

Overview of Managing Workplace Disabilities in California

BUSINESS & PEOPLE STRATEGY CONSULTING GROUP
HR & EMPLOYMENT LAW WEBINAR SERIES

Your Presenter

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Agenda

Distinguishing California from Federal

Interactive Process

Reasonable Accommodation

Good Faith

Pre and Post Hire Inquiries

Consequences

State vs. Federal

Federal: Americans with Disabilities Act (ADA)

California: Fair and Equal Housing Act (FEHA)

Importance of Distinguishing

Reliance upon stricter standards.

California's disability laws are far reaching, broader, and stricter than the ADA.

ADA

Prohibits discrimination and retaliation against qualified employees with disabilities.

Includes employment practices such as recruiting, hiring, firing, promotions, benefits, and compensation.

ADA laws are enforced by the EEOC for employers with 15+ employees.

ADA: Defining

Employees are regarded as having a disability if they have a physical or mental impairment that *substantially limits* a major life activity.

ADA protections also cover those with a history of a disability or whose employer believes they have a disability, even if no actual disability exists.

To be protected under the ADA, a disability must be considered a substantial (as opposed to minor) impairment.

This would include impairments that significantly limit speaking, seeing, hearing, walking, performing manual tasks, breathing or similarly major life activities.

ADA: Essential Functions

Employees must be qualified to adequately perform the essentials of the job, whether or not you require a reasonable accommodation, in order to be covered by the ADA.

That means they must fulfill the requirements for the job (education, experience, skills, etc.) and must be able to perform the essential functions of the position.

Employers may not refuse to hire an individual if their disability limits them from performing tasks that are not considered essential to the job.

ADA: Drug Use

Individuals who use drugs illegally *are not protected by the ADA*, even if they are in a substance abuse treatment program.

ADA: Impairments

A physical impairment is any medical disorder, condition, disfigurement or loss affecting one of the body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.

A mental impairment is any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

ADA: Examples

AIDS and its symptoms

Alcoholism

Asthma

Blindness or other visual impairments

Cancer

Cerebral palsy

Depression

Diabetes

Epilepsy

Hearing or speech impairments

Heart disease

Migraine headaches

Multiple sclerosis

Muscular dystrophy

Orthopedic impairments

Paralysis

Complications from pregnancy

Thyroid gland disorders

Tuberculosis

Loss of body parts

ADA: Not Examples

The common cold or the flu

A sprained joint

Minor and non-chronic gastrointestinal disorders

A broken bone that is expected to heal completely

Compulsive gambling

Pregnancy

Old age

Lack of education

Poor judgment

FEHA

Prohibits employment discrimination and harassment based on a person's disability or perceived disability.

Requires employers to reasonably accommodate individuals with mental or physical disabilities unless the employer can show that to do so would cause an undue hardship.

FEHA vs. ADA

ADA “disability must substantially limit” a major life activity

FEHA “disability must only limit” a major life activity

FEHA “Limits” Note

Whether a condition or disability “limits” a major life activity is determined regardless of any mitigating measure, such as medication, prosthesis, etc., unless the mitigating measure itself limits a major life activity.

FEHA

Categories of Disability

Physical disabilities

Mental disabilities

Medical conditions

FEHA: Physical

Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and *limits* a major life activity.

The body systems listed include the neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine systems.

A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity, such as working, if it makes the achievement of the major life activity difficult.

Also includes any other health impairment that requires special education or related services.

FEHA: Mental

Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that *limits* a major life activity, or having any other mental or psychological disorder or condition that requires special education or related services.

An employee who has a record or history of a mental or psychological disorder or condition which is known to the employer, or who is regarded or treated by the employer as having a mental disorder or condition.

Important Note

Under both physical and mental disability, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, *are specifically excluded and are not protected* under the FEHA.

FEHA: Medical Condition

Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, or a genetic characteristic.

A “genetic characteristic” can be a scientifically or medically identifiable gene or chromosome or an inherited characteristic that could statistically lead to increased development of a disease or disorder.

Reasonable Accommodation

Reasonable accommodation is any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job.

It can include making facilities accessible to individuals with disabilities or restructuring jobs, modifying work schedules, buying or modifying equipment, modifying examinations and policies, or other accommodations.

Exception to Reasonable Accommodation

The FEHA does provide legal reasons an employer can permissibly refuse to accommodate a request for reasonable accommodation from an applicant or employee.

One of the legal reasons is whether the accommodation would present an undue hardship to the operation of the employer's business.

