

# Navigating California Disability Law: Lessons for the Business Savvy

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## INTRODUCTION

Employment law attorneys, even those who are experienced and who understand the complexities and broad nature of discrimination law, are often bewildered by the complicated nature of this area of practice. For those who are not employment law specialists, and particularly for those who dedicate their practice to providing clients with business advice, the ins-and-outs of compliance are even more challenging.

This article first provides an overview of the general principles related to disability law, primarily focusing on California law. Second, it furnishes insight into disability law compliance. Finally, the article provides practical advice for business owners, managers, and executives and business law attorneys regarding how to stay within the law and protect the rights of employees with disabilities, while implementing best business practices. The authors of this article have been on the front lines providing prelitigation advice, analyzing issues at the litigation stage, and adjudicating disability discrimination disputes, as well as drafting regulations to clarify the California Fair Employment and Housing Act's disability discrimination provisions.

## CALIFORNIA'S STRONG PUBLIC POLICY AGAINST DISABILITY DISCRIMINATION

### The FEHA

The California legislature, through the California Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996), has repeatedly emphasized the importance of employment rights for California's employees and in particular for persons with disabilities. The legislature has stated that the FEHA "shall be construed liberally" to accomplish its purposes. Govt C §12993(a). California's public policy of seeking and holding employment "free of prejudice" has been deemed "fundamental." *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 220, 185 CR 270.

The FEHA provides that freedom from job discrimination based on physical disabilities, mental disabilities, medical conditions, and other enumerated factors, is a civil right. Govt C §12921. Such discrimination is against public policy (Govt C §12920) and constitutes an unfair employment practice (Govt C §§12940–12941).

With respect to disability discrimination, the California legislature has imposed additional require-

ments on employers so that individuals with disabilities are afforded equal rights in employment. The FEHA not only prohibits discrimination in employment against a disabled individual, it also establishes an affirmative duty to engage in an interactive process to determine whether there is a reasonable accommodation that will allow the individual to perform the essential duties of his or her position. Govt C §12940(n). The employer and employee have an obligation to participate cooperatively during the interactive process, to provide each other necessary information, and to refrain from obstructing the process in any way. In addition to having an affirmative duty to engage in the interactive process, California employers have an affirmative obligation to provide a reasonable and effective accommodation to disabled employees. The accommodation should be reasonable and effective and should allow the employee to perform the essential functions of the job. Govt C §12940(m).

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#### 2000 Amendments to the FEHA

California employers are obligated to follow both the FEHA provisions regarding disability discrimination and the corresponding provisions of federal law, the Americans with Disabilities Act (ADA) (42 USC §§12101–12213) and its Amendments Act (ADA Amendments Act of 2008 (ADAAA) (Pub L 110–325, 122 Stat 3553)). In general, however, California law in this area reaches more broadly in terms of protecting the rights of disabled individuals. In fact, the landscape of disability law in California changed significantly in 2000 when the FEHA was amended through the Prudence Kay Poppink Act (PKP Act) (Stats 2000, ch 1049, §6) (AB 2222). See CC §§51, 51.5, 54; Govt C §§12926, 12926.1, 12940, 12955.3, 19231. Although issues related to disability discrimination existed before 2000, the PKP Act greatly expanded disabled employees' rights to a discrimination-free workplace. The PKP Act provides a structural framework for determining whether an individual has a disability and emphasizes that definitions of

physical disability, mental disability, and medical conditions are broad. Those terms are required “to be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.” Govt C §12926.1(b).

