



Tips & Strategies for Effectively Managing Leaves

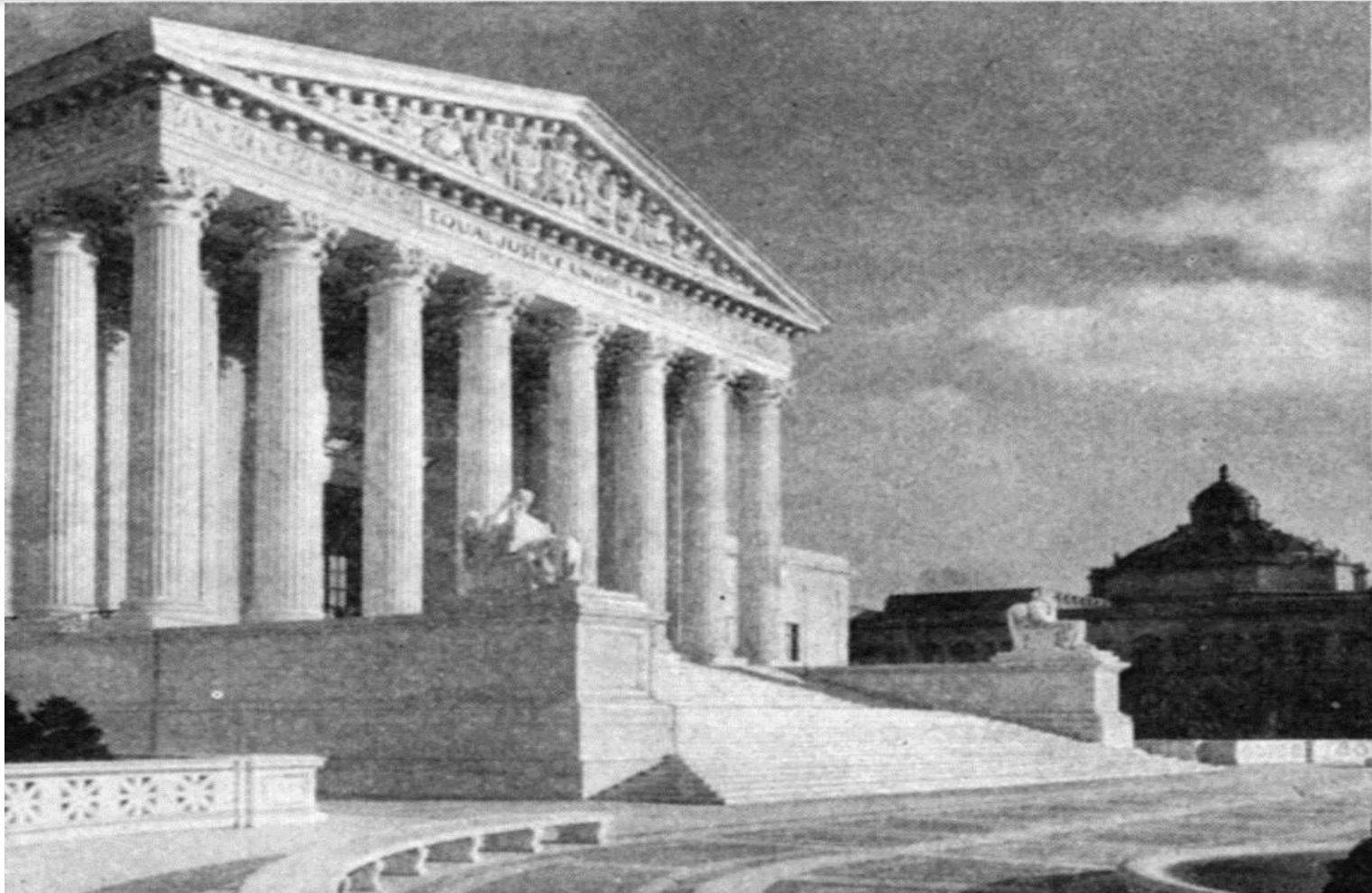
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Agenda

- Overview of how medical leave laws intersect
- Review obligation to provide workplace accommodations for employees with disabilities
- Engaging in the interactive process
- Tips for dealing with dueling doctors



Overview of the Law





Medical Leave Basics (beyond workers' comp.)

