EMPLOYER'S LEGAL ADVISORY

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New California Disability Regulations

The Fair Employment and Housing Commission (before being dissolved and replaced with the Fair Employment and Housing Council) issued new regulations with regard to disability discrimination. [Employers with 5 or more employees are subject to California disability discrimination law.] Generally these regulations incorporate existing statutory and case law changes. The new regulations reflect the expansion of disability discrimination law to cover almost all medical conditions and to require the employer to actively engage in the interactive process.

Generally, only very mild conditions (such as colds, common flu or non-migraine headaches) are excluded from the **definition of disability**. "**Essential job functions**" are very limited. A job function may be essential because the reason the position exists is to perform that function; there are a limited number of employees available among whom the performance of that job function can be distributed; or the function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. It is important for the employer to have specific evidence of the essential job functions which can include: accurate, current, written job descriptions; documentation on the amount of time spent on the function; legitimate business consequences if the employee is not required to perform a function; and reference to the importance of a job function in prior performance reviews. [Many employers include "lifting" as an essential job function when it is not in many cases.]

An employer has an affirmative duty to make a reasonable accommodation, unless the employer can show, after engaging in the interactive process, that the accommodation would impose an undue hardship. A **"reasonable accommodation"** must be effective in enabling the employee to perform the essential functions of the job. A leave of absence may be a reasonable accommodation.

An employer must assess on an individual case-by-case basis whether an employee can perform the essential functions of the job with or without a reasonable accommodation. Therefore an employer cannot impose an arbitrary "100 percent healed" policy before an employee can return to work. An employer should not have a policy that limits all leaves to a particular period of time, e.g., one year, as this is counter to an individualized assessment.

Engaging in the **interactive process** is a separate obligation of the employer, even if there may be no reasonable accommodation. The interactive process requires communication and good-faith exploration of possible accommodations between employers and employees.

Recommendations

Whenever an employee is unable to work or is looking to return to work as a result of any medical condition (whether work-related or not) an employer should engage in the interactive process with the employee to determine whether a reasonable accommodation is necessary and can be made. Employer policies on leaves of absence and return to work issues should be reviewed to ensure compliance with disability discrimination laws.

For more information or assistance on implementing any of the above please contact Jeanne Flaherty.

Jeanne Flaherty is the President and Managing Attorney of Employer's Legal Advisor, Inc., which represents and advises employers on all employment matters. The firm specializes in conducting employment practices compliance reviews and advising employers on day-to-day legal issues in the workplace.

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