



by KEVIN RIVERA

ACCOMMODATING *Attorneys*

The interactive process that a law firm establishes to assist disabled staff is key to selecting appropriate accommodations

LAW FIRMS and other legal employers in California have an affirmative legal duty under state and federal law to provide reasonable accommodation to their attorneys with disabilities unless doing so would cause undue hardship. According to the most recent data provided by the Equal Employment Opportunity Commission, 35.3 percent of EEOC claims filed in California in 2017 were based on disability, surpassing the number of claims filed based on any other protected characteristic, including race, sex, color, religion, national origin, or age.¹

Similarly, the California Department of Fair Employment and Housing (DFEH) reported that the majority of employment-based discrimination claims it received in 2016 were based on disability.² This is not surprising given the complexity of the law on accommodating individuals with disabilities. Providing reasonable accommodation to attorneys with disabilities lifts barriers to employment faced by disabled attorneys and serves the larger goal of enabling legal employers to diversify their workforce.

Reasonable Accommodation

A California employer's duty to provide reasonable accommodation to individuals with disabilities is principally derived from two laws, the federal Americans with Disabilities Act (ADA)³ and the California Fair Employment and Housing Act (FEHA).⁴ The ADA prohibits private sector employers from discriminating against employees on the basis of disability and requires employers to provide reasonable accommodation to qualified applicants and employees with disabilities, unless doing so would cause undue hardship.⁵ Like the ADA, the FEHA requires employers to provide reasonable accommodation for the known physical or mental disability of an applicant or employee, unless doing so would impose an undue hardship.⁶ One major difference between the FEHA and ADA is that while the ADA applies to employers with 15 or more employees,

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the FEHA applies to employers who regularly employ just five or more employees.⁷

Under the FEHA, an employer has an affirmative duty to provide reasonable accommodation(s) for the disability of an applicant or employee unless it can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.⁸ Thus, an employer's duty with respect to disabled attorneys encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in an "interactive process." "Reasonable accommodation" refers to a modification or adjustment to the work environment that enables an employee to perform the essential functions of the job he or she holds.⁹ An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate accommodation.¹⁰

Undue Hardship

If providing a reasonable accommodation for an employee's disability would impose an undue hardship on the employer, the accommodation is not required.¹¹ The FEHA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of several factors: the nature and cost of the accommodation; the employer's ability to pay for the accommodation; the type of operations conducted at the facility; the impact on the operations of the facility; the number of employees and the relationship of the employees' duties to one another; the number, type, and location of the employer's facilities; and the geographic, administrative, and financial relationship of the facilities to one another.¹²

While the cost of an accommodation and an employer's ability to pay for it are factors used to assess undue hardship, the determination cannot be made by making a cost-benefit analysis.¹³ For example, if an organization's only in-house intellectual property attorney with significant experience and expertise requires two months off as a reasonable accommodation to recover from back surgery, and his or her caseload cannot be handled by the organization's other attorneys, the company might engage a legal staffing agency that places highly specialized attorneys in-house on a temporary basis. Granting the leave would not be an undue hardship if the firm has the financial ability to hire a qualified temporary attorney through the staffing agency, even if the cost of doing so will be more than what the company would have paid to the disabled attorney for the same period of time. This is because

whether the cost of a particular accommodation imposes an undue hardship depends on the employer's resources and ability to pay, and not on the accommodation's benefit to the employer and attorney in relation to its cost.

Undue hardship includes "reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."¹⁴ Law firms and other employers, however, should exercise caution when denying an accommodation based on undue hardship, as "[t]he bar for undue hardship is 'high.'"¹⁵ If the determination is later challenged in court, the employer will have to present "proof of actual imposition or disruption" that would have resulted from granting the accommodation.¹⁶ "Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."¹⁷ Whether a reasonable accommodation will cause undue hardship should be based on a case-by-case basis, careful analysis, and be meticulously documented.

