

# C'MON, Be Reasonable!

Emerging Disability Issues  
and Unreasonable Requests  
Under the ADA/FEHA

ACHRO Conference  
Sacramento, CA

October 11, 2018

Presented by:

Darren C. Kameya

Robert A. Unger

LS



Lozano Smith  
ATTORNEYS AT LAW

## WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Bakersfield, Fresno, Los Angeles, Mission Viejo, Monterey, Sacramento, San Diego and Walnut Creek.

## AREAS OF EXPERTISE

- Charter Schools
- Community Colleges
- Facilities and Business
- Labor and Employment
- Litigation
- Local Government / Municipal Law
- Public Finance
- Public Safety
- Special Education
- Students
- Technology and Innovation

**COST CONTROL** is always a huge issue in education and an area we have mastered. We recognize and understand the financial restraints placed on those in education and work tirelessly to provide the very best legal representation with those limitations in mind. One of the best ways we keep legal costs to a minimum is through strategic, preventive legal services. These include Client News Briefs to keep you up-to-date on changing laws affecting education. In addition, we offer extensive workshops and legal seminars which provide the tools needed to minimize liability, thus reducing the need for legal assistance down the road.

**CLIENT SERVICE** is our top priority and we take it very seriously. With premier service as the benchmark, we have established protocols and specific standards of practice for each of our offices statewide. Client calls are systematically returned within 24 hours and often sooner when required.

**DIVERSITY IS KEY** and we consciously practice it in all that we do. It is one of our core beliefs that there is a measurable level of strength and sensitivity fostered by bringing together individuals from a wide variety of different backgrounds, cultures and life experiences. Both the firm and the clients benefit from this practice, with a higher level of creative thinking, deeper understanding of issues, more compassion, and the powerful solutions that emerge as a result.

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### C'Mon, Be Reasonable!

- Office clerk with a mobility impairment uses a scooter and a service animal.
  - Employee requests that the District assign a custodian to follow his daily path to “pick up” after his dog each day, District insists that Employee get off of his scooter and do the “pick up.”



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## C'Mon, Be Reasonable!



- PE teacher with claustrophobia cannot attend meetings inside the Athletics Department building.
  - PE teacher requests that the staff meetings take place on the soccer field, District insists that teacher must attend in person.

## C'Mon, Be Reasonable!

- Custodian with hearing loss has problems hearing co-workers and during trainings.
  - Custodian requests to be excused from meetings, District insists that effective communication is an essential function.



## Presenter



### Darren C. Kameya

*Partner*

Darren C. Kameya is a Partner in Lozano Smith's Los Angeles office and is the co-chair of the firm's Investigations practice area. For many years, Mr. Kameya has advised school district clients in both the northern and southern California regions. Mr. Kameya's legal experience includes labor and employment matters and extends to issues of board governance, public meetings laws, charter schools, facilities use agreements, student rights and discipline, tort liability, insurance coverage issues, public records and privacy rights. Mr. Kameya's background covers other public agencies as well, including cities and special districts. As a litigator, Mr. Kameya has represented clients in federal and state courts, including representation of the City of Carson during trial and on appeal in a published case involving public financing issues. *City of Carson v. City of La Mirada* (2004) 125 Cal.App.4th 532. Mr. Kameya has lectured at educational conferences and other gatherings, including California School Boards Association (CSBA), Community College League of California (CCLC), Association of California School Administrators (ACSA), California Latino School Board Members Association (CLSBA), School Employers Association of California (SEAC), Leadership Association for Asian Pacifics (LEAP) and the Center for Collaborative Solutions (CCS).



## Presenter



### Robert A. Unger

*Acting Vice President for Human Resources  
Southwestern Community College District*

Robert Unger is the Acting Vice President for Human Resources at Southwestern Community College in Chula Vista, California. Previous to that, he was the Acting Director of Human Resources at Southwestern College. He is also a licensed attorney. Prior to assuming his role in Human Resources, he served as a professor at Southwestern College and at other local colleges in San Diego for more than 20 years. He has also served in various leadership roles in the Faculty Union at Southwestern College including serving in the roles of Union President and Grievance Chair. Mr. Unger's experience has given him a view from "both sides" having worked as both a Human Resources administrator and as a grievance and litigation rep for the faculty union for a CTA local chapter.

