The Interactive Process and Workers’ Compensation: How to fit the pieces together

Workplace injuries create many legal obligations on the part of employers, and employers cannot rely on their Workers’ Compensation insurer to satisfy all of these obligations for them. Workers’ Compensation insurance provides certain benefits to injured employees, including medical treatment and disability benefits. However, when the employee returns from an injury with a disability that may require accommodations, your company still has obligations under the federal ADA and FEHA, which often create greater exposure to liability than most Workers’ Compensation claims.

How you conduct the statutorily required interactive process, and the steps you take before deciding whether to offer an accommodation to an employee, can make or break your company’s defense to a disability discrimination claim.

Important steps in a Workers’ Compensation Claim

Regular communication with the injured employee and your Workers’ Compensation insurer is essential to coordinating your company’s response, and to help prevent expensive complaints and lawsuits. When an employee files a claim for Workers’ Compensation, there are steps along the way at which your participation can help protect your company from liability:

- **When the claim is reported:** obtain prompt medical care for the employee, and investigate to find out what caused the injury. DO NOT question the legitimacy of the employee’s claim – leave any such inquiry to your insurer.

- **If the employee misses time:** contact the employee and request documentation authorizing the absence. Let the employee know that they need to keep you apprised of their status, including how long they are expected to be off work, and when follow-up appointments are scheduled. REMEMBER: FMLA and CFRA leave entitlements should run concurrently with most Workers’ Comp absences, and you should designate and notify the employee accordingly.

- **If the employee has temporary restrictions:** make sure that the employee’s doctor specifies an ending date for any restrictions. If temporary accommodations can be offered, the employee must return to work or lose Workers’ Compensation disability payments. Any temporary accommodations should be made according to your company’s policy. NOTE: an employee with temporary restrictions generally does not qualify as “disabled” for purposes of the employer’s obligation to engage in the interactive process. Employees with temporary restrictions should be treated with the expectation that they will return to full duty.

- **If the employee has permanent restrictions:** when you become aware of permanent restrictions, the company’s obligation to engage in the interactive process is triggered. Unfortunately, in the case of an occupational injury, you may be the last to find out. MAKE SURE that your insurer is instructed to notify you as soon as a Permanent and Stationary finding or other finding of permanent disability has been issued.
The Interactive Process – When to Begin?

The employer’s duty to engage in the Interactive Process begins when the employer becomes aware of an employee’s need for accommodations. A request for accommodations does not have to come on any special form, or utilize any particular language, or refer to the ADA or FEHA. *Any* notice you receive that an employee has permanent restrictions or a permanent disability rating should be treated as a request for accommodation.

Conducting the Interactive Process

Most initial requests for accommodation do not contain all the information an employer needs to identify and select appropriate reasonable accommodations. Workers’ Comp medical exams often provide little or no information about an employee’s actual work restrictions. In this case, the employer’s obligation is to ask the employee for more details regarding the accommodation requested.

You can ask the employee to provide information from his or her doctor, or you may ask the employee to sign an Authorization to Release Medical Information, which must comply with the Confidentiality of Medical Records Act. This authorization permits you to communicate directly with the employee’s doctor. You should provide a copy of the employee’s job description and the description for any other job in which you may consider placing the employee, but do not send this information directly to the employee’s doctor without an authorization. Employers are only entitled to learn work-related information regarding an employee’s disability. For example, rather than asking “what is wrong with the employee,” inquiries should focus on “what work-related tasks is the employee unable to perform?”

After you have received sufficient information to assess potential accommodations, you should schedule a meeting with the employee. This meeting should usually be face-to-face, unless the employee is physically unable to attend. Invite the employee to set a mutually acceptable time; if the employee refuses, set a time and give sufficient advance notice by writing.

When meeting with the employee, it is important to elicit from the employee his or her suggestions regarding potential accommodations. Reasonable accommodations may include modifications to the employee’s present position, or assignment to an alternative open position. Therefore, you should inquire about the employee’s skills and abilities that may qualify him or her for another position. Ask the employee to submit a current resume and any diplomas or certificates of training. The discussion should also address the employee’s interest in possible alternative positions, and how much training would be required to qualify the employee for those jobs.

Breakdowns in the Interactive Process

The interactive process requires each side to engage in a good-faith exchange of information. Often, after a long and contentious Workers’ Compensation claim, an employee is not interested in communicating with the employer. *REMEMBER:* it is still your responsibility to show that
the employer made a good-faith attempt, and that any breakdown in the process was due to the employee’s unreasonable failure to participate.

This means that all communications should be in writing or written down immediately, and that all letters should be sent with a signature required for delivery. Furthermore, sending one letter is usually not enough. Any failure by the employee to respond should be followed up, and you should be able to show at least two attempts to reach the employee before deciding that he or she has failed to participate.

At the end of the road, if the employee fails to communicate (after at least two attempts) or there is no reasonable accommodation available, then the employer is justified in separating the employee for medical reasons. If you have documented your efforts well, you can take this step feeling secure that you will be in a good position to defend any potential claims.

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