

Handling FEHA and ADA Issues

Weekly Steward's Call

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Presented by Alan Goldstein
Attorney, SEIU Local 1000 Legal Department

Disclaimer: Presentation is for informational purposes only.
This is not legal advice.

Session Outline



1. Basics of the Fair Employment and Housing Act (FEHA) & Americans with Disabilities Act (ADA)
2. Issues that may arise related to FEHA & ADA
3. Reasonable Accommodation Issues
 - a. The Interactive Process
 - b. Medical Inquiries
4. Resources
5. Questions

Laws Prohibiting Discrimination on the basis of Disability: ADA & FEHA



The Americans With Disabilities Act (ADA)

42 U.S. Code § 12101

Federal Law – Provides Floor for FEHA

Cal. Gov. Code § 12926.1.

Fair Employment & Housing Act (FEHA)

Cal. Gov. Code § 12940, *et seq.*

See also the Rehabilitation Act, California Unruh Civil Rights Act, among other state and federal laws.

State Policy



California State Law – CA Gov. Code § 12930, *et seq.*

Defines State policy on Employing People with Disabilities:

- a) Full participation, including remunerative employment;
 - b) **Same terms and conditions** as people without disabilities;
 - c) Departments to make **reasonable accommodation absent undue hardship**.
- Requires an “**effective affirmative action program**” with “goals and timetables” to ensure equal access to positions.
 - HR departments to provide technical assistance.

Query: Does the LEAP program help the State meet these requirements?

FEHA and ADA: Covered Individuals

FEHA Definition: Physical or mental impairment **limiting** a major life activity. (Broader than ADA: “substantially limits.”)

1. Most physical or mental impairments will be covered.
2. ADA is a floor, any ADA violation is a FEHA violation.
3. Individual must be qualified for the job:
 - (1) Skills, licensing & training, and
 - (2) Ability to perform essential job functions with or without reasonable accommodation.

Note: FEHA and ADA both prohibit discrimination based on an “association” with someone with a disability. However, FEHA incorporates this into the definition of disability, ADA won’t apply this to employees, CRD may.

42 U.S.C. 12102(2), 12112(B)(4); 29 C.F.R. 1630.2(g);
CA Gov. Code § 12940, *et seq.*

FEHA and Associational Disability: A New Frontier?

FEHA's definition of disability may require reasonable accommodations based on an association with a person with a disability. (See Gov. Code § 12926(o).)

DFEH has taken comments on this issue, stating:

[A California Appellate Court] has stated in *dicta* and one federal district court has held, that FEHA requires employers to reasonably accommodate an employee who associates with someone with a disability.

DFEH calls it the “Duty to Reasonably Accommodate Associational Disability.”

Query: 1. How would this compare with FMLA rights?
2. What can this right include?

FEHA Covered Individuals: Drug or Alcohol Use

1. **Not Covered** – People who currently use illegal drugs.
2. **Covered** – People who used illegal drugs in the past after going through a rehabilitation program.
3. **Covered** – Present and former users of alcohol. Must still obey workplace rules.
4. State may restrict drug and alcohol use at work.
5. Drug tests are allowed - not considered medical tests.

FEHA: General Anti-Discrimination & Reasonable Accommodation Requirements

FEHA (CA Gov. Code § 12940): It is an unlawful employment practice, unless based upon a bona fide occupational qualification:

- (a) ... because of the race, religious creed, color, national origin, ... [physical or mental] disability, gender identity, ... age, sexual orientation, ... or veteran status... to discriminate in the terms, conditions, or privileges of employment.
- (m) (1) ... fail to make **reasonable accommodation** for the **known** physical or mental disability of an applicant or employee [absent] undue hardship;
(2) ... retaliate ... against a person for requesting accommodation..., regardless of whether the request was granted;
- (n) ... fail to engage in a timely, good faith, **interactive process**;
- (o) ... test for the presence of a genetic characteristic.

See also GINA (Genetic Information Non-Discrimination Act), 42 U.S.C. 2000ff, et seq.; 29 C.F.R. 1635.1, et seq.

MOU Issues Related to Disability Discrimination



Article 5.7: Anti-Discrimination Provision



MOU Article 5.7 prohibits discrimination, harassment and retaliation due to a disability.

1. **Grievable but only up to the 3rd level – no arbitration hearing.**
2. Can file at Department's EEO Office.
3. Without a hearing, this provision is difficult to enforce but filing a grievance may still be worthwhile.
4. Filing at the Civil Rights Department (CRD) or U.S. Equal Employment Opportunity Commission (EEOC) is possible whether a grievance or a departmental EEO complaint is filed or not.

Article 8.2: Sick Leave Policy



MOU Article 8.2 provides for sick leave but substantiation may be required.

