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PUBLIC AGENCY RISK MANAGERS ASSOCIATION (PARMA) ANNUAL CONFERENCE

Supervising & Managing Employees After COVID-19: Navigating Employee Leave Rights and Teleworking & Other Accommodation Requests

2/3/2021

PRESENTED BY:

Jennifer Rosner

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**Supervising & Managing Employees After COVID-19:
Navigating Employee Leave Rights and Teleworking &
Other Accommodation Requests**

**Presented By:
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47th Virtual Conference & Expo

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Agenda

- Leave Laws
- Reasonable Accommodations
 - Teleworking
 - Employee Leave
 - Workplace-Specific Accommodations
- Interactive Process
- Fitness for Duty exam

Significant Disability and Medical Leave Laws

- Americans with Disabilities Act (“ADA”)
- Fair Employment and Housing Act (“FEHA”)
- Calif. Workers’ Compensation Act (including Labor Code § 4850)
- Family Medical Leave Act (“FMLA”)
- Calif. Family Rights Act (“CFRA”)

Is COVID-19 a Covered Disability?

- Answer: It Depends
- It will depend on whether the COVID-19 limits (FEHA) or substantially limits (ADA) a major life activity
- When a covered disability prevents an employee from performing an essential job function, the employer is obligated to engage in the interactive process and attempt to accommodate

Discretionary Authority to Provide Accommodations to Employees not Covered by the ADA or the FEHA

Conditions that contribute to increased risk of serious illness from COVID-19:

1. Chronic kidney disease
2. Chronic obstructive pulmonary disease
3. Immunocompromised state from organ transplant
4. Serious heart conditions
5. Sickle cell disease
6. Type 2 diabetes

Conditions that *may* increase risk:

1. Asthma (moderate-to-severe)
2. Cerebrovascular disease
3. Cystic fibrosis
4. Hypertension
5. Immunocompromised state from blood/bone marrow transplant; immunodeficiencies
6. Neurologic conditions
7. Liver disease
8. Pulmonary fibrosis
9. Thalassemia (blood disorder)
10. Type 1 diabetes

Typical Reasonable Accommodations:

- Paid / unpaid leave of absence of finite duration
 - After statutorily protected leaves run out (a.k.a. “reasonable accommodation leave”)
- Temporary light duty
- Part-time / modified work schedule
- Physical changes to work area
- Equipment / devices
- Modifying policy, exam and / or training materials

(Un)reasonable Accommodations

Reasonableness Depends on the Facts of Each Case

- Creating a new position
- Transforming a temporary light duty position into a permanent one
- Lowering quality and quantity of work standards
- Indefinite leave
 - Repeated extensions ≠ indefinite

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Teleworking

Teleworking: Relevant Authority

- Fair Labor Standards Act (“FLSA”)
 - 29 C.F.R. § 785.11-12
 - 29 C.F.R. § 790.6(a)
- DOL Field Assistance Bulletin (“FAB”) No. 2020-5
- Labor Code § 2802
 - In re Work Uniform Cases (2005) 133 Cal. App. 4th 328
 - In re Acknowledgement Cases (2013) 239 Cal.App.4th 1409

Teleworking Policy Considerations

- Adopt Teleworking Policy Restricting “Off-the-Clock” Work
 - Timekeeping Policy
 - Overtime Policy
 - Reimbursement Policy
- Training for Teleworking Employees and Supervisors
- Uniformly Enforce Applicable Policies for Employees and Supervisors
- Maintain Records Related to Enforcement

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Meet-and-Confer Requirements

- What Is Negotiable?
- When to Negotiate?
- What Happens If We Do Not Reach an Agreement?

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True or False

The emergency exception means employers do not ever have to notify employee representatives or offer to meet and confer.

Teleworking and Supervision

- Communication
- Responsiveness
- Clear Expectations
- Workload Assignment & Distribution
- Time Management
- Meetings (Zoom, Microsoft Teams, WebEx, etc.)

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Measuring Performance

- Time spent on tasks
- Quality of work
- Quantity of work
- Job knowledge
- Teamwork/collaboration
- Communication
- Initiative

Compensation While Teleworking

- Continued Application of FLSA Obligations to Teleworking Employees
 - Compensation Owed Where “Suffered or Permitted” to Work (29 C.F.R. § 785.11-12)
- Employer’s Knowledge of Employee’s Work
 - To establish a prima facie case for a wage claim, the employee or group of employees must establish that the employer knew or had reason to know of work performed by employee(s)
 - Actual knowledge
 - Constructive knowledge
 - An employee can establish that the employer had constructive knowledge of work performed by various means, including:
 - Employee responding to emails earlier in the morning and late in the evening
 - Employee reported time not corresponding to volume of work performed
- Prevention of Work Not Desired to Be Performed

Reimbursement Obligations under Labor Code § 2802

- Labor Code § 2802, subdivision (a):

“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer”

- Common Teleworking Expenses

- Internet and utilities
- Computer and video conferencing equipment
- Ergonomics

- Application to Public Employers

- *In re Work Uniform Cases* (2005) 133 Cal. App. 4th 328
- *In re Acknowledgement Cases* (2013) 239 Cal. App. 4th 1409

