

2018 FITTING THE PIECES TOGETHER:

FEHA/ADA Disability Compliance & Understanding the Workers' Compensation Overlay



Ryan Eskin, Esq. | University Counsel
The California State University
Rachel Shaw | President
Shaw HR Consulting, Inc.

Click Here to Download Conference Materials



- Visit www.shawhrconsulting.com
- Scroll down and click on: “Click Here to Download Conference Materials”
- Type in the conference code **CSU-23**, as well as your email, and click Submit.
- An automatic download will begin.

Professional Development Credits



Shaw HR Consulting is recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CPSM and SHRM-SCPSM.

For This Training
Please Use Code:

18-14BBJ

3 credits



Shaw HR Consulting trainings are eligible for points for IPMA-HR Certified Professionals (IPMA-CP) and IPMA-HR Senior Certified Professionals (IPMA-SCP).

Self Reported:
3 hours

Today's Topics

What we will cover this morning:

- ADA/FEHA Compliance – The Fundamentals
- The Disability Interactive Process Hallway for Industrial and Non-Industrial Injuries/Illnesses
- Making Reasonable Accommodation Decisions for Industrial and Non-Industrial Injuries/Illnesses
- Questions & Answers



FEHA & ADA OVERVIEW

Disability Laws

- **Americans with Disabilities Act** and 2008 Amendments (ADA), 42 U.S.C. §§ 12012; 12101 *et seq.*
- **California Fair Employment and Housing Act (FEHA)**, Government Code §§ 12940 *et seq.*
- **Rehabilitation Act of 1973**



ADA



Title I of the Americans with Disabilities Act

“Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against **qualified individuals with disabilities** in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.”

FEHA



BACKGROUND AND ENFORCEMENT OF THE FEHA: THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (CALIFORNIA GOVERNMENT CODE § 12940 ET SEQ.)

On September 30, 2000, California enacted sweeping changes to FEHA resulting in a substantial expansion of state protection against disability discrimination. Most notably, these reforms intentionally separate FEHA from its national counterpart, the ADA. The FEHA continues to track the ADA in certain ways (i.e., adopting ADA guidelines with regard to physical examinations for applicants with disabilities and FEHA's adoption of ADA provisions or related case law that would provide even broader protection than FEHA). The ADA still preempts "inconsistent" requirements established by state or local laws for safety or security-sensitive positions. FEHA is already interpreted as providing the broadest protection against disability discrimination among state laws given its preemptive effect over those laws that would provide narrower protection.

ADAAA



The **ADA Amendments Act of 2008 (ADAAA)** was enacted on September 25, 2008, and became effective on January 1, 2009.

The law made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA.

The ADAAA now more closely tracks the country's strongest disability law, California's Fair Employment and Housing Act.

FEHA/ADA

Mandates:

1. Employers must engage in a Timely Good Faith Interactive Process, and
2. Employers must provide Reasonable Accommodation

Each is a stand alone statutory obligation

APPLICANT / EMPLOYEE ELIGIBILITY

FOR DISABILITY INTERACTIVE PROCESS

Eligibility

FEHA Definition of a Disability:

- Physical or mental medical condition that “limits... a major life activity.”
- “Limits” = “makes the achievement of a major life activity difficult”
- Work is considered a major life activity

Government Code Sections 12962(i),(k)



Eligibility

The 3 typical ways an employer is triggered to start a time good-faith interactive process:

1. Request for Accommodation

- Applicant or employee verbalizes concern, regardless of the specific words that they may use

Eligibility



Front Line Supervisors MAY ask:

- If your employee believes that they may benefit from workplace accommodations due to a medical condition. **This is a yes or no question.**
 - If yes, get Human Resources/Risk Management involved to obtain remaining needed information. Call and send email to Human Resources/Risk Management outlining the possible accommodation need of employee
 - If no, email Human Resources/Risk Management to document the question asked and document the response received from employee
 - Example: If an employee is acting "off," it's reasonable to say "Are you OK today?" But don't say "You seem depressed."

Eligibility

Best Practice Recommendation:

- **Targeted Front-Line Supervisor Training (10-minutes annually):** Understand and train out to your front line supervisors to inform Human Resources/Risk Management when they *think* that they have been triggered that their employees ***may*** have a disability that is impacting
 - their ability to do the work assigned and/or
 - be safe while working
- Your employee can have a disability and NOT be disabled from work

Eligibility

The 3 typical ways an employer is triggered to start a time good-faith interactive process:

2. Perception of disability / Impacting work

- Performance changes
- Attendance problems / changes
- Rumors, with an impact on work performance or availability

Eligibility

The 3 typical ways an employer is triggered to start a time good-faith interactive process:

3. Knowledge of work restrictions / functional limitations impacting work

- Medical Note listing work restrictions

Eligibility

The 3 typical ways an employer is triggered to start a time good-faith interactive process:

1. Request for Accommodation

- Applicant or employee verbalizes concern, regardless of the specific words that they may use

2. Perception of disability / Impacting work

- Performance changes
- Attendance problems / changes
- Rumors, with an impact on work performance or availability

3. Knowledge of work restrictions / functional limitations impacting work

- Medical Note listing work restrictions

Code Reference: 2 CCR § 11069(a)(b)

Eligibility

- An employer should start a timely good-faith interactive process as soon as 1 of the triggers occurs – **don't wait for PROOF that an employee/applicant is disabled**
- Just because you **start** the disability interactive process does not mean that you will need to **implement** reasonable accommodations

Eligibility

You MAY NOT ask questions to determine if a person is disabled, such as:

- What disability / condition they have / claim to have
- What treatment (medication, therapies, etc.) they are receiving
- If they have had a workers' compensation injury in the past
- If they are taking their medications / what medications are being taken

Eligibility

Human Resources / Risk Management MAY ask:

- For a medical note indicating:
 - **Covered Disability:** Has a serious medical condition that impacts their ability to perform one or more of the essential functions of their job
 - **Work Restrictions / Leave Needs:** What are their work restrictions / functional limitations / leave needs
 - **Duration:** What is the duration of work restrictions / functional limitations / leave

Understanding the...

DISABILITY INTERACTIVE PROCESS

Interactive Process

Statutory Obligation # 1:

Provide a timely good-faith interactive process



- 1... Medicals / EFJA
- 2... Explore / Research Ideas
- 3... Schedule
- 4... Post Meeting Work




SHAW
HR CONSULTING

INTERACTIVE PROCESS HALLWAY

Interactive Process

Shared responsibility to engage in good-faith:

- The employee must also “cooperate in good faith” and provide “reasonable medical documentation” identifying the existence of the disability and the related work restrictions, if requested. (2 Cal. Code Regs., tit 2 § 11069(d).)

Interactive Process

Interactive Process is...

All activities that are necessary to properly address the potential need for Reasonable Accommodation by an applicant or employee

- Every verbal and written communication with injured or disabled applicant/employee
- Meetings
- Actions, etc.

Interactive Process

Uniformly apply two interactive processes across the organization, regardless of how injury occurred:

**Short-Term Interactive
Process
(Low Touch)**

**Temporary Work
Restrictions / Known
Leave Needs**

**Long-Term Interactive
Process
(High Touch)**

**Permanent Work
Restrictions or Leave /
Chronic Conditions /
Unknown Duration of
Leave or Restrictions**

Same hallway... same doors... used efficiently

The Disability Interactive Process Hallway

**LONG-TERM REASONABLE
ACCOMMODATION DECISIONS**

Interactive Process

- Long-Term Interactive Process Hallway is used when decisions relate to permanent or long-term work restrictions / functional limitations and where the decision may result in medical separation / termination
- Ensure your process and documentation tools are a match for the level of importance of the decision and risk your organization is assuming
- The Long-Term Interactive Process is more robust than the Interactive Process used for Short-Term decisions.
- Never say “permanent accommodations”

- 1... Medicals / EFJA
- 2... Explore / Research Ideas
- 3... Schedule
- 4... Post Meeting Work




SHAW
HR CONSULTING

INTERACTIVE PROCESS HALLWAY

The Foyer

Discuss with Employee:

- What was the trigger?
- What can they expect?
- What do they need to do?
- What will you do?
- Send Letter
- Move down the Hallway



Interactive Process Hallway



Obtain Necessary Documentation/Information

Medical report with:

- ✓ Serious medical condition impacting work
Yes/No answer
- ✓ START here...

1. Does Mr./Ms. NAME have a physical or mental impairment that limits his/her ability to engage in a major life activity such as the ability to work; care for his/herself; perform manual tasks; walk, see, hear, eat, sleep; or engage in social activities?
 - NO, Mr./Ms. NAME does not have a physical or mental impairment that limits his/her ability to engage in a major life activity.
 - YES, Mr./Ms. NAME has a PHYSICAL and/or MENTAL impairment that limits his/her ability to engage in a major life activity.
2. If the answer to question 1 is yes, does the impairment currently affect Mr./Ms. NAME's ability to perform the essential functions of a POSITION TITLE (see attached job description)?
 - NO, Mr./Ms. NAME's impairment does not limit his/her ability to perform all of the essential functions of his/her position.
 - YES, Mr./Ms. NAME's impairment does affect his/her ability to perform the essential functions of his/her position.

