

Helping Injured Employees Return to Work

**Practical Guidance Under Workers' Compensation
and Disability Rights Laws in California**



Prepared by the
Institute for Research on Labor and Employment, University of California at Berkeley

For the
California Commission on Health and Safety and Workers' Compensation

February 2010



Helping Injured Employees Return to Work

**Practical Guidance Under Workers' Compensation
and Disability Rights Laws in California**



Prepared by the
Institute for Research on Labor and Employment, University of California at Berkeley

For the
California Commission on Health and Safety and Workers' Compensation

February 2010

Acknowledgments

This handbook was designed and produced by the Institute for Research on Labor and Employment (IRLE), University of California at Berkeley, under a contract with the California Commission on Health and Safety and Workers' Compensation (CHSWC). Its goal is to help small employers understand how to comply with both workers' compensation and disability rights laws that govern return to work in California.

Project Director Juliann Sum, J.D., Sc.M.
Editor Stefanie Kalmin
Designer Vicki Valentine

We wish to thank California Department of Industrial Relations Director John C. Duncan, 2009 CHSWC Chair Sean McNally, 2010 CHSWC Chair Angie Wei, other members of the Commission, and California Department of Fair Employment and Housing Deputy Director of Employment Jennifer Harlan for their support in this project.

This project would not have been possible without the ongoing efforts of CHSWC Executive Officer Christine Baker, Workers' Compensation Judge Lachlan Taylor, CHSWC Research Specialist Irina Nemirovsky, CHSWC Program Analyst Selma Meyerowitz, and other CHSWC staff. They guided and collaborated in the project and facilitated participation by the following project advisors and contributors, whom we also wish to acknowledge:

Roundtable Attendees

Cathy Aguilar, CHSWC
Saul Allweiss, Law Office of Saul Allweiss
Linda Atcherley, Linda Atcherley & Associates
Stuart Baron, Stuart Baron & Associates
Joe Carrisi, Southern California Edison
Roberta Etcheverry, Diversified Management Group*
Scott Hauge, Small Business California and Cal-Insurance
Nanette Goldberg Hauser, Southern California Edison
Lori Kammerer, Kammerer & Company representing Small Business California
Doug Kim, Green & Azevedo representing California Applicants' Attorneys Association
Robin Nagel, Kaiser Permanente
Carrie Nevans, California Division of Workers' Compensation
Michael Nolan, California Workers' Compensation Institute
Sarah Oliver, Grimmway Farms
Pearl Phoenix, Zenith Insurance
Seth Seabury, RAND Corporation
Mark Webb, Employers Direct Insurance Company
Herbert Yarbrough, California Department of Fair Employment and Housing

Additional Advisors and Contributors

Kathy Biala, Milestone Medical Management Alternatives
Erika Bruce, State Compensation Insurance Fund
California Department of Rehabilitation, Disability Access Section
Patricia Eyres, Stuart Baron & Associates
Jean K. Hyams, Dickson Levy Vinick Burrell Hyams LLP
Gideon Letz, M.D., State Compensation Insurance Fund
Herb Levine, Independent Living Resource Center San Francisco
Leslie F. Levy, Dickson Levy Vinick Burrell Hyams LLP
Bryon MacDonald, World Institute on Disability
Patricia Owens, National Academy of Social Insurance member and former board member
Lee Patton, Association of California Water Agencies Joint Powers Insurance Authority
Joe Severino, State Compensation Insurance Fund

*Ms. Etcheverry provided resources and invaluable assistance on an ongoing basis throughout the project.

Copyright © February 2010, IRLE and CHSWC. All or portions of this handbook may be reproduced without permission for educational purposes. Please credit IRLE and CHSWC.



Contents

Introduction. About This Handbook	4
Section I. Best Practices in Returning an Injured Employee to Work	6
Step 1. Contact the injured employee and start the interactive process	6
Step 2. Describe essential functions and usual duties of jobs	7
Step 3. Obtain work capacities and restrictions	7
Step 4. Research and evaluate possible accommodations	8
Step 5. Select a reasonable accommodation and make an offer of work	9
Step 6. Implement and monitor the accommodation	10
Section II. Establishing an Effective Return-to-Work Program	11
Develop and formalize your policies and procedures	11
Evaluate existing jobs and working conditions	12
Ensure everyone assumes their roles and responsibilities	13
Appendices	
A. Examples Comparing Essential Functions and Usual Duties of a Job	16
B. Time Frames for Engaging in the Interactive Process and Offering Work	17
C. Examples of Return to Work in Construction and Agriculture	20
D. Additional Resources	22
E. California Workers' Compensation Laws	25
F. California Disability Rights Laws	28

About This Handbook

When a work-related injury prevents an employee from returning to his or her original job and working conditions, the employer must navigate both workers' compensation and disability rights laws. These two sets of laws, however, have distinctly different goals, approaches, time frames, and definitions. Navigating the laws can be a complicated process for the typical small business employer, who does not have the benefit of a human resources department to ensure compliance.

