

Keenan



Like Peanut Butter and Chocolate:
Bringing Employment Law and
Workers' Compensation Risk
Principles Together in Harmony



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Presenters



Brad Keenan

Vice President

Keenan and Associates



Eric De Wames

Managing Partner

Michael Sullivan & Associates



About Keenan and Associates

Keenan provides innovative insurance and financial solutions for schools, public agencies and health care organizations. We serve those who support our communities. Our high quality, cost effective programs consistently exceed our customers' expectations. We are the experts you can rely on when it comes to risk management, claims services, and technology.

Innovative Solutions:

- When it comes to meaningful answers to property & casualty and employee benefits challenges, Keenan is the specialist. We deliver innovative solutions designed specifically for California educational institutions, public agencies and health care organizations

Enduring Principles

- Keenan's philosophy has always been that solving the needs of our customers and directly supporting our communities is good for our business. We continually present informational workshops and seminars, free of charge, on topics relevant to our customers, and provide scholarships to further the education and advancement of our clients.
- Because of our specialized expertise in claims services and technology, we can help you offer higher quality, efficiency and cost effectiveness in your insurance and benefit programs supported by more than 45 years of experience serving California.

About Michael Sullivan & Associates

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, subrogation, general liability, and state audits.
- Offices in El Segundo, Fullerton, San Diego, Westlake Village, Ontario, Fresno, San Jose, Oakland, Sacramento & Redding
- Author of *Sullivan On Comp* which covers the complete body of California workers' compensation law

