

The California Commission on Health and Safety and Workers' Compensation



Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

CHSWC Members

Sean McNally (2009 Chair)

Catherine Aguilar

Allen Davenport

Kristen Schwenkmeyer

Robert B. Steinberg

Darrel "Shorty" Thacker

Angie Wei

Executive Officer

Christine Baker

**State of California
Labor and Workforce Development Agency
Department of Industrial Relations**

April 2009

Table of Contents

Background.....	1
Welcome	1
Briefing from the Department of Fair Employment and Housing.....	2
Key Issues from Advisory Group Participants	4
Advisory Group Recommendations and Next Steps	6
Closing	9
<i>Attachment A</i> – Advisory Group Meeting Agenda.....	10
<i>Attachment B</i> – Advisory Group Meeting Participants.....	11

Return-to-Work/FEHA/ADA Advisory Group Meeting

Background

Return to work after an injury or illness is important for employers and workers and their families in the State of California. Efforts need to be made to reduce litigation, reduce friction, and provide information to employers, particularly small employers who have the most difficult time complying with requirements regarding return to work. Improved information for all system participants about the requirements of the Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA) will be critical to efforts to improve return to work in California.

This project comes out of discussion about introducing legislation to develop guidebooks, and it was determined that authority already exists within the Department of Industrial Relations (DIR). Several stakeholders have requested information to help workers and employers meet their responsibilities under FEHA and ADA. John Duncan, Director of DIR, has requested that the Commission on Health and Safety and Workers' Compensation (CHSWC) work with the Department of Fair Employment and Housing (DFEH) and to partner with the Division of Workers' Compensation (DWC) on a new guidebook on return to work, FEHA and ADA. The Commission voted at its November 6, 2008 meeting to proceed with this project. This is a multi-agency effort to improve return to work and improve information for workers and employers in order to reduce confusion and litigation.

Welcome

Christine Baker, Executive Officer, the Commission on Health and Safety and Workers' Compensation (CHSWC), welcomed participants to the Advisory Group meeting. She introduced Carrie Nevans, Deputy Administrative Director of the DWC, who participated by telephone and who stated that return to work is a key issue for 2009. Ms. Baker also introduced two Commissioners, Sean McNally, representing private employers, and Catherine Aguilar, representing public sector employers. Sean McNally commented that for employers, return to work is a very complicated area for human resources and workers' compensation professionals. There is more and more emphasis on the interactive process, so it is critical to understand how the interactive process, the workers' compensation process, and the Family Medical Leave Act (FMLA) interact in an effort to return people to work for both industrial and non-industrial situations. He also stated that currently, confusion exists within human resources regarding which party can communicate and share information with another party and what timeframes are reasonable. Catherine Aguilar stated that in the public sector, it is challenging to identify how benefits are delivered and coordinated in cases involving job accommodations, as well as how these issues relate to conditions in the economy.

Ms. Baker stated that the Guidebook would not be written in a legalistic manner and would include best practices. Ms. Baker invited the Advisory Group to provide their comments at the meeting on what should be included in the Guidebook and to identify the issues and needs for getting the information out to employers and workers.

Briefing from the Department of Fair Employment and Housing

Role of DFEH and the FEHA Complaint Process

Jennifer Harlan and Herbert Yarbrough from DFEH described the FEHA complaint process. DFEH is a state agency that enforces the State's civil rights laws including discrimination in employment, housing, public accommodations, and hate crimes. Its investigations are neutral, not adversarial. DFEH works with employers when a complaint is filed, to request information. Some believe that DFEH pursues every complaint from an employee; this is not the case. The first point of contact is the 800 number for the DFEH Communications Center. Approximately half the calls do not result in an appointment with agency staff because it is clear that they are not an issue under FEHA. When an appointment is scheduled, a consultant conducts an interview at a District Office or on the phone to determine whether there is sufficient information to investigate a possible violation of law. About half of the appointments do not result in investigations. If DFEH declines to investigate, it issues a right-to-sue letter if the employee so requests. There are people who hire attorneys and go directly to court. There is also a right-to-sue process online, primarily for attorneys who choose to pursue claims without going through DFEH.

