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My Employee is Injured –So Why Am I in Pain?

8 Tips for Dealing with Employees Who Have Disabilities, Injuries and Medical Conditions

Workplace injuries, employee medical conditions, disabilities, and pregnancies are complex legal issues and can cause employers a great deal of frustration. The acronyms for all of these laws are exhaustive and utilize much of the alphabet – ADA, FEHA, FMLA, CFRA, PDL, PFL, SDI, and WCAB. These laws have different requirements regarding the number of employees necessary for protection, the cause of the injury, the severity of the medical condition, and the length of required time off. This is a minefield of potential liability for employers. The following are eight tips to use in navigating that minefield.

1. "Disabilities" reach far beyond the obvious

Employers often find themselves in trouble because they don't realize all that can be covered by California's disability discrimination laws. In picturing a disabled employee, obvious conditions come to mind: blindness, deafness, paralysis, etc. But other, less obvious conditions such as depression, hypertension and learning disabilities may also constitute disabilities. In order to be covered by California's Fair Employment and Housing Act (FEHA) disability discrimination laws, a condition need not be totally debilitating, and an employee need not be declared totally disabled from working. Instead, an employee need only have a physical or mental condition that limits a major life activity. The FEHA applies to all employers with 5 or more employees. Under the federal Americans with Disabilities Act (ADA) the condition must "substantially" limit the major life activity. The ADA applies to all employers with 15 or more employees. In dropping the "substantial" requirement, the California legislature expressly declared its intention that this "result in broader coverage under the law of this state than under that federal act."

"Major life activities" are defined as "activities an average person can perform with little or no difficulty" and these include obvious activities such as walking, speaking, breathing, seeing and hearing, as well as less obvious activities such as learning, interacting with others, sitting and working.

Every employee must be considered on a case-by-case basis. An impairment can be limiting for some employees but not all (ex: asthma or a back condition). Conditions that are episodic or in remission are covered if they would limit a major life activity when active.

Whether a condition is disabling is determined without respect to any mitigating measures (i.e., employers cannot argue that the employee's condition is controlled by medication, therefore it is not a disability).

Thus, employers must be careful when dealing with employees with any type of medical condition or health issue because that employee may be entitled to the full protection of the disability discrimination laws.

2. Essential duties of the job – are they qualified?

Employers are not required to hire a person who is not qualified for the job. However, a person is qualified for the job if they can perform the "essential duties" of that job with or without reasonable accommodation. Accordingly, it is important to determine the actual "essential duties" of the job. Frequently, these include education, licenses, certifications, physical requirements, or work experience. If an applicant does not meet the essential duties because of a disability, it is up to the employer to show that the essential duty is consistent with business necessity. For example: If the job is for a truck driver who must deliver packages and the disabled applicant does not have the required driver's license, then they are not qualified for the job because they cannot meet the essential duties of that job. If however they have the license, but they cannot carry the packages, it must be then evaluated if there is a reasonable accommodation that can be given to them to allow them to deliver the packages, such as using a hand-truck or dolly. It is also important to decide whether a particular duty is "essential" or just preferred or marginal. If the duty is not essential, then employers should be careful when making a decision not to hire based upon it. Consequently, employers should be cautious when crafting job descriptions as they may serve as evidence should their hiring decision later be questioned by a court or administrative officer.

3. Accommodation can be tricky

Under California and federal law, employers are required to provide a reasonable accommodation to qualified employees and applicants unless the accommodation would impose an undue hardship on the employer. Accommodations come in many forms and often include modifications to the employee's job functions and/or the work environment. Some examples include: modified physical tasks, reduced working hours, temporary job transfers, modified break schedules, time for medical appointments, working from home, use of special chair, headphones, keyboard or monitor, installing ramps, reserved parking, change of lighting, or use of support animal. These accommodations must be designed to assist the employee in meeting the essential duties of the job.

Some accommodations however have been held by courts to be unreasonable. Hiring another person do to an employee's work has been held to be unreasonable. Transferring an employee to a position that is a promotion has been held to be unreasonable. Yet, transferring an employee to lower paying job may be a reasonable accommodation.

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Often employers are asked to accommodate an employee's medical condition pursuant to a doctor's note which specifically states the restriction (e.g. no lifting more than 10 lbs. for 30 days). These typically are the easy accommodations. Frequently, however, an employer must engage in the interactive process with the employee or applicant to figure out what, if any, accommodation works. This can sometimes be a difficult task. While there are some resource guides that employers can use to determine potential accommodations, the assistance of legal counsel can sometimes be necessary.

