Overview of the Statutes

- Federal Americans with Disabilities Act ("ADA")
  - 15 or more employees - covered
  - "Disabled" under ADA definitions - eligible
  - Obligation to provide reasonable accommodation, unless undue hardship
- California Fair Employment and Housing Act ("FEHA")
  - 5 or more employees - covered
  - Disability defined under FEHA - eligible
  - Obligation to provide reasonable accommodation, unless undue hardship

Disability Discrimination

Disability discrimination occurs when an employer or other entity covered by the ADA or FEHA treats a qualified individual with a disability who is an employee or applicant unfavorably because:

- He or she has a disability;
- He or she has a history of disability (e.g., cancer that is controlled or in remission);
- The employer believes that he or she has a disability or has a condition/impairment will become a disability (i.e., "regarded as" disabled); or,
- Of his or her association with a person with a disability (e.g., employee's husband has a disability).
Definition of Disability Under FEHA

“Physical disability” is defined as:

- Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
  - Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
  - Limits a major life activity.
- Any other health impairment not described above that requires special education or related services.

“Mental disability” includes:

- Having any mental or psychological disorder or condition, including but not limited to, emotional or mental illness, intellectual or cognitive disability, 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.
- Any other mental or psychological disorder or condition not described above that requires special education or related services.

“Disability” does not include:

- sexual behavior disorders;
- compulsive gambling;
- kleptomania;
- pyromania;
- or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.
- conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis
  - E.g., 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.
**Definition of Disability Under FEHA**

- A condition, disorder, disease, cosmetic disfigurement or anatomical loss “limits a major life activity” if it makes the achievement of the major life activity difficult.
  - “Limits” determined without regard to mitigating measures (medications, assistive devices, or reasonable accommodations) unless the mitigating measure itself limits a major life activity.
  - “Major life activity” is broadly construed and includes physical activities, mental activities, social activities and working
    - E.g., standing, sitting, walking, lifting, reaching, talking, eating, breathing, hearing, seeing, speaking; working; learning; concentrating; thinking; interacting with others, etc.

**FEHA vs. ADA Disability Definition**

- The ADA (as amended by the ADA Amendments Act of 2008 (“ADAAA”) defines disability as:
  - a physical or mental impairment that substantially limits one or more major life activities of such individual;
  - a record of such an impairment; or
  - being regarded as having such an impairment.

**FEHA Definition vs. ADA Definition**

- “Substantially limits” should be construed broadly, and the impairment need not prevent or severely or significantly restrict a major life activity to be considered “substantially limiting”
  - Determination of whether an impairment substantially limits a major life activity must be made without considering the effects of mitigating measures (with the exception of ordinary eyeglasses or contact lenses)
- “Regarded as”—focus is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor) rather than on what an employer may have believed about the nature of the person’s impairment.
FEHA Definition vs. ADA Definition

• Effect In California?
  – FEHA definition provides greater protection (e.g., "limits" a major life activity vs. "substantially limits" a major life activity and already does not consider mitigating measures)

If there is a disability, is the person a qualified individual?

• A qualified individual:
  – Has the necessary training, experience, skill required for the job; and
  – Can perform the essential functions of the job with or without reasonable accommodation
• Analyze on a case by case basis; do not label every individual with a certain disability as unable to perform a specific job

If there is a disability, is the person a qualified individual?

• Performance of “essential functions”
  – Essential functions are the fundamental job duties of the employment position
  – When determining which duties are “essential functions,” factors including the following may be considered:
    • Employer’s judgment as to which functions are essential
    • Written job descriptions prepared before advertising or interviewing for position
    • Amount of time spent performing the function
    • Consequences of not requiring the employee to perform function
    • How many other employees perform or are able to perform the function
Duty to Provide Reasonable Accommodation

• General rule: an employer has obligation to make reasonable accommodation to known physical and mental limitations of applicants or employees unless it can demonstrate accommodation would cause undue hardship.

What is a reasonable accommodation?

• A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities.
• Reasonable accommodations may include:
  – Job restructuring
  – Providing leave
  – Modifying work schedule
  – Work from home
  – Acquiring or modifying equipment or devices
  – Adjusting or modifying examinations, training materials, or workplace policies
  – Allowing applicants or employees to bring assistive animals to the work site

What constitutes an “undue hardship?”

