

I HAVE A DOCTOR'S NOTE, NOW WHAT DO I DO?

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THE INTERACTIVE PROCESS

- Time to Start the Interactive Process
- Review Job Description
- Identify Essential Functions
- Invite Employee to an Interactive Meeting
 - Allow employee to bring a union representative or attorney

AGENDA

- General understanding of accommodation
- Accommodation process
- Securing sufficient documentation – the battle of the doctor's note
- Best practices

QUESTIONS TO ASK

- Is the employee having problems performing some aspect of the job?
- Is the employee disabled under the law?
- Is the employee entitled to an accommodation?
- When is the employer obligated to start the accommodation process?
- How to manage the accommodation process

COMMON PROBLEMS IN THE WORKPLACE

- Have you seen this before?
 - You have a long term exemplary employee that recently exhibits unusual behavior
 - You just hired a new employee and she/he says she/he suffers from anxiety and depression
 - You spent months training, coaching, and mentoring an underperforming employee with no improvement in sight. You issue the first reprimand and she/he tells you of a disability as the cause of the performance problem

WHAT ARE THE LEGAL ISSUES?

- Is the employee disabled under the law?
- Is the employee entitled to an accommodation?
- Is the employer obligated to start the accommodation process?
- When does the employer start the accommodation process?
- What does the employer accommodate?
- Can an employer terminate an employee with a disability?

THE LAWS ON DISABILITIES

- Americans with Disabilities Act
- California Fair Employment and Housing Act
- ADA Definition
 - A physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment and being regarded as having such an impairment
 - Compare to FEHA definition: Physical or mental impairment limits a major life activity without regard to mitigating measures

WHAT ARE MAJOR LIFE ACTIVITIES?

- Major life activities
 - Seeing
 - Hearing
 - Walking
 - Learning
 - Speaking
 - Performing manual tasks
 - Concentrating
 - Working

IMPAIRMENTS

- When does the impairment limit a major life activity?
 - If, due to the impairment, the employee is significantly restricted compared to the average person in the general population
 - Interacting with others: consistent high level of hostility
 - Concentration: employee is easily distracted, frequent intrusive thoughts
 - Sleeping: sleeping few hours due to depression

ESSENTIAL FUNCTIONS OF THE POSITIONS

- The law requires employer to accommodate essential functions
- Essential functions are the basic job duties to be performed with or without an accommodation
- How to determine essential job functions?
- Must examine each job and determine which tasks are essential to performance
- Factors to consider in determining essential job functions:
 - Does the position exist to perform that function?
 - Number of employees available to perform that function
 - Degree of expertise or skill required to perform the function

ESSENTIAL FUNCTIONS

- Essential functions are duties that are fundamental to the position
- Are the following essential functions?
 - Ability to work in stressful environments
 - Ability to get along with co-workers and students
 - Attendance
 - Punctuality
 - Accuracy
 - Lifting, pulling, standing, sitting

ACCOMMODATION OBLIGATIONS

- The employer must reasonably accommodate a disabled employee or applicant unless doing so presents an undue hardship or creates a direct threat to health or safety.



THE GOOD FAITH INTERACTIVE PROCESS

- The law requires the employer to engage in a good faith interactive process to explore reasonable accommodation for the employee



WHEN TO START THE INTERACTIVE PROCESS?

- Employee asks for an accommodation
- Employer learns of the employee's need for an accommodation
- Employer has reason to know of a need for an accommodation:
 - Difficulty performing some aspect of the job
 - Employee exhausted all leaves of absences, and/or all leaves under workers' compensation
 - Unusual or change in behavior or performance
 - Employer becomes aware of need for accommodation because employee presented a doctor's note

STARTING THE ACCOMMODATION PROCESS

- Did the employee ask for an accommodation?
 - Giving employer a doctor's note to employer is the request for accommodation
- Did employer notice the employee having performance issues?
- Did employer hear any rumors employee unable to do some aspect of the job?
- Did the employee give you a medical note?



WHEN CAN THE EMPLOYER ASK FOR A DOCTOR'S NOTE?

- Does the employer have a right to obtain a medical note?
- YES, when the disability is NOT obvious
 - ER may ask for reasonable documentation to confirm existence of disability and need for reasonable accommodation. [Title 2, CCR 11069(d)(1)]
 - EE required by law to provide doctor's not as part of the interactive process since the need for the accommodation is not obvious.