This handbook provides guidance for small business employers. It describes how to establish and implement an effective return-to-work program, coordinate the return-to-work process with the injured employee's workers' compensation benefits, and ultimately strengthen the work environment and overall health of the company or organization. For employees of small businesses, the handbook describes the goals and benefits of returning to work, everyone's roles and responsibilities, and what can be expected in the process. Larger employers and their employees may also find this handbook useful.

The primary focus of this handbook is the interplay between workers' compensation and disability rights laws. To read more about workers' compensation benefits and other assistance available to injured workers, see *Workers' Compensation in California: A Guidebook for Injured Workers*, 3rd Edition, November 2006, and updates to the guidebook. They are available online at www.dir.ca.gov/chswc (link to "Find the most recent Guidebook for Injured Workers"). To access further information about workers' compensation requirements, disability rights in employment, and job-protected leave for employees with serious health conditions, see Appendix D of this handbook.



The main portion of the handbook is organized as follows:

Section I discusses six basic steps that constitute best practices to help an injured employee return to safe and appropriate work in a timely fashion. The information is based on recommendations from experts and practitioners in the field and on the actual legal requirements.

Section II discusses how to establish an effective program to carry out the best practices.

The six appendices give examples of essential functions of jobs, discuss time frames for engaging in the interactive process and offering work, describe return-to-work scenarios in construction and agriculture, list additional resources, and cite the different laws governing return to work.

This handbook encourages collaboration between employers and injured employees to find effective ways to accommodate job injuries. Working together will serve as a model for coworkers and colleagues. It will also contribute to health, well-being, and equal opportunity in employment, and to increased productivity in our workforce and society.

Best Practices in Returning an Injured Employee to Work

An effective return-to-work program can benefit employers in numerous ways. Such a program can help avoid millions of dollars in fines and penalties, reduce workers' compensation costs, retain experienced employees, improve employee morale and productivity, increase competitiveness of a business, and help ensure equal opportunity of employment for persons with disabilities. Employees participating in return to work can protect their jobs and income, avoid long-term unemployment, stay physically conditioned and mentally active, maintain daily structure and social connections provided by work, and participate in injury and illness prevention programs in the workplace.

This section describes six basic steps that constitute best practices to help an employee with a work-related injury or illness return to work.

STEP 1. **Contact the injured employee and start the interactive process**

When an employee has been hurt on the job, personally contact the employee and provide a Workers' Compensation Claim Form (DWC 1). Before providing the form, if possible fill in the employer's name and address, employee's name, date employer first knew of injury, and date the claim form is being provided to the employee. Encourage the employee to read the information attached to the form, and show the employee where to fill in his or her portion. After the employee completes his or her portion, finish filling in the employer's portion and provide copies of the form to the employee and to your insurance company.

Tell the employee that medical care will be provided while the claim is pending and that other benefits may also be provided after the claim is accepted. Discuss the return-to-work process. Stay in contact with the employee and be available to answer questions. Also be mindful of the employee's situation and needs, and show respect for the employee as a person. This will help allay the employee's concerns, avoid possible misunderstandings, and encourage the employee to have a positive view of the return-to-work process.



If the injury makes it difficult for the employee to do his or her job temporarily or on a long-term basis, discuss possible ways to address the problem. If it becomes clear that a reasonable accommodation is needed, explain that you will work with the employee to find one.

STEP 2. **Describe essential functions and usual duties of jobs**

Discuss with the employee the “essential functions” of his or her job. Essential functions are the fundamental purposes of a job. They focus on *why* a job exists. You will not be required to remove essential functions of a job to accommodate the employee. You may, however, be required to remove a non-essential function or otherwise provide a reasonable accommodation to enable the employee to perform a job’s essential functions.

Also discuss with the employee the actual activities, demands, and environmental conditions usually required in his or her job, including frequencies and hours per day. These may include, for example, details about required postures, motions, lifting, carrying, pushing, and pulling. In contrast to essential functions, usual duties focus on *how* a job is performed.

After you reach agreement with the employee about the essential functions and usual duties of the employee’s job, put this information in writing. Repeat this process for other jobs that the employee may be able to perform with or without a reasonable accommodation.

STEP 3. **Obtain work capacities and restrictions**

If it is not obvious what kind of accommodation would be appropriate, you will need to obtain the employee’s work capacities, which describe the tasks the employee can do safely. You also will need to obtain the employee’s work restrictions, which describe the tasks the employee is limited in doing or cannot do because of the injury.

