

KNOW YOUR RIGHTS IN THE WORKPLACE

An Introduction to Employment
Laws Protecting Individuals with
Disabilities and their Loved Ones

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SOME IMPORTANT EMPLOYMENT LAWS that Protect People with Disabilities

- **The California Fair Employment and Housing Act, Gov. Code secs. 12900 *et seq.* ("FEHA") (18 protected bases)
(Regulations: title 2, CCR 11064-11073)**
- **The California Family Rights Act, Gov. Code sec. 12945.2. ("CFRA")
(Regulations: title 2, CCR 11087-11097)**
- The Americans with Disabilities Act of 1990, Title 42, United States Code, secs. 12101 *et seq.* ("ADA")
- The Family Medical Leave Act of 1993, 29 USC sec. 2601 *et seq.* ("FMLA")
- Social Security Disability Insurance (SSDI) (earnings based) and SSI (needs based), both administered by SSA
- California SDI (since 1946) and Paid Family Leave, (earnings based) by EDD
- Calif. Paid Sick Leave, Labor Code secs. 245.5, 246.5, 246.5. ("PSL")
- Calif. Workers Compensation, Labor Code secs. 3201 *et seq.*

CALIFORNIA FAIR
EMPLOYMENT AND
HOUSING ACT
("FEHA")

FEHA Prohibits Employers from:

- **Discriminating** against job applicants and employees **on the bases of Mental and Physical Disability** (and 16 other protected bases)
- **Harassing** individuals because of their disability or the disability of a person with whom they associate;
- **Retaliating** against individuals because of their disability, their opposition to discrimination, or their association with a person with a disability, or for requesting reasonable accommodation;
- **Failing to provide Reasonable Accommodation; and**
- **Failing to engage in an Interactive Process.**

What Is a Disability under FEHA?

A mental or physical impairment that limits* a major life activity, including working.

- Actual or perceived (i.e., treated as, or regarded as having a condition that makes achieving a major life activity difficult) or potentially disabling;

OR

- Having a record or history of a disability;

OR

- Associating with a person with a disability.

Even if medication mitigates the symptoms of a disability, the person still has a disability.

*Compare to federal ADA: “substantially limits”

Examples of “Mental Disabilities”

Mental disability includes, but is not limited to:

- emotional or mental illness,
- intellectual or cognitive disability (formerly referred to as ‘mental retardation’),
- organic brain syndrome, or specific learning disabilities,
- autism spectrum disorder,
- schizophrenia, chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder;
- past (not current) addiction to drugs or alcohol.

(2 CCR sec. 11065(d)(1); 11071(d))

What Is NOT a Mental Disability?

- Mild conditions that do not limit a major life activity, and are determined on a case-by-case basis, such as, common cold, flu, minor bruises.
- Gambling, kleptomania, pyromania, psychoactive substance abuse disorders resulting from the current use of controlled substances or drugs, sexual behavior disorders (pedophilia, exhibitionism, voyeurism)

(Gov. Code secs. 12926(j)(5) (m)(6); 2 CCR 11065(d)(9), (q))

Who Does FEHA Protect?

Not everyone with a disability is protected

- Job applicants or employees with an “actual or perceived” mental disability or potentially disabling impairment who can perform the essential functions of their job, with or without reasonable accommodation, in a way that does not endanger their health and safety or the health and safety of others.
- Applicants or employees who associate with individuals who have an actual or perceived disability (or if they fall under any other bases enumerated in the Act).
- Applicants or employees who sympathize with, encourage, or participate in groups organized for the protection or assertion of rights protected by the Act.

FEHA Requires Employers to:

- Treat all applicants and employees equally;
- Provide **reasonable accommodation** to enable a person with a known disability to perform the essential functions of their job **unless it would cause an “undue hardship;”**
- Engage in an interactive process to determine if any effective reasonable accommodations are feasible.

Which Employers Are Subject to FEHA?

- In most cases, any employer is any person or individual engaged in a business or enterprise that employs 5 or more individuals on a regular basis, or acting as an agent of an employer.

In *harassment* cases, an employer need employ only one employee to be a subject to FEHA.

- Private and public employers are covered.

Under FEHA, religious corporations and associations are exempt from FEHA unless they are health care facilities that are not restricted to a particular religion and the Employee is not performing religious duties. However, an employee with a disability may have rights under ADA, the California Constitution, or other claims, so long as they're not serving in a ministerial capacity.

(Gov. Code secs. 12926(d). 12926.2; 12940(J)(4))

What Is Unlawful Discrimination under FEHA?

It is against the law for an employer to subject an applicant or employee to an **adverse employment action** *because of* their disability.

- There must be a **causal connection** between the employee's disability and the employer's decision-making.
- The employee's disability must be a "**substantial motivating factor**" in the employer's decision to take adverse action. (Disability does not have to be the only reason, but it must be more than de minimis.)