- Nature of Teleworking Arrangement (Mandatory vs. Voluntary)

Public Accountability

- Organization's Responsibility to the public
- Remaining Answerable for Actions/Inaction
- Team/Work Unit Impacts
- Trustworthiness
- Protection from Liability

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Employee Leave

Available Types of Leave

- FMLA/CFRA
- Paid Sick Leave
- Pregnancy Disability Leave
- Paid Family Leave
- Leave as a Reasonable Accommodation
- Workers' Compensation
- Military Leave
- Leave to Appear at a Child's School
- Leave for Victims of Crimes
- (Optional) Negative Leave Policy

Intermittent Leave

- Intermittent Leave
 - Common with chronic/lifelong conditions
 - While on FMLA/CFRA, employer required to grant intermittent or reduced leave schedule when medically necessary for employee's own serious health condition (rest, treatment, recuperation)
 - Can create management challenges when an employee with chronic health condition needs FMLA for multiple consecutive years
 - Employer may require that absence be scheduled to minimize disruption

Residual COVID-19 Benefits

- Families First Coronavirus Response Act (“FFCRA”)
 - No Longer Mandatory as of January 1, 2021
 - Employers May Voluntarily Continue to Offer Benefits
- Paid Leave Under Labor Code § 248.1
 - No Longer in effect as of January 1, 2021
 - Employees Taking Leave at Its Expiration May Continue To Take the Amount To Which They Are Entitled

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Workplace-Specific Accommodations

Poll: Face Coverings Requirement

Sue is an account analyst. She presents a doctor's note that she cannot wear a mask due to a medical condition. Does the employer have to accommodate her?

(A) Yes

(B) No

(C) It depends whether it is an undue burden for Agency

Workspace Reorganization

- Use Physical Partitions
- Repurpose Existing Rooms/Spaces (e.g., a breakroom)
- Rearrange Existing Furniture/Equipment

Modified Work Schedules

- Stagger Employee Schedules
 - Arrival
 - Breaks
 - Departure
 - Alternate Days in Conjunction with Teleworking

The Interactive Process

- When it Begins:
- Employee requests an accommodation
- Employer observes employee having difficulty performing essential job functions & suspects disability is the cause
- Existing accommodation appears ineffective
- Periodic check-ins about existing accommodations
- Employee has exhausted applicable medical leaves

Interactive Process

Steps in Process:

- Attempt to accommodate in current assignment
- Attempt to accommodate with alternate vacant position for which employee qualified
- Record Written Notes from Meetings and Maintain Records of Meetings and Any Agreements
- Separate employee if cannot be reasonably accommodated
 - Can't just terminate
 - Must follow "*Skelly*" procedures in most situations
 - Must apply for disability retirement on employee's behalf in most situations

Polling: Case Study

Sandy is a records clerk. She takes a six week leave of absence for stress. After the leave, Sandy tells city she is ready to return to work.

In addition:

- She filed a stress claim during her leave
- She requests a new supervisor which is supported by a doctor's note that says she has anxiety adjustment disorder and will exacerbate the condition if she is not re-assigned to someone else
- She requests an emotional support animal (ESA) to assist her in her return to work. The city has a policy against animals in the workplace and Sandy's supervisor is allergic to dogs.

Does the City have to re-assign Sandy to a new supervisor?

Does the City have to provide an ESA?

Fitness for Duty Examinations

- Requirements for Medical Examinations
 - (1) Job-related; and
 - (2) Consistent with business necessity

Fitness-for-Duty

- Triggered if there is evidence that:
 - Employee has difficulty performing one or more essential functions of the job; OR
 - Other objective good cause exists (e.g. excessive absenteeism, poor productivity)
- Rumors and assumptions are insufficient

Fitness-for-Duty

Ordering the FFD Exam:

- Select an appropriate evaluator
 - Employee's personal physician/psychiatrist is usually not a good choice
- Provide evaluator with a job description
- Do not provide medical information about the employee to the evaluator UNLESS you have a release from the employee

Fitness-for-Duty

After the FFD Exam:

- Employer entitled to know:
 - Whether employee has a disability
 - Whether employee can perform the essential functions of the job
 - The functional limitations of employee's ability to perform the job (e.g., cannot lift more than 20 lbs.)
 - Type and duration of any reasonable accommodation
- Employer is NOT entitled to know:
 - The employee's diagnosis or other medical information without a signed release from the employee

Summary for Responding to Employee Accommodation Requests

- Determine Nature of the Request:
 - If Based on a Health Condition, Treat Request as Covered by ADA/FEHA Interactive Process
 - If Based on Non-Health Condition, Inform the Human Resources Department of the Request to Discuss Proper Procedure
- Engage in Interactive Process
 - Meet with Employee and Listen to Employee's Issue and Concerns
 - Discuss with Employee In Order to Understand What Accommodation They Are Seeking
 - Use Fitness for Duty Exam as a tool for determining disability/restrictions of Employee
- Consider Possible Accommodations
- Determine Whether Accommodation is Reasonable or If It Would Cause Undue Hardship

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Thank You!

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