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Brass Tacks: Reasonable Accommodation

presented by

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The Disability Laws

- Employment Related
 - Americans with Disabilities Act (“ADA”)
 - California Fair Employment and Housing Act (“FEHA”)
 - California Pregnancy Disability Leave (“PDL”)
- Prohibit discrimination on basis of physical or mental disability
- Require reasonable accommodation for a qualified individual with a disability

The Statistics

- Over 1/3 of EEOC Charges in CA = disability discrimination
 - Second only to retaliation
- 17 Protected classes under FEHA
- According to a DOL study, 57% of accommodations cost nothing and the remainder cost approximately \$500

What does this mean: This is an important subject and solutions are available.

Who is Protected?

- Every employee from first day of employment
 - Not immutable characteristic
 - No length-of-service requirement
 - No minimum-facility-size requirement
- Employee can become “disabled” at any time

What is a “Disability”?

- **Federal:** Physical or mental impairment that “substantially limits” a major life activity
- **State:** Physical or mental impairment that “limits” a major life activity

What is a “Disability”? (cont’d.)

Physical and mental disabilities can affect life activities:

- Walking
- Speaking
- Breathing
- Hearing
- Seeing
- Thinking
- Sitting
- Standing
- Reaching
- Interacting with Others
- Communicating
- Learning
- Performing Manual Tasks
- Bending
- Caring for Oneself
- Concentrating
- Lifting
- Sleeping
- Working
- Reproduction
- Sexual Functions
- Eating
- Controlling Bowels
- Reading
- Running

What is NOT a Disability?

- Voyeurism
- Exhibitionism
- Pedophilia
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders that result from current illegal drug use

What is a “Reasonable Accommodation”?

Current Job: enables employee to perform
“essential functions”

- Job restructuring – reassign “marginal tasks”
- Facility modification or work station relocation
- Modified/reduced work schedule
- Modification of a workplace policy
- Equipment or other devices
- Assistive aids (e.g. qualified readers or interpreters)
- Assistive animals
- Change to supervisory methods (e.g. dividing complex tasks into smaller parts)
- Telecommuting

What is NOT a Reasonable Accommodation?

- Need not be the employee's desired accommodation
- Promotion
- A position not minimally qualified for
- Lower quantity or quality standards
- Provision of personal items (e.g. glasses or hearing aids)
- Indefinite or open-ended leave

What is a “Reasonable Accommodation”?

(cont'd)

- **Leave of Absence**

- A form of reasonable accommodation
 - Time off for treatment and recovery
 - Return to work in foreseeable future...AND
 - Perform essential functions of the job (with or without accommodation)

- **Reassignment**

- Last step in the process
- Vacant position
- Minimum qualifications

Pregnancy Disability and Accommodation

- Duty to reasonably accommodate during pregnancy
- Employee's health care provider determines need
- Same interactive process as ADA/FEHA
- “Unique” disability, as time-limited
 - make every effort to accommodate
 - leave is only one type of accommodation
 - temporary modified duty in current job or temporary transfer

What is an “Essential Function”?

- Essential = reason job exists; specialized function
- Essential = limited number of employees can do
- Marginal = task that is easily reassigned to others

Attendance – Essential Function of the Job?

- “An employee who does not come to work cannot perform any of his job functions, essential or otherwise.” 9th Circuit
- Attendance at work on a predictable basis is an essential function of most jobs
- Physical presence essential to perform duties
- Example: Tour Guide can’t telecommunicate

REASONABLE ACCOMMODATION AND THE INTERACTIVE PROCESS

What Triggers the Duty to Reasonably Accommodate?

- Employee statement or request
 - No magic language or legal terms required
 - Need not be in writing or on a particular form
- Notice from others
- Observation

Remember: Your knowledge = the company's knowledge

The “Interactive Process”

- Independent legal duty in CA to engage
- Constructive dialogue with the employee
 - Identify functional limitations
 - Review job description
 - What able to do
 - What tasks create difficulty
 - Explore options – employee’s ideas/employer’s ideas

The “Interactive Process”

- Can require medical substantiation of need
- Consider feasibility and effectiveness – try it!
- Document discussions and efforts
- Get back to the employee
- Repeat...repeat...repeat

Reassignment as a Possible Accommodation

- Placement in an alternative open position if:
 - no effective accommodations in the employee's current job
 - Employee is minimally qualified for the position based on training, education or experience
 - Employee is able to perform essential functions (with or without accommodation)
- May reassign to a lower grade, lower paying position
 - where accommodation of current position poses an undue hardship, and
 - there is no funded, vacant, comparable position available

Reassignment as a Possible Accommodation

(cont'd)

Important reminders: A reassignment does not require any of the following:

- Creation of a new position
- Replacement of an incumbent
- Removal of essential job functions
- Higher compensation than an alternative job pays

Performance Considerations

- Uniform production standards (quantitative or qualitative)
- No need to lower production standards
- Reasonable accommodation to assist in meeting standard
- Uniform approach to evaluating employee performance

Performance Considerations (cont'd)

- When an employee gives notice of a need for an accommodation only after a performance problem has arisen, reasonable accommodation does not require that the employer:
 - Withhold disciplinary action (including termination) warranted by the performance
 - Raise the performance rating
 - Tolerate or excuse the poor performance
 - Give an evaluation that does not reflect the employee's actual performance

Interactive Process – Important Reminders

- Refrain from speculating – ask simply “what do you need?”
- Limit medical inquiry to job-related information
- Not entitled to know diagnosis in CA absent employee consent
- Do not ask for genetic information (GINA and Cal-GINA)
- Shield managers and supervisors from medical information
 - can discuss limitations
 - can discuss needs
 - can discuss strategies to accommodate needs and limitations
- Protect employee’s privacy

COMMON MISTAKES AND CAVEATS

10 Common Mistakes of Employers

1. Only engaging in reasonable accommodation process if employee formally initiates it
2. Having front-line supervisors obtain medical information
3. Focusing on disability and not essential job functions
4. Failing to use job description when evaluating essential functions
5. Dismissing unreasonable requests without exploring more reasonable ones
6. Assuming that burden is on employee and/or doctor to identify and not evaluating independently other alternatives

10 Common Mistakes of Employers (cont'd.)

7. Failing to consider other accommodation decisions in similar situations
8. Eliminating essential functions temporarily without preserving legal position
9. Failing to understand potential right of employee to leave of absence under not only ADA/FEHA but also FMLA/CFRA
10. Sharing medical information beyond need to know, narrowly defined

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Thank you!



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HOT TOPICS IN ACCESSIBILITY LAW

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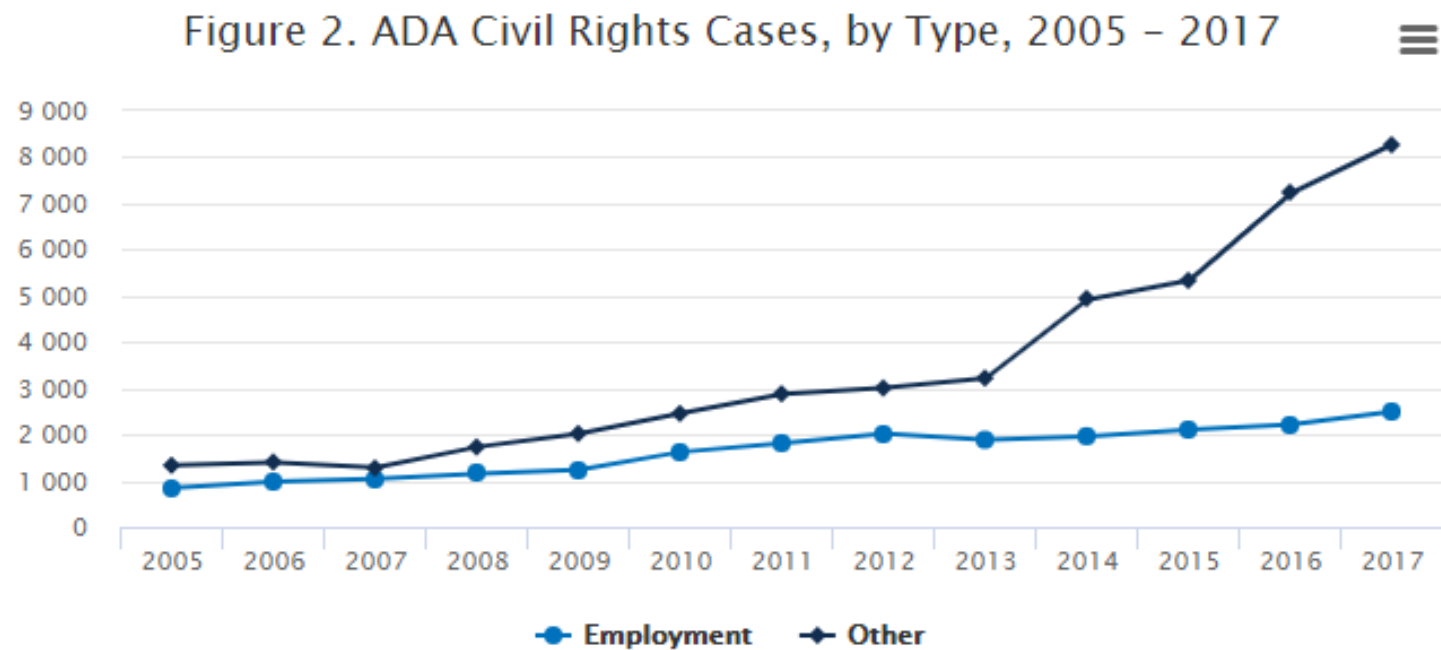
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Accessibility Requirements -- Enforcement

- Private Federal Lawsuits:
 - ADA/Section 504 of Rehabilitation Act
 - In 2017:
 - 10,773 ADA cases (27% of civil rights cases)
 - ADA cases increased 395% since 2005
 - Other civil rights cases decreased by 12%*

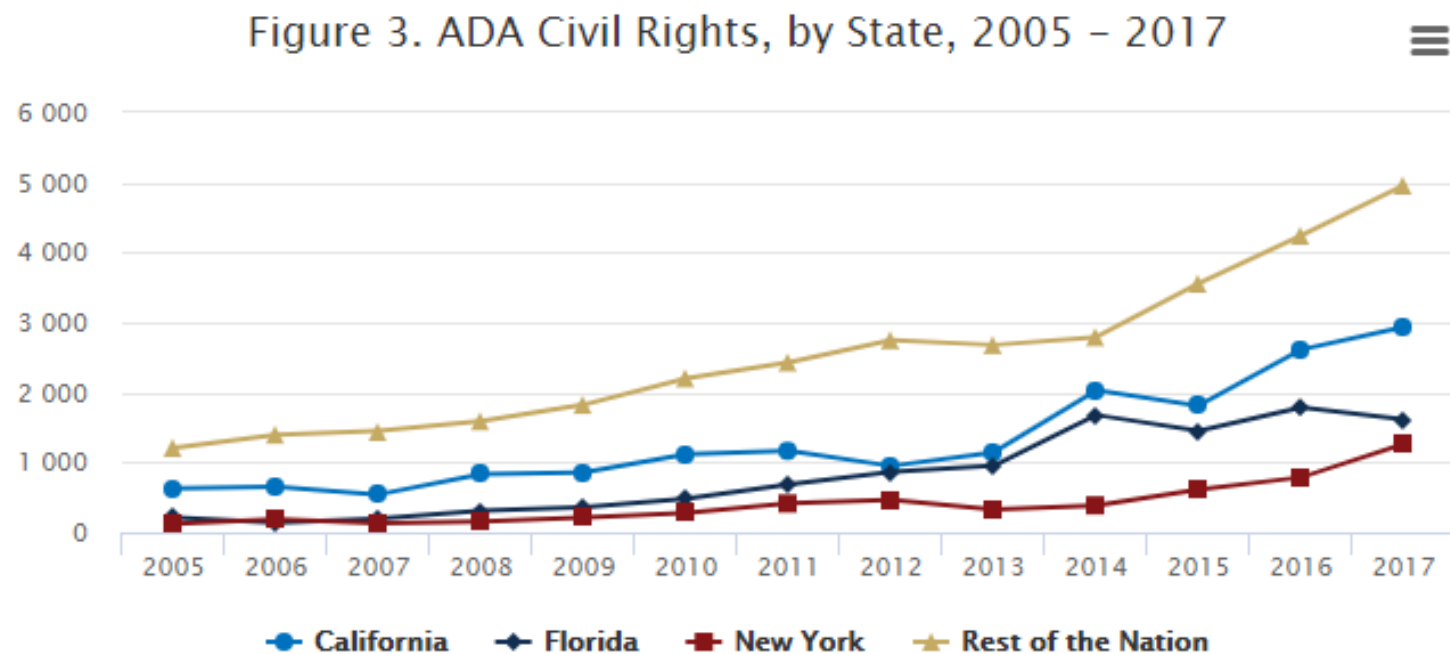
*<http://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act>

Figure 2



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017.

Figure 3



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017, Aggregated by State.

Additional State Remedies

- Private California Lawsuits:
 - California Disabled Persons Act
 - California Fair Employment and Housing Act
 - California Unruh Civil Rights Act
 - Remedies include:
 - Minimum fine of \$4000/violation
 - Attorneys' fees
 - Punitive damages
 - Injunctive relief

Let's Dive in to ...



- Website Accessibility
- Service Animals vs. Emotional Support Animals

Website Accessibility

- No Brightline Standard (yet)
 - W3C's WCAG
 - 2.0 or 2.1?
 - A? AA? AAA?
 - WCAG 2.1 AA held to be a good standard
 - See Payan v. Los Angeles Comm. Coll. Dist., 2:17-cv-1697, 2019 WL 3298777 (C.D. Cal. July 22, 2019)
- More accessible, the more defensible

General Areas of Compliance

- Perceivable
 - Text alternative, captions
 - Operable
 - Keyboard, timing, navigation
 - Understandable
 - Readable, predictable
 - Robust
 - Compatible with user tools
- <https://www.w3.org/WAI/WCAG21/quickref/>

Website Accessibility

- Internal Compliance Process Guidelines:
 - Website Accessibility Coordinator
 - Periodic reviews by tech staff or outside vendor
 - Webpage with information on how to make a complaint or request further accommodation
 - Contract with outside vendors to be compliant

Service Animals



Service Animal Defined

- Service Animals are “dogs that are individually trained to do work or perform tasks for people with disabilities”
 - Examples of tasks include:
 - Guiding person with visual impairment
 - Warning of allergens
 - Opening doors, reaching items, making beds, etc.

WHAT??! Just dogs??

- YES! 😊
 - Only **DOGS** qualify as service animals



One small caveat – miniature horses



How to identify a service dog

- Can only ask two questions:
 - Is the dog a service animal required because of a disability?

AND

- What work or task has the dog been trained to perform?

How **NOT** to identify a service dog

- There is no official registry
- There is no official certification
- There is no official identification card



(\$16.99)



(\$19.95)



(\$10.00)

Are there limits?

- Can request to remove service animal if:
 - The dog is out of control and handler does not take effective action to control it;
 - OR
 - The dog is not housebroken
- The person must still be afforded the opportunity to participate without the dog.

Emotional Support Animals (“ESA”)

- Defined as an animal whose presence alone is therapeutic



Things to do if you **want to get sued**

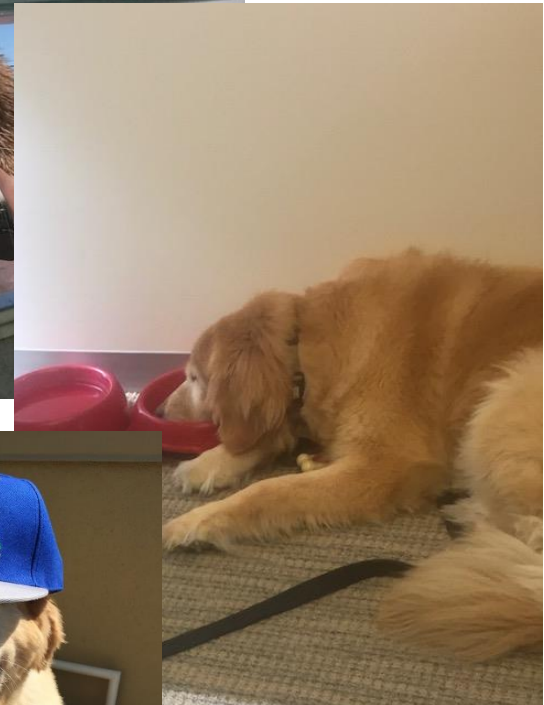
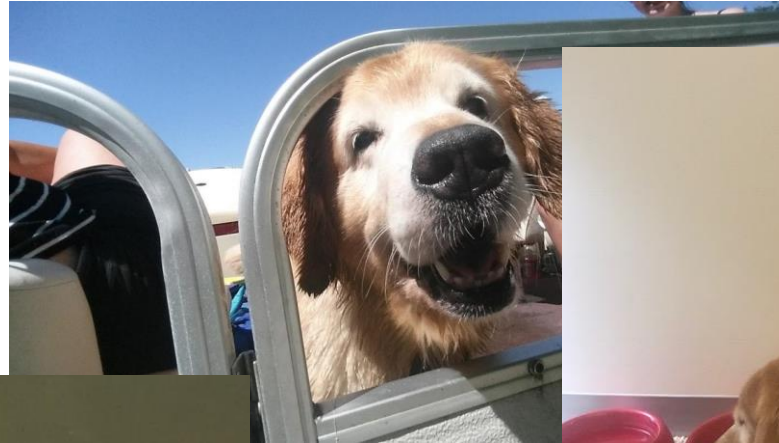
- Charge a cleaning fee not imposed upon others
 - Unless the dog causes damage
- Segregate people with disabilities
- Allergies or fears are not reasons to exclude

Concluding Thoughts

Tips for Interacting with Service Dogs/ESAs

- **DO:**
 - Interact with the person, not the animal
 - Use person-first language
- **DO NOT:**
 - Pet, speak to, or otherwise distract the service dog/ESA
 - Could endanger safety of person and/or animal
 - Assume the person wants to hear about your pet

To quote my father-in-law's favorite joke,
service dogs don't always have a "ruff" life. 😊



Thank you for attending!

Any Questions?

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