

# ***ADA AND FEHA WORKPLACE DISABILITIES; THE REASONABLE ACCOMMODATION REQUIREMENT; AND THE INTERACTIVE PROCESS***

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*These slides cover broad topics. Case citations have been omitted.  
Detailed discussion is provided during the presentation.*

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Overview. The Fair Employment and Housing Act ("FEHA") and the Americans with Disabilities Act ("ADA") prohibit employment and workplace discrimination, not limited to hiring, termination, conditions, benefits and terms. The FEHA and the ADA both prohibit disability discrimination and require a "reasonable accommodation" process. The FEHA specifically prohibits discrimination based on the following criteria.

- Age (40 and over)
  - Ancestry
  - Color
  - Religious Creed
  - Marital Status
  - Denial of Family and Medical Care Leave
  - Disability (mental and physical)
  - Medical Condition (cancer and genetic characteristics)
  - Race
  - Religion
  - Sex
  - Sexual Orientation
  - National Origin
- FEHA: Cal. Gov. Code §§12940-12951.
  - ADA: 42 USC §§12111-12117.
  - The FEHA also prohibits harassment in the workplace.

## *What is the reasonable accommodation requirement?*

- Is shall be an unlawful employment practice "for an employer . . . to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."
- FEHA: Cal. Gov. Code §12940(m).
- ADA: 42 USC §12112(b).
- See also slide 15 for further clarifying discussion.

## *What is the interactive process requirement?*

- It shall be an unlawful employment practice "for an employer . . . to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."
- FEHA: Cal. Gov. Code §12940(n).
- ADA: 42 USC §12112(b).
- See also slide 15 for further clarifying discussion.

*Who are individuals for whom reasonable accommodation is required?*

- An employee or a prospective employee, with a disability, who, with or without reasonable accommodation, can perform the essential job functions of the employment position that the person holds or desires.

## *What is a disability?*

- A physical or mental disability is a condition that limits (that is, makes more difficult) a major life activity, without regard to such things as medications, assistive devices, reasonable accommodations, or other ameliorative effects of mitigating measures.
- Important. Additionally, the anti-discrimination prohibitions are triggered even when an employer erroneously believes that the employee has a disability, i.e., when there is an actual or even an erroneously perceived limitation of a major life activity.

## *What is a disability (continued)?*

- New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011. The primary purpose of the ADAAA (Americans with Disabilities Act as amended by the ADA Amendments Act of 2008) is to make it easier for people with disabilities to obtain protection under the ADA. The definition of “disability” should be construed broadly in favor of expansive coverage to the maximum extent permitted by the ADA. The primary attention in cases brought under the ADA should be whether discrimination has occurred, not whether the person meets that definition of disability. Whether a person meets the definition of disability should not demand extensive analysis.

In general, Disability means, with respect to an individual:

- (i) A physical or mental impairment that substantially limits one or more of the major life activities of the person;
- (ii) A record of such an impairment; or
- (iii) Being regarded as having such an impairment as described in (i) above.

## *What is a disability (continued)?*

- New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

Claims based on transitory and minor impairments under the “regarded as” prong. It may be a defense to a charge of discrimination by a person claiming coverage under the “regarded as” prong of the definition of disability that the impairment is (for an actual impairment) or would be (for a perceived impairment) “transitory and minor.” To establish this defense, a covered entity must demonstrate that the impairment is both “transitory” and “minor.” Whether the impairment at issue is or would be “transitory and minor” is to be determined objectively. A covered entity may not defeat the claim simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (for an actual impairment) or would be (for a perceived impairment) both transitory and minor. For the purpose of this defense, “transitory” is defined as lasting or expected to last six months or less.

## *What is a physical or mental impairment?*

- New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.
  - (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine; or
  - (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

## *What is a life activity?*

- Life activities include physical, mental and social activities, and working. Generally, a physical disability is a physiological condition (including external and internal body activities and functions), whereas a mental disability includes but is not limited to any mental or psychological disorder or condition, and the definitions of both physical and mental disability include being regarded or treated by the employer as having or having had a disability or a condition that may become a physical or mental disability. Generally, the prohibition against discrimination or harassment relating to a medical condition includes a health impairment related to a diagnosis of or a record of a history of cancer; or any scientifically or medically identifiable genetic characteristic (gene or chromosome), or inherited characteristics.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

Major life activities include but are not limited to:

- (i) 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; and
- (ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, including the operation of an individual organ within a body system.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

Whether an activity is a major life activity is not determined by reference to whether it is of central importance to daily life.

