Disability Discrimination and Reasonable Accommodation under California’s Fair Employment and Housing Act (FEHA) [1]

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If your business has five or more employees, your business is one of the millions in California that has a duty to provide reasonable accommodations for its employees with known disabilities.

A duty to provide reasonable accommodation arises when the employer knows of the employee’s disability. While the employer undoubtedly becomes aware of the disability when the employee directly informs the employer, the duty is also triggered if the employer learns of the disability from someone else or by observation.

Once the employer knows of the disability, the employer must enter into the “interactive process” with the employee to determine an appropriate accommodation. While the term “interactive process” may sound like it’s riddled with formalities, but it is actually quite informal and simple to accomplish. Engaging in the “interactive process” is basically an informal discussion with the employee (or his/her representative) in which the employer makes an effort to identify a reasonable accommodation that will allow that employee to continue to perform the essential function of the job he/she was hired to perform. This can be as simple as a brief, morning check-in, but must be done and should be memorialized in writing.

As part of this discussion, and if the disability is not obvious, the employer may ask for supporting medical documentation. However, this does not entitle the employer to a free-for-all of the employee’s medical records, and the employee must still be afforded his/her right to privacy. This means that if the employee chooses to remain private about his/her medical condition, managers and supervisors who need to know of the disability to meet the employee’s work restrictions, should be the only individuals privy to the employee’s disability. Any information and records obtained as part of the interactive process, should be maintained separate from the employee’s personnel file and kept confidential.

However, before the interactive process takes place, it is important for the employer to have a firm grasp on what constitutes the essential functions of the employee’s job. Once that is determined and within a reasonable time of the employer learning of the employee’s disability, the employer and employee can engage in a meaningful dialogue about how the employee’s disability can be reasonably accommodated to allow him/her to continue to perform his/her job - the keyword here being “reasonably”.

An accommodation is reasonable when changes are made so that the employee with disabilities can perform the essential functions of the job, unless the employer can demonstrate that granting an accommodation creates undue hardship to the business operation. In such a scenario, the accommodation would be considered unreasonable, and the employer would not be required to accommodate the employee.

An “undue hardship” is defined as an action requiring “significant difficulty or expense”. (California Gov’t Code section 12926 (u).) While the determination of what constitutes an “undue hardship” is extremely fact-specific, the courts will use the following factors to determine whether an undue hardship exists:

1. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding;
2. The overall financial resources of the facilities involved in providing the reasonable accommodations, the number of persons employed at the facility and that effect of the accommodation on expenses and resources or on the operations of the facility, including the impact on other employees’ ability to perform their duties and the facility’s ability to conduct business;

3. The overall resources of the covered entity, the overall size of the business with respect to the number of employees, and the number, type, and location of the covered entity’s facilities;

4. The type of operations of the employer entity, including the composition, structure and functions of its workforce; and

5. The geographic separateness, administrative or fiscal relationship of the facility or facilities involved. (California Gov't Code section 12926 (u).)

As mentioned, whether an accommodation is reasonable, and whether it creates an undue hardship on the employer, is fact-specific. Therefore, it requires an individualized analysis, which considers factors like, the employee’s disability, the cost of the accommodation, and the employer’s ability to pay for it. This kind of an analysis can be done internally, but is much better suited for experienced employment counsel.

[1] It is important to note that the duty to reasonably accommodate arises under FEHA and under the Americans with Disabilities Act (ADA) and that FEHA protections against disability discrimination are independent of those the ADA provides. The FEHA provides broader protection than the ADA in certain important areas, including the employer’s duty to accommodate.

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