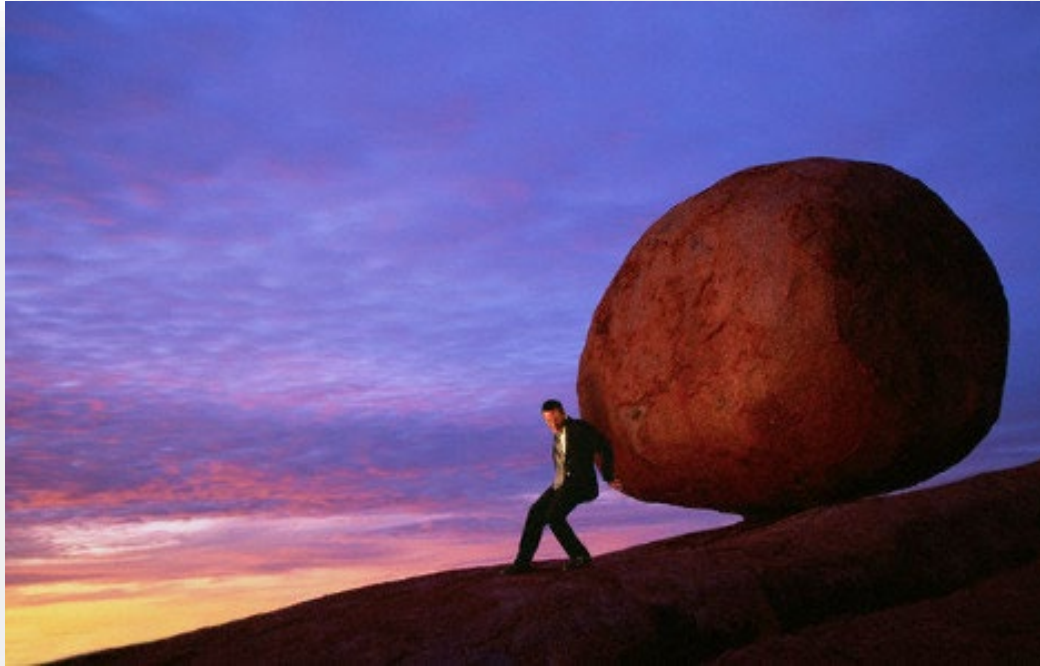


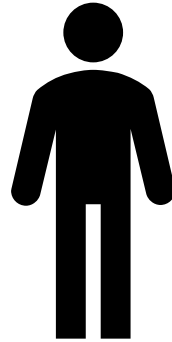


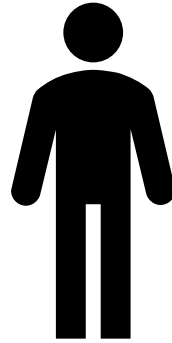
Presentation Overview

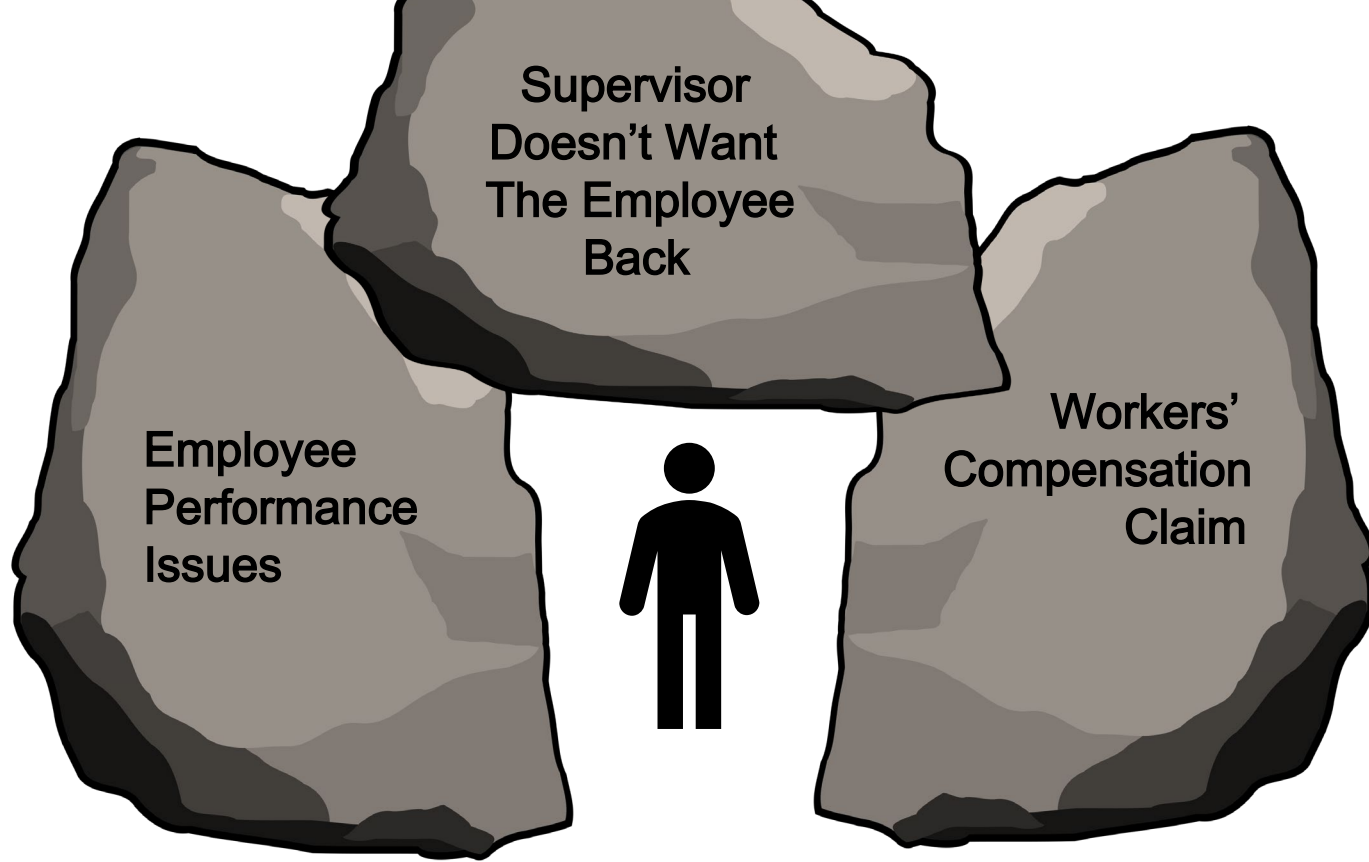
- The nexus between industrial injury Workers' Comp objectives and its overlap with ADA and other employment law compliance mandates continues to be one of the most challenging areas for Risk Managers and HR Professionals to master.
- In this session, presenters will breakdown the interplay between workers' comp and employment law issues, discuss return to work procedures, provide strategies for implementing the interactive process, and cover the most complex issues facing HR and Risk Management.