MEDICAL DOCUMENTATION WHEN DISABILITY OBVIOUS

IF THE DISABILITY IS OBVIOUS, DO NOT ASK FOR MEDICAL CERTIFICATION
GO STRAIGHT TO INTERACTIVE PROCESS



TIME LIMITS FOR PROVIDING MEDICAL DOCUMENTATION

- Neither the ADA or FEHA have a set time limit for medical notes
- Some ERS use the timelines from FMLA which allow for 15 days and provide additional time if the EE cannot provide the note for reasons beyond EE's control
- Best Practice
 - Have a disability accommodation policy that sets forth the timelines for the interactive process including deadlines to secure medical notes
 - Create forms to request accommodation with time frames
 - Create sample medical documentation forms with pre-printed questions
 - ER should document its attempts to obtain documents from employee

ACCOMMODATION BEFORE THE MEDICAL NOTE

- Are Employers Obligated to Accommodate Employee before Obtaining Medical Note?
 - It is both a YES and a NO – typical lawyer response!
- EEOC Enforcement Guidelines on Reasonable Accommodation
 - ER should respond expeditiously to request for accommodation and act promptly to accommodate employee. Unnecessary delays can result in violation of ADA
- FEHA Regulations: “If the medical documentation provided to date does not support any reasonable accommodation, no reasonable accommodation need by required. [Title 2, CCR 11069(d)(6)]
- Best Practices: ER should consider granting a leave of absence as an accommodation before receiving the medical note conditioned on receiving the note in a timely fashion, unless granting the leave poses an undue hardship

MEDICAL DOCUMENTATION

- **I have a doctor's note, now what?**
- Check the note for legal compliance
 - Come from health care provider with expertise to confirm the disability and need for accommodation?
 - Describe physical/mental limitations that affect major life activities
 - Does the note confirm the existence of a disability?
 - Nature of disability cannot be disclosed
 - Does the note state the need for an accommodation?
 - If note does not support an accommodation, no accommodation is required

MEDICAL DOCUMENTATION/SEEKING CLARIFICATION

- ER may decide if note needs clarification
- ER must identify issues that need clarification,
- Specify what information is needed, and
- Afford reasonable time to produce supplemental information
- Best Practices:
 - Send memo to employee with specific instructions to clarify what part of the note is not clear and what is needed
 - Set a deadline to obtain a clarified note
 - Consider extending leave of absence conditioned on new note

THE CASE OF JANE AND DR. SUNSHINE

JANE DOE

- Jane is a Campus Security Officer for the District. Her duties are to supervise students during recess and during the lunch hour.
- Jane asked to be transferred inside during recess and lunch time

JANE'S NOTE

- From the desk of Dr. Sunshine
- “Jane suffers from an eye condition and cannot work outdoors. Jane needs to work indoors out of the sun.”

THE CASE OF JANE AND DR. SUNSHINE

- Is employer allowed to ask for a medical note?
 - Yes if the disability is not obvious
- Is the note sufficient?
 - Does the note describe physical/mental limitations that affect major life activities? – what is the major life activity here?
 - Does the note confirm the existence of a disability?
 - Does the note say that an accommodation is needed?

THE CASE OF JANE AND DR. SUNSHINE

- What are your options as an employer?
 - Accept the note and schedule interactive process
 - Reject the note
- If reject, identify what the issues is with the note
- Clarify what information is missing
- Afford employee reasonable time to obtain a new note
- If EE still provides insufficient note ER may require EE to go to a health care provider of ER's choice

THE CASE OF JOHN AND HIS ASTHMA

- John works for the District as a Counsellor for XYZ Community College
- John's duties involved engaging with students
- John submitted the following note from his psychiatrist:
- "District work environment triggers asthma. John needs to work from home forever."

THE CASE OF JOHN AND HIS ASTHMA

- What do you do with the note?
- Option 1
 - Accept the note and allow John to work from home
- Option 2
 - Reject the note
 - What do you say to the employee?

THE INTERACTIVE PROCESS STEPS

- Identify the essential functions of the job
- Review and identify potential accommodations
- Review lateral positions and lower level positions
- Review medical note for functional limitations

THE INTERACTIVE MEETING

- Ideally in person
- Confirm functional limitations and its affect on essential functions
- Explore accommodations
 - Consider the preference of the employee
 - ER has right to implement effective accommodation that allows the employee to perform the essential functions of the job
 - If considering reassignment to alternate position –
 - EE must provide ER information of educational qualifications and work experience to help ER find alternative position