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INTERACTIVE PROCESS MANUAL FOR CALIFORNIA PUBLIC AGENCY EMPLOYERS

*Legal and Policy Guidelines for Initiating, Conducting, and Documenting the
Interactive Process & Making Reasonable Accommodation Decisions*

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About Eyres Law Group, LLP

Eyres Law Group, LLP offers a specialized law practice focusing exclusively on helping employers to proactively manage their employment practices and train their managers and supervisors to lead within legal limits. The firm advises public agencies and private industry clients in all aspects of employment law from recruiting and hiring through performance management, discipline and termination decisions. In addition to drafting enforceable policies and procedures, guiding employers through their personnel practices and developing defensible documentation, the firm provides an array of specialized training programs and other resources for administrators, executives, front line leaders, HR specialists and risk management professionals. Despite the best efforts of employers to enforce consistent policies, manage proactively and document their actions effectively, some legal disputes are simply unavoidable. The firm represents clients in administrative matters before the California Department of Fair Employment & Housing and the Equal Employment Opportunity Commission (EEOC).

The firm's specialized Education law practice, guiding public school districts through in a wide range of employment-related actions involving return-to-work, reasonable accommodation and leave of absence requirements. We work extensively with K-12 public school districts to assure their compliance with the Education Code and overlapping Federal and State law mandates governing their workplaces.

About Patricia S. Eyres, Managing Partner



Patricia S. Eyres (Patti) is a Phi Beta Kappa graduate of Stanford University (B.A. with Distinction 1974). She earned her law degree from Loyola Law School (J.D. Cum Laude 1977). Patti calls herself a “recovering litigator,” who knows first-hand the value of paying attention to prevention. After spending 18 years devoted exclusively to defending companies in the courtroom, she resolved to help business leaders recognize potential legal landmines **before** they explode into lawsuits. She brings a unique and practical perspective to the critical legal issues impacting the workplace.

Patti also supervises the firm's specialized Education law practice, guiding public school districts through in a wide range of employment-related actions involving return-to-work, reasonable accommodation and leave of absence requirements. She consults with school districts on how to conduct and document the interactive process, internal misconduct investigations, disciplinary actions and due process hearings. She serves as an independent harassment/discrimination investigator, and trains HR professionals to conduct misconduct investigations. She is a recognized expert in helping guiding public agency and private industry employers through their critical compliance processes for evaluating workplace reasonable accommodations, making

return to work decisions and managing multiple leaves of absence.

She is the author of the *Interactive Process Manual for California School Districts*, the *California School District Guide to Managing Multiple Leaves of Absence*, and the *Administrator's Desktop Guide to Return to Work, Reasonable Accommodations and Leaves of Absence* (2013), and *Managing Multiple Leaves for Public Agency Employers* (2014). She also wrote the *Employer's Guide to the Return to Work Process: Tools & Tactics to Keep your Agency out of Court* (2010). As CEO/Publisher of Proactive Law Press, LLC, Ms. Eyres supervises the production and publication of books, training materials educational products for public agency Department Heads and Administrators, front-line leaders, HR and risk managers.

This manual is customized for PRISM members, in conjunction with the Labor Law/Employment Practices Program provided by Eyres Law Group LLP. It is intended to provide tools, techniques, compliance checklists and forms for managing the interactive process and making return to work decisions. While the information is accurate and up to date, it is not intended to, and does not constitute, legal advice on any individual situation. For specific advice on particular matters, consult the ELG – PRISM legal help line or your agency's legal counsel. 602-448-4051 ▲ peyres@eyreslaw.com

Interactive Process Manual for California Public Agency Employers, 8th Edition (2022)

Table of Contents

Section 1: Principles

Legal, Regulatory, and Policy Standards

Newly Updated

Section 2: Procedures

Conducting & Documenting the Interactive Process

Subsection A:

Ten Step Process and Checklists

Subsection B:

Coordinating Disability and the Interactive Process

- Division of Responsibilities
- Communication is Critical: 5 C's of an Effective IP
- Sharing Information
- Communication Responsibilities: (Graphic)

The Steps of the Interactive Process

Step One: Initiation

Determine When There is a Duty to Engage in the Interactive Process

Step Two: Inspection

Review Relevant Documents

Step Three: Identification

Identify Essential Job Functions

Step Four: Interview

Obtain Information from Relevant Individuals

Step Five: Interaction
Dialogue with Employee: The Heart of the Process

Step Six: Investigation
Identify all Feasible Accommodations

Step Seven: Inspection
Inspection and Investigation to Determine Reasonableness vs. Undue Hardship

Step Eight: Implementation
Offer an Available, Reasonable Accommodation (or decline and document)

Step Nine: Integration of Documentation
Documenting the Entire Process – Step by Step

Completely Updated
Section 3: COVID -19 Interactive Process and Accommodations

Subsection A: Principles
Legal, Regulatory and Policy Standards

Subsection B: Procedures
Coordinating the Interactive Process and Key Leave Options

Subsection C: Practical Solutions
Realistic Scenarios and FAQs

Section 4 Practices
Management, Supervision, Policy Enforcement and Effective Communications for Agency Leaders

- What did the Agency Know and When? What did it Do?
- The Manager who Doesn't Lead within Legal Limits
- The Manager who Doesn't Lead within Changing Legal Limits
- The Paralyzed Leader
- The Leader who is Held Hostage by the Law
- Disability Discrimination and Leave Law Checklist for Managers & Supervisors
- Retaliation Checklist for Managers and Supervisors and Risk Professionals

Completely Updated
Section 5: Problem Solving: FAQs and Special Issues

Updated with New Samples and Templates

Section 6: Preparation: Defensible Documentation and Forms

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- Reasonable Accommodation Requests and Information forms
- Medical Information Release forms
- Sample Medical Practitioner Certification for Disability
- Sample Medical Practitioner Certification for Pregnancy Disability
- Sample Medical Practitioner Certifications for Extended Leave
- **NEW** Sample Medical Practitioner Certification for Sit to Stand Workstation
- **NEW** Sample Medical Practitioner Certification for physical tasks – basic
- **NEW** Sample Medical Practitioner Certification for bus driver safety issues
- **NEW** Sample Medical Practitioner Certification for Cognitive/Neurological Restrictions
- **NEW** Sample Medical Practitioner Certification for Fragrance Allergies/ environmental restrictions
- **NEW** Sample Medical Practitioner Certification for Imminent Safety Threat
- **NEW** Sample Medical Practitioner Certification for Observed Loss of Consciousness
- **NEW** Sample Medical Practitioner Certification for Park Maintenance – Physical
- **NEW** Sample Medical Practitioner Certification for PTSD
- **NEW** Sample Medical Practitioner Certification for Psychiatric Service Dog
- **NEW** Sample Medical Practitioner Certification for Mood Disorder Restrictions
- **NEW** Sample Medical Practitioner Certification for Monitoring Existing Accommodations
- **NEW** Sample Request for Disability Based Accommodation
- **NEW** Sample Documentation of Interactive Meeting
- Sample Talking Points for Interactive Process
- Sample Chart of Essential Job Functions
- **NEW Updated** Request for Accommodations
- **NEW Updated** Notice of Rights and Responsibilities
- Accommodations and Costs Considered
- Denial of Accommodation Form
- Samples of Letters to begin Interactive Process
- Samples of Letters to Keep Interactive Process On Track
- Samples of Letters Closing Interactive Process

Section 1
PRINCIPLES
Legal, Regulatory and Policy Standards



PRINCIPLES

Legal, Regulatory and Policy Standards

Applicability

These guidelines apply to reasonable accommodation decisions that must be made in recruiting, hiring, placement and promotional decisions. It also applies to employees in the terms, conditions, privileges and benefits of employment. These procedures supplement relevant personnel policies and collective bargaining agreements, and should be read in conjunction with those provisions.

Purpose

When a qualified individual with a mental or physical disability, or a medical condition (chronic or acute) is, or becomes, unable to perform the essential, assigned duties of the currently held position as a result of a covered disability, the Agency is committed to providing reasonable accommodation. The Agency will explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a covered disability, or when the need for reasonable accommodation is obvious. Accommodation options will be considered in discussions with the employee.

The Interactive Process is the way in which employees, supervisors, and their departments consider potential reasonable accommodations or modified work assignments. The process is required to arrive at a reasonable accommodation, or to reach the conclusion that there is no available reasonable accommodation.

This is an interactive process that requires the active participation of the employee and his/her supervisor. Both parties are obligated to respond to reasonable requests for information in a timely manner and to meet and confer as needed. The Agency and the employee clarify what the individual needs and identify the appropriate reasonable accommodation. The Agency's representative conducting the process will ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.

The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the Agency in determining the type of reasonable accommodation to provide.

What Laws Apply to Return to Work, Stay at Work and Leaves of Absence?

Workers Compensation	Disability Discrimination	Medical Leaves of Absence
<p>Focuses on What an Injured Worker Can No Longer Do</p> <p>Applies to employees with work related injury or illness</p>	<p>Explores Through the “Interactive Process” What the Employee is Still Capable of Doing</p> <p>Applies to both work-related and non-industrial disabilities</p>	<p>Provides Job-Protected and Benefit-Protected Time off For Employees Needing Treatment & Recovery</p> <p>Applies to serious health conditions, whether or not work-related</p>

What is FEHA?

The Fair Employment & Housing Act (“FEHA”), enforced by the California Department of Fair Employment & Housing (DFEH), prohibits employment discrimination and harassment based on a person’s disability or perceived disability. It also requires employers to reasonably accommodate individuals with mental or physical disabilities unless the employer can show that to do so would cause an undue hardship. FEHA provides significantly broader protections to employees with disabilities than the Federal ADA. In California, it an unlawful employment practice for an employer to fail to engage in a timely, good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known disability or medical condition.

What Is Disability Discrimination?

Communication: Failure or refusal to engage in an interactive process (discussion) with a disabled employee to evaluate and consider potential reasonable accommodations or modified duty that may allow the employee to perform the essential functions of the job or return to work following a disability leave. This applies both to work-related injuries and non-work-related disabilities.

Accommodation: Failure or refusal to make a reasonable accommodation so that a disabled employee may perform the essential functions of the job, provided that the reasonable accommodation does not place an undue hardship on the employer, such as extensive costs or danger to other employees at the work site. Reasonable accommodations do not require an employer to suffer "undue hardship." A determination of undue hardship includes consideration of the specific tasks of the job, the type of work that is done and what the accommodation would cost.

Investigation: Failure to address disability harassment incidents by investigating and then taking appropriate corrective action. Disability harassment is hostile, offensive, intimidating, or abusive behaviors based on disability. This may be mocking of disabilities, insults, disparaging remarks, jokes or innuendos which create a hostile, offensive, intimidating or abuse work environment based on disability.

Retaliation against an individual with a disability by managers, supervisors or co-workers through with adverse assignments, mocking, threats or other reprisals because the employee made a claim for workers’ compensation benefits, asked for a reasonable accommodation or took a leave of absence for illness or disability.

Forms of Discrimination Prohibited by Federal and State Law

An individual with a disability, who brings a lawsuit, sets forth claims for damages in a “cause of action.” These are separate claims for relief and any one can support an award of damages or other remedies.

Cause of Action	Explanation and Examples
Exclusion	Refusal to hire, train, offer to promote, extend benefits or provide equal terms and conditions of employment to an individual because of his or her disability.
Disparate Treatment	<p>Treating an employee or applicant differently because of a known disability or the effects of the disability.</p> <p>Example: negative or unsatisfactory performance appraisal, based on the effects of the disability or the circumstances of the employee’s reasonable accommodation.</p> <p>Example: disciplinary action based on conduct caused by a disability such as discipline for tardiness when the late arrival is due to the effects of a disability or required medical treatment.</p>
Process Failure	Failure or refusal to engage in an interactive process (discussion) with a disabled employee to evaluate and consider potential reasonable accommodations or modified duty that may allow the employee to perform the essential functions of the job or return to work following a disability leave. This applies both to work-related injuries and non-work-related disabilities.
Adverse Impact	<p>A neutral policy on its face, which falls more harshly on a disabled employee or applicant for employment. The effect is to exclude an individual without reference to whether s/he can perform the essential functions of the job.</p> <p>Example: a pre- or post-employment test that requires the disabled candidate to perform a task (such as sight, cognitive analysis) without provision for a reasonable accommodation.</p>
Failure to provide an accommodation to facilitate equal opportunity	Failure or refusal to make a reasonable accommodation so that a disabled employee may perform the essential functions of the job, provided that the reasonable accommodation does not place an undue hardship on the Agency, such as extensive costs, business disruption or safety risks that can’t be overcome.
Disability harassment	Usually based on a hostile working environment. This may result from mocking of disabilities, insults, disparaging remarks, jokes, innuendos, inflammatory communications (written, email, or posted on Agency’s Intranet) which create a hostile, offensive, intimidating or abuse work environment based on disability.
Retaliation	Leaders or co-workers retaliate against a person because of protected activity. Examples: adverse assignments, mocking, threats or other reprisals because the employee made a claim for workers’ compensation benefits, asked for a reasonable accommodation or took a leave of absence for illness or disability.
Unfair Practices	Inconsistent enforcement of the Agency’s policies and/or procedures

FEHA Areas of Risk for Civil Liability Jury Trials

Employment Action or Practice¹	Law²	Policy³	Process⁴	Independent cause of action⁵
Recruiting / Placement				
Improper Interview Questions	X	X		X
Improper Posting Notices	X	X		
Refusal to hire qualified candidate	X			X
Refusal to promote qualified candidate	X	X	X	X
Refusal to transfer to position for which qualified	X	X		X

Interactive Process				
Failure to engage in the interactive process with applicant	X		X	X
Failure to engage in the interactive process with employee returning from LOA	X		X	X
Failure to engage in the interactive process with employee with limitation or barriers to performance	X		X	X

Reasonable Accommodation				
Failure to offer a reasonable accommodation to applicant	X			X
Failure to offer a reasonable accommodation to employee	X			X

Employment Action or Practice	Law	Policy	Process	Independent Cause of Action
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Discipline/Termination				
Inappropriate discipline of disabled employee	X		X	X
Unwarranted termination	X		X	X

¹ This category is the range of employment practices and activities that the Agency conducts, from hiring, to performance management, terms and conditions of employment, discipline and termination.

² Direct violations of the Fair Employment & Housing Act (FEHA)

³ Violations of specific, existing policies of the Agency

⁴ Violation of process requirements (may be inconsistent enforcement of required FEHA process or Agency policy.

⁵ An independent claim in a civil lawsuit that may support separate award of compensatory damages (lost wages, pain and suffering, emotional distress or lost benefits) or punitive damages (to make an example of the defendant employer and punish for "malice, oppression or fraud."

Harassment				
Hostile environment created by acts of supervisors	X	X		X with personal liability
Hostile environment created by acts of co-workers	X	X		X with personal liability
Hostile environment created by acts of third parties	X	X		
Failure to investigate complaint of harassment	X	X	X	
Failure to prevent or correct harassment	X		X	
Retaliation				
Reprisals, threats or punishment by supervisors	X	X		X with personal liability
Reprisals or threats by co-workers	X	X		
Failure to investigate complaints of retaliation	X		X	X
Failure to prevent or correct retaliation	X		X	X
Unfair Practices	X	X		X

What is an “Adverse Employment Action?”

An employer may not take any “adverse employment action” against an employee on the basis of a “protected characteristic” such as race, gender or sex, religion, national origin, pregnancy, physical or mental disability, or medical condition. Adverse employment actions consist of decisions that materially affect the terms and conditions of the individual’s employment. Common adverse employment actions include:

- Refusal to hire an otherwise qualified job applicant because of the protected characteristic;
- Disciplinary action that leads to suspension, loss of pay or benefits, or job status change;
- Demotion or an unfavorable transfer to a materially different position;
- Denial of promotion or advancement;
- Failure to engage in an interactive process to evaluate reasonable accommodations;
- Failure to make a reasonable accommodation; and
- Termination or discharge.

An adverse employment action is an action that **materially affects the terms, conditions, or privileges of employment**. Whether the action is “material” is viewed from an objective perspective. Relatively minor actions that are reasonably likely to simply anger or upset an employee do not constitute an adverse action. An adverse employment action is adverse treatment that is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion.

In retaliation cases, both federal and state courts have broadened the range of what constitutes an adverse action, concluding that an action is also material if it is reasonably likely to deter an employee from engaging in protected activity. In *Yanowitz v. L’Oreal USA, Inc.*, the

California Supreme Court reviewed an employee's unlawful retaliation claim under the FEHA. The retaliatory conduct included unwarranted negative performance evaluations, criticism voiced by a supervisor in front of other employees, and a supervisor's solicitation of negative feedback from the plaintiff's staff. Thus, depending on the circumstances, lateral transfers, unfavorable job references, and changes in work schedules may constitute adverse employment actions.

Involuntary Transfer or Reassignment is an Adverse Employment Action

Prior to the recent adoption of new regulations that will become effective on January 1, 2013 the list of potential "adverse actions" did not specifically include involuntary transfers or involuntary reassignments. The Fair Employment & Housing Commission added this as a specified unlawful employment action based largely on the case law that has emerged over the last few years. The DFEH was finding that many times employees claimed that they were transferred or reassigned against their will to less desirable positions because of their protected characteristic (e.g. gender, race, religion, age, disability, etc.) or in retaliation for engaging in protected activity.

A retaliation lawsuit in San Diego specifically focused on an involuntary transfer as an "adverse employment action." In *Coyne v. County of San Diego*, the employee sued for discrimination and retaliation in violation of Title VII and the California Fair Employment and Housing Act. The plaintiff claimed that she was transferred to a lateral position in a different division because of her gender and because she actively supported the gender discrimination claims of other employees. The County conceded that the plaintiff had engaged in protected activity, and the issues were whether the transfer constituted a materially adverse employment action **and whether the transfer was justified by legitimate non-discriminatory reasons.**

In analyzing the facts, the district court concluded that that a jury should decide whether the transfer was an adverse employment action. First, assignment to the new division was perceived by the County's employees as less prestigious, unfavorable and, at times, punitive. Second, the transfer interfered with the plaintiff's ability to care for her disabled son because it lengthened her commute. The judge found that the County knew that the plaintiff needed to care for her disabled son and that her current assignment was more conducive to that need. Because the plaintiff met her initial burden of proving the elements of retaliation, the burden shifted to the County to offer a legitimate non-discriminatory reason. The County offered more than one legitimate non-discriminatory reason for the transfer. However, the employee offered evidence that the County's reason for the transfer shifted over time from one reason to another. The court concluded that the shift from one reason to another was sufficient to create an issue of fact for a jury about whether the non-discriminatory reasons offered by the County were pretextual.

It is clear that any "involuntary" transfer or reassignment will now be subject to an employee claiming that the decision was made, in whole or in part, for discriminatory motives and not for legitimate non-discriminatory business reasons. With the very broad definition of disability, it is likely that many employees fall within the protections FEHA offers for disability and medical conditions. Given the fluctuating needs of California public agencies to make staffing decisions based on budgetary criteria, we can also anticipate that more reassignments and transfers will be necessary. This will have an immediate impact on agencies as they consider staffing issues.

Impact on Public Agencies with Involuntary Transfer/Reassignments

Most public agency and school district collective bargaining agreements have provisions addressing criteria for transfers or reassignments. Bargaining unit members are eligible for any position for which they are appropriately credentialed or qualified using the process outlined in the CBA. And, most provide that any reassignment or transfer is subject to the Agency finding an appropriately credentialed teacher or qualified individual to fill his/her position.

The agreements also typically address the circumstances under which an **involuntary** transfer (to another site) or reassignment (to a different position at the same site) may be made. A reassignment or transfer may be necessary due to a shift in student population resulting in a decline or increase of enrollment at grade levels or departments, reduction of programs, initiation or expansion of programs, opening of a new school, or for the legitimate needs of a specific program. The criteria set forth in the contract are very important because they will form the criteria for defending an involuntary reassignment as a legitimate, non-discriminatory decision.

Most agreements also have a provision that first seeks voluntary requests for a transfer or reassignment to a posted vacant position. If there is no interest, then the agency has the right to invoke the involuntary transfer or reassignment process. The very nature of “involuntary” suggests that the person who is reassigned (who expressed no interest in the position when posted) will be unhappy. In the past, employees and their union representatives invoked whatever remedies the CBA provides to contest an involuntary transfer. Now, agencies can expect that when an unhappy employee is involuntarily transferred or reassigned, **even within the boundaries of a governing CBA**, s/he may also claim that the decision was made in whole or in part, on a disability, medical condition or perceived disability and not non-discriminatory business reasons.

The Employee’s Initial Burden of Proof

If an employee sues for disability discrimination alleging that an involuntary reassignment was based on disability, s/he must provide evidence that the disability played some role in the decision. Once that initial burden is met, the burden of proof shifts to the agency to prove that the business decision was based on objective job-related criteria and that it was a legitimate non-discriminatory decision. ***It will, therefore, be very important for agencies to establish, with clear and objective evidence, the business-related basis for involuntary reassignments.***

To establish a disability discrimination claim in California, the employee must have a covered disability and must still be able to perform the essential functions of the job with or without accommodation. Treating an employee adversely in hiring, advancement, performance appraisal, termination, compensation, job training, and other terms, conditions, and privileges of employment because of a disability violates the California FEHA. Also, taking adverse employment actions against an employee because of a perceived disability or limitation violates FEHA, whether or not the impairment actually limits a major life activity.

To prove disability discrimination, the employee must prove the following elements:

1. S/he has a physical or mental disability or medical condition, as those terms are defined in the law (and the FEHA regulations amended in 2013);
2. S/he is qualified for the position she seeks or holds, meaning that s/he is able to perform the essential job functions with or without reasonable accommodation;
3. The agency denied an equal employment opportunity by taking an adverse action against him/her; and
4. A “causal connection” between the individual’s disability or perceived disability and the denial of an employment opportunity. In other words, **the decision was based, at least in part, on the disability, medical condition or perceived disability.**

An adverse employment action can be proven through direct evidence or by inference. For example, when an employee alleges, she was involuntarily reassigned because of her disability, the employer's discriminatory motive can be shown by establishing that the employee was reassigned due to factors related to his/her disability (such as irregular attendance due to the condition or other factors involving physical capacity, etc.). The evidence need not show that the disability or medical condition was the **sole, or even the dominant motivation** for the adverse action. Rather, discrimination is established if the preponderance of the evidence indicates that the claimant's disability or medical condition was **at least one of the factors that motivated the decision** that led to an adverse employment action.

The Agency's Burden of Proof to Defend an Involuntary Reassignment

As noted above, FEHA provides a "mixed motive" basis for establishing discrimination claims. Once the plaintiff provides "some evidence" that one or more of the reasons for an adverse employment decision was based on a protected characteristic, the burden shifts to the defendant to prove that it had a **legitimate non-discriminatory reason**. These reasons can vary with the individual circumstances. The criteria for making involuntary transfers or reassignments set forth in a CBA will certainly be a starting point; particularly since they apply to all similarly situated members of the bargaining unit. Agencies should be prepared to produce concrete, objective reasons for making an involuntary transfer and why the particular employee with a disability was the appropriate person to select. Often, this can be based on factors such as appropriate credentials, seniority, or other objective factors.

Also, if the decision makers on the reassignment were unaware of the individual's disability, then the agency can defend by establishing that the decision could not have been based on the disability or aspects of the disability. However, agencies should also be prepared for the potential that an **involuntarily reassigned individual with a previously undisclosed disability requests a reasonable accommodation** that would: (a) invalidate the reassignment or transfer so the employee can remain in the current assignment; (b) seek to identify modifications or adjustments needed to perform in the new position or at the new site; (c) seek to identify a different reassignment (to a different vacant position) be considered as a reasonable accommodation; or (d) request leave as a reasonable accommodation rather than to complete the involuntary reassignment or transfer.

All of these requests will **trigger an interactive process** that must be completed and well documented. It will not be sufficient to assert that the CBA provisions on involuntary transfer or reassignment is controlling. Remember that modifying or bypassing a provision of a CBA to make a reasonable accommodation must at least be considered as part of an interactive process. And, when the CBA states that seniority is "one factor" to consider in making an involuntary reassignment, it does not constitute a "bona fide seniority system" because it leaves some discretion and flexibility to balance a number of legitimate business factors in making staffing decisions.

Distinction: Involuntary Reassignments versus Reassignments as a Reasonable Accommodation

This section addresses involuntary reassignments or transfers which are made outside of an interactive process. This is very different from making a reassignment to a vacant position as part of a reasonable accommodation, to better suit the employee's needs for modified schedule or adjustments to physical tasks such as standing, walking, etc. Such decisions are made properly in the context of an interactive process. Although an employee may not "welcome" a reassignment, that isn't the same as an involuntary reassignment prior to (or in the absence of) a timely good faith interactive process.

In the context of an interactive process, after considering potential alternatives to effectively accommodate an employee with modifications or adjustments to his regular job or other environmental changes, an agency may conclude that a reassignment to a “comparable” vacant position for which he is qualified offers the best opportunity to reasonably accommodate his work restrictions. As long as the interactive process explores in good faith all options for reasonable accommodation, the reassignment can be defended even if this is not the employee’s preferred accommodation. It is important, however, to be sure the reassignment is to a comparable position that the employee can perform and to have a constructive dialogue with the employee to obtain his/her agreement on the reassignment as a reasonable accommodation.

In fact, reassignment to a vacant position as part of a reasonable accommodation is required when the employee cannot perform his own job even with an accommodation. Reassignment as a reasonable accommodation received specific attention in the new regulations. The regulations provide: “As a reasonable accommodation, employer shall ascertain through an interactive process suitable alternate, vacant positions and offer an employee such a position for which the employee is qualified under the following circumstances:

- Employee can no longer perform essential job functions, even with accommodation;
- Accommodation of the essential functions of own job creates an undue hardship; and
- Agreement with employee that reassignment is preferable to accommodation in U&C

If no funded, vacant comparable positions for which the employee is qualified with or without reasonable accommodation, the employer may assign to a lower graded or lower paid position. Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, employer may offer and an employee may choose to accept or reject a temporary assignment *during the interactive process*. (Interactive process is continuous – so the intent is to make this a “stop gap”)

Most significantly, the new regulations make it clear that reassignment as a reasonable accommodation is a very high-level responsibility for employers. The regulations specify: “***The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees.*** However, ordinarily an employer is not required to accommodate an employee by ignoring a bona fide seniority system absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer reserves the right to modify its seniority system or the established practice is to allow variations to its seniority system.”

Affirmative Defenses for Employers in a Discrimination Lawsuit

Type of Defense	Explanation and Examples
Undue Hardship	The Agency may show significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. It may include accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operation of the Agency.
Business Necessity	Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the Agency must prove that there is an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business and the practice effectively fulfills that business purpose.
Health & Safety of the Individual with a Disability	<p>A discriminatory decision may be legally excused if the Agency proves that the worker's disability prevents him or her from performing essential job duties over a reasonable length of time without facing <u>identifiable, substantial and immediate danger to his or her own health and safety</u> and that no reasonable accommodation exists that would remove the danger. But note: speculative concerns about future injury are not legally sufficient to invoke this affirmative defense. The determination must be made on objective data rather than "stereotypes, assumptions, or generalized fears about risks that might occur if the disabled worker is placed in a certain job."</p> <p>Example: a laboratory employee who handles glass beakers of hazardous materials has impaired manual dexterity. The Agency may not automatically reject the individual for RTW on the assumption that the impaired dexterity will prevent performance. The functional abilities and any work restrictions for the particular individual must be considered.</p>
Health & Safety of Others	Example: A diabetic firefighter who combats forest fires is able to control his condition through testing blood sugar levels and medication. However, his physician indicates that there is no guarantee he won't suffer periodic episodes of loss of consciousness. An essential function of the position is to work in remote areas where he poses a serious danger to himself or his partner if he loses consciousness.
Inability to Perform	The Agency may rebut a <i>prima facie</i> showing of discrimination with evidence that no reasonable accommodation exists or can be devised that would enable the employee to perform essential functions of the position. Factors to consider are; the nature of the disability and the type of time commitment, if any, routinely required of all employees for the job in question, and normal workforce turnover. But note: The Agency's belief that the employee will be unable to perform at an unspecified future date or mere speculation about the worker's inability to perform will not justify denial of employment opportunity or the failure to conduct an interactive process.
Otherwise Required by Law	"Notwithstanding a showing of discrimination, such an employment practices are lawful where required by State or Federal law or a court with proper jurisdiction.
Release	A defendant may show that the individual has released the claim through a specific agreement that is supported by adequate "consideration." Note: A Compromise & Release in a WC claim does not automatically release a FEHA claim, even with a "voluntary separation."
Statute/limitations	The claim is brought more than 1 year from the last act of discrimination.

Who is Protected from Disability Discrimination?

Under California law, public agency employers can't discriminate against, harass, or retaliate against an employee because of any of these actions:

- The person has a disability or medical condition; or
- The employee asks for modified duty or a change in schedule because of a medical condition or disability; or
- The employee gets hurt on the job or makes a claim for workers' compensation benefits; or
- The employee takes a leave of absence for a non-worker related illness, injury, disability or pregnancy.

When Must the Agency Engage with the Employee?

A few examples:

- A person returning from any physical injury (whether or not work related) whose doctor provides work restrictions.
- After a manager provides critical performance feedback to an employee, if the employee says he is having trouble performing job tasks because of a medical condition.
- A diabetic who takes regular insulin and requires frequent meal breaks.
- A person who has migraine headaches, asthma or other "episodic" conditions (conditions that are sometimes "active" and sometimes not).
- A person who must attend physical therapy sessions following back or knee surgery. Or, a worker who is undergoing chemotherapy, psychotherapy as ongoing treatment.
- A person whose doctor says she needs a reduced day schedule because of a pregnancy-related condition that must be coordinated with FMLA/CFRA leave.
- A person who takes medication that causes a side effect that limits his ability to perform major life activities or makes performing a life activity difficult to achieve.
- A person with stress-related illness due to an off-the-job injury or illness.
- A person with high blood pressure or arthritis that requires modified duty.

Why Should Public Agency Leaders Care? Disability discrimination lawsuits lead all types of claims in California. Defending against lawsuits costs California employers millions of dollars each year in lost management time, attorneys' fees, and large payments to disabled workers. The risks come from not enforcing workplace policies carefully and not having consistent processes for making return-to-work and stay at work decisions carefully.

Situations that require some type of action, but should not always be considered as a disability:

- An employee who tells a manager during a work shift that she or he is feeling pain in the hands, back, feet or other body part
- A person who had an injury or took medical leave, IF he is released to full duty without work restrictions.
- A person who has a visible physical disability or known medical condition, but who can perform essential job functions without any restrictions or limitations.

What is a Protected Disability?

1. A physical, mental, cognitive or medical condition that actually limits the performance of one or more of the following major life activities:

- Walking
- Standing
- Sitting
- Moving fingers, toes, arms, legs,
- Lifting and reaching
- Bending and stooping
- Crawling
- Speaking
- Breathing
- Seeing
- Hearing
- Reading

- Learning
- Working
- Eating and digesting food
- Caring for oneself
- Communicating
- Concentrating
- Interacting with others
- Thinking
- Sleeping
- Staying awake
- Socializing
- Performing manual tasks

2. A record of a disability or record of treatment for that limitation

- When in the past, although not now, he had an impairment that limited his performing one or more major life activities.
- An individual who was once mistakenly thought to have a disability.
- A person who was treated for a condition and recovered, such as alcoholism or a medical condition that is now in remission.
- A record of treatment for cancer, kidney disease, or other chronic illnesses. Persons with a history of treatment and rehabilitation for drug addiction.

3. Being “regarded as” disabled when the employee is not actually limited in performing major life activities.

- Assuming that a person with a back injury won’t be able to do the job when he returns to work.
- Stereotypes or subjective assumptions about the abilities to work a full shift or week. Focus must be on whether the person can do job tasks, not on the condition itself.

Federal ADA	California FEHA
Applies to employers with 15+ employees	<u>1 or more employees:</u> for harassment based on mental or physical disability. <u>5 or more employees:</u> for physical disabilities or medical conditions <u>15 or more employees:</u> for mental disability
Disability still defined as a “ substantial limitation ” of a major life activity – but that is to be broadly construed by the courts	Disability defined as any limitation of a major life activity, if it makes achieving that major life activity difficult [still broader than ADA]
Definition of “major life activity” includes physical and mental activities and provides a long list of what will be considered a major life activity. Effectively adopted California standards.	Major life activity encompasses physical, mental, or social activities and working. Intent was to broadly construe the definition of major life activities.
Expressly rejects Supreme Court determination that employee had to be unable to perform a broad range of jobs. Brings it in line with Calif. Includes conditions that are “episodic,” even when the symptoms/ effects are inactive or in remission.	Employee is limited in working even if impairment only limits him in a particular job.
Expressly rejects Supreme Court’s decision that required courts to consider ‘mitigating measures when determining whether an impairment substantially limits a major life activity.	Limitation is defined without regard to mitigating factors. However, if the mitigating factor itself creates a limitation of a major life activity, individual will have FEHA disability
Although an interactive process is mandated, ADAAA still has no separate violation for failing to engage in the interactive process. Individual must prove that the failure to interact led to a failure/refusal to reasonably accommodate.	Failure to timely engage in the interactive process with an employee with a known disability is an independent violation of the law expressly permits damages for this failure even if there is ultimately no reasonable accommodation that can be made.
Employer liable only if the court finds that there was, in fact, a reasonable accommodation that was denied	Employer liable for failing to engage in the interactive process, even if there was, in fact, no reasonable accommodation.
Employee request for accommodation must be specific	Employer must treat any statement by an employee that he is “limited,” as request for accommodation
“Temporary” disabilities not covered (e.g. broken limb expected to heal)	FEHA has no ‘time requirement’ for length of the disability. If it limits the life activity of working, even temporarily, FEHA applies.
No individual (personal) liability for supervisors or managers.	Individual may be liable for acts of harassment or retaliation, aiding or abetting conduct prohibited by FEHA or discriminating in hiring, terms and conditions of employment or discharge decisions.
<p>Enforced by United States Department of Justice. NO Administrative Adjudication option available. Make whole remedy available, plus emotional distress & punitive damages in federal court limited to intentional discrimination cases according to size of employer:</p> <p>15-100 employees = \$50,000 (combined emotional distress & punitive damages) 101-200 = no more than \$100,000 201-500 = no more than \$200,000 501 or more = no more than \$300,000</p>	<p>Enforced by the California Department of Fair Employment & Housing:</p> <p>Administrative adjudication = make whole remedy available, plus a limit of \$150,000 in combined emotional distress & administrative fines per respondent.</p> <p>Civil litigation = make whole remedy and unlimited emotional distress and punitive damages.</p>

Major bodily functions are also specifically listed in the newest regulations under the expanded Federal Americans with Disabilities Act (ADAAA) and they are applicable under the expansive California FEHA. These include major bodily functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.

Positive effects of mitigating measures **must be ignored** in determining whether person has a disability

Example: a mitigating measure that eliminates or reduces symptoms or impact of an impairment cannot be used

Instead, focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure.

Negative effects of a mitigating measure **must be considered** in determining if a person meets the definition of disability

Example: the side effects from use of medication for hypertension may be considered if they limit a major life activity such as sleeping, concentration, etc.

What is an “Essential Job Function?”

To be protected under the laws, a person must be both disabled and be "otherwise qualified" to do the job. He or she is "otherwise qualified" if able to meet all of the essential requirements of the job with or without reasonable accommodation. In essence, to avoid unlawful discrimination, a manager/supervisor must know what the "essential job functions" are, must be able to ask proper pre-employment interview questions, must be able to enforce work rules, and enforce performance standards in a non-discriminatory way. The “essential functions” of a particular job are those “fundamental job duties of the employment position that the individual with a disability holds or desires. Essential functions do not include the marginal functions of the position.

Evidence of whether a particular function is “essential”

- The employer’s judgment as to which functions are essential;
- Written, **current** job descriptions that reflect the jobs as performed today;
- References to the tasks being essential in recent performance evaluations;
- The amount of time spent on the job performing the function;
- The consequence of not requiring the incumbent to perform the function;
- The work experiences of past incumbents in the job; and current workers’ experience
- The terms of a collective bargaining agreement, if any.

Position descriptions are a valuable tool to help establish essential job functions. They provide notice to employees and supervisors regarding the performance standards you intend to enforce. When position descriptions are used as an objective, job-related "road map" for supervisors to use in selecting and placing employees in specific jobs, and in later evaluating their performance, the position descriptions also assist in defending against claims of discrimination or inconsistent enforcement of Agency policies. Both areas have resulted in legal claims and protracted litigation. This occurs with discrimination and implied contract/wrongful termination claims.

Every manager or supervisor should thoroughly understand **the essential functions of the job**, and the standards by which applicants will be evaluated.

1. It sets an objective set of functions for the job which can be quantified.
2. It forces managers/supervisors to focus on precisely what knowledge, education, skills or experience will be required to perform essential functions.
3. It requires managers/supervisors to accurately assess the physical and/or mental functions of the job -- in objective rather than subjective terms.
4. It promotes consistency in job standards for various positions.
5. It increases the likelihood of placing an individual who can competently perform the requirements of the job at all phases: hiring, performance management, and assessment for modified duty assignments or other accommodations.
6. It facilitates good documentation of the essential functions of the job, and the experience, education, skills and/or knowledge required.

Proactive employers who are able to identify essential job functions are better able to compare them to the employee's work restrictions in order to determine whether or not a return to work is feasible. Employers do win these cases.

Why is Consistent Process Key to Defending RTW Decisions?

California law requires that employers **enact** and then consistently **enforce** policies and procedures that are both legally compliant and fair. The employer's **processes must have integrity**. This means that the process must be trustworthy, consistently applied and capable of being replicated on a case by case basis. For processes to have integrity, employees and managers alike must be able to predict consistent (not necessarily identical) outcomes.

The California legislature and appellate courts so emphatically support process integrity that FEHA creates – and courts have extended – a separate “cause of action” (e.g., a separate and independent basis to obtain damages, for (1) failure to engage in the interactive process; (2) failure to investigate, correct and prevent harassment; and (3) failure to investigate and prevent retaliation. **Failure to engage in the process is separately subject to damages, as shown in the chart above. As an employer, you can be correct in your initial expectation that you will not be able to reasonably accommodate an employee in a particular situation and still risk losing a FEHA lawsuit if you fail to engage in the interactive process.**

Yet, proactive employers are winning these lawsuits. Public agencies have a much better chance of prevailing in a FEHA lawsuit when they prove that they applied a consistent return-to-work process, conducted a timely, good faith interactive dialogue with the affected employee, and made a reasonable decision. Documentation of the process is often critical to mounting a successful defense.

When Can Managers' Words or Actions Lead to Lawsuits?

Sometimes managers and front-line supervisors say things that can hurt the Agency in court. Supervisors have "history" with your employees.

- If you feel good about a worker (your "go to person") who then becomes disabled (e.g., it is their "go to guy"), you might work really hard to try to accommodate a return to work by either ignoring work restrictions or by modifying and even eliminating essential job functions. This could lead to changes that are **not really reasonable or required by the law**.
- But, when your relationship or history with the worker is not so good, you might try to find ways not to bring him or her back to work. This can result in discrimination claims that are hard for the Agency to defend against.

Examples of Attitudes and Assumptions that Can Hurt the Agency in Court

- An employee on modified duty is more likely to get hurt on the job.
 - Disability laws don't protect an employee if his own "negligence" caused him to get hurt.
 - An employee whose own behavior caused him to get sick (e.g., smoking, drinking, drug use, obesity, or other chronic conditions) doesn't deserve an accommodation.
 - An injured worker who can't be returned to his regular job can get workers' comp benefits, but he can't claim discrimination because workers' comp is "no fault."
 - Our Agency or budget is **too small** to even consider job accommodations.
 - Accommodating people with disabilities is **too disruptive to productivity**.
 - Our Agency provides light duty **only for people who get hurt at work**.
 - Keeping employees with medical conditions will increase insurance costs.
 - We can refuse to put workers with a history of on-the-job injuries back to work because they might get hurt again.
 - We never have to consider accommodating people with stress unless they make a claim for workers' comp benefits, even when they have written work restrictions from a doctor.
 - An employee terminated for poor performance after returning from a WC leave will **always** have a successful claim for retaliation.
- Modifying a job for one of our best workers by changing his essential duties is a business decision that an Administrator can make without legal trouble.
 - If a worker complains of pain in the hands, feet, or back, if the Agency moves him to light duty for the remainder of the shift, he must stay on light duty.
 - The Agency provides temporary light duty for a worker while his workers' comp claim is pending, but doesn't have to do so for employees with a temporary disability from an off-duty accident.

What is the “Interactive Process” for Making Accommodation Decisions?

California law requires a **timely, good faith, “interactive process”** to determine whether the employer can offer and implement **a reasonable accommodation** for a disabled employee or applicant for employment. This is an essential face-to-face dialogue with a disabled applicant or employee to fully explore adjustments or accommodations that may remove barriers to performance and/or to privileges and benefits of employment.

Timeliness: respond as quickly as possible to a request for reasonable accommodation. Then, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of FEHA.

Good Faith: The Agency and the affected employee must communicate directly with each other to determine essential information; neither party can delay or interfere with the process. To demonstrate good faith, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation. The good faith interactive process is a “*reciprocal obligation.*”

The Process IS:	The Process is NOT:
Dialogue	Monologue
Interactive	Reactive
Individualized	Generalized
Receptive	Deceptive
Face-to-face	In-your-face
Meet and Confer	Defeat and Deter
Objective	Subjective
Fact-based	Conjecture based
Adaptable	Inflexible
Instructive	Destructive
Analysis	Paralysis
Careful	Careless
Continuous	Impetuous
Consistent	Resistant
Trustworthy	Blameworthy
Required Result	Desired Result

Individualized Decision: Every return-to-work decision is an individualized decision in which you must consider the particular employee’s functional limitations or work restrictions, the essential functions of that employee’s usual job (or other vacant positions for which he may be qualified by education, training and experience, and your business needs at the time the accommodation decision is made.

Inflexible Policies Preventing Individualized Decision Results in Unlawful Process

- We don’t allow permanent modified duty.
- We place a maximum time limit on temporary light duty or transitional assignments.
- We have no light duty assignments in certain jobs or classifications.
- Maximum medical leave of 6 months (or any other inflexible time frame).
- Employees on modified duty are never eligible to work overtime hours.
- Modified work is not offered after 90 days.

When Does the Duty to Engage in the Interactive Process Begin?

1. The employee asks for an accommodation, which may include saying:
 - My hands hurt from washing dishes;
 - My legs hurt from standing so much;
 - I have a backache every day from carrying these heavy trays;
 - My knees are sore from bending and stretching to clear tables;
 - I need six weeks off for back surgery;
 - I can't get to work on time because I am too stiff from arthritis; or
 - I'm so overwhelmed (or stressed out) that I can't concentrate.
2. The employee returns to work after a leave of absence with work restrictions;
3. The employee comes in one day with a doctor's note saying he needs light duty, modified schedule, or some other accommodation;
4. During a performance or discipline discussion, the employee says "I am having trouble doing my job because my pain medication makes it hard to concentrate;"
5. A supervisor or manager observes an employee having trouble doing regular tasks that involve standing, walking, bending, carrying, lifting, stooping, etc.; or
6. A family member, friend, doctor or other representative asks for an accommodation on the employee's behalf.
7. The Agency also must engage in the interactive process as soon as it recognizes the need for an accommodation. ***The disabled employee does not need to use magic words, such as "reasonable accommodation" or "light duty," or "modified job." Even ambiguous comments can be requests for accommodation.***

Important Consideration on Roles of Agency Personnel: Dividing the roles of managers, supervisors and the individual leading the interactive process discussion is very important to a successful outcome. Managers and supervisors may be the first to become aware that the interactive process has been triggered, because of something the disabled employee says or does. Once that occurs, an independent manager or HR professional should conduct the interactive process.

Reasons for Role Separation: People making ***employment decisions*** about the employee should not have information about disabilities, conditions, limitations or treatment regimens for any disabled individual. This information may actually influence an employment decision in a way that amounts to discrimination under FEHA. At the very least, it may give a complaining employee an opportunity to assert that the decision maker was influenced, making it harder to defend against claims of discrimination.

Important Input from Managers and Supervisors at the Proper Time: Of course, the person conducting the interactive process may need to get information from the employee's manager or direct supervisor to identify and evaluate possible accommodations. This includes: what the employee's job involves, how her tasks could/could not be reassigned, but the less you tell them about the employee's limitation the better. Also, the person conducting the interactive process will probably need to interview the employee's managers later in order to implement an accommodation.

What Triggers the Duty to Engage in the Interactive Process?

Triggering Event	Examples
<p>The job applicant or employee requests a reasonable accommodation, specifically or by reference to his limitations</p>	<p>An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."</p> <p>An employee tells his supervisor, "I need six weeks off to get treatment for a back problem."</p> <p>A new employee, who uses a wheelchair, informs the Agency office that her wheelchair cannot fit under the desk in her office.</p> <p>An employee tells her supervisor she is overwhelmed by anxiety and stress and needs a reduction in her scheduled hours.</p>
<p>A manager or supervisor observes barriers to the employee's performance on the job</p>	<p>the employee's wheelchair won't fit under the desk or within the workstation; an employee is seen sleeping at her desk for extended periods or periodically)</p>
<p>The Agency may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation.</p>	<p>The Agency could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation;</p>
<p>The Agency also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation. For example: an employee who is observed sleeping at his work station on a regular basis or one who has observable difficulty staying awake in departmental meetings may be asked if she needs a reasonable accommodation. The focus should be on the accommodation, not on what the nature of the medical condition</p>	<p>"What changes to your schedule or break times may assist you in staying awake/alert?" rather than "have you seen a doctor, as you may have a medical condition like narcolepsy."</p> <p>Never ask an employee whether s/he has a disability or any other question about his/her medical condition. However, in keeping with the spirit of the interactive process, an employee who is struggling to adequately perform should be asked if there is any type of assistance that might enable the employee to better perform his/her job functions and, along with other material describing employee support resources, the employee should be given information about Agency policies/procedures applicable to employees with disabilities.</p>
<p>A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Of course, the individual with a disability may refuse to accept an accommodation that is not needed.</p> <p>In this situation, the Agency should confirm with the employee with a disability that s/he, in fact, wants a reasonable accommodation, before proceeding. In some situations, as where the employee is hospitalized for an extended time, the Agency should process the request and consult directly with the employee as soon as it is practicable</p>	<p>An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to a severe asthma attack, needed to be hospitalized, was given a shot of Demerol and thus requires time off. This discussion constitutes a request for reasonable accommodation.</p> <p>An employee has been out of work for six months with a work-related injury. The employee's doctor sends the Agency a letter, stating that the employee is released to return to work, but with certain work restrictions or is released to return to a light duty position. The letter constitutes a request for a reasonable accommodation.</p>

Why is Communication Critical for an Effective Dialogue?

Communication is the heart of the interactive process. Your organization should take a proactive approach in considering all feasible adjustments, modifications or accommodations, including consulting appropriate resources for assistance. Continuous, constructive communication is particularly important when the:

1. employee's specific limitations or restrictions are unclear;
2. barrier to performance is uncertain;
3. parties are considering different possible accommodations;
4. employee's limitations change over time (improve or decline);
5. accommodation is no longer working;
6. essential job functions change, for business reasons; or
7. Agency's financial circumstances change materially.

What is the Agency's Ten Step Process for Evaluating Reasonable Accommodations?

<p style="text-align: center;">Steps 1-4 = Preparing to Interact Gather information on essential job functions, work restrictions and relevant performance history</p> <p style="text-align: center;">Step 5 – Interactive Dialogue with the Employee (the Heart of the Process)</p> <p style="text-align: center;">Steps 6 & 7 = Preparing to Decide and Making a Decision Evaluate whether a modification or reassignment to a vacant position will be effective to allow the employee to perform essential job functions. Determine whether cost and/or disruption make it an undue hardship for the Agency. Decide whether to offer or decline a requested accommodation.</p> <p style="text-align: center;">Step 8 = Implementing the Decision</p> <p style="text-align: center;">Steps 9 & 10 = Documentation and Monitoring</p>

What are the 6 C's of an Effective Interactive Process?

Candid	Direct and truthful exchange of information
Constructive	Creative approach to finding accommodations
Cooperative	Reciprocal participation in good faith
Considered	Fact-gathering and reasoned objective evaluation
Consistent	Process that has integrity
Continuous	FEHA duty to re-engage – changed circumstances

What is a Reasonable Accommodation?

Reasonable accommodation refers to any change in the work environment or in the way job duties are customarily done in order to provide an equal opportunity.

- Making existing facilities useable and accessible to persons with physical disabilities.
- Modification of existing job duties such as light duty, shift changes or alternate schedules.
- Job restructuring.
- Part-time or modified work schedules.
- Modify dress code for employees with chronic conditions.
- Modify environmental temperatures or other factors.
- Fragrance-free or scent-free policy.
- Provide adjustable lighting and/or work stations.
- Reassignment to vacant position for which the employee is qualified.
- Equipment or assistive devices that help a worker perform certain tasks.
- Acquisition of adaptive technologies, like computer software or lifting tools.
- Modifications to tests, safety training, or other job tools.
- Suspension of “no fault” attendance or leave of absence policy.
- Periodic or more frequent rest breaks away from workstation.
- Telecommuting
- Alternative work station away from noise or other distractions
- Allow use of scooter or other mobility devices
- Allow, with medical verification of need, service dog for physical or emotional assistance
- Adjustable ventilation, fans, heaters, HEPA filters or other environmental adjustments
- Reducing or otherwise accommodation travel requirements during treatment
- Flexible scheduling for medication adjustments, counseling or other services
- Extended unpaid leave beyond expiration of available leave (last resort)
- Medical treatment accommodations
- Allow self-paced workload with flexible hours
- Adjust start time and break schedule
- Enforce attendance, punctuality and other policies with flexibility

Reassignment to a vacant position under the new regulations:

“As a reasonable accommodation, employer shall ascertain through an interactive process suitable alternate, vacant positions and offer an employee such a position for which the employee is qualified under the following circumstances:

1. Employee can no longer perform essential job functions, even with accommodation
2. Accommodation of the essential functions of own job creates an undue hardship
3. Agreement with employee that reassignment is preferable to accommodation in U&C

If no funded, vacant comparable positions for which the employee is qualified with or without reasonable accommodation, employer may assign to a lower graded or lower paid position.

Employer is **not required to create a new position** to accommodate an individual with a disability to a greater extent than employer would offer a new position to any employee, regardless of disability. BUT “***The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees.*** However, ordinarily an employer is not required to accommodate an employee by ignoring a bona fide seniority system absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer reserves the right to modify its seniority system or the established practice is to allow variations to its seniority system.”

What is NOT a Reasonable Accommodation?

The Agency must evaluate on a case-by-case basis whether a particular accommodation would cause undue hardship, either temporarily or on a long-term basis. If the Agency denies accommodation because it would be an “undue hardship,” it must show that the accommodation requires significant difficulty, business disruption, or expense.

- Monitoring by the employer to be sure employee takes medication.
- Elimination of an essential job function or task (as a job modification).
- Reduction of performance standards in modified or other job.
- Removal of another employee in order to effectuate job transfer.
- Employer supplied personal items for both workplace and off-duty.
- The precise accommodation the employee insists upon (if it isn’t otherwise reasonable).
- An assignment that would require the Agency to violate a federal or state law.

WHAT is an Undue Hardship?

Undue hardship must be **significant expense or difficulty**. This is an individualized analysis, in which an employer must evaluate on a case-by-case basis whether a particular accommodation would cause undue hardship, either temporarily or on a long-term basis. Factors that are considered include, but are not limited to excessive cost.

The highest level of undue hardship is when a fact-based evaluation concludes that there would be a significant and negative impact on program services to students (school districts) or clients (social services and other departments in public entities), that would fundamentally alter the operations of the school site or district office, or would place the District in a position of violating legal or regulatory compliance obligations. If there is more than one effective accommodation, the employer can choose the one that provides the least hardship.

<u>Undue Hardship Evaluation IS</u>	<u>Undue Hardship Evaluation is NOT</u>
Individualized	Generalized
Fact-based	Conjecture-based
Comprehensive	Apprehensive
Determination	Speculation
Confirmed job functions	Unconfirmed task assumptions
Fundamental disruption	Incremental dysfunction
Consistent	Resistant

Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operation of the organization.

The Agency must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. If an employer denies accommodation because it would be an “undue hardship,” it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

1. the nature and cost of the accommodation needed;
2. the overall financial resources of the facilities involved in providing the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations on the operation of the facility
3. the overall financial resources of the Agency, the size of the business with respect to the number of employees and the number, type and locations of its facilities.

What is an Imminent Safety Threat?

A decision to deny accommodation may be legally excused if the district proves that the disability prevents the individual from performing essential job functions over a reasonable length of time without facing identifiable, substantial and immediate danger to his or her own health and safety, or the safety of others, and that no reasonable accommodation exists that would remove the imminent risk of harm. **Caveat:** speculative concerns about future injury are not legally sufficient to invoke this defense to deny a reasonable accommodation. The determination must be made on objective data rather than “stereotypes, assumptions, or generalized fears about risks that might occur if the disabled worker is placed in a certain job.”

- **Job Must be Safety Sensitive:** Defense is available only if, after engaging in an interactive process, there is no reasonable accommodation that would allow the employee to perform essential functions in a manner that would not endanger his/her health or safety because the job imposes an imminent and substantial degree of risk.
- **Risk Must be Present and Not Future:** No defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.
- **Risk Must be Medically Supported:** *“The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”*
 - **Job-related** means tailored to assess the employee’s ability to carry out the essential functions of the job or to determine whether the employee poses a danger to himself or others
 - **Business necessity** regarding medical or psychological examinations means that the need for the disability inquiry or medical examination is vital to the business operations

<u>Direct Threat/ Imminent Risk IS</u>	<u>Direct Threat/Imminent Risk is NOT</u>
Objective	Subjective
Risk is current (“what is”)	Risk is future (“what might be”)
Educated	Exaggerated

What is Retaliation?

Protection from retaliation is quite broad. Every federal employment discrimination statute defines retaliation as a separate form of wrongdoing, as does the California FEHA. Individuals who make reports or complaints about any kind of discrimination or harassment in their workplace, or who participate truthfully and in good faith in the investigation of a co-worker's complaint, are protected from reprisals or punishment for their "protected activity."

In addition, whistleblowers who report suspected illegal or unethical practices are often protected activity includes requesting or taking a job-protected leave of absence, requesting a reasonable accommodation for a disability can't be penalized for doing so. The California FEHA specifically provides that employees who request or receive a reasonable accommodation (through an interactive process) are protected from all forms of harassment **whether or not the accommodation is granted.**

If the employee has a reasonable, good faith belief that the employer is doing or has done something "wrong" (legal, ethical, policy violation or contractual breach), or engages in other protected activity -- such as requesting or taking a leave of absence or requesting a reasonable accommodation -- and the employee's response to the wrong doing is reasonable, the law will protect that employee from retaliation. This is so even if the employee's claims are ultimately not substantiated. Truthfully raising an issue, making a complaint, or participating in any proceeding (internal or external) is absolutely protected. Reason: an employee's concern about whether he can "prove it" may chill the exercise of rights and violates public policy. A **good faith** complaint is sufficient to protect against retaliation. False complaints may still be dealt with appropriately. But be careful when determining whether a complaint is knowingly false or mistaken but in good faith because if later sued, a neutral and well documented investigation will be critical.

Retaliation involves threats or punishment for employees who seek an accommodation, take leave or file a WC claim -- is a separate form of discrimination. Retaliation claims are the fastest growing and most dangerous type of claims under the discrimination laws, largely because they allege conduct that is consistent with human nature to strike back at those who "cause trouble." Retaliation may include:

- Adverse performance review - lower than the employee earned.
- Changes in shift or work responsibilities with no objective business purpose.
- Negative or abusive treatment by supervisors or managers.
- Improper denial or delay of an earned promotion.
- 3 "D's" - *Discipline, Demotion, Discharge.*
- Ostracism by supervisors.
- Ostracism by co-workers that is ignored, tolerated, or incited by supervisors.
- Taunts, threats or other coercive activities.
- Gossip, ridicule or bullying by supervisor or co-workers
- Inconsistent enforcement of terms and conditions of employment.
- Denial of training or other professional growth opportunities.
- Allowing harassment via e-mail or social media to go unaddressed.
- Allowing ridicule or bullying by students to go unaddressed.

When Must the Agency Conduct a Further, Continuous Interactive Process?

Even after an employer defines and implements an accommodation for a disabled individual, it must ensure a continuous flow of information on the effectiveness of the assignment. Case law clearly establishes that **“the duty to provide an accommodation is also a continuing duty that is “not exhausted by one effort.”**

If you try one form of accommodation and it works for a while but then circumstances change, the Agency must consider alternative means of accommodation before taking any action. This rule encourages employers to actively seek to find accommodations that "really work," and avoids an incentive for employees to "request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation would not be effective. Examples of changed circumstances are:

1. The accommodation is no longer effective in helping the employee to perform job functions.
2. Changes in the type of essential job duties or how they are performed. **Example:** three food servers are assigned to a busy shift. A disabled worker’s accommodation requires allocating some of the tasks she can’t do because of work restrictions. The accommodation is only working effectively because two other employees are assigned the heavier lifting and she is assigned other functions. Now, a layoff eliminates one food server. With only one remaining employee on-site, the accommodation with lighter duty may no longer be feasible. This requires a new interactive process.
3. Changes in the employee's restrictions render the original accommodation obsolete or inoperative, such as new information from a medical provider about functional limitations or observations of the employee's physical/mental limitations in performing major life activities.
4. Financial condition changes and employer can't pay the **ongoing cost** of an accommodation.

What Are Some Do's and Don'ts for Agency Leaders?

Do be alert to spot situations that trigger the interactive process.	Don't assume there are any jobs immune to a reasonable accommodation decision.
Do evaluate all potential requests for modified duty or working with restrictions.	Don't say or write that “we never have modified duty assignments” or “this job can’t be done with restrictions.”
Do take seriously any reports or complaints of pain or trouble doing job tasks that are made directly to you.	Don't convey disrespect or intolerance for individuals with disabilities or who may be working with reasonable accommodations.
Do instruct co-workers that they are expected to perform their jobs even when some individuals may be working with modified duty or other restrictions.	Don't make disparaging comments, verbally or in writing, about employees who are working with restrictions or modified duty.
Do understand the critical distinctions between the WC claim process and duties to under the California Fair Employment & Housing Act.	Don't assume that the resolution of a WC claim extinguishes the continuing duty to consider reasonable accommodations for employees covered by FEHA.

Do cooperate on all interactive process activities conducted by the HR Department.	Don't make disparaging or inflammatory remarks about the interactive process or the duty to engage in the interactive process.
Do respect the privacy of employee medical information, which may come to your attention as part of a reasonable accommodation decision.	Don't disclose confidential information to any individual (including managers and supervisors) who doesn't have an immediate "need to know."
Do become familiar with Agency policies for preventing disability harassment in the workplace.	Don't engage in or ignore behaviors that may create a hostile environment for employees based on disability. This includes jokes, mocking and mean treatment.
<p>Do become familiar with the Agency policies for preventing retaliation against individuals who engage in protected activities, including:</p> <ul style="list-style-type: none"> • taking a medical leave of absence; • making a claim for WC benefits; • requesting an adjustment or reasonable accommodation to perform the essential functions of their job; • engaging in the interactive process; • Making an internal complaint for discrimination, harassment or retaliation. 	<p>Never, never retaliate or punish employees for engaging in protected activities. Retaliation may include, but is not limited to:</p> <ul style="list-style-type: none"> • threats or disparaging remarks; • negative performance feedback (when not earned); • unwarranted discipline; • differential treatment because of a reasonable accommodation; • Refusal to train, transfer or extend benefits of employment to an individual who is engages in protected activities.

What Standards Apply to Recruiting, Hiring and the Interactive Process?

Do address the specific tasks of the job – essential functions – and performance standards, using the job description as an objective roadmap	Don't ask for non-job relevant information, such as physical or mental illnesses, record of disabilities, past treatment, diagnosis or prognosis for medical conditions
Do ask about education and experience the applicant has to perform objective job tasks and "soft skills" such as judgment, initiative, leadership, ability to work under pressure	Don't convey disrespect or intolerance for individuals with disabilities, limitations or who are using mitigating devices such as wheelchair, service dog, vision or hearing aids
Do address potential required reasonable accommodations based on disabilities or limitations that are apparent or which the employee discloses in the pre-placement process	Don't ask about previous WC claims, physical or medical data, leaves of absences records or sick time taken in previous positions
Do obtain appropriate authorization for pre-placement physical (where necessary and consistent with existing policies), background checks and other pre-placement procedures	Don't obtain or use information from prior employers or supervisors other than sources that the company cannot lawfully obtain directly from the applicant
Do provide reasonable accommodations in the hiring and application process, even if you believe that no reasonable accommodation will be effective "on the job." The accommodations may be different from application process to job.	Don't refuse to continue with the pre-placement process, or the interview process, because an individual request an accommodation during the hiring process. If necessary, consider extending the application process to facilitate the provision of a reasonable accommodation.

Do make a conditional offer of employment to an otherwise qualified applicant, and then send the applicant for a pre-placement physical or drug test.	Don't refuse to make an offer to a qualified applicant with a disability because of the anticipated inability to pass a pre-placement physical. Use the conditional offer process.
Do comply with all employer's pre-placement processes for advertising, posting, interviewing, testing and offering a job or a promotional opportunity.	Don't ignore or inconsistently enforce policies – for any reason – to favor or disfavor an applicant with a disability in hiring, placement and promotional decisions.

Lawful and Appropriate Questions

Unlawful and Prohibited

This job requires moving boxes of equipment that weigh approximately 40 to 50 pounds from the warehouse to the loading dock.	How strong is your back? Have you ever injured your back? Do you have foot or ankle problems?
This job requires out of state travel, primarily by air, about two weeks every month. Can you fulfill this requirement?	Are you in good health? Are you physically able to work long hours? Do you have agoraphobia?
Did you have an acceptable attendance record in your prior job?	How many sick or leave days did you take last year? Have you ever taken a medical leave?
Can you work under stress?	Have you ever been treated for stress-related illness? Have you been under the care of a psychiatrist?
Are you available to work authorized OT; such as 10-12 hour shifts regularly? On a periodic basis?	Are you well enough to handle long hours of travel? Are you in good health/

Pre-Employment, Post-Conditional Offer Medical Data Standards

Action	California FEHA	Federal ADA
Pre-Employment (pre-offer) inquiries and medical exams	Prohibits non-job related inquires that directly or indirectly express any limitation, specification, or discrimination based on any of the FEHA's protected bases. For employers of 15 or more, AB 1077 limits pre-offer medical exams and disability-related questions as the ADA does. (employers of less than 15 employees may request info regarding physical fitness, medical condition, physical condition, or medical history IF directly related to and pertinent to position applicant is applying for, or directly relate to whether applicant would endanger self or others).	Prohibits pre-offer medical exams and disability related questions.

Action	California FEHA	Federal ADA
Pre-employment (post offer) inquiries	<p>NO general inquiries permitted, but post-offer employers of any size may request info regarding physical fitness, medical condition or medical history IF directly related to and pertinent to position applicant is applying for or directly related to whether applicant would endanger self or others. FEHA amendments added language equal to ADA that inquiry must be 1) job-related and 2) consistent with business necessity, but emphasized additionally that inquiry must be asked of all applicants to whom job offer is made.</p>	<p>General disability-related questions are OK, as long as:</p> <ol style="list-style-type: none"> 1. required of all entering applicants in the same job category 2. results are treated as confidential medical records; HOWEVER, if individual is screened out because of disability, employer must show inquiry is: <ul style="list-style-type: none"> • job related and • consistent with business necessity
Pre-employment (post-offer) medical exams	<p>Same as ADA regarding timing of medical exam (post offer) but nature and scope of exams are more limited than under ADA:</p> <ol style="list-style-type: none"> 1. nature of exam must be directly related to the position applicant is applying for, or directly related to whether applicant would endanger self or others (for example, a med exam may be lawful in a physically demanding job, but not for a sedentary job). 2. scope of exam must be job-related or directly related to whether employee would endanger himself or others (for example, an individual with a back exam, but not an exam for cancer or AIDS) where the results of a medical exam would result in disqualification, employer must allow applicant to submit an independent medical opinion before a final decision on disqualification. 	<p>Medical exams are permissible after a conditional offer of employment, provided that all entering applicants in the job classification are required to take the exam and results are treated like confidential medical records.</p> <p>General medical exams are permissible and do not have to be job-related. However, if an employee is screened out because of disability, employer must show it is job-related and consistent with business necessity.</p>
Drug tests	<p>Since drug tests may identify an individual's disability, they may only be required if job-related (may be required pre-offer)</p>	<p>Drug tests are not medical exams, so employers can require applicants to take them before making a conditional offer, and can require employees to take them without having to show that they are job-related and consistent with business necessity. If test reveals medical condition info must be treated as confidential records.</p>

Action	California FEHA	Federal ADA
Alcohol tests	Same as ADA regarding alcohol tests to post-offer. However, alcohol tests are only lawful if job-related.	Alcohol tests are medical exams so they can only be required after a conditional job offer. All rules for "medical exams" apply.
Physical ability tests	Permissible pre-offer, but limited to situations in which they are job-related.	Not medical exams so permitted pre-offer. However, if individual is screened out because of disability, employer must show inquiry is job-related and consistent with business necessity.
Employees disability-related inquiries and medical exams	Same: only permitted if job-related and consistent with business necessity.	Same: only permitted if job-related and consistent with business necessity.

What Rules Apply to Performance Management & the Interactive Process?

Performance	Disciplinary Action
Based on standards for acceptable performance	Based on standards of behavior – workplace rules
Occurs with regular evaluations and feedback	Occurs when a standard or rule is violated
Requires Communication	Requires Investigation
Can support termination as long as policies are consistently followed and non-discriminatory	Can support a termination, based on misconduct that rises to cause or violation of specific rules

Why is Continuous Performance Feedback Your Best Defense?

- Employees should not be genuinely surprised by candid, constructive performance feedback
- Good feedback may bring to light unknown barriers to performance
- Specific performance evaluations help with later analysis of skills, experience and potential for other jobs assignments as a reasonable accommodation
- Regular feedback avoids the “I didn’t know what was expected” syndrome
- Well crafted documentation, done contemporaneously with performance, enhances defense that actions were job related and not retaliatory (if employee is injured or sues later).

What are the Differences Between Leave and Disability Laws?

Leave Laws (CFRA/FMLA)	Disability Laws (FEHA/ADA)
Eligibility requirements: 12 months of service and 1250 actual hours worked in the preceding 12 months	No eligibility requirements involving length of service or hours worked
Requires only that the employer determine eligibility and Certification that the employee has a "serious health condition," as defined	Requires interactive process to evaluate whether the individual can perform essential job functions with or without reasonable accommodations
Medical inquiry is strictly limited to whether employee meets definitions of "SHC," and probable duration for block or intermittent leave	Allows an employer to obtain information from the worker's health care provider addressing "functional abilities, functional limitations and work restrictions."
Limits the decision to whether employee may take intermittent leave, and does not mandate other adjustments or modifications to work duties	Requires that employers provide reasonable accommodations, including modified duty or other adjustments to the work environment
No undue hardship defense for eligible employees	Allows "undue hardship/burden" defense
Separate claim for damages can be raised if employer interferes with the right to take leave or be reinstated upon release	No separate cause of action for "interference" with FEHA or ADA rights, although retaliation for seeking a reasonable accommodation is a viable claim
FMLA allows employer to require written "fitness for duty release" upon return from leave	Severely restricts the circumstances under which employer can seek "fitness for duty" medical exam
Leave is job-protected and benefit-protected, including reinstatement to the same or substantially similar job	Reasonable accommodations not mandated for a specific time and no requirement of job-protected or benefit-protection status

Which Leaves Apply and in What Order? A Checklist

#1 Workers' Compensation

- Is it a workplace injury or illness?
- Immediately provide DWC-1 form and WC packet to employee
- Inform HR Department

#2 FMLA/CFRA

- Is it the employee's own serious health condition as defined by law?
- Is a "block" of time needed, or intermittent/reduced time leave?
- IF CFRA might apply, provisionally designate the leave (Must designate in 5 days)
- Provide Medical Provider Certification form to employee and give 15 days for response
- Designate the leave, explain concurrent/consecutive and other terms & conditions

#3 FEHA/ADA Reasonable Accommodations

- Is it a covered disability, as defined by law?
- What about employee who isn't eligible for FMLA/CFRA?
- What about employee who exhausts all available leave?
- Is the leave intermittent/reduced time? Consider impact of FEHA/ADA on duty hour

What Leaves of Absence Affect an Interactive Process?

Some leaves of absence laws have a direct impact on the conduct of an interactive process. When an employee with a pregnancy-related condition requires a leave of absence on an intermittent basis, OR a transfer to a light duty position for the duration of her temporary restrictions, the agency must engage in an interactive process to address her functional capacity and work restrictions and then identify appropriate accommodations.

Likewise, when an employee with a physical, mental, or medical disability requires a modified schedule or other adjustments that involve periodic time off for medical appointments or related episodic treatment and recovery periods, the public agency employer must conduct an interactive process to evaluate the scope of required modifications and whether they can be implemented without undue burden on the operations of the department or an imminent safety threat for the employee or others.

	California PDL	CFRA	FMLA
Purpose	Provides time off for rest, treatment or recovery from pregnancy-related condition or disability	Provides leave to bond with new child, either immediately consecutive to PDL leave or within one year following the birth of the child	<ul style="list-style-type: none"> • Leave for serious health condition of pregnancy • Leave to bond with new child
Employees Protected	Employees who are disabled by pregnancy eligibility requirements for length of service or hours worked	<ul style="list-style-type: none"> • Employees with one-year service (52 weeks, not necessarily consecutive) • Employee who worked 1,250 hours in immediately preceding 12 months 	<ul style="list-style-type: none"> • Employees with one-year service (52 weeks, not necessarily consecutive) • Employee who worked 1,250 hours in immediately preceding 12 months
Medical certification of pregnancy-related disability / serious health condition	Agency may request certification Health care provider. Certification is sufficient if it contains: <ul style="list-style-type: none"> (a) statement that the employee is disabled by pregnancy, childbirth or a related medical condition; (b) The date on which the employee became disabled because of pregnancy and the estimated duration of the leave. 	<ul style="list-style-type: none"> • Employer may require documentation 	Agency may request certification of serious health condition
Job Protection	<ul style="list-style-type: none"> • Up to 17.3 weeks. Does not have to be in 12-month period; runs by pregnancy • Guarantee of reinstatement to same or comparable (identical) job • No loss of seniority and same terms and 	<ul style="list-style-type: none"> • Up to 12 weeks to bond with child, must be completed within one year of birth • Guarantee of reinstatement to same or comparable (identical) job • No loss of seniority and same terms and conditions of employment upon return 	<ul style="list-style-type: none"> • <u>Concurrent with PDL:</u> Up to 12 weeks for serious health condition • <u>Concurrent with CFRA:</u> Up to 12 weeks; must be completed within one year of birth or adoption • Guarantee of reinstatement to same or comparable (identical) job

	<p>conditions of employment upon return</p> <ul style="list-style-type: none"> Freedom from leave interference or retaliation for requesting, taking, or returning from leave 	<ul style="list-style-type: none"> Freedom from leave interference or retaliation for requesting, taking, or returning from leave 	<ul style="list-style-type: none"> No loss of seniority and same terms and conditions of employment upon return Freedom from leave interference or retaliation for requesting, taking, or returning from leave
Light duty, modified duty or reasonable accommodations	<p>Accommodations for a variety of “conditions of pregnancy” are required. May include transfer to light duty, intermittent time off or reduced schedule, temporary modified tasks, other adjustments. <i>Dr. certification must only state medical advisability of reasonable accommodation or temporary light duty transfer and estimated duration.</i></p>	<p>Employee is not required to accept if employee has leave time available during 12-month period. <i>Interactive process should address both intermittent and continuous block of leave – employee using intermittent leave may need reasonable accommodations to perform essential functions when reporting for duty when not using intermittent leave.</i></p>	<p>Employee is not required to accept if employee has leave time available during 12-month period <i>Interactive process should address both intermittent and continuous block of leave – employee using intermittent leave may need reasonable accommodations to perform essential functions when reporting for duty when not using intermittent leave.</i></p>

What is Genetic Information Discrimination?

Federal law (Genetic Information Non-Discrimination Act) and California law both prohibit the **use** of genetic information **in employment**, restricts employers from:

- Information about an individual’s genetic tests
- Information about the genetic tests of a family member
- Family medical history
- Requests for, and receipt of, genetic services by an individual or a family member
- Genetic information about a fetus carried by an individual or family member
- Genetic information about an embryo legally held by the individual or family member
- Discriminating, harassing or retaliating against an applicant or employee
- Requesting, requiring, or purchasing genetic information
- Disclosing genetic information without appropriate authorization.

What is a Request for Genetic Information?

- Performing Internet searches on individuals in a way likely to reveal genetic information
- Trying to acquire genetic information by actively listening to third party conversations
- Searching an employee’s personal effects to acquire genetic or family history data
- Requesting current health status in a way that is likely to reveal genetic information

Who is Covered by Family Medical History as Genetic information?

- **Family members:** specifies individuals from the “first to the fourth degree,” based on a finding that “the degree of relationship reflects the average proportion of genes in common between two individuals.” GINA covers “*children, siblings, and parents (first degree), grandparents, grandchildren, uncles, aunts, nephews, nieces, and half-siblings (second degree), great-grandparents, great grandchildren, great uncles, great aunts, and first cousins (third degree), and great-great grandparents and first cousins once removed (the children of a first cousin) (fourth degree)*”
- **Medical history:** includes information concerning any disease or disorder that any of these individuals has suffered — *whether or not hereditary* — as long as the disease or disorder has been diagnosed or the symptoms have sufficiently manifested themselves that the disease or disorder could reasonably be diagnosed.

Two Separate Sets of Federal and State Laws

GINA	ADA and California FEHA
Protects individuals who may be discriminated against because Agency thinks they are at risk of acquiring a condition in the future due to a genetic pre-disposition or condition, or family medical history	Protects individuals who has an actual, current limitation of major life activity, even if the condition has a genetic basis
Prohibits acquisition – even if not intentional and not used to discriminate	Protects individuals from being regarded as disabled due to a genetic pre-disposition or family member condition
Agency may never use genetic information to make employment decision, including the possibility that employee will be limited in the future	Requires interactive process for individuals with conditions or disorders, even if they are genetically based
Prohibits harassment or retaliation for employees who opposed employment practices made unlawful by GINA	Prohibits harassment based on actual or perceived disability; and prohibits harassment for requesting a reasonable accommodation, whether or not it is granted.

What Genetic Information is Available During the Interactive Process?

Although employer may conduct medical examinations after making a job offer or during employment as permitted by ADA and FEHA, the examination *may not include collection of family medical history; The Agency must tell its health care providers not to collect genetic information as part of an employment-related medical exam; and* If it finds out that family medical histories are being collected, the employer *must take measures within its control (including not using the services of that health care provider) to prevent this from happening in the future.*

GINA's prohibition on requesting, requiring, or purchasing genetic information controls during the interactive process used to determine an appropriate reasonable accommodation. The Regulations specifically state "*The Commission knows of no reason why a covered entity would need to request genetic information to determine an individual's current physical or mental limitations and whether those limitations can be accommodated.*"

Requests for information about functional limitations and work restrictions during the interactive process should clearly indicate that genetic information is not requested and should not be provided (including family history).

An employer in possession of genetic information about applicants or employees must treat it the same way it treats medical information generally. It must keep the information confidential and, if the information is in writing, must keep it apart from other personnel information in separate medical files. Genetic information may be kept in the same file as medical information subject to the ADA and FEHA.

What are Some Do's and Don'ts when Talking About Family Medical Issues?

Yes: How are you? Did they catch it early? Will your son be okay? I hope the surgery is successful.

No: Do you have cancer in your family? Are you worried that your other children might have cancer? Have you considered getting tested (or having a child tested)?

Why is Social Media a High-Risk Activity?

GINA allows acquisition of genetic information that is publicly and commercially available. But, EEOC expressly states that this does not apply to the acquisition of genetic information from "social networking sites and online media sources which require permission to access from a specific individual."

Result: a manager who reads about an employee's family medical history on the employee's Facebook page will not be able to defend that the information was "commercially and publicly available," if the employee has set the privacy settings to "friends only." This is true even if the employee has previously accepted a "friend request" from the manager.

Examples: "I'm walking in the Race for the Cure in honor of my mom and sister"
"I'm going for a colonoscopy. Wish my dad had gone in time to catch it early."

If an administrator accidentally overhears conversations, it won't violate GINA. But, "actively listening" to conversation does violate GINA, even without direct participation. The regulations suggest that managers should leave the area or direct that the conversation stop if the manager is in a position to actively listen (such as a meeting room). Might be inadvertent if it was a single posting after the manager was 'friended'. But ongoing conversation on the employee's Facebook wall about family history could establish that the manager "actively listened" because ongoing posts were anticipated.

What are the Principles of Effective Documentation?

- Write with accuracy and precision.
- Avoid connotations which may be misleading to someone not familiar with public sector activities. Be factual with all memos, letters and r business communications.
- When writing about activities or events, stay within your personal knowledge, expertise and responsibility. Don't speculate or guess as to the meaning of any aspect of a business transaction with which you are not personally familiar.
- Eliminate all inflammatory, offensive or otherwise inappropriate content.
- Define or clarify technical terms involving your work, including specialized industry terms. Always consider the purpose of the communication. For example, if you are writing to someone outside the agency to require some action, use terminology that is easily understood. Remember that a lay juror, arbitrator or judge from outside your industry may later be asked to consider the effect of your internal and external communications.
- Close the loop on all significant issues raised in writing. If information is requested of you, provide it promptly or notify the person of any foreseeable delays. If an action is requested in writing, and the resolution is not reflected in writing, the agency runs the risk that its actions may later be mischaracterized.
- Minimize handwritten comments and rapid e-mail replies which may not be well thought out. These types of communications are often incomplete or misleading.
- Control copy distribution of all sensitive records, or confidential/proprietary data. Understand the scope and limitations of attorney-client privileges. Be sensitive to confidentiality, where appropriate.
- Be consistent in your documentation techniques.

A Word About E-Mail: Tone and Content are often missing



- Delete ≠ destroyed
- Password protection ≠ private
- Intangible ≠ inaccessible
- Unauthorized ≠ unaccountable
- Not printed ≠ discoverable

Prevent “Click, Click Click . . . OOPS, Moments



Be careful: attach correct file / document
Is there a more secure delivery method?
Do privacy / confidentiality issues apply?
Who has the legal right to know?
Who has the legal need to know?

**FEHA DISABILITY REGULATIONS
HIGHLIGHTED AND ANNOTATED WITH
COMMENTS ON KEY POINTS**

**MODIFIED AMENDED DISABILITY REGULATIONS
As Adopted by the Commission on December 18, 2012,**

**CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4. Fair Employment & Housing Commission**

Chapter 1. Administration

Subchapter 9. Disability Discrimination

§ 7293.5. General Prohibitions Against Discrimination on the Basis of Disability.

(a) Statutory Source. These regulations are adopted by the Commission pursuant to Sections 12926, 12926.1 and 12940 of the Government Code.

(b) Statement of Purpose. The Fair Employment and Housing Commission is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental disability or medical condition that is disabling, potentially disabling or perceived to be disabling or potentially disabling. The definition of "disability" in these regulations shall be construed broadly in favor of expansive coverage by the maximum extent permitted by the terms of the Fair Employment and Housing Act ("FEHA"). As with the Americans with Disabilities Act of 1990 ("ADA"), as amended by the ADA Amendment Act of 2008 (Pub. L. No. 110-325), the primary focus in cases brought under the FEHA should be whether employers and other covered entities have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their obligations to engage in the interactive process and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis.

(c) Incorporation of General Regulations. These regulations governing discrimination on the basis of disability incorporate each of the provisions of Subchapters 1 and 2 of Chapter 2, unless specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7293.6. Definitions.

Comment: This section is the most important in the regulations because it sets forth the specific processes and types of reasonable accommodations

As used in this subchapter, the following definitions apply:

(a) **“Assistive animal”** means a trained animal, including a trained dog, necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) “Guide” dog, as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) “Signal” dog, as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) “Service” dog, as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) “Support” dog or other animal that provides emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities such as major depression.

(2) Minimum Standards for Assistive Animals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace:

(A) is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces;

(B) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace; and

(C) is trained to provide assistance for the employee’s disability.