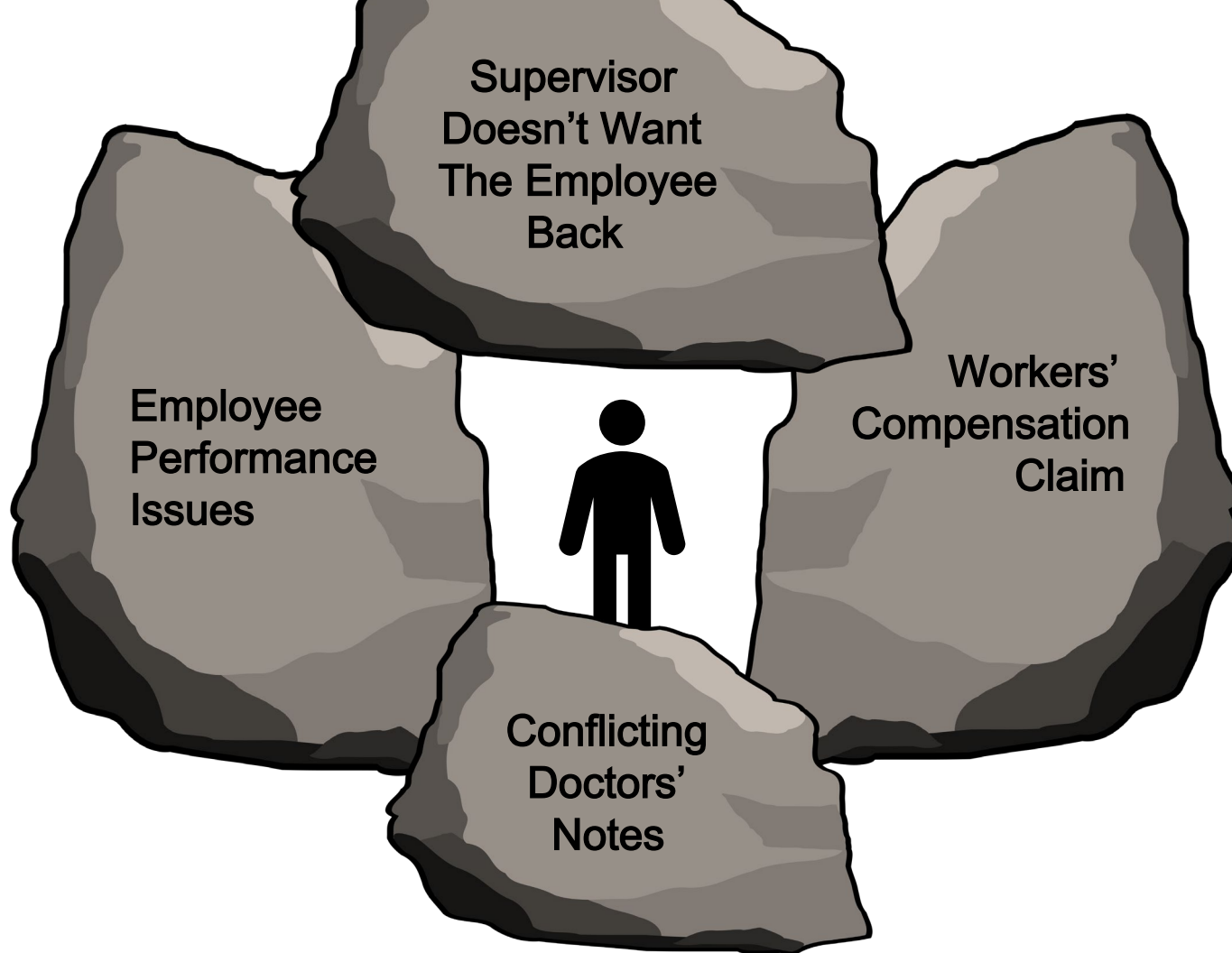
● All Too Real Claim Example

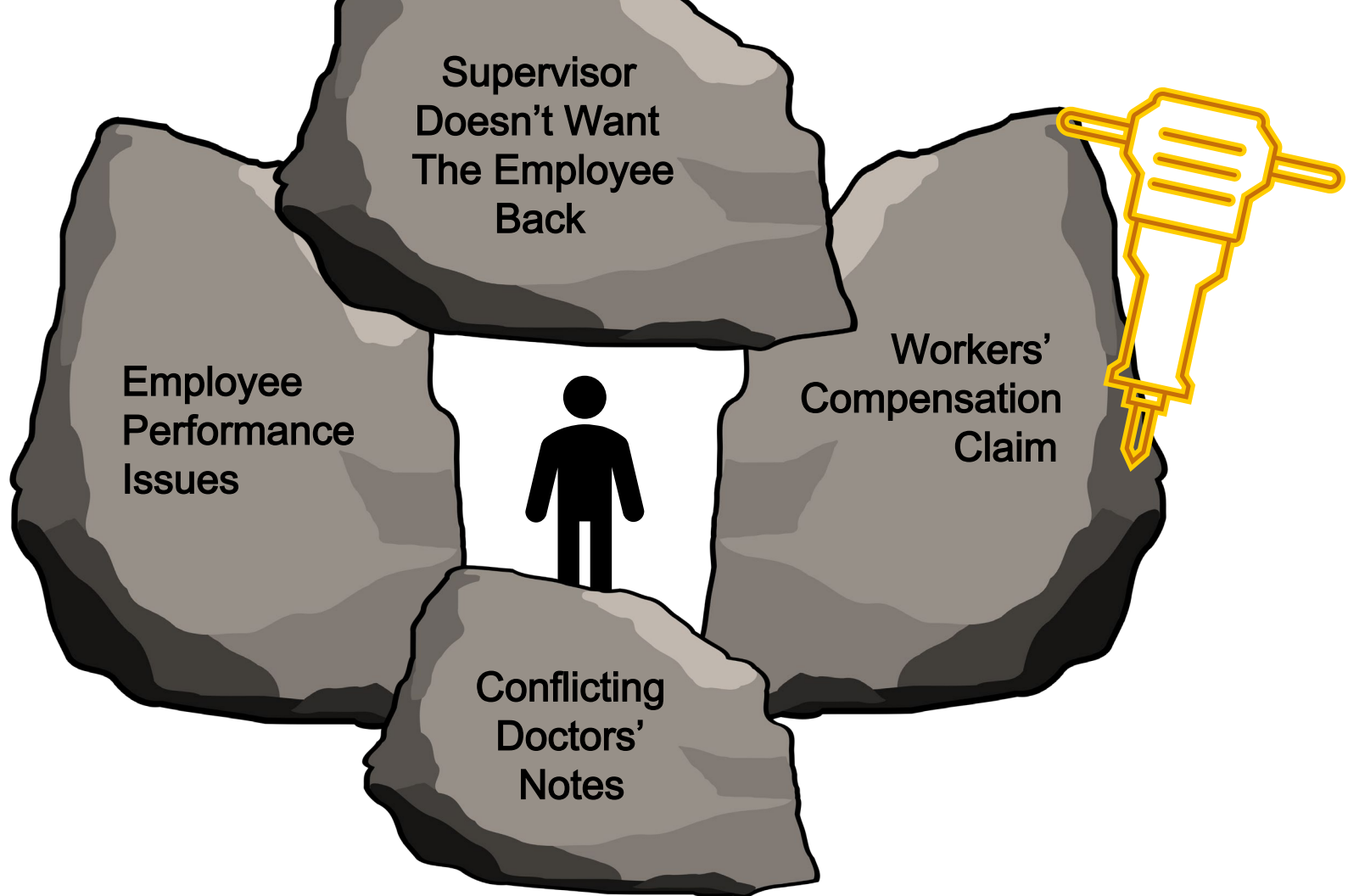












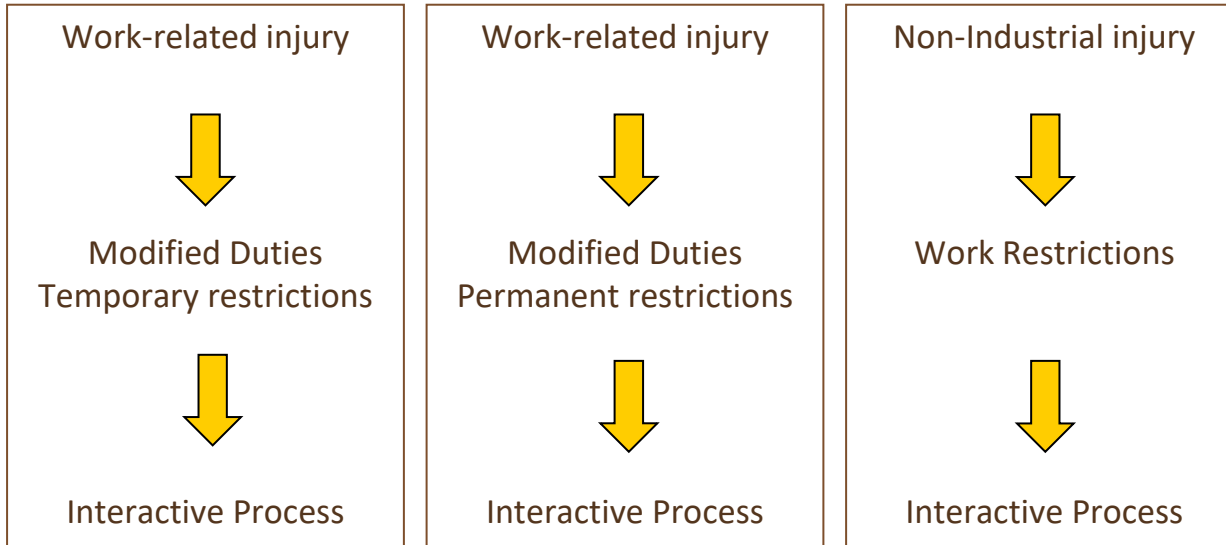


The Silver Bullet . . .

- Consistent policies and procedures:
 - Is there alignment between procedures on industrial vs. non-industrial?
 - Is the process different if restrictions are temporary vs. permanent?
 - What is your interactive process and how do you document?
 - Timeline is critical
 - Essential job functions updated



Return to Work



Outcome is the same regardless of the type of injury



Prepping for the Interactive Meeting

5 Key Steps

1. Determine who needs to participate
2. Documentation of work restrictions/abilities or if clarification is needed by the physician
3. Essential job functions
