

Understanding Reasonable Accommodations

Presented by

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California Leave Laws



Leave Entitlement

Option	Coverage	Leave	Medical Certification	Health Care Benefits	Vacation, PTO, and Sick Leave	Reinstatement
Fair Employment and Housing Act (FEHA) (Disability Law)	Employers with five or more employees total regardless of location. Employees covered at date of hire.	Leave as a reasonable accommodation for disability. Unpaid leave. No specific timeframe.	Can be required if the disability or need for accommodation is not obvious.	Continuation of health benefits on same terms as similar unpaid absences per company policy and practice.	Employer may require use of vacation/PTO and sick pay if consistent (but not sick leave under the state sick leave law).*	Reinstatement required unless undue hardship. Reassignment required unless undue hardship, but creating a new position is not required.
Pregnancy Disability Leave (PDL)		Up to four months of unpaid leave per pregnancy (not per year) for disability due to pregnancy, childbirth, or a related medical condition. A "four month leave" means time off for the number of days or hours the employee would normally work within four calendar months (one third of a year or 17 and 1/3 weeks).	Can be required.	Continuation of coverage required. Normal cost sharing.	Employer may require sick pay use during unpaid periods (but not sick leave under the state sick leave law). Employee may elect to use vacation or PTO.*	Reinstatement required unless job is legitimately eliminated. Reassignment required unless the employee would not be offered a comparable position if they had worked continuously instead of taking PDL or no comparable position is available.
California Family Rights Act (CFRA)		12 weeks unpaid leave for the employee's or family member's serious health conditions, for newborn bonding, adoption or foster placement of a child, or military qualifying exigency.	Can be required for leave because of a serious health condition of the employee or their family member. Certification cannot be required for bonding leave or qualifying exigency leave.	Continuation of coverage required. Normal cost sharing.	Employer may require use of vacation/PTO. Sick pay only for employee's own illness or any other reason if mutually agreed to by employer and employee (but not sick leave under the state sick leave law).*	Reinstatement required unless job is legitimately eliminated.

Today's Agenda

- Introduction
- Define “disability”
- Disability regulations
- The good faith interactive process
- Making reasonable accommodations
- Undue hardship defense and not making an accommodation
- Common employer mistakes
- Best practices



Leave Laws

- Sick Leave
- School Activities Leave
- Family and Medical Leave (FMLA and CFRA)
- New Parent Leave (NPLA)
- Pregnancy Disability Leave Law (PDL)
- Domestic Violence Victim Leave
- Crime Victims Leave

New(ish) FEHC Disability Regulations

- Defines mental and physical disability, and provides examples
- Defines and provide examples of perceived disability, medical condition, and genetic characteristics
- Provides standards for determining when a job function is essential, as well as examples of reasonable accommodations
- Assistive animals defined

What is a “Disability” (under FEHA)?

A “disability” (under FEHA) is:

- A *physical or mental impairment* that “limits” a major life activity; or
- A *record* of such an impairment; or
- *Regarded* as having or having had such an impairment, or is regarded or treated as having an impairment that has no present disabling effect but might become a future disability.

Definitions of physical and mental disabilities are to be *broadly* construed

If in doubt = DISABLED

What is a “Disability” (under FEHA)?

What is a “*physical impairment*”?

- A physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that affects one or more body systems and limits the ability to perform a major life activity

Examples:

- Deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease

What is a “Disability” (under FEHA)?

What is a “*mental impairment*”?

- A mental or psychological disorder or condition that limits a major life activity

Examples:

- Emotional or mental illness, intellectual or cognitive disability (formally referred to as “mental retardation”), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder

What is a “Disability” (under FEHA)?

What is a “*major life activity*”?

- A major life activity are those activities which are of central importance to daily life (caring for oneself, walking, breathing, sitting, reading, sleeping, interacting with others, etc.)
- Under FEHA, it includes physical, mental and social activities
- Working is a major life activity under both FEHA and the ADA, but in California an individual is limited if he is limited in performing the requirements of a single, particular job. (ADA has a higher standard—class/range of jobs)

What is a “Disability” (under FEHA)?

What does “*limit*” mean?

