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## It Takes Two To Tango: The Interactive Process Dance

By Patricia C. Perez

Disability discrimination is one of the most complicated areas of employment law. In fact, the legal requirements are so complex that numerous employment lawyers now specialize in nothing but disability discrimination issues. Of the numerous issues that can arise in these discrimination lawsuits, one that has caused particular confusion with both plaintiff and defense attorneys (and with employees and employers) is the interactive process. This interaction is vital to a company's ability to perform a thorough and fair analysis of an employee's accommodation request, or an analysis of whether the requested accommodation constitutes an undue burden.

Making these issues even more difficult is the fact that there are just as many that arise before litigation as arise during the course of litigation. Language in the case law helps us identify some of the issues that may arise, but the pre-litigation stage provides even greater lessons on how to conduct an interactive process that complies with legal requirements and effectively accomplishes the underlying public policy goals of disability discrimination law.

### THE GENERAL LEGAL REQUIREMENTS

At its core, disability discrimination law is meant to ensure discrimination-free access to employ-

ment opportunities for all employees, notwithstanding an individual's disability. One of the ways in which employers must meet this goal is by providing employees with disabilities reasonable accommodations that allow them to perform the essential functions of their jobs. In fact, in California, employers have an affirmative duty to provide reasonable accommodations to employees with disabilities.<sup>1</sup> Similarly, the Fair Employment and Housing Act (FEHA) affirmatively requires California employers to engage in a "timely, good faith interactive process" in order to determine whether a requested accommodation is reasonable.<sup>2</sup>

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This special issue is dedicated to disability discrimination law, in honor of the 20th anniversary of the signing of the Americans with Disabilities Act. To mark this anniversary, we offer three articles presenting practical issues that arise when employees and employers grapple with accommodating disabilities and medical conditions. To increase your knowledge about disability discrimination issues, we encourage you to attend our upcoming October 15, 2010 annual conference, entitled "Litigating a Disability Discrimination Case From Intake Through Trial."

We hope that our foray into one of the most challenging areas of employment law is both interesting and useful.

Americans with Disabilities Act  
20th Anniversary

~The Editors

## It Takes Two To Tango: The Interactive Process Dance

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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.<sup>3</sup>

A thorough review of existing case law provides some guidance on how to conduct this interactive process. Yet there is no clear-cut or single way to interact effectively; the specifics of this dialogue will vary from situation to situation.<sup>4</sup> The interactive process must include open communication between the parties and a good-faith examination of possible accommodations.<sup>5</sup> An important point often missed by the parties is that an appropriate accommodation must, among other requirements, allow the employee to perform the job *effectively*.<sup>6</sup> In terms of the actual interaction, the most successful cases are those where both parties follow not only the letter of the law, but, perhaps more importantly, the spirit of it.

What does this mean in real life? Though the process works well in most instances, here are some practical examples that show how the process can break down.

### **Scenario 1: The Responsible but Aloof Employer**

Compliance Minded, Inc. is a sophisticated company. Large and profitable, the company

executives understand the value of the HR function. One employee, an assistant manager in the Accounting Department, tells her supervisor that she needs an accommodation for her disability. The supervisor, having been trained appropriately, knows the initial questions to ask, but knows that he will need to enlist the assistance of the Human Resources Department. The company has set up a comprehensive program for looking at accommodation requests and begins to process the employee's request.

For three months the team of knowledgeable and responsible senior employees from HR, the general counsel's office, and risk management look at the request, compare it to other requests, conduct studies on the likely costs of various potential accommodations, and perform a litigation risk analysis for each potential accommodation. Though all of these steps are useful ones when performing an analysis regarding the most appropriate and effective reasonable accommodation, the company misses the real point of the process: to include the employee in the discussion so that the process is mutual and truly interactive. The fact that an employer took steps to interact with the employee is a good beginning, but its obligation is to continue working with the employee. Failing to continue that interactive discussion could spell liability for the employer.<sup>7</sup> The employer is responsible for engaging in an interactive process in good faith and in a timely manner and cannot obstruct or delay the interactive process.<sup>8</sup> Though the point of including the employee in the conversation may seem obvious, the number of cases in which an employer fails to truly interact with the employee proves that this point is not so obvious after all.

In this scenario, the company, though well-intentioned and

thorough, failed to fulfill its obligation by neglecting to interact promptly and by failing to include the employee in the important discussions.

