

# Hold My Job, I'll Be Right Back . . .

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*By Karen L. Gabler, Esq.*

In today's stressful economic environment, employers find themselves faced with more employee illnesses, injuries and workplace stress claims. For example, California's increasingly burdensome employment laws can hamper the employer's ability to maintain a productive workforce with absentee employees, and mishandling a disability situation can lead to extraordinary liability for discrimination and failure to accommodate claims. When an employee becomes disabled, there are several key steps to be taken by the employer:

## 1. Obtain a medical certification.

An employer should never make assumptions about what an employee can or cannot do. Before taking any action or making any representations, ask the employee to get a note from the doctor, stating the general nature of the disability, the anticipated duration of the disability and any restrictions on the employee's ability to perform the job. Always follow the doctor's instructions. If the employee wants to deviate from that directive, ask the employee to obtain an updated medical certification before making any modifications.

## 2. Engage in an interactive discussion with the employee.

Talk directly with the employee about the disability, any workplace restrictions, whether the employee can do all or any portion of the job, and what accommodations might be necessary to allow the employee to do so. Ask the employee for input about what he thinks he can do. Carefully document the interactive process (including your attempts to have an interactive discussion with the employee, if the employee is uncooperative), and confirm the outcome in writing to the employee.

## 3. Consider reasonable accommodations that will not cause undue hardship.

Employers must make any available

reasonable accommodations to permit the disabled employee to continue working. This may include modifying the work space, obtaining additional or different equipment, altering the employee's schedule and providing a leave of absence. Ask the management team if they have any projects (even short-term) that the disabled employee can do within his restrictions. Employers are free to reject accommodations that cause "undue hardship" for the employer, defined as something more than mere hassle, loss of morale or unexpected cost. Carefully document all accommodations considered and the basis for rejecting any accommodation.

## 4. Consider applicable leaves of absence.

Employers must be aware of available leaves of absence and proactively offer them to the disabled employee, rather than waiting for the employee to request a particular leave. Consider first whether there is a statutory leave of absence available to the employee. These statutory

leaves might include Family Medical Leave/California Family Rights leave (twelve weeks), pregnancy disability leave (four months), or workers' compensation leave (indefinite), among others. If no statutory leave applies, or if the leave period has been exhausted, go back to steps two and three above.

## 5. Address insurance continuation requirements.

If the employee is on a medical plan, continue participation on the plan and the employer's payment of its usual portion of the premiums for the required time period (which can be up to 12-16 weeks depending on the leave and workplace circumstances). Keep the absent employee on the group health plan instead of COBRA, as long as the plan will permit it and the employee pays his required premiums.

*Note: Employers would be well-advised to seek legal counsel in most disability situations, as there are numerous pitfalls in the process and significant opportunities for costly employee complaints. Employers should consult their local employment counsel for disability accommodation requirements specific to their state.*



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