

Keep Your Hands Off of My Medical Information:

A Guide to Confidentiality, Medical Releases, and Medical Information Privacy

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Intro Music: *Start Wearing Purple*, by Gogol Bordello
<https://www.youtube.com/watch?v=QKjsPKiF43Y>

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

Session Outline



1. Federal Laws Regarding Confidentiality
 - a. Americans with Disabilities Act (ADA)
 - b. HIPPA

2. State Laws Regarding Confidentiality
 - a. California Constitution
 - b. Fair Employment and Housing Act (FEHA)
 - c. Other State Law Provisions

3. Reasonable Accommodation Issues

4. FMLA/CFRA Issues

5. Fitness for Duty Examinations

6. Resources

7. Questions

What Issues Have You Seen with Medical Releases or Medical Privacy?



When May the State Require Medical Information?



1. Reasonable Accommodation is Requested
2. FMLA/CFRA Leave
3. Fitness for Duty Examinations
4. State Disability Insurance (SDI)
5. Workers' Compensation Claim (DIR)
6. Disability Retirement Application to CalPERS
7. After a medical appointment
 - a. May be ok to substantiate attendance only pursuant to MOU.
 - b. **Query:** What if the appointment is with a psychiatrist?
8. At a hearing (at SPB, PERB, DIR, CalPERS,...)
Note: A Protective Order can be used to protect privacy.

Federal Laws Protecting Confidentiality



The Health Insurance Portability and Accountability Act (HIPAA)

HIPAA requires health care providers, health plans, and health care providers to comply with privacy and security rules. HIPAA aims to **increase individuals' access to medical records while decreasing unauthorized dissemination.** *42 USC 2000ff, et seq.; 29 CFR 1635.1, et seq; 45 CFR Parts 160, 162, & 164.*

Note: Enforced by HHS; no HIPAA private right of litigation.

The Genetic Information Nondiscrimination Act (GINA); 42. U.S.C. Section 2000ff, et seq. See EEOC for more info.

GINA prohibits employers and health insurers from discriminating based on genetic information or from requesting genetic information in most instances.

CalGINA is broader, prohibiting genetic discrimination in housing, mortgages, employment, education, & public accommodations.

Federal Anti-Discrimination Laws Protecting Confidentiality



The Rehabilitation Act of 1973

1. Creates a right to receive vocational rehabilitation;
2. Prohibits discrimination by federal funding recipients and agencies.
3. Generally covers State employees as State gets federal funding.

The Americans With Disabilities Act (ADA) of 1990

1. Provides equal opportunity and access in employment, government services, public accommodations, and telecommunications.
2. Employers must separate medical records from personnel records and only allow access to staff access on a “need to know” basis.
3. Legal Standards are generally the same for ADA & Rehab Act.

Family and Medical Leave Act (FMLA) of 1993 / CFRA

1. Creates a right to receive leave for health or certain family reasons.

California Confidentiality Laws



California Constitution, Article 1, section 1

Gives citizens an "inalienable right" to pursue and obtain "privacy."

Patient Access to Health Records Act

[California Health & Safety Code § 123110, et seq.](#)

With limitations, this law gives patients the right to see and copy medical information. Also gives patients the right to submit amendments to their records, if they are inaccurate or incomplete.

Confidentiality of Medical Information Act

[California Civil Code § § 56-56.37.](#)

Limits disclosure of patients' medical information and requires an electronic health or medical record system to protect the integrity of the information.

California Confidentiality Laws



The Information Practices Act of 1977

Civil Code § 1798 et seq.

Applies to records, including personal health information, maintained by a state agency.

Fair Employment & Housing Act (FEHA)

Cal. Gov. Code Sec. 12940, et seq.

Anti-discrimination law,. (Discussed more below).

- requires protection of confidentiality in certain situations, ADA standards set minimum standards

See https://www.thedocuteam.com/wp-content/uploads/2012/08/hipaa_calif.pdf for more info.