Ask the employee to give the information you prepared in Step 2, above, to his or her primary treating physician or other health care professional, such as the employee's regular physician (if different from the primary treating physician), physician assistant, nurse practitioner, or physical therapist. This will help the professional determine work capacities and restrictions that are relevant to the employee's situation. If possible, provide the employee with a letter or form requesting the information you need. Ask the employee to share with you any information he or she obtains from the primary treating physician or other health care professional pertaining to his or her work capacities and restrictions.

If the information you receive is incomplete or unclear, ask the employee to obtain clarification, or ask the employee for permission for you to contact the primary treating physician or other health care professional directly. If you choose to ask your workers' compensation insurer to obtain the information from the primary treating physician, keep the employee fully informed to maintain openness in the process.

If you ask the employee to sign a medical release, limit its scope to the employee's work capacities and restrictions. Do not ask about the employee's medical condition, treatment plan, prognosis, or other matters unrelated to work.

If you use information from a health care professional other than the employee's primary treating physician, coordinate with your insurer so that the employee's workers' compensation benefits can be made consistent with the job accommodations you provide.

STEP 4. **Research and evaluate possible accommodations**

With the employee, explore ways to accommodate the employee's injury. The employee may already have useful ideas based on firsthand knowledge of the employee's job and a personal understanding of his or her injury and



disability. Keeping the needs of both employee and employer in mind, consider the employee's work capacities and restrictions and all possible jobs available to the employee. Evaluate whether the employee can perform the essential functions of those jobs with or without a reasonable accommodation. Use outside resources if necessary. Share all important information, communicate openly, and encourage a genuine, meaningful dialogue.

Examples of reasonable accommodations:

- Limiting tasks to those that are safe for the employee (“job restructuring”)
- Making changes in the way duties are performed
- Physically adjusting the work station based on an ergonomic evaluation
- Providing new equipment and training on how to use it
- Establishing a part-time work schedule
- Allowing time off for medical appointments or medically necessary time off for a longer period while recovering

With the employee, assess how effective each accommodation would be in allowing the employee to perform the job. You may find it helpful to request feedback from the employee's primary treating physician or other health care professional.

STEP 5. **Select a reasonable accommodation and make an offer of work**

You must consider accommodating the employee in the following order, unless you and the employee agree otherwise:

- Provide accommodations that would enable the employee to stay in his or her original job.
- Reassign the employee to an equivalent vacant position in a job the employee is qualified to perform, and provide reasonable accommodations as needed.

-
- Reassign the employee to a lower-graded vacant position in a job the employee is qualified to perform, and provide reasonable accommodations as needed.
 - Temporarily assign tasks that the employee is able to perform while recovering.

If there is more than one option in a particular category above, consider both the employee's preferences as well as how the accommodation could impact the operation of your business. It may be preferable, for example, to offer the employee a job that best utilizes his or her skills, training, and experience. It may also make the most sense for the employee to continue working in the same area, unit, or program as his or her original job. If an accommodation clearly would be too costly relative to the overall resources of your company or organization, or would significantly disrupt your business, consider other accommodations.

Make an offer based on the accommodation you select. This could be, but is not necessarily, an offer of regular, modified, or alternative work to reduce workers' compensation costs.

STEP 6. **Implement and monitor the accommodation**

After the employee accepts your offer, encourage and support his or her return to work. If the employee is still recovering from the injury, the primary treating physician or other health care professional should reduce or remove restrictions as the employee's condition improves. This will allow you to adjust accommodations accordingly to aid the recovery process. Continue to communicate as part of the ongoing, interactive process to ensure that the accommodation is working as anticipated.



Establishing an Effective Return-to-Work Program

Research shows that the benefits to employers of providing accommodations for employees with disabilities far outweigh the costs. This section discusses what employers can do to establish an effective program that carries out the best practices discussed in Section I and allows the employer to reap the benefits of providing effective accommodations.

Develop and formalize your policies and procedures

1. Apply the six-step return-to-work process

Review each of the six steps in Section I to formulate your policies and procedures, describe these policies and procedures in writing, and disseminate and discuss them with everyone involved:

- Identify who in your company or organization will be responsible for carrying out each of the six steps. Different persons may be involved at different stages. The person who starts the interactive process, for example, may not be the person who makes final decisions on job accommodations.
- Include instructions on how to obtain information from the employee's primary treating physician, other health care professionals, your workers' compensation insurer, and the persons in your company or organization responsible for accommodations.
- Be proactive, emphasize the need to gather complete and accurate information about work capacities and restrictions and possible accommodations, share important information with the injured employee, and communicate openly, respectfully, and in a timely fashion.