The term substantially limits shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

An impairment is a disability if it substantially limits the ability of a person to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict the person from performing a major life activity in order to be considered substantially limiting.

Nevertheless, not every impairment will constitute a disability.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether a person's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

The determination of whether an impairment substantially limits a major life activity requires an individual assessment. However, in making that assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

The comparison of a person's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing however prohibits the presentation of scientific, medical, or statistical evidence to make a comparison.

The determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

The above principles are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all people and entities with rights and responsibilities under the ADA as amended.

Applying the above principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under the “actual disability” prong or the “record of” prong. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, for these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

## *What is a life activity (continued)?*

New regulations promulgated by the EEOC (U.S. Equal Employment Opportunity Commission) March 10, 2011.

In determining whether a person has a disability under the “actual disability” or “record of” prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

Given the above rules of construction, it may often be unnecessary to conduct an analysis involving most or all of these types of facts.

Note, there are special rules for eyeglasses and contact lenses.

## *What are examples of possible reasonable accommodations? (Slide 1 of 3)*

- California Code of Regulations:
  - Examples of Reasonable Accommodation. Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:
    - (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
    - (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions. (Continued)

## *What are examples of possible reasonable accommodations? (Slide 2 of 3)*

- Department of Fair Employment and Housing website:
  - Reasonable accommodation can include but is not limited to:
    - Changing the job duties.
    - Changing the work shift.
    - Providing leave for medical care.
    - Accommodating work schedules.
    - Relocating the work area.
    - Providing mechanical or electrical aids (or modifications).
    - Providing interpreters or readers; acquiring or modifying equipment, furniture or devices; restructuring job schedules or responsibilities; making facilities accessible to and usable by people with disabilities. (Continued)

## *What are examples of possible reasonable accommodations? (Slide 3 of 3)*

- California Gov. Code:
  - "Reasonable accommodation" may include either of the following:
    - (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
    - (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

## *Why are the essential job functions important?*

- An employee or prospective employee must be able to perform the essential job functions of the current or potential employment position, either with or without reasonable accommodation.
- The FEHA does not prohibit an employer from refusing to hire or discharging an employee with a disability where the employee, because of his or her disability is unable to perform his or her essential job functions even with reasonable accommodation.

## *What are essential job functions?*

- California Gov. Code:
  - A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:
    - (1) The function may be essential because the reason the position exists is to perform that function.
    - (2) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.
    - (3) 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.

## *What evidence indicates that a particular function is essential?*

- Evidence of whether a particular function is essential includes, but is not limited to, the following:
  - (1) The employer's judgment as to which functions are essential.
  - (2) Written job descriptions prepared before advertising or interviewing applicants for the job.
  - (3) The amount of time spent on the job performing the function.
  - (4) The consequences of not requiring the incumbent to perform the function.
  - (5) The terms of a collective bargaining agreement.
  - (6) The work experiences of past incumbents in the job.
  - (7) The current work experience of incumbents in similar jobs.

## *When is the reasonable accommodation requirement triggered?*

- Different authorities suggest different answers. The California Gov. Code states or suggests that the employee must first request a reasonable accommodation. Don't follow that standard. Cases indicate that the requirement is triggered when the employer knows or reasonably should know that the employee is experiencing workplace problems because of a disability. Note, a qualified disability can also be a condition that is episodic or that is in remission. However, an actual disability must exist for the reasonable accommodation requirement to be triggered.

*For how long must an employer continue to look for a reasonable accommodation?*

- There is no definitive answer to this question. The answer depends on the existing case law and other authorities, as applied to the facts and circumstances of each case. There is no bright line test. This slide and the following three slides discuss closely related issues. Based on existing case law, and depending on the facts and circumstances, the time period could be as long as 8 or 9 months, but also could be considerably shorter. I have not seen a case involving a time period as long as 1 year. The employer will be required to make a judgment call about how and when to proceed, and for how long.

