

Disability Under the Fair Employment & Housing Act:

*What you should know
about the law*



**California Department of
Fair Employment & Housing**

Disability Under the Fair Employment and Housing Act: What You Should Know About the Law

In 1974, California passed its first law intended to ensure that individuals with disabilities are protected in the workplace. Since then, California has been at the forefront of guaranteeing that persons with disabilities have equal access to employment.

This guide is intended to highlight and summarize workplace disability laws enforced by the California Department of Fair Employment and Housing (DFEH). It will familiarize you with the content of these laws, including recent changes and amendments to state statutes and attendant accommodation responsibilities. It should not be relied upon as a definitive statement of the law. For answers to your particular questions, you should consult an attorney or employment relations specialist for advice. You can also contact DFEH for information at 1-800-884-1684.

California disability laws are intended to allow persons with disabilities the opportunity for employment. To meet this goal, California's laws have historically offered greater protection to employees than federal law. Yet, because most news coverage focuses on actions taken by the U.S. Congress and court decisions interpreting the federal Americans with Disabilities Act (ADA), many employees and employers in California are not aware that California's laws are broader in many aspects. For example, the ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." However, under California law, disability is defined as an impairment that makes performance of a major life activity "difficult." Thus, under California law, persons with a wide variety of diseases, disorders or conditions would be deemed to have a disability who, under the definitions set forth in the ADA and the United States Supreme Court's narrow interpretations of that statute, might not be considered "disabled" and therefore denied protection.

A chart illustrating some of the differences between federal and state law is provided at the back of this guide.

WHAT CHANGES DO I NEED TO KNOW ABOUT?

In 2000, the state legislature passed the Prudence K. Poppink Act that made significant changes to the state's disability laws. It amended existing provisions of law and re-emphasized previous legal and policy positions. These legislative amendments took effect on January 1, 2001. Some of the important changes are as follows:

- The Legislature found and declared that the laws of this state provide protection independent of the 1990 ADA and has always afforded broader protection than federal law.
- The definitions of mental and physical disability were amended to prevent discrimination based on a person's "record or history" of certain impairments.
- Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, multiple sclerosis, and heart disease.

- The Legislature clarified that the definitions of physical and mental disability only require a “limitation” upon a major life activity, not a “substantial limitation” as required by the ADA. They further stated that when determining whether an employee’s condition is a limitation, mitigating measures should not be considered, unless the mitigation itself limits a major life activity.
- “Working” is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment. Whereas, under the ADA, the mental or physical disability must affect a person’s ability to obtain a broad class of employment.
- An employer or employment agency cannot ask about a job applicant’s medical or psychological condition or disability except under certain circumstances. In addition, it is illegal to ask current employees about these conditions unless the condition is related to the employee’s job.

WHAT DOES THE LAW REQUIRE OF EMPLOYERS?

An important aspect of complying with California law is knowing what is required by state law. When it comes to applicants and employees with disabilities, the FEHA generally requires two things of employers. Those requirements are:

1. Employers must provide reasonable accommodation for those applicants and employees who, because of their disability, are unable to perform the essential functions of their job.
2. Employers must engage in a timely, good faith interactive process with applicants or employees in need of reasonable accommodation.

However, before engaging applicants or employees, the employer should have some understanding of what constitutes a “disability” under state law. Before an applicant or employee must be reasonably accommodated, he or she must establish that they have a disability as defined under the Fair Employment and Housing Act.

WHAT IS A DISABILITY UNDER THE LAW?

The Fair Employment and Housing Act basically defines two categories of disability: mental disability and physical disability. Each category contains its own specific definitions. Additionally, under the FEHA, an employee with a “medical condition” is also entitled to accommodation.

The following are the specific definitions of physical disability, mental disability, and medical condition as outlined in the FEHA:

Physical Disability—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.

