that are job related and consistent with business necessity.
  - Don't ask for diagnosis or details of impairment not related to the job.
- Doctor's note
  - Ask for a note when the disability is not obvious.
  - Do not ask for information regarding the underlying medical condition once a note is received.
- Discuss functional abilities and limitations of the employee.
- Do not ask about limitations not job related/consistent with business necessity.



# Engaging in Interactive Process

- Brainstorm possible accommodations.
- Consider reasonableness of accommodations.
  - Implementation and monitoring effectiveness of possible accommodations.
  - Consider the impact on students and other staff.



# Engaging in Interactive Process

- Document the entire process.
  - If the information provided by the employee is insufficient, explain what is missing and request that the employee provide you with supplemental information in a timely manner.
- Document functional abilities and limitations
  - details are important.



# Reasonable Accommodation Standard under the ADA

- 29 CFR 16320(o)(1)(ii) defines “reasonable accommodation” to include:
  - “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.”



# Accommodations

Evaluate possible modifications to current position:

- Essential functions
- Impact on company – economic and workplace disruption
- Elimination of non-essential functions



# Accommodations

- Determine whether other positions, even lesser paying, are available and can be performed by individual
  - Caution: Cannot “force” employee to take a demotion.
- Consider any and all reasonable accommodations, including those suggested by the employee.
- Cannot require an employee to accept an offered accommodation.
  - Can inform them that refusal to accept the accommodation may render the employee unable to perform essential job functions.



# What types of "Accommodations" are *NOT* Required

Not required to:

- Lower quality or production standards
- Provide employee with device that will assist employee both on and off the job
- Create a new position
- Make a temporary "light" position permanent





# What types of "Accommodations" are *NOT* Required

Not required to:

- Remove or alter "essential" functions
- Excuse violations of conduct rules
- Provide an indefinite leave of absence



# Accommodations

## Types of reasonable accommodations

- Job restructuring (reassigning non-essential job duties).
- Providing equipment or devices.
- Making existing facilities readily accessible.
  - i.e. accessible break rooms, modified furniture, and reserved parking places
- Transferring an employee to a more accessible worksite.
- Reassignment to vacant position.
  - Required to give a preference to disabled employees.
  - May ask the employee about his/her educational qualifications.



# Undue Hardship

Not required to offer an accommodation that causes an undue hardship.

- Significant difficulty or expense when considered in light of:
  - Nature and cost of accommodation needed;
  - Overall financial resources, number of persons employed and effect on expenses, resources and operations of facility;
  - Overall size of business;
  - Type of operation, composition, structure and functions of work force;
  - Geographic separateness, administrative or fiscal relationship of the facility/ies.



# Case Study #1

- Employee has diabetes.
- What possible accommodations might be needed?
  - Store insulin?
  - Store food?
  - Provide food?
  - Additional breaks for blood testing?
  - Needle disposal?
- What if employee is stealing food during hypoglycemic attacks?



# Case Study #2: Back Pain

- Employee is diagnosed with sciatica and a herniated and two bulging spine discs.
- One-hour commute is exacerbating symptoms and put her at risk for irreparable spinal damage. The school district has many schools closer to the employee's home.
- Employee wants ergonomic chair for all meetings or to be excused from attending.



# Case Study #3: Tardiness

- Employee is engaging in obsessive rituals which prevent her from arriving to work on time
- District has provided many warnings and required her to attend the Employee Assistance Program consisting of “tips” on how to be timely
- Employee is diagnosed with Obsessive Compulsive Disorder (OCD) and psychiatrist states OCD directly contributed to tardiness issues.



# Case Study #4: Fragrance Allergy

- Occupational therapist has a “severe” fragrance allergy when exposed to certain fragrances and chemicals.
- District implemented fragrance free zones, notified parents and students on case load, changed cleaning products, added air purifiers, moved office location, etc.
- Student was wearing perfume when she arrived to receive services and the employee refused to provide services.



# Fragrance Allergies & Sensitivities

- Common reactions:
  - Headaches
  - Respiratory problems
  - Asthma
  - Skin irritations
- ADA: Fragrance Policies
  - Employer may not be required to totally ban fragrances from the workplace unless the fragrance is unique to the work environment, minimal, and/or the employer has more control over it





# Fragrance cont.

## ■ Accommodation Options:

- Reduce offending fragrances
- Relocate employee to area away from fragrances
- Reduce employee's exposure to the fragrances
- Maintain good indoor air quality
- Discontinue the use of fragranced products
- Use only unscented cleaning products
- Provide fragrance-free meeting rooms and restrooms
- Modify workstation location
- Modify work schedule
- Allow for fresh air breaks
- Provide purification system
- Modify communication methods
- Modify/create fragrance-free policy
- Telework



# Service/Assistive Animals in CA

- CA amended regulations allowing assistive animals in the workplace as reasonable accommodation.
  - This includes support dogs or other animals
- If employee asks to bring assistive animal:
  - Can require medical certification of disability
  - Can require confirmation that animal meets employer's minimum standards



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