Interactive Process Hallway



Door #1

Obtain Necessary Documentation/Information

Medical report with:

- ✓ Serious medical condition impacting work
- Yes/No answer
- ✓ Clear work restrictions
- ✓ Duration of work restrictions, or
- ✓ Leave Needs & Duration

Interactive Process Hallway



Door #1

Clear Work Restrictions / Leave Needs:

Know if restrictions or accommodations & always clarify both:

- Heavy lifting
- No undue stress
- Part-time work / 4 hours per day
- No working with Rachel Shaw
- Repetitive bending
- Prolonged standing
- Fragrance Free

Interactive Process Hallway



Door #1

Obtain Necessary Documentation /Information Continued...

How to get clear work restrictions?

- Employee (non-industrial)
- Risk Management / TPA (industrial)
- Write to doctor
 - Medical supplemental questionnaire
- Fitness for Duty Examination

Note: California Confidentiality of Medical Information Act / HIPAA

Requesting Medical Related Information

- **California Confidentiality of Medical Information Act** (CA Civil Code Sec. 56.10.8(b)):
 - (B) Describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.
- **2 California Code of Regulations (CCR) (tit 2 § 11069(d)):**
 - The employee must also “cooperate in good faith” and provide “reasonable medical documentation” identifying the existence of the disability and the related work restrictions, if requested.

Interactive Process Hallway



Door #1

Sending Medical Supplemental Questionnaires:

- Send questionnaire through employee (non-industrial)
- Send questionnaire through workers' compensation contact (industrial)
- Send questionnaire to known health care provider directly, with a cc to employee
 - Benefits and risks of this approach

Interactive Process Hallway

When **STUCK** at door # 1 (industrial injury):

- Reevaluation of employee if it has been over a year since the doctor saw the applicant.
- Consider deposition of doctor if he/she won't clarify restrictions.
- Get ahead of the issues... send a medical supplemental questionnaire to the QME/AME before the examination

Interactive Process Hallway

When **STUCK** at door # 1 (non-industrial injury):

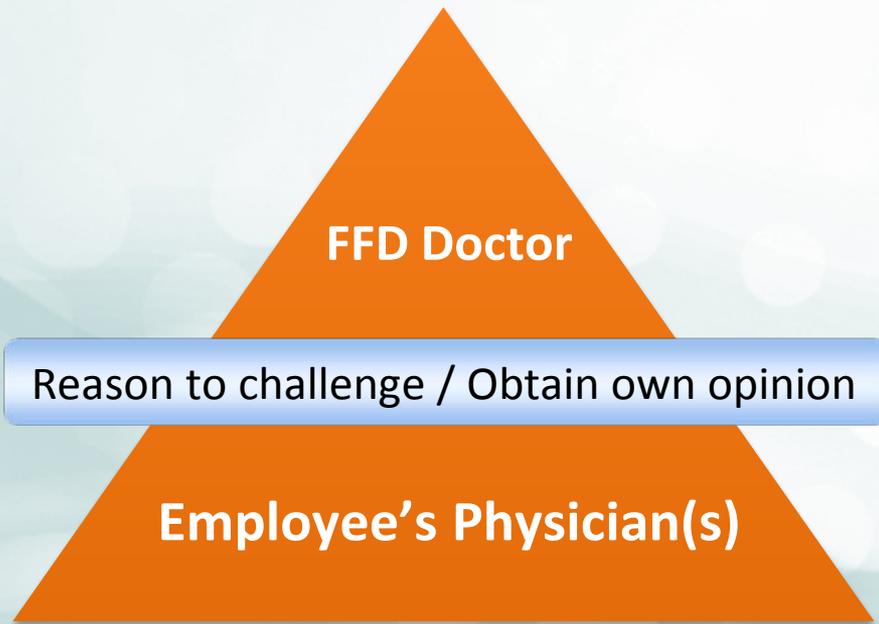
- Employee's Health Care Provider is unable to provide information needed to move through the Hallway
 - Unclear, illogical, incomplete, not returned
- Employee is unwilling to allow their HCP to provide information needed
- Employee does not have medical insurance and/or a doctor that they can request the information from
- Employee has multiple HCP's issuing medical notices (*may* be helpful)

Interactive Process Hallway

- **Utilize Door # 1 Tool: The Fitness for Duty Examination**
 - Before using tool, try to obtain clarification from employees HCP
 - When necessary, realize:
 - They are seen as more aggressive by employees and labor organizations
 - Rarely welcome
 - Can be very expensive
 - Results are not guaranteed
 - You are stuck with your doctor
 - **I rarely recommend a FFD exam for ACCEPTED workers' compensation claims.**
 - Regardless, an important tool

Fitness for Duty Examinations:

The FFD Hierarchy



- FFD Doctor's opinion is used to make decisions
- Overrides personal doctor**
- Must have observable reason to believe that additional information is needed and/or can not rely on personal doctor's opinion

*** CBA/MOU or Personnel Rules may modify this*

Fitness for Duty Examinations:

What is a FFD Examination?