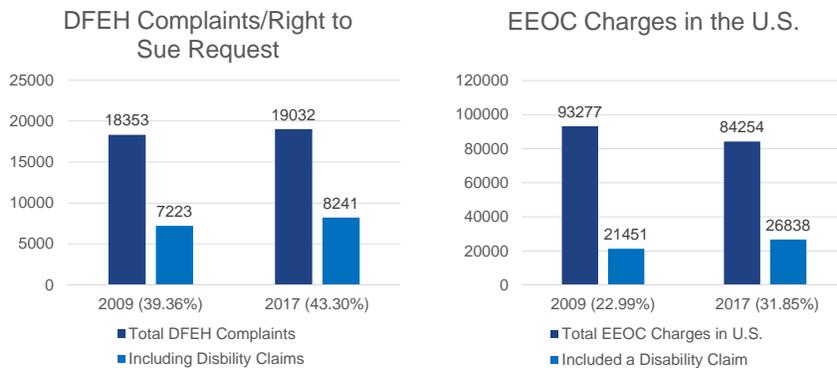


## Today's Roadmap



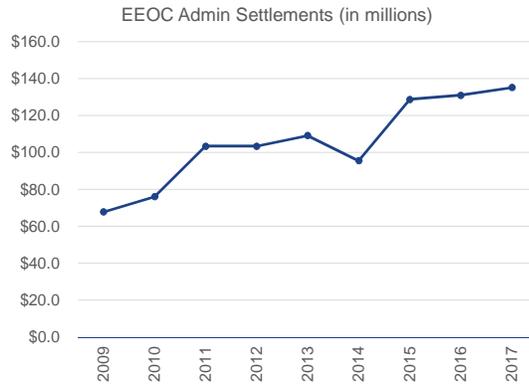
## Disability Discrimination Trends

On both federal and state levels, the last decade has seen an increase in employment disability claims, which are more common and a greater percentage of employment claims.



## Disability Discrimination Trends

Disability discrimination/failure to accommodate claims can be expensive.



- Not including any money paid in judgments or settlements from federal lawsuits
- Not including any judgments or settlements in state court litigation or admin settlements

## Brief Recap of the ADA Legal Framework

## Defining Disability

### ADA

- **Actual Disability:** A physical or mental impairment that *substantially* limits one or more major life activities; **OR**,
- **Record of Disability:** A record of having had such an impairment; **OR**,
- **Regarded As:** When a person is perceived as having such an impairment.

### FEHA

- **Actual Disability:** A physical, mental or social limitation or medical condition that limits one or more of the individual's major life activities; **OR**,
- **Record of Disability:** A record or history of disability; **OR**,
- **Perceived Disability:** A person who is treated based on the perception of having a disability.

## Regulations

### ADAAA (2008)

- Congress believed that “disability” was too narrowly interpreted and excluded impairments such as cancer, diabetes, and epilepsy.
- The ADAAA expressly states that the definition of disability should be interpreted in favor of broad coverage of individuals.
- The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

### FEHA (2013)

- Strengthened basis for requesting an assistive animal as an accommodation.
- Separate violation of FEHA for failure to engage in the interactive process.
- Detail an employer's rights to request information when disabilities are not obvious.
- Shift the burden of determining the existence of a disability to the medical provider.

## Reasonable Accommodations

- Duty runs to employees or applicants with a known disability, who are “otherwise qualified” to perform the essential functions of the job.
- When does this arise?
  - Request for accommodations
  - Third party or employer observation
  - Disabled employee exhausts leave for own illness under Workers’ Comp., FMLA, CFRA, and further leave is needed

## Pop Up Survey

## *Pop Up Survey*

1. Open your browser on your cell phone

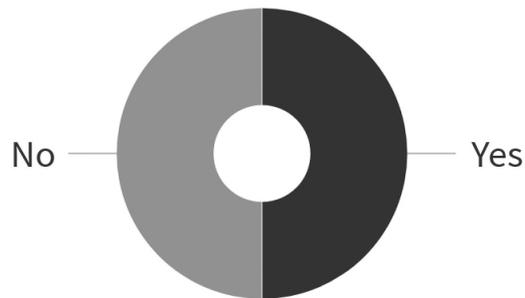
2. Go to: [pollev.com/lozanosmith2](http://pollev.com/lozanosmith2)



PHONES  
UP

**Is a disability sufficiently known or perceived to trigger an IPM in the case of a forgetful custodian perceived to have Alzheimer's Disease?**

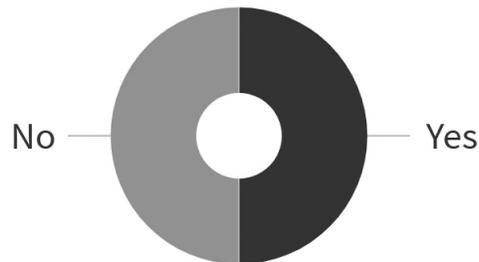
Yes No



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**Is a disability sufficiently known or perceived to trigger an IPM in the case of an irritable clerk with violent outbursts who is suspected of a Bipolar Disorder?**