MOU Confidentiality Provisions



5.7 Non-Discrimination

A. No State employee shall be discriminated against or harassed in State employment consistent with applicable State and Federal Employment Laws.

8.18 Work and Family Participation

B. Family Crisis : The State shall maintain the confidentiality of any employee requesting accommodation under this section, but may require substantiation to support the employee's request.

8.33 Time Off for Victims of Domestic Violence (Notice of Rights Under Labor Code 230.1)

An employer would be required to maintain the confidentiality of any employee's request for time off pursuant to a provision of this law.

MOU Confidentiality Provisions



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9.5 Employee Assistance Program (EAP)

C. The records concerning an employee's referral and/or treatment shall be kept confidential... Records of such referrals shall not be kept in the employee's personnel file.

10.2 Health and Safety Committees

Protects confidentiality of occupational injury reports.

MOU Confidentiality Provisions



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10.21 Workplace Violence and Bullying Prevention

Requires a written policy, consistent with the model policy, that is made available to all employees.

Article 10.23 Independent Medical Examinations (Covered later)

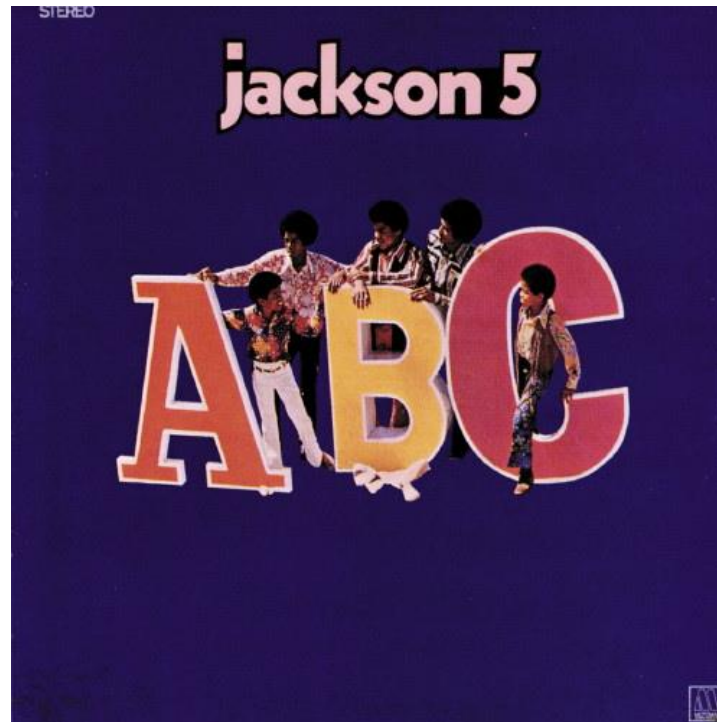
13.1 Performance and Evaluation Materials

B. Information in an employee's official departmental personnel file and supervisory work file shall be confidential

Query: If co-workers ask why someone seems to have preferential treatment due to their accommodation, how should the State respond?

Medical Information Under the ADA

The ABCs of FMLA/CFRA Leave and the Reasonable Accommodation Process



FMLA/CFRA: Medical Information Requirements

1. When may the state require certification for FMLA/CFRA leave?

When you request leave for:

- Your own serious health condition.
- The serious health condition of a parent, spouse, son or daughter, or
- Military family leave

The state may **not** request a certification for leave to bond with a healthy newborn child or a child placed for adoption or foster care. However, it may request documentation to confirm the family relationship.

2. When must the certification be returned?

You must return certification within 15 days.

3. When can the state ask for a 2nd opinion?

A 2nd opinion may be required only if there is a “good faith, objective reason” to doubt the validity of the certification.

FMLA/CFRA:

Medical Information Requirements

4. Can the state seek clarification of the certification?

The state cannot request additional information if the certification is complete, sufficient, and signed by the health care provider. If information is missing, the state must give the employee to remedy it before having HR contact the health care provider. (The direct supervisor is prohibited from contacting the provider.)

