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# Employment Discrimination Based on Disability

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The Fair Employment and Housing Act (FEHA) enforced by the California Department of Fair Employment and Housing prohibits employment discrimination and harassment based on a person's disability or perceived disability. It also requires employers to reasonably accommodate an individual with a mental or physical disability unless the employer can show that to do so would cause an undue hardship.

The law covers mental or physical disabilities (including AIDS/HIV) regardless of whether the conditions are presently disabling. It also covers medical condition, which is defined as either rehabilitated cancer or genetic characteristics.

Disability does not include homosexuality, bisexuality, transvestism, pedophilia, transsexualism, exhibitionism, voyeurism, gender identification disorders not resulting from physical impairment, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance abuse disorders resulting from the current illegal use of drugs.

## **The Americans with Disabilities Act vs. the Fair Employment and Housing Act**

The Americans with Disabilities Act (ADA) is a federal law enforced by the United States Equal Employment Opportunity Commission (EEOC). Where differences between federal and state law exist, employers should comply with those provisions that are most beneficial to the employee. For instance, several recent United States Supreme Court decisions significantly narrow the protections of the ADA. The Court determined that a person with an impairment may be excluded from the protections of the ADA if that person can overcome the substantial limitations created by that impairment with the use of internal and external mitigating measures (e.g., glasses, medication, prosthetic devices, etc.) that render the individual fully able and employable.

These holdings by the United States Supreme Court apply only to the ADA. They do not affect the disability protections of the FEHA. Under the FEHA, when determining whether an individual has a disability, mitigating measures are **not** taken into consideration. In other words, the availability of medication or an assistive device that assists the individual in overcoming the limitations of his/her disability is not considered in determining whether the individual has a disability that is protected under the law.

## **Screening Applicants**

When interviewing job applicants, employers may **not** ask (verbally or on an employment application) questions about the applicant's medical history. Employers may ask about an applicant's ability to perform specific tasks. Also, employers may **not** inquire whether the applicant has ever filed a Workers' Compensation claim.

The FEHA prohibits all non-job related inquires, whether verbal or through use of an applicant form, which express directly or indirectly any limitation, specification or discrimination on any of the protected bases or any intent to make that limitation, specification or discrimination. This prohibition applies to both current employees and applicants.

## Medical Evaluation of Applicants and Employees

Employers subject to the federal ADA (15 or more employees) cannot require that an applicant undergo a medical examination until after a job offer has been made. However, an employer may make a job offer contingent on the applicant's passing the examination.

Employers not subject to federal law are also prohibited from requiring medical examinations of applicants prior to a job offer. However, under the FEHA, an employer may condition an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty in order to determine fitness for the particular job in question only if the medical examination is directly related and pertinent to the position.

Notwithstanding the above, it is an unlawful employment practice for an employer or other covered entity to subject, directly or indirectly, any employee, applicant or other person to a test for the presence of a genetic characteristic.

Persons must not be excluded from a job because of a generalization about any disability. Each person must be judged solely on whether his/her particular medical history and condition presently prevent him/her from performing the job safely and efficiently. Any medical standard or employment policy which automatically excludes entire groups of people \*such as all people with high blood pressure, diabetes, AIDS, or back problems) is usually improper.

## Discrimination

An employer who discriminates against a person because of his/her disability may do so **only** if the employer can demonstrate that:

1. The person is unable to perform the essential functions of the job and that no reasonable accommodation exists that would enable the person to perform the essential functions of the job; or
2. The person would create an imminent and substantial danger to himself/herself or a substantial danger to others by performing the job and no reasonable accommodation exists that would remove or reduce the danger.

The following two reasons commonly raised by employers **are not** legally acceptable excuses for discriminating against disabled persons:

1. That there is the possibility of future harm to the person or to others.
2. That employing such individuals will cause an employer's insurance rates to rise.

## Reasonable Accommodation

The employer must explore all possible means of reasonably accommodating a person prior to rejecting the person for a job or making any employment-related decision. An accommodation is reasonable if it does not impose an undue hardship on the employer's business. Reasonable accommodation can include, but is not limited to, changing the job duties, changing the work shift, providing leaves for medical care, accommodating schedules, relocating the work area, and providing mechanical or electrical aids. A employer may obtain help from government agencies and outside experts to determine whether accommodation is possible.

Disabled employees may have separate rights to unpaid leaves under the **California Family Rights Act (CFRA)** or the federal **Family Medical Leave Act (FMLA)**.

## **Independent Medical Opinion**

An employer must allow an applicant the opportunity to submit an independent medical opinion if there is a dispute of to whether the person can perform the essential functions of a position. Failure to allow the submission of an independent medical opinion may be a separate violation of the law.

## **AIDS**

California law recognizes AIDS as a disability, which may require an employer to provide reasonable accommodation to enable the employee to continue working as long as he/she is medically able. Employees who are perceived as having AIDS or who have been medically tested as HIV positive are also protected.

Employers should engage in activities that inform employees about AIDS and HIV by:

1. Ensuring that company policy states that an employee with AIDS or and HIV positive diagnosis will be treated as any other employee with a life-threatening ailment. The policy should also state that such employees may continue to work as long as they can perform their duties and medical evidence supports the same.
2. Developing an internal educational program that allays fear by communicating authoritative information on AIDS transmission; i.e., there is no known risk of AIDS transmission between an infected employee and other employees while engage in their normal activities which may involve close contact at work.

Technical assistance is available from several sources:

AIDS project, Los Angeles (323) 993-1600 provides employers and others with an "AIDS in the Workplace" program including printed material.

California HIV/AIDS Hotline

(800) 367-2437 (English or Spanish)

TTY (800) 553-2437 provides written materials, brochures, and information.

## **How the Law is Enforced**

Employees or job applicants who believe that they have been discriminated against or harassed because of a disability may, within one year of he alleged discrimination, file a complaint of discrimination with the California Department of Fair Employment and Housing (DFEH). The department processes complaints filed by persons with terminal illnesses on a priority basis.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If the Department finds evidence of discrimination and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to either a public hearing before the fair Employment and Housing Commission or a lawsuit filed by the Department on behalf of the complaining party.

If the Commission finds that discrimination occurred, it can order remedies, not to exceed \$150,000 in fines or damages for emotional distress from each employer or person charged. In addition, the Commission may order hiring or reinstatement, back pay, promotion, and changes in the policies or practices of the involved employer.

After a complaint is filed with DFEH, a complainant may elect to pursue the matter through a lawsuit in civil court. Damages in court are unlimited.

For further information or assistance with Disability Access issues or Employment Discrimination based on disability, please contact:

**Disability Access Coordinator**  
**County of Riverside, Human Resources**  
**Telephone: 951-955-0811**  
**TTY: 951-955-8688**