Employer can coordinate a Fitness for Duty examination with a qualified Health Care Provider (physical or mental impairment) in the event that they determine that the need to do so is job related and consistent with business necessity (42 USC § 12112(d)(4)(A), 42 USC § 12101 et seq. (ADA); Gov. Code § 12940(f)(2) (FEHA) and there are objective facts that:

- **Safely:** The employee may have a medical or psychological condition that could result in a direct physical threat or other liability to themselves, a co-worker or the public.
- **Fully:** The employee may have a medical condition or injury that impacts their ability to perform the essential functions of their classification fully and it is unclear as to what type of reasonable accommodation is necessary.

Fitness for Duty Examinations:

Medical Examinations / Releases:

- Can the doctor have an employee's prior medical records?
 - California Confidentiality of Medical Information Act (CMIA)
 - Civil Code 56.10: Health care provider cannot have the records unless the employee authorizes the release except under certain limited conditions.
 - Civil Code 56.20(b): “No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. **However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.**”

Health Care Provider Definition

California Code of Regulations § 11065 Definitions

(i) “Health care provider” means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of “others capable of providing health care services” under FMLA and its implementing regulations, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, or a group health plan's benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

Health Care Provider Definition

Per the California Code of Regulations § 12945.2(c)(6)(B)

- (6) “Health care provider” means any of the following:
 - (A) An individual holding either a physician’s and surgeon’s certificate issued pursuant to Article 4 (commencing with Section 2080) of Chapter 5 of Division 2 of the Business and Professions Code, an osteopathic physician’s and surgeon’s certificate issued pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.
- **A Note of Chiropractors:** A chiropractor is a health care provider “limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist.” (Cal.Gov.Code § 12945.2(c)(6)(B); 29 C.F.R. § 825.118(b)(1) (2007).)

Interactive Process Hallway



Door #1

Obtain Necessary Documentation /Information Continued...

- **Essential Functions Job Analysis (EFJA)**

- Understands and document the Essential Functions of the job description/classification and the particular assignment
- Document this in advance of a medical examination or accommodations meeting
- **SAMPLE**

Interactive Process Hallway



Door #2

Engage, Interact and Explore Together

- Ensure applicant/employee is aware of process
- Talking and/or informal meeting with applicant/employee
- Seek applicant/employee opinions and interests
 - **Research ideas of employee/applicant, department or organization before accommodations meeting**
- Consult with professionals in the field for assistance to identify reasonable accommodation options
- Use Resources: Colleagues, attorneys, WC examiners, consultants
- No Decisions, but research options

Interactive Process Hallway



Door #3

Schedule Accommodations Meeting / Have the Right People Involved in Decisions:

- **Long-Term decisions:**
 - Human Resources
 - Workers' Compensation / Risk Management
 - Employee's Manager / Supervisor
 - Employee
 - Employee Representative of choice
 - **PERB found in SEIU v Sonoma County Superior Court – EE's are entitled to union representation at IP meetings**
 - Facilitator & Note Taker

Interactive Process

Use the Disability Interactive Process to evaluate if you can provide Long-Term Accommodations:

1. Offer of Modified Work
 - Current classification, performing all of the essential functions, same efficiency and effectiveness
2. Offer of Alternative Work/Reassignment
 - a) Available and approved to be filled
 - b) Not a promotion
 - c) Minimally qualified
 - d) Only after a to c, physically appropriate with/without reasonable accommodation

Interactive Process Hallway

At the **REASONABLE ACCOMMODATIONS MEETING, TAKE NOTES**. Notes should include:

1. Purpose of meeting / Reason for Meeting
2. Documents relied on (EFJA, Medicals)
3. Summaries of discussions between all parties relating to:
 - Modified work
 - Extended leave of absence
 - Alternate work
4. Summarize outcomes/decisions or next steps
5. Signatures of all attending parties



Interactive Process Hallway



Door #4

Post-Meeting Activities / Close Process Correctly

- Place all documents in the accommodations file
 - Process Letters (Summaries of events, meeting invites)
 - Meeting Notes Templates
- Complete Post Meeting Agreements
 - Inform others that need to know of a result
 - Complete post meeting forms, letters, etc.
- Identify Next Steps of the Interactive Process

Interactive Process

Best Practice Recommendation:

- Designate someone in your organization as the “Interactive Process Coordinator”
- This person should NOT be a decision maker, they are a process hawk, organized and a good communicator
- Depending on the size of your organization, this can be an “additional duty as assigned” or a dedicated person

Interactive Process

Role of “Interactive Process Coordinator”