5. How often can the state seek recertification?

30-day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless the medical certification indicates that the minimum duration of the condition is more than 30 days. If so, the employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies.

See 29 CFR §§ 825.305 – 825.308

The Reasonable Accommodation Request

The request should describe:

1. The existence of a qualifying disability and limitations;
2. The need for an accommodation;
3. A requested accommodation, if known;
4. A timeframe for a response is recommended.

- Tips:**
1. Protect Confidentiality as much as possible.
 2. Medical information may be required only if the disability is not “known or obvious.”
 3. The diagnosis need not be disclosed, just the existence of a qualifying disability.
 4. However, revealing limitations need to be disclosed and may reveal the diagnosis.

ADA Requirements: Interactive Process

An informal, interactive process should follow an accommodation request.

1. Employee's preference gets "primary consideration;"
2. Employers must provide "effective" accommodations, not necessarily the accommodation requested.
3. The duty to accommodate is ongoing and following up on effectiveness is encouraged.
4. An unreasonable delay may constitute discrimination.

Tip: The employer must engage in the interactive process in good faith. The employee must respond to proper requests for information.

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



Medical Inquiries

The EEOC has divided the employment process into three stages for obtaining disability-related information:

- A. Pre-Employment
- B. After a Conditional Job Offer
- C. On-The-Job

Note: SPB has stated, “[T]he administrative guidance and cases that have analyzed and applied the ADA’s medical examination provisions provide valuable assistance in determining how [FEHA] should be interpreted and applied.”

Stephen W. Van Zee (2003) SPB Dec. No. 03-03, at p. 4.

Pre-Employment Testing



A. Pre-Employment:

1. Covers state employees applying for a new position.
2. An employer may not request any disability-related information or give medical examinations prior to making a (conditional) job offer.
3. Any question or examination that may elicit disability-related information is prohibited.
4. Tests such as physical fitness/agility tests that include no medical monitoring, drug screening tests, or psychological tests that only identify a person's skills are not considered medical examinations, and are not prohibited by the ADA.

Tip: It is a pre-employment situation when a State employee applies for a different position with the department or the State.

After a Conditional Job Offer



B. Conditional Job Offer: An offer conditioned on the applicant successfully meeting the reasonable and legitimate physical and medical requirements of the job.

1. Employers may ask disability-related questions and require medical exams if done uniformly for all applicants.
2. Employers cannot withdraw a job offer unless the disability prevents performing essential job functions & a reasonable accommodation cannot be provided.
3. The reasons for denying a job must be job-related and consistent with business necessity.

On The Job



C. Once An Employee is on the Job:

The employer may only seek disability-related information only if there is a “**reasonable basis**” for the employer to think that the employee:

1. Is **unqualified** to do the job;
2. Needs a **reasonable accommodation**; or
3. Poses a **direct threat** to the health or safety of the or others.

Query: Can a division chief ask what medications all staff are taking?

EEOC Enforcement Guidance at eoc.gov: *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA; Reasonable Accommodation and Undue Hardship Under the ADA.*

The Interactive Process: Medical Information

1. Employers may request medical information if disability and/or accommodation need is not known or obvious.
 - a. Request should be limited in scope and must be “job-related” and “consistent with business necessity.”
 - b. “An employer cannot ask for an employee’s complete medical records.”
2. Employees must comply with reasonable requests.
3. Employers should seek clarification from the employee if the information seems vague or incomplete.
4. All medical information must be kept confidential.
 - a. In a separate location
 - b. Only staff who “need to know” should have access.

Tip: Avoid signing a general release or letting the state to speak with your Dr.

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

FEHA: The Interactive Process and Confidentiality



CA Gov. Code Sec. 12940 (FEHA): It is an unlawful employment practice,...

- n) to fail to engage in a timely, good faith, **interactive process** with the employee or applicant to determine effective reasonable accommodations.

