

# Notes

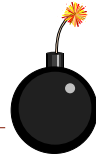
## SCHOOL TRANSPORTATION LEGAL UPDATE



CASTO 2008  
South Lake Tahoe

Presented By:  
Peter C. Flanderka, Esq.  
Bononi Law Group

*Acronyms You  
Gotta Know . . .*



NHTSA  
NTMVSA  
FMVSS  
ESQ.

\$\$\$

**CYA**



*Boarding The Bus . . .*

- ❑ **OMG R U INSULATED ?**
- ❑ **Great Belt Debate Continues**
- ❑ **Sign(s) of the Times (Prop. 65)**
- ❑ **Cases Worth Comment.**
- ❑ **AB 2222 – Ultimate Employment Law Pothole.**
- ❑ **Reasonable Accommodation 101.**



*Along for the ride . . .*

- ❑ **Cell Phones and School Buses . . .  
Lessons from 9/12 and the Metrolink  
Nightmare !!!**

# Notes



*Along for the ride . . .*

- **Seat Belts on School Buses ?**  
Same Old Story



*Along for the ride . . .*

- **Prop. 65 Litigation . . . What's to be Learned From Laidlaw's Big Payout ?**



*Along for the ride . . .*

- **Worth Mentioning . . .**

*How To Make An Employment  
Law Time Bomb . . .*



□ **Explosive Ingredients:**

- Employee off work with injury or illness that may trigger several state/federal statutes.
- Employee may already have an attorney.
- That attorney probably looking for new ways to make \$\$\$.
- State law that makes it easier for that attorney to make more \$\$\$.

# Notes

AB 2222:

*A Tickin' Time Bomb*



- ❑ Send your cards and letters to “Zelda.”
- ❑ “Prudence K. Poppink Act.”
- ❑ Government Code Section 12926.1.

AB 2222:

*A Tickin' Time Bomb*



- ❑ Redefines mental and physical disability under FEHA and Unruh Civil Rights Act.
- ❑ No longer required to show “substantial” limitation of major life activity to establish disability. Now only required to show “**limitation**” on major life activity.
- ❑ “Limits” if makes achievement of major life activity merely “**difficult.**”

AB 2222:

*A Tickin' Time Bomb*



- ❑ Broadly construes “major life activity”:
  - physical activities;
  - mental activities;
  - **social activities.**

AB 2222:

*A Tickin' Time Bomb*



- ❑ Working is major life activity even if working limitation implicates only a **particular job**, not a class or broad range of employment.
- ❑ Counter to state and federal cases.

# Notes

AB 2222:

*A Tickin' Time Bomb*



- ❑ Mitigating measures no longer a factor.
- ❑ Repudiates U.S. Supreme Court rulings:
  - Sutton v. UA; Murphy v. UPS.
- ❑ Now, consider limitation of major life activity without respect to mitigating measures:
  - Medications, prosthetics, assistive devices.

AB 2222:

*A Tickin' Time Bomb*



- ❑ Creates category of “per se” disabilities:
  - HIV/AIDS;
  - hepatitis;
  - epilepsy;
  - seizure disorder;
  - diabetes;
  - multiple sclerosis;

AB 2222:

*A Tickin' Time Bomb*



- heart disease;
- clinical depression;
- bipolar disorder;
- mental retardation;
- organic brain syndrome;
- learning disabilities;
- any condition requiring “special education or related services.”

AB 2222:

*A Tickin' Time Bomb*



- ❑ Expands scope of liability from federal law.
- ❑ May be liable under FEHA even if ultimate determination is that no reasonable accommodation existed.
- ❑ **Failure to engage employee in timely, good faith interactive process to determine effective reasonable accommodation now separate cause of action under FEHA.**

# Notes

## Practical Implications Of AB 2222 . . .



- First, and most importantly, there will be more disability discrimination lawsuits!!!
  - Easier for employees to fall within FEHA disability discrimination prohibitions.
  - More employer “traps” under FEHA.
  - New “interactive process” cause of action attractive to plaintiff attorneys.
  - AB 2222 is still getting plenty of press.