(b) **“Business Necessity,”** as used in this subchapter regarding medical or psychological examinations, means that the need for the disability inquiry or medical examination is vital to the business.

(c) **“CFRA”** means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this subchapter, “CFRA leave” means medical leave taken pursuant to CFRA.

(d) **“Disability”** shall be broadly construed to mean and include any of the following definitions:

(1) **“Mental Disability,”** as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. “Mental Disability” includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as “mental retardation”), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) **“Physical Disability,”** as defined at Government Code section 12926, includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) 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

(B) limits a major life activity.

(C) “Disability” includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease.

(3) A **“special education” disability** is any other recognized health impairment or mental or psychological disorder not described in section 7293.6, subdivisions (d)(1) or (d)(2), of this subchapter, that requires or has required in the past special education or related services. A special education disability may include a “specific learning disability,” manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder, such as those for English language acquisition by persons whose first language was not English.

(4) A **“Record or History of Disability”** includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.

(5) A **“Perceived Disability”** means being “Regarded as,” “Perceived as” or “Treated as” Having a Disability. Perceived disability includes:

(A) Being regarded or treated by the employer or other entity covered by this subchapter as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or

(B) Being subjected to an action prohibited by this subchapter, including non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

(6) A “Perceived Potential Disability” includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) “Medical condition” is a term specifically defined at Government Code section 12926, to mean either:

(A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or

(B) a “genetic characteristic,” as defined at Government Code section 12926. “Genetic characteristics” means:

- 1) Any scientifically or medically identifiable gene or chromosome, or combination or alteration of a gene or chromosome, or any inherited characteristic that may derive from a person or the person’s family member,
- 2) that is known to be a cause of a disease or disorder in a person or the person’s offspring, or that is associated with a statistically increased risk of development of a disease or disorder, though presently not associated with any disease or disorder symptoms.

(8) A “Disability” is also any definition of “disability” used in the federal Americans with Disabilities Act of 1990 (“ADA”), and as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110–325) and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the Fair Employment and Housing Act’s definition of disability.

(9) “Disability” does not include:

Comment: these exclusions are very narrowly tailored and strictly limited

(A) excluded conditions listed in the Government Code section 12926 definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and “sexual behavior disorders,” as defined at section 7293.6, subdivision (q), of this subchapter; or

(B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

(e) “Essential job functions” means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following: **Comment: these standards should be considered during the interactive process to assure that the evaluation at STEP 3 (what is essential function vs. marginal function) is properly addressed and documented**

(A) The employer’s or other covered entity’s judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

(3) “Essential functions” do not include the marginal functions of the position. “Marginal functions” of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.

(f) “Family member,” for purposes of discrimination on the basis of a genetic characteristic or genetic information, includes the individual’s relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great

aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents. **Comment: Be very careful to assure that genetic information, including family medical history is not requested or used in the interactive process.**

(g) **“FMLA”** means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. § 825 et seq. For purposes of this section only, “FMLA leave” means medical leave taken pursuant to FMLA.

(h) **“Genetic information,”** as defined at Government Code section 12926, means genetic information derived from an individual’s or the individual’s family members’ genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual’s family members.

(i) **“Health care provider”** means either:

Comment: Be careful not to limit the type of health care provider from whom your agency will accept work restrictions for evaluating reasonable accommodations.

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of “others capable of providing health care services” under FMLA and its implementing regulations, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, or a group health plan’s benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

(j) **“Interactive process,”** as set forth more fully at California Code of Regulations, title 2, section 7294.0, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant’s or employee’s disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) **“Job-Related,”** as used in sections 7294.1, 7294.2 and 7294.3, means tailored to assess the employee’s ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.

(l) **“Major Life Activities”** shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting,

bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment “limits” a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is “difficult” is an individualized assessment which may consider what most people in the general population can perform with little or no difficulty, what members of the individual’s peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) “Limits” shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active. Comment: This affects IPs with chronic health conditions and employees who are also using intermittent leave. Keep the LOA and IP processes separate.

(m) A “medical or psychological examination” is a procedure or test performed by a health care provider that seeks or obtains information about an individual’s physical or mental disabilities or health.

(n) “Mitigating measure” is a treatment, therapy, or device which eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) “Auxiliary aids and services,” which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) “Qualified Individual”, for purposes of disability discrimination under California Code of Regulations, title 2, section 7293.7, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) “Reasonable accommodation” is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as: **Comment: this is not an exhaustive list. See Section 2 of this manual and consider a broad array of modifications, adjustments, or other creative approaches to accommodating employees to return to and stay at work. Consider all options at STEP 6 of the 10-step process and then apply undue hardship evaluation only at Step 8.**

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 7293.9, subdivision (c);

(N) Providing a reassignment to a vacant position, consistent with section 7293.9, subdivision (d); and

(O) other similar accommodations.

(q) **“Sexual behavior disorders,”** as used in this subchapter, refers to pedophilia, exhibitionism, and voyeurism.

(r) “Undue hardship” means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

- (1) the nature and net cost of the accommodation needed under this subchapter, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business;
- (3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;
- (4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and
- (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, 12945.1 and 12945.2, Government Code; Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110–325) and its implementing regulations at 29 C.F.R. § 1630 et seq.; Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and its implementing regulations at 29 C.F.R. § 825 et seq.; and Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) and its implementing regulations at 34 C.F.R. § 300.8 et seq.

§ 7293.7. Establishing Disability Discrimination.

(a) An applicant or employee has the burden of proof to establish that the applicant or employee is a qualified individual capable of performing the essential functions of the job with or without reasonable accommodation.

(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual’s disability and denial of an employment benefit to that individual by the employer or other covered entity. The evidence need not demonstrate that the qualified individual’s disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual’s disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 7293.8 of this subchapter.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code; Green v. State of California (2007) 42 Cal.4th 254, 260; Mixon v. Fair Empl. & Hous. Com. (1987) 192 Cal.App.3d 1306, 1319.

§ 7293.8. Defenses.

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Subchapter 1, at California Code of Regulations, title 2, section 7286.7, shall be applicable to this subchapter.

(b) Health or Safety of an Individual With a Disability. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.

(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner which that would not endanger the health or safety of others because the job imposes an imminent and substantial degree of risk to others.

(d) Future Risk. However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

(e) Factors to be considered when determining the merits of the defenses enumerated in Section 7293.8, subdivisions (b)-(d) include, but are not limited to:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that potential harm will occur;
- (4) the imminence of the potential harm; and
- (5) consideration of relevant information about an employee's past work history.

The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7293.9. Reasonable Accommodation.

(a) **Affirmative Duty.** An employer or other covered entity has an affirmative duty to make reasonable accommodation to for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.

(b) **No elimination of essential job function required.** Where a quality or quantity standard is an essential job function, an employer or other covered entity is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity. **Comment: Carefully evaluate the mix of essential and non essential job functions and remove or modify non-essential functions where feasible.**

(c) **Paid or unpaid leaves of absence.** When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation **provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, Comment: for a finite and reasonable period of time (based on case law)** with or without further reasonable accommodation, and does not create an undue hardship for the employer. **When 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. Comment: to avoid employee "burning leave" prematurely or in greater increments than is necessary.** An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation. **Comment: This is one of the most important and yet overlooked potential accommodations. It should always be considered, but only as a "last resort," so the Agency doesn't**

(d) Reassignment to a vacant position.

(1) As a reasonable accommodation, an employer or other covered entity shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified, under the following circumstances:

(A) if the employee can no longer perform the essential functions of his or her own position even with accommodation; or

(B) if accommodation of the essential functions of an employee's own position creates an undue hardship; or

(C) if both the employer and the employee agree that a reassignment is preferable to being provided an accommodation in the present position; or

(D) if an employee requests reassignment to gain access to medical treatment for his or her disabling condition(s) not easily accessible at the current location.

(2) No comparable positions. If there are no funded, vacant comparable positions for which the individual is qualified with or without reasonable accommodation, an employer or other covered entity may reassign an individual to a lower graded or lower paid position.

(3) Reassignment to a temporary position. Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, an employer or other covered entity may offer, and an employee may choose to accept or reject a temporary assignment during the interactive process.

(4) The employer or other covered entity is **not required to create a new position** to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability.

(5) The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested “accommodation” is “reasonable” on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority system. **Comment: This is a critical part of Step 6 when employee can no longer perform usual job. May be a different job class and employee may be required to serve a new probationary period.**

(e) Any and all reasonable accommodations. An employer or other covered entity is required to consider any and all reasonable accommodations of which it is aware or which are brought to its attention by the applicant or employee, except ones that create an undue hardship. The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to select and implement an accommodation that is effective for both the employee and the employer or other covered entity.

(f) An employer shall not require a qualified individual with a disability to accept an accommodation and shall not retaliate against an employee for refusing an accommodation. However, the employer or other covered entity may inform the individual that refusing an accommodation may render the individual unable to perform the essential functions of the current position.

(g) Reasonable Accommodation for the Residual Effects of a Disability. An individual with a record of a disability may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the residual effects of the disability. For example, an employee may need a leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

(h) Accessibility Standards. To comply with section 7293.6, subdivision (p)(2)(A), of this subchapter, the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, Title 24, pursuant to Chapter 7, Division 5 of Title 1 of the Government Code (commencing with Government Code Section 4450), and Part 5.5 of Division 13 of the Health and Safety Code (commencing with Health and Safety Code Section 19955).

(i) An employer or other covered entity shall assess individually an employee’s ability to perform the essential functions of the employee’s job either with or without reasonable accommodation. In

the absence of an individualized assessment, an employer or other covered entity shall not impose a “100 percent healed” or “fully healed” policy before the employee can return to work after an illness or injury.

(j) It is a permissible defense to a claim alleging a failure to provide reasonable accommodation for an employer or other covered entity to prove that providing accommodation to an applicant or employee with a disability would have created an undue hardship.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.0. Interactive Process.

Comment: This section of the regulations is the technical roadmap used by the DFEH and the courts to determine whether an interactive process was timely, good faith, individualized, and continuous. The employer and employee have reciprocal duties of good faith.

(a) Interactive Process. When needed to identify or implement an effective, reasonable accommodation for an employee or applicant with a disability, the FEHA requires a timely, good faith, interactive process between an employer or other covered entity and an applicant, employee, or the individual’s representative, with a known physical or mental disability or medical condition. Both the employer or other covered entity and the applicant, employee or the individual’s representative shall exchange essential information identified below without delay or obstruction of the process.

(b) Notice. An employer or other covered entity shall initiate an interactive process when:

(1) an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodations, or

(2) the employer or other covered entity otherwise becomes aware of the need for an accommodation through a third party or by observation, or

(3) the employer or other covered entity becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers’ Compensation Act, for the employee’s own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee’s health care provider indicates that further accommodation is still necessary for recuperative leave or other accommodation for the employee to perform the essential functions of the job. An employer’s or other covered entity’s offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, title 2, section 7297.4, subdivision (b)(1) & (b)(2)(A)(1), prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a “serious medical condition.”

(c) **Obligations of Employer or Other Covered Entity.** An employer or other covered entity shall engage in a timely, good faith, interactive process as follows:

- (1) The employer or other covered entity shall either grant the applicant's or employee's requested accommodation, or reject it after due consideration, and initiate discussion with the applicant or employee regarding alternative accommodations.
 - (2) When the disability or need for reasonable accommodation is not obvious, and the applicant or employee has not already provided the employer or other covered entity with reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation, the employer or other covered entity may require the applicant or employee to provide such reasonable medical documentation.
 - (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, but may require medical information, as set forth in section 7294.2 below, and second opinions from other health care providers.
 - (4) If information provided by the applicant or employee needs clarification, then the employer or other covered entity shall identify the issues that need clarification, specify what further information is needed, and allow the applicant or employee a reasonable time to produce the supplemental information.
 - (5) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity shall analyze the particular job involved and the essential functions of the job.
 - (6) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity may consult experts.
 - (7) In consultation with the applicant or employee to be accommodated, the employer or other covered entity shall identify potential accommodations and assess the effectiveness each would have in enabling the applicant to have an equal opportunity to participate in the application process and to be considered for the job; or for the employee to perform the essential function of the position held or desired or to enjoy equivalent benefits and privileges of employment compared to non-disabled employees.
 - (8) The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to implement an accommodation that is effective in allowing the applicant or employee perform the essential functions of the job.
 - (9) If reassignment to an alternate position is considered as an accommodation, the employer or other covered entity may ask the employee to provide information about his or her educational qualifications and work experience that may help the employer find a suitable alternative position for the employee, and shall comply with section 7293.9, subdivision (d).
- (d) **Obligations of Applicant or Employee.** The applicant or employee shall cooperate in good faith with the employer or other covered entity, including providing reasonable medical documentation

where the disability or the need for accommodation is not obvious and is requested by the employer or other covered entity, as follows:

(1) Reasonable medical documentation confirms the existence of the disability and the need for reasonable accommodation. Where necessary to advance the interactive process, reasonable medical documentation may include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee. Disclosure of the nature of the disability is not required.

(2) If reassignment to an alternate position is considered as an accommodation, the employee shall provide the employer or other covered entity information about his or her educational qualifications and work experience that may help the employer or other covered entity find a suitable alternative position for which the employee is qualified and for which the employee can perform the essential functions.

(3) An employee's mental or physical inability to engage in the interactive process shall not constitute a breach in either the employee's or the employer's obligation to engage in a good faith interactive process.

(4) Direct communications between the employer or other covered entity and the applicant or employee rather than through third parties are preferred, but are not required.

(5) Required medical information. Where the existence of a disability and/or the need for reasonable accommodation is not obvious, an employer or other covered entity may require an applicant or employee to obtain and provide reasonable medical documentation from a health care provider that sets forth the following information:

(A) The name and credentials of the health care provider which establishes that the individual falls within the definition of "health care provider" under section 7293.6, subdivision (i), of these regulations.

(B) That the employee or applicant has a physical or mental condition that limits a major life activity or a medical condition, and a description of why the employee or applicant needs a reasonable accommodation to have an equal opportunity: to participate in the application process and to be considered for the job, or to perform the employee's job duties, or to enjoy equal benefits and privileges of employment compared to non-disabled employees. The employer or other covered entity shall not ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records, because those records may contain information unrelated to the need for accommodation.

(C) If an applicant or employee provides insufficient documentation in response to the employer's or other covered entity's initial request, the employer or other covered entity shall explain why the documentation is insufficient and allow the applicant or employee an opportunity to provide supplemental information in a timely manner from the employee's health care provider. Thereafter, if there is still

insufficient documentation, the employer may require an employee to go to an appropriate health care provider of the employer's or other covered entity's choice.

1) Documentation is insufficient if it does not specify the existence of a FEHA disability and explain the need for reasonable accommodation. Where relevant, such an explanation should include a description of the applicant's or employee's functional limitation(s) to perform the essential job functions.

2) Documentation also might be insufficient where the health care provider does not have the expertise to confirm the applicant's or employee's disability or need for reasonable accommodation, or other objective factors indicate that the information provided is not credible or is fraudulent.

(6) If an applicant or employee provides insufficient documentation, as described above, an employer or other covered entity still must provide reasonable accommodation but only to the extent the reasonable accommodation is supported by the medical documentation provided to date. If the medical documentation provided to date does not support any reasonable accommodation, no reasonable accommodation need be required. If supplemental medical documentation supports a further or additional reasonable accommodation, then such further or additional reasonable accommodation shall be provided.

(7) Any medical examination conducted by the employer's and other covered entity's health care provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation.

(8) If an employer or other covered entity requires an employee to go to a health care provider of the employer's or other covered entity's choice, the employer or other covered entity shall pay all costs and allow the employee time off for the visit(s). An employee may use sick leave for the time off.

(9) If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced-schedule basis for planned medical treatment of the employee's disability, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

(10) If an employee requests leave on an intermittent or reduced-schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

(e) If an employee requests permission to bring an assistive animal into the workplace as a reasonable accommodation, prior to allowing the animal to be in the workplace, the employer may require that the employee supply:

(1) a letter from the employee's health care provider stating that the employee has a disability and explaining why the employee requires the presence of the assistive animal in the workplace (e.g., why the animal is necessary as an accommodation to allow the employee to perform the essential functions of the job); and

(2) confirmation that the animal meets the standards set forth in section 7293.6, subdivision (a)(2). Such confirmation may include information provided by the individual with a disability. The employer may challenge that the animal meets that standards set forth in section 7293.6, subdivision (a)(2) within the first two weeks the assistive animal is in the work place 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 animal.

(f) For reasonable accommodations extending beyond one year, employers may ask for medical documents substantiating the need for continued reasonable accommodations on a yearly basis.

(g) Maintenance and Confidentiality of Medical Files. Medical information and/or records obtained during the interactive process shall be maintained on separate forms, and in medical files separate from the employee's personnel file, and shall be kept confidential, except that:

(1) supervisors and managers may be informed of restriction(s) on the work or duties of employees with disabilities and necessary reasonable accommodations; and

(2) first aid and safety personnel may be informed, where appropriate, that the condition may require emergency treatment; and

(3) government officials investigating compliance with this subchapter shall be provided relevant information on request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.1 Pre-Employment Practices.

Comment: there is a persistent theme in the litigation involving pre-employment practices: regarding an applicant as disabled (or too disabled) to perform the duties without an interactive process, exclusionary practices or language in job posting and/or interviews, and failure to engage in an interactive process following a post-conditional offer, pre-placement examination that reveals a limitation of major life activities.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize an employment benefit in any way that discourages or is designed to discourage individuals applicants with disabilities from applying to a greater extent than applicants without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) “Do you have any particular disabilities?”

(B) “Have you ever been treated for any of the following diseases or conditions?”

(C) “Are you now receiving or have you ever received Workers’ Compensation?”

(D) “What prescription medications are you taking?”

(E) “Have you ever had a job-related injury or medical condition?”

(F) Have you ever left a job because of any physical or mental limitations?

(G) “Have you ever been hospitalized?”

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110–325) and the regulations adopted pursuant thereto, nothing in Government Code section 12940, subdivision (d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) **Interviews.** An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§7294.2. Medical and Psychological Examinations and Inquiries.

(a) **Pre-offer.** It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual's physical or mental conditions or health but does not include testing for current illegal drug use.

(b) **Post-Offer.** An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee's entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

(c) **Withdrawal of Offer.** An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical and Psychological Examinations and Disability-Related Inquiries During Employment.

Comment: This is also a consistent source of FEHA lawsuits.

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees that are both job-related and consistent with business necessity.

(2) **Drug or Alcohol Testing.** An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) **Current Drug Use.** An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers (49 C.F.R. § 391.41), or medical requirements for airline pilots (14 C.F.R. § 61.23).

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is “voluntary” as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 7294.0, subdivision (g).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

§ 7294.3. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an individual applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use qualification standards, employment tests, or other selection criteria based on an applicant's or employee's uncorrected vision or uncorrected hearing unless the standards, tests, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills affected by disability are the criteria that the tests purport to measure. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code; GINA, 42 U.S.C. § 2000ff-1(b).

§ 7294.4. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, and 12940, Government Code.

**FEHA PREGNANCY REGULATIONS
HIGHLIGHTED AND ANNOTATED WITH
COMMENTS ON KEY POINTS**

PREGNANCY REGULATIONS
As Adopted by the Commission on October 2, 2012

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4. Fair Employment & Housing Commission

Chapter 1. Administration

Subchapter 6A. Sex Discrimination: Pregnancy, Childbirth or Related medical Conditions

§ 7291.2. Definitions.

Comment: This is the most important section of the regulations. Addresses all types of pregnancy conditions and potential reasonable accommodations, transfer to temporary light duty and LOA.

The following definitions apply only to this subchapter:

- (a) **“Affected by pregnancy”** means that because of pregnancy, childbirth, or a related medical condition, or “a condition related to pregnancy, childbirth, or a related medical condition,” as set forth in Government Code section 12945, it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.
- (b) **“Because of pregnancy”** means due to an employee’s actual pregnancy, childbirth or a related medical condition.
- (c) **“CFRA”** means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) “CFRA leave” means family care or medical leave as those leaves are defined at section 7297.0.
- (d) A **“condition related to pregnancy, childbirth, or a related medical condition,”** as set forth in Government Code section 12945, means a physical or mental condition intrinsic to pregnancy or childbirth that includes, but is not limited to, lactation. Generally lactation without medical complications is not a disabling “related medical condition” requiring pregnancy disability leave, although it may require transfer to a less strenuous or hazardous position or other reasonable accommodation.
- (e) A **“covered entity”** is any person (as defined in Government Code section 12925), labor organization, apprenticeship training program, training program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of Government Code sections 12940, 12943, 12944 or 12945 apply.
- (f) A woman is **“disabled by pregnancy”** if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy’s successful completion, or to other persons. An employee also may be considered to be “disabled by pregnancy” if, in the opinion of her health care provider, she is suffering from severe “morning sickness” or needs to take time off for: prenatal or postnatal care; bed rest;

gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth, loss or end of pregnancy. The preceding list of conditions is intended to be non-exclusive and illustrative only.

- (g) An “eligible female employee” is an employee who qualifies for coverage under her employer’s group health plan. An employee’s pregnancy, childbirth or related medical conditions are not lawful bases to make an employee ineligible for coverage.
- (h) “Employer,” as used in these regulations, except for section 7291.3, is any employer with five or more full or part time employees, who is an employer within the meaning of Government Code section 12926, and section 7286.5, subdivision (a), of these regulations. “Employer” includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees.
- (i) “Employment in the same position” means employment in, or reinstatement to, the position that the employee held prior to reasonable accommodation, transfer, or disability leave because of pregnancy.
- (j) “Employment in a comparable position” means employment in a position that is virtually identical to the employee’s position held prior to reasonable accommodation, transfer, or disability leave in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from the employee’s prior position and ordinarily has the same shift or the same or an equivalent work schedule.
- (k) “FMLA” means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., and its implementing regulations, 29 Code of Federal Regulations part 825. “FMLA leave” means family care or medical leave taken pursuant to FMLA. (29 C.F.R. § 825.)
- (l) “Four months” means the number of days the employee would normally work within four calendar months (one-third of a year equaling 17½ weeks), if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee’s schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee’s normal work month.
- (m) “Group Health Plan” means medical coverage provided by the employer for its employees, as defined, as of the effective date of these regulations, in the Internal Revenue Code of 1986 at Section 5000(b)(1).
- (n) “Health Care Provider” means: Comment: requires taking restrictions for light duty as well as certifications for leave from a provider who does not have to be a “doctor” or “physician?”
 - (1) A medical or osteopathic doctor, physician, or surgeon, licensed in California, or in another state or country, who directly treats or supervises the treatment of the applicant’s

or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

- (2) A marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations, including nurse practitioners, nurse midwives, licensed midwives, clinical psychologists, clinical social workers, chiropractors, physician assistants, who directly treats or supervises the treatment of the applicant's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or
- (3) A health care provider from whom an employer or a group health plan's benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

(o) "Intermittent leave" means leave taken in separate periods of time because of pregnancy, rather than for one continuous period of time. Examples of intermittent leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time over a period of several months for purposes related to pregnancy, childbirth or a related medical condition. Comment: this is often part of a light duty accommodation for temporary restrictions to keep the employee at work as long as possible

(p) "Medical certification" means a written communication, as specified in section 7291.17, subdivisions (b)(6) and (b)(7), from the employee's health care provider to the employer stating that the employee is disabled because of pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or duties or otherwise to be reasonably accommodated.

(q) "Perceived pregnancy" is being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition.

(r) "Pregnancy disability leave" is any leave, whether paid or unpaid, taken by an employee for any period(s) up to a total of four months during which she is disabled by pregnancy.

(s) "Reasonable accommodation" of an employee affected by pregnancy is any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. Reasonable accommodation may include, but is not limited to an employer:

(1) modifying work practices or policies;

(2) modifying work duties;

(3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);

- (4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices; or
- (5) providing a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in Labor Code section 1030, et seq.
- (t) **“Reduced work schedule”** means permitting an employee to work less than the usual number of hours per work week, or hours per work day.
- (u) A **“related medical condition”** is any medically recognized physical or mental condition related to pregnancy, childbirth or recovery from pregnancy or childbirth. This term includes, but is not limited to, lactation-related medical conditions such as mastitis; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy; or recovery from loss or end of pregnancy.
- (v) **“Transfer”** means reassigning temporarily an employee affected by pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12926, 12940, 12943, 12944, 12945,; Family and Medical Leave Act, (FMLA) 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. §2000e; *J. E. Robinson v. Fair Empl. & Hous. Com.* (1992) 2 Cal. 4th 226.

§ 7291.3. Prohibition Against Harassment.

As set forth in Government Code sections 12926, and 12940, it is an unlawful employment practice for any employer with one or more employees or other covered entities to harass an employee or applicant because of pregnancy or perceived pregnancy.

Authority Cited: Government Code section 12935, subd. (a).

Reference: Government Code sections 12926, 12940, and 12945.

§ 7291.4. No Eligibility Requirements.

There is no eligibility requirement, such as minimum hours worked or length of service, before an employee affected or disabled by pregnancy is eligible for reasonable accommodation, transfer, or disability leave.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code section 12945.

§ 7291.5. Responsibilities of Covered Entities Other than Employers.

Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under Government Code sections 12926, 12940, 12943 and 12944.

Authority Cited: Government Code section 12935, subd. (a).

Reference: Government Code sections 12926, 12940, 12943, 12944, and 12945.

§ 7291.6. Responsibilities of Employers.

(a) Employer Obligations

- (1) Except as excused by a permissible defense, it is unlawful for any employer to:
 - (A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;
 - (B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;
 - (C) refuse to promote an employee because of pregnancy or perceived pregnancy;
 - (D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;
 - (E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;
 - (F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 7291.3;
 - (G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 7291.8, subdivision (c), below. Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;
 - (H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;
 - (I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or

because she has filed a complaint, testified, or assisted in any proceeding under the FEHA; or

(J) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any practice that is prohibited on the basis of sex.

(2) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to provide employee benefits for pregnancy as set forth at section 7291.11 below, if the employer provides such benefits for other temporary disabilities;

(B) refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave, as set forth at section 7291.11, below, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 7291.7, below;

(D) refuse to transfer an employee affected by pregnancy as set forth at section 7291.8, below;

(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section 7291.9, below; or

(F) deny, interfere with, or restrain an employee's rights to reasonable accommodation, to transfer or to take pregnancy disability leave under Government Code section 12945, including retaliating against the employee because she has exercised her right to reasonable accommodation, to transfer or to take pregnancy disability leave.

(b) Permissible defenses, as defined at section 7286.7, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12926, 12940, 12945; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. §2000e, §701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.); *Cal. Federal Sav. & Loan Ass'n v. Guerra* 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

§ 7291.7. Reasonable Accommodation.

Comment: This is a critical part of these regulations. Use the same 10-step process to assure timely, good faith, individualized, continuous and compliant process with structure and consistency.

(a) It is unlawful for an employer to deny a request for reasonable accommodation made by an employee affected by pregnancy if:

(1) The employee's request is based on the advice of her health care provider that reasonable accommodation is medically advisable; and

(2) The requested accommodation is reasonable.

(A) Whether an accommodation is reasonable is a factual determination to be made on a case-by-case basis, taking into consideration such factors, including but not limited to, the employee's medical needs, the duration of the needed accommodation, the employer's legally permissible past and current practices, and other such factors, under the totality of the circumstances.

(B) The employee and employer shall engage in a good faith interactive process to identify and implement the employee's request for reasonable accommodation as set forth in section 7291.17, subdivision (a), below.

(b) When a reasonable accommodation, such as a change of work duties or job restructuring, is granted, it shall not affect the employee's independent right to take up to four months for pregnancy disability leave. If the requested reasonable accommodation, however, involves a reduction in hours worked such as a reduced work schedule, or intermittent leave, the employer may consider this as a form of pregnancy disability leave and deduct the hours from the employee's four month leave entitlement.

(c) An employer may, but need not, require a medical certification substantiating the employee's need for reasonable accommodation, as set forth in sections 7291.16, subdivisions (a) and (b), and 7291.17, subdivision (b). **Best practice is to apply a consistent process.**

Authority Cited: Government Code section 12935, subd. (a).

Reference: Government Code sections 12926 and 12945.

§ 7291.8. Transfer.

(a) Transfer - All Employers

(1) It is unlawful for an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions or duties for the duration of the disability, including disabilities or conditions resulting from on-the-job injuries, to fail to apply the policy, practice or collective bargaining agreement to transfer an employee who is disabled by pregnancy and who so requests.

Comment: Agency that uses an early RTW program for workers' comp should consider applying transitional or "bridge" assignments for temporary conditions of pregnancy. Document in process.

(2) It is unlawful for an employer to deny the request of an employee affected by pregnancy to transfer provided that:

(A) The employee's request is based on the advice of her health care provider that a transfer is medically advisable; and

(B) Such transfer can be reasonably accommodated by the employer. To provide a transfer, an employer need not create additional employment that the employer would not otherwise have created, discharge another employee, violate the terms of a collective bargaining agreement, transfer another employee with more seniority, or promote or transfer any employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no obligation to do so.

(C) An employer may, but need not, require a medical certification substantiating the employee's need for transfer, as set forth in sections 7291.16, subdivisions (a) and (b), and 7291.17, subdivision (b).

(b) Burden of Proof

The burden shall be on the employer to prove, by a preponderance of the evidence, that such transfer cannot be reasonably accommodated for one or more of the enumerated reasons listed in section 7291.8, subdivision (a)(2).

(c) Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule

This is a common form of reasonable accommodation for temporary modified duties or schedule

If an employee's health care provider provides medical certification that an employee has a medical need to take intermittent leave or leave on a reduced work schedule because of pregnancy, the employer may require the employee to transfer temporarily to an available alternative position that meets the needs of the employee. The employee must meet the qualifications of the alternative position. The alternative position must have the equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than her regular job, but does not have to have equivalent duties.

(d) Right to Reinstatement After Transfer

When the employee's health care provider certifies that there is no further medical advisability for the transfer, intermittent leave, or leave on a reduced work schedule, the employer must reinstate the employee to her same or comparable position in accordance with the requirements of section 7291.10.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code section 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

§ 7291.9. Pregnancy Disability Leave.

The following provisions apply to leave taken for disability because of pregnancy.

(a) Four-Month Leave Requirement for all Employers

All employers must provide a leave of up to four months, as needed, for the period(s) of time an employee is actually disabled because of pregnancy even if an employer has a policy or practice that provides less than four months of leave for other similarly situated temporarily disabled employees.

- (1) A “four month leave” means time off for the number of days or hours the employee would normally work within four calendar months (one-third of a year-or 17 $\frac{1}{3}$ weeks). For a full time employee who works 40 hours per week, “four months” 693 hours of leave entitlement, based on 40 hours per week times 17 $\frac{1}{3}$ weeks.
- (2) For employees who work more or less than 40 hours a per week, or who work on variable work schedules, the number of working days that constitutes “four months” is calculated on a pro rata or proportional basis.
 - (A) For example, for an employee who works 20 hours per week, “four months” means 346.5 hours of leave entitlement. For an employee who normally works 48 hours per week, “four months” means 832 hours of leave entitlement.
 - (B) Leave on an intermittent leave or a reduced work schedule.

An employer may account for increments of intermittent leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour. For example, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, the employer must account for pregnancy disability leave in increments of 30 minutes or less. If an employer accounts for other forms of leave in two-hour increments, the employer must account for pregnancy disability leave in increments no greater than one hour.

- (C) If a holiday falls within a week taken as pregnancy disability leave, the week is nevertheless counted as a week of pregnancy disability leave. If, however, the employer’s business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer’s activities have ceased do not count against the employee’s pregnancy disability leave entitlement.
- (3) Although all pregnant employees are eligible for up to four months of leave, if that leave is taken in one period of time, taking intermittent or reduced work schedule throughout an employee’s pregnancy will differentially affect the number of hours remaining that an employee is entitled to take pregnancy disability leave leading up to and after childbirth, depending on the employee’s regular work schedule.
 - (A) For example, a full-time employee, who normally works a 40-hour work week is entitled to 693 working hours of leave. If that employee takes 180 hours of

intermittent leave throughout her pregnancy, she would still be entitled to take 513 hours, or approximately three months leading up to and after her childbirth.

(B) In contrast, a part-time employee who normally works 20 hours per week, would be entitled to 346.5 hours of leave. If that employee takes intermittent leave of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of leave, approximately two months of leave, leading up to and after her childbirth.

(4) Minimum Duration

Leave may be taken intermittently or on a reduced work schedule when an employee is disabled because of pregnancy, as determined by the health care provider of the employee. An employer may account for increments of intermittent leave using the shortest period of time that the employer's payroll system uses to account for other forms of leave, provided it is not greater than one hour, as set forth in section 7291.9, subdivision (a)(2)(B).

(5) Employees are eligible for up to four months of leave per pregnancy, not per year.

(b) Employers With More Generous Leave Policies

If an employer has a more generous leave policy for similarly situated employees with other temporary disabilities than is required for pregnancy purposes under these regulations, the employer must provide the more generous leave to employees temporarily disabled by pregnancy. If the employer's more generous leave policy exceeds four months, the employer's return policy after taking the leave would govern, not the return rights specified in these regulations.

(c) Denial of Leave is an Unlawful Employment Practice

It is an unlawful employment practice for an employer to refuse to grant pregnancy disability leave to an employee disabled by pregnancy

(1) who has provided the employer with reasonable advance notice of the medical need for the leave, and

(2) whose health care provider has advised that the employee is disabled by pregnancy. The employer may require medical certification of the medical advisability of the leave, as set forth in sections 7291.16, subdivisions (a) and (b), and 7291.17, subdivision (b).

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12940, 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

§ 7291.10. Right to Reinstatement from Pregnancy Disability Leave.

The following rules apply to reinstatement from any leave or transfer taken for disability because of pregnancy.

(a) Guarantee of Reinstatement

An employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 7291.10, subdivisions (c)(1)(A) or (c)(1)(B), to a comparable position, and the employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

(b) Refusal to Reinstatement

(1) Definite Date of Reinstatement

Where a definite date of reinstatement has been agreed upon at the beginning of the leave or transfer, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave or transfer was granted by the employer and that the employer failed to reinstate the employee to the same position or, where applicable to a comparable position, by the date agreed upon, as specified below in subdivisions (c)(1) and (c)(2).

(2) Change in Date of Reinstatement

If the reinstatement date differs from the employer's and the employee's original agreement or if no agreement was made, the employer shall reinstate the employee within two business days, or, when two business days is not feasible, reinstatement shall be made as soon as it is possible for the employer to expedite the employee's return, after the employee notifies the employer of her readiness to return, to the same, or, where applicable, a comparable position, as specified below in subdivisions (c)(1) and (c)(2).

(c) Permissible Defenses – Employment Would Have Ceased

(1) Right to Reinstatement to the Same Position

An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than those rights she would have had if she had been continuously at work during the pregnancy disability leave or transfer period. This is true even if the employer has given the employee a written guarantee of reinstatement.

A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, that the employee would not

otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

(2) Right to Reinstatement to a Comparable Position

An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the employer is excused from reinstating the employee to her same position, or with the same duties, a refusal to reinstate the employee to a comparable position is justified if the employer proves, by a preponderance of the evidence, either of the following:

(A) The employer would not have offered a comparable position to the employee if she would have been continuously at work during the pregnancy disability leave or transfer period.

(B) There is no comparable position available.

1) A position is “available” if there is a position open on the employee’s scheduled date of reinstatement or within 60 calendar days for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement.

2) An employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or email, or by links to postings on the company’s website if there is a section for job openings.

3) If a comparable position is not available on the employee’s scheduled date of reinstatement, but the employee is later reinstated under the 60 calendar day period set forth in section 7291.10, subdivision (c)(2)(B)(1), above, the period between the employee’s scheduled date of reinstatement and the date of her actual reinstatement shall not be counted for purposes of any employee pay or benefit.

(3) If an employee is laid off during pregnancy disability leave or transfer for legitimate business reasons unrelated to her leave or transfer, the employer’s responsibility to continue the pregnancy disability leave or transfer, maintain benefits, and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement, or otherwise.

(d) Right to Reinstatement to Job if Additional Leave Taken Following End of Pregnancy Disability Leave; Equal Treatment

If an employee disabled by pregnancy remains on some form of leave following the end of her pregnancy disability leave (e.g., employer's disability leave plan, etc.), an employer shall grant the employee reinstatement rights that are the same as any other similarly situated employee who has taken a similar length disability leave under the employer's policy, practice or collective bargaining agreement. For example, if the employer has a policy that grants reinstatement to other employees who are temporarily disabled for up to six months, the employer must also grant reinstatement to an employee disabled by pregnancy for six months. An employer and employee also may agree to a later date of reinstatement.

(e) Right to Reinstatement to Job if CFRA Leave is Taken Following Pregnancy Disability Leave

At the expiration of pregnancy disability leave, if an employee takes a CFRA leave for reason of the birth of her child, the employee's right to reinstatement to her job is governed by CFRA and not section 7291.10, subdivisions (c)(1) and (c)(2), above. Under CFRA, an employer may reinstate an employee either to her same or a comparable position.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12940, 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

§ 7291.11. Terms of Pregnancy Disability Leave.

(a) Paid Leave

An employer is not required to pay an employee during pregnancy disability leave unless the employer pays for other temporary disability leaves for similarly situated employees. An employee may be entitled to receive state disability insurance for a period of disability because of pregnancy and may contact the California Employment Development Department for more information.

(b) Accrued Time Off

(1) Sick Leave

An employer may require an employee to use, or an employee may elect to use, any accrued sick leave during the otherwise unpaid portion of her pregnancy disability leave.

(2) Vacation Time and Other Accrued Time Off

An employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off (PTO)) for which the employee is eligible.

(c) Continuation of Group Health Coverage

- (1) An employer shall maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period, beginning on the date the pregnancy disability leave begins, at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.
 - (A) An employer may maintain and pay for coverage for a group health plan for longer than four months.
 - (B) If the employer is a state agency, the collective bargaining agreement shall govern the continued receipt by an eligible female employee of health care coverage under the employer's group health plan.
- (2) The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.
- (3) An employer may recover from the employee the premium paid while the employee was on pregnancy disability leave if both of the following conditions occur:
 - (A) The employee fails to return at the end of her pregnancy disability leave.
 - (B) The employee's failure to return from leave is for a reason other than one of the following:
 - 1) Taking CFRA leave, unless the employee chooses not to return to work following the CFRA leave.
 - 2) The continuation, recurrence or onset of a health condition that entitles the employee to pregnancy disability leave, unless the employee chooses not to return to work following the leave.
 - 3) Non-pregnancy related medical conditions requiring further leave, unless the employee chooses not to return to work following the leave.
 - 4) Any other circumstance beyond the control of the employee, including, but not limited to, circumstances where the employer is responsible for the employee's failure to return (e.g., the employer does not return the employee to her same position or reinstate the employee to a comparable position), or circumstances

where the employee must care for herself or a family member (e.g., the employee gives birth to a child with a serious health condition).

(d) Other Benefits and Seniority Accrual

During her pregnancy disability leave, the employee shall accrue seniority and participate in employee benefit plans, including, but not limited to, life, short-term and long-term disability or accident insurance, pension and retirement plans, stock options and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability.

- (1) If the employer's policy allows seniority to accrue when employees are on paid leave, such as paid sick or vacation leave, and/or unpaid leave, then seniority will accrue during any part of a paid and/or unpaid pregnancy disability leave-
- (2) The employee returning from pregnancy disability leave shall return with no less seniority than the employee had when the leave commenced.

(e) Employee Status

The employee shall retain employee status during the period of the pregnancy disability leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, or other qualifying provisions.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12926, 12940, and 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. §2000e, §701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.).

§ 7291.12. Relationship Between Pregnancy Leave and FMLA Leave.

(a) A Pregnancy Leave May Also Be a FMLA Leave

If the employer is a covered employer and the employee is eligible for leave under the federal Family Care and Medical Leave Act (FMLA), the employer may be able to count the employee's pregnancy disability leave under this subchapter, up to a maximum of 12 weeks, against her FMLA leave entitlement.

(b) FMLA Coverage

For more information on rights and obligations under FMLA, consult the FMLA regulations regarding family care and medical leave (29 C.F.R. § 825).

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code section 12945; FMLA, 29 U.S.C. §2601, et seq., and FMLA regulations, 29 C.F.R. § 825.

§ 7291.13. Relationship Between CFRA and Pregnancy Leaves.

(a) Separate and Distinct Entitlements

The right to take pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take leave under the California Family Rights Act (CFRA), Government Code sections 12945.1 and 12945.2.

(b) “Serious Health Condition” - Pregnancy

An employee’s own disability due to pregnancy, childbirth or related medical conditions is not a “serious health condition” under CFRA.

(c) CFRA Leave after Pregnancy Disability Leave

At the end of the employee’s period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.

- (1) There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave for the birth of her child. There is also no requirement that the employee no longer be disabled by her pregnancy before taking CFRA leave for the birth of her child.
- (2) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, as a reasonable accommodation, allow the employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled under CFRA.

(d) Maximum Entitlement

The maximum statutory leave entitlement for California employees, provided they qualify for CFRA leave, for both pregnancy disability leave and CFRA leave for reason of the birth of the child and/or the employee’s own serious health condition is the working days in 29½

workweeks. This assumes that the employee is disabled by pregnancy for four months (the working days in 17½ weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12945, 12945.1, and 12945.2.

§ 7291.14. Relationship Between Pregnancy Disability Leave and Leave of Absence as Reasonable Accommodation for Physical or Mental Disability – Separate and Distinct Rights.

The right to take pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation under Government Code section 12940. At the end or depletion of an employee's pregnancy disability leave, an employee who has a physical or mental disability (which may or may not be due to pregnancy, childbirth, or related medical conditions) may be entitled to reasonable accommodation under Government Code section 12940. Entitlement to leave under section 12940 must be determined on a case-by case basis, using the standards provided in the disability discrimination provisions (subchapter 9) of these regulations, and is not diminished by the employee's exercise of her right to pregnancy disability leave.

Authority cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12926 and 12940.

§ 7291.15. Remedies.

Upon determining that an employer has violated Government Code sections 12940, 12943, or 12945, the Commission may order any remedy available under Government Code section 12970, and section 7286.9 of the regulations. The remedy, however, for a violation of section 7291.16, subdivision (c)(2), (failure to provide notice) shall be an order that the employer provide such notice.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code section 12970.

§ 7291.16. Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, To Transfer and To Take Pregnancy Disability Leave.

(a) Employers to Provide Reasonable Advance Notice Advising Employees Affected by Pregnancy of Their FEHA Rights and Obligations

An employer shall give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth or related medical conditions as set forth

below at section 7291.16, subdivisions (e) and (f), and as contained in “Notice A” and “Notice B” as set forth below at section 7291.18, subdivisions (a) and (b), or their equivalents.

(b) Content of Employer’s Reasonable Advance Notice

An employer shall provide its employees with information about:

- (1) an employee’s right to request reasonable accommodation, transfer, or pregnancy disability leave;
- (2) employees’ notice obligations, as set forth in section 7291.17, to provide adequate advance notice to the employer of the need for reasonable accommodation, transfer or pregnancy disability leave; and
- (3) the employer’s requirement, if any, for the employee to provide medical certification to establish the medical advisability for reasonable accommodation, transfer, or pregnancy disability leave, as set forth in section 7291.17, subdivision (b).

(c) Consequences of Employer Notice Requirement

- (1) If the employer follows the requirements in section 7291.16, subdivision (d), below, such compliance shall constitute “reasonable advance notice” to the employee of her notice obligations.
- (2) Failure of the employer to provide reasonable advance notice shall preclude the employer from taking any adverse action against the employee, including denying reasonable accommodation, transfer or pregnancy disability leave, for failing to furnish the employer with adequate advance notice of a need for reasonable accommodation, transfer, or pregnancy disability leave.

(d) Distribution of Notices

- (1) Employers shall post and keep posted the appropriate notice in a conspicuous place or places where employees congregate. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section.
- (2) An employer is also required to give an employee a copy of the appropriate notice as soon as practicable after the employee tells the employer of her pregnancy or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves.
- (3) If the employer publishes an employee handbook that describes other kinds of reasonable accommodation, transfers or temporary disability leaves available to its employees, that employer is encouraged to include a description of reasonable accommodation, transfer, and pregnancy disability leave in the next edition of its handbook that it publishes

following adoption of these regulations. In the alternative, the employer may distribute to its employees a copy of its Notice at least annually (distribution may be by electronic mail).

(4) Non-English Speaking Workforce

Any FEHA-covered employer whose work force at any facility or establishment comprised of ten percent or more persons whose primary language is not English shall translate the notice into the language or languages spoken by this group or these groups of employees. In addition, any FEHA-covered employer shall make a reasonable effort to give either verbal or written notice in the appropriate language to any employee who the employer knows is not proficient in English, and for whom written notice previously has not been given in her primary language, of her rights to pregnancy disability leave, reasonable accommodation, and transfer, once the employer knows the employee is pregnant.

(e) “Notice A”

“Notice A” or its equivalent is for employers with less than 50 employees and who are therefore not subject to CFRA or FMLA. An employer may provide a leave policy that is more generous than that required by FEHA if that more generous policy is provided to all similarly situated disabled employees. An employer may develop its own notice or it may choose to use the text provided in section 7291.18, subdivision (a), below, unless it does not accurately reflect its own policy.

(f) “Notice B”

“Notice B” or its equivalent is for employers with 50 or more employees who are subject to CFRA or FMLA. “Notice B” combines notice of both an employee’s rights regarding pregnancy and CFRA leave rights and satisfies the notice obligations of both this subchapter and section 7297.9 of the regulations. An employer may develop its own notice or it may choose to use the text provided in section 7291.18, subdivision (b), below, unless it does not accurately reflect its own policy.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code section 12940; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

§ 7291.17. Employee Requests for Reasonable Accommodation, Transfer or Pregnancy Disability Leave: Advance Notice; Medical Certification; Employer Response.

The following rules apply to any request for reasonable accommodation, transfer, or disability leave because of pregnancy.

(a) Adequate Advance Notice

(1) Verbal or Written Notice

An employee shall provide timely oral or written notice sufficient to make the employer aware that the employee needs reasonable accommodation, transfer, or pregnancy disability leave, and, where practicable, the anticipated timing and duration of the reasonable accommodation, transfer or pregnancy disability leave.

(2) 30 Days Advance Notice

An employee must provide the employer at least 30 days advance notice before the start of reasonable accommodation, transfer, or pregnancy disability leave if the need for the reasonable accommodation, transfer, or leave is foreseeable. The employee shall consult with the employer and make a reasonable effort to schedule any planned appointment or medical treatment to minimize disruption to the employer's operations, subject to the health care provider's approval.

(3) When 30 Days Is Not Practicable

If 30 days advance notice is not practicable, because it is not known when reasonable accommodation, transfer, or leave will be required to begin, or because of a change in circumstances, a medical emergency, or other good cause, notice must be given as soon as practicable.

(4) Prohibition Against Denial of Reasonable Accommodation, Transfer, or Leave in Emergency or Unforeseeable Circumstances

An employer shall not deny reasonable accommodation, transfer, or pregnancy disability leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide adequate advance notice of the need for the reasonable accommodation, transfer, or leave.

(5) Employer Response to Reasonable Accommodation, Transfer, or Pregnancy Disability Leave Request

The employer shall respond to the reasonable accommodation, transfer, or pregnancy disability leave request as soon as practicable, and, in any event no later than ten calendar days after receiving the request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(6) Consequences for Employee Who Fails to Give Employer Adequate Advance Notice of Need for Reasonable Accommodation or Transfer

If an employee fails to give timely advance notice when the need for reasonable accommodation or transfer is foreseeable, the employer may delay the reasonable

accommodation or transfer, until 30 days after the date the employee provides notice to the employer of the need for the reasonable accommodation or transfer. However, under no circumstances may the employer delay the granting of an employee's reasonable accommodation or transfer if to do so would endanger the employee's health, her pregnancy, or the health of her co-workers.

- (7) Direct notice to the employer from the employee rather than from a third party regarding the employee's need for reasonable accommodation, transfer, or pregnancy disability leave is preferred, but not required. The content of any notice must meet the requirements of this section and the employer may require medical certification.

(b) Medical Certification

As a condition of granting reasonable accommodation, transfer, or pregnancy disability leave, the employer may require written medical certification. The employer must notify the employee of the need to provide medical certification; the deadline for providing certification; what constitutes sufficient medical certification; and the consequences for failing to provide medical certification.

- (1) An employer must notify the employee of the medical certification requirement each time a certification is required and provide the employee with any employer-required medical certification form for the employee's health care provider to complete. An employer may use the form provided at section 7291.17, subdivision (e), or may develop its own form. Notice to the employee of the need for medical certification may be oral if the employee is already out on pregnancy disability leave because the need for the leave was unforeseeable. The employer shall thereafter mail or send via electronic mail or by facsimile a copy of the medical certification form to the employee or to her health care provider, whomever the employee designates.
- (2) When the leave is foreseeable and at least 30 days notice has been provided, the employee shall provide the medical certification before the leave begins. When this is not practicable, the employee shall provide the requested certification to the employer within the time frame requested by the employer (which must be at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.
- (3) When the employer requires medical certification, the employer shall request that an employee furnish medical certification from a health care provider at the time the employee gives notice of the need for reasonable accommodation, transfer or leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the reasonable accommodation, transfer, or leave or its duration.
- (4) At the time the employer requests medical certification, the employer shall also advise the employee of the anticipated consequences of an employee's failure to provide adequate

medical certification. The employer shall also advise the employee whenever the employer finds a medical certification inadequate or incomplete, and provide the employee a reasonable opportunity to cure any deficiency.

- (5) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the medical certification requirements of these regulations, and the employee or employer elects to substitute sick, vacation, personal or family leave for unpaid pregnancy disability leave, only the employer's less stringent leave certification requirements may be imposed.
 - (6) The medical certification indicating the medical advisability of reasonable accommodation or a transfer is sufficient if it contains:
 - (A) A description of the requested reasonable accommodation or transfer;
 - (B) A statement describing the medical advisability of the reasonable accommodation or transfer because of pregnancy; and
 - (C) The date on which the need for reasonable accommodation or transfer became or will become medically advisable and the estimated duration of the reasonable accommodation or transfer.
 - (7) The medical certification indicating disability necessitating a leave is sufficient if it contains:
 - (A) A statement that the employee needs to take pregnancy disability leave because she is disabled by pregnancy, childbirth or a related medical condition;
 - (B) The date on which the employee became disabled because of pregnancy and the estimated duration of the leave.
 - (8) If the certification satisfies the requirements of section 7291.17, subdivision (b), the employer must accept it as sufficient. The employer may not ask the employee to provide additional information beyond that allowed by these regulations. Upon expiration of the time period that the health care provider originally estimated the employee would need reasonable accommodation, transfer, or leave, the employer may require the employee to obtain recertification if additional time is requested.
 - (9) The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.
- (c) Failure to Provide Medical Certification
- (1) In the case of a foreseeable need for reasonable accommodation, transfer, or pregnancy disability leave, an employer may delay granting the reasonable accommodation, transfer or leave to an employee who fails to provide timely certification after the employer has

requested the employee to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

- (2) When the need for reasonable accommodation, transfer or leave is not foreseeable, or in the case of recertification, an employee shall provide certification (or recertification) within the time frame requested by the employer (which must be at least 15 days after the employer's request) or as soon as reasonably possible under the circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of the reasonable accommodation, transfer or pregnancy disability leave.

(d) Release to Return to Work

As a condition of an employee's return from pregnancy disability leave or transfer, the employer may require the employee to obtain a release to "return-to-work" from her health care provider stating that she is able to resume her original job or duties only if the employer has a uniformly applied practice or policy of requiring such releases from other similarly situated employees returning to work after a non-pregnancy related disability leave or transfer.

(e) Medical Certification Form

Employers requiring written medical certification from their employees who request reasonable accommodation, transfer or disability leave because of pregnancy may develop their own form, utilize one provided by the employee's health care provider or use the form provided below.

FAIR EMPLOYMENT & HOUSING COMMISSION

CERTIFICATION OF HEALTH CARE PROVIDER
FOR PREGNANCY DISABILITY LEAVE, TRANSFER AND/OR REASONABLE
ACCOMMODATION

Employee's Name:

Please certify that, because of this patient's pregnancy, childbirth, or a related medical condition (including, but not limited to, recovery from pregnancy, childbirth, loss or end of pregnancy, or post-partum depression), this patient needs (check all appropriate category boxes):

- Time off for medical appointments.
Specify when and for what duration:

- A disability leave. [Because of a patient's pregnancy, childbirth or a related medical condition, she cannot perform one or more of the essential functions of her job or cannot perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons.]
Beginning (Estimate): _____
Ending (Estimate): _____
- Intermittent leave. Specify medically advisable intermittent leave schedule:

Beginning (Estimate): _____
Ending (Estimate): _____
- Reduced work schedule. [Specify medically advisable reduced work schedule.]

Beginning (Estimate): _____
Ending (Estimate): _____
- Transfer to a less strenuous or hazardous position or to be assigned to less strenuous or hazardous duties [specify what would be a medically advisable position/duties].

Beginning (Estimate): _____
Ending (Estimate): _____
- Reasonable accommodation(s). [Specify medically advisable needed accommodation(s). These could include, but are not limited to, modifying lifting requirements, or providing more frequent breaks, or providing a stool or chair.]

Beginning (Estimate): _____

Ending (Estimate): _____

Name, license number and medical/health care specialty [printed] of health care provider.

Signature of health care provider:

Date:

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12940, 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

§ 7291.18. Employer Notices.

(a) “Notice A”

YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE

If you are pregnant, have a related medical condition, or are recovering from childbirth, PLEASE READ THIS NOTICE.

- California law protects employees against discrimination or harassment because of an employee’s pregnancy, childbirth or any related medical condition (referred to below as “because of pregnancy”). California also law prohibits employers from denying or interfering with an employee’s pregnancy-related employment rights.

- Your employer has an obligation to:
 - reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);
 - transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and
 - provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17½ weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.

- provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in Labor Code section 1030, et seq.
- For pregnancy disability leave:
 - PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care provider determines how much time you will need.
 - Once your employer has been informed that you need to take PDL, your employer must guarantee in writing that you can return to work in your same position if you request a written guarantee. Your employer may require you to submit written medical certification from your health care provider substantiating the need for your leave.
 - PDL may include, but is not limited to, additional or more frequent breaks, time for prenatal or postnatal medical appointments, doctor-ordered bed rest, severe “morning sickness,” gestational diabetes, pregnancy-induced hypertension, preeclampsia, recovery from childbirth or loss or end of pregnancy, and/or post-partum depression.
 - PDL does not need to be taken all at once but can be taken on an as-needed basis as required by your health care provider, including intermittent leave or a reduced work schedule, all of which counts against your four month entitlement to leave.
 - Your leave will be paid or unpaid depending on your employer’s policy for other medical leaves. You may also be eligible for state disability insurance or Paid Family Leave (PFL), administered by the California Employment Development Department.
 - At your discretion, you can use any vacation or other paid time off during your PDL.
 - Your employer may require or you may choose to use any available sick leave during your PDL.
 - Your employer is required to continue your group health coverage during your PDL at the level and under the conditions that coverage would have been provided if you had continued in employment continuously for the duration of your leave.
 - Taking PDL may impact certain of your benefits and your seniority date; please contact your employer for details.

Notice Obligations as an Employee.

- Give your employer reasonable notice: To receive reasonable accommodation, obtain a transfer, or take PDL, you must give your employer sufficient notice for your employer to make appropriate plans – 30 days advance notice if the need for the reasonable accommodation, transfer or PDL is foreseeable, otherwise as soon as practicable if the need is an emergency or unforeseeable.
- Provide a Written Medical Certification from Your Health Care Provider. Except in a medical emergency where there is no time to obtain it, your employer may require you to supply a written medical certification from your health care provider of the medical need for your reasonable accommodation, transfer or PDL. If the need is an emergency or unforeseeable, you must provide this certification within the time frame your employer requests, unless it is not practicable for you to do so under the circumstances despite your diligent, good faith efforts. Your employer must provide at least 15 calendar days for you to

submit the certification. See your employer for a copy of a medical certification form to give to your health care provider to complete.

- PLEASE NOTE that if you fail to give your employer reasonable advance notice or, if your employer requires it, written medical certification of your medical need, your employer may be justified in delaying your reasonable accommodation, transfer, or PDL.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, look at the Department of Fair Employment and Housing's website at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Fair Employment and Housing Commission's website at www.fehc.ca.gov.

(b) "Notice B"

FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with your employer and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.

Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth or related medical conditions, you are entitled to take pregnancy disability leave (PDL) of up to four months, or the working days in one-third of a year or 17 $\frac{1}{3}$ weeks, depending on your period(s) of actual disability. Time off needed for prenatal or postnatal care; doctor-ordered bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; childbirth; postpartum depression; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy would all be covered by your PDL.

Your employer also has an obligation to reasonably accommodate your medical needs (such as allowing more frequent breaks) and to transfer you to a less strenuous or hazardous position if it is medically advisable because of your pregnancy.

If you are CFRA-eligible, you have certain rights to take BOTH PDL and a separate CFRA leave for reason of the birth of your child. Both leaves guarantee reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or a family member). For events that are unforeseeable, you must to notify your employer, at least verbally, as soon as you learn of the need for the leave.

Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Your employer may require medical certification from your health care provider before allowing you a leave for:

- your pregnancy;
- your own serious health condition; or
- to care for your child, parent, or spouse who has a serious health condition.

See your employer for a copy of a medical certification form to give to your health care provider to complete.

When medically necessary, leave may be taken on an intermittent or a reduced work schedule.

If you are taking a leave for the birth, adoption or foster care placement of a child, the basic minimum duration of the leave is two weeks and you must conclude the leave within one year of the birth or placement for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. Contact your employer for more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). The FEHA prohibits employers from denying, interfering with, or restraining your exercise of these rights. For more information about your rights and obligations, contact your employer, look at the Department of Fair Employment and Housing's website at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Fair Employment and Housing Commission's website at www.fehc.ca.gov.

Authority Cited: Government Code sections 12935, subd. (a), and 12945.

Reference: Government Code sections 12940, 12945; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

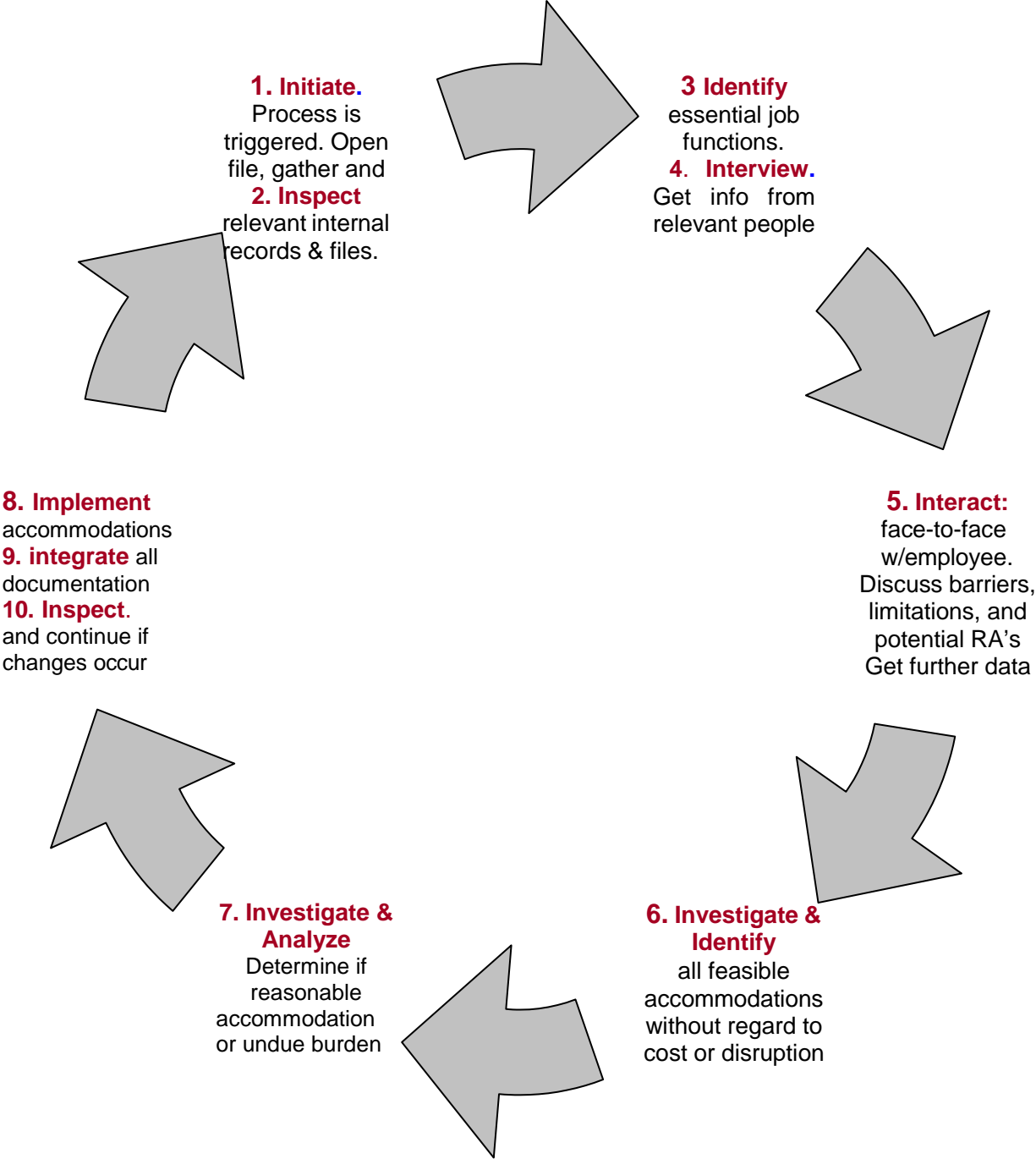
Section 2
PROCEDURES
Conducting and Documenting the
Interactive Process



PROCEDURES Section 2 A

Conducting and Documenting the Interactive Process

The Interactive Process is a Continuous Cycle and Each Step is Well Documented



Steps 1-4 = **Preparing to Interact**
 Step 5 - **Interaction**
 (the Heart of the Process)

Steps 6 & 7 = **Preparing to Decide**
 (whether to offer or decline an accommodation)

Step 8 = **Implementation**
 Steps 9 & 10 = Documentation and Monitoring

Summary and Checklist of the Ten Step Interactive Process

Step	Activity to Further Interactive Process	Specific Considerations
1.	Initiation (plus documentation) Determine when there is a duty to engage in the interactive process. Open file and begin.	Has the duty been triggered by: <ul style="list-style-type: none"> • employee’s request? • observed performance barrier? • observed access barrier? • return from leave? • Changed circumstances? • other, as you identify?
2.	Inspection of internal records for Information (plus documentation) Gather and review documents initially & throughout the process	Are there relevant items in: <ul style="list-style-type: none"> • personnel file • medical or therapy records, • supervisor’s records • prior requests for accommodation • communications between disabled employee and supervisor • other?
3.	Identification (plus documentation) Identify “Essential Job Functions”	Are job functions discernible from: <ul style="list-style-type: none"> • current job description? • job function analysis? • incumbents in position? • Layoff analysis? • supervisor or manager? • Other?
4.	Interview for Information (plus documentation) Interview relevant individuals	Obtain relevant information from: <ul style="list-style-type: none"> • medical provider(s) • supervisor and/or manager • other job incumbents • other?
4 A Consider Direct Threat to Health or safety as a qualification factor	Some courts allow consideration of direct threat to health and safety as a qualification factor – a substantial and imminent threat to own or others’ health and safety that cannot be reduced or eliminated. ** Separate from Step 7B CA FEHA “imminent safety threat” defense under CA FEHA which is addressed as STEP 7B	<ul style="list-style-type: none"> • Employee threatening violence? • Substance abuse? Drug test? • Has there been a FFD exam? • Does treating doctor agree? • Reasonable current medical data? • Nature and severity of the harm? • Is the risk current not future? • Is the risk of harm objective? • Has treating physician agreed? • Duration of the risk? • Can risk be reduced with protective measures?

5.	<p>Interaction + information (plus documentation)</p> <p>Face-to-face interaction with disabled applicant or employee</p> <p>Obtain information about further data, including medical or other information in possession of, or identified by, the employee</p>	<p>Focus: what essential job tasks can s/he perform, with or without help?</p> <ul style="list-style-type: none"> • are there tools, equipment or assistive devices that will aid performance? • Task modifications? • Schedule modifications? • Additional training? • Devices or tools used at home? • Devices or tools used on other jobs? • what other skills, education or experience does s/he have that would help with other jobs within the District? • Suggestions or ideas?
<p>Step 5 discussion and</p> <p>Step 6 consider all effective options to accommodate</p> <p>Sample options to implement</p>	<p><u>General Checklist -Potential Accommodation</u></p> <ul style="list-style-type: none"> • Modify how essential functions are performed • Adjust the order in which tasks are performed • Removal of non-essential job duties • Light duty, shift changes or alternate schedules • Job restructuring (including telecommuting, where feasible) • Part-time or modified work schedules • Shift changes from night to day or vice versa • Periodic or more frequent rest breaks away from workstation • Telecommuting or working from home • Flexible scheduling for start time, break periods • More frequent breaks for bathroom or other needs • Reassignment to vacant position • Acquisition of equipment or devices • Relax travel requirements • Allow assistive animal in the workplace <p><u>Respiratory or environmental restrictions</u></p> <ul style="list-style-type: none"> • Provide adjustable ventilation • Keep work environment free from dust, smoke, odor, and fumes • Avoid temperature extremes in workspaces or facilities • Redirect air conditioning and heating vents • Modify dress code • Use fan/air-conditioner or heater at the workstation • Allow work from home during extremely hot or cold weather 	<p><u>To address fatigue or weakness</u></p> <ul style="list-style-type: none"> • Reduce or eliminate physical exertion and workplace stress • Schedule periodic rest breaks away from the workstation • Allow a flexible work schedule and flexible use of leave time • Allow work from home • Implement ergonomic workstation design • Provide parking close to the work-site • Make sure materials and equipment are within reach range • Alternative work space to reduce visual and auditory distractions • Move workstation close to other work areas, office equipment, and break rooms <p><u>Restrictions on visual distractions</u></p> <ul style="list-style-type: none"> • Install space enclosures or cubicle walls • Reduce clutter in the employee's work environment • Redesign employee's office space • Relocate employee's office space away from visual distractions <p><u>Restrictions - auditory distractions</u></p> <ul style="list-style-type: none"> • Purchase a noise canceling headset • Hang sound absorption panels • Provide a white noise machine • Relocate employee's office space away from audible distractions

<p>Step 5 discussion and</p> <p>Step 6 consider all effective options to accommodate</p> <p>Sample options to implement (not exhaustive List)</p>	<ul style="list-style-type: none"> • Maintain the ventilation system • HEPA filters or other items to aid respiratory concerns • Redirect air conditioning and heating vents • Provide an office with separate temperature control <p><u>Accommodations for conditions of pregnancy</u></p> <ul style="list-style-type: none"> • Modifying work practices or policies • Modifying work duties such as timing when duties are performed • Modifying work schedules to permit earlier or later hours' • Permitting more frequent breaks; • Providing furniture (stools or chairs) or re-organizing workspace; • Acquiring or modifying equipment or devices; or • Temporary transfer to light duty <p><u>Restrictions related to cognitive, communication or neurological restrictions</u></p> <ul style="list-style-type: none"> • Provide positive praise and reinforcement • Establish written, long-term and short-term goals and instructions • Develop strategies to deal with conflict as it occurs • Procedures to evaluate effectiveness of accommodation • Relax policies mandating attendance at work related social functions, • Encourage all employees to move non-work-related conversations • Develop written work agreements with agreed upon accommodations, clear expectations of responsibilities, and the consequences for not meeting performance standards • Divide large assignments into several small tasks • Assign new project only when previous project is complete • Use daily, weekly or hourly charts or checklists to identify each task • Use flow-chart (color coded?) to indicate steps in a task • Establish interim deadlines with regular progress follow up • 	<ul style="list-style-type: none"> • Redesign employee's office space to minimize audible distractions <p><u>Mental health / mood disorders</u></p> <ul style="list-style-type: none"> • Allow flexible start and end times • Modified weekly schedule • Reduce distractions\ • Increase natural / full spectrum lighting • Work from home/telecommuting • Divide tasks and set small deadlines • Job restructuring • Provide memory aids such as schedulers, organizers, etc. • Allow additional training time • Use daily, weekly and monthly task charts <p><u>Cognitive, Neurological</u></p> <ul style="list-style-type: none"> • Allow telephone calls during work hours to doctors • Allow longer breaks for counseling support • Provide sensitivity training to coworkers and supervisors • Reinforce the importance of peer support • Assistive animal <p><u>Medical Treatment Accomm's.</u></p> <ul style="list-style-type: none"> • Flexible schedules and leave time • Self-paced workload with flexible hours • Allow employee to work from home • Provide part-time work schedules • Adjust start time or break schedule • Address attendance policies with flexibility
<p>STEP 5</p>		

<p>Step 5 discussion and</p> <p>Step 6 consider all effective options</p> <p>Sample options to implement</p>	<ul style="list-style-type: none"> • Provide verbal or pictorial cues on written instructions or checklists • Consider color coding to prioritize tasks, events & importance level • Allow additional training time for new tasks • Use a job coach or mentor to teach/reinforce organization skills – particularly for supervisors • Permit very short “time out” periods throughout the day 	
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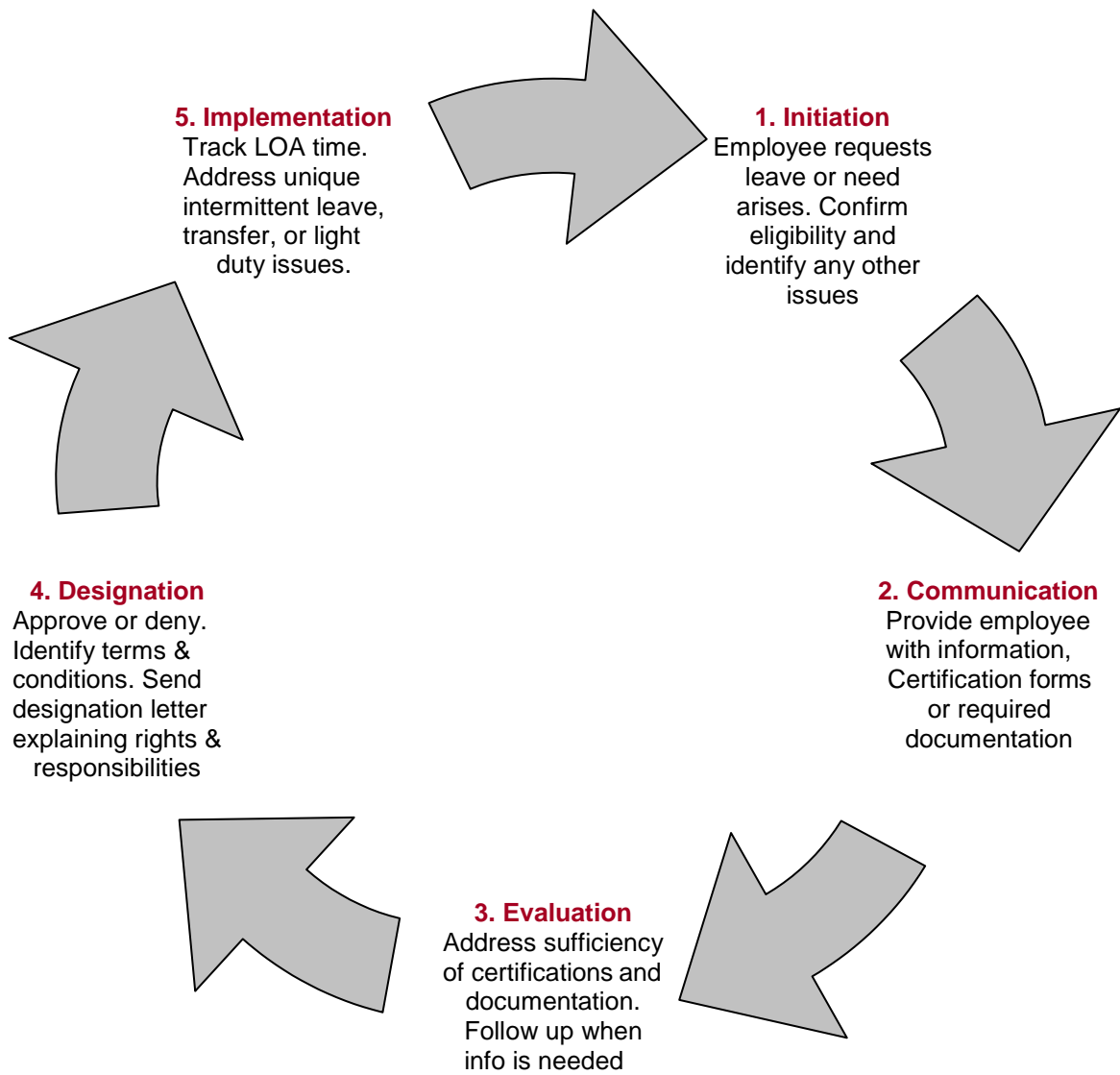
<p>6</p> <p>See above samples of potential effective options – use as a checklist not an exhaustive list</p>	<p>Investigation, Inspection plus Identification (and documentation)</p> <p>Investigate possible accommodations that will allow the employee to perform the essential functions of the job</p>	<p><u>Evaluate <i>without considering cost or disruption</i>:</u></p> <ul style="list-style-type: none"> • would any feasible accommodation(s) facilitate performance of job functions? • what equipment or devices would aid performance? Are they available from any source at any cost? • what other jobs are open? • does s/he have the required skills, education or experience to perform any other vacant position?
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7.	<p>Investigation and in-depth analysis (plus documentation)</p> <p>Analyze the “reasonableness” of potential accommodations</p>	<p><u>Now consider burden or disruption:</u></p> <ul style="list-style-type: none"> • nature of accommodation? • Is new equipment required? • Are equipment or technology resources shareable? • What is the duration of the need? • Source of funding? • Vacant, budgeted position? • Is there a bona fide seniority system?
7A Undue burden analysis	<p>Must be significant expense or difficulty (significant disruption or other factors that impact school site or program operations)</p> <p>Impact on student or program services is fundamental consideration.</p> <p>Compliance challenges with IEP or other requirements.</p> <p>Cost as a stand-alone factor is way down the list</p> <p>Gripes or unhappiness by co-workers, if otherwise reasonable, is not a factor at all.,</p>	<ul style="list-style-type: none"> • Impact on program operations? • Impact on student services? • Impact on classroom supervision? • Impact on student safety? • Impact on ability to perform any essential functions? • Impact on IEP compliance? • Impact on obtaining subs? • What is impact on facility? • Impact of modified schedule?
California FEHA Affirmative Defenses to Deny individually requested RTW or stay at work	<p>Undue Hardship: Significant difficulty or expense and focuses on the resources and circumstances of the specific situation in relationship to the cost or difficulty of providing a specific accommodation. May include accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operations of the public entity.</p> <p>Business Necessity: Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the employer must prove that there is an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business and the practice effectively fulfills that business purpose.</p>	<p>Health & Safety of Individual with Disability or Imminent Risk of Harm: Disability prevents performance of essential job duties over a reasonable length of time without facing <u>identifiable, substantial and immediate danger to his or her own health and safety</u> and that no reasonable accommodation exists that would remove the danger.</p> <p><i>Speculative concerns about future injury are not legally sufficient to invoke this affirmative defense. The determination must be made on objective data rather than “stereotypes or generalized fear</i></p>

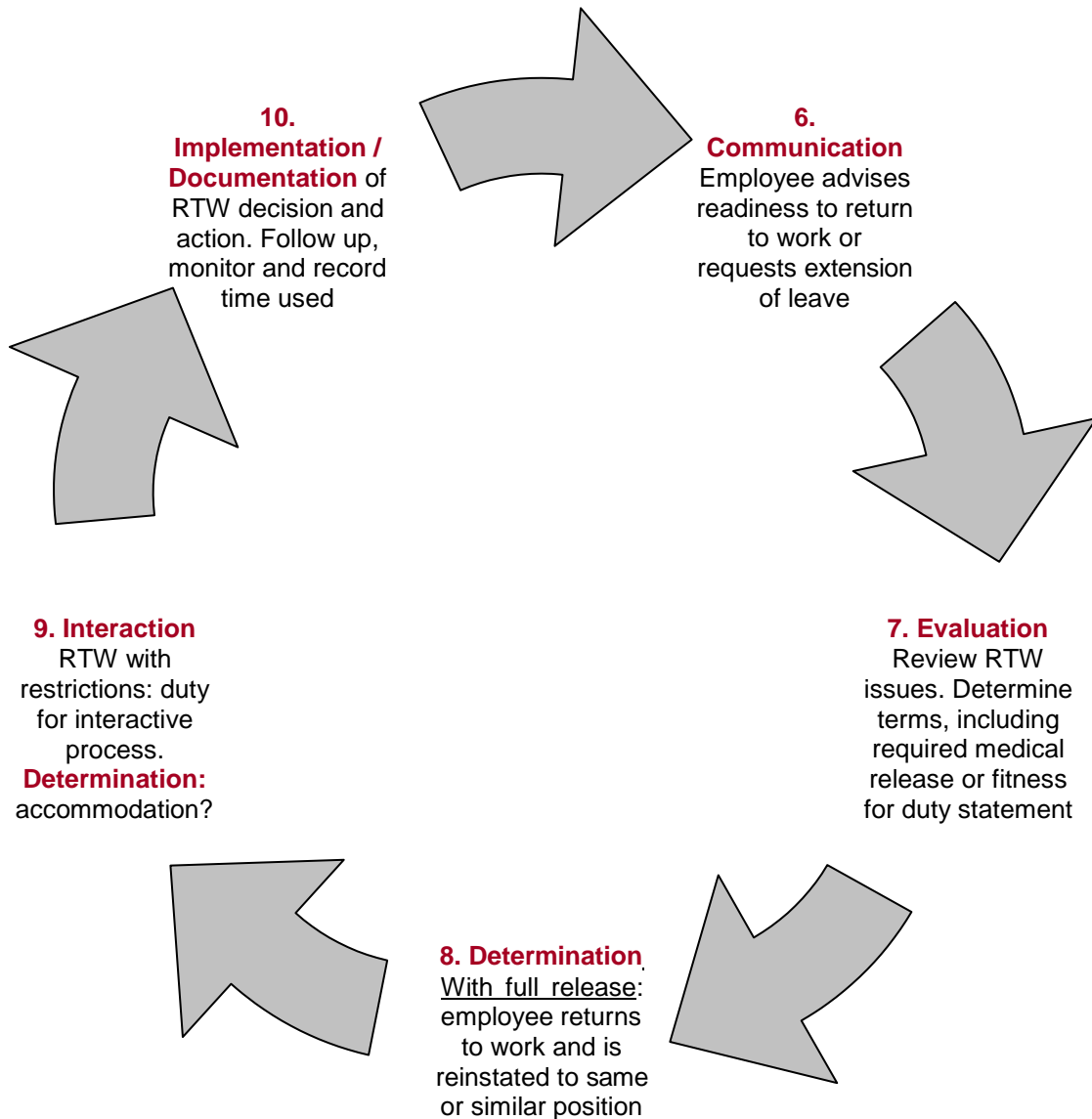
<p>7B</p> <p>Direct threat to health or safety</p> <p>Imminent safety threat analysis</p>	<p>Must be “significant risk of substantial and imminent harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.”</p> <p>Job must be safety sensitive</p> <p>Risk must be present and not future</p> <p>Risk must be medically supported – based on job related factors and business necessity</p>	<ul style="list-style-type: none"> • Is this based on an <u>individualized analysis</u>? • Is the job safety sensitive? • Is the risk present, not future? • Is the risk supported by reasonable and current medical judgment? • Impact on student or staff safety? • Is the risk objective and specific? • Is the medical information from treating doctor? • Is a fitness for duty evaluation warranted? Is information objective, documented and credible? • Is employee’s behavior threatening physically or verbally? • Can the risk be minimized with protective equipment or modifications? • Can risk be reduced in a different position? Is there a vacant position? • Is the medical documentation reasonably current and based on best available medical judgment?
<p>8.</p>	<p>Implementation of decision (plus documentation)</p> <p>Decide to offer or reject a reasonable accommodation.</p> <p>Offer a reasonable accommodation</p> <p>or</p> <p>Decline accommodation based on unavailability or undue hardship</p> <p>Then</p> <p>Implementation of accommodation, adjustment, modification or another barrier removal</p>	<p><u>Offer when</u> s/he can perform essential functions with;</p> <ul style="list-style-type: none"> • Modification of existing job • Reassignment with no required modification • Reassignment w/ modification • S/he can perform with available assistive devices • Modified or part time schedule • Job restructuring • Leave of absence will facilitate later return to duties • Other – <i>evaluate every aspect</i> <p><u>Decline when:</u></p> <ul style="list-style-type: none"> • No modifications to job duties will facilitate performance • No equipment or devices will assist performance • No other jobs are available for his/her skills or education; • Costs are prohibitive • Disruption is prohibitive or will produce objective safety concern.
<p>9.</p>	<p>Integrate Nine Principles of Effective Documentation into file of defensible documentation</p> <p>Document the entire process</p> <p>Be consistent</p>	<ul style="list-style-type: none"> • Accuracy and precision • Avoid negative connotations • Stick to personal knowledge • Avoid ultimate legal conclusions • Define technical terms • Eliminate inflammatory words • Minimize off-the-cuff writing • Close the loop on material issues raised in writing

<p>10.</p>	<p>Inspection (continuous or periodic) as necessary</p> <p>Plus documentation</p> <p>Follow up periodically to assure the accommodation is effective</p> <p>Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers to performance? • Is the supervisor managing appropriately? • Is s/he performing effectively? • Are barriers to privileges of employment rectified? • Have costs and/or disruption stabilized? • Did the accommodation fail to work as anticipated? Why? • Has the employee's disability progressed or changed? • Have job duties changed? • Have financial conditions changed sufficiently to render current RA impossible? • Has performance declined for reasons connected to the disability or accommodation? • Has supervisor recommended discipline for reasons that may be connected to the disability? • Has supervisor recommended termination for any reason?
<p>Repeat Process as situation changes</p>	<p>Re-Initiation and documentation) with changed circumstances</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p> <p>Major changed circumstances:</p> <ul style="list-style-type: none"> • Employee functional capacity better • Employee restrictions more limiting • Mix of essential functions changes • Business needs in window of time • Accommodations no longer effective • Employee requires discipline • Technology/ equipment needs change • Residual or new performance barriers • New, separate disability

Leave Request Process for Extended Leaves



Return to Work Process for Extended Leaves



Leave of Absence Process Step-by Step

Step	Activity to Further Interactive Process	Specific Considerations
1.	<p>Initiation (plus documentation)</p> <p>Determine when there is a need to begin the leave of absence process. Confirm eligibility and identify other issues. Other issues may involve pending workers' comp Industrial Accident Leave or other Ed. Code leave in progress.</p> <p>Determine what type of leave is needed (family leave for new child, employee's own serious health condition, family member SHC, military caregiver, military exigency, pregnancy-disability, or other).</p> <p>Is block or intermittent leave required?</p>	<p>Is LOA process been triggered by:</p> <ul style="list-style-type: none"> • Employee's request? • Agency learns of need? • Attendance a problem? • WC injury? • Other? • Is eligibility confirmed? <p style="text-align: right;">12 months of employment 1,250 hours in prior year Leave not exhausted Not a key employee</p>
2.	<p>Communication</p> <p>Provide employee with information about eligibility, terms and conditions of leaves, rights and responsibilities during leave.</p>	<p>Provide employee with:</p> <ul style="list-style-type: none"> • Notice of FMLA Rights • Appropriate Cert. form • Specific terms and conditions of leave • Coordination with other benefits • Other documentation requirements.
3.	<p>Evaluation.</p> <p>Address sufficiency of Certifications the employee provides and other documentation. Follow up as needed with employee or health care provider.</p>	<p>Are eligibility issues met by?</p> <ul style="list-style-type: none"> • Certification form? • Supplemental information? • Other?
4.	<p>Designation</p> <p>Approve or deny the requested leave. Identify terms and conditions. Send written designation letter explaining rights and responsibilities.</p>	<p>Provide employee with info:</p> <ul style="list-style-type: none"> • Type of leave approved • Block or intermittent • Pay and benefits during leave • Concurrent or consecutive • Reqts. for RTW – will release and fitness statement by needed? • Reinstatement rights
5.	<p>Implementation</p> <p>Track leave time. Address any unique issues that arise from use of intermittent leave, transfer or light duty issues. Stay in touch with front-line supervisor.</p>	<p>Focus on:</p> <ul style="list-style-type: none"> • Is intermittent leave working? • Is additional or re-cert needed?

