RETURN TO WORK UPDATE

DWC Education Conference

February 25, 2011 (LA) and March 1, 2011 (Oakland)

Otis Byrd
Division of Workers' Compensation

Roberta Etcheverry
DMG: Diversified Management Group

Jennifer Harlan
CA Dept of Fair Employment and Housing

What happens when an employer makes an offer of modified work and then, after a few months, there are problems such as the employee presents a different set of restrictions or the employee has not been effective at doing the job?

What do I do when an employee has both an industrial injury AND a non-occupational condition? What issues arise under Workers' Compensation? Under the Fair Employment and Housing Act? For instance, what do I do if I can offer modified work based only on the employee's work-related injury, but based on their non-occupational disability they would not be able to do that work?

What about employees with temporary restrictions? Do employers have obligations under Workers' Compensation? Under the Fair Employment and Housing Act?

What if the injury is deemed to have occurred with another employer? What obligations does the current employer have to meet regarding the Workers' Compensation and Fair Employment and Housing Act considerations?

When an employee has been terminated for cause or no longer meets the job qualifications (unrelated to their injury or disability), how does this impact the employer's obligations under Workers' Compensation? Under the Fair Employment and Housing Act (FEHA)?

How extensive do an employer's efforts need to be to try to find a workable solution? When has the employer done "enough" and can say they simply cannot find modified work or cannot accommodate? What guidelines are there for when an employee can be terminated under Workers' Compensation? Under the Fair Employment and Housing Act?

CA Codes sections 139.47 & 4658.1 thru 4658.6

139.47. The Director of Industrial Relations shall establish and maintain a program to encourage, facilitate, and educate employers to provide early and sustained return to work after occupational injury or illness. The program shall do both of the following:

(a) Develop educational materials and guides, in easily understandable language in both print and electronic form, for employers, health care providers, employees, and labor unions. These materials shall address issues including, but not limited to, early return to work, assessment of functional abilities and limitations, development of appropriate work restrictions, job analysis, worksite modifications, assistive equipment and devices, and available resources.

(b) Conduct training for employee and employer organizations and health care providers concerning the accommodation of injured employees and the prevention of reinjury.

4658.1. As used in this article, the following definitions apply:

(a) "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(b) "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(c) "Alternative work" means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that is located within reasonable commuting distance of the employee's residence at the time of injury.

(d) For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, the wages and compensation for any increase in working hours over the average hours worked at the time of injury shall not be considered.

(e) For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, actual wages and compensation shall be determined without regard to the minimums and maximums set forth in Chapter 1 (commencing with Section 4451).

(f) The condition that regular work, modified work, or alternative work be located within a reasonable distance of the employee's residence at the time of injury may be waived by the employee. The condition shall be deemed to be waived if the employee accepts the regular work, modified work, or alternative work and does not object to the location within 20 days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

4658.5. (a) Except as provided in Section 4658.6, if the injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of

temporary disability, the injured employee shall be eligible for a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state-approved or accredited schools, as follows:

(1) Up to four thousand dollars ($4,000) for permanent partial disability awards of less than 15 percent.

(2) Up to six thousand dollars ($6,000) for permanent partial disability awards between 15 and 25 percent.

(3) Up to eight thousand dollars ($8,000) for permanent partial disability awards between 26 and 49 percent.

(4) Up to ten thousand dollars ($10,000) for permanent partial disability awards between 50 and 99 percent.

(b) The voucher may be used for payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement. No more than 10 percent of the voucher moneys may be used for vocational or return-to-work counseling. The administrative director shall adopt regulations governing the form of payment, direct reimbursement to the injured employee upon presentation to the employer of appropriate documentation and receipts, and other matters necessary to the proper administration of the supplemental job displacement benefit.

(c) Within 10 days of the last payment of temporary disability, the employer shall provide to the employee, in the form and manner prescribed by the administrative director, information that provides notice of rights under this section. This notice shall be sent by certified mail.

(d) This section shall apply to injuries occurring on or after January 1, 2004.

4658.6. The employer shall not be liable for the supplemental job displacement benefit if the employer meets either of the following conditions:

(a) Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, modified work, accommodating the employee's work restrictions, lasting at least 12 months.

(b) Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, alternative work meeting all of the following conditions:

(1) The employee has the ability to perform the essential functions of the job provided.

(2) The job provided is in a regular position lasting at least 12 months.

(3) The job provided offers wages and compensation that are within 15 percent of those paid to the employee at the time of injury.

(4) The job is located within reasonable commuting distance of the employee's residence at the time of injury.

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 4.5. DIVISION OF WORKERS' COMPENSATION
SUBCHAPTER 1.5. INJURIES ON OR AFTER JANUARY 1, 1990

ARTICLE 6. RETRAINING AND RETURN TO WORK--DEFINITIONS AND GENERAL PROVISIONS

§ 10116. Applicability of Article

The provisions of this article are applicable to Articles 6.5, 7, and 7.5 of these regulations, except for the definitions in section 10116.9. The definitions in section 10116.9 only apply to the provisions of Articles 6.5 and 7.5.

§ 10116.1. Filing and Reporting Requirements

(a) "Electronic Adjudication Management System" or "EAMS" means the computer case management system used by the Division of Workers' Compensation to electronically store and maintain the Division of Workers' Compensation or appeals board's case files and to perform other case management functions.

(b) All forms, documents or correspondence submitted to the Retraining and Return to Work Unit shall be signed by the filing party and stored in the EAMS:

(1) Except for documents or forms which open a Retraining and Return to Work Unit file, all documents and forms shall contain a case number assigned by the Division of Workers' Compensation.

(2) Case opening documents shall be assigned a case number by the Division of Workers' Compensation after filing where no case number has been previously assigned for the date of injury alleged by the injured worker. The case number shall be preceded by the prefix "VOC" for cases governed by Article 7 of these rules and "RSU" for cases governed by Article 6.5 and 7.5 of these rules. If a case number has been previously assigned by the Division of Workers' Compensation, the prefix "VOC" or "RSU" shall precede the assigned case number on a form or document filed with the Retraining and Return to Work Unit. Documents or forms filed in existing cases without a case number will be returned to the sender with instructions for proper filing.

(3) All documents presented for filing shall conform to the requirements of sections 10217, 10228 and 10232 of title 8 of the California Code of Regulations.

(4) The Division of Workers' Compensation shall scan all documents and forms filed into the EAMS case file and then the paper document or form will be destroyed not less than 30 business days after filing. A properly filed form or document shall be deemed a legal filing for all purposes.

(5) The service of all documents and forms shall conform to the methods of service described in section of 10218 of title 8 of the California Code of Regulation.

(c) All required notices, any documents or forms shall be sent to the employee and his or her attorney, if any, on a timely basis by the claims administrator in the form and manner prescribed in section 10218 of title 8 of the California Code of Regulation.

Failure to provide notices timely shall subject the insurer, third party administrator or self-insured employer to administrative or civil penalties. The notices are timely when sent according to the requirements of sections 9813, 9813.1 and 9813.2 of title 8 of the California Code of Regulation.

AUTHORITY:

Note: Authority cited: Sections 133, 139.48, 139.5, 4658, 4658.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code; Godinez v. Buffets, Inc. (2004, Significant Panel Decision) 69 Cal. Comp. Cases 1311; and Vulean Materials Co. v. WCAB (2006, Writ Denied) 71 Cal. Comp. Cases 1346.

§ 10116.2. Electronic Filing Exemption

If a document is filed with EAMS as part of the electronic filing trial, that document does not need to be filed in compliance with sections 10228 and 10232 of title 8 of the California Code of Regulation.