- The disability makes the achievement of the major life activity “*difficult.*” THAT’S ALL
- Moreover, mitigating measures (such as glasses, canes, etc.) are not considered in determining if a condition limits a major life activity, unless the mitigating measure itself limits a major life activity

Compare to the federal ADA

- “Substantially” limit
- However, the ADA Amendments Act of 2008 did broaden coverage

What is a “Disability” (under FEHA)?

- *Current* illegal drug use and alcohol intoxication or effects of such use
 - However, a *former* drug addict may be disabled if the addiction limits a major life activity and he has successfully completed rehab *or* is participating in rehab *and* is no longer using illegal drugs
- Alcoholism *may* be a disability if it limits a major life activity, but an employee who abuses alcohol may be held to the same performance standards as other employees
- Compulsive gambling
- Sexual behavior disorders (pedophilia, exhibitionism, and voyeurism)
- Kleptomania and pyromania

What is NOT a “Disability” (under FEHA)?

- Age
- Height, weight, or muscle tones *within normal ranges*
- Physical characteristics (eye and hair color, left-handedness)
- Pregnancy*
- Personal traits that are *not* the result of a mental disability (poor judgment, quick temper, chronic lateness, irritability, inability to get along with others)
- Conditions that are mild, which do not limit a major life activity, *as determined on a case-by-case basis*:
 - Common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches; and minor and non-chronic gastrointestinal disorders

FEHA Only Protects “Qualified Individuals” with a Disability

- The burden is on the applicant or the employee to prove he is qualified to perform the “*essential functions of the job*” with or without a reasonable accommodation
- It is not unlawful to draw a distinction on the basis of disability if that disability renders an employee unqualified, with or without reasonable accommodation, to perform the “*essential functions of the job*”



“Essential Functions of the Job”

- What are they?
- These are the “*fundamental job duties*” of the employment position
 - Include actual essential functions
 - Include “*intangibles*”: punctuality, ability to accept direction, ability to work well with others, ability to display a positive attitude, ability to multitask, etc.
 - Include “soft skills”/mental demands
- Do not include “marginal” job functions
- A job description is considered prima facie evidence of the essential functions



This is why it is important to have good job descriptions

The “Good Faith Interactive Process”

FEHA mandates a Good Faith Interactive Process:

“Employers must engage in a good-faith interactive process with employees and candidates who have disabilities to determine the appropriate reasonable accommodations that might overcome the employee’s/applicant’s job limitations.”

This is a separate statutory requirement

What Triggers the Interactive Process?

- *Perceptions* of disability
 - Change in performance/behavior
 - Rumors circulating around workplace
 - Sudden attendance problems, stamina issues, etc.
- Employee requests “help” or informally asks for an “accommodation”
- Employee’s doctor, spouse or union representative asks for an accommodation
- Employee states he’s having difficulty getting to work on time because of the medical treatment for a health condition
- Employee’s doctor sends a letter stating that employee cannot lift more than 50 pounds

What Would NOT Trigger the Interactive Process?

- Employee mentions a disability but does not inform his employer of any specific limitation (*and none is readily apparent to the employer*)
- Employee requests an accommodation but doesn't mention any disability (*and employer has no reason to know of the disability*)
- Employee mentions inability to perform specific task, but does not request an accommodation or mention that inability is tied to a disability
- Employee makes threats of violence against a supervisor or co-workers



Nevertheless, keep your nose to the ground...

Breaking Down the Interactive Process

Step 1: Determine eligibility

- Employee request (formal or verbal)

Step 2: Obtain necessary documents

- Medical reports (ensure they provide clear work restrictions but no diagnosis information)
- Essential functions job analysis/job descriptions

Step 3: Assemble your team

- Employee, human resources manager, employee's supervisor, employee's representative (if applicable)

Breaking Down the Interactive Process

Step 4: Engage, interact, explore

- Short and long-term options; make sure employee is aware of process
- Seek employee's input (he or she must be invited to participate face-to-face)
- Consult with professionals in occupational accommodation if necessary

Step 5: Process and Results

- Document notices and invitations, and all discussions and outcomes
- Get signatures from all participants at meetings
- Send letters to close out process and tie up all loose ends

Breaking Down the Interactive Process

And then???