FEHA Regulations on confidentiality prohibit requiring disclosure of a diagnosis:

§ 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 the State take in responding to, and implementing a RA request?

The Interactive Process: Tips



Helpful
Tips

1. A diagnosis does not have to be disclosed. Only that a qualifying disability exists, the disability-related limitations, and a requested accommodation, if known.
 - a. See **JAN** for accommodation examples.
2. Try to review medical information before submitting.
 - a. Don't let the dr. write the member out of a job.
3. Avoid having the member sign a broad release.
4. Prevent the department from speaking with the doctor.
 - a. Have them specify missing or vague information and provide more detail if appropriate.

Fitness For Duty Examinations



FFD Exams by Medical Doctors are permitted “to evaluate the capacity of the employee to perform the work of his or her position.” [Cal. Gov. Code § 19253.5](#)

But under FEHA: It is an unlawful employment practice...

(f) to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee,.... [unless]

(2) [the employer] can show the exam to be **job related and consistent with business necessity**. (Emphasis added.)

(o) [It is unlawful to] ... test for the presence of a genetic characteristic.

[Cal. Gov. Code § 12940 \(FEHA\)](#); *See GINA (Genetic Information Non-Discrimination Act), 42 U.S.C. 2000ff, et seq.; 29 C.F.R. 1635.1, et seq.*

Note: FEHA offers more protection than federal law (ADA & FMLA). [See Cal. Gov't Code § 12926.1.](#)

FFD Exams: Job Related and Consistent with Business Necessity

Business Necessity

- ⑩ The business necessity defense requires the employer to demonstrate that the imposition of a job qualification is reasonably necessary to the legitimate conduct of the employer's business.
- ⑩ Business necessity is a defense to disparate impact discrimination.

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The Ninth Circuit has cautioned courts to “guard against the potential for employer abuse of [FFD] exams.”

(*Brownfield v. City of Yakima* (9th Cir.) 612 F.3d 1140, 1146.)

“The ‘business necessity’ standard is quite high, and ‘is not [to be] confused with mere expediency.

[The exam] must “substantially promote” the business' needs... and relate to ‘the specific skills and physical requirements of the ... position.

The business necessity standard is more stringent than the undue hardship standard.”

(*Cripe v. San Jose* (9th Cir. 2001) 261 F.3d 877, 889.)

Fitness For Duty Examinations in the MOU (IME)



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Article 10.23 Independent Medical Examinations

- A. Whenever the State believes that an employee, due to an illness or injury, is **unable to perform his/her normal work duties**, the State may require the employee to submit to an independent medical examination at State expense.

- B. If the State, after the independent medical examination, determines that the employee cannot perform the essential functions of the job position, the **State shall give the employee the opportunity to challenge the State's medical evaluation by supplying his/her personal medical evaluations to dispute the State's findings.**
(Emphasis added.)

Note: Treating physicians' opinions often carry more weight than state-hired IME doctors.

FFD Exams: Additional Information



1. Do I have to provide medical records to the doctor performing the FFD examination?

No. Section 19253.5, subdivision b, of the Government Code states that employees “**may** submit medical or other evidence to the examining physician.” (Emphasis added.)

The word “may” means that it cannot be required.

2. Does the Union have any documents protecting my rights with FFD examinations?

Yes. SEIU Local 1000 has a Limited Medical Information Release and Authorization for you to sign and provide to your doctor in an effort to protect your rights.

Fitness For Duty Cannot Be Required After CFRA Leave

FMLA Regulations: 29 CFR § 825.312(b) Fitness-for-duty certification upon return

“An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee’s need for FMLA leave.”

BUT...

CFRA Regulations:

2 CCR § 11091(b)(1) Serious Health Condition of Child, Parent, or Spouse:

“The employer **may not** contact a health care provider for any reason other than to authenticate a medical certification.” (Emphasis added.)