AUTHORITY:

Note: Authority cited: Sections 111, 133, 5307.3 and 5307.4, Labor Code. Reference: Sections 124 and 126, Labor Code.

§ 10116.3. Incomplete Filings

(a) A form filed without the attachments or enclosures required by these rules are deemed incomplete and shall not be deemed filed for any purpose. All incomplete requests will be date stamped by the Division of Workers' Compensation.

(b) The Retraining and Return to Work Unit shall notify the filer and the other parties when a form or document is deemed not filed.

(c) Forms including filing instructions and venue lists shall be provided upon request by the Retraining and Return to Work Unit. Requests shall be submitted to:

RETRAINING AND RETURN TO WORK UNIT HEADQUARTERS
P. O. BOX 420603
SAN FRANCISCO, CA 94142

Or may be found at http://www.dir.ca.gov/dwc/forms.html

AUTHORITY:

Note: Authority cited: Sections 133, 139.48, 139.5, 4658, 4658.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code; Godinez v. Buffets, Inc. (2004, Significant Panel Decision) 69 Cal. Comp. Cases 1311; and Vulean Materials Co. v. WCAB (2006, Writ Denied) 71 Cal. Comp. Cases 1346.

§ 10116.5. Technical Problems and Unavailability of EAMS

Technical problems with filing documents shall be governed by sections 10223 and 10225 of title 8 of the California Code of Regulation.

AUTHORITY:

Note: Authority cited: Sections 133, 139.48, 139.5, 4658, 4658.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code; Godinez v. Buffets, Inc. (2004, Significant Panel Decision) 69 Cal. Comp. Cases 1311; and Vulean Materials Co. v. WCAB (2006, Writ Denied) 71 Cal. Comp. Cases 1346.

§ 10116.6. Retraining and Return to Work File Retention

(a) Following a period of fifty (50) years after the filing of a document used to open a case or file, the Division of Workers' Compensation may destroy the electronic and/or paper file in each case maintained by the Retraining and Return to Work Unit.

(b) The Division of Workers' Compensation, at any time, may convert a paper file to an electronic file. The Division of Workers' Compensation shall inform the parties when a paper file is converted. If a paper case file has been converted to electronic form, the paper case file may be destroyed no less than 30 business days after the parties have been informed of the conversion.

AUTHORITY:

Note: Authority cited: Sections 133, 138.4, 139.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code.

§ 10116.7. Misfiled or Misdirected Documents

(a) A request to move, substitute, or correct a document shall be made in conformity with section 10223 of title 8 of the California Code of Regulation, except that a request to substitute shall be made in lieu of a petition to substitute as allowed under section 10223(b). The authority to approve moving a document from one file to another file shall reside with the Manager of the Retraining and Return to Work Unit or his or her designee.

(b) If a document is not filed in compliance with sections 10217, 10228 and 10232 of title 8 of the California Code of Regulations and these regulations, the administrative director may in his or her discretion take the actions set forth in section 10222 of title 8 of the California Code of Regulations.

AUTHORITY:

Note: Authority cited: Sections 133, 138.4, 139.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code.

§ 10116.8. Jurisdiction Where the Issue of Injury Has Not Been Resolved

(a) No forms, notices or reports shall be filed with the Retraining and Return to Work Unit until the claims administrator has accepted liability for the injury or there has been a finding of compensable injury by the appeals board.

(b) Any requests for provision of retraining or return to work services and for intervention/dispute resolution require confirmation on the appropriate form by the employee or his/her representative that liability for the injury has been accepted.

(c) Forms sent to the Retraining and Return to Work Unit when a good faith issue of injury exists or where there has been no confirmation of acceptance of liability for the injury shall be returned to the sender.

AUTHORITY:

Note: Authority cited: Sections 133, 139.48, 139.5, 4658, 4658.5 and 5307.3, Labor Code. Reference: Section 139.5, Labor Code; Godinez v. Buffets, Inc. (2004, Significant Panel Decision) 69 Cal. Comp. Cases 1311; and Vulean Materials Co. v. WCAB (2006, Writ Denied) 71 Cal. Comp. Cases 1346.

§ 10116.9. Definitions for Article 6.5 and 7.5

The following definitions apply to the provisions of Article 6.5 and 7.5 governing injuries occurring on or after January 1, 2004:

(a) "Alternative work" means work (1) offered either by the employer who employed the injured worker at the time of injury, or by another employer where the previous employment was seasonal work, (2) that the employee has the ability to perform, (3) that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and (4) that is located within a reasonable commuting distance of the employee's residence at the time of injury.

(b) "Approved training facility" means a training or skills enhancement facility or institution that meets the requirements of section 10133.58.

(c) "Claims administrator" means a self-administered insurer providing security for the payment of compensation required by Divisions 4 and 4.5 of the Labor Code, a self-administered self-insured employer, a self-administered joint powers authority, a self-administered legally uninsured, or a third-party claims administrator for a self-insured employer, insurer, legally uninsured employer, or joint powers authority.

(d) "Employer" means the person or entity that employed the injured employee at the time of injury.

(e) "Essential functions" means job duties considered crucial to the employment position held or desired by the employee. Functions may be considered essential because the position exists to perform the function, the function requires specialized expertise, serious results may occur if the function is not performed, other employees are not available to perform the function or the function occurs at peak periods and the employer cannot reorganize the work flow.

(f) "Insurer" has the same meaning as in Labor Code section 3211.

(g) "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(h) "Nontransferable training voucher" means a document provided to an employee that allows the employee to enroll in education-related training or skills enhancement. The document shall include identifying information for the employee and claims administrator, and specific information regarding the value of the voucher pursuant to

Labor Code section 4658.5.

(i) "Notice" means a required letter or form generated by the claims administrator and directed to the injured employee.

(j) "Offer of modified or alternative work" means an offer to the injured employee of medically appropriate employment with the date-of-injury employer through the use of Form DWC-AD 10133.53, Notice of Offer of Modified or Alternative Work.

(k) "Parties" means the employee, the claims administrator and their designated representatives, if any.

(l) "Permanent and stationary" means the point in time when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment, based on (1) an opinion from a treating physician, AME, or QME; (2) a judicial finding by a Workers' Compensation Administrative Law Judge, the Workers' Compensation Appeals Board, or a court; or (3) a stipulation that is approved by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board.

(m) "Permanent partial disability award" means a final award of permanent partial disability determined by a workers' compensation administrative law judge or the appeals board.

(n) "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(o) "Seasonal work" means employment as a daily hire, a project hire, or an annual season hire.

(p) "Supplemental job displacement benefit" means an educational retraining or skills enhancement allowance for injured employees whose employers are unable to provide work consistent with the requirements of Labor Code section 4658.6.

(q) "Vocational & return to work counselor (VRTWC)" means a person or entity capable of assisting a person with a disability with development of a return to work strategy and whose regular duties involve the evaluation, counseling and placement of disabled persons. A VRTWC must have at least an undergraduate degree in any field and three or more years full time experience in conducting vocational evaluations, counseling and placement of disabled adults.

(r) "Work restrictions means permanent medical limitations on employment activity established by the treating physician, qualified medical examiner or agreed medical examiner.

AUTHORITY:

Note: Authority cited: Sections 133, 139.48, 4658.5 and 5307.3, Labor Code. Reference: Sections 124, 139.48, 4658.1, 4658.5 and 4658.6, Labor Code; and Henry v. WCAB (1998) 68 Cal.App.4th 981.

