

THE
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OF RISK MANAGEMENT

PARMA ANNUAL CONFERENCE

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SACRAMENTO CONVENTION CENTER

The Tension Between Privacy and the Need to Share Information in the Workplace MCLE

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“Shredding” the Myths
And
Avoiding the Undue Fears



Providing “Real World” Guidance
That Keeps You as Safe as Possible

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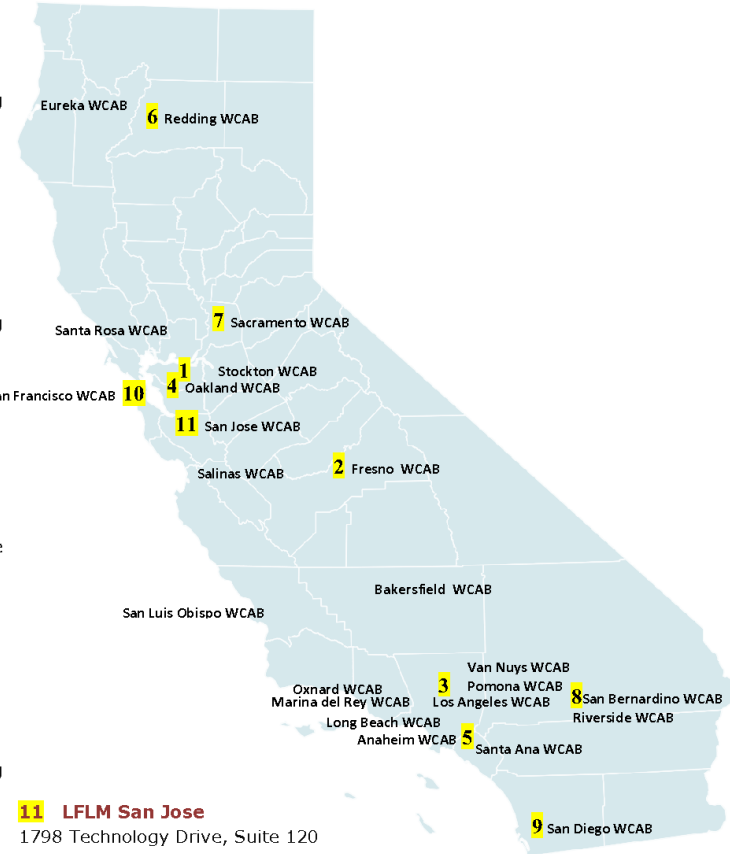
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NEW YORK

Why “Privacy”

Why “Now”

Is It Because Of The “New” California Consumer Privacy Act (2023 Version)?

- CCPA And Its Expansion To Employers/Employees Effective January 1, 2023
- No, That's Not It – It Doesn't Apply To Most Of You

Is It Because Of The “New” California Age-appropriate Design Code Act (7/1/2024)?

- Businesses Providing Online Services, Products, Or Features Likely To Be Accessed By Children Will be Subject To New Rqmts.
- No, That's Not It (Might Be Next Year Though) -

Is It Because Of *Dobbs V. Jackson*?

- No, Although “Medical Privacy” Issues, And “Privacy” Issues In General Are Certainly At The Forefront Of Current Discussions

Is It Because It's Exciting And Fun?