The PKP Act amendments distinguish California law from the Americans with Disabilities Act and its case law regarding disability definitions and protections for disabilities. The PKP Act clarifies that, under the FEHA, the ADA serves as a “floor of protection” but not a ceiling, because the FEHA provides additional protections. Govt C §12926.1(a). These protections include:

- “Broad definitions” (Govt C §12926.1(b)) of medical condition (Govt C §12926(h)), mental disability (Govt C §12926(i)), and physical disability (Govt C §12926(k)).
- An explanation that a physical or mental condition need only “limit” rather than “substantially limit” a major life activity, as required by the ADA (Govt C §12926.1(c)).
- Clarification regarding mitigating measures. The question of whether a condition limits a major life activity is analyzed without regard to any mitigating measures, unless the mitigating measure itself limits a major life activity. Govt C §12926.1(c). The FEHA specifies that “working” is considered a major life activity, regardless of whether the working limitation implicates a particular job or a class of employment. Govt C §12926.1(c).
- Clarification that physical or mental disabilities include “any other health impairment that requires special education or related services,” having a record or history of a physical or mental disability, or being regarded or treated by the employer or other covered entity as having a present or future physical or mental disability. Govt C §§12926(i)(2)–(5), (k)(2)–(5), 12926.1(b).

#### DEFINITION OF DISABILITY; WHAT IS NOT CONSIDERED A DISABILITY

##### Physical and Mental Disabilities

Following are some issues that an employer should address in order to ascertain whether an individual has a physical or mental condition that would qualify as a disability under the FEHA.

1. Is the physical or mental condition specifically listed in the FEHA as a disability? Certain mental and

physical conditions in the FEHA are identified as disabilities per se. These are: HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. Govt C §12926.1(c).

2. For mental disabilities not listed in the FEHA, does the individual have a mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities? Govt C §12926(i)(1).

3. For physical disabilities not listed in the FEHA, does the individual have a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the listed body systems? The FEHA covers the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. Govt C §12926(k)(1)(A).

4. Does the physical or mental condition “limit a major life activity”? Limits are determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. Govt C §12926(i)(1)(A), (k)(1)(i). Thus, for example, if the physical symptoms of early-stage Parkinson’s disease are entirely controlled by medication, the condition would nonetheless be covered as a disability because, untreated, this condition (a brain disorder) affects the neurological and musculoskeletal systems governing walking, movement, and coordination.

5. Does the physical or mental condition make the achievement of the major life activity “difficult”? This is the test for whether a physical or mental condition limits a major life activity. Govt C §12926(i)(1)(B), (k)(1)(B)(ii). Note that the FEHA requires only that the condition “limits” a major life activity, in contrast to the ADA, which requires that the condition *substantially* limits the major life activity. Govt C §12926.1(d). Major life activities are to be broadly construed and include physical, mental, and social activities and working. Govt C §12926(i)(1)(C), (k)(1)(B)(iii).

6. Does the individual have (1) another mental or psychological disorder or condition, or (2) another physical health impairment that requires special education or related services? These conditions are also covered. Govt C §12926(i)(2), (k)(2).

7. Does the individual have a record or history of a mental or physical disability that is known to the employer or other covered entity? Even if the individual has no current disabling condition, a history of a dis-

ability is sufficient if the employer is taking adverse action against the individual because of it. Govt C §12926(i)(3), (k)(3).

8. Does the employer or other covered entity regard or treat the individual as someone who has, has had, or will have in the future any mental or physical condition that makes achievement of a major life activity difficult? If so, the employee has a covered disability. Govt C §12926(i)(4)–(5), (k)(4)–(5).

9. Has disability case law interpreting the FEHA found a physical or mental condition to be a disability? Court decisions provide guidance on which physical or mental conditions might be considered disabilities under the FEHA. Courts have held that physical disabilities under the FEHA include:

- Monocular vision (*EEOC v United Parcel Serv., Inc.* (9th Cir 2005) 424 F3d 1060, 1068 n5);
- Severe myopia (*EEOC*, 424 F3d at 1072 n7);
- Chronic back injury that limits work activities (*Colmenares v Braemar Country Club, Inc.* (2003) 29 C4th 1019, 1024, 130 CR2d 662);
- Polio (*Bagatti v Department of Rehabilitation* (2002) 97 CA4th 344, 354, 118 CR2d 443);
- Wrist injury (*Hanson v Lucky Stores, Inc.* (1999) 74 CA4th 215, 220, 87 CR2d 215);
- Hypertension and high blood pressure (*American Nat’l Ins. Co. v FEHC* (1982) 32 C3d 603, 610, 186 CR 345); and
- Hypersensitivity to tobacco smoke (*County of Fresno v FEHC* (1991) 226 CA3d 1541, 1548, 277 CR 557).