2. Eliminate inappropriate policies

Remove policies that categorically limit return to work. Before deciding not to provide an accommodation, you must determine whether it would be too costly relative to the overall resources of your company or organization, or would significantly disrupt your business.

Examples of inappropriate policies:

- Always terminating an employee if he or she is unable to return to full duty after a specific, fixed period
- Never considering modified or alternative work outside an employee's area, unit, or program
- Requiring that injured employees be released to full duty without restrictions or be healed 100 percent before returning
- Not considering time off except under fixed, pre-determined circumstances
- Delaying discussion of job accommodations until the employee's condition is permanent and stationary
- Refusing to purchase new equipment to accommodate the employee unless approved by the workers' compensation insurer

Evaluate existing jobs and working conditions

1. Identify essential and non-essential functions of jobs to know which functions may need to be removed

"Essential functions" are the fundamental purposes of a job. An employer is not required to remove an essential function of a job to accommodate an employee with a disability. A function may be considered essential because of one or more of the factors listed in Appendix F.

Non-essential functions are duties that an employer may be required to remove because the non-essential function creates problematic demands or working conditions for an employee with a disability. An employer may, for example, remove a non-essential function to enable the employee to perform a job's essential functions.

It is best to identify essential and non-essential functions of all jobs proactively and in collaboration with employees (and the union, if there is one). Because jobs may change over time, reevaluate your list of essential and non-essential functions of jobs when an employee with a disability needs an accommodation.



2. Identify short-term tasks outside regular jobs to allow injured employees to return to work while recovering

Proactively identify and compile lists of specific tasks outside regular jobs that could be done on a temporary basis. This should also be done in collaboration with employees (and the union, if there is one). The tasks you identify can later be assigned to an injured employee while recovering. This type of work can aid the recovery process and help the employee eventually transition to a regular job. The tasks could be among those that help your company or organization in the long run, such as researching and compiling information, organizing files and other materials, or maintaining equipment and facilities.

3. Evaluate working conditions and encourage employee input to reduce injuries

Periodically inspect your workplace to identify and evaluate unsafe conditions. Encourage employees to report injuries and unsafe conditions, and conduct investigations as needed. This will enable you to make changes that can reduce injuries and allow employees who do become injured to return to safer conditions.

Ensure everyone assumes their roles and responsibilities

1. Select suitable physicians and the best workers' compensation insurer

Primary treating physicians should clearly specify work capacities and restrictions, both during an employee's recovery and after the employee's condition has become permanent and stationary. The work capacities and restrictions should be based on the employee's medical condition and adjusted accordingly as the employee's condition improves. The physicians

should be willing to review the essential functions and usual duties of available jobs, since this will enable them to make accurate determinations relevant to the employee's situation. Other roles and responsibilities of primary treating physicians include notifying the workers' compensation insurer after the first examination of an employee with a work-related injury, communicating effectively with injured employees (and employers, when necessary), and being available to answer questions.

It is therefore important to choose a workers' compensation insurer that will:

- Select suitable primary treating physicians or medical provider networks
- Reimburse the physicians for actively participating in the return-to-work process
- Authorize medical treatment promptly
- Share information about work capacities and restrictions received from the primary treating physician in a timely fashion

The insurer should also offer services to help you design and implement your return-to-work program and be willing to reduce your workers' compensation costs for creating an effective program.

2. Train supervisors and managers on the return-to-work process

Train and continually remind supervisors and managers that when they learn that an employee has, or may have, a disability requiring an accommodation, they must notify the staff responsible for engaging the employee in the interactive process. Make certain that these staff understand how to carry out the interactive process. The focus must be on understanding work restrictions and capacity to work, not on the employee's exact medical diagnosis.

Emphasize to staff that they should be open to different, creative ways of getting the job done, not just the usual and customary way. Educate staff to engage in the interactive process until a reasonable accommodation is found or all possibilities have been exhausted.



Instruct staff to document the process fully. This includes keeping accurate records of the interactive process and the data used to evaluate possible accommodations. Clear and detailed information will help ensure the process is truly interactive, inform future supervisors and managers about the accommodation that was selected, and provide backup in case of possible legal problems.

3. Inform employees of their rights and obligations in the process

Educate all employees about the return-to-work process before an injury occurs. Encourage, and make it possible for, injured employees to return to work as soon as medically appropriate. Emphasize the collaborative nature of the process. Let employees know that they should share medical information about job-related limitations to help determine what kind of accommodations are needed, offer ideas about what accommodations might work, accept reasonable accommodations, and inform the employer if their contact information has changed.

Examples Comparing Essential Functions and Usual Duties of a Job

Essential functions focus on *why* a job exists, whereas usual duties focus on *how* a job is performed.

Note: The examples below illustrate how essential functions differ from usual duties of a job. The actual essential functions of a job and its usual duties must be identified on a case-by-case basis.

