Disabilities in the Workplace: An Introduction to State and Federal Laws

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1. Who is protected by the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA)?

   A person with a physical or mental impairment that substantially limits a major life activity is "disabled" and protected by the ADA. A person with a physical or mental impairment that limits a major life activity is "disabled" and protected by the FEHA. Under both laws a person with HIV/AIDS, for example, is considered to be disabled.

   Physical disabilities may include conditions such as:

   - Diabetes
   - Epilepsy
   - Blindness
   - HIV / AIDS
   - Paralysis

   Mental disabilities may include conditions such as:

   - Depression
   - Bipolar disorder /manic depression
   - Schizophrenia
   - Panic, anxiety and stress disorders
   - Post-traumatic stress disorder
   - Obsessive compulsive disorder
   - Traumatic brain injury

   Major life activities are basic functions and may include: seeing, sleeping, learning, hearing, breathing, thinking, speaking, concentrating, reproduction, performing manual tasks, walking, interacting with others, sexual relations, caring for oneself, standing, reading, and working. Major life activities also include bodily functions, such as normal cell growth, or the functioning of the respiratory, circulatory, cardiovascular, endocrine, immune, and digestive systems.

   An impairment limits a major life activity if it makes achieving the activity more difficult. An impairment may be substantially limiting if it restricts an individual's ability to perform a major life activity compared to most people.

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2. What if my condition is stabilized with medication or I use a prosthetic device?

   Under the FEHA and the amended ADA, an employee's disability is considered without regard to "mitigating measures" such as medication, prosthetics, assistive technology, or other devices or strategies used to mitigate the effects of the condition. This means that people with physical or mental conditions who are currently stable due to medications or treatment are still protected.

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3. What if my condition is episodic or is currently in remission?

   A condition which is episodic or in remission is considered a "disability" if it would be substantially limiting in its active phase.

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Who else is protected?

The ADA and the FEHA also protect people who are regarded or treated as having a disability, or who are discriminated against based on impairment, even if they do not have a disability. Also protected are persons with a record or history of a disability. In addition, the FEHA protects persons who are not currently disabled, but who may become disabled in the future.

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5. What are my rights if I have a disability?

Under the ADA, employers with fifteen or more employees cannot discriminate against qualified individuals with disabilities. The FEHA bars discrimination by employers with five or more employees. This means that if you have a disability and can do the basic duties of the job, you cannot be harassed, demoted, terminated, paid less, or treated more poorly because of your disability.

Qualified disabled employees must be able to perform the essential functions of their jobs with or without reasonable accommodations. Persons with disabilities may request and obtain reasonable accommodations to enable them to perform their jobs. Qualified applicants cannot be rejected on the basis of their disabilities, and may obtain reasonable accommodation during the hiring process.

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6. What is a reasonable accommodation?

Reasonable accommodations are adjustments or modifications made to a job or workplace to enable an employee or job applicant to successfully perform the basic duties of a position. A reasonable accommodation does not change the essential functions of the job. Whether a particular accommodation request is reasonable depends upon the situation and type of job. The accommodation, however, may not be unduly costly or disruptive for the employer (undue hardship). An employee also has the right to refuse an accommodation.

Examples of possible reasonable accommodations include:

Modification of facilities
: An employee who uses a wheelchair might need a higher desk or a clear path of travel. An employee with PTSD might need dividers or a more private workspace to reduce distractions.

Equipment or devices
: An employee with carpal tunnel syndrome might need a different keyboard or telephone headset, or voice recognition software. A deaf employee might need a text pager. An employee who hears voices or is sensitive to distractions might need headphones.

Part-time work schedule
: An employee with a condition causing fatigue or disrupted sleep might need a part-time schedule. Such conditions might include HIV/AIDS, cancer, or chronic fatigue syndrome.

Modified work schedule
: An employee who takes medications causing grogginess might need a later or flexible schedule.

Time away for treatment or therapy
: An employee under treatment might need periodic time away from work to attend appointments.

Unpaid leave of absence
: An employee with a disability may need a leave of absence for medical treatments or procedures or to recover from illness related o the disability.

Job restructuring
: An employee with a lifting restriction might need to delegate that function if it is not essential to the job. An employee with anxiety disorder might ask that someone else moderate a monthly meeting, where running the meeting is not an essential job duty.

Training
: An employee with post-traumatic stress disorder or another disability interfering with concentration or learning may need additional or specialized training to master the job.

Modified supervision
: An employee with a learning disability might seek a change to the mode of communication, such as an increase in face-to-face meetings or in email reminders. An employee with a mental health disability may seek modified supervisory techniques, such as positive and negative feedback, more frequent performance reviews, and more detailed instruction or task assignment.

Job coach to assist the employee in learning the job
: A visually impaired employee might seek permission to bring a job coach to the worksite to assist the employee in learning to navigate the job site.

Policy Changes
: An employee with insulin-dependent diabetes might need additional breaks to test blood sugar or to administer insulin, or permission to eat food throughout the day.

Education to raise awareness and to debunk fears and stereotypes
: An employee with epilepsy might seek disability education of co-workers and supervisors to raise awareness of how to respond if the

employee has a seizure.

Transfer to a vacant position

An employee who is not able to perform the essential job functions of a current position may seek a transfer to a vacant position for which the employee is qualified. A transfer may also be appropriate where the employee remains qualified for the current position with accommodation, but the employee and the employer agree that a transfer is an appropriate modification.

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7. When is an employer required to accommodate an employee?