• “Undue hardship” means significant difficulty or expense
  – Focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation
  – Not just financial difficulty—also applies to accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business
• Employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.
Reasonable Accommodation-General Principles

• Focus on what the particular individual needs
• Accommodation should be determined jointly with the individual and others knowledgeable about the disability (i.e., individual’s physician) and the workplace.
  – This is an interactive process; dialogue with the disabled individual is the key.
• Note: Employer may ask for reasonable documentation about employee’s disability and limitations

Reasonable Accommodation-General Principles

• Reasonable accommodation must be effective, meaning must give opportunity to achieve same performance/enjoy same benefits; does not need to ensure same results
• Employer must reduce only those barriers related to person’s disability, not provide other adjustments simply because individual prefers.
• Employer has ultimate discretion to choose accommodation
  – Disabled individual’s expressed choice must be given primary consideration, but if another effective accommodation is available which is less expensive, the employer has the ultimate discretion to choose

Reasonable Accommodation-General Principles

• Employer does not have to provide accommodation primarily for personal use (i.e., guide dog, wheelchair, hearing aid).
• Employer is not required to lower quality or production standards to make an accommodation
• Employer is not required to eliminate essential functions of position as a reasonable accommodation
Even with reasonable accommodation, does the individual pose a direct threat to the health and safety of [him or herself] or others in the workplace?

• Employer may deny job on basis of disability if applicant or employee poses direct threat of harm to [self] or others.
• Narrow definition of direct threat. Employer must show significant risk of substantial harm based on several objective factors:
  – no accommodation exists to eliminate or reduce risk;
  – able to identify specific behavior that poses direct threat;
  – objective, factual evidence is available from qualified medical opinions based on relevant expertise and knowledge;
  – have evaluated duration of risk, nature and severity of potential harm, and likelihood harm will occur, and imminence of potential harm.

Request for reasonable accommodation?

• Employee does not need to use “magic words,” but must provide sufficient information to put employer on notice
  – E.g., Employee requests time off because “depressed and stressed.” Statement sufficient to put employer on notice that employee requesting accommodation, but employer could request reasonable documentation concerning disability and functional limitations.
  – E.g., Employee asks for a few days off after completing major project, but does not provide further information. Statement not sufficient to put employer on notice that employee requesting reasonable accommodation.


Recognizing Signs of Mental Illness in Workplace

• Indications of possible mental illness include:
  – Marked personality change over time
  – Confused thinking; strange or grandiose ideas
  – Prolonged severe feelings of depression or apathy
  – Heightened anxieties, fears, anger or suspicion
  – Social withdrawal, diminished friendliness, increased self centeredness
  – Dramatic, persistent changes in eating or sleeping habits;
  – Feelings of extreme highs or lows;
  – Substance abuse

  Source: Boston University Center for Psychiatric Rehabilitation https://cpr.bu.edu/resources/reasonable-accommodations
Recognizing Signs of Mental Illness in Workplace

- Changes in work habits, behaviors, performance and attendance that may be result of mental illness:
  - Consistent later arrivals or frequent absences;
  - Low morale;
  - Lack of cooperation or general inability to work with colleagues;
  - Decreased productivity;
  - Increased accidents or safety problems;
  - Frequent complaints of fatigue or unexplained pains;
  - Problems concentrating, making decisions, or remembering things;
  - Making excuses for missed deadlines or poor work;
  - Decreased interest or involvement in one’s work;

  Source: Boston University Center for Psychiatric Rehabilitation
  https://cpr.bu.edu/resources/reasonable-accommodations

Examples of Potential Reasonable Accommodations for Mental Disability

- Examples of activities individuals with psychiatric disabilities may have difficulty doing and potential accommodations:
  - Screening out environmental stimuli (e.g., unable to block out sounds, sights or odors which interfere with focus)
    - Potential accommodations: Relocate employee to low-traffic area, or away from background noise/stimuli
  - Sustaining concentration (e.g., shortened attention span, difficulty remembering verbal directions, easily distracted)
    - Potential accommodations: Provide written work directions and/or checklists, break larger assignments into smaller series of assignments, allow brief but more frequent breaks