- ▶ California Family Rights Act (CFRA)
- ▶ Federal Family Medical Leave Act (FMLA)
- ▶ Leave as an accommodation under CA (FEHA) & Federal law (ADA)

FMLA/CFRA Leave

Up to 12 weeks of leave for an employee's own serious health condition.

Can be taken intermittently





So if an employee suffers an industrial injury, I can just put him/her out on leave until he/she can return to full duty, right?

Federal ADA & California FEHA

- Both
 - ▶ Prohibit discrimination based upon an individual's disability and require employers to engage in the interactive process to identify and implement a reasonable accommodation





California: Disability Is Broadly Defined

- An impairment that makes performance of a “major life activity” difficult.
 - ▶ the definition of a “major life activity” includes
 - physical, mental and social activities
 - caring for oneself
 - performing manual tasks
 - seeing, hearing, eating, sleeping, breathing, speaking
 - walking, standing, sitting, reaching, lifting, bending
 - learning, reading, concentrating, thinking, communicating
 - interacting with others
 - working



Interplay Between Workers' Compensation Leave and Duty to Accommodate under FEHA/ADA

Independent statutory obligations

- Monitor employee's status and ability to return to work

- ▶ What are the employee's work restrictions?
- ▶ Are the work restrictions temporary or permanent?
- ▶ Do they impact the employee's ability to perform his/her essential job functions?
- ▶ Can the employee be returned to work with or without reasonable accommodation?



Leave as a Reasonable Accommodation under State and Federal law

- Paid or unpaid leave can be a reasonable accommodation
 - Must hold job open during leave
 - Indefinite leave requests: analyze on case by case basis to determine reasonableness and undue hardship.
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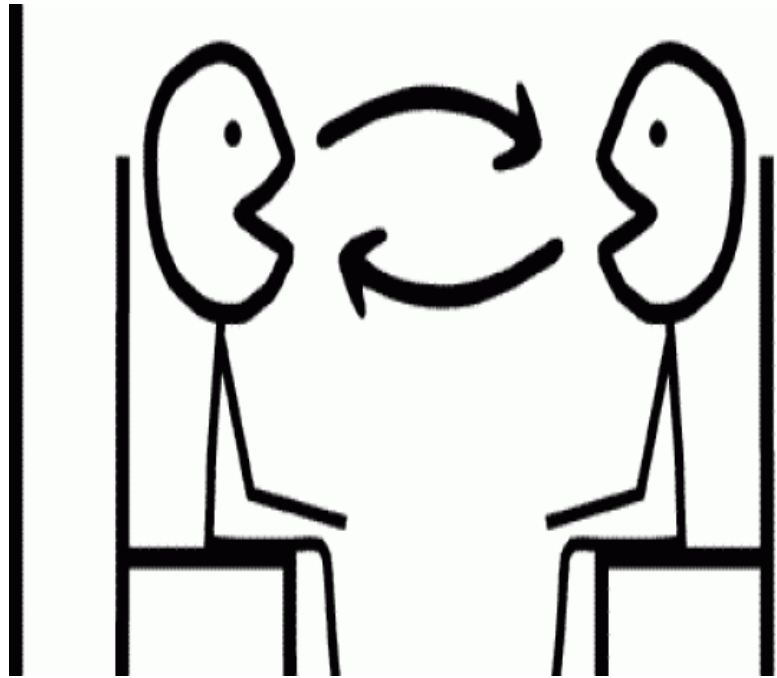
How does the Interactive Process fit in?



Required by state and federal law

In California, failure to engage in the Interactive Process is a separate legal violation.

How does the Interactive Process fit in?

