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EMPLOYER CALIFORNIA DISABILITY REQUIREMENTS - REGULATIONS

1. The FEHA prohibits discriminatory employment practices against “any person” (see [Gov.C. § 12940\(a\)-\(o\)](#)).
2. The FEHA prohibits discrimination against individuals who have a “physical disability, mental disability or medical condition.” [[Gov.C. § 12920](#); see also [2 Cal.C.Reg. § 11065\(a\)](#)].
3. “**Physical disability**” includes “any *other* health impairment... that requires special education or related services.” [[Gov.C. § 12926\(m\)\(2\)](#) (emphasis added); [2 Cal.C.Reg. § 11065\(d\)\(3\)](#)].
4. “**Mental disability**”: This term includes “any *mental or psychological disorder*, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities” that “limits a major life activity.” [[Gov.C. § 12926\(j\)\(1\)](#) (emphasis added); [2 Cal.C.Reg. § 11065\(d\)\(1\)](#)].

The Legislature has stated its intent that “mental disability” be construed so that applicants and employees are protected from discrimination due to actual or perceived mental impairment that is disabling, *potentially* disabling, or *perceived as* disabling or potentially disabling. [[Gov.C. § 12926.1\(b\)](#); [2 Cal.C.Reg. § 11065\(d\)\(5\)](#), (6)].

5. **Broadly construed**: The Legislature has stated its intent that “mental disability” be construed so that applicants and employees are protected from discrimination due to actual or perceived mental impairment that is disabling, *potentially* disabling, or *perceived as* disabling or potentially disabling. [[Gov.C. § 12926.1\(b\)](#); [2 Cal.C.Reg. § 11065\(d\)\(5\)](#), (6)]

Particular mental impairments: Under the FEHA, “mental disabilities” include, but are not limited to:

- Clinical depression;
- Bipolar disorder. [[Gov.C. § 12926.1\(c\)](#); see [2 Cal.C.Reg. § 11065\(d\)\(3\)](#)]

FEHA regulations also identify the following as “mental disabilities”:

- Emotional or mental illness;
- Intellectual or cognitive disability (formerly referred to as “mental retardation”);
- Organic brain syndrome;
- Specific learning disabilities;
- Autism spectrum disorders;
- Schizophrenia;
- Chronic or episodic conditions, such as ***post-traumatic stress disorder*** and obsessive-compulsive disorder. [[2 Cal.C.Reg. § 11065\(d\)\(3\)](#)].

7. **Reasonable Accommodation**: Like the ADA and the Rehabilitation Act, the FEHA requires employers to make reasonable accommodation for the known disabilities of applicants and

employees to enable them to perform a position's essential functions, unless doing so would produce undue hardship to the employer's operations. [[Gov.C. § 12940\(m\)](#); [2 Cal.C.Reg. § 11068\(a\)](#); see *Fisher v. Sup.Ct. (Alpha Therapeutic Corp.)* (1986) 177 CA3d 779, 783, 223 CR 203, 205—employer had reasonable accommodation obligation to employee with cancer-related medical condition; *A.M. v. Albertsons, LLC* (2009) 178 CA4th 455, 463, 100 CR3d 449, 455—employer's failure to provide reasonable accommodation for employee's known physical disability constitutes unlawful employment practice]

8. Affirmative duty: “Reasonable accommodation” means that employers have an *affirmative duty* to accommodate disabled workers. [See *Sargent v. Litton Systems, Inc.* (ND CA 1994) 841 F.Supp. 956, 962—employer had duty under FEHA to make reasonable accommodations to enable disabled employee to get to work]. A supervisor is the employer's agent for purposes of this duty; i.e., if a supervisor has acquired knowledge that he or she had a duty to communicate to the employer, a *conclusive presumption* arises that the supervisor has done so. [See *California Fair Employment & Housing Comm'n v. Gemini Aluminum Corp.* (2004) 122 CA4th 1004, 1015, 18 CR3d 906, 913 (involving accommodation of religious beliefs)]

9. Where disability known to employer: Employers who are aware of an employee's disability have an affirmative duty to make reasonable accommodations for such disability. This duty arises even if the employee has not requested any accommodation. [*Prilliman v. United Air Lines, Inc.* (1997) 53 CA4th 935, 949–950, 62 CR2d 142, 149–150—employer had duty to take affirmative steps to make known to disabled employee other job opportunities within the company and to determine whether employee was qualified for those positions]

10. Includes employees “regarded as” disabled: Under the FEHA, an employer must reasonably accommodate an applicant or employee whom it *regards* as disabled, even if the applicant or employee is not actually disabled. The FEHA's reasonable accommodation requirement does not in any way distinguish between actually disabled and “regarded as” disabled individuals. [*Gelfo v. Lockheed Martin Corp.* (2006) 140 CA4th 34, 60, 43 CR3d 874, 894]