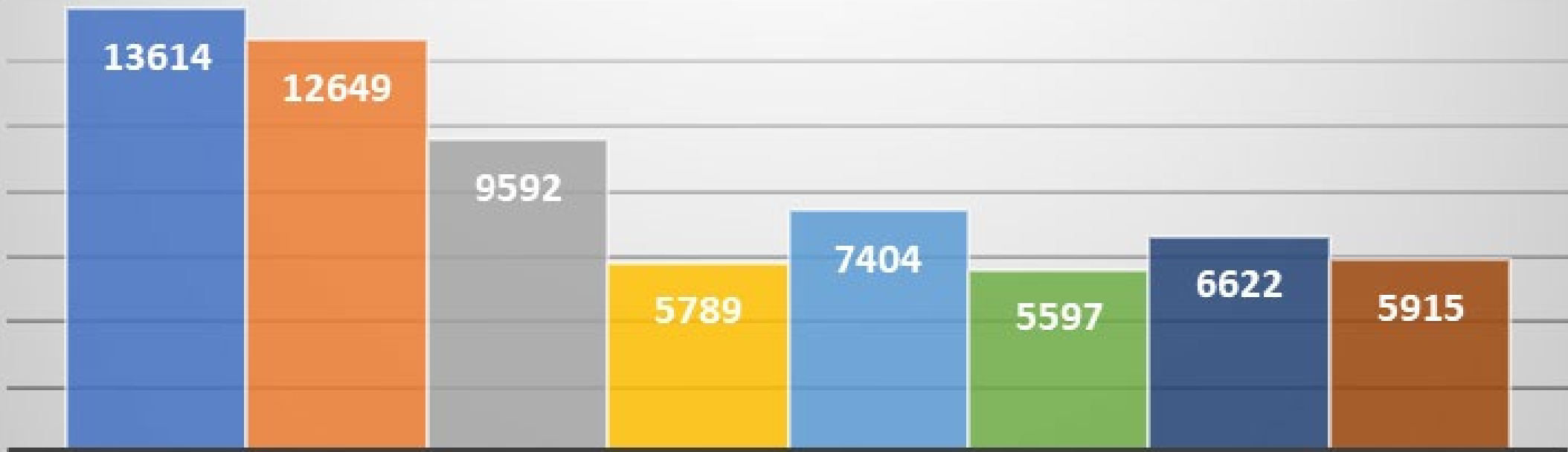
- No, It's Really Not All That Exciting Or Fun, But There Are A Lot Worse Things To Talk About!

Some of the Reasons for Today ...

Some Headlines/Comments are Pretty Sensational!

- **“Invasion Of Privacy Lawsuits Will Be On The Rise In California Where Employers Use Monitoring/Tracking Technology”**
 - Based On The California Constitution
 - Based On The Electronic Communications Privacy Act Of 1986 (EPCA)
- **California Employers Prepare For Landmark Worker Privacy Rights**
 - “It’s Very Big And Significant, Because Before Now Employers Have Not Had To Give Employees These Kinds Of Rights,” Said Kristen Mathews, Partner At Morrison & Foerster LLP.
- **A Large Verdict (On Appeal, And For Good Reason) Emphasizing “Relational” Issues**
 - The Sharing Of Information Relative To A Workers’ Compensation/Disability Accommodation Situation
 - How The Jury Responded To Claims Of “Conspiracy” And “Aiding And Abetting” And A Whole Lot Of “Ugly” Words, Where Bias and Emotion Trumped Certain Important Realities
 - Reemphasizing The Importance of Accurate and Proper Sharing of Information Between Employers, TPAs, Counsel, and Everyone Else Involved in these Processes

FEHA Primary Areas of Complaint



1

■ Retaliation

■ Disability

■ FMLA/CFRA

■ Medical

■ Sex

■ Sexual Harassment

■ Age

■ Race

The “Real” Reason
for Today

The “New
Workplace” - With
Some Old
Problems

And, We Really
Need to Get this
Right”

Remote vs. In-Office/Workplace

- Employee “investments” in alternate locations

Finding/Retaining/Compensating Qualified Employees

- Although unemployment benefits have ended, finding qualified employees and have them regularly appear and be focused on work is difficult

Safety and Sensitivity Issues Dominate

- There is a heightened level of concern/emotional responses to “lesser” issues

Increasing Efforts to Find Ways “Not to Work” (and not just “Millennialism”)

- Disability/LOA/“Inability” to Return to Work

Challenges in Lines of Communication

- Finding Paths of Communication that are Effective and Accurate

Privacy - What it is ...