(2 CCR 11066(a); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232)

Examples of Adverse Employment Actions

- Failure to hire
- Demotion
- Failure to promote
- Reduction of hours
- Failure to select for a training program
- Reduced compensation
- Termination
- Denial of any other favorable term, condition or privilege of employment
- Denial of reasonable accommodation without proof of undue hardship
- Failure to engage in an interactive process

(Gov. Code sec. 12940(a), m), (n); 2 CCR sec. 11008(g), 11009, 11068, 11069)

If an Employee with a Disability Needs Help Performing their Job, What Should They Do?

Request Reasonable Accommodation

But, be mindful that by requesting reasonable accommodation, you will need to disclose your disability if the disability isn't obvious or already known.

Is it Legal for an Employer to Make Disability-related Inquiries? YES, if...

Before offer of employment: An employer may inquire into an applicant's ability to perform job-related duties and can respond to an applicant's request for reasonable accommodation.

After offer: An employer may condition a bona fide offer of employment on the results of a medical or psychological exam or inquiries to determine fitness for the job, **so long as all entering employees are subjected to an exam.**

During Employment: An employer may make disability-related inquiries and require employees to submit to a fitness-for-duty medical examination exam, "so long as the inquiries are **both job related and consistent with business necessity.**"

What Is a Reasonable Accommodation?

Any **modification or adjustment** that is effective in:

- enabling an applicant to have an equal opportunity to be considered for a job;
- enabling an employee with a disability to perform the essential functions of the job; or
- enabling the employee to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

In other words ... **Ways to level the playing field.**

Examples of Reasonable Accommodations

- Making existing facilities accessible and usable
- Allowing individuals to bring assistive animals to work
- Transferring or reassigning the individual to a vacant position
- Providing assistive aids and services (e.g. ergonomic chair)
- Restructuring the job, i.e. redistribution of “non-essential” job functions
- Altering when and how essential functions are performed
- Providing additional training
- Providing part-time or modified schedules
- Allowing the person to work from home
- Enabling the person to take a paid or unpaid leave of absence.

What Must an Employer Do and Not Do?

- The employer must make an individualized assessment of the person's ability to perform the essential functions of the job.
- An employer cannot impose a 100% healed policy before an employer is allowed to return to work following a leave of absence.
- An employer cannot retaliate against a person for requesting reasonable accommodation, whether or not the request is granted.

Is an Employer Required to Provide Reasonable Accommodation?

YES. An employer has an **affirmative duty** to provide Reasonable Accommodation for an employee's known disability **UNLESS:**

- there is no reasonable accommodation that would allow the employee to perform the essential functions of the job in a manner that will not endanger the employee's health or safety or the health and safety of others.

OR

- it would impose an **undue hardship** on the employer.

n
(Gov. Code sec. 12940(m)(1); 2 CCR 11067(d).11068(a))

What is Undue Hardship?

“An action requiring significant difficulty or expense incurred by an employer...when considered under the totality of the circumstances....”

Factors to be considered include:

- Nature and net cost;
- Overall financial resources of the facilities involved, number of people employed at the facility, impact on operation of the facility, including impact on other employees;
- Overall financial resources of the employer;
- Type of operation;
- Facility’s geographic separateness, administrative or fiscal relationship.

What Happens after an Employee Requests Reasonable Accommodation

The Employer may grant an employee's request for accommodation without actually meeting to discuss it.

If not, the Employee and Employer must engage in an Interactive Process, in person, by Zoom, or phone.

What is an Interactive Process?

“A timely, **good faith** communication” between the employer and the employee and/or representative to explore whether the employee needs reasonable accommodation to perform the essential functions of the job, and if so, how the employee can be accommodated.

In other words, the Employee and Employer
MEET and TALK

(Gov. Code sec. 12940(n); 2 CCR 11065(j))

When Does the Duty to Engage in an Interactive Process Arise?

The Employer must engage in an interactive process when:

- An employee with a known disability requests reasonable accommodation; or
- The employer becomes aware of the need for an accommodation through a third party or observation; or
- The employer becomes aware because the employee has exhausted leave under the Workers Comp Act, CFRA, or other federal or state leave laws, and the employee still needs accommodation to perform essential functions of the job.

(Gov. Code sec. 12940(n); 2 CCR 11069(b))

An Employee May Be Required to Provide Medical Documentation

Before meeting, the Employer may request “reasonable medical documentation” of the existence of disability. The employee must comply when the disability or need for reasonable accommodation isn’t obvious.

- The Employer may ask for clarification of submitted medical documentation, specify what additional information is required, and allow employee enough time to obtain it.
- The Employer can require a second medical opinion or supplemental information, but if requires the employee to go to a health care provider it chooses, then must pay for it.

What is Reasonable Medical Documentation?

Reasonable medical documentation must include the following:

- Name and credentials of health care provider
 - That the employee has a condition that limits a major life activity and a description of why the employee needs a reasonable accommodation.
-
- Employer cannot ask for the underlying medical cause, and disclosure of the nature of the disability is not required. (NO DIAGNOSIS)
 - Employer cannot ask for unrelated information, including the employee's complete medical records because they usually contain information unrelated to accommodation.