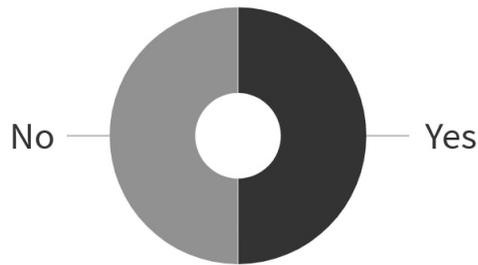
Yes No



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**Is a disability sufficiently known or perceived to trigger an IPM in the case of an instructor with Crohn's Disease who is unable to timely submit student grades?**

Yes No



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## Interactive Process Meeting expectations

- FEHA and the ADA require an interactive process, which is typically one or more meetings (“IPMs”) with the employee regarding accommodation needs and options.
- The Interactive Process “is more than a short meeting without discussion of possible accommodations.”
- It must be timely, in good-faith, and designed to identify or implement effective reasonable accommodations for employees with disabilities.
- In addition to consideration of an employee’s request for accommodations, the employer must:
  - Identify potential accommodations; and
  - Assess the effectiveness each potential accommodation.

## Reasonable or Undue Hardship?

### Reasonable

- Gives a disabled employee an equal opportunity to enjoy the benefits and privileges of employment that non-disabled employees enjoy.
- Requires the employer to be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.

### Undue Hardship

- Requires a “significant difficulty or expense” under the circumstances.
  - If the operational impacts of the accommodation undermine the mission, objectives, purpose or function of the employer’s operation.
  - If the nature and cost of the accommodation are overwhelming in relation to the size, resources, nature, and structure of the employer’s operation.

## iPolling Activity



## *iPolling Activity*

1. Open your browser on your cell phone

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**What is the most common ADA accommodation given  
at your district?**

**What is the second most common ADA accommodation given at your district?**

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**What is the most unusual ADA accommodation given at your district?**

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## Application of Performance Standards

## Holding Everyone to the Same Performance Standards

- An employee with a disability is able to perform the essential functions of the job with accommodations.
- Accordingly, employers may apply the same performance requirements of essential functions to a disabled employee.
- Performance Requirements and Discipline follow a concurrent track with the Reasonable Accommodations interactive process.
- A disability does not excuse poor performance, and a poor rating may be included in a performance evaluation even if it was caused by a disability.
- Once known, the employer must offer reasonable accommodations to enable the employee to adequately perform the essential functions of the job.



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**What if an employee responds to a low performance rating by revealing she has a disability that is causing the performance problem?**

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**What if a disabled employee seeks a flexible work schedule to come and go at will, based on the disability's effects?**

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**What if a supervisor wants to discuss an employee's disability during her performance evaluation meeting, and the employee has not raised the issue?**

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**An employer is aware that evening radiation treatments are available for an employee's cancer that would not conflict with her day-time food service worker duties. Can he insist that her treatments be scheduled around her work hours?**

Yes A No B



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## Emerging Accommodations Issues

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## Emerging Issues

- ADAAA and FEHA broaden the scope of “disability” and some researchers believe that 1 out of 8 people in the U.S. are affected by a disability.
- The ADA and FEHA require employers need to “think outside the box” by narrowing the essential functions and expanding possibilities for accommodations.
- Emerging disability issues include:
  - Chemical Sensitivity
  - Back Condition
  - Fibromyalgia
  - Medical Marijuana
  - Telecommuting
  - Service animals
  - Anxiety/Stress
  - Phobias

## Brain Sprint on Emerging Issues



- Join your nearby colleagues in groups of 3 – 4 people.
- You will be given several short stories, each of which present a reasonable accommodations dilemma.
- Your group will have three minutes to read and discuss options for possible ADA accommodations. Think outside of the box, and jot down the options for each story.
- When done, we’ll do a quick round-robin for each team to present their ideas.

## Brainstorming Warm Up



- Think outside of the box.

## Short Story Brain Sprints

On your mark, get set,

**GO!**



## Round Robin Responses

- Payroll Clerk with PTSD
- Instructor with a seizure disorder
- Security officer with episodic seizures
- Agoraphobic director of state/federal programs
- HR Clerk with gastrointestinal disorder
- Department Secretary with fragrance sensitivity

## Closing Thoughts



- Readily offer the Interactive Process to employees if you have notice of a potential disability that affects employment.
- Get appropriate and relevant information for the IPM, and think outside the box to create an inexpensive and effective bundle of accommodations.

## Questions



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