Courts have held that mental disabilities under the FEHA include:

- Post-traumatic stress disorder (*Jensen v Wells Fargo Bank* (2000) 85 CA4th 245, 256, 102 CR2d 55);
- Depression and personality disorders (*Auburn Woods I Homeowners Ass’n v FEHC* (2004) 121 CA4th 1578, 1592, 18 CR3d 669); and
- Obsessive compulsive disorder (*Humphrey v Memorial Hosp. Ass’n* (9th Cir 2001) 239 F3d 1128, 1134).

10. Does the individual have a “medical condition” covered by the FEHA? In addition to mental and physical disabilities, the FEHA also covers “medical conditions,” a legal term defined as either (1) any health impairment related to or associated with a cancer diagnosis or a record or history of cancer, or (2) genetic characteristics. Govt C §12926(h). “Genetic characteristics” refers to any scientifically or medically identifiable gene or chromosome, its combination or alteration, or inherited characteristic known

either (1) to be a disease or the cause of a disorder for the individual or family member or (2) to be associated with a statistically increased risk of developing a disease or disorder, even without symptoms of a current disease or disorder. Govt C §12926(h)(2); see *American Nat'l Ins. Co. v FEHC* (1982) 32 C3d 603, 610, 186 CR 345. Note that having a “medical condition” does not require proof that the condition limits a major life activity.

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**The FEHA does not prohibit refusing to hire, or discharging, an employee with a physical or mental disability who, even with reasonable accommodations, is unable to perform his or her essential job duties in a manner that would not endanger his or her health or safety or the health or safety of others.**

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#### What Is Not a Covered Disability Under the FEHA

The FEHA, like the ADA, excludes as disabilities sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs. Govt C §12926(i) (last sentence), (k)(6). Although temporary conditions may qualify for protection as disabilities (*Diaz v Federal Express Corp.* (CD Cal 2005) 373 F Supp 2d 1034, 1051 (short term depression covered as disability)), not all will. For example, one court has held that temporary hospitalizations for minor elective surgery or preventative treatment for a nondisabling condition would not be covered as FEHA disabilities. *Avila v Continental Airlines, Inc.* (2008) 165 CA4th 1237, 1249, 82 CR3d 440. Moreover, pain alone does not by itself constitute a disability; its classification depends on how the pain affects the specific employee. *Arteaga v Brink's Inc.* (2008) 163 CA4th 327, 348, 77 CR3d 654 (carpal tunnel syndrome affected plaintiff's ability to play soccer but not to work as a messenger).

#### Individuals Must Be Able to Perform Their Essential Job Functions

To prevail on a FEHA claim at trial, a plaintiff must be able to demonstrate that he or she can perform the essential functions of the job with or without accommodation. *Green v State of Calif.* (2007) 42 C4th 254, 263, 64 CR3d 390. The FEHA does not

prohibit refusing to hire, or discharging, an employee with a physical or mental disability who, even with reasonable accommodations, is unable to perform his or her essential job duties in a manner that would not endanger his or her health or safety or the health or safety of others. Govt C §12940(a)(1).

#### Practical Takeaway

From a practical perspective, employers are often faced with the question of whether an employee is disabled under the definitions provided by statutes, case law, and regulations. Given the breadth of the definition of a disability, particularly under the FEHA, employers will be best served by (1) implementing consistent policies for analyzing the question of whether an employee has a disability and for requesting medical documents to show that an employee indeed has a disability; (2) ensuring that the company's HR professionals and line managers are well trained in recognizing a disability (which, as discussed below, will trigger a duty to engage in the interactive process), and (3) developing policies for receipt of medical information that do not violate the employees' privacy rights. In addition, because a critical component of the analysis is whether the applicant or employee can perform the essential job duties, it is important that employers clearly define those duties in job descriptions.