*Is an opening for a different current job, or for a different job in the future a reasonable accommodation?*

- Yes, it can be, but it also depends on the facts and circumstances.

*If the employer provides temporary reasonable accommodation, for how long must the employer continue to make that reasonable accommodation available?*

- There is no definitive answer to this question. The answer depends on the facts and circumstances of each case, and existing case law and other authorities.

*Is the employer required to make a part-time reasonable accommodation position available as a permanent position?*

- No.

*Are sick and vacation time off, or time off without pay reasonable accommodations?*

- Yes, they can be, but it also depends on the facts and circumstances, including, but not limited to the employer's policies, and the employer's past patterns and practices of handling similar situations.

*Is the employee required to participate during the interactive process?*

- Yes. The employee is required to actively participate in the interactive process and to provide the employer with sufficient information about the disability to allow the employer to determine whether the employee has a disability and to engage in the interactive process. Still the employer should view it as the employer's primary responsibility to attempt to obtain necessary information from the employee, and not depend on the employee's lack of initiative as an opportunity to forgo the interactive process.

*Can the employer choose or select between different reasonable accommodations that are available?*

- Yes. The employer has the discretion to choose between different, effective accommodations, and is not necessarily required to choose the accommodation desired by the employee, or the “best” accommodation.

*Are the reasonable accommodation requirements applicable with respect to an applicant for employment?*

- Yes, the reasonable accommodation requirements apply for both employees and applicants for employment.

*If the employer is able to offer an alternative employment position, how does the employer handle the possible issue of job position priority between the employee with the disability and other employees or applicants who also desire the alternative employment position?*

- It depends on the facts and circumstances, including the employer's policies and past patterns and practices, and contract, collective bargaining, etc., requirements or provisions that might apply.

*Is a “disability” a possible employee defense to past or current employee misconduct?*

- Yes, depending on the facts and circumstances, it is a possible employee defense, if the disability is related to the misconduct.

*Can the employer terminate or refuse to hire an individual, and not be required to evaluate reasonable accommodations if the employee or job applicant cannot perform the essential duties of the job without endangering the health and safety of others or of the individual, even with an accommodation?*

- Yes, depending on the facts and circumstances. Pursuant to Cal. Labor Code §§1026 and 1052, an employer may refuse to hire or may discharge an employee, who is unable to perform his or her duties because of alcohol or drug use, or cannot perform the duties without endangering his or her health or safety, or the health or safety of others. However, there is a requirement that the qualifications standard be incapable of modification through a reasonable accommodation that would permit the disabled employee to meet those standards.
- See also, Cal. Labor Code §§1025-28. An employer who has 25 or more employees must reasonably accommodate any employee wishing to participate in an alcohol or drug rehabilitation program, provided it does not impose an employer undue hardship. The employer has a duty to reasonably safeguard the privacy of the employee's enrollment. 36

## *What is the employer undue hardship exception to the reasonable accommodation requirement?*

- Pursuant to Cal. Gov. Code §12926(s), “Undue hardship” means significant difficulty or expense, in light of the following factors:
  - (1) The nature and cost of the accommodation needed;
  - (2) The overall financial resources of the facilities involved in providing 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 on the operation of the facility;
  - (3) The overall financial resources and size of the covered entity's business, including number of employees, and number, type, and location of facilities.
  - (4) The type of operations, including the composition, structure, and functions of the workforce of the entity; and
  - (5) The geographic separateness, administrative, and fiscal relationship of the facility or facilities.

*Does a workers' compensation settlement with a Cal. Civ. Code §1542 waiver bar a separate civil action for disability discrimination under the FEHA?*

- Surprisingly, perhaps not. At least two cases have held that a settlement or finding in a workers' compensation case is not collateral estoppel to that issue in a related civil action.