ARTICLE 6.5. RETURN TO WORK

§ 10117. Offer of Work; Adjustment of Permanent Disability Payments

(a) This section shall apply to all injuries occurring on or after January 1, 2005, and to the following employers:

(1) Insured employers who employed 50 or more employees at the time of the most recent policy inception or renewal date for the insurance policy that was in effect at the time of the employee's injury;

(2) Self-insured employers who employed 50 or more employees at the time of the most recent filing by the employer of the Self-Insurer's Annual Report that was in effect at the time of the employee's injury; and

(3) Legally uninsured employers who employed 50 or more employees at the time of injury.

(b) Within 60 calendar days from the date that the condition of an injured employee with permanent partial disability becomes permanent and stationary:

(1) If an employer does not serve the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, each payment of permanent partial disability remaining to be paid to the employee from the date of the end of the 60 day period shall be paid in accordance with Labor Code section 4658(d)(1) and increased by 15 percent.

(2) If an employer serves the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, and in accordance with the requirements set forth in paragraphs (3) and (4), each payment of permanent partial disability remaining to be paid from the date the offer was served on the employee shall be paid in accordance with Labor Code section 4658(d)(1) and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer.

(3) The employer shall use form DWC-AD 10133.53 (Section 10133.53) to offer modified or alternative work, or form DWC-AD 10118 (Section 10118) to offer regular work. The claims administrator may serve the offer of work on behalf of the employer.

(4) The regular, alternative, or modified work that is offered by the employer pursuant to paragraph (2) shall be located within a reasonable commuting distance of the employee's residence at the time of the injury, unless the employee waives this condition. This condition shall be deemed to be waived if the employee accepts the regular, modified, or alternative work, and does not object to the location within 20 calendar days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

(c) If the claims administrator relies upon a permanent and stationary date contained in a medical report prepared by the employee's treating physician, QME, or AME, but there is subsequently a dispute as to an employee's permanent and stationary status, and there has been a notice of offer of work served on the employee in accordance with subdivision (b), the claims administrator may withhold 15% from each payment of permanent partial disability remaining to be paid from the date the notice of offer was

served on the employee until there has been a final judicial determination of the date that the employee is permanent and stationary pursuant to Labor Code section 4062.

(1) Where there is a final judicial determination that the employee is permanent and stationary on a date later than the date relied on by the employer in making its offer of work, the employee shall be reimbursed any amount withheld up to the date a new notice of offer of work is served on the employee pursuant to subdivision (b).

(2) Where there is a final judicial determination that the employee is not permanent and stationary, the employee shall be reimbursed any amount withheld up to the date of the determination.

(3) The claims administrator is not required to reimburse permanent partial disability benefit payments that have been withheld pursuant to this subdivision during any period for which the employee is entitled to temporary disability benefit payments.

(d) If the employee's regular work, modified work, or alternative work that has been offered by the employer pursuant to paragraph (1) of subdivision (b) and has been accepted by the employee, is terminated prior to the end of the period for which permanent partial disability benefits are due, the amount of each remaining permanent partial disability payment from the date of the termination shall be paid in accordance with Labor Code section 4658 (d) (1), as though no decrease in payments had been imposed, and increased by 15 percent. An employee who voluntarily terminates his or her regular work, modified work, or alternative work shall not be eligible for the 15 percent increase in permanent partial disability payments pursuant to this subdivision.

(e) Nothing in this section shall prevent the parties from settling or agreeing to commute the permanent disability benefits to which an employee may be entitled. However, if the permanent disability benefits are commuted by a workers' compensation administrative law judge or the appeals board pursuant to Labor Code section 5100, the commuted sum shall account for any adjustment that would have been required by this section if payment had been made pursuant to Labor Code section 4658.

(f) When the employer offers regular, modified or alternative work to the employee that meets the conditions of this section and subsequently learns that the employee cannot lawfully perform regular, modified or alternative work, the employer is not required to provide the regular, modified or alternative work.

(g) If the employer offers regular, modified, or alternative seasonal work to the employee, the offer shall meet the following requirements:

(1) the employee was hired for seasonal work prior to injury;

(2) the offer of regular, modified or alternative seasonal work is of reasonably similar hours and working conditions to the employee's previous employment, and the one year requirement may be satisfied by cumulative periods of seasonal work;

(3) the work must commence within 12 months of the date of the offer; and

(4) The offer meets the conditions set forth in this section.

AUTHORITY:

Note: Authority cited: Sections 133, 139.48 and 5307.3, Labor Code. Reference: Sections 139.48 and 4658, Labor Code; Del Taco v. WCAB (2000) 79 Cal.App.4th 1437; Anzelde v. WCAB (1996) 61 Cal. Comp. Cases 1458 (writ denied); and Henry v. WCAB (1998) 68 Cal.App.4th 981.

§ 10118. Form [DWC AD 10118 Notice of Offer of Work]

State of California
Division of Workers' Compensation
Retraining and Return to Work Unit

NOTICE OF OFFER OF REGULAR WORK
For Injuries occurring on or after 1/1/05
DWC-AD form 10118 (SJDB) Version: 11/2008

[See Form In Original Printed Version]

AUTHORITY:

Note: Authority cited: Sections 133, 139.48 and 5307.3, Labor Code. Reference: Sections 139.48 and 4658, Labor Code.

§ 10122. Definitions

The following definitions apply to this article and are in addition to those as set forth in Labor Code section 4635:

(a) Alternative Work: A job or occupation, other than modified work, with the same employer which is compatible with the injured employee's work restrictions. Alternative work for injuries occurring on or after 1/1/94 shall also meet the criteria of Labor Code Section 4644(a)(6).

(b) Claims Administrator. The person or entity responsible for the payment of compensation for a self-administered insurer providing security for the payment of compensation required by Divisions 4 and 4.5 of the Labor Code, a self-administered self-insured employer, or a third-party claims administrator for a self-insured employer, insurer, legally uninsured employer, or joint powers authority.

(c) Correct Rehabilitation Unit District Office. The district office venue assigned by the Rehabilitation Unit.

(d) Employer. The person or entity that employed the injured employee at the time of injury.

(e) In-House Qualified Rehabilitation Representative. An employee of the claims administrator who is capable of developing and implementing a vocational rehabilitation plan and whose experience and regular duties involve the evaluation, counseling or placement of disabled persons, and who is familiar with this article and Article 2.6 (commencing with Section 4635) of Chapter 2 of Part 2 of Division 4 of the Labor Code.

(f) Insurer. Has the same meaning as in Labor Code Section 3211.

(g) Modified Work: An injured employee's usual and customary job or occupation with the same employer after modification to accommodate required work restrictions. Modification includes, but is not limited to, changing or excluding certain tasks, reducing the time devoted to certain tasks, modifying the work station, changing the work location, and providing helpful equipment or tools. Modified work for injuries occurring on or after 1/1/94, shall meet the criteria of Labor Code Section 4644(a)(5). An Employer's provision of ergonomic or safety equipment or devices for injury prevention purposes shall not give rise to liability for vocational rehabilitation services.

(h) Notices. Required notices letters generated by the claims administrator and directed to the injured employee.

(i) Parties. The employee, claims administrator and their designated representatives, if any.

(j) Rehabilitation Provider. A person or entity providing vocational rehabilitation services for a fee.

(k) Rehabilitation Unit. The unit established within the Division of Workers' Compensation.

(l) Regular Position: A position arising from the ongoing business needs of the employer which consists of defined activities that can be reasonably viewed as required or prudent in view of the company's business objectives and is expected to last at least 12 months.

(m) Represented Employee: An injured employee who has retained an attorney-at-law who is a member in good standing of the State Bar of California.