Return to Work Process Step by Step

6.	<p>Communication.</p> <p>Keep in touch with employee as needed.</p> <p>If employee needs extension of leave, address with same steps as above. Determine if re-certification is appropriate.</p> <p>When employee advises she or he is ready to return to work, determine what documentation you need.</p>	<ul style="list-style-type: none"> • Ongoing communication with employee on leave. • Ongoing communication with front-line supervisor or manager concerning current needs of department (that may have arisen while employee was on leave).
7.	<p>Evaluation</p> <p>Review the return to work issues. Determine terms and required medical release (note: must conform with your original designation notice)</p>	<ul style="list-style-type: none"> • Determine whether you need a release to return to work and/or fitness for duty • Address any documentation issues at this time.
8.	<p>Determination</p> <p>With full release: employee returns to work and is reinstated to same or similar position.</p> <p>Benefits are restored, as necessary.</p>	
9.	<p>Interaction</p> <p>This is for a return to work with restrictions. It may arise in two situations: (1) during ongoing intermittent or reduced schedule leave; or (2) on return to work</p> <p>Determination</p> <p>Is there a reasonable accommodation that can be made [COORDINATE with steps 6, 7, 8 and 9 of the Interactive Process Checklists]</p>	<p>Focus on:</p> <ul style="list-style-type: none"> • what essential job tasks can s/he perform, with or without assistance? • are there tools, equipment or assistive devices that will aid performance? • what other skills, education or experience does s/he have that would help with other jobs within the agency? • does s/he have suggestions or ideas about how s/he can be reasonably accommodated • what are cost and disruption issues?

10.	<p>Implementation (Plus documentation)</p> <p>Implement the return to work decision and action. Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers to performance? • Is the supervisor managing appropriately? • Is s/he performing effectively? • Are barriers to privileges of employment rectified? • Have costs and/or disruption stabilized? <ul style="list-style-type: none"> • Did the accommodation fail to work as anticipated? Why? • Has the employee's disability progressed or changed? • Have job duties changed? • Have financial conditions changed sufficiently to render current RA impossible? • Has performance declined for reasons connected to the disability or accommodation? • Has supervisor recommended discipline for reasons that may be connected to the disability? <p>Has supervisor recommended termination for any reason?</p>
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<p>Step One</p> <p>Repeat process</p>	<p>Initiation (and documentation)</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p>
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PROCEDURES Section 2 B

Coordinating Disability and Step by Step Checklists

Steps 1-4 = **Preparing to Interact**

Step 5 - **Interaction**
(The Heart of the Process)

Steps 6 & 7 = **Preparing to Decide**
(Whether to offer or decline an accommodation)

Step 8 = **Implementation**

Steps 9 & 10 = Documentation and Monitoring

Communication is Critical for an Effective Dialogue

Communication is the heart of the interactive process. Your organization should take a proactive approach in considering all feasible adjustments, modifications or accommodations, including consulting appropriate resources for assistance. Continuous, constructive communication is particularly important when the:

1. Employee's specific limitations or restrictions are unclear;
2. Barrier to performance is uncertain;
3. Parties are considering different possible accommodations;
4. Employee's limitations change over time (improve or decline);
5. Accommodation is no longer working;
6. Essential job functions change, for business reasons; or
7. Agency's financial circumstances change materially.

Division of Responsibilities

There is a division of roles in this process, for three specific reasons.

1. Managers and supervisors may be the first to become aware that the interactive process has been triggered, because of something the disabled employee says or does.

2. Once that occurs, an independent manager or HR professional should conduct the interactive process.
3. The person conducting the interactive process will need to get information from the employee's manager or direct supervisor to identify and evaluate possible accommodations. This includes: what the employee's job involves, how her tasks could/could not be reassigned, but the less you tell them about the employee's limitation the better. Also, the person conducting the interactive process will probably need to interview the employee's managers later in order to implement an accommodation.

Communication is the heart of the interactive process. The Interactive Process Coordinator (IPC) or Disability Manager will have the principal responsibility for facilitating the process, gathering relevant information and identifying possible accommodations. The IPC will take a proactive approach in considering all feasible adjustments, modifications or accommodations, including consulting appropriate resources for assistance.

The employee requesting the accommodation should also participate in helping to identify an effective accommodation. Both the Agency and the employee are obligated to participate in the interactive process in good faith and are required to communicate directly and to exchange essential information. This mutual good faith participation will assist both the Agency and the employee to achieve their shared objective of identifying an effective reasonable accommodation.

Where the employee's restrictions are unambiguous and an accommodation can be easily identified, then the request can be promptly approved, Communication may be simply to confirm and document that the Agency has obtained all relevant information. Seeking the employee's input in this context is important, to verify that the accommodation will work as anticipated and that the employee has been involved in the decision.

Continuous, constructive communication is particularly important when the:

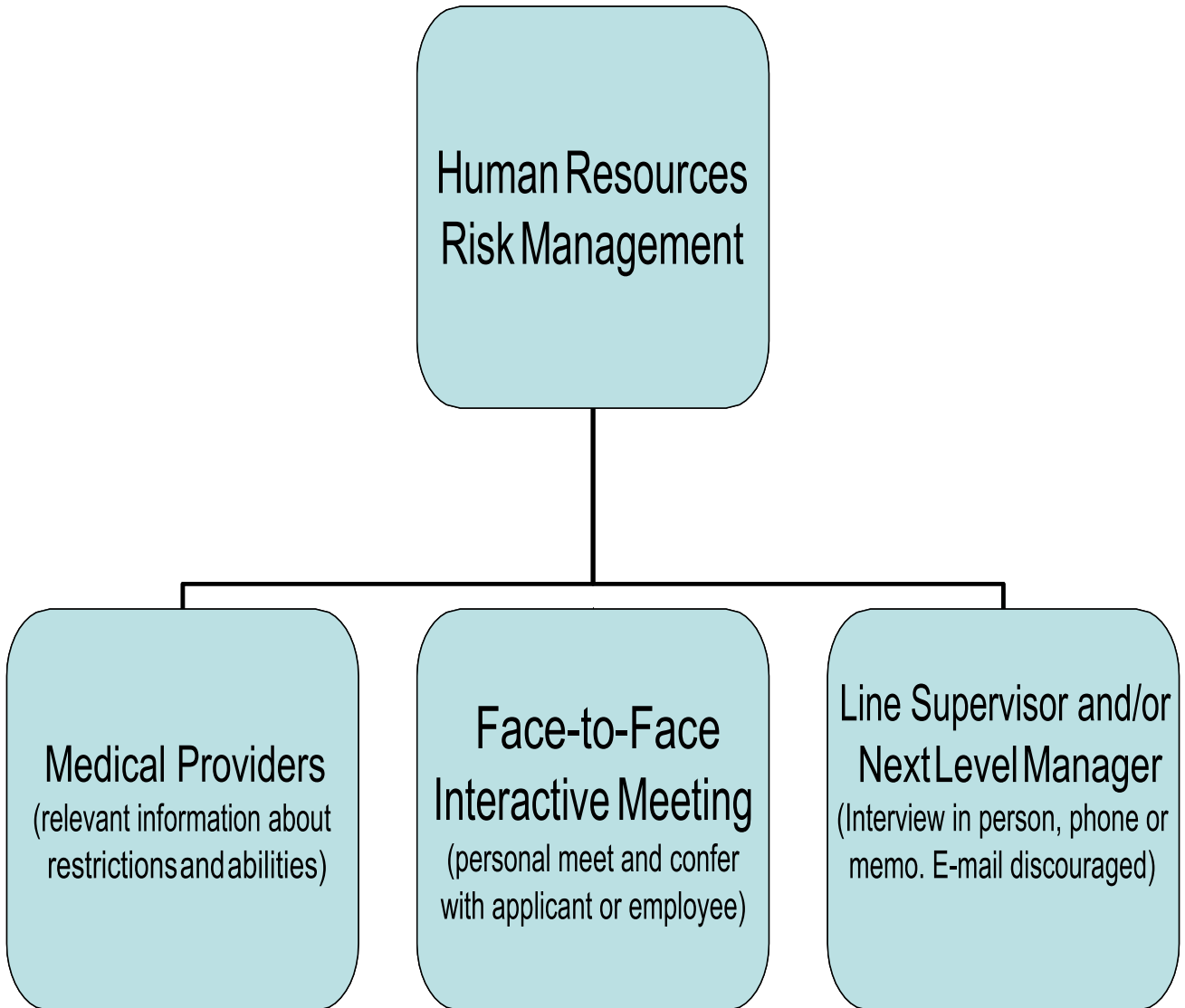
- employee's specific limitations or restrictions are unclear;
- barrier to performance is uncertain;
- parties are considering different possible accommodations;
- employee's limitations change over time (improve or decline);
- accommodation is no longer working;
- essential job functions change, for business reasons; or
- Agency's financial circumstances change materially.

The IPC, in conjunction with the supervisor or manager, should inspect the work site conditions and observe the employee requesting accommodation while performing the functions of his/her assignment to gain further understanding of the requested accommodation or the existing barrier.

Sharing Information

The IPC or other Agency administrator who receives information in connection with a request for reasonable accommodation may share information with other Agency officials only when they need to know the information in order to make determinations on a reasonable accommodation request or to appropriately supervise the employee.

Communication Responsibilities:



Detailed Explanations and Checklists

Step One: Initiation

Determine When There is a Duty to Engage in the Interactive Process

Requesting a Reasonable Accommodation

A request for a reasonable accommodation occurs when an individual with a disability needs an adjustment or change at work, in the application process or in the benefits or privileges of employment. The reasonable accommodation process begins as soon as the need for accommodation is determined.

An individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.

To request accommodation, an individual with a disability may use "plain English" and does not require special words, such as "disability," or "reasonable accommodation." The individual does not have to refer to any specific law, such as ADA or FEHA, and does not have to refer to a particular Agency policy. The request may be verbal or written. It may be formal or informal.

An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. FEHA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer.

Unless the disability or the need for accommodation is obvious, it is the employee's responsibility to inform a supervisor, a manager or a representative of the HR department that an accommodation is needed in order to perform the essential job functions, or to receive equal benefits and privileges of employment. When the disability or the need for accommodation is obvious, the supervisor should inquire whether the employee has a need for assistance.

Processing and Record-Keeping

Once the request for a reasonable accommodation is triggered, or the need is observed (see "triggering events," next page), a documentation package should be assembled by the Interactive Process Coordinator (IPC). This is to allow the Agency to keep accurate records regarding requests for a reasonable accommodation, the conduct of the interactive process, the conclusions reached, and the decisions implemented.

Managers and supervisors must follow up a verbal request by completing the "Reasonable Accommodation Request Form," or otherwise confirming the request in writing to the IPC.

The IPC will then assemble a file that should include a description of the limitation, barrier or restriction that requires the accommodation and an explanation of the manner in which the request was triggered.

Further information will be added to this file throughout the interactive process and following implementation of the decision to offer or deny the requested accommodation.

Cross Reference: See the forms recommended for this process in Tab 5 of this IP Manual. The Agency should utilize additional forms, as required, to maintain consistency with existing documentation protocols. Forms supplied in this manual include:

1. Reasonable Accommodation Request form
2. Reasonable Accommodation Information Reporting form
3. Medical Release form
4. Denial of Reasonable Accommodation form.

Supervisory Authority to Make Accommodation Without the Interactive Process

If an employee requests a type of assistance that is within the supervisor's authority and effective to solve the barrier or accommodate the limitation, the supervisor may simply provide it (without any reference to whether the request is disability-related).

Alternatively, a supervisor may ask if the assistance is being requested as an accommodation to a limitation or barrier (and if the response is affirmative, proceed under Agency procedures for accommodating employees with disabilities). If a supervisor decides not to provide the assistance, even if it is not identified as a request for accommodation of a disability, the supervisor should provide the employee with a copy of the Agency's EEO policies applicable to reasonable accommodations and notify the IPC about the circumstance of the request and decision. The IPC will then determine whether follow up is required with the employee.

Timelines for Beginning and Concluding the Interactive Process

The Agency should process requests for reasonable accommodation in as short a time frame as reasonably possible. The Agency recognizes, however, that the time necessary to process a request will depend on the nature of the accommodation requested and whether it is necessary to obtain further supporting information. The IPC should make a decision on the request and accommodation, if offered, within a reasonable time from the date the request was initially made, absent extenuating circumstances.

Begin Interactive Process

The process should begin within five to seven (5-7) working days from the triggering event that opens the interactive process.

The process should proceed as promptly as possible, given the need to obtain relevant information from external sources (such as medical records) and interview internal personnel.

Absent extenuating circumstances, the face-to-face meeting with the employee should take place no later than seven (7) working days from the triggering event. This may require an initial meeting and follow-up meetings as additional documentation becomes available.

Extenuating circumstances are factors that could not reasonably have been anticipated or avoided in advance of the events that triggered the interactive process. When extenuating circumstances are present, the time for the interactive process should be extended as necessary to assure a comprehensive analysis and objective conclusion. Extensions based on extenuating circumstances should be limited.

Considerations in setting time frame:

- Medical documentation is necessary
- Purchase of equipment may take longer than 30 days.
- Equipment must be back-ordered.
- Employee must work with tools/devices as a trial to evaluate effectiveness
- New staff needs to be hired or contracted for.
- Accommodation requires removal or modification to architectural barriers

Implementing a Reasonable Accommodation

“Extenuating circumstances” covers limited situations in which unforeseen or unavoidable events prevent timely processing and delivery of an adjustment or accommodation. Where extenuating circumstances occur, the IPC must notify the employee of the reason for the delay, and the approximate date on which a decision or implementation of the reasonable accommodation is expected. Any further developments or changes should also be promptly communicated to the individual and the supervisor/manager involved.

If there is a delay in an accommodation that has been approved, the IPC, in conjunction with the employee’s supervisor, must investigate whether temporary measures can be taken to assist the employee. This could include providing the requested accommodation on a temporary basis or providing a less effective form of accommodation.

The IPC may provide measures that are not reasonable accommodations within the meaning of FEHA (e.g., temporary removal of an essential job function) if:

1. they do not interfere with the operations of the department/facility; and
2. the employee is clearly informed that this is a temporary, interim basis.

**** FEHA does not provide specific timeline requirements. Each public agency should conform the timelines for this policy with other governing policies that provide timelines for investigation, response to complaints, etc.**

Step One Checklist

[may be further customized using a template prepared for each Agency]

No.	Question/Consideration	YES	NO	More Data Needed	Target Date to Complete
1	Has there been a workplace injury that you anticipate will require temporary light duty assignment?				
2	Has an injured worker been released MMI with permanent work restrictions?				
3	Has the employee informed a manager of a disability or limitation that is not a work related injury?				
4	Has the employee specifically asked for an adjustment or reasonable accommodation or stated that there are barriers to performance because of his limitation?				
4	<p>Has the employee informed any supervisor, manager or administrator that he has barriers to effective performance because he is limited in his physical ability to perform some or all functions of his job?</p> <p>Statements in performance reviews?</p> <p>Statements during work activities?</p> <p>Statements following a return to work in QIW status?</p> <p>Statements following a return to work from a non-work related injury or medical leave of absence?</p>				
5	Has the employee told any supervisor, manager or administrator that he is experiencing work-related stress in the performance of his job or in any other aspect of his performance?				

No.	Question/Consideration	Yes	No	More Data Needed	Target Date to Complete
6	Has any manager/supervisor observed an employee who objectively demonstrates a physical, mental or social limitation in connection with job performance?				
7	Has any manger/supervisor observed barrier to job performance of an employee due to apparent physical, mental or social limitations, including apparent distraction, personality changes, visible fatigue or persistent inability to follow directions?				
8	Has an employee personally brought to the workplace any device, tool or adaptation that he is using to assist him in performing job duties?				
9	Are there any other circumstances that suggest an employee is limited in a major life activity that interferes with his ability to perform essential job functions?				
10	Have you received information from risk managers or claims professionals identifying circumstances that reveal a limitation or barrier for a particular employee?				
11.	Has the employee demonstrated erratic behavior or violated standards of conduct that may be caused by a limitation of major life activity, or for which the limitation is a contributing factor?				
12.	Has the employee raised a limitation of major life activity in a prospective disciplinary action				
13.	Has the employee demonstrated erratic attendance or punctuality?				
14.	Other circumstances you identify?				

Step Two:**Inspection for Information: Review Relevant Documents**

Purpose: identify specific information that will aid in the interaction with the employee and making the ultimate reasonable accommodation decision.

No.	Question/Consideration	YES	NO	More Data Needed	Target Date for Completion
1	Personnel file for the employee, including any performance reviews that address how the employee performs essential job functions				
2	Documentation reflecting the employee's education, work history and experience in other jobs (for purposes of discussing with the employee and determining whether there are other available jobs for which the employee may be qualified by education or experience).				
3	Documentation reflecting the employee's training both in the current job and in prior jobs (for purposes of discussing with the employee and determining whether there are other available jobs for which the employee may be qualified by on the job training).				
4	Any written communications between the employee and management concerning limitations and/or requests for accommodation.				
5	Any e-mail communications between the employee and management concerning limitations and/or requests for accommodation.				
6	Any prior reasonable accommodations that have been made for this employee.				
7	Any existing reasonable accommodations that are currently in use for this employee.				

No.	Question/Consideration	Yes	No	More Data Needed	Target Date for Completion
8	Any records that reflect other reasonable accommodations for persons performing the same job (note: this is for comparison purposes; not for use as “precedent” for offering or denying an accommodation in this instance).				
9	Any communications from the employee’s physician or other health care professional concerning limitations and potential accommodations. [Insulate managers and supervisors from this information. These records are confidential and shared on a very narrow “need to know” basis.]				
10	Communications from the employee’s legal representative regarding the employee’s claims, limitations or requested reasonable accommodations. [Insulate managers and supervisors from this information. These records are confidential and shared on a very narrow “need to know” basis.]				
11	<p>Communications or documents from a workers’ compensation claim file or other information from risk management or claims professionals that reflect:</p> <ul style="list-style-type: none"> • existing limitations or barriers • potential future limitations • current restrictions or modifications required by medical providers • potential future restrictions <p>[some of this may be confidential. Insulate managers & supervisors, as necessary.</p>				

No.	Question/Consideration	Yes	No	More Data Needed	Target Date for Completion
12	<p>Any other documentation that is relevant to assessing the following:</p> <ul style="list-style-type: none"> a. The essential functions of the job the employee seeks or holds. b. The essential functions of jobs to which the employee may be transferred or re-assigned. c. Information on how essential functions are established; statements of qualifications or other criteria 				

Obtain relevant information from Agency records

Personnel File
 Appropriate information concerning education, experience transferable skills, training and past performance

Job Descriptions and Job Function Analyses
 for current position and other positions for which employee is qualified by education, training and experience

Current Restrictions and Abilities
 Information from medical providers and related records concerning physical, medical and mental/emotional conditions and need for a reasonable accommodation or removal of barrier (obtain only when relevant, appropriately authorized and held confidential)

Special Considerations for Requesting Medical Records

The Agency is entitled to verify that an employee or applicant has a FEHA- covered disability that requires a reasonable accommodation. When a disability and/or need for reasonable accommodation is not obvious or otherwise already known to the IPC, the Agency may require that the employee provide reasonable documentation about the limitations and his or her functional restrictions.

Health care providers from whom relevant information may be obtained include, but are not limited to, a doctor, psychologist, physical therapist, rehabilitation counselor, nutritionist or social worker. Note: Under FEHA, the health care provider does not have to be a licensed physician or certified clinician.

The IPC will also request that the employee provide medical records or other documentation that reflects the limitations and the need for a reasonable accommodation. The Agency will request only that information that is sufficient to substantiate that the individual has a disability covered by FEHA and that s/he needs a reasonable accommodation. The Agency will not request overly broad medical information that is irrelevant to the interactive process.

Your workers' compensation carrier and claims professionals may, in some instances, be a good source of information. Note: CA. Labor Code Section 3762 prohibits the WC carrier from disclosing medical information to employers unless it is related to the diagnosis or treatment of the injury, ***or necessary to enable the employer to accommodate the employee's injury.***

If the information initially provided is insufficient for the Agency to determine whether a reasonable accommodation is necessary, and the type of accommodation, the IPC may ask for further information. As part of the interactive process, the Agency and the employee should work together to find the most appropriate way for the Agency to obtain relevant information from health care providers to make a determination of the following:

1. whether the employee has a FEHA-covered disability;
2. the nature of any relevant functional limitations or restrictions;
3. any modifications or restrictions to the employee's performance of physical, mental, cognitive or other job tasks; and
4. whether there is a reasonable accommodation that will allow the employee to perform the essential functions of the job. This will require that the health care provider be given complete information on essential job functions.

Confidentiality Requirements Regarding Medical Information Obtained During the Interactive Process

Medical information obtained in connection with the reasonable accommodation process must be kept confidential. This means that all medical information, including information about functional limitations and prescription medications, that the Agency obtains in connection with a request for reasonable accommodation must be kept in files separate from the employee's official personnel file. It also means that the Agency employee who obtains or receives such information is strictly bound by these confidentiality requirements.

The information may only be disclosed as follows:

1. First aid and safety personnel may be informed, when necessary, if the disability might require emergency treatment.
2. Supervisors and managers who need to know may be informed about necessary restrictions on work or duties of the employee and about the necessary accommodation, but medical information should only be disclosed if strictly necessary.

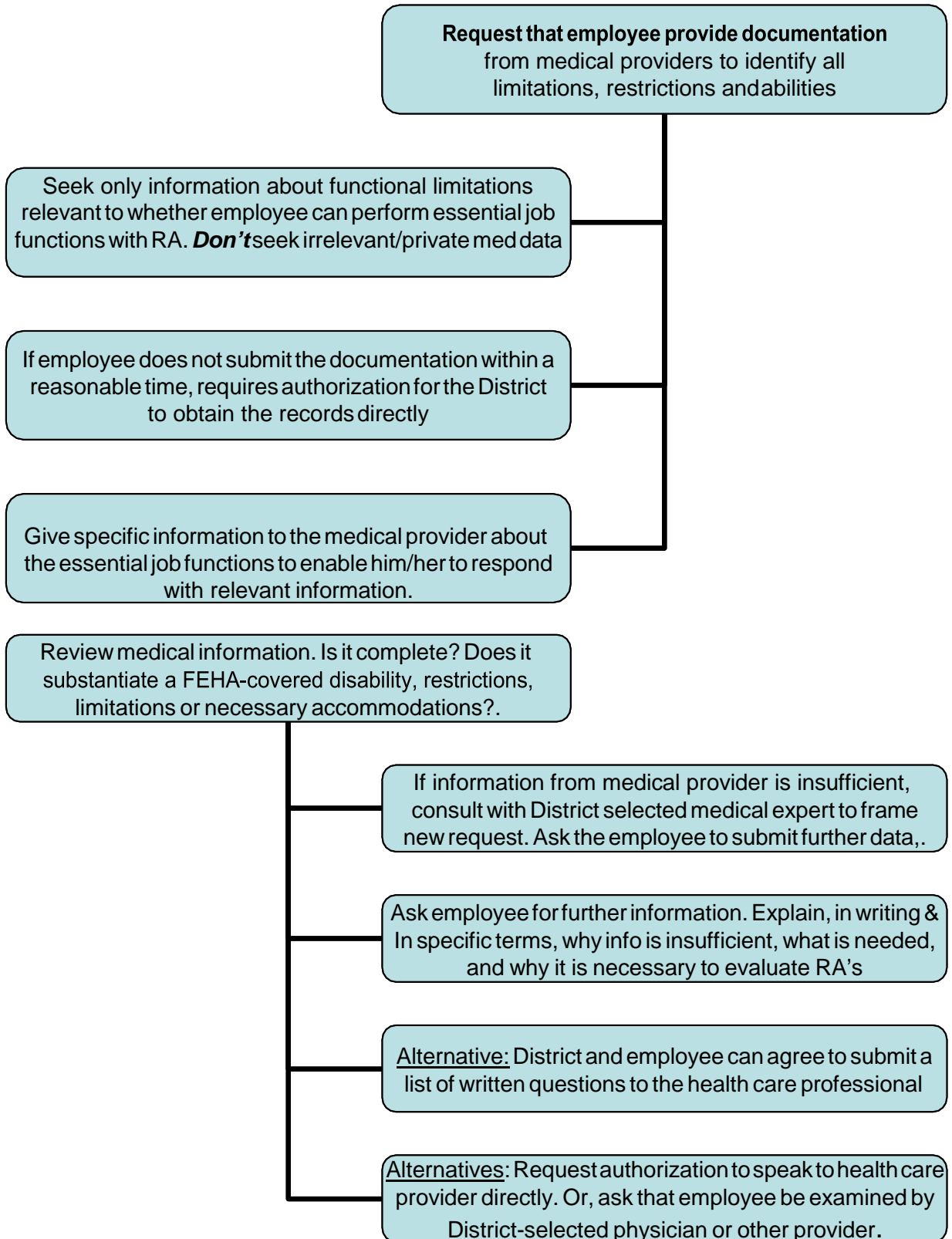
Example: an employee with epilepsy who may experience a seizure at work will require immediate attention in advance of first responder emergency personnel. The supervisor may be given enough information to recognize and respond accordingly.

Example: an insulin dependent diabetic may be reasonably accommodated with periodic meal breaks. The supervisor may be informed of the need for those period breaks, and of any objective signals in the employee's demeanor or behavior that may signal a need for an unscheduled break.

1. Government officials may be given information necessary to investigate the Agency's compliance with the ADA, FEHA or the Occupational Safety & Health Act.
2. The information may be disclosed, in limited circumstances, to workers' compensation claims professionals or insurance carriers.

Whenever medical information is disclosed, the individual disclosing the information must inform the recipients of the information about the confidentiality requirements.

Recap: Flow Chart for Obtaining Relevant Medical Information



Step Three: Identification: Identify Essential Job Functions

To be protected under the laws, a person must be *both* disabled and be "*otherwise qualified*" to do the job. He or she is "otherwise qualified" if able to meet all of the essential requirements of the job with or without reasonable accommodation. To avoid unlawful discrimination, the Agency must be able to identify the **essential job functions**.

This process accomplishes several important functions:

- It sets an objective set of functions for the job which can be quantified.
- It allows the decision maker to accurately assess the physical and/or mental functions of the job -- in objective rather than subjective terms.
- It promotes consistency in job standards for various positions. It facilitates good documentation of the essential functions of the job in the context of the reasonable accommodation decision.

Job functions may be considered essential for any of several reasons, including, but not limited to, any of the following:

- The position exists specifically to perform that function.
- A limited number of other employees perform the function.
- The function is highly specialized and requires specific expertise.
- A limited number of employees are available to distribute duties.

Determination of the essential functions of a position must be done on a case-by- case basis so that it reflects the job as actually performed, not simply the components of a generic position description. Evidence of whether a particular function is essential includes, but is not limited to, the following:

- The Agency's judgments as to which functions are essential.
- Written job descriptions prepared before advertising or interviewing.
- The amount of time spent on the job performing the function.
- The consequences of not requiring incumbents to perform the function.
- The terms of a collective bargaining agreement.
- The work experiences of past incumbents in the job.
- The current work experience of incumbents in similar jobs.

Step 3 Checklist

Purpose: Evaluate the job description/job analysis for the following issues:

No.	Question/Consideration	Physical	Mental/ Cognitive	Medical (include License reqts)	Additional Data Needed and Target Date to get it
1	<p>What types of physical activities are involved in performing each essential job function, including sitting, standing, walking, stooping, climbing, pulling, pushing, grasping, etc.</p> <ul style="list-style-type: none"> • Consider physical issues involving ingress and egress from work space or work facility. • Consider duration and amount of time each physical task may take, separately or cumulatively. 				
2	<p>What mental activities are involved in performing each essential job function, including working under stress, managing multiple tasks, working with tight deadlines, etc.?</p> <ul style="list-style-type: none"> • Consider duration of stress on the job • Consider types and duration of stress involving third parties such as students, parents, visitors, etc. 				
3	<p>What type of social/interaction activities are involved in performing each essential job function, including ability to get along with co-workers, supervisors, students and parents?</p>				

No.	Question/Consideration	Physical	Mental/ Cognitive	Medical (include License reqts)	Additional Data Needed and Target Date to get it
4	What types of cognitive activities are involved in performing each essential job function, including learning, counting, analyzing, recollection and recall, following simple or complex directions.				
5	Be sure to make the same evaluation for jobs to which the employee may be able to be transferred or re-assigned.				
6	Go through job description, task by task, to identify specific physical, mental/cognitive/emotional or medical requirements.				
7	Are there any special medical requirements or restrictions pertinent to this job? (e.g., DOT requirements for bus drivers, driver's license, teaching credential, etc.)				
8	Do duties have to be performed at specific times of the day, in a manner that would preclude periodic meal breaks for a person with diabetes or other condition created by medication?				

Step Four: Interview for Information: Talk to Relevant Individuals

Purpose: To further identify essential job functions, evaluate employee's skills and department's reasonable accommodation issues, and prepare for interactive face-to-face with employee. Persons to be interviewed may include:

1. The employee's immediate supervisor and/or manager. Ask about:
 - Employee's abilities and performance records
 - Other identifiable skills the employee may have from prior job experience
 - Essential functions of employee's current job (or the one s/he left) and how they are done. Focus on all aspects: physical, mental/emotional, etc.
 - Similarities or differences in the way incumbents in the same job perform essential functions.
 - Employee's disciplinary record, if any, that is NOT related to the disability or an aspect of the disability.
 - Ask the supervisor for ideas, suggestions or evaluation of potential adjustments, accommodations or removal of barriers to performance
2. Incumbents doing the same or similar jobs
 - essential job functions, and how they are done (focus on all essential functions, not just the ones affected by the disabled employee's restrictions or limitations)
 - Ask for ideas and suggestions for workable accommodations
3. Appropriate health care providers (for non-privileged information)
 - ask only about ability to do the essential job functions with or without a reasonable accommodation. Focus on restrictions (not impairments). Focus on ability to perform essential job functions (not on exclusions)
 - Never ask for information or documents pertaining to impairment diagnosis, prognosis, and medication (other than side effects that may limit performance on the job or impairments).
 - Appropriate inquiry: potential for imminent risk of harm to self or others
 - Actual or threatened violence?
 - Substance abuse? Drug test?
 - Independent FFD evaluator or treating doctor – do they agree?
 - Reasonable current medical data?
 - Nature and severity of the harm? Is it objective?
 - Is the risk current not future?
 - Is the risk of harm objective?

Obtain Information from internal sources at your Public Agency

Front Line Supervisor

Essential job functions, appropriate safety considerations, objective supervisory issues, relevant performance records

Next Level Manager or Dept. Head

Same as above + relevant, objective considerations about supervision, cost and/or disruption factors

Incumbents in Similar Jobs or Positions

Where it is necessary to “flesh out” essential job function analyses. Focus on how tasks are done and potential modifications

Step Five; Interaction: The Heart of the Process

This is an ongoing activity, *not a one-time event*. The shared goal of this interaction is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and act in good faith. Neither side may obstruct the process, but the Agency has a special duty to help identify potential accommodations within its organization.

Request Documentation from Employee -- What Can You Ask For?

When the disability and/or the need for accommodation are not obvious, the Agency may ask the individual for reasonable documentation about his/her disability and functional limitations. The Agency is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

Reasonable documentation means that the Agency may require only the documentation that is needed to establish that a person has a FEHA disability, and that the disability necessitates a reasonable accommodation. Thus, the Agency, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations the Agency cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, the Agency can request information pertaining only to the disability that requires a reasonable accommodation.

The Agency may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the Agency to submit a list of specific questions to the health care or vocational professional.

As an alternative to requesting documentation, the Agency may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the Agency to make clear to the individual why it is requesting information, i.e., to verify the existence of a FEHA disability and the need for a reasonable accommodation.

Example: An employee says to the Agency, "I'm having trouble reaching tools because of my shoulder injury." The Agency may ask the employee for documentation describing the restrictions on movement; the nature, severity, and duration of the limitation as it relates to the restricted movement; the activity or activities that the impairment limits; and the extent to which the limitation restricts the employee's ability to perform the activity or activities (i.e., the Agency is seeking information as to whether the employee has a FEHA disability).

Example: An Agency employee who serves as a public relations liaison to the community has a learning disability. He attends numerous meetings with community organizations, including PTA, Chamber of Commerce and local citizen/parent groups. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his immediate supervisor about his limitations and requests a laptop computer to use in the meetings. Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The Agency also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the Agency, then s/he is not entitled to reasonable accommodation. On the other hand, failure by the Agency to initiate or participate in a dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.

Prohibited Requests for Documentation -- What Can't You Ask For?

The Agency cannot ask for documentation when:

1. Both the disability and the need for reasonable accommodation are obvious;
or
2. The individual has already provided the Agency with sufficient information to substantiate that s/he has a FEHA disability and needs the reasonable accommodation requested.

Example: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood,

and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has a FEHA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The Agency cannot ask for additional documentation.

Example: One year ago, the Agency learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working and that medication controlled the frequency and severity of these episodes.

Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the Agency may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has a FEHA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

Checklist for Step 5 Interaction with the Disabled Employee

Purpose: To conduct an appropriate, good faith interactive process to identify potential reasonable accommodations that will allow the employee to perform the essential functions of the job and enjoy an equal employment opportunity.

Never ask about impairments. Ask about limitations/barriers in the context of job performance and potential accommodations to overcome them.

1. What essential and non-essential job tasks can the employee perform unaided, and with an accommodation?
2. What essential job tasks can't the employee perform unaided? This inquiry should not be limited to work activities; for example what equipment, tools or adaptive devices does the employee use at home that help him perform major life activities? Would those be effective in the workplace?
3. What training and experience can the employee use in a different or adapted job?
4. What devices or tools does the employee use off the job to assist in performing major life activities? How are those used and where does the employee obtain them? How long have they been in use?
5. Can these be utilized in the workplace to help the employee perform essential job duties? How could those be used to perform job duties?
6. Where appropriate, ask for verification from a physician.
7. Specifically ask for suggestions from the employee on how the job can be re-structured, modified or changed to allow him to perform the essential functions of the job?
8. Tell the employee that this is an ongoing process and ask for suggestions, questions and thoughts from the employee.
9. Inform the employee about the interplay with leaves of absence policies.
10. Tell the employee that this process is undertaken in good faith and that Agency policies prohibit any discrimination, harassment or retaliation against individuals who are working with a reasonable accommodation. This includes behaviors by co-workers. Ask the employee to report any inappropriate behaviors and assure him/her the Agency will promptly investigate and take corrective action, if required.

Step Six: Investigation to Identify all Feasible Accommodations, Irrespective of Cost and Disruption

Step Seven: Inspection and Investigation To Determine “Reasonableness” vs. Undue Hardship.

Step 6 identifies all feasible accommodations, without consideration of actual cost or potential disruption. There is only one focus in Step 6: are there any modifications, adjustments, assistive devices, tools, equipment, alternative schedule, leave of absence or other accommodations that will work – at all – to allow the employee to perform the essential functions of the job s/he left or another position for which s/he is qualified by education, training, or experience?

Step 7 then investigates whether any feasible accommodations identified in step 6 are, in fact, “reasonable,” or whether they create an “undue hardship.”

The purpose of dividing this into a two-level investigation is to avoid potential “mixing” of the issues in a way that could lead discrimination under FEHA. It is a common temptation for supervisors, managers and even human resources professionals to reject potential accommodations “out of hand,” because they anticipate the costs will be too high. This approach short-circuits the thorough analysis required under the FEHA, as indicated in the exhaustive legislative intent. The floor debates and other documentation generated in connection with the 2001 amendments to the FEHA suggest, and subsequent court cases confirm, that employers will invite legal and practical risks for failing to explore every conceivable alternative for a reasonable accommodation.

The separation of this investigation has practical merit for several reasons:

- If the investigation in step 6 reveals there are no feasible accommodations at all, then the process is completed, except for notifying the employee that a reasonable accommodation cannot be offered and documenting the results.
- If the investigation undertaken in step 6 identifies one or more feasible accommodations, then the analysis of costs, logistics and/or business disruption can proceed independently. Thorough documentation of the data and analysis separately, helps the decision maker (the IPC in large agencies or a supervisor or manager in small agencies) avoid getting caught in a difficult cross examination about why a particular accommodation was rejected.

Step 6 and Step 7 Checklists

Purpose: To identify all potential accommodations that could facilitate the employee's performance of the essential functions of the job s/he left or another job within the facility or agency for which s/he is qualified by education, skills, training or experience.

Potential Accommodation With Explanations	Examples
<p>Modification of Existing Job Duties</p> <p>A modification or adjustment to an employee's job duties is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.</p>	<p>Example: The Agency employs librarians with different areas of expertise, including research and online learning specialties. In order to ensure that each site benefits from these unique skills, the Agency rotates its librarians to different sites on a monthly basis. One librarian has a psychiatric disability that is covered under FEHA. While his mental illness does not affect his ability to perform the essential functions of the job as a school librarian, it does make it difficult to adjust to alterations in his daily routine. The librarian has had significant difficulty adjusting to the monthly changes in assignments.</p> <p>He asks for a reasonable accommodation and proposes three options: staying at one site permanently, staying at one site for two months and then rotating, or allowing him to provide information about his specialty to other sites in written or teleconference format. The first two proposed accommodations are reasonable because they appear to be feasible solutions to this librarian's problems dealing with changes to his routine and would allow him to perform the essential functions of the librarian's job. The third option may be reasonable only if the method of knowledge transfer is effective in meeting the needs of the students or other librarians at the other library sites.</p> <p>Example: An employee in the Agency's Information Technology (IT) Department has lifting restrictions of no more than 10 pounds. One of the essential functions of his job is to move computers, printers and other peripherals to various locations for testing and maintenance. He cannot perform this essential function, which accounts for 20% of his weekly duties. A reasonable accommodation may be to shift this function to another employee in the department. FEHA cases have found this to be a reasonable accommodation.</p>

<p>Note: this scenario → would require an individualized evaluation & discussion. If the nature of the teacher’s job requires constant interaction with students, such as a shop teacher or science laboratory. The “essential job functions” should be spelled out in a job analysis or detailed job description if there are variations in the nature of various faculty members’ work.</p>	<p>Example: A classroom art teacher is undergoing radiation treatments for prostate cancer. He easily becomes fatigued by the third period of the day. The teacher requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a relatively inexpensive solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.</p>
<p>Eliminating an Essential Job Function</p>	<p>Example: Eliminating an essential function is not a reasonable accommodation. The agency may consider adjusting the flow of work, or otherwise providing assistance for those tasks the individual cannot perform.</p>
<p>Leave of Absence (or extended leave for finite, reasonable time.)</p> <p>Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. The Agency does not have to provide paid leave beyond that which is provided to similarly-situated employees. The Agency should enforce its existing policy regarding required exhaustion of accrued paid leave first. The Agency may require an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the Agency should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.</p> <p>An employee with a disability may need leave for a number of reasons related to the disability, including.</p> <p><i>** Always consider the interplay with Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA), as well as agency policy on LOA's when evaluating leaves as a RA. See Tab 4. FAQ's.</i></p>	<p>Example: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.</p> <p>Example: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. The employee has used all available leave.</p> <p>Examples: obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy; recuperating from an illness or an episodic manifestation of the disability; obtaining repairs on a wheelchair, accessible van, or prosthetic device;</p> <p>avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with MS or ALS.</p>

<p>Holding Open Employee's Position Following Leave</p> <p>An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the Agency demonstrates that holding open the position would impose an undue hardship.</p> <p>If the Agency cannot hold a position open during the entire leave period without incurring undue hardship, the Agency must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.</p>	<p>Example: A physical education teacher who also coaches the single Agency high school football team (which is a regular playoff contender) needs eight months of leave for treatment and recuperation related to a chemotherapy and radiation treatment. The Agency grants the request, but after four months the Agency determines that it can no longer hold open the position for the remaining four months (which encompasses the regular football season and playoff period) without incurring undue hardship.</p> <p>The Agency must consider whether it has a vacant, equivalent position to which the physical education teacher/coach can be reassigned for the remaining four months of leave, at the end of which time the PE teacher/coach would return to work in that new position. If an equivalent position is not available, the Agency must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.</p>
<p>Employee on extended medical leave can unable to provide a fixed date of return (e.g., asking for open-ended leave as a reasonable accommodation).</p>	<p>Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, If an employee cannot provide a fixed date of return, and the Agency determines that it can grant such leave at that time without causing undue hardship, the Agency has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.</p>
<p>Suspension of "No-Fault" Leave</p> <p>If an employee with a disability needs additional unpaid leave as an RA the Agency must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that there is another effective accommodation that would enable the person to perform the essential functions of his/her position,</p>	

Modification of other Workplace Policies

It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. But, reasonable accommodation only requires that the Agency modify the policy for an employee who requires such action because of a disability; therefore, the Agency may continue to apply the policy to all other employees.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies...

Refusal to modify a policy for a disabled employee when the Agency does so for non-disabled employees may be unlawful ***disparate treatment under FEHA***.

Example: The Agency has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her Dept. Head that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The Agency must modify its policy to grant this request, absent undue hardship. Similarly, the Agency might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the Agency's refrigerator, to store medication that must be taken during working hours.

Example: it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability-related medical problems, barring undue hardship. Furthermore, the Agency may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship

Example: The Agency's policy requires employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If the Agency would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the Agency must do the same thing when the emergency hospitalization or medical treatment is due to a disability

Several case decisions, including the US Supreme Court in *Barnett v. US Airways*, have held that modification or waiver of existing policies is not absolutely required to make a reasonable accommodation, but also cannot be used as a blanket denial of consideration. Such modifications or waivers should always be considered, as they may be appropriate in some cases.

*** For further information on modification of existing policies, including seniority, reassignment, and related policies see Tab 4, Frequently Asked Questions and refer to specific Agency policies, as required.

Modified or Part time Schedule

A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, or altering when certain functions are performed.

The Agency must provide a modified or part-time schedule when required as a reasonable accommodation, even if it does not provide such schedules for other employees

If modifying an employee's schedule in his existing job poses an undue hardship, the Agency must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Example: An employee with rheumatoid arthritis must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be permitted to take a daily 45-minute break when the nausea occurs. The Agency must grant this request absent undue hardship. Undue hardship will be strictly scrutinized based on the unique aspects of the employee's job location, assignment or responsibilities.

Example: A cafeteria worker works from 8:00 a.m. to 1:30 p.m. He works primarily in food service to students. He requests a change of hours to 10:00 a.m. - 3:30 p.m. because of a disability that requires morning therapy appointments. The cafeteria is open from 7:00 a.m. - 4:30 p.m. It will still have sufficient coverage at the beginning of the morning if it grants the change in hours. Also, the change may require the employee to perform some different clean up duties. In this situation, the Agency must provide the reasonable accommodation if the employee can satisfactorily

Example: A mechanic who services the Agency's buses and other vehicles. Due to his disability and required medication schedule, he needs to work only in the daytime. The essential function of his position requires that he work at night because the buses are on their required routes during the daytime hours. Since the Agency cannot modify his hours, it must consider whether it can reassign the mechanic to a different position. If the mechanic is qualified by education, skills or experience, this accommodation may be available. If he is not so qualified, there may be no reasonable accommodation that the Agency may make without undue hardship

Reassignment to a Vacant Position

Reassignment is a form of RA that, absent undue hardship, is provided to employees (not job applicants) who, because of a disability can no longer perform the essential functions of the job s/he previously performed with or without an RA.

The employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. The employee does not need to be the best qualified individual for the position in order to obtain it as an accommodation reassignment.

Note: There is **no obligation for the Agency to assist the individual to become qualified**. Thus, the Agency does not have to provide training so that the employee acquires necessary skills to take a job. The Agency, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to any other individual (including non-disabled employees) hired for or transferred to the position

FEHA Regulations, Section 7293.9 (d)

(5) The employee with a disability **is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees**. However, ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested "accommodation" is "reasonable" on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority

Example: The Agency is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the Agency to send him to a course to learn Spanish. The Agency is not required to provide this training as part of the obligation to make a reassignment. Thus, the employee is not qualified for this position.

Example: The Agency is considering reassigning an employee with a disability to a contract procurement position in the Agency office. The employee is qualified for the position. The Agency has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the Agency must provide the employee with this specialized training.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the Agency knows that it will become available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the Agency, based on experience, can anticipate that an appropriate position will become vacant within a short period of time. A position is considered vacant even if the Agency has posted a notice or announcement seeking applications for that position. The Agency does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.

The Agency must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the Agency must reassign the employee to a vacant lower level position for which the individual is qualified, and the employee will be paid the prevailing wage for that position. If there is more than one vacancy for which s/he is qualified, the Agency must place the individual in the position that comes closest to the employee's current position for pay & status.

Example: The Agency is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the Agency has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the Agency must offer it to him.

Example: The Agency is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the Agency has just learned that an employee in an equivalent position plans to retire in six months. Although the Agency knows that the employee with a disability is qualified for this position, the Agency does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the Agency decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

<p>Job Restructuring</p> <p>Job restructuring includes modifications such as:</p> <ul style="list-style-type: none"> • reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and • altering when and/or how a function, essential or marginal, is performed. <p>The Agency never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.</p> <p>The Agency may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.</p>	<p>Example: A janitorial employee in an Agency school has had a knee replacement. He can walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second janitor include cleaning the small kitchen in the faculty lounge, which is something the disabled janitor can perform. The Agency can switch the marginal functions performed by these two employees</p>
<p>Use of Adaptive Devices</p>	<p>Example: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.</p>
<p>Modification of Materials</p> <p>Work, examination and training materials converted to alternative formats</p>	<p>Materials in Braille, large print, audio tapes, computer-generated audio/visual</p>
<p>Test Adjustments</p> <p>Providing adjustments or modifications to examinations to allow equal access</p>	<p>Adjustments on timed tests for learning challenged employees; alternative logistics for test-takers (e.g., rooms without distractions for ADD or hyperactive disorders)</p>

Assignment of Special Service Assistant	Examples: a reader, sign language interpreter, driver or other special service assistant to enable the employee to perform his/her job functions, where the accommodation can't be provided by current staff.
Removal of architectural barriers, including re-configured work spaces	Example: a data entry operator in the Agency payroll department uses a wheelchair that won't fit in the cubicle she is assigned. The Agency may consider installing a different cubicle or moving her to another location that allows both equal access to computer and other tools and interaction/accessibility to supervisor and co-workers with whom she must interact.
Accessible parking	For employees or applicants who use wheelchairs, walkers or other devices, or who have limitations of sight, walking, breathing, climbing or similar limitations.
Assistive Animals	<ul style="list-style-type: none"> • Definitions of <u>Guide Dog</u> (visually impaired), <u>Signal Dog</u> (hearing impaired) and <u>Service Dog</u> (individually trained for person with a disability) Civil Code § 54.1. • "Support dog" or other animal provides emotional or other support to a person with a disability, including but not limited to traumatic brain injuries or mental disabilities such as major depression. • Minimum standards include free from odors, displays habits appropriate to the work environment, doesn't engage in behavior that endangers health or safety of the employee with disability or others and is trained to provide assistance to disabled employee. • Agency can require letter from health care provider explaining the need for the animal as an accommodation and can ask for confirmation of the animal's training. Agency may challenge that the animal meets the standards within the first 2 weeks the animal is in the workplace based on objective evidence of offensive or disruptive behavior. May also ask for annual recertification from the employee of continued need for the animal.

Reasonable accommodation in the recruiting/hiring process

- providing written materials in accessible formats, such as large print, braille, or audiotape
- providing readers or sign language interpreters
- ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
- providing or modifying equipment or devices
- adjusting or modifying application policies and procedures.

Example: A blind candidate applies for a job as an Agency public affairs officer. He could perform this job with assistive technology, such as a program that reads information on the screen. If the Agency wishes to have him demonstrate his ability to use the computer, it must provide appropriate assistive technology as a reasonable accommodation.

Example: The Agency requires job applicants to line up outside each job site to apply for a job, a process that could take several hours. An applicant with inflammatory arthritis is unable to tolerate prolonged exposure to temperatures in the 90's. She requests that she be allowed to wait indoors where it is air conditioned until the human resources department is ready to take her application. The Agency would need to modify its hiring procedure to accommodate this applicant.

Not a Reasonable Accommodation

Proposed Accommodation	Explanation/ Examples
Monitor to assure that an employee takes medication as prescribed	Medication monitoring is not a reasonable accommodation. Agencies have no obligation to monitor medication because doing so does not remove a workplace barrier.
Elimination of an essential job function (e.g., a fundamental duty of the position)	Example: A data entry clerk in the payroll department requests that all duties involving typing on a computer or other keyboard be eliminated from her position. This is not a reasonable accommodation, unless the employee can effectively use a voice recognition software program to enter data.
Reduction of production or performance standards	Example: If the data entry clerk is provided a voice recognition system to replace her keyboarding duties, she must meet regular production standards relating to accuracy, speed and other performance standards that apply to all similar positions.

The precise accommodation that the employee wants or asks for.

The Agency may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus, as part of the interactive process, the Agency may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

If there are two possible reasonable accommodations, and one costs more or is more burdensome or disruptive than the other, the Agency may choose the less expensive, least burdensome or minimally disruptive accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the Agency may choose the one that is easier to provide. In either situation, the Agency does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. The Agency providing the accommodation has the ultimate discretion to choose between effective accommodations.

Analysis: this interactive process → must focus on: (1) can the assistant principal perform the essential functions of his job, with either accommodation? If so, the Agency may choose the least costly or disruptive. (2) how much does the reader cost, and will the assistant principal be able to use it for the anticipated length of his career with the Agency? If so, balance the cost with the functionality. Note: failure to provide the reader, **absent undue hardship**, would violate FEHA.

Example: An employee who has had surgery and is being treated for a malignant brain tumor has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the Agency install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the Agency may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

Example: An assistant principal with progressively disabling cataracts is reluctant to have surgery for religious reasons. He requests that the Agency provide someone to read printed materials that he needs to review daily. The assistant principal explains that a reader enables him to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly (and that the administrator can correct the problem with readily available surgery), the Agency instead provides the assistant principal with a device that allows him to magnify print so that he can read it himself. He can read print using this device, but with such great difficulty it significantly slows down his ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the assistant principal with an equal opportunity to attain the same level of performance as his colleagues. Without an equal opportunity to attain the same level of performance, this AP claims he is denied an equal opportunity to compete for promotions.

Step Seven: Analyze Reasonableness of Potential Accommodations

Cost and Disruption Considerations

Undue hardship is determined based on the net cost to the Agency. Thus, the Agency should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the Agency should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the Agency should ask the individual with a disability if s/he will pay the difference.

1. Determine how eliminating functions the employee cannot perform would affect the Agency.
2. What is the economic impact of the purchase of special equipment, adaptive devices or alteration of job duties?
3. What workplace disruption will be involved in re-configuring jobs and/or physical space? This includes the effect on other employees who will have to do tasks the employee can't do, but note that **FEHA and judicial cases specify that objections of other employees are never to be considered** in evaluating whether the accommodations create an undue hardship.

“Undue Hardship” Considerations

The Agency does not have to provide a reasonable accommodation that would cause an "undue hardship" to the Agency or to the individual school or facility. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

1. the nature and cost of the accommodation needed;
2. the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
3. the overall financial resources, size, number of employees, and type and location of facilities of the Agency (if the facility involved in the reasonable accommodation is part of a larger entity);
4. the type of operation of the Agency, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the Agency;
5. the impact of the accommodation on the operation of the facility.

If the Agency determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, **then under FEHA the Agency must provide the second accommodation.**

Specific Undue Hardship Considerations and Examples

Factual Circumstances as Undue Hardship	Example	Yes	No
Other employees' fears or the fears or prejudices of parents, citizens or other third parties toward the individual's disability			X
Reasonable accommodation might have a negative impact on the morale of other employees	Example: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the Agency transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the Agency determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the Agency cannot show significant disruption to its operation, there is no undue hardship		X
A reasonable accommodation would be unduly disruptive to other employees' ability to work.	Example: An agency office employee with Parkinson's Disease, who handles the public reception area during the day and prior to school board meetings requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The Agency assigns two receptionists per shift, and if the first employee's hours are reduced, the second employee's workload will increase significantly beyond his ability to handle his responsibilities. The Agency determines that such an arrangement will result in inadequate coverage to serve the public in a timely manner and	X	

	<p>maintain store security. Thus, the Agency can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The Agency, however, should explore whether any other reasonable accommodation will assist the clerk without causing undue hardship.</p>		
<p>The result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, and then the significant disruption to the operations of the Agency constitutes an undue hardship.</p>	<p>Example: A bus mechanic, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The mechanic works with three other employees who cannot perform their jobs without the mechanic. As a result, if the Agency grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. FEHA does not require the Agency to take any of these actions because they all significantly disrupt the operations of the business. Thus, the Agency can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.</p> <p>Example: A teacher assigned to a 'team teaching' assignment for 6 periods of 10th grade Government classes. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity that they have often worked together early in the morning.</p> <p>The teacher, due to his disability, requests an adjustment in his work schedule so that he works from 9:00 a.m. - 3:00 p.m. rather than 8:00 a.m. - 4:00 p.m. In this situation, the Agency could grant the adjustment in hours because it would not significantly disrupt the</p>	<p>X</p>	

	operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments		
Employee, due to medical condition that requires extended leave, can't provide a fixed date of return.	if the Agency is able to show that the lack of a fixed return date causes an undue hardship, because the Agency can neither plan for the employee's return nor permanently fill the position, then it is an undue hardship.	X	

Step 7 Additional Checklists

[to be further customized using a template prepared for each Agency]

Purpose: To analyze the “reasonableness” of any feasible accommodations (including job modifications, adjustments or other items) identified in Step 6.

1. Determine how eliminating functions the employee cannot perform would affect the Agency's operations, facilities or departmental concerns.
2. What is the economic impact of the purchase of special equipment, adaptive devices or alteration of job duties?
3. What workplace disruption will be involved in re-configuring jobs and/or physical space? This includes the effect on other employees who will have to do tasks the employee can't do, but note that **FEHA and court cases specify that objections of other employees are never to be considered** in evaluating whether the accommodations create an undue hardship.

4. Potential Accommodations for Medical Treatments

- Flexible schedules for start and end of shift and break schedule
- Self-paced workload with flexible hours
- A private area to test their blood sugar levels or to administer insulin injections
- A place to rest until blood sugar levels become normal
- A quiet, dark and private location to recover from a migraine
- Adjustment of lighting during periods of treatment
- Breaks to eat or drink, take medication, or test blood sugar levels
- Allow employee to work from home
- Provide temporary part-time work schedule during treatment weeks
- Provide flexibility for time needed to obtain counseling
 - Address attendance policies with flexibility
- A private space for confidential physician-patient communications

5. Potential Accommodations to Reduce Auditory Distractions

- Purchase a noise canceling headset or white noise machine
- Hang sound absorption panels
- Relocate employee's office space away from audible distractions
- Redesign employee's office space to minimize audible distractions

6. Potential Accommodations to Reduce Visual Distractions

- Install space enclosures or cubicle walls
- Reduce clutter in the employee's work environment
- Redesign employee's office space to minimize visual distractions
- Relocate employee's office space away from visual distractions

7. Potential Accommodations for Treatment Side Effects

- Scooter or other mobility device for walking restrictions
- Provide a stool to sit for periods throughout the work day
- Adjust parking area to be closer to work station when feasible
- Move work area to another location (for environmental distractions)
- Adjustable ventilation, fans, heaters or other temperature controls
- HEPA filters, fragrance limitations policies
- Modifying dress code, where appropriate, for treatment issues
- Strategies to address susceptibility to infection
- Allow longer or more frequent breaks for medication adjustments
- A rubber mat or carpet to cushion a fall during seizures
- Extended unpaid leave beyond expiration of available leave (last resort)

8. Accommodations for Enhancing Performance with Mental, Emotional or Cognitive Disabilities

- Divide large assignments into several small tasks
- Establish interim deadlines with regular progress follow up
- Use flow-chart to indicate steps in a task
- Provide verbal or pictorial cues on written instructions or checklists
- Use weekly chart to identify daily work activities
- Set a timer with alarm after assigning ample time to complete a task
- Provide written instructions or checklists for assignments
- Supply handheld organizer and train on how to use effectively
- Consider color coding to prioritize tasks, events & importance level
- Allow additional training time for new tasks
- Speech recognition software to address detail oriented data entry issues
- Consider professional organizer services for entire workgroups
- Use a job coach or mentor to teach/reinforce organization skills
- Assign new project only when previous project is complete, when possible

9. Potential Accommodations for Neurological, Memory or Cognitive Limitations

Attendance

- Flexible start or end times
- Modified weekly schedule

Concentration

- Reduce distractions
- Increase natural lighting
- Work from home/telecommuting

Control over Emotions

- Flexible breaks
- Stress management techniques
- Assistive animals (FEHA regulations.)

Fatigue

- Provide goal oriented workload
- Self paced workload
- Telecommuting part of the week

Memory

- Provide job coach
- Provide a mentor
- Allow additional training time
- Written checklists or memory aids

Organizational skills

- Daily weekly, monthly task lists
- Divide larger assignments into smaller tasks or goals

Step Eight: Offer an Available, Reasonable Accommodation or Deny the Request for Accommodation

Offering a Reasonable Accommodation Request

As soon as the IPC determines that a reasonable accommodation will be provided, the decision should be immediately communicated to the employee and his/her supervisor, and the department manager. If the accommodation cannot be provided immediately, inform the employee and his/her supervisor of the projected time frame for providing the accommodation. This notice does not need to be in writing, although the decision and the bases for it should be documented.

Denial of a Reasonable Accommodation Request

As soon as the IPC determines that a reasonable accommodation cannot be offered, s/he must complete the "Denial of Request" form. The explanation for the denial should be written in clear language, stating the specific reasons for the denial. The reasons for denial may be:

1. there is no feasible accommodation that would be effective
2. there is no reasonable accommodation to allow the employee to perform the essential functions of the job s/he had or another job in the facility or agency for which s/he is qualified by education, skills or experience
3. medical or other documentation is inadequate to establish that the employee has a FEHA-covered disability that requires a reasonable accommodation **[this must be carefully documented, following the specific actions set forth in Steps 2 and 5 of the ten step process].**

4. there is no accommodation that can be made without undue hardship to the agency. **[This must be carefully documented, and can only be reached with the IPC and the employee's supervisor and/or manager have fully explored whether other effective accommodations exist that would not cause an undue hardship].**

Step Nine: Documenting the Entire Process

What is the Purpose of Documentation?

Documentation is a written record of an event, discussion or observation by one or more individuals. Most organizations rely on documentation to record their activities and those of their employees. Any written information, whether formally or informally generated, can be considered documentary evidence if it is pertinent to a legal action or a regulatory proceeding or a misconduct investigation.

A written record of events is the best evidence of what occurred. Many times in litigation, the events surrounding the event took place months **or years** before the evidence is actually presented in court.

Many of these records can be requested for identification and disclosure in litigation. Agency management and/or legal counsel will review the requests for both relevancy and potential areas where a proper privilege can be raised. Even where a document is subject to a privilege, its existence must be disclosed. Documentation is most commonly used as evidence:

- To tell the story of what occurred.
- To document that a specific decision was made objectively, consistently and in accordance with all Agency policies.
- To refresh the memory of a witness or to discredit a witness who gives inconsistent testimony.
- To reconstruct past events, such as personnel decisions
- To establish knowledge, notice or intent

Documentation to Establish FEHA Compliance.

One primary purpose for maintaining documentation is to establish that the Agency has fully complied with regulatory requirements, including the ADA and FEHA. Complete, legible, concise and easy to understand documentation provides the best opportunity to avoid enforcement proceedings, and to establish the Agency's proper activities.

Using Documentation in Court or FEHA Administrative Proceedings.

In most civil proceedings, written documentation is not introduced by itself. Rather, oral testimony about an event will be given. Testimony will be provided through witnesses from the adverse parties (for example, an injured employee and a manager from the employer organization) and from independent witnesses with no stake in the litigation. The trier of fact -- judge, jury, arbitration panel, etc. -- will be asked to weigh the testimony and reach a determination.

Very often, the memories of the witnesses about the same events will differ substantially. This is usually the result of human memory frailties or honest misrecollection. However, sometimes witnesses attempt to testify about personal memory when in fact they did not actually observe or participate in the events. Sometimes, witnesses may even be untruthful.

Documentation to Refresh Memory.

When recollections vary, the trier of fact must determine whom to believe. This is the crucial issue of **credibility**. Many times, witnesses whose memory is imprecise can still be very credible, **if their memory is refreshed by reviewing documents that they prepared closer to the time of the original events**. This documentation is used to refresh memory.

Documentation to Attack Credibility.

Documentation may also be used to attack the credibility of a witness. For example, suppose an injured employee testifies that he was never trained on a hazard of his job, and as a result of that lack of training, he was injured. Suppose further that, under questioning, the employee contends he specifically remembers that he was not at work the day training took place. But, his employer has documentation reflecting the date, location and substance of this employee's training. When confronted with the documentation, the employee's credibility as a witness may be adversely affected.

Likewise, if the employee has kept documentation, and the employer has not, the manager testifying for the employer may have diminished credibility. This may affect the outcome of the proceeding.

Documentation Must be Capable Of "Authentication."

To submit documentation to a regulator or to introduce it as evidence in a courtroom, you must establish that it was created as a business record, on or about the date it bears. This includes **all** evidence, including hard copies, electronic files, photographs, audio and videotapes and other tangible items. While the parties may "stipulate" (agree) that the evidence is authentic, a difficult adversary has the option to require you to call a knowledgeable witness to authenticate, or verify, when and how the documents were created. This may be the photographer or videographer, or the individual **who actually generated the documents**.

Because it can be troublesome when an authenticating witness is unavailable, it is prudent to develop consistent methods for creating records maintained in the ordinary

course of business. This provides flexibility -- and veracity -- when you offer documents in your own defense. Develop productive documentation procedures to meet the needs of the particular department. Once you adopt procedures, strive for consistent enforcement. Keep informed about emerging statutory documentation requirements. When in doubt about the applicability of a statute to your work, consult the Human Resources and/or Risk Management Department.

Why is Effective Documentation So Important?

A written record of events is the best evidence of what occurred. Leaving this vital information to human memory is risky and often does not serve the Agency's best interests. The author of the documentation may have retired or moved to another area. In the absence of a written record of the activities that took place, the Agency's position may be **significantly affected**. In the ordinary course of business it is often essential to record and memorialize significant decisions and action items. It may be unproductive when documentation does not reflect the evolution of a business transaction or decision; particularly when events must later be reconstructed to assist the Agency and others in determining the true course of events. Good, complete, accurate documentation can be invaluable when used in the context of regulatory or judicial proceedings. Complete records, used as an adjunct to accurate testimony, are frequently invaluable in enhancing the credibility of a witness.

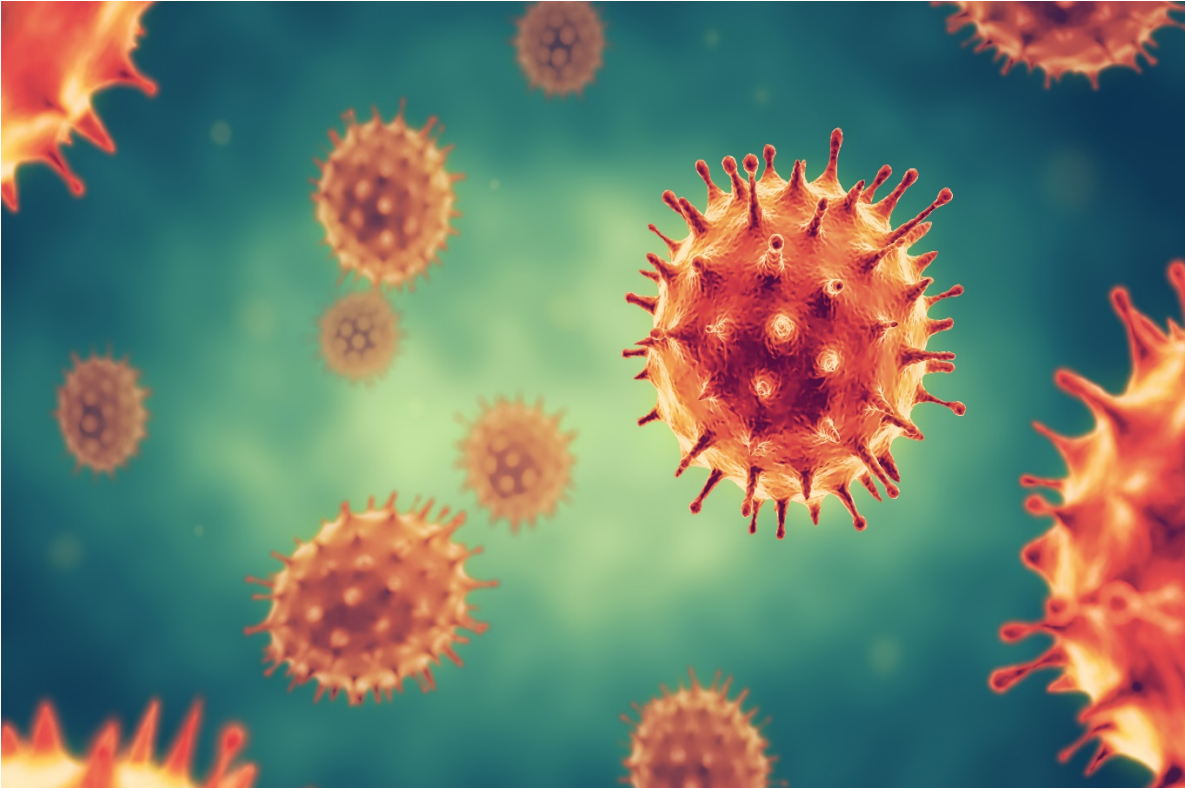
Write with Accuracy and Precision

Avoid	Stick With
Speculation	Objective facts
Exaggeration	Concrete examples
Slang	Precise terminology
Unnecessary technical jargon	Specific references to people, dates, decisions, actions, data and RA details

Avoid Ultimate Legal Conclusions: Let the Facts Control

Conclusion	Fact-Based Documentation
Negligent	Stick with what happened
Breached	Record only objective, fact-based decisions or actions
Fraudulent	Describe or paraphrase the actual representation or omission
Dishonest	Describe the acts or activities
Harassing	Identify and describe the words, gestures or writing and address the impact on the work environment
Retaliatory	Identify and describe the words or actions of the "actor" (leader or co-worker) and the adverse impact on an individual in the workplace

Section 3
COVID-19
Interactive Process and Accommodations



Section 3

Subsection A

PRINCIPLES for COVID 19

Legal, Regulatory and Policy Standards



Note: The information provided in this section of this Interactive Process Manual is relevant and up to date as of the publication date in December, 2022. It is subject to change with supplemental information, clarification and supplementation as events unfold. In particular:

1. COVID-19 is a novel coronavirus. Information about the medical and public health ramifications and how long haul COVID-19 will affect return to work and stay at work. We anticipate additional changes and information through the Fall of 2020 and the winter of 2021, which we will be watching closely. This section of the manual will be periodically updated as material and relevant information is provided by public health authorities at CDC, CDHP, and County Health Departments.
2. SB 1159 with a rebuttable presumption for industrial injuries is also novel. As implementation of SB 1159 takes place, claims for industrial injuries are filed, processed, delayed for investigation and either accepted or denied, we will supplement this manual on all aspects of the interactive process for return to work and stay at work ,and overlapping leaves of absence. employees test positive, known exposures and outbreaks occur through the fall and winter months,
3. Many COVID 19 protocols have changed in the past 24 months. Many of the safety protocols have been modified, indoor masking, physical distancing, and some disinfecting protocols have been modified or eliminated (except in outbreak situations). The relevance of COVID-19 in the context of the interactive process and reasonable accommodations remains in two primary areas: (a) employees who have significantly compromised conditions that render them unable to return to some physical worksites; and (b) the impact of “long COVID,” or “post-COVID syndrome” for employees who experience mild, to moderate, to some severe lingering ramifications that limit their ability to perform major life activities. In turn, interactive processes and accommodations are required.

PRINCIPLES for COVID-19

Legal and Regulatory Requirements

Applicability

These guidelines apply to interactive process and reasonable accommodation decisions that must be made during the pandemic in recruiting, hiring, placement and promotional decisions. It also applies to employees in the terms, conditions, privileges and benefits of employment.

These procedures supplement the “regular” reasonable accommodation requirements under the applicable disability accommodation statutes (ADA and FEHA) and appropriate leave of absence statutes (FMLA, CFRA, and the Families First Coronavirus Relief Act – FFCRA).

These requirements also supplement relevant personnel policies and collective bargaining agreements, and should be read in conjunction with those provisions.

Purpose

Reasonable accommodation requirements during a pandemic, in this case the Coronavirus (identified by public health officials as COVID-19 or alternatively SARS-2), are intended to assure that individuals in the following circumstances;

- Individuals with underlying serious health conditions or significantly compromised immune systems that place them at high-risk of serious illness from contracting COVID-19 and who therefore are strongly encouraged by public health professionals and their personal health care providers to avoid exposure at work; and/or
- Individuals who experience lingering functional limitations involving fatigue, brain fog, impacts on cognition and memory, muscle pain or weakness, or related conditions diagnosed as “long COVID,” or “post COVID syndrome may experience continuous or episodic periods of incapacity or inability to perform essential job functions without reasonable modifications. They generally present work restrictions or requests for intermittent leave.

The purpose for conducting an interactive process, evaluating and then implementing all effective and reasonable accommodations, is to assure that these individuals are able to remain actively engaged in work to the largest extent possible; or, if accommodations are not available due to objective undue burden or imminent risk to their health and safety, they are able to remain off work without adverse impact on their employment status. There are several considerations:

- **Stay at work in regular job at physical site:** To facilitate qualified individuals to continue to perform their essential job functions without disruption to their earned income. These accommodations may include modifications to the physical worksite or modified schedule/staggered shifts, to assure physical distance and enhanced protocols for preventing infection.

- **Stay at work through telework in the employee’s regular job:** If onsite work at the physical facility is not feasible, then telework from home or other remote location may be a viable option.
- **Stay at work onsite via reassignment to a vacant, budgeted position:** Although reassignment to a vacant, budgeted position would ordinarily not be considered a reasonable accommodation for temporary work-restrictions or incapacity, due to the uncertainty regarding the anticipated duration of COVID-19 community spread, reassignment should be considered. Temporary modified work outside the employee’s regular job classification, or with alternative duties the employee is qualified to perform, should be considered as part of every interactive process.
- **Stay at work via telework in a temporary reassignment:** If there is a vacant position, for which the employee is qualified (even if it is another job classification), and the employee can perform the essential functions capably via telework, this option should be considered as a temporary assignment during any period of required self-isolation due to COVID-19 exposure.
- **Extended leave for a reasonable period of time:** When individuals cannot perform essential job functions onsite or via telework, in any capacity and is required to self-isolate, extended leave should be considered as a reasonable accommodation.

The Agency as employer must explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a covered disability, or when the need for reasonable accommodation is obvious. Accommodation options will be considered in discussions with the employee.

How do ADA and FEHA apply to COVID-19?

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

FEHA provides significantly broader protections to employees with disabilities than the Federal ADA. In California:

- Disability is defined as a limitation of major life activity;
- Limits a major life activity means achievement of the life activity is difficult;
- Whether achievement of a major life activity is “difficult,” is evaluated in relation to the following:
 - what people in the general population can perform with little or no difficulty;
 - what people in the employee’s peer group can perform with little or not difficulty;
 - what the employee could perform with little or no difficulty but for the limitation

- Working is expressly defined as a major life activity.

The most significant limitation of a major life activity for individuals who are within one or more of the “high-risk” categories for serious health complications due to COVID-19 exposure is working. If the individual is prevented from reporting to work onsite and telework is not available, the FEHA will apply.

In addition to the major life activity of working, a large number of the underlying health conditions identified by the CDC limit major life activities, including without limitation breathing, sensory taste or smell, major organ function of heart, lungs, kidneys, gastric, circulatory, and other systems. The high-risk conditions currently include;

- Significant immune compromise
 - Lung disease (e.g., COPD, asthma)
 - Diabetes
 - Severe heart disease
 - Severe hypertension
 - Chronic liver disease
 - Chronic kidney disease, with dialysis
 - Chronic inflammatory conditions, (e.g., rheumatoid arthritis or Lupus)
 - Severe obesity, defined as a BMI of 40 or above (with or without sleep apnea)
-
- Immune compromises, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications

Additionally, the FEHA specifies that it is an unlawful employment practice for an employer to fail to engage in a timely, good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known disability or medical condition.

What Is Disability Discrimination in the context of COVID-19?

Communication: Failure or refusal to engage in an interactive process with a disabled employee to evaluate and consider potential reasonable accommodations. During the pandemic, due to physical distancing requirements, and other factors, an interactive dialogue may take place through a virtual meeting. This may be a conference via telephone or Skype, an online virtual meeting via Google Meets, ZOOM, GotoMeeting, or any other available platform to assure a mutual and reciprocal dialogue. Both the employer and the employee are required to participate in good faith to explore all viable alternatives that will assure the employee’s rights are upheld, while the employer’s business needs are met, including operational continuity, stable and dependable public services and programs, educational services to all students, protecting public health in facilities and the community, and preventing threats to health and safety for employees, staff, and constituents.

Accommodation: Failure or refusal to make a reasonable accommodation so that an employee with a disability related to COVID-19 (as identified above) may perform the essential functions of the job, provided that the reasonable accommodation does not place an undue hardship on the employer, such as extensive costs or danger to other employees at the work site. Reasonable accommodations do not require an employer to suffer “undue hardship.” A determination of undue hardship includes consideration of the specific tasks of the job, the type of work that is done and what the accommodation would cost.

Harassment Investigation: Failure to address disability harassment incidents by investigating and then taking appropriate corrective action. Disability harassment is broadly defined as hostile, offensive, intimidating, or abusive behaviors based on disability. This may be mocking of disabilities, insults, disparaging remarks, jokes or innuendos which create a hostile, offensive, intimidating or abuse work environment based on disability.

In particular, public health authorities have advised that COVID-19 is highly infectious, and is most easily spread from person to person through respiratory droplets. Respiratory droplets are created by coughing, sneezing, talking, singing, shouting, or other engagement between individuals. Droplets can remain in the air for some length of time, and can be spread through distances. Thus, in addition to physical/social distancing, face coverings (masks, scarves or other coverings of the nose and mouth) are strongly recommended and mandated in many locations in California. The requirement to wear face coverings has become a sensitive and emotional issue, with individuals having very strong feelings for and against wearing face coverings.

NOTE: any mocking, threatening, bullying, abusive conduct, or intimidation by threats of conduct against an individual due to their requesting use of face coverings or request that other with whom they interact at work is inappropriate and potentially unlawful. In particularly, an individual who falls with FEHA protections for disability due to a high-risk underlying condition and who is harassed or bullied, may use the Agency's existing harassment complaint process. A prompt, neutral, and effective investigation must be conducted, and if the complaint or reported harassment is substantiated, the Agency must take immediate and appropriate corrective action.

Retaliation against an individual with a disability or who requests a reasonable accommodation is flatly prohibited by the FEHA. Retaliation may include, but is not limited to the following adverse actions, threats of reprisals, mocking or isolating individuals who engaged in protected activity, and/or threats or other abusive conduct by managers, supervisors or co-workers.

- Adverse actions because the employee made a claim for workers' compensation benefits, asked for a reasonable accommodation, requested or took a leave of absence for illness or disability related to COVID-19.
- Adverse actions for an employee raising a complaint or report about safety or health concerns in the workplace, ranging from lack of PPEs, to concerns about consistent enforcement of protocols to assure physical distancing, face coverings, infection control and regular sanitizing of surfaces and high touch areas;
- Adverse actions for an employee raising a complaint or report about discrimination or harassment based on any protected characteristic – national origin, age, or disability;
- Actions by co-workers, such as mocking, gossiping, ridicule, failing or refusing to provide job assistance, lack of essential communications, or abusive conduct directed at an individual who has exercised any right regarding COVID-19.

Forms of Discrimination Relevant to COVID-19

An individual with a disability, who brings a lawsuit, sets forth claims for damages in a “cause of action.” These are separate claims for relief and any one can support an award of damages or other remedies.