### **Scenario 2: The Privacy-Minded Employee**

Eventually, the head of Compliance Minded, Inc.'s Reasonable Accommodation Committee gets in touch with the employee, Jan Private. As the Assistant Manager of the Accounting Department, Jan is responsible for, among many other essential functions, creating daily, weekly, monthly, quarterly, and yearly accounting reports. Additionally, she supervises the work of subordinate staff, and is also primarily responsible for distributing work among the accounting staff and evaluating the work of many of the staff members. Though the exact nature of her disability is unclear, Jan suffers from depression and anxiety, as well as other health issues. Her doctor has provided a note indicating that she can only work limited hours for an indefinite period of time. The doctor specifically indicates that Jan can only work in the mornings and that he will re-examine her in eight weeks. The note does not provide any additional information.

The employee's main responsibility during the interactive process is to understand her disability well enough to inform the employer concisely of the restrictions that will need to be considered when making accommodations.<sup>9</sup> This information should, ideally, be provided as early in the process as possible, to facilitate the employer's ability to present the employee with reasonable accommodations, and should include a list of restrictions that must be met in order to accommodate the employee.<sup>10</sup>

The doctor's note Jan has presented contains some, but not all, of the information necessary

to properly determine whether the requested accommodation is reasonable and will be effective in allowing her to do her job. Jan clearly has privacy rights associated with her medical history, diagnosis, and records, but in the context of the interactive process, she needs to provide her employer with sufficient information to allow it to make a determination as to whether the requested accommodation is reasonable (or whether it constitutes an undue burden based on all the relevant circumstances). A common scenario that leads to a breakdown in the interactive process involves an employee who, like Jan, presents medical information that is insufficient to allow her employer to perform this necessary analysis.

### **Scenario 3: The Company That Fails to Perform an Individualized and Thorough Analysis**

Conducting an individualized assessment is one of the keys to complying with the interactive process requirement. Another key component of good-faith interaction is creativity. Though the phrase “thinking outside the box” has been overused, this is an area where thinking creatively will go a long way toward meeting everyone’s goal: to provide an employee with a disability every opportunity to contribute to the workplace.

Ideally, Jan’s doctor would have provided the company additional information about the reasons she can only work limited hours and more precise information about the expected duration of her need to work specific hours. Using the lack of detail in the doctor’s note as a justification, the company rejects Jan’s requested accommodation. By doing so, the company has failed to uphold its obligation on numerous fronts.

Most obviously, the company can and should request that Jan provide additional information about her restrictions. This will not only facilitate the analysis of whether Jan’s particular request is reasonable in allowing her to effectively perform her essential duties, but will also provide the employer with the information needed to analyze whether there are other options (in the event this particular request is deemed unreasonable or would legitimately present an undue hardship on the company). Simply rejecting the information provided and ending the interactive process is not the right approach.

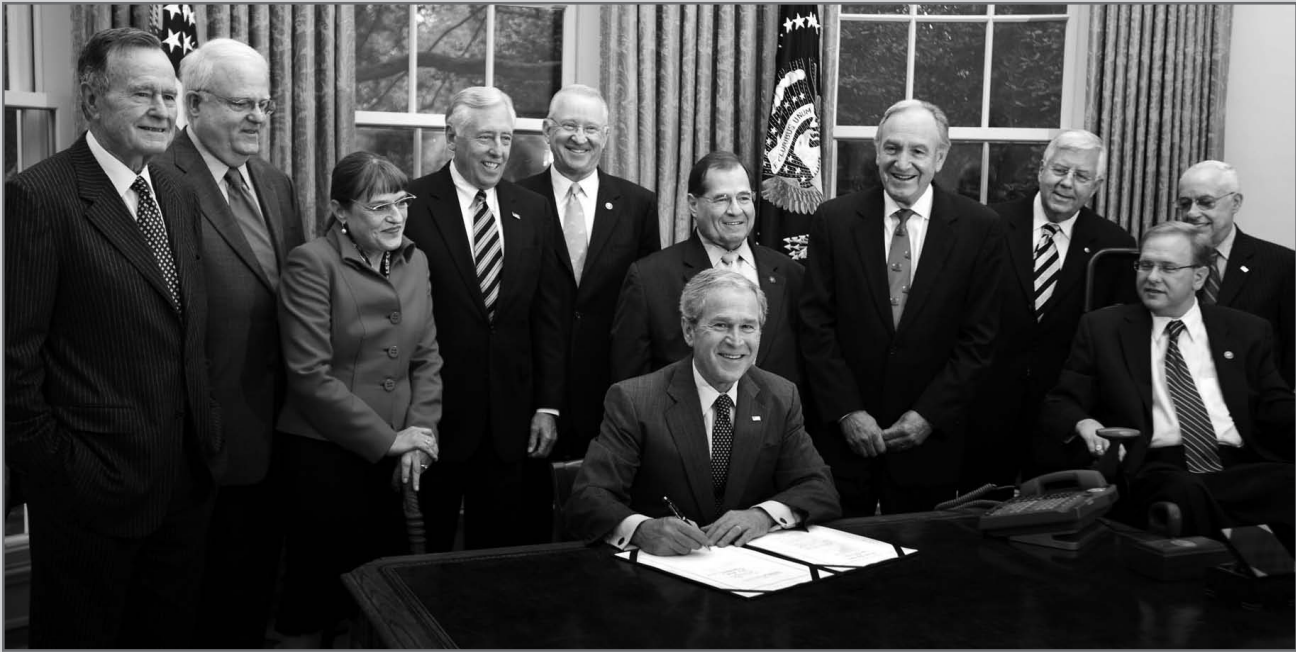
While it is true that the company will be better able to perform a detailed analysis with additional information from Jan and her doctor, the information it has already received will enable the company to begin this analysis.