Anything Not Generally Available in the Public Domain

Medical Information

Salary Information (although
that just changed a bit)

Discipline

"Personal Identifiers"

"Private" Communications/Use
of Non-Public Technology



Privacy - What it (Generally) is Not



Information Generally Available in the Public Domain

Facebook/Twitter/Instagram

Information Readily Viewable by Others (what your
neighbors see)

That said "in public" or written in a "public domain"

“Privacy” Relates not Just to the “Type” of Information It Also Relates to the “Use”/Sharing of Information

The Tort of “Inclusion upon Seclusion” (Love the Name)

- Getting More Attention – the Unauthorized Intrusion into a person’s secluded area/private discussion that was highly offensive and caused anguish

The Tort of “Invasion of Privacy”

- Disclosing to Another Having No Right to the Information that which is Private

The Tort of “False Light”

- Sharing Information in a Manner that is inconsistent with the truthful characteristics or statements of another to promote hatred or ridicule

Various Statutory Claims

- CMIA (not HIPPA) and California Constitution (yep, the Constitution)

CCPA and CCRA

One Slide Just to Make Everyone Happy They Came!

Rights include:

- The right to request a copy of the specific personal information collected by the employer.
- The right to request a disclosure of personal information collected about the employee, the sources from which information was collected, the business purpose for collecting or selling such information, and the categories of third parties with which the information was shared in the last 12 months.
- An employee's right to request certain limits on the employer's use or disclosure of the employee's sensitive personal information.
- An employee's right to request correction of their personal information.
- A employee's right to not be discriminated against for exercising any right under the CCPA or CPRA.
- How a business must inform an employee of their rights under the CCPA or CPRA.

Privacy When Hiring

(Or not Hiring)

- ▶ The Application – the Rules Have Changed
 - ▶ Your Current Salary (except in public sector) now “private”
 - ▶ Should have Removed all “Privacy” Issues
 - ▶ Cannot Do “Background” Checks on a single Form
 - ▶ So, What Can you Learn, and What Can you Share?
- ▶ Interviews
 - ▶ Must Stay Away from “Private” Information, Particularly That Involving “Protected Class” Issues - Kids/Activities/Marital Status
 - ▶ Questions- How Can You Effectively Meet the Essential Functions of your Job?
 - ▶ And when the Answer goes Astray ... “Thank you, but we do not consider those issues when making hiring decisions,” and refocus on job qualifications
- ▶ In your Interview, the Applicant volunteers that he was convicted of forgery 3 years ago, and sentenced to County Jail, “if that matters.” Private? What do you Do With It?
- ▶ In your interview, one of your fellow interviewers asks the question – “With 3 Kids, and the flu and COVID going around, how do I know you will show up for work each day?” What do you do?

Eavesdropping
... It's Rude

but Can be Fun

...

(and can be
Legal or Illegal)

- ▶ In California you can ...
 - ▶ Monitor Electronic Communications, Log-ins/Key Activity, etc. – With Adequate Notice
 - ▶ Business Necessity/Notice/Training
- ▶ In California you cannot
 - ▶ Videotape/Audiotape Employees in Places Where they have an Expectation of Privacy
 - ▶ Generally Locker rooms/bathrooms, but what about houses?
 - ▶ Record a Private Conversation – even in a “public place” without consent
 - ▶ Criminal/Civil/And All Sorts of Bad Things
- ▶ You are at the PARMA Reception, there is drinking (maybe), someone shares in the conversation next to you that “Joe,” who is your CBO, has just confessed to being an alcoholic and needing treatment. You are a [fill in the blank, if you think it matters]. Private? What do you do?

Leaves of Absence

Who is Handling the Leave (and Why)



State Leave vs. FMLA vs. ADA

FMLA/CFRA - No "Diagnosis" and No Right to Seek Updated Medical Certification Until Prior Certification Expires (FMLA/CFRA)

ADA/FEHA - Far Broader Informational Rights, Tied to Current Workplace Efforts (modified duty, accommodation, etc.)



Timely and Complete Designations of Leaves

What Can you Ask/When Can you Ask it?



Monitoring Leaves/Ability to Return

Who Can You Ask About Status?

What Can you Ask?/When Can You Ask it?