#### WHAT TRIGGERS THE OBLIGATION TO ENGAGE IN THE INTERACTIVE PROCESS?

Once a company makes a determination about an individual's disability, *i.e.*, whether the definitional standards are met, the next issue that HR professionals, line managers, and senior managers often struggle with is how to decide appropriately whether they are obligated to begin an interactive process. Although it might seem easy to conclude that the obligation is only triggered when an employee specifically requests an accommodation (which does trigger the company's duty to start the process), real-life situations are often much more nuanced. An employer's duty to engage in an interactive process is triggered if “the company knows of the existence of the employee's disability,” even if the employee has not requested an accommodation. *Barnett v US Air, Inc.* (9th Cir 2000) 228 F3d 1105, 1114, vacated on other grounds, *US Airways, Inc. v Barnett* (2002) 535 US 391, 152 L Ed 2d 589, 122 S Ct 1516. An employee does not need to directly request accommodation in order for the employer's duty of reasonable accommodation to arise, although an employer's duty to

reasonably accommodate does *not* arise if an employee denies having a disability or the need for an accommodation. *Prilliman v United Airlines, Inc.* (1997) 53 CA4th 935, 954, 62 CR2d 142. Once the employer knows of the employee's disability, the employer must engage in an interactive process with "good faith" and in a "timely" manner. Govt C §12940(n).

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In some cases, the employer's awareness of a disability, even if not coupled with a specific request by the employee, may trigger the duty to begin the interactive process. In *Faust v California Portland Cement Co.* (2007) 150 CA4th 864, 58 CR2d 142, the court noted that "an employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." 150 CA4th at 887.

Another issue that sometimes arises and has caused confusion for employers involves employees whom the employer *perceives* as disabled, even if the employee is not actually disabled. In *Gelfo v Lockheed Martin Corp.* (2006) 140 CA4th 34, 43 CR3d 874, the plaintiff suffered a work-related back injury that cause him pain and limited his ability to perform certain job functions. Although it was initially diagnosed as a permanent injury, the plaintiff eventually recovered and was able to engage in physical activity. In fact, because of his recovery, he was able to perform the functions for the position he sought. The company offered him the position, but then rescinded the offer based on an internal review of his file, which included medical records that had initially identified his industrial injury as permanent and limiting. The court indicated that under the FEHA, which provides much broader protections than the ADA, an employee who is *regarded as* having a disability—even if, as in the case of Mr. Gelfo, he is not *actually* disabled—is entitled to have the company engage in a mutual interactive process that will properly analyze an employee's ability to perform the job functions in question. 140 CA4th at 56. In *Gelfo*, the court found the employer liable because it failed to engage in cooperative communication with the employee and instead relied

on its own, one-sided analysis of his medical information.

Employers (including line supervisors) should be trained to recognize situations that may require them to begin, and continue, the interactive process. Such cases might include, *e.g.*, an employee who is disabled (either the disability is apparent or the supervisor knows of the disability) but has not made a specific request for an accommodation, yet is having problems meeting performance or attendance standards. As discussed below, an employer is not obligated to reduce performance standards, but the employer's knowledge of a job performance issue could trigger an obligation to begin an interactive process so that the disabled employee can be given all appropriate options. From a business perspective, this approach is also helpful to the company, because assisting a disabled employee to achieve performance, attendance, or other work standards will make the employee more productive. In addition, the employee's morale should improve as he or she senses that the employer is willing to cooperate to ensure the employee's ability to perform the job. Although not every situation requires an interactive process and not every situation will result in the implementation of an accommodation, given the legal and practical consequences, it is imperative that companies understand their obligations to engage in this process and to conduct a proper analysis of their employees' needs.