Rinse and repeat...

and repeat...

and repeat...

What is a Reasonable Accommodation?

Any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job, such as:

- Facility modifications
- Schedule changes
- Job restructuring (*nonessential functions only*)
- Equipment purchases
- Changing policies
- Paid/unpaid leaves*
- Transfer or reassignment to a vacant position (lateral or demotion)

Employee *not* required to accept a reasonable accommodation, however...

What is a Reasonable Accommodation?

An employer is *not* required to:

- Lower quality or production standards
- Provide personal use items (e.g., glasses or canes)
- Create a new position
- Displace (bump or layoff) other employees
- Convert a full-time position to part-time
- Create a light duty position
- Remove an essential function from a job
- Promote the disabled employee
- Assign a helper to the employee
- Hold a position open indefinitely
- Offer remote work
- Offer the employee's preferred accommodation (BUT-consider it)

Confidentiality

Information about an employee's reasonable accommodation must be kept confidential

- **Exception:** Information may be disclosed to supervisors and managers for necessary work restrictions or reasonable accommodations
- **Exception:** Information may be disclosed to individuals involved in making decisions about reasonable accommodations
- **Exception:** Where necessary for emergency treatment; to officials investigating compliance with Rehabilitation Act; for workers' compensation and insurance purposes

Undue Hardship Defense

- An employer is *not* required to provide a reasonable accommodation if so doing would present an undue hardship on the operation of the business.
- ***BE CAREFUL WITH THIS DEFENSE***
- An “undue hardship” is an action that would require significant difficulty or expense when considered in light of:
 - The accommodation’s nature and cost
 - Overall financial resources of the employer
 - Overall, size structure and function of the workforce
 - Number, type and location of facilities
 - Geographic separateness of the facility in question in relation to whole business

What if No Accommodation is Made?

If no accommodation is possible, an employer must be able to *PROVE* and *DOCUMENT* one of the following:

- One or more essential functions of the job could not be performed;
- Accommodation options created a *direct threat* or undue hardship for the employer;
- An extended leave of absence would not support a return to work effort at a later time; OR
- No appropriate vacant positions were available

What is a “Direct Threat”?

- Comes up primarily in the context of accommodating mental disabilities
 - Anxiety disorder, panic disorder, bipolar disorder, depression, PTSD, schizophrenia, adjustment disorder
- An individual with a disability may be excluded for safety reasons if he or she poses a “direct threat”
- Direct threat means a *significant risk* of substantial harm to self or others that cannot be reduced or eliminated through reasonable accommodation
- Determination relies upon best available *objective evidence*
- An *individualized* assessment is required

Direct Threat Factors

- *Nature of the risk* and severity of the potential harm
- *Duration* of the risk
- *Likelihood* that the potential harm will occur
- *Imminence* of the risk
- Availability of *reasonable accommodation*

Common Employer Mistakes

- Assuming workers' compensation is the exclusive remedy for work-related injuries
- Following a 100% healthy rule before an employee can return to work
- Failure to consider vacant positions
- Refusal to grant accommodation due to inflexible company rules
- Asserting an essential functions defense based on a job description that does not accurately reflect the employee's actual job
- Asserting an essential functions defense without considering the ease of certain accommodations, such as assistance from co-workers or tools.

Best Employer Practices

How to avoid exposure?

- Have a written policy and accurate job descriptions
- Conduct regular performance evaluations
- Educate your supervisors
- Conduct good faith interactive processes
- Maintain confidentiality
- Avoid medical examinations of employees (only permitted when job-related and consistent with business necessity)
- Safeguard against retaliation
- *DOCUMENT, DOCUMENT, DOCUMENT*

Bonus Tips: Meal/Rest period Premiums and PAGA representative claim waivers

- New Meal/Rest Period Premiums Calculations- Based on the Regular rate, NOT the normal hourly rate
 - What is the regular rate and why does this matter?
 - This is retroactive!
- Viking River Cruises: SCOTUS allows for enforcement of arbitration provisions mandating individual PAGA claims, avoidance of representative actions and overruling of Iskanian



Any Questions?



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