KOUMAS LAW GROUP

Employment Law Update

June 2010

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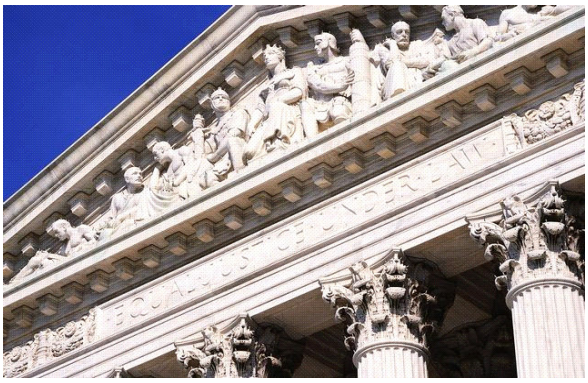

Navigating the Interactive Process For Reasonable Accommodations

Job Accommodation Network (JAN) is a service of the U.S. Department of Labor's Office of Disability Employment Policy, and is the leading source of expert, and confidential assistance on workplace accommodations and disability employment issues.

JAN provides free consulting services designed to increase the employability of people with disabilities. These consulting services are available for all employers, regardless of the size of an employer's workforce. Services include one-on-one consultation about all aspects of job accommodations, including the accommodation process, accommodation ideas, product vendors, referral to other resources, and ADA compliance assistance. JAN also provides services providing technical assistance regarding the ADA and other disability related legislation; and educating callers about self-employment options.

Accommodation for workers with disabilities can be overwhelming. But a good job description is a valuable tool for identifying reasonable accommodations. In relation to the ADA, reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to ensure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities. JAN consultants can provide callers with various accommodation solution ideas for a specific situation. They cannot tell callers what is reasonable for a specific situation, but are able to provide guidance regarding the ADA's definition of reasonable accommodation from the EEOC, the enforcing agency for the ADA's employment provisions.

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All is Fair in Love and War. What About Discipline in the Workplace?

The doctrine of at-will employment remains alive and well in California. In California, Labor Code Section 2922 recognizes employees and employers presumptively may end their relationship "at will." However, if a lawsuit should arise between an employee and his or her employer, alleging that an adverse employment action such as a demotion, or worse yet discharge, was unlawful, the twelve potential jurors deciding the fate of that action will be looking for fairness. After all, most jurors either are, or were at one time, employees somewhere, and typically believe that an employer would not take any *lawful* adverse action against an employee without there be a prior warning. Those potential jurors usually also believe that if there were prior warnings, they would be documented in the personnel file. Here are some tips for *fair* documentation:

- When you document performance or behavioral issues, cite specifics. Do not use generalized or conclusory words like "bad attitude." Instead, write out the actual acts that merited the discipline.
- Make sure employees know what is in their files. California employees have the right to inspect their personnel files. Ask workers to initial a summary of your discussions and the goals that have been agreed to every time.
- Avoid absolutes. Never say "never" or 'always" with employees. If, by example, a supervisor wishes to say " Sue always misses deadlines" in documentation (or verbally), the employee's lawyer need only show one instance in which Sue made a deadline for the supervisor's whole document or testimony to become untrustworthy.
- Have absolute reasons for any discharge, including violence or theft. If there are acts that will only be subject to termination, and no other form of discipline, such as violence or theft, then do not draft policies stating that such acts may be "subject to discipline up to and including termination." That would suggest that sometimes an employer finds these acts acceptable.
- Do not list all the little things an employee has done wrong in a discipline or discharge report. It will only make the employer look petty. Instead, put three or four examples to show a pattern of problematic behavior.

If the disciplinary process is perceived as fair, an employer will have an advantage going into any adversarial proceedings. The human factor of *fairness* should be considered in discipline and termination processes, and can best be addressed by the following recommendations:

- Consider using progressive discipline. Handling problem employees through a process, instead of just cutting them lose, as employers are legally entitled to do, may lead to a cleaner separation.
- Make sure employees understand all performance standards. If they don't fully understand their

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Here is one accommodation scenario offered by JAN to show how to match job description requirements with disability limitations.

Scenario: Diabetic Programmer

An applicant is interviewing for a Computer Programmer position. Although disclosure wasn't required, because of questions about a particular job requirement for which she may need an accommodation, the applicant tells the employer she has diabetes.

- *Job task from job description:* "Responsibilities occasionally may require an adjusted work schedule, overtime, and evening/weekend hours in order to meet deadlines or to access the computer to perform program tests."
- *Limitation revealed by applicant:* Needs to eat at specific time each day. May need to test blood sugar and take insulin while at work. Prospective employee is happy to work an adjusted schedule or extra hours provided that she can take the steps necessary to regulate her diabetes.
- *Accommodation solution:* Employer accommodates the employee by allowing her to adjust her lunch hour to 11 a.m.-12 p.m. rather than the typical 12-1 p.m. and permits flexible break times. The employee is also allowed to bring a small refrigerator to store food and medication in her office. When working evening hours, the employee may set her own dinner breaks as needed to cope with her diabetic need

Both the employer and the employee have obligations to engage in an "interactive process" to explore what measures might reasonably accommodate the employee's disability. Courts have noted that failure to engage in the interactive process at all may be prima facie evidence that the employer violated the ADA. In short, if you're an employer, engage in the process in good faith. California's disability laws are intended to provide persons with disabilities the opportunity for employment. Protection under California's Fair Employment and Housing Act (FEHA) is far broader than provided by the federal Americans with Disabilities Act (ADA).

JAN can be accessed by phone at 800-526-7234 (TTY 877-781-9403) or via its website, http://askjan.org/.

PRACTICE TIPS FOR EMPLOYERS:

1. Employers must provide reasonable accommodation for those employee and applicants who, because of their disability, are unable to perform the essential function of their job;
2. Employers must engage in a timely, good faith interactive process with employees or applicants in need of reasonable accommodation.

An employer's obligation arises when it receives notice that an employee suffers from a disability that impairs job performance. If you would like a form you can give to employees that are seeking a reasonable accommodation, to start the interactive process please contact Ms. Koumas at ejk@koumaslaw.com.

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obligations and how their work is being judged, the performance appraisal system will be of little use and not necessarily perceived as reasonable or fair.

- Discharge problem employees in the initial 90 days of employment. If warning signs are exhibited during the initial introductory period of work, do not ignore them. Waiting can build an employee's "sense of entitlement" or false sense of security they are performing satisfactorily. Ask coworkers for feedback about new hires 10 days before the common 90-day probationary period ends, and take action promptly if needed.
- Properly manage marginal performers. Don't give raises to marginal employees. Some employers give poor performers a raise in the hope it will motivate them to improve. Without counseling an employee about his or her inadequate performance, however, this strategy is doomed to fail. What's more, if the employee is terminated and sues, the person can point to the history of pay raises to show that he or she was doing a good job. Don't let marginal performers slide. When an employee's actions go uncriticized for several weeks or months, negative comments in a performance evaluation lose credibility and are likely to trigger complaints of unfairness or bias.
- Have the same person who hired, fire. This can prevent charges of discrimination in firing. Although it is the "same actor," the rationale is basic: If the supervisor showed no bias in hiring the employee, it is unlikely that the same supervisor suddenly developed a bias that motivated the termination.

Ms. Koumas conducts "Effective Performance Evaluations and Discipline" training. If you would like more information about properly documenting performance or are interested in scheduling a training session process please contact Ms. Koumas at ejk@koumaslaw.com or (619)398-8301.

EMPLOYMENT LAW COMPLIANCE AND RISK REDUCTION SERVICES

Annual Audit of Employee Handbook

"When was the last time an audit was conducted of your written policies, to ensure compliance with current labor laws?"

It is critical to the success of any business operations to learn how to protect your company's interests while conveying your employees' rights and obligations in a handbook. Periodic review of your policies and practices will help ensure compliance with the ever changing labor laws. By way of example only, if you are a covered employer, do your leaves of absence policies contain the new protections for leave relating to active duty reservists (enacted in October 2008), or to care for injured military personnel (effective January 2009)? To prevent your written policies from being used against you, including but not limited to, your leave of absence policy being silent on how long the company will continue to pay for its portion of health insurance premiums where you are not otherwise obligated to provide them, schedule an audit of your employee handbook immediately.

Sexual Harassment Training Workshops

"When was the last time you provided training to your employees and supervisors to prevent sexual harassment in the workplace?"

Whether you are an organization with 50 or more employees, (or one who regularly receives services from 50 or more persons), *required* by California law to conduct supervisor training every other year since January, 2005, or a smaller business equally interested in preventing workplace harassment, in order to demonstrate that you exercise reasonable diligence to establish a work place that is harassment free, schedule your 2010 Sexual Harassment Prevention Training workshop. This can be an important factor if a court needs to decide whether or not there is employer liability for the conduct of one of its employees.

- Staff Workshops are intended to inform employees what harassment is (and is not), your company's specific policy, and the reporting procedures in place to protect the employee's rights.
- Supervisor Workshops are intended to ensure that your managers not only understand the law and the possibility of personal exposure for their own actions, but also their role and duties in preventing harassment; as well as understanding the proper procedures to follow should a complaint be received from an employee. Since January 2005, Assembly Bill 1825 requires all supervisors to be provided with at least two (2) hours of training relating to sexual harassment. All new supervisors (hired or promoted) must receive training within 6 months of obtaining the position. The training must be repeated every 2 years.

Please contact Elizabeth J. Koumas at (619) 398-8301 or ejk@koumaslaw.com for more information about how to obtain for a **flat rate fee agreement** for either of these services.

FUTURE SEMINAR

Topic: The Dance: The Overlap Between FMLA, ADA and Workers' Compensation Leave Laws

Handling employee requests for time off as a result of illness or injury is one of the most challenging and frustrating duties of a human resource employee's job. The difficulty arises from having to consider the complicated state and federal laws governing family leaves of absence, workers' compensation, and disability discrimination that may come into play. For example, some serious health conditions, including those which are work-related, may also fit the definition of a disability under state and federal discrimination laws. A work-related injury is covered by workers' comp, but if it qualifies as a "serious health condition" family medical laws kick in as well.

Date: Thursday July 15, 2010 **Time:** 11:30am-1:30pm (light food)
Location: 110 West C Street (The Chamber Building)
Cost: $ 45
RSVP by July 13th. *Registration and Credit Card Forms on firm website.*
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