- Introduce and orient the employee/applicant to the laws and the process
 - What this process can do and what it cannot do
 - What they can expect in terms of timelines, information that will be requested and possible outcomes
- Ensure that there are NO surprises at the end of the process
- Serve as a quasi neutral party to try and support the employee/applicant and the employer to understand each other and explore openly, honestly and thoroughly
- Insource vs. Outsource this role = INSOURCE; with support from Labor Attorney, Disability Consultants, other Professionals in your Industry when needed

The Disability Interactive Process Hallway

**SHORT-TERM (TEMPORARY) REASONABLE
ACCOMMODATION DECISIONS**

- 1... Medicals / EFJA
- 2... Explore / Research Ideas
- 3... Schedule
- 4... Post Meeting Work




SHAW
HR CONSULTING

INTERACTIVE PROCESS HALLWAY

Interactive Process for Short-Term Restrictions

- For temporary / short-term restrictions, process can reflect the risk
- Usually you are not considering medical separation/ termination for short-term / temporary work restrictions, if you are, Long-Term Interactive Process should be initiated
- Process goals:
 - Timely
 - Manageable
 - Produce realistic documentation



Short-Term Processes & Decisions

- What is Short-Term anyway?
 - Organizational decision
 - Short-term process usually will move into a Long-term process when the following occurs:
 1. Restrictions or leave are for an unknown duration and have continued past ____ months (6, 9 months, etc.)
 2. Employee is upset about Short-term process decisions and disagrees with decisions made by employer
 3. Leave of absence and/or light duty assignment has continued for _____ months (6, 9 months, etc.)
 4. When paid leaves exhausts
 5. Permanent Work Restrictions

Interactive Process Hallway

Door #1

- **Clear Enough Data:** Determine if additional clarification is needed; may develop an EFJA

Door #2

- **Explore Temporary Accommodation Options:** Call/email/discuss with employee and supervisor the restrictions and begin exploring accommodation ideas

Door #3

- **Document Decision:** A formal meeting is rarely necessary. Discuss options and yes/no and document decision with a Temporary Modified / Light Duty (TMLD) Form (Sample 17)

Door #4

- **What You Said You Would Do / Follow-Up:** Calendar to follow-up as recovery continues. End TMLD with RTW or by sending to Lon-Term process

Short-Term Processes & Decisions

Use the Disability Interactive Process to evaluate if you can provide **Short-Term Accommodations:**

1. Is it reasonable to offer **Temporary Modified Duty**
 - Do you offer Temporary Light Duty (must provide for none or all), if not
 2. Is it reasonable to offer an **Extended Leave of Absence**
 - Potentially in excess of your policies (unpaid)
 - If not possible, then Alternative Work is explored
- **Note**: If NO to # 1 and # 2, start Long-Term Hallway / IP Process

Short-Term Processes & Decisions

How Long Do You Extend Temporary Modified or Light Duty Assignments (TMLD)?

Opinion Corner: How long should a TMLD assignment be for?

- Is it supporting **medical improvement**, as evidenced by a reduction in restrictions every ____ months?
- Is EE performing **meaningful work** for the organization?

If yes to both... extend.

Short-Term Processes & Decisions

- **Considerations:**
 - What if EE does not agree to sign the TMLD agreement?
 - What if EE does not agree to work the assignment offered?
 - Consistency of offerings
 - Industrial,
 - Non-industrial, and
 - Pregnancy related disabilities

Reasonable Accommodation

Statutory Obligation # 2:

Provide Reasonable
Accommodations



Reasonable Accommodation

Reasonable accommodations include:

Any appropriate measure that would allow the applicant or employee with a disability to perform the **essential functions** of the job, such as:

- Facility modifications
- Schedule changes
- Equipment purchases
- Modifying examinations
- Changing policies



Reasonable Accommodation

An accommodations can be ANYTHING.

You are not required to provide accommodations. You are required to provide REASONABLE accommodations.

What makes an accommodation REASONABLE:

1. Provides the employee/applicant with a **SAFE** work environment
2. Allow the employee/applicant to perform the **FULL** set of Essential Functions of their position.

Technically:

- **Undue Hardship** (29 CFR §1630 app. §1630.15(d)) (1996)
- **Direct Threat** (42 U.S.C. § 12113(b); see 29 CFR §1630 app. §1630.2(r))

Reasonable Accommodation

Short-Term Accommodations:

1. Offer of **Temporary Modified**

- Temp. Modified: Current classification, performing all EF, same efficiency and effectiveness
 - **Optional:** Temp. Light Duty - Performing part of / some of the EF of current job or set of meaningful work duties or special assignments
 - Supporting medical improvement / stabilization, and
 - Performing organizationally meaningful work

2. Offer of and **Extended Leave of Absence**

- Potentially in excess of your policies
 - Job-protected, not paid
- If not possible, then Alternative Work is explored