Cause of Action	Explanation and Examples
Exclusion due to actual COVID-19 illness or positive test	<p>Refusal to hire, train, offer to promote, extend benefits or provide equal terms and conditions of employment to an individual because of any of the following: symptoms of COVID-19, a positive test for COVID-19 infection, <u>or a history of having had</u> and recovered from COVID-19.</p> <p>Regarding an individual with no actual disability or high-risk condition as disabled. Example: excluding an individual who is moderately overweight but not obese, or who has moderate, but not severe arthritis as having a high-risk condition, based on subjective assumptions with no medical verification.</p>
Disparate Treatment Lack of consistent policy enforcement	<p>Treating an employee or applicant differently because of a high-risk factor.</p> <p>Example: adverse action toward, or singling out an individual with a high-risk condition identified by the CDC, who must be reasonably accommodated with enhanced safety measures at the physical worksite, such as mandatory face-masks, modified or staggered schedules, more frequent sanitizing of surfaces and high touch areas.</p> <p>Example: imposing unwarranted health monitoring for individuals with high-risk conditions, or conditions on RTW that are not required of other employees</p>
Process Failure	<p>Failure or refusal to engage in an interactive process (discussion) with a disabled employee to evaluate and consider potential reasonable accommodations or modified duty that may allow the employee to perform the essential functions of the job or return to work following a disability leave.</p>
Adverse Impact	<p>A neutral policy on its face, which falls more harshly on a disabled employee or applicant for employment. The effect is to exclude an individual without reference to whether s/he can perform the essential functions of the job.</p> <p>Example: a pre- or post-employment test that imposes conditions on individuals in high-risk categories that are not imposed on others, and which are neither objectively job related or consistent with business necessity.</p>
Failure to provide a reasonable accommodation	<p>Failure or refusal to make a reasonable accommodation so that a disabled employee may perform the essential functions of the job, either onsite or via telework, provided that the reasonable accommodation. Examples: failure to offer telework when it can be performed capably; failure to consider or to implement mandatory face coverings in worksites where individuals at high-risk are interacting for 15+ minutes.</p>
Harassing or retaliatory conduct	<p>Mocking, insults, disparaging remarks, offensive jokes about age or certain health conditions. inflammatory communications (verbal or email) which create a hostile, offensive, intimidating or abuse work environment based on disability. Adverse actions or reprisals, isolating, gossip or threats of reprisal.</p>
Retaliation	<p>Leaders or co-workers retaliate against a person because of protected activity. Examples: adverse assignments, mocking, threats or other reprisals because the employee made a claim for workers’ compensation benefits, asked for a reasonable accommodation or took a leave of absence for illness or disability.</p>

How do Health Screenings for COVID-19 infection Controls Affect Disability Discrimination?

The ADA and FEHA permit your entity to prohibit an employee from physical presence in the workplace after refusal to answer questions about symptoms associated with COVID-19, or has been tested for COVID-19.

Acceptable testing procedures

- Body temperature tests;
- Sending employees with COVID-19 symptoms home;
- Asking employees who report feeling sick about symptoms of COVID-19;
- Questions about travel to at-risk areas
- Pre-employment testing? (yes, post offer)

Don't require only certain employees to have regular temperature checks. Example: don't single out those with underlying conditions who do come to physical worksite. *Don't test only those over 65.* Employers may ask an individual employee about symptoms or be tested only if there is a reasonable belief, based on objective evidence, that the employee has COVID-19. Example: an employee with a persistent, hacking cough, manager can ask whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19. These types of questions are permissible because of direct threat of COVID-19 infection. The inquiry must be based on objective, first-hand observation and not "rumor" or subjective assumptions about at-risk workers.

If you do temperature testing pre-shift, at the worksite or by home self-monitoring may also bar employees who refuse temperature checks or do not comply with apps for home testing and reporting before each shift. To help with cooperation: ask the reasons for the employee's refusal. You may be able to reassure employee that these steps are for everyone's safety.

Assure employees the results will be confidential. Assure employees that IF they believe they need an accommodation for certain underlying symptoms related to a disability, they request accommodation and entity for accommodation. **Always conduct a good faith interactive process, to comply with CA FEHA, and avoid retaliation claim.**

Health screening protocols

- Ask the same questions of every employee – don't single out only the high-risk or "vulnerable" categories.
- Employees should consent in writing to testing – may not refuse if it is a consistent condition of entering certain worksites.
- Limit the scope of screening to COVID-19 – temperature, symptoms, known exposures, and/or self or family high-risk categories.
- Retain all testing results as confidential medical records.
- Consider alternative testing methods if necessary for reasonable accommodation.
- Handle employee questions, concerns, or reluctance to participate properly, starting with asking that concerns the employee has.

- Be aware that wage and hour laws require paying non-exempt employees for testing and monitoring time, pre-shift, and during shift. This may include standing in line to have temperatures taken, so consider alternatives to reduce lines – for wage purposes and also to assure physical distancing. Pay employees for the day to go home, if they have a temperature.

Affirmative Defenses for Employers in the Context of COVID-19

Type of Defense	Explanation and Examples
Undue Hardship	The Agency may show significant difficulty or expense . Focus on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Consider the fact that these are temporary, but of indefinite duration during COVID-19 pandemic, which ebbs and flows with new variants . Focus on substantial interruption of operations, or business continuity, and less on cost. Balance the extremely serious consequences of exposure. May be harder to establish undue hardship than in the past for similar accommodations; particularly telework.
Business Necessity	Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the Agency must prove that there is an overriding legitimate business purpose that is necessary for safe and efficient operation of the business and the policy or decision effectively fulfills that business purpose.
<p>Health & Safety of the Individual with a Disability</p> <p>FEHA: a substantial and imminent threat to safety and health</p>	<p>This is a major defense supporting health screening, exclusion of positive COVID cases, and accommodations for some high-risk individuals or those with “post-COVID syndrome” when there is an imminent threat to their health. A discriminatory decision may be legally excused if the Agency proves that the worker’s disability prevents him or her from performing essential job duties over a reasonable length of time without facing identifiable, substantial and immediate danger to his or her own health and safety and that no reasonable accommodation exists that will remove the danger.</p> <p>Note: speculative concerns about future injury are not legally sufficient. The determination must be made on objective data rather than “stereotypes, assumptions, or generalized fears about risks that might occur if the disabled worker is placed in a certain job.”</p>
Health & Safety of Others	The same considerations apply here to support removing from the worksite any individual who has COVID-19 symptoms, or known exposure to someone who tested positive, or receives a positive COVID-19 test themselves. They present an imminent and substantial threat to the safety and health of others.
Inability to Perform	The Agency may rebut a <i>prima facie</i> showing of discrimination with evidence that no reasonable accommodation exists or can be devised that would enable the employee to perform essential functions of the position. Factors to consider are; the nature of the disability and the type of time commitment, if any, routinely required of all employees for the job in question, and normal workforce turnover. NOTE: The Agency’s belief that the employee will be unable to perform at an unspecified future date or mere speculation about the worker’s inability to perform will not justify denial of employment opportunity or the failure to conduct an interactive process.

**Otherwise
Required by Law**

“Notwithstanding a showing of discrimination, such an employment practices are lawful where required by State or Federal law or a court with proper jurisdiction.

Who is Protected from Disability Discrimination in the Context of COVID-19?

Under the California FEHA, public agency employers can't discriminate against, harass, or retaliate against an employee because of any of these actions:

- The person has an actual physical disability or chronic medical condition, which now may include “post-COVID syndrome” or other lingering ramifications from COVID infection; or
- The person has a mental health disability, including chronic or acute mood disorder, which are becoming more frequent with “post-COVID syndrome,” or simply the aftermath of great loss of financial disruption in the employee’s life, due to the pandemic; or
- The person has a current or past cancer-related condition, for which treatment was initiated and was impacted in some way by COVID-19 exposures or impact of delayed treatment due to the pandemic or
- The person has a record of having had, and recovered from an actual physical, medical, or mental health disability, including COVID-19, or “post-COVID syndrome;” or
- The person is incorrectly regarded as having a disability, but has no actual limitation of major life activity or record of past disability;
- The employee is exposed on the job and becomes infected in the course and scope of employment and has an accepted industrial injury claim; or
- The employee takes a leave of absence for an illness, injury, disability, including continuous block of leave or intermittent leave for treatment and recovery from “post-COVID syndrome;” or
- People of all ages with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma;
 - People who have serious heart conditions;
 - People with severe obesity (body mass index [BMI] of 40 or higher);
 - People with diabetes;
 - People with chronic kidney disease undergoing dialysis;
 - People with liver disease;
 - People with inflammatory conditions such as Lupus or rheumatoid arthritis
 - People who are immunocompromised from underlying disease, cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications;

When Must the Agency Engage with the Employee for a COVID-19 Accommodation?

- An employee who reports one or more symptoms of COVID-19 illness or positive test;
- An employee who is experiencing lingering symptoms from “post-COVID syndrome,” ranging from extreme fatigue, to “brain fog,” to mental health disorders or organ damage;
- An employee returning from a medical leave whose doctor provides work restrictions;
- To comply with OSHA regulations, CDC guidance, or public health orders;
- An employee who requests modifications to the physical worksite or onsite schedule;
- An employee who presents restrictions related to infection control measures due to a high risk of serious illness from exposures to COVID-19 variants;
- An employee who takes medication or receives treatment for “post-COVID syndrome,” that causes a side effect;
- An employee with anxiety, panic attacks, or other mental health concerns who presents work restrictions due to the after-effects of the pandemic or “post-COVID syndrome;”
- An employee who claims to have contracted COVID-19 at the worksite.
- A job applicant in the onboarding process who tests positive has COVID-19 symptoms,
- An employee who requests telework due to high-risk conditions that merit self-isolation from the workplace as recommended by a health care provider;
- An employee who cannot work onsite or in a telework capacity who requests an extended leave of absence as a reasonable accommodation.

Why Should Public Agency Leaders Care about COVID-19 Accommodations?

- Disability discrimination and retaliation lawsuits lead all claims and the statute of limitations is now three years to file a claim with the CA. DFEH.
- Failure to engage in a timely, good faith, individualized interactive process is itself a violation of the FEHA, even if no reasonable accommodation could be made.
- Defending against lawsuits costs California employers millions of dollars each year in lost management time, attorneys’ fees, and large payments to disabled workers.
- The risks come from not enforcing workplace policies carefully and not having consistent processes for making return-to-work and stay at work decisions carefully.
- Concerns about COVID-19 exposure are especially difficult and require careful documentation.

What is a Protected Disability in the Context of COVID-19?

1. A physical, mental, cognitive or medical condition that actually limits the performance of one or more of the following major life activities:

- Walking
- Standing
- Sitting
- Breathing
- Speaking
- Breathing
- Seeing
- Hearing
- Sense of taste or smell
- Concentrating

- Working
- Eating and digesting food
- Caring for oneself
- Communicating
- Concentrating
- Interacting with others
- Thinking
- Sleeping
- Staying awake
- Socializing

2. A record of a disability or record of treatment for that limitation

- When in the past, although not now, the employee had COVID-19 infection;
- An individual who was once mistakenly thought to have COVID-19;
- A person who was treated for a high-risk condition and recovered to the point that it is well controlled (such as heart disease, hypertension, chronic fatigue)
- A record of treatment for cancer, kidney disease, or other chronic illnesses.

3. Being “regarded as” disabled when the employee is not actually limited in performing major life activities.

Examples:

- Considering all individuals over the age of 65 as automatically at higher risk, without verification from a medical professional.
- Treating all individuals who are, in fact, at high-risk as unable to return in any capacity to the physical worksite.
- Treating employees who previously tested positive for COVID-19 as infectious for longer periods than their health care providers verify
- Treating any work restrictions calling for face coverings, enhanced physical distancing, or other measures as automatically disqualifying for return to work in the physical facilities.

What is an “Essential Job Function?”

To be protected under the laws, a person must be both disabled and be "otherwise qualified" to do the job. He or she is "otherwise qualified" if able to meet all of the essential requirements of the job with or without reasonable accommodation. In essence, to avoid unlawful discrimination, a manager/supervisor must know what the "essential job functions" are, must be able to ask proper pre-employment interview questions, must be able to enforce work rules, and enforce performance standards in a non-discriminatory way. The “essential functions” of a particular job are those “fundamental job duties of the employment position that the individual with a disability holds or desires.

Essential functions do not include the marginal functions of the position.

Evidence of whether a particular function is “essential”

- The employer’s judgment as to which functions are essential;
 - Written, **current** job descriptions that reflect the jobs as performed today;
 - References to the tasks being essential in recent performance evaluations;
 - The amount of time spent on the job performing the function;
 - The consequence of not requiring the incumbent to perform the function;
 - The work experiences of past incumbents in the job; and current workers’ experience
 - The terms of a collective bargaining agreement, if any.
-
- **Effective job descriptions that spell out the substantive tasks of the position are critical when evaluating telework as a reasonable accommodation.**

Why is Consistent Process Key to Defending These Decisions in the Context of COVID-19?

Employers must **enact** and then consistently **enforce** policies and procedures that are both legally compliant and fair. The employer’s **processes must have integrity**. This means that the process must be trustworthy, consistently applied and capable of being replicated on a case by case basis. For processes to have integrity, employees and managers alike must be able to predict consistent (not necessarily identical) outcomes. In the context of COVID-19, it is especially important to assure that policies and procedures are crafted to be consistently enforceable, and that care is taken for all onsite protocols to minimize infection. This includes frequent sanitizing, physical distancing, strongly encouraging face coverings for environments with high-risk individuals or conditions.

When Can Managers’ Words or Actions Lead to Lawsuits in the Context of COVID-19?

Sometimes managers and front-line supervisors say things that can hurt the Agency in court.

- If you feel that employees who work from home are unreliable or “goofing off,” and therefore are resistant to any telework arrangement.
- If you favor your “go to” employees over those who are not, in your view, the best performers, you may tend to overlook triggers for an interactive process.
- If you believe that individuals with underlying high-risk conditions, or those over 65 should consider long term leave or retirement, rather than staying at work with accommodations, you may discriminate by treating them differently from other employees.

What is the “Interactive Process” for Making Accommodation Decisions during Covid-19 Pandemic?

California law requires a **timely, good faith, “interactive process”** to determine whether the employer can offer and implement **a reasonable accommodation** for a disabled employee or applicant for employment. This is an essential face-to-face dialogue with a disabled applicant or employee to fully explore adjustments or accommodations that may remove barriers to performance and/or to privileges and benefits of employment.

Timeliness: respond **immediately** to a request for reasonable accommodation for a COVID-19 high-risk individual, in light of the extreme risk for being at the physical site., . Then, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of FEHA, and a claim of significant emotional distress from the delay and potential requirement to return to an environment the employee perceives as unsafe; particularly if the request is supported right away with medical documentation..

Good Faith: The Agency and the affected employee must communicate directly with each other to determine essential information; neither party can delay or interfere with the process. To demonstrate good faith, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation. The good faith interactive process is a “*reciprocal obligation.*”

The Process IS:

Dialogue
Interactive
Individualized
Receptive
Face-to-face
Meet and Confer
Constructive
Objective
Fact-based
Adaptable
Instructive
Analysis
Careful
Continuous
Consistent
Trustworthy
Required Result

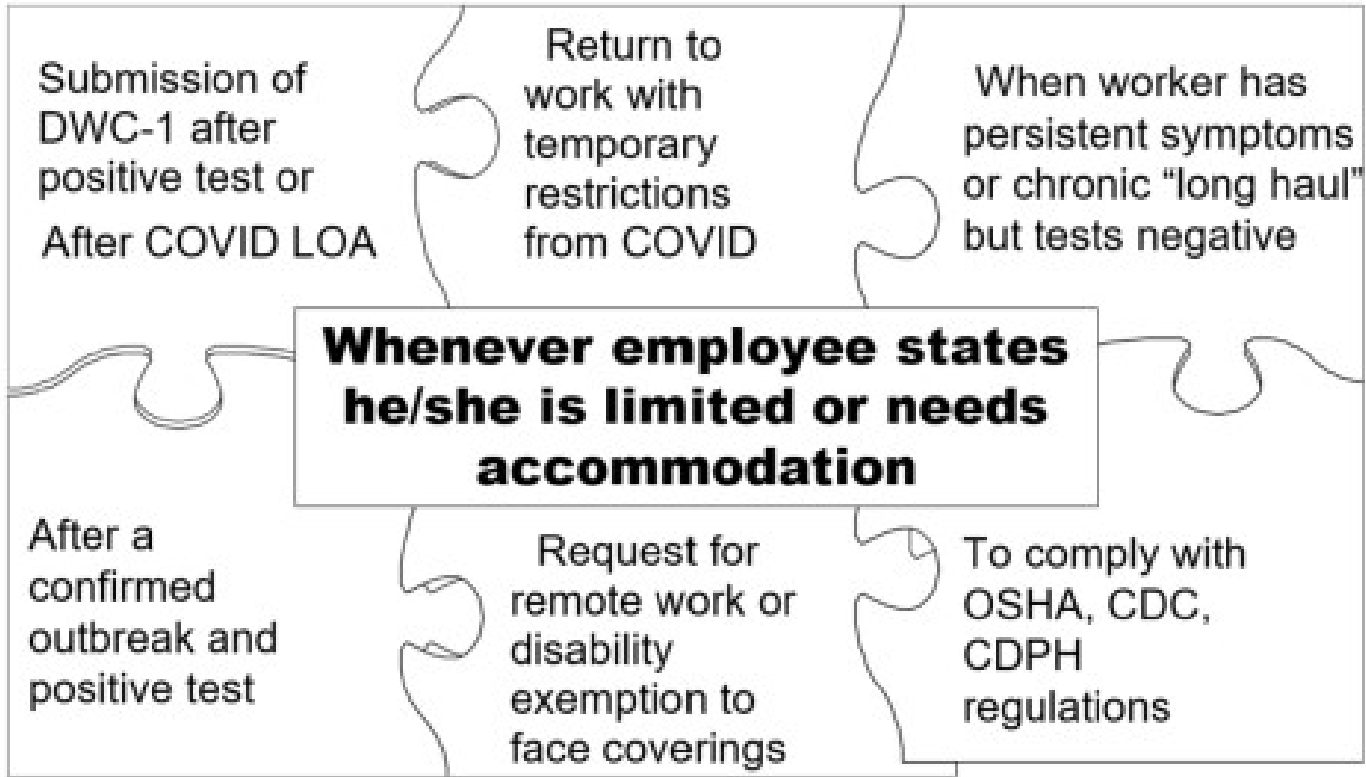
The Process is NOT:

Monologue
Reactive
Generalized
Deceptive
In-your-face
Defeat and Deter
Confrontational
Subjective
Conjecture based
Inflexible
Destructive
Paralysis
Careless
Impetuous
Resistant
Blameworthy
Desired Result

Individualized Decision: Every return-to-work decision is an individualized decision. Avoid generalizations, subjective assumptions, and lumping all individuals into perceived categories based on risk.

- We don't allow persons over 65 to return to work until the pandemic is “over.”
- Persons with chronic high-risk conditions must take medical leave.
- We place a maximum time limit on temporary light duty or transitional assignments.
- We have no telework assignments in certain jobs or classifications.
- Maximum medical leave of 6 months (or any other inflexible time frame).
- Employees on modified duty are never eligible to work overtime hours.
- No extensions of leave beyond a certain time (or after exhausting FMLA leave).

What Triggers the Duty to Engage in the Interactive Process?



Why is Communication Critical for an Effective Dialogue with COVID-19?

Communication is the heart of the interactive process. Your organization should take a proactive approach in considering all feasible adjustments, modifications or accommodations, including consulting appropriate resources for assistance. Continuous, constructive communication is particularly important in the context of COVID-19, because the circumstances can change materially from month to month. Closely monitor your County health department and CDC guidelines, to determine how the presence (or absence) of community spread may affect your organization.

- Start with modifications to the manner of performing essential functions in employee's current position.
- Address necessary protocols for response to foreseeable medical incidents.
- Consider appropriate adjustments to environmental conditions.
- Implement protective measures for the employee, other staff or visitors.
- If no accommodation is effective in the employee's current position, or would result in undue hardship, evaluate reassignment to vacant position that minimizes or mitigates the risk.
- **Last resort: leave to recover or self-isolate within finite and reasonable period of time**

Considering accommodations for "generalized fear of exposure"

- Generally, you are not required to "accommodate" employee fears when there is no basis (e.g., no underlying health risk for self or family, no reasonably expressed concern about workplace safety); and
- Accommodations may be required if disability present (may be physical, medical, pregnancy-related, or mental health/mood disorder); and
- Communicate with bargaining unit representatives and be mindful of union-related complaint (concerted activity) v. individual fear; and
- Ask about reasons or basis for fear and refusal to return; employer is not required to permit employee to remain off work if based on vague and unexplained fears.
- Recognize "whistleblower" safety complaint vs. general fear. When employees make a report or complaint that protocols are not being consistently followed at the site, or there is either insufficient or ineffective PPEs, or any other genuine concern about safety and potential exposure, the Agency must both protect the employee from retaliation and conduct an investigation or inquiry to determine whether the safety complaint is well-founded or mistaken. Even if mistaken,

individuals who make truthful, good faith reports or complaints must be protected from all forms of retaliation or reprisal.

Factors to consider in documenting a defensible dialogue and decision

- Conduct an individualized analysis for the employee's limitations.
- Don't assume all people with same disability (high risk underlying health condition) are similarly limited for complications for COVID-19 exposure.
- Don't speculate about risks; stick to verified information.
- Identify and implement necessary protocols for physical worksite: distancing, PPE, regular sanitizing of surfaces and temperature taking.
- Appropriately address any concerns or "fears" for employee and staff.
- Carefully work with leaders on "do's and don'ts" for communications.

What is a Reasonable Accommodation?

- Additional or enhanced protective gowns.
- PPE: Masks, gloves, or other gear beyond those generally provided.
- Erecting a barrier that provides separation from co-workers.
- Increasing space between employee and others in meetings.
- Relaxation of essential travel requirements for employees at high risk.
- Elimination or substitution of specific "marginal" functions
- Temporary modified work schedules onsite.
- Requiring co-workers in department to wear face coverings.
- Daily temperature checks for all co-workers with unavoidable proximity.
- Adjusting times certain essential tasks are done – for staggered shifts.
- Moving employee's workstation from open cubicle to private office on a temporary basis.
- Reassignment to a vacant position – temporary or permanent
- Extended leave as a reasonable accommodation

Reassignment to a vacant, budgeted position is often an effective accommodation; but only when the individual can no longer perform the essential functions of his or her regular position and telework is not available. The FEHA regulations mandate: *"As a reasonable accommodation, employer shall ascertain through an interactive process suitable alternate, vacant positions and offer an employee such a position for which the employee is qualified under the following circumstances:*

1. *Employee can no longer perform essential job functions, even with accommodation*
2. *Accommodation of the essential functions of own job creates an undue hardship*
3. *Agreement with employee that reassignment is preferable to accommodation in U&C*

If no funded, vacant comparable positions for which the employee is qualified with or without reasonable accommodation, employer may assign to a lower graded or lower paid position. The employer is **not required to create a new position** to accommodate an individual with a disability to a greater extent than employer would offer a new position to any employee,

regardless of disability. BUT “***The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees.*** However, ordinarily an employer is not required to accommodate an employee by ignoring a bona fide seniority system absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer reserves the right to modify its seniority system or the established practice is to allow variations to its seniority system

Considerations for telework as a reasonable accommodation

- Employers must not single out employees either to telework or to continue reporting to the workplace on the basis of race, sex, national origin, religion, sexual preference, disability or veteran’s status.
- Restrictions that were not reasonably accommodated in the past (e.g., driving restrictions) should be re-visited, and undue hardship defenses will be more difficult to establish for individuals in vulnerable populations at high risk of serious COVID-19 complications from exposure or infection on site.
- Telework accommodations with COVID-19 are different because the restriction is from exposure onsite- not necessarily physical performance of essential functions.

What should the telework interactive process address

- Medical verification of limitation on working at physical worksites.
- Obtain concrete restrictions on how much onsite exposure would be acceptable and consider options for staggered shifts, other physical distancing modifications to office settings.
- Consider modified schedule, with medical verification, so that employee works part of the week remotely and reports to physical worksite only periodically and under very concrete defined terms for modification of facilities, co-worker face coverings, additional sanitizing, etc.
- Consider telework as an interim arrangement with a very specific accommodation plan that sets a time limit and opportunity for ongoing evaluation of effectiveness for productivity and performance

Craft a written accommodation plan that is clear, specific, meaningful and measurable

- Specify performance expectations, standards of conduct when interacting with peers or stakeholders online, requirements for following operating procedures.
- Timekeeping is critical for both wage and hour and managing work outflow. Face to face communications via Zoom, Skype or video calls can keep employees on track. Maintain flexibility due to the stressful conditions.
- Configuration of at-home workstation for both security and safety. Follow ergonomic recommendations.

- Encourage a private, dedicated space for at-home Specific restrictions for job tasks and environment: modifications for partial onsite or prohibition of any onsite work. Address anticipated time frame to re-address effectiveness, scope of accommodation, and any modifications.
- Any modifications to work station at home or in the physical facility for periodic on-site work.
- Expectations for operational security, continuity of key operations, records management for CPRA, backups, performance expectations, and terms for extending, suspending, or ending telework accommodation.
- Requirements for availability at all times during working hours, or will remote meetings and appointments be scheduled ahead of time. Remote meetings over phone or on camera

WHAT is an Undue Hardship?

Undue hardship must be **significant expense or difficulty**. This is an individualized analysis, in which an employer must evaluate on a case-by-case basis whether a particular accommodation would cause undue hardship, either temporarily or on a long-term basis. Factors that are considered include, but are not limited to excessive cost.

The highest level of undue hardship is when a fact-based evaluation concludes that there would be a significant and negative impact on program services to students (school districts) or clients (social services and other departments in public entities), that would fundamentally alter the operations of the school site or district office, or would place the District in a position of violating legal or regulatory compliance obligations. If there is more than one effective accommodation, the employer can choose the one that provides the least hardship.

<u>Undue Hardship Evaluation IS</u>	<u>Undue Hardship Evaluation is NOT</u>
Individualized	Generalized
Fact-based	Conjecture-based
Comprehensive	Apprehensive
Determination	Speculation
Confirmed job functions	Unconfirmed task assumptions
Fundamental disruption	Incremental dysfunction
Consistent	Resistant

Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operation of the organization.

The Agency must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. If an employer denies accommodation because it would be an “undue hardship,” it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

1. the nature and cost of the accommodation needed;
2. the overall financial resources of the facilities involved in providing the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations on the operation of the facility
3. the overall financial resources of the Agency, the size of the business with respect to the number of employees and the number, type and locations of its facilities.

What is an Imminent Safety Threat with COVID-19?

A decision to deny accommodation may be legally excused if the Agency proves that the disability prevents the individual from performing essential job functions over a reasonable length of time without facing identifiable, substantial and immediate danger to his or her own health and safety, or the safety of others, and that no reasonable accommodation exists that would remove the imminent risk of harm. **Caveat:** speculative concerns about future injury are not legally sufficient to invoke this defense to deny a reasonable accommodation. The determination must be made on objective data rather than “stereotypes, assumptions, or generalized fears about risks that might occur if the disabled worker is placed in a certain job.”

- **Job Must be Safety Sensitive:** Defense is available only if, after engaging in an interactive process, there is no reasonable accommodation that would allow the employee to perform essential functions in a manner that would not endanger his/her health or safety because the job imposes an imminent and substantial degree of risk.

NOTE: In the context of COVID-19, any position is “safety sensitive” within the objective of this provision if the tasks must be performed in an environment for which, despite best efforts by the employer and implementation of all appropriate safety protocols, the risk to health cannot be entirely removed or successfully mitigated.

Example: if, despite safety protocols in place, the nature of the job tasks, the location where the tasks must be performed, the proximity of other individuals necessary for the work to be accomplished, or other environmental factors make render physical distancing impossible to maintain – such as a classroom teacher, a first responder or other person who must render immediate medical aide in event of an emergency -- the position is safety sensitive.

Example: a public service employee who must closely interact with the public or other agency personnel to fulfill the essential job functions, in which neither physical distancing nor frequent sanitizing of high touch surfaces can be consistently maintained while still fulfilling the essential job functions, the environment renders the position safety sensitive.

Example: an employee whose position is responsible for undertaking the necessary infection control, sanitizing of shared surfaces and high touch areas, disposal of used PPE in order to enforce safety protocols, and where consistent use of face coverings and protective equipment cannot mitigate all risk, the position will be safety sensitive in the context of COVID-19.

- **Risk Must be Present and Not Future:** No defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

- **Risk Must be Medically Supported:** *“The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”*
 - **Job-related** means tailored to assess the employee’s ability to carry out the essential functions of the job or to determine whether the employee poses a danger to himself or others
 - **Business necessity** regarding medical or psychological examinations means that the need for the disability inquiry or medical examination is vital to the business operations

<u>Direct Threat/ Imminent Risk IS</u>	<u>Direct Threat/Imminent Risk is NOT</u>
Objective	Subjective
Risk is current (“what is”)	Risk is future (“what might be”)
Educated	Exaggerated

What is Retaliation in the Context of COVID-19?

Protection from retaliation is quite broad. Every federal employment discrimination statute defines retaliation as a separate form of wrongdoing, as does the California FEHA. Individuals who make reports or complaints about any kind of discrimination or harassment in their workplace, or who participate truthfully and in good faith in the investigation of a co-worker’s complaint, are protected from reprisals or punishment for their “protected activity.”

In addition, whistleblowers who report suspected illegal or unethical practices are often protected activity includes requesting or taking a job-protected leave of absence, requesting a reasonable accommodation for a disability can’t be penalized for doing so. The California FEHA specifically provides that employees who request or receive a reasonable accommodation (through an interactive process) are protected from all forms of harassment **whether or not the accommodation is granted.**

If the employee has a reasonable, good faith belief that the employer is doing or has done something “wrong” (legal, ethical, policy violation or contractual breach), or engages in other protected activity – such as requesting or taking a leave of absence or requesting a reasonable accommodation -- and the employee’s response to the wrong doing is reasonable, the law will protect that employee from retaliation. This is so even if the employee’s claims are ultimately not substantiated. Truthfully raising an issue, making a complaint, or participating in any proceeding (internal or external) is absolutely protected. Reason: an employee’s concern about whether he can “prove it” may chill the exercise of rights and violates public policy. A **good faith** complaint is sufficient to protect against retaliation. False complaints may still be dealt with appropriately. But be careful when determining whether a complaint is knowingly false or mistaken but in good faith because if later sued, a neutral and well documented investigation will be critical.

- Adverse performance review - lower than the employee earned (particularly with telework.
- Deliberate withholding of key information necessary for employee to telework successfully
- Changes in shift or work responsibilities to punish, and with no objective business purpose.
- Bullying, abusive commentary, or bullying by supervisors or managers.
- Ostracism by supervisors.
- Ostracism by co-workers that is ignored, tolerated, or incited by supervisors.
- Bullying or abusive conduct by co-workers.
- Taunts, threats or other coercive activities designed to punish or isolate.
- Gossip, ridicule or bullying by supervisor or co-workers – particularly about face masks
- Inconsistent enforcement of terms and conditions of employment.
- Denial of training or other professional growth opportunities during.
- Allowing harassment via e-mail or social media to go unaddressed.
- Allowing ridicule or bullying by members of the public without intervention or action.
- Refusal to investigate complaints or reports of unsafe practices at worksite
- Refusal to consistently enforce safety protocols – particularly for high-risk individuals

When Must the Agency Conduct a Further, Continuous Interactive Process in the Context of COVID-19?

Even after an employer defines and implements an accommodation for a disabled individual, it must ensure a continuous flow of information on the effectiveness of the assignment. Case law clearly establishes that **“the duty to provide an accommodation is also a continuing duty that is “not exhausted by one effort.”**

If you try one form of accommodation and it works for a while but then circumstances change, the Agency must consider alternative means of accommodation before taking any action. This rule encourages employers to actively seek to find accommodations that "really work," and avoids an incentive for employees to "request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation would not be effective.

Examples of changed circumstances are:

1. The accommodation is no longer effective in helping the employee to perform job functions, or due to changes in the employee's lingering limitations due to "post-COVID syndrome," the functional limitations and/or work restrictions change.
2. The employee's needs change due to spikes in community spread of COVID-19 infections.
3. The employee's needs change due to "post-COVID syndrome, with episodic period of incapacity or flare ups – fatigue, "brain fog," trouble concentrating, physical weakness or lethargy, pain, fluctuations in mood that rise to the level of mental health mood disorders.
4. Changes in the type of essential job duties or how they are performed. **Example:** due to changes in the manner in which services or programs are performed, resulting from material changes in the community spread or other public health directives, the mix of essential and non-essential job functions change to the point that the accommodation is not effective.
5. Changes in the employee's restrictions render the original accommodation obsolete or inoperative, such as new information from a medical provider about functional limitations or observations of the employee's physical/mental limitations in performing major life activities.
6. Financial condition changes and employer can't pay the **ongoing cost** of an accommodation.
7. Financial condition changes and employer must materially modify workforce requirements, making modified schedules or staggered shifts inoperative.
8. New hazards are introduced into the worksite, making risk factors materially different and more difficult to reasonably accommodate.

Section 3 - Subsection B
PROCEDURES for COVID 19
Conducting & Documenting Interactive Process

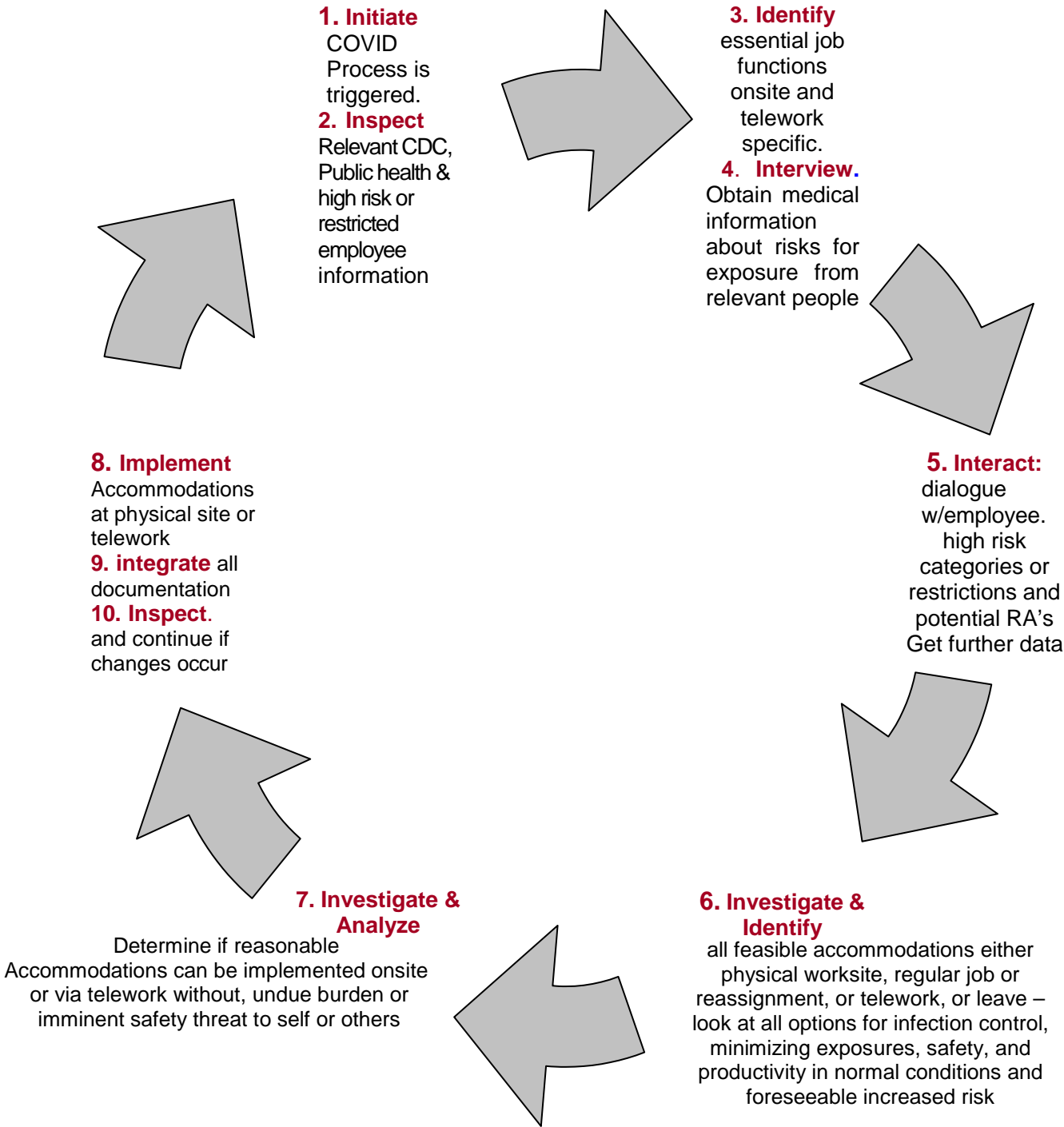
COVID-19 Related High Risk Conditions
and *NEW*: Industrial Injury



PROCEDURES for COVID-19

Conducting and Documenting the Interactive Process Applies to “Post-COVID Syndrome” and Extreme High Risk

The Interactive Process is a Continuous Cycle and Each Step is Well Documented



Summary and Checklist of the Ten Step Interactive Process

Step	Activity to Further Interactive Process	Specific Considerations
1.	<p>Initiation (plus documentation)</p> <p>Determine when there is a duty to engage in the interactive process. Open file and begin.</p>	<p>Has the duty been triggered by:</p> <ul style="list-style-type: none"> • Active COVID-19 symptoms or exposure? • Quarantine or self -isolation order? • return from leave for COVID-19 recovery? • employee's request not to return to physical site? • Employee request for telework? • Changed circumstances? • other, as you identify?
2.	<p>Inspection of internal records for Information (plus documentation)</p> <p>Gather and review documents initially & throughout the process</p>	<p>Are there relevant items in:</p> <ul style="list-style-type: none"> • employee's personnel file? • medical verifications for high-risk conditions? • prior requests for accommodation or leaves? • CDC or public health orders increasing risks? • Unforeseen changes in onsite exposures?
3.	<p>Identification (plus documentation)</p> <p>Identify "Essential Job Functions"</p>	<p>Are job functions discernible from:</p> <ul style="list-style-type: none"> • current job description? • Telework job description during shutdown? • Successful/ unsuccessful telework in shutdown? • Tasks with particularly high COVID exposures? • Layoff analysis or foreseeable budget cuts? • Impact on mix of work - increased COVID LOAs? • Inability to consistently enforce physical distance? • Inability to enforce other safety protocols?
4.	<p>Interview for Information (plus documentation)</p> <p>Interview relevant individuals</p>	<p>Obtain relevant information from:</p> <ul style="list-style-type: none"> • medical provider(s) – as necessary • supervisor and/or manager • other job incumbents
4 A Consider Direct Threat to Health or safety as a qualification factor	<p>Some courts allow consideration of direct threat to health and safety as a qualification factor – a substantial and imminent threat to own or others' health and safety that cannot be reduced or eliminated.</p> <p>** Separate from Step 7B CA FEHA "imminent safety threat" defense under CA FEHA which is addressed as STEP 7B</p>	<ul style="list-style-type: none"> • Employee has COVID symptoms • Health screenings reflect potential infection • Employee has known exposure to COVID illness • Employee has fever from temperature screening • Treating doctor agrees exposure too risky • Reasonable current medical data • Nature and severity of the harm • Is the risk current not future? • Is the risk of harm objective? • Has treating physician agreed? • Duration of the risk? • Can risk be reduced with protective measures?
5.	<p>Interaction + information (plus documentation)</p> <p>Dialogue with employee via face to face or virtual interaction</p> <p>Obtain information about further data, including medical or other information in possession of, or identified by, the employee</p>	<p>Focus: what essential job tasks can s/he perform, with or without help?</p> <ul style="list-style-type: none"> • At the worksite/ • Via telework? • In a reassignment position? • Physical distancing? • Task modifications? • Schedule modifications? • Telework? Suggestions or ideas?

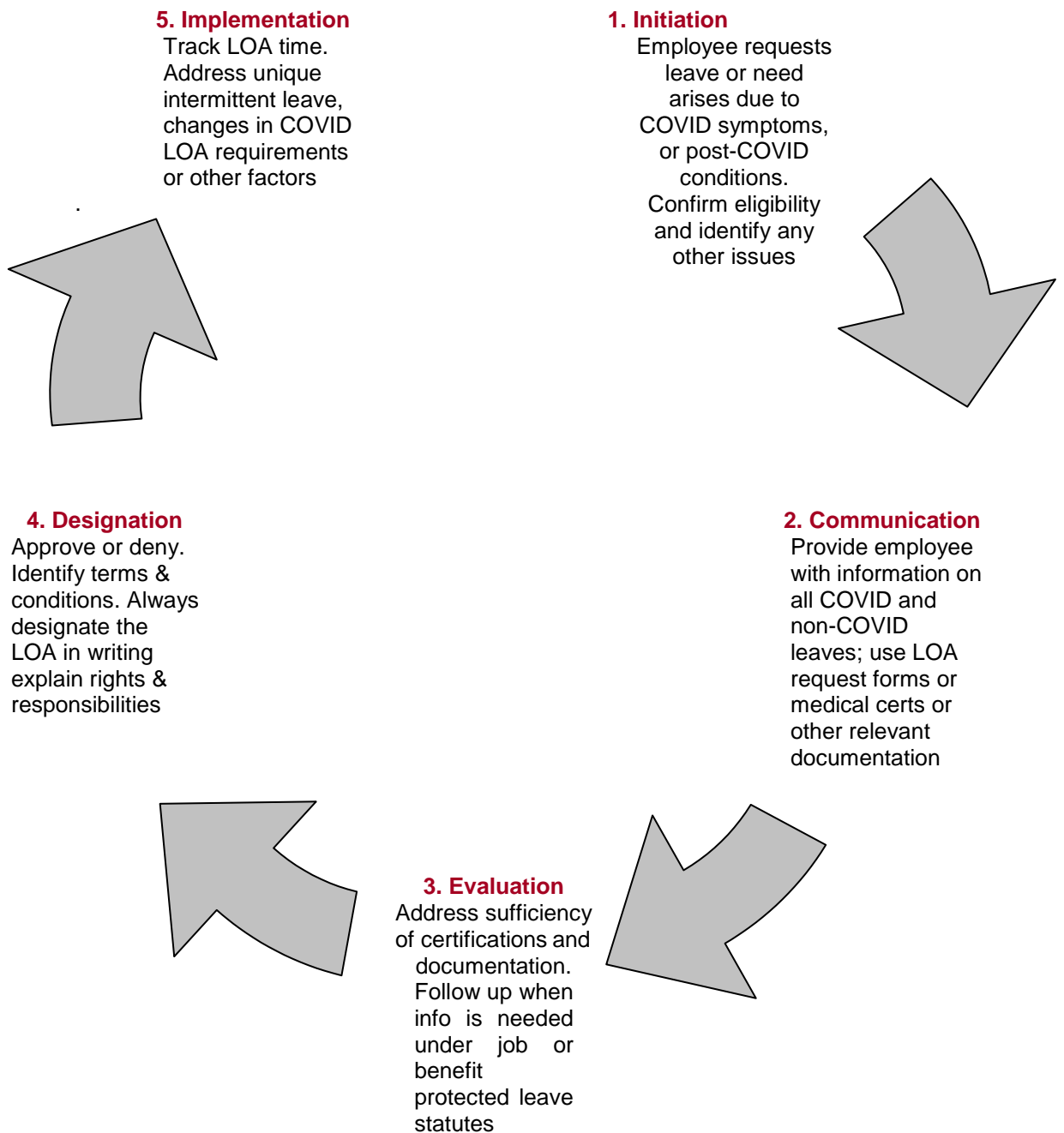
7.	<p>Investigation and in-depth analysis (plus documentation)</p> <p>Analyze the “reasonableness” of potential accommodations</p>	<p><u>Now consider burden or disruption:</u></p> <ul style="list-style-type: none"> • nature of accommodation? • Temporary or permanent? • Specific to COVID-19 or more long term? • Is new equipment required at worksite? • Is new equipment required for telework? • Are equipment or IT resources shareable? • What is the duration of the need? • Source of funding? • Vacant, budgeted position for telework (such as distance learning)?
7A Undue burden analysis	<p><i>Must be significant expense or difficulty</i> (significant disruption or other factors that impact school site or program operations)</p> <p>Impact on student or program services is fundamental consideration.</p> <p>Compliance challenges with IEP or other requirements.</p> <p>Cost as a stand-alone factor is way down the list</p> <p>Gripes or unhappiness by co-workers, if otherwise reasonable, is not a factor at all.</p>	<ul style="list-style-type: none"> • Impact on program operations? • Impact on student services? • Impact on classroom supervision? • Impact on student safety? • Impact on ability to perform any essential functions? • Impact on IEP compliance? • Impact on obtaining subs? • What is impact on facility? • Impact of modified schedule?
California FEHA Affirmative Defenses to Deny individually requested RTW or stay at work	<p><u>Undue Hardship:</u> Significant difficulty or expense and focuses on the resources and circumstances of the specific situation in relationship to the cost or difficulty of providing a specific accommodation. May include accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operations of the public entity.</p> <p><u>Business Necessity:</u> Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the employer must prove that there is an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business and the practice effectively fulfills that business purpose.</p>	<p><u>Health & Safety of Individual with Disability or Imminent Risk of Harm:</u></p> <p>Disability or high-risk underlying condition prevents performance of essential job duties over a reasonable length of time without facing <u>identifiable, substantial and immediate danger to his or her own health and safety</u> and that no reasonable accommodation exists that would remove the danger.</p> <p><i>Speculative concerns about future illness or exposure are not legally sufficient to invoke this affirmative defense.</i> The determination must be made on objective data rather than “stereotypes or generalized fear</p> <p><u>Health & Safety of Others:</u></p> <p>Remove individuals from worksite and provide leave for anyone who has active COVID symptoms, known exposure to a COVID-positive individual, tests positive, or otherwise presents a risk of infection to others by remaining present in worksite.</p>

<p>7B</p> <p>Direct threat to health or safety</p> <p>Imminent safety threat analysis</p>	<p>Must be “significant risk of substantial and imminent harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.”</p> <p>Job must be safety sensitive</p> <p>Risk must be present and not future</p> <p>Risk must be medically supported – based on job related factors and business necessity</p>	<ul style="list-style-type: none"> • Is this based on an <u>individualized analysis</u>? • Is the job safety sensitive? • Is the risk present, not future? • Is the risk supported by reasonable and current medical judgment? • Impact on student or staff safety? • Is the risk objective and specific? • Is the medical information from treating doctor? • Is a fitness for duty evaluation warranted? Is information objective, documented and credible? • Is employee’s behavior threatening physically or verbally? • Can the risk be minimized with protective equipment or modifications? • Can risk be reduced in a different position? Is there a vacant position? • Is the medical documentation reasonably current and based on best available medical judgment?
<p>8.</p>	<p>Implementation of decision (plus documentation)</p> <p>Decide to offer or reject a reasonable accommodation.</p> <p>Offer a reasonable accommodation</p> <p>or</p> <p>Decline accommodation based on unavailability or undue hardship</p> <p>Then</p> <p>Implementation of accommodation, adjustment, modification or another barrier removal</p>	<p><u>Offer when</u> s/he can perform essential functions with;</p> <ul style="list-style-type: none"> • Modification of existing job • Reassignment with no required modification • Reassignment w/ modification • S/he can perform with available assistive devices • Modified or part time schedule • Job restructuring • Leave of absence will facilitate later return to duties • Other – <i>evaluate every aspect</i> <p><u>Decline when:</u></p> <ul style="list-style-type: none"> • No modifications to job duties will facilitate performance • No equipment or devices will assist performance • No other jobs are available for his/her skills or education; • Costs are prohibitive • Disruption is prohibitive or will produce objective safety concern.
<p>9.</p>	<p>Integrate Nine Principles of Effective Documentation into file of defensible documentation</p> <p>Document the entire process</p> <p>Be consistent</p>	<ul style="list-style-type: none"> • Accuracy and precision • Avoid negative connotations • Stick to personal knowledge • Avoid ultimate legal conclusions • Define technical terms • Eliminate inflammatory words • Minimize off-the-cuff writing • Close the loop on material issues raised in writing

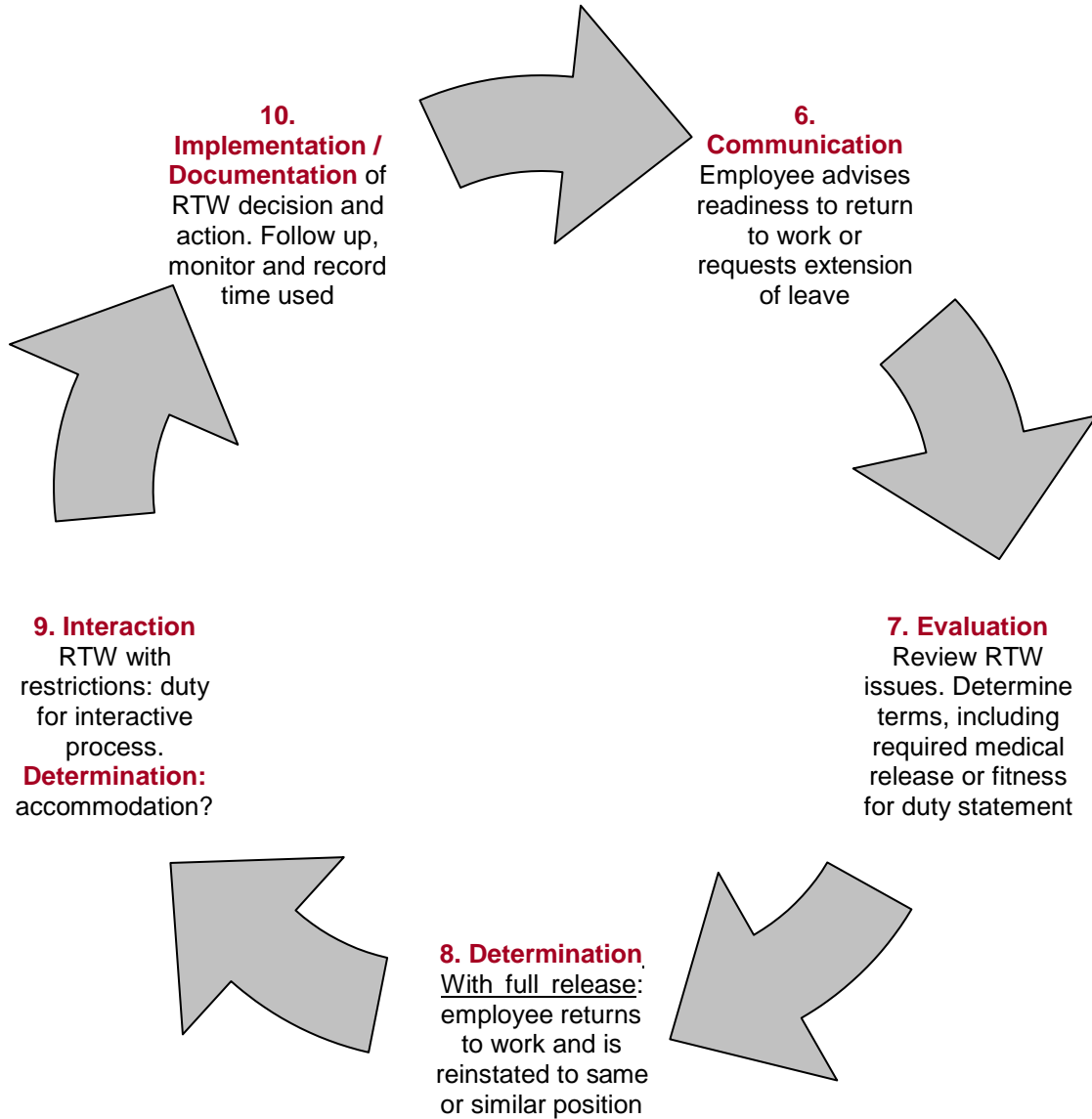
<p>10.</p>	<p>Inspection (continuous or periodic) as necessary</p> <p>Plus documentation</p> <p>Follow up periodically to assure the accommodation is effective</p> <p>Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers to performance? • Is the supervisor managing appropriately? • Is s/he performing effectively? • Are barriers to privileges of employment rectified? • Have costs and/or disruption stabilized? • Did the accommodation fail to work as anticipated? Why? • Has the employee's disability progressed or changed? • Have job duties changed? • Have financial conditions changed sufficiently to render current RA impossible? • Has performance declined for reasons connected to the disability or accommodation? • Has supervisor recommended discipline for reasons that may be connected to the disability? • Has supervisor recommended termination for any reason?
<p>Repeat Process as situation changes</p>	<p>Re-Initiation and documentation) with changed circumstances</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p> <p><u>Major potential changed circumstances with COVID-19:</u></p> <ul style="list-style-type: none"> • Accommodation not working effectively • Physical distancing cannot be maintained • Unavoidable PPE shortage • PPE usage creates new disability (allergies) • Changes to California shelter in place order • New public health orders increase or decrease risk • New guidance from CDC increase or decrease risk • High risk condition no longer present • Increased list of high risk conditions • New, unanticipated risks to health and safety • New COVID hazards introduced to alter risks • Fundamental alteration in business operations • Costs and/or disruption stabilized or increased? • Objective reasons to conduct a neutral FFD exam? • Supervisor not managing gripes by co-workers a • Co-workers training or support to mitigate risks • Mix of essential functions changes • Business needs in window of time • Accommodations no longer effective • Employee requires discipline • Technology/ equipment needs change • Residual or new performance barriers • New, separate disability <ul style="list-style-type: none"> • Periodically re-evaluate the accommodation plan to assure that it is effective, or re-engage to make necessary changes.

Leave Request Process for Extended Leaves

Consider all COVID-19 Related Leaves of Absence under California FEHA, FMLA-CFRA and California Labor Code

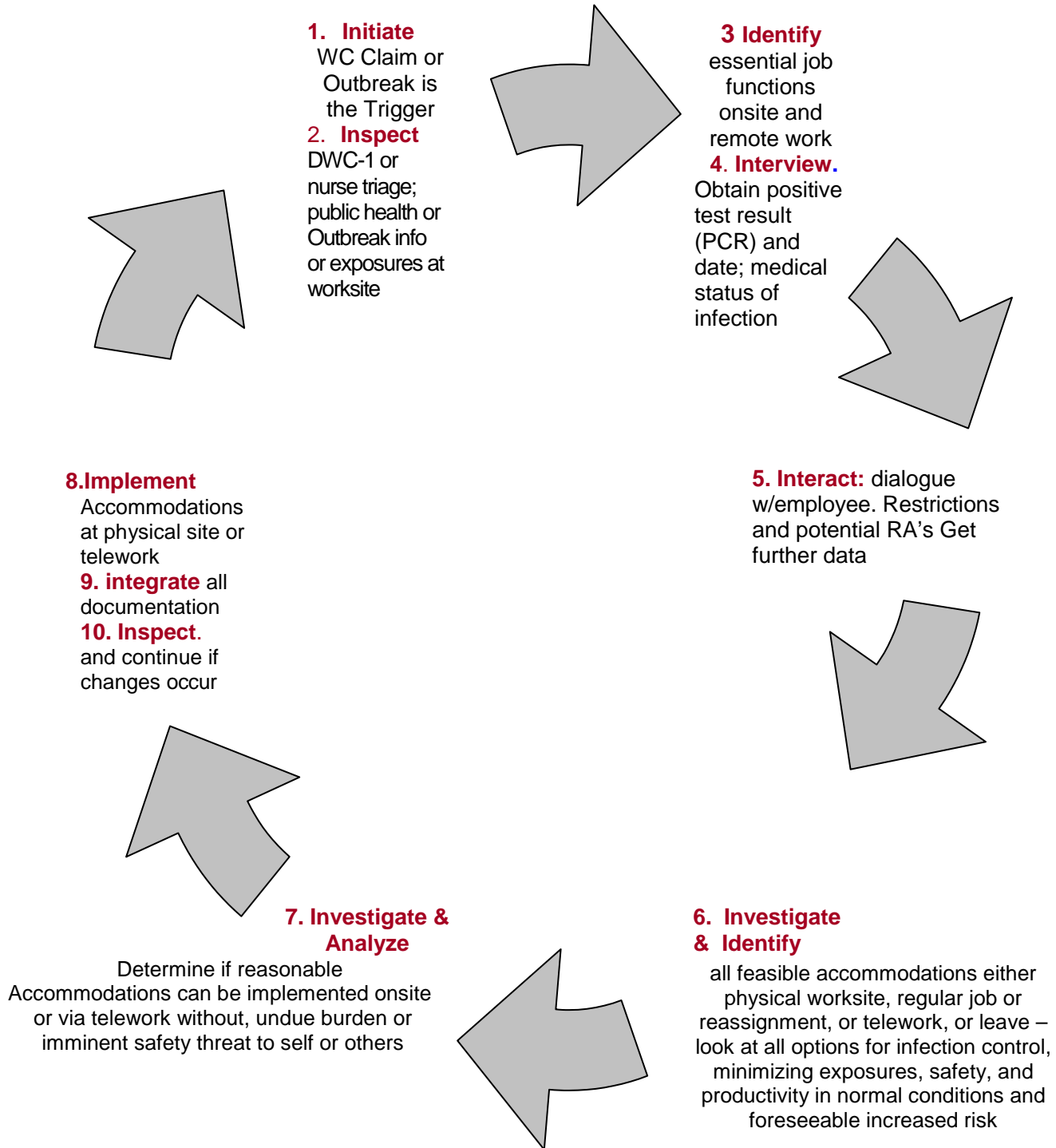


Return to Work Process for Extended Leaves



Industrial Injuries – Accepted and Delayed Conducting and Documenting the Interactive Process for RTW

- Applies to individuals who have tested positive for COVID 19 and submitted a claim for industrial injury.
- Applies whether claim is accepted or on delay for investigation of AOE/COE
- Applies to asymptomatic, mild or moderate symptoms, or persistent limitations after release to return to work



Summary and Checklist of the Ten Step Interactive Process

**** For Temporary modified duty as transitional ERTW or for claims on delay (Non-Industrial) or COVID illness and “long haul COVID following negative test, resolution of all symptoms and release from leave or isolation. The interactive process is entirely separate from the claim process, so no consideration of evidence to rebut the presumption of industrial injury. Concentrate solely on RTW or stay-at-work**

Step	Activity to Further Interactive Process	Specific Considerations
1.	<p>Initiation (plus documentation)</p> <p>Determine when there is a duty to engage in the interactive process. Open file and begin.</p>	<p>Has the duty been triggered by:</p> <ul style="list-style-type: none"> • Active COVID-19 symptoms or exposure? • Submission of WC claim (DWC-1 or triage) • Notification of positive PCR test • Notification of exposure or active disease • Notification of worksite outbreak E • Changed circumstances? • other, as you identify?
2.	<p>Inspection of internal records for Information (plus documentation)</p> <p>Gather and review documents initially & throughout the process</p>	<p>Are there relevant items in:</p> <ul style="list-style-type: none"> • Verification of positive PCR test? • Information on dates worker was onsite? • Information on safety protocols in place? • Information on known exposures on or off the job? • medical verifications for high-risk conditions? • prior requests for accommodation or leaves? • CDC or public health orders increasing risks? • Specific information on status of infection; e.g., mild, moderate, severe? • Chronic long term symptoms after RTW? • Unforeseen changes in onsite exposures?
3.	<p>Identification (plus documentation)</p> <p>Identify “Essential Job Functions”</p>	<p>Are job functions discernible from:</p> <ul style="list-style-type: none"> • current job description? • Telework job description during shutdown? • Successful/ unsuccessful telework in shutdown? • Tasks with particularly high COVID exposures? • Layoff analysis or foreseeable budget cuts? • Impact on mix of work - increased COVID LOAs? • Inability to consistently enforce physical distance? • Inability to enforce other safety protocols?
4.	<p>Interview for Information (plus documentation)</p> <p>Interview relevant individuals</p>	<p>Obtain relevant information from:</p> <ul style="list-style-type: none"> • medical provider(s) – as necessary • restrictions from occupational med doctor • restrictions from personal healthcare provider • individuals exposed onsite • supervisor and/or manager • other job incumbents
4 A	<p>Consider Direct Threat to Health or safety as a qualification factor</p> <p>Some courts allow consideration of direct threat to health and safety as a qualification factor – a substantial and imminent threat to own or others’ health and safety that cannot be reduced or eliminated.</p> <p>** Separate from Step 7B CA FEHA “imminent safety threat” defense under CA FEHA which is addressed as STEP 7B</p>	<ul style="list-style-type: none"> • Employee has COVID diagnosis • Employee has positive PCR positive test • Employee has known exposure to COVID illness • Reasonable current medical data • Nature and severity of the harm • Is the risk current not future? • Is the risk of harm objective? • Has treating physician agreed? • Duration of the risk? • Can risk be reduced with protective measures?

5.	<p>Interaction + information (plus documentation)</p> <p>Dialogue with employee via face to face or virtual interaction</p> <p>Obtain information about further data, including medical or other information in possession of, or identified by, the employee</p>	<p>Focus: what essential job tasks can s/he perform, with or without help?</p> <ul style="list-style-type: none"> • Asymptomatic positive? Remote work option? • Mildly symptomatic? Remote work option? • Moderate or severe symptoms? LOA only? • RTW with restrictions? What are they? • Temp or permanent? • Persistent symptoms following negative test? • Physical distancing? Face coverings? Infection protocols? • Task modifications? Schedule modifications? • Telework? Suggestions or ideas?
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<p>Step 5 discussion and</p> <p>Step 6 consider all effective options to accommodate</p> <p>Sample options to implement</p> <p>Step 5 discussion and</p> <p>Step 6 consider all effective options to accommodate</p>	<p><u>Enhanced Safety Protocols Specifically for High Risk Individuals to Minimize Exposures</u></p> <ul style="list-style-type: none"> • Modify how essential functions are performed • Adjust the order in which tasks are performed • Removal of non-essential job duties • Staggered or alternate schedules • Job restructuring for telework • Part-time or modified work schedules • Shift changes from night to day or vice versa • Periodic or more frequent rest breaks • Telecommuting or working from home • Reassignment to vacant position • Additional or enhanced protective gowns. • PPE: Masks, gloves, beyond those provided. • Erect a barrier to provide separation • Increasing space in meetings. • Relax <u>essential</u> travel for high risk employee • Elimination or substitution “marginal” functions • Require co-workers to wear face coverings. <ul style="list-style-type: none"> • Daily temperature checks for all co-workers with unavoidable proximity. <ul style="list-style-type: none"> • Moving employee's workstation from open cubicle to private office on a temporary basis. • Strategies to deal with conflict as it occurs • Relax policies mandating attendance at work related social functions, 	<p><u>Accommodations for lingering symptoms after negative test and release to return</u></p> <ul style="list-style-type: none"> • Modifying work hours • Modifying work duties and tasks for telework • Permitting more frequent and longer breaks; <p>Temporary transfer to alternative position</p> <p><u>To address fatigue or weakness after RTW</u></p> <ul style="list-style-type: none"> • Reduce or eliminate physical exertion • Reduce workplace stressors, where effective • Reduce onsite meetings or interactions • Schedule periodic rest breaks • Allow a flexible work schedule and flexible use of leave time • Allow work from home – all week or hybrid • Implement ergonomic workstation design • Provide parking close to the work-site • Alternative work space to reduce visual and auditory distractions • Move workstation close to other work areas, office equipment, and break rooms <p><u>Cognitive limitations (“brain fog in long COVID)</u></p> <ul style="list-style-type: none"> • Reduce auditory & visual distractions • Increase natural / full spectrum lighting • Work from home/telecommuting • Divide tasks and set small deadlines • Provide memory aids or organizers, etc. • Use daily, weekly and monthly task charts • Temporarily reduce workload, where feasible • Allow longer breaks for counseling support • Reinforce the importance of peer support • Assistive animal
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		<p><u>Medical Treatment Accommodations</u></p> <ul style="list-style-type: none"> • Flexible schedules and leave time • Self-paced workload with flexible hours • Allow employee to work from home • Provide part-time work schedules • Adjust start time or break schedule • Address attendance policies with flexibility <p><u>Temporary Reassignment- alternative position</u></p> <ul style="list-style-type: none"> • Although not normally used for temporary restrictions – due to indeterminate lingering long haul COVID- fatigue, etc. • Onsite work in regular position unsafe • Alternative position outside class exists • Employee is qualified in all respects • Better suited to isolation onsite or telework • <i>FEHA preferential consideration may require bypassing union seniority provision</i> <p><u>Extended LOA</u></p> <ul style="list-style-type: none"> • Employee cannot work onsite or telework • All available leave exhausted • Unpaid extended leave for finite and reasonable period of time
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6 use as a checklist not exhaustive list	<p>Investigation, Inspection plus Identification (and documentation)</p> <p>Investigate possible accommodations that will allow the employee to perform the essential functions of the job</p>	<p><u>Evaluate without considering cost or disruption:</u></p> <ul style="list-style-type: none"> • would any feasible accommodation(s) facilitate performance of job functions? • what equipment or devices would aid performance? Are they available from any source at any cost? • what other jobs are open? • does s/he have the required skills, education or experience to perform any other vacant position?
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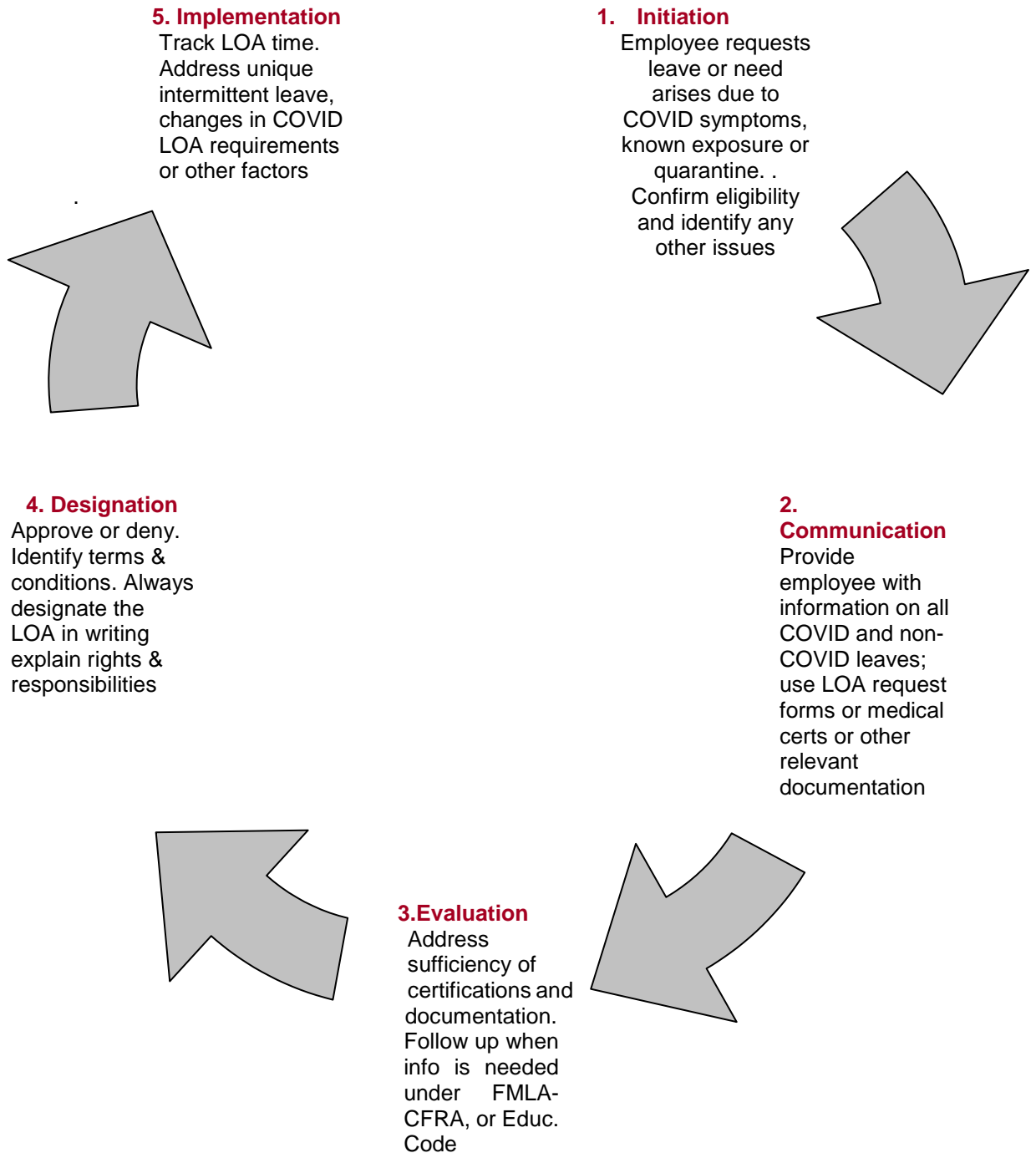
7.	<p>Investigation and in-depth analysis (plus documentation)</p> <p>Analyze the “reasonableness” of potential accommodations</p>	<p><u>Now consider burden or disruption:</u></p> <ul style="list-style-type: none"> • nature of accommodation? • Temporary or permanent? • Specific to COVID-19 or more long term? • Is new equipment required at worksite? • Is new equipment required for telework? • Are equipment or IT resources shareable? • What is the duration of the need? • Source of funding? • Vacant, budgeted position for telework (such as distance learning)?
7A Undue burden analysis	<p><i>Must be significant expense or difficulty</i> (significant disruption or other factors that impact school site or program operations)</p> <p>Impact on student or program services is fundamental consideration.</p> <p>Compliance challenges with IEP or other requirements.</p> <p>Cost as a stand-alone factor is way down the list</p> <p>Gripes or unhappiness by co-workers, if otherwise reasonable, is not a factor at all.</p>	<ul style="list-style-type: none"> • Impact on program operations? • Impact on student services? • Impact on classroom supervision? • Impact on student safety? • Impact on ability to perform any essential functions? • Impact on IEP compliance? • Impact on obtaining subs? • What is impact on facility? • Impact of modified schedule?
California FEHA Affirmative Defenses to Deny individually requested RTW or stay at work	<p><u>Undue Hardship:</u> Significant difficulty or expense and focuses on the resources and circumstances of the specific situation in relationship to the cost or difficulty of providing a specific accommodation. May include accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operations of the public entity.</p> <p><u>Business Necessity:</u> Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the employer must prove that there is an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business and the practice effectively fulfills that business purpose.</p>	<p><u>Health & Safety of Individual with Disability or Imminent Risk of Harm:</u></p> <p>Disability or high-risk underlying condition prevents performance of essential job duties over a reasonable length of time without facing <u>identifiable, substantial and immediate danger to his or her own health and safety</u> and that no reasonable accommodation exists that would remove the danger.</p> <p><i>Speculative concerns about future illness or exposure are not legally sufficient to invoke this affirmative defense.</i> The determination must be made on objective data rather than “stereotypes or generalized fear</p> <p><u>Health & Safety of Others:</u></p> <p>Remove individuals from worksite and provide leave for anyone who has active COVID symptoms, known exposure to a COVID-positive individual, tests positive, or otherwise presents a risk of infection to others by remaining present in worksite.</p>

<p>7B</p> <p>Direct threat to health or safety</p> <p>Imminent safety threat analysis</p>	<p>Must be “significant risk of substantial and imminent harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.”</p> <p>Job must be safety sensitive</p> <p>Risk must be present and not future</p> <p>Risk must be medically supported – based on job related factors and business necessity</p>	<ul style="list-style-type: none"> • Is this based on an <u>individualized analysis</u>? • Is the job safety sensitive? • Is the risk present, not future? • Is the risk supported by reasonable and current medical judgment? • Impact on student or staff safety? • Is the risk objective and specific? • Is the medical information from treating doctor? • Is a fitness for duty evaluation warranted? Is information objective, documented and credible? • Is employee’s behavior threatening physically or verbally? • Can the risk be minimized with protective equipment or modifications? • Can risk be reduced in a different position? Is there a vacant position? • Is the medical documentation reasonably current and based on best available medical judgment?
<p>8.</p>	<p>Implementation of decision (plus documentation)</p> <p>Decide to offer or reject a reasonable accommodation.</p> <p>Offer a reasonable accommodation</p> <p>or</p> <p>Decline accommodation based on unavailability or undue hardship</p> <p>Then</p> <p>Implementation of accommodation, adjustment, modification or another barrier removal</p>	<p><u>Offer when</u> s/he can perform essential functions with;</p> <ul style="list-style-type: none"> • Modification of existing job • Reassignment with no required modification • Reassignment w/ modification • S/he can perform with available assistive devices • Modified or part time schedule • Job restructuring • Leave of absence will facilitate later return to duties • Other – <i>evaluate every aspect</i> <p><u>Decline when:</u></p> <ul style="list-style-type: none"> • No modifications to job duties will facilitate performance • No equipment or devices will assist performance • No other jobs are available for his/her skills or education; • Costs are prohibitive • Disruption is prohibitive or will produce objective safety concern.
<p>9.</p>	<p>Integrate Nine Principles of Effective Documentation into file of defensible documentation</p> <p>Document the entire process</p> <p>Be consistent</p>	<ul style="list-style-type: none"> • Accuracy and precision • Avoid negative connotations • Stick to personal knowledge • Avoid ultimate legal conclusions • Define technical terms • Eliminate inflammatory words • Minimize off-the-cuff writing • Close the loop on material issues raised in writing

<p>10.</p>	<p>Inspection (continuous or periodic) as necessary</p> <p>Plus documentation</p> <p>Follow up periodically to assure the accommodation is effective</p> <p>Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers to performance? • Is the supervisor managing appropriately? • Is s/he performing effectively? • Are barriers to privileges of employment rectified? • Have costs and/or disruption stabilized? • Did the accommodation fail to work as anticipated? Why? • Has the employee's disability progressed or changed? • Have job duties changed? • Have financial conditions changed sufficiently to render current RA impossible? • Has performance declined for reasons connected to the disability or accommodation? • Has supervisor recommended discipline for reasons that may be connected to the disability? • Has supervisor recommended termination for any reason?
<p>Repeat Process as situation changes</p>	<p>Re-Initiation and documentation) with changed circumstances</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p> <p><u>Major potential changed circumstances with COVID-19:</u></p> <ul style="list-style-type: none"> • Accommodation not working effectively • Physical distancing cannot be maintained • Unavoidable PPE shortage • PPE usage creates new disability (allergies) • Changes to California shelter in place order • New public health orders increase or decrease risk • New guidance from CDC increase or decrease risk • High risk condition no longer present • Increased list of high risk conditions • New, unanticipated risks to health and safety • New COVID hazards introduced to alter risks • Fundamental alteration in business operations • Costs and/or disruption stabilized or increased? • Objective reasons to conduct a neutral FFD exam? • Supervisor not managing gripes by co-workers a • Co-workers training or support to mitigate risks • Mix of essential functions changes • Business needs in window of time • Accommodations no longer effective • Employee requires discipline • Technology/ equipment needs change • Residual or new performance barriers • New, separate disability <ul style="list-style-type: none"> • Periodically re-evaluate the accommodation plan to assure that it is effective, or re-engage to make necessary changes.

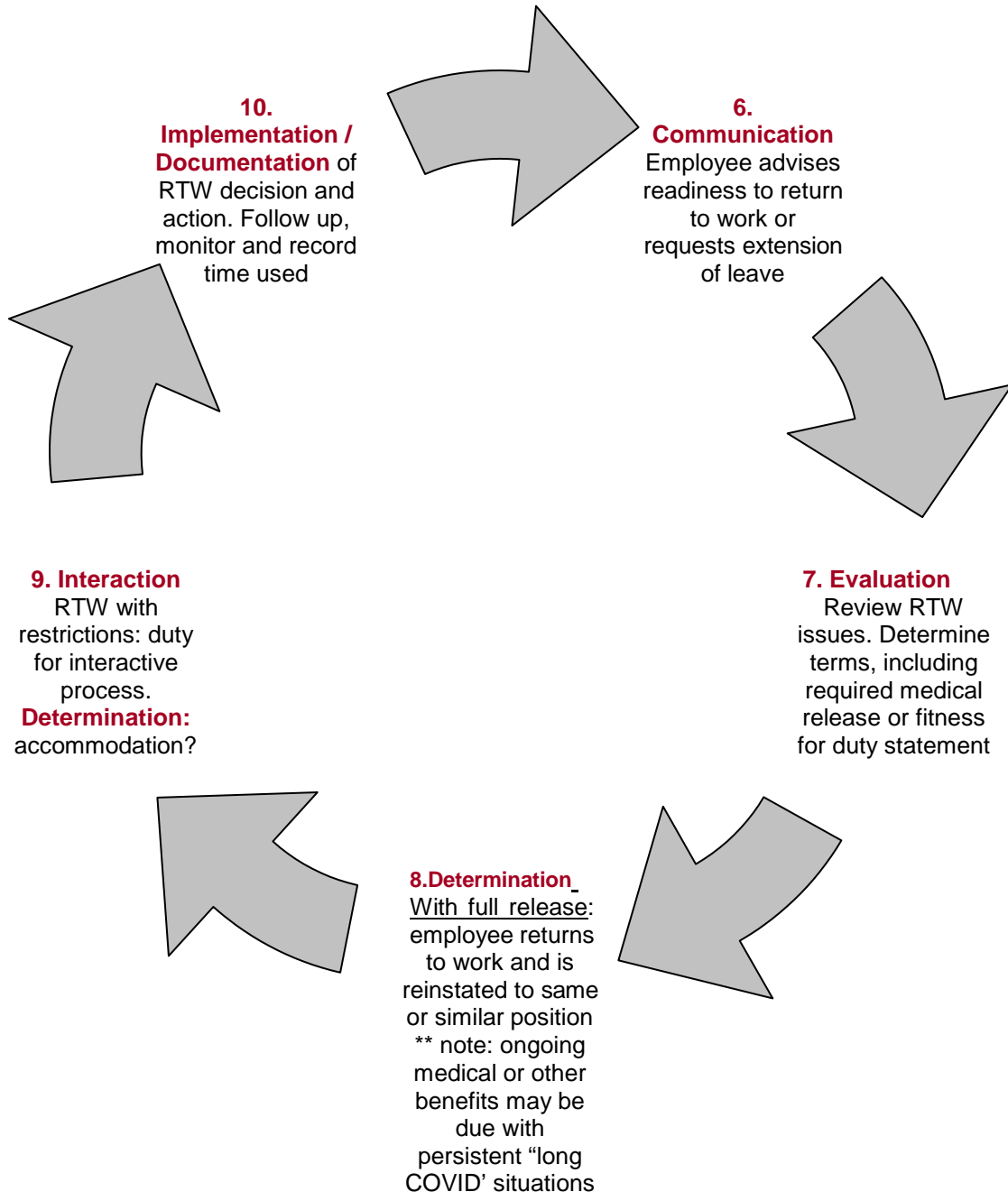
Leave Request Process for Extended Leaves

Worker Related Leaves under Labor Code (Accepted Industrial Injuries/illness), California FEHA for Delayed Claims (treated as non-industrial pending decision)



Return to Work Process for Extended Leaves

Worker Related Leaves under Labor Code (Accepted Industrial Injuries/illness), California FEHA for Delayed Claims (treated as non-industrial pending decision)



Leave of Absence Process Step-by Step

Step	Activity to Further Interactive Process	Specific Considerations
1.	<p>Initiation (plus documentation)</p> <p>Determine when there is a need to begin the leave of absence process. Confirm eligibility and identify other issues. Other issues may involve pending workers' comp Industrial Accident Leave or other Ed. Code leave in progress.</p> <p>Determine FMLA/CFRA eligibility for lingering functional limitations due to "post-COVID syndrome," including physical, cognitive, neurological, or mental health serious health conditions.</p> <p>Determine if the leave will be a continuous block or intermittent.</p>	<p>Is LOA process been triggered by:</p> <ul style="list-style-type: none"> • DWC-1 claim filed • Nurse triage or claim report • Presentation of positive PCR test • Exposure notice from public health • County contract trace notification • Determination of worksite outbreak • Internal determination of exposure <ul style="list-style-type: none"> • Presentation of work restrictions stating illness is work related • Presentation of work restrictions after employee initially returns, due to persistent or materially impactful lingering COVID-19 symptoms • Other?
2.	<p>Communication</p> <p>Provide employee with information about eligibility, terms and conditions of leaves, rights and responsibilities during leave.</p>	<p>Provide employee with:</p> <ul style="list-style-type: none"> • Notice all WC rights • How to file a notice of claim • Information on WC system • Information on LOA Rights • Appropriate Cert. forms • Specific terms & conditions • Coordination of paid IRequired documentation
3.	<p>Evaluation.</p> <p>Address sufficiency of Certifications the employee provides and other documentation. Follow up as needed with employee or health care provider.</p>	<p>Are eligibility issues met by?</p> <ul style="list-style-type: none"> • DWC-1 • Positive test verification • Certification form? • Supplemental information?

