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## The Interactive Process Promotes ROI

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by Karen L. Brajenovich

Use of the Interactive Process with qualified disabled employees is mandated by state law under California's Fair Employment and Housing Act (FEHA) for any employer with five or more employees. Per the Department of Fair Employment and Housing (DFEH), FEHA's mandate is farther reaching than Federal American's with Disabilities Act (ADA) law. On the flip side, Worker's Compensation rules and regulations do not require any such intervention. However, good communication is at the heart of both the Interactive Process, which is a cornerstone of any company's disability management program, and worker's compensation savings.

Using the Interactive Process toward the goal of early return to work following work injury is proven to save a company money in both soft and hard costs. Early engagement in the Interactive Process helps to save people's jobs, increase productivity and keep companies out of court, thus making it a great business practice. The time and money spent on the Interactive Process is sure to provide return on the employer's investment because of everything that doesn't happen... no loss of employee, less increased insurance premiums and no legal entanglements.

The Interactive Process is an ongoing communication between the employer and employee or job applicant with a known

occupational or non-occupational disability in an effort to provide reasonable job accommodation. It is unlawful and supported by case law for employers to fail to engage in a timely, good faith interactive process, whether or not it would have resulted in the employer's obligation to provide a reasonable job accommodation. In other words, an employer cannot make any assumptions or decisions without input from the employee or job applicant. Further, employers can't place the person in just any old job, i.e., screw prep; it has to be meaningful work. The decision must be a joint effort. Both State and Federal laws mandate an employer provide reasonable accommodation for qualified individuals, who because of the effects of their disability are unable to perform the essential functions of their job. FEHA does not require a job to be created, an employer to endure undue hardship, nor the creation of a direct threat on safety for the employee or their co-workers.

In the case of a work related accident or illness resulting in temporary or permanent disability, the employer is automatically placed on notice of the need to consider the interactive process under FEHA. While not all injured employees have a qualified disability, those that do, most always fall under FEHA requirements. Oddly enough, failure to engage in a timely conversation is of no legal consequence under Worker's Compensation,



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and accommodating the employee in modified or alternate work is not required under State law. However, the rub comes in not getting the employee back to work as quickly as possible, because excess money is then paid to the employee in temporary and permanent disability benefits. The employer reaps zero benefit from disability dollars spent for an employee to stay home. Further, the company's worker's comp experience modification and premiums increase for every dollar spent on worker's compensation claim costs. Lastly, its documented that a good majority of the cases of some FEHA lawyers come from worker's compensation attorney referrals.

It's a no brainer that employers should be chomping at the bit to bring employees in to talk as soon as possible. If the employee refuses to speak with the employer, document the attempted invitation, hold the meeting, and send the employee and their doctor the minutes, so as to start any flow of conversation. The key is to have an open and sincere line of communication between the worker, their physician, the comp carrier and the employer. While larger employers may have a dedicated professional to fill this function, smaller companies may not, and are advised to aggressively keep open the chat lines or contract out the service.

The importance of good communication cannot be over emphasized. Employers are faced with the legal and financially motivated task of identifying the essential functions of the work they provide through job description and job analysis. Ideally an employer will already have a good set of job descriptions in place before injury happens. If not, one should

be drafted jointly between the employee and employer soon after a disabling injury occurs. Identifying whether the employer or insurer will provide the document to the doctor needs to be established.

The employee's physician then must decide and report back to the employer and insurer if the employee can or cannot perform the essential functions of a temporary duty assignment, their regular job, a modified version of their regular job, or an alternate position. In the catcher-pitcher framework, at either end of the spectrum, communication can break down or get stuck. Either the employer or the physician can have difficulty deciphering what the other is trying to say, and two way clarification is critical. Doctors talk about restrictions, and employers want to know about work abilities. How to get from point A to point B can be tricky, and there's plenty of room for information to get lost in translation. The gap can result in a delay of the employee coming back to work, re-injury or no return at all.

Complicating the process is there are numerous ways in which a job can be reasonably accommodated between tools, equipment, hours, functions, leaves, relocation, etc. Once a game plan is established and any modifications are in place, the employee returns to work and communicates back to the employer if they can do the job. Having a system in place that does not get stuck on a supervisor's desk or result in issues with co-workers is critical. The interactive process is not a one shot deal, and back and forth communication continues over the period of time needed, until the employee is permanently placed and fully



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accommodated, or the treating physician determines they cannot return with the employer in any capacity.

Costs of not implementing the Interactive Process are significant, and can range from lost dollars spent in disability benefits and protracted medical treatment, on up to millions spent in defending a FEHA or ADA lawsuit. The expense starts the moment the worker cannot do their job following a disability. An employer only makes money on their investment if the employee is at work, and productively performing their job. If injured workers are not on the job, the employer ultimately spends more money in worker's compensation premiums, and the employee's financial and family lives are disrupted. That's a lose-lose.

While it costs in time and money to set up a disability management system that creates an interactive process communication chain, it saves money in the long run. By having an established protocol that is systematically followed in each and every case to bring the employee back to work as soon as possible, there is less duplication of effort. It can have a positive effect on productivity and morale. When all workers recognize what is expected from all parties, they better understand their roles and responsibilities to each other. Workers and supervisors move quicker to respond. It transforms an environment of apathy into one of empathy, empowerment and action.

If disability is treated in a systematic and uniform fashion, an employer is less likely to be accused of non-communication, non-accommodation, discrimination, harassment or

retaliation. These issues tend to be flushed out when employers and employees are openly talking with each other, and concerns are culled before they fester. Once in the open, problems can be dealt with. What an employer does not know, can hurt them in legal expense. It's better and more comfortable to voluntarily talk to eliminate problems before they start. than to be forced by an attorney or judge to talk, after a problem was ignored and got out of hand.

Having the communication process in place translates to employees (and a jury) that an employer cares, and is responsibly trying to do the right thing. It helps to keep people working. Failure in any system can only assuredly be marked by lack of implementation, and even if implemented. it's not fail safe. Ignorance is not a defense, but affirmative action is. The employer creates a built-in legal affirmative defense every time they have a documented results oriented interactive conversation with their disabled employees. They limit claims and risk exposure to liability. With active focus on bringing disabled workers back to meaningful work as soon as possible, both employers and employees win... and that makes for good business!

***Karen Brajenovich is the Owner of K. L. Brajenovich Consulting and contracts with employers as a Disability Management Consultant, Interactive Process Facilitator and Workplace Mediator. Reproductions of this article are granted with permission.***