

WHEN FEHA, ADA, AND WORKER'S COMPENSATION COLLIDE

Darin Hampton; National Safety Coordinator at International Paper

Dana Peterson, Esq.; Partner at Seyfarth Shaw LLP

Negar Matian Esq.; Managing Partner at Matian Law Group

Laurie Love-Gary; Claims Specialist at Sedgwick CMS

PRESENTERS

Darin Hampton
International
Paper

6400 Poplar Ave.
Memphis, TN
38197

901-419-3937
Darin.Hampton@
ipaper.com

Dana Peterson Esq.
Seyfarth Shaw LLP

2029 Century Pk E,
Los Angeles, CA
90067

310-201-5265
DPeterson@
seyfarth.com

Negar Matian Esq.
Matian Law Group

14541 Sylvan St,
Van Nuys, CA
91411

888-223-6529
NMatian@
matianlaw.com

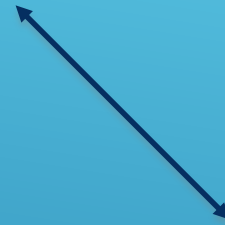
Laurie Love-Gary
Sedgwick CMS

PO Box 14440
Lexington, KY
40512

951.275.5429
Laureen.Gary@
sedgwick.com



Workers'
Compensation



ADA



FEHA



ADA/FEHA and WC apply to virtually all employees in CA, depending on employer's size

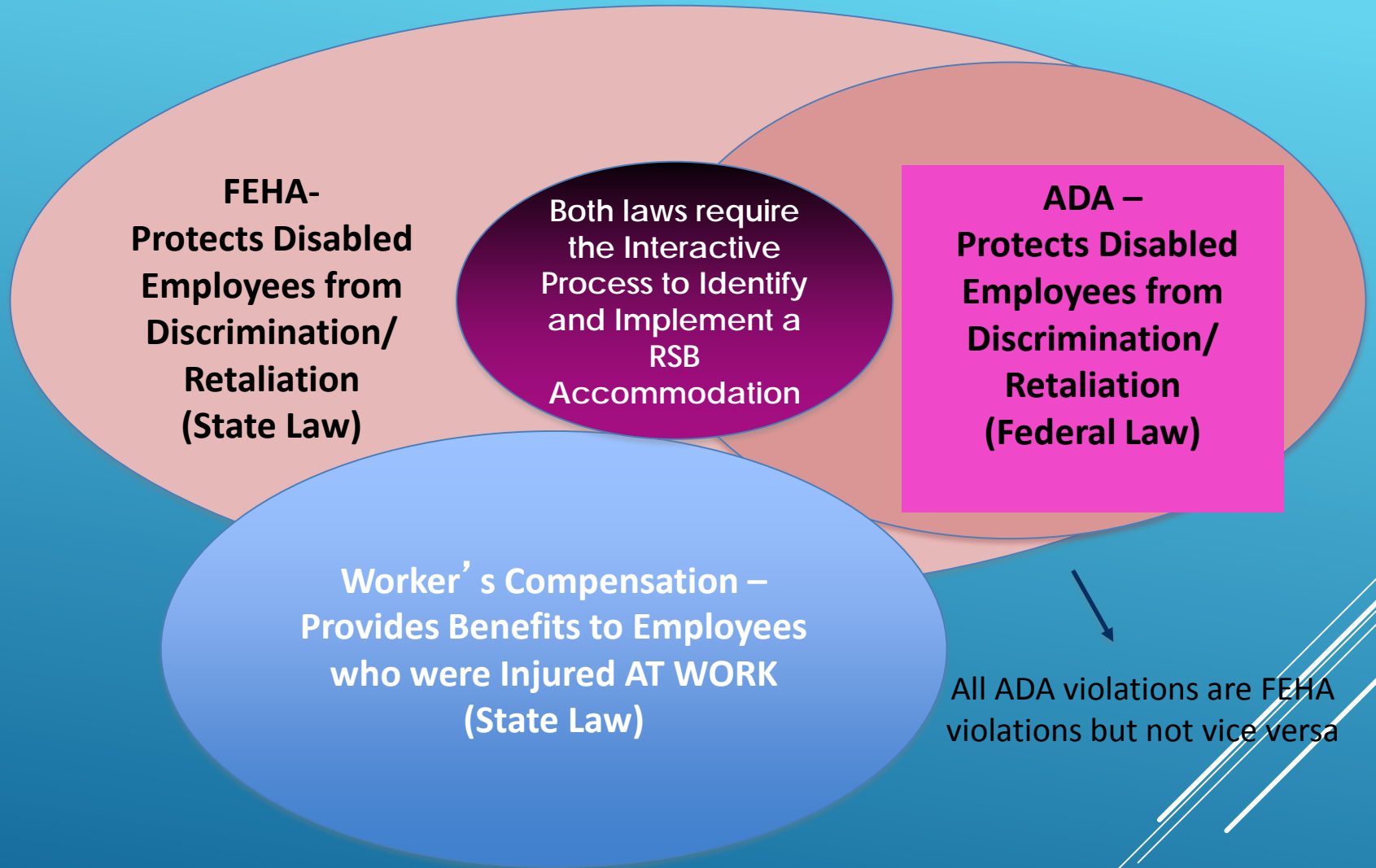


An employee can be awarded separate damages for violation of ADA/FEHA and WC allowing for double pay out!!!!

WC requires a Medical Care Provider's note identifying injury or illness, and ER frequently require a care provider note identifying limitations under ADA/FEHA.



Provide PROTECTIVE leave from employment whether compensated or not.



FEHA-
Protects Disabled
Employees from
Discrimination/
Retaliation
(State Law)

Both laws require
the Interactive
Process to Identify
and Implement a
RSB
Accommodation

ADA –
Protects Disabled
Employees from
Discrimination/
Retaliation
(Federal Law)

Worker's Compensation –
Provides Benefits to Employees
who were Injured AT WORK
(State Law)

All ADA violations are FEHA
violations but not vice versa



ADA

- ▶ Disability is defined as an impairment that “substantially limits” a “major life activity” → physical or mental
- ▶ Conditions such as visual impairments, that can be corrected by mitigating measures (such as eyeglasses) are excluded
- ▶ No separate violation for failing to engage in interactive process



FEHA (broader)

- ▶ Disability is defined as “any condition” (physical or mental) that merely “limits” (makes more difficult) a “major life activity” (which is virtually everything.)
- ▶ Failure to engage in interactive process is itself unlawful
- ▶ Any statement by an employee that he is limited is treated as a request for an accommodation

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“The government says we need to replace our corporate ladder with a ramp”

WORKERS' COMPENSATION IS A BENEFITS SYSTEM. IT PROVIDES COMPENSATION WHEN AN EMPLOYEE IS INJURED AS A RESULT OF WORK.


TD
lost wages

PD
impairment

SJDV
retraining

Medical
Treatment

... It also prohibits discriminating or retaliating against an employee for filing a worker's compensation claim.

A decorative graphic consisting of several parallel white lines of varying lengths, slanted diagonally from the bottom right towards the top right, located in the lower right corner of the slide.

WORKER'S COMPENSATION

- ▶ Determine whether Injury or Illness is caused by work?
- ▶ Must provide compensation and medical treatment
- ▶ Benefits are paid while employee is off work due to injury and for any disability as defined by the Doctor and the AMA Guides
- ▶ Appointed Doctor (PQME/AME) provides work restrictions and determination as to whether employee can return back to work. Employer and Doctor can communicate with each other on this issue.

ADA/FEHA

- ▶ Determine whether the individual has a disability
- ▶ **Compensation** not required
- ▶ Must determine whether individual is able to perform essential functions of the job with or without reasonable accommodation
- ▶ Must engage in the interactive process
- ▶ Must hold job open during leave
- ▶ Limitations on ability to communicate with treaters

ER determines if the injury is industrial.
If industrial, medical treatment provided to the EE.

The doctor may provide temporary work restrictions until EE's injury stabilizes or reaches MMI.

After EE's injury stabilizes a PQME/AME will determine impairment and **permanent work restrictions**.

Any party may contact the doctors to seek clarification of the report including whether EE can return back to work .

EE and ER negotiate a settlement based on the reports. Many times a voluntary resignation is included in the settlement.

ER receives notice that the EE has work restriction(s)

ER meets with EE to discuss work restrictions and possible reasonable accommodations.
(INTERACTIVE PROCESS)
ER determines the **ESSENTIAL FUNCTIONS** of the **JOB** → Job Analysis.

ER must determine whether the EE can be reasonably accommodated.
Must consider all options.

If EE cannot be accommodated in EE's usual and customary job, must consider leave for temporary restrictions, and reassignment to any vacant position of equal or lesser status for which the employee is qualified if the restrictions are permanent.

When does a disability require an accommodation?
When it poses a “barrier”
to performing one or more essential job functions



DUTY TO ACCOMMODATE



Monitor employee's status and ability to return to work

- ▶ What are the employee's work restrictions?
- ▶ Are the work restrictions temporary or permanent?
- ▶ Do they impact the employee's ability to perform his/her essential job functions?
- ▶ Can the employee be returned to work with or without reasonable accommodation?



ESSENTIAL = the reason
the position exists is to
perform that function.

Job Description Components



Identification

- Job title
- Reporting relationships
- Department
- Location
- Date of Analysis

General Summary

- Describes the jobs distinguishing responsibilities and components

Essential Functions and Duties

- Lists major tasks, duties and responsibilities

Job Specifications

- Knowledge, skills and abilities
- Education and experience
- Physical requirements

Disclaimer

- Of Implied contract

Signature of Approvals



Why is interacting with the employee and trying to come up with a reasonable workplace accommodation so important?

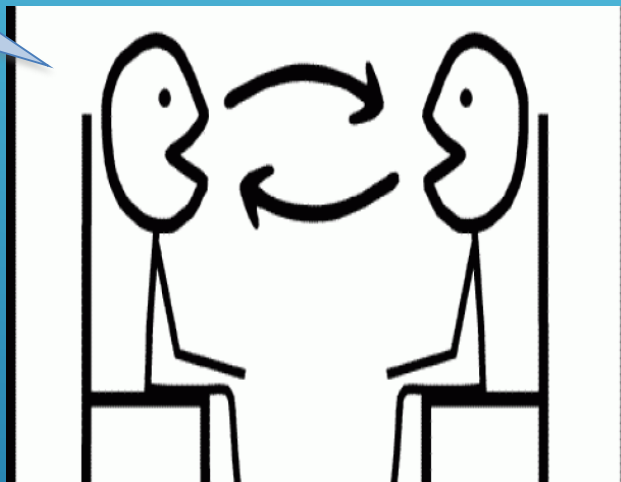
Isn't accommodating an employee the same thing as engaging in the Interactive Process?

Can't we just keep the employee out on leave until he/she can return to full duty?



INTERACTIVE PROCESS

Is this working for you?



Kind of, is it working for you?

To be honest, I don't even know what your work restrictions mean.

Can you put that in writing.



- ▶ Is it the same for industrial and non-industrial injuries?
- ▶ What if the employee doesn't have a doctor's note to verify the disability or work restrictions?



- ▶ What if I am about to lay off this employee in the very near future?
- ▶ What if ER creates a light duty position and later terminates their U&C position, do you have to keep them in their light duty job?



Reasonable Accommodations



UN-Reasonable Accommodations



UNDUE HARDSHIP = An action requiring significant difficulty or expense

When does this process end?



- ▶ No reasonable accommodations
- ▶ Endangerment to the health and safety of the EE or others
- ▶ When the employee's employment terminates - Contact attorneys if there is an overlapping claim

*For purposes of ADA and FEHA
does it matter if someone has
temporary work restrictions or
permanent work restrictions?*

All injured workers appear to be
TTD for at least 104 weeks!



What happens if . . .

I have doctors that tell me different things?

I don't understand the work restrictions?



"Mr. Smith is under my care for post-traumatic stress disorder and it is recommended that he be relieved of all job duties that might exacerbate his condition."

"Patient is deemed permanent and stationary, with the following work restrictions:

No lifting in excess of 20 lbs."

"Patient was treated in this office on 4/20/15 and is TTD. Follow-up appointment scheduled for 7/28/15."

This note is followed by 3 identical notes extending leave another 9 months.



Can I ask applicants/interviewees if they. . .

- Have ever filed a workers' comp claim?
- Have a "limitation/ disability" requiring accommodation?
- Are pregnant, like to take sick leave, are on medications, or have future surgery planned?
- Will attend a physical exam before I determine to hire them?
- Are planning on hiring an attorney to sue me at anytime in the near future?



QUESTIONS?