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**What Does the "Interactive Process" Mean?**

As noted above, the California legislature has declared that it is the public policy of this state to provide all individuals, including those with disabilities, equal access to jobs and a workplace free from discrimination and harassment. To this end, California employers have an affirmative statutory duty to engage in "a timely, good faith interactive process" with disabled employees in order to determine whether a requested accommodation is reasonable or to determine whether an accommodation (even if not specifically requested) should be implemented. Govt C §12940(n).

The interactive process requires: (1) direct communication between the employer and employee to explore, in good faith, possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective. *Zivkovic v Southern Cal. Edison Co.* (9th Cir 2002) 302 F3d 1080, 1089. Although case law provides some guidance on how to conduct the process, there is no single way to interact effectively; the specifics of the dialogue vary from situation to situation. *Smith v Midland Brake, Inc.* (10th Cir 1999) 180 F3d 1154, 1173.

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**[A]lthough it is important to begin the interactive process, it is equally important to continue the process until an accommodation is found, or a thorough analysis indicates that no accommodation is available (or that all available accommodations would cause the company an undue hardship).**

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Even within this flexible framework, however, there are some requirements that all employers (and employees) should follow. For example, it is clear that both the employer and employee are expected to fully participate and cooperate during the interactive process. "[I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process." *Jensen v Wells Fargo Bank* (2000) 85 CA4th 245, 266, 102 CR2d 55. The employer has the right to request medical information that will allow it to make an appropriate analysis of the requested accommodation or to determine whether there is an alternative accommodation that is reasonable and will effectively allow the employee to perform the essential job functions. On the employee's side, "it is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." 85 CA4th at 266. If the information provided by the employee is insufficient, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. See EEOC's *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans With Disabilities Act (ADA)*, Notice 915.002 at No. 11 (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

Neither side is expected to be clairvoyant; the employer needs to be clear about the information it needs, and the employee should be clear about his or her restrictions. See *King v United Parcel Serv., Inc.* (2007) 152 CA4th 426, 442, 60 CR3d 359.

Another requirement that courts have emphasized is that, although it is important to begin the interactive process, it is equally important to continue the process until an accommodation is found, or a thorough analysis indicates that no accommodation is available (or that all available accommodations would cause the company an undue hardship). In *Nadaf-Rharov v Neiman Marcus Group, Inc.* (2008) 166 CA4th 952, 83 CR3d 190, the court of appeal provided additional guidance on a company's obligation to engage in the interactive process. See 166 CA4th at 985. In that case, the plaintiff developed injuries that resulted in her doctor declaring her unfit for any work. 166 CA4th at 957. The company then put the plaintiff on medical leave and made initial attempts to discuss alternatives to her current position, but communication between the parties broke down when the company claimed that there was no need to have a discussion because the plaintiff's own doctor had not released her to return to work. 166 CA4th at 958. After the employee ran out of leave, still not being medically released to return to work, the company terminated the plaintiff's employment. 166 CA4th at 959. The court held that, although the employer began an interactive process with the plaintiff, the process was insufficient because the employer was responsible for the later breakdown in the process. 166 CA4th at 978.

### Practical Takeaways

For employers unfamiliar with the nuances of disability discrimination law and with the specific requirements of the interactive process, there are numerous landmines that can present themselves. These include failing to adequately involve the employee in the process and failing to follow through once the process has been started.

Failing to truly involve the employee in the process (thus failing to make the process truly interactive) is a common employer mistake. As discussed above, *Gelfo v Lockheed Martin Co.* (2006) 140 CA4th 34, 43 CR3d 874, presents a case study regarding the need to involve the employee in the interactive process, even when the employee is not actually disabled but is regarded as disabled. Too often, employers make decisions about possible accommodations in a vacuum, without involving the employee sufficiently in the process. Although it is necessary to consider business issues (including reviewing personnel and

medical records and conferring with a committee, as Lockheed Martin did in the *Gelfo* case), it is equally important to make business decisions by taking into account information provided directly by the employee. The employee, along with his or her doctor, is presumably the person in the best position to assess his or her medical condition and provide information about his or her restrictions.

