Navigating Employment Law Issues Impacting People Living with HIV/AIDS

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Reasonable Accommodations and Interactive Process

Medical Leaves of Absence

Privacy Concerns
Reasonable Accommodations & Interactive Process

Rights and Obligations of Employer and Employee

Reasonable accommodation means employers have an affirmative duty to accommodate disabled workers.

The duty to reasonably accommodate only applies to "known" physical or mental impairments.

Generally, the individual should notify the employer that accommodation is needed, especially when a disability is less obvious.
Reasonable Accommodation Standard

ADA & FEHA

- Whether the employee can perform the *essential functions* of the job with or without reasonable accommodation
- "Essential functions" means the fundamental job duties of the position—it does not include marginal functions of the position

- The employee must show that accommodation is possible
- Once it's determined that accommodation is possible, the burden is on the employer to make the accommodation or show that it's unreasonable or imposes a risk of harm to the health and safety of others
Types of Reasonable Accommodations

- Making facilities readily accessible to and usable by disabled individuals
- Job restructuring
- Offering part-time work or modified schedules
- Reassigning to a vacant position
- Acquiring or modifying equipment or devices
- Allowing assistive animals on the worksite
- Providing additional training
- Providing paid or unpaid leave for treatment and recovery
The Interactive Process

- FEHA requires employers to engage in a "timely, good faith, interactive process" with the employee or applicant in response to a reasonable accommodation request.
- Employers are liable for failing to engage in the IAP in good faith and face liability under the if a reasonable accommodation is possible.
- Ninth Circuit held that the IAP obligation imposes a continuing obligation to consider alternative accommodations if a presently implemented accommodation is ineffective.
- EEOC requires that "the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual."
The Interactive Process Cont.

- **Employer Obligations**
  - Grant the requested accommodation, or reject it after due consideration, and initiate the discussion with the applicant or employee regarding alternative accommodations.
  - When the disability is not obvious, and the individual has not already provided the employer with reasonable medical documentation confirming the existence of the disability and the need for accommodation, the employer may require the individual to provide medical documentation.
  - Once the employer receives medical documentation, it cannot ask the individual about the underlying cause of the disability.
The Interactive Process Cont.

- **Employee/Applicant Obligations**
  - Cooperate with the employer in good faith, including by providing reasonable medical documentation where the disability or the need for accommodation is not obvious and is requested by the employer.
  - When necessary to advance the IAP, reasonable medical documentation may include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee.
  - Direct communication is preferred, but not required.
Triggering the IAP

- Employer becomes aware of the need for accommodation through a third party
- Individual with a known disability requests reasonable accommodations
- Employer becomes aware of the need for accommodation by observation
- Employer becomes aware because the individual exhausted leaves under CFRA/FMLA or workers' comp
CASE STUDY #1
LEAVES OF ABSENCE
Medical Leave Entitlements

- California Family Rights Act (CFRA)
- Family and Medical Leave Act (FMLA)
- Employer Disability Leave Policy
- *Kin Care Leave
Types of Pay While on Leave

- Accrued Sick Leave, Vacation Leave or Accrued Time Off
- Employer Disability Leave/CBA Leave
- State Disability Insurance
- Paid Family “Leave” (PFL)
- *Workers’ Compensation
PRIVACY CONCERNS

- Legal Obligation to Disclose
- HIPAA
- Unauthorized Disclosure
- Inadvertent or Improper Disclosure
- Public disclosure of private facts
When can employer ask medical questions?

- If employer has affirmative action for people with disabilities and all employees asked the same question. Whether to respond is employee choice.

- When requesting reasonable accommodation, but there are limits to questions employer can ask.

- After job offer made, but before employment begins, so long as everyone offered job in the same category is asked the same question.

- On the job if there is objective evidence employee may be unable to do job or pose a safety risk because of condition. (Employer cannot rely on myths or stereotypes to conclude inability to do job or employee poses a safety risk.)
CASE STUDY #2