



# Engaging in the Interactive Process

**Navigating Your Way for  
Best Results AND Compliance**

Presented by:  
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# Your Presenter

- Roberta Etcheverry
  - Certified Professional in Disability Management
  - Over 20 years experience working with employers on stay-at-work and return-to-work for injured/disabled employees
  - Trainer for EEOC Annual Seminar, DWC Annual Educational Conference, Disability Management Employer Coalition, Northern CA HR Association, Public Agency Risk Managers' Association, etc.
  - Key contributor for State RTW Guide (w/CHSWC)
  - Extensive experience and education on identification of essential functions, job accommodations, job descriptions and ergonomics
  - Received my education at Stanford and United States Military Academy/West Point

# Outline for Today



- Fundamental responsibilities
- The Six Steps of the Interactive Process
- Resources available
- Leave/time off as an accommodation
- Performance-Conduct-Disability

# The Law...

- State vs. Federal
- Relatively recent changes to both
  - Americans with Disabilities Act – Amendment Act
  - Revised California disability regulations
- Intent of BOTH:
  - Focus should NOT be on analysis of who does/does not have a disability
  - Emphasis is on whether or not employer can reasonably accommodate

# Resource from the DFEH

- “What you should know about the law”
- 13-page brochure
- Simple, easy to understand guide
- Compares FEHA to ADA

<http://www.dfeh.ca.gov/res/docs/Publications/DFEH-208DH.pdf>

# Resource from DIR

- “Helping Injured Workers Return to Work” – Practical Guidance under Workers’ Compensation and Disability Rights Laws in California
- Navigate through dual obligations

[http://www.dir.ca.gov/chswc/Reports/2010/HandbookRTW\\_2010.pdf](http://www.dir.ca.gov/chswc/Reports/2010/HandbookRTW_2010.pdf)

# FEHA – What is required?

- What does FEHA require of employers? (specific to disability issues and employment)
  - Must provide reasonable accommodations for applicants and employees who, because of disability, are unable to perform the essential functions of a job.
  - Must engage in a timely, good faith interactive process with applicants or employees in need of reasonable accommodation.

# FEHA – Definition of Disability

- What constitutes “disability” under FEHA?
- Condition that Limits the ability to perform a Major Life Activity
  - Physical Disability
  - Mental Disability
  - Medical Condition



# Temporary versus Permanent

- FEHA

- “When determining whether an (employee) is a person with a disability, emphasis should not be placed on the duration of the disability (i.e. whether is it permanent or temporary)”
- Generally accepted that very short term situations are not covered (flu, sprained ankle)

- ADA

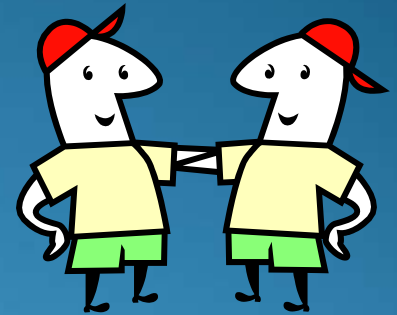
- Analysis of whether disabled does include focus on duration; however, employee is not required to show that disability is permanent to be covered

# Major Life Activities

- Term “major life activities” (in CA) is broadly construed and includes physical, mental and social activities and working.
- AMENDED REGS: further defined to include standing, sitting, reaching, lifting, bending, learning, reading, concentrating, thinking, communicating, and interacting with others”

# Define “limits” a major life activity

- How different from the ADA?
- The baseline to compare to is the individual without the impairment or the average “unimpaired” person.



- **Amended REGS:** “the condition makes achievement of the major life activity *difficult*”

# Workers' compensation

- Do ALL injured employee's meet the definition of having a disability?
- Employees with PERMANENT work restrictions?



# But let's not forget...

- The law protects ALL of us
- Side step the frustration
- What would I want my employer to do for ME?



# What IS Reasonable ??



# Reasonable Accommodation

- Any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job
- Does not require an accommodation that would be an “undue hardship” to the employer
- NO BRIGHT LINE !!
- **AMENDED REGS:**
  - Must be *EFFECTIVE* to be reasonable

# What is the Interactive Process?

- The Interactive process includes:
  - Consulting with an individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation
  - Identifying potential accommodations and assessing their effectiveness
  - Not “interacting” carries its own penalty under FEHA