Automotive mechanic

- An essential function is to ensure all important parts are examined, including belts, hoses, steering systems, spark plugs, brake and fuel systems, wheel bearings, and other potentially troublesome areas.
- Usual duties include bending at the waist up to three hours a day, and looking up and reaching overhead up to three hours a day to inspect parts of vehicles.

Landscaping worker

- An essential function is to mow lawns.
- Usual duties include pushing, pulling, and guiding a power mower for two to three hours a day while standing and walking.

School bus driver

- An essential function is to transport students between neighborhoods, schools, and school activities.
- Usual duties include driving a school bus two to three hours twice a day, and pushing and pulling a manual lever at shoulder level to open and close bus doors up to 50 times a day.

Security guard

- An essential function is to circulate among visitors, patrons, or employees to preserve order and protect property.
- Usual duties include standing and walking seven hours a day.



Time Frames for Engaging in the Interactive Process and Offering Work

The Fair Employment and Housing Act (FEHA) and workers' compensation laws have different goals and time frames. Employers must comply with both sets of laws.

The interactive process under the FEHA

Start

The interactive process is required when a supervisor or someone else in management learns that an employee has a disability (whether work-related or not) and needs an accommodation to be able to continue working.

Duration

The process must continue until the employer and employee are satisfied that a suitable return to work has been accomplished or that a reasonable accommodation is not possible. The process could continue even after workers' compensation deadlines to offer regular, modified, or alternative work have passed or after the 12-month period covered by an offer of work has ended. (These time frames are described below.)

Follow-up

The employer must re-engage the employee in the interactive process if the employee's disability, the work environment, or the employer's business needs change, or if the accommodation is no longer effective for any reason.

Offering regular, modified, or alternative work under workers' compensation laws

During the recovery phase

While an employee is recovering from an injury, the employer should make every effort to offer appropriate work. Doing so will aid the employee's recovery and reduce or eliminate unnecessary temporary disability (TD) benefits. The work can involve temporary changes to the employee's regular job or temporary assignment to a different job or to different tasks, as long as the work meets the employee's capacities and restrictions.

An alternative to paying a supplemental job displacement benefit

Employees with a permanent disability may be eligible to receive a supplemental job displacement benefit (SJDB) in the form of a voucher that promises to pay for educational retraining or skill enhancement. As an alternative to the employee receiving an SJDB, the employer may offer modified or alternative work within 30 days after the employee's final payment of TD benefits. Ideally, the employee's primary treating physician should specify permanent work restrictions so the employer can know what kind of work to offer. The offer of modified or alternative work must be on an approved form and meet the following requirements:

- Pay at least 85 percent of the wages and benefits that were paid at the time of the injury
- Last at least 12 months
- Be within a reasonable commuting distance of where the employee lived at the time of injury
- Meet the work restrictions specified by the primary treating physician.

The employee may accept the offer within 30 days or object to it on the ground that it does not meet the requirements of modified or alternative



work. After the offer is accepted or rejected, the insurer or employer must send a completed copy of it to the state Division of Workers' Compensation.

Reducing permanent disability payments

Employees with a permanent disability are paid permanent disability (PD) benefits every two weeks. An employer with 50 or more employees has an incentive to offer regular, modified, or alternative work to an employee receiving these benefits. If the employer makes this offer within 60 days after the employee's condition becomes permanent and stationary (P&S), the employee's payments will be reduced by 15 percent. On the other hand, if the employer does not make this offer, the employee's payments will be increased by 15 percent.

The offer of regular, modified, or alternative work must be on an approved form and meet the following requirements:

- Pay the same wages and benefits that were paid at the time of the injury (regular work), or pay at least 85 percent of those wages and benefits (modified or alternative work)
- Last at least 12 months
- Be within a reasonable commuting distance of where the employee lived at the time of injury
- Meet the work restrictions specified by the primary treating physician.

The employee may accept or object to an offer of regular work within 20 days, and may accept or object to an offer of modified or alternative work within 30 days. After an offer of modified or alternative work is accepted or rejected, the insurer or employer must send a completed copy of it to the state Division of Workers' Compensation. (This requirement does not apply to offers of regular work.)

Examples of Return to Work in Construction and Agriculture

Part-time schedule with gradually increasing hours in construction

A carpenter working for a construction company has a back injury and cannot work full days while recovering. He would like to work partial days. The employer engages the employee in the interactive process to determine how many hours he can work per day doing carpentry. The employee contacts his physical therapist to ask whether it would be safe to work part-time. The physical therapist estimates that it would be safe for the employee to work half days and increase gradually the number of hours. Based on this, the employer postpones one project that does not have a set deadline and allows the employee to start at four hours per day. The employee gradually increases to full days by the time the injury is healed. The employer coordinates with the workers' compensation insurer to ensure the employee's benefits are consistent with his increased hours at work.