1. The reason for using sick leave need not qualify as a disability.
2. Par. D - Verification from a health care provider may be required:
 - a. The employee has a demonstrable pattern of sick leave abuse;
or
 - b. The supervisor has good reason to believe the absence was for an unauthorized reason. (Reasonable Person Standard)
3. No discrimination or sick leave denial based “solely on the amount of use.”
4. This provision is grievable to the 4th level and may include an arbitration hearing.
5. Can request unpaid leave if no sick leave available (best done if RA).

Article 10.21: Bullying



MOU Article 14.2 applies to all situations, if a person is not promoted due to disability discrimination, can use other remedies as well.

1. Each department must have an anti-bullying policy.
2. Very difficult to prove unless the bullying is on a protected basis, e.g., disability, race, gender, gender identity, religion, national origin...

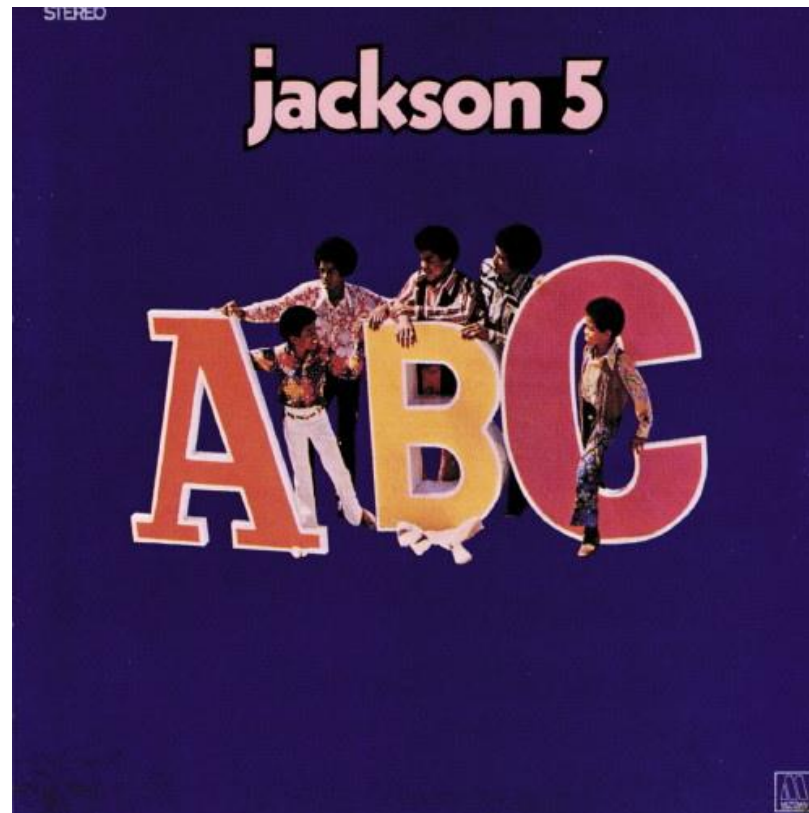
Article 14.2: Out of Class Grievance



MOU Article 14.2 applies to all situations, if a person is not promoted due to disability discrimination, can use other remedies as well.

1. Must have desk audit performed.
2. Can be difficult to prove.

ABCs of Discrimination Issues



California Anti-Discrimination Requirements Due to Disability



CA Gov. Code § 19702 prohibits discrimination, harassment, and retaliation due to a disability.

1. **Must file with department's EEO Office(r) before filing at SPB.**
 - a. Very Long Timelines. Department has had 90 days to respond to EEO complaints.

**** Note:** Exhaustion is not necessary before filing at EEOC or DFEH.
2. SPB has said:

“When implementing Government Code § 19702, the Board applies the California Fair Employment and Housing Act (FEHA), unless the federal Americans with Disabilities Act of 1990 (ADA) would offer greater protection.”

Reasonable Accommodation: The First Step



1. Requesting a reasonable accommodation is usually the first step.
2. There is no specific language that must be used.
3. Another party may make the request
4. Must disclose:
 - a. Existence of a disability under FEHA (**but not the diagnosis**);
 - b. Resulting limitations affecting performance of essential functions
 - c. A suggested reasonable accommodation if possible.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.

The Reasonable Accommodation Request

The request should describe:

1. The existence of a qualifying disability and the resulting **limitations**;
2. The disability-related limitations affecting your ability to perform essential functions, showing the need for a RA;
3. Your preferred accommodation, if known (See **JAN** for ideas);
4. Helpful to describe how essential job functions will be performed.
5. A timeframe for a response is recommended.

Tip: Protect Confidentiality. The diagnosis need not be disclosed, just the existence of a qualifying disability. However, at some point, it may be helpful to disclose it.

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship; CA Gov. Code § 12940(m)

What are Reasonable Accommodations?