Most employers comply voluntarily with requests for information. If a request is burdensome, DFEH will work with the employer to get the information as easily as possible. If an employer ignores a DFEH request or resists complying with the request, DFEH will resort to subpoenas. It tries to resolve complaints and work with employers to make discovery requests reasonable. When it receives a response from an employer, it is reviewed with the complainant and a resolution to a "no fault" settlement is attempted. Complainants often think DFEH is siding with the employer, especially if the employer makes negative statements about the complainant. If at some point DFEH thinks that illegal discrimination has occurred, it will work with the employer to try to resolve the issue. First, an investigator talks to the employer. If the problem cannot be resolved, there is a conciliation conference where the investigator explains to the employer the findings of the investigation and why it is believed there is a violation. The complainant is present to receive any offers of settlement. If the complaint is not resolved in the conciliation conference and there is still reason to believe that discrimination has occurred, it is then referred to the Legal Department for a review for possible legal action. From the conciliation conference forward, DFEH is no longer neutral but an advocate for the law. The injured party is entitled to remedies under the law. Complainants are entitled to make-whole damages, including back pay, job opportunities, and emotional damages. The State has enforcement remedies, such as requiring the employer to adopt policies, requiring implementation of training, and collecting administrative fines that go to the State's General Fund.

The administrative law judge (ALJ) is an employee of the DFEH Commission. The ALJ hears cases. The employer can ask that a case be removed to Superior Court if the employee is seeking

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

emotional distress damages. DFEH will continue to be present and represent the interests of the State, which are also the interests of the complainant. Few cases get to this point. There are many opportunities to resolve the case before this.

DFEH does offer assistance to employers. If an employer has a policy and wants to know if it is consistent with the law, DFEH can consult with the employer about this. At the 800 number, there is a consultant and a district administrator who can answer technical questions. There are also employer roundtables; there is one active in southern California and one active in central California; in addition, one is being revitalized in northern California. The roundtables have breakfast meetings and annual conferences with panelists discussing topics of benefit to employers.

From the time a complaint is filed, DFEH has one year in which to bring an accusation. DFEH sends to employers by certified mail a letter with a copy of the complaint signed by the employee and other pieces of information. At any point when DFEH closes a case that it has investigated without settlement or adjudication, DFEH issues a right-to-sue letter. If the case goes to the administrative adjudication process and no discrimination is found, there is no right to sue; the employee has had due process and does not proceed further.

Dual Claims with the U.S. Equal Employment Opportunity Commission (EEOC)

DFEH has a work-sharing agreement with EEOC; the case is dual filed, but the EEOC defers the process to DFEH, and EEOC generally accepts the DFEH determination. Conversely, if an employee in California goes first to EEOC, DFEH accepts the EEOC determination. If someone gets a right-to-sue letter from EEOC, they have shorter time than the one year that they have to file suit after getting a DFEH right-to-sue letter.

The Interactive Process Under FEHA

The interactive process requires engagement of both employers and employees to determine whether or not that employee can continue to work for that employer. The discussion may not exhaust every possibility, but there has to be meaningful dialogue. The process can end when the requested accommodation is far too expensive for the employer, when it imposes undue hardship on either party, or when the employee cannot perform the job even with accommodation. The process is specific to each employer. For example, large employers may have a slow process for approving accommodations; small employers may have a faster process but costs of accommodations may be prohibitive. Employers get in trouble when communication breaks down.

