Reasonable Accommodation & Interactive Dialogue

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Where do these obligations come from?

- Fair Employment and Housing Act (FEHA)
  - Applies to employers with 5 or more employees
  - State Law

- Americans with Disabilities Act (ADA)
  - Applies to employers with 15 or more employees
  - Federal Law

- Employer Policies & Practices
What Must Employer Do?

- Once the employer is on notice, employer must engage in a timely, good faith interactive dialogue to identify and implement effective reasonable accommodation.

- Employer must provide reasonable accommodation to qualified individuals with disabilities (employees or applicants) unless doing so would cause an undue hardship.
Breaking Down the Key Terms

- Notice
- Qualified Individual
- Disability or other Trigger
- Reasonable Accommodation
- Undue Hardship
- Interactive Dialogue
Notice

- Employee requests an accommodation
  - Broadly defined!!
  - Train Supervisors to send comments UP the food chain
  - Request for equipment; complaints about sensitivity to office environment; complaints about health
    - Example: Complaint that secretary wore too much perfume was later construed as a chemical sensitivity disclosure that triggered accommodation obligations

- Employer observes behavior that might suggest that the employee or applicant is suffering from an disability
  - Watch out for pre-hire Internet Searches!

- Employer is informed by a third-party that the employee may be suffering from a disability
Qualified Individual

- An employee or applicant who can, with or without a reasonable accommodation, perform the essential job duties of the position.
- If the person cannot perform the essential job duties, he or she is not a qualified individual.
- Remember: NO BLIND PILOTS!
Essential Job Duties

- Fundamental functions of the position that the person seeks or holds
- Look At:
  - Job Descriptions
  - Amount of time spent performing that function
  - Consequences of not having that function performed
  - Nature and purpose of the position
Accommodation Triggers: Disability Defined

- Having a physical or mental impairment that limits a major life activity
  - Under ADA: If impairment will last less than 6 months, it must “substantially” limit a major life activity
  - Under FEHA: Impairment needs only to make a major life activity more difficult to do
- Having a record of such an impairment or being perceived or regarded as having such an impairment
What is a Major Life Activity?

- Physical Activities (walking, seeing, hearing)
- Mental Activities (thinking, remembering)
- Social Activities (communicating, talking)
- Working
- Sleeping
What is NOT a Disability?

- Mild Conditions that have little or no residual side effects
  - Non-migraine headaches
  - Soreness, Achiness
  - Non-chronic gastrointestinal illnesses
  - Common colds, flus
- Statutory exclusions: compulsive gambling, kleptomania, pyromania, pedophilia, exhibitionism, voyeurism, current abuse of alcohol or drugs
Disability Broadly Construed!

- Watch out because we are probably all disabled!
- In 2013, the American Psychiatric Association announced two new mental disorders:
  - Mild Neurocognitive Disorder: Modest decline in learning or memory
  - Social Pragmatic Communication Disorder: Problems communicating verbally and nonverbally in social situations
Accommodation Triggers: Religious Practices

- Employers must reasonably accommodate the religious dress and grooming practices of an employee or applicant unless doing so would present an undue hardship.

- Allowing an employee to wear a head scarf in violation of the store’s dress code policy was not an “undue hardship” (EEOC v. Abercrombie & Fitch Stores, Inc. 2013).
Accommodation Triggers: Stalking Protections

- As of January 1, 2014, employers are obligated to reasonably accommodate an employee who believes they may be a victim of stalking.

- Possible accommodations: changed phone numbers, changed locks, changed schedule, time off to relocate, temporary restraining orders, etc.
Accommodation Triggers: Rehabilitation Treatment

- Employer must reasonably accommodate an employee who voluntarily elects to seek treatment for drug or alcohol addiction
- No obligation to accommodate employee who is currently using drugs
- No obligation to accommodate Medical Marijuana use
  - Do not discipline based on registry, only on basis of a failed drug screen
Accommodation Triggers: Statutory Leave Rights

- Many of the leave of absence right that are guaranteed by statute also contain “accommodation” obligations which require that the employer work with the employee in order to schedule and allow the leave.