4. Determine if there is a Disability under ADA/ FEHA
5. Identify possible “reasonable accommodations” or if no accommodation is possible



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Who Should Attend the IA Meeting?

- Who handles the interactive process at your agency?
- Is it a different person based on industrial vs. nonindustrial?
- Is it a different person if the restrictions are temporary vs. permanent?



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Conflicting Medical Reports

- Still need to engage in interactive process
- Gap between workers' compensation and employment law
 - Usually do not see conflicts on nonoccupational injuries
 - Workers' Compensation (AME/QME v. PTP)
- Need to apply consistent procedures with each employee
- No return to work should be considered where there is a safety concern for worker or others



Ramirez v. City of Fullerton, **2022 Cal. Wrk. Comp. P.D. LEXIS 96**

Facts of the Case:

- Applicant was released to full duty by his treating physician in Jan. 2016. The QME evaluated applicant in Sept. 2016 and reported no work restrictions were necessary
- On April 6, 2017, the QME issued a supplemental report finding applicant required restrictions for the cervical spine. He added additional restrictions in an Aug. 2017 supplemental report
- In Aug. 2017, there was a reasonable accommodation meeting, and applicant was taken off work pending further evaluation by the QME
- The QME reevaluated applicant in Oct. 2017 and returned to work when he was released to full duty