A good starting place is the employee’s requested accommodation. While an employer does not have to grant an employee’s choice of accommodation, it should consider whether the requested accommodation is reasonable *and* effective. It is important to note that although the FEHA requires employers to consider an employee’s requested accommodation, courts have ruled that the choice of which accommodation to offer is ultimately at the employer’s discretion.<sup>11</sup> An employer is not required to select the “best accommodation or the specific accommodation the employee seeks.<sup>12</sup> The employer can choose a reasonable and effective accommodation, and may consider the cost and ease of the accommodation when making its decision.<sup>13</sup> In order to properly ascertain whether the requested accommodation is reasonable and will effectively allow Jan to perform

her essential functions, Compliance Minded, Inc. should examine:

- Whether the essential functions can be accomplished under the circumstances requested (during specific part-time hours);
- Whether this department is one whose function is necessary to meet the primary mission of the company and whether this position is vital to meet the primary mission of this department;
- Whether this position involves duties that are relatively interchangeable, so that someone can perform her essential functions in her absence; and
- Whether there are any business or economic realities (downsizing or increasing staff, lower or higher revenue/profits) that will impact the company’s ability to absorb costs associated with the requested accommodation.

Though these are only a few of the issues Compliance Minded, Inc. should consider in analyzing whether Jan’s request is reasonable, it is a good roadmap for the company to follow, and asking these questions will likely trigger additional important issues that need to be examined. In a nutshell, courts require companies to do their homework in this area and think critically when performing this analysis. Too many companies make ad-hoc decisions without conducting a careful analysis. If during litigation an employee can show that the employer failed to identify an accommodation that existed and was available, the employer will likely be held liable for



President George W. Bush signed the Americans with Disabilities Amendments Act (ADAAA) on September 25, 2008. The ADAAA made important changes to the definition of the term "disability" by overturning the holdings in several Supreme Court decisions and portions of the EEOC's Americans with Disabilities Act (ADA) regulations. These changes make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Joining President Bush for the signing of the law were, from left: Former President George H.W. Bush, Rep. James Sensenbrenner (R-Wis.) and his spouse, Cheryl Sensenbrenner, Rep. Steny Hoyer (D-Md.), Rep. Buck McKeon (R-Cal.), Rep. Jerry Nadler (D-N.Y.), Sen. Tom Harkin (D-Iowa), Sen. Mike Enzi (R-Wyo.), Rep. Jim Langevin (D-R.I.), and U.S. Attorney General Michael Mukasey.

failing to engage in the interactive process and for failing to appropriately accommodate the employee.<sup>14</sup>

In addition to performing a careful analysis regarding the requested accommodation, the company can consider other options (unless, of course, the careful examination shows that the requested accommodation is acceptable; that is, reasonable and effective). If the company wants to explore other possible accommodations, it can first look to the FEHA itself, which lists numerous potential accommodations, including job restructuring, providing paid or unpaid leave, and reassignment to another (vacant) position. In fact, in addition to the provisions in the

FEHA, courts have weighed in on the issue of alternative accommodations. One court indicated that the employer has a duty to inform the employee of other suitable job opportunities with the employer.<sup>15</sup> Similarly, courts have held that an employer should consider the ability and desire of the employee to do other jobs within the company.<sup>16</sup> Again, creativity and critical thinking are the key: an employer is expected to look at the entire gamut of potential accommodations to ensure compliance with both the interactive process requirement and the obligation to provide reasonable and effective accommodations to employees with disabilities.

