Reasonable Accommodations in the Workplace

Presented by Alexis Alvarez, Staff Attorney, Disability Rights Program
Legal Aid Society – Employment Law Center

AIDS Legal Referral Panel
December 1, 2016
Federal Protections

- Federal Rehabilitation Act of 1973 (Rehab Act)
  - Federal Employers
  - Federal Contractors
  - Recipients of Federal Funds
State Protections

- California Fair Employment and Housing Act (FEHA)
Covered Employers

- Under Federal Law – 15 or more employees
- Under State Law – 5 or more employees
  - Does not cover federal government or religious employers (except healthcare)
Establishing “Disability” under the ADA

ADA Definition – 3 prong definition
  ◦ Physical or mental impairment that **substantially limits** one or more of the major life activities of an individual
  ◦ **Record of** such an Impairment
  ◦ **Regarded as** having such an impairment
The ADA Amendments Act of 2008

1) Broad construction of disability
2) Mitigating measures no longer considered
3) Conditions that are episodic or in remission are assessed in active state
4) New major life activities of bodily functions (e.g. neurological, brain, respiratory, circulatory)
5) Expanded “Regarded as” prong
Establishing Disability under the FEHA

- FEHA’s definitions require only a limitation of a major life activity
- Cal. Gov’t Code 12926.1(c): “Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.”
New EEOC Guidance

- On pregnancy discrimination
  - Clarifies that pregnancy is not a disability
  - But pregnancy-related complications might be disabilities

- Updated EEOC guidance on cancer, diabetes, epilepsy, and intellectual disabilities (f/k/a “mental retardation”)
Protections Available under the ADA/FEHA

- No discrimination in terms, conditions, privileges of employment
- No harassment
- No segregation
- Reasonable accommodation unless employer can show undue hardship
- Interactive process
- No discrimination on the basis of association with people with disability
- Restrictions on medical inquiries
- No retaliation or interference
“Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities”

- Enable employees with disabilities to perform essential functions

- Allow employees with disabilities to enjoy the same “benefits and privileges of employment” enjoyed by non-disabled employees (e.g., promotional opportunities, training, services, social functions)
Examples of Common Reasonable Accommodations

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities
- Job restructuring
- Part-time or modified work schedules
- Leave
- Reassignment to vacant position
- Acquisition or modification of equipment or devices
Examples of Common Reasonable Accommodations (cont.)

- Modified training
- Modified supervisory methods
- Modifications of employer policies
- Provision of qualified readers or interpreters
Examples of Accommodations by Limitation

- **Organization:**
  - Use daily, weekly, and monthly task lists; use calendar with automated reminders to highlight meetings and deadlines

- **Stamina During the Workday:**
  - Allow longer or more frequent work breaks; allow telecommuting

- **Difficulty Handling Stress and Emotions:**
  - Provide praise and positive reinforcement; allow telephone calls during work hours to doctors and others for needed support; allow the presence of a support animal
Further Examples

- **Attendance:**
  - Allow flexible work environment: Flexible scheduling, modified break schedule or leave for medical appointments including therapy

- **Concentration:**
  - Reduce distractions in the work area: space enclosures, panels or use headphones

- **Memory:**
  - Provide written minutes of meetings; allow additional training time
Employees who do not qualify for or have already exhausted FMLA/CFRA leave may still be able to take leave as a reasonable accommodation.

Differences from leave under FMLA/CFRA:
- No strict, pre-defined time limitation (but cannot be indefinite)
- Employer can deny based on undue hardship
- Employer not required to continue benefits during leave taken as an accommodation under ADA/FEHA
**Job Accommodation Network ("JAN")**

- Service of the U.S. Department of Labor’s Office of Disability Employment Policy

- Provides free consultations to employees with disabilities and their employers regarding disability-specific accommodation ideas

- 1-800-526-7234

- askjan.org
What are NOT Reasonable Accommodations?

- Elimination of an essential job function
- Lowered production standards (where production standards are consistently applied to all employees)
- Employer-provided personal use items needed in accomplishing daily activities both on and off the job (e.g., wheelchair, eyeglasses, hearing aids)
Reasonable Medical Documentation

- Confirms disability by describing impairment and limitation of major life activity
- Confirms need for reasonable accommodation
- Explains link between disability and need for reasonable accommodation
Timing for Requesting an RA

- Can request at any time

- Wise to request before performance suffers
  - An employer must make reasonable accommodation to enable employee with disability to meet a conduct standard in the future
  - However, an employer is not required to excuse past misconduct even if it is the result of an employee’s disability
Undue Hardship

- Significant difficulty or expense, considers the resources of the particular employer

- Includes accommodations that are unduly extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business
Key steps in a Failure-to-Accommodate Claim

- Employee’s request for an accommodation (unless need for one is obvious)

- Requirement that both parties engage in flexible, interactive process

- Identifying accommodation that is reasonable and would not pose an undue hardship
Medical Inquiries: Pre-offer (application/interview)

- ADA/FEHA prohibit any and all disability-related inquiries at the pre-offer stage
  - What impairments do you have?
  - What prescription medications do you take?
  - Have you ever been hospitalized?

- Employer can ask whether you can perform essential job functions
  - Are you able to meet this job’s attendance requirements?
Medical Inquiries: After Conditional Job Offer

- Federal law: Exams and inquiries allowed
- State law: Only allowed if job-related and consistent with business necessity
Medical Inquiries: After Employment Begins

- Disability-related inquiries and medical examinations allowed only if job-related and consistent with business necessity.
  
  - “Job-related and consistent with business necessity”: when employer has reasonable belief based on objective evidence that either (1) employee’s ability to perform essential function will be impaired by medical condition; or 2) employee will pose a direct threat due to a medical condition.
Administrative Requirements

- File with the EEOC within 300 days
  SF EEOC 415-625-5600
  www.eeoc.gov

- File with the DFEH (within 1 year)
  800-884-1684
  www.dfeh.ca.gov
Any questions?

Alexis Alvarez

- aalvarez@las-elc.org
- (415) 864-8848 ext. 268
- www.las-elc.org