Managing Workplace Absences

Impact on Other Workers

Return to Work (Which is Where we Now Take You)

Return to Work Just Got More Complex

Early Return to Work is Still the Goal and Desire

Harder to Get Doctor Visits/Clearances

- And “Short Hand” and “Incomplete” Notes are Too Common

If the Industrial Injury ** involves ongoing health-related issues, getting clearance is more difficult due to “fear of COVID”

Getting the “Team” together can be more challenging

- TPA/Adjuster, Health Care Provider/In-House Risk Mgt. and/or HR Team

**** Nonindustrial Injuries are Treated the Same as Industrial Injuries Friendly Reminder**



Who Gets to Know “Medical”

Supervisors

- No ... no No, no, no.
- They only Get “Capabilities” (Restrictions) – not the “Why’s”
- They cannot be “funnels” for information – Should not accept “medical”

Benefits

- Only the Introductory Forms, and then Claim Forms
- May be a Confidential Process Function

Human Resources

- Your Primary Gatekeeper – And Needs to be the Gatekeeper
- Should always know a key “rule” – you can’t ask for information outside of the identified disability/request for accommodation, but if volunteered, you need to figure out if it is relevant to a current situation
- May be the “point person” for sharing and limiting information

Risk Management

- Only to the Extent of their Actual Role

Senior Management

- Depends – Usually involves issues of Discipline/Separation/“Undue Burden”/Job Modification
- It is not a “Want to Know” Option

Coordinating and Sharing/Preventing Access to Information

You Cannot Safely and Effectively Meet All of Your Obligations in Compartmentalized Units

- Risk Management vs. Human Resources vs. Employee Benefits
- “Return to Work” vs. Disability Management vs. Benefits Administration
- Industrial vs. Non-Industrial Accommodations

Yet, The Standards Are Different, and Information Cannot be Freely Exchanged without Potentially Violating Privacy Laws

- W/C Gets Broader Access to Information (Because You are Challenging Liability or Apportionment)
- Disability Management **Only** Gets Information/Can Only Consider Information Relating to the Disability for Which Accommodation is Sought
- Benefits Only Gets (and Keeps) Information Relating to the Request and/or Administration of Benefits

Disability Management Process

Direct Request

Indirect Notification

Includes
Intermittent
Leaves/
Returns
from Leave

- Discuss their capabilities (what can they do; not what can't do – different from W/C focus, but necessary)
- Medical information may be necessary to determine capabilities, but “open and obvious” controls

Capabilities
(HR-RM/Dr/Eee)
**Supervisor

Medical
Information
(Dr./HR-RM/Eee)

- Disability Accommodation Medical Release authorization (voluntary; they might refuse)
- Clarify information with doctor (with authorization – care needed for Medical Privacy)

HIPAA Does not Apply!
CMIA Can Apply
Lab.Code Can Have Limits

Essential
Functions
(Supervisors/HR)

- Focus on result, not method
- Ergonomic equipment
- Additional leave
- **Change in position**
- Change in hours/tasks
- Additional breaks
- Alternate/modified duties
- Alternate position (if open/qualified)

Communication!
Interactive
Process

Potential
Accommodations
(Supervisor/HR-
RM/Dr./Eee)

- Essential Functions Analysis
(Can they return to work/Are they facing separation)
- Job Description
- Supervisor feedback/Performance Std. Compliance
- Regular Attendance often "essential"