An employer is required to accommodate only known disabilities. There is no one specific way to notify an employer; an employer's knowledge of a disability may be implied. However, to ensure your legal rights, you should tell your employer that you have a disability and need accommodation.

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8. What do I have to say to my employer if I am seeking an accommodation?

To be protected by the ADA/FEHA, you must disclose your disability to at least one person who represents the employer, such as a supervisor or human resource person. While you do not have to share every detail about your disability, you need to provide enough information to show that you have a "disability" under the law and that you need accommodation. To be safe, you should use words such as "disability," "impairment," "limiting," "major life activities," and "accommodation."

Disclosure to an employer of a disability can be an extremely personal decision. Employees considering such disclosure should compare the costs and benefits, including:

- Need for accommodation to perform the job;
- Need for accommodation to avoid discipline or termination;
- Need for accommodation to protect health;
- Whether you can get the accommodation;
- Risk of stigma and harassment;
- Risk of loss of job or promotion;
- Risk of loss of privacy; and
- Potential for more successful and supportive employment experience.

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9. Do I have to request an accommodation in writing?

No. You can request accommodation in writing, orally, through e-mail or by any other form of communication. However, you may want to keep records in case there is a dispute in the future over whether you made the request.

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10. Am I required to release my medical or psychiatric records to obtain accommodations?

No. If your disability or your need for accommodation is not obvious, your employer may ask for reasonable medical documentation. The documentation should be limited to a doctor's note or other medical documents showing that you have a disability and need accommodation. You are not required to produce your entire medical or mental health file.

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11. Do I have to disclose my disability to everyone at work?

No. You must disclose to someone who represents the employer, such as a supervisor or a human resources person. However, you are not required to disclose to co-workers. In fact, medical information obtained by an employer must be kept confidential, and maintained in files separate from your personnel file. This information can be revealed only to supervisors and managers who need to know about the accommodation and any restrictions on your work or duties.

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12. What happens after I request an accommodation?

Once you request an accommodation, your employer must make a reasonable effort to determine the appropriate accommodation. However, you must also be willing to participate in the process of developing and implementing the accommodation.

Employees who do not fully participate in the process may lose their ADA and FEHA rights. This participation may require the employee to submit requested medical documentation and to attend scheduled meetings. If the employer or employee rejects a suggested accommodation, the employee must take steps to continue the process. You may wish to enlist the assistance of third-party advocates during the process.

To protect their rights, employees should take proactive steps, such as:

- presenting accommodation requests to the employer in writing;
- suggesting alternative accommodations;
- scheduling and attending meetings with the employer to discuss accommodations;
- offering the employer referrals to accommodation specialists like the Job Accommodation Network (800-526-7234) or Disability and Business Technical Assistance Centers (DBTACs) (800-949-4232).

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13. What may an employer ask me when I am applying for a job?

Before a job offer is made, an employer may not ask you any questions that are likely to reveal information about a disability. This rule bars direct questions about a particular disability ("Do you have any heart problems or mental illnesses?"), questions about the ability to perform "major life activities" unrelated to the job ("Have you ever been unable to take care of yourself?"), and most questions regarding prescription drug use ("Do you take painkillers or antidepressants?").

However, if the disability is obvious or if the applicant has voluntarily disclosed a disability, and the employer reasonably believes that the applicant will need an accommodation to do the job, or if the applicant has requested accommodations during the application process, then the employer may ask limited questions about accommodations.

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14. Am I required to disclose my disability when I apply for a job to protect my rights?

No. You are not required to disclose your disability at the time you apply for a job, even if you later need a workplace accommodation. You may wait until you actually are seeking accommodation—which may be months or years later—before you disclose. However, it is wise to seek accommodation before your performance suffers.

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15. What may an employer ask me after a job offer has been made, but before I start working?

The ADA does not prohibit post-offer, pre-employment medical examinations or inquiries—even those unrelated to job performance—so long as the information is kept confidential, and all entering employees in the same job category are asked the same questions. If an employer uses the results of such examinations or inquiries to revoke the job offer, it may be required to prove that its reasons are "job-related and consistent with business necessity."

Under the FEHA, medical inquiries and examinations made after a job offer has been given but before the person starts working must be job-related and consistent with business necessity.

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16. What may an employer ask after I start working?

Employers cannot ask questions about your disability, or require a medical examination, unless the questions or examination are job-related and consistent with business necessity. Even if you seem sickly or ill, an employer cannot ask medical questions unless there is a job-related reason.

The following situations may justify limited medical inquiries. Otherwise, your employer is probably not entitled to medical information:

- A request for reasonable accommodation: If an employee requests an accommodation and the disability or need for accommodation is not obvious, the employer may request reasonable documentation showing the employee's right to accommodation. Medical documentation must be confidentially maintained in a separate medical file.
- Evidence of the inability to perform the essential functions of the job: If an employer has a reasonable belief that a disability will impair an employee's ability to perform the essential duties of the job, the employer may ask limited medical questions or request a medical examination.
- Evidence of a direct threat to the health or safety of others: If an employer has a reasonable belief that the employee's disability poses a direct threat to the health or safety of others, the employer may ask limited medical questions or request an examination.
- A workplace injury: If an employee has a work-related injury, the employer may ask limited medical questions or request an examination in order to assess its liability under workers' compensation.

Even if there is a job-related reason, the employer's request for medical information or documentation must still be reasonable and related to the situation. No requests can exceed the scope of the employer's need to evaluate the impact of the disability on the situation. Most important, any medical information the employer obtains must be kept confidential, and stored in a separate medical file—not with your regular personnel file.

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For further information about your employment rights, contact the Workers' Rights Clinic.

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