When determining whether a person has a disability, an employer cannot take into consideration any medication or assistive device, such as wheelchairs, eyeglasses or hearing aids, that an employee may use to accommodate the disability. However, if these devices or mitigating measures “limit a major life activity”, they should be taken into consideration.

Physical disability also includes any other health impairment that requires special education or related services; having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment which is known to the employer; and being perceived or treated by the employer as having any of the aforementioned conditions.

Mental Disability—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, is also protected.

It should be noted that 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.

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. For example, women who carry a gene established to statistically lead to breast cancer are protected under state law.

Keep in mind, however, that Government Code section 12940(o) makes it an unlawful employment practice for an employer to subject, directly or indirectly, any applicant or employee, to a test for the presence of a genetic characteristic.

In determining a disability, an employer may only request medical records directly related to the disability and need for accommodation. However, an applicant or an employee may submit a report from an independent medical examination before disqualification from employment occurs. The report must be kept separately and confidentially as any other medical records, except when a supervisor or manager needs to be informed of restrictions for accommodation purposes or for safety reasons when emergency treatment might be required.

WHAT CAN BE DONE FOR AN APPLICANT OR EMPLOYEE WITH A DISABILITY?

Once a disability that is protected under the law is established, an employer is obligated to provide a reasonable accommodation unless the accommodation would represent an undue hardship to the business operation.

In the process of determining a reasonable accommodation, an employer must enter into a good-faith, interactive process to determine if there is a reasonable accommodation that would allow the applicant or employee to obtain or maintain employment. The first step of the “interactive process” is the determining the “essential functions” of the position. When determining whether a job function is essential, the following should be taken into consideration: (1) the position exists to perform that function; (2) there are a limited number of employees available to whom the job function can be distributed; or (3) the function is highly specialized.

Evidence of whether a particular function is essential includes the employer’s judgment as to which functions are essential; a written job description prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; or the current work experience of incumbents in similar jobs.

Once an employer has evaluated the position and the essential functions of the position, he or she should begin the process of determining reasonable accommodation by engaging in good-faith interaction with the employee.

WHAT IS A REASONABLE ACCOMMODATION?

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. For example, providing a keyboard rest for a person with carpal tunnel syndrome may qualify as a reasonable accommodation. A person with asthma may require that the lawn care be rescheduled for a non-business day.

WHAT IS THE INTERACTIVE PROCESS?

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.

WHAT IS GOOD FAITH?

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.

MUST AN APPLICANT OR EMPLOYEE ALWAYS BE ACCOMMODATED?

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.

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.

For example, an applicant with a severe vision impairment applies for employment with a small market that has only four other employees. The applicant requires assistance to work the register by having another employee present at all times. The business in question would not have to provide the accommodation if, for example, it could not afford the cost of the additional staff or could not afford the cost of remodeling to accommodate two employees at the same time.

WHAT QUESTIONS MAY BE ASKED OF AN APPLICANT OR EMPLOYEE?

What questions may be directed to an individual depends, largely, upon whether the individual is an applicant for a position or is currently employed by the employer.

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.

However, 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 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.

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; or
- The nature or severity of a physical disability, mental disability, or medical condition.

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

WHAT ARE THE REMEDIES AVAILABLE UNDER THE FAIR EMPLOYMENT AND HOUSING ACT?

Under the Fair Employment and Housing Act, if an employer fails to reasonably accommodate an applicant or employee, the Fair Employment and Housing Commission can order the employer to cease and desist the discriminatory practice; to hire or reinstate; and award actual damages including, but not limited to, lost wages; emotional distress damages; and administrative fines not to exceed \$150,000.00. If the matter is heard in civil court, the damages would be unlimited.

IF DISCRIMINATION HAS OCCURRED, WHAT CAN BE DONE?

If an applicant or employee believes they have been discriminated against or denied reasonable accommodation for their disability, they should first try to work with the immediate supervisor to resolve the issue. If there is still no resolution, they should contact the employer's reasonable accommodation coordinator, a human resource representative or the person in charge of accommodation issues. Again, both the applicant or employee and the employer must engage in a good-faith interactive process to determine an appropriate resolution.