EEOC Regulations define reasonable accommodations as:

1. Modifications or adjustments to the work environment, or
2. to the manner or circumstances under which the position ... is customarily performed,
3. that enable a qualified individual with a disability to perform the essential functions of that position ... or ...
4. enjoy equal benefits and privileges of employment.

29 C.F.R. 1630.2(o)(1)

What are Possible Reasonable Accommodations?



1. **Teleworking** – The New Frontier?
 - a. **EEOC:** teleworking experiences during COVID-19 are relevant – “*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,*” found at:
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
2. **Job restructuring:** Removing non-essential functions permanently or essential functions temporarily.
 - a. **Query:** Can there be a team approach to performing job functions?.
3. **Modified work schedules** (temporarily or permanently)
4. **Modifying examinations, training or policies**
42 U.S.C. 12111(9)(B); 29 C.F.R. 1630.2(o); *See also, EEOC Enforcement Guidance on Reasonable Accommodation at:*
<http://www.eeoc.gov/policy/docs/accommodation.html>.

Possible Reasonable Accommodations

6. Purchasing or modifying **equipment**, e.g. computer software or hardware, ergonomic equipment.
7. **Aids**: Qualified readers, sign language interpreters, ...
8. **Workplace accessibility** (including reducing scents or distractions).
9. **Emotional Support Animals** (even if they don't meet the ADA Title III service animal definition).

42 U.S.C. 12111(9)(B); 29 C.F.R. 1630.2(o)

Possible Reasonable Accommodations

6. **Reassignment** to an existing vacant position. The reasonable accommodation of “last resort.”
 - a. If no reasonable accommodation would assist performance of essential job functions of the position; or
 - b. If requested by the employee.
 - c. Involuntary reassignments may be adverse employment actions if other reasonable accommodations were available.

7. **Leave**
 - a. If no reasonable accommodation would assist performance of the essential job functions of the position.

Possible Reasonable Accommodations

8. Reasonable accommodations **based on an association** with a person with a disability. (DFEH is examining)
 - a. See Gov. Code §§ 12926(j)(4); 12926(m)(4); 12926(o); *Castro v. Classy Inc.*, No. 3:19-cv-02246-H-BGS, 2020 WL 996948 (S.D. Cal. Mar. 2, 2020); *Castro-Ramirez v. Dependable Highway Express Inc.* (2016) 2 Cal.App.5th 1028 (*review denied*);
9. Anything else that complies with M.O.U., duty statement, and job classification.

Essential Job Functions



“Essential Functions” of the job are:

1. Fundamental Job Duties
2. Employers are not required to **permanently** reallocate essential functions, but may choose to do so anyway
3. Duty Statements are relevant evidence but are not necessarily determinative.

29 C.F.R. 1630.2(n); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship.

ADA Requirements: Interactive Process

1. An informal, good faith interactive process should follow a reasonable accommodation request.
2. Generally, employee's preference gets "**primary consideration**" but the employer can provide any "**effective**" reasonable accommodation.
 - a. **Exceptions: Reassignment or leave – Per EEOC:** Reassignment is the RA of last resort. (**AG:** Leave may be the next-to-last resort.)
3. The duty to accommodate is **ongoing**.
4. Medical Information must be kept **confidential**.

29 C.F.R. § 1630.2(o)(3); *EEOC Enforcement Guidance on Reasonable Accommodation, and Undue Hardship*.

ADA Requirements: Interactive Process

5. Per EEOC: An employer should respond “**expeditiously.**” An **unreasonable delay** may constitute discrimination.

a. Relevant Factors:

- (1) Reason(s) for the delay;
- (2) Length of the delay
- (3) How much each party contributed to the delay;
- (4) What the employer was doing during the delay, and
- (5) Whether the required accommodation was simple or complex to provide, (**AG Note:** E.g., if an ergonomic or assistive technology evaluation is required).

29 C.F.R. § 1630.2(o)(3); *EEOC Enforcement Guidance on Reasonable Accommodation, and Undue Hardship.*

FEHA: The Interactive Process and Confidentiality



Disclosure of a diagnosis cannot be required if enough info is supplied:

§ 11069. Interactive Process.

(c)(3) When the employer or other covered entity has received reasonable medical documentation, **it shall not ask the applicant or employee about the underlying medical cause of the disability....**

(d)(1) Reasonable medical documentation confirms the existence of the disability and the need for reasonable accommodation... **Disclosure of the nature of the disability is not required.**

2 Cal. Code Reg. § 11069 (Emphasis added).

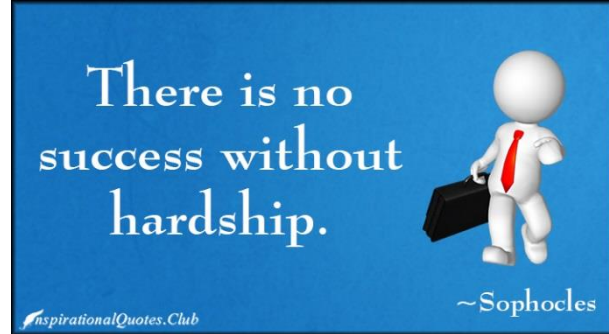
Query: How long should to respond to and implement a RA request that is not complex?