Reasonable Accommodation

Short-Term Accommodations - Offer of and Extended Leave of Absence

- **When is a LOA a reasonable accommodation?**
 - **Known duration of leave**
 - **Expected to support return to work at conclusion of known leave period**

Interactive Process

Let's Agree on Vocabulary:

Temporary Modified Duty

(Different than Light Duty)

- Performing 100% of the essential functions of the position, same effectiveness and efficiency as all others in the position/class but with accommodations that are temporarily needed or temporarily reasonable to implement
- Determination has not yet been made if the accommodations would be reasonable to implement long-term, but they may be if they truly support employee to perform all of the work safely and fully

Interactive Process

Let's Agree on Vocabulary:

Light Duty

(Sometimes called Temporary Alternative)

- Performing some of the essential functions of the usual and customary position, and/or
- Performing less than the full workload of the assignment or working part-time, or
- Performing a different job assignment or set of tasks; regardless if the work is represented by a formal job description or assignment in the organization
- Not required to be offered, but is often a good idea. If you offer it to industrial injured workers, you must offer to non-industrial employees

Reasonable Accommodation

Long-Term Accommodation:

1. Offer of **Modified Work**: Current classification, performing all of the essential functions, same efficiency and effectiveness
2. Offer of **Alternative Work/Reassignment**
 - a) Available and approved to be filled
 - b) Minimally qualified
 - c) Not a promotion
 - d) Only after a to c, physically appropriate with/without reasonable accommodation

Interactive Process

Let's Agree on Vocabulary:

Modified Duty

- Performing 100% of the essential functions of the position, same effectiveness and efficiency as all others in the position/class but with LONG-TERM reasonable accommodations that the organization believes will be able to be implemented on-going
- Determination HAS been made that it appears the accommodations are reasonable for the long term as the employee appears to have **long-term or permanent work restrictions / functional limitations**
- However, NOTHING in life is permanent and this could change if the condition changes, the work changes or if it no longer appears that the accommodations are working sufficiently

Interactive Process

Let's Agree on Vocabulary

Alternative Work / Reassignment

- If an employer determines that they cannot accommodate an employee to return to work in their regular/usual and customary position and that an extended leave of absence is not reasonable due to their **long-term or permanent work restrictions / functional limitations**, the employee may be reassigned into another position
- Position must be vacant and approved to be filled
- Position cannot be a promotion
- Employee must be minimally qualified / demonstrate minimum proficiency for the position
- Employee must be able to perform all of the essential functions of the position with the same effectiveness and efficiency as all others in the positions – with or without reasonable accommodations

Reasonable Accommodation

An employer is not required to:

- Lower quality or production standards
- Provide personal use items (such as glasses or hearing aids)
- Create a new position / create permanent “light-duty”
- Displace (bump/layoff) other employees

Making Decisions

When Accommodations are Reasonable:

- Document decisions in writing.
- Accommodations are never permanent, goal is long-term.
- Revisit, if needed or requested by any party.

Making Decisions

Trial Accommodations: If you are unsure if an accommodation will support an employee to **FULLY** perform his job, don't be afraid to trial the accommodations

1. Clarify and document what a “successful accommodation plan will look like and/or produce
2. Identify when the plan will be reviewed / checked-in on
3. Discuss and document what happens if the accommodations don't work so there are no surprises

Note: Trials don't work when concerned for **SAFETY** of accommodation ideas.

Making Decisions

When no accommodations are reasonable, employer must have documented the following evaluations and decisions:

1. What could the employee no longer do **FULLY or SAFELY** due to their permanent or long-term restrictions?
2. Extended leave of absence was for an **unknown duration** or was **not medically expected to support a return to work** at the end.
3. No appropriate vacant positions were available.



Making Decisions

When accommodation is not reasonable:

- Use of leaves, paid and unpaid (FMLA/CFRA)
 - Did FMLA/CFRA run? If not, run now.
 - Sick Leave, Vacation Leave, PTO
- Medical Separation / Retirement
 - At-will / private sector employees
 - Medical Separation
 - Public Sector / Represented Employees
 - Retirement Obligations:
 - Labor Contracts
 - Civil Service Rules