If the issue is still not resolved, the applicant or employee can contact the Department of Fair Employment and Housing at any time during the process and file a complaint. However, they have only one year from the date of harm (denial of accommodation, discharge, etc.) to file a complaint with the Department.

CONCLUSION

Accommodation of persons with disabilities on the job is important to the maintenance of good employer/employee relations. Understanding the duties and responsibilities of employers and supervisors to provide accessible workplaces is critical to ensuring that physical or mental limitations are not insurmountable barriers to those willing to work.

If you require further information,
please contact the department toll free at:

(800) 884-1684 For Employment

(800) 233-3212 For Housing

TTY (800) 700-2320

Or

Visit our website at:
www.dfeh.ca.gov

Comparison of Major Distinctions in California and Federal Employment Disability Provisions

	<p style="text-align: center;">Provisions included in the CA Fair Employment and Housing Act; (FEHA) and Fair Employment & Housing Commission (FEHC) Decisions and Regulations</p>	<p style="text-align: center;">Provisions included in the American with Disabilities Act (ADA), Equal Employment Opportunity Commission (EEOC) Regulations; Federal Court Decisions</p>
<p>Covered Employers</p>	<p>Having five or more employees for complaints involving physical or mental disability or medical condition.</p> <p>Having one or more employees for complaints involving harassment based on mental or physical disability.</p> <p>Excludes religious associations or corporations not organized for profit.</p>	<p>Private employers with 15 or more employees; state and local governments regardless of size.</p> <p>Nonprofit, religious organizations engaged are covered by the ADA but they may give employment preference to people of their own religion or religious organization. However, they may not discriminate on the basis of disability against members or nonmembers. Executive agencies of the US government are excluded from the ADA.</p>
<p>Definition of “Disability”</p>	<p>The FEHA forbids employment discrimination against an individual because of his or her physical disability, mental disability, or medical condition.</p> <p>A person is recognized as “disabled” if he/she:</p> <ul style="list-style-type: none"> • has a physical or mental disability that <u>limits</u> (i.e., it makes the achievement of the major life activity difficult) one or more <u>major life activities</u> (construed broadly to include physical, mental, and social activities and working); or • has a <u>history</u> of such an impairment known to the employer; or • is incorrectly <u>regarded</u> or <u>treated</u> as having or having had such an impairment; or • is <u>regarded</u> or <u>treated</u> as having or having such an impairment that has no presently disabling effects but may become a qualifying impairment in the future. <p>“Physical disabilities” include, but are not limited to, any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs (including speech organs), respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin,</p>	<p>The ADA defines “qualified individual with a disability” as an individual with a disability who can perform the essential functions of a job with or without reasonable accommodation.</p> <p>A person is recognized as “disabled” if he/she:</p> <ul style="list-style-type: none"> • has a physical or mental impairment that <u>substantially limits</u> one or more of his/her <u>major life activities</u> (caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); or • has a <u>record</u> of such an impairment; or • is <u>regarded</u> as having such an impairment.