Good faith is required of the employee as well, including disclosing medical information and accepting less costly accommodations that would allow the employee to continue working. Employers generally get in trouble when they do not engage in any interactive process; it is not usually a question of the degree of interactive process. For example, first-line supervisors often

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

think the employee is just trying to get special treatment without need. The interactive process is not right from the beginning if it starts with the attitude of “What is going on with you now” or “I will do what I have to do, but I do not believe you,” or “We let your job go; give me a call when you have a chance.” If the first step is dismissive, the process will usually lead to violation. Instead, the process should begin with asking what is needed for accommodation. If the employer cannot accommodate the employee in his/her job, the discussion should be about what other work the employer has that the employee can do. It would be helpful to provide training for supervisors on how to take the first steps in the interactive process in a positive way and how to identify when requests for accommodations need to be discussed with senior management and/or the Human Resources Department.

Key Issues from Advisory Group Participants

Employer and Employee Responsibilities in the Interactive Process

Often, a large employer with a Human Resources Department does work with front-line supervisors to look for options for accommodation. Still, clearly defined standards are needed to educate employers about reasonable accommodations and how much an employer needs to try to engage the employee when the employee has not responded (sometimes this occurs in cases where a workers’ compensation attorney has advised the employee not to talk to the employer). The employee has to provide the necessary contact information, especially if this information has changed. Employers should document attempts they have made to engage in the interactive process even if the attempts have not been successful. If they provide documentation of efforts to engage the employee and there has been no response, the employer will not be held accountable for the failure of the interactive process.

Large employers would like to know that there will be communication about some protection for employers if they do engage in the interactive process and have made attempts to engage the employee in the process, for example, by encouraging communication about accommodation and asking for medical information about why the requested accommodation is needed. DFEH has found that when employers make good faith efforts, it is rare in case law to find liability for discrimination because they failed to take one extra step. Most are cases where employees have provided all the necessary information and employers have failed to take the claim seriously even after they have been put on notice.

Employers need to know that there is an automatic violation of FEHA if there is no attempt to communicate with the employee in the interactive process. Manager/supervisor training should identify clues that constitute a trigger to contact the manager or Human Resources Department and say that there is a problem. There are many compliance training vendors available to provide these types of training resources.

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

Role of Workers' Compensation Insurance Carriers and Applicants' Attorneys

Insured employers used to be able to rely on the insurance carrier to walk them through many of the steps. Now, insurers are prohibited from advising about compliance with other laws, and they cannot require an employer to bring an employee back to work. The scope of FEHA was expanded in 2001, and vocational rehabilitation has been eliminated since then. Before the expansion of FEHA and the elimination of vocational rehabilitation, timelines provided for an earlier intervention than the current return-to-work incentives. There was also an ending point to the process which was the commencement of a vocational rehabilitation plan. The elimination of vocational rehabilitation has led to applicants' attorneys becoming more involved in FEHA cases, including disability discrimination cases.

Workers' Compensation Claims and the Interaction of Different Systems

Where conduct is covered by both FEHA and ADA, pursuant to a work-sharing agreement an adjudication by DFEH also binds EEOC. The only appeal is if DFEH declines to take it to a hearing; then the employee may request a substantial merit review by EEOC. A pending workers' compensation claim does not affect a DFEH investigation. Sometimes a worker comes to an agreement on both the DFEH and workers' compensation claims, and sometimes employers want workers' compensation language in the DFEH settlement agreement. DFEH will not enter into an agreement that releases claims other than those under FEHA, but there can be a separate release with the employer addressing workers' compensation.

In 2006-07 (after vocational rehabilitation was eliminated for new injuries), there was an increase in disability discrimination suits, but it would not necessarily be known if there was a workers' compensation case behind the claim. DFEH has had a slight increase in the past year in disability claims but there was a brief drop the year prior to that. There were 65 disability discrimination cases that went before the Fair Employment and Housing Commission (FEHC) for hearing, constituting the majority of cases that go before the Commission.

A key issue is that workers' compensation claims involve medical examinations. Some constituents believe that there should be a way to deem the medical reports for one proceeding inadmissible in another. Otherwise, there will be a bleeding of concepts from one system (e.g., capacity to work) that will contaminate another (e.g., impairment rating).