*Can an employer do anything to fix a possible wrongful termination?*

- Yes, in part. Under the "special circumstances" doctrine and mitigation of damages, an employer can in part cure, or reduce or stop the additional accrual of damages from a wrongful termination wrongdoing, unless the employee can show special circumstances.

## *Why is managing agent (supervisor) status important?*

- An employer is directly liable for discrimination against an employee by a managing agent or supervisor of the employer. The same rule also applies in an action against the employer for punitive damages. An employer is not responsible for discrimination against an employee by another employee who is not a managing agent or supervisor, unless the employer knew or should of known about the discrimination and failed to take sufficient action to stop the wrongful conduct.

## Who is a managing agent or supervisor?

- The definition of managing agent or supervisor is not entirely clear. One court's definition of the term "managing agent" provides: an employee who exercises substantial independent authority and judgment over decisions that ultimately determine corporate policy. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563; see also, *Chapman v. Enos* (2004) 116 Cal. App. 4th 920.
- Pursuant to Cal. Gov. Code §12926(r) the term 'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

## California jury instruction definition of the term "supervisor."

- For the purpose of FEHA employment discrimination cases, the term "supervisor" is defined by CACI No. 2525:
- CACI No. 2525. Harassment—"Supervisor" Defined
- [*Name of alleged harasser*] was a supervisor of [*name of defendant*] if [he/she] had the discretion and authority:
  - [a. To hire, transfer, promote, assign, reward, discipline, [or] discharge [or] [*insert other employment action*] other employees [or effectively to recommend any of these actions];]
  - [b. To act on the grievances of other employees or effectively to recommend action on grievances;] [or]
  - [c. To direct [*name of plaintiff*]'s daily work activities.]

## California jury instruction for reasonable accommodation discrimination.

- CACI No. 2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))
- [*Name of plaintiff*] claims that [*name of defendant*] failed to reasonably accommodate [his/her] [select term to describe basis of limitations, e.g., physical condition]. To establish this claim, [*name of plaintiff*] must prove all of the following:
  1. That [*name of defendant*] was [an employer/[*other covered entity*]];
  2. That [*name of plaintiff*] [was an employee of [*name of defendant*]/applied to [*name of defendant*] for a job/[*describe other covered relationship to defendant*]];
  3. That [[*name of defendant*] thought that] [*name of plaintiff*] had [a] [e.g., physical condition] [that limited [*insert major life activity*]]];
  4. That [*name of defendant*] knew of [*name of plaintiff*]'s [e.g., physical condition] [that limited [*insert major life activity*]]];
  5. That [*name of plaintiff*] was able to perform the essential job duties with reasonable accommodation for [his/her] [e.g., physical condition];
  6. That [*name of defendant*] failed to provide reasonable accommodation for [*name of plaintiff*]'s [e.g., physical condition];
  7. That [*name of plaintiff*] was harmed; and
  8. That [*name of defendant*]'s failure to provide reasonable accommodation was a substantial factor in causing [*name of plaintiff*]'s harm.
- [In determining whether [*name of plaintiff*]'s [e.g., physical condition] limits [*insert major life activity*], you must consider the [e.g., physical condition] [in its unmedicated state/without assistive devices/[*describe mitigation measures*]].]

## *California jury instruction definition of “reasonable accommodation.”*

- CACI No. 2542. Disability Discrimination—“Reasonable Accommodation” Explained
- A reasonable accommodation is a reasonable change to the workplace that [*choose one or more of the following*]
- [gives a qualified applicant with a disability an equal opportunity in the job application process;]
- [allows an employee with a disability to perform the essential duties of the job;] [or]
- [allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]
- Reasonable accommodations may include the following:
  - a. Making the workplace readily accessible to and usable by employees with disabilities;
  - b. Changing job responsibilities or work schedules;
  - c. Reassigning the employee to a vacant position;
  - d. Modifying or providing equipment or devices;
  - e. Modifying tests or training materials;
  - f. Providing qualified interpreters or readers; or
  - g. Providing other similar accommodations for an individual with a disability.
- If more than one accommodation is reasonable, an employer makes a reasonable accommodation if it selects one of those accommodations in good faith.

*Group questions and discussion.*

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***\* \* \* THE END \* \* \****

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