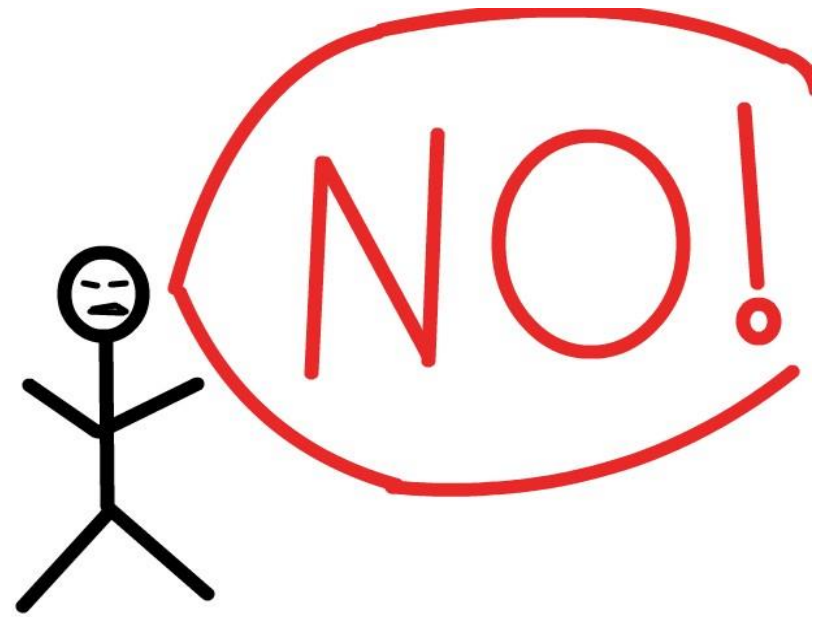


The Interactive Process is the method employers and employees use to determine

- ▶ Whether a reasonable accommodation is needed
- ▶ Possible reasonable accommodations
- ▶ Whether a reasonable accommodation is working



Is this process any different if the work restrictions are the result of an industrial injury vs. a non-industrial injury?



- Interactive meeting and duty to accommodate is the same.

When is a “Disabled” Employee Entitled to Reasonable Accommodation?



When an employee’s disability is creating a “barrier” to performance of one or more essential job function, then the employee needs a reasonable accommodation to remove the barrier and allow for full performance of all essential job functions.





What is an Essential Function?

- The fundamental job duties of the position
 - ▶ The reason a job function may be considered essential includes but is not limited to:
 - the reason the position exists is to perform that function.
 - only a limited number of employees are available among whom the performance of that job function can be distributed.
 - it's highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.



Evidence of Whether A Function is “Essential”

- Includes but is not limited to:
 - ▶ accurate, current written job descriptions (including those contained in a CBA)
 - ▶ amount of time spent performing the function
 - ▶ employer’s judgment as to which functions are essential
 - ▶ consequences of not requiring that the employee perform the function
 - ▶ work experience of other employees holding same job *or* past incumbents in the job.
 - ▶ reference to the importance of the performance of the job function in prior performance reviews



Interactive Process



- TIMELY GOOD FAITH PROCESS—DON'T DELAY
- Be prepared
 - ▶ Use updated and accurate Job Analysis
 - ▶ Obtain and review list of work limitations/restrictions
 - If information submitted by employee is insufficient or needs clarification, tell employee, give employee copy of job description to take to health care provider, and give employee reasonable time to provide supplemental information.



Steps in the Interactive Process

When Might Medical Information be Insufficient?

- DFEH regulations define “health care provider” to include not only doctors, dentists, chiropractors, etc., but also:
 - ▶ nurse practitioners
 - ▶ nurse midwives
 - ▶ clinical social workers
 - ▶ physician assistants
 - ▶ licensed marriage or family therapists
 - ▶ licensed acupuncturists
 - ▶ dentists and optometrists
 - ▶ podiatrists and chiropractors

Examples of Reasonable Accommodations



- Making existing facilities used by employees readily accessible to and usable by persons with disabilities
- Job restructuring, modifying work schedules, reassignment to a vacant position
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters
- Permitting an employee to work from home;
- Allowing applicants or employees to bring assistive animals to the work site



Examples Of What Is *Not* A Reasonable Accommodation

- Personal use items (eyeglasses, hearing aids that ee would use both on and off job)
- The employee's personal preference when the employer has offered adequate accommodation
- Eliminating essential functions of the job
- Job reassignment that would violate a bona fide seniority system.
- Promotion



Examples Of What Is *Not* A Reasonable Accommodation

- Bumping an employee (even with lower seniority) from his/her job to give it to disabled ee
- Creating a new position that doesn't otherwise already exist
- Accommodations that would pose an undue hardship
- Transferring into a vacant position for which ee is not already qualified



What constitutes an
“undue hardship?”



