

Comparison of key disability provisions in the Fair Employment and Housing Act with those in the Americans with Disabilities Act

SkillBrief

	AMERICANS WITH DISABILITIES ACT (ADA)	FAIR EMPLOYMENT AND HOUSING ACT (FEHA)
Persons Protected	Protects from discrimination (including failure to accommodate) only “qualified individuals with a disability” capable of performing the essential functions of the job either with or without reasonable accommodation. <u>Note:</u> Employees subjected to retaliation, illegal medical examination or inquiry are also covered by ADA.	FEHA’s discrimination provision applies to all “persons” with a disability and the failure to accommodate provision applies to any “applicant or employee” who has a known disability. <u>Note:</u> FEHA does not contain the “qualified individual” language in ADA and may have broader coverage.
“Disability” Defined	Actual physical or mental impairment that “substantially limits” a “major life activity”; or A record of impairment; or Being “regarded as” having an impairment.	FEHA is broader than ADA as the impairment only needs to “limit” a major life activity. FEHA also expressly covers “medical condition” (cancer or genetic characteristics). FEHA provides detailed definitions of disability and adopts the ADA definition of disability only if it is broader.
Consideration of Corrective and Mitigating Measures	Considered in determining whether the individual is disabled. If condition is correctable through medication, eyeglasses, prosthetics, cane, etc., then it may not be a disability.	FEHA is broader because limitation is assessed without regard to corrective or mitigating measures, unless the mitigating measure is itself limiting.
Alcoholism and Rehabilitated Drugs - Addicts	May be covered (but current drug users are not covered). Despite coverage, employees using drugs or alcohol at work can be held to same job standards as other employees and can be disciplined.	Similar.

	AMERICANS WITH DISABILITIES ACT (ADA)	FAIR EMPLOYMENT AND HOUSING ACT (FEHA)
Conditions That Are Not Disabilities	Homosexuality, bisexuality, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, disorders resulting from current drug use, age, height, weight or muscle tone within normal ranges (obesity may be covered), physical characteristics such as eye or hair color or left-handedness, pregnancy, personal traits, general grief or emotional stress, temporary, non-chronic injury or illness (e.g., ankle sprain, concussion, etc.)	Similar.
“Limits”	One must be limited to a substantial or large degree and be significantly restricted or unable to perform a “major life activity” that the average person in the general population can perform. Moderate, minor and temporary limitations are not covered. Individualized assessment that must be made on a case-by-case basis.	FEHA is broader because the impairment need only “limit” a major life activity. FEHA covers chronic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease. Courts have also found these to be disabilities: cervical spondylitis, polio disability, hypertension and high blood pressure and hypersensitivity to tobacco smoke.
“Working” as a Major Life Activity	“Working” should only be considered if no other major life activity is implicated. Cannot be substantially limited in working unless employee is unable to perform a broad range or class of jobs as compared to the average person with comparable skills and abilities. Exclusion from one’s chosen field not enough.	Broader protection than the ADA because working is a major life activity under FEHA regardless of whether the employee cannot perform just one particular job or a broad range of jobs.
“Regarded As” Having Impairment	Employer mistakenly believes the applicant or employee has a physical impairment that substantially limits a major life activity or that an actual, non-limiting impairment substantially limits a major life activity. The perceived condition must meet the disability definition.	Same concept but broader because FEHA protects against discrimination based on misperception that one has a disabling or potentially disabling condition and also only requires that a disabling condition “limit” a major life activity.

<p>“Qualified Individual”</p>	<p>One who can perform the essential functions of the position held or desired. If one lacks the requisite skills or knowledge to perform the job or cannot perform the essential functions of the job or available jobs within the organization, then not covered under ADA.</p>	<p>FEHA appears to be broader in that it does not use the “qualified individual” term and in some contexts the employee may not have the burden of showing that s/he can perform the essential functions of the job with or without reasonable accommodation. Nevertheless, the law is unclear and the employee should be prepared to make this showing.</p>
<p>“Essential Functions”</p>	<p>The fundamental (not marginal) job duties of the position held or desired.</p> <p>✓This is a case-by-case inquiry that considers whether the employer currently requires employees in the position to perform the functions, whether removal of the functions will fundamentally alter the nature of the job (which turns on whether the number of employees available to perform the function is limited and whether position requires an employee with special expertise or skills).</p> <p>✓Look at evidence of the employer’s judgment, job descriptions, portion of time spent on a particular function, consequences of having the employee not perform the function, terms of the CBA, work experience if past and current employees.</p>	<p>Similar.</p>