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In some cases, employers begin the interactive process but fail to follow through. As noted above, the court in *Nadaf-Rharov v Neiman Marcus Group, Inc.* (2008) 166 CA4th 952, 83 CR3d 190, made it clear that simply starting the process will not shield a company from liability for failure to meet the FEHA interactive-process requirements when the company is responsible for the breakdown in the process later.

**WHAT IS A REASONABLE AND EFFECTIVE ACCOMMODATION?**

Once an employer engages in the interactive process with an employee, the question becomes whether there is an accommodation that will reasonably and effectively allow the individual to carry out the job's essential functions. California employers have an affirmative duty to reasonably accommodate a disabled individual unless doing so creates an undue hardship. Govt C §12940(m); *Fisher v Superior Court* (1986) 177 CA3d 779, 223 CR 203.

Reasonable accommodations make "existing facilities used by employees readily accessible to, and usable by, individuals with disabilities." Govt C §12926(n)(1). In addition to changes in physical facilities, reasonable accommodations may include restructuring an existing job, modifying an employee's work schedule (including allowing part-time work), reassigning the disabled employee to a vacant position, modifying or acquiring equipment or devices, adjusting or modifying examinations, adjusting or modifying training policies or materials, or providing qualified interpreters or readers. Govt C §12826(n)(2).

Although the analysis required—determining whether there is an accommodation that is reasonable and effective and does not create an undue hardship—may appear easy at first glance, courts have

repeatedly found that employers too often do not act creatively in conducting the analysis and thus fail to satisfy their obligation. Moreover, although there are certain general principles that should be observed in all cases, federal and California courts have repeatedly emphasized that a reasonable accommodation analysis is an individualized assessment. The analysis takes into account issues that include company size and resources, the truly essential functions of the job in question, economic and workforce realities, the nature of the employee's restrictions, the company's history, and many other factors. For employers, the overarching lessons from courts that have interpreted the requirement is that employers must look at all of these factors (and others if applicable) in determining whether a requested accommodation is reasonable and will be effective or whether there is another reasonable and effective accommodation that can be implemented.

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**[F]ederal and California courts have repeatedly emphasized that a reasonable accommodation analysis is an individualized assessment.**

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**Some Examples of Reasonable Accommodations**

Courts have explored the following employer actions (among others) in determining whether the employer has met its obligation to provide a reasonable and effective accommodation.

**Recuperative Leave of Absence**

An employer may be required to provide a disabled individual with a finite leave of absence if, following the leave, the employee likely can resume his or her duties. As the court in *Jensen v Wells Fargo Bank* (2000) 85 CA4th 245, 263, 102 CR2d 55, stated:

[h]olding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.

The *Jensen* court indicated, however, that if it is not likely that the employee will be able to return to work, providing a leave of absence would be futile and is not required.

**Reinstatement Following a Leave**

The EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the*

*Americans With Disabilities Act*, Notice 915.002 (Oct. 17, 2002) (available at <http://www.eeoc.gov/policy/docs/accommodation.html>; cited below as Notice 915.002) indicates that reinstatement to the same or an alternative position following a leave, if possible, is required in order for a leave of absence to constitute a *nonretaliatory, effective* accommodation. See Notice 915.002 at No. 19. The question of whether granting a leave of absence constitutes a reasonable accommodation includes other considerations (*e.g.*, other leave laws may apply), some of which are discussed below.

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**Reassignment to a lower-level position is permissible only in cases where no accommodation can be made in the current position and no positions are vacant at the same level.**

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#### Notification of Other Jobs

An employer may also be required to notify the disabled individual of other job openings. In *Prilliman v United Airlines, Inc.* (1997) 53 CA4th 935, 950, 62 CR2d 142, the court stated:

An employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship.