AUTHORITY:

Note: Authority cited: Sections 133, 139.5 and 5307.3, Labor Code. Reference: Sections 124, 139.5, 4635 and 4644, Labor Code.

ARTICLE 7.5. SUPPLEMENTAL JOB DISPLACEMENT BENEFIT

§ 10133.50. Definitions. [Repealed]

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Sections 124, 4658.1, 4658.5 and 4658.6, Labor Code.

§ 10133.51. Notice of Potential Right to Supplemental Job Displacement Benefit

(a) This section and section 10133.52 shall only apply to injuries occurring on or after January 1, 2004.

(b) Within 10 days of the last payment of temporary disability, if not previously provided, the claims administrator shall send the employee, by certified mail, the mandatory form "Notice of Potential Right to Supplemental Job Displacement Benefit Form" that is set forth in Section 10133.52.

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.52. "Notice of Potential Right to Supplemental Job Displacement Benefit Form."

Notice of Potential Right to Supplemental Job
Displacement Benefit Form
(Mandatory Form)

If your injury causes permanent partial disability, which prevented you from returning to work within 60 days of the last payment of temporary disability, and the claims administrator has not provided you with a Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work," you may be eligible for a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state approved or accredited schools.

The amount of the voucher for the supplemental job displacement benefit will be as follows:

Up to four thousand dollars ($ 4,000) for a permanent partial disability award of less than 15%.

Up to six thousand dollars ($ 6,000) for a permanent partial disability award between 15 and 25%.

Up to eight thousand dollars ($ 8,000) for a permanent partial disability award between 26 and 49%.

Up to ten thousand dollars ($ 10,000) for a permanent partial disability award between 50 and 99%.

A permanent partial disability award is issued by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board. You may also settle your potential eligibility for a voucher as part of a compromise and release settlement for a lump sum payment. Any settlement must be reviewed and approved by a Workers' Compensation Administrative Law Judge.

The voucher may be used for payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement. Not more than 10 percent of the voucher moneys may be used for vocational or return to work counseling. A list of vocational return to work counselors is available on the Division of Workers' Compensation's website www.dir.ca.gov or upon request.

If you are eligible, and you have not already settled the benefit, you will receive the voucher from the claims administrator within 25 calendar days from the date the permanent partial disability award is issued by the Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board.

If modified or alternative work is available, you will receive a Form DWC-AD 10133.53

"Notice of Offer of Modified or Alternative Work" from the claims administrator within 30 days of the termination of temporary disability indemnity payments. The claims administrator will not be required to pay for supplemental job displacement benefits if the offer for modified or alternative work meets the following conditions:

(1) You have the ability to perform the essential functions of the job provided;

(2) the job provided is in a regular position lasting at least 12 months;

(3) the job provided offers wages and compensation that are at least 85 percent of those paid to you at the time of the injury; and

(4) the job is located within reasonable commuting distance of your residence at the time of injury.

If there is a dispute regarding the Supplemental Job Displacement Benefit, the employee or claims administrator may file Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director."

If you have a question or need more information, you can contact your employer or the claims administrator listed below. You can also contact a State Division of Workers' Compensation Information and Assistance Officer.

Date: ...
Name of Claims Administrator: .....Phone No.: ...
Address of Claims Administrator: .....
Email (optional): .....

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.53. Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work."

State of California
Division of Workers' Compensation
Retraining and Return to Work Unit

NOTICE OF OFFER OF MODIFIED OR ALTERNATIVE WORK
For injuries occurring on or after 1/1/04
DWC-AD form 10133.53 (SJDB) Rev. 11/2008

[See Form In Original Printed Version]

AUTHORITY:

Note: Authority cited: Sections 133, 4658 and 5307.3, Labor Code. Reference: Sections 4658, 4658.1, 4658.5 and 4658.6, Labor Code.

§ 10133.54. Dispute Resolution

(a) This section and section 10133.55 shall only apply to injuries occurring on or after January 1, 2004.

(b) When there is a dispute regarding the Supplemental Job Displacement Benefit, the employee, or claims administrator may request the administrative director to resolve the dispute.

(c) The party requesting the administrative director to resolve the dispute shall:

(1) Complete Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director;"

(2) Clearly state the issue(s) and identify supporting information for each issue and position;

(3) Attach all pertinent documents;

(4) Submit a copy of the request and all attached documents to the administrative director and serve a copy of the request and all attached documents on all parties; and

(5) Attach a signed and dated proof of service to the Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director."

(d) The opposing party shall have twenty (20) calendar days from the date of the proof of service of the Request to submit the original response and all attached documents to the administrative director and serve a copy of the response and all attached documents on all parties.

(e) The administrative director or his or her designee may request additional information from the parties.

(f) The administrative director or his or her designee shall issue a written determination and order based solely on the request, response, and any attached documents within thirty (30) calendar days of the date the opposing party's response and supporting information is due. If the administrative director or his or her designee requests additional information, the written determination shall be issued within thirty (30) calendar days from the receipt of the additional information. In the event no decision is issued within sixty (60) calendar days of the date the opposing party's response is due or within sixty (60) calendar days of the administrative director's receipt of the requested additional information, whichever is later, the request shall be deemed to be denied.

(g) Either party may appeal the determination and order of the administrative director by filing a written petition together with a declaration of readiness to proceed pursuant to section 10250 within twenty calendar days of the issuance of the decision or within twenty days after a request is deemed denied pursuant to subdivision (f). The petition shall set forth the specific factual and/or legal reason(s) for the appeal as set forth in section 10294.5 of title 8 of the California Code of Regulations.

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Sections 4658.5 and 4658.6, Labor Code.

§ 10133.55. Form DWC-AD 10133.55 "Request for Dispute Resolution Before the Administrative Director."

State of California
Division of Workers' Compensation
Retraining and Return to Work Unit

REQUEST FOR DISPUTE RESOLUTION
BEFORE ADMINISTRATIVE DIRECTOR
DWC-AD form 10133.55 (SJDB) Rev. 11/2008

[See Form In Original Printed Version]

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.56. Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher

(a) This section and section 10133.57 shall only apply to injuries occurring on or after January 1, 2004.

(b) The employee shall be eligible for the Supplemental Job Displacement Benefit when:

(1) the injury causes permanent partial disability; and

(2) within 30 days of the termination of temporary disability indemnity payments, the claims administrator does not offer modified or alternative work in accordance with Labor Code section 4658.6; and

(3) either the injured employee does not return to work for the employer within 60 days of the termination of temporary disability benefits; or

(4) in the case of a seasonal employee, where the employee is unable to return to work within 60 days of the termination of temporary disability benefits because the work season has ended, the injured employee does not return to work on the next available work date of the next work season.

(c) When the requirements under subdivision (b) have been met, the claims administrator shall provide a nontransferable voucher for education-related retraining or skill enhancement or both to the employee within 25 calendar days from the issuance of the permanent partial disability award by the workers' compensation administrative law judge or the appeals board.

(d) The voucher shall be issued to the employee allowing direct reimbursement to the employee upon the employee's presentation to the claims administrator of documentation and receipts or as a direct payment to the provider of the education related training or skill enhancement and/or to the VRTWC.

(e) The voucher must indicate the appropriate level of money available to the employee in compliance with Labor Code section 4658.5.

(f) The mandatory voucher form is set forth in Section 10133.57.

(g) The voucher shall certify that the school is approved by one of the Regional Associations of Schools and Colleges authorized by the United States Department of Education or has approval from a California State agency that has an agreement with the United States Department of Education or Regional Associations of School and Colleges for the regulation and oversight of non-degree granting private post secondary providers.

