Workers’ Compensation and the Interactive Process: How to Fit the Pieces Together

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  - Representing employers to defend Title III ADA matters.

Common California Leave Issues: POLICIES REQUIRED

You Should Have Policies for Each of the Following:

- Family Medical Leave Act (FMLA) / California Family Rights Act (CFRA)
- Pregnancy Disability Leave (PDL)
- Paid Family Leave (PFL)
- Paid Sick
More California Leave Issues:

• Organ Donation/Bone Marrow leave
• ADA (ADAAA) and California Fair Employment and Housing Act – leave as an accommodation (disability)
• Time Off for Volunteer Firefighters, Emergency or Law Enforcement Personnel
• Time off for Voting
• Literary Assistance Leave
• Kin Care Leave under Labor Code 233 and 234 (beyond mandatory sick leave)
• Rehabilitation Leave – Labor Code 1025
• Military Spouse Leave
• Civil Air Patrol Leave
• Time Off for Victims of Domestic Violence, Stalking or Serious Crime
• Time-Off for School Children
• CA Workers’ Compensation Leave

Family and Medical Leave (FMLA)

Covered Employer:
• 50 or more employees; or
• Government agency

Covered Employee:
• Employment for at least 12 months (can be nonconsecutive)
• 1,250 hours of service within the last 12 month
• At a worksite with 50 or more employees within a 75 mile radius
Family and Medical Leave (FMLA)

Up to 12 weeks of unpaid, job-protected leave:

- to bond with a newborn child or placement of child in employee’s home for foster care or adoption;
- to care for a seriously-ill family member (spouse, child, or parent);
- to recover from a worker’s own serious illness; or
- to address qualifying exigencies arising out of a family member’s deployment.

- Up to 26 weeks of leave to care for an injured service member.

California Family Rights Act (CFRA)

Similar to but not the same as FMLA:
- Includes leave to care for a registered domestic partners
- Does not include military exigency or servicemember leaves
- Does not include pregnancy as a serious health condition

Requires modification of federal DOL forms
- Employer cannot ask for a medical diagnosis
- Do not use DOL WH 380 in California without modification.
Pregnancy Disability Leave (PDL)

• Applies to employers with 5 or more employees

• Provide leave or reasonable accommodation to employees disabled due to pregnancy, childbirth or related medical conditions

• No length of service requirement

• Employees can take up to 4 months (17.3 weeks) of leave

• As of April 1, 2016, Must Have a Pregnancy Disability Leave Policy

Expanded list of PDL Protections

Perceived Pregnancy
• Regard or treated by an employer as being pregnant or a related medical condition.

Expanded List of Pregnancy-Related Medical Conditions Permitting Leave
• Lactation-related conditions (Mastitis)
• Gestational diabetes
• Pregnancy-induced hypertension
• Preeclampsia
• Postpartum depression
• Loss of a pregnancy
• Recovery from loss or end of pregnancy
Intermittent Leave and Reduced Leave Schedules

FMLA/CFRA leave can be taken intermittently or on a reduced work schedule
- Must be medically necessary
- For any qualifying exigency
- For bonding purposes (if employer agrees)

CFRA: When bonding, leave generally must be in 2-week increments
- Exception permits two occasions where the leave may be for less than 2 weeks

Reinstatement Rights

FMLA: Reinstated to the same or equivalent position
- “Equivalent” means position has the same pay, benefits, schedule, shift and responsibilities and a geographically proximate location.

CFRA: Reinstated to same or comparable position.
- “Comparable” is similar to FMLA definition of “equivalent”

PDL: Employee must be reinstated to the same position (very narrow exceptions apply)
Fair Employment and Housing Act

• Employers are required to engage in an “interactive process” with individuals (both applicants and employees) to determine the need for reasonable accommodations of disabilities in light of essential job functions.

• The law does not require an employee to use “magic words” to trigger the accommodation obligation.

• A reasonable accommodation could include an unpaid or paid leave of absence of a defined duration.