See also *Spitzer v The Good Guys, Inc.* (2008) 80 CA4th 1376, 1389, 96 CR2d 236 (“[c]ourts have made it clear that ‘an employer has a duty to reassign a disabled employee if an already funded, vacant position at the same level exists.’”); *Hanson v Lucky Stores, Inc.* (1999) 74 CA4th 215, 227, 87 CR2d 215 (offering a vacant position may be a reasonable accommodation, even if the position pays less than the disabled employee’s former job, if he or she can no longer perform the former job’s duties).

#### Reassignment

Although it should be done only as a last resort if no other accommodation is available, reassignment to another position is in some circumstances the most effective accommodation. The employer, however, should make every effort to accommodate the employee in his or her own job before considering reassignment. EEOC Notice 915.002 at “Reassignment” states:

Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that . . . there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position.

In *Smith v Midland Brake, Inc.* (10th Cir 1999) 180 F3d 1154, 1177 (en banc), the court ruled that the employer should first consider lateral moves to positions that are regarded as equivalent. Reassignment to a lower-level position is permissible only in cases where no accommodation can be made in the current position and no positions are vacant at the same level.

#### Giving Disabled Employee Preference

The court in *Jensen v Wells Fargo Bank* (2000) 85 CA4th 245, 102 CR2d 55, indicated that the FEHA entitled the disabled employee to “preferential consideration” in reassignment. 85 CA4th at 265. See also *U.S. Airways, Inc. v Barnett* (2002) 535 US 391, 397, 152 L Ed 2d 589, 122 S Ct 1516 (“preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.”).

#### Limits of Employer’s Obligation

Courts have made clear, however, that there are limitations on how far an employer must go to accommodate a disabled employee. As noted below, an employer does not have an obligation to create a new position or to lower its job performance standards.

#### Employer Need Not Wait Indefinitely

The reasonable accommodation standard does not require the employer to wait indefinitely for an employee’s medical condition to be corrected. *Hanson v Lucky Stores, Inc.* (1999) 74 CA4th 215, 87 CR2d 215.

#### Employer Not Required to Lower Work Standards

According to EEOC Notice 915.002, an employer is not required to lower its standards of quality and quantity of work as an accommodation. However, the employer may need to accommodate an employee with a disability to enable him or her to meet those quality and quantity standards. Notice 915.002 at “Reasonable Accommodation.” For example, an employer may require a data entry clerk to type 35 words per minute, but may also need to provide the clerk with an ergonomic keyboard to accommodate a carpal tunnel disability so that the clerk can meet the 35-wpm production standard. An employer is required to prorate its production standards for an employee who

had taken full-time or part-time leave as an accommodation, by excluding the leave taken from the employer's work production calculations. See Notice 915.002 at "Reasonable Accommodation, Leave."

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**When a disabled employee cannot be otherwise accommodated, the employer's responsibility does not require that it create a new job, relocate another employee to open up a position, or promote the disabled employee.**

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**Employer Not Required to Create a New Position**

An employer is not required to create a new position as an accommodation. *Watkins v Ameripride Services* (9th Cir 2004) 375 F3d 821, 828; *Raine v City of Burbank* (2006) 135 CA4th 1215, 1224, 37 CR3d 899 (employer not required to convert a light duty assignment into a permanent position outside employee's civil service classification). When a disabled employee cannot be otherwise accommodated, the employer's responsibility does not require that it create a new job, relocate another employee to open up a position, or promote the disabled employee. *Spitzer v The Good Guys, Inc.* (2000) 80 CA4th 1376, 1389, 96 CR2d 236.

**Employee Choice Should Be Given Strong Consideration, but Employer Has Ultimate Discretion**

EEOC Notice 915.002, citing 29 CFR Pt 1630 App §1630.9, provides that:

If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (*i.e.*, it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."

