

*and assists employers in untangling the web of workers' compensation, ADA, FMLA and disability overlap. Woodruff-Sawyer & Co. is one of Employers Group's insurance partners.*

**T**here is little doubt that many of us are applauding the changes of the recent workers' compensation reform and its positive impact on the California business community. Be aware however, California Workers' Compensation Applicant Attorneys are now increasingly turning their attention toward employment exposures that they have historically ignored.

With the transition from vocational rehabilitation to the voucher system whereby injured workers can no longer collect cash benefits for retraining, attorneys have begun to focus on Fair Employment and Housing Act (FEHA) exposures that have traditionally been overlooked. Furthermore, the passage of AB 2222, the Poppink Act, (which took effect January 1, 2002) amended the FEHA to ensure that disabled workers in California would have broader workplace protections well beyond that of the Federal Americans with Disabilities Act (ADA). Both the ADA and FEHA prohibit discrimination in the workplace based on disability, but the Poppink Act broadens the definition of disability to include several additional physical and mental impairments.

Many applicant attorney firms throughout the state have either hired or aligned themselves with employment practice attorneys to complement their existing workers' compensation practice, and have begun to scrutinize those cases where disabled workers have been denied their rights under the FEHA.

This exposure is by no means new, but because it was not applicant counsel's focus in the past, Risk Managers and HR professionals need to be aware and work together to take the necessary steps to avoid these legal landmines.

Labor Code 132a extends protection to employees by declaring that there shall not be discrimination against workers who are injured in the course and scope of their

employment. The burden is on the employee who must establish that employer's actions are "detrimental" to the employee in the employment relationship. Generally speaking, many 132a claims arise from situations where the employer terminates employment and benefits prior to the employee being placed in a new vocation and without any consideration to the interactive process. This creates an opening to file a disability discrimination claim with the Department of Fair Employment and Housing (DFEH).

Failure to engage in the interactive process will make it more difficult to defend against any discrimination charge brought forward by an employee with a disability. And, with the elimination of the formal rehabilitation system, the probability is far greater now that an applicant's attorney will be monitoring the actions of the employer and the extent to which they engage in a timely good faith interactive process with the disabled employee.

#### **What employers must do**

In light of the earlier expansion of the definition of disability under FEHA, along with Workers' Comp reform and the elimination of vocational rehabilitation as we knew it, it is recommended that employers allocate adequate resources to the process and efforts to return injured employees to work. Whether the disability is due to occupational or non-occupational reasons, employers need to understand two key aspects of California law when it comes to employees with disabilities: 1) Employers must provide a reasonable accommodation for those applicants and employees who are unable to perform the essential functions of their job because of their disability, and 2) Employers must engage in a timely, good faith interactive process with applicants or employees in need of a reasonable accommodation.

A reasonable accommodation can be any appropriate measure that would allow an applicant or employee with a disability to perform the essential functions of the job. It can include buying or modifying existing equipment, restructuring jobs, modifying work schedules, examinations and policies, as well as other accommodations. As an

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## **FEHA Implications on California Workers' Compensation Cases**



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## FEHA Implications

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example, a reasonable accommodation may be providing a keyboard rest for a person with carpal tunnel syndrome. Again, whether that disability is caused by industrial or non-industrial factors matters not. If it is a disability that limits the function of a major life activity, a consistent employer policy and practice that addresses making reasonable accommodations is highly recommended.


The interactive process is the process by which applicants or employees engage in a dialogue about the employee's functional work limitations due to a covered disability, and any accommodations that can be made that would allow the employee to perform the essential functions of the job.

When considering your approach to the interactive process, you may first want to start by analyzing the job and identifying and distinguishing between its essential and non-essential job tasks. You should consult with the employee and their healthcare provider to identify job-related limitations. Then, identify possible accommodations and assess the reasonableness of each, in terms of effectiveness and equal opportunity, with the employee. Consider the preferences of the employee and implement the accommodation that is most appropriate both for the employee and employer under the circumstances. Once the accommodation is made, be sure to periodically follow-up with the employee to verify its success.

Essential versus non-essential tasks and functions, physical and functional capacities of the employee, and employer resources (time, space, materials and money) are components that will lead the parties rationally toward reasonable and realistic accommodations.

Documentation of these steps cannot be over-emphasized. Maintaining a written record of the process and the parties' expressed ideas will help greatly should you need to defend your actions at some point in the future. In addition, it may help as a guide for streamlining future accommodations.

Now that the New Year is upon us, it is the

perfect time to undertake a review of your corporate Return-To-Work policy and procedures manual. Two important outcomes from your review should validate that your policy treats occupational disabilities consistent with those that are non-industrial in nature and that consistent interactive processes are in place to assist all departments in the identification and ability to accommodate those individuals who may have a qualifying disability. These results are best achieved by a cross-organizational effort involving Human Resources, Risk Management, Safety and Legal, all of which play a key role in mitigating your employment exposures. 

*(Editor's Note: If your company would like help with a review of your policy and procedures manual, contact your broker or call Employers Group at (800) 748-8484 and ask for a Professional Services Manager.)*