Interactive Process

FEHA regulations provide that the employer must initiate the interactive process when any of the following conditions occur.¹⁸

A disabled applicant or employee requests reasonable accommodations. Importantly, an attorney need not mention the words "reasonable accommodation" when making a request. Any plain English request will suffice. For example, an associate attorney might tell a partner at the firm that his or her migraines are making it difficult to complete tasks on time, that walking from the office to the courthouse is difficult due to a leg injury, or that he or she cannot sit at the office desk for long stretches of time due to back pain flaring up. Each of these would constitute a request for reasonable accommodation, triggering the employer's duty to initiate the interactive process.

The employer becomes aware of the need for an accommodation through a third party or by observation. Even if an attorney does not say he or she is disabled or request an accommodation, the employer must nonetheless initiate the interactive process if the employer learns of the need for an accommodation. For example, if an in-house attorney's spouse calls the attorney's boss to advise that the attorney was rushed to the hospital due to a heart condition requiring surgery or an attorney is observed coming into the office in a wheelchair with his or her arm in a cast, either scenario would trigger the employer's duty to start the interactive process.

A disabled employee has exhausted leave under state or federal law or under the employer's leave policy, and the employee or employee's health care provider indicates that further accommodation is necessary. Often, an employee's doctor will place an employee on medical leave for a duration that exceeds the amount of leave the employee is entitled to by law or under the employer's leave policy. Employers are required to take a request for such additional time off as a request for accommodation. For example, in a hypothetical situation, an in-house attorney is out under the Family and Medical Leave Act due to a serious health condition, and his or her leave entitlement ends on June 1,¹⁹ and, on May 30, the attorney submits medical documentation to the supervisor indicating that he or she must remain off work until June 25, the employer is required to interpret the doctor's note as a request by the attorney for accommodation for the period starting June 2.

Medical Documentation

If an attorney's disability or need for accommodation is not obvious, his or her employer may require the attorney to provide "reasonable medical documentation" from a health care provider that confirms the existence of the disability and the need for accommodation.²⁰ In this instance, the employer may require documentation that contains the name and credentials of the attorney's health care provider, a statement that the attorney has a physical or mental condition that limits a major life activity, and a description of why the attorney needs a reasonable accommodation.²¹

The attorney must then cooperate "in good faith" and provide the documentation.²² If an attorney provides insufficient documentation in response to the employer's initial request, the employer must explain why the documentation is insufficient and give the attorney an opportunity to provide supplemental information in a timely manner from his or her health care provider.²³ Importantly, all such medical information and records obtained during the interactive process must be maintained in a medical file separate from the attorney's personnel file, and must be kept confidential.²⁴

Accommodations for Attorneys

An employer is required to consider any and all reasonable accommodations of which it is aware or that are brought to its attention, except for those that create an undue hardship.²⁵ Thus, the employer should consider all potential accommodations and assess their effectiveness in enabling an attorney to perform the essen-

MCLE Test No. 276

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1. Disability discrimination was the most reported employment-based discrimination claim made to the California Department of Fair Employment and Housing in 2016.

True
False

2. Disability discrimination was the third most reported employment-based discrimination claim made to the Equal Employment Opportunity Commission (EEOC) in California in 2017.

True
False

3. The California Fair Employment and Housing Act (FEHA) applies to employers only if they have 10 or more employees.

True
False

4. An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate reasonable accommodation.

True
False

5. An employer has no obligation to provide a reasonable accommodation to an employee if doing so would cause undue hardship.

True
False

6. An employer's duty with respect to disabled individuals encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in a "communicative dialogue."

True
False

7. An undue hardship determination may be based on a cost-benefit analysis.

True
False

8. Employers should be cautious when denying an accommodation based on undue hardship because it is a high bar to meet.

True
False

9. An employer is required to engage in an interactive process only if an employee specifically requests an accommodation.

True
False

10. An employer may require an employee to provide medical documentation as part of the interactive process.

True
False

11. All medical information and records obtained during the interactive process must be maintained in a medical

file separate from the attorney's personnel file.