2 CCR § 11091(b)(2)(B) Serious Health Condition of Employee upon RTW:

“[T]he employer may require, at the employer's own expense, the employee to obtain the opinion of a second health care provider.”

2 CCR § 11091(b)(2)(E):

“The employer may require the employee to obtain a release to return-to-work from his/her health care provider.”

2 CCR § 11091(b)(2)(F):

“An employer **may not** require an employee to undergo a fitness-for-duty examination as a condition of an employee's return.” (Emphasis added.)

Protecting Medical Confidentiality: Additional Tips



1. **Do not sign a broad release.**
 - a. Instead, ask the department what information is needed and then promptly obtain it from your doctor.
 - b. If you do sign a release, limit it to by time, (for example, 3 months), and restrict it to relevant information, (For example, only information related to a reasonable accommodation).
2. **Limit the Type of Info to be Provided:** If signing a Medical Authorization, include limitations on the information to be received, such as info for my back condition only.
3. **Include an End Date:** Provide an Authorization end date of 6 months or a year.
4. **Review Info Supporting RAs:** Make sure the requested accommodation is reasonable and that the letter does not make you sound unqualified to perform your essential job functions.

Enforcing Confidentiality Violations

There are different avenues that may be pursued.

1. For MOU violations, you can file a Grievance.
<http://www.seiu1000.org/general-information/union-resource-center>.
2. For FEHA violations, you must file with DFEH within one year of the last discriminatory act. <https://www.dfeh.ca.gov/complaint-process/file-a-complaint/>.
3. For ADA violations, you must file with EEOC within 300 days of the last discriminatory act.
https://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm.
4. For HIPAA violations, you can file a complaint with the U.S. HHS within 180 days of the violation. <https://www.hhs.gov/hipaa/filing-a-complaint/index.html>.

Employment Discrimination Resources: Agencies



1. **SEIU Local 1000 Legal Unit**
2. **Equal Employment Opportunity Commission - [eeoc.gov](https://www.eeoc.gov)**
 - a. See e.g., EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA. Found at: <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>
3. **Job Accommodation Network - askjan.org**
4. **California Civil Rights Department (CRD) - dfeh.ca.gov**

Employment Discrimination Resources: Agencies



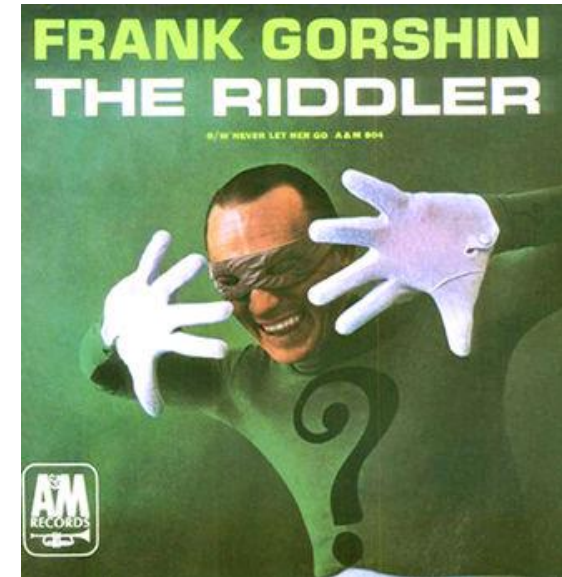
4. Legal Aid Society, Employment Law Center – <http://las-elc.org/>
 - a. Workers' Rights Clinic - <https://las-elc.org/workers-rights-clinics>

5. Great Lakes ADA Center – <http://adagreatlakes.com/>
 - a. Legal Briefs at: <http://adagreatlakes.com/Publications/#legalBrief>

6. The DocuTeam - Info on Confidentiality at:
https://www.thedocuteam.com/wp-content/uploads/2012/08/hipaa_calif.pdf

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<https://www.youtube.com/watch?v=CtAi4cybFVU>



ANY QUESTIONS?

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