Step	Activity to Further Interactive Process	Specific Considerations
4.	<p>Designation</p> <p>Approve or deny the requested leave. Identify terms and conditions. Send written designation letter explaining rights and responsibilities.</p>	<p>Provide employee with info:</p> <ul style="list-style-type: none"> • Type of leave approved • Explanation of internal LOA separate from WC • Division of responsibility between claims examiners and HR or risk management <p>** claims administrators will handle the management and resolution of the industrial injury claim – internal interactive process is ONLY for RTW and stay at work</p> <ul style="list-style-type: none"> • ERTW transitional assignment (if relevant) • Non-industrial LOA if claim is delayed or denied • Block or intermittent • Pay and benefits during leave • Concurrent or consecutive • RTW requirements • Reinstatement rights
5.	<p>Implementation</p> <p>Track leave time. Address any unique issues that arise from use of intermittent leave, transfer or light duty issues. Stay in touch with front-line supervisor.</p>	<p>Focus on:</p> <ul style="list-style-type: none"> • Is intermittent leave working? • Is additional or re-cert needed? • Is extension of leave needed • Has leave exhausted

Return to Work Process Step by Step

<p>6.</p>	<p>Communication.</p> <p>Keep in touch with employee as needed.</p> <p>If employee needs extension of leave, address with same steps as above. Determine if re-certification is appropriate.</p> <p>When employee advises she or he is ready to return to work, determine what documentation you need.</p>	<ul style="list-style-type: none"> • Communication with employee on leave. • Require reporting if COVID conditions change (e.g., positive test) • Communications with public health, as necessary • Communication with WC claims administrators – as needed • Ongoing communication with front-line supervisor or manager concerning current needs of department (that may have arisen while employee was on leave).
<p>7.</p>	<p>Evaluation</p> <p>Review the return to work issues. Determine terms and required medical release (note: must conform with your original designation notice)</p>	<ul style="list-style-type: none"> • Determine whether you need a release to return to work and/or fit for duty statement • Determine whether claim status affects RTW or early RTW assignments • Address terms and conditions of ERTW transitional assignments • Address any documentation issues at this time.
<p>8.</p>	<p>Determination</p> <p>With full release or medical clearance from health care provider: employee returns to work and is reinstated to same or similar position.</p> <p>Benefits are restored, as necessary.</p>	<ul style="list-style-type: none"> • Don't keep employees with release off work, absent statement of restrictions or objective barriers to performance • Unless work restrictions, return to full duty • If work restrictions, conduct interactive process • Obtain further information if restrictions materially changed while on leave • Determine if fitness for duty statement has been provided • With accepted claim – is worker P&S If so, are there ongoing restrictions to address in an interactive process? If claim denied, proceed as if LOA and RTW are non-industrial per FEHA

Step	Activity to Further Interactive Process	Specific Consideration
9.	<p>Interaction</p> <p>This is for a return to work with restrictions. It may arise in two situations: (1) during ongoing intermittent or reduced schedule leave; or (2) on return to work</p> <p>Determination</p> <p>Is there a reasonable accommodation that can be made</p> <p>[COORDINATE with steps 6, 7, 8 and 9 of the Interactive Process Checklists]</p>	<p><u>Focus on:</u></p> <ul style="list-style-type: none"> • what essential job tasks can s/he perform, with or without assistance? • are there tools, equipment or assistive devices that will aid performance? • what other skills, education or experience does s/he have that would help with other jobs within the agency? • does s/he have suggestions or ideas about how s/he can be reasonably accommodated • what are cost and disruption issues? • Are there lingering or chronic conditions from COVID-19 recovery/ • Are there changing work restrictions? • Are restrictions temporary or permanent? • Are restrictions going to require further leave for treatment and recovery? • Make it very clear that for WC claims that are delayed for investigation of work-relatedness, the management, investigation and resolution of the i claim will be handled separately from the LOA process. Claims on delay or denied are treated for all purposes as non-industrial, so any time off for intermittent or continuous blocks of leave will be evaluated applicable statutes. • All discussion of other available leaves and designation for concurrent/consecutive leave for industrial injuries will be addressed in the forthcoming Managing Multiple LOAs for California Public Entity Employers (3rd Edition)

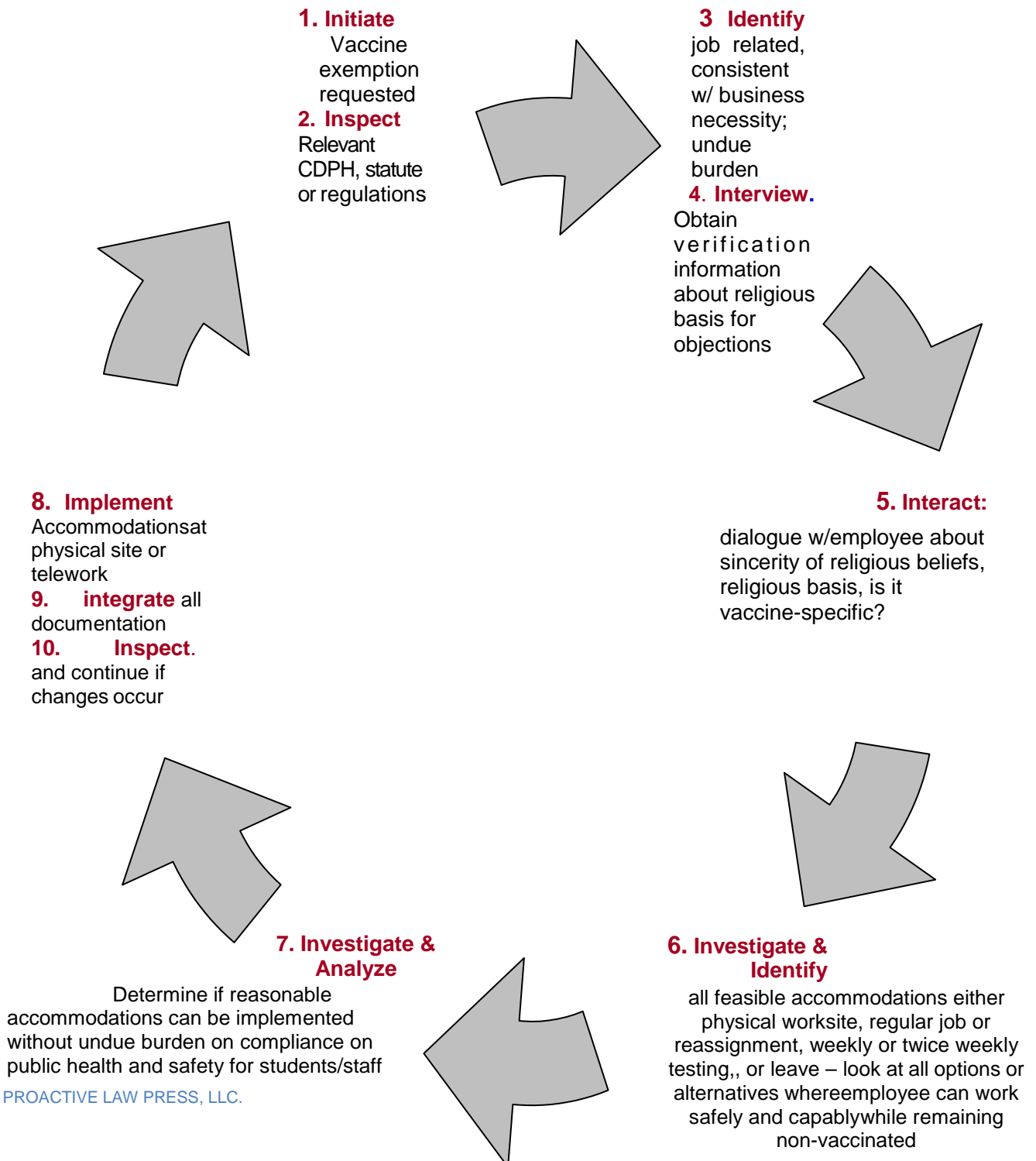
Step	Activity to Further Interactive Process	Specific Considerations
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10.	<p>Implementation (Plus documentation)</p> <p>Implement the return to work decision and action. Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers to performance? • Is the supervisor managing appropriately? • Is s/he performing effectively? • Are barriers to privileges of employment rectified? • Have costs and/or disruption stabilized? <ul style="list-style-type: none"> • Did the accommodation fail to work as anticipated? Why? • Has the employee's disability progressed or changed? • Have job duties changed? • Have financial conditions changed sufficiently to render current RA impossible? • Has performance declined for reasons connected to the disability or accommodation? • Has supervisor recommended discipline for reasons that may be connected to the disability? • Have Cal-OSHA regulations changed? • Have public health guidance from CDC and CDPH or local health departments changed? • Has there been a lapse of compliance with Cal-OSHA, CDPH or local health department orders with respect to face coverings, return from self-isolation or other safety protocols? <p>Has supervisor recommended termination for any reason?</p>
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<p>Step One</p> <p>Repeat process</p>	<p>Initiation (and documentation)</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p>
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COVID-19 Vaccination Interactive Process Conducting & Documenting Genuine Exemptions

The Interactive Process is a Continuous Cycle and Each Step is Well Documented



Summary and Checklist of the Ten Step Interactive Process

Step	Activity to Further Interactive Process	Specific Considerations
1.	<p>Initiation (plus documentation)</p> <p>Determine when there is a duty to engage in the interactive process. Open file and begin.</p>	<p>Has the duty been triggered by:</p> <ul style="list-style-type: none"> • Employee invokes exemption from vaccine based on religion • Statutory or regulatory order? • Religious objection to particular vaccine Pfizer MRNA Moderna MRNA Johnson and Johnson • Religious objection based on medical procedure? Changed circumstances? • other, as you identify?
2.	<p>Inspection of internal records for Information (plus documentation)</p> <p>Gather and review documents initially & throughout the process</p>	<p>Are there relevant items in any of the following:</p> <ul style="list-style-type: none"> • religious objection for all inoculations • religious objection verifications for particular vaccine (pastor, clergy, denomination or letter from employee) • has employee received other vaccines in the past (e.g., flu, TB, shingles, pneumonia, etc.)? • prior requests for accommodation or leaves based on religion? • CDPH definition of religious basis for exemption – or personal belief exemption • Job classification – interaction with students on school site? • Job classification- interactions at district or COE office? • Is the religious basis clearly stated? • Is the documentation from the employee’s own clergy or form letters from Internet? • Has employee clearly stated basis for objection? • Is the basis for objection use of fetal tissue or stem cells in research (see below for questions at step 50)
3.	<p>Identification (plus documentation)</p> <p>Identify “Essential Job Functions”</p>	<p>Are job functions discernible from:</p> <ul style="list-style-type: none"> • current job description? • Description of direct threat if unvaccinated? • Extensive contact with students or public? • Tasks with particularly high COVID exposures? • Mix of essential functions for job-related vaccine? • Inability to consistently enforce physical distance? • Inability to enforce other safety protocols? • Inability to consistently enforce mask mandate for SPED students?
4.	<p>Interview for Information (plus documentation)</p> <p>Interview relevant individuals</p>	<p>Obtain relevant information from:</p> <ul style="list-style-type: none"> • Clergy, denomination or employee on specifics of religious objections to vaccination • Information on alternatives to being unvaccinated – e.g., weekly or twice weekly testing • county health officials re: increased risks and direct threat

<p>5.</p>	<p>Interaction + information (plus documentation)</p> <p>Dialogue with employee via face to face or virtualinteraction</p> <p>Obtain information about further data, including medical or other information in possession of, or identified by, the employee.</p> <p>NOTE:</p> <ol style="list-style-type: none"> 1. Generally, assume that stated religious belief is sincerely held unless employer has a good faith and objective basis for questioning the religious nature of the documentation? 2. If the employee or job candidate's reason for seeking exemption is distrust of the vaccine, political beliefs about COVID or a philosophical news article they read online, it will not rise to a "sincerely held religious belief (per EEOC) 3. This is an individualized process, so tailor questions to the person's specifically stated objections? 4. Employer ay probe whether an employee's religious belief is in fact sincere. They may ask questions about that employee's vaccination history or church attendance. If the employer determines the belief is not sincere, it may deny the exemption request. 5. Even if an employee's or job candidate's religious belief is determined to be sincere, it's the employer who decides what the reasonable accommodation will be. It does not have to be the accommodation requested by the employee. 6. This is a continuous process, so even if a temporary accommodation is identified and implemented, employer is not locked in to the choice. 7. If employee or job candidate refuses any offered accommodation, holding out for their "first choice," that is not a reasonable accommodation based on religious objections. 	<ul style="list-style-type: none"> • Focus: what essential job tasks that would create direct threat if exposures by employee or others at worksite? • Has the employee recently adopted the religious beliefs in response to the COVID-19 protocols? • Has the information about the religious doctrine come exclusively from online letters or descriptions of religious objections? • Has the individual acted in a way that is inconsistent with the claimed belief? • Is the timing of the request questionable (e.g., follows on the heels of the request to be relieved of vaccination requirement for other reasons?) • Has the individual expressed strong political or ideological views about COVID-19 protocols in other contexts? Has s/he used words like "scamdemic," "hoax," etc.? • Has the individual previously resisted wearing a face covering for political reasons, or claimed religious reasons that were denied? • Has the individual previously resisted COVID 19 testing for claimed religious reasons that were denied? • Has the individual previously resisted COVID 19 protocols for secular reasons? • Fetal cell lines developed decades ago in a laboratory were used to develop and test the vaccines. However, the vaccines themselves do NOT contain any fetal cells. • If the employee's reason is based on the use of fetal tissue or stem cells in research, ask if they take any of the following over the counter medications that were developed with this same type of research – ask if they will attest they do NOT use any of the following:: • Tylenol, Aspirin, Tylenol Cold & Flu, Acetaminophen • Benedryl, Sudafed, Claritin, Prilosec OTC, • Pepto Bismal, Tums. Maalox, Ex-Lax, Senokot • Motrin, Ibuprofen, Zocor, Simvastarin • MMR vaccine? <p>*** Be careful not to ask about medications that would disclose a potential disability or prescribed treatment for a medical condition or disability – even if this is post-conditional job offer.</p>
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<p>Step 5 <u>Enhanced Safety Protocols</u></p> <p>Step 6 consider all effective options to accommodate</p> <p><u>Sample options to implement</u></p> <p>Use forms provided</p> <p>Consider all options for onsite or other accommodations that do not result in undue burden or jeopardize safety or health of students or staff</p>	<p><u>Specifically, for Vaccine-exempt individuals</u></p> <ul style="list-style-type: none"> • Reduce functions with higher exposure • Staggered or alternate schedules • Job restructuring for telework • Part-time or modified work schedules • Shift changes from night to day or vice versa • Reassignment to position with less exposure • Additional or enhanced protective gowns. • PPE: Masks, gloves, beyond those provided. • Require co-workers to wear face coverings. • Enhanced safety protocols onsite • Re-structure tasks to avoid imminent harm from direct exposure to students or public <p>NOTE: Individual’s religious belief, no matter how sincerely held, is superseded by workplace safety.</p> <ol style="list-style-type: none"> 1. Highest priority for undue burden is jeopardizing safety and health of students and staff 2. Employer may weigh the importance of workplace safety against the religious beliefs of the individual employee or job candidate. 3. Title VII of the Federal Civil Rights Act and the CA. FEHA define undue burden as “significant expense or difficulty.” Neither require that religious beliefs be prioritized above safety and health in the workplace. 4. Case law is clear: safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer. 5. Undue hardship exists if the proposed accommodation would “either cause or increase safety risks or the risk of legal liability for the employer. Title VII does not require employers to test their safety policies to determine the minimum level of protection needed to avoid injury. 	<p><u>Submitting to regular COVID-19 testing</u></p> <ul style="list-style-type: none"> • Would apply to persons working anywhere onsite or in temporary remote assignments • May be weekly or even twice weekly • Testing as accommodation to replace vaccination as condition of employment would be at employee’s expense and on employee’s own time, otherwise it isn’t reasonable. • Employee would be accountable to with antigen or PCR FDA EUA approved and laboratory confirmed and to produce results to HR Dept. weekly (or twice weekly). <p><u>Temporary Reassignment- alternative position</u></p> <ul style="list-style-type: none"> • Although not normally used for temporary restrictions – due to indeterminate COVID-19 exposures • Onsite work in regular position unsafe • Better suited to isolation onsite or telework <p><u>Unpaid LOA (current employees only – not job candidates)</u></p>
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<p>6</p> <p>use as a checklist not exhaustive list</p>	<p>Investigation, Inspection plus Identification (and documentation)</p> <p>Investigate possible accommodations that will allow the employee to perform the essential functions of the job without jeopardizing health or safety</p>	<p><u>Evaluate <i>without considering cost or disruption</i>:</u></p> <ul style="list-style-type: none"> would any feasible accommodation(s) facilitate performance of job functions without imminent harm to self or others? what other jobs are open? does s/he have the required skills, education or experience to perform any other vacant position?
<p>7.</p>	<p>Investigation and in-depth analysis (plus documentation)</p> <p>Analyze the “reasonableness” of potential accommodations</p>	<p><u>Now consider burden or disruption:</u></p> <ul style="list-style-type: none"> nature of accommodation? Temporary or permanent? EAU specific or vaccine specific? Extent of complications or side effects likely to be altered in near term? Specific to COVID-19 or more long term? Is new equipment required at worksite? Is new equipment required for telework? What is the duration of the need? Source of funding? Vacant, budgeted position for telework (such as distance learning)?
<p>7</p>	<p><i>Must be significant expense or difficulty</i> (significant disruption or other factors that impact school site or program operations)</p>	<ul style="list-style-type: none"> Impact on program operations? Impact on student services? Impact on classroom supervision? Impact on student safety? Impact of staff safety Impact on ability to perform any essential functions? Impact on IEP compliance? Impact on obtaining subs? What is impact on facility? Impact of modified schedule?
<p>Undue burden analysis</p>	<ul style="list-style-type: none"> Impact on student or program services is fundamental consideration. Compliance challenges with IEP or other requirements. Cost as a stand-alone factor is way down the list Gripes or unhappiness by co-workers, if otherwise reasonable, is not a factor 	

<p>California FEHA Affirmative Defenses to Deny individually requested RTW or stay at work</p>	<p>Undue Hardship: Significant difficulty or expense and focuses on the resources and circumstances of the specific situation in relationship to the cost or difficulty of providing a specific accommodation. May include accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally alter the nature or operations of the public entity.</p> <p>Business Necessity: Where a facially neutral practice has an adverse impact (or a discriminatory effect) on a disabled individual, the employer must prove that there is an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business and the practice effectively fulfills that business purpose.</p>	<p>Health & Safety of Others:</p> <p>Remove individuals from worksite and provide leave for anyone who has active COVID symptoms, known exposure to a COVID-positive individual, tests positive or otherwise presents a risk of infection to others by remaining present in worksite.</p>
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<p>8.</p>	<p>Implementation of decision (plus documentation)</p> <p>Decide to offer or reject a reasonable accommodation.</p> <p>Offer a reasonable accommodation</p> <p>or</p> <p>Decline accommodation based on unavailability or undue hardship</p> <p>Then</p> <p>Implementation of accommodation, adjustment, modification or another barrier removal</p>	<p><u>Offer when</u> s/he can perform essential functions with;</p> <ul style="list-style-type: none"> • Temporary adjustment of duties pending more data on complications or side effects <p><u>Decline when:</u></p> <ul style="list-style-type: none"> • No modifications to job duties will facilitate performance • No other jobs available for skills or education; • Disruption is prohibitive or will produce objective safety concern or imminent risk of harm to self or others • Health and safety is unduly impacted <p>See Legal analysis memo fully analyzing religious objections and personal belief objections – forthcoming by late October, 2021</p>
<p>9.</p>	<p>Integrate Nine Principles of Effective Documentation into file of defensible documentation</p> <p>Document the entire process</p> <p>Be consistent</p>	<ul style="list-style-type: none"> • Accuracy and precision • Avoid negative connotations • Stick to personal knowledge • Avoid ultimate legal conclusions • Define technical terms • Eliminate inflammatory words • Minimize off-the-cuff writing • Close the loop on material issues raised in writing

<p>10.</p>	<p>Inspection (continuous or periodic) as necessary</p> <p>Plus documentation</p> <p>Follow up periodically to assure the accommodation is effective</p> <p>Inspect the workplace and the way the accommodation is working for the disabled employee and co-workers</p> <p>Be alert to changed circumstances that may trigger a new interactive process</p> <p>Note: the duty under the FEHA is a continuing duty, until all reasonable accommodation decisions have been exhausted.</p>	<ul style="list-style-type: none"> • Is the accommodation working as anticipated? • Are there any residual or new barriers? • Has information on EAU changed? • Have vaccine complications been mitigated? • New COVID variants producing additional risks? • Are variants producing need for new vaccines? • New data on vaccine risk for pregnancy? • Have costs and/or disruption stabilized? • Did the accommodation fail to work as anticipated? • Has the employee's disability progressed or changed to allow vaccine? • Have job duties changed? • Has performance declined for reasons connected to the disability or accommodation?
<p>Repeat Process as situation changes</p>	<p>Re-Initiation and documentation) with changed circumstances</p> <p>Repeat the timely, good faith interactive process, for any reason identified in #10.</p>	<p>Fulfills the continuous duty to engage in the interactive process if changes occur to employee's limitations, essential job functions or employer circumstances.</p> <p><u>Major potential changed circumstances with vaccine exemptions</u></p> <ul style="list-style-type: none"> • Accommodation not working effectively • Physical distancing cannot be maintained • Unavoidable PPE shortage • PPE usage creates new disability (allergies) • New public health orders increase or decrease risk • Potential reactions or complications avoidable • New, unanticipated risks to health and safety • New COVID hazards introduced to alter risks • Fundamental alteration in business operations • Mix of essential functions changes • Business needs in window of time • Accommodations no longer effective • Employee requires discipline • Technology/ equipment needs change • Residual or new performance barriers • New, separate disability <ul style="list-style-type: none"> • Periodically re-evaluate the accommodation plan to assure that it is effective, or re-engage

Section 3 Subsection C

Practical Scenarios & FAQs for COVID-19



Practical COVID-19 Scenarios for Addressing Interactive Process and Reasonable Accommodations

Scenario #1:

What are the facts?

An employee who already suffered from depression anxiety was having difficulties coping with the feelings of isolation and fear of the COVID-19 pandemic. As a result, he was unable to concentrate and work productively when he returned to work when the office reopened.

What should the employer do?

1. Engage in the interactive process with the employee to determine which reasonable accommodation would work best for him
2. The employer may seek medical certification or documentation but should provide at least a temporary accommodation right away.
3. With medical verification of functional limitations and work restrictions, consider telecommuting, reduced scheduling and leave as an accommodation

Scenario #2

What are the facts?

An employee who is a custodian a who has never had an reactions or trouble with the cleaning products suddenly has physical symptoms because of the exposure to the increased use of strong disinfecting cleaning supplies. The employee is experiencing headaches, nausea, dizziness, insomnia and other effects.

What should the employer do?

1. Immediately trigger an individualized interactive process.
2. Even though the custodian has never had a problem with the cleaning supplies before, the e cleaning and disinfecting products may be stronger because of the pandemic and are certainly being used more frequently.
3. Ask for medical verification and work restrictions. Specifically, ask for information on the frequency and duration the employee may work with certain cleaning and disinfectant products, and any measures that will facilitate safe and effective performance.
4. After receiving medical verification, consider all alternative options for this employee to reasonably accommodate him. Consider the following:
 - a. alternative cleaning supplies the employer could order that are just as effective but not as strong of a scent.
 - b. Enhanced forms of PPE that the employee could wear while cleaning so that the products do not both him.

- c. If there are no feasible alternatives, it is not necessary or appropriate to waive the requirement for increased sanitizing and disinfecting due to COVID 19 exposures. Consider reassignment of job duties could work for this employee, even on a temporary basis.
- d. Obviously telecommuting is not a viable solution. If there are no options to modify his usual position, to use alternative PPEs for him, or to locate a reassignment for which he is qualified and can be performed within his limitations, the last resort is to consider extended leave.

Scenario #3

What are the facts?

An employer has been approving sit/stand workstations to any employees who request them, but after multiple requests decides to only give them if needed for a disability. The employer removes every sit/stand workstation and issues a policy stating that such alternative workstations or other ergonomic adjustments will only be considered through a good faith interactive process, with medical verification of need. Shortly thereafter, the pandemic hits and all of the employees are telecommuting. Some of them report that they need the sit/stand workstations to work effectively at home.

What should the employer do?

1. Immediately trigger a timely, good faith, individualized interactive process with each employee who claims a need for accommodations.
2. Obtain the medical verification, if possible, identifying restrictions and alternatives for how long the employee may work in a seated position before a standing break is required, and the length of the break before the employee may resume working in a seated position.
3. For those employees with a confirmed functional limitations and work restrictions, the employer should consider all options- sit/stand workstations for employees to use at home, OR more frequent standing and walking breaks, or other alternatives.
4. Treat every separate interactive process as an individualized assessment, so that it does not create a precedent for others at home or at the physical worksite.
5. The employer and employee should discuss and document who owns the equipment and the logistics of obtaining the equipment and what will happen with the equipment when the employee returns to the workplace.

Scenario #4

What are the facts?

A public entity needs to hire additional employees as they return to work following the COVID-19 pandemic because so many employees are unable to return. The job posting lists having a valid driver's license as a qualification. It also lists a number to call about accommodations. An applicant with a vision impairment calls the number to discuss the driving requirement as she cannot drive. No one answers and the voice mail is full. She decides not to apply for the job.

What should the employer do?

1. Provide multiple contact methods, i.e. phone, email, mailing address, etc.
2. Designate a knowledgeable responsible person and a back up to respond.
3. Review and update job descriptions.
4. Focus on job tasks, not how they're typically performed.

Scenario #5

What are the facts?

An employee works for a school district as a teacher, but has a second job in food service. Other employees are concerned that the employee with the second job will expose the rest of the staff to COVID-19 because he is in a high contact industry.

What should the employer do?

1. Discuss with all employees the need for physical distancing and wearing face coverings outside of the workplace, in their case in their second workplace, to minimize the risk of being exposed to COVID-19.
 2. Do not single out any specific employee, but should address this issue with all employees equally.
 3. You may require all employees to have temperature checks every morning upon coming to the workplace and fill out a health symptom questionnaire and any employees with any questionable temperature readings or symptoms should not be allowed at work.
1. Reinforce with all employees that if they develop any COVID-19 related symptoms or have any known exposure to anyone with COVID-19, they should not come to work.

Scenario # 6

What are the facts?

Employees at employer's workplace are concerned because some of the employees are out and about during non-work hours, going to bars and restaurants, being around people, not socially distancing and not wearing facemasks. The employees are concerned that these employees will be exposed to COVID-19, contract the virus, remain asymptomatic and bring the virus into the workplace.

What should the employer do?

1. The employer cannot mandate what employees do after work hours and on their own time.
2. The best practice is to reiterate to all employees the importance of physical distancing and wearing face coverings outside the workplace to minimize the risk of being exposed to COVID-19.
3. Don't single out any specific employee. Do address this issue with all employees equally.

4. The employer may require all employees to have temperature checks every morning upon coming to the workplace and complete a health symptom questionnaire and any employees with any questionable temperature readings or symptoms should not be allowed at work.
5. Reinforce with all employees that if they develop any COVID-19 related symptoms or have any known exposure to anyone with COVID-19, they should not come to work.

SAMPLE RETURN TO WORK QUESTIONNAIRE / SURVEY

Asking if Reasonable Accommodation is Requested

Please answers these questions to help the district plan effectively to meet the needs of all personnel for returning to work. This questionnaire is being conducted by the Human Resources Leaves Department; your answers will be kept confidential.

Please complete this form by not later than July 1, 2020. Thank you for your timely response. Late forms will be accepted. Will or will NOT be accepted? How about accepted with a reasonable explanation for the delayed response.

Proceed with this questionnaire assuming appropriate safety protocols will be in place upon your return.

1. I am able to return to work without restrictions. (Yes/No)
2. I do not have a child under the age of 18 in my care that requires daycare in order for me to return to work and do not anticipate that I will require daycare. (Yes/No)

If you answered **YES** to both of the above questions, thank you for your time. You have completed your portion of the questionnaire.

If you answered **NO** to either of the above questions, please continue with the following questions.

3. Do you have an underlying condition that puts you at greater risk of serious complications from exposure to or contracting COVID-19? (Yes/No)
4. Does any person living in your residence have an underlying condition that puts them at greater risk of serious complications from exposure to or contracting COVID-19? (Yes/No)

If you answered yes to either of the above questions, please check the one answer the most applies to you:

- I can return to work as scheduled on the first duty day.
- I currently anticipate that I will be able to maintain regular and consistent attendance at the start of the school year
- I can return to work with a reasonable accommodation*
- I cannot return to work at the physical worksite.
- I cannot return to work in any capacity, including telework

** ADA-FEHA Reasonable Accommodation Requests: Employees who have disabilities or conditions that make them susceptible to serious complications from exposure to or contracting Covid-19 may request reasonable accommodations before returning to work. The interactive process is a good faith, entirely individualized discussion and evaluation, and focuses on the specific needs of each individual. The determination of whether or not a reasonable accommodation may be offered does not create a precedent for any other individual. Following an interactive dialogue, potential accommodations may include telework, additional PPE, other enhanced safety measures at the worksite, changes to their work schedule such as staggered*

shifts, or other adjustments and modifications, etc. FEHA prohibits retaliation, whether or not the accommodation is approved or denied on legitimate basis. Retaliation may be adverse action, reprisals, threats of reprisals and is strictly prohibited. The District will take seriously all reports or complaints of retaliation and after investigation will determine whether immediate and appropriate action is warranted.

- *An employer is required only to provide reasonable accommodations to employees and applicants with known or medically verified disabilities, as defined by federal or state law. State law (the FEHA) provides broad protections to individuals who are limited in performing major life activities, including working.*
- *An employer is not required to provide a reasonable accommodation that imposes an “undue hardship” to the employer. Undue hardship is defined as “significant expense or difficulty:*
- *An employer is not required to provide reasonable accommodation if it would result in a substantial or imminent threat of harm to the health and safety of the employee, or to others at the workplace.*
- *If your disability or your need for reasonable accommodation is not obvious, your employer may ask for reasonable medical documentation to support the request and to inform the interactive process. Employees have a reciprocal duty to cooperate and participate in good faith in the interactive dialogue, which is for your benefit to evaluate all options available to you as the school year begins..*

5. I have been employed by [Entity] for at least the last 30 days and have a child under the age of 18 in my care that requires daycare. Please check the one answer the most applies to you:

- This question does not apply to me.
- I have daycare and can return to work.
- I need daycare provided in order to return to work.
- Due to childcare issues, I cannot return to work.

- I am unable to return to work for a reason not listed above and would like HR to contact me with my options.

SAMPLE BASIC POLICY

POLICY AND PROTOCOLS FOR THE REASONABLE ACCOMMODATION OF EMPLOYEES WHO REMAIN AT HIGH-RISK OF SEVERE ILLNESS FROM COVID-19

Federal and State equal employment opportunity laws, including the Americans with Disabilities Act (“ADA”), the Rehabilitation Act of 1973, Title VII of the Federal Civil Rights Act, the Fair Employment and Housing Act (“FEHA”), and the Age Discrimination in Employment Act (“ADEA”) impose certain obligations on the [ENTITY] to evaluate and provide reasonable accommodations.

Absent an undue hardship to the [ENTITY] or a direct and imminent threat to the health and safety of [ENTITY] employees or others, the [ENTITY] may provide certain employment-related accommodations to employees who are at higher risk of severe illness if they contract the COVID 19 virus. Those at higher risk of such severe complications are identified by the Centers for Disease

Control (CDC) as falling into high risk categories, including age 65 or older or an underlying medical condition identified by the CDC. Accommodations are intended to reduce the risk of such employees contracting the virus

Statement of Policy This discretionary policy provides to qualified employees the right to request that the [ENTITY] provide certain additional modifications or adjustments to their assignment location, or their work environment, that, while not otherwise required by law, may reduce the risk of such employees contracting the COVID 19 virus.. The [ENTITY] will evaluate such accommodations on an individualized basis, considering the employee's needs, the essential functions of the job, and the business needs of the [ENTITY] or department. A decision to offer an accommodation for any employee shall not create an obligation to offer a similar accommodation to any other individual. Decisions based on minimizing exposure to the COVID-19 virus shall not create a precedent for any other disability or requested accommodation.

The [ENTITY] intends to fully and faithfully comply with any and all applicable laws, including, but not limited to, the ADA, Rehabilitation Act, the FEHA and the ADEA in the administration of this policy and associated protocol.

Scope of Coverage: This policy applies to and covers all [ENTITY] employees who can verify that they are at higher risk of severe illness if they contract the COVID-19 virus because they are age 65 or older or have one or more of the underlying medical conditions enumerated below, or that may subsequently be identified by public health authorities of the CDC.

Based on the available information at the time that this policy was adopted, the Centers for Disease Control and Prevention ("CDC") identifies the following individuals as those who might be at higher risk of severe illness if the individual contracted the COVID 19 virus.

- People 65 years of age and older;
- People who have chronic lung disease, including COPD;
- People with moderate to severe asthma;
- People who have heart disease or severe hypertension;
- People who are immunocompromised by conditions such as cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, and prolonged use of corticosteroids and other immune weakening medications;
- People with severe inflammatory conditions, such as lupus or rheumatoid arthritis;
- People with severe obesity (body mass index of 40 or higher);
- People with severe sleep apnea;
- People with diabetes;
- People with chronic kidney disease undergoing dialysis; and/or
- People with liver disease

The [ENTITY] expressly reserves the right to modify the above enumerated conditions based on new information or guidance provided by the CDC or other public health authorities.

Effective Dates: This Policy shall be effective immediately upon adoption and shall remain in effect until the [ENTITY] HR Director [or designee] advises employees that the Policy is no longer operative due to the end of the applicable public health emergency.

Notice to Human Resources: If an employee is age 65 or older, has any of the recognized underlying medical conditions enumerated herein, or another condition that the employee believes places them at higher risk for severe illness if they contract the virus that causes COVID-19, the employee may

inquire with [ENTITY]'s Human Resources Department regarding a potential workplace accommodation.

Policy Against Retaliation: The [ENTITY] will not terminate, suspend, discipline, or take any other adverse employment action against an employee exercising their privileges under this Policy.

Process for Accommodation Request: While the request for accommodation under this policy is separate and distinct from a request for a reasonable accommodation under the ADA or California FEHA, an employee who desires an accommodation under this policy must make such a request in accordance with the [ENTITY]'s Personnel Rules.

Following receipt of the request, the [ENTITY]'s Human Resources Department will require a written verification from the employee's health care provider(s) stating that the employee has a qualified underlying medical condition that exposes the employee to a higher risk of severe illness if they contract the COVID 19 or recommending that they self-isolate or implement other workplace modifications. . Furthermore, the Department may require additional information, including, but not limited to, documentation from the employee's health care provider to determine whether the employee's underlying condition necessitates an additional accommodation when the employee returns to the workplace.

If the [ENTITY] is on notice or becomes aware that an employee has a disability that could affect the employee's ability to perform their essential job functions, then the Department will engage in the interactive process, as indicated in the [ENTITY]'s Interactive Process Guidelines. The interactive process is a timely, good faith assessment of all effective and reasonable accommodations that may be implemented without undue hardship on the [ENTITY] or the employee's department.

Determinations regarding accommodations under this policy will be made on a case-by-case basis by the [ENTITY] Department Heads or their designee. Any decision to offer or implement an accommodation for an individual will not create an obligation or precedent for any other accommodation decision.

Accommodations may include, but are not limited to, the following:

- Alternative work assignments or locations;
- Modified schedule or working staggered shifts;
- Telework;
- Temporary reassignment;
- Increased physical distancing measures;
- Increased requirements for face coverings for the employee or others interacting with the employee while working;
- Increased sanitizing of shared work surfaces or high touch areas;
- Implementation of confidential screenings for temperature checks or other appropriate monitoring; and/or
- Extended authorized leave on an intermittent or continuous basis (paid or unpaid).

Departments will work in good faith with the employee to fully consider all potential accommodations.

FREQUENTLY ASKED QUESTIONS

Who May Be Reasonably Accommodated, Disability Related Inquiries, When Employee Refuses to Return to Work, Employees at a Higher Risk of Serious Complications from COVID-19?

May an employer ask an employee without symptoms to disclose medical conditions that make them vulnerable or place them in a high-risk category?

1. No. Employees ARE permitted, however, to let all employees know of accommodations available to those who are vulnerable or who are in a high-risk category.
2. Employers just need to make sure they are putting this information out to all employees, not just those in a particular high-risk category, such as age.
3. Whether any given employer should take that position—at present without the explicit cover of EEOC guidance—is itself an individualized inquiry into that employer's work environment and risk factors.

May an employer ask an employee specific reasons why they have been absent from work if the employer suspects it is for a medical reason?

1. Yes. Asking why an individual did not report to work is not a disability related inquiry, as long as all employees are being treated the same.
2. Employers may also ask employees who have been absent from work if they have any symptoms of COVID-19.

May an employer ask an employee who calls in sick about health conditions or symptoms not related to COVID-19?

No. However the list of symptoms has been evolving and changing over the past three months of the pandemic, so employers are encouraged to check with the CDC and state and local public health websites for the most up to date symptoms.

What are an employer's obligations to provide reasonable accommodation if an employee says that he lives in the same household as someone who due to a disability is a greater risk of severe illness if he contracts COVID-19?

1. The employee only has a right to reasonable accommodation for his own disability.
2. In the situation being raised here, the employee does not have a disability, only a member of his household.
3. However, the employer should consider if they are treating the employee differently than other employees with a similar need before responding to the request.
4. The employer could choose to be flexible and provide a reasonable accommodation to the employee if the employer chooses, i.e. telework.

In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends?

1. Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now.
2. The employer may be able to acquire all the information needed to make a decision.
3. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?

1. Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens.
2. Employers may begin the "interactive process" - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

May an employer postpone an employee's return to work date or withdraw a job offer just because the employee falls in a high-risk category?

1. No. This is a red flag for discrimination.
2. The EEOC Guidance requires that a reasonable accommodation be made for that employee as long as the employee lets the employer know of a need for an accommodation due to a high-risk condition.
3. If the employee does not request an accommodation, the ADA does not mandate that the employer take action.

May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

Which employees are entitled to COVID-19 related accommodations?

1. Employees who don't want to return to work because they are receiving more in unemployment? -- NO
2. Employees who are just afraid to return to work because they don't want to be exposed? – NO
3. Employees who have no symptoms associated with COVID-19? – NO
4. Employees caring for someone who is at higher risk of developing serious complications from COVID-19? -- NO

5. High-risk employees who are at a higher risk of developing serious complications from COVID-19? YES
6. Employees who have lingering health conditions following a COVID infection, and various symptoms including fatigue, shortness of breath, lethargy, cognitive impairment (“brain fog”),. Lapses in concentration or memory, impact on heart or lungs, mental health conditions and mood disorders. These are ongoing conditions, some episodic, some chronic, that fall within the category of “post-Covid syndrome,” also known as “long haul.” YES
7. Pregnant employee? – NO, unless a health care provider verifies a pregnancy-related condition due to high-risk of COVID-19 exposure
8. Pregnant employee who has a pregnancy related disability? – YES

What if an employee is not in a high-risk category, but requests an accommodation to lower their risk of contracting COVID-19 so that they don’t expose a high-risk individual that they live with or care for?

1. Employers are not required to honor such an accommodation request, but many employers are attempting to do so when practicable.
 - a. If an employer does choose to do this, they must be careful not to engage in disparate treatment on a protected EEO basis.
2. The EEOC states: “The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.”

What if an employee refuses to come back to work due to a general fear of the virus and/or coworkers?

1. This is not an allegation that the employer is not doing a good job of putting safety measures in place and following them. This is just a general fear.
 - a. If based on rumors of positive cases, the employer cannot divulge identity of employees who tested positive and/or were exposed to positive cases.
2. The employer is generally not required to “accommodate” employee fears.
 - a. As noted above, accommodation may be required if disability is present.
 - b. Remain mindful of “whistleblower” safety complaint vs. general fear.
 - c. Remain mindful of union-related complaint (concerted activity) v. individual fear.
3. While not required, employer may consider continued remote work.

4. Employer should proceed with caution, inquire about reasons or basis for fear and refusal to return; employer is not required to permit employee to remain off work if based on vague and unexplained fears.

Does contracting COVID-19 or “post-COVID syndrome” constitute having a disability under the FEHA or the ADA?

1. For exposed employees who experience no symptoms, or only mild, temporary symptoms, COVID-19 alone may not qualify as a “disability” under the ADA because temporary, nonchronic impairment with little or no long-term impact (such as broken limbs, sprained joints, concussions, appendicitis) usually are not considered disabilities.
2. Under the FEHA, an employee will likely be disabled, because the Act covers some transitory illnesses. The factors to be considered include:
 - a. The severity of the symptoms;
 - b. Whether the symptoms exacerbate an existing condition;
 - c. Whether complications from the illness develop; AND
 - d. Whether the illness has long-term effects are factors to determine whether COVID-19 is a disability.
3. FEHA definitions are quite broad, and likely result in COVID-19 infection as a disability.
 - a. Limits is defined as making achievement of the life activity difficult.
 - b. Working is defined as a major life activity Thus, any limitation of a major life activity of working, which would include active COVID-19 symptoms, positive test, or underlying high-risk condition that prevents working, would fall within the FEHA obligations to conduct a reasonable accommodation.
4. Longer term complications could also fall within both ADA and FEHA protections. Experts around the world are seeing evidence to suggest that the virus causes heart inflammation, acute kidney disease, neurological malfunctions, blood clots, intestinal damage, and liver problems, all of which indicate that it may very well be a disability.
5. The consensus from the medical community is that the virus is taking a severe toll on its victims both physically and mentally and that these effects are lasting much longer than expected.
6. The EEOC has stated that COVID-19 will virtually always “substantially limit the major life activities” of the functions of the immune system and normal cell growth. The DFEH takes an even broader position.
7. Moreover, the adverse side effects of the medications and medical treatment should also be taken into consideration:
 - a. i.e. remdesivir causes liver damage;
 - b. i.e. hydroxychloroquine causes irregular heart rhythms.

8. Even though COVID-19's physical and mental impairment may last less than 6 months, it may still be considered a disability if those effects are sufficiently severe.
9. If the EEOC adds COVID-19 to the list of impairments that will be a substantial limitation of a major life activity, a court will rely on that language to conclude that the individual with COVID-19 has a disability.
 - a. If challenged by an employer, the plaintiff will carry the burden of showing that COVID-19 did limit a major life activity.

Must an employee with COVID-19 or “post COVID syndrome” be accommodated under the ADA or the FEHA?

It depends, because every individual reasonable accommodation decision (informed by a timely, good faith interactive process, is an individualized assessment. No two physical or mental health conditions affect people in exactly the same way. So, every situation must rise or fall on its own merits.

1. If the illness is a disability, and an accommodation would enable the employee to perform the essential functions of his or her job, it would be required if it didn't cause the employer undue hardship.
2. The law requires employers to assess whether an employee is “disabled” on a case-by-case basis, taking into account the following:
 - a. The employee's particular reaction to the illness;
 - b. His or her symptoms; AND
 - c. Any other relevant considerations.
3. In most cases, the required reasonable accommodation would be offering leave to the disabled employee.
 - a. In considering that option, examine whether the Families First Coronavirus Response Act applies, as well as the Family and Medical Leave Act and the California Family Rights Act.
4. Employers should remain open to other possible accommodations as more information becomes available from the health-care community about COVID-19, and whether its long-term effects possibly render it a chronic condition that might may be considered a disability under the law.

Is a person who has had COVID-19 illness or “post-COVID syndrome” protected under the “regarded as disabled” prong of the definition of disability.

1. Yes, most likely.
2. The ADAAA and the California FEHA both provide that an individual falls within the regarded-as category if she has “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”

3. The focus will be on whether the individual was subjected to adverse employment action due to the perceived impairment, regardless of the actual or perceived impairment's severity.

What are some “best practices for employers” when employees are asking for accommodation requests based on COVID-19 or “post-COVID syndrome?”

1. Accommodate individuals with disabilities who are in the higher risk categories for developing complications.
2. Accommodate individuals with disabilities or chronic complications from “post-COVID syndrome.”
3. Maintain complete documentation on accommodation requests, even if you don't engage in the interactive process.
4. Plan for increased accommodations and leave requests.
5. Have strategies in place for limiting the risk of exposure to COVID-19 in the workplace for all employees, but especially those in a higher risk group.
6. Follow state and local orders and CDC guidance on ways to keep employees working and safe during this pandemic.

Are employees who are not eligible for CFRA leave entitled to a reasonable accommodation if they cannot come to work because of illness related to COVID-19, including “post-COVID syndrome?”

1. Employers of five or more employees are required to provide reasonable accommodation to employees with disabilities, unless doing so would impose an undue hardship.
2. Telework is an acceptable and recommended form of accommodation, when it can be implemented effectively and without undue hardship on the employer.
3. Unpaid leave can also be a form of reasonable accommodation, even if the employee is not entitled to CFRA leave.
4. Whether illnesses relating to and resulting from COVID-19 rise to the level of a disability is a fact-based determination and will vary from case to case.

During a pandemic, must an employer continue to provide reasonable accommodations for employees with disabilities that are unrelated to the pandemic (barring undue hardship?)

Absolutely yes.

The Interactive Process and Temporary Accommodations During the Process

As an overview, what are an employer's obligations when an employee says that he or she has a disability that puts him or her at a greater risk of developing serious complications from COVID-19 or has been diagnosed with "post-COVID syndrome?"

1. This is clearly a request for reasonable accommodation, meaning it is a request for a change in the workplace due to a medical condition.
2. Because the ADA would not require an accommodation where the employee has no disability, the employer may verify that the employee does have a disability, as well as verifying that the accommodation is needed because the particular disability may put the individual at higher risk.
3. There could also be situations where accommodations are requested because a current disability is exacerbated by past COVID infection or current diagnosis of "post-COVID syndrome."
4. The employer can verify the existence of the disability and should engage in an interactive process to discuss both why an accommodation is needed and the type of accommodation that would meet the employee's health concerns.
5. In either situation, and as with any requests for reasonable accommodation, an employer may also consider whether a reasonable accommodation would pose an undue hardship, meaning the employer may assess whether a specific form of accommodation would pose significant expense or significant difficulty.
6. Under the current circumstances, for employers seeking documentation from a health care provider to support the employee's request, they should remember that because of the pandemic many doctors may have difficulty responding quickly.
 - a. There may be other ways to verify the existence of a disability. For example, a health insurance record or a prescription may document the existence of the disability.
7. If the employer is waiting to receive documentation, it may want to provide the accommodation on a temporary basis. This could be particularly critical where the request is for telework or leave from an employee whose disability puts them at a higher risk of developing serious complications from COVID-19.

What does an employee need to do in order to request a reasonable accommodation from his or her employer because the employee is at a higher risk of developing serious complications from COVID-19 or is experiencing lingering conditions that are identified as "post-COVID syndrome?"

1. An employee, or the employee's representative, must let the employer know that he or she needs an accommodation for a reason related to a medical condition.
2. Individuals may request accommodation verbally or in writing.

3. While the employee (or third party) does not need to use the term “reasonable accommodation,” he or she may do so.
4. The employee (or his/her representative) should communicate that he or she has a medical condition that necessitates a change to meet a medical need.
5. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

What are some of the questions an employer should ask during the interactive process?

1. How the disability creates a limitation and what limitations is the employee experiencing;
2. How the limitations affect the employee and the employee’s job performance;
3. The accommodations that are available to reduce or eliminate these problems;
4. Are all possible resources being used to determine possible accommodations?
5. The ways that the requested accommodation will effectively address the limitation;
6. Whether or not the employee has had an opportunity to discuss the proposed possible accommodations;
7. Whether another form of accommodation could effectively address the issue;
8. How a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties);
9. Once the accommodations are in place, whether or not it would be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed;
10. Whether or not supervisory personnel and employees need training.

How should employers begin the interactive process?

1. Employers may begin the "interactive process" by combining the above inquiry with notice to employees on the CDC’s list of people at higher risk of developing serious complications from COVID-19, and the risk/morbidity statistics for those individuals.
2. Such a notice could have a fair chance of prompting voluntary employee disclosure of high-risk, so that employers can work to manage it.
3. The employer should follow the following steps:
 - a. Acknowledge the accommodation request;
 - b. Gather information to determine if an accommodation law applies;
 - c. Find out how the employee is limited;
 - d. Find out how the requested accommodation is going to address that limitation;
 - e. Discuss whether another accommodation could solve the issue;

- f. Make sure the proposed accommodation will enable the employee to continue to perform the essential functions of the job;
- g. Explore, choose, implement and monitor possible accommodations; AND
- h. Document each step of the process.

What practical consideration should employers and employees keep in mind about the interactive process in the current COVID-19 situation?

1. The interactive process refers to the process an employer and employee should use to fully discuss a request for accommodation so that the employer obtains necessary information to make an informed decision.
2. In the current pandemic, some requests may need an employer's prompt attention, such as those employees who have disabilities putting them at a higher risk of serious complications from COVID-19.
3. Employers may provide requested accommodations on a temporary basis (for example, one or two weeks) while the employer is discussing the request more fully with the employee or waiting to receive medical documentation.
4. Given the current circumstances, employers and employees should try to be as flexible and creative as possible. There may be accommodations that are not ideal but will meet an employee's needs, at least on a short-term basis.

What should managers and supervisors be trained on with regard to reasonably accommodating workers for reasons relating to COVID-19?

1. To be flexible;
2. To stay on top of CDC and State/Local public health recommendations;
3. To maintain confidentiality with respect to all medical information;
4. That the consideration and provision of accommodations requires discussion with employees.

What are some other “practical tips” for employers during the interactive process?

1. Err on the side of caution.
 - a. If the employer is not sure whether an employee has requested an accommodation, the employer should ask the employee to clarify what is being requested and why.
2. Act quickly.
 - a. Time is of the essence even more so during this pandemic.
3. Assign responsibly.
 - a. Employers should assign at least one person who is responsible for making sure an accommodation request is processed so that the request is not lost on someone's desk.

4. Conduct training.
 - a. Employers should train all managers and supervisors to recognize accommodation requests and what to do with a request once it is received.
5. Keep an open mind. Remember that accommodations are about doing things differently to help overcome disability related limitations, so keep an open mind when exploring options.
6. Invite the employee to suggest accommodations. The employee may have good ideas but may be hesitant to bring them up without being asked to do so.
7. Consider the employee's preference. Although not required, when possible employers should choose the accommodation most preferred by the employee.
8. Make sure to take all necessary steps to implement the accommodation. And check back frequently to see if the accommodation is actually working
9. Communicate with essential personnel. Managers and supervisors must know about the accommodation, others should not be told to protect the employee's privacy, but sometimes it's inevitable.
10. Be flexible if things change. The employee's situation may change and the nature of the pandemic will definitely change, so flexibility will be key.
11. Encourage ongoing communication.

Types of Reasonable Accommodations

What are the top possible accommodations for employers who at a higher risk of serious complications from COVID-19?

1. Temporary job restructuring of marginal (not essential) job duties;
2. Job restructuring to have no direct contact with others;
3. Temporary transfer to a different position;
4. Modifying a work schedule or shift assignment, as long as it decreases contact with coworkers or the public;
5. Making sure the workplace is reconfigured for physical distancing and follow all other protocols, i.e. face coverings, health screenings, cleaning and disinfecting, etc.;
6. Moving the location of where the employee performs his or her work;
7. Telecommuting;
8. Leave;
9. Additional or enhanced PPE;

10. Erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others.

If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities absent undue hardship that could offer protection to an employee who, due to a preexisting disability, is at higher risk of developing serious complications from COVID-19?

1. There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk of developing serious complications from COVID-19 and who therefore requests such actions to eliminate possible exposure.
2. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.
3. Low-cost solutions achieved with materials already on hand or easily obtained may be effective.
4. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.
5. Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances.
6. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

Does an employer have an obligation to create a job for a disabled or high-risk employee as a reasonable accommodation?

1. No. There is no obligation to create a job.
2. However, the employer is obligated to consider a reassignment to a different position, if one is available.

Are employers required to eliminate an essential job function as an accommodation for an individual with a disability?

1. No, they are not required to do that, but they may do so if they wish.
2. If the employer chooses to do this, they can restore the employee's essential duties after the pandemic has passed.

What if an employee had a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?

1. An employee who was granted a reasonable accommodation prior to the pandemic might be entitled to an additional or altered accommodation, absent undue hardship.
2. For example, a different type of accommodation might be necessary for teleworking than what is used in the workplace.
3. The employer should discuss with the employee whether the same or a different disability is the basis for the new request, and why an additional or altered accommodation is needed.
4. Examples: an employee who needs to take additional breaks during the workday or an employee who needs an ergonomic keyboard. These accommodations should continue to be allowed when the employee is teleworking.

Telecommuting as a Reasonable Accommodation

What are some important basic things an employer must remember when an employee is telecommuting as a reasonable accommodation?

1. Employers who allow telecommute must have a written telecommute policy signed by both the employer and employee.
2. Employers should consider and clarify rules regarding taking confidential info and/or documents home.
3. Employers should take appropriate steps to ensure accurate timekeeping and data and information security.
4. Employers should pay careful attention to state law requirements for reimbursement of business-related expenses. Especially equipment, internet use, cell phone use, etc.
5. Employers should remind employees to report any occupational injuries or illnesses, even though they are occurring at home.

In a workplace where all employees are telecommuting, should the employer postpone discussing a request for a worker with a disability for an accommodation that will not be needed until he or she returns to the workplace after telecommuting ends?

1. No, not necessarily. Although reasonable accommodations necessary for telecommuting are a higher priority, the employer and employee should engage in the interactive process and consider return-to-work accommodations now.
2. The employer might be able to collect in advance all the information it needs to make a decision.
3. If a reasonable accommodation is granted, the employer also might be able to make some arrangements for the accommodation in advance.

Must an employer grant telecommuting as a reasonable accommodation to every employee with a disability who wishes to continue to work from home after the public health measures are no longer necessary?

1. No. The EEOC recognizes that the employer still is entitled to inquire about and understand the disability-related limitation that necessitates an accommodation.
2. Absent such a limitation requiring telecommute, no continued work-from-home accommodation is required.
3. If there is a disability-related limitation that can be addressed with another form of reasonable accommodation at the workplace, the employer may choose that option over telecommute.
4. An exception to this would be employees who are at a high-risk of serious complications from COVID-19.

If an employer allows employees to work remotely as an accommodation, should it have a written telecommuting policy?

Yes, any employer who permits employees to telecommute as a reasonable accommodation should have a telecommuting policy to manage employee expectations and to ensure that workers comply with wage and hour and confidentiality laws.

What should an employer consider in drafting such a policy?

1. Inventory the types of equipment employees have taken home or will need to take home in order to do their jobs remotely, including computers, printers, chargers, office supplies and other tools of the workplace.
2. Determine whether employees can perform work on their own devices, and if so, how company use of an employee's personal device might be compensated.
3. Define expectations about employee availability:
 - a. Must workers be available during the whole work day?
 - b. May their work hours be flexible?
 - c. How will workplace communication occur?
4. Ensure that employees understand time-keeping protocol and that they follow time-clock requirements as if they were working at the employer's facility. This is important particularly for nonexempt employees who are entitled to rest and meal breaks under the California Labor Code even when working from home.

If, prior to this pandemic, an employee with a disability requested telecommuting as a reasonable accommodation and the employer denied the request due to concerns that he or she would not be able to perform the essential job functions remotely, must the employer grant the accommodation request during the pandemic if the employee renews the request?

1. It depends. The experience during the temporary telecommute situation could be considered a trial to determine if the worker could perform all essential job functions working remotely.
2. The employer should reconsider its initial, pre-pandemic decision, and decide accordingly.

Must an employer accommodate an employee's disability while the worker is temporarily telecommuting?

1. Yes, if:
 - a. The disability has been made known to the employer and the employee was receiving accommodations for the disability prior to beginning telecommute; OR
 - b. The disability has been made known to the employer and the employer and employee have engaged in the interactive process; AND
 - c. The accommodation does not cause an undue hardship.

What actions should an employer take if the employer learns that an employee who is telecommuting due to the pandemic is sending harassing emails to another worker?

1. The employer should take the same actions it would take if the employee was in the workplace.
2. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

If an employer provides telecommute, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

May an employer require temperature checks or COVID-19 testing or ask questions about symptoms of employees who are telecommuting but not coming in to the workplace?

No because they are not physically interacting with coworkers or anyone else.

An employer knows that an employee is telecommuting because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is telecommuting without saying why?

1. Yes. If staff need to know how to contact the employee and that the employee is working even if not present in the workplace, then disclosure of this information without saying why the employee is telecommuting is permissible.
2. If the employee was on leave rather than telecommuting because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

Many employees, including managers and supervisors, are now telecommuting as a result of COVID-19. How should they keep medical information of employees confidential while working remotely?

1. The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files.

2. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while telecommuting, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so.
3. But to the extent that that is not feasible, the supervisor still must safeguard this information to the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can see them.
4. Similarly, documentation must not be stored electronically where others would have access. And in fact, a manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

When an employer requires some or all of its employees to telecommute because of COVID-19 or government officials require employers to shut down their facilities and have workers telecommute, is the employer required to provide a telecommuting employee with the same reasonable accommodations that it provides to this individual in the workplace?

1. If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting.

For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

2. Also, the undue hardship considerations might be different when evaluating a request for accommodation while telecommuting rather than when working in the workplace. In other words, a reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering the circumstance and the place where it is needed, and also the circumstances that necessitated the telecommute.

For example, the fact that the period of telecommute may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a needed assessment.

3. So as a practical matter, given the circumstances that have led to the need for telecommute, employers and employees should both be creative and flexible about what can be done where an employee needs a reasonable accommodation for telecommute at home in these circumstances. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

If an employee has already been allowed to telecommute as a reasonable accommodation, can the employer claim after a few months that it is an undue hardship and require the employee to come back?

1. Yes, if the employer's circumstances have changed.

2. However, once an employer has allowed an employer to telecommute as a reasonable accommodation, most likely they will need to continue to allow telecommuting as a reasonable accommodation throughout the duration of the pandemic.

What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests to telecommute? Must the employer continue to provide the original reasonable accommodation?

1. Yes, the pandemic has not taken away the need for reasonable accommodations that were approved prior to the pandemic. An example would be frequent breaks, special ergonomic equipment, etc.
2. If the original accommodation proves to now be a hardship, either because the employee is now telecommuting or because the employer's situation has changed, the employer and employee should re-engage in the interactive process to see if they can find a reasonable accommodation that is not an undue hardship.

What benefits does telecommuting offer to both employers and employees?

1. Enhances worker morale and health;
2. Reduces employee absenteeism;
3. Improves retention of good quality workers;
4. Boosts productivity;
5. Creates a better work/life balance;
6. Minimizes harmful impact on global economy (i.e. helps sustainability efforts by reducing carbon emissions, office energy costs, and workplace footprints in terms of new office buildings);
7. Reduces travel and commuting expenses.;
8. Allows for business continuity during the COVID-19 pandemic.

What are some challenges for employers when their employees are telecommuting?

1. It's hard to keep programs relevant to workers' real needs and wants.
2. It's difficult to focus on the unique needs of specific groups of workers without creating a second class of workers and without engaging in unlawful disparate treatment or disparate impact discrimination.
3. It's challenging to communicate broadly to everyone and hard to have employees out of the day to day flow of information.
4. Upper management might be resistant to change.
5. It results in a partial loss of control, especially in terms of supervision of work.

6. It's often hard to maintain the safety and security of personnel and data.
7. There is a need for increased technology costs.
8. It is often harder for employers to establish set expectations, trust and unique methods of evaluation to lead from a distance.

What are some challenges for employees in a telecommute model?

1. It can be difficult to work as a team with members in different places and with varying schedules.
2. It could result in a negative impact on career advancement.
3. Workers may be distracted by spouse, children, pets and household tasks.
4. Employees may feel a heightened feeling of being "owned" by their employer, in that the company now has a virtual presence in the employee's home.
5. Employees may feel that their employer has an expectation that they will now be available outside of "normal" business hours.
6. Feelings of burnout.
7. Lack of clear boundaries between home and work.
8. Feelings of isolation.
9. Job insecurity.

What are the key considerations employers should consider when managing employees working from home as a result of COVID-19?

1. Make sure to have a clear policy in place
 - a. Employers must spell out their policy clearly and in writing.
 - b. If a policy was already in place, make sure it's current, up to date, and clear.
 - c. If there was no "work from home" policy in place before, they should quickly draft one and disseminate it to their employees.
 - d. Clearly state the expectations regarding:
 - i. Start and stop times;
 1. Make sure employees know when overtime is appropriate and approved.
 - ii. The extent to which they're expected to remain available;
 - iii. Productivity standards;
 - iv. Whether any conference calls or virtual meetings will be required.
2. Make sure to apply the telecommute policy consistently among all employees.
3. Make sure to track hours accurately.
 - a. Employees must be paid their regular hourly rate or salary, as well as any overtime.

- b. An electronic timekeeping system that employees can log into would be ideal. Other options:
 - i. A daily email from an employee to their supervisor attesting to the hours they work;
 - ii. A written timesheet filled out by hand and turned in weekly;
 - c. From a management perspective, it's best to have the employee self-report their time to put the responsibility on them.
 - d. Nonexempt employees working remotely must agree to accurately record their hours, including meal and rest breaks—and must take those mandated breaks. The state's Division of Labor Standards Enforcement requires that hourly workers receive a paid 10-minute rest break for every four hours they work "or major fraction thereof." They are also entitled to a 30-minute unpaid meal break for every five hours on the job.
 - i. Employees who work through their 30-minute meal period must receive a missed-meal premium equal to an hour of pay. Managers or HR professionals who discover missed meal breaks should coach employees on time management strategies and remind them that the company expects them to fit the breaks into their schedule.
4. Make sure to pay attention to special rules for salaried workers.
- a. Normally, salaried workers must be paid their full salary irrespective of how many hours they work, unless the business is closed for a full workweek and the person performs no work at all.
 - b. If a business is forced to shut down part of the way through a workweek, exempt workers must be paid as if they worked the full week if they worked any hours at all before the company shut down.
 - c. The "emergency carve out" of allowing exempt employees to perform nonexempt work in emergency situations without putting their exempt status at risk does not come into play here because employers DO have the opportunity to plan things out.
5. Both employer and employee should stay flexible.
- a. Employers should maintain a bit of flexibility on their employee's exact work hours given the fact that so many factors are coming into play, such as parents needed to take care of their kids while school is out.
 - b. Employers should offer flexibility on work hours and employees should be responsible to get the work done at different times if needed.
6. Consider workers' expenses.
- a. In California, when employees are working from home based on a mandatory edict from their employer, the company's business costs cannot be passed on to the employees.
 - i. This would include cell phones to make their phone calls or internet cost.
 - ii. These costs must be reimbursed, per the Labor Code
 - b. Employees who don't typically work from home may not have a home office. Employers can deliver laptops, printers and other goods from the workplace to employees' homes or allow employees to purchase necessary equipment.

- c. Most people already pay for monthly data plans and Internet access for phones and home computers. But when they're using that equipment for work, employers should provide a stipend—\$50 is recommended—to defray those costs.
- d. Employers should review their personnel manuals and policies to identify all employee requirements regarding home telephones, internet, software and hardware.
- e. Employers should confirm and circulate their written expense reimbursement policies or codify any existing practice into a written policy.
- f. Employers that do not have a written reimbursement policy that establishes specifications for reimbursement for home internet and personal cellphones should keep in mind the “reasonable percentage” language from the recent court opinion of ***Herrera v. Zumiez*** (2020).
 - i. In *Herrera*, the 9th Circuit addressed a claim regarding personal cellphones and ruled that an employer in CA must pay a “reasonable percentage” of expenses associated for work when telecommuting.
- g. When the shelter-in-place order is lifted and workers can once again return to their office buildings, if they do, employers must decide what, if any, equipment and supplies employees need to return.
 - i. Goods that the employer paid for belong to the employer.

What are five steps that can help keep employees engaged while telecommuting?

1. Prioritize communication.
 - a. Remote employees can often feel like they're left out of the loop. As such, it's important for managers to communicate on a daily basis. Consider scheduling a daily check-in to see how employees are doing with this new working arrangement and if you can do anything to help them perform their work. Be sure to communicate any important company news as it presents itself, too.
 - b. Remember that communication is a two-way street, and be sure to listen to any concerns employees may have. The COVID-19 pandemic is a rapidly evolving situation, and many employees may be feeling overwhelmed or anxious. If they express concerns along those lines, evaluate whether there's anything you can do to help mitigate those feelings.
 - c. Additionally, remote employees may start to feel isolated, so it's important to remind them that they're not alone, especially during these uncertain times.
2. Make sure employees know that the employer is here for them and has their back.
3. Set clear expectations.
 - a. Employers should be sure to communicate expectations of your employees while they work from home.
 - i. Employees who are aware of what the expectations are will be more motivated to meet those expectations.
 - ii. If an employer wants employees to be online during specific hours of the day, communicate that.
 - iii. If an employer wants a daily report of what they are working on, be sure to ask.

- b. With that being said, employers should be mindful that not all employees may have an ideal telecommuting setup while daycares and schools are closed due to the COVID-19 pandemic.
 - i. As such, employers should be patient and understanding with employees.
- 4. Recognize good work.
 - a. Recognizing and rewarding employees for their hard work is a key factor in boosting engagement among telecommuting employees. Employee recognition can take many different forms, but the main goal is to incentivize continued productivity and dedication from employees.
 - i. For example, an employer could send out a teamwide or companywide e-mail detailing what an employee did and why it's exceptional
 - b. Recognition doesn't need to be formal or grand for it to be effective.
 - i. For example, a personal thank-you e-mail or message can go a long way in making employees feel valued and engaged while they work from home.
- 5. Encourage work/life balance.
 - a. Remote employees may have difficulty establishing a healthy work/life balance right now. Because there may not be a physical separation between their workspace and their personal space, employees may feel like they need to be available for work 24/7, which can lead to unnecessary stress and, eventually, burnout.
 - b. As a result, employers should communicate to the employees the importance of creating boundaries.
 - i. Suggest that they work their normal hours and then step away from the computer until it's time to start working the next day.
- 6. Demonstrate a collaborate culture.
 - a. Employees tend to be more engaged when they feel like they are part of a team. When they are working from home, it can be hard for them to buy into that mentality.
 - b. Employers should make sure employees understand that even though they may not be in the office together, they're all working together toward the same common goal.
- 7. Give working parents some latitude and flexibility during this pandemic.
 - 1. It requires a high degree of compatibility, communication and cooperation between the job-sharing partners and with their supervisor.

Reasonable Accommodations (for employees who can't wear the required PPE, who are sensitive to the cleaning chemicals, etc.)

What are some examples of employees who cannot wear the required PPE or engage in infection control practices and what are some solutions?

- 1. Example: an employee who cannot wear latex gloves due to a latex allergy:
 - a. Solution: provide non-latex gloves.
- 2. Example: an employee who cannot frequently wash his/her hands due to a skin condition:
 - a. Solution: provide disposable gloves for that employee and provide enough that the gloves can be changed frequently.

3. Example: an employee cannot frequently wash his/her hands with the soap provided due to an allergy to that product:
 - a. Solution: provide alternate soap.
4. Example: an employee cannot wear a facemask due to an actual medical condition, such as asthma, COPD, claustrophobia or skin irritations (NOT due to just not wanting to wear one):
 - a. Solution: provide a modified face mask or a face shield.
 - i. Make sure the employee's mask is the correct fit.
 - ii. Make sure the employee is wearing a cloth mask, as cloth masks are more breathable.
 - b. Alternative solution: If that isn't feasible or doesn't solve the problem, re-assign the employee so that the employee doesn't have direct contact with others.
5. Example: an employee is an interpreter who relies on lip reading to interpret to employees who use lip reading:
 - a. Solution: provide face shields or clear masks
6. Example: an employee needs a modification of PPE due to religious reasons:
 - a. Solution: discuss alternatives with the employee
7. In all of these situations, the employer should discuss the request and provide the modification or an alternative, as long as it is feasible and not an undue hardship

Is the employer entitled to a medical certification confirming that the employee has a disability that prevents the use of a face covering or other PPE

Yes.

What would be the next step for the employer?

1. After receiving the additional information and medical documentation from the employee, the employer would have to evaluate whether the employee requires a reasonable accommodation, and if so, what reasonable accommodation works best for the employer.
2. For example, if the employee provides a legitimate medical reason for not being able to wear a face covering, reasonable accommodations could include the following:
 - a. Providing the employee with an unpaid leave of absence until face coverings are no longer required at work;
 - b. Allowing the employee to work remotely; OR
 - c. Providing an alternative face covering that is allowed by the employee's medical condition, such as a face shield or different kind of face covering.

Is it a violation of the ADA or California FEHA for employers to require employees to wear PPE to address a safety hazard?

No.

Sensitivities or allergies to cleaning products

Is it possible for an employee to have a disability based on allergies or sensitivities to the cleaning products that will be used more extensively to follow the increased cleaning and disinfecting protocols in light of the COVID-19 pandemic?

1. Yes. Many employees have allergies or sensitivities to cleaning products and this may pose a problem.
2. 60 million people have asthma attacks or allergic reactions to scented cleaning products.
3. Some medical professionals believe that 4% to 6% of the population suffer from some form of chemical sensitivity.

How might an employee with a sensitivity or allergy to cleaning products physically react?

1. Stinging eyes;
2. Wheezing;
3. Nausea;
4. Headache or migraine;
5. Vertigo or dizziness;
6. Extreme fatigue or lethargy;
7. Poor memory and concentration;
8. Runny nose;
9. Rashes or itching;
10. Impaired memory or concentration;
11. Insomnia or sleep disturbance;
12. Situational or interpersonal issues at work;
13. Inability to concentrate.

Does it make a difference if the exposure is high level or low level?

No. If an employee has an allergy or sensitivity, the reaction will occur with any level of exposure.

What are the possible accommodations for an employee with allergies or sensitivities to cleaning products?

1. Since there will be increased cleaning in the workplace, the best two accommodations will likely be telecommuting or, if that is not feasible, leave as an accommodation.
2. Another option would be for the employer to find unscented cleaning products, which would work as long as they are disinfecting.

Mental illness

In what ways might the COVID-19 pandemic cause or exacerbate mental illness in employees?

1. Individuals prone to depression and mood disorders may struggle with the social isolation that accompanies staying home.
2. Those with anxiety, phobias or obsessive-compulsive disorder (OCD) may have increased symptoms related to germs, being around people, and/or the fear of contracting the virus.

3. The sudden change in routine and need to quickly adapt might contribute to issues with concentration, memory, increased fatigue, and irritability.
4. Feelings of loneliness, apprehension, sadness, anxiety, anger, fear, hostility, grief, loss and frustration may continue for the foreseeable future.
5. It can be helpful to recognize and acknowledge how this pandemic is affecting everyone personally and professionally.
6. All of these might result in an inability to cope both at home and at work.

What should employers consider when thinking about mental health and returning to the workplace?

1. Recognize that we are in the midst of a worldwide unprecedented crisis and everyone is experiencing a tremendous amount of complex trauma.
 - a. Everyone will be handling the trauma differently.
2. Recognize that length of the crisis is continuing and ongoing and will be for a long time.
3. Substance abuse: It must be considered that many employees are dealing with this crisis by turning to substances, which can lead to substance abuse.
4. Don't assume you know exactly how your employees are feeling. Ask them.
5. Really think about the amount of training managers will need to handle the mental and emotional needs of their employees during this pandemic.
 - a. Emphasize and train on information, communication, guidance and direction.
6. Give employees some space to process everything.
7. Employers need to do all they can to take away the stigma of mental health issues. Have open dialogues and conversations with employees.

If an employee has a pre-existing mental illness or disorder that has been exacerbated by the COVID-19 pandemic, is he or she entitled to a reasonable accommodation?

1. Yes, as long as the employee has a known disability and requests an accommodation that would not cause an undue hardship.
2. Employers should be aware that employees with pre-existing mental health disorders might have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.
3. As with any accommodation request, employers may:
 - a. Seek medical documentation;
 - b. Ask questions to determine whether the condition is a disability;
 - c. Discuss how the requested accommodation would assist the worker and enable him or her to keep working; AND
 - d. Explore alternative accommodations that could meet his needs.

What are some examples of pre-existing mental health conditions that may be exacerbated by COVID-19?

1. Anxiety disorder;
2. Obsessive compulsive disorder;
3. Post-traumatic stress disorder; AND
4. Depression.

What are some anxiety disorders?

1. General Features: excessive fear and anxiety and related behavioral disturbances.
2. Fear: emotional response to real or perceived imminent threat.
3. Anxiety: anticipation of future threat.
4. Panic Attacks: particular type of fear response (may be seen in other mental disorders as well).
5. Specific types of Disorders
 - a. specific phobia;
 - b. social anxiety disorder;
 - c. panic disorder;
 - d. agoraphobia;
 - e. generalized anxiety disorder;
6. Not every anxiety disorder is a disability
7. COVID-19 has resulted in an anxiety disorder in many individuals

What if the employer fails to engage in the interactive process?

1. Where employer fails to engage in interactive process, the employer is liable for failure to accommodate by causing a breakdown in accommodation process.
 - a. Case: **Battle v. UPS** (2006):
 - i. After employee who had suffered nervous breakdown and submitted physicians report that employee needed accommodation to perform marginal function of “memorizing intricate information,” employer liable for failure to provide appropriate reasonable accommodations.
 - b. Case: **Galero-Cerezo v. Dep’t of Justice** (2004):
 - i. Despite employee’s reasonable accommodation requests and provision of medical evidence that employee suffering from depression, employer continued to claim that employee not disabled.
2. However, where the employee fails to engage in the interactive process in good faith, the employee may not pursue a failure to accommodate claim against the employer.
 - a. Case: **Huge v. The Boeing Company** (2016):

- i. Employee with Asperger's had no disability discrimination claim where employee's requests for accommodation contradictory and employee delayed and frustrated interactive process.

What types of reasonable accommodations should employers provide to employees with emotional or mental disabilities?

1. Job Restructuring (re-assign the non-essential functions of the job):
 - a. Case: **Emerson v. Northern States Power Co** (2001)
 - i. Customer telephone consultant with acute anxiety disorder and panic attacks could not perform the essential functions of her position, which included handling safety-sensitive calls. Although plaintiff suggested routing safety-sensitive calls to other employees, employer not obligated to change essential functions of job.
2. Modified Work Schedules and Part-Time Work – Biggest accommodation we are seeing as a result of COVID-19:
 - a. Recent case: **Kassa v. Synovus Financial Corp** (2020):
 - i. Allowing an employee suffering from bipolar disorder and intermittent explosive disorder to take short breaks when the employee was frustrated could be a reasonable accommodation, especially where such accommodations had been provided by the employee's prior supervisor.
 - b. But remember that predictable attendance is essential.
 - c. Allowing a "work when able" schedule is not required, but employers may need to accommodate a flexible work schedule.
 - i. Case: **Solomon v. Vilsack** (2014):
 1. Budget analyst w/depression who had worked flexible schedule denied continuation by supervisor. Jury issue as to whether reasonable accommodation.
 - ii. Recent case: **Summerland v. Excelon Generation Co.** (2020):
 1. Employee who suffers from anxiety and depressive disorders could pursue ADA/FMLA claim against employer who threatened to revoke her access to one of its plants for continuing to request medical leave to see her therapist.
3. Leave – another big accommodation as a result of COVID-19:
 - a. Case: **Orta-Castro v. Merck, Sharp and Dohne Quimica PR** (2006):
 - i. Employer accommodated employee with major depression by providing several medical leaves of absence and allowing employee to work 4 hours per day upon return from leave and to take leave once every two weeks to see doctor.
 - b. Case: **Rask v. Fresenius Med. Care N. Am.** (2007):
 - i. Employer not required to allow patient care technician with depression to take sudden unscheduled absences due to problems with medication.
 - c. More than 12-week FMLA period may be a reasonable accommodation unless undue hardship occurs. However, extended leave may not be reasonable.
 - d. Case: **Severson v. Heartland Woodcraft** (2017):

- i. “multi-month” leave of absence is not a reasonable accommodation under the ADA.
 - e. Case: **Hwang v. Kan. State Univ.** (2014):
 - i. granted 6 months paid medical leave for cancer and asked for additional time off. Court said absence of more than 6 mos. not required where plaintiff did no work.
 - f. Courts have held that requests for more than 1 year of unpaid leave create an undue hardship.
 - g. Indefinite leave is not required.
- 4. Telework – probably the biggest accommodation as a result of COVID-19:
 - a. Pre-COVID courts held that telework in general would not necessarily be a reasonable accommodation, particularly where employees interact on a daily face to face basis and work in teams. That all changed with COVID-19, now telework is readily accepted as a reasonable accommodation and even for employees who don’t qualify for a reasonable accommodation.
 - b. Case: **Humphrey v. Memorial Hosp. Ass’n.** (2002):
 - i. Work from home may be reasonable accommodation for medical transcriptionist suffering from OCD.
 - c. Case: **EEOC v. Ford Motor Co.** (2015):
 - i. Telework not reasonable accommodation where employee works as part of a team and job involves frequent interaction with co-workers.
 - d. Case: **Mason v. Avaya Comm., Inc.** (2004):
 - i. Service coordinator with PTSD not qualified for her position because on-site attendance was an essential function of the job and working at home could not be a reasonable accommodation. Management could not adequately supervise her and she would not be available to cover other coordinators at busy times.)
- 5. Reassignment to a Vacant Position
 - a. Case: **Tyler v. Ispat Inland, Inc.** (2001):
 - i. Transfer to another worksite of employee with paranoia and delusional disorder who was afraid of co-workers was “entirely reasonable” accommodation.
 - b. Case: **Lawler v. Peoria School District** (2016):
 - i. Due to PTSD, Plaintiff requested medical leave and a transfer to a classroom with fewer students with severe behavioral and emotional disorders. District’s refusal to transfer Plaintiff to one of the vacant positions in a less stressful classroom was a failure to accommodate.

- c. Case: ***Burchett v. Target Corp.***, (2003):
 - i. Transportation analyst with depression not entitled to a transfer to different position because she was qualified for her current position with the reasonable accommodation the employer.
- 6. Acquisition or Modification of Equipment or Devices;
- 7. Adjustment or Modification of Employer Policies;
- 8. Qualified Readers or Interpreters;
- 9. Making Existing Facilities Readily Accessible to and Usable by Persons with Disabilities:
 - a. Persons with psychiatric disabilities may have problems concentrating.
 - i. Sound proofing through room dividers or partitions may aid person's concentration.
 - ii. Relocating work station away from workplace noise may help.
- 10. Providing a job coach;
- 11. Changing supervisory methods:
 - a. EEOC says that providing a new supervisor is not required. However, the employer can change methods of supervision in the following ways:
 - i. Communicating by email rather than orally about work assignments, evaluations and training;
 - ii. Providing additional training or modified training materials;
 - iii. Providing detailed day to day feedback and guidance.
 - b. The following would NOT be required because that would be an undue hardship:
 - i. Providing a completely stress-free environment;
 - ii. Immunizing employee from criticism.

What can employers do to help employees suffering with mental health issues arising out of COVID 19 or “post-COVID syndrome”, whether they are new issues or existing but exacerbated issues?

- 1. Provide reasonable accommodations.
- 2. Provide mental health counseling to employees who need it.
- 3. Provide temporary accommodations to all employees who are feeling increased stress and facing personal difficulties at this time.
- 4. Recognizing that all employees are having difficulties with everything by showing patience and flexibility can go a long way during this outbreak.
- 5. Check in with employee's regularly.
 - a. Email, call, video chat, etc. A simple “check in” can help everyone feel connected.

What are the biggest stresses faced by employees during the COVID-19 pandemic?

1. Adapting to telework or new work arrangements;
2. Childcare issues with the schools, camps and child care facilities closed;
3. Getting sick;
4. Dealing with a sick family member;
5. Fear of being laid off or furloughed;
6. Fear of returning to being exposed at work;
7. Sadness over the loss of normalcy;
8. Fear of economic toil;
9. Sadness over the loss of connection with coworkers;
10. Uncertainty of the future;
11. Uncertainty of what the “new normal” is going to look like.

