

# Returning Injured Employees to Work While Complying With the ADA & FEHA

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## Americans With Disabilities Act (Federal) & Fair Employment & Housing Act (California)

- **An EE who sustains an industrial injury may be considered “disabled” under state and/or federal law.**
  - *Beware: California law (FEHA) defines “disability” much broader than federal law (ADA).*
    - Federal law: Test = “substantially limits” a major life activity
    - California law: Test = “limits” a major life activity
- **What is the “Test” for Returning a Disabled EE to Work Under the ADA/FEHA?**
  - **Test: An EE that is “disabled” as a result of an industrial injury has the right to be reinstated to an:**
    - Existing job, Modified job, or Alternative job**If the EE can perform the “essential functions” of the position with or without a “reasonable accommodation.”**

Remarks That Can Directly to Litigation ...  
How Do You Unring This Bell?"

- "Our company has a policy that modified work is not offered after 90 days ..."
- "Our company has a policy that we do not offer *permanent* modified work."
- "Our company has a policy that an EE must be released to return to full duty before he/she can be reinstated."
- "Our company has a policy that the EE must be 100% before returning to work."
- "The injured employee has been declared permanent & stationary and *still* cannot perform his former job."

Review the Top 5 Comments Made to Mary  
by Employers...

- None of them even **mention**:
  - The ADA or FEHA
  - Identification of a Reasonable Accommodation
  - The Interactive Process
- Only one of the comments even focuses on a specific injured employee!

## Understanding How the “Interactive Process” Works and When it is Triggered

- ERs need to understand their obligations under the ADA/FEHA – worker compensation is only one statutory scheme.
  - Workers compensation is relevant because EEs sometimes become “disabled” as a result of industrial injuries.
- Despite company policies, the law requires the ER and EE to engage in the “interactive process” to determine:
  - Whether the EE can performed the “essential functions” of his/her job with or without a reasonable accommodation.

## Overlap Between WC and ADA/FEHA

- *Difficult News:*
  - ERs must consider permanent modified duty or alternative assignments for workers who are not expected to sufficiently recover from their injuries enough to permit them to return to their original jobs.
- *Good News:*
  - By considering all possible avenues of returning an injured EE to work, the ER complies with obligations under ADA & FEHA, and avoids considerable increases in WC premiums attributable to expensive total and partial temporary disability expenses and voc rehab costs.

## Interaction Between Worker's Compensation & the ADA/FEHA

- While the Labor Code states that the workers compensation system is the exclusive remedy for workplace injuries, consider this...

- *City Of Moorpark v. Superior Court*

The California Supreme Court held that employees who suffer discrimination based on a work-related disability can sue for disability discrimination under the Fair Employment & Housing Act and for common law wrongful discharge.

- **Rule:** Despite the exclusivity of work comp for the *actual injury* to the employee, employees can still sue their employers for "failing to accommodate" an industrial injury under the FEHA.

## Impact of the *Moorpark* Decision

- An injured worker has additional claims outside the comp system to bring against the ER.
- Why are injured workers pursuing these claims?
  - Follow the \$\$ -- Applicants are looking for additional revenue streams following the WC reforms
  - Additional claims = more \$\$
  - The plaintiffs' bar is advising injured EEs of their rights under the ADA/FEHA
  - Remedies are more extensive under the ADA/FEHA than Labor Code section 132a

## What Happens When an EE Suffers an Industrial Injury Because of her ER's Refusal to Accommodate a Disability?

● *Ask Marilyn Bagatti ...*

- Marilyn was employed by the California Department of Rehabilitation. Marilyn had a disability that required an accommodation. However, her employer refused to modify her job to accommodate her physical disability.
- Marilyn filed a complaint with the DFEH.
- Marilyn continued to work, but then suffered an industrial injury and claimed that it resulted from her employer's "failure to accommodate" her physical disability.

## What Happens When an EE Suffers an Industrial Injury Because of her ER's Refusal to Accommodate a Disability? (cont.)

- The ER argued that WC was Marilyn's exclusive remedy and that she could not bring a claim under the FEHA for her physical injury.
- Who won?
- Why?

Why Do Employees Like “Failure to Accommodate” Claims Under the ADA/FEHA More than Labor Code 132a Claims?

- The remedies are different!!
- The FEHA allowed Marilyn significant additional remedies. Labor Code section 132(a) offers a limited remedy, while a violation of the FEHA allows the EE to seek compensatory and punitive damages!