(h) The claims administrator shall issue the reimbursement payments to the employee or direct payments to the VRTWC and the training providers within 45 calendar days from receipt of the completed voucher, receipts and documentation.

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5, 4658.6 and 5307.3, Labor Code. Reference: Sections 4658.5 and 4658.6, Labor Code.

§ 10133.57. Form DWC-AD 10133.57 "Supplemental Job Displacement Nontransferable Training Voucher Form."

State of California
Division of Workers' Compensation
Retraining and Return to Work Unit

SUPPLEMENTAL JOB DISPLACEMENT
NONTRANSFERABLE TRAINING VOUCHER FORM
DWC-AD form 10133.57 (SJDB) Rev. 11/2008

[See Form In Original Printed Version]

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.58. State Approved or Accredited Schools

(a) This section shall only apply to injuries occurring on or after January 1, 2004.

(b) Private providers of education-related retraining or skill enhancement selected to

provide training as part of a supplemental job displacement benefit shall be:

(1) accredited by one of the Regional Associations of Schools and Colleges authorized by the United States Department of Education; or

(2) has approval from a California State agency that has an agreement with the United States Department of Education or Regional Associations of School and Colleges for the regulation and oversight of non-degree granting private post secondary providers; or

(3) certified by the Federal Aviation Administration.

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.59. The Administrative Director's List of Vocational Return to Work Counselors

(a) This section shall only apply to injuries occurring on or after January 1, 2004.

(b) The Administrative Director shall maintain a list of Vocational & Return to Work Counselors (VRTWC) who perform the work of assisting injured employees. A VRTWC who meets the qualifications specified in Section 10133.50(a)(15) must apply to the Administrative Director to be included on the list throughout the year. The list shall be reviewed and revised on a yearly basis, and shall be made available on the website www.dir.ca.gov or upon request.

(c) The injured employee may select a Vocational & Return to Work Counselor whenever the assistance of a Vocational & Return to Work Counselor is needed to facilitate an employee's vocational training or return to work in connection with the Supplemental Job Displacement Benefit set forth in this Article.

(d) The injured employee shall be responsible for providing the VRTWC with any necessary medical reports. However, a claims administrator shall provide a VRTWC with any medical reports, including permanent and stationary medical reports, upon an employee's written request and a signed release waiver.

(e) The VRTWC shall communicate with the injured employee regarding the evaluation.

AUTHORITY:

Note: Authority cited: Sections 133, 4658.5 and 5307.3, Labor Code. Reference: Section 4658.5, Labor Code.

§ 10133.60. Termination of Claims Administrator's Liability for the Supplemental Job Displacement Benefit

(a) For injuries occurring on or after January 1, 2004, the claims administrator's liability to provide a supplemental job displacement voucher shall end if either (a)(1) or (a)(2) occur:

(1) the claims administrator offers modified or alternative work to the employee, meeting

the requirements of Labor Code §4658.6, on DWC-AD Form 10133.53 "Notice of Offer of Modified or Alternative Work";

(A) If the claims administrator offers modified or alternative work to the employee for 12 months of seasonal work, the offer shall meet the following requirements:

1. the employee was hired on a seasonal basis prior to injury; and

2. the offer of modified or alternative work is on a similar seasonal basis to the employee's previous employment;

(2) the maximum funds of the voucher have been exhausted.

AUTHORITY:

Note: Authority cited: Sections 133 and 5307.3, Labor Code. Reference: Sections 4658.1, 4658.5, 4658.6 and 5410, Labor Code; and Henry v. WCAB (1998) 68 Cal.App.4th 981.

Disability Under the Fair Employment & Housing Act:

What you should know about the law

California Department of Fair Employment & Housing

Disability Under the Fair Employment and Housing Act: What You Should Know About the Law

In 1974, California passed its first law intended to ensure that individuals with disabilities are protected in the workplace. Since then, California has been at the forefront of guaranteeing that persons with disabilities have equal access to employment.

This guide is intended to highlight and summarize workplace disability laws enforced by the California Department of Fair Employment and Housing (DFEH). It will familiarize you with the content of these laws, including recent changes and amendments to state statutes and attendant accommodation responsibilities. It should not be relied upon as a definitive statement of the law. For answers to your particular questions, you should consult an attorney or employment relations specialist for advice. You can also contact DFEH for information at 1-800-884-1684.

California disability laws are intended to allow persons with disabilities the opportunity for employment. To meet this goal, California's laws have historically offered greater protection to employees than federal law. Yet, because most news coverage focuses on actions taken by the U.S. Congress and court decisions interpreting the federal Americans with Disabilities Act (ADA), many employees and employers in California are not aware that California's laws are broader in many aspects. For example, the ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." However, under California law, disability is defined as an impairment that makes performance of a major life activity "difficult." Thus, under California law, persons with a wide variety of diseases, disorders or conditions would be deemed to have a disability who, under the definitions set forth in the ADA and the United States Supreme Court's narrow interpretations of that statute, might not be considered "disabled" and therefore denied protection.

A chart illustrating some of the differences between federal and state law is provided at the back of this guide.

WHAT CHANGES DO I NEED TO KNOW ABOUT?

In 2000, the state legislature passed the Prudence K. Poppink Act that made significant changes to the state's disability laws. It amended existing provisions of law and re-emphasized previous legal and policy positions. These legislative amendments took effect on January 1, 2001. Some of the important changes are as follows:

- The Legislature found and declared that the laws of this state provide protection independent of the 1990 ADA and has always afforded broader protection than federal law.
- The definitions of mental and physical disability were amended to prevent discrimination based on a person's "record or history" of certain impairments.

- Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, multiple sclerosis, and heart disease.
- The Legislature clarified that the definitions of physical and mental disability only require a "limitation" upon a major life activity, not a "substantial limitation" as required by the ADA. They further stated that when determining whether an employee's condition is a limitation, mitigating measures should not be considered, unless the mitigation itself limits a major life activity.
- "Working" is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment. Whereas, under the ADA, the mental or physical disability must affect a person's ability to obtain a broad class of employment.
- An employer or employment agency cannot ask about a job applicant's medical or psychological condition or disability except under certain circumstances. In addition, it is illegal to ask current employees about these conditions unless the condition is related to the employee's job.

WHAT DOES THE LAW REQUIRE OF EMPLOYERS?

An important aspect of complying with California law is knowing what is required by state law. When it comes to applicants and employees with disabilities, the FEHA generally requires two things of employers. Those requirements are:

1. Employers must provide reasonable accommodation for those applicants and employees who, because of their disability, are unable to perform the essential functions of their job.

2. Employers must engage in a timely, good faith interactive process with applicants or employees in need of reasonable accommodation.

However, before engaging applicants or employees, the employer should have some understanding of what constitutes a "disability" under state law. Before an applicant or employee must be reasonably accommodated, he or she must establish that they have a disability as defined under the Fair Employment and Housing Act.

WHAT IS A DISABILITY UNDER THE LAW?

The Fair Employment and Housing Act basically defines two categories of disability: mental disability and physical disability. Each category contains its own specific definitions. Additionally, under the FEHA, an employee with a "medical condition" is also entitled to accommodation.

The following are the specific definitions of physical disability, mental disability, and medical condition as outlined in the FEHA:

Physical Disability—Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and

limits a major life activity. The body systems listed include the neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine systems. A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity, such as working, if it makes the achievement of the major life activity difficult.

When determining whether a person has a disability, an employer cannot take into consideration any medication or assistive device, such as wheelchairs, eyeglasses or hearing aids, that an employee may use to accommodate the disability. However, if these devices or mitigating measures "limit a major life activity," they should be taken into consideration.