See also *Hanson v Lucky Stores, Inc.* (1999) 74 CA4th 215, 228, 87 CR2d 215 (employer reasonably accommodated disabled employee who could no longer perform former job's duties by offering alternative vacant position paying only 50 percent of former pay without benefits).

**OVERLAPPING LEAVES**

As discussed above, recuperative leave can be a form of reasonable accommodation if the leave is likely to be effective at allowing the employee to return to work at the end of the leave and does not create an undue hardship for the employer. Because the issues related to leaves of absence as a disability accommodation potentially involve the overlap of other leave laws, it is important for employers to be aware of the basics of these laws so they can adequately perform the reasonable accommodation analysis. Other types of leave available under leave laws include:

- Pregnancy disability leave (Govt C §12945(a)) (entitles employee to up to 4 months' leave for pregnancy, childbirth, or related medical conditions);
- California Family Rights Act (CFRA) (Govt C §12945.2) leave (Govt C §12945.2(c)(3)(C)) (employee can take up to 12 weeks of leave per year for the employee's own serious health condition that does not include pregnancy);
- Federal Family and Medical Leave Act (FMLA) leave (29 USC §§2601–2654) (entitles an employee up to 12 weeks leave per year for an employee's own serious health condition);
- Workers' compensation leave (Lab C §§3200–6002); and
- The employer's own company disability leave policy (if one exists).

Some of these leaves can run concurrently, some cannot. For example, an employer can charge an employee's CFRA or FMLA leave entitlement while the employee is out on a workers' compensation leave. A review of the details of the various leave laws is beyond the scope of this article. Nevertheless, it is important for employers to understand that these laws may come into play during a leave analysis. The Fair Employment and Housing Commission has posted a detailed explanation of the major leave entitlements available to California employees on its website at <http://www.fehc.ca.gov> to assist employers with this analysis. For additional information, see *Advising California Employers and Employees*, chap 6 (Cal CEB 2005).

## LESSONS FOR EMPLOYERS

The reasonable accommodation analysis is one that requires creativity and careful examination on the part of employers. Companies can, however, implement policies and practices to make the process run smoothly so that disabled employees are given options to enable them to fully participate in the workplace. Beginning with the appropriate frame of mind—that providing disabled employees reasonable accommodation is not only a legal requirement but also a best business practice—is key. From there, companies should follow the guidelines discussed in this article, but should also remember that flexibility is critical in the analysis.

Certain aspects of a company's preparedness to accommodate disabled employees require greater structure. Companies should make sure that job descriptions appropriately identify essential job functions, that supervisors and HR professionals understand their obligations to analyze reasonable accommodation requests, and that written policies are in place and in compliance with legal requirements. For example, although medical privacy laws are beyond the scope of this article, companies should ensure that there is a consistent and fair method for receipt of an employee's medical documentation, and should also ensure that requests for documentation do not violate an employee's right to privacy.

In addition to the structured components of the analysis, employers should also make sure that crea-

tivity and flexibility are part of the process. The person conducting the analysis should review the company's past history of dealing with employee requests to ensure consistency and should also look to business and economic realities for that particular time period. The analysis should not only review the essential functions of the job as presented in the job description, but also consider departmental needs, whether job duties are easily interchangeable, the importance of the position in the department and the company as a whole, and other business factors. In short, the analysis should be thorough and fair, and should ensure that the accommodation is not only reasonable, but *effective* in allowing the disabled employee to perform his or her job.

## CONCLUSION

Although the issues are complex, companies can establish a range of internal policies and practices that will ensure compliance with disability discrimination laws. Companies will be particularly well served by establishing practices that help supervisors and HR professionals (1) identify how to properly engage in an interactive, cooperative process with disabled individuals, and (2) properly analyze and implement, when appropriate, accommodations that are reasonable and effective to allow a disabled individual to perform the job's essential functions.