

What to Expect in the Interactive Process (For Supervisors)

The California Fair Employment and Housing Act (FEHA) and Americans with Disabilities Act (ADA) are state and federal laws that prohibit discrimination based on disability and also require an employer to engage in an ongoing, good faith interactive process to determine whether reasonable accommodation can be made to an employee with a known disability. Since we are in California and FEHA has stricter rules for employers, our focus will be on FEHA rules in this document.

What Triggers The Interactive Process?

The Interactive Process is triggered as soon as the employer becomes aware that the employee may have a mental or physical impairment that limits his/her ability to perform any aspect of his/her job. While an employee may disclose to the employer that he/she has an impairment that affects his/her ability to do the job, the employee is not required to specifically request accommodation or disclose that he/she has a disability requiring accommodation.

The interactive process may be triggered by any one or a combination of the following situations:

- Verbally or in writing by the disabled employee.
- An employee regularly misses work, telling the employer that he/she is ill (may be eligible for FMLA).
- An employee with a workers' compensation injury. (The protections and obligations of FEHA apply to a workers' compensation injury just as it would to any non-work related injury. If an employee is receiving temporary disability benefits or other workers' compensation benefits, it does not relieve an employer of any obligations under FEHA or ADA.)
- A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.
- The employee requests a reasonable accommodation, specifically or by reference to his/her limitations.
- A manager or supervisor observes that an employee is having some difficulty performing his/her job duties.
- The employer receives work restrictions from a medical provider.

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If Employee is eligible for FMLA/CFRA and needs time off, does the employer have to do the Interactive Process?

No. As long as the employee is only asking for time off and they qualify for FMLA/CFRA or any other statutory leave, you do not have to enter into the interactive process.

What May Be A Reasonable Accommodation?

Reasonable accommodation is any effective measure that would enable an employee with a disability to perform the essential functions of his/her position. The following are accommodations that should be considered (this is not all inclusive):

- Job restructuring.
- Modifying work schedules.
- Adjusting or modifying exams, training, materials or policies.
- Acquiring or modifying equipment or devices.
- Providing qualified readers or interpreters.
- Alcohol or drug rehabilitation programs.
- Paid or unpaid leave, including reduced hours or leave coordination in conjunction with the Family Medical Leave Act (FMLA)/California Family Right's Act (CFRA).
- Reassignment to a vacant position. (FEHA entitles an employee with a disability to "Preferential Consideration" in reassignment or transfer (not a promotion) to a vacant position. This is typically considered an accommodation of "last resort".)

What May Not Constitute Reasonable Accommodation

- Modifying an employee's work hours or job duties to the extent that it causes a significant disruption to the employer's operations.
- Providing an unknown amount of time off, with no estimated date of return. (After statutory leaves are exhausted-FMLA/CFRA, etc.)
- Changing an employee's supervisor, unless you are changing the position and this would result in a new supervisor.
- Promoting an employee.
- An action that would result in an undue hardship to the employer.

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What Is An Undue Hardship?

"Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

- The nature and cost of the accommodation needed.
- The overall financial resources of the facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of the accommodation upon the operation of the facility.
- The overall financial resources of the employer, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
- The type of operations, including the composition, structure, and functions of the workforce of the entity.
- The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

The employer has the burden of proving that it would be an undue hardship for the employer to provide accommodation to the employee.

Note: In determining an undue hardship, the total agency budget must be taken into consideration, not individual departments/units.

Tips For The Interactive Process Meeting(s)

- The Interactive Process Meeting should always have two people from the agency present (HR Director/Analyst and a department designee). There should be a designated note-taker for the meeting. Notes should be taken of what the employee says and that you asked his/her opinion regarding what accommodations may work for the employee. If the employee will not or does not talk to you, document your effort to talk to him/her.

NOTE: *The representative from the department should be a decision maker to make the process efficient.*

- It is not advised that you audio or video tape an interactive meeting.
- Avoid judgment or diagnosis of the employee's medical condition. If you have any questions about the ability of an employee to perform the job

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functions, the agency may need to order a fitness for duty examination.

- After meeting with the employee, evaluate what options exist in the department or agency as a whole by analyzing the employee's current job or any other position. What could work in this situation for example: shorter hours, fewer days a week, or having that person do only part of a job.
- Take the time to explain whatever final decision the agency makes. Meet with the employee in person to discuss the agency's decision and listen once again for any possible and reasonable way to resolve differences. Provide the decision in writing (Job Accommodation Offer Form).
- If an accommodation cannot be provided in the employee's current position, it is the Agency's responsibility to look for other employment throughout the Agency that may meet the employee's accommodation needs. The Agency would need to reassign the employee to another vacant, funded position if the employee is qualified for that position and can perform the essential functions of the job with or without accommodation. (The Agency is not required to promote an employee as an accommodation.)
- Employers do not have to pay the employee his/her regular pay or full pay if he/she is only doing a partial job or a lower paying job.
- The Agency only has to do what is reasonable considering its size and its resources, but it may have to do some inconvenient things unless it causes an undue hardship.
- Employers should keep the discussion of the interactive process confidential. An employee has the right to confidentiality in the process.
- Medical information must be kept in a separate medical file. Distribution of medical information (copies) should be kept to a minimum.

General Guidelines To Follow During The Interactive Process (IAP) Meeting(s)

How to Prepare for the Interactive Meeting:

- Understand the definition of "Undue Hardship".
- Have an understanding of the essential functions of the employee's current job description.
- Determine who should participate in the meeting. Remember that the information provided in the meeting is confidential. A meeting for employees regarding accommodation is often intimidating and

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uncomfortable given the uncertainty surrounding the outcome. The fewer people included in the meeting the more open the employee will likely be to the interactive process.

- Develop an agenda for the meeting. This is especially important if the issue includes workers compensation, FMLA/CFRA and other areas of integrated disability management.

What to bring to the IAP Meeting(s):

- Reasonable Accommodation Packet (including Reasonable Accommodation Request Form, Job Accommodation Offer Form, Job Accommodation/Interactive Process Documentation Form and a Job Analysis Form).
- Job Description
- Any doctors' notes
- A note pad

What to say during the IAP Meeting(s):

- Greet employee and explain the interactive process and how their participation in the process is essential to determine possible accommodations.
- Provide the employee with an explanation of why you are conducting the interactive process and that the interactive process is a legal right provided to the employee and required for the employer by state and federal law.
- Inform the employee that you may or may not have a decision for them at the end of your discussion. Provide them an estimated timeline if possible.
- If temporary accommodations have been made, discuss that the temporary accommodations may not continue on a long term basis.
- Discuss the employee's impairments (not the diagnosis). What is the impairment/limitation in relation to the essential job functions and what can the agency do to accommodate the impairment/limitation? Employee should have completed the Reasonable Accommodation Request Form prior to the meeting.

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- Review the job description and determine what essential functions the employee cannot perform without a reasonable accommodation. You may need to complete the Job Analysis Form to analyze the job functions.
- Discuss possible accommodations (tools or equipment that can be provided, adjusting the job functions, adjusting a work schedule, or any other possibilities). It is important to review all possibilities even if they seem unreasonable. Discussion and documentation is a crucial part of the process.
- If the impairment is not clear you may need to ask the employee to clarify their restrictions and needs with their physician. This may be a time to ask those clarifying questions. A letter may need to be provided by the agency to the physician to clarify any restrictions. This letter should be provided to the employee to present to the physician. Use caution in sending it directly from the agency. Ask the employee if they have any questions.
- Make sure you follow up in writing with the employee after the meeting.

Follow Up from the IAP, if Accommodation is Granted:

- Gather any additional information needed to help assess the possibilities for providing the employee an accommodation.
- Make the final decision about the type of accommodation to offer and put this in writing to the employee (Job Accommodation Agreement/Offer Form) along with a summary of the meeting.
- Monitor the effectiveness of the accommodation to ensure it fully addresses the restrictions. Follow up at 30 days, 3 months, 6 months and at one year.
- If the need for an accommodation changes, reinstate the accommodation process.
- If the accommodation was temporary and the employee is recovered, follow up to determine if any further accommodation is needed.

Remember the interactive process is ongoing and does not stop once you hold one interactive process meeting. If operational needs change or the accommodation is not effective, this should be discussed in subsequent interactive process meetings.

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Note: Accommodations should be decided based on the current operational needs of the department and/or agency. Along with the documentation from meetings and discussions, it is important to document the current operational financial, staffing and workload status and any hardships that may be occurring due to the accommodation.

What Happens When Unable to Provide Accommodation

- Review all notes and documentation. Determine that all processes have been completed and options exhausted.
- Review supporting documents (Physician Certification, fitness for duty exam (if completed), job analysis, list of all possible job openings (qualified or not qualified), policies, MOU's and any other documentation related to reasonable accommodation).
- Complete the Job Accommodation/Interactive Process Documentation Form throughout the process.
- Maintain a list of all possible reasonable accommodations, even those that may seem unreasonable. Review possible accommodations on Job Accommodation Network (www.askjan.org) or other online resources.
- Review and list all current job openings in the entire agency. Determine if the employee is qualified for any of these positions. Keep the list for documentation purposes. (Note: If the employee is qualified for any vacant, funded positions in the organization, and can perform the job duties with or without accommodation, he/she is entitled to reassignment.)
- Provide substantial reasons for why accommodation cannot be made. (Keeping in mind that if the employee challenges the employer's decision, the employer has the burden of proving that it would have been an undue hardship for the employer to have provided accommodation to the employee.)
- Determine if employee qualifies for disability retirement.
- Seek assistance from legal counsel to determine next steps.

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Mistakes to Avoid

- Providing an accommodation to an employee without going through the interactive process.
- Not documenting the need for an accommodation and just offering an accommodation to the employee would be inappropriate. All accommodations should be documented and go through the interactive process. .
- Offering a long standing “accommodation” without a transitional work assignment or interactive meeting. After an extended period of time temporary modifications can be considered permanent accommodations.