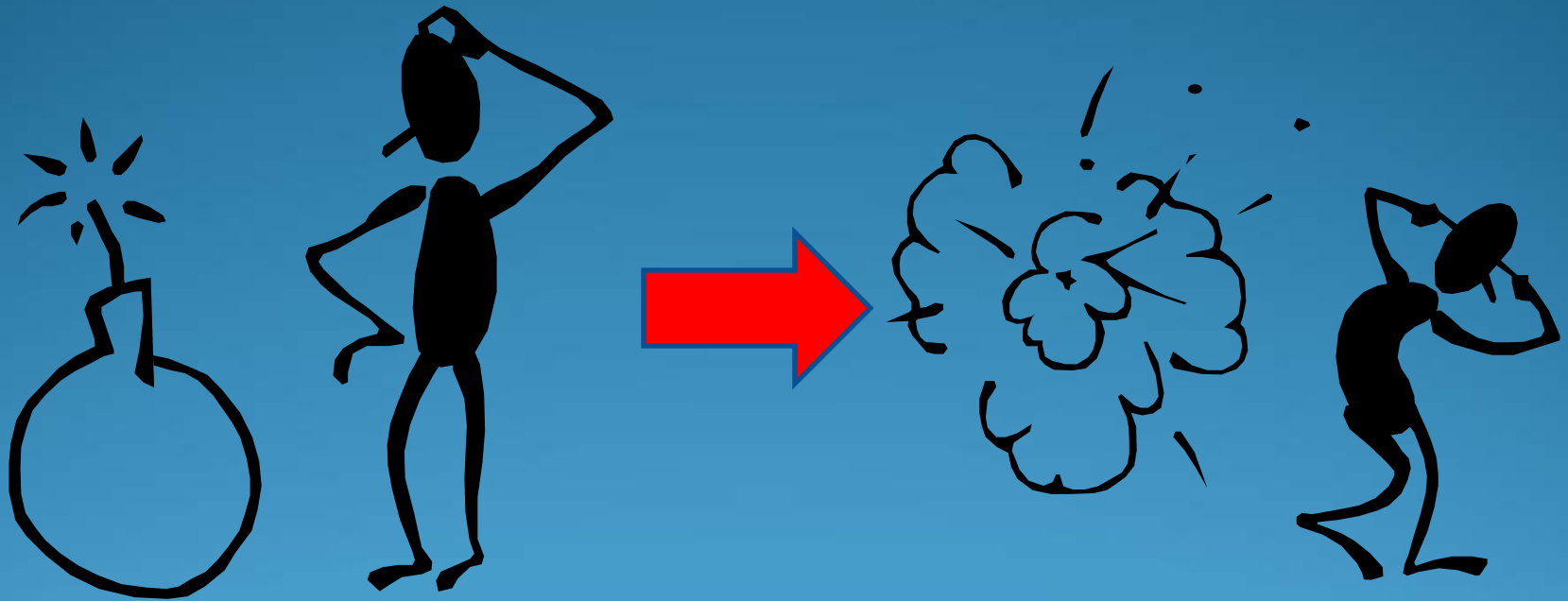
# Timely, Good Faith Process

- Employer and employee must communicate directly with each other to determine essential information
- Neither party can delay or interfere
- Employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation



# Getting the Interactive Process Started

I know what you are thinking...



# Interactive Process for Dummies



What can or can't  
employee do?



What does employer  
need employee  
to do?

**What are the gaps?  
Can we “bridge” the gaps?**

# What triggers the process?

- An oral or written request for an accommodation by an employee (does not need to refer to ADA, FEHA or use the phrase “reasonable accommodation”)
  - “My wheelchair does not fit under my desk”
  - “I have problems getting to work at my start time because of medical treatments I am undergoing”
  - “I need time off to get treatment for a back problem”

# What triggers the process?

- A request is made or the employer otherwise learns of a request for accommodation from a third party (spouse, friend, doctor...)
  - Employee's wife calls telling the employer that employee had a medical emergency due to MS, is hospitalized, and therefore needs time off
  - Employee given restrictions related to W.Comp claim
  - Employer observes employee with an obvious disability having difficulty performing the essential functions of the job

# What triggers the process?

- **AMENDED REGS:**

- “Employee with a disability exhausts leave under WC/CFRA/FMLA and the employee’s healthcare provider indicates further leave is needed”



# In a “nutshell”

- Whenever an employer knows or reasonably should have known that an employee may need assistance performing the essential job functions due to difficulties related to a physical, mental or medical condition – that triggers the start of the Interactive Process.

# Six Steps of the Interactive Process

1. Identify the Essential Functions
2. Identify limitations and abilities
3. Brainstorm on accommodation ideas
4. Assess the options and make a decision
5. Implement the accommodation
6. Follow up regularly



# Criteria for what is “Essential”

- EEOC and DFEH both offer guidance
- CA Code: “The fundamental job duties of the employment position”
- When to apply the criteria:
  1. Establishing job descriptions in your organization
  2. Conducting the Interactive Process and making decisions regarding accommodations
  3. Defending decisions already made

# Essential Functions Criteria

- The position exists to perform the function
- There are a limited # of employees to perform the function
- The function is highly specialized and the person in the position is hired for his/her special expertise or ability to perform the function
- The employer's judgment as to which functions are essential
- Based on business or operational necessity
- Written job descriptions include the function as essential
- The amount of time spent on the job performing the function
- The consequences of not performing the function
- Terms of collective bargaining agreement

# What if... ?

- Request to remove an essential function
- Is it EVER a good idea?
- What if “team” of employees all perform same functions?

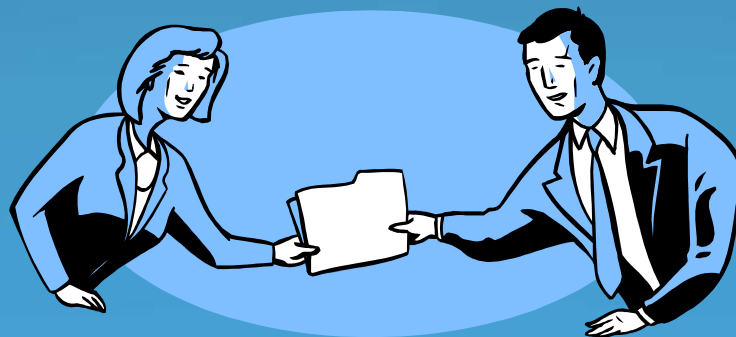
# What about... ?

- “Regular and punctual attendance” as an essential function?



## Step 2: Identify Limitations & Abilities

- Notorious for “jamming up” the process
- Do not let missing information stop you from starting the IP or proceeding as best as you can
- Use the Interactive Process to resolve the issues and obtain needed information
  - REMEMBER: IP is an “information exchange”



# Obtaining the information you need

- Go back to “IP for dummies” – second half of that equation
  - **DO** have the right to get documentation that employee qualifies for protection under the law (UNLESS..disability is obvious or employee has already provided)
  - **DO** have a right to job-related limitations/restrictions
  - **ALWAYS** keep the focus on the job-related limitations and not the nature of the disability
  - **AMENDED REGS:** The employer must provide additional time for the employee to clarify the information if clarification is needed to assess the request

# Routing requests for information

- BEST practice: route requests for information to the doctor through the employee
  - Provide employee with specific form and language
  - Express your intent to consider accommodations
  - Make clear what specific information is needed
- Hold employee accountable
- Do not insert yourself in the doctor-patient relationship

# Requests for information

- “Our organization provides equal employment opportunities...”
- “Our goal is RTW”
- “Please provide us with what we need to engage in dialog with the employee about accommodations”
- First – ask about limitations
- Second – ask for accommodation ideas
- See JAN form

<http://askjan.org/media/medical.htm>

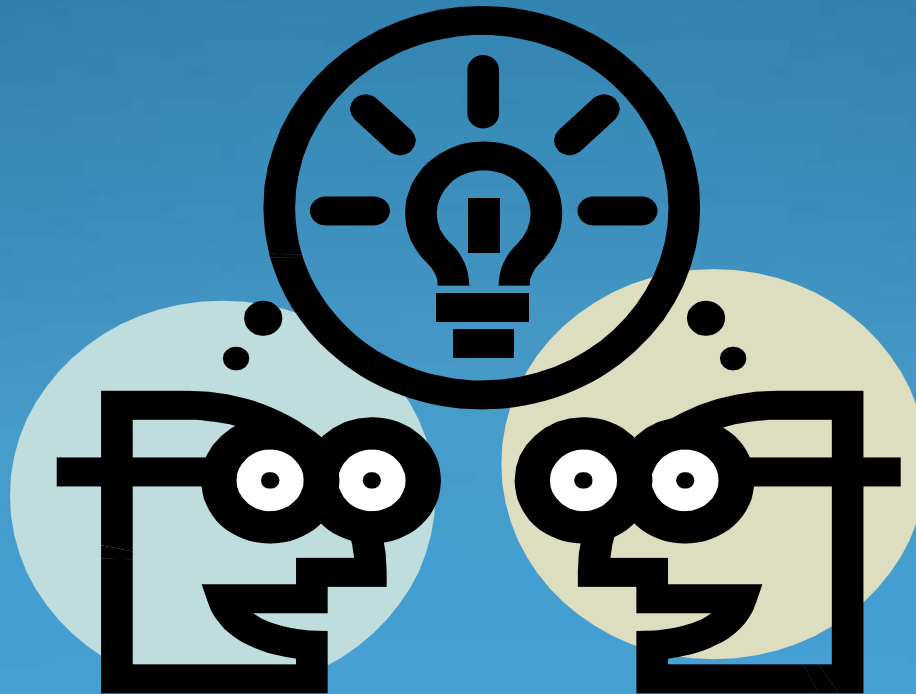


# Mental / “Intellectual” Disabilities

- Do not be afraid to seek clarification
- Be careful when asking questions
  - Focus on limitations and the effect of the impairment on the performance of essential functions

# Step 3: Brainstorm for Accommodation Ideas

Let your good faith efforts shine !



# Step 3: Brainstorm for Accommodation Ideas

- Do not be afraid to generate ideas, even if you have concerns that you might not be able to implement them
- The more ideas, the more you show you tried
- Great time to use resources – also shows good faith effort and generates more ideas

# Resources

- JAN – Job Accommodation Network

[www. askJAN.org](http://www.askJAN.org)

- Searchable database of accommodation ideas sorted by impairment
- “A to Z” of disabilities – “Accommodation and compliance series”
- JAN “On Demand” (under “contact us”)



# Resources

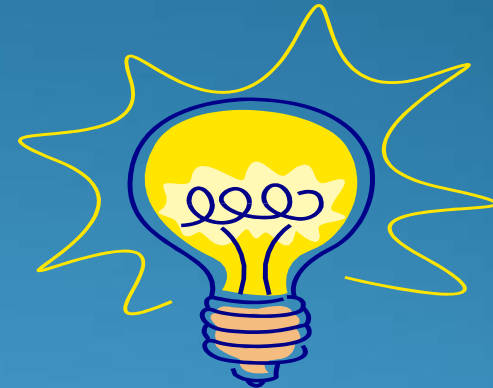
- Employer Assistance and Resource Network

[www. askEARN.org](http://www.askEARN.org)

- EARN is a service of the National Employer Technical Assistance Center (NETAC) based at Cornell University's Employment and Disability Institute, funded by the Office of Disability Employment Policy, U.S. Department of Labor.
- EARN's **vision** is to increase employment and workplace inclusion for people with disabilities by engaging and empowering employers to be leaders in this effort.

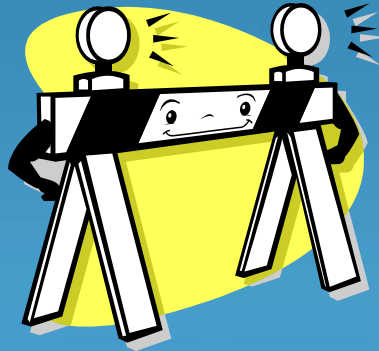
# Accommodation Ideas

- Job restructuring (move non-essential functions or how/when essential function performed)
- Leave / time off
- Flexible schedule / start time
- Ergonomic evaluation
- Telecommuting
- Assistive devices
- Modification of the workstation, tools, equipment
- Accessibility enhancements at the job site
- ETC, ETC, ETC



# Accommodation “Hot Spots”

- Leave / time off
- Conduct, performance, attendance, policy



# Leave / Time off

- When is enough ENOUGH?
- Can be extremely effective/beneficial
- No bright lines
- Cannot “hide” behind policies
- Indefinite leave not required
  - Hanson v. Lucky Stores
- Paid leave not required (outside existing practices)
- Is providing more time an undue hardship?
- Is providing more time likely to result in RTW?



# Leave / Time Off

- Length of Leave Considerations
  - Medical necessity
  - Difficulty replacing employee
  - Skill set of the position
  - Ease of redistribution of duties
  - Cost of temporary replacement
  - Resources of the employer
  - Time already provided v. duration expected
  - Likelihood employee can perform essential functions



# FMLA Issues

- Must still comply with FMLA/CFRA statutes – if employee qualifies for protected leave
- Intermittent leave – OK under FMLA, but not required as “permanent accommodation”
- You are able to provide accommodations during protected leave time - can you deny continued FMLA leave?
- What about when protected leave expires?

# Conduct /Performance Issues

- EEOC - “Applying Performance and Conduct Standards to Employees with Disabilities”

<http://www.eeoc.gov/facts/performance-conduct.html>

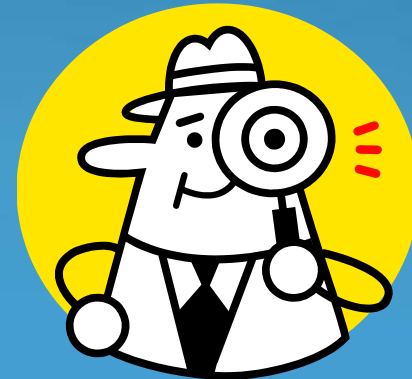
- Can apply same requirements for quantitative and qualitative performance
- Lowering production standard not required
- Not required to withdraw performance critique, disciplinary actions
- CANNOT withdraw an accommodation offer based on poor performance evaluation overall

# Performance and disability

- **DO** set performance and conduct expectations
- **DO** maintain those standards
- **DO NOT** “overlook” conduct violations or performance deficiencies
- **DO** consider reasonable accommodations that would eliminate conduct violations / support successful performance
- Might need to “pause” disciplinary actions

# Performance and disability

- Group discussion – Example #1
  - Employee works for a home inspection company
  - It is a requirement of the job that the inspectors complete a set amount of inspections per time period
  - This employee has limitations that impact their ability to keep up with the required number of inspections
  - What issues should we consider?



# Performance and disability

- Group discussion – Example #2:
  - Blood bank/sourcing company
  - Issues: forgetting to record temperatures, losing/forgetting thermometers
  - Employee informs employer they have been diagnosed with depression that contributes to memory loss
  - What now ??



# Performance and disability



- Group discussion – Example #3:
  - Employee is a security guard
  - Employee was observed on camera striking a visitor entering the building. The visitor did not make any report of the incident nor is there any way to track the visitor's identity.
  - When addressed about the issue, the employee states that they have been diagnosed with bi-polar disorder and have had difficulties with medication adjustments and feel the incident was a result of their disability
  - What do you do ?

# Step 4: Assess options & make decision

- Does the accommodation have to be the employee's first (only?) choice?
  - Prepare a menu of options
  - Give preference of the employee primary consideration
  - Employer ultimately selects an effective accommodation
- Examples:
  - Employee with vision impairment
  - Motorized cart v. hand dolly
  - Help taking notes



# Selecting the accommodation

- Undue Hardship
  - High threshold
  - Factors such as:
    - Prohibitive expense
    - Eliminates essential function
    - Unduly disruptive for operations
    - Overload of other employees (not manageable)
    - Alters fundamental nature of organization
    - Conflicts with terms of Collective Bargaining



# “Direct threat”

- ADA “Direct threat”
- FEHA “Health and safety of employee or others”
- Can deny accommodation if employer can show that employee’s disability prevents him/her from performing the essential job duties without facing identifiable, substantial and immediate danger to his/her own health safety (or that of others) AND no reasonable accommodation exists that would remove this danger. (not speculative concerns about what might potentially happen down the road)

# “Direct threat”

- Is the threat (of harm/injury)
  - Identifiable: what would happen?
  - Substantial: How serious?
  - Immediate: What is realistic time frame?
  - Probably: How likely is it to happen?



# Ongoing Process

- Must go “back to the drawing board” if not immediately successful
- Adjust to variables that present during the process
- For Workers’ compensation claims
  - FEHA not limited to 30 or 60 day “one-time” process



# Step 5: Implementation

- Have an ACTION PLAN
  - Who is responsible for actions?
  - In what time frame?
  - Who is the “gatekeeper”?
  - What triggers intervention when implementation not going as planned?
  - COMMUNICATE and DOCUMENT.



# Still Going....

- “It ain’t over ‘til it’s over”



# Step 6: Follow up

- At 30 days, 3 months, 6 months, 1 year
  - Was action plan followed to completion?
  - Does the work continue to be within the limitations?
  - Is the employee successful at performing the essential functions?
  - Changes in the work environment – what impact?

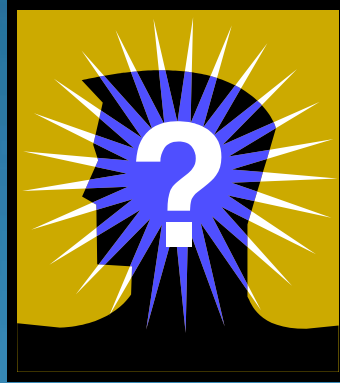
**“Successful accommodation is a beginning,  
not an ending”**

# Conclusions & Questions

- Going through this is not always easy
- Celebrate your victories
- Keep it simple
- Point yourself in the right direction
- Rely on your available resources
- Keep a sense of humor/humility
- What would you want your employer to do for you?



# Questions ?



Thank you !!

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