Too often, companies gloss over these requirements. By becoming accustomed to performing this type of analysis, companies will not only find that doing so becomes easier each time, they will also send a strong message to employees about their commitment to complying with their legal and practical obligations. In the end, this will also lead to greater productivity and increased profitability for companies.

**Scenario 4:  
The Employee Who Focuses  
on "Reasonable" but Forgets  
About "Effective"**

After hitting some stumbling blocks, Compliance Minded, Inc.

fulfills its obligation to perform a careful analysis of Jan's request. The head of the Reasonable Accommodation Committee tells Jan that although they want to provide a reasonable accommodation, they are unable to provide her with the limited hours she seeks to work. Instead, they want to discuss other possible options to allow her to effectively perform her essential job functions.

Jan objects, indicating that the restrictions currently placed by her doctors require that she only work mornings for some time. She states that she will be seeing her doctor again in eight weeks, but acknowledges that she will likely need her requested accommodation for a substantially longer period of time. The company representative goes through the analysis with Jan and indicates that in addition to serious business concerns (primarily that her absence in the afternoons will not allow her to perform numerous essential job functions), they are also unable to grant her request because of its timing. The employer reminds her that a full-time employee is necessary in both May and June because it is the busiest time of year, just before the fiscal year ends on June 30th. In fact, overtime is sometimes required beyond the full-time workweek during this period. The representative indicates that he would like to explore other ways in which the company might be able to accommodate her. Jan stands her ground and claims that despite her restrictions, she can get all her work done in the mornings. She says that this is the only accommodation she will accept.

Though an employer should certainly consider the employee's requested accommodation, the company has the right to select another accommodation, as long as it is reasonable and effective.

Further, the employer is allowed to consider cost and ease when making a determination as to which accommodation it will grant.<sup>17</sup> The court in *Hanson v Lucky Stores, Inc.* emphasized the fact that if an employer has offered a reasonable accommodation, the employee cannot reject it simply because the employee prefers another.<sup>18</sup> Additionally, a point that Jan has missed (and that many employees often miss) is that the requirement is not only that the accommodation provided be reasonable, but also that it be *effective* in allowing the employee to perform the essential functions of her job.<sup>19</sup> Finally, Jan must remember that although it is her responsibility to provide her employer with a complete list of restrictions, the greater the restrictions, the fewer options that may be available to accommodate her.<sup>20</sup>

Here, both Jan and the company would be best served by performing a fair and thorough analysis of Jan's request. Jan will be better off if she is flexible and works cooperatively and openly with her employer so that, together, they can find a way to allow her to do her job.

## CONCLUSION

The issues touched upon in this article are intricate and complex. Though these are but a few of the situations that arise during the interactive process, they represent some of the most common ways in which employers and employees forget their obligations and contribute to the breakdown of the process. Rather than becoming entrenched in certain positions or being overly concerned with crossing "T"s and dotting "I"s in an effort to comply with the law, trust, flexibility, openness and creativity will serve employers better when they engage in the interactive process. ⚖️

## ENDNOTES

1. Cal. Gov't Code § 12940(m).
2. Cal. Gov't Code § 12940(n).
3. *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002).
4. *Smith v. Midland Brake, Inc.*, 18 F.3d 1154, 1173 (10th Cir. 1999).
5. *Barnett v. US Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000).
6. *Id.*
7. Cal. Gov't Code § 12940(n); *Nadaf-Rharov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952, 986 (2008).
8. *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).
9. *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 266 (2000).
10. *King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426 (2007).
11. *Wilson v. County of Orange*, 169 Cal. App. 4th 1185 (2009).
12. *Id.* at 1194.
13. *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 228 (1999).
14. See *Nadaf-Rharov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal. App. 4th at 983.
15. *Prillman v. United Airlines, Inc.*, 53 Cal. App. 4th 935, 950 (1997).
16. See *Barnett v. US Air, Inc.*, *supra*, 228 F.3d at 1108 and *Smith v. Midland Brake, Inc.*, *supra*, 180 F.3d at 1173.
17. *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal. App. 4th at 228.
18. *Id.*
19. See *Zivkovic v. Southern Cal. Edison Co.*, *supra*, 302 F.3d at 1089 and *Barnett v. US Air, Inc.*, *supra*, 228 F.3d at 1114.
20. See *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal. App. 4th at 266.