Physical disability also includes any other health impairment that requires special education or related services; having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment which is known to the employer; and being perceived or treated by the employer as having any of the aforementioned conditions.

Mental Disability—Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity, or having any other mental or psychological disorder or condition that requires special education or related services. An employee who has a record or history of a mental or psychological disorder or condition which is known to the employer, or who is regarded or treated by the employer as having a mental disorder or condition, is also protected.

It should be noted that under **both** physical and mental disability, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, are specifically excluded and are not protected under the FEHA.

Medical Condition—Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, or a genetic characteristic.

A "genetic characteristic" can be a scientifically or medically identifiable gene or chromosome or an inherited characteristic that could statistically lead to increased development of a disease or disorder. For example, women who carry a gene established to statistically lead to breast cancer are protected under state law.

Keep in mind, however, that Government Code section 12940 (o) makes it an unlawful employment practice for an employer to subject, directly or indirectly, any applicant or employee, to a test for the presence of a genetic characteristic.

In determining a disability, an employer may only request medical records directly related to the disability and need for accommodation. However, an applicant or an employee may submit a report from an independent medical examination before disqualification from employment occurs. The report must be kept separately and confidentially as any other medical records, except when a supervisor or manager

needs to be informed of restrictions for accommodation purposes or for safety reasons when emergency treatment might be required.

WHAT CAN BE DONE FOR AN APPLICANT OR EMPLOYEE WITH A DISABILITY?

Once a disability that is protected under the law is established, an employer is obligated to provide a reasonable accommodation unless the accommodation would represent an undue hardship to the business operation.

In the process of determining a reasonable accommodation, an employer must enter into a good-faith, interactive process to determine if there is a reasonable accommodation that would allow the applicant or employee to obtain or maintain employment. The first step of the "interactive process" is determining the "essential functions" of the position. When determining whether a job function is essential, the following should be taken into consideration: (1) the position exists to perform that function; (2) there are a limited number of employees available to whom the job function can be distributed; or (3) the function is highly specialized.

Evidence of whether a particular function is essential includes the employer's judgment as to which functions are essential; a written job description prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; or the current work experience of incumbents in similar jobs.

Once an employer has evaluated the position and the essential functions of the position, he or she should begin the process of determining reasonable accommodation by engaging in good-faith interaction with the employee.

WHAT IS A REASONABLE ACCOMMODATION?

Reasonable Accommodation

Reasonable accommodation is any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job. It can include making facilities accessible to individuals with disabilities or restructuring jobs, modifying work schedules, buying or modifying equipment, modifying examinations and policies, or other accommodations. For example, providing a keyboard rest for a person with carpal tunnel syndrome may qualify as a reasonable accommodation. A person with asthma may require that the lawn care be rescheduled for a non-business day.

WHAT IS THE INTERACTIVE PROCESS?

Interactive Process

State law incorporates guidelines developed by the Equal Employment Opportunity Commission in defining an "interactive process" between the employer and the applicant or employee with a known disability.

The guidelines include: consulting with the individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation; and identifying potential accommodations and assessing their effectiveness.

Although the preferences of the individual in the selection of the accommodation should be considered, the accommodation implemented should be one that is most appropriate for both the employee and the employer.

WHAT IS GOOD FAITH?

Good Faith

Federal courts have provided an interpretation of "good faith," essentially stating that an employer and employee must communicate directly with each other to determine essential information and that neither party can delay or interfere with the process.

To demonstrate good-faith engagement in the interactive process, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation.

MUST AN APPLICANT OR EMPLOYEE ALWAYS BE ACCOMMODATED?

The FEHA does provide legal reasons an employer can permissibly refuse to accommodate a request for reasonable accommodation from an applicant or employee. One of the legal reasons is whether the accommodation would present an undue hardship to the operation of the employer's business.

If an employer denies accommodation because it would be an "undue hardship," it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
- The overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and locations of its facilities;
- The type of operations, including the composition, structure, and functions of the workforce of the employer; and
- The geographic separateness, administrative or fiscal relationship of the facility or facilities.

For example, an applicant with a severe vision impairment applies for employment with a small market that has only four other employees. The applicant requires assistance to work the register by having another employee present at all times. The business in

question would not have to provide the accommodation if, for example, it could not afford the cost of the additional staff or could not afford the cost of remodeling to accommodate two employees at the same time.

WHAT QUESTIONS MAY BE ASKED OF AN APPLICANT OR EMPLOYEE?

What questions may be directed to an individual depends, largely, upon whether the individual is an applicant for a position or is currently employed by the employer.

Pre-employment Inquiries

Prior to employment, it is unlawful for an employer to require an applicant to attend a medical/psychological examination, make any medical/psychological inquiry, make any inquiry as to whether an applicant has a mental/physical disability or medical condition, or make any inquiry as to the severity of the disability or medical condition.

However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation or require a medical/psychological examination or make an inquiry of a job applicant ***after*** an employment offer has been made but ***prior*** to the the start of employment provided that the examination or inquiry is job-related and consistent with business necessity and all new employees in the same job classification are subject to the same examination or inquiry.

Post-employment Inquiries

If the individual is a current employee, the employer may not require any medical/psychological examination of an employee or make any of the following inquiries:

- Medical or psychological;
- Whether an employee has a mental/physical disability; or
- The nature or severity of a physical disability, mental disability, or medical condition.

However, an employer may require any examinations or inquiries that it can show to be job-related *and* consistent with business necessity. Furthermore, an employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

WHAT ARE THE REMEDIES AVAILABLE UNDER THE FAIR EMPLOYMENT AND HOUSING ACT?

Under the Fair Employment and Housing Act, if an employer fails to reasonably accommodate an applicant or employee, the Fair Employment and Housing Commission can order the employer to cease and desist the discriminatory practice; to hire or reinstate; and award actual damages including, but not limited to, lost wages; emotional distress damages; and administrative fines not to exceed $150,000.00. If the

matter is heard in civil court, the damages would be unlimited.

IF DISCRIMINATION HAS OCCURRED, WHAT CAN BE DONE?

If an applicant or employee believes they have been discriminated against or denied reasonable accommodation for their disability, they should first try to work with the immediate supervisor to resolve the issue. If there is still no resolution, they should contact the employer's reasonable accommodation coordinator, a human resource representative or the person in charge of accommodation issues. Again, both the applicant or employee and the employer must engage in a good-faith interactive process to determine an appropriate resolution.

If the issue is still not resolved, the applicant or employee can contact the Department of Fair Employment and Housing at any time during the process and file a complaint. However, they have only one year from the date of harm (denial of accommodation, discharge, etc.) to file a complaint with the Department.

CONCLUSION

Accommodation of persons with disabilities on the job is important to the maintenance of good employer/employee relations. Understanding the duties and responsibilities of employers and supervisors to provide accessible workplaces is critical to ensuring that physical or mental limitations are not insurmountable barriers to those willing to work.

Comparison of Major Distinctions in California and Federal Employment Disability Provisions

	Provisions included in the CA Fair Employment and Housing Act (FEHA) and Fair Employment & Housing Commission (FEHC) Decisions and Regulations	Provisions included in the ADA, ADA Amendments Act (ADAAA), and Equal Employment Opportunity Commission (EEOC) Regulations
Covered Employers	Having five or more employees for complaints involving physical or mental disability or medical condition. Having one or more employees for complaints involving harassment based on mental or physical disability. Excludes religious associations or corporations not organized for profit.	Private employers with 15 or more employees; state and local governments regardless of size. Nonprofit, religious organizations are covered by the ADA as employers, but they may give employment preference to people of their own religion or religious organization. However, they may not discriminate on the basis of disability against members or nonmembers. Executive agencies of the US government are excluded from the ADA.