True
False

12. The FEHA regulations provide an exhaustive list of all possible types of reasonable accommodations an employer must consider.

True
False

13. An employer may not require an attorney to take a leave of absence as an accommodation if other reasonable accommodations are available.

True
False

14. Providing a reduced schedule may be a reasonable accommodation.

True
False

15. An employer is never required to allow an attorney to bring an animal that provides emotional support into the workplace as a form of reasonable accommodation.

True
False

16. Permitting a disabled attorney to work from home for a short duration may be a reasonable accommodation.

True
False

17. An employer does not have to reassign a disabled attorney to a different supervisor as a reasonable accommodation if the current supervisor causes the attorney to experience stress.

True
False

18. An employer is not required to provide an indefinite leave of absence as a reasonable accommodation.

True
False

19. An employer has no obligation to provide any further reasonable accommodation once the attorney is no longer disabled.

True
False

20. The EEOC has taken the position that a law firm has no obligation to lower its billable hours requirement as a form of reasonable accommodation for a disabled attorney.

True
False

MCLE Answer Sheet #276



ACCOMMODATING ATTORNEYS

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. True False

2. True False

3. True False

4. True False

5. True False

6. True False

7. True False

8. True False

9. True False

10. True False

11. True False

12. True False

13. True False

14. True False

15. True False

16. True False

17. True False

18. True False

19. True False

20. True False

tial job functions.²⁶ Although an employer is required to consider an employee's preferred accommodation, it has the ultimate discretion to choose among effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.²⁷

FEHA regulations provide a nonexhaustive list of examples of the different kinds of accommodations that employers may

provide to employees in general, irrespective of industry or the type of work performed.²⁸ Attorneys with disabilities often require reasonable accommodations similar to those required by employees in other business environments. However, law firms and other legal employers may face unique challenges when providing reasonable accommodation to their attorneys, taking into account factors such as billable-hour requirements, demanding caseloads, and the ability to work under pressure.

secondary office, allowing the attorney to work at the closer office on the days he or she has physical therapy appointments may be a reasonable accommodation.

Providing assistive aids and services. For attorneys who are blind or have vision loss, their employer might provide a qualified reader or a computer screen-reading program. For those who are deaf or have hearing loss, the employer might provide

visior's standard oversight of the employee's job performance does not constitute a disability under the FEHA.²⁹

Permitting a disabled attorney to work from home. For many attorneys, much of their work involves using a computer and communicating via phone and e-mail, which usually can be performed anywhere with an Internet and phone connection. Permitting these attorneys to work from home for a short duration may be a reasonable accommodation, depending on the circumstances. However, if an attorney's essential job functions include collaborating closely with other attorneys in the office and supervising filings, permitting a telecommuting arrangement may not be reasonable.

FEHA regulations provide that employers may also be required to provide reasonable accommodation for the "residual effects of a disability."³⁰ For example, an attorney may need a schedule change to permit him or her to attend follow-up appointments with a health care provider.

Leaves of Absence

If an attorney cannot perform the essential job functions or otherwise needs time away from the job for treatment and recovery, holding the position open so the attorney may take a leave of absence may be a reasonable accommodation. Similarly, providing an attorney leave on an intermittent or reduced-schedule basis to obtain planned medical treatment may also be a reasonable accommodation.³¹ Employers are not required to provide paid leave, but they may elect to do so. If the attorney can work with a reasonable accommodation other than a leave of absence, the employer cannot require the attorney to go on leave.³² Importantly, an employer is not required to provide an indefinite leave of absence as a reasonable accommodation, meaning an employer need not provide an open-ended leave with no return date.³³

