

Reasonable accommodations

Interaction with and providing leaves of absence to a disabled employee

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When an employee requests a leave of absence because of a disability, employers have two separate duties: 1) interact with the employee; and 2) provide a defined period of leave so the employee can obtain treatment and recover, as a reasonable accommodation. But if that employee seeks ongoing, or more successive weeks off from work, the obligations of the employer under state and federal law become less clear.

“The matter of deciding what accommodations are ‘reasonable’ and required is determined on a case-by-case basis and involves a good-faith, interactive process between the employer and the employee,” says Roberta Hayashi, partner, Employment Law Practice Group Chair at Berliner Cohen.

“This interactive process can include obtaining verification from a health care provider of the existence of a disability, the expected length of the leave and the likelihood of a release to return to work at the end of the leave. Failing to engage in an interactive process may violate State and Federal laws.”

Smart Business spoke with Hayashi about how critical a good faith, interactive process is in this matter.

What should a company consider when deciding about reasonable accommodation?

Both California and federal law require an employer to provide reasonable accommodations that will enable a disabled employee to perform his/her job. Not only must the employer provide the accommodations, but the employer has to engage in a good faith, interactive process with the employee. During the process, the employer can verify whether the person has a disability. Information may be requested

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from the employer's health care provider, with the employee's permission.

The employer has to identify and discuss potential accommodations, even if the employee has not requested them, and discuss whether the potential accommodations are reasonable for the particular employee, given the nature of the work, the impact on co-workers, the cost and who pays.

What happens when the employer refuses to provide reasonable accommodation?

If the employer refuses to engage in an interactive process, fails to identify potential accommodations or refuses an accommodation without proving that it was unreasonable, the employer may be open to an administrative claim or may be sued. Liability can include lost earnings, emotional distress, punitive damages and attorneys' fees.

Are there concerns that apply only to California?

In California, there is a very broad definition of who is disabled. Also the fact that an employee is merely 'perceived' as being disabled is enough to trigger the requirement of a good faith interactive process.

There was a case in California last year (*Sanchez v. Swissport*) in which the court held

that the employer had to engage in a good-faith, interactive process and to provide reasonable accommodations in the form of additional leave of absence, even after the employee exhausted all her available pregnancy disability leave, but was still disabled due to pregnancy or childbirth.

What are some best routes for employers?

- Understand that the issue of reasonable accommodation is not only confined to physical disabilities of or access by wheelchair-dependent employees. It is a far broader issue, applicable to mental disabilities or employees with pregnancy-related disabilities.
- Reasonable accommodation may require additional leave after FMLA, pregnancy disability leave or paid sick leave expire.
- Prudent employers can proactively defend a claim by holding an interactive process whenever the company perceives that a disability may be involved.
- If an employer denies accommodation, the employer must document factual support for the decision; consider consulting vocational rehab, medical, legal and other experts for advice and support for the decision.
- Remember, if a lawsuit is filed, the prevailing plaintiff can recover attorney's fees, making these claims extraordinarily expensive. •