11. Single failure to accommodate actionable? Despite a pattern of successful accommodation, a single failure to accommodate an employee's disability may be actionable in some cases. [See *A.M. v. Albertsons, LLC*, *supra*, 178 CA4th at 465, 100 CR3d at 456–457—although Employer had successfully accommodated Employee's disability-based need for bathroom breaks for more than a year, its failure to do so on a single occasion caused Employee to suffer serious mental and physical consequences]

12. Types of reasonable accommodations: Selection of an appropriate accommodation is an individualized process depending on the limitations of the applicant or employee's disability. The FEHA and FEHA regulations provide a non-exhaustive list of possible accommodations:

- Making facilities readily accessible to and usable by disabled individuals (e.g., providing accessible break rooms, restrooms, training rooms or reserved parking places, acquiring or modifying furniture, equipment or devices or other similar adjustments);

- Job restructuring;
- Offering part-time or modified work schedules;
- Reassigning to a vacant position;
- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials or policies;
- Providing qualified readers or interpreters;
- Allowing assistive animals on the worksite;
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- Permitting an employee to work from home;
- Providing paid or unpaid leave for treatment and recovery;
- “(O)ther similar accommodations for individuals with disabilities.” [[Gov.C. § 12926\(p\)](#); [2 Cal.C.Regs. § 11065 \(p\)\(2\)](#)]

Because the above list is incomplete, California courts look to cases decided under the ADA and Rehabilitation Act for guidance. [[Prilliman v. United Air Lines, Inc.](#), *supra*, 53 CA4th at 948, 62 CR2d at 148; [Nadaf-Rahrov v. Neiman Marcus Group, Inc.](#) (2008) 166 CA4th 952, 975–976, 83 CR3d 190, 211]

13. Paid or unpaid leave: A finite leave of absence may be a reasonable accommodation under the FEHA if, following the leave, the employee likely can resume his or her duties ([2 Cal.C.Regs. § 11068\(c\)](#)). Otherwise, a leave would be futile and is not required. “Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.” [[Jensen v. Wells Fargo Bank](#) (2000) 85 CA4th 245, 263, 102 CR2d 55, 68]

14. No need to hold position open indefinitely: “Reasonable accommodation does not require the employer to wait indefinitely for an employee’s medical condition to be corrected.” [[Hanson v. Lucky Stores, Inc.](#) (1999) 74 CA4th 215, 226–227, 87 CR2d 487, 494; see *Lawler*—retail manager was properly terminated, after her requests for reduced hours and five-month leave of absence were denied, where she was unable to competently perform her duties with or without reasonable accommodation, remained unemployed and did not seek employment for almost a year]

15. No statutory limit on leave duration: Unlike other forms of statutory leave (*see Ch. 12*), the FEHA does not have a fixed limit on the amount of leave required as a reasonable accommodation. Rather, “a disabled employee is entitled to a reasonable accommodation—which may include leave of no statutorily fixed duration—provided that such accommodation does not impose an undue hardship on the employer.” [*Sanchez v. Swissport, Inc.* (2013) 213 CA4th 1331, 1338, 153 CR3d 367, 371]

16. Employer may not require leave if employee can work with reasonable accommodation: While a leave of absence may be a reasonable accommodation, “(w)hen an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence.” [2 Cal.C.Reg. § 11068(c)]

17. Reassignment to vacant position: Offering a vacant position may be a reasonable accommodation, even if the position pays less than the disabled employee's former job, if he or she can no longer perform the former job's duties. [Gov.C. § 12926(p); 2 Cal.C.Reg. § 11065(p)(2)(N); see *Hanson v. Lucky Stores, Inc.*, *supra*, 74 CA4th at 227, 87 CR2d at 495—employer reasonably accommodated disabled employee who could no longer perform former job's duties by offering alternate vacant position paying only 50% of former pay without benefits]

18. Employer's duty to ascertain and offer suitable jobs: Telling the disabled employee to check available job postings does not satisfy the employer's duty to reassign or transfer a disabled employee to a vacant position. The employer is in a better position to know what jobs are vacant or may become vacant, to which the person with the disability can be assigned. [See 2 Cal.C.Reg. § 11068(d)(1); *Spitzer v. The Good Guys, Inc.* (2000) 80 CA4th 1376, 1389–1390, 96 CR2d 236, 245–246]

19. Disabled employee entitled to preference: The FEHA entitles the disabled employee to “preferential consideration” in reassignment of existing employees. [2 Cal.C.Reg. § 11068(d)(5); *Jensen v. Wells Fargo Bank* (2000) 85 CA4th 245, 265, 102 CR2d 55, 69.

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