Definition of "Disability"	The FEHA forbids employment discrimination against an individual because of his or her physical disability, mental impairment, or medical condition. A person is recognized as "disabled" if he/she: • has a physical or mental disability that limits (i.e., it makes the achievement of the major life activity difficult) one or more major life activities (construed broadly to include physical, mental, and social activities and working); or • has a history of such an impairment known to the employer; or • is incorrectly regarded or treated as having or having had such an impairment; or • is regarded or treated as having or having such an impairment that has no presently disabling effects but may become a qualifying impairment in the future. "Physical disabilities" include, but are not limited to, any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine systems. "Medical Condition" is defined as including any health impairment associated with a diagnosis of cancer when competent medical evidence indicates that the cancer victim has been cured or rehabilitated. It also includes certain genetic characteristics as defined in the statute. "Mental disabilities" include, but are not limited to, any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, specific learning disabilities, or any other mental or psychological disorder or condition that requires special education or related services.	The ADA defines "qualified individual with a disability" as an individual with a disability who can perform the essential functions of a job with or without reasonable accommodation. A person is recognized as "disabled" if he/she: • has a physical or mental impairment that substantially limits one or more of his/her major life activities; • has a record of such an impairment; or • is regarded as having such an impairment. Under the ADAAA, "major life activity" includes, but is not limited to: • caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. • Major bodily functions, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions, are also considered major life activities. An individual is "regarded" as having a disability if he/she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, regardless whether the impairment limits or is perceived to limit a major life activity. An individual cannot be "regarded" as having a disability if he/she has an impairment that is minor or "transitory" (i.e., having an actual or expected duration of 6 months or less).

Exclusions from Definition of Physical and Mental Disability	• Sexual behavior disorders (e.g. transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments); or • Compulsive gambling, kleptomania, pyromania; or • Psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.	• Persons who currently use drugs illegally (those not currently using illegal drugs but in rehabilitation from such use may be covered); • Homosexuality and bisexuality are not considered "impairments" or "disabilities;" • Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments • Compulsive gambling, kleptomania, or pyromania; or • Psychoactive substance use disorders resulting from current illegal use of drugs.
Mitigating Measures	Mitigating measures, such as assistive devices, prosthesis, medication, etc., are not considered in determining whether a condition "limits" a major life activity, unless the mitigating measure itself limits a major life activity.	Under the ADAAA, mitigating measures (such as medication, prosthetics, hearing or mobility devices, oxygen therapy equipment, assistive technology, reasonable accommodations or learned behavioral, adaptive or neurological modifications) are not considered in determining whether an impairment "substantially limits" a major life activity. The ameliorative effects of ordinary eyeglasses or contact lenses is considered in determining whether an impairment substantially limits a major life activity.
"Working" as a Major Life Activity	• Working is considered a major life activity along with physical, mental and social activities. • To be limited in the major life activity of working, an individual need only be limited in performing the requirements of a single, particular job.	• EEOC regulations state that working is considered a major life activity along with caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. • To be substantially limited in the major life activity of working, an individual must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity.

Employment Medical or Psychological Inquiries and Examinations	*Pre-Offer:* An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may inquire into the ability of an applicant to perform job-related functions. *Post Offer:* An employer may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry. *Post-Hire:* An employer may require examinations and inquiries if it can show such to be job-related and consistent with business necessity. An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.	*Pre-Offer:* An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he/she would perform these functions. *Post-Offer:* An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does <u>not</u> have to be job related or consistent with business necessity. However, an employer may not refuse to hire an individual with a disability based on the medical examination results unless the reason for rejection is job-related and justified by business necessity. *Post-Hire:* After a person starts work, a medical examination or inquiry of an employee must be job related and consistent with business necessity. Employers may conduct employee medical examinations where: there is evidence of a job performance or safety problem, required by federal law, necessary to determine fitness to perform a particular job, and where part of a voluntary examination that is part of an employee health program.
Genetic Characteristics	An employer may not test an applicant or employee for the presence of a genetic characteristic.	Not explicitly included as a covered disability. May fall within the category of a “perceived disability” in some cases.

Reasonable Accommodation; Exceptions	Generally, an employer must make reasonable accommodation for an employee or for an applicant with a known physical or mental disability. Requires a "good faith, interactive process" to determine an accommodation. Incorporates the EEOC guidelines for defining an "interactive process." To deny an accommodation, an employer must prove that: 1) the accommodation poses an undue hardship on the employer; or 2) the employee cannot perform the essential job functions even with accommodation; or 3) the accommodation presents a danger to the disabled employee or others; or 4) the employee would not meet a bona fide occupational qualification; or 5) Another statutory requirement (e.g. safety, OSHA, etc.) preempts the FEHA provision; or 6) Another affirmative defense under FEHA applies.	EEOC guidelines outline steps that the employer and employee may take to arrive at an accommodation. "Good faith" is interpreted in a federal court decision as it applies to the EEOC guidelines. Under the ADA, employers will not be liable for compensatory and punitive damages if they have been engaged in "good-faith efforts" to identify a possible accommodation. "Undue hardship" defense provisions to deny an accommodation are generally the same under the ADA. An employer may refuse to hire an employee if the selection standards and criteria are job related and consistent with business necessity <u>and:</u> 1) no accommodation exists that permits the person to perform essential job functions; or 2) the person poses a direct threat to the safety of others.

If you require further information,
please contact the department toll free at:

(800) 884-1684 For Employment

(800) 233-3212 For Housing

TTY (800) 700-2320

Or

Visit our website at:
www.dfeh.ca.gov

A Summary of the ADA Amendment Act

Prepared by: Roberta Etcheverry, DMG

The ADA Amendment Act went into effect 1/1/2009. The following is a summary of the key changes and the impact of the Act for employers.

Key changes:

- The new act rejects the strict interpretation of the definition of a disability and makes clear that the ADA is intended to **provide broad coverage** to protect anyone who faces discrimination on the basis of disability.

- The focus shifts, under the new Act, from whether or not someone has a covered disability to whether employers have **complied with their obligations to reasonably accommodate** employees and applicants.

- The Act fundamentally maintains the original definition of disability, but takes steps to ensure a **broader interpretation of the terms**. According to the Act, "the term disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such as impairment".

- EEOC has issued proposed new regulations **re-defining "substantially limits"**, which is consistent with the Act's broader view of coverage provided.

- Under the Act, the determination of whether or not an individual is substantially limited in a major life activity is made ***without* regard for mitigating measures** (except ordinary eyeglasses and contact lenses). For example, if a diabetic uses insulin, they may still be deemed disabled under the Act even if the insulin controls their symptoms. Mitigating measures include (but are not limited to) medications, medical supplies, equipment, and other auxiliary aides.

- The Act now includes a non-exhaustive **list of major life activities** in an effort to eliminate any confusion about what conditions may fall under the ADA. According to the Act, major life activities include a "General" category covering (but not limited to) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working as well as a "Major bodily functions" category covering (but not limited to) functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, grain, respiratory, circulatory, endocrine, and reproductive functions.

- The Act generally expands the **"regarded as" protections**. A person will be regarded as having a disability if an employer discriminates against him/her because of an actual or perceived impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. "Regarded as" protections do not apply to impairments that are transitory and minor, with an actual or expected duration of 6 months or less. Employers are not required to provide reasonable accommodations to individuals that have been "regarded as" having a disability.