- Civil Air Patrol Leave, Military Leave, Military Spouse Leave, Pregnancy Leave, CFRA/FMLA, etc.
Reasonable Accommodation

- Action that an employer takes or allows in order to facilitate the employee’s ability to return and/or perform his or her essential job duties

- Employer must make an individualized assessment when considering reasonableness of accommodation

- Accommodations must be considered on a case-by-case basis
Accommodation Examples

- Modified schedule or assignment
- Modified equipment, resources, or training
- Providing readers or interpreters
- Providing a leave of absence
- Temporary reassignment to a vacant position (preferential consideration over other employees or applicants must be given when filling vacant position per new 2013 regulations)
- Use of an assistive animal (new per 2013 regulations)
Undue Hardship

- An action that requires significant hardship or expense for employer

- Look at:
  - Nature and cost of accommodation
  - Facility where employee is applying or employed
  - Number of employees
  - Effect on operations

- If the only “hardship” is that the customers won’t like it or it “might impact” profit, courts will be reluctant to find undue hardship
Interactive Dialogue

- Timely (Do not put this on the back burner!)
- Good Faith
- Interactive Conversation with Employee
- Aimed at identifying and/or implementing possible reasonable accommodations
- Employer obligated to BEGIN conversation (unless the condition is not obvious or apparent)
- Employee obligated to identify possible accommodations
Interactive Dialogue: THE ROAD MAP

- Watch for Accommodation Triggers:
  - Employee requests accommodation
  - Employer becomes aware of need for accommodation from third party or based on observation
  - Employee exhausts FMLA/CFRA but remains unable to return to work

- Other Triggers: Religious dress and grooming standards; Stalking (New January 1, 2014); Coordination with various statutory leave rights (rehabilitation, voting, military service, victims rights, etc.)
Interactive Dialogue: THE ROAD MAP

- Once triggered, employer is obligated to begin the dialogue process.
- Send letter to employee explaining that he or she may be entitled to an accommodation and inviting the employee to contact employer to discuss possible accommodation.
- Employer can request documentation certifying the need for the accommodation.
- June 2013: Former Postal Worker pled guilty to workers comp fraud for eight years of disability payments after she was spotted on The Price is Right. Oops.
Interactive Dialogue: THE ROAD MAP

- Employer must give the suggested accommodation “due consideration”

- If the employer rejects an employee’s proposed accommodation, the employer must then re-initiate the interactive dialogue process to identify other possible accommodations

- Think of it like a Tennis Match...Employer always needs to return the ball back to the Employee’s side of the court

- Prock v. Tamura (2013): Employer liable for failing to re-initiate interactive dialogue even though employee was totally disabled at time such that no accommodation existed
Interactive Dialogue: THE ROAD MAP

- Employer must implement an accommodation if doing so is reasonable and does not cause undue hardship
- Employer can choose cheapest, most efficient option
- Employer does NOT have to:
  - Create a new position
  - Modify the essential job duties
  - Make temporary accommodations permanent
Interactive Dialogue: THE ROAD MAP

- When employee is scheduled to return from leave or resume full duties, employer can request a fitness for duty certification from medical provider
  - Ensure that medical provider has a copy of the essential job duties so that he or she can accurately evaluate the condition
- Build in time limits to the accommodation
- Document all correspondence with employee
Practical Tips:

- Policies should clearly state that accommodations will be provided as required by law and should clarify how employees should request accommodation.

- Have accurate, up-to-date job descriptions.

- Train supervisors to recognize when accommodation obligation triggers.

  - A.M. v. Albertsons (2009): Verdict for Employee after the store assigned employee as the single cashier on duty during the graveyard shift, even though she had requested accommodation for her need to use the restroom frequently.
Practical Tips

- The reasonable accommodation obligation is an on-going duty; Try to ensure that the last correspondence in the dialogue is from the employer, not the employee.
- Document all conversations with employee and all actions taken.
- When in doubt, seek legal advice.
Questions???

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