What can employers do to help employees deal with these stressors?

1. Listen to them. Provide an opportunity for them to express their concerns.
2. Communicate often and quickly as new information is available. Part of the biggest stress is the unknown.
3. Remind employees to practice self-care and encourage them to take time to exercise, eat right, get plenty of sleep and relax.
4. Remind employees about the mental health benefits available to them.
5. Focus on what you can do, not what you can't do. You can't fix every problem, but try to fix the ones you can.

What if an accommodation for someone's mental illness presents a direct threat to their own health and safety or the safety of others?

1. Employer is not required to provide an accommodation that would cause an “undue hardship” to the employer.
 - a. Generalized conclusions will not support claim;
 - b. Must be based on individualized assessment of current circumstances to show that specific accommodation would cause significant difficulty or expense;
 - c. Cannot be based on employee's (customer's) fears or prejudices about disability;
 - d. Not undue hardship because it would cause employee morale problems;

- e. But, could be where accommodation unduly disruptive to other employees' ability to work.
2. A "Direct Threat" is a:
 - a. Significant risk of substantial harm to the health or safety of the individual or other;
 - b. That cannot be eliminated or reduced by reasonable accommodation.
 3. With regard to mental-health disabilities, employer must identify the specific behavior that would pose a direct threat.
 - a. A history of mental-health related conditions or undergoing current treatment alone is not sufficient to establish a direct threat.
 - b. Taking medication that may have side effects alone is not sufficient to establish a direct threat.
 - c. Must be determined on an individualized basis, and based upon reasonable medical judgment as to the nature and severity of side effects on the individual.
 - d. May require fitness for duty exam.
 - e. Case: **Freelain v. Vill. of Oak Park** (2018):
 - i. Proper for municipality to require police officer who had taken extended sick leave due to migraine headaches and other psychological conditions to undergo psychological evaluation.
 4. Employers need to maintain a safe and healthy workplace.

Why might employers see an increase in a request for a reasonable accommodation of an emotional support animal as a result of mood or mental disorders from the pandemic or "post-COVID syndrome?"

Because the COVID-19 pandemic has caused many individuals to feel increased stress and anxiety, more employees may request permission to bring their emotional support animal to work as a reasonable accommodation.

How should employers handle a request by an employee to an emotional support animal to work as a reasonable accommodation?

1. Employers should follow their usual procedures for processing an accommodation request.
2. If an employee asks to use a service or emotional support animal in the workplace as a reasonable accommodation, the employer should grant the request unless allowing the use of the animal would be an undue hardship or pose a significant risk of substantial harm to the employee or others in the workplace.
3. The employer must still go through the steps of the interactive process.

What would be an employer's first step in the interactive process if an employee requests to bring an emotional support animal to work?

1. Typically, an employee asks if he can bring his emotional support animal to work, but sometimes an employee will just show up with the animal.

2. In some cases, this is because employees, like many employers, are confused about the rules related to emotional support animals in the workplace and believe they have an automatic right to use such an animal at work.
3. When this happens, the employer needs to decide what to do – allow the emotional support animal temporarily while going through the interactive process or require the employee to take the animal home. This decision will often depend on the specific situation.

What would be an employer’s second step in the interactive process if an employee requests to bring an emotional support animal to work?

1. Step two in the interactive process is gathering the information that is needed to process the accommodation request.
2. This can be done as an informal conversation with the employee or, when the disability and need for accommodation are not obvious, an employer can require medical documentation.
 - a. Documentation that shows an employee has a disability and related limitations typically comes from a healthcare professional, but what about documentation related to the emotional support animal itself?
 - i. Such documentation might include a description of how the animal would help the employee in performing job tasks and how the animal is trained to behave in the workplace.
 - ii. In many cases, a healthcare provider won’t be involved in the acquisition or training of the emotional support animal so can’t provide documentation.
 - iii. When that’s the case, documentation about the emotional support animal may need to come from another source, such as the person who trained the animal.
 - iv. Sometimes the best way to tell whether an emotional support animal is appropriately trained to be in a work environment is to simply have the employee bring the animal into the workplace for a demonstration.

What would be an employer’s third step in the interactive process if an employee requests to bring an emotional support animal to work?

1. Step three in the interactive process is exploring accommodation options.
2. Employers get to choose among effective accommodation options so if an employer wants to explore other accommodations besides the emotional support animal, the employer can do so.
3. However, employers should keep in mind that an emotional support animal may help with personal, medical issues and provide support that other types of accommodations cannot provide, such as a sense of security.

What would be an employer's fourth step in the interactive process if an employee requests to bring a service or emotional support animal to work?

1. Step four in the interactive process is choosing an accommodation.
2. Even though it's the employer who gets to decide what accommodation will be implemented, in many cases allowing the employee to use an emotional support animal at work will be the only fully effective option.
3. When possible, employers should give preference to the employee's request to use the emotional support animal.
4. If an employer isn't sure whether having an emotional support animal in the workplace will pose an undue hardship, one thing the employer can do is allow the employee to bring the emotional support animal to work on a trial basis. That way the employer can base its decision on facts and not speculation.

What would be an employer's fifth step in the interactive process if an employee requests to bring an emotional support animal to work?

1. Step five in the interactive process is implementing the accommodation.
2. This is when the employer and employee need to talk about the specifics of having an emotional support animal in the workplace.
3. In general, an employee can be expected to be responsible for the behavior and care of the emotional support animal and for cleaning up after it, but may need accommodations in order to do so.
 - a. For example, are there places the animal isn't allowed?
 - b. If so, where will it stay if the employee must go to those places?
 - c. How often does the animal need to relieve itself and where will it relieve itself?
 - d. Will the employee's current break schedule be sufficient time for the employee to care for the animal's needs?

How should an employer educate the coworkers of an employee who is allowed to bring an emotional support animal to work as a reasonable accommodation?

1. Confidentiality rules state that employers cannot tell coworkers about an employee's disability or accommodations, so how will coworkers learn about proper emotional support animal etiquette?
2. An employer should start with the employee who will be using the emotional support animal and ask how he would like to handle coworker education. If the employee does not want to educate coworkers, then the employer may just want to let coworkers know that there will be an emotional support animal in the workplace and they are not to interact with it.

How should an employer handle a situation where a coworker of an employee who is allowed to bring an emotional support animal to work as a reasonable accommodation is allergic to or afraid of the animal?

1. Employers should not automatically deny the request to have the emotional support animal at work, as there may be things the employer can do to accommodate both employees.
 - a. The employees might work different schedules or work in separate parts of the building.
 - b. There are cleaning methods for removing pet dander and those could be used frequently.
 - c. One employee may be able to, and prefer to, work from home or another location.
 - d. If a coworker has an allergy, the employer must accommodate both employees.

What would be an employer's final step in the interactive process if an employee requests to bring an emotional support animal to work?

1. The final step in the accommodation process is monitoring the accommodation to make sure it continues to be effective.
2. The easiest way to do this is to keep the lines of communication open: check in with the employee periodically to make sure the accommodation continues to be effective and encourage the employee to report any problems.

Will having an emotional support animal in the workplace be a problem with the increased cleaning and disinfecting protocols that are now required as a result of the COVID-19 pandemic?

It is possible. This is something that the employer and employee will have to discuss to work out.

Will having an emotional support animal in the workplace be a problem with the increased physical distancing protocols that are now required as a result of the COVID-19 pandemic?

It is possible. This is something that the employer and employee will have to discuss to work out.

Leave as a Reasonable Accommodation

What factors should an employer consider when deciding if leave is a reasonable accommodation due to COVID-19?

1. The number of employees;
2. The number of employees who are out on leave or who cannot work due to COVID-19 and the effect it is having on business operations;
3. The size of the employer's budget;

4. The impact of COVID-19 on the employer's budget;
5. The nature of the business or operation; AND
6. The impact of COVID-19 on the business or operation.

What are some “out of the box” strategies employers can use to give employees paid time off as an accommodation?

1. Allow other employees to contribute leave hours to employees who need the leave.
2. Consider eliminating paid time off altogether and simply allow employees to manage their leave needs. Employees must still meet work goals, but are left to manage their own time.

If an employer transfers an employee upon their return from leave, could this be considered retaliation?

1. Yes. Employers need to be cautious not to do this because they could face an FMLA lawsuit, even if the transfer comes with the same pay and benefits. If the job title seems inferior or if there is less room for advancement, the move could be considered retaliatory.
2. Recent case – ***Ottley-Cousin v. MMC Holdings*** (2019)
 - a. The plaintiff, a customer service representative, received consistently good reviews for years and earned a promotion to supervisor in her department, overseeing the work of four customer service representatives. She began to complain about her supervisor being overly harsh. Then she needed to take FMLA leave to care for her ill son and needed to extend that leave beyond the 12 weeks allowed under the FMLA.
 - b. When she contacted her supervisor to discuss her leave and return, he advised her that she no longer had a job. Her supervisor allegedly said “Now it is a disability? For a whole month? Unreal.”
 - c. When plaintiff talked to her supervisor's supervisor, she learned that she had not been terminated, but had been transferred to a non-supervisory position, although she had the same salary and benefits.
 - d. The plaintiff considered the transfer a demotion, even though her salary was actually more, the salary range was lower and there was less opportunity for advancement. She sued, alleging that the transfer was retaliation for taking the FMLA leave.
 - e. The court ruled in favor of the plaintiff, agreeing that the “timing was suspect” and that there was evidence of retaliation because of her use of her FMLA leave.

If an employee is on leave as a reasonable accommodation during the COVID-19 pandemic and then returns to work, must the employee provide a return to work certification from a healthcare provider indicating fitness for duty, upon the employee's return to work?

1. It really depends.

2. If the employee is on an extended leave as a reasonable accommodation because the employee has tested positive for COVID-19 and/or has symptoms of COVID-19, then the following protocol must be followed.
 - a. Symptom based strategy:
 - i. Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
 1. At least 72 hours have passed since recovery defined as a resolution of fever without fever-reducing meds AND improvement in respiratory symptoms, AND
 2. At least 10 days have passed since the first symptoms appeared.
 - b. Test based strategy (contingent on the availability of ample testing supplies and lab capacity and access to testing):
 - i. Persons who have COVID-19 who either had or didn't have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
 1. Resolution of fever without fever reducing meds;
 2. Improvement of respiratory symptoms; AND
 3. Negative results of two covid-19 tests collected 24 hours apart.
 - c. Time based strategy:
 - i. Persons who have tested positive for COVID-10 but were asymptomatic and were directed to care for themselves at home may discontinue isolation under the following conditions:
 1. At least 10 days have passed since the date of their first positive COVID-19 diagnostic test, assuming they have not subsequently developed symptoms since their positive test.
3. If the employee is on leave as a reasonable accommodation because the employee is in a high-risk category but has not tested positive and has never had any symptoms of COVID-19, the employee may return to work whenever the employee feels they are ready.

May an employer require a fitness for duty or return to work certification for employees returning to work after being on extended leave due to COVID-19?

No. Unless the employee is out on FMLA leave due to his own serious health condition.

Must an employee returning to work from an extended leave due to COVID-19 be returned to the exact position the employee had prior to going out on leave?

1. Not necessarily. Even though an employee returning from FMLA leave would need to be returned to the exact same position as prior to leave, the COVID-19 pandemic is different.
2. The business needs of the employer may have changed and the exact same position may no longer be available.
3. The employer should try to reinstate the employee to the same position when possible.

May an employer require an employee returning from an extended leave due to COVID-19 require the employee to requalify for any benefits he or she enjoyed before the leave began?

No. All benefits accrued prior to the leave must be restored upon return, unless the entire workforce has had a change in benefits due to the pandemic.

What if an employee who has been out on an extended leave due to COVID-19 returns to work and finds that his or her job has the same pay, benefits, job location and job description, but has a reduced level of expertise, more clerical responsibilities and less opportunities for advancement. Does the employee have a claim against the employer?

1. It depends. If everything else remained the same, the employee should be reinstated to the same position with the same responsibilities and opportunities for advancement if at all possible.
2. However, in light of the pandemic, the nature of the workplace may have changed and the employer's situation may be completely different.

What if an employee who has been out on an extended leave due to COVID-19 returns to work and finds that his or her job has the same pay, benefits, job location and job description, but has some different tasks and the employee is required to use different tools to increase efficiency. Does the employee have a claim against the employer?

No. the nature of the workplace and the need for all of the new health and safety protocols and more employees teleworking and more employees being out on leave have all likely resulted in a change to the workplace and tasks of each employee.

What are the main exceptions to the requirement to reinstate an employee to the same or equivalent position if the employee has been on extended leave due to COVID-19?

1. If the company had a reduction in force, layoff, or furlough;
2. If the company had a significant change in business operations or income;
3. If inappropriate conduct of the employee was uncovered while the employee was on leave;
4. If inappropriate conduct was engaged in while the employee was on leave; AND
5. If it creates an undue burden on the part of the employer.

What is a reasonable amount of leave time for an employee on extended leave due to COVID-19?

1. It depends on the facts and the circumstance.
2. Employers should look to the CDC, and state/county/local public health authorities for guidance.
3. Indefinite leave is not reasonable.
4. Remember, we're in the middle of a global pandemic, so the rules and guidelines are different.
5. Prior to the pandemic, six months to a year would have been viewed as reasonable.

If an employee has been on extended leave due to COVID-19, but it has been going on too long and the employee wants to return to work but is still high-risk and cannot return to the workplace, what should the employer do?

1. The employer should start the interactive process all over again to find a new reasonable accommodation.
2. At that point, the employer should consider the following other accommodations:
 - a. Reassignment;
 - b. Restructuring of the employee's job; OR
 - c. Telecommuting.

What factors are generally involved in the analysis of whether granting leave as an accommodation constitutes an undue hardship on the company?

1. An inability to ensure a sufficient number of employees to accomplish the work required;
2. A failure to meet work goals or to serve customers/clients adequately;
3. A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; OR
4. Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

PRACTICES

Management, Supervision, Policy Enforcement and Appropriate Communications for Agency Leaders

What is the Role of Front-Line Managers and Supervisors?

Managers and front-line supervisors have many responsibilities in managing the workplace effectively. For example, when you have an opening for a position, you make selection decisions from among many individuals who all claim to have the needed skills, knowledge and abilities. You usually rely on resumes, applications, interviews, references and sometimes pre-employment tests to make a selection decision. If knowledge, skills and abilities were the only factors used in distinguishing between applicants, discrimination in the workplace would not be a major issue.

The large number of discrimination claims made each year to the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment & Housing (DFEH) suggests that it *is* a major concern for employers. Managers and supervisors are charged with the responsibility of assuring that characteristics other than an individual's skills, experience and knowledge do not become factors in making an employment decision.

What did the Agency Know, and When? What did it do?

Under Federal and California law, an employer is legally liable for activities in its workplace when it "knows or reasonably should know" that wrongful conduct is occurring. Once it gets into a lawsuit, the focus shifts to "what did the employer know, when did it know, and what did it do?"

How does an employer "know" anything? The Employer and its divisions are "persons" under the law, but they have no ability to "know" anything at all - except through the eyes, and the ears, and the knowledge of their managers and supervisors - **leaders**. Leaders have power over people or the work environment in which people operate. Your knowledge is the Employer's knowledge.

The Manager Who Doesn't Lead Within Legal Limits.

The first type of leader - the most common - marches along every day thinking that he or she is making the "right" decision. Most leaders don't get up in the morning and drive to work thinking "how can I be abusive today?" How can I create a discriminatory or harassing environment?" This leader doesn't "intend" to discriminate or harass. There is no "purposeful" wrongdoing. In fact, such leaders are often shocked at the suggestion that they are being unfair or violating the law. And yet, the courts are filled with real cases of wrongdoing (as defined by the law), in which the employer is ultimately found legally responsible for the actions – or the failure to react - of these leaders. These "unaware" supervisors or managers don't manage within law or policy, despite their good faith, simply because they may be unaware of the standards or their role in upholding those standards within their areas of responsibility.

The Manager Who Doesn't Lead within Changing Legal Limits

This type of leader is relying on what he or she *believes in good faith the law or Employer policies to be*, or is relying upon outdated information. Employment law isn't static. Just since 2001, there have been four critical areas of change in the enforcement of workplace discrimination and harassment standards:

- Expansion of disability discrimination standards under FEHA;
- Expansion of personal liability for leaders or employees who harass or retaliate;
- Cases that toughened investigation standards and raised significant restrictions on available employer defenses.

The Paralyzed Leader

This is the leader who knows that the law can change quickly. So, what does she or he do? Nothing. This leader is paralyzed into inaction; so afraid of being challenged that he doesn't do anything at all. The manager who avoids making the tough decisions that good business requires. The supervisor who hesitates to dismiss an unproductive employee. The leader who fails to manage employees' performance, because of concern they will draw a complaint for discrimination or harassment. Such leaders are literally stopped in their tracks. They might just as well handcuff themselves to their desks. The reality in competitive business climates is that events will overtake the leader who is indecisive or refuses to address difficult, but necessary personnel actions.

The Leader Who is Held Hostage by the Law

This leader tries so hard not to do something "wrong," that he violates the very standards he is attempting to avoid. These leaders aren't paralyzed; but they back themselves into a corner, and they might as well be paralyzed.

This type of leader is held hostage by the law: so afraid of being accused of doing something wrong, that they violate the very laws they are trying to avoid. A prime example is a real case in which a manager who didn't give a minority female employee who had recently come back from maternity leave the candid, constructive performance communications required by the law, because he was afraid that if he criticized her performance (which was objectively poor), she would accuse him of being harassment, discrimination or retaliation. After she was laid off for poor performance, she filed a lawsuit alleging discrimination. The Federal court ultimately said that he in fact considered her racial/gender identity in making the business decision "not to give her criticism that could have resulted in her improving her performance, and thus avoiding being laid off."

Disability Discrimination and Leave Law Checklist For Administrators, HR Professionals and Risk Managers

What Is The Law?

1. **The California Fair Employment and Housing Act (FEHA)** applies to employers with 5 or more employees. FEHA prohibits discrimination against individuals who have a physical, mental or social disability which affects one or more life activities or makes the life activity difficult to perform. It also protects individuals with a record of disability or are perceived as “regarded as” disabled. FEHA also establishes a separate claim for discrimination when an employer fails to engage in an “interactive process” for determining whether an individual can perform essential job functions with a reasonable accommodation.
2. **The Americans with Disabilities Act (ADA)** as amended and effective January 1, 2009 applies to organizations with 15 or more employees. It prohibits discrimination against individuals who have a physical or mental disability which significantly limits one or more of life's major activities, has a record of, or is perceived as disabled **and** who are qualified to perform essential job responsibilities with or without a reasonable accommodation.
3. **The Rehabilitation Act of 1973** prohibits discrimination by agencies and departments of the federal government and government contractors against qualified disabled applicants and employees who can perform a job with or without reasonable accommodation.
4. **The Vietnam Era Veterans' Readjustment Act of 1974** prohibits discrimination against disabled veterans under certain circumstances.
5. **The Uniformed Service Employment & Reemployment Act (USERRA)** requires reinstatement to the same job, all benefits and seniority for employees who return from military service. Also prohibits discrimination against disabled military veterans and requires active efforts to reasonably accommodate disabled service members. The statute also prohibits discrimination against returning service members based on their active military duty or training obligations and/or any leave taken to fulfill those obligations.
6. **Genetic Information Non-Disclosure Act of 2009 (GINA)** prohibits discrimination against employees or applicants because of genetic information. GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs-referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.
7. **The Federal Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA)** both apply to employers with 50 or more employees. They require up to 12 weeks of leave for the employee's serious health condition. Leave is job-protected and benefit-protected, so eligible employees can't be denied leave, denied reinstatement upon return from leave, denied privileges or benefits of employment or otherwise retaliated against.
8. **Health Insurance Portability and Accountability Act (HIPAA) & California Confidentiality of Medical Information Act.** Both require employers to maintain personnel records that may include protected data in a separate, secure personnel file or security-protected electronic record.

Who is Protected Under these Laws?

1. Applicants for employment, during the recruiting, interviewing, hiring, job selection or placement process who are qualified to perform the job they are seeking, but who are rejected or denied a reasonable accommodation in the recruiting or hiring process.
 - Individuals who are disabled, as defined by FEHA (a limitation of a major life activity, including limitations on working).
 - Individuals who have a record of being disabled, or treated for a disabling medical condition as defined by FEHA.
 - Individuals who are not disabled or limited, but who the employer “regards as” disabled OR individuals with a disability who are “regarded as” unable to perform essential job functions.
2. Employees with a disability who are qualified to perform the essential job functions of the position they hold or seek, but who are denied equal employment opportunities in one or more of the following:
 - Opportunity to return to work following an injury, illness or leave of absence and to perform essential job functions, with or without a reasonable accommodation.
 - Equal opportunities for training, promotion, or benefits of employment because of a disability.
 - Opportunity to participate in a timely, good faith interactive process in which the employer evaluates potential reasonable accommodations that would allow the employee to stay at work and perform essential job functions.
 - Opportunity to achieve success in meeting performance expectations without barriers to their performance created by a disability.
3. Employees who are denied individualized determinations of their ability to perform essential job functions with or without reasonable accommodation, or other disadvantages, due to the employer’s inflexible or “blanket” policies regulating attendance and punctuality, even when labeled “no fault,” when the policy penalizes an employee’s absence due to a physical or mental disability or mental condition.
4. Employees who return from military service with an illness or service connected injury and who are denied reinstatement, benefits and seniority.
5. Employees who are subjected to hostile, offensive, intimidating, abusive or bullying work environments due to workplace harassment by managers, supervisors or co-workers.
6. Employees who are subjected to reprisals, punishment, threats, intimidating, or other acts of retaliation for exercising their rights to request/take a job-protected leave, to request a reasonable accommodation, to make an internal discrimination complaint, or to oppose unlawful or discriminatory policies in the workplace.

When Does Managerial/Supervisory Conduct Violates These Laws?

1. Improper pre-employment selection criteria.
 - a. Advertisements or job solicitations which exclude persons with disabilities generally, or specific disabling conditions, without regard to potential reasonable accommodations.
 - "Able-bodied" applicants; good health required.
 - "Successful candidate must have driver's license."
 - b. Use of seemingly neutral employment criteria which have a disproportionate impact on the basis of disability.
 - Eyesight and hearing requirements which are not reasonably job related.
 - Pre-employment physicals which screen for non-job-related conditions and which are not applied equally.
 - Weight and agility standards which eliminate disabled individuals without regard to possible reasonable accommodations.
 - Exclusions from certain worksites because of anticipated adverse consequences to the disabled individual's safety or health or to the safety of other employees.
 - c. Collection or use of genetic information or family medical history.
2. Improper pre-employment interview questions.
 - Are you disabled? Do you have any impairments or limitations?
 - Do you have any back problems or have you taken a WC leave?
 - Will your limited mobility interfere with your ability to perform this job?
 - How much sick leave did you use last year?
3. Enforcing "blanket" or inflexible policies regulating attendance and punctuality, even when labeled "no fault," when the policy precludes an individualized assessment of the employee's status or improperly penalizes an employee's absence due to a physical or mental disability or mental condition.
4. Denying an individual an equal employment opportunity in hiring, advancement or conditions of employment by "regarding" the individual as limited or, "too disabled" to perform the essential job functions.
5. Making overly broad requests for medical documentation when considering a workplace accommodation, seeking information about diagnosis, prognosis, medication regimens or dosages, or requiring a "Fitness for Duty" medical examination without objective basis to do so.

6. Making impulsive statements to employees that the public agency doesn't have modified duty assignments, or employees returning from leave must be 100% healed."
 - The District doesn't have modified or light duty bus driver positions;
 - Employees in certain job classifications must be "100% healed" to return to work;
 - The District only provides temporary light duty assignments for employees who have been injured on the job.
7. Failure to recognize a request by an employee for a reasonable accommodation, based on the employee's statements about limitations in performing essential job functions that triggers the duty to engage in a timely, good faith interactive process.
8. Failure or refusal to engage in the "interactive process" to allow an employee with a known disability to perform the essential functions of the job with or without a reasonable accommodation.
9. Refusing to consider reasonable accommodations for employees with chronic or episodic conditions, based on the "assumption" that sick leave is the only avenue for that employee to take time off for treatment or recovery.
10. Failure to consider or to make reasonable accommodation to allow an employee to perform essential job functions.
 - Suspension of "no fault" attendance or maximum leave policies;
 - Leave for a finite and reasonable period of time to allow employee to recover sufficiently to return to work with or without restrictions;
 - Modifying the way an essential job function is performed, without eliminating the function or reducing performance standards;
 - Job restructuring or telecommuting;
 - Reassignment to a vacant position or temporary transfer that is better suited to the employee's work restrictions;
 - Acquisition of assistive devices, equipment or adaptive technologies;
 - Modifications to workplace policies, including provisions of a CBA that does not violate the seniority rights of other employees;
 - Modifications to examinations, training materials or methods of completing work assignments within the facility; or
 - Modified schedules, shift changes or other adjustments to work schedules to assist an employee with controlling chronic conditions or limiting anxiety or stress.
11. Inconsistent performance appraisal or promotion standards based on disability, history of being treated for chronic conditions, or genetic information or family medical history.
12. Referring in a performance evaluation to sick days taken, leave taken for FMLA/CFRA, pregnancy-related disability, or industrial injury during the performance appraisal period.

13. Improper "disability" stereotyping.
 - Persons with disabilities are a danger to others in the workplace.
 - Persons with disabilities will be absent more than other employees.
 - Persons with disabilities will be more difficult or costly to insure.
 - Persons with disabilities will cause a morale problem for other employees at the worksite.
 - Providing a reasonable accommodation will be too disruptive or costly.
 - Persons with disfigurements or other conditions which are protected under the law will make others uncomfortable.
14. Participating in or permitting employees under the manager's direction and control to engage in disability harassment or harassment based on genetic information.
 - Comments, jokes, innuendo, including making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee.
 - Patronizing or belittling attitudes.
 - Failure to include disabled employees in work activities or work-related social and recreational activities.
15. Failure to engage in the interactive process for determining whether a disabled employee can perform the essential functions of the job with a reasonable accommodation.
16. Failure to provide a reasonable accommodation when requested by a disabled employee.
17. Limiting, segregating, or classifying employees or j applicants on the basis of disabilities genetic information or activities that reveal genetic information or family medical history.
18. Excluding or limiting individuals from participating in benefits programs because of a disability, or genetic information (including testing, treatment or family medical history data).
19. Intentional or inadvertent disclosure of confidential medical information about an individual's condition, functional limitations, basis for authorized leave of absence, to individuals without a need to know the information.
20. Retaliation against an employee or applicant because they made a charge, testified, assisted or participated in any way in an action under FEHA, ADAAA, GINA, USERRA or any other employment discrimination law.
21. Interference with the right of an employee to take leave of absence for which s/he is eligible, by refusing leave or threatening denial of reinstatement.
22. Failure to "take reasonable steps to prevent discrimination" in the workplace, department or school site, by ignoring acts by co-workers that are bullying, intimidation, harassment, stereotyping, gossip, ridicule, or disclosure of confidential medical information.

How Do Managers And Supervisors Fulfill their Responsibilities to Prevent Disability Discrimination In School District Work Environments?

1. Develop complete and objective job descriptions, which set forth all skills, education, experience and physical/mental characteristics which are required to perform the essential functions of the job.
2. Scrutinize pre-employment advertising and solicitations for improper language or exclusionary characteristics.
3. Eliminate from the workplace stereotypes about employees with disabilities, chronic conditions, history of injuries or leaves, or a record of having been treated for a disability.
4. Revise or update any policy that provides a maximum time limit for leave of absence, time limits on the availability of temporary or transitional assignments, or blanket exclusions of persons with disabilities from consideration (such as opportunity to work overtime or to participate in benefits programs or training opportunities).
5. Be prepared to show an objective, job-related requirement or business necessity for every physical and/or mental requirement of a job.
6. Enforce return to work, stay at work and leave of absences processes with uniformity and integrity.
7. Enact appropriate policies prohibiting disability discrimination, defining and prohibiting harassment and retaliation in your work environments and enforce them consistently.
8. Preserve the confidentiality of medical data and carefully control the filing and distribution.
9. Train all first line supervisors and employees in a work lead role on how to spot requests for a reasonable accommodation from employees with a disability, including specific requests, statements/complaints about limitations and personal observations.
10. Stay on top of evolving legal and policy issues and partner with your HR and risk management team when addressing workplace accommodations.

Retaliation and Leaves of Absence Legal Checklist For Administrators, HR Professionals and Risk Managers

What Is The Law?

1. **The California Fair Employment and Housing Act (FEHA)** applies to employers with 5 or more employees. FEHA prohibits retaliation against individuals who exercise their rights to be free from discrimination or harassment, or other FEHA violations. It also protects individuals from reprisals for requesting a reasonable accommodation in employment or raising claims of barriers to their employment because of a disability.
2. **FEHA [Gov't Code § 12940(h)]**: prohibits retaliation against employees who oppose discriminatory or harassing treatment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.
3. **The Americans with Disabilities Act (ADA)** as amended and effective January 1, 2009 applies to organizations with 15 or more employees. It prohibits retaliation against individuals who exercise their rights under the ADA, including to request a reasonable accommodation in employment, and who make claims or oppose practices made unlawful by the ADA.
4. **The Federal Occupational and Safety & Health Act (FED-OSHA) and California Occupational Safety & Health Act (CAL-OSHA)** both prohibit reprisals or retaliation against individuals who make a report of safety or health hazards in the workplace based on a good faith belief that hazards exist that should be corrected to insure a safe and healthful work environment.
5. **The Rehabilitation Act of 1973** prohibits retaliation against individuals who seek to exercise their rights under the Act.
6. **The Uniformed Service Employment & Reemployment Act (USERRA)** prohibits retaliation or reprisals against individuals returning from military service and who seek reinstatement to the same job, all benefits and seniority for employees or who are disabled military veterans who request a reasonable accommodation in employment. It also prevents retaliation against individuals who request or seek job-protected time off to serve in the military.
7. **The Genetic Information Non-Disclosure Act of 2009 (GINA)** prohibits retaliation against employees or applicants because they exercise rights under the Act or decline to provide information about their genetic tests, family medical history in response to unlawful or overbroad requests for medical information.
8. **The Federal Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA)** both apply to employers with 50 or more employees and prohibit retaliation against employees for requesting or taking job-protected, benefit-protected leaves to bond with a new child, for their own serious health condition, to care for a close family member with a serious health condition, or for military exigencies and military caregiver responsibilities.
9. **The California Fair Employment & Housing Act (FEHA)** prohibits retaliation against an employee due to pregnancy, childbirth, requesting reasonable accommodations for pregnancy-related conditions, or taking a leave for a pregnancy-related disability.

- 10. California and Federal Statutes** that prohibit retaliation against individuals who are deemed “whistleblowers,” when they make reports, complaints or public disclosures of unlawful, unethical or illegal activities or practices.
- 11. California Labor Code Section 132a** prohibits retaliation or discrimination against individuals who are injured on the job, who claim to have been injured on the job, who take a leave of absence for an occupational injury or illness, or who make a claim for workers’ compensation benefits.

Who is Protected From Retaliation Under these Laws?

1. Applicants for employment, during the recruiting, interviewing, hiring, job selection or placement process who are qualified to perform the job they are seeking, but who are retaliated against because they decline to answer unlawful interview questions or to provide information that is not job related or consistent with business necessity.
2. Employees engaged in protected activity in the terms and conditions of employment
 - Requesting or taking job-protected, benefit-protected leave of absence (short term or long term);
 - Absolute right to take the leave without interference or retaliation, if employee meets eligibility requirements and provides required certification or documentation
 - Absolute right to reinstatement to the same or similar job upon return to work and to be free from retaliation for having taken the leave
 - Can’t be terminated or disciplined for excessive absences or tardiness (intermittent leave)
 - Entitlement to the same benefits as if employee had continued to work
 - Can’t be denied the right to seek benefits under workers’ comp system or punished for seeking benefits (Labor Code 132a)
 - Filing for or receiving Workers Compensation benefits;
 - Seeking a reasonable accommodation in recruiting, hiring, or employment;
 - Requesting or participating in an interactive process to discuss accommodations;
 - Reporting discrimination or harassment through internal public agency policies;
3. Protected “Oppositional” Activities
 - Opposing discriminatory, unlawful, or unethical actions;
 - Refusing to perform an illegal or unethical act;
 - Threatening to report suspected wrongful or criminal practices;
 - Reporting or threatening to report safety violations to a government agency;
 - Reporting accounting abuses or illegal activity in a taxpayer funded agency;
 - Opposing practices believed to be unlawful discrimination:
 - Complaining to anyone about alleged discrimination
 - Threatening to file a charge of discrimination
 - Picketing in opposition to discrimination
 - Refusal to obey an order reasonably believed to be discriminatory

- Participating in or cooperating with an internal or external discrimination complaint on behalf of another individual;
 - Responding truthfully and in good faith to management questions during internal investigation of harassment or discrimination;
 - Whistleblowing activities in which an individual reports, or expresses an intent to report in good faith actual or suspected misconduct, legal, ethical or financial abuses by a taxpayer funded public agency; and/or
 - Reporting actual or suspected violations of law, regulation, or financial practices by a public-public agency under the provisions of the California Education Code Sections 44111-44114
4. A reasonable, good faith belief in the accuracy of the report, claim, or oppositional activity is enough to shield an individual from retaliation
- If the employee has a reasonable, good faith belief that the public agency is doing or has done something “wrong” (legal, ethical, policy violation or contractual breach), and the employee’s response to the wrong doing is reasonable, the law will protect that employee from retaliation.
 - This is so even if the employee’s claims are ultimately not substantiated. Truthfully raising an issue, making a complaint, or participating in any proceeding (internal or external) is absolutely protected.
 - Reason: an employee’s concern about whether he can “prove it” may chill the exercise of rights and violates public policy.
5. Requesting or taking a job-protected, benefit-protected leave of absence
6. ***Requesting a reasonable accommodation, “whether or not the accommodation is granted.” Applies to retaliatory actions by leaders or co-workers.***

When Does Managerial/Supervisory Conduct Violates These Laws?

1. Refusing an employee’s request to take job-protected, benefit-protected leave.
2. Refusing to reinstate an employee who takes job-protected, benefit-protected leave to the same or similar job, as required by the applicable statute or code.
3. Intimidating, threatening, bullying, or other acts directed at an individual who has requested or taken job-protected leave.
3. Enforcing inflexible policies that have a negative impact on individuals who have taken or requested leave.
4. Denying an individual an equal employment opportunity in hiring, advancement or conditions of employment because s/he has requested or taken job-protected leave or engaged in other protected activities as defined by state or federal law.
5. Making overly broad requests for medical documentation or otherwise discouraging or interfering with an employee’s right to take job-protected leave of absence.

6. Commenting negatively in performance reviews or disciplinary notices about the time an individual took off for job-protected leave of absence.
7. Making impulsive or inflammatory statements verbally or in writing to employees or to other individuals about the fact that an employee requested, took or returned from a job-protected leave of absence.
8. Taking disciplinary action against an employee who exercised protected rights, or engaged in protected activities, as defined by federal and state laws or codes.
9. Making intimidating, threatening or bullying statements to an employee who exercised protected rights, or engaged in protected activities, as defined by federal and state laws or codes.
10. Terminating, or threatening to terminate employment, benefits, or other terms and conditions of employment against an employee who has exercised protected rights, or engaged in protected activities, as defined by federal and state laws or codes.
11. Participating in or permitting employees under the manager's direction and control to engage in acts of retaliation, punishments, threats or reprisals against individuals who have exercised protected rights or engaged in protected activities, including:
 - Comments, jokes, innuendo, including making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee.
 - Patronizing or belittling attitudes.
 - Failure to include disabled employees in work activities or work-related social and recreational activities.
12. Excluding or limiting individuals from participating in benefits programs because of their exercise of protected rights.
13. Intentional or inadvertent disclosure of confidential medical information about an individual who has engaged in protected activities without a need to know the information.
14. Taking adverse action against an employee or applicant because s/he made a charge, testified, assisted or participated in any way in an action under FEHA, ADAAA, GINA, USERRA or any other employment discrimination law.
15. Interference with the right of an employee to take leave of absence for which s/he is eligible, by refusing leave or threatening denial of reinstatement.
16. Failure to "take reasonable steps to prevent retaliation" in the workplace, department or school site, by ignoring acts by co-workers that are bullying, intimidation, harassment, stereotyping, gossip, ridicule, or disclosure of confidential medical information.
17. Direct retaliation may include:
 - Adverse performance review. This may be any appraisal that is lower than the employee earned.

- Differential assignments. This may be changes in shift, changes in responsibilities or work location unrelated to business needs.
- Negative or abusive treatment by supervisors. This includes ridicule, threats, ostracism undue embarrassment.
- Improper denial or delay of an earned promotion. Evidence may include failure to timely consider promotional opportunities or negative comments about a promotional candidate.
- 3 "D's" - discipline, demotion, discharge.

18. Indirect retaliation may include:

- Ostracism or overt ridicule by supervisors or managers.
- Ostracism or other behavior by co-workers and ignored by leaders.
- Taunts, threats or other coercive activities.

How Do Managers And Supervisors Fulfill their Responsibilities to Prevent Retaliation In Public Agency Work Environments?

1. Scrutinize performance appraisals and disciplinary actions to identify any language that can be construed as punishing or retaliatory.
2. Eliminate from the workplace stereotypes about employees who take leaves of absence or request reasonable accommodations for disabilities or religious observances.
3. Revise or update any policy that provides a maximum time limit for leave of absence, time limits on the availability of temporary or transitional assignments, or blanket exclusions of persons with disabilities from consideration (such as opportunity to work overtime or to participate in benefits programs or training opportunities).
4. Be prepared to show an objective, job-related basis for all performance feedback, appraisals and/or disciplinary actions.
5. Enforce return to work, stay at work and leave processes with uniformity and integrity. Preserve the confidentiality of medical data and carefully control the filing and distribution.
6. Enact appropriate policies prohibiting retaliation, defining and prohibiting behaviors in your work environments and enforce them consistently.
7. Follow your internal complaint procedures carefully and take steps to assure employees who participate in a complaint process (by reporting, complaining or serving as a witness) that they will be protected from retaliation.
 - Review the public agency's sexual harassment and workplace conduct policies and provide the employee with a copy of the policies and discrimination complaint procedures.

- Advise the employee that the complaint will be taken seriously and an investigation undertaken immediately.
 - Let the employee know that the public agency is receptive to the details of his/her complaint.
 - Do not assume the person is over-sensitive.
 - Assure the employee that action, including an investigation will be taken on the matter, and also assure the employee that no retaliation will be taken. Do the same thing with each potential witness you talk to.
 - Promptly report the incident to HR Department in accordance with public agency policies.
 - Encourage all employees and/or witnesses to report any future incidents.
 - Affirm the public agency's commitment to a harassment-free, retaliation-free work environment.
8. Follow your internal investigation procedures uniformly by conducting a neutral, fact-finding investigation when employees make reports or complaints of harassment or discrimination, reach objective conclusions. ***Avoid, Prevent, Spot, Report, Cooperate***
- ***Do*** be alert to spot situations before they become complaints or get out of control;
 - ***Do*** take seriously reports or complaints made directly to you. Report incidents or policy violations to HR;
 - ***Do*** cooperate with all internal investigations;
 - ***Don't*** be disrespectful or intolerant of differing reactions to threats or intimidation by individuals with diverse backgrounds and experiences;
 - ***Don't*** refuse to report a complaint or suggest to the subject of an investigation that you will cover it up
 - ***Never, never retaliate*** or threaten investigation participants
9. Take immediate and appropriate corrective action to stop harassment, discrimination or retaliation. Communicate appropriately with all individuals who participate in the internal investigation process and hold confidential, to the extent it is appropriate, the circumstances surrounding the complaint and any corrective actions taken.
10. Prevent inappropriate attitudes or statements directed at individuals who make complaints or report workplace harassment.

Express or implied statements to the complaining employee:

- "Boys will be boys," "or "It's just in fun."
- "You must have misunderstood."
- "You're being overly sensitive."
- "You must be exaggerating."
- "You must have asked for it [by dress, conduct or mannerisms]."

- "Nobody will believe you."
- "You just have to get used to our workplace culture"
- "Nobody else has complained, why are you causing trouble?"

Express or implied statements to the alleged harasser:

- "Management will protect you even if the allegations are true."
 - "We'll take care of it quietly." Or "the policy doesn't apply."
11. Train all first line supervisors and employees in a work lead role on how to spot potentially retaliatory actions or threats, including communications that are verbal or by email.
 12. Stay on top of evolving legal and policy issues and partner with your HR and risk management team when addressing requests and/or approvals for job-protected leaves of absence or internal complaints or reports of discrimination.

Documentation Management for Administrators, Managers, HR Professionals and Risk Managers

Why is Effective Documentation of the Interactive Process So Important?

A written record of events is the best evidence of what occurred. Leaving this vital information to human memory is risky and often does not serve the organization's best interests. The author of the documentation may have retired or moved to another area. In the absence of a written record of the activities that took place, the organization's position may be **significantly affected**.

In the ordinary course of business, it is often essential to record and memorialize significant decisions and action items. It may be unproductive when documentation does not reflect the evolution of a business transaction or decision; particularly when events must later be reconstructed to assist the organization and others in determining the true course of events.

Good, complete, accurate documentation can be invaluable when used in the context of regulatory or judicial proceedings. Complete records, used as an adjunct to accurate testimony, are frequently invaluable in enhancing the credibility of a witness.

Good documentation has several elements. In particular, it should be easily understandable and readable by everyone in the organization. Consistency in documentation techniques is vital.

There is no single correct way to construct documentation or to memorialize your activities. It is important to develop procedures you and your department can enforce consistently. Much will depend on the type of activities you are documenting. Regulatory activities generally require more detailed compliance records, while others can meet their needs with simple files. The key is to use a system that works for you consistently, so you can reconstruct past events with ease and accuracy.

What are the Risks when Documentation is Incomplete, Inconsistent, Ineffective, or Insensitive?

Employers lose lawsuits when their documents are turned against them in the courtroom. The outcome of civil lawsuits is increasingly affected by evidence from business records generated over years; even decades. Damage awards have soared, some due to explosive content of business communications, gaps in documentation, inflammatory e-mail or charges of evidence tampering.

Many managers and supervisors today are unaware of the legal pitfalls inherent in generating written communications and business records -- ranging from informal memos to performance appraisals and marketing plans -- which may later be used in litigation against the organization. Worse yet, those who are informed are often pressured into over-documenting, avoiding written communications or using ambiguous language due to fear of lawsuits.

Professionals must be able to generate and use documentation in the normal course of business without compromising sound business practices. This includes knowing when and how to document their actions, personnel decisions, external communications and internal correspondence without unnecessary fear of putting anything in writing. Proactive businesses can protect themselves by developing, distributing and retaining business records -- both formal documentation and informal communications -- with an awareness that the document may ultimately be disclosed, dissected and evaluated by untrained persons outside the organization who serve as jurors.

What is Documentation?

Documentation is a written record of an event, discussion or observation by one or more individuals. Most organizations rely on documentation to record their activities and those of their employees. Any written information, whether formally or informally generated, can be considered documentary evidence if it is pertinent to a legal action or a regulatory proceeding or a misconduct investigation.

A written record of events is the best evidence of what occurred. Many times, in litigation, the events surrounding the event took place months **or years** before the evidence is actually presented in court.

"Documentation" is a very broad concept. In the course of regular business activities, employees generate and maintain a broad range of materials which become business records, and thereby may be relevant documentation for later disclosure in a civil lawsuit or regulatory proceeding. These documents can include all of the following:

- internal and external memos and letters
- e-mail communications (both printed versions and electronic versions housed on the network or in backup archives)
- voice mail tapes and/or transcripts of voice mail messages
- handwritten notes, telephone logs or memoranda
- daytimers, appointment calendars or other materials reflecting the dates, times, and content of business meetings or activities
- files reflecting the processing of business activities, such as claims handling, securities transactions, real estate transactions and activities and other business activities
- meeting minutes or other documents that memorialize what occurred at a business meeting
- financial and accounting records
- intra-company communications in all formats, including e-mail, handwritten and typewritten formats
- external communications with agents, vendors and consumers
- marketing materials and memoranda regarding marketing campaigns and strategies
- personnel records
- word processing documents (including all drafts)
- spreadsheets and financial analysis worksheets
- database files
- telephone records and logs

Many of these records can be requested for identification and disclosure in litigation. The organization's legal representatives will review the requests for both relevancy and potential areas where a proper privilege can be raised. Even where a document is subject to a privilege, its existence must be disclosed.

Electronic evidence is fast becoming a central focus of evidence in litigation. Until a few years ago, most corporate data was maintained on large mainframe computers. Today, most organizations use personal computer workstations and local area networks. These systems, and the data stored on them, are more easily retrieved and cost-effectively analyzed in litigation.

Specialized computer consultants now have the power to process electronic data that were previously unattainable. E-mail and other electronic data evidence have become more prevalent and critical in employment litigation. Given current trends, it appears that electronic materials will become the primary type of documentation utilized by all parties to court cases. This reality makes it more important than ever to develop and consistently enforce a method for electronic data management.

Proactive agency departments and HR professionals can take steps to develop electronic evidence management techniques that will prepare you to review, evaluate and retrieve electronic data for use in defending litigation. A significant aspect of this management plan is to prepare the organization -- and the particular department -- to respond to requests for documentation from regulators and opponents in litigation. You must know what you've got, where it is, and the nature of the content. When you manage electronic data in a planned manner, rather than being put on the defensive, you will present a better posture and defuse a weapon your adversary was depending upon.

Your ability to identify and retrieve relevant electronic records will assist your department and the organization's legal representative in evaluating the strength and weaknesses of the organization's position at an early stage of any dispute. Without such early review, organization representatives may be required to give sworn testimony in a civil lawsuit without the benefit of reviewing the materials. If relevant materials such as e-mail messages, personnel records or other memoranda exchanged internally within a department, organization-wide or with external contacts are later discovered, they may be a source of embarrassment if inconsistent with the early responses. Effective management of electronic records will permit authorized representatives to give complete information when requested. It will also enable the organization's legal representative to make informed judgments about the strength or weakness of the organization's position should litigation occur.

How is Documentation Used in Administrative Proceedings or Litigation?

Documentation is used in several ways in regulatory proceedings and civil litigation.

Documentation To Establish Compliance With A Statute.

One primary purpose for maintaining documentation in regulated industries is to establish compliance with regulatory requirements. Complete, legible, concise and easy to understand documentation provides the best opportunity to avoid enforcement proceedings, and to establish the organization's proper activities.

Use Of Documentation In Court.

In most civil proceedings, written documentation is not introduced by itself. Rather, oral testimony about an event will be given. Testimony will be provided through witnesses from the adverse parties (for example, an injured employee and a manager from the employer organization) and from independent witnesses with no stake in the litigation. The trier of fact -- judge, jury, arbitration panel, etc. -- will be asked to weigh the testimony and reach a determination.

Very often, the memories of the witnesses about the same events will differ substantially. This is usually the result of human memory frailties or honest mis-recollection. However, sometimes witnesses attempt to testify about personal memory when in fact they did not actually observe or participate in the events. Sometimes, witnesses may even be untruthful.

Documentation To Refresh Memory.

When recollections vary, the trier of fact must determine whom to believe. This is the crucial issue of **credibility**. Many times, witnesses whose memory is imprecise can still be very credible, **if their memory is refreshed by reviewing documents that they prepared closer to the time of the original events**. This documentation is used to refresh memory.

Documentation To Attack Credibility.

Documentation may also be used to attack the credibility of a witness. For example, suppose an injured employee testifies that he was never trained on a hazard of his job, and as a result of that lack of training, he was injured. Suppose further that, under questioning, the employee contends he specifically remembers that he was not at work the day training took place. However, his employer has documentation reflecting the date, location and substance of this employee's training. When confronted with the documentation, the employee's credibility as a witness may be adversely affected.

Likewise, if the employee has kept documentation, and the employer has not, the manager testifying for the employer may have diminished credibility. This may affect the outcome of the proceeding.

The Civil Discovery Process – a Primer for Agency Leaders

After a lawsuit is filed and all parties have submitted their initial positions (through a "complaint" and "answer" or "cross-complaint"), the lawsuit proceeds to what is called the discovery process.

During this phase, each party is entitled to discover facts, identify witnesses and obtain documents from other parties. The purpose is to locate information that is relevant to a claim or issue in the dispute. In particular, a party looks for documents that support its position in the dispute. It may also learn about the opponent's case and weaknesses in its own case. Court rules typically provide several methods for each party to get information from other parties and from non-parties. The purpose of these rules is to allow the litigants to gather all relevant facts before the trial begins.

The parties to a lawsuit typically engage in a lengthy process to exchange information. There is -- or should be -- no surprises by the time the parties get to trial. Extensive efforts are made by all sides to identify and gather their own relevant documentation and to seek disclosure of pertinent documents from their adversary.

In most states, the standard for disclosure is very broad, essentially requiring the production of all documents which are relevant to the subject matter of the case, or which may lead to discoverable information or witnesses. Accordingly, the existence or absence of documentation often has a significant impact on the case results.

Pre-trial discovery takes several forms: exchange of written questions and answers, known as interrogatories, document productions and deposition testimony under oath. The parties are also required to exchange lists of expert witnesses prior to trial, so that they too may be subject to deposition after they produce their reports and files.

Written Interrogatories.

With this form of discovery, one party may ask another party written questions. For example, a consumer (such as a policyholder) may inquire into the organization's actions leading to the development or marketing of a service or product. Or, an employee may inquire into personnel policies and practices. Product manufacturers are often asked about the design or manufacture of the product which is the subject of the lawsuit or the development of warnings provided with the product.

It is at this stage that questions may be asked about the existence and contents of documents relevant to the matter in dispute. In most cases, the parties use interrogatories to seek the identity of knowledgeable witnesses, including those who may have authored a relevant document.

Document Disclosure.

Discovery rules permit each party to request and inspect documents and other tangible items, such as voice mail tapes or electronic files. These document requests are also submitted in writing. The responding party must do two things: (1) identify the documents with sufficient specificity to identify the date, author, type of document and location; and (2) produce a copy of the document. If there is a legitimate claim of privilege, such as attorney-client or attorney work product, the document must be minimally identified and the claim of privilege asserted in writing.

As noted above, a wide variety of documents may be relevant. The standard for civil discovery of such materials is extremely broad -- all documents that are relevant to the subject matter of the litigation or may reasonably lead to the discovery of admissible evidence. Thus, any document (even a handwritten note, telephone log or meeting minutes) which discloses even the name of another potential witness may be subject to disclosure through discovery.

Once it becomes apparent that litigation may occur concerning a particular activity or personnel action, all potentially relevant documents may be subject to disclosure. The failure to produce the documents when lawfully requested results in significant consequences: negative publicity, unfavorable results in the case itself, monetary fines by the judge, disapproval by the jury or adverse court orders from the judge (including default). Failure to produce relevant documents after a court order has been entered is contempt of court, with a host of additional penalties.

Depositions Under Oath.

Any party may take testimony from an organization witness under oath in a deposition. A deposition is a proceeding in which the person is asked questions under oath by the attorneys representing any other party. The questions and answers are recorded verbatim by a court reporter, who makes an official transcript of the proceedings. The transcript, and any documents used as exhibits during the deposition, may be read to or shown to the judge or jury during a later trial.

It is not uncommon for a witness to be questioned extensively about documents he or she may have generated years earlier. Witnesses may also be interrogated about the absence of key documentation. The latter may reveal haphazard recordkeeping, which is merely negligent, or destruction of documents, which is criminal.

Once testimony is given under oath, any inconsistencies are invariably the subject of cross-examination, with resulting negative impact on the witness' credibility. The impact of the discovery process cannot be over-emphasized. Cases are won on the strength of evidence produced pre-trial. Likewise, inconsistencies or evasion often devastate a defense. The solution is to be aware of how the discovery process -- particularly production of documents -- may impact both your work and subsequent litigation.

Tampering With Or Concealing Documents Is Unacceptable.

In extreme situations, the willful alteration or destruction of documents relevant to the case is a felony; it's called "obstruction of justice." Obstruction of justice occurs when documentation is willfully destroyed or withheld in contemplation of or after litigation is filed. It is appropriate to dispose of documentation in the ordinary course of business, but no document should be destroyed or altered if you anticipate that the document is relevant to an actual or likely dispute or lawsuit.

Never back date or alter a document once it is generated. If something needs to be clarified, create a new memorandum explaining the clarification and the basis for it, and record the date on the new document. In the normal course of business, decisions and plans may evolve over time. It may be appropriate to record changed plans on a new memorandum, as necessary for your records to reflect the complete transaction.

Be careful when preparing e-mail and other electronic documents. Remember that they can be easily transmitted inadvertently. Once transmitted, and part of a system-wide back up of data, these become business records, which must be maintained in accordance with your organization's record retention policies.

How Business Records And Documentation Are Used In Litigation.

- To tell the story of how a personnel action was decided or implemented. This can aid in establishing the organization's good faith, objective actions and appropriate business activities. Often, the subject matter of a lawsuit can span years. The absence of effective documentation to establish the basis for the organization's actions in the past makes it more difficult to establish what occurred and to support the organization's positions.
- To document that personnel decisions were made objectively, consistently and in accordance with all organization policies.
- To refresh the memory of a witness or to discredit a witness who gives inconsistent testimony.
- To establish knowledge, notice or intent of the organization or a particular individual at a relevant time.

What is Word Management for Effective Interactive Process Documentation?

Word management utilizes techniques for developing documentation and supporting evidence that works for the organization and individual witnesses, not against them in the courtroom. Use of word management principles and effective documentation techniques should assist you in preparing business communications. Word management is:

- The discipline of writing documents, including marketing, consumer, regulatory, claims, transactional and human resources documents to avoid misunderstanding of those documents in future litigation to which an insurer is a party
- Drafting business records with an awareness that the document may ultimately be read and judged by untrained persons outside the organization who serve as jurors

Principles Of Word Management.

1. Write with accuracy and precision.
2. Avoid connotations which may be misleading to someone not familiar with the nonprofit industry or the organization. Be factual with all memos, letters and other business communications.
3. When writing about activities or events, stay within your personal knowledge, expertise and responsibility. Don't speculate or guess as to the meaning of any aspect of a business transaction with which you are not personally familiar.
4. Eliminate all inflammatory, offensive or otherwise inappropriate content.
5. Define or clarify technical terms involving clinical or technical matters. Always consider the purpose of the communication. For example, if you are writing to someone outside the organization to require some action, such as a policyholder, use terminology that is easily understood. Remember that a lay juror, arbitrator or judge from outside the Western Youth Services industry may later be asked to consider the effect of your internal and external communications.
6. Close the loop on all significant issues raised in writing. If information is requested of you, provide it promptly or notify the person of any foreseeable delays. If an action is requested in writing, and the resolution is not reflected in writing, the organization runs the risk that its actions may later be mischaracterized.
7. Minimize handwritten comments and rapid e-mail replies which may not be well thought out. These types of communications are often incomplete or misleading.
8. Control copy distribution of all sensitive records, or confidential/proprietary data. Understand the scope and limitations of attorney-client privileges. Be sensitive to confidentiality, where appropriate. When in doubt, consult the Law Department.
9. Be consistent in your documentation techniques.

How To Write With Accuracy And Precision.

- Avoid speculation and exaggeration.
- Avoid slang or shortcuts in terminology. Minimize unnecessary technical jargon; attempt to show the meaning of the term in its technical context.
- Minimize conclusionary language, such as "malingerer," or "team player," without a description of the underlying factual basis for the evaluation.
- Avoid subjective terms when describing people, when those terms may be misleading to a lay person serving as a juror.
- Avoid relative terms, such as "frequent," "excessive," "sub-standard," unless given context. Think about your objective for the communication, and how you intend it to be read and acted upon. If someone reading the communication could ask "relative to what standard?" the writing is non-specific. Use objective facts and examples instead.
- When writing memos, letters, e-mail and other communications, state the facts of the situation clearly and objectively.
- Include all details: date, time, location, name of persons involved, witnesses, conditions of work environment.
- Be honest in assessing the situation (do not rely on second/third party information unless it is specified as such).
- Describe all actions and conclusions objectively, including the date, the decision or action reached, and any subsequent action to be taken or recommended.
- Retain copies of all significant documents and electronic communications, so that you can easily reconstruct events or activities.

Use Objective Terms To Describe Events And Compliance.

Make the effort to assure that your documents are correctly interpreted by a jury, even years after the underlying events have occurred. If your documents can be taken out of context by your adversary, or your records express opinions on the ultimate facts in dispute -- without all the relevant facts -- your position may be adversely affected. Avoid subjective or relative terms, which at best are ambiguous and at worse misconstrued. Your documentation should have all of the following elements:

OBJECTIVITY	Be specific and factual. Use the 5 "Ws" (who, what, when, where and why) as guidelines to think about the message you are creating.
CONSISTENCY	The same basic information Always
RELIABILITY	Created From Personal Knowledge
RELEVANCY	Job-Related Or Training Related Data
VERIFICATION	Witnesses and Documents Are Identified
CREDIBILITY	Truthful and Trustworthy

Avoid Conclusionary Language.

- Careless use of relative terms, when objectivity and precision are required can often be later misconstrued.
- Avoid unintended conclusions created by words such as "better or worse," "safe or unsafe," "misleading," "negligent," "defective." These terms may have specific meaning in a regulatory proceeding or lawsuit. It is the responsibility of the judge, jury or regulatory to make reach these conclusions **based upon the specific facts**. Unless you are responsible for reaching a conclusion on such matters, stick to a factual description of what occurred, so that later determinations can be made based upon the entire record.
- When you are asked to make a judgment or state a conclusion, support them with a full description of the factual basis for your conclusion.

Terms That Require Context.

When giving feedback it is important to provide context through examples and facts about performance issues. People are more likely to take action when they know specifically what they have done and what they can do to change.

Instead of saying, "You are rude" or "you frequently interrupt people," you might say, "It is important to let people complete their thoughts before you share yours. For example, in the last meeting, I noticed that you interrupted Sally and Joe five times. If you let them complete their thoughts before you share yours, they will be more likely to listen to what you have to say. In addition, you will create a better partnership for handling problems."

Below are examples of words that require context.

- Aggressive
 - Timid
 - Slow
 - Uncommunicative
 - Pepsi Generation
 - Incapable/Incompetent
 - Uncooperative
 - Committed
 - Loner
 - Rude
-
- Use facts and examples
 - Tie to relevant performance standards
 - Be able to articulate concrete areas for improvement

Section 5

PROBLEM SOLVING

Practical Issues: FAQs



PROBLEM SOLVING AND SPECIALIZED ISSUES

Disability “Basics” Necessary to Understanding the Interactive Process

How does the California FEHA define a disability?

1. A physical, mental, cognitive or medical condition that **actually limits** the performance of one or more major life activities; or
2. A record of impairment (or of limitation) or record of treatment for a limitation; or
3. Being “regarded as disabled” (or as having a limitation), or being perceived as “more disabled” than the actual limitation.

Pursuant to the California FEHA regulations, what is a “major life activity” and what “limits” a major life activity?

1. Life activities are physical, mental, and social activities, “*especially those life activities that affect employability or otherwise present a barrier to employment or advancement.*”
2. “Limits” a major life activity means it makes achievement of the life activity difficult. Whether achievement is difficult is an individualized assessment considering:
 - a. What most people in the population can perform with little or no difficulty.
 - b. What members of the individual’s peer group can perform.
 - c. What the individual would be able to perform with little or no difficulty, if not for the disability.
3. **Important area of life functioning: Major bodily functions** of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems, and reproductive functions.
4. **Important area of life functioning: Major physical, cognitive, or mental activities**: eating, sleeping, staying awake, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, sitting, reaching, and appropriate interaction with others.
5. **Working** is a major life activity, so any active, episodic or chronic condition that impacts attendance or ability to work a regular schedule is likely covered.

What is the effect of mitigating measures with regard to a disability?

1. **Positive effects** of mitigating measures ***must be ignored***
 - a. Focus on whether the individual would be limited in performing a major life activity without the mitigating measure.
2. **Negative effects** of a mitigating measure ***must be considered if they limit major life activity***
 - a. Example: side effects of medication may be considered if they limit major life activities of sleeping, staying awake, concentration, etc.

When does an individual have a “Record of Disability?”

1. When in the past, although not currently, s/he has an impairment that limited his/her performing one or more major life activities.
2. An individual can also meet the “record of” definition if s/he was once misclassified as having an impairment.
3. All of the changes to the definition of an actual disability (including expanded list of major life activities, lower threshold for finding a limitation, and episodic conditions) apply to evaluating whether an individual meets the “record of” definition of disability.
4. **Important:** “record of” disability does not depend on whether an employer relied on a record in making an employment decision. An employer’s knowledge of an individual’s past substantially limiting impairment relates to whether the employer engaged in discrimination, not to whether an individual is covered by the ADAAA.

What does it mean to have a “Perceived Disability” or to be “Regarded As” having a disability?

1. **“Perceived Disability”** means being regarded as, perceived as, or treated as having a disability.
 - a. Includes non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition or cosmetic disfigurement, anatomical loss or adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit a major life activity.
2. **“Perceived Potential Disability”** includes being regarded, perceived, or treated by the employer as having, or having had, a physical or mental disease.... *That has no present disabling effect, but may become a mental or physical disability or special education disability.*

What are the differences between the applicable laws, as applied to disabled employees?

1. **Worker’s Compensation** focuses on what an injured employee **can no longer do**.
2. **FEHA-ADAAA** seeks to explore through the “Interactive Process” what the employee is **still capable of doing**.
3. **CFRA-FMLA** provides job-protected and benefit-protected time off for employees **needing treatment and recovery**.

What are the main differences between the CFRA/FMLA versus the FEHA/ADA with respect to an employee with a disability taking leave as a reasonable accommodation or having other accommodations?

1. The CFRA/FMLA limits the decision to whether the employee may take intermittent leave or not, and does not mandate other adjustments or modifications to work duties.
2. The FEHA/ADA requires that employers provide reasonable accommodations, including modified duty or other adjustments to the work environment.
3. The CFRA/FMLA does **not** have an undue hardship defense.
4. The FEHA/ADA **does** have an undue hardship/burden defense for employers.
5. The CFRA/FMLA allows a separate claim for damages for leave interference or retaliation if the employer interferes with the right to take leave or be reinstated upon release.
6. The FEHA/ADA does **not** have a separate cause of action for “leave interference,” but **does** have a cause of action for retaliation for seeking a reasonable accommodation.
7. The FMLA/CFRA allows the employer to require a written “fitness for duty” statement, but not examination, upon return from leave.
8. The FEHA/ADA severely restricts the circumstances under which an employer can seek a “fitness for duty” examination or information.
9. The FMLA/CFRA provides for at least 12 weeks of job and benefit protected leave, including reinstatement to the same or a similar job.
10. The FEHA/ADA has no similar requirement of job or benefit protected status and reasonable accommodations are not mandated for a specific time period.

How should an employer handle requests for modified or part-time schedules for an employee covered by both FEHA and CFRA?

1. The employer should determine an employee’s rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.
2. Under FEHA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship.
 - a. If there is undue hardship, the District must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).
 - b. An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance that other part-time employees receive. Thus, if non-disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.
3. Under CFRA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period. When such leave is foreseeable based on planned medical treatment, the employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.
 - a. The employer always must maintain the employee’s existing level of coverage under a group health plan during the period of CFRA leave, provided the employee pays his/her share of the premium.

What is the primary role of the Human Resources Department when an employee is or becomes disabled requiring a leave of absence or an accommodation?

1. Primary role is to facilitate two-way communication – listening, conveying information, and facilitating dialogue.
2. Employee's legal, contractual, and policy rights:
 - a. FMLA-CFRA: job-protected, benefit-protected leave.
 - b. FEHA-ADA: workplace accommodations to return to work or stay-at-work.
 - c. Contractual leaves: medical, catastrophic leave bank, memorandum of understanding or collective bargaining agreement.
 - d. Policy Particulars: available paid and unpaid leave.
3. Entity benefits and resources to support employees:
 - a. STD/ LTD; State Disability (SDI); Paid Family Leave (PFL); other options.
 - b. Employee Assistance Programs: resources, services, and counseling.
 - c. Vacation-paid time off or extended unpaid leave options.
 - d. Other internal and external employer, community, and industry resources.

What are the primary responsibilities of a human resource professional?

1. Clear **Communicator**;
2. Careful **Listener**;
3. Empathetic **Encourager**;
4. Thorough **Resource Evaluator**;
5. **LOA Manager**;
6. Knowledgeable **Risk Identifier**;
7. Process **Convener**;
8. Accessible **Facilitator**;
9. Accommodation **Implementer**;
10. Policy **enforcer**;
11. Comprehensive **Documenter in Chief**.

Basics of the Interactive Process

Once an employer recognizes the “triggers,” what are the basic steps the employer must follow to prepare for the face-to-face dialogue? (Steps 1 – 4 in the interactive process)

1. Initiate the process.
2. Inspect documents.
3. Identify essential job functions.
4. Interview individuals.

What are the next steps the employer must follow in the process? (steps 5-10)

5. Engage in face-to-face dialogue interaction with the employee.
6. Investigate and identify all feasible accommodations.
7. Investigate and analyze reasonable accommodations versus undue hardships.
8. Implement a decision.
9. Inspect, document, and follow up – is the accommodation working effectively?

10. Continue to interact with the employee. Identify any changes to the employee's limitations, the essential job functions or the employer's business needs.

What are the possible “triggers” for the duty to engage in the interactive process? Whenever the employee states that s/he is limited or needs accommodation for any of the following:

1. to return to work after injury or leave of absence.
2. to be recruited or be placed.
3. to achieve consistent policy enforcement.
4. during performance feedback or counseling.
5. during or after harassment or retaliation investigation.
6. during discipline or discharge situations.

What are the six most important things to remember about the interactive process?

1. The process must be an **individualized analysis** with three main components:
 - a. The individual's functional capacity;
 - b. The essential job functions of the job s/he has or seeks; and
 - c. The department's business needs in the window of time the employer is making the decision.
2. The process must be **consistent**.
3. The process must be **trustworthy**.
4. The process must be **flexible**.
5. The duty to engage in the interactive process with employees who are disabled, or perceived to be disabled, is **independent and continuous**
6. Even if there is ultimately no reasonable accommodation: no interactive process = *prima facie* cause of action.

Does one short meeting with the employee establish a “good faith” interactive process?

1. No, all steps must be followed for the interactive process to be in good faith. One short meeting doesn't meet the necessary steps.
2. The Department of Fair Employment and Housing is very aggressive in pursuing litigation where the employer has no documentation of an individualized, good faith interactive process.

What are the employer's duties in the interactive process, as specified by the FEHA regulations?

1. When employer has received reasonable medical documentation, it **shall not ask about the underlying medical cause** but **may** require medical information and second opinions.
2. If information needs clarification, employer **shall** identify the issues that need clarification, specify what further information is needed and allow employee a reasonable time to produce supplemental information.
3. When needed to assess a requested accommodation or to advance the IP, employer **shall** analyze the particular job and essential functions.
4. When needed, employer **may** consult experts to assist in evaluating potential accommodations

5. In consultation with the disabled individual, employer **shall** identify potential accommodations and assess effectiveness of **each** to provide equal opportunity.
6. Employer **shall** consider preference of the applicant or employee but **may** implement an accommodation that is effective in facilitating performance of essential functions.
7. When disability or need for accommodation is not obvious, applicant or employee **must provide** reasonable medical documentation confirming the existence of the disability and need for accommodation.
8. If reassignment is considered, employer **may** ask employee to provide information about educational qualifications and work experience to find a suitable alternative position.

What are the employee's duties in the interactive process, as specified by the FEHA regulations?

1. The employee **must cooperate** in good faith including providing reasonable medical documentation where the disability or the need for accommodation is not obvious and is requested by employer.
2. The medical documentation **may include** a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee.
3. If reassignment is considered, employee **must provide** information about educational qualifications and work experience that may help find a suitable alternative position.
4. Employee's mental or physical inability to engage in the process **shall not** constitute a breach of either the employee's or the employer's obligation to engage in good faith.

What can the employer legitimately expect from the employee?

1. Productivity;
2. Performance;
3. Accuracy;
4. Good judgment;
5. Communications on work related matters;
6. Communications on anticipated absences and assistance;
7. Professional Interactions;
8. Consistency;
9. Attendance;
10. Punctuality;
11. Work flow.

What are some "Best Practice" policies and procedures that an employer should have in place to facilitate appropriate handling of the interactive process and the providing of a reasonable accommodation?

1. A consistent process must be in place for quickly considering reasonable accommodation requests.
2. The employer must state explicitly that reasonable accommodations may be available to individuals with temporary restrictions.
3. The employer must distribute the policy widely and periodically remind employees and supervisors about accessibility of temporary assignments.
4. The employer must train managers on how to handle requests for accommodation and on the triggers for the interactive process and accommodation evaluation.
5. The employer must make sure that HR and others responsible for conducting the process understand what types of documentation are appropriate, and where a request for medical documentation may exceed FEHA and ADAAA standards.

6. The focus of the process should be on determining appropriate and on implementing reasonable accommodations.
7. The employer must coordinate, where applicable, light duty position descriptions for industrial injuries and temporary conditions due to pregnancy or disability.
8. If a particular accommodation isn't available, the employer must explain why and offer other potential accommodations, absent undue hardship (See more on undue hardship in section below)

What internal records should the employer review to prepare for the interactive process meetings? (Step 2)

1. Review employee's personnel file for relevant information on substantive skills and experience (possible reassignment), prior accommodations, performance or disciplinary issues impacted by disability, or medical conditions.
2. **Review job descriptions, job function analyses, and related information on current essential job functions and tasks. (This is crucial.)**
3. Review work restrictions or statements of functional capacity or limitations.
4. Identify all positions for which the individual may be qualified by education, training, and experience.

How should the employer identify essential job functions that are current and realistic? (step 3)

1. **"Essential functions"** means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires. May be essential if:
 - a. Job exists to perform the function.
 - b. Limited number of employees available to distribute the function.
 - c. Function is highly specialized, so the incumbent is hired for specific expertise to perform that function.
2. **"Marginal functions"** are those that if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternate way.

What do the FEHA regulations specify as good evidence for comparing work restrictions with essential job functions during the interactive process?

1. The employer's judgment as to which functions are essential.
2. Accurate, **current** written job descriptions.
3. **Legitimate** business consequences of not requiring the incumbent to perform the function.
4. The current work experience of incumbents in similar jobs or the experience of past incumbents.
5. **References to the importance of performance of the job function in prior performance reviews.**
6. Specific unambiguous medical restrictions that address the essential functions.
7. It should be emphasized to the employer's leaders how critical this is for an effective and defensible interactive process.
8. The amount of time spent on the job performing the function.

What information should the employer consider if a job description or job function analysis isn't current or available?

1. Up to date requirements from front line supervisor.
2. Information from current or recent incumbents in the job.
3. Job descriptions for related positions or positions at other facilities.
4. Transition or temporary assignment descriptions
 - a. These can be helpful but are not determinative.
5. **The employee in question can provide information during the "Interaction" step.**
6. The employer must be careful to use realistic data to avoid claims of "pretext" or retaliation.
 - a. The law gives deference to the employer's determination of essential job functions, BUT:
 - i. Jurors are often skeptical of significant physical requirements when incumbents aren't held to the same standards; and
 - ii. Appellate courts are often reluctant to overturn a jury verdict that is based, in whole or in part, on their view of witness and employer credibility.

What are the two most important things employers need for an effective interactive process? (steps 3 and 4 overlap here)

1. Concrete statements of essential job functions and job function analyses
2. Specific, unambiguous medical restrictions that address the essential job functions

Who is responsible for providing medical records during the interactive process?

1. Access to injury related medical records for non-work-related injuries or illness will only be provided to the HR Department staff through express permission of the injured employee.
2. The employee is responsible for providing medical information that relates to current job limitations and restrictions related to the non-work-related injury or illness.
3. If it is determined that an employee cannot return to his/her usual job due to permanent work restrictions, the employer must explore through the interactive process all potential appropriate and reasonable accommodations the ability to accommodate the employee's disability under the applicable federal and state guidelines.

What do the FEHA regulations specify about seeking medical information during the interactive process? (step 4)

1. Where necessary to advance the interactive process, reasonable medical documentation may include a description of physical or mental limitations that limit achievement of a major life activity.
2. Where the existence of the disability and the need for reasonable accommodation is not obvious, the employer may require:
 - a. The name and credentials of the health care provider;
 - b. That the individual has a physical or mental condition that limits a major life activity or medical condition that needs accommodation.

3. The employer may **not** ask for unrelated documentation, including copies of medical records, because those records may contain information unrelated to the need for accommodation.
4. In requesting documentation, specify what types of information being sought regarding the disability, its functional limitations, and the need for reasonable accommodation.
5. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.
6. The employer may require that the documentation about the disability and the functional limitations come from an appropriate health care professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes.
7. Specifically, crafted sets of job-relevant essential functions help health care providers articulate concrete language for limitations and work restrictions.
8. If the individual provides insufficient documentation, the employer must explain why the documentation is insufficient and allow the employee time to provide supplemental information.
9. **The employee has a reciprocal duty of good faith to cooperate in this process.**
10. The employer must reasonably accommodate, but only to the extent the accommodation is supported by the medical documentation provided to date.

What types of medical professionals are appropriate for seeking medical documentation during this process?

1. Doctors, including psychiatrists, osteopaths, others who are M.D.s;
2. Psychologists;
3. Nurses or nurse practitioners;
4. Licensed midwives;
5. Physical therapists;
6. Occupational therapists;
7. Speech therapists;
8. Vocational rehabilitation specialists;
9. Licensed mental health professionals;
10. Clinical social workers;
11. Marriage and family therapists;
12. Acupuncturists;
13. Chiropractors;
14. Physician assistants;
15. Optometrists
16. Surgeons.
17. Any health care provider, in U.S. or outside U.S., who is licensed and treating the employee.

What types of “work restrictions” are typically suggested by medical professionals?

1. Working a modified schedule – limited hours or days per week.
2. Workload adjustment – caseload or other measurable reduction.
3. Transfer to a different department, team, or work group.
4. Reassignment to a different supervisor.
5. Changes to the supervisor’s management approach.
6. Reassignment to a different position or facility.
7. Change in work environment involving auditory or visual distraction.
8. Assistance or aide to help with workload, task completion.
9. Longer or more frequent breaks.
10. Limiting time in large meetings or noisy environments.

11. Short term time off for illness or long-term leave of absence.

What is considered to be sufficient content for medical certifications for reasonable accommodations or transfers?

1. The medical certification indicating the **medical advisability** of reasonable accommodation or transfer is sufficient if it contains:
 - a. A **description** of the requested reasonable accommodation or transfer;
 - b. A statement **describing the medical advisability** of the reasonable accommodation or transfer; and
 - c. The **date** on which the need for accommodation or transfer became or will become medically advisable **and the estimated duration** of the reasonable accommodation or transfer.
2. The employer must advise employee whenever certification is inadequate or incomplete and provide time to cure any deficiency

What types of ambiguous or imprecise work restrictions are problematic?

1. Ambiguous restrictions, such as “sitting work only,” “reduced workload,” “remove stressors,” “work between light and heavy,” or “avoid contentious contacts with staff or the public.”
2. Requested specified accommodations rather than restrictions, such as “recommend stand to sit workstation” or “avoid contact with ... a particular supervisor.”
3. Restrictions that are described in language from the patient’s request.

What are some ways to obtain clarification on functional capacity and work restrictions?

1. For **industrial** injuries: workers comp claims examiner may seek clarification or more specificity (no additional signed authorization required).
2. For **non-industrial** injuries: employee must sign a limited release allowing the employer to submit a list of specific questions to the health care professional.
3. Consider the Physician’s Statement of Ability to Work (addresses physical, psychological, and safety-related limitations and restrictions).
4. Consider Customized Reasonable Accommodation in Employment Medical Provider Questionnaire, with specific questions focused on essential job functions and/or clarifying written requested modifications.
5. Ask clarifying questions when there are inconsistencies between physicians or between provider and employee’s perspective on limitations.

When can an employer require a disability-related “fitness for duty” medical exam?

1. When the employer reasonably believes, based on **objective evidence**, that an employee's ability to perform essential job functions are impaired by his or her condition.
2. When the employer reasonably believes, based on **objective evidence**, that an employee will pose a direct threat to his or her own or others' health safety. (See more on direct threat in section below)
3. When the employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition.

4. When the employer receives **reliable** information from a **credible** third party that an employee has a medical condition—or the employer has observed **objective** symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or pose a direct threat.
5. **NOTE:** Any information obtained through a disability-related medical exam about an individual's physical or mental condition or medical history must be treated as a confidential medical record and stored accordingly.

What are the main purposes of the face-to-face interaction? (Step 5)

1. To conduct a timely, good faith dialogue to identify potential reasonable accommodations that will allow the employee to perform the essential functions of the job.
2. To facilitate a process that is flexible not rigid, continuous and not impetuous, trustworthy, filled with integrity and flexible.

What is discussed during the face-to-face dialogue, the “interaction,” which is the heart of the process? (step 5)

1. Discuss how the employee is “limited” in relation to others.
2. Discuss employee functional abilities and restrictions.
3. Discuss essential job functions, as currently performed and the job functions of the jobs’ s/he seeks.
4. Discuss the employer’s business needs in the window of time the decision is being made.
5. Discuss with the employee protocols for safely performing each job task.

What are some examples of good questions that the employer can ask the employee during the face-to-face dialogue interaction?

1. What essential functions can s/he perform unaided?
2. What essential functions can't s/he perform unaided?
3. What types of modifications would work?
4. What types of equipment would work?
5. Is s/he familiar with or trained to use this equipment?
6. What training can s/he use in a different or modified job?
7. What devices or tools does s/he use off the job that would aid performance?
8. What skills, experience or training does s/he have to perform other jobs?
9. How does s/he handle the restrictions in major life activities outside of work?
10. Ask for suggestions.
11. Consider a demonstration of performance with the modified task or equipment

What are the most important specific considerations for the accommodation plan? (step 7)

1. Start with modifications to the manner of performing essential functions in the employee's current position.
2. Address necessary protocols for response to foreseeable medical incidents.
3. Consider appropriate adjustments to environmental conditions.
4. Implement protective measures for the employee, other staff, or visitors.
5. If no accommodation is effective in the employee's current position, or would result in undue hardship, evaluate reassignment to vacant position that minimizes or mitigates the risk.
6. **Consider extended leave as a last resort for a reasonable period of time.**

What are some other important things for the employer to remember about the dialogue with the employee?

1. **This is always an individual assessment.**
2. The employer must not assume that all people with same disability are similarly limited.
3. The employer should not speculate about the employee's diagnosis or prognosis, but should stick to verified information.
4. The employer should avoid subjective assumptions about the impact of prescribed medications.
5. The employer should ask about experience at other jobs and what accommodations were made.
6. The employer should appropriately address any concerns or "fears" by co-workers.
7. The employer should work with front line leaders on "do's and don'ts" for communications.

What are some examples of inflexible employer policies? (These are unlawful because they preclude an individualized decision!)

1. Employees must be "100% healed" to return to work
2. Maximum medical leave of 12 weeks (or any other inflexible time frame).
3. Employees on modified duty are never eligible to work overtime hours.
4. Reduced hourly schedules are never approved as reasonable accommodations.
5. Employees injured in certain jobs are never accommodated by transfer to other vacant positions.
6. Inflexible limited term modified schedule/light duty.
7. Modified work is not offered after 90 days.

What is the purpose of investigating and identifying all feasible accommodations? (step 6)

1. To look at all potential adjustments, modifications, or accommodations that will be effective to facilitate the employee's performance of essential job functions.
2. This does not involve consideration of budget, disruption, impact on other employees, etc.

What is involved in investigating and analyzing reasonable accommodations versus undue hardship? (step 7)

1. This step of the process starts when starts when the employer has a list of potential accommodations that can be analyzed on the basis of "reasonableness" versus undue hardship. (See more on undue hardship in section below)

May the employer offer reassignment to a temporary position DURING the interactive process under FEHA?

1. Yes. Although reassignment to a temporary position is **not** considered a reasonable accommodation under FEHA, an employer may offer (and an employee may choose to accept or reject) a temporary assignment **during the interactive process.** (See more on Return to Work and Transitional/Bridge assignments in section below)
2. Remember, the interactive process is continuous, so the intent is to make this a "stop gap."
3. Per the FEHA regulations: ***"The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily an employer is not required to accommodate an employee by ignoring a bona fide seniority system absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where***

the employer reserves the right to modify its seniority system or the established practice is to allow variations to its seniority system.