Workers' Compensation and the FEHA/ADA

INTERACTION AND COORDINATION

Workers' Compensation

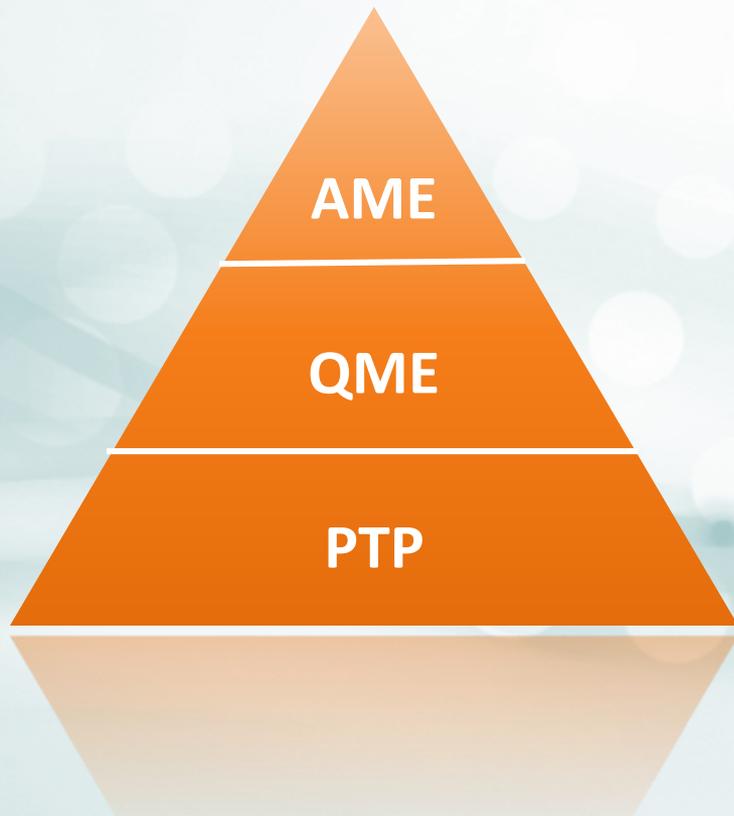
Key Terms in Workers' Compensation and what they mean for the Disability Interactive Process:

- Permanent and Stationary / Maximum Medical Improvement
- Prophylactic work restrictions
- Repetitive / very repetitive
- Prolonged
- Heavy / very heavy



Workers' Compensation Doctors

The Workers' Comp Pyramid of doctors



- WC Dr. hierarchy means nothing to FEHA/ADA
- FEHA/ADA requires employers to utilize accurate medical restrictions / opinions
- Industry standard is to combine and accommodate to the most restrictive when there is more than one accepted WC medical opinion
 - Exceptions

FEHA/ADA & Workers' Compensation

Communicating with Medical Providers:

- **Primary Treating Physician (PTP):**
 - No restrictions in how you communicate with this provider except for medical privacy regulations.
 - You can only request work restrictions and duration of limitations
 - Opinions coordinate with any QME, pQME or AME opinions

FEHA/ADA & Workers' Compensation

Communicating with Medical Providers in Workers' Compensation

- **State Panel Qualified Medical Examiner (pQME)**
 - L.C 4062.3(e): You can communicate the State Panel QME in writing however parties have to be carbon copied.
 - Do not send new medicals to the State Panel QME requesting that she review and comment without parties agreeing to the new medicals, however, if it's medicals that the doctor already reviewed in his initial evaluation parties can be carbon copied.
 - Recommendations:
 - Before sending an EFJA, make sure both parties received it already
 - Treat QME and pQME the same; and if EE is represented, ensure your attorney OKs all communication with QME
 - Opinion coordinates with the PTP's opinion

FEHA/ADA & Workers' Compensation

Communicating with Medical Providers in Workers' Compensation

- **Agreed Medical Examiner:**
 - Means that EE is represented by an attorney
 - Cannot send request to clarify restrictions directly to doctor, must send through your workers' compensation attorney
 - Don't recommend you introduce opinions of other doctors (PTP/FFD providers) to AME
 - Ensure that the AME has an Essential Functions Job Analysis to review as he/she makes opinions
 - If you cannot get AME to clarify restrictions in writing, request that your attorney depose the doctor.
 - Opinion coordinates with the PTP's opinion

- 1... Medicals / EFJA
- 2... Explore / Research Ideas
- 3... Schedule
- 4... Post Meeting Work




SHAW
HR CONSULTING

INTERACTIVE PROCESS HALLWAY

FEHA/ADA & Workers' Compensation

Door # 1 - Clear Medicals

- Don't guess what restrictions mean
 - No Heavy Lifting, No Bending, No undue stress
 - Don't be afraid to send more than one questionnaire, if needed, to best understand limitations.
- Obtain clarification on leave needs
- Don't use American Medical Association (AMA) definitions
- Don't use CA Department of Industrial Relations definitions
- Do use specific medical definitions by the employee's workers' compensation doctor(s).