## Practical Implications Of AB 2222 . . .



- More of these lawsuits will be in state court.
  - Less advantageous jury pool.
  - State court judges not as well-versed in law.
  - Plaintiff’s attorneys prefer state court.
  - No damages cap under FEHA.

## Practical Implications Of AB 2222 . . .



- Requires heightened awareness of new law and its ramifications.
- Requires informed interaction between risk management and human resources.
- Return to work decisions more critical than ever.
- Most certainly impacts handling of employees who may fall within new law.

## Practical Implications Of AB 2222 . . .



- Requires employers to implement and/or fine tune reasonable accommodation protocol consistent with new law.

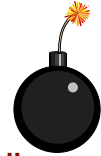
# Notes

## Interactive Process . . .



- ❑ First, develop “interactive process” state of mind.
- ❑ Be proactive.
- ❑ Try to engage employee in person.
- ❑ Err on side of being “too interactive.”
- ❑ Document, document, document.

## Reasonable Accommodation 101



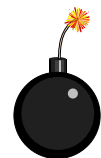
- ❑ **Have protocol . . . Will follow.**
- ❑ **Never assume cannot accommodate.**
  - Even if inability to accommodate is obvious, must go through the analysis in good faith, interactive manner.
- ❑ **Have updated job descriptions in place -- cannot consider accommodation without them.**

## Reasonable Accommodation 101



- ❑ Know three levels of possible accommodation:
  - 1. Modification of job, job environment and/or work schedule (**including extended leave of absence**).
  - 2. Lateral transfer into existing position for which employee is qualified.
  - 3. Transfer to “demoted” position or position of lesser terms/conditions (“last resort accommodation”).

## Reasonable Accommodation 101



- ❑ Remember, never have to create position as accommodation.
- ❑ It's employer's choice. Doesn't have to be most expensive or “best” accommodation or accommodation employee prefers. Only has to be “effective.” (However, employee's preference should be considered.)

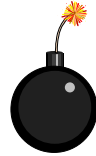
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## Reasonable Accommodation 101



- ❑ Make sure it's an interactive process.
  - Talk to employee and keep employee in loop.
- ❑ Make sure it's thorough and in good faith.
  - Talk to employee's physician, other employers, Job Accommodation Network.
- ❑ Beware "undue hardship" defense.
- ❑ Beware "risk of harm" defense.

## Reasonable Accommodation 101



- ❑ Beware 100% fit for duty requirement.
- ❑ Beware return to work modified/light duty trap.
  - May establish floor for all reasonable accommodations.
- ❑ Document, Document, Document!!!

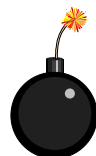
## Reasonable Accommodation 101



Understand "Popeye's Rule" regarding "extended leave of absence" (i.e., when is enough enough?).

- Determined on case-by-case basis (undue hardship).
- Employer never required to provide "open-ended" leave of absence.

## Reasonable Accommodation 101



Is employer required to hold position "open" for employee on extended leave of absence?

- Again, determined on case-by-case basis (undue hardship).
- Does it interfere with employer's ability to effectively conduct business (includes morale issues)?

# Notes

## Reasonable Accommodation Protocol



1. Analyze job and determine EJFs.
2. Engage employee in interactive process:
  - Determine job-related limitations.
  - Determine how accommodation would eliminate/reduce those limitations.
  - Discuss possible accommodations and/or ask employee to suggest possible accommodations.

## Reasonable Accommodation Protocol



3. Assess effectiveness and cost of each possible accommodation.
4. Determine possible undue hardship.
5. If multiple accommodations, ask employee his/her preference.
6. Select accommodation most appropriate for employer and employee.

## Reasonable Accommodation Protocol



7. If cannot accommodate job, go through same analysis/protocol regarding possible lateral transfers.
8. If no lateral transfers available, go through same analysis/protocol regarding possible demoted transfers.
9. Document, document, document.

## Calling In The Bomb Squad



### In Summary . . .

- Know the Laws . . . and know your rights.
- Appreciate Need for Increased Communication.
- Get Up Close and Personal with AB 2222.
- Get up Close and Interactive with Disabled Employees.
- Have Better Than Reasonable Understanding of Reasonable Accommodation.

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