## ADA/FEHA Basics

- Individual with a disability
- Essential functions
- Interactive process
- Reasonable v. Undue hardship
- Time frames
  - During WC leave and prior to P&S designation
  - After P&S determination
- Document, document, document

## What Type of Accommodation is Deemed “Reasonable?”

- Job restructuring (i.e., assigning “non-essential” job duties to other employees)
- Part-time or modified work schedules
- Reassignment to vacant position
- Providing equipment or devices
- An accommodation that causes the ER “undue hardship” is not “reasonable.”
  - Caveat -- ER has the burden of proof!
- An accommodation that constitutes a “direct threat” to the health and safety of coworkers or to the EE is not “reasonable.”
  - Caveat -- ER has the burden of proof!

## Who Needs to be Involved with Decisions Regarding “Reasonable Accommodations?”

- Supervisors.
  - Front line supervisors usually know and understand the *real* “essential functions” of each specific job better than Human Resources, Risk Management or upper management.
  - ERs are required to consider permanent modified duty or alternative assignments for workers who are not expected to sufficiently recover from their injuries enough to permit them to return to their original jobs.
    - Who best knows the “essential functions” of these various jobs, but the supervisors who oversee these functions on a daily basis?

## When Can “Return to Work” be Denied?

If an injured EE is **not** returned to work, the ER must demonstrate either:

- The EE cannot perform the “essential” functions of the job with or without “reasonable accommodation,” or
- The EE poses a direct threat to himself/herself or co-workers that cannot be reasonably accommodated.

## From the EEOC’s Website...

- Regardless of cost, and ER does not need to provide an accommodation that would pose significant difficulty in terms of the operation of business.
  - **Example:** A store clerk with a disability asks to work part-time as a reasonable accommodation, which would leave part of one shift staffed by one clerk instead of two. This arrangement poses an undue hardship if it causes untimely customer service.

## From the EEOC's Website...

- **Example:** An employee with a disability asks to change her scheduled arrival time from 9:00 a.m. to 10:00 a.m. to attend physical therapy appointments and to stay an hour later. If this accommodation would not affect her ability to complete work in a timely manner or disrupt service to clients or the performance of other workers, it does not pose an undue hardship.

## From the EEOC's Website...

- An ER does not have to do any of the following:
  - **Provide an employee with a device that would assist him/her both on and off the job, such as a prosthetic limb, wheelchair, or eyeglasses.**
  - **Remove or alter a job's "essential" functions.**
    - **Example:** A grocery store bagger develops a disability that makes her unable to lift any item weighing more than five pounds. The store does not have to grant an accommodation removing its fifteen-pound lifting requirement if doing so would remove the main job duty of placing items into bags and handing filled bags to customers or placing them in grocery carts.

An ER does not have to do any of the following:

- **Lower production or performance standards.**
  - **Example:** A hotel that requires its housekeepers to clean 16 rooms per day does not have to lower this standard for an employee with a disability.
- **Excuse violations of conduct rules necessary for the operation of the business.**
  - **Example:** ER does not have to tolerate violence, threats of violence, theft, or destruction of property, even if the EE claims that a mental or physical disability caused the misconduct.

How Much Time Off Does an ER Have to Provide?

- If EE is not eligible for FMLA/CFRA, how long can EE be off work on a WC leave?
  - *What is the impact of ADA and FEHA?*
- If the EE is eligible for FMLA/CFRA, the FMLA/CFRA requires at least 12 weeks off in a 12 month period.
  - *Is the ER obligated to provide leave beyond 12 weeks as a “reasonable accommodation?”*

## How Much Time Off is Too Much?

- Is an “indefinite” leave of absence a “reasonable accommodation?”
  - No
  - What is the definition of “indefinite?”

## Another Compelling Reason to Return Injured Employees to Work -- \$\$\$

- For employees covered by the new reforms:
  - **If ER has 50 or more employees and offers regular, modified, or alternative work lasting at least 12 months, EE’s permanent benefits will be decreased by 15%.**
    - Modified or alternative work must pay at least 85% of the wages the EE was receiving at the time of injury and be within a reasonable commuting distance of EE’s residence at the time of injury.
  - **If ER has 50 or more employees and does not make the offer described above, the EE’s permanent disability benefits will be increased by 15%.**

## What is Labor Code Section 132a?

- Labor Code section 132(a) prohibits an employer from discharging, threatening, or discriminating in any way against an employee because he/she has received an award from, has filed, or even intends to file, a workers' compensation claim.
  - Therefore, an ER should not take any adverse action against an EE who:
    - Has received an award
    - Filed a claim, or
    - Intends to file a claim

without considering the possibility of a discrimination or retaliation claim.