- Essential functions of this employee's job include accurately measuring, marking, cutting, and shaping materials to specified dimensions; building, installing, and repairing structures and fixtures in buildings; using particular hand tools, power tools, and machinery; following established safety rules; and maintaining a safe and clean environment. The employee is still able to perform these essential functions.
- It is not essential that the employee be able to work full days while recovering from his injury, because the employer has a contract with a client who is flexible about the completion date of a project. The employer is able to accommodate the employee by allowing him to work part-time, which enables the employee to perform the essential functions of his job.



New equipment and training in agriculture

An agricultural employee sustains a permanent injury in her right hand. She is not able to prune as many plants per hour as before her injury. The employer learns about the employee's disability and engages her in the interactive process to share information about the functional capacities of each hand and the demands that her job places on the hands. The employer finds a new pruning tool that can be used in either hand and is ergonomically designed to avoid injuries. The employee reviews the tool with her physician to ensure that it would be safe for her to use. The employer purchases the tool and brings in a representative from the tool supplier to train the employee on how to use it with her left hand, with the right hand doing the less demanding task of placing cut pieces into bins.

- Essential functions of this employee's job include pruning and thinning vines and branches to desired lengths and thicknesses; separating branches to make pruning easier; and maintaining the shape and growth of plants by adjusting the height and location of supporting structures. The employee is able to perform these essential functions with a reasonable accommodation.
- Using a pruning tool is required to perform the essential function of pruning and thinning vines and branches, but the employee is no longer able to use the old pruning tool. The employer accommodates the employee's injury and disability by purchasing the new tool, which enables the employee to perform the essential functions of her job.

Additional Resources

Physician's role

For information about how physicians can help injured employees return to work, see “The Personal Physician’s Role in Helping Patients with Medical Conditions Stay at Work or Return to Work,” American College of Occupational and Environmental Medicine, position statement approved on November 8, 2008, available online at www.acoem.org (link to “Policies & Position Statements”).

Insurer's role

Some workers’ compensation insurers actively support employers’ return-to-work programs. The insurer with the largest market share in California, State Compensation Insurance Fund, posts resources at its website to help employers with return-to-work programs: www.scif.com. Other insurers post similar resources at their websites or provide them directly to their policyholders.

For a list of all workers’ compensation insurers that do business in California, go to the website of the California Department of Insurance at www.insurance.ca.gov. Under “For Consumers,” link to “Companies by Lines of Insurance.”

Essential functions of jobs

O*Net OnLine, a resource developed for the U.S. Department of Labor, lists essential functions of many types of jobs at www.online.onetcenter.org (link to “Find Occupations”). These lists should be used as examples only, to aid in identifying the essential functions of actual jobs.

Job accommodations

The Job Accommodation Network (JAN), which is a service of the U.S. Department of Labor, provides accommodation ideas, publications, and other



resources, including a “Searchable Online Accommodation Resource” at www.jan.wvu.edu. A summary of JAN’s research showing that the benefits to employers of providing reasonable accommodations far outweigh the low costs is available online at www.jan.wvu.edu/media/LowCostHighImpact.doc.

The Pacific ADA Center, one of 10 regional centers, is a private, nonprofit organization that offers information, referral, training, consultation, and technical assistance to business, state and local government, and disability communities about the responsibilities and rights under the American with Disabilities Act: www.adapacific.org.

The Disability Access Section of the California Department of Rehabilitation provides information, training, consultation, and technical assistance on the FEHA and related laws: www.dor.ca.gov/ada.

Independent living centers provide information about local resources for persons with disabilities. Some also provide technical assistance to employers. The Department of Rehabilitation describes the independent living philosophy and lists the 29 independent living centers in California: www.dor.ca.gov/ils.

The California Consortium to Promote Stay at Work / Return to Work is a voluntary, multi-disciplinary group of stakeholders whose mission is to provide resources and offer strategies to employers and others to ensure that more California employees stay at work or return to work: www.casawrtw.org.

Workers’ compensation benefits, rights, and procedures

For information about injured employees’ rights and benefits, see *Workers’ Compensation in California: A Guidebook for Injured Workers*, 3rd Edition, November 2006, and updates to the guidebook. Go to the website of the Commission on Health and Safety and Workers’ Compensation at www.dir.ca.gov/chswc (link to “Find the most recent Guidebook for Injured Workers”).

The state Division of Workers' Compensation (DWC) administers California workers' compensation laws. For fact sheets, forms, reports, publications, and the Division's phone numbers and addresses, go to www.dir.ca.gov/dwc, or call 1-800-736-7401. The Workers' Compensation Claim Form (DWC 1) is available at www.dir.ca.gov/dwc/DWCForm1.pdf.

