



**THE INTERACTIVE PROCESS:
FROM ACORN TO MIGHTY OAK**

By

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“Seek first to understand, then to be understood.”ⁱ

Stephen R. Covey

Introduction:

The interactive process (IAP) is a phrase or “term of art” that has been in and around the workplace for many years. Over those years, the IAP has been regarded by employers as both a friend and an enemy, depending upon the extent to which the process was sufficiently engaged in by the employer in making certain employment decisions.

The IAP had its origin as a relative “acorn” of a procedure necessary for an employer to engage in to accommodate an employee’s religious beliefs. It evolved into a legal requirement for employers in responding to accommodation requests from their disabled employees. Now, in the knowledge workplace, where acquiring a talented workforce and producing results through it are imperatives for successful businesses, the IAP has grown to become a “mighty oak” of critical importance to enlightened employers.

Understanding what the process is and how it can be used to both reduce legal exposure and increase employee engagement in making a multitude of vital employment-related decisions is critical for employers today. Once understood and well practiced, the IAP clearly becomes much more of a friend than an enemy for employers not only to avoid discrimination claims, but, to boost employee productivity and commitment.

Origins:

Statutory

Statutory protections against religious and disability discrimination are found in both federal and state laws. Federally, Title VII of the 1964 Civil Rights Actⁱⁱ and the Americans With Disabilities Act of 1990 (ADA)ⁱⁱⁱ enacted these protections for employees. In California, these protections are found in the Fair Employment and Housing Act (FEHA)^{iv} of 1959.

Additionally, in California, effective January 1, 2001, amendments made to FEHA broadened the protection available to disabled employees and added a separate cause of action for employees whose employers fail “to engage in the interactive process in good faith”. Specifically, under AB 2222, employers must engage a disabled employee in a timely, interactive discussion of possible accommodations that might permit the disabled employee to remain on the job.

Judicial

In the religious discrimination context, the seminal decision establishing an affirmative duty on the part of the employer to engage in the IAP was *TWA v. Hardison*, 432 U.S.63, (1977). In that landmark case, the U. S. Supreme Court, keying from the Equal Employment Opportunity Commission’s 1967 amendments to its religious discrimination Guidelines^v, held that the

employer did not have to violate the seniority provisions of a collective bargaining agreement in order to meet its duty to reasonably accommodate an employee's religious beliefs.

In effect, the High Court in *Hardison* found that the employer had met both its duties to engage in the IAP and to accommodate an employee's religious beliefs by negotiating and enforcing a seniority system that controlled job assignments and schedules for all its employees.^{vi}

In the disability context, the seminal decision from the U. S. Supreme Court on the subject of an employer's use of the IAP to meet its affirmative duty to attempt to accommodate an employee was: *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In that case, a unanimous Supreme Court found that an obligation of reasonable accommodation exists for a disabled employee under the ADA, where such an accommodation is achievable without an undue financial or administrative burden on the employer. Determinations of what a reasonable accommodation is and what an undue burden is for an employer in a particular situation was declared by the high court to be the main purpose for the employer and disabled employee to engage in the IAP.

Interactive Process Defined:

The IAP is an informal, open discussion between the employer and employee about their respective legitimate needs, in order to ascertain whether or not those needs could be met through mutual accommodation. In other words, the IAP is about a genuine or "good-faith" dialogue between the employer and the employee, during which they share information about each other's legitimate needs and make a real effort to work out a "win-win" solution that will not cause an "undue" hardship on either party.

Primary IAP Applications:

Disability

In the context of accommodating a disability, this mutual discovery process would include, but not be limited to the following:

- ▶ a thorough review of the employee's current job description including the legitimate physical abilities required to perform the major elements of the job;
- ▶ a clear understanding of the employee's physical limitations rendered by a qualified medical practitioner (or practitioners) familiar with the work required to be performed by the employee;
- ▶ identification of the essential and non-essential job functions and a determination as to the main purpose for which the job exists; and,
- ▶ with significant input from the employee, identification of potential accommodations and sincere evaluations as to how effective each would be in enabling the employee to perform the essential functions of their current job or, by focusing on what they can do, to perform other available work.