Disability Defined

Fair Employment and Housing Act:
• A physical or mental disorder that affects a specified body system and limits a major life activity.
• Requires an individualized assessment

Special Education Disability:
• Requires or has required special education or related services
• May include a specific learning disability
• Does not include English as a second language
Disability Defined

When does a condition “limit” a major life activity?
- Old Definition: Makes achievement difficult
- New Definition: Individualized assessment to determine if achievement is "difficult"

Consider:
- What can most people in the general population perform with little or no difficulty?
- Peer group's ability to perform
- Individual's ability to perform in absence of disability

Mitigating Measures

Determined without considering mitigating measures

Expanded examples of mitigating measures:
- Medications, medical supplies, and equipment
- Low-vision devices
- Prosthetics
- Hearing aids
- Mobility devices
- Oxygen therapy
- Assistive animals
Still not a Disability

Statutorily excluded conditions:
- Current use of illegal drugs
- Compulsive gambling
- Kleptomania
- Sexual behavior disorders

Conditions that are mild, which are generally considered not to limit a major life activity
- Common cold / flu
- Minor cuts, sprains, muscle aches, bruises and abrasions
- Non-migraine headaches
- Minor, non-chronic gastrointestinal disorders

Employer Defenses

No duty to provide accommodation if:
- Undue hardship, determined by considering the totality of the circumstances
- Risk to health or safety of individual or others
- “Imminent and substantial degree of risk”
- Future risk is not a defense if condition does not presently interfere with ability to perform duties.
- An employee needs to be able to perform the essential functions of the position, with or without a reasonable accommodation.
Identifying Accommodations

How do you determine what accommodations are reasonable?
- Engage in the Interactive Process
- What are the essential functions of the job position?
- Resources to determine what is a reasonable accommodation
  - JAN

Interactive Process

Interactive Process requirements:
- Good faith communication with individual
- Communication with representative permissible “when necessary”

Explores:
- Need for reasonable accommodation
- How person can be reasonably accommodated

Duty to engage is triggered when:
- Employer or applicant requests reasonable accommodation
- Employer has notice, due to undisputed background information, that employee or applicant “might have a disability.”
Requests for Medical Information

If existence of disability or need for reasonable accommodation is not obvious:

• DO request a description of physical limitation that affects a major life activity
• DO request reasonable documentation including:
  • Healthcare provider’s name and credentials
  • Confirmation of physical or mental condition that limits a major life activity
  • Description of why individual needs a reasonable accommodation
• DON’T request entire medical history or diagnosis

Requests for Medical Information

• Information received during the Interactive Process is confidential

• Keep separate from personnel file

• Can be shared with:
  • Supervisors and managers: work restrictions and necessary reasonable accommodations
  • First aid and safety personnel: where appropriate, that a condition may require treatment
  • Government officials: investigation into regulation compliance
Essential Function?

Under FEHA guidelines, evidence of whether a particular function is essential includes, but is not limited to, the following factors:

• The employer’s judgment as to which functions are essential.
• Written job descriptions prepared before interviewing job applicants.
• The amount of time spent on the job performing the function.
• The consequences of not requiring the incumbent to perform the function.
• The terms of a collective bargaining agreement.
• The work experiences of past incumbents in the job.
• The current work experience of incumbents in similar jobs.

What is a Reasonable Accommodation?

A reasonable accommodation varies highly from employee to employee, but courts have provided some general guidelines:

• Make existing facilities more accessible
• Create a defined leave of absence
• Temporarily restructure scheduling or permit part time work
• Reassign employees to vacant positions
• Modify or obtain devices and/or equipment
• Provide qualified readers or interpreters
• Temporarily modify an employee’s position

Note: These must not create an undue hardship!!!
NOT a Reasonable Accommodation

- Eliminating *essential* job functions or reassigning them
- Excusing, or forgiving misconduct
- Changing a supervisor
- Monitoring medications
- Violating a seniority system
- Withholding discipline

Example: Donny and Teddy

- Donny is a full-time warehouse employee who tends to be always speaking his mind and telling it like it is, as he sees it. There are many lift drivers with high turnover.
- Teddy, a fellow employee, is tired of listening to Donny tell his stories and opinions.
- Teddy argues with Donny while both are operating forklifts.
- The argument escalates and Teddy crashes his forklift into Donny’s forklift.
**Example: Donny and Teddy II**

- Donny sustains a back injury and surgery is recommended with at least 6 weeks TTD. Due to complications, his disability is extended and has now been off work for 10 months.
- Donny’s MD indicates he can return to work with restrictions of no lifting over 20 lbs. and no more than 4 hours of work per day. Employer indicates that there are no modified duty.
- Teddy claims injury to his neck and psych as a consequence of the neck injury and “harassment” from Donny. One of Teddy’s claims is that he had repeatedly told his supervisor that he was offended by the constant “harassment” from Donny.

What laws are implicated in this scenario?
Who has a right of recovery, if any? Defenses?