The Interactive Process: Medical Information

1. Employers may request **limited medical information only** if disability and/or accommodation need is not known or obvious.
2. **Employees must comply** with reasonable requests.
3. Employers should seek clarification from the employee if the information seems vague or incomplete.
 - a. Try to avoid providing a signed medical authorization.
 - b. Instead, politely offer to provide any needed and appropriate medical information upon request. Then be sure to do so.
4. All medical information must be kept confidential.
 - a. In a separate location
 - b. Only staff who “need to know” should have access.

42 U.S.C. § 12112(d)(4)(A); *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the ADA*

Reasonable Accommodation Limitations



An Accommodation does not have to be provided if:

1. It is unreasonable –
 - a. **Requires reallocation of essential job functions**
 - b. Will not enable the employee to be qualified
2. It results in an undue hardship to the employer; or
3. Results in a direct threat to the health or safety of the employee or others.

29 C.F.R.1630.2(o)

Reasonable Accommodation Limitations: Undue Hardship



- Employers do not need to provide a reasonable accommodation if it would be an undue hardship.
- Undue Hardship defined: “**significant difficulty or expense.**” (Probably not always the same as operational need).
- Factors include:
 - (1) Type of operation;
 - (2) Department financial resources;
 - (3) Cost of the reasonable accommodation; and
 - (4) the impact ... upon operations...”

What is Not a Reasonable Accommodation?

1. A change in supervisor is not a reasonable accommodation, but...
 - a. Reassignment to a vacant, open position (with a different supervisor) for disability-based reasons may be a RA.
2. Creating a **permanent** part-time or full-time job is not a reasonable accommodation, but...
 - a. Temporarily making a position part-time may be a RA.
3. **Permanently** removing essential functions is not a reasonable accommodation, but...
 - a. Temporarily making a position part-time may be a RA.

ADA Requirements: Interactive Process Takeaways

Both parties must engage in good faith.

- 1) Employer must timely engage in the interactive process in good faith. (Just saying “No” is not an interactive process.)
- 2) Employee must respond to appropriate information requests.
- 3) 2-4 weeks is generally enough time for basic RA requests.
- 4) Fitness-for-duty evaluations (by M.D.s) are authorized under the Government Code.

29 C.F.R. § 1630.2(o)(3); *EEOC Enforcement Guidance on Reasonable Accommodation, and Undue Hardship.*

Medical Actions and Fitness for Duty Examinations

State may order a Fitness for Duty examination by a M.D.

1. It cannot be given pre-job offer.
2. After a conditional job offer it is acceptable if given to everyone in that position.
3. When on the job a FFD can be ordered if “job-related and consistent with business necessity.”
4. The State can dismiss or demote based on the FFD. This can be appealed to SPB within 15 days.
5. It’s good to have a contrary medical opinion from your dr.

Cal. Gov. Code § 19253.5; Cal. Code Regs. tit. 2 § 11071

Some Practical Tips



How to Address Discrimination Issues

1) Check Government Code and Regulations, MOU, EEOC Guidance, and Job Accommodation Network (JAN).

2) Document, document, document. Have the worker keep complete accurate notes, i.e., who present, what was said, where it was said, disability knowledge of management,...

2) Contact the Member Resource Center (MRC) to have issue included, referral to a Union Resource Representative (URC) can be extremely helpful.

3) Encourage obeying first and grieving later to avoid being insubordinate.

How to Address Discrimination Issues



- 4) Make sure RA request & medical note do not give a basis for finding employee cannot perform essential job functions. Try to review it before submitting.
- 5) Filing internally with the EEO office may not help much and is not required, but it may help establish retaliation charge.
- 6) CRD and EEOC are generally better enforcement than the SPB (long timelines, not all ALJs are helpful).
- 7) When there is also a WC case, the issues sometimes get jumbled together. It's best to keep them separate if possible.
- 7) Argue strongly but politely.

Employment Discrimination Resources: Agencies

1. **SEIU Local 1000:** 866.471.SEIU (7348); seiu1000.org
 - a. Union Stewards
 - b. Member Resource Center / Union Resource Center (URC)
 - c. Legal Department
2. **Job Accommodation Network:** askjan.org
3. **Equal Employment Opportunity Commission:** eeoc.gov
4. **CA Dept. of Civil Rights:** dfeh.ca.gov
5. **CalHR:** www.CalHR.ca.gov.
6. **Great Lakes ADA Center:** adagreatlakes.org/publications/

Disability Rights: Employment Protections Under Federal and State Law