FEHA/ADA & Workers' Compensation

- Disability under FEHA and “permanent disability” under workers' comp is not the same thing
 - ERs are to only focus on work restrictions / functional limitations and leave needs only
 - ER are to treat denied claims the same, WR trigger them to act
- Level of PD means nothing for FEHA/ADA decisions

FEHA/ADA & Workers' Compensation

Tools to get through Door # 1:

- Create an EFJA for the position, if one does not exist. Especially useful in your high volume positions
 - Your TPA may pay to have these created for you, otherwise ask your risk management folks to develop these
- Work WITH your TPA/Risk Management folks to create clarifying questions to be sent to the medial provider (PTP/QME/AME)



FEHA/ADA & Workers' Compensation

Scenario - TTD:

- Mary is an accountant and has been off work for 12 months. She performs very technical accounting and budgeting work for senior management.
- Mary exhausted all of her paid leave on January 14, 2018.
- Mary's FMLA/CFRA exhausted December 20, 2017
- The organization reports that it has become a hardship to manage the department without and a qualified substitute has not been able to be found
- She remains TTD and the adjustor on her claim is stating she may remain TTD for another 6 or more months.
- What can you do?

FEHA/ADA & Workers' Compensation

Scenario – TTD Questions:

1. Can you hold an accommodations meeting now and before she is P&S/MMI?
2. Without work restrictions, what do you use?
3. How do we evaluate if an extended LOA is reasonable to accommodate or an undue hardship?
 - Known Duration?
 - Expected to support return to work?
 - Contract / Personnel Rules / Practices
 - Availability of staff / substitutes
 - Impact on operations – measurable or antidotal

FEHA/ADA & Workers' Compensation

Scenario – Conflicting Medical Reports:

- Geraldo is a maintenance mechanic for Organization.
- He has clarified permanent work restrictions from Agreed Medical Examiner (AME) and his Primary Treating Physician (PTP) has him as TTD.
- The AME is Dr. Mattie and has listed the following permanent work restrictions in a medical supplemental questionnaire dated February 27, 2018:
 - No Lifting over 10 pounds with right, left or both hands
 - No forceful pushing and pulling over 15 pounds of force with either hand or both
 - No overtime
- The Reasonable Accommodations meeting is scheduled for October 26, 2017
- On March 20, 2017, Geraldo brings in a new PTP report dated March 19, 2017 stating:
 - “Full release to work, no restrictions”
- What do you do?

FEHA/ADA & Workers' Compensation

Questions: Conflicting Reports

- What do you do?

FEHA/ADA & Workers' Compensation

Labor Code vs. FEHA/ADA

Labor Code:

- Offer of Modified or Alternative Job per Labor Code:
- Position lasting at least 12 months
- Wages & compensation offered are at least 85% of pre-injury wages
- Job is within reasonable commuting distance
- Form: DWC- AD 10133.53 (pre 2013 claims) DWC-AD 10133.35 (TPA post 2013)

FEHA/ADA:

- No specific requirements for job duration, but must be a bona fide position
- No specific requirements regarding compensation. Employee may welcome an offer at 70% or less of pre-injury wage
- Look for jobs in reasonable commuting distance, but explore all options. May be interested in relocating at his/her own expense
- Form: Document the entire process

FEHA/ADA & Workers' Compensation

Labor Code Sec. 132a:

“It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor...”

Workers' Comp Doctors

- When There are Conflicting Medical Opinions from Multiple Providers: Combine and Accommodation to the Most Restrictive
- Concern with using a FFD = Serious and Willful Risk
- Workers' Compensation doctors' and personal doctors' opinions: Combine and Accommodation to the Most Restrictive



Workers' Comp Doctors

- Just because an employee does not agree with a set of work restrictions does not mean that the work restrictions are not accurate.
 - Do Door # 1 and try to resolve discrepancies between doctors and employee disagreements, if possible
 - Be prepared in a meeting to respond to an employee disagreeing with a work comp doctor
 - Understand options you can suggest to an employee
 - If litigated, he/she should talk with their attorney about options to get restrictions reconsidered
 - If not litigated, how can you assist employee to ensure before making employment impacting decisions that the information you are using is accurate

FEHA/ADA & Workers' Compensation

Summary:

1. Go thorough each door down the interactive process hallway
2. Don't guess what restrictions mean
3. Door # 1 is the key and will take time
4. Support the folks who Run the Hallway to do Door # 1, even if there is added cost

In Closing...

- 1. Develop It:** Develop and implement a comprehensive Disability Management program
- 2. Staff it:** Have sufficient persons in your organization knowledgeable enough to manage your program
- 3. Consistently Apply it:** Be disciplined in consistently applying your program across your organization – even when it is unpopular
- 4. Document it:** Document everything

The above will ensure you make good decisions organizationally, and when you don't, you will know it.



Questions & Answers

Ryan Eskin, Esq., University Counsel
CSU Chancellor's Office | Tel.: 562.951.4500
www.calstate.edu/gc/

Rachel Shaw | Principal Consultant / President
Shaw HR Consulting, Inc. | Tel.: 805.498.9400
www.shawhrconsulting.com