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**Example: Elmo and Oscar**

- On 10/10/16, Elmo timely reports to employer that he hurt his back lifting but says he will “try” to treat on his own and does not go off work.
- Employer documents the report but does not provide a claim form or medical treatment.
- On 11/15/16, Elmo reports to the HR office that he is having issues at home with a sick child and wants to take time off.
- He also says that his back continues to hurt him and he wants to know the status of his worker’s compensation claim.
- Sesame Street’s HR director, Oscar, finds no record of a back injury claim.
- Oscar investigates and learns of the “report” of injury back on 10/10 and also learns from supervisor Bert, that Elmo has been intermittently missing time from work for “back pain”.
- Oscar forwards the claim (within 24 hours) to the administrator and notes that they will claim investigated as suspicious because the applicant has a history of suspicious claims in the past.
- Elmo returns the claim form (along with an non-MPN MD indicating that he is TTD due to the back injury).
Example: Beyonce and Bruno

• Employee Beyonce injures her shoulder and timely reports a work injury. Her claim is accepted.
• After 3 weeks off work, Beyonce returns to work with modifications.
• Bruno, her supervisor, has had issues in the past with modified work and not being able to find enough able-bodied workers to get the work completed.
• Bruno refuses to allow Beyonce to return to work until she has a full release.
• Beyonce, knowing a co-worker, Rihanna, was allowed to return to work in the past while rehabbing from a non-work injury, believes that she is being discriminated against because she has filed a WC injury.

Example: Stephen, KD, and Klay

• A well-liked employee, Stephen, sustains an admitted back injury that precludes him from doing his regular duties. His supervisor, KD accommodates his inability and allows modified work.
• This modified work continues for 10 months until Stephen’s treating MD indicates that the work restrictions are permanent.
• The permanent work preclusions are brought to the risk manger’s (Klay) attention who notes that the work preclusions prevent Stephen from doing his usual duties and therefore instructs that he be taken off work.
• Klay advises Stephen that, if he is released to full duty they will bring him back but otherwise he will be terminated due to his inability to perform his regular duties.
Example: Cersei and Stark, Inc.

- An employee, Cersei, injures her knees in a non-industrial accident and has to go off work for surgery.
- After surgery, her treating MD releases her to return to work at modified duty.
- The employer, Stark, Inc., is not too keen on the modified duty but allows it for Cersei.
- Cersei performs modified work for the maximum of 10 weeks.
- On the last day modified duty is allowed, Cersei claim an unwitnessed trip over an electrical cord at work and now claims an upper extremity injury as well as aggravation of the knee injury.
- She again is taken off work and after three weeks off, she returns with another release, to the same modified duty position.
- Stark advises Cersei that she has exhausted the 10 week leave policy and will therefore not be allowed to return to work in modified capacity.

Example: Mickey, Goofy, and Donald

- Mickey, Goofy, and Donald all work as Nurses at a hospital emergency room.
- While the team is tending to a patient that sustained several gun shots, the team is accosted by a man with a gun. Mickey gets grazed by a bullet and Donald gets injured by falling while he tries to escape. Goofy watches as the gun man shoots at the patient.
- After the incident, Goofy gets goofier and takes leave for a stress claim. During the workers compensation deposition, it is discovered that Goofy used to be a part of the gang Roadster Racers six years ago and he was in juvenile hall for two years.
- The hospital asks employees if they committed any felonies within the past six years on their application and Goofy did not disclose any felony convictions.
- Goofy has requested that he be transferred to the orthopedic department as an accommodation for his stress claim.
Example: Monsters, Inc. and Prince Ali’s Temporary Staffing Agency

- Monsters, Inc. hires monster employees to generate electricity by eliciting laughter from children.
- After Sully and Mike Wazouski get suspended after getting into a fight with Randall at the plant, Monsters, Inc. engages with Prince Ali’s temporary staffing agency to temporarily hire the Magical Genie in Sully and Mike’s place.
- The Magical Genie gets injured after he gets bit by Jasmine’s support animal Rajah. The Magical Genie has to have surgery after it is determined that his tendon was cut by the bite.

5 Recommended Practices

- Recognize key terms that may put employer on notice that a duty to engage in the interactive process is triggered including; “modified duty”, “work restrictions”, “work duration restrictions”, “ergonomic evaluation”, “light duty” are all common examples.
- Communicate, communicate, communicate- Do not rely on your workers’ compensation carrier to handle your leave issues. Employers have a constant obligation to engage in the interactive practice with an employee on leave for an employment or non-employment related injury or disability.
- Separate the files- Keep your workers’ compensation case files and leave files separate from your personnel files.
- Openly communicate with the TPA/insurance carrier to verify you are receiving updated needs to determine if a duty to engage in the interactive process is triggered. Employers should engage in the interactive process and have a discussion to determine what, if any accommodation may exist to assist the individual to perform the essential functions each time a new doctors note is received, whether that be received through the compensation case or directly from the employee.
- If in doubt, contact your attorney to ensure you have properly engaged in the