<p>Discrimination and Harassment Prohibited</p>	<p>No discrimination against a “qualified individual” because of disability (or association with a disabled person) in regard to job applications, hiring, advancement, discharge, training, compensation, or other terms, conditions or privileges.</p> <p>Note: Employer may show employee is a direct threat to the health or safety threat to the employee or others.</p> <p>✓If no direct evidence, the employee’s prima facie burden is to show that s/he is disabled, qualified to perform the essential functions of the position held or desired job and suffered an adverse action because of his or her disability. Employee must rebut employer’s reasons to show pretext.</p> <p>✓No harassment because of a person’s disability (or association with a disabled person).</p>	<p>Similar to ADA, but broader coverage of employees given the liberal definition of disability and the employee may not have to show that s/he is a “qualified individual.”</p> <p>Note: FEHA does not use the “qualified individual” term and FEHA’s language appears to make it a defense for the employer to show that it refused to hire or discharged an employee because s/he was unable to perform the essential duties even with a reasonable accommodation. In some contexts, however, it still may be the employee’s burden to show s/he was qualified, i.e., could perform the essential functions of the job held or desired job, so the employee should be prepared to make this showing.</p>
<p>Retaliation Prohibited</p>	<p>No adverse action can be taken against any employee for opposing any practice illegal under ADA or for making a charge, testifying, assisting or participating in ADA investigation or proceeding.</p> <p>✓The employee need not be disabled to be protected. Unless direct evidence, then must show engaged in protected activity, adverse action followed and a causal connection between the two and then rebut employer’s defense to show pretext.</p>	<p>Similar.</p>

<p>Failure to Accommodate</p>	<p>Illegal to fail to provide reasonable accommodation to the known limitations of an otherwise qualified individual with a disability in order to perform essential job functions, unless it would be an undue hardship.</p> <p>✓Employee has the duty to inform the employer of disability and request accommodation.</p> <p>✓No duty to provide accommodation to one who is merely regarded as disabled.</p> <p>✓Reasonable accommodation may include making the workplace accessible, changing job responsibilities or work schedules, reassignment to a vacant position in the same civil service classification (even if it pays less), leave of absence, modifying training materials or providing qualified readers or interpreters.</p> <p>✓Employer has discretion to select the accommodation, which need not be the “best” accommodation.</p>	<p>Similar to ADA, although FEHA may impose a broader duty to accommodate because of the broader definition of disability and the employee may not be required to show that s/he is a “qualified individual.”</p> <p>Note: FEHA does not use the “qualified individual” term and in some contexts the employee may not have the initial burden of showing that s/he can perform the essential functions of the job with or without reasonable accommodation. The law is unclear, however, and the employee should be prepared to make this showing.</p>
<p>Failure to Engage in a Good Faith Interactive Process</p>	<p>Both the employer and employee have a continuing duty to engage in an interactive process to determine the nature of accommodation necessary. The employer must identify and consider possible accommodations. Duty only arises if the employee informs employer of disability and requests reasonable accommodation.</p>	<p>Similar, except the duty is expressly codified in FEHA and is likely to be a separate violation.</p>

Medical Inquiries and Exams	<p>Prohibits medical exams and inquiries about the existence, nature or severity of a disability, except where required by another law or as follows:</p> <ul style="list-style-type: none"> ✓Pre-employment: Inquiry about ability to perform job-related functions is permitted. Cannot inquire about past injuries. ✓Post-offer pre-employment: Once offered a job, then can make inquiry or require an exam if all entering employees in same class are subject to the inquiry/exam. Offers can be conditioned on medical exam or inquiry. ✓Current employees: Inquiry/exams are generally prohibited unless job-related and consistent with business necessity. (All employees are entitled to this ADA protection whether disabled or not.) Employer can make inquiry/require fitness for duty exam to determine whether employee can determine essential functions once employee's ability to perform the job is in doubt or has requested reasonable accommodation. <p>Note: Medical information must be kept confidential.</p>	<p>Similar.</p>
Enforcement and Possible Remedies	<p>File charge with the EEOC within 300 days of alleged violation. EEOC may mediate or settle for back pay, compensatory damages and other appropriate relief. If EEOC finds an ADA violation, then the case is referred to the Department of Justice (DOJ). DOJ can sue and obtain individual relief, but rarely files suit.</p> <ul style="list-style-type: none"> ✓State employees cannot bring an individual, private suit for money damages under ADA. 	<ul style="list-style-type: none"> ✓ File charge with the Department of Fair Employment and Housing (DFEH) within one year of the alleged violation. DFEH may issue accusation and seek relief from the Fair Employment and Housing Commission. ✓State employees can bring a private suit with a jury right and opportunity for compensatory damages, back pay, interest, and attorneys' fees, injunctive and other appropriate relief. ✓ Must go to DFEH first and then file suit within one year of obtaining a right to sue letter

IMPORTANT ADDITIONAL REMEDIES

State Personnel Board:

The SPB hears discrimination, retaliation and failure to accommodate appeals. SPB will review the written appeal for jurisdiction and then refer unresolved cases for evidentiary hearing. No jury and employee have the burden of proof. Compensatory damages for emotional distress, back pay and/or other appropriate relief may be awarded. A negative SPB decision generally bars a private suit under FEHA.

✓ **Discrimination/retaliation appeals** – The employee must first file an internal complaint with his or her department within one year. The employee can make a written appeal to SPB within 30 days of the department's response, or within 30 days of the exhaustion of the time period specified in the department's process. Employee may bypass the department's internal process if the remedy requested is outside of the department's authority or the claim directly concerns a departmental director or executive staff.

✓ **Failure to accommodate appeals** – The employee must first make a written request for reasonable accommodation to the department, which must respond in writing within 20 days. The employee can make a written appeal to SPB within 30 days after receipt of a denial, or 30 days after exhaustion of the department's 20-working days response period.

SEIU Local 1000 Master Contract, Article 5.7 and 5.7.17:

- ✓ Discrimination is subject to grievance procedures.
- ✓ Retaliation is subject to grievance and arbitration (under Article 6).