In determining the amount of time off to provide, if any, the employer may consider factors such as the size of the employer's organization, how busy the attorney's practice is, and whether the attorney's workload can be distributed to other attorneys at the firm without burdening their workloads. For example, a large law firm with attorneys in multiple offices may be better able to provide a four-month leave of absence as a reasonable accommodation than a small firm with just five attorneys. Because there are no bright-line rules in the statutes or case law as to how much leave, if any, should be provided, this is a heavily litigated area in failure-to-accommodate cases. Therefore,



provide to employees in general, irrespective of industry or the type of work performed.²⁸ Attorneys with disabilities often require reasonable accommodations similar to those required by employees in other business environments. However, law firms and other legal employers may face unique challenges when providing reasonable accommodation to their attorneys, taking into account factors such as billable-hour requirements, demanding caseloads, and the ability to work under pressure.

Following are various examples of reasonable accommodations that may be provided to attorneys with disabilities.

Making existing facilities readily accessible to and usable by disabled attorneys. This may include providing accessible office space, break rooms, and restrooms, acquiring or modifying furniture, equipment, or devices, or making other similar adjustments in the work environment. For example, a firm may need to provide an attorney with a wheelchair-accessible desk and arrange furniture in the office to clear a path so that the attorney can easily maneuver about in a wheelchair.

Transferring an attorney to a more accessible office building. If a law firm has more than one office location, temporarily transferring an attorney to a different office may be a reasonable accommodation. For example, if an attorney has weekly physical therapy appointments near his or her firm's

a qualified notetaker or sign language interpreter, or use real-time captioning technology (a service similar to court reporting in which a transcriber types what is being said at a meeting or event into a computer that projects the words onto a screen).

Job restructuring. This method may include reallocation or redistribution of an attorney's nonessential job functions. For example, a litigator's essential job functions may entail legal research, drafting briefs, and taking depositions, and non-essential job functions may include entertaining clients, updating the firm's legal blog, and serving on the firm's hiring committee. Temporarily reassigning these non-essential functions to another attorney may be a reasonable accommodation.

Modifying supervisory methods. An employer may need to modify the ways in which it exercises supervisory oversight of an attorney's performance as a reasonable accommodation. For example, for an attorney with a learning disability, this might mean that instead of requiring that a brief be completed by a certain date, the supervising attorney may set different deadlines for completing the fact, law, and analysis sections, or using daily, weekly, and monthly task lists. Modifying supervisory methods does not require assigning an attorney to a new supervising attorney. An employee's inability to work for a particular supervisor due to anxiety or stress related to the super-

it is important that employers carefully document their analysis when determining the appropriate amount of time off to provide and its impact on the employer's business operations.

Billable-Hour Requirements

Like the ADA, the FEHA regulations provide that where a quality or quantity standard is an essential job function, an employer is not required to lower the standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its quality or quantity standards.³⁴ The EEOC has taken the position, with respect to the ADA, that "a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable-hour requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement."³⁵ Thus, under the ADA and FEHA, a law firm's billable-hour requirement may be an essential job function tied to a quantity standard, and a firm would have no obligation to reduce or waive its billable-hour requirement as an accommodation.

However, a law firm may not penalize an attorney for failing to meet its billable-hour requirement if the firm has granted the attorney leave as an accommodation and the attorney's failure to meet the hours requirement is due to taking the leave. The EEOC has advised that penalizing an attorney in such instance would amount to retaliation for the attorney's use of a reasonable accommodation, would violate the ADA, and would render the leave an ineffective accommodation.³⁶ An employer should also exercise caution if it plans to give an attorney an unsatisfactory performance review when the attorney was out on leave for a significant portion of the review period. Otherwise, it may violate the ADA and FEHA, and amount to retaliation. Instead, the employer should delay the evaluation for several months until after the attorney has resumed a normal workload, thus enabling the firm to conduct a more accurate review of the attorney's work.