Must the employer consider reassignment as a reasonable accommodation even if it does not allow any of its employees to transfer from one position to another?

1. Yes. FEHA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others.
2. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship.
3. If the employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.

How does the employer implement the decision to offer a reasonable accommodation? (step 8)

1. Build in protocols for evaluating the effectiveness of the accommodation in relevant time intervals.
2. Maintain productive communications with supervisors about ongoing issues (positive and requiring intervention).
3. Inform the employee that communication channels remain open on the effectiveness of the accommodation and any changes that may require a renewed interactive process.
4. Document these activities.

What are the most important “Do’s” for administrators and managers during the interactive process?

1. **Do** respect the privacy of employee medical information which may come to your attention as part of this process.
2. **Do** understand key distinctions between the workers comp claim process and the FEHA.
3. **Do** understand the critical distinctions between leaves of absence and the requirements to reasonably accommodate.
4. **Do** cooperate with all interactive process activities and partner with human resources department.
5. **Do** instruct co-workers that they are expected to perform their jobs in a department where another individual is being reasonably accommodated.
6. **Do** be alert to situations that trigger the interactive process.
7. **Do** take seriously any reports or complaints made about an accommodation issue.
8. **Do** partner with the human resource or risk management team if there are questions about how to handle an accommodation issue.
9. **Do** cooperate with all internal investigations and interactive process activities.
10. **Do always** conduct prompt, candid, constructive performance feedback to all employees.

What are the most important “Do NOT’s” for administrators and managers during the interactive process?

1. **Do not** disclose confidential information to any individuals (including other managers) who don’t have a need to know.
2. **Do not** assume the closure of a worker’s comp claim or the return from leave without restrictions extinguishes continuing duties.

3. **Do not** make disparaging, inflammatory remarks about the process.
4. **Do not** make disparaging remarks about individuals who are being reasonably accommodated or about work restrictions in general.
5. **Do not** assume there are any jobs immune to a reasonable accommodation decision.
6. **Do not** convey disrespect or intolerance for individuals with disabilities or accommodations.
7. **Do not** delay or refuse to address a request for accommodation, or a complaint about how an accommodation is being managed.
8. **Do not ever** retaliate or threaten participants in an interactive process.
9. **Do not ever** be paralyzed about performance feedback for employees with restrictions.

What are the most important principles of effective and defensible documentation of the process? (step 9)

1. Put all material issues in writing.
2. Write with accuracy, precision, and clarity.
3. Avoid negative connotations.
4. Stick to personal knowledge and responsibility.
5. Avoid ultimate legal conclusions.
6. Define technical terms.
7. Eliminate inflammatory or offensive content.
8. Minimize off-the-cuff correspondence.
9. Close the loop.
10. Be consistent.
11. Be complete.
12. Be truthful.
13. Make sure all written documentation is legible.

Why is it so important to keep the process continuous and to keep interacting with the employee? (step 10)

1. It is important so that any changes to the employee's limitations, the essential job functions, or the employer's business needs, can be identified and handled.
2. It is essential to periodically evaluate the accommodation in progress.
3. It identifies when it might be necessary to re-initiate by beginning a new interactive process.

What are some factors to consider and questions to ask during this step of the process? (step 10)

1. Is the modification, adjustment, or accommodation working as anticipated?
2. Has the disability/limitation changed? (improved or declined)
3. Are there any residual or new barriers to performance or access?
4. Is the supervisor managing the employee appropriately?
5. Is the supervisor managing other employees appropriately?
6. Have costs and/or disruption stabilized or increased?
7. Are there issues regarding the employee's future career opportunities?
8. Have there been unanticipated risks to health and safety?
9. Have new hazards been introduced that alter safety risks?
10. Has there been a fundamental alteration in business operations?
11. Is any proposed discipline for reasons that may be disability-related?
12. Are there objective reasons to conduct a neutral fitness for duty evaluation?
13. Is the supervisor managing the employee's workload appropriately?
14. Is the supervisor managing other employees' workloads appropriately?

What are the main reasons employers fail to conduct a consistent and correct interactive process?

1. Confusion about when to conduct an interactive process when a claim is delayed or denied and a bridge assignment is not available. (See more on bridge assignments in section below)
2. Uncertainty about how to address a combination of industrial and non-industrial work restrictions that may impact bridge assignments or longer-term accommodations.
3. Confusion about how to address conflicting work restrictions between an “Agreed Medical Evaluator” or a “Qualified Medical Evaluator” and a treating physician.
4. Confusion about how to address non-industrial work restrictions when considering “return to work” for a worker who is permanent and stationary.
5. Reluctance to even consider accommodations for chronic non-industrial conditions based on concern about potential injuries, or not recognizing that non-industrial condition may be impacting the accommodations for an industrial condition.
6. Desire to reach an accommodation decision too quickly, without addressing all the required aspects of a thorough interactive process.
7. Forcing employee to take leave prematurely when accommodations are available.
8. Misunderstanding the legal requirement to consider leave (block or intermittent) for a finite and reasonable period of time after employee exhausts all available paid and unpaid leaves.
9. Expressing significant concern about creating a “precedent” when implementing an accommodation, without recognizing that each individual interactive process is an individualized decision that does not create a precedent.
10. Using a “record of disability” (usually a prior workers comp claim) or perceiving employee as too limited, resulting in a lack of interactive process.
11. Uncertainty about applying paid and unpaid leave to industrial injury absences.
12. Confusion about differences between workers comp, FEHA and leave laws.

What are some examples of improper attitudes and assumptions about workers comp claimants that often prevent employers from conducting a proper interactive process?

1. An employee with a prior injury is more likely to file another workers comp claim.
2. An employee on modified duty is likely to get hurt again.
3. Disability laws doesn't protect an employee if his/her own “negligence” caused him to get hurt on the job.
4. An employee whose own behavior caused him/her to get sick is not entitled to workplace accommodations.
5. An employee with a mental disability is always a safety risk and must be kept out of the any safety sensitive job.
6. Employees with disabilities will increase insurance costs.

What is the best way to deal with co-workers’ “gripes” or discontent when a co-worker is receiving accommodations?

1. Address co-worker discontent promptly and consistently.
2. Don't require disabled employee to address it directly.
3. Without disclosing confidential or medical information, inform coworkers that the employer has made a business decision to implement the modifications or adjustments consistent with its policies and appropriate legal standards.
 - a. They may discuss with their supervisor or human resources any concerns they have about their own work assignments or work environment, but not those of another employee.

4. Reinforce the provisions of employer's harassment and retaliation policies.
5. Provide training and support to co-workers
 - a. Co-workers may need help coping with the stress of a colleague who is seriously ill or disabled.
6. Co-workers may need guidance regarding what to say, what to avoid, and how to communicate on the job.
7. Reinforce the provisions of employer's harassment and retaliation policies, make it clear that bullying, abusive conduct, harassment, or retaliation is strictly prohibited by law and policy.
8. Any co-worker who persists in complaining should be counseled by human resources and management and will be subject to discipline for persistent "griping."

How should employers deal with abusive conduct in the workplace based on disability or accommodation of an employee with a disability?

1. Advise all employees that abusive conduct is not tolerated.
2. Include bullying or abusive conduct based on disability in harassment training.
3. Draw a distinction between prohibited harassment and abusive conduct (which is not technically unlawful harassment).
4. Explain to managers that abusive conduct is not tolerated and must be addressed.
5. Help managers understand how to spot abusive conduct.
6. Help managers understand how to respond when an employee raises a concern about abusive conduct.
7. Hold employees and managers accountable for abusive conduct.

What are the primary legal strategies to reduce risks and liability during the interactive and reasonable accommodation process?

1. Prepare administrators and human resource personnel for new requests for accommodation or leave.
2. Train supervisors to recognize triggers for the interactive process, including objective barriers to performance and workplace conduct or behavior.
3. Carefully document the employee's work restrictions and the interactive process undertaken to determine how those restrictions might be accommodated.
 - a. Focus on the restrictions, not the diagnosis or prescribed medications.
4. If an employee being disciplined for inappropriate workplace behavior raises their disability as a "cause," consider what kinds of accommodations, if any, can be made to permit such employees to perform their job and comply with standards of conduct.
5. Be prepared to address extended leave requests for employees who need time off that does not qualify for FMLA or other leaves. Always consider leave as a reasonable accommodation independent from other employer policies or collective bargaining agreement.
6. Be alert when following medical leave employees that have trouble returning to their regular activities.
7. Remember to re-trigger the interactive process based on changed circumstances. **The employer's duty to accommodate is a continuing duty.**

Reasonable Accommodation – The Outcome of the Process

What is the language of the FEHA regulations regarding reasonably accommodating employees suffering from a permanent or temporary disability?

1. FEHA Regulations Section 7293.9
 - a. **Affirmative Duty.** *An employer or other covered entity has an **affirmative duty** to make reasonable accommodation to for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, **after engaging in the interactive process**, that the accommodation would impose an undue hardship.*
 - b. **No elimination of essential job function required.** *Where a quality or quantity standard is an essential job function, an employer or other covered entity is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity.*
 - c. **Paid or unpaid leaves of absence.** *When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan **may** be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and **does not create an undue hardship** for the employer.*
 - i. When 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. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation.

What are the most common ways an employer can reasonably accommodate an employee who needs accommodation?

1. Flexible schedules for start and end of shift and break schedule.
2. Self-paced workload with flexible hours.
3. Private area to rest, eat or drink, take medication, or handle medical needs.
4. Breaks to eat or drink, take medication, or handle medical needs.
5. Allow employee to work from home.
6. Provide temporary part-time work schedule during treatment weeks.
7. Provide flexibility for time needed to obtain counseling.
8. Address attendance policies with flexibility.
9. Allow longer and more frequent breaks.
10. Extend unpaid leave beyond expiration of available leave (this is a last resort.)
11. Special equipment that may make it easier for the employee to work, i.e. ergonomic work stations, standing desks.
12. Re-distribution of tasks and responsibilities.
13. For detailed suggested accommodations for specialized disabilities, see sections below.

Must reassignment to an alternate position be considered as a reasonable accommodation?

1. As a reasonable accommodation, the employer shall ascertain, through an interactive process, suitable alternate vacant positions and offer the employee such a position for which the employee is qualified.
 - a. Per FEHA, *the employee has preferential consideration over other qualified applicants.*
2. If no funded vacant comparable positions for which the employee is qualified with or without reasonable accommodation, the employer may assign to a lower graded or lower paid position.
3. The employer is **not** required to create a new position to accommodate an individual with a disability to a greater extent than employer would offer a new position to any employee, regardless of disability.

Must an employer notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

1. In order to narrow the search for potential vacancies, as part of the interactive process, the employer should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment.
2. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.
3. The employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly the employer can search for and identify whether an appropriate vacant position exists.
4. For a very small employer, this process may take one day; for other employers this process may take several weeks. When the employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

Is a probationary employee entitled to reassignment?

1. An employer cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.
2. The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability.

3. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

What does it mean for an employee to be reinstated to the same or a comparable position after an accommodation, transfer, or leave?

1. **“Employment in the same position”** means employment in, or reinstatement to, the position that the employee held prior to reasonable accommodation, transfer, or disability leave.
2. **“Employment in a comparable position”** means employment in a position that is “virtually identical to the employee’s position held prior to reasonable accommodation, transfer or disability leave in terms of pay, benefits and working conditions, including pre-requisites and status.
 - a. Involves the same or substantially similar duties and responsibilities;
 - b. Entails substantially equivalent skill, effort, responsibility and authority;
 - c. Requires that the work be performed at the same or a geographically proximate worksite; and
 - d. Involves the same shift or the same or an equivalent work schedule.

Once a reasonable accommodation is in place, what may an employer ask an employee with a disability throughout this continuous process?

1. For information, including reasonable documentation, explaining the need for the continued reasonable accommodation because of the functional limitations and/or work restriction.
2. For medical information that is part of a voluntary wellness program;
3. To justify the use of sick leave by providing a doctor's note or other explanation, as long as all employees who use sick leave are required to do the same and the information requested does not exceed what is necessary to verify that sick leave is being used appropriately; and
4. For employees on leave, for periodic updates on his/her condition if the employee has not provided an exact or fairly specific date of return, or where the employee requests leave in excess of that which the employer has already authorized.

If the employer has provided one reasonable accommodation, must the employer provide additional reasonable accommodations requested by an individual with a disability?

1. The duty to provide reasonable accommodation is an ongoing one. Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation.
 - a. If an individual requests multiple types of reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

2. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.
 - a. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

May the employer ask whether a reasonable accommodation is needed when an applicant (as opposed to current employee) has not asked for one?

1. The employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.
2. During the hiring process and before a conditional offer is made, the employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.
3. After a conditional offer of employment is extended, the employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question.
 - a. Alternatively, the employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.

Must the employer provide a reasonable accommodation in the pre-employment process to an applicant with a disability (as opposed to current employee) even if the employer believes that it will be unable to provide this individual with a reasonable accommodation on the job?

1. Yes. The employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship).
 - a. Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job.
2. In many instances, the employer will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation

to perform the job, it may not be the same type or degree of accommodation that is needed for the application process.

- a. Thus, the employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job.

If an employer modifies a disabled employee’s job functions, can the employer decrease their salary to reflect their modified position? If an employee is reassigned to a lower level position, must the employer maintain his/her salary from the higher-level position?

1. Yes. The offer of a modified duty position is with the rate of pay customarily paid to employees performing the modified job.
2. No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.

Leave A Reasonable Accommodation as a Last Resort

Can an employer require an ill or disabled employee to take leave if the employee can be reasonably accommodated to stay at work?

1. No. The employer cannot mandate leave if the employee can be reasonably accommodated to stay at work, as long as there is no undue burden to the employer.
2. If the employee can work intermittently, the employer cannot mandate that the leave be taken in a block of time (whether paid or unpaid) and the intermittent leave must be allowed.
3. The Agency may require that absence be scheduled to minimize disruption.

When must an employer consider leave as a potential reasonable accommodation?

1. If the employee exhausts all medical leave and is still unable to return to work, the employer must consider extended unpaid leave as a reasonable accommodation, but it **should be a last resort**.
2. If this option is taken, the medical provider must be able to state a finite expected duration to allow employee to recover sufficiently to return to work with or without restrictions. If leave would be indefinite, then it is **not** a “reasonable” accommodation and the employer does not **need** to allow it, although the employer still **may** allow it.
3. Once the employee returns from the finite leave, then a new (continuous) interactive process is required.
4. The purpose of this additional leave is to facilitate additional reasonable time to recover and return to work.
5. If employer can demonstrate objectively that the lack of a fixed and finite return date causes an undue hardship (i.e., operating with a temp unduly disrupts operations), it may deny the leave.

6. If employee cannot provide a fixed date for return to work, and employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship. **As always, the process is continuous.**

When an employee is on disability leave, what is an employer prohibited from doing?

1. An employer cannot mandate that leave begin sooner than the employee's health care provider specifies, nor extend beyond the provider's release to return to work.
2. An employer cannot require the use of a job-protected leave day if it would have been a non-duty day for the employee had s/he not been on leave.
3. An employer cannot place the employee on "forced leave" when reasonable accommodations are available.
4. An employer cannot mandate that the employee use FMLA-CFRA leave for multiple consecutive days of sick leave unless the illness qualifies as 'serious health condition.'
5. An employer cannot mandate that the employee use leave as part of a 'light duty' or 'modified duty' assignment under the workers' compensation program.
6. An employer cannot require the use of a job-protected leave day if it would have been a non-duty day for the employee had s/he not been on leave

Early Return to Work Program with Bridge/Transitional Assignments- For Industrially Injured Employees Who Have Pending Workers Compensation Claims

What is an early return to work (ERTW) program and what are the key features of such a program?

1. ERTW assignments are made from a bank of **temporary** alternate work assignments that are specifically designed to accommodate employees injured at work, who have filed workers compensation claims and whose claims have been accepted.
2. These temporary assignments are usually referred to as "bridge" or "transitional" assignments.
3. Bridge assignments are not permanent or long-term assignments, but, rather, an interim step to assist in the employee's medical recovery process.
4. Such assignments provide a match between the physical demands of available transitional job tasks and the employee's current functional abilities and work restrictions.
5. Assigned transitional tasks are consistent with the business needs of the department or facility to which the employee is assigned, allowing injured employees to perform work that adds value to their employer's workplace.
6. Continued improvement in the employee's condition should be demonstrated throughout the transitional assignment. The employee's progress is reviewed periodically throughout the assignment.
7. A primary objective of the program is to establish a set of appropriate assignments that are made available for newly injured workers who require transitional or modified work. Transitional duties may not be in employee's job classification.

How does an employer identify bridge or light duty assignments?

1. Each assignment has physical capacity guidelines that can help the employer and doctor choose the right level of activity for injured employees at any given time.
2. The employee may be asked to perform all or just some of the tasks in an established transitional assignment.
3. The department head or supervisor will review the assignment with the employee to ensure clear expectations that are appropriate to his or her physical capacity.
4. Specific job descriptions for ERTW assignments are developed to provide a variety of suitable transitional work opportunities for injured workers and that are consistent with the Agency's business needs.
5. **It is never acceptable to ask an employee to perform work that violates the employee's medical restrictions.**

What are some examples of light duty or transitional assignments?

1. Security guard or facilities monitor;
2. Inventory of parts, supplies or tools;
3. Inspection of facilities or equipment;
4. Complete a safety inspection or help develop evacuation procedures;
5. Sort and deliver mail;
6. Clerical duties, such as typing or filing;
7. Ordering of supplies;
8. Help develop training programs for safety protocols;
9. Classroom monitor;
10. Campus Beautification Assistant;
11. Pick up trash;
12. Replenish first aid cabinets;
13. Perform assembly;
14. Make/answer telephone calls;
15. Train new employees;
16. Drive a vehicle or run errands;
17. Do light housekeeping or cleaning;
18. Perform quality control inspections;
19. Work in shipping (i.e. labeling and wrapping);
20. Computer lab monitor.

What are some key definitions of terms relating to an ERTW program?

1. **Transitional work**: a temporary assignment that may allow the employee to perform some of her usual job duties or may be entirely new functions. Enables the employee to gradually resume duties as the treating physician recommends.
2. **Temporary alternative work**: another form of transitional work that involves an entirely new position. Many ERTW programs identify "bridge" assignments that are developed exclusively for the ERTW program.
3. **Modified work**: an assignment that allows the employee to perform his regular job, with modifications. Modifications may include location, schedule, tasks, or use of equipment.
4. **Light duty**: Another term for modified work.

What are some triggers for additional face-to-face dialogue between an employer and an employee who has industrial injuries, when the employee is in an ERTW program?

1. When the employee is identified as being “early RTW with temporary restrictions,” the interactive process should identify a specific bridge assignment.
2. When the employee is identified as being “early RTW with temporary restrictions,” the interactive process should identify a specific bridge assignment and concrete duties.
3. If the employee isn’t recovering sufficiently, the interactive process should evaluate ending the bridge assignment.
4. If the employee needs more time to reach a permanent and stationary position, the interactive process should evaluate extending the bridge assignment for a finite and reasonable period of time.
5. If the employee can be offered a suitable bridge assignment, but a non-industrial condition precludes the employee from working in the bridge assignment, the interactive process should evaluate alternatives.

What are some challenges with an ERTW program?

1. Uncertainty about whether (and when) to meet with workers when there is a material change in their restrictions while on a bridge assignment. FEHA requires a timely, good faith interactive process.
2. Failure to recognize that the interactive process is a continuous duty, whenever circumstances change
3. Beginning accommodations without HR involvement and without an appropriate interactive process
4. Employee doesn’t show up for bridge assignment or calls in sick but objects when personal sick leave is applied.
5. Reluctance or misunderstanding about how to address violations of standards of conduct while on bridge assignment.
6. NOTE: If the employee is able to return to work with permanent restrictions, the interactive process should evaluate long term reasonable accommodations, either modified the employee’s usual and customary job or consider a permanent reassignment.

What are the employee’s responsibilities while participating in an ERTW program?

1. Promptly report known or suspected injury or illness to direct supervisor.
2. If medical treatment is necessary, treatment must be with a medical provider network or a pre-designated personal physician.
3. Schedule all medical appointments outside of work hours to the extent possible.
4. Keep all medical and/or therapy appointments.
5. Follow the advice of the treating health care provider, including use of any appliances or aides as instructed. (such as crutches or other mobility devices)
6. Adhere to all work restrictions both on and off the job.
7. Complete a transitional or modified work agreement and comply with all terms. Notify HR or program coordinator if given instructions that employee knows are outside of applicable work restrictions.
8. Follow all requirements for completing time sheets when reporting for a transitional assignment.

9. Report absences for illness or other reasons promptly in accordance with procedures.
10. Comply with all conduct standards.
11. Contact supervisor and the HR Department immediately if problems occur while in the ERTW program.
12. Be receptive to direction from supervisors or others managing the transitional assignment.
13. Seek training or instruction where appropriate.

What are the employer's responsibilities with regard to their employees participating in an ERTW program?

1. Ensure that daily assignments given to the employee are consistent with the work restrictions.
2. Consult with HR or RTW Coordinator before changing the tasks, terms, and/or conditions of any transitional assignments, and obtain approval.
3. Monitor work duties so employee does not exceed functional capacity.
4. Ensure adequate supervision and training.
5. Provide reasonable training, if necessary, to facilitate the employee's performance of duties not usually performed.
 - a. If significant training will be required, the treating health care provider will be asked to approve the training aspect of the assignment.
6. Ensure the employee provides a Work Status Report for all physician appointments.
7. Refrain from conducting any employee performance evaluations while the employee is participating in a temporary transitional work assignment.
 - a. Supervisors may address violations of work rules, standards of behavior, or provide on-the-job feedback concerning the employee's performance of job tasks.
8. Communicate any standards of conduct, including recording time worked and time off, and address disciplinary action as appropriate to consistently enforce standards of conduct.

What leave is available for medical appointments during a transitional assignment for an injured employee?

1. This is a policy decision for RTW program guidelines.
2. The employee can be encouraged, but not required, to schedule appointments for medical status updates, physical therapy appointments, or other treatments outside of regular work hours.
3. Three possible options for using industrial accident leave for appointments:
 - a. Employee can use the leave for all medical appointments;
 - b. Employee can use the leave for specialist referrals only;
 - c. Employee can use sick leave for physical therapy and follow up appointments only; or
 - d. NOTE: Employee can schedule his/her transitional assignment hours with anticipated medical appointments in mind.

How long is an employee in an ERTW program permitted to be in a light duty assignment?

1. Assignments are **initially** anticipated to be in place for 12 weeks, as determined appropriate from the employee's medical condition and treatment/recovery plan.

- a. To be consistent with the requirements of ADA/FEHA the “maximum” limit of 12 weeks should not be inflexible or applied to every injured employee without considering the individual circumstances.
3. The employer, in conjunction with the claim’s examiner, should evaluate on an individual basis whether it is reasonable and appropriate to extend or end the bridge assignment for that employee, based on a combination of factors.
4. At approximately week 9 or 10 of the bridge assignment, the claims team should determine from the medical provider if a finite and reasonable period of time will allow the worker to achieve permanent and stationary status.

What is the process after the medical provider has responded to the employer’s request for the employee’s status?

1. The employer will need to evaluate the available information at that time and then make a decision about further transitional duty or other appropriate actions consistent with the objectives of the bridge assignment program, workers’ compensation laws, and other applicable legal or regulatory standards.
2. The employer and claims specialists will individually evaluate whether the transitional assignment will:
 - a. Be continued in its current form for a reasonable and appropriate time and then periodically reviewed to assess continued effectiveness;
 - b. Be modified with alternative transitional duties, and then periodically reviewed; or
 - c. Be discontinued. The worker will return to Temporarily Totally Disabled payments while continuing medical treatment and until the worker is released as Permanent & Stationary.

What questions should be asked during the individualized evaluation for altering, extending or ending transitional or modified work?

1. Has the employee’s condition improved during the assignment?
2. Have the temporary restrictions been modified?
3. Are the restrictions relaxed or increased?
4. Has the employee’s condition declined or remained static?
5. How has the employee’s performance on the assignment been impacted?
6. Is the employee anticipated to reach permanent and stationary status within a finite and reasonable period of time?
7. Are the tasks the employee is performing on the ERTW assignment adding value to the workplace?
8. Is there a sufficient flow of work?
9. Do the costs of keeping the employee on an ERTW outweigh the benefits?
10. Is the assignment creating disruption that places an undue burden on the workplace?
11. Are there a limited number of ERTW assignments at the workplace?
12. Is it necessary to make the ERTW assignment available for a newly injured employee?

How should employers enforce attendance, performance, and conduct standards with employees participating in an ERTW program?

1. Make sure that all accommodations or alterations in bridge assignment tasks are addressed by the HR Department.
2. Always address the employee’s responsibilities verbally and in a written agreement.
3. Empower front line leaders to communicate performance expectations regularly with employees in transitional or modified duty assignments.

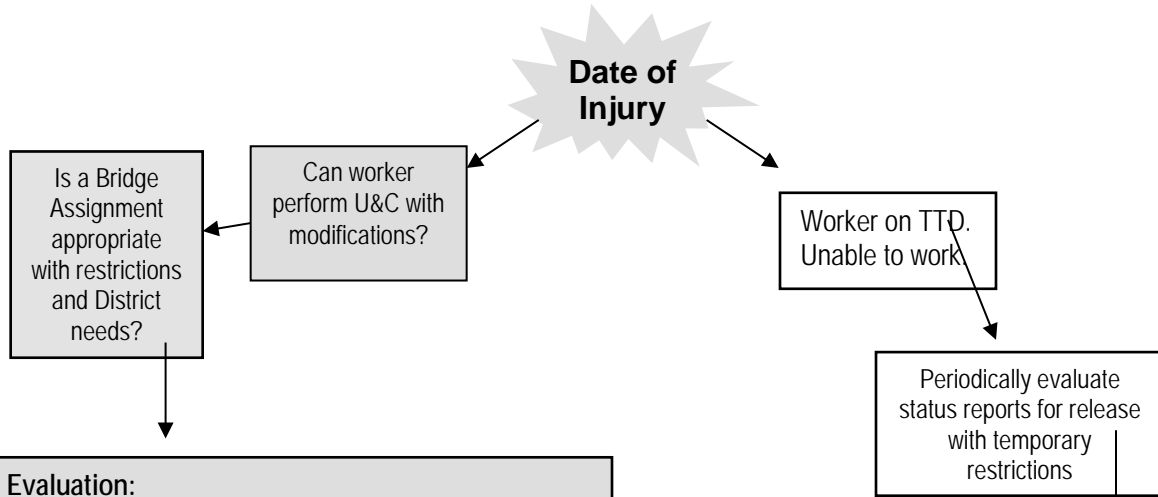
4. Consistently enforce time reporting and attendance requirements for employees in a transitional assignment outside their usual job. Mandate proper absence reporting, including for follow up medical or physical therapy appointments.
5. Consistently enforce conduct standards, including impact of attitude, insubordination, etc.

What should an employer do if an employee in an ERTW program is found to be in violation of a standard of conduct?

1. Any employee violating an ERTW Program Policy may be subject to discipline, up to and including termination, in accordance with the employer's applicable Memorandum of Understanding or other applicable Policies and Procedures.
2. Any employee who, while working in a temporary modified or transitional duty assignment who violates any other employer's rule, standard of conduct, or personnel policy may be subject to discipline, up to and including termination, in accordance with the employer's applicable Memorandum of Understanding or other applicable Policies and Procedures.

Evaluations for Extending or Ending Bridge Assignments

Consider Combination of Factors for Each Worker on an Individualized Basis



Individualized Evaluation:

Consider a combination of factors to determine whether extension of the Bridge assignment is reasonable and appropriate **OR** whether the Bridge should end and the worker return to TTD.

1. Has the worker's condition improved during the assignment? Have the temporary restrictions been modified? Are they less or more restrictive? How does that affect the worker's performance on the Bridge assignment?
2. Is the worker anticipated to reach P&S status within a finite and reasonable period of time?
3. Are the tasks the worker is performing on the Bridge assignment adding value for the District or Department? Is there a sufficient flow of work?
4. Do the costs of keeping the worker on a Bridge outweigh the benefits? Is it creating disruption that places an undue burden on the site or the District?

1. When worker is released with temporary restrictions, consider the availability and effectiveness of a Bridge assignment.
2. Periodically evaluate the Bridge assignment for effectiveness.

Consider Alternatives, Make Decision and Document the Individual Analysis

1. **Return worker to TTD if:** (a) anticipated duration to P&S is indefinite; **or** (b) duration is finite, but time is unreasonably lengthy under the circumstances; **or** (c) duration is finite but anticipated to be 4+ weeks and there are no exceptional circumstances making an extension of the Bridge necessary or appropriate.
2. **Extend the Bridge assignment if:** (a) extension is finite and reasonable under the combination of factors; **or** (b) the current assignment can be modified with alternative appropriate duties for a reasonable time; **or** (c) identify an alternative Bridge assignment that is better suited to current restrictions and anticipated duration. Extend in practical and appropriate increments rather than lengthy blocks of time.
3. **Conduct periodic evaluation:** periodically assess continued effectiveness and ongoing business needs. **When circumstances change** (e.g., the worker's restrictions or business needs), re-evaluate. Make appropriate changes as the new situation warrants.
4. **Document the individualized analysis and basis for decision:** Identify and record the combination of factors relevant to the decision, including the worker's individual circumstances and the District's business needs. "Business needs" includes maintaining the effectiveness of an early RTW

Key Objectives of Transitional Return-to-Work Program

The purpose of the Transitional Return-to-Work program is to return injured workers who suffer industrial work-related injuries to work as soon as possible, in a position that is within the temporary medical restrictions outlined by the treating physician and that can be reasonably and appropriately accommodated while the worker is receiving medical treatment. Transitional work assignments are **temporary assignments** that assist the injured or ill worker in returning to work from an industrial (work-related) injury or illness at a level they are physically capable of performing until they can return to their usual position. This process enables the worker to gradually resume his or her duties as the worker's treating physician recommends.

Specific job descriptions for transitional work assignments (Bridge assignments) are developed to provide a variety of suitable transitional work opportunities for injured workers and that are consistent with the business needs of departments with injured workers.. A primary objective of the program is to establish a set of appropriate Bridge assignments that are made available for newly injured workers who require transitional work.

- Bridge assignments **are not permanent or long term assignments**; but rather, an interim step to assist in the worker's medical recovery process.
- Assignments provide a match between the physical demands of available transitional job tasks and the worker's current functional abilities and work restrictions.
- Assigned transitional tasks are consistent with the business needs of the school site, department or facility to which the worker is assigned, allowing injured workers to perform work that adds value to their employer's workplace.
- Continued improvement in the worker's condition should be demonstrated throughout the transitional assignment. The worker's progress is reviewed periodically throughout the assignment.
- Assignments are **initially** anticipated to be in place for 12 weeks, as determined appropriate from the worker's medical condition and treatment/recovery plan. To be consistent with the requirements of the Americans with Disabilities Act and the California FEHA, the "maximum" limit of 12 weeks should not be inflexible or applied to every injured worker without considering the individual circumstances. The District, in conjunction with the claims examiner, should evaluate on an individual basis whether it is reasonable and appropriate to extend or end the Bridge assignment for that worker, based on a combination of factors.
- At approximately week 9 or 10 of the Bridge assignment, the claims team should determine from the medical provider if a finite and reasonable period of time will allow the worker to achieve P&S status. The District will evaluate the available information **at that time** and then make a decision about further transitional duty or other appropriate actions consistent with the objectives of the Bridge assignment program, workers' compensation laws and other applicable legal or regulatory standards. The Risk management department and claims specialists will evaluate whether the transitional assignment will be either:
 1. Be continued in its current form for a reasonable and appropriate time and then periodically reviewed to assess continued effectiveness;
 2. Be modified with alternative transitional duties, and then periodically reviewed; or
 3. Be discontinued. The worker will return to TTD payments while continuing medical treatment and until the worker is released as Permanent & Stationary.

Affirmative Defenses – Undue Hardship and Direct Threat/Imminent Safety Risk

What are the two main affirmative defenses that employers may use to deny a specific reasonable accommodation?

1. The two main affirmative defenses are undue hardship and direct threat (also referred to as imminent safety risk or imminent danger.)
2. **Undue hardship** involves a significant disruption of business operations or expense to the employer.
3. **Direct threat/imminent safety risk** involves a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.
4. The burden of proving both undue hardship and direct threat/imminent safety risk is on the employer.

What are the primary characteristics of an evaluation of undue hardship and direct threat/imminent safety risk?

1. An undue hardship evaluation IS:
 - a. Individualized;
 - b. Fact based;
 - c. Comprehensive;
 - d. Determined;
 - e. Consistent;
 - f. Involves confirmed functions;
 - g. Involves a fundamental disruption.
2. An undue hardship evaluation is NOT:
 - a. Generalized;
 - b. Conjecture based;
 - c. Apprehensive;
 - d. Speculative;
 - e. Resistant;
 - f. Involving unconfirmed assumptions;
 - g. Involving incremental dysfunction.
3. A direct threat/imminent safety risk IS:
 - a. Objective;
 - b. Current (focus is on “what is...”);
 - c. Educated.
4. A direct threat/imminent safety risk is NOT:
 - a. Subjective;
 - b. In the future (“what might be...”);
 - c. Exaggerated.

What are the most common mistakes employers make when an employer invokes the under hardship or imminent safety risk defenses to deny a specific reasonable accommodation?

1. Failure to apply the proper level of hardship to the requested accommodation – **significant expense or difficulty or necessary accommodations would fundamentally alter the nature of the business.**
2. Failure to engage in an individualized evaluation of the hardship to the entity or department; invoking undue hardship based on **subjective assumptions.**
3. Invoking undue hardship based on inconvenience, difficulty, cost, or some intangible effect on other employees that is not a fundamental alteration.
4. Failure to focus on undue hardship as a **fact-specific analysis** before concluding that a particular accommodation (or totality of modifications) would result in significant difficulty or expense.
5. Lack of **objective, fact-specific reasons** why an accommodation, if implemented, would be unduly disruptive or would fundamentally alter the nature or operations of the workplace.
6. Invoking undue hardship due to concern that other employees may either gripe or seek the same accommodation, or that purchase of reasonably priced equipment would create a precedent (such as a sit to stand workstation).
7. Relying on a “snap judgment” about safety or hardship, without first engaging in a good interactive process; thus, having **no documented dialogue** with the employee about the individual circumstances.
8. Claiming that an accommodation creates an undue hardship when it involves performing essential job tasks in a manner that is different from the “regular,” or requires departure from established practices or policies.
9. Refusal to implement a “fragrance free” policy or modifications to prevent environmental exposures, based on gripes by other employees; OR because enforcement may require additional effort (**inconvenience or difficulty is not undue hardship**);
10. Failure to conduct a specific fact-based and individualized assessment of whether the employee’s disability or use of prescribed medication poses a direct threat to self or others, or presents a present and imminent risk of harm;
11. Using generalized concerns about safety without a thorough analysis of all feasible modifications, adjustments, or alternatives.
12. Invoking undue hardship based on concerns about increased “liability” for medical incidents, workplace injuries, or costs.
13. Claiming undue hardship based on other employees’ fears or prejudices toward the individual’s disability.
14. Claiming undue hardship based on a fear that a reasonable accommodation might have a negative impact on the morale of other employees.

Can an employer use the under-hardship defense to claim that a proposed accommodation creates an undue disruption to business operations?

1. Yes. According to the EEOC Guidance, *“Employers may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees’ ability to complete their work.*
2. For “undue disruption” to be a viable defense, the entity, facility, or department needs concrete, objective evidence that the accommodation, if implemented, **would be so unduly**

disruptive that the work would not be completed on time or at all, or would result in negative impact on other employees or the work product of the business.

3. This is a high evidentiary hurdle. It requires the employer to specify, on an objective basis, the specific costs, disruption, or fundamental impact on operations that would result.

What are some specific factors to consider with regard to the undue hardship defense?

1. The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding.
2. The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.
3. The overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities.
4. The type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity.
5. The geographic separateness, administrative, or fiscal relationship of the facility or facilities.
6. NOTE: With regard to cost, undue hardship is determined based on the net cost to the employer.
 - a. There might be funding from an outside source that can help pay for the accommodation or the employer can also ask the employee with the disability if they are willing to pay the difference.
 - b. If there is more than one effective accommodation, the employer can choose the one that provides the least hardship.

What are the differences between the ADA's "imminent safety threat" defense versus the FEHA's "direct threat" defense?

1. **ADA Imminent Safety Threat**: the ability to perform essential functions safely is a qualification standard since an essential function of every workplace is the ability to work safely and capably, and to react appropriately to periodic stressors.
 - a. The employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself or others in the workplace. If not qualified, then no reasonable accommodation required but conclusion must be based on individualized evaluation, not speculation.
2. **FEHA Direct Threat Defense**: in CA., the issue of whether the employee is a direct threat to his own health or safety, or the safety of others, is an affirmative defense after a requested accommodation is denied. It is addressed at step 7, rather than step 4, and is more limiting in scope – to prevent misplaced subjective concerns about safety issues overriding broader evaluation at steps 5 and 6.
3. Subjective assumptions or generalizations about potential "safety threats" are prohibited under both ADA and FEHA. **The threat must be objective, specific, and credible.**

What are some specific factors to consider with regard to the direct threat/imminent safety risk defense?

1. Duration of the risk.
2. Nature and severity of the potential harm.
3. Likelihood that potential harm will occur.
 - a. Potential harm must be “imminent.”
4. The job must be safety sensitive.
5. Whether the risk is present and not in the future.
 - a. No defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.
6. The risk must be supported by medical judgment.
 - a. Rely upon the most relevant and up to date medical verification, rather than generalized fear - particularly with mental health limitations and certain chronic health conditions.
 - b. The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.
7. Whether an individual poses a direct threat should be determined on a **case-by-case basis**. Rely on objective medical determinations – not fear or speculation

8. This defense is available only if, after engaging in an interactive process, there is no reasonable accommodation that would allow the employee to perform essential functions in a manner that would not endanger his/her health or safety **because the job imposes an imminent and substantial degree of risk**.

Performance Standards and Disciplinary Action

Is it important for employers to establish performance standards when an employee is receiving a reasonable accommodation, and, if so, what does this involve?

1. Yes, it is crucial that employers establish performance standards when an employee is receiving a reasonable accommodation.
2. Performance standards are expressions of requirements or expectations that must be met for each element at a particular level of performance.
3. Employees should be able to clearly understand how the results they are responsible for are linked to the results for which others are also held responsible.
4. Critical elements of the job should be established for each employee at the start of the performance period.
5. The focus should be on results and include credible and attainable measures.
6. Employees must be accountable for work assignments and responsibilities of their position, including clear and measurable standards for transitional or modified duty assignments.

What are some specific strategies for enforcing attendance, performance, and conduct standards?

1. Always address the employee's responsibilities verbally and in a written agreement.
2. Empower front line leaders to communicate performance expectations regularly with employees in transitional or modified duty assignments.
3. Consistently enforce time reporting and attendance requirements for employees in a transitional assignment outside usual job. Mandate proper absence reporting, including follow up medical or physical therapy appointments.
4. Consistently enforce conduct standards, including impact of attitude, insubordination, etc.
5. Regularly monitor employee's progress in meeting assignment expectations.
6. Perform candid evaluations.
7. Communicate expectations.
8. Stick to job-based criteria.
9. Be as specific as possible.
10. Record and memorialize specific examples.
11. Confront performance problems constructively.
12. Approach all employees consistently.
13. Provide written job instructions.
14. Establish written, long-term and short-term goals.
15. Develop strategies to deal with problems as they arise.
16. Recognize triggers for the interactive process.
17. Develop procedures to evaluate effectiveness of accommodation.
18. Apply appropriate standards of conduct and discipline for anyone violating policy or with positive drug tests.
19. Develop written work agreements clear expectations of responsibilities, and the consequences for not meeting performance or conduct standards

How can an employer cope with irregular attendance and accommodate periodic absenteeism not otherwise covered by FMLA-CFRA?

1. **Do** identify when regular attendance is an essential job function that cannot be modified without undue hardship.
2. **Do** discuss with employee why regular, dependable attendance is critical and identify methods for reaching objective standards.
3. **Do** encourage employee to set regular medical appointments at times that won't impact the job, provided they can be flexible and it is consistent with their medical provider's judgment on best medical practices for treatment.
4. **Don't** refer negatively to authorized job protected leave in performance evaluations, email, employee meetings or staff events.
5. **Don't** state or imply that an employee who needs modified schedule is untrustworthy or not committed to the job or employer.
6. **Don't** directly or indirectly interfere with leave or accommodation rights by demanding that the employee change medical appointments or asking (in exasperated tone) "you had to go to the doctor... again??"

What are some supervisory strategies to increase engagement and productivity?

1. **To increase performance management:**
 - a. Provide positive praise and reinforcement.

- b. Establish written, long-term and short-term goals and instructions.
 - c. Develop strategies to deal with conflict as it occurs.
 - d. Establish procedures to evaluate effectiveness of accommodation.
 - e. Relax policies mandating attendance at work related social functions.
 - f. Encourage all employees to move non-work-related conversations to outside work.
 - g. Develop written work agreements with agreed upon accommodations, clear expectations of responsibilities, and clear designation of consequences for not meeting performance standards.
2. **To enhance performance organization and task prioritization:**
- a. Divide large assignments into several small tasks.
 - b. Assign new project only when previous project is complete.
 - c. Use daily, weekly or hourly charts or checklists to identify each task.
 - d. Use flow-chart to indicate steps in a task.
 - e. Establish interim deadlines with regular progress follow up.
 - f. Provide verbal or pictorial cues on written instructions or checklists.
 - g. Consider color coding to prioritize tasks, events & importance level.
 - h. Allow additional training time for new tasks.
 - i. Use a job coach or mentor to teach/reinforce organization skills – particularly for supervisors.
3. **To deal with stress management:**
- a. Permit very short “time out” periods throughout the day.
 - b. Allow telephone calls during work hours to doctors.
 - c. Allow longer breaks for counseling support.
 - d. Provide sensitivity training to co-workers and supervisors.
 - e. Reinforce the importance of peer support.
 - f. Allow the presence of a support animal.

What are some examples of how to handle specific situations with regard to performance management and discipline?

1. Consider the following scenarios:
 - a. An employee with restrictions having poor performance issues.
 - b. An employee on intermittent leave having an episodic flare up.
 - c. An employee with a mood disorder or other disability having conduct or behavior issues.
2. Ask the following questions:
 - a. How should this be addressed, if at all, in the employee’s performance evaluation?
 - b. Has employee used job protected leave? Requested an accommodation?
 - c. Is there a trigger for an interactive process to run parallel with evaluation?
 - d. Can disciplinary action proceed if employee asserts disability as the “cause?”
 - e. How is employee being reasonably accommodated? Is there a need to do so?
 - f. Does evaluator have specific facts and examples of performance deficiencies?
 - g. Is there solid documentation?
 - h. Has there been protected activity?

What are the requirements for any “standards of conduct” an employer may put into place?

1. Must be job related and consistent with business necessity.
2. Must be applied uniformly to all similarly situated employees.
3. Must generally cover all types of jobs.

4. Must prohibit actual or threatened violence or destruction of property.
5. Must require that employees observe safety and operational rules.
6. Must require that employees observe safety and operational rules.
7. Should prohibit offensive emails, profanity, obscene gestures, etc.
8. Should prohibit theft, dishonesty, and tampering with business records.
9. Should prohibit confidentiality breaches, and improper access to agency equipment.
10. Should prohibit drinking or illegal use of drugs in the workplace.
11. May prohibit insubordination or disrespect for supervisors.

If someone is having family issues and the employer is aware that the employee is having performance and attendance issues, would this be a trigger for an interactive dialogue?

1. No, family issues do not qualify the employee as disabled under FEHA or ADA, and so the concept of “interactive process” doesn’t apply.
2. In this situation, the employer should consistently enforce its policies on handling attendance, punctuality, enforcement or work rules, and performance standards.
3. If the employer takes into account personally challenging situations, then it should do so consistently.
4. **Exception:** If the family issues involve the employee’s need to care for a close family member who has a serious health condition (and the employer has 50+ employees), then FMLA/CFRA may apply.
 - a. The medical provider for the close family member would need to certify that the family member has a serious health condition and that the employee is needed to participate in health care activities or decisions.

Specialized Issues

This section of these FAQ’s addresses some specific specialized issues and offers clarity and guidance on how to approach the interactive process and offer reasonable accommodations to employees dealing with these specific disabilities. Of course, there are so many more illnesses and disabilities than can be covered in this section, this is just a sample of some of the more common ones. The generalized guidelines in the above sections are to be applied to all situations.

Obesity

Is obesity recognized as a disease?

1. Obesity is not a new concept to workers compensation and employment law issues, but it was almost always a **“co-morbidity,”** meaning a condition occurring at the same time, but usually independent of the work-related injury or illness.
2. Now, obesity **is** classified as a “disease” by the AMA and under both the ADA and the FEHA, creating multiple types of limitations of major life activities, including walking, standing, sitting, staying alert (e.g., apnea), maintaining a regular schedule, etc. **Working is a major life activity.**

How does the AMA define the “disease” of obesity and the related physical, emotional, and medical impacts that are “chronic conditions as a result of obesity?”

1. A disease or disorder of slow progression and long duration;

2. Which causes continuous or episodic periods of incapacity;
3. Lasting at least one year, but usually a lifetime; and
4. Which often involves episodic complications from treatments or medications.

What are some of the key questions that arise with obesity defined as a disease?

1. Are obese injured workers at greater risk of complications from surgery and recovery, or from extended need for pain medications?
2. Will work restrictions now focus more on limitations for length of time sitting, or other modified schedules? More stand-sit workstations or even regular exercise breaks unconnected with wellness programs?
3. Will HR professionals need to focus more on training front line leaders to avoid “comments” about obese workers?
4. Are employers at risk for “regarded as disabled” claims when front line leaders react subjectively, even when focus is safety and not “fat-bias?”

What is the effect of obesity on workplace injuries and workers comp claims?

1. According to the California’s Workers Comp Institute: *“The AMA’s reclassification of obesity as a disease may prompt an increase in workers’ comp claims involving obesity as a co-morbidity, a compensable consequence of injury, or perhaps in some situations, a primary diagnosis, which could be costly given historic cost differences between claims with and without an obesity co-morbidity.”*
2. Obesity can cause or contribute to a work-related illness or injury, through falls and other injuries.
3. Obesity becomes an issue when the employee is sedentary too long while recovering from a work-related illness or injury.

What are some questions that arise when managing workers comp claims of obesity as a disease?

1. Will certain types of work now be blamed for causing obesity, such as jobs that are primarily sedentary performed over many years?
2. Will an individual with a sedentary career be able to establish cumulative trauma due to weight gain each working year?
3. How will apportionment be determined between industrial injury and pre-existing obesity?
4. How will apportionment be determined when a person gains a significant amount of weight following a workplace injury?
5. Does genetic pre-disposition play a role in apportionment?
6. Do gender-based conditions that may be obesity-related play a role in apportionment decisions?
7. Do obese injured workers have increased risk of delayed recovery or return to work if they gain even more weight post-injury?
8. Will employers be held responsible for covering weight-loss programs or medical procedures relating to obesity?

How should apportionment issues be handled when dealing with obesity and obesity related chronic conditions?

1. The medical provider shall make an apportionment determination by finding what approximate percentage of PD was caused by the direct result of injury arising out of and occurring in the course and scope of employment and what was caused by other factors, both before and after the industrial injury, including prior industrial injuries.
2. The medical provider must distinguish between Causation of Injury versus Causation of Disability.
3. The medical provider must make an apportionment determination.
4. The medical provider must base conclusion on “reasonable medical probability.”
5. The medical provider must explain the basis for the determination.

What are some of the most common “potential injury consequences” that may arise out of obesity and affect employees in the workforce?

1. Reduction in physical activity resulting in physical deconditioning;
2. Depression;
3. Stress;
4. Financial loss impacting ability to afford healthy foods;
5. Onset of type 2 diabetes in at risk populations;
6. Increased blood pressure;
7. Unintended consequences of recuperation, treatment and derivative injury (e.g. more time being sedentary).

What are the top diagnostic injury categories for claims involving obesity?

1. Medical back problems without spinal cord involvement;
2. Degenerative, infective and metabolic joint disorders;
3. Sprains: shoulder, arm, knee, lower leg;
4. Wound, fracture of shoulder, arm, knee, lower leg;
5. Other injuries, poisonings and toxic effects;
6. Spine disorders;
7. Ruptured tendon, Tendonitis, Myositis, Bursitis;
8. Hernia;
9. Carpal Tunnel Syndrome;
10. Minor Wounds and injuries;
11. Heart attacks, strokes, diabetes, certain types of cancers.

What are some negative attitudes and faulty assumptions employers make about obese employees that become problematic during the interactive process?

1. Obese individuals are potentially at risk for major health emergencies at work, such as heart attack or stroke.
2. A morbidly obesity is always a safety risk and must be kept out of the any safety sensitive job.
3. Obese employees will cost the employer more with health insurance and workers comp claims.
4. Obesity is a “choice” and not a disease, and therefore workplace accommodations are not required.
5. Any job that requires lifting, bending, stooping, walking, or mobility is unsuitable for an obese applicant or employee.
6. Since an employer can’t possibly remove all “risk factors” for overweight individuals after an injury, the employee can be put on sick leave and must get a full duty release to return to work.
7. Genetic information can be requested or used in making employment decisions.

8. Even obese employees can participate in workplace wellness programs, even if they are aggressive or require a health assessment.
9. It is acceptable to have mandatory wellness programs and workers can be penalized for not meeting goals.

What questions must employers consider when making the individualized assessment to determine if an obese employee can be reasonably accommodated?

1. What can most people in the general population do with little difficulty?
2. What can members of the individual's peer group do with little difficulty?
3. What is the employee able to do, if not for the disability?
4. What are the employee's underlying conditions that should be considered?
 - a. There are several underlying medical conditions that may cause weight gain and lead to obesity; in these cases, obesity would be a symptom. The underlying condition may be a disability in its own right if it meets the criteria or if an individual is regarded as disabled as a result.
5. How severe is the employee's obesity?
 - a. The severity of the obesity can make a difference. Severe or morbid obesity would qualify.
6. Has the employee's obesity given rise to other conditions, which would be covered on their own?
 - a. There are other related conditions that may come about either in part or completely due to an individual's weight. These conditions may qualify as disabilities in many cases.
7. Has any harassment occurred? Employer will still have a duty to protect from harassment. Even if an individual is not technically disabled under the law, if the individual is being subjected to harassment or a hostile working environment, the employer still has an obligation to take appropriate steps to stop this from occurring.
8. NOTE: Be very careful about the risk of "Regarded an employee as disabled due to obesity."

Aside from leave, what accommodations can an employer consider making to allow an obese employee continue to work?

1. Flexible schedules for start and end of shift and break schedule;
2. Self-paced workload with flexible hours;
3. Private area to test their blood sugar levels or to administer insulin or other medications;
4. Breaks to eat or drink, take medication, or test blood sugar levels;
5. A place to rest;
6. Allow employee to work from home;
7. Provide flexibility for time needed to obtain counseling;
8. Address attendance policies with flexibility;
9. A private space for confidential physician-patient communications;
10. Modification of bending, lifting, standing, walking and carrying requirements.

What are some other proactive approaches to addressing obesity in the workplace?

1. Include people with disabilities in programs such as informational and educational, behavioral and social, and policy and environmental strategies.
2. Ensure that worksite nutrition and physical activity programs are accessible to people with disabilities. Promote the physical availability of healthy foods/snacks and appropriate portion sizes at worksites, including foods in vending machines, cafeterias, and at employee functions.

And ensure that physical activity programs, gyms, and walking/running paths are accessible for people with disabilities who want and can use them.

3. Work closely with state or local public health agencies on worksite wellness programs.
4. Motivate people with disabilities to participate in worksite wellness programs and ensure that these programs can accommodate the disability.
 - a. Example incentives could include financial or other incentives to employees that may include health insurance premium reduction to employees.
5. Understand and support research on how workplace wellness programs can improve employee health, including workers with disabilities.
 - a. Effective programs take a multidisciplinary approach that focuses on providing workers with the knowledge, skills, and support to eat a healthier diet and be more active. This can include nutrition classes, onsite exercise facilities and changing rooms, access to nutritionists and other counselors, and worksite or company-wide policies that provide healthier food options and reimburse exercise-related expenses.

Allergies, Odors, Scents and Environmental Exposures

How do allergies and sensitivities to odors, scents, and environmental exposures manifest themselves in the workplace?

1. Employees with such allergies or sensitivities have an inability to tolerate an environmental chemical or class of substances, including both high- and low-level exposure.
2. This may affect them in the following ways: nervous system, lungs, vascular, neurological.
3. Allergies and sensitivities to odors, scents, and environmental exposures in the workplace can be disabling and trigger a need for the interactive process and reasonable accommodations.
4. Specific ways these allergies and scent sensitivities manifest:
 - a. Symptoms are reproducible with repeated exposure.
 - b. The conditions are chronic.
 - c. Both high and low levels of exposure trigger the same result.
 - d. The symptoms improve or resolve when t triggers are removed.
 - e. Responses often occur to unrelated substances.
 - f. Inability to work in a particular environment, with specific substances, or with particular co-workers.

What are some specific symptoms employees with allergies and scent sensitivities might have?

1. Stinging eyes and/or runny nose;
2. Sneezing and coughing;
3. Wheezing, tightening of throat, ragged breathing, asthma attacks;
4. Nausea, vomiting, or extreme gastric distress;
5. Headache, migraine, vertigo, blurred vision, or dizziness;
6. Extreme fatigue or lethargy;
7. Poor memory and concentration;
8. Rashes, itching, or other “contact” responses;
9. Insomnia and other sleep disturbances;

What types of odors or substances in the workplace can be potential triggers for employees with these types of allergies and scent sensitivities?

1. Perfumes, scented cologne or aftershave;
2. Shampoo & conditioners, hair spray;
3. Hand or body lotions, creams;

4. Air fresheners, deodorizers, aerosol sprays;
5. Scented candles, potpourri or scented items on desks or restrooms;
6. Soaps or detergents with lingering scents;
7. Sun screen used throughout the day within confined areas;
8. Deodorants or other personal hygiene products;
9. Cleaning products, maintenance products, paints and solvents;
10. Toner cartridge;
11. Exhaust from common office products or leaf blowers (grounds);
12. Nail polish and/or nail polish remover;
13. Latex in health care or classroom settings;
14. Strong food odors in lunchroom areas (such as microwave popcorn).

What kinds of specific reasonable accommodations could be made for employees suffering with allergies or scent sensitivities in the workplace?

1. Remove all scented products from the workplace, including workspaces and common areas;
2. Purchase unscented soaps, wipes, lotions, air fresheners, etc.;
3. Ask all employees to keep their food in air tight containers and sealed bags;
4. Purchase latex free supplies;
5. Keep plants and flowers away from workspaces;
6. Transfer employee to a different department, team, or work group;
7. Declare a chemical-free work environment;
8. Install adjustable fans, filters, or environmental modifications to confined workplaces;
9. Allow employees with sensitivities to telecommute or call into meetings;
10. Reassign employee to a different position or facility;
11. Provide longer or more frequent breaks;
12. Allow employee to limit time in large meetings;
13. Have a plan in place for emergency intervention;
14. Alter where, when or how an essential function is performed;
15. Designate a fragrance-free or chemical-free zone within the workplace;
16. Use only unscented cleaning products;
17. Provide scent-free meeting rooms and restrooms;
18. Reduce or otherwise accommodate travel requirements;
19. Modify dress code, where appropriate, for treatment issues
20. Make sure the office has working windows;
21. Use HEPA filters and have ducts maintained;
22. Make sure ventilation system does not distribute pollutants from outside;
23. Use exhaust systems to remove fumes from copiers/office machines;
24. Perform maintenance, and remodeling when building is not occupied;
25. Have an air quality test performed by an industrial hygiene professional to assess poor air quality, dust, mold, or mildew accumulation;
26. Provide pre-notification for remodeling, painting, pesticide applications, floor waxing, and carpet shampooing by way of signs, memos, e-mails, or an employee register;
27. Use non-toxic building materials, furnishings, and supplies;
28. Use nontoxic carpeting or alternative floor coverings;
29. Consider alternatives to synthetic lawn care products;
30. Provide a short-term time off for illness or intermittent leave;
31. Allow a long-term leave of absence (last resort.)

What must employers always make sure to do when they have employees with allergies or scent sensitivities?

1. Remember that the interactive process is **individualized**.
2. Always take complaints or reports seriously.
3. Always carefully document efforts to identify alternative products and provide reasonable accommodations.
4. Provide training to inform and “sensitize” co-workers to the adverse effects of reactions to scent-based products at work.

Chronic Conditions - Chronic Pain and Opiod/Marijuana Abuse

What is a “chronic condition” for the purpose of the interactive process and reasonable accommodation?

1. A disease or disorder of slow progression and long duration;
2. Which causes continuous or episodic periods of incapacity;
3. Lasting at least one year, but usually a lifetime; and
4. Which often involves episodic complications from treatments or medications.

What are some of the “chronic” conditions that manifest themselves in the workplace?

1. Pain;
2. Diabetes and other endocrine disorders;
3. Inflammatory and auto-immune issues (Fibromyalgia, Arthritis, etc.);
4. Gastrointestinal issues.

What types of reasonable accommodations may employees with diabetes need and is it a reasonable accommodation for an employer to make sure that an employee regularly checks her blood sugar levels and eats or takes insulin as prescribed?

1. Some employees may need one or more of the following accommodations:
 - a. A private area to test blood sugar levels or to take insulin;
 - b. a place to rest until blood sugar levels become normal;
 - c. breaks to eat or drink, take medication, or test blood sugar levels.
2. No, employers have no obligation to monitor an employee to make sure that she is keeping her diabetes under control. It may be a form of reasonable accommodation, however, to allow an employee sufficient breaks to check her blood sugar levels, eat a snack, or take medication.

What is the prevalence of chronic pain and what are some of the causes and treatments?

1. **Prevalence:** Almost 1 in 5 adults experience chronic pain.
 - a. Leads to loss of appetite, depression, and exhaustion.
 - b. The pain associated with chronic pain usually overwhelms all other symptoms
2. **Causes:** migraines, low back, arthritis, joint inflammation, cancer pain and/or side effects of treatment.
 - a. Neurogenic pain (damage to peripheral nerves or central nervous system)

- b. Psychogenic pain (not due to past disease, injury or any visible sign of damage inside or outside nervous system).
- 3. **Treatments:** Medications, acupuncture, physical therapy, local electrical stimulation, and brain stimulation, as well as surgery.

In what ways do the symptoms and manifestations of chronic pain and side effects of pain killers adversely impact productivity and performing in the workplace?

- 1. **Physical conditions that involve fatigue, pain, or frequent periods of incapacity**
 - a. Loss of concentration or focus and difficulty making decisions;
 - b. Inability to maintain regular schedule;
 - c. Frequently interrupts performance of duties;
 - d. Negative impact on decision-making.
- 2. **Stress and anxiety:**
 - a. Impulsive or indecisive actions, excuses for inadequate or incomplete work;
 - b. Irritability and anger;
 - c. Working more slowly than usual; frequently missing deadlines;
 - d. Showing decreased interest or involvement in work or work-related functions.
- 3. **Absenteeism or Tardiness** – calling in sick or leaving early.
- 4. **Presenteeism** - employees physically report to work but are not productive.

What are the underlying conditions associated with chronic pain and the complications from the medications prescribed for the pain (usually opioids)?

- 1. **Underlying Conditions Associated with Chronic Pain**
 - a. Back and knee injuries (may be acute or episodic);
 - b. Inflammatory joint conditions (lupus, arthritis (RA), fibromyalgia);
 - c. Chronic pain syndrome (often episodic);
 - d. Fibromyalgia, lupus, rheumatoid arthritis (often episodic);
 - e. Migraine headaches;
 - f. Swelling of hands and feet;
- 2. **Complications from Prescribed Medications / Opioids**
 - a. Peripheral neuropathy (often side effect of medications);
 - b. Gastric inflammation, irritable bowel syndrome, constipation;
 - c. Immune deficiencies or susceptibility to infections;
 - d. Depression or anxiety disorders (panic attacks, phobias);
 - e. Heart palpitations and other chest discomfort;
 - f. Skin irritations;
 - g. Immune deficiencies;
 - h. Susceptibility to infections;
 - i. Incontinence;
 - j. Inability to regulate body temperature
 - k. Short term memory impairment;
 - l. Temporary cognitive and concentration deficiencies.
- 3. **NOTE:** There is some overlap between these two categories.
- 4. **NOTE:** Chronic pain is **BOTH** a CFRA “Serious Health Condition” **AND** a FEHA Disability.

What elements of the process becomes even more important when dealing with disabilities that are chronic?

1. Because chronic conditions can last for a long time or indefinitely, the need for a continuous interactive process becomes even more important whenever circumstances change.
2. Because chronic conditions are often episodic, increased flexibility on the part of the employer is even more important.
 - a. Employees may be able to perform essential job elements one day but not another.
 - b. Intermittent leave is more common with chronic illnesses.

What negative effects can painkillers such as opioids and marijuana have on employees?

1. Effects can cause sleepiness and blurred vision, which can impair the ability to drive and work safely.
2. Consumption may impair thinking and reactions. In some people, it can cause confusion, unusual thoughts, impulsive behavior, delayed reaction or difficulty in following directions.
3. Severe fatigue or lethargy can cause falls, vehicle crashes or contribute to other safety incidents.
4. Consumption of marijuana can lead to serious errors when performing job tasks which require focus, attention to detail or the need to react quickly to avoid injury.
5. Side effects can cause productivity issues, such as affecting pace, focus, and concentration.

Under FEHA, what are the reasonable accommodation requirements with regard to disabilities stemming from lawfully prescribed pain killers (opioids) versus prescribed medicinal marijuana?

1. Disabilities with pain or side effects from valid, lawfully prescribed pain killers (opioids) are covered by FEHA:
 - a. Employees acute or chronic pain that limit major life activities or working are entitled to an interactive process;
 - b. Reasonable accommodations are required to facilitate performance of essential job functions – modifications, adjustments, leaves, etc.;
 - c. Accommodations may be necessary due to side effects of medications;
 - d. Accommodations may be necessary that include working with some pain meds.
2. Pain or side effects from prescribed medicinal marijuana:
 - a. Controlled substance under Federal law – no accommodations required;
 - b. Cannot terminate due to medical marijuana – but can prohibit in workplace;
 - c. Entity may still need to consider accommodations for the underlying condition, provided no marijuana in the workplace or use before reporting for duty;
 - d. No accommodations for addictions to unlawful drugs; but LOAs may be necessary.

What are some potential reasonable accommodations for employees experiencing chronic pain?

1. **Activities of Daily Living:**
 - a. Personal attendant at work;
 - b. Service animal at work;
 - c. Move workstation closer to the restroom;
 - d. Allow longer or more frequent breaks;
 - e. Provide access to a refrigerator for medications.

2. **Muscle Pain and Stiffness:**
 - a. Implement ergonomic workstation design;
 - b. Reduce repetitive tasks or interrupt the tasks with other duties;
 - c. Provide carts and lifting aids, automatic door openers;
 - d. Use fan/air-conditioner or heater at the workstation;
 - e. Allow work from home during extremely hot or cold weather.
 - f. Ergonomic chair and adjustable monitors or other equipment;
 - g. Adjustable workstation to alternate between sitting and standing;
 - h. Reduce repetitive tasks or interrupt the tasks with other duties;
 - i. Consider stand-to-sit workstation (or other alternatives to encourage more movement throughout the day); or
 - j. Consider short opportunities for walking or standing with meetings.
3. **Chronic back or knee pain:**
 - a. Modify the worksite to make it accessible and adjustable;
 - b. Provide parking close to the worksite;
 - c. Accessible entrance and install automatic door openers;
 - d. Accessible restroom and break room;
 - e. Provide private area for rest breaks, as appropriate;
 - f. Accessible route of travel to other work areas used by the employee;
 - g. Make sure materials and equipment are within reach range;
 - h. Place tools and equipment within reach;
 - i. Provide stand/sit workstation or other ergonomic adjustments;
 - j. Provide a cart, scooter, or other mobility device for large work areas;
 - k. Allow service dog at the worksite;
 - l. Modified scheduling for meetings or other events outside worksite.
 - m. Low task chairs for work that cannot be brought to waist height;
 - n. Stand/lean stools and anti-fatigue mats for standing work;
 - o. Compact lifting devices to push/ pull supplies and tools;
 - p. Adjustable bookshelves or other storage devices in facility;
 - q. Train employees on proper lifting techniques;
 - r. Provide a height adjustable desk and ergonomic task chairs; or
 - s. Provide carts to move supplies and stock
4. **Migraine headaches:**
 - a. Provide task lighting;
 - b. Eliminate fluorescent lighting;
 - c. Use computer monitor glare guards;
 - d. Reduce noise with sound absorbent baffles/partitions, environmental; sound machines, and headsets;
 - e. Provide alternate work space to reduce visual or auditory distractions;
 - f. Implement a "fragrance-free" workplace policy;
 - g. Provide air purification devices;
 - h. Allow flexible work hours or modified schedule;
 - i. Allow periodic rest breaks;
 - j. Allow work from home or remote location – telework arrangements.
5. **Chronic fatigue and weakness:**
 - a. Reduce or eliminate physical exertion and workplace stress;
 - b. Schedule periodic rest breaks away from the workstation;
 - c. Allow a flexible work schedule and flexible use of leave time;
 - d. Allow work from home all or part of the work week;
 - e. Implement ergonomic workstation design;
 - f. Provide parking close to the work-site;

- g. Install automatic door openers;
- h. Make sure materials and equipment are within reach range;
- i. Move workstation close to other work areas and office; equipment and/or restroom and break room;
- j. Reduce noise with sound absorbent baffles/partitions; environmental sound machines, and headsets.

What safe practices can employers put into place for their employees who are undergoing treatment and taking prescription drugs?

1. Talk with the employee's medical provider about the effect of a medication on the ability to perform their job safely and effectively.
2. Understand and recognize side effects that may impact their concentration, focus, memory, or cause drowsiness.
3. Make their supervisor aware should accommodations be required while using certain medications, while assuring the employee it won't be "used against" him/her and may be subject to an interactive process and provide proof of a valid prescription.
4. Use appropriate personnel procedures, i.e. use leave, short-term disability, or reasonable accommodations of modified duty when the prescribed pain killer may interfere with safe work practices.
5. Make sure employees understand about safe storage and proper disposal of their medications.
6. Educate employees on the risk of sharing drugs.

What are some ways employers should handle the use of prescription drugs in the workplace?

1. Recognize prescription drugs have big impact on the workplace.
2. Train supervisors and employees how to spot signs of abuse.
3. Have clear written drug free work policies in place (DFWP) and make sure all employees are aware of the policy. Redistribute on an annual basis.
4. Enforce the policy consistently, with no "exceptions."
 - a. Train managers on the importance of this requirement and hold them accountable for any enforcement lapses.
5. Policy should clearly state that illegal or unauthorized use of prescription drugs is prohibited. It is a violation of drug-free workplace policy to intentionally misuse and/or abuse prescription medications, including:
 - a. Borrowing or using someone else's meds
 - b. Taking more than prescribed dose
 - c. Use without valid prescription
6. Prohibit consumption, possession, or transfer of marijuana at all times and at all workplaces.
7. Leverage wellness or assistance programs to help ease employees' return to work.
8. Policy should also address the consequences if an employee violates the policy.
9. If the policy includes drug testing, which it should, it should clearly state which drugs are tested (including opioids), the cut off levels, testing procedures and what happens if a test is determined positive for prohibited drugs or if a test indicates that the prescription use is a workplace safety concern.
 - a. Remind employees that a positive test will result in discipline or other consequences.
 - b. Ensure that employee drug testing includes all relevant controlled substances, including opiates/heroin, cocaine, marijuana, PCP, and amphetamines.
 - c. NOTE: Oxycodone and Methadone will not show up on the opiates screen as they are synthetic opioids. If Dilaudid or Fentanyl are commonly used, additional tests need to be added.

10. Clearly state that decriminalization of marijuana does not mean it won't be prohibited at work, or reporting to work impaired.
11. Prohibit all illegal controlled substances at work.
12. Address prescription use of opioids as controlled substances.
13. Train employees to avoid unsafe work practices.
14. Remind employees that impairment on the job will not be tolerated, even if impairment was due to a morning smoke before leaving the house for work. Applies to both recreational and medicinal use.
15. Use appropriate and experienced clinics to report results.
16. Ask for Fitness for Duty exam only where objectively warranted.
17. Address leaves of absence for rehabilitation, CFRA (substance abuse), and other appropriate leaves for treatment and recovery and cross-reference to reasonable accommodation process.
18. Treat substance abuse as a disease, not a character flaw or crime.
19. Be alert to situations of employees struggling after return to work: fatigue, distractions, medication dependencies, lack of focus, changes in personality or interpersonal interactions.
20. Carefully document the employee's work restrictions and the interactive process undertaken to determine how those restrictions might be accommodated. Focus on the restrictions, not the diagnosis or prescribed medications.

What are some “red flags” in the workplace that gives an employer enough reasonable suspicion to require drug testing of an employee?

1. Odor of alcohol, marijuana, etc., on breath, clothing, or body;
2. Staggering, stumbling, sustained unsteadiness standing, walking;
3. Unusual body movement;
4. Slurred or unusual speech;
5. Bloodshot or red eyes, squinting, dilated or constricted pupils;
6. Unusual/inappropriate verbal or physical behavior;
7. Unusual/delayed communications or thought process;
8. Excessive drowsiness;
9. Extreme unexplained fatigue;
10. Significant lapses in concentration;
11. Flushed skin.

What steps should an employer take when reasonable suspicion of drug use in the workplace is confirmed?

1. Manager sends the employee home for the day on paid administrative leave.
2. Offer for the employee to call someone to pick up and take him/her home to avoid a safety risk driving their own vehicle while impaired.
3. If the employee has no option to find a safe ride home, then inform employee that a taxi will be called and paid for in order to get them safely home.
4. If the employee refuses a ride and insists on driving a vehicle, the manager should inform the employee that it would then be necessary to call law enforcement and inform them of the situation. since the determination has been made that the employee is not in a condition to safely operate a motor vehicle.
5. Inform the employee that the expectation is that they return to work on the very next workday unless otherwise directed by Human Resources.
6. Document all aspects of the incident and forward that documentation to Human Resources.
7. Discipline as it relates to the use or possession of alcohol, drugs or a controlled substance in the workplace, if warranted, will be dealt with through a separate process.

8. Manager should contact Human Resources with any concerns or to report any actions taken as a result of reasonable suspicion.

How should an employer train managers and supervisors with regard to the use of prescription and non-prescription drugs in the workplace?

1. Managers are the critical link of employer communication plan related to roll out of new policy and key to ensuring employee understanding of what this means.
2. Managers should communicate the drug free workplace policy and information about the process and scope of drug testing regularly with employees during individual and team meetings.
3. Managers have a critical role in actively promoting employee assistance programs and resources.
4. Supervisors have significant responsibilities under the DFWP policy.
5. Supervisors must understand how to implement the employer's procedures related to fitness for duty or reasonable cause testing.
6. Supervisors must know how to account for consistent performance management and appropriate disciplinary actions.
7. Supervisors must partner with Human Resources and Risk Management in this area.
8. Supervisors must be trained about the specifics of the drug testing protocols, emphasizing the seriousness and importance of consistency and legal limitations. Selected leaders should be trained on reasonable suspicion testing protocols.
9. All leaders must be trained to identify signs of drug or alcohol use, including typical behavioral and performance related signs of impairment and the organization should determine a very specific definition of reasonable cause for initiating drug testing that is consistent with legal and policy requirements.
10. Safety is key and employee communication needs to focus on the shared goal of ensuring that work can be done safely and effectively at all times.
11. Managers and front-line supervisors need to know that ADA, as well as leave laws, may protect an employee's use of over the counter or prescription drugs to treat a disability.
12. All leaders must be educated as to what they can – and cannot – ask or address with the employee.
13. Managers and supervisors must be prepared to engage in the interactive process to identify reasonable accommodations, including modifying job responsibilities.

Pregnancy: Conditions of Pregnancy, Childbirth, Recovery, Post-Partum

What are the basic principles of reasonable accommodation under the ADA, PDA, and EEOC with respect to pregnancy?

1. A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.
2. A reasonable accommodation is a change in the workplace or the way tasks are customarily done that enables a person with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.
3. It is unlawful to deny a request for reasonable accommodation made by an employee "affected by pregnancy" if:
 - a. The request is on the advice of her health care provider that reasonable accommodation is **medically advisable**; and

- b. The requested accommodation is **reasonable**. Whether an accommodation is reasonable is a factual determination to be made on a case-by-case basis, taking into account factors such as:
 1. Employee's medical needs;
 2. Duration of the necessary accommodation;
 3. The employer's legally permissible past and current practices;
 4. Other factors under the totality of the circumstances;
 5. Employer may require a medical certification to substantiate.
4. An employer may only deny a reasonable accommodation if it would result in undue hardship.
 - a. Undue hardship requires **significant difficulty or expense**.
5. The employer and employee shall engage in an **individualized interactive process** to identify and implement the employee's request for reasonable accommodation.
6. The EEOC notes that the ADA Amendments Act expanded the definition of a person with a "disability" to include those with work restrictions similar to those needed by pregnant women. *"Pregnant employees may require other kinds of workplace adjustments similar to accommodations provided to individuals with disabilities, such as permission to take more frequent breaks and to keep a water bottle at a workstation where an employer generally prohibits this practice, just as an employer might allow a water bottle for someone who takes medication to combat dry mouth, which is caused by some psychiatric medications."*
 - a. *"An employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work."*
 - b. Employer can keep limits on the number of light-duty jobs available and their duration, but if the employer makes exceptions from its limits on light duty for some workers injured on the job, those exceptions must also apply to disabled pregnant workers.

How does the FEHA define some of the key terms relating to pregnancy?

1. **"Affected by Pregnancy"** means that because of pregnancy, childbirth or related medical condition or "a condition related to pregnancy, childbirth or a related medical condition," it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.
2. **"Because of Pregnancy,"** means due to an employee's actual pregnancy, childbirth or related medical condition.
3. **"A Condition Related to pregnancy, childbirth, or a related medical condition."** means a physical or mental condition intrinsic to pregnancy or childbirth.
4. **"Perceived pregnancy"** is being regarded or treated by an employer as being pregnant or having a related medical condition.

What does it mean to be "disabled by pregnancy?"

1. A woman is **"disabled by pregnancy,"** if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons.
2. This includes, but is not limited to, the following:
 - a. She has severe morning sickness;
 - b. She needs time off for prenatal or postnatal care;
 - c. She needs best rest;
 - d. She has gestational diabetes;
 - e. She has pregnancy-induced hypertension;
 - f. She has preeclampsia;

- g. She has post-partum depression/
- h. She has given birth or suffered a loss or the end of the pregnancy.

What is the expanded interpretation of “related medical conditions of pregnancy” under the EEOC, to be used during the interactive process and reasonable accommodation process?

1. A **“related medical condition”** for reasonable accommodation purposes is any medically recognized physical or mental condition related to pregnancy, childbirth or recovery from pregnancy or childbirth.
2. This includes, but is not limited to, the following:
 - a. Lactation-related medical conditions such as mastitis
 - b. Gestational diabetes
 - c. Pregnancy-induced carpal tunnel or repetitive stress disorder
 - d. Hypertension
 - e. Preeclampsia
 - f. Post-partum depression
 - g. Recovery from childbirth or loss of pregnancy

What are some “Best Practice” policies and procedures that an employer should have in place to facilitate appropriate handling of the interactive process and the providing of a reasonable accommodation with respect to pregnant employees?

1. Adopt and enforce a specific policy stating that reasonable accommodations may be available to individuals with temporary limitations, including pregnancy.
2. Establish a consistent protocol for individualized interactive processes to evaluate accommodations due to pregnancy.
3. Don’t “assume” that any position cannot be modified.
4. Document the entire process.
5. Train front line leaders to recognize triggers for interactive process.
6. Provide training for staff who will conduct the interactive process.
7. Always conduct an interactive process when a pregnant employee requests an accommodation or provides work restrictions.
8. Avoid inflexible “maximum” time limits for a light duty assignment. Each interactive process must be an individualized assessment, taking into considerations the particular employee’s restrictions.
9. Fully evaluate all potential accommodations that will effectively enable her to remain at work.
10. **Never** force a pregnant employee to begin her FMLA-PDL leave for childbirth sooner than her medical provider specifies, or extend beyond her release to return to her regular duties.
11. When the employee’s need for the light duty accommodation concludes, don’t mandate she be cleared for “full duty,” or “with no restrictions.”
12. Always confirm the terms of workplace accommodations in writing. Always designate leave in writing, and if an employee is using intermittent leave, designate those terms and conditions.

What are some examples of reasonable accommodations that can be made for pregnant employees?

1. Redistributing “marginal functions” that employee can’t perform due to pregnancy-condition/disability, which would require other employees to perform those duties.
2. Altering how the essential functions are performed and re-distributing tasks.

3. Modification of workplace policies to better accommodate the needs of pregnant employees.
4. Purchasing or modifying equipment, furniture, and devices.
5. Modifying work schedules.
6. Relocating the employee's work area to minimize walking, or moving supplies and equipment closer to employee's workstation.
7. Permitting more frequent breaks.
8. Lactation accommodation (see below).
9. Allowing a temporary reassignment to an alternate position that the pregnant employee can physically handle, i.e. one that requires less lifting or standing.
10. Granting extending unpaid leave.

What must an employer do to reasonably accommodate a nursing mother? (lactation accommodation)

1. An employer must provide a reasonable amount of break time and use of a room or location in close proximity to the employee's workspace to express breast milk in private.
2. New California legislation expand this requirement in 2019, requiring this space to be a space that is NOT a bathroom.
3. The space must be private and have a chair and small table or shelf for the breast pump.
4. The nursing mother must be allowed to do this as frequently as necessary.
5. This is a requirement for up to one year of the child's birth.

What are the most common “unlawful practices” by employers with regard to pregnant employees?

1. Refusal to provide employee benefits for pregnancy, if the employer provides such benefits for other temporary disabilities.
2. Refusal to provide reasonable accommodation for an applicant or employee “affected by pregnancy.”
3. Refusal to transfer an employee “affected by pregnancy.”
4. Refusal to grant an employee disabled by pregnancy a PDL leave.
5. Denying, interfering with or restraining an employee's right to reasonable accommodation, to transfer or to take a pregnancy disability leave.
6. Retaliating against the employee because she exercised her right to reasonable accommodation, to transfer or to take PD.

What are some negative attitudes, faulty assumptions and improper stereotypes that employers may have about pregnant employees that may be problematic during the interactive process?

1. A pregnant employee will have attendance problems or leave her job.
2. An employee who requires light duty for pregnancy is always a safety risk and must be kept out of the any safety sensitive job.
3. Reasonable accommodations involving light duty are only available for employees who are hurt on the job.
4. A pregnant employee who takes some sick days due to early pregnancy illness must be placed on leave.
5. An employer with a physically demanding worksite or other workplace hazards must remove employees who are pregnant or trying to become pregnant, out of concern for risk to the fetus.
6. Since we can't possibly remove all stressors, we can deny accommodation for anyone with a high-risk pregnancy.

How does a reasonable accommodation for a pregnant employee work with the employee's pregnancy disability leave (PDL)?

1. When a reasonable accommodation, such as a change of work duties or job restructuring, is granted, it shall not affect the employee's independent right to take up to 4 months of pregnancy disability leave
2. If the accommodation involves a reduction of hours or intermittent leave, the employer may consider this a form of pregnancy-disability leave and deduct the hours from the 4-month entitlement (different from FMLA relative to modified duty.)

What are the FEHA medical certification requirements for reasonable accommodations, transfers, or PDL for pregnant employees?