Undue Hardship

If an employer denies accommodation because it would be an “undue hardship,” it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
- The overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and locations of its facilities;
- The type of operations, including the composition, structure, and functions of the workforce of the employer; and
- The geographic separateness, administrative or fiscal relationship of the facility or facilities.

Examples of Reasonable Accommodation

Allowing applicants or employees to bring assistive animals to the work site;

Transferring an employee to a more accessible worksite;

Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

Providing a part-time or modified work schedule;

Permitting an alteration of when and/or how an essential function is performed;

Providing an adjustment or modification of examinations, training materials or policies;

Modifying an employer policy;

Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

Providing additional training;

Permitting an employee to work from home;

Providing a paid or unpaid leave for treatment and recovery;

Providing a reassignment to a vacant position

Essential Job Functions

“Essential job functions” means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

A job function may be considered essential for any of several reasons, including, but not limited to, the following:

- The function may be essential because the reason the position exists is to perform that function.
- The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
- The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Major Life Activities

Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

It also includes the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

Major bodily functions include the operation of an individual organ within a body system.

Interactive Process

State law incorporates guidelines developed by the Equal Employment Opportunity Commission in defining an “interactive process” between the employer and the applicant or employee with a known disability.

The guidelines include:

- Consulting with the individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation; and
- Identifying potential accommodations and assessing their effectiveness.

Although the preferences of the individual in the selection of the accommodation should be considered, the accommodation implemented should be one that is most appropriate for both the employee and the employer.

Good Faith

Federal courts have provided an interpretation of “good faith,” essentially stating that an employer and employee must communicate directly with each other to determine essential information and that neither party can delay or interfere with the process.

To demonstrate good-faith engagement in the interactive process, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation.

Pre-Employment Inquiries

Prior to employment, *it is unlawful* for an employer to require an applicant to attend a medical/psychological examination, make any medical/psychological inquiry, make any inquiry as to whether an applicant has a mental/physical disability or medical condition, or make any inquiry as to the severity of the disability or medical condition.

Pre-Employment Inquiries

An employer *may inquire into the ability of an applicant to perform job-related functions* and may respond to an applicant's request for reasonable accommodation or require a medical/psychological examination or make an inquiry of a job applicant *after an employment offer has been made but prior to the start of employment* provided that the examination or inquiry is *job-related* and *consistent with business necessity* and *all new employees in the same job classification are subject to the same examination or inquiry.*

Independent Medical Opinion

An employer must allow an applicant the opportunity to submit an independent medical opinion if there is a dispute as to whether the person can perform the essential functions of a position.

Failure to allow the submission of an independent medical opinion may be a separate violation of the law.

Post-Employment Inquiries

If the individual is a current employee, the employer may not require any medical/psychological examination of an employee or make any of the following inquiries:

- Medical or psychological
- Whether an employee has a mental/physical disability
- The nature or severity of a physical disability, mental disability, or medical condition

Discrimination

Any employment-related or personnel decision based on either of the following reasons *is not discriminatory*:

- The person is *unable to perform the essential functions of the job and no reasonable accommodation exists* that would enable the person to perform the “essential functions” of the job.
- The person would *create an imminent and substantial danger to self or others* by performing the job *and no reasonable accommodation exists* that would remove or reduce the danger.

Discrimination

The following two reasons commonly raised by employers *are not legally acceptable excuses* for discriminating against persons with disabilities:

- Possibility of future harm to the person or to others
- Employing such individuals will cause an employer's insurance rates to rise

Post-Employment Inquiries

An employer may require any examinations or inquiries that it can show to be job-related and consistent with business necessity.

An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

Employer Obligations

Required Posters

Required Notices (PFL, Disability Benefits, etc.)

Interactive Process

Reasonable Accommodation

Non-Discrimination or Retaliation

Privacy

Consequences

Fines and damages for emotional distress from each employer or person found to have violated the law.

Hiring or reinstatement

Back pay or promotion

Can also pursue in private or civil court after complaint has been filed with the DFEH and Right-to-Sue Notice has been issued

Damages and penalties

Attorney fees and legal costs

Closing Notes

Employers are expected to go beyond the initial accommodation.

The reasonable accommodation obligation is ongoing.

Recent changes in the laws have indicated that extending protected leaves may be required when related to a disabling condition.

Document, document, document.

Don't apply a one-size-fits-all approach to disabilities...treat each one carefully and individually.

Establish clear procedures for identifying & managing workplace disabilities and train your managers.

QUESTIONS

Thanks for Attending

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Need assistance with your HR, compliance or employment law needs...feel free to contact us today for a free consultation.

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