Disability rights and job-protected leave laws

The California Department of Fair Employment and Housing (DFEH) administers and enforces the Fair Employment and Housing Act (FEHA). As part of the FEHA, the Department also administers and enforces the California Family Rights Act (CFRA), which requires employers with 50 or more employees to grant job-protected leave to employees with serious health conditions. For information about the complaint process, go to www.dfeh.ca.gov, or call 1-800-884-1684 (within California), 1-916-478-7200 (outside California), or TTY 1-800-700-2320 (within California).

The U.S. Equal Opportunity Employment Commission (EEOC) enforces the Americans with Disabilities Act (ADA) and offers information and training. The ADA, its regulations and procedures, enforcement guidances, statistics, and other facts are available online at www.eeoc.gov. The following documents discuss the order of priority in which employers must consider reasonable accommodations for an employee with a disability:

- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
- Enforcement Guidance: Workers' Compensation and the ADA

The U.S. Department of Labor (DOL) enforces the Family and Medical Leave Act (FMLA). This federal law requires employers with 50 or more employees to grant job-protected leave to employees with serious health conditions. The FMLA, its regulations and procedures, compliance assistance, and related information are available online at www.dol.gov.



California Workers' Compensation Laws

The laws described below are found in the California Labor Code, which is available online at www.leginfo.ca.gov. The regulations are available online at www.oal.ca.gov.

Anti-discrimination law

It is illegal for an employer to punish or fire an injured employee for filing a workers' compensation claim or for having a job injury. This means an employer may not fire, threaten to fire, demote, or otherwise treat an employee differently from other employees solely because the employee filed a workers' compensation claim, intended to file a claim, or got injured at work. To defend against a discrimination claim in workers' compensation, the employer must prove there was a valid business reason for the action taken against the employee. An employee has one year from the last act of discrimination to file a claim under this law. The claim could be litigated as part of the employee's main workers' compensation case or litigated separately. The employee could be awarded a 50 percent increase in workers' compensation benefits up to \$10,000, reinstatement, and reimbursement for lost wages and work benefits. (Labor Code section 132a.)

Worker' compensation claim form

Employers are required to give or mail a Workers' Compensation Claim Form (DWC 1) to an injured employee within one working day after learning about the injury. (Labor Code section 5401.) The claim form is available online at www.dir.ca.gov/dwc/DWCForm1.pdf.

Employer's report of occupational injury or illness

Employers that are not self-insured are required to file an Employer's Report of Occupational Injury or Illness with their insurer within five days after learning about an injury or illness. (Labor Code section 6409.1; California Code of Regulations, title 8, sections 14000, 14004.)

Limitations on employer's right to medical information

A claims administrator may not disclose to an employer any medical information about an injured employee except the diagnosis for which workers' compensation is claimed, the treatment provided for this condition, and information necessary for the employer to have to modify the employee's work duties. (Labor Code section 3762.)

Temporary disability benefits

Temporary disability (TD) benefits are paid if an injured employee loses wages because the employee cannot do his or her regular job while recovering and the employer cannot offer work that meets the employee's work restrictions. TD benefits are not paid if the employer offers appropriate work at a sufficient pay rate while the employee is recovering. (Labor Code sections 4453-4459, 4650-4657, 4661, 4661.5.)

Supplemental job displacement benefit

A supplemental job displacement benefit (SJDB) is paid to an injured employee who is eligible to receive permanent disability benefits if the employer cannot offer modified or alternative work meeting certain requirements. (The requirements are described in Appendix B.) The benefit is in the form of a voucher that promises to help pay for educational retraining or skill enhancement, or both. The voucher is not paid, however, if the employer offers appropriate modified or alternative work. (Labor Code sections 4658.5, 4658.6; California Code of Regulations, title 8, sections 10133.50-10133.60.)



Permanent disability benefits

Permanent disability (PD) benefits are paid every two weeks if an injured employee sustains a permanent disability that limits his or her ability to compete for jobs or earn a living in the future. Employers with 50 or more employees can reduce these payments by 15 percent by offering regular, modified, or alternative work meeting certain requirements. (The requirements are described in Appendix B.) If the employer does not make this offer, the payments increase by 15 percent. (Labor Code sections 4453-4459, 4650-4651, 4658, 4658.1, 4659-4661, 4662-4664; California Code of Regulations, title 8, sections 10001-10003, 10133.53.)

Doctor's first report

Physicians who see a patient with a work-related injury or illness must file a Doctor's First Report of Occupational Injury or Illness with the patient's employer or the employer's workers' compensation insurer within five days after the initial examination. (Labor Code section 6409; California Code of Regulations, title 8, sections 14003, 14006.)

