



Amended Disability Regulations: The California Fair Employment and Housing Commission Clarifies “Interactive Process” for Disabled Employees

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Effective December 30, 2012, California employers must comply with the amended Disability Regulations issued by the Fair Employment and Housing Commission (“FEHC”). These regulations clarify an employer’s obligation to provide reasonable accommodations for disabled employees and applicants, and emphasize that employers must engage in a prompt, good faith interactive process in order to reduce the risk of liability. Under its “Statement of Purpose,” the FEHC states that the regulations “are to be broadly construed to protect applicants and employees from discrimination due to an actual, perceived or potential physical or mental disability, or medical condition.”

The amended regulations expressly downplay the importance of determining whether an employee actually has a disability, by specifically stating that the “primary object of attention in cases brought under the [Fair Employment and Housing Act] should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis.”

As elaborated upon below, the regulations also include: (1) a section on assistive animals, (2) a broad definition of “disability,” (3) additional detail on what constitutes an “essential” job function, (4) specific examples of reasonable accommodations, and (5) considerations for employers when engaging in the interactive process.

I. Assistive Animals

Employers may have to allow “assistive animals” into the workplace as a reasonable accommodation. Assistive animals include “guide,” “signal,” “service” and “support” animals. A guide animal is trained to guide a blind or visually impaired person. A signal animal alerts a deaf or hearing impaired person to sounds. A service animal is trained to the requirements of a person with a disability. A support animal provides emotional support to individuals with disabilities, including traumatic brain injuries or mental disabilities such as depression.

If an employee asks to bring an assistive animal to work as a reasonable accommodation, the employer may ask for a letter from the employee’s health care provider stating that the employee has a disability requiring an assistive animal and

signed statements from one or more animal trainers that the animal is well-behaved and performs the tasks it was trained to do to assist the employee with the disability. The employer may challenge that the animal meets these standards within the first two weeks the assistive animal is in the workplace based on objective evidence of offensive or disruptive behavior. An employer may require an annual recertification from the employee of the continued need for the assistive animal.

Employers may require that an assistive animal in the workplace: (i) is free from offensive odors and displays habits appropriate to the work environment, for example, with respect to the elimination of urine and feces; (ii) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace; and (iii) is trained to provide assistance for the employee’s disability.

II. Broad Definition of “Disability”

The regulations define “disability” broadly to mean and include:

- *a mental disability*: having any mental or psychological disorder or condition that limits a major life activity including, but not limited to, emotional or mental illness, intellectual or cognitive disability, organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, posttraumatic stress disorder, and obsessive compulsive disorder.
- *A physical disability*: anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following: (i) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and (ii) limits a major life activity.
- *a learning disability*: can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia.
- *a “Record or History of Disability”*: previously having or misclassified as having a record or history of mental or physical disability or learning disability of which the employer is aware.



- a *“Perceived Disability”*: being “regarded as” or “treated by” the employer as having a mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult.
- a *“Perceived Potential Disability”*: includes being regarded, perceived, or treated by the employer as having, or having had, a physical or mental disorder that has no present disabling effect, but that may become a mental or physical disability or learning disability.
- a *“Medical Condition,”* such as any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer, or a “genetic characteristic.”

The regulations further state that the following are **not** considered a disability: compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders from unlawful use of drugs, sexual behavior disorders, and mild conditions that do not limit a major life activity as determined on a case-by-case basis (common cold, seasonal or common flu, minor cuts, sprains, muscle aches, soreness, bruises, abrasions, non-migraine headaches and minor and non-chronic gastrointestinal disorders.)

Note: In the event that an employee brings a claim for disability discrimination, the employee must show that he or she is a qualified individual with a disability, and that the disability was a factor, not necessarily the sole or dominant factor, in the adverse employment action.

III. Essential Job Functions

The regulations provide standards for determining when a job function is essential. A job function may be considered essential if the job exists to perform that function, the job duties can only be performed by a limited number of employees at the company, or the job is highly specialized. Evidence of whether a particular function is essential includes, but is not limited to: (i) the employer’s judgment as to which functions are essential, (ii) accurate, current written job descriptions, (iii) the amount of time spent on the job performing the function, (iv) the legitimate business consequences of not requiring the employee to perform the function, and (v) whether the employer referenced that particular job function in prior performance reviews (hence, emphasizing the importance of the function).

As a result, employers must keep job descriptions up-to-date and ensure that performance reviews adequately address performance in the essential functions of the job.

IV. Reasonable Accommodations

The regulations provide examples of reasonable accommodations, which may include, but are not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places for use by employees with disabilities; acquiring or modifying furniture, equipment or devices, or making other similar adjustments in the work environment; allowing assistive animals, transferring an employee to a more accessible worksite; providing assistive aids and services such as qualified readers or interpreters to an applicant or employee; job restructuring; providing part-time or modified work schedules; allowing an employee to work from home; dividing complex tasks into smaller tasks; or providing a definite leave or reassignment to a vacant position.

An employer need not offer a temporary light duty position on a permanent basis as a reasonable accommodation. The regulations clarify that creating a new position for a statutorily disabled employee is not a reasonable accommodation. The regulations also clarify that an employer need not lower quality or quantity standards as a reasonable accommodation.

The employee must establish the effectiveness of the accommodation that is sought. The regulations recognize that the employee bears the burden of establishing that he or she is a “qualified individual with a disability.” This means that the employee must show that he or she can perform the position’s essential functions with or without reasonable accommodation.

The employer can assert safety and health defenses only if the employer has engaged in the interactive process. The regulations recognize that employers legitimately can defend themselves by showing that no accommodation exists that would allow the employee to perform the position’s essential functions without imposing an “imminent and substantial degree of risk” to the employee or others.

Note: The employer forfeits these defenses if the employer has not engaged in the interactive process.

Note also: Employers may not ask about the specific underlying medical condition.

V. Engaging in the Interactive Process

With respect to engaging in the interactive process, employers must consider the following:

- An employer shall initiate the interactive process when an applicant or employee with a known physical or mental



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disability, or medical condition requests a reasonable accommodation.

- An employer shall initiate the interactive process when the employer becomes aware of the need for accommodation through a third party or by observation.
- An employer may also become aware of the need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act or for the employee's own serious health condition under the California Family Rights Act or the federal Family and Medical Leave Act, or other federal or state law, and the employee's health care provider indicates that additional leave is necessary for the employee to recuperate enough to be able to perform the essential functions of the job.
- The employer may grant the requested accommodation, or reject it after due consideration, and initiate discussion with the employee regarding an alternative reasonable accommodation.
- When the disability is not obvious and the employee has not provided the employer with reasonable medical documentation, the employer may require the employee to provide such documentation.
- The employer has to consider the preference of the employee to be accommodated, but has the right to implement an alternative reasonable accommodation that is effective for allowing the employee to perform the essential functions of the job.
- The employer must keep interactive process medical information confidential and separate from the personnel file.

Please contact counsel with questions about how these regulations may affect your company and whether revisions to your written policies and procedures are required.



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