Examples of Potential Reasonable Accommodations for Mental Disability

- Responding to change (e.g., coping with changes in supervisors, rules, job duties, etc.)
  - Potential accommodations: Prepare employee for changes that will be happening in advance, explain new rules or duties, make a special effort to introduce new staff to employee
  - Maintaining stamina (e.g., drowsiness due to medications, low energy)
    - Potential accommodations: Part time hours, additional rest breaks during day, job sharing

  Source: Boston University Center for Psychiatric Rehabilitation
  https://cpr.bu.edu/resources/reasonable-accommodations
Examples of Potential Reasonable Accommodations for Mental Disability

- Time off: Employees with mental disabilities also may need intermittent time off (e.g., for doctor’s appointments) or extended time off (e.g., to adjust to new medication or treatment options)
- Modifying work policies: in some circumstances, may need to modify a general work rule or work policy as a reasonable accommodation
  - E.g., permitting employee to keep beverage at work station (although generally prohibited) to combat dry mouth, a side-effect of psychiatric medication

Recognizing Signs of Substance Abuse

- Signs of potential substance abuse include:
  - Frequent tardiness or unexplained absences
  - Inconsistent on-the-job performance
  - Frequent small accidents resulting in minor injuries or broken objects
  - Unusual physical symptoms or behaviors (unsteady gait, hyperactive/manic activity, sudden weight loss, dental problems, wearing long sleeves on hot days, etc.)
  - A sudden lack of concern over personal appearance and hygiene
  - Paranoia or overreaction to criticism or helpful suggestions
  - An unwillingness to talk about hobbies, family life, or personal interests in someone who was forthcoming before
  - Lower levels of productivity in the morning; a general sluggishness when first reporting to work
  - Bloodshot eyes, or bags under the eyes indicating a lack of sleep

Rehabilitation Leave for Substance Abuse

- 5 or more employees (state) (covered)
- 15 or more employees (fed)
- Alcoholism/drug abuse; voluntary request for treatment - eligible
- No maximum duration unless hardship
- Unpaid
- Reinstatement

Source: Promises Treatment Center
https://www.promises.com/articles/addiction-intervention/employees-substance-abuse-problems/
Protecting Medical Privacy

- Do not request or discuss specific medical information regarding employee without first obtaining signed authorization from employee
  - Authorization must be in 14 point font and otherwise comply with Civil Code 56.11 requirements
  - Include requisite Genetic Information Nondiscrimination Act of 2008 ("GINA") disclosure:
    - The Genetic Information Nondiscrimination Act of 2008 ("GINA") prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, the Employer has instructed your healthcare provider not to provide any genetic information when responding to any request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Tip #1: Be Prepared! Address in Policies and Update Handbook

- Update or establish Reasonable Accommodation Policy
- Have Medical Certification Form
- Authorization To Release Medical Information
  - Must be in 14 point font!
- Prepare job descriptions that include essential function and clearly identify physical requirements

Tip #2: Track and Document All Steps of the Interactive Process

- Document the entire process
  - When the accommodation request first arose
  - Medical Questionnaire sent
  - Each step of the interactive process
  - Steps Company took to determine a potential accommodation
    - What did the employee say? What did the employer say?
  - Documentation is crucial to preventing and defeating claims and can help reveal employees abusing the system.
Tip #3: It’s Ok to Reach Out

- Follow-up with employee to determine if accommodation is working out.
  - If not, reengage in the interactive process!
- If out on an accommodation leave of absence, ok to periodically check in to determine if status has changed or if still planning on returning on X date.

Tip #4: Train Your Managers

- Managers must be able to spot potential accommodations issues
- Do not rush to say “No” — failure to engage in the interactive process is a stand-alone claim.
- The law trumps your policy!

Tip #5: Train Your Managers

- Avoid disciplining someone whose performance of a duty is excused
- Train to document reason for discipline — Keep separate from accommodation request/process
Tip #6: Train Your Managers

• How to keep moral up when a person is out on an accommodation leave (or is working from home - the “me too” syndrome)
• To document any hardships to the group
  – i.e. overtime, missed deadlines, cost overruns, complaints of additional stress because of workload, etc.

Tip #7: Train Your Managers

• How to handle social media posts regarding disabled employees
  – If learn something inconsistent with accommodation need/request - report it immediately to HR.
• All medical information must be kept on a need to know basis.
• That it is ok to respond to inquisitive employees with, “I cannot discuss other’s personnel information – I’m sure you understand and would want me to not discuss your personnel information with others.”

Thank you. Questions?
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