Religious Beliefs

In the context of accommodating religious beliefs, a similar analysis would be appropriate by substituting scheduling challenges resulting from the need to recognize certain religious practices for the performance challenges caused by the need to recognize certain physical limitations. In both cases, for the IAP to be successful, genuine information sharing and a mutual appreciation of the other party's legitimate interests and concerns are required of the employer and employee.

IAP Solutions

For both religious and disability situations, there are at least five (5) possible solutions that should be "brainstormed" or otherwise creatively considered by participants in the IAP:

- ▶ modification of job duties, job environment and/or work schedule;

- ▶ lateral transfer into an existing, available position for which the employee is qualified;
- ▶ transfer to an existing, available “lesser” position (“demotion”) for which the employee is qualified;
- ▶ alternate work at another facility for which the employee is qualified; and,
- ▶ leaves of absence—unpaid or paid.

IAP Benefits and Other Key Considerations

Additional benefits to be realized and other considerations to be made by employers who actively participate in the IAP include, but are not limited to the following:

- ▶ using the IAP in attempting to accommodate an employee’s legitimate needs shows a good-faith effort on the part of the employer and can both prevent and mitigate exposure from civil liability for unlawful discrimination for the business and individual supervisors involved;
- ▶ an employer never has to create or make a position available to satisfy its duty to accommodate;
- ▶ an employer does not need to accommodate an employee’s religious practices or disability that will lead to ongoing, unpredictable absences from work;
- ▶ accommodation does not require a change in established, legitimate performance standards;
- ▶ if and, if so, the extent to which accommodation is made is always the employer’s final decision to make—however, where appropriate, an employee’s suggestions and input should be taken seriously and, if rejected, should be done for solid reasons that are well communicated to the employee;
- ▶ if at all possible, the IAP should be witnessed by credible and objective persons, then well documented;
- ▶ an “impasse”^{vii} or stalemate in the IAP has been reached when:
 - 1) several meetings have been held with the *employee* during which she/he has been given *ample opportunity to propose accommodations* that meet their legitimate needs as well as those of their employer;
 - 2) the *employer* has offered accommodations to the employee that are *reasonably unique, creative or unprecedented* to meet the employee’s legitimate needs;
 - 3) a *reasonable amount of time* has passed during which both the employer and employee have been actively engaged in the IAP; and,
 - 4) despite proposals to accommodate by both the employer and employee that demonstrate their *willingness to compromise*, the *parties cannot agree* on a solution that meets their respective legitimate needs.
- ▶ if an “impasse” is reached despite using the IAP, experienced employment counsel should be consulted to determine the sufficiency of the attempts to accommodate by both parties prior to either placing the employee on a leave of absence or terminating her/him.

Additional IAP Applications:

The genuine exchange of information between a prospective employee, an employee and an employer with the intent to work out a mutually informed “win-win” solution can be valuable to all participants in making many other types of employment decisions. This is especially true in today’s highly competitive and constantly changing workplace where open, frequent and effective communication between employer and employee is critical to their mutual success. These other uses of the IAP include, but are not limited to the following:

Hiring

What could be more important to the hiring process than a frank discussion of legitimate needs and abilities between the prospective employer and applicant? A prospective employer needs to tell the applicant exactly what is expected of her/him if hired. An applicant then must match her/his proven abilities to the employer’s stated expectations.

If a match between expectations and abilities exists, then a hiring likely should occur. If not, both parties should keep looking. But clearly, for hiring, a mutual exchange of relevant facts must take place between the prospective employer and applicant. The IAP is essential to that exchange.

Performance Management

Likewise, a mutual exchange of relevant information must take place for a meaningful performance evaluation to occur. The employer and employee should each communicate to the other their respective views on if and, if so, how well the employee performed against the employer's stated expectations. Of course, both parties should be prepared during the review to support their views with the necessary data to support their views.

If the views align either because expectations were met or otherwise, then a discussion should be had on either what additional responsibilities should be assigned to continue to develop and challenge the employee or what steps the employee should take to improve her/his performance. If a difference of opinion exists, then further discussion must be had either to clarify expectations or performance in order to achieve a meeting of the minds between the employer and employee regarding required performance going forward. The IAP is vital to carrying on this mutually beneficial dialogue concerning the comparison of results expected vs. results produced.