Preserving Rights to Employment Practices Insurance Benefits

Businesses that have employment practices insurance need to know that a claim needs to be reported to the insurer when the complaint is filed. The right to insurance benefits could be lost if a claim is not reported in a timely manner after an employer learns of a complaint. DFEH does not advise employers about potential insurance issues.

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

Suggested Reform to the DFEH Process

DFEH files about 19,000 cases a year. Therefore, pretty much everybody gets a right-to-sue letter, either when the case is closed after an investigation or upon request. The only time there is no right-to-sue letter is when there is a settlement or an adjudication by FEHC..

There is concern that employees get right-to-sue letters and demand settlements and employers are unaware that a right-to-sue letter does not necessarily mean there is a valid claim. The employer should understand that there might be a right-to-sue letter simply because a complaint was filed. One possible reform to the process would be to remove the right-to-sue letter at the end of a DFEH investigation that finds that the employer did everything right.

Advisory Group Recommendations and Next Steps

Advisory Group meeting participants suggested the following recommendations for the new Return-to-Work/ FEHA/ADA Guidebook and next steps:

- Do not just provide another summary of what employers should not do and what to watch out for to avoid litigation or penalties. Instead, present best practices and encourage employers to follow best practices.
- Provide an informational piece that explains to employers, employees, clinicians and other interested parties how various benefits interact with one another.
- Move away from defensive measures, fear of missteps, fear of litigation, and fear of job loss:
 - Adopt an organizing principle of the value of work for working Californians, which is comparable to the value of work for businesses.
 - Emphasize the economic necessity of keeping Californians working safely and productively.
 - Provide guidance to employees on what to do when you are unable to work safely and productively, which has a huge economic impact on everyone – employers, employees and families.
 - Make it an affirmative principle – what the employer can do to bring a formerly productive person back to productivity.
 - Emphasize the importance of looking at the whole person, not just at factors related to the occupational injury.
 - Emphasize the importance of being proactive, not waiting until there is an investigation in process.

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

- Emphasize the importance of having a timely, cordial, well documented engagement with the employee.
- Use an easy-to-read format, e.g., bullet points, gearing the use of language to the average reading level of the target populations.
- Take into account language barriers:
 - Consider how to present the guidebook in different languages, possibly by partnering with small business employer organizations.
- Make it basic enough for the small employer; emphasize that the employer should pick up the phone and call the appropriate resource to get support for handling the return-to-work process.
- Put the employer on notice to call the insurance carrier.
- Inform the employer that the insurance carrier will not be able to provide information, that the burden of asking for information is now on the employer, and that compliance information and training resources are available online.
- Ask the Department of Public Health (DPH) to put out information for employers on wellness programs.
- Address all parties, not just employers:
 - Clarify roles and responsibilities.
 - Create bridges between parallel processes, for example, FEHA and workers' compensation, and workers' compensation and human resources, and indicate how to make them more compatible with the required interactive process.
 - Provide guidance on what can be discussed and what is off limits for discussion.
 - Employers have the privilege and duty to define the essential functions for all jobs. That could be two or three lines stating that whoever does this job has to be able to do particular things.
 - Employers have the right to ask for medical information.
 - Employees have the duty to bring relevant information to the table to protect their own health and productivity.
 - Clinicians should be commenting on capacity, what the patient can safely do between now and the next visit; they should not define accommodations.