1. The medical certification **must** contain the following:
 - a. Clear indication of the medical advisability of the reasonable accommodation or transfer;
 - b. A description of the requested reasonable accommodation or transfer; **and**
 - c. The date on which the need for accommodation or transfer became or will become medically advisable and the estimated duration of the reasonable accommodation or transfer.
 - d. Labor Code section 7291.17(b)(6) and (b)(7) requires: *"A written communication from the employee's health care provider to the employer stating that the employee is disabled by pregnancy **or** that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or duties or otherwise to be reasonably accommodated."*
2. The employer must give the employee 15 days' notice of the following:
 - a. The need to provide medical certification;
 - b. The deadline for providing the certification;
 - c. The parameters of what constitutes sufficient medical certification; **and**
 - d. The consequences for failing to provide the certification.
3. The employer must advise the employee whenever certification is inadequate or incomplete and provide time to cure any deficiency.
4. In addition to the various types of medical providers outlined in the main section of these FAQ's, a licensed midwife or a physician assistant who directly treats or supervises the treatment of the employee's pregnancy is authorized to provide the medical certification.

What are the specific terms for accommodation or leave used in medical documentation regarding pregnant employees?

1. **"Disability"**: Certifies the existence of a pregnancy-related condition that requires either time off work (block of leave) or intermittent, reduced-schedule leave;
2. **"Temporary Transfer"**: Certification may provide that employee be transferred to another position (light duty) during duration of pregnancy;
3. **"Functional Limitations/Work Restrictions"**: Certification may provide work restrictions that involve modified duty work restrictions for her existing job;
4. **"Release from Period of Disability"**: Establish procedure for employee to notify your agency when this transition occurs. Require release from period of actual disability, for transition CFRA bonding leave.

Is an employer required to authorize a temporary transfer for pregnant employees?

1. Yes, it is unlawful to deny a temporary transfer when an employee is "affected by pregnancy," as long as the health care provider certifies that it is medically advisable and it can be reasonably accommodated.
2. The employer is **not** required to make a transfer if it would require:
 - a. Creating a position employer would not otherwise have created.
 - b. Discharging another employee.
 - c. Transfer would violate the terms of a collective bargaining agreement.
 - d. Transferring another employee with more seniority.
 - e. Promoting or transferring any employee who is not qualified to perform the new job.
3. The new position must have equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than her regular job, but does not have to be equivalent duties.
4. When the employee's health care provider certifies that there is no further medical advisability for the transfer, the employer must reinstate the employee to her same or comparable position.
 - a. The employer should provide this guarantee in writing to the employee upon request.
5. Exact language of the FEHA regulations: *"It is unlawful for an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous positions or duties for the duration of the disability, including disabilities resulting from on-the-job injuries, to fail to apply the policy, practice or CBA to transfer an employee who is disabled by pregnancy and who so requests."*

What is the employer's defense to reinstatement guarantee to a comparable position?

1. A pregnant employee has no greater rights than an employee who has been continuously employed in another position being eliminated.
2. Employer has burden to prove that:
 - a. It would not have offered a comparable position to pregnant employee if she had been continuously at work during PDL or transfer period; and
 - b. There is no comparable position available. Available means if there is a position open on the scheduled reinstatement date or within 60 calendar days, for which she is qualified or to which she is entitled by policy, contract, or CBA
3. The employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform her of comparable positions during the reinstatement period (letter, phone, email or links to postings on employer website in a section for job openings).

Cancer

What types of obstacles are faced by employees suffering from cancer and what are some basic reasonable accommodations that employers can provide?

1. Employee obstacles:
 - a. Low energy levels;
 - b. Unhappiness with their appearance;
 - c. Temporary fatigue;
 - d. Nausea/diarrhea;
 - e. Cognitive or neurological affects;
 - f. Pain;
 - g. Incapacitating medications.
2. Possible accommodations:
 - a. Flexible schedules;

- b. More frequent breaks;
- c. Allow employee to work from home or a remote location;
- d. Re-assignment of duties;
- e. Short term or extended leave.

How might certain symptoms and consequences of cancer impact an employee's productivity and performance?

1. **Fatigue, pain, or frequent periods of incapacity:**
 - a. Loss of concentration or focus;
 - b. Inability to maintain regular schedule;
 - c. Performs and reacts more slowly;
 - d. Frequently interrupts performance of duties;
 - e. Negative impact on decision-making;
 - f. Difficulty in maintaining productive communications.
2. **Stress and anxiety:**
 - a. Impulsive or indecisive actions;
 - b. Irritability and anger;
 - c. Working more slowly than usual and frequently missing deadlines;
 - d. Decreased interest or involvement in work or work-related functions;
 - e. Withdrawal from interactions with co-workers.

What are the most common cancer-related symptoms experienced by employees suffering from cancer?

1. Symptoms arising out of the **underlying cancer** – the illness itself, surgery, and initial recovery:
 - a. Pain;
 - b. Drug dependencies or substance abuse;
 - c. Skin irritations;
 - d. Chronic infections;
 - e. Shortness of breath;
 - f. Nausea or vomiting;
 - g. Extreme fatigue;
 - h. Weakness of extremities;
 - i. Swelling of hands or feet (lymphedema).
2. Symptoms arising out of the **treatment** – chemotherapy and radiation:
 - a. Short term memory loss from certain forms of chemotherapy;
 - b. Cognitive or neurological deficits (some short and some long term);
 - c. Peripheral neuropathy;
 - d. Immune deficiencies or susceptibility to infections;
 - e. Digestive or gastric distress;
 - f. Temperature sensitivity;
 - g. Environmental sensitivities to smells, noise, or distractions
 - h. Migraines;
 - i. Stress related illness;
 - j. Mood disorders and depression;
 - k. Panic attacks;
 - l. Incontinence.

What are the basic guidelines employers must keep in mind when they learn that one of their employees has cancer?

1. Employers should never set expectations (either high or low) based on the experience of others because everyone facing cancer is different.
 - a. One size definitely does not fit all.
 - b. This is why the interactive process must always be **individualized**.
2. Employers must always listen and engage with employees on their individual concerns. Remember, employees are going to all be different with regard to the following:
 - a. Their reaction to their diagnosis or the diagnosis of a close family member.
 - b. Their coping mechanisms for pain and fatigue.
 - c. Their response to side effects of treatments.
 - d. Their emotional reactions – fear, anxiety, depression.
 - e. Their available support structures in home, community, or workplace.
 - f. Their prior health or wellness
 - g. Their receptivity to new targeted or experimental treatments.
3. Be aware that the physical, mental, and emotional manifestations of cancer may precede or supersede the actual diagnosis and treatment.
4. Employers should not make a distinction between the underlying cancer or the incapacitating treatments.

What are the legal, contractual, and policy rights available to an employee facing cancer?

1. FMLA-CFRA: job-protected, benefit-protected leave;
2. FEHA-ADA: workplace accommodations to return to work or stay-at-work;
3. Contractual leaves: medical, catastrophic leave bank, memorandum of understanding or collective bargaining agreement;
4. Policy Particulars: available paid and unpaid leave.

Is cancer an automatic disability under the FEHA? What does FEHA cover?

1. Any cancer related diagnosis, treatment, or related effect is covered by FEHA, whether or not it is active, in remission, episodic, etc.
2. FEHA covers all physical and mental health disabilities resulting from cancer and/or its side effects.
 - a. **Physical disability:** *“Any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (1) 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, skin and endocrine; and (2) “Limits” a major life activity.”*
 - b. **Mental Disability:** *“Any mental or psychological disorder or condition, including organic brain syndrome, emotional or mental illness, mood disorder, that: (1) may limit a major life activity; or (2) Any other mental or psychological disorder or condition ... that requires special education or related services.”*

What are the benefits and resources that employers can offer to employees facing cancer?

1. STD/ LTD; State Disability (SDI); Paid Family Leave (PFL); other options;
2. Employee Assistance Programs: resources, services, and counseling;
3. Vacation: paid time off or extended unpaid leave options;
4. Other internal and external employer, community, and industry resources.

What are the steps that Human Resource managers should take when learning that an employee has cancer?

1. Schedule a meeting with the employee as soon as possible.
 - a. Demonstrate compassion but avoid speculative statements such as “You’ll be all right” or “they probably caught it early.”
2. Explain the worker’s legal rights and protections, including benefits and policies.
3. Guide a discussion about workplace modifications and accommodations.
 - a. i.e. paid time off, leave-sharing, flexible or part-time hours, telecommuting, job restructuring, and leaves of absence.
4. Review the employee’s benefits package and identify any “gaps” in potential coverage or anticipated increase in costs at next open enrollment.
5. Ask questions about the employee’s preferences.
 - a. i.e. whether s/he plans to inform colleagues about the diagnosis.
6. Carefully consider when, what, and how to communicate relevant information within the employee’s work team, department or entity-wide.
 - a. Discuss with the employee the nature of the communication and respect his/her wishes.
 - b. Identify a point person who will serve as the worker’s contact when s/he is absent and craft a plan for how work will be handled.
7. Maintain a sense of normalcy in the workplace.
8. Be flexible and communicate often when the employee has more questions.
9. Train all employees on how to interact with a coworker who may have cancer.
 - a. Suggestions for employees: ask your co-worker if s/he wants to talk and be willing to listen, ask how you can help, keep your conversations confidential.
10. All entity leaders should already be trained on rights, risks, and responsibilities for leaves and workplace accommodations.
 - a. Discuss with the employee’s supervisor or department head the specifics of handling this individualized situation.
11. Educate all leaders to address issues of serious illness for all employees sensitively and avoid assumptions about their ability to perform their jobs.
12. Make sure supervisors are mindful not to let their history with the employee (good or less-than-good) affect how they react, communicate and supervise the affected employees and the entire work group.
13. Help identify community organizations and other resources available for support;
14. Consider sensitivity training for co-workers.

In what way is cancer different from other disabilities with regard to leave as a reasonable accommodation?

1. With cancer treatment and recovery, FMLA-CFRA leave is often the first request and accommodation, versus a last resort.
2. Some key reasons why an employee may need a short term or extended leave when fighting cancer:
 - a. For Hospital Care: Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.
 - b. Due to Incapacity: Inability to work or perform other regular daily activities due to the serious health condition, treatment, or recovery.
 - c. Due to Absence Plus Treatment: A period of incapacity of more than three consecutive calendar days which also involves treatment two or more times by a health care provider or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

- d. For Multiple treatments for non-chronic conditions: any period of absence to receive multiple treatments (including period of recovery) by a health care provider either for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.
- e. For Chronic conditions requiring treatment: Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.
- f. For Multiple treatments for non-chronic conditions: any period of absence to receive multiple treatments (including period of recovery) by a health care provider either for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.

Can an employer require an employee affected by cancer to take leave?

- 1. No, an employer must never force an employee suffering from cancer (or dealing with cancer in a close family member) to take leave unnecessarily or prematurely.
- 2. The employer cannot mandate that leave begin sooner than the employee's health care provider specifies, nor extend beyond the provider's release to return to work.
- 3. The employer cannot mandate that the employee use FMLA/CFRA leave for multiple consecutive days of sick leave unless it qualifies as 'serious health condition';
- 4. The employer cannot require the use of a job-protected leave day if it would have been a non-duty day for the employee had s/he not been on leave;
- 5. The employer cannot mandate extended leave if the employee can work with accommodations;
- 6. If employee can work intermittently, the employer cannot mandate that the leave be taken in a block of time (whether paid or unpaid).

What questions should an employer may ask an employee who has cancer during the interactive process, in order to find a reasonable accommodation that will allow the employee to perform the reasonable functions of his/her job?

- 1. What limitations is the employee with cancer experiencing?
- 2. How do these limitations affect job performance (job tasks and environment)?
- 3. What essential functions can s/he perform unaided?
- 4. What essential functions can't s/he perform unaided?
- 5. What types of modifications would work?
- 6. What types of equipment would work?
- 7. Is s/he familiar with or trained to use this equipment?
- 8. What training can s/he use in a different or modified job?
- 9. What devices or tools does s/he use off the job that would aid performance?
- 10. Are there environmental changes or modifications that would assist in staying at work?
- 11. How does s/he handle the restrictions in major life activities outside of work (not to pry, but to determine what's working well and can translate effectively into the workplace)?

What are some of the key reasonable accommodations (other than leave) that an employer can offer an employee who has cancer?

- 1. Provide flexible and/or part-time schedules;
- 2. Allow a self-paced workload with flexible hours;
- 3. Allow employee to work from home;
- 4. Address attendance policies with flexibility;

5. Modification of existing job duties;
6. Allow for light duty;
7. Job restructuring (including telecommuting, where feasible);
8. Periodic or more frequent rest breaks away from workstation;
9. Provide a private space for confidential physician-patient communications;
10. Removal of non-essential job functions;
11. Reassignment to vacant position;
12. Acquisition of equipment or assistive devices;
13. Adjustments to travel requirements;
14. Reduce or eliminate physical exertion and workplace stress;
15. Provide parking close to the work-site;
16. Make sure materials and equipment are within reach range;
17. Alternative work space to reduce visual and auditory distractions;
18. Move workstation close to other work areas, office equipment, and break rooms;
19. Provide adjustable ventilation;
20. Keep work environment free from dust, smoke, odor, and fumes;
21. Avoid temperature extremes in workspaces or facilities;
22. Use fan/air-conditioner or heater at the workstation;
23. Redirect air conditioning and heating vents;
24. Modify dress code;
25. Provide HEPA filters or other items to aid respiratory concerns;
26. Provide an office with separate temperature control
27. Allow telephone calls during work hours to doctors, counselors, and others for support.

What type of medical certification is required when an employee or a close family member has cancer or a similar “serious health condition?”

1. The standards are a bit less stringent and limited certification is permitted in these circumstances.
2. Medical certification must provide:
 - a. Date of onset of condition;
 - b. Probable duration of condition;
 - c. With regard to an employee’s own serious health condition:
 1. A statement that, due to the serious health condition, the employee is unable to perform the essential functions of the job.
 - d. With regard to the serious health condition of a close family member:
 1. A statement that the condition warrants the participation of the family member to provide care, psychological comfort, transportation, safety, or arranging third party care;
 2. A statement of the health care provider’s estimate of how long the employee will need to care for the family member, the frequency and duration of anticipated episodic absences for care or medical appointments.

What are considered improper questions when recruiting and/or hiring individuals who may have or have had cancer?

1. Have you ever had cancer? Is your cancer in remission?
2. Have you ever been treated with chemo or radiation?
3. Questions about lengthy medical leaves or insurance claims.
4. Questions about family medical history and cancer or related illnesses.
5. If applicant voluntarily discloses that s/he has had cancer (e.g., to explain hair loss): ask no follow-up questions about diagnosis, treatment, recovery, or prognosis.

6. NOTE: Employers may ask about an employee's need for reasonable accommodation.

May an employer be required to provide more than one accommodation for the same employee with cancer?

1. Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with cancer may require only one reasonable accommodation, others may need more than one.
2. For example, an employee with cancer may require leave for surgery and subsequent recovery but may be able to return to work on a part-time or modified schedule while receiving chemotherapy.
3. An employer must consider each request for a reasonable accommodation and determine whether it would be effective and whether providing it would pose an undue hardship.

Is an employer required to remove one or more of a job's essential functions to accommodate an employee with cancer?

1. No. An employer never has to reallocate essential functions as a reasonable accommodation but can do so if it wishes.
2. It may be mutually beneficial to the employer and employee to remove an essential function that the employee is unable to do, at least on a temporary basis, because of limitations caused by the cancer, its treatment, and/or side effects.

May an employer automatically deny a request for leave from someone with cancer because the employee cannot specify an exact date of return?

1. No. Granting leave to an employee who is unable to provide a fixed return to work date may be a reasonable accommodation. Although many types of cancer can be successfully treated -- and often cured -- the treatment and severity of side effects often are unpredictable and do not permit exact timetables. An employee requesting leave because of cancer, therefore, may be able to provide only an *approximate* date of return (e.g., "in six to eight weeks," "in about three months").
2. In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss the need for continued leave beyond what originally was granted. The employer also has the right to require that the employee provide periodic updates on his condition and possible date of return. After receiving these updates, the employer may reevaluate whether continued leave constitutes an undue hardship.

When may an employer ask an employee if cancer, or some other medical condition, may be affecting his/her ability to do the job?

1. An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that cancer, or some other medical condition, may be affecting the employee's ability to do his/her job, or to do so safely.
2. Sometimes an employer will be able to ask for medical information because the employer knows that the person has cancer and reasonably believes that the cancer itself, its treatment, and/or side effects are causing the employee's performance problems.

3. At other times, an employer may ask for medical information when it has observed symptoms, such as fatigue or difficulties with memory or concentration, or has received reliable information from someone else (e.g., a family member or co-worker), indicating that the employee may have a medical condition that is causing performance problems.

Mental Health Disabilities: Mood Disorders, Depression, Anxiety, Panic Attacks, PTSD

What are some of the mood disorders recognized as disabilities under the FEHA and how are they defined?

1. The FEHA defines mood disorders as being disabling if they affect the employee's ability to work, think, and interact in the workplace.
2. **Panic disorders**: feelings of terror that strike suddenly and repeatedly with no warning. Intense fear triggers severe physical reactions when there is no real danger or apparent cause.
3. **Specific phobias**: an intense fear of a specific object or situation. The level of fear is usually inappropriate to the situation.
4. **Generalized anxiety disorder**: involves excessive, unrealistic worry and tension, even if there is little or nothing to provoke the anxiety.
5. **Obsessive-Compulsive disorder**: characterized by irrational and fearful thoughts that lead to compulsions and obsessions to relieve anxiety.
6. **Intermittent Explosive Disorder (IED)**: a behavioral disorder characterized by explosive outbursts of anger (sometimes rage) that are disproportionate to the situation.
7. **Depressive illness**: often results in overt or suppressed anger (combined with "hopelessness: and confusion)
8. **Chronic anger**: which is prolonged and impacts the immune system. Can be self-directed or judgmental directed at others.
9. **Volatile anger**: spontaneous bouts of excessive anger, which are disproportionate to the situation triggering the outburst.

What are some specific symptoms employees with mood disorders might have?

1. Feelings of anxiousness or sadness;
2. Feelings of being "empty;"
3. Feelings of hopelessness or pessimism;
4. Feelings of guilt, worthlessness, or helplessness;
5. Restlessness, irritability, bouts of anger;
6. Loss of pleasure in activities that were once enjoyed;
7. Decreased energy, fatigue, feeling of being "slowed down;"
8. Difficulty concentrating, remembering, or making decisions;
9. Insomnia, early morning awakening or oversleeping;
10. Loss of appetite and/or weight loss, or overeating and weight gain;

11. Persistent physical symptoms that do not respond to treatment, such as headaches, digestive disorders and chronic pain;
12. Feelings of panic, fear and uneasiness;
13. Hot flashes;
14. Cold and sweaty hands and feet;
15. Numbness or tingling in hands, feet or face;
16. Trembling or shaking;
17. Chest pain, palpitations, fast heart rate or shortness of breath;
18. Nausea, dizziness, or fainting;
19. Fear of losing control or impending doom;
20. Obsessive, repetitive behaviors or compulsions;
21. Feeling of choking;
22. Inability to be still and calm, including muscle tension;
23. Feelings of detachment or unreality.

How should employers handle the interactive process and making reasonable accommodations with employees suffering from mood disorders?

1. Treat every request for accommodation seriously, even if it initially seems unreasonable. Use the interactive process to evaluate whether a change in supervisory methods may reasonably accommodate.
2. Obtain functional capacity and work restrictions, not just recommended accommodations. Clarify the workplace “stressors” from both the employee and the health care provider. Provide the doctor with a current job description or essential functions and ask about alternatives to address limitations.
3. When a restriction focuses on interactions with a leader, determine whether inappropriate conduct has occurred; If the employer finds “red flags” about a manager’s interactions, they must investigate specific incidents and document the findings.
4. Support company leaders when their performance management is professional, job-related, or constructively critical. Discipline when they overstep

What are some possible accommodations that can be made for employees with auditory and visual disturbances?

1. Purchase noise cancelling headsets;
2. Hang sound absorption panels;
3. Provide a white noise machine;
4. Relocate employee’s office space away from audible distractions;
5. Redesign employee’s office space to minimize audible distractions;
6. Install space enclosures or cubicle walls;
7. Reduce clutter in the employee’s work environment;
8. Redesign employee’s office space to minimize visual distractions;
9. Relocate employee’s office space away from visual distractions.

What are some reasonable accommodations that can be implemented for employees with mood disorders or emotional limitations?

1. To deal with attendance issues:
 - a. Allow flexible starting and ending times to the day.
 - b. Modify weekly schedules.

2. To deal with low levels of concentration:
 - a. Reduce distractions.
 - b. Increase natural / full spectrum lighting.
 - c. Allow employee to work from home/telecommute.
 - d. Divide tasks and set small deadlines.
 - e. Job restructuring.
 - f. Provide memory aids such as schedulers, organizers, etc.
3. To deal with emotional employees:
 - a. Allow flexible breaks.
 - b. Implement stress management techniques.
4. To deal with fatigue:
 - a. Provide a goal-oriented workload.
 - b. Reduce tasks.
5. To deal with memory issues:
 - a. Provide job coach or mentor.
 - b. Allow additional training time.
 - c. Provide written checklists.
6. To deal with poor organizational skills:
 - a. Encourage employee to use daily, weekly, and monthly task lists.
 - b. Provide written checklists.
 - c. Divide large assignments into smaller tasks and goals.
 - d. Use flow chart to indicate steps in a task.
 - e. Consider color coding to help prioritize tasks, events, and importance level
7. To help manage multiple priorities:
 - a. Provide job coach or mentor.
 - b. Provide written checklists.
 - c. Assign new project only when previous project is complete.
 - d. Establish interim deadlines with regular process follow up.
8. With all issues:
 - a. Provide positive praise and reinforcement.
 - b. Establish written long-term and short-term goals and instructions.
 - c. Develop strategies to deal with conflict as it occurs.
 - d. Relax policies mandating attendance at work related social functions.
 - e. Encourage all employees to move non-work-related conversations.
 - f. Develop written work agreements with agreed upon accommodations, clear expectations of responsibilities, and the consequences for not meeting performance standards.

How can employers cope with irregular attendance caused by episodic mood disorders?

1. **Do** identify when regular attendance is an essential job function that cannot be modified without undue hardship.
2. **Do** discuss with employee why dependable task performance is critical and identify methods for reaching objective standards.
3. **Do** encourage employee to set regular medical appointments at times that won't impact the job, provided they can be flexible
4. **Don't** refer negatively to authorized job protected leave in performance evaluations, email, employee meeting or staff events

5. **Don't** state or imply that an employee who needs modified schedule is untrustworthy or not committed to the job or employer
6. **Don't** directly or indirectly interfere with leave or accommodation rights by demanding that the employee change medical appointments or asking (in exasperated tone) "you had to go to the doctor... again??"

How should employers deal with a request for psychiatric service or emotional support animals in the workplace?

1. The interactive process should be thorough, and identify all other potential reasonable accommodations, along with assistive animal.
2. No registration or certification is required, but an employee must have a letter from a licensed professional stating that the service/support animal is an **essential** part of treatment for a disability.
 - a. May also ask for annual recertification from the employee of continued need for the animal.
 - b. The letter must confirm that the animal has been trained for this purpose.
3. The employer may challenge that the animal meets the standards within the first 2 weeks the animal is in the workplace based on objective evidence of offensive or disruptive behavior

What is the difference between psychiatric service animals and emotional support animals?

1. **Psychiatric service animal:**
 - a. Must be directly related to the individual's psychiatric disability;
 - b. Must be trained to recognize and respond to the specific needs;
 - c. Must be designed to prevent or interrupt impulsive or destructive behaviors;
 - d. May have the purpose of reminding the individual to take medication;
 - e. May be able to provide safety checks or room searches for PTSD
 - f. May help with interrupting self-mutilation;
 - g. May help to remove disoriented individuals from dangerous situations.
2. **Emotional support animal:**
 - a. Provides comfort, but not trained to perform specific tasks
 - b. Presence helps the individual with calming
 - c. Labor Code Section 7294.0(e): *If an employee requests permission to bring an assistive animal into the workplace as a reasonable accommodation, prior to allowing the animal to be in the workplace, the employer may require that the employee supply a letter from the employee's health care provider stating that the employee has a disability and explaining why the employee requires the presence of the assistive animal in the workplace (e.g., why the animal is necessary as an accommodation to allow the employee to perform the essential functions of the job).*
 - d. FEHA section 11065(2): *Minimum standards for assistive animals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces; does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace; and is trained to provide assistance for the employee's disability.*

How can employers reduce risks with mental disorders in the workplace?

1. Prepare administrators and HR personnel for new requests for accommodation or leave, based on increased attention to mental health issues by providers.
2. Train supervisors to recognize triggers for the interactive process, including objective barriers to performance and behavior issues.
3. Remind supervisors to contact HR or Risk Management for assistance in addressing these complex issues.
4. Carefully document the employee's work restrictions and the interactive process to determine how those restrictions might be accommodated.
5. Be alert when employees have trouble following loss of a loved one and are having difficulty returning to their regular activities. This may well extend beyond bereavement to leave to FMLA-CFRA for the employee's own serious health condition.
6. With mood disorders, restrictions and necessary accommodations often fluctuate. Trigger the interactive process based on changed circumstances. Remember that the employer's duty to accommodate is a continuing duty.
7. Be prepared to address extended leave requests for employees who need time off that does not qualify for FMLA-CFRA or other leaves. Always consider extended leave as a reasonable accommodation as a last resort.
8. Consider what kinds of accommodations, if any, can be made to permit such employees to perform their job and comply with standards of conduct.
9. If an accommodation fails or circumstances change, an employer must consider whether any other reasonable accommodations may be available.
10. If employees with performance problems involving participation in group meetings or other "social interactions," on a social communication disorder or personality disorder, then review their job descriptions and consider whether effective social communication or interaction with others is an essential function of the position.
11. If employees being disciplined for inappropriate workplace behavior raise their disability as a "cause," consider what accommodations, if any, can be made to permit such employees to perform their job and comply with standards of conduct.

Reassignments to Vacant Positions as Reasonable Accommodation

Is a probationary employee entitled to reassignment?

The Agency cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

Example: The Agency designates all new employees as "probationary" for one

year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

Example: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The Agency does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hire.

Must the Agency consider reassignment as a reasonable accommodation even if it does not allow any of its employees to transfer from one position to another?

Yes. FEHA requires Agencies to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, the Agency who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if the Agency has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.

When an employee requests leave as a reasonable accommodation, may the Agency provide an accommodation that requires him/her to remain on the job instead?

Yes, if the reasonable accommodation would be effective and eliminate the need for leave. The Agency need not provide an employee's preferred accommodation as long as the Agency provides an effective accommodation. Accordingly, in lieu of providing leave, the Agency may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The Agency is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

Example: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the Agency, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the Agency provides these accommodations, then it can require the employee to return to work after seven weeks.

Example: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the Agency proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The Agency's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

Is the Agency's obligated to offer reassignment to a vacant position limited to those vacancies within an employee's work site or department?

No. This is true even if the Agency has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. FEHA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc. Rather, the extent to which the Agency must search for a vacant position will be an issue of undue hardship.

If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the Agency routinely pays such expenses when granting voluntary transfers to other employees.

Does the Agency have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

In order to narrow the search for potential vacancies, as part of the interactive process, the Agency should ask the employee about his/her qualifications and interests. Based on this information, the Agency is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the Agency in identifying appropriate vacancies to the extent that the employee has access to information about them. If the Agency does not know whether the employee is qualified for a specific position, the Agency can discuss with the employee his/her qualifications.

The Agency should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly the Agency can search for and identify whether an appropriate vacant position exists. For a very small Agency, this process may take one day; for other Agencies this process may take several weeks. When the Agency has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the Agency will have fulfilled its obligation.

Does reassignment mean that the employee is permitted to compete for a vacant position?

No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be

implemented.

If an employee is reassigned to a lower level position, must the Agency maintain his/her salary from the higher-level position?

No, unless the Agency transfers employees without disabilities to lower level positions and maintains their original salaries. Must the Agency provide a reassignment if it would violate a seniority system?

Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system. This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be undermined if Agencies had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process. However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where the Agency retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system in this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference. Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter. Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

If the Agency has provided one reasonable accommodation, does it have to provide additional reasonable accommodations requested by an individual with a disability?

The duty to provide reasonable accommodation is an ongoing one. Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple types of reasonable accommodation, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the Agency must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the Agency must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

Must the Agency withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

No. The Agency never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that the Agency never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. The Agency may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

Must the Agency provide a reasonable accommodation for an employee with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?

The Agency must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination. Since reasonable accommodation is always prospective, the Agency is not required to excuse past misconduct even if it is the result of the individual's disability. Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.

Special Long Covid (Post COVID Syndrome) Issues and Scenarios

- 1. An employee has asked for accommodations due to Long COVID. What should my next steps be?**
 - a. Your next steps can vary depending on the situation and the specific accommodation request.
 - b. Initially, an employer should engage in the interactive process with the employee. To help ensure consistency and success, you should consider developing written accommodation policies and procedures if you do not already have them.
 - c. When developing policies and procedures, employers should strive to draft flexible and simple procedures, appoint a responsible person to implement them, and inform all employees about the policies by written notice or other office-wide communication.

- 2. What do I do if my employee cannot get an official Long COVID diagnosis?**
 - a. Because Long COVID is a relatively new condition, some employees may find it challenging to obtain a definitive diagnosis.
 - b. The Long COVID diagnosis is complicated because employees may have developed Long COVID symptoms after having been asymptomatic with COVID-19. However, a diagnosis may not be necessary to move forward with providing

an accommodation.

- c. Even if an employee does not have an official diagnosis, the health care provider should be able to document that the employee has an impairment and how the impairment affects the employee.
- d. Keep in mind that the ADA does not provide a list of medical conditions that constitute disabilities. Instead, it includes a general definition of disability that each person must meet. Rather than determining whether an employee has a disability, your focus should be on the employee's limitations and whether there are effective accommodations that would enable the employee to perform essential job functions. It should be noted, employers may choose to provide an accommodation even when not legally required to do so under the ADA.

3. How do I support an employee who wants to perform 100% telework due to Long COVID?

- a. If the employee meets the definition of disability and needs to perform 100% telework because of their disability, you can consider the request as you would any other accommodation request.
- b. An employer can further support an employee by granting the request on a temporary basis without going through the formal ADA process, with the understanding of reassessing the need to continue telework later. This approach might give the employee the support and flexibility needed to get treatment or adjust to having a new disability.

4. How do I assess what support an employee with Long COVID needs when they seem fine at work but then report that they feel sick and ask for time off?

- a. There are a few options that you may want to explore. These include intermittent leave under the Family and Medical Leave Act (FMLA), intermittent use of accrued paid leave under company policy, or allowing an employee with a disability to use intermittent leave as an ADA-related accommodation. If the employee prefers to work instead of taking leave, you can work with the employee to determine whether there are accommodations you can provide other than leave time.

5. How flexible do I have to be when providing workplace flexibilities for an employee with Long COVID?

- a. If you are providing flexibility as an accommodation under the ADA, then you must provide it unless doing so poses an undue hardship. If you are providing flexibilities for all employees as a workplace policy, you can be as flexible as you choose to be and then provide any additional flexibilities on a case-by-case basis when accommodating employees with disabilities.

7. We have gone through an exhaustive interactive process with an employee who has Long COVID, trying several accommodations, including reassignment, without success. What are resources we can provide the employee if we have determined the employee is no longer qualified for the position?

- a. Employers may determine that it is worth the investment to provide education or training for an employee who is no longer qualified for the position currently held or other vacant positions within the organization. This “upskilling” or “reskilling” gives the opportunity for a valued employee to acquire the skills necessary for another position. However, when separation is the only option, you may consider providing resources to the employee as part of your off-boarding process. Examples include the Administration for Community Living’s Disability and Aging Networks, the Social Security Administration and state vocational rehabilitation agencies among other job-seeker resources.
8. An employee is a caregiver for someone with Long COVID. What am I obligated to do to support them and what types of supports can I offer?
- a. In March 2022, the EEOC released new guidance about protections for caregivers, including those who care for people living with Long COVID. Though “caregiver” is not a protected status under federal employment discrimination laws, caregiver discrimination is illegal when it intersects with discrimination based on a caregiver’s protected status, including disability, sex (including pregnancy, sexual orientation and gender identity), race, color, religion, national origin, age or genetic information.
 - b. In a 2021 report prepared for Congress regarding the Family Caregivers Act, the RAISE Family Caregiving Advisory Council suggests caregivers are disproportionately likely to be a member of a protected status group, particularly women, people over 40 and members of racial minorities. Discrimination is also illegal based on a caregiver’s association with someone with protected status, including Long COVID, if diagnosed as a disability. The EEOC’s guidance provides information and links to additional resources.

Section 6

Preparation

Defensible Documentation and Forms for Re-use and Customization



DOCUMENTATION AND FORMS

This section contains sample forms, documentation, and policies for conducting the interactive process and making reasonable accommodation decisions. *They may be reproduced or adapted for your Agency's needs.*

The pages are not numbered,** so that you may use them as needed. You can request electronic copies from:

PEyres@eyreslaw.com

When questions arise about when and how to use or adapt particular forms, always contact the hotline

(602) 448-4051
(Patti Eyres direct hotline number)

REASONABLE ACCOMMODATION REQUEST FORM

To: _____
(Department Head)

From: _____
(Name of person requesting accommodation)

Address _____
Street Apt. # District State Zip

Telephone (____) _____

REQUEST FOR REASONABLE ACCOMMODATION

1. I am requesting accommodation because (circle one): **A** **or** **B** **or** **C**

(A) I am requesting accommodation that will allow me to participate in a company sponsored program, activity or service. Activity name:

(B) I am applying for employment. The accommodation requested will allow me to participate in the examination for (position title):

(C) I am currently employed by the Company and request a reasonable accommodation. My current job title is:

2. My specific functional limitation is: _____ The accommodation I am requesting is described below. (Describe the type of accommodation; if it is a purchasable item list model, number, cost, where it can be obtained, etc., suggestions for work site or examination site modifications or specific job duties which may be restructured or shared to facilitate employment, participate in the examination or utilize a District program, activity or service.)

3. Describe how this accommodation will assist you. **Please attach additional sheets as necessary**

EMPLOYEE CERTIFICATION

I certify that I have a disability or medical condition that requires reasonable accommodation, which will be met by acquiring the equipment, services, or work adjustments described above.

Signature: _____ **(Date)** _____

2. The following accommodations can be offered to the employee for the essential job functions listed below:

Essential Job Function	Accommodation(s)
1.	1.
2.	2.
3.	3.

- The employee agrees that these accommodations will assist in performing the essential functions of the job.*
- The employee disagrees that the accommodations will assist in performing the essential functions of the job for the following reasons:*

ALTERNATIVE POSITIONS/VACANCIES

1. No reasonable accommodations can be offered to the employee for the following reasons:

2. Is there another position available to this employee? Yes No

The employee is able to perform in the following job classification with or without accommodations:

Job Classification:

Essential Job Function	Accommodation(s)
1.	1.
2.	2.
3.	3.

REVIEW OF FINAL DECISION REGARDING ACCOMMODATIONS

- The employee accepts and agrees with accommodations given.
- The employee accepts and agrees that no accommodation can be given.
- The employee disagrees with the following:

Review of Accommodations Scheduled for: _____

Signature

Title

Date

UPDATED SAMPLE OF BASIC FORM
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. This employee is requesting that the [redacted] Unified School District consider a workplace accommodation(s) to facilitate her performance of the essential functions of her job as [redacted] (insert title).

The District needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position as [redacted] (insert proper title). **The District is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions. In accordance with the Genetic Information Non Discrimination Act, the district also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

**UPDATED SAMPLE – USE FOR INQUIRING ABOUT EXTENDED LEAVE
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual. This employee is requesting that the District consider a workplace accommodation(s) to facilitate her performance of the essential functions of her job. **Attached is a job description for this individual's position as a Paraeducator [insert proper title]**

The District needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other accommodations such as extended leave of absence. **THE DISTRICT is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non Discrimination Act, the THE DISTRICT also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

SAMPLE 2- Extended leave as reasonable accommodation

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	Denise Douglas
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **The Travis Unified School District must determine whether a workplace accommodation in the form of additional discretionary leave of absence is appropriate to facilitate her eventual return to full duty or with work restrictions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

1. In a progress report dated 9/21/2012, you provided a target date of January 3, 2013 for this employee to be re-evaluated for potential release to return to work. **Is it your medical opinion that this patient will be released with or without restrictions on or about January 3, 2013?**

Yes No Cannot determine with reasonable medical certainty.

2. If the patient is currently unable to work on 1/3/2013, would a further leave of absence for **a finite period of time** assist her in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes No Cannot determine with reasonable medical certainty.

3. If YES, please provide your medical opinion on the **finite and maximum amount of time** that the patient may reasonably require to be able to return to work and to perform essential job functions, with or without restrictions:

Less than 15 days after January 3, 2013
 30-45 days 45-60 days after January 3, 2013
 Cannot determine with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

**ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. This employee informed the Roseville Joint Union High School District (RJUHSD) that she is taking medication or has other conditions that may limit his/her ability to perform her job and the district is evaluating potential reasonable accommodations. The information provided by your office requires clarification because it addresses the patient's request for accommodation, but not the anticipated duration of these work restrictions.

RJUHSD needs this information to reconcile inconsistencies between the response to this questionnaire and Work/Duty status report signed by Dr. _____ and the note from Dr. _____ received by the district (both attached).

Please provide this information as soon as possible but no later than October 5, 2012.

RJUHSD also needs this information to assist in a determination of whether the patient has a covered disability under the law and the extent to which the employee's "functional limitations" require job modifications or other accommodations to allow him/her to perform the essential functions of his position as a Cafeteria Assistant.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. **In accordance with the Genetic Information Non Discrimination Act, the PCOE also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions**

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Medical Condition is defined as: either of the following: (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; (2) Genetic Characteristics

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

Limits include making achievement of major life activities difficult.

1. Applying these definitions, do the I condition(s) referenced in the attached documents from Dr. Shea and/or Dr. Kumar constitute a **limitation** in the performance of **one or more major life activities**?

____ Yes ____ No

2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult. (Please use additional pages, as necessary).

3. This employee's essential job functions during her regular 3.5 hour shift each day are as follows:

a. 10:00 a.m.: Empty clothes driver of towels and put in bin unfolded

b. 10:15 a.m.: Dishing in dishroom. Tasks involve rinsing and scrubbing dishes as needed before loading dish washer rack and putting in washer. Unload racks of washed dishes and stacks for drying.

c. 10:40: Serves food during lunch. Tasks involve dishing up food onto plate for each student as they go through the lunch line

d. 11:15: Rinsing and scrubbing dishes as needed before loading dish washer rack and putting in washer. Unload racks of washed dishes and stacks for drying.

e. 12:00: puts frozen pre-proportioned cookie dough on trays and puts on rack in freezer

f. 12:20: serves food during 2nd lunch. Tasks include dishing up food onto plate for each student

g. 12:50 to 1:30: Dishes in dishroom. Same tasks as above.

For each of the above tasks, please describe **any work restrictions** that are medically recommended for this patient to enable her to perform these essential job functions under this schedule. Please specifically address the following:

- Duration of time that she can perform each separate task
- Any modifications to her daily schedule
- The frequency and duration of any rest breaks that she may require
- Any work restrictions relating to grasping with her fingers
- Any work restrictions relating to movement of her arms and/or shoulders

(Please use additional pages, as necessary to fully answer question #3).

4. If this patient cannot be reasonably accommodated in her current position, would a leave of absence for a finite period of time allow her to recover sufficiently to return to work and perform these duties?

Yes No Cannot currently determine with reasonable medical certainty

If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-45 days 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	
Signature of Representative	
Title	
Address/Phone/Fax	

**UPDATED SAMPLE – USE FOR INQUIRING ABOUT EXTENDED LEAVE
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual. This employee is requesting that the District consider a workplace accommodation(s) to facilitate her performance of the essential functions of her job. **Attached is a job description for this individual's position as a Paraeducator [insert proper title]**

The District needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other accommodations such as extended leave of absence. **THE DISTRICT is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non Discrimination Act, the THE DISTRICT also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

SAMPLE 2- Extended leave as reasonable accommodation

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	Denise Douglas
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **The Travis Unified School District must determine whether a workplace accommodation in the form of additional discretionary leave of absence is appropriate to facilitate her eventual return to full duty or with work restrictions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

1. In a progress report dated 9/21/2012, you provided a target date of January 3, 2013 for this employee to be re-evaluated for potential release to return to work. **Is it your medical opinion that this patient will be released with or without restrictions on or about January 3, 2013?**

Yes No Cannot determine with reasonable medical certainty.

2. If the patient is currently unable to work on 1/3/2013, would a further leave of absence for **a finite period of time** assist her in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes No Cannot determine with reasonable medical certainty.

3. If YES, please provide your medical opinion on the **finite and maximum amount of time** that the patient may reasonably require to be able to return to work and to perform essential job functions, with or without restrictions:

Less than 15 days after January 3, 2013
 30-45 days 45-60 days after January 3, 2013
 Cannot determine with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

SAMPLE FOR OBTAINING MEDICAL RESTRICTIONS
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	XXX
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	Xxx

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. The County of XXX is evaluating whether or not this individual requires reasonable accommodations to perform the essential functions of her position as a **Supervising XXX, XXX Department**

The County needs this information **and clarification of your letter dated 5/25/2017** in order to assist in a determination of whether the extent to which the individual's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. **The County is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions. In accordance with the Genetic Information Non-Discrimination Act, the County also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.**

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve."

Limits includes making achievement of major life activities difficult.

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ___ Yes ___ No

2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Is this patient prescribed medication that produces side effects that prevents, restricts or makes more difficult her performance of major life activities (such as focus, concentration, memory, ability to analyze or calculate, etc.)? ____ Yes ____ No

If "yes," **without disclosing the name or dosage of the medication**, please describe any **work restrictions** which in your opinion are medically recommended for this patient to enable her to perform her essential job functions

4. The Supervising Appraiser supervises a major assessment section in the Assessor's Office and coordinates related business functions. She has a broad scope and breadth of **both function and supervisory responsibilities**. Required skills include the following:

- Communicate clearly and concisely both orally and in writing
- Produce concise and comprehensive reports
- Supervise, train, guide and evaluate subordinates
- Analyze work processes/situations thoroughly; implement effective actions
- Apply advanced appraisal principles/techniques to ensure equitable, justifiable appraisals

- Analyze existing, new and proposed appraisal related legislation, recognize resulting required changes, and devise appropriate and efficient systems of implementation

Please describe any **work restrictions or modifications** that would enable her to apply these skills to perform her essential job functions. (Attach additional pages, as necessary).

Work restrictions: ____ Yes ____ No If yes, please identify restrictions:

Restrictions are ____ Temporary ____ Permanent
If temporary, please specify anticipated duration in weeks or months

5. The Supervising Appraiser must accurately perform a variety of detail-oriented tasks in a fast-paced environment, with periodic tight deadlines. Required knowledge applied to job tasks on a daily basis:

- Court decisions related to ad valorem taxation of real property
- Principles, practices and techniques of training
- Principles and practices of supervision
- Real property advanced appraisal theory and practices for assessment purposes
- County personnel policies

Please describe any **work restrictions or modifications** that would enable her to apply these skills to perform her essential job functions. (Attach additional pages, as necessary).

Work restrictions: ____ Yes ____ No If yes, please identify restrictions:

Restrictions are ____ Temporary ____ Permanent
If temporary, please specify anticipated duration in weeks or months

6. This individual must be able to adapt to change in work environment, effectively handle multiple tasks and competing demands, work cooperatively in group situations, work actively to resolve conflicts, and communicate effectively with subordinates. Please describe any **work restrictions, modifications or adjustments** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

Identify restrictions:

Restrictions are ____ Temporary ____ Permanent
If temporary, please specify anticipated duration in weeks or months

7. The Assessor's Office has attempted to put in place modifications to this individual's work schedule in accordance with recommendations from her health care providers at Stanford Health Care. She has been objectively observed unable to accomplish mandatory tasks, even with additional time provided and does not remember what tasks she has performed or must perform, even with continual reminders. The Assessor's Office has attempted to accommodate this individual by must process work on a fixed annual time line. The Assessment roll must be delivered by July 1 of each year. Please describe any **work restrictions or modifications** that would enable her to apply these skills to perform her essential job functions. (Attach additional pages, as necessary).

8. Despite the implementation of significant performance improvement plans and temporary accommodations to her workload and supervisory responsibilities, this individual has been observed **unable to implement even rudimentary aspects of the accommodations.** She is **objectively unaware of the tasks that she should perform, and does not know the questions to ask.** **Despite implemented methods for reminding her of deadlines and related performance requirements (checklists, frequent reminders), she is forgetting many tasks and can't recognize what needs to be done.**

Please describe any **work restrictions or modifications** that would enable her to perform her essential job functions. (Attach additional pages, as necessary).

9. The Assessor's Office has attempted to accommodate this individual's functional limitations, in accordance with work restrictions provided by Stanford Health Care. 50% of her day provided as uninterrupted time She has been permitted extra time to complete tasks involving employee reviews, developing assignments and reviewing work of subordinates. She is demonstrating an inability to perform, even with these relaxed deadlines. Please describe any additional or different **work restrictions or modifications** that would enable her to perform her essential job functions. (Attach additional pages, as necessary).

10. Attached is the description for the position of **Supervising Appraiser**, for which this individual is employed. **Separately for each of the critical job functions listed below** please describe any **work restrictions, including prophylactic restrictions**, which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

- Assists in the selection of personnel
- Appears and testifies at assessment appeal hearings
- Responsible for resolving the more difficult complaints
- Supervises the preparation and maintenance of office records
- Prepares and reviews correspondence and reports
- Makes minor and intermediate policy decisions for the Division

Patient is entirely precluded from performing these tasks: Yes No
Patient has specific work restrictions in performing this task: Yes No

Identify applicable restrictions:

Temporary Permanent Anticipated duration in weeks or months:

11. This individual has been objectively observed having significant problems working with her computer because she forgets where files are located and how to perform tasks on the computer. A major source of the online resources with which she must interact are in digital format, and she is struggling with performing basic computer tasks.

Patient is entirely precluded from performing these tasks: Yes NO
Patient has specific work restrictions in performing tasks: Yes NO

Identify applicable restrictions:

Temporary Permanent Anticipated duration in weeks or months:

12. In performing tasks that require substantive knowledge, technical expertise and application of data to technical principles. She has been objectively observed repeatedly forgetting key concepts and when reminded she recalls the information only on a short-term basis.

Patient is entirely precluded from performing these tasks: Yes NO
Patient has specific work restrictions in performing tasks: Yes NO

Identify applicable restrictions:

Temporary Permanent Anticipated duration in weeks or months:

13. As a supervisor, **she must communicate clearly and provide consistent instructions and information.** She has been objectively observed providing **materially inconsistent instructions to the Sr. Appraisers** and **when directed to meet with them as a group in order to effectively perform her communication responsibilities, she refuses** to do so and also fails to implement even approved accommodations.

Patient is entirely precluded from performing these tasks: Yes NO
 Patient has specific work restrictions in performing tasks: Yes NO

Identify applicable restrictions:

Temporary Permanent Anticipated duration in weeks or months:

14. If this patient is currently unable to perform essential job functions, even with reasonable accommodations, would a leave of absence assist her in making a recovery sufficient to allow her to perform those essential job functions with or without restrictions?

Yes No
 Cannot currently determine with reasonable medical certainty

15. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-60 days 60-90 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

XXX County Representative	
Signature of Representative	
Title	
Address/Phone/Fax	

**SAMPLE ENHANCED QUESTIONNAIRE TO CLARIFY RESTRICTIONS
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **This employee is being evaluated for a potential reasonable accommodation based on objective barriers to effective performance.** This employee has informed the Rocklin Unified School District (“RUSD”) that she believes she may have a medical condition that limits her performance of major life activities and impacts her performance of her essential job functions as a Classroom Teacher.

RUSD needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of her position. RUSD **is not seeking information regarding diagnosis, prognosis or other protected information**; but rather, functional limitations and/or work restrictions. Also, **In accordance with the Genetic Information Non Discrimination Act, RUSD also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.” This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine; (B) “Limits” a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, thinking, concentrating, reading, interacting with others in a professional work environment, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ____ Yes ____ No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Is this patient currently prescribed medication that produces side effects limiting performance of one or more major life activities? ____ Yes ____ No. If yes, Without identifying the specific medication, dosages treatment or disclosing other protected medical information, please describe the major life activities, if applicable, which this patient's medication and/or treatment may prevent, restrict or make more difficult.

4. This teacher has significant responsibilities for providing **instruction and supervision** for elementary school 4th grade students (ages between 9-10 years old) during classroom hours and other activities, and is responsible for their safety and security **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.** (Please use additional pages, as necessary).

5. This teacher is required to assume the responsibility for the safety and welfare of students during classroom hours, when escorting the class throughout the school and whenever a danger is observed on or about the campus. **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

6. This employee is required to maintain a regular structured daily schedule in which she is required to supervise her classroom and be relieved by another employee if she must leave during class hours. **Please describe any specific work restrictions or accommodations that may assist this employee in performing this function.**

7. This employee has significant responsibilities for handling sensitive and confidential information and a variety of tasks that require significant attention to detail. **Please describe any specific work restrictions and/or workplace modifications that may assist this employee to perform these essential job functions.**

8. With respect to each of the duties identified below that this teacher performs on a regular basis, please **describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

- Plan and coordinate the work of teacher aides, teacher assistants, and para professionals.
- Maintain functional learning environments, including orderliness of equipment and materials assigned to the classroom.

- Exercise supervision and care over books, supplies, and equipment; instruct pupils in the proper use and preservation of school property; and maintain records which establish student accountability for assigned property.
- Be responsible for **immediate interior and exterior supervision** during passing periods, recess, before and after school.
- Be accountable for supervision as assigned by the principal/designee and supervise pupils **in extra-curricular activities**

9. If the work restrictions specified in response to questions 4, 5, 6 and 7 are **temporary**, please provide the anticipated **duration** that the restrictions are in place.

_____ Weeks _____ Months _____ Cannot currently determine duration
 10. With respect to this employee's ability to report for work for all or part of the next four months, please respond to the following:

a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? _____ Yes _____ No

_____ Hours per Day _____ Days per Week From: _____ through: _____

b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ time(s) per _____ week(s) _____ month(s) Duration: _____ hour(s) or _____ day(s) per episode

11. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

_____ Yes _____ No
 _____ Cannot currently determine with reasonable medical certainty

12. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

_____ Less than 30 days _____ 30-45 days _____ 45-60 days
 _____ Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

Placer County Office of Education	Director, Personnel Services
Signature of Representative	
Address/Phone/Fax	2615 Sierra Meadows Drive, Rocklin, CA. 95677 PH: 530-630-2240 FAX: 530-630-4894

SAMPLE CHARTS FOR COMPARING ESSENTIAL FUNCTIONS WITH RESTRICTIONS

Intensive Behavioral Instructional Assistant

1	Provide one-on-one intensive behavioral instructional assistance to designated students in classroom, home, community settings, as directed by supervisor or other specialist
2	Follow documented therapy plans for intensive behavioral treatment
3	Confer with instructional personnel and provide input regarding student progress
4	Assist instructional personnel with development of learning materials and reinforcement strategies
5	Assist instructional personnel and parents with behavior management of students
6	Assist in supervision of students, training students on personal hygiene and developing self sufficiency
7	Tutor students individually or in small groups to reinforce learning, in accordance with the IEP
8	Schedule activities, prepare charts, records, graphs or otherwise display student performance data

* Essential Functions Applicable					Doctor's Work Restrictions
1	2	5	6		Heavy Lifting more than 25 lbs. weight on an occasional or regular basis P&S
1	2	4, 5	6	7	Lifting up to 1 pound (temporary restrictions)
1	2	4	5	6	Avoid student contact (temporary restrictions)
1	2, 3	4, 5	6	7	No prolonged upward/downward gaze (temporary restrictions)

CAFETERIA ASSISTANT

Essential Functions

1	Prepares food and beverage items.
2	Arranges food and beverage items for the purpose of serving them to students and staff in an efficient manner.
3	Cleans utensils, equipment, and areas used for storage, food preparation and service, for the purposes of maintaining required sanitary conditions.
4	Collects payments for food items from students and staff (e.g. cash, meal tickets, etc.)
5	Inventories food, condiments and supplies for purposes of ensuring availability of items.
6	Gathers and reports to appropriate personnel information related to food production and service.
7	Assists other personnel as may be required for the purpose of supporting them in the completion of their work activities.

Essential Functions Applicable					Doctor's Essential Function Restrictions
1	5	7			Heavy Lifting more than 15 lbs. weight
2	3	4	5	7	Repetitive movements of hands/arms (carrying, pushing, pulling) more than 30 minutes – Judy believes at a time
2	3	5	7		Climbing, balancing, stooping, kneeling, crouching, crawling more than 10 minutes – Judy believes in a 2 hr day
1	2	3	5	7	Continuous walking < 1 hr 15 min; Standing < 45 min - = 2 hour day
All # 1 - 7					Standing < 45 min (Judy indicated if she just stands for 45 min. she would need 15 min. break

1	Perform a variety of one-on-one physical care to students. (hygiene, feeding, first aid, wheelchair/walker positioning/pushing.
2	Guiding/supervising (safety and encouragement) or otherwise providing hands on assistance to students when walking between the CHS and WHS campuses done in conjunction with other activities.
3	Guiding/supervising (safety and encouragement) or otherwise providing hands on assistance to students during PE including walking to the track and walking the track 6 laps with the students every M/W/F
4	Provides basic tutoring and classroom assistance to special ed students.
5	Sets up classroom and prepares material for class use.
6	Guiding/supervising (safety and encouragement) or otherwise providing hands on assistance to students every Tuesday and Thursday on fieldtrips.
7	Guiding/supervising (safety and encouragement) or otherwise providing hands on assistance to students every Wednesday to walk to the Library.
8	Guiding/supervising (safety and encouragement) or otherwise providing hands on assistance to students every Friday to walk to Starbuck's.

2	3	6	7	Off feet for 30 minutes every hour.
3				Do not ride exercise bicycles.
3				Reduce walking on track to .5 miles (20 min.)
All # 1-7*				Reduce walking to 1.5 miles total w/break

*Dependent on how much walking had been done – if it exceeds miles/time she would be required to sit for 30 minutes in which case, other activities could not be performed. Specific activities were addressed by the doctor but not in conjunction with activities that may be performed before and/or after walking activity which can vary daily.

REASONABLE ACCOMMODATION INFORMATION REPORTING FORM

Name of Individual requesting reasonable accommodation:

Office of Requesting Individual:

1. Reasonable accommodation: (check one)

Approved

Denied (If denied, attach copy of the written denial letter/memo - See Section X, page 12, of the Reasonable Accommodation Procedures.)

2. Date reasonable accommodation requested:

Who received request: _____

3. Date reasonable accommodation request referred to decision maker (*i.e.*, supervisor, Office Director, Disability Program Manager, Personnel Management Specialist):

Name of decision maker: _____

4. Date reasonable accommodation approved or denied:

5. Date reasonable accommodation provided (*if different from date approved*):

6. If time frames outlined in the Reasonable Accommodation Procedures were not met, please explain why.

7. Job held or desired by individual requesting reasonable accommodation (*including occupational series, grade level, and office*):

8. Reasonable accommodation needed for: (*check one*)

Application Process

Performing Job Functions or Accessing the Work Environment

Accessing a Benefit or Privilege of Employment (*e.g.*, attending a training program or social event)

9. **Type(s) of reasonable accommodation requested** (*e.g., adaptive equipment, staff assistant, removal of architectural barrier*):

10. **Type(s) of reasonable accommodation provided** (*if different from what was requested*):

11. **Was medical information required to process this request? If yes, explain why.**

12. **Sources of technical assistance, if any, consulted in trying to identify possible reasonable accommodations** (*e.g., Job Accommodation Network, disability organization, Disability Program Manager*):

13. **Comments:**

Submitted by: _____ **Phone:** _____

Attach copies of all documents obtained or developed in processing this request.

Sample Letters

Setting Accommodation Meeting

Address to Employee

Re: Accommodation Meeting

Date:

Dear Mr. _____

The workers' compensation claims examiner has recently notified ABC District that you have permanent work restrictions as a result of injuries you sustained during the course of your employment on _____.

In accordance with the California Fair Employment & Housing Act ("FEHA"), and ABC District policy, the District will explore reasonable accommodation options when an employee requests accommodation or there is a need for accommodation due to a limitation that is, or may be, a covered disability under FEHA.

The reasonable accommodation process is one that is interactive and necessarily involves input from the affected employee; therefore, your presence is required at this meeting.

Please contact me at your earliest convenience to confirm whether or not you are available on this date and time. If you are unavailable we may reschedule to a time that is mutually convenient to you and the District. I look forward to hearing from you soon.

Alternative Initial Letter Requesting Meeting

Date

Re: Employment and Return to Work Considerations

Dear _____,

ABC District values your work and acknowledges the importance of having you back to work. As part of our policies, the District will evaluate your ability to return to work, with or without reasonable accommodations, based on your permanent restrictions. To do so, we need to meet with you in person. Please contact us so we can set up an appointment.

Please contact _____ in the _____ Department within seven (7) days from the date you receive this letter to schedule the appointment.

Thank you and looking forward to hear from you.

Follow up letter to same employee

Re: Employment and Return to Work Considerations

Dear _____,

On _____, we sent you a letter via FedEx requesting that you contact us in regards to your ability to return to work. A copy of the letter is enclosed for your convenience. As of today, neither _____ nor I have received any call or communication from you.

Please contact us at _____ as soon as you receive this letter but not later than Thursday, _____, so that we can set up an appointment for a meeting to discuss your work restrictions and potential return to work with or without reasonable accommodation. Thank you and looking forward to hear from you.

Third Follow Up letter

Dear _____

We are writing to you as a follow up to our letters of _____ [insert the dates of both letters]. We have sent two letters to you via FedEx and we understand that the letters were delivered to your home address above. We are writing to you again because we did not receive a response from you by either of the requested dates. Please see attached a copy of our original letters in which we advised you about the need to engage in a dialogue about your potential to return to work at ABC District..

This interaction is necessary in order to determine whether your work restrictions can be reasonably accommodated and is part of our District's policies and compliance with California requirements. In order to determine whether the District can accommodate your restrictions and return you to work here, we need to meet with you. We can not consider your return to work until you contact us for the purpose of conducting an interactive meeting.

Please call me by Friday, _____ so we may arrange an appointment. Alternatively, if you do not wish to consider a return to work, please so advise us. If that is the case, we will comply with your wishes and will take appropriate steps to document your intentions

Employee Not Cooperating or Participating in the Process

Dear _____,

In August and September, 2010, ABC District initiated contact with you on several occasions to request your participation in the interactive process to discuss your permanent work restrictions that arose out of your employment as a _____ with the District. We informed you that this process was necessary to explore what, if anything, the District would be able to do to reasonably accommodate those restrictions. In accordance with the California Fair Employment & Housing Act ("FEHA"), and District policy, we will explore reasonable accommodation options when the it has knowledge an employee requires a job accommodation due to a limitation that is, or may be, a covered disability under FEHA.

We tried several times to schedule a meeting with you, but received no response. California Law requires both the employer and employee engage in a timely, good faith process to communicate directly with each other in order to exchange information and evaluate the potential for reasonable accommodations, if any. This process is a shared responsibility, as exploring a potential reasonable accommodation requires a mutual interactive exchange between employer and employee, with each seeking and sharing information to achieve the best match between the employee's capabilities and available positions.

Further, neither the employee nor the District can delay or interfere with this process. ABC District has fulfilled its obligation to address your permanent work restrictions in good faith and is unable to proceed further without your response and participation. Accordingly, until you engage in this process with the District in good faith, we cannot consider potential accommodations, including any potential extended leave. Once you exhaust all leave, you will be subject to termination.

SAMPLE LETTER INITIATING INTERACTIVE PROCESS

It has been brought to the District's attention that based on statements you have made to coworkers and your supervisors, and your submission of Dr. _____'s letter of _____ you may believe you have a medical condition or disability that limits a major life activity and that may impact your ability to perform the essential job functions of your Special Education Secretary position. Accordingly, the District will treat your statements regarding migraine headaches, anxiety attacks and other medical conditions and your medical provider's note concerning interactions with certain staff members (and their impact on your ability to perform job duties) as your request that WPUSD consider a reasonable accommodation.

In accordance with the California Fair Employment & Housing Act (FEHA), the Americans with Disabilities Amendments Act (ADAAA) and the District's policies, WPUSD will explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that may be a covered disability under FEHA. This process is independent of the Collective Bargaining Agreement and the District's leave of absence policies. This interactive process is a dialogue between you and the District to determine whether you have a functional limitation that limits a major life activity, as defined by California FEHA, and if so whether you can perform the essential functions of your job with or without reasonable accommodation. In order for the interactive process to be effective, both WPUSD and you must participate in good faith.

To begin this process, and in order for the District to thoroughly evaluate all relevant issues and information, some clarifications to your medical provider's letter of July 7th are necessary. To accomplish this process and obtain appropriate information to consider all potential reasonable and appropriate workplace accommodations, your medical provider must complete and return a "Request for Reasonable Accommodation in Employment: Medical Practitioner Certification." In addition, you will need to complete, sign and return to the District the enclosed "Authorization for the Release of Medical Information," which gives the District and your medical provider permission to engage in communication regarding your functional abilities/limitation(s) and work restrictions specific to your request for reasonable accommodation.

Please note: The District is not concerned with, and is not seeking information about, the extent, nature, diagnosis, prognosis, or any related information about the medical conditions themselves. Rather, the District is requesting only relevant information from your treating physician to determine the extent of your functional abilities, functional limitations, and work restrictions. This information is essential for us to conduct an effective interactive discussion with you and to aid WPUSD in fully evaluating your request for reasonable accommodation in employment.

Please sign and return the "Authorization for the Release of Medical Information" form to the District and give the enclosed "Request for Reasonable Accommodation in Employment: Medical Practitioner Certification" to Dr. _____ to complete. **The _____ (job title)** job description is included to assist your doctor in completing the Questionnaire. If you prefer that the District obtain this information from a different medical provider or physician, please so advise.

In accordance with the District's policy to engage in a timely, good faith interactive process, and because of the need to complete this process within a reasonable time frame, we request that the enclosed documents be completed and returned to the district

within ten business days. This will help us to fully evaluate your request for reasonable accommodation and we ask that you assist the District in expediting this initial step in the interactive process with your medical provider.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me at _____

SAMPLE

Re: Follow up and Second Attempt to Engage in Return to Work Interactive Process

In accordance with the California Fair Employment and Housing Act (FEHA), the Americans with Disabilities Act (ADA) and the Districts policies, the District explores reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that may be a covered disability under the law. **This process is independent of your workers' compensation claim and the Company's leave of absence policies.** In order for the interactive process to be effective **you and the District must each participate in good faith.**

We made several attempts to reach you to schedule a meeting to review your job restrictions and your return to work. We have left messages on your home and cell phone on October 13th, 14th, and 17th. On October 17, 2011, we sent you a letter by Federal Express, overnight delivery, explaining the importance of your participation in a meeting to address your work restrictions and your potential return to work with or without reasonable accommodations. Our mutual obligation is to engage in a timely, good faith interactive discussion. Because time is of the essence, we set the meeting for October 24, 2011 at 9:00 a.m. and informed you in the letter of 10/17 that if you or your union representative wished to arrange an alternative meeting time to contact us by last Friday, October 21, 2011. We received no response and you did not arrive for the meeting this morning. We have received confirmation that the letter was delivered to your home on _____, and we enclose another copy, with a copy of the delivery receipt, for your information.

This process is **for your benefit** and yet we have not heard from you. It is very important that you cooperate in good faith in this process. Accordingly, we are setting another interactive process meeting for **October 27, 2011, which is this coming Friday.** If you do not respond and if you fail again to attend this scheduled meeting, the District will be unable to consider any input from you in addressing your work restrictions and in making a decision regarding your return-to-work.

SAMPLE FINAL LETTER

Employee Not Cooperating or Participating in the Process

Dear _____,

On October _____, 2011, The District initiated contact with you on several occasions to request your participation in the interactive process to discuss your permanent work restrictions and to evaluate your potential return to work, with or without reasonable accommodations. We informed you that this process was

essential to explore what, if anything, the District may be able to do to reasonably accommodate your restrictions.

We tried several times to schedule a meeting with you, but received no response. California Law requires both the employer and employee engage in a timely, good faith process to communicate directly with each other in order to exchange information and evaluate the potential for reasonable accommodations, if any. This process is a shared responsibility, as exploring a potential reasonable accommodation requires a mutual interactive exchange between employer and employee, with each seeking and sharing information to achieve the best match between the employee's capabilities and available positions.

Further, neither the employee nor the District can delay or interfere with this process. The District has made several timely attempts to fulfill its obligation to address your permanent work restrictions in good faith, including _____ phone calls and two letters delivered by Federal Express. Without your cooperation, and in light of your failure to respond to our communications, the District is unable to obtain your input in its decision making process. Accordingly, until you engage in this process in good faith, we cannot consider potential accommodations, including any potential extended leave. Once you exhaust all leave, you will be placed on the 39-month reemployment list.

Accommodation Meeting Not Necessary
Accommodation Accomplished

Dear Ms. _____

This letter follows our telephone conversation last week and summarizes the District's efforts thus far to address your request for a reasonable accommodation in employment. You submitted a Reasonable Accommodation Request Form on _____ along with a medical note dated _____, which was written by Dr. _____ and contained several work restrictions.

In accordance with the California Fair Employment & Housing Act ("FEHA"), and ABC District policy, the District will explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that is, or may be, a covered disability under FEHA. Following receipt of your Reasonable Accommodation Request Form, and as part of our interactive process for evaluating such requests, I contacted _____ [supervisor] to discuss your limitations and the accommodations you were requesting. Specifically, we discussed your inability to lift over ten (10) pounds or pick up objects or boxes from the floor, and your request for assistance with getting or putting items up high; having deliveries of boxes/materials placed onto tabletops rather than the floor; and having furniture returned to their proper places following floor cleanings. Your supervisor agreed that the District would be able to accommodate these restrictions and that she would facilitate getting you assistance in these areas as needed.

After speaking with the supervisor, you and I spoke by telephone about the agreed upon accommodations. I explained to you the District's formal reasonable accommodation process, one that is interactive and involves the affected employee, his or her supervisor, a Human Resources administrator, and myself. In that process, we collaborative review limitations and determining what, if any, accommodations may be made, which is typically done in person in Human Resources. During this process the group reviews the limitations and goes through each essential job function to determine if said job function is impacted by the limitations, and then exploring reasonable accommodation options, if applicable.

Our dialogue has served the purpose of the District's interactive process policy and our informal interaction resulted in what appears to be a reasonable accommodation. Accordingly, you informed me that a further meeting is unnecessary, as you've identified the areas impacted by your limitations on the Reasonable Accommodation Request Form, and it was determined that the District would be able to make the requested accommodations.

From time to time, reasonable accommodation requests and the resulting agreed upon accommodations may need to be revisited if the accommodations are not working out as intended. Should you wish to schedule an accommodation meeting to discuss this matter further, or if you have any further questions regarding this process, please do not hesitate to contact me.

Sample letter to be sent at time leave is exhausted
Considering Leave as Reasonable Accommodation

Dear _____:

On _____, your available paid leave and all of your available leave under the Family & Medical Leave Act (FMLA) will be exhausted. Your eligibility for paid status with the will expire.

[NOTE: make sure that FMLA/CFRA leave has been exhausted and that you designated that leave to be running concurrently with sick leave or vacation IF there is no FMLA/CFRA designation letter, employer needs to take a different approach].

If you have **not** been released for duty by _____, but your medical provider certifies that a further leave will assist you in recovering sufficiently to return to work within a reasonable period of time, the District will evaluate whether or not further unpaid leave is appropriate.

In accordance with the California Fair Employment & Housing Act ("FEHA"), and our policies, the District will explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that is, or may be, a covered disability under FEHA. The process requires a separate evaluation from the information you may have submitted to support your extended sick leave and/or leave under the Family & Medical Leave Act and the California Family Rights Act (CFRA).

This process is independent of the District's leave of absence policies.

In order for the District to thoroughly explore what, if any, reasonable accommodations may be feasible to allow now that your available leave is exhausted, it is necessary for your physician to complete and return the enclosed "Request for Disability Accommodation in Employment: Medical Practitioner Questionnaire." You will need to complete, sign and return to me the enclosed "Authorization for the Release of Medical Information," which gives the District and your physician permission to engage in communication regarding your limitation(s) specific to your request for reasonable accommodation.

Once you have signed/returned the "Authorization for the Release of Medical Information" form, I will send the Questionnaire to the physician listed on the Authorization. The gathering of this information is part of the District's efforts to determine whether or not additional discretionary unpaid leave of absence would assist in your making a recovery within a reasonable period of time sufficient to allow you to return to work. This information is essential for the District to make this determination. Without this information, the District will be unable to consider additional discretionary unpaid leave time as a potential reasonable accommodation.

Since your leave will be exhausted on _____, it is very important that you have the enclosed certification completed and returned by no later than _____. If you are unable to return to work and further leave is not appropriate, you will be subject to separation when all leave is exhausted. If you have any questions or wish to discuss this with me further, please call me at _____.

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified himself as your patient. This employee has requested an accommodation involving an extended leave of absence. The information provided by your office requires clarification because it addresses the patient's request for accommodation, but not the foundational functional limitations and work restrictions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Medical Condition is defined as: either of the following: (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; (2) Genetic Characteristics

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing , breathing , thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself. **Limits** includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities?

Yes No

2. Applying these definitions, does this patient have a **medical condition** that limits the performance of one or more major life activities?

Yes No

3. If the patient is currently unable to work perform essential job functions would a leave of absence assist the patient in making a recovery sufficient to allow him to perform essential job functions with or without restrictions?

Yes No
 Cannot currently determine with reasonable medical certainty

4. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-45 days 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	Director, Human Resources
Signature of Representative	
Title	
Address/Phone/Fax	

Letter to Doctor Seeking Clarification on Work Restrictions

Dr. John Doe

Re: Employee name

Dear Dr. Doe,

Enclosed please find an Authorization for the Release of Medical Information, signed by your patient and ABC District employee Jane Doe. We are in receipt of Ms. Does 8/31/10 Doctor's Visit Verification Form that lists the following restrictions/limitations effective 9/1/10:

- Lift/Carry 11 – 25 pounds: Not at all
- Reach above shoulder(s): Occasionally
- Bend/Twist/Squat: Frequently
- Up to 5 days a week with possible days off for pain flares

In accordance with the California Fair Employment & Housing Act ("FEHA"), and ABC District policies, the District will explore reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that is, or may be, a covered disability under FEHA. Accordingly, we have scheduled a reasonable accommodation meeting for _____, to discuss Ms. Doe's limitations and their impact on the essential functions of her job. The District is making the temporary accommodation of allowing Ms. Doe to modify her job by having her do deskwork only until the September 9th meeting.

In order for the District to thoroughly evaluate what, if any, reasonable accommodations may be implemented, we must first understand the specific limitations of the employee that affect his or her ability to perform the essential functions of her job, with or without reasonable accommodation. Enclosed please find a copy of Ms. Doe's job description for your review. As an [insert job title], Ms. Doe is assigned _____ [describe any specific physical, cognitive or mental tasks].

Also enclosed is a Request for Disability Accommodation in Employment: Medical Practitioner Questionnaire for you to complete and return to the District. The purpose of this form is for you to provide the District with Ms. Doe's specific functional limitations or work restrictions, if any, that may impact her ability to perform the essential functions of her job, with or without accommodation, so that ABC District can explore what, if any, reasonable accommodations may be feasible in addressing such restrictions. **The District is not concerned with, and is not seeking information about the extent, nature, diagnosis, prognosis, or any related information about the medical conditions themselves.**

Please complete the enclosed Questionnaire and fax it to my attention in the Human Resources Department at _____ no later than _____. We realize this is relatively short notice and thank you in advance for your anticipated prompt response to the enclosed questionnaire.

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. This employee has requested an accommodation that may involve job modifications or transfer to another position. The information provided by your office requires clarification because it addresses the patient’s request for accommodation, but not the foundational functional limitations and work restrictions.

[Employer] needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of his position. The District also needs this information to assist in a determination of whether the patient has a covered disability under the law and the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of his position as [insert title]

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.” This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) “Limits” a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Medical Condition is defined as: either of the following: (1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; (2) Genetic Characteristics

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing , breathing , thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

Limits includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities?

___ Yes

___ No

2. Applying these definitions, does this patient have a **medical condition** that limits the performance of one or more major life activities?

___ Yes

___ No

3. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult. Attached is a job description with the essential functions of this patient's job. Please describe any work restrictions applicable to each essential job function (attach additional pages, if necessary)

4. Attached is the job description for listing the essential functions of the position for which this individual is employed. **Separately for each of the items listed under "Position Responsibilities,"** please describe any **work restrictions and/or workplace accommodation(s)** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (use additional pages, as necessary).

5. If the patient is currently unable to work perform essential job functions would a leave of absence assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes

No

Cannot currently determine with reasonable medical certainty

6. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days

30-45 days

45-60 days

Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	Director, Human Resources
Signature of Representative	
Title	
Address/Phone/Fax	

SAMPLE LETTER PLACING EMPLOYEE ON 39 MONTH RE-EMPLOYMENT LIST

Dear _____:

This letter is to inform you of the status of your _____ position in the _____ Unified School District. We have conducted an extremely thorough evaluation of your ability to perform the essential job functions of your regular and customary job, and even other jobs for which you may be qualified, with or without reasonable accommodation.

We regret that the district is unable to reasonably accommodate your work restrictions in your regular and customary job. In addition, _____ USD does not have any other position for which you are qualified by education, training and experience that is compatible with your work restrictions. As you know, we have engaged in a series of interactive process meetings that included dialogue with you to evaluate all potential options for accommodating your work restrictions.

We regret that given the nature of your permanent work restrictions, and our interactive discussions concerning your ability to report to work and maintain a regular schedule, the district determined that you cannot perform the essential functions of your job with or without a reasonable accommodation.

Your Status on the Reemployment List

Pursuant to California Education Code Section 45192: "when all available leaves of absence, paid or unpaid, have been exhausted and if the employee is not medically able to assume the duties of the person's position, the person shall, if not placed in another position, be placed on a reemployment list for a period of 39 months. When available, during the 39-month period, the person shall be employed in a vacant position in the class of the person's previous assignment over all other available candidates except for a reemployment list established because of lack of work or lack of funds, in which case the person shall be listed in accordance with appropriate seniority regulations... an employee who has been placed on a reemployment list who has been medically released for return to duty and who fails to accept an appropriate assignment, shall be dismissed."

Please be advised that you have exhausted all available sick leave, extended illness leave, industrial accident leave, vacation or other paid leave benefits. You have also exhausted all leave available to you under the Family & Medical Leave Act (FMLA) and the California Family Rights Act (CFRA).

Because you have been deemed medically unable to perform the duties of your position and there is no other position for which you are qualified and can perform with your permanent restrictions, you have been placed on the reemployment list, effective _____.

Your placement on the reemployment list does not affect your workers' compensation claim or your eligibility for benefits under the workers' compensation system.

Your availability for assignment to any vacant position during the 39-months would first require a medical release to return to duty with or without restrictions that are capable of being reasonably accommodated in any applicable vacant position.

Accordingly, if at any point you receive a release from a physician who is treating you for the injury, you may notify the District and we will address it in the appropriate manner in accordance with the provisions of Ed. Code Section 45192. Until that time, the work restrictions must govern our actions.

You will be separately notified of your rights to elect continuation coverage of your medical and _____ [dental, etc?] benefits under COBRA.

**SAMPLE LETTER
DESIGNATION OF CALIFORNIA PDL FOLLOWED BY BABY BONDING**

(Date)

(Employee Name)
(Employee Address)

Dear (Employee Name):

This is to confirm your medical leave due to pregnancy beginning (date). Please be advised that this leave will be counted against your Family and Medical Leave (FMLA-CFRA) entitlement of up to 12 weeks in a 12 month period, as well as the California Pregnancy Disability Leave (FEHA) entitlement of up to four months (17.3 weeks).

These two leaves run concurrently.

Upon conclusion of your leave due to pregnancy disability, you may be eligible for up to 12 weeks of (FMLA-CFRA) to care for your newborn child. This leave begins to run the day following your release from your disability leave by your medical provider.

Please provide certification from your physician of the anticipated end of the disability portion of your leave. Unless we hear from you otherwise, we will consider that date to be the end of your disability leave and record subsequent leave as (FMLA-CFRA) for the care of your newborn child. Please advise us if you wish to use accrued vacation for this latter portion of your leave.

For your information, I have enclosed *Your Rights and Obligations Under the Federal Family and Medical Leave Act of 1993; Family and Medical Leave Benefits Checklist; Pregnancy Disability Leave Benefits Checklist* and, applicable portions of (applicable collective bargaining agreement) regarding family and medical leave.

Pay

Family and medical leave is normally unpaid leave; however, you may request or be required to substitute paid leave (i.e., accrued vacation, sick leave, or extended sick leave) for all or a portion of the unpaid leave in accordance with the appropriate policies and collective bargaining agreements [insert specific provision, where applicable].

Pursuant to this policy (or the CBA), you may use all accrued vacation and you may also use accrued sick leave for the time it is necessary to attend to the initial health-related needs of your child after birth. Your leave balance as of today is (xxx) hours of vacation and (yyy) hours of sick leave. In the event that you run out of vacation and/or applicable sick leave, and choose to continue your leave off of pay status, your benefits will be covered for the duration of your family and medical leave entitlement of 12 weeks in a 12-month period (including the periods of paid sick and/or vacation leave).

Insert the specific information on the number of days of sick leave and extended sick leave available for the disability portion of her leave. Also insert any paid leave benefits such as vacation that are available under the CBA for the baby bonding portion of the leave (if any)

If you have requested leave for pregnancy-disability (running concurrently with your FMLA leave for own serious health condition), you may be eligible during the unpaid portion of your leave for temporary disability payments under a disability insurance plan or for Paid Family Leave, which is administered by the California Employment Development Department. [NOTE: If this employee does NOT pay into SDI for state disability, then she is not eligible for paid family leave or disability and you should take this paragraph out]

Advance Notice

The district requests [redacted] days advance notice is required if your need for family and medical leave is foreseeable (e.g., the birth of child or a planned medical treatment). If your need for leave is not foreseeable, you should provide notice within a reasonable time after learning of the need for leave. Written notice is recommended.

Health Benefits

Coverage under any group health plan (medical, dental, optical) will be maintained during any leave covered by FEHA pregnancy-disability/FMLA and then your CFRA baby-bonding leave to the extent coverage would be maintained if you had been actively at work during the leave period. You are responsible for arranging with [redacted] (the Payroll Office) for the payment of the employee portion of any premiums that are not fully covered by a district contribution. Failure to pay the employee portion of the premiums within [redacted] days of the due date will result in cancellation of your enrollment in that plan.

If you do not return to work at the conclusion of your approved family and medical leave, you will be liable for payment of the health plan premiums (medical, dental, optical) paid by the district during any unpaid portion of your leave. The district may recover its share of health plan premiums by taking deductions, to the extent permitted by law, from your unpaid wages, if any, vacation pay, or other pay due you, or by initiating legal action. However, you will not be liable for the premiums if your failure to return to work is due to continuation of your own serious health condition or other reasons beyond your control. You will be considered to have returned to work if you work for at least 30 calendar days commencing with your scheduled return date.

Reinstatement

Under federal law (FMLA), and California law (FEHA and CFRA) you must be reinstated to the same position you had prior to taking the leave, or to an equivalent position provided that you return to work immediately following the conclusion of family and medical leave. If your position is unavailable (due to, for example, a temporary or indefinite layoff), you have no greater right to reinstatement than had you been continually employed during the FMLA/CFRA leave period. You are not entitled to reinstatement if your contract end date occurs before your scheduled return date from family and medical leave.

Signature, etc.

This form is used to note what options the employer considered, what they were able to do/not do, and what the employer reasons were for their decision.

SAMPLE ONLY

**ADAPTED FROM EEOC TECHNICAL ASSISTANCE MANUAL ON
REASONABLE ACCOMMODATION DECISIONS**

CONFIDENTIAL INFORMATION, ACCESS LIMITED TO:

ACCOMMODATION CONSIDERATION / SELECTION

When an individual with a disability is qualified to perform the essential functions, except for functions that cannot be performed because of related limitations and existing job barriers, the employer must try to find a reasonable accommodation to reduce or eliminate these barriers.

Applicant / Employee Name:

Reason for Accommodation:

Job Related Limitation:

Direct Threat (MUST be specifically documented)

Existing limitations or barrier(s) (USE FEHA Definitions)

Accommodation(s) Suggested by and/or Discussed with Applicant / Employee:

1.	
2.	
3.	
4.	

If consultation does not identify an appropriate accommodation, technical assistance is suggested.

	Internal/External Resource(s) Consulