

The FEHA/ADA Interactive Process

California’s Fair Employment and Housing Act (FEHA) and the federal Americans with Disabilities Act (ADA) require employers to engage in an Interactive Process with their disabled employees and job applicants as part of the employment or re-employment process. An employer’s failure to engage in this process may be considered a “per se” violation of these Acts which could subject the employer to very expensive legal proceedings and judgments. The following is a brief summary of the Interactive Process:

Step 1	Invite the employee to participate in assessing return-to-work options and alternatives	<p>The CA Dept. of Fair Employment & Housing (DFEH) expects employers to make up to three attempts, if needed, to contact the employee regarding participation in the interactive meeting. At least one of the attempts must be in writing and all three must be documented.</p> <p>Who participates in the IAP meeting? At minimum, it must be the disabled employee and a management person with the authority to commit to accommodations. Additional individuals may be included, as needed, keeping in mind that the employee is entitled to medical confidentiality.</p>
Step 2	Obtain current work restrictions	<p>For industrial injuries, you would obtain work restrictions from your workers’ compensation claims administrator. For non-industrial disability, the employee should have his/her physician provide work restrictions. If the employee fails to provide usable work restrictions, the employer may schedule a medical evaluation at its own expense.</p>
Step 3	Identify the essential functions of the job	<p>The employer must attempt to accommodate the employee in the essential functions that exceed his/her work restrictions. The employer should therefore have a current job description that appropriately identifies work functions as essential or marginal.</p>
Step 4	Identify barriers to employment or re-employment	<p>Only those essential functions that exceed work restrictions are at issue; the employer does not need to consider accommodations for functions the employee can perform. Note that the employer must either eliminate or trade marginal functions (although it can provide accommodations for marginal functions if it so chooses). The functions that represent barriers to employment/re-employment should be listed along with the specific problems.</p>
Step 5	Identify possible accommodations	<p>Identify and list specific accommodations, including their expected cost and availability, for each problem essential function. Note that there will often be multiple <u>possible</u> accommodations for a particular essential function – all should be listed. The employer should be certain to use available resources to identify possible accommodations including (for example) the local Dept. of Rehabilitation and/or the Job Accommodation Network (you can find JAN on the web at http://www.jan.wvu.edu).</p>

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Step 6	Select accommodations that are reasonable and effective	Accommodations cannot be prohibitively expensive, cannot substantially interfere with general work processes, and cannot present a danger to the employee, co-workers, or members of the public. Note that cost is rarely a defense since most accommodations are either free or cost just a few hundred dollars. Accommodations must also work – it is usually advisable to provide the accommodation(s) preferred by the employee as such accommodations are most likely to be effective.
Step 7	Obtain and implement the agreed accommodations	Once the parties have agreed on the appropriate accommodations, the employer should immediately make the necessary changes and/or order any equipment necessary. Should any items be back-ordered, the employee must be kept apprised of anticipated delivery dates. The agreed accommodations should be noted in the employee’s personnel records.
Step 8	If job modification is not possible, identify possible alternative work assignments	<p>The interactive process sometimes results in a conclusion that job modification simply is not possible and/or safe. If so, the employer and employee should then review other open positions for which the <u>employee is qualified</u>. If there is an open position of <u>equal or lower status for which the employee is qualified</u> and the employee wants the position, he or she must be offered that position without competition.* In other words, if the employee wants the job and they meet minimum qualifications, they get the job even if the employer was about to offer the job to another person. The job offer for the alternative position must be appropriately documented.</p> <p>* There is an exception for union shops where the CBA provides that members bid for any open positions covered by the bargaining agreement. In that case, the open position would go to the union member with seniority, irrespective of disability.</p>
Step 9	If no alternative assignments are available, review/repeat the process	If the interactive process results in a determination that job modification is not feasible and there are no open positions with the employer for which the employee is qualified, the employer should carefully review Steps 2-8 to insure all possible options have been considered.
Step 10	Terminate the employee*	If the attempt at job modification and reassignment fails and the process has been properly documented, the employer should be able to terminate the employment relationship. However, errors in this process can be extremely expensive with legal fees and judgments running into hundreds of thousands, even millions of dollars. The employer may want to consider getting a legal opinion from a legal specialist prior to the actual termination.