California Disability Rights Laws

The California Fair Employment and Housing Act (FEHA) can be found in sections 12900-12996 of the Government Code, which is available online at www.leginfo.ca.gov. The regulations governing disability rights in employment under the FEHA are in the California Code of Regulations, title 2, sections 7293.5-7294.2, available online at www.oal.ca.gov.

Note: Employers in California must also comply with the federal Americans with Disabilities Act (ADA). The requirements to engage in the interactive process and provide a reasonable accommodation under the FEHA are more extensive than those under the ADA. This booklet primarily discusses the FEHA because an employer can comply with the ADA by complying with the FEHA.

Requirements

The FEHA makes it illegal for an employer with five or more employees to discriminate against an employee because of a physical disability, mental disability, or medical condition. The employer must also provide a reasonable accommodation to a disabled employee if doing so does not create an undue hardship on the employer. The employer is not required to remove an essential function of a job, but may be required to remove a non-essential function to enable the employee to perform the job's essential functions.

To accomplish the goal of return to work, the FEHA requires the employer to engage in a "timely, good faith, interactive process" with an employee with a known physical or mental disability or known medical condition to determine effective reasonable accommodations for the employee. This means that one or more persons in positions of supervision or management must communicate directly and openly with the employee and share important information about possible accommodations. The interaction must be genuine. The employer should be proactive at every stage, communicate frequently with the employee, obtain input from the employee about his or her job-related limitations and ideas for accommodation, use outside



resources if necessary, and seek an accommodation that works for both employee and employer.

The employer must start the interactive process when a supervisor or someone else in management becomes aware that an employee has a disability and needs an accommodation to be able to perform his or her job. The employee is not required to make a specific request or use particular words, and the need for an accommodation is not always obvious. Examples of when an employer must start the process are as follows:

- An employee informs a supervisor that he or she is having trouble working full days because of medical appointments.
- A supervisor learns from an employee that another employee cannot do a certain task or use a particular device on the job because of pain or other symptoms.
- An employee or employer's insurer informs the employer of work restrictions reported by the employee's primary treating physician.
- The interactive process may end only when a reasonable accommodation is found or it becomes clear that an accommodation is not possible or would create undue hardship.

Definitions

Important terms in the FEHA are as follows:

“Disability” means a physical or mental impairment, regardless of whether it was caused by work, that limits a major life activity. It can be one that prevents an employee from doing his or her usual job, either temporarily or permanently. This definition also includes simply being regarded as having a disability.

“Reasonable accommodation” means an adjustment or change in an employee's job or workplace to make it possible for the employee to continue working.

“Undue hardship” means that an accommodation would cost too much relative to an employer’s overall resources or would significantly disrupt the employer’s business. It may be more difficult to show under the FEHA that an accommodation would create an undue hardship than it would be to prove under Labor Code section 132a (described in Appendix E) that there was a valid business reason for an action taken against an employee.

“Essential functions” are the fundamental purposes of a job. A function may be considered essential because of one or more of the following factors:

- The job exists to perform that function, and removing the function would fundamentally change the job.
- There are a limited number of employees among whom the function can be distributed.
- The function is highly specialized, and the person in that job is hired for his or her expertise or ability to perform it.

Timeline

The employee has one year from the last act of discrimination to file a complaint with the Department of Fair Employment and Housing (DFEH). (The deadline is earlier for complaints filed with the U.S. Equal Employment Opportunity Commission, including those filed under the Americans with Disabilities Act, or ADA.) After a complaint is filed and the Department determines that the case is governed by the FEHA, agency staff investigate the complaint and seek informal resolution or settlement with the employer. If not resolved, the case is handled in a formal conciliation conference. If still



not resolved, the Department pursues formal litigation before the Fair Employment and Housing Commission (FEHC) or, at the employer's request, in civil court. Litigation must be initiated within one year after the complaint was filed. Alternatively, the employee may request a right-to-sue notice, which permits the employee to litigate in civil court. In cases where the Department decides not to litigate a case, the Department automatically issues a right-to-sue notice.

Fines and penalties for violating the FEHA

If a case goes before the Fair Employment and Housing Commission, the Commission can require reinstatement, promotion, back pay, reasonable accommodation, actual damages including damages for emotional distress, training, policy changes, and administrative fines. Actual damages, which are payable to the employee, and administrative fines, which are payable to the state, can be up to \$150,000 (total). In civil cases, the employee could be awarded the same as listed above, with three exceptions: (1) no limit on the amount of emotional distress damages; (2) unlimited punitive damages instead of administrative fines; and (3) reasonable attorney's fees and expert witness fees and costs awarded to the prevailing party. In some cases, courts have awarded millions of dollars in punitive damages.