Compensation

Today, the link between performance and reward must be as close as that between trust and teamwork. In a global marketplace where every dollar counts, employers must demand and employees must deliver a big ROI for every compensation dollar spent.

If stated expectations have been achieved, then that achievement must be recognized and rewarded with more compensation, increased responsibilities, or both. If expectations have not been met, then those shortfalls must be recognized and the necessary steps taken to improve performance. In both cases, the IAP between the employer and employee on the subject of compensation must be factual, frank and frequent.

Corrective Action/Termination

In a competitive marketplace, when underperformance becomes an issue, both the employer and employee should deal it with promptly and effectively. Employers need to correct the shortcomings in order to obtain and benefit from the results assigned to the employee. The employee needs to know that the results expected from her/him have not been produced and respond by either committing to accomplishing them in a specified time or to move on.

In either case, through the effective, mutual use of the IAP, neither the employer nor the employee should be surprised that corrective action, up to and including termination, will result from failure to improve lapses in required performance.

Discrimination/Harassment Investigations and Recommendations

When an allegation of discrimination and/or harassment has been made and substantiated through the investigative process, the IAP can be useful in fully resolving the matter. Asking the accuser to suggest what they believe would be an appropriate remedy for resolving their claim and, if reasonable, accepting it is an effective way to completely resolve the matter and avoid litigation.

Other(s)

The IAP is essential to solving other workplace challenges such as: safety, change, innovation, negotiating reinstatement of employees returning from leaves of absence and meeting new

customer/client expectations. To remain competitive, employers need timely and substantive help, input and support from all their employees.

Fortunately, top down communication is largely a thing of the past. Asking has replaced telling as the preferred method of communication between managers and the employees they steward. Now, use of the IAP, up, down and sideways throughout an organization often spells the difference between a businesses success and failure.

Conclusion:

The IAP began as a small “acorn” and now has grown into a “mighty oak” for employers. It no longer is just a means of reducing exposure from the religious or disability forms of unlawful discrimination.

In today’s workplace, frequent and effective use of the IAP between employers and their employees is not an option, it is an essential requirement. Those employers who embrace the IAP as a “mighty oak” and vital ingredient for engaging their workforces will thrive, those who don’t will experience avoidable legal exposure and, at best, mediocre employee performance.

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ⁱ Habit 5. Covey, Stephen R., *The 7 Habits of Highly Effective People*, New York, Simon and Schuster, 1989.

ⁱⁱ 42 U.S.C. Section 2000e, *et seq.*

ⁱⁱⁱ 42 U.S.C. Sections 12101-13.

^{iv} California Government Code Section 12900, *et seq.*

^v Those official EEOC Guidelines require employers “to make reasonable accommodations to the religious needs of the employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer’s business.”

^{vi} See also: *Clarke v. Carnation Company*, 53 A.D.2d 1053, 385 N.Y.S.2d 888 (1976); *Berry v. Dep’t of Social Services*, 447 F.3d 642 (9th Cir. 2006); *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60 (1986); *Stolley v. Lockheed Martin Aeronautics Co.*, No. 06-11068, 2007 WL 1010418 (5th Cir. Mar. 28, 2007).

^{vii} In determining the sufficiency of the employer’s duty to reasonably accommodate, a definition of what constitutes an “impasse” between an employer and a union during the collective bargaining process is instructive. Both an employer’s well established “duty to accommodate” an employee’s religious beliefs and disability and “duty to bargain in good-faith” with a collective bargaining representative involve “inherently vague and fluid standards”. A working definition of an “impasse” in collective bargaining is: “impasse normally arises after negotiations have been in progress for a certain period, the parties’ positions become fairly fixed and bargaining reaches a point of stalemate”. BNA, Policy and Practice Series, Labor Relations, Section 70:761. See also the National Labor Relations Board’s 1967 seminal decision in *Taft Broadcasting Company*, 61 LRRM 1386.