4. Pregnancy-related disabilities have their own set of rules

To further complicate matters, the California legislature again veers from federal law by providing special protection for pregnancy-related disabilities. Under the ADA, pregnancy itself, and the routine medical issues that often accompany pregnancy, such as morning sickness, are not considered disabilities. But pregnancy and pregnancy-related conditions are covered by the federal Family and Medical Leave Act (FMLA). Then are excluded from the California Family Rights Act (CFRA) and instead are covered by California's Pregnancy Disability Leave (PDL). An employee may take up to 4 months of PDL to cover any period during which the employee is "disabled by pregnancy." An employee can also take another 12 weeks of leave to bond with her child under the CFRA. Therefore, an employee who qualifies for both PDL and CFRA can theoretically take 4 months plus 12 weeks (roughly 7 months) of time off work when she is disabled by pregnancy and then to bond with her baby.

Entitlement to PDL starts from an employee's time of hire – there is no requirement that the employee must have worked a specific amount of time before becoming eligible for PDL. This is unlike the FMLA and CFRA, where an employee must have worked for at least 12 months for the employer and have worked at least 1,250 hours in the 12 months before the leave. The threshold number of employees also differs between PDL and FMLA/CFRA. FMLA/CFRA must be provided by employers of 50 or more employees within a 75 mile radius. PDL only requires 5 or more employees.

Employers are required to post a notice regarding PDL and the notice can be found on the Department of Fair Employment and Housing's website: *www.dfeh.ca.gov.*

5. Paid Family Leave

California is very unique in that employees taking PDL, FMLA or CFRA time off can receive a wage subsidy. "Paid Family Leave" is administered by the State Disability Insurance (SDI) program and it essentially extends disability insurance coverage to employees taking PDL, FMLA and CFRA time off. One common misconception is that it is the employer who must pay for this time, and another is that Paid Family Leave entitles an employee to take additional time off beyond what is allowed under PDL, FMLA or CFRA. More information regarding how an employee can make a claim for Paid Family Leave can be found at the Employment Development Department's website: *www.edd.ca.gov* or by contacting the authors.

6. Workers' compensation issues

Each day, employees report injuries at the workplace. It is important for employers to carefully follow their insurance company's protocol for reporting these injuries to ensure they are handled properly. After an employee has been injured or gone on leave for an injury, employers must be careful in how they deal with these employees. In addition to the all the potential civil claims under the FEHA, ADA, FMLA and CFRA, an employer may also be liable for discrimination under Labor Code section 132a for discriminating against an employee who has made a workers' compensation claim or had a

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workers' compensation injury. Most workers' compensation attorneys will file a 132a claim with the Workers' Compensation Appeals Board (WCAB) whenever any negative action is taken against an employee after they have been injured or filed a claim. The damages for these claims can include reinstatement, lost wages and benefits, costs, plus up to $10,000 in penalties. Importantly, these claims are typically excluded from workers' compensation coverage and often the employer will have to engage separate counsel to represent the employer on these claims. Accordingly, employers should be careful in making adverse decisions about employees on workers' compensation leave or those who have recently had a workers' compensation injury.

7. 12 weeks of FMLA/CFRA leave are up: Does that mean time off is over?

Many employers mistakenly think that once an employee has exhausted 12 weeks of leave under the FMLA/CFRA or if the employee has not been employed long enough to qualify for FMLA/CFRA leave, then the employee is not entitled to any additional leave time. This is wrong for employees on workers' compensation leaves and for employees whose conditions qualify as disabilities under the FEHA and the ADA. Unlike the FMLA and CFRA which allow for 12 weeks off, or California's PDL laws which allow for 4 months, neither the Workers' Compensation Act nor the FEHA/ADA specify how much time off must be given to an employee. Employers who apply a strict cut off may face a labor code or disability discrimination claim. Sears, Roebuck and Co. paid $6.2 million to the EEOC to settle a class action arising from Sears' policy of terminating employees after being out on leave for one year. The EEOC recently sued UPS because of a similar policy.

So what is an employer to do? Unless the employer can prove that it is an "undue hardship" (which does not mean simply that it costs you some money or is difficult), the employer should provide the disabled employee with the additional time off as a reasonable accommodation. Indefinite leaves, however (i.e., a doctor's note saying that the doctor cannot predict when the employee will be able to return), do not need to be offered because they are not a reasonable accommodation.

8. The doctor's note: Do not accept it blindly

The flip side of the coin mentioned in point #7 above is that employers are entitled to some supporting information from an employee's doctor before simply granting the leave of absence. When the need for an accommodation is not obvious, employers may require that the doctor complete a more detailed form providing the nature, extent and duration of the condition, and explaining why the requested accommodation is necessary. Employers, however, cannot violate employee privacy rights by asking the doctor to provide his or her specific diagnosis or to provide copies of the employee's medical file.