Definition of Undue Hardship

- An action requiring significant difficulty or expense, when considered in light of:
 - ▶ the nature and cost of the accommodation needed
 - ▶ overall financial resources of the company
 - ▶ size of the company (# of ee's)
 - ▶ the geographic separateness, administrative, or fiscal relationship of the facility or facilities
 - ▶ the effect on the facility's operations and ability to conduct business
 - ▶ the impact on other employees' ability to do their jobs



Other lawful reasons to deny an accommodation

- At conclusion of the interactive process, it's determined that no reasonable accommodation exists that would allow the employee to perform the essential functions of the job without endangering his/her health or safety or the health or safety of others, because the job imposes an imminent and substantial degree of risk to the applicant/employee or others. (“Direct Threat”)

Direct Threat

- “Direct Threat” means a *significant risk* of substantial harm that cannot be eliminated or reduced by reasonable accommodation.
 - ▶ “Significant risk” means a high probability of substantial harm
 - ▶ Speculative or remote risk is not enough.





Direct Threat

- “Direct Threat” determinations should be based on an *individualized assessment* of the worker’s present ability to safely perform the essential functions of the job.
 - ▶ When making that assessment, consider the most current medical opinion of the worker’s abilities/limitations, and/or the best available objective evidence

Direct Threat

- In making “Direct Threat” determinations, the following factors should be considered:
 - ▶ What the specific risk is (e.g. injury, contagion, etc.)
 - ▶ Whether the risk is significant (i.e. highly probable)
 - ▶ The duration of the risk
 - ▶ The specific nature and severity of the potential harm
 - ▶ The likelihood that potential harm will occur and
 - ▶ The imminence of the potential harm



Direct Threat



Potential future risk is not enough!

It is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

Interactive Meeting

- Make sure the current work restrictions are clear before you hold the meeting





Interactive Process

When Might Medical Information be Insufficient?



- If it does not sufficiently describe the employee's functional limitations
 - ▶ Example: "Precluded from substantial work."
 - ▶ Example: "Light duty work only."
- Information is inconsistent with other health care provider's notes covering same time period
- Health care provider does not have the expertise to give an opinion about employee's condition and ability to work

Is this note sufficient?

“Patient was seen today for treatment and has the following work restrictions:

No bending, stooping, reaching or heavy lifting. Needs frequent stretch breaks and ability to alternate between sitting and standing in order to alleviate pain.”



Is this note sufficient?

“Patient is deemed permanent and stationary, with the following work restrictions:

No lifting in excess of 20 lbs.”



Is this note sufficient?

“Patient was treated in this office on 4/20/15 and is excused from work for 1 week. Follow-up appointment scheduled for 4/28/15.”



Is this note sufficient?

“Mr. Smith is under my care for post-traumatic stress disorder and it is recommended that he be relieved of all job duties that might exacerbate his condition.”





So if at the conclusion of this process, we determine that the employee cannot perform the essential functions of his/her job either with or without reasonable accommodation, we can terminate employment, right?



Interactive Meeting

- Prior to the meeting, you should try to determine what accommodations are reasonable (be prepared to make suggestions)
- Be prepared in advance of meeting with up to date job descriptions of vacant positions if it's unlikely the employee will be able to perform essential functions of his/her usual job



Helpful
Tips



Interactive Meeting



Helpful
Tips

- Document the accommodations requested and offered
- Summarize the discussion, document resolution, and if employee agrees to specific accommodation
- Have employee sign
- Prior to the meeting, you should try to determine what accommodations are reasonable (be prepared to make suggestions)

Dueling Doctors



Primary care physician says employee can return to work with no 90% work restrictions.

Workers' comp treater says employee has severe permanent work restrictions.

When Does the Process End?

- No hard and fast rule.
 - Requests must be analyzed on a case by case basis. No “three strikes” rule.
 - When a reasonable accommodation is rejected, this may be a breakdown of process
- It is always advisable when “ending the process,” that the reason be because of the employee’s failure to participate and not the employer’s (2-way street)
 - Make sure all the steps in the process have been documented, including failed attempts to accommodate



QUESTIONS?