Attorneys with disabilities may require a range of accommodations to perform the essential functions of their jobs. Legal employers can take a number of steps to create a climate in which their attorneys feel comfortable requesting an accommodation and to ensure that attorneys and managers are aware of their legal obligations. At a minimum, employers should have clear, written policies and procedures

in place for handling accommodation requests and that confirm the employer's commitment to nondiscrimination and providing reasonable accommodation. Employers can also ensure that their attorneys and other employees receive proper training on the interactive process and reasonable accommodation requirements. ■

¹ U.S. Equal Emp. Opportunity Comm'n, EEOC Charge Receipts by State (includes U.S. Territories) and Basis for 2016, available at https://www1.eeoc.gov/eeoc/statistics/enforcement/state_17.cfm.

² California Dep't of Fair Emp. and Housing, 2016 Annual Report (2017).

³ 42 U.S.C. §§12101 *et seq.*

⁴ GOV'T CODE §§12900 *et seq.*

⁵ 42 U.S.C. §12112(b)(5)(A).

⁶ GOV'T CODE §12940(m).

⁷ 42 U.S.C. §12111(5)(A); GOV'T CODE §12926(d).

⁸ CAL. CODE REGS. tit. 2, §11068(a).

⁹ Nealy v. City of Santa Monica, 234 Cal. App. 4th 359, 373 (2015); CAL. CODE REGS. tit. 2, §11065(p).

¹⁰ GOV'T CODE §12940(n); CAL. CODE REGS. tit. 2, §11069(a).

¹¹ GOV'T CODE §12940(m).

¹² GOV'T CODE §12926(u). The Job Accommodation Network (JAN) provides cost information for reasonable accommodations at <http://askjan.org/links/faqs.htm> and <http://askjan.org/media/LowCostHighImpact.doc>. The California Department of Rehabilitation, at www.dor.ca.gov, offers programs that may offset the costs of accommodations.

¹³ U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), #45.

¹⁴ EEOC v. Placer ARC, 114 F.Supp.3d 1048, 1058

(E.D. Cal. 2015).

¹⁵ *Id.*

¹⁶ EEOC v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 962 (N.D. Cal. 2013).

¹⁷ *Id.*

¹⁸ CAL. CODE REGS. tit. 2, §11069(b).

¹⁹ The Family and Medical Leave Act (FMLA) and analogous California Family Rights Act (CFRA) provide up to 12 weeks of unpaid leave per year to employees who meet certain eligibility requirements and who work for employers with 50 or more employees. An employer's obligation to provide reasonable accommodation exists independently of its duty to comply with the FMLA, CFRA, and other leave laws.

²⁰ CAL. CODE REGS. tit. 2, §11069(c)(2).

²¹ CAL. CODE REGS. tit. 2, §11069(d)(5)(A),(B).

²² CAL. CODE REGS. tit. 2, §11069(d).

²³ CAL. CODE REGS. tit. 2, §11069(d)(5)(C).

²⁴ CAL. CODE REGS. tit. 2, §11069(g).

²⁵ CAL. CODE REGS. tit. 2, §11068(e).

²⁶ CAL. CODE REGS. tit. 2, §11069(c)(7).

²⁷ CAL. CODE REGS. tit. 2, §11069(c)(8); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 228 (1999).

²⁸ CAL. CODE REGS. tit. 2, §11065(p).

²⁹ Higgins-Williams v. Sutter Medical Found., 237 Cal. App. 4th 78, 84-85 (2015).

³⁰ CAL. CODE REGS. tit. 2, §11068(g).

³¹ CAL. CODE REGS. tit. 2, §11069(d)(9).

³² CAL. CODE REGS. tit. 2, §11068(c).

³³ CAL. CODE REGS. tit. 2, §11068(c).

³⁴ CAL. CODE REGS. tit. 2, §11068(b).

³⁵ EEOC, Reasonable Accommodations for Attorneys with Disabilities (2011), available at <https://www.eeoc.gov/facts/accommodations-attorneys.html>; see also, Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 405-406 (2002) (lawyer who could not meet law firm's minimum billable hours requirement would not be performing an essential function of position).

³⁶ *Id.*



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