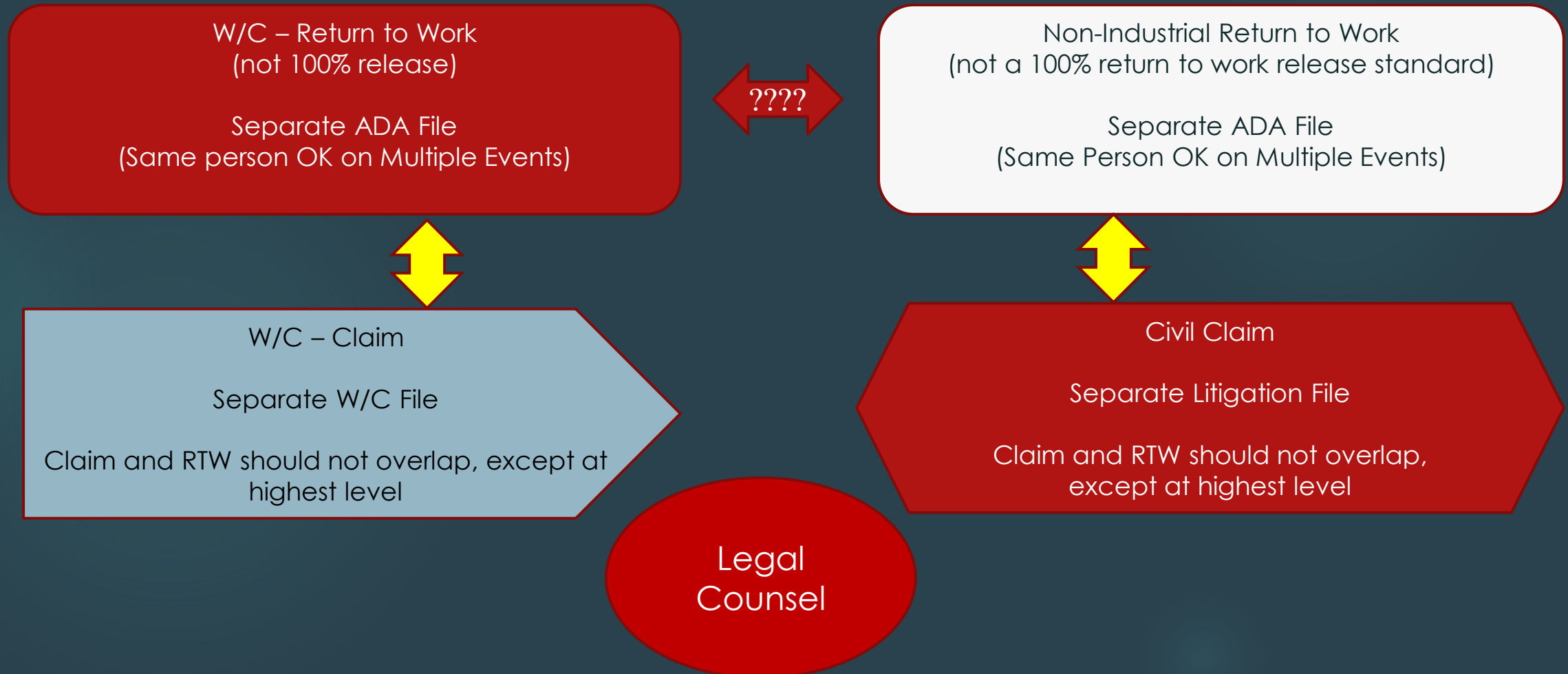
- Can be a simple 1 time/1 minute discussion, but it may take several meetings and discussions
- Multiple methods of communication can be used, but face-to-face is best
- May include 3rd Parties for E'ee
- This is “informal” and non-adversarial

- Communicate decisions timely & in writing
- Schedule follow-up to make sure accommodation is working (or not working)
- If no "reasonable" accommodation, separate “safely,” with objective written determination

DECISION

Accommodation/Termination

INFORMATION SHARING & DETERMINATIONS



Ways to Get into (and out of) Trouble

▶ Hypothetical 1

- ▶ Medical Information is “Conflicting” – not uncommon
- ▶ You have a W/C Claim, and a Disability Accommodation Situation – not uncommon
- ▶ You have a question/concern about “faking it” – not uncommon
- ▶ You’ve got W/C Claims, Counsel, Risk Management, Human Resources, Dept. Head, and CBO all focusing on situation

Questions: Who is “Point”
 What is your “Goal”

▶ Hypothetical 2

- ▶ Medical Evaluation was incomplete/inaccurate, but you acted on it (not uncommon) And made some unfortunate statements to others along the way
- ▶ You now need to “unwind” your prior accommodation decision, and in doing so you will be “on record” – maybe – for having made a prior incorrect decision and statements

Questions: How do you Draft this Up (Must be in Writing)
 How Much do you Disclose



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