



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

In 1974, California passed its first law intended



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 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.



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

matter is heard in civil court, the damages would be unlimited.

**IF DISCRIMINATION HAS OCC**



## Comparison of Major Distinctions in California and Federal Employment Disability Provisions

	<b>Provisions included in the CA Fair Employment and Housing Act (FEHA) and Fair Employment &amp; Housing Commission (FEHC) Decisions and Regulations</b>	<b>Provisions included in the ADA, ADA Amendments Act (ADAAA), and Equal Employment Opportunity Commission (EEOC) Regulations</b>
<b>Covered Employers</b>	<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 are covered by the ADA as employers, 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>

## Definition of “Disability”

The FEHA forbids employment discrimination against an individual because of his or her physical disability, mental impairment, or medical condition.

A person is recognized as “disabled” if he/she:

has a physical or mental disability that limits (i.e., it makes the achievement of the major life activity difficult) one or more major life activities (construed broadly to include physical, mental, and social activities and working); or has a history of such an impairment known to the employer; or is incorrectly regarded or treated as having or having had such an impairment; or is regarded or treated as having or having such an impairment that has no presently disabling effects but may become a qualifying impairment in the future.

“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, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine systems.

“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.

“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.

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.

A person is recognized as “disabled” if he/she:

has a physical or mental impairment that substantially limits one or more of his/her major life activities;

has a record of such an impairment; or

is regarded as having such an impairment.

Under the ADA, “major life activity” includes, but is not limited to:

**Exclusions from  
Definition of  
Physical and  
Mental Disability**

Sexual behavior disorders (e.g.

## **Employment Medical or Psychological Inquiries and Examinations**

*Pre-Offer:* 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 or severity of a disability. An employer may inquire into the ability of an applicant to perform job-related functions.

*Post Offer:* An employer may require a medical or psychological examination or

<p><b>Reasonable Accommodation; Exceptions</b></p>	<p>Generally, an employer must make reasonable accommodation for an employee or for an applicant with a known physical or mental disability.</p> <p>Requires a “good faith, interactive process” to determine an accommodation. Incorporates the EEOC guidelines for defining an “interactive process.”</p> <p>To deny an accommodation, an employer must prove that:</p> <ol style="list-style-type: none"> <li>1) the accommodation poses an undue hardship on the employer; or</li> <li>2) the employee cannot perform the essential job functions even with accommodation; or</li> <li>3) the accommodation presents a danger to the disabled employee or others; or</li> <li>4) the employee would not meet a bona fide occupational qualification; or</li> <li>5) Another statutory requirement (e.g. safety, OSHA, etc.) preempts the FEHA provision; or</li> <li>6) Another affirmative defense under FEHA applies.</li> </ol>	<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 they have been engaged in “good-faith efforts” to identify a possible accommodation.</p> <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"> <li>1) no accommodation exists that permits the person to perform essential job functions; or</li> <li>2) the person poses a direct threat to the safety of others.</li> </ol>
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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](http://www.dfeh.ca.gov)