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800-746-4364 x 105 Contact: RobertaE@DMG-at-Work.com

A Summary of the ADA Amendment Act and the implications (continued)

- Under the Act, impairments that are **episodic or in remission** can still be considered a disability if they would substantially limit a major life activity when active.

Impact of the Act on employers:

- The Act's stated intent to provide broader coverage will result in an **increased number of individuals protected** by Federal Law.

- The Act removes the focus from the disability inquiry (whether or not an individual meets the definition of having a disability) and **places the focus on the individualized "interactive process"** to provide reasonable accommodations.

- Employers must be prepared to engage **employees and applicants in a reasonable accommodation dialog** and, as appropriate, provide qualified individuals with accommodations to perform the essential functions of the job.

- There will be a heightened emphasis on what the **essential functions of the job** are, and employers should be prepared by having job descriptions that include essential functions, as well as the physical, environmental and mental job factors.

- Employers should keep **records** of all reasonable accommodation dialogs, processes and outcomes.

ADA Amendment Act- full text

One Hundred Tenth Congress of the United States of America *AT THE SECOND SESSION* Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act to restore the intent and protections of the Americans with Disabilities Act of 1990

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'ADA Amendments Act of 2008'.

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings- Congress finds that--

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes- The purposes of this Act are--

(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be

substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act.

SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended--

(1) by amending paragraph (1) to read as follows:

'(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;';

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) Definition of Disability- Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

'SEC. 3. DEFINITION OF DISABILITY.

'As used in this Act:

'(1) DISABILITY- The term 'disability' means, with respect to an individual--

'(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

'(B) a record of such an impairment; or

'(C) being regarded as having such an impairment (as described in paragraph (3)).

'(2) MAJOR LIFE ACTIVITIES-

'(A) IN GENERAL- For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

'(B) MAJOR BODILY FUNCTIONS- For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

'(3) REGARDED AS HAVING SUCH AN IMPAIRMENT- For purposes of paragraph (1)(C):

'(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

'(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

'(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

'(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

'(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

'(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

'(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

'(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

'(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

'(II) use of assistive technology;

'(III) reasonable accommodations or auxiliary aids or services; or

'(IV) learned behavioral or adaptive neurological modifications.

'(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

'(iii) As used in this subparagraph--

'(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

'(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.'.

(b) Conforming Amendment- The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

'SEC. 4. ADDITIONAL DEFINITIONS.

'As used in this Act:

'(1) AUXILIARY AIDS AND SERVICES- The term 'auxiliary aids and services' includes--

'(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

'(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

'(C) acquisition or modification of equipment or devices; and

'(D) other similar services and actions.

'(2) STATE- The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.'.

(c) Amendment to the Table of Contents- The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

'Sec. 3. Definition of disability.

'Sec. 4. Additional definitions.'.

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) On the Basis of Disability- Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended--

(1) in subsection (a), by striking 'with a disability because of the disability of such individual' and inserting 'on the basis of disability'; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking 'discriminate' and inserting 'discriminate against a qualified individual on the basis of disability'.

(b) Qualification Standards and Tests Related to Uncorrected Vision- Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

'(c) Qualification Standards and Tests Related to Uncorrected Vision- Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.'.

(c) Conforming Amendments-

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended--

(A) in the paragraph heading, by striking 'WITH A DISABILITY'; and

(B) by striking 'with a disability' after 'individual' both places it appears.

(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking 'the term 'qualified individual with a disability' shall' and inserting 'a qualified individual with a disability shall'.

SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended--

(1) by adding at the end of section 501 the following:

'(e) Benefits Under State Worker's Compensation Laws- Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

'(f) Fundamental Alteration- Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

'(g) Claims of No Disability- Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

'(h) Reasonable Accommodations and Modifications- A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.';

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

'SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

'The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.'; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking '511(b)(3)' and inserting '512(b)(3)'.

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

'Sec. 506. Rule of construction regarding regulatory authority.'.

SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended--

(1) in paragraph (9)(B), by striking 'a physical' and all that follows through 'major life activities', and inserting 'the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)'; and

(2) in paragraph (20)(B), by striking 'any person who' and all that follows through the period at the end, and inserting 'any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).'.

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

EEOC'S NOTICE OF PROPOSED RULEMAKING (NPRM) TO IMPLEMENT THE ADA AMENDMENTS ACT OF 2008 (ADAAA)

http://www.eeoc.gov/laws/regulations/adaaa-summary.cfm

SUMMARY OF KEY PROVISIONS

The ADAAA NPRM was published in the Federal Register on September 23, 2009 for a 60-day notice and comment period. To view the NPRM, see http://edocket.access.gpo.gov/2009/E9-22840.htm, and for more information, go to http://www.eeoc.gov/ada/amendments_notice.html.

Basic Definition of "Disability"

- The basic three-part ADA definition is retained: a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. However, the meaning of these terms has changed.

Rules Used to Determine Whether Someone Has a "Disability"

- An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be "substantially limiting."
- Disability "shall be construed in favor of broad coverage" and "should not require extensive analysis."
- An individual's ability to perform a major life activity is compared to "most people in the general population," often using a common-sense analysis without scientific or medical evidence.
- An impairment need not substantially limit more than one major life activity.

Major Life Activities (MLAs)

- MLAs include "major bodily functions," such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.

- MLAs also include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, interacting with others, and working.

Mitigating Measures

- Positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) are ignored in determining whether an impairment is substantially limiting.

- Examples of mitigating measures include medication, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, reasonable accommodations and auxiliary aids or services, behavioral or neurological modifications, and surgical interventions that do not permanently eliminate an impairment.

- Ordinary eyeglasses and contact lenses are lenses "intended to fully correct visual acuity or eliminate refractive error."

Impairments that Are Episodic or in Remission

- An impairment that is "episodic" or "in remission" is a disability if it would substantially limit a major life activity when active. Examples of impairments that are episodic or in remission include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer.

Examples Illustrating Definition of Disability

- Impairments for which an individualized assessment "can be conducted quickly and easily, and that will consistently result in a determination that the person is substantially limited in a major life activity": deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

- Impairments that may be substantially limiting for some individuals but not for others, and therefore may require somewhat more, though still not extensive, analysis: asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism.

- Temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity: common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.

- However, an impairment may still be substantially limiting even if it lasts or is expected to last fewer than 6 months, such as a 20-pound lifting restriction lasting several months.

Substantially Limited in Working

- An individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working.

- Replaces "class" or "broad range" of jobs with the concept of a "type of work."

  A type of work may be identified by the nature of the work (e.g., commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs).

  A type of work may also be defined by reference to job-related requirements (e.g., jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing).

"Regarded As "

- Employer regards an individual as having a disability if it takes a prohibited action based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor. For example, taking an adverse employment action based on a sprained wrist and broken leg expected to heal normally does not amount to regarding an individual as having a disability, because these impairments are transitory and minor. Taking an adverse action based on

carpal tunnel syndrome or Hepatitis C, or on a 2-day virus that an employer perceived to be heart disease, would amount to regarding an individual as having a disability.

- Actions taken on the basis of an impairment's symptoms (e.g., a facial tic related to Tourette's Syndrome) or an individual's use of mitigating measures (anti-seizure medication for epilepsy) are actions taken on the basis of an impairment.

- Reasonable accommodation is not available to someone only covered under the "regarded as" prong of the definition of "disability."

Uncorrected Vision Standards

- Employer must show challenged uncorrected vision qualification standards are job-related and consistent with business necessity, regardless of whether the person challenging the standard has a disability.

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

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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

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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.

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