<p>Definition of “Disability” (continued)</p>	<p>and endocrine systems.</p> <p>“Medical Condition” is defined as including any health impairment associated with a diagnosis of cancer when competent medical evidence indicates that the cancer victim has been cured or rehabilitated. It also includes certain genetic characteristics as defined in the statute.</p> <p>“Mental disabilities” include, but are not limited to, any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, specific learning disabilities, or any other mental or psychological disorder or condition that requires special education or related services.</p>	
<p>Exclusions from Definition of Physical and Mental Disability</p>	<ul style="list-style-type: none"> • Sexual behavior disorders (not currently defined); or • Compulsive gambling, kleptomania, pyromania; or • Psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs. 	<ul style="list-style-type: none"> • Persons who currently use drugs illegally (those not currently using illegal drugs but in rehabilitation from such use may be covered); • Homosexuality and bisexuality are not considered “impairments” or “disabilities”; • Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments; or • Compulsive gambling, kleptomania, or pyromania; or • Psychoactive substance use disorders resulting from current illegal use of drugs.
<p>Mitigating Measures</p>	<p>Mitigating measures, such as assistive devices, prosthesis, medication, etc., <u>are not</u> considered in determining whether a condition “limits” a major life activity, unless the mitigating measure itself limits a major life activity.</p>	<p>Mitigating measures are considered in determining if a major life activity is “substantially limited.”</p>
<p>“Working” as a Major Life Activity</p>	<ul style="list-style-type: none"> • Working is considered a major life activity along with physical, mental and social activities. • To be limited in the major life activity of working, an individual need only be limited in performing the requirements of a single, particular job. 	<ul style="list-style-type: none"> • EEOC regulations state that working is considered a major life activity along with caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. • To be substantially limited in the major life activity of working, an individual must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity.

<p>Employment Medical or Psychological Inquiries and Examinations</p>	<p><i>Pre-Offer:</i> An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may inquire into the ability of an applicant to perform job-related functions.</p> <p><i>Post Offer:</i> An employer may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.</p> <p><i>Post-Hire:</i> An employer may require examinations and inquiries if it can show such 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.</p>	<p><i>Pre-Offer:</i> An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he/she would perform these functions.</p> <p><i>Post-Offer:</i> An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does <u>not</u> have to be job related or consistent with business necessity. However, an employer may not refuse to hire an individual with a disability based on the medical examination results unless the reason for rejection is job-related and justified by business necessity.</p> <p><i>Post-Hire:</i> After a person starts work, a medical examination or inquiry of an employee must be job related and consistent with business necessity. Employers may conduct employee medical examinations where: there is evidence of a job performance or safety problem, required by federal law, necessary to determine fitness to perform a particular job, and where part of a voluntary examination that is part of an employee health program.</p>
<p>Genetic Characteristics</p>	<p>An employer may not test an applicant or employee for the presence of a genetic characteristic.</p>	<p>Not explicitly included as a covered disability. May fall within the category of a “perceived disability” in some cases.</p>
<p>Reasonable Accommodation; Exceptions</p>	<p>Generally, an employer must make reasonable accommodation for an employee or for an applicant with a known <u>physical or mental disability</u>. This requirement does not apply to an applicant or employee with a known <u>medical condition</u>.</p> <p>Requires a “good faith, interactive process” to determine an accommodation. Incorporates the EEOC guidelines for defining an “interactive process.” California courts have yet to define “good faith.”</p>	<p>EEOC guidelines outline steps that the employer and employee may take to arrive at an accommodation.</p> <p>“Good faith” is interpreted in a federal court decision as it applies to the EEOC guidelines.</p> <p>Under the ADA, employers will not be liable for compensatory and punitive damages if it has been engaged in “good-faith efforts” to identify a possible accommodation.</p>

Reasonable Accommodation; Exceptions (continued)	<p>To deny an accommodation, an employer must prove that:</p> <ol style="list-style-type: none"> 1) the accommodation poses an undue hardship on the employer; 2) the employee cannot perform the essential job functions even with accommodation; 3) the accommodation presents a danger to the disabled employee or others; 4) the employee would not meet a bona fide occupational qualification; 5) Another statutory requirement (e.g. safety, OSHA, etc.) preempts the FEHA provision; or 6) Another affirmative defense under FEHA applies. 	<p>“Undue hardship” defense provisions to deny an accommodation are generally the same under the ADA.</p> <p>An employer may refuse to hire an employee if the selection standards and criteria are job related and consistent with business necessity <u>and</u>:</p> <ol style="list-style-type: none"> 1) no accommodation exists that permits the person to perform essential job functions; 2) the person poses a direct threat to the safety of others.
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