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# **2017 Update: Accommodating Employees With Disabilities**

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# Basic Premise

- Title I of the ADA requires an employer to provide **reasonable accommodation** to **qualified individuals with disabilities** who are employees or applicants for employment, except when such accommodation would cause an **undue hardship**.



# Disability defined

The term “**disability**” means, with respect to an individual-

- (A) a physical or mental impairment that [*substantially*] limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.



# Disability defined

**ADA Regs:** Impairment may still be substantially limiting even if it is expected to last less than 6 mos.

**DFEH regs:** Exclude conditions that are mild, which have little or no residual effects,

- The common cold; seasonal or common influenza; minor cuts, sprains;
- Muscle aches, soreness, bruises, or abrasions; non-migraine headaches; and
- Minor non-chronic gastrointestinal disorders.



# Disability defined

Definition also excludes:

- Statutorily specified conditions, e.g. compulsive gambling, kleptomania, pyromania, pedophilia, exhibitionism, and voyeurism
- Current abuse of alcohol or drugs



# Qualified individual

A qualified individual with a disability is an individual who, with or without reasonable accommodation, can perform **the essential functions** of the employment position that such individual holds or desires.



# Essential Functions

- The fundamental job duties of the employment position the individual with a disability holds or desires
- Look at:
  - Employer's judgment/written job descriptions
  - Time spent performing
  - Consequences of not requiring the person to perform
  - CBA terms
  - Work experience





# Reasonable accommodation/Undue Hardship

“Reasonable accommodation” may include-

- (A) making existing facilities used by employees readily accessible; and
- (B) job restructuring, part-time/ modified work schedules; reassignment to a vacant position; acquiring or modifying equipment; modifying exams, training materials or policies; qualified readers or interpreters; and other similar accommodations



# Reasonable accommodation/**Undue Hardship**

“**Undue hardship**” means an action requiring significant difficulty or expense, when considered in light of:

- the nature and cost of the accommodation;
- the facility and the employer’s financial resources and number of employees; and
- the effect on operations.



# ADA Amendments Act of 2008

Expanded definition of disability by saying don't consider "mitigating measures" in determining whether individual is "substantially limited in a major life activity"

- Medications
- Medical supplies/equipment
- Prosthetics
- Hearing aids
- Mobility devices



# ADA Amendments Act of 2008

Expanded definition of disability to include impairments that are episodic or in remission if they would substantially limit a major life activity when active.



# Treating Everyone The Same Isn't Enough

- Equal opportunity  $\neq$  Equal treatment
- Goal is to give disabled employees/applicants opportunities to work
- Understanding the extent of that obligation is the challenge

# Significant Burden on Employers

- The number of impairments that qualify as disabilities and the range of possible accommodations are vast
- The ability to rely on a defense of “undue hardship” is narrow



# Significant Burden on Employers

- Employers must be prepared to assume costs, inconvenience, inefficiencies, and disruption
- The larger the employer, the greater the obligation
- Even if no accommodation is available, employers must engage the employee in a timely, good faith **interactive process**



# Misconduct attributed to a disability

- EEOC Enforcement Guidance says an employer is free to discipline a disabled employee for violating a “workplace conduct standard” if it is job-related and consistent with business necessity, even if the misconduct resulted from a disability.
- Case law not as clear – *Wills v. Superior Court* (OK to enforce standards where disability-related misconduct involves threats or violence)





# Flexibility Is Key



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# What the interactive process requires

- "Both the employer or other covered entity and the applicant, employee or the individual's representative shall exchange essential information identified below without delay or obstruction of the process." (DFEH regs)



# What the interactive process requires

The employer must:

1. Grant the applicant or employee's requested accommodation.
2. Reject it "after due consideration" *and initiate discussion of other possible accommodations.*
3. Ask for "reasonable medical documentation confirming the existence of the disability and the need for accommodation."



# What the interactive process requires

4. If information provided by the employee isn't clear, the employer can specify what further information it needs.
5. When necessary to assess a requested accommodation or to advance the interactive process, the employer can consult with experts.
6. If reassignment is being considered, the employer can ask about relevant education and work experience.



# What the interactive process requires

Once the necessary information has been exchanged, the employer must consult with the individual to identify potential accommodations and assess their effectiveness. It need not grant the employee's preferred accommodation.



# Employers must act promptly

- EEOC Regs:
  1. “An employer should respond *expeditiously* to a request for reasonable accommodation.”
  2. Interactive process “should proceed *as quickly as possible*.”
  3. “The employer should act *promptly* to provide the reasonable accommodation”
  4. “Unnecessary delays can result in a violation of the ADA.”



# What triggers the obligation to engage in the interactive process?

- When the employee requests accommodation
- When an employer becomes aware of the need for an accommodation through a third party or by observation. (Don't assume poor performance or behavior is due to a disability.)
- If an employee with a disability exhausts the leave provided under some other law (such as FMLA) and remains unable to return to work.



# Examples of accommodation (from DFEH regs)

- “Providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments.”
- Allowing use of assistive animals.
- Transferring to a more accessible worksite.
- Assistive aids and services such as qualified readers or interpreters.





# Examples of accommodation (from DFEH regs)

- Job Restructuring (although the employer is not required to reassign essential job functions).
- Part-time or modified work schedules.
- Changing when and/or how an essential function is performed.
- Adjusting or modifying examinations, training materials or policies.
- Modifying policies or supervisory methods.



# Examples of accommodations (from DFEH regs)

- Providing additional training.
- Letting the employee work from home.
- Leaves of absence.
- Reassignment to a vacant position



# Reassignment to a vacant position

- An employee returning from a disability LOA is entitled to “preferential consideration” over other applicants or existing employees
- More than the ability to compete
- Absent a bona fide seniority system, “reassignment means that the employee gets the vacant position if s/he is qualified for it.” (EEOC Enforcement Guidance)



# How can employers reduce their exposure?

- Policies should spell out the right to accommodations and how to request
- Job descriptions should be current and accurately identify essential functions
- Managers should know that there's an obligation to accommodate and whom to address disability-related issues to
- Train employees who engage in the interactive process.



# How can employers reduce their exposure?

- The obligation to accommodate is ongoing. If an accommodation isn't effective, start over.
- Protect employee privacy
- Document, Document, Document
- Get legal advice, if necessary



# Sources for further information

- The Americans With Disabilities Act of 1990 – 42 USC § 12101 et seq.
- EEOC Regs – 29 CFR Part 1630
- <http://www.eeoc.gov/laws/types/disability.cfm> - EEOC
- <http://www.ada.gov> – US DOJ Civil Rights Div.
- <http://www.eeoc.gov/policy/docs/accommodation.html> - EEOC Enforcement Guidance (reasonable accommodation)



# Sources for further information (continued)

- <http://www.eeoc.gov/policy/docs/psych.html> - EEOC Guidance (psychiatric disabilities)
- <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> - EEOC Guidance (disability-related inquiries)
- <http://californiaemploymentlaw.foxrothschild.com>
- <http://employmentdiscrimination.foxrothschild.com>



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