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

- They would be helped by having information about work requirements.
- Provide a tool kit:
 - Common timeframes, common vocabulary, and common requirements for the different processes.
 - Sample dialogues that reflect civility, concern and timeliness and that begin a verbal and documented exploration of the desired outcome: modified or alternate work under workers' compensation law.
 - Sample job descriptions that focus on essential duties.
 - Guidelines for accommodations.
 - A checklist that would include:
 - Having a conversation with the employee.
 - Developing a job description that identifies essential job functions.
 - Identifying whether the employee can do the essential job functions with or without accommodations.
 - Identifying what accommodations are medically necessary.
 - Identifying accommodations that the organization can afford and that the employee can benefit from.
 - Notifying the insurance carrier; notifying the DFEH, if appropriate; and notifying first-line supervisors about what events or discussions to watch for that trigger the need to contact a manager or the Human Resources Department.
 - A model interactive process.
 - A resource list.
- Identify resources already in place, including FEHA brochure and resources on the State Compensation Insurance Fund (SCIF) website.
- Address timelines:
 - Emphasize that the employer should talk to the employee when the employee is out with an injury; the employer should not wait to deal with return to work when the condition is permanent and stationary (P&S).

Summary of December 9, 2008 Return-to-Work/FEHA/ADA Advisory Group Meeting

- Develop strategies for dissemination, particularly co-branding with other organizations serving small businesses such as: Small Business California, Chambers of Commerce, local and state agencies, joint powers authorities (JPAs), and others. These organizations would promote the guide and facilitate translation into multiple languages.

Commissioner McNally commented that there is a need for a new and better approach, especially with an aging workforce and the economy shedding jobs. Public policy is emphasizing that employers bring people back to work. The system in place now has to be reformed to look more like the affirmative approach discussed by the group today, rather than the defensive posture created by the workers' compensation system. A more affirmative approach to return to work is needed with FEHA being the umbrella for it.

Closing

Christine Baker thanked participants for their comments and support for improving the return-to-work process in California and the new Return-to-Work/FEHA/ADA Guidebook.

Attachment A

Commission on Health and Safety and Workers' Compensation

Return-to-Work/FEHA/ADA Advisory Group Meeting

When: Tuesday, December 9, 2008

Where: Elihu Harris State Building

1515 Clay Street, Oakland

13th Floor, Room 1304

Time: 10:00 pm – 12:30 pm

AGENDA

- I. Welcome and Introductions 10:00 a.m.
John Duncan, DIR Director (invited)
Carrie Nevans, Deputy Administrative Director, Division of Workers' Compensation
Sean McNally, CHSWC Commissioner
Christine Baker, Executive Officer
DFEH Representative (invited)
- II. Discussion on "Questions" and "Issues" to consider 10:15 a.m.
- Reasons to create or improve a return-to-work program
- Establishing goals and objectives
- Understanding applicable laws
- Workers' compensation benefits and LC 132a
- Fair Employment and Housing Act and ADA
- California Family Rights and FMLA
- Steps to implement changes
- Monitoring progress and success
- Additional resources
- III. Next Steps 12:15 p.m.

Attachment B

Advisory Group Meeting Participants

Cathy Aguilar
Workers' Compensation Consultant

Sean McNally
Grimmway Farms

Saul Allweiss
Attorney

Robin Nagel
Kaiser Permanente

Linda Atcherley
California Applicants' Attorneys
Association

Carrie Nevans
DWC

Stu Baron
Stuart Baron & Associates

Michael Nolan
CWCI

Joe Carrisi
Southern California Edison

Pearl Phoenix
Zenith Insurance

Roberta Etcheverry
Diversified Management Group (DMG)

Seth Seabury
RAND Corporation

Jennifer Harlan
DFEH

Herbert Yarbrough
DFEH

Scott Hauge
Small Business California and
Cal-Insurance

Mark Webb
Employers Direct Insurance Company

Nanette Goldberg Hauser
Southern California Edison

Project Staff

Lori Kammerer
Small Business California

Christine Baker, CHSWC
Juliann Sum, UC Berkeley
Lachlan Taylor, CHSWC

Doug Kim
California Applicants' Attorneys
Association

Chris Bailey, CHSWC
Selma Meyerowitz, CHSWC
Irina Nemirovsky, CHSWC