(2 CCR 11069(c-d))

What Happens in the Interactive Process?

- If the Employer rejects employee's requested accommodation(s), it must initiate a discussion about alternatives.
- “In consultation with” the Employee, the Employer must identify potential accommodations that would enable the Employee to perform the essential functions of the job.
- The Employee must cooperate in good faith, including providing reasonable medical documentation.

(2 CCR 11069(c), (d))

Can the Employee Bring Another Person to the Interactive Process Meeting?

- Employees have a right to have a **union representative** at an Interactive Process meeting convened to consider the employee's need for reasonable accommodation. (*SEIU v. Sonoma County Superior Court* (2015) PERB Decision No. 2409-C)
- Employees may request to bring a friend, family member, co-worker. The Employer is not required to permit them to attend, but denying the request may reflect poorly on the Employer's intentions.

Is the Employer Required to Provide the Specific Accommodation Requested by the Employee?

NO!

The Employer must consider the employee's preference, but it has the right to select and implement a different accommodation, so long as it is effective in allowing the person to perform the essential functions of the job.

(2 CCR 11068(e);11069(c)(8))

For example, an Employer Is Not Required to:

- Create a new position for an employee with a disability to a greater extent than it would for an employee without a disability.
- Eliminate any essential job functions.

(2 CCR 11068(d)(4) and(5))

What if the Employer Cannot or Refuses to Provide an Accommodation?

The employee may need to:

- Take a leave of absence (i.e., CFRA), transfer if permitted, or quit;
- Face termination if they are unable to perform the essential functions of the job in a safe manner;
- Return to the same job with less than effective accommodations, assuming the employee can perform the essential functions.

AND/OR....

- Apply for Unemployment Insurance, SDI, SSDI
- File a Complaint with the California Civil Rights Department (CRD).

CALIFORNIA FAMILY RIGHTS ACT (CFRA)

**(State equivalent of the federal
Family Medical Leave Act, FMLA)**

CFRA Protections for Employees

CFRA entitles employees to take a leave of absence for **up to 12 weeks** because of:

- 1) their own **serious health condition**;
 - 2) for the birth of a child, adoption, or foster care; or
 - 3) **to care for** a child, parent, grandparent, grandchild, sibling spouse, domestic partner, or designated person who has a **serious health condition**.
- An employee who requests a CFRA leave must give 30-days notice, or as soon as practicable.
 - An employer may require the employee to provide medical certification by a health care provider.

If the Employee complies with both, the employer cannot deny a CFRA leave request.

CFRA continued...

- CFRA leave does not have to be paid (but person may be eligible for PFL, SDI, disability insurance, or other benefits).
- Employee must have worked at least a year for the employer and have at least 1,250 hours within the past 12 months (no requirement for public school employees who request parental leave)
- CFRA leave can be taken only once during a 12-month period, although it can be taken incrementally.

Retaliation for exercising CFRA rights is illegal.

(Gov. Code sec. 12945.2; 2 CCR 11087-11097; Ed Code 44977.5)

NOTE: More generous leaves may be provided under a Collective Bargaining Agreement or an employer's own policy

The Big Advantages of CFRA are...

- The employer must maintain and pay for the employee's health insurance at the same level and under the same conditions as coverage would have been if the person had not taken a leave; and
- The employee is entitled to a right to reinstatement to their same or comparable position upon return from a CFRA leave.

(Gov. Code sec. 12945.2(a); 2 CCR 11089, 11092(c))

**WHAT TO DO IF FEHA or CFRA
RIGHTS HAVE BEEN
VIOLATED?**

If You Believe You Have Been Wronged, You May....

- Consult with your union if you are a member; and/or
- Confer with an attorney;* and/or
- File a timely complaint with CRD.

* For a directory of employment lawyers, check the website of the California Employment Lawyers Association at www.cela.org. Or, contact Legal Aid at Work at www.legalaidatwork.org.

Filing a Complaint with the CRD

CRD complaints must be filed within 3 years of when the alleged harm occurred. A lawsuit must be filed within one year of receipt of a “right-to-sue” letter.

A CRD complaint may allege:

- Discrimination and/or harassment on the basis of disability;
- Failure to engage in an interactive process;
- Failure to provide effective reasonable accommodation(s);
- Retaliation (including for requesting reasonable accommodation);
- Refusal to grant a reasonable CFRA leave request, or retaliation for making a request.

**To start the complaint process, go online to
www.calcivilrights.ca.gov**

What Remedies Are Available under FEHA and CFRA?

Under FEHA and CFRA, an applicant or employee may be entitled to relief, including:

- back pay
- front pay
- reinstatement (if the employee was fired or demoted)
- compensatory damages for emotional distress and/or injury to professional reputation
- injunctive and/or declaratory relief
- punitive damages*
- attorneys fees
- and any other relief deemed appropriate by a court.

*Punitive damages are not awardable against a public entity.)

THE END