Ramirez v. City of Fullerton, **2022 Cal. Wrk. Comp. P.D. LEXIS 96**

The WCAB held that applicant established a prima facie violation of LC 132a

- It noted that the defense attorney requested a supplemental report a year and a half after applicant was returned to full duty
- It relied on testimony from defendant's representative that she never requested a second opinion for such an injury and would not require a non-industrially injured employee to see another doctor
- The WCAB found defendant's request for a supplemental report from the QME on whether applicant should be restricted from work was a deviation of its usual procedures



Ramirez v. City of Fullerton, **2022 Cal. Wrk. Comp. P.D. LEXIS 96**

- The defense representative also testified that their policy to resolve conflicting reports was to produce a list of three physicians and secure agreement between the parties on a neutral doctor to prepare a report
- It found that by choosing the QME's report over the PTP's report, the defendant deviated from its own procedures for resolving conflicts between reports



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Essential Job Functions

- Whether an employee is qualified for a position depends on whether an employee can perform the essential functions of a position
- The "essential functions" of a position are "the fundamental job duties of the employment position the individual with a disability holds or desires." They do not include the marginal functions of a position
- A job function may be considered essential for any of several reasons, including, but not limited to, the following:
 - a. The function may be essential because the reason the position exists is to perform that function.
 - b. The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed
 - c. The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function



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The ADA and the FEHA

- The American With Disabilities Act (ADA) and the Fair Employment & Housing Act (FEHA) prohibit discrimination against any person with a disability but allows an employer to discharge or otherwise act against an employee's desired interests when the employee with a disability is unable to perform the essential duties of the job, even with a reasonable accommodation
- FEHA defines disability broadly:
 - **Physical disability** - Physical condition or disorder that affects a major bodily system that limits a major life activity
 - **Mental disability** - Having any mental or psychological disorder or condition that limits a major life activity
- **Limits** means simply that the condition makes achievement of the major life activity *difficult*



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Reasonable Accommodation

- Per Government Code 12940(m), it is unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an ... employee."
- The phrase "reasonable accommodation" is defined as modifications or adjustments that are:
 - effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job;
 - effective in enabling an employee to perform the essential functions of the job the employee holds or desires; or
 - effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities



Reasonable Accommodation

- Examples of reasonable accommodation include:
 - Transferring an employee to a more accessible work site
 - Providing assistive aids and services
 - Job restructuring including reallocation or redistribution of nonessential job functions
 - Providing a part time or modified work schedule
 - Altering when and/or how an essential function is performed
 - Providing additional training
 - Permitting an employee to work from home
 - Providing paid or unpaid leave for treatment and recovery
 - Providing a reassignment to a vacant position



Undue Hardship

- Reasonable accommodation is not required if it would result in undue hardship
- Undue Hardship means an action requiring significant difficulty or expense. The following factors are considered:
 - The nature and cost of the accommodation needed
 - The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of employees; and the number, type and location of its facilities
 - The type of operations, including the composition, structure and functions of the workforce of the entity
 - The geographic separateness, administrative or fiscal relationship of the facility or facilities



Defenses for Refusing to Accommodate

- No accommodation would allow employee to perform essential functions of the job
- Danger to health and safety of employee– must pose an imminent and substantial degree of risk
- Danger to health and safety of others– must pose an imminent and substantial degree of risk
- NO defense for future risk of harm
- Factors considered:
 - Duration of risk
 - Nature and severity of potential harm
 - The likelihood harm will occur
 - The imminence of the harm



After the Interactive Meeting

Document, document, document

All work restrictions based on all medical reports

Outline the possible accommodations discussed

Confirm Essential Job Functions (include current job description that includes essential functions)

Identify the agreed upon accommodations, or why no accommodation is possible

Provide copy to all parties

Supervisor adherence to accommodations critical



Questions

Visit Us in The Exhibit Hall For Resources

- *Keenan: Booth 201-203*
- *MS&A: Booth 419*



Thank You!

Brad Keenan

Vice President

Keenan and Associates

bkeenan1@keenan.com

Eric De Wames

Managing Partner

Michael Sullivan & Associates

edewames@sullivanattorneys.com
(916) 802-6483

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