



new california disability regulations emphasize importance of interactive process

MSK Client Alert

February 13, 2013

On December 30, 2012, new disability discrimination regulations drafted by the now defunct California Fair Employment and Housing Commission (FEHC) became effective. These detailed regulations, codified at 2 Cal. Code Regulations Section 7293.5, *et seq.*, adopt many of the standards set forth in the guidelines issued by the federal Equal Employment Opportunity Commission interpreting the Americans With Disabilities Act (ADA). However, in certain respects these regulations go further, underscoring both the breadth of the definition of a protected "disability" under California law and the scope of an employer's duty to engage in the interactive process and accommodate persons with disabilities.

The new regulations also emphasize that the primary focus of disability discrimination law should be "whether employers...have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their obligation to engage in the interactive process and whether discrimination has occurred, *not whether the individual meets the definition of disability*, which should not require extensive analysis." While it is impractical to summarize all of the new FEHC regulations, employers should be aware of the following key provisions:

- **Definition of Disability:** The new regulations stress that the term "disability" "shall be broadly construed." Indeed, the regulations provide specific examples of numerous mental and physical impairments that constitute disabilities, as well as detailed definitions of "perceived" and even "perceived potential" disabilities (meaning that an individual is regarded as having a condition that may become a mental or physical disability). Illustrating the breadth of the definition, the regulations exclude only the most minor conditions from the definition, noting that the term "disability" does not include "conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little

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or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches; and minor and non-chronic gastrointestinal disorders." By implication, it would appear that medical conditions more serious than those described (such as migraine headaches) meet the definition of disability under the FEHA.

- **Disability Standard for Establishing Discrimination:** The new regulations provide that an employee is not required to show that his or her disability was the sole or even "dominant" cause of the employer's action. An employee must establish only that the disability was "*one of the factors* that influenced the employer." Section 7293.7(b) (emphasis added). This language may be construed as requiring a lower standard for establishing disability discrimination than the standard required by courts in ADA and FEHA cases. In such cases, courts have required the employee to show that the disability was a "motivating factor" not just "one of the factors."
- **The Interactive Process:** The FEHA imposes an obligation to engage in a "timely, good faith interactive process" with a disabled employee regarding potential accommodations. The new regulations repeatedly emphasize the importance of engaging in the interactive process and make clear that this obligation is triggered not only when an employee requests an accommodation, but also when an employer "otherwise becomes aware of the need for an accommodation through a third party or by observation." *Further, the regulations expressly state that the duty to engage in the process is triggered whenever an employee with a disability exhausts available leave under the Family and Medical Leave Act, California Family Rights Act, or the Workers' Compensation Act, but is not yet medically able to return to work.* Section 7294.0.
- **Medical Documentation Regarding an Accommodation:** In order to assess the need for an accommodation, an employer may request medical documentation to confirm that an employee has a disability requiring accommodation and to describe how the employee's limitations affect his or her ability to perform the essential functions of the job. Sections 7294.0(c)(2) and (5). The employer also may require the name and credentials of the health-care provider to confirm his or her qualifications. As is true under the ADA guidelines, the California regulations emphasize that an employer may obtain only as much medical information as is necessary to establish the existence of a covered disability and need for an accommodation; an employer may not request access to an employee's complete medical records. Section 7294.0(c)(3). However, the new regulations go even further than the EEOC guidelines, which permit an employer to inquire about the nature and severity of the employee's impairment. *The California regulations expressly prohibit an employer from requiring disclosure of the employee's specific underlying medical condition or the "nature of the disability."* Sections 7294.0(c)(3) and (d)(1). *Moreover, the new regulations also state that an employer may not require an employee to be examined by a company-selected health-care provider unless the medical information provided by the employee's health-care provider is insufficient and the employee has been given a reasonable time to correct the insufficiencies.* Section 7294.0(d)(5)(C). These provisions significantly heighten the role of the employee's health-care provider, to the detriment of the employer.
- **Importance of Job Descriptions:** The new regulations provide that an employer may rely on a job description as evidence of the essential functions of a job only if it is an "*accurate, current written job description.*" Section 7293.6(e)(2)(B). For this reason, it is imperative that employers maintain up-to-date job descriptions. Fortunately, the regulations also state that an employer may rely on prior performance reviews to establish



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essential job functions. Section 7293.6(e)(2)(H).

- **Reasonable Accommodation:** The new regulations state that an employer must consider "any and all reasonable accommodations" and provide an expansive list of examples, including such things as permitting an employee to work from home, "job restructuring," and modifying "supervisory methods." Sections 7293.6 and 7293.9. The regulations also remind employers that a reasonable accommodation may include permitting an employee to bring an "assistive animal" in the workplace. Assistive animals are dogs, or any other animal, trained to guide, signal, service, or support individuals who are physically or emotionally impaired. Section 7293.6(a). The employer may require documentation of the medical need for bringing the animal in the workplace. Section 7294.0(e). The regulations also repeatedly note that providing additional time off from work, including leaves that extend beyond what is normally provided under company policy or required by law (such as FMLA or CFRA), may be a reasonable accommodation. Fortunately, the regulations acknowledge that providing an *indefinite leave is not a reasonable accommodation*. Section 7293.9(c).
- **Assertion of Health and Safety Defense:** The prior disability regulations recognized that employers could assert a health-and-safety defense to disability-discrimination claims by showing that no accommodation existed that would have allowed the employee to perform the job's essential functions without endangering the health or safety of the employee or others. The new regulations provide that an employer may assert this defense only after it has engaged in the interactive process with the employee. Section 7293.8(b), (c).

ASK MSK

Q: When should an employer and employee start the interactive process?

A: An employer must initiate the interactive process whenever it has reason to believe that an employee has a disability requiring accommodation. While, in many cases, the interactive process is triggered by an employee's request for accommodation, the new regulations make clear that employer knowledge of the possible need for an accommodation may come from any source. Moreover, employers should document their efforts to engage in the interactive process and consider all potential accommodation options, whether or not requested by the employee.

Q: How much leave is reasonable?

A: Employers should weigh the "undue hardship" of extending a leave of absence on a case-by-case basis, considering, among other things, the impact of the leave on other employees, the size of the business, and the financial resources needed to cover the leave. Section 7293.6(r). Employers should be aware, however, that they have the burden of proof in establishing that providing leave constitutes an "undue hardship."

Q: Do employees with disabilities get priority over other employees with more seniority or preferential consideration for vacant positions?



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A: The regulations do not require the employer to ignore a seniority system, unless extenuating circumstance exist, such as if the employer's policy or practice allows the employer to modify its seniority system. Section 7293.9(d)(5).

An employee with a disability is entitled to preferential consideration for a vacant position if the employee can no longer perform essential functions or his or her own position even with an accommodation, an accommodation from the employee's own job creates an undue hardship, the employer and employee agree that the vacant position is preferable to an accommodation in the present job, or the employee requests medical care that is not easily accessible at the current location. However, the employee must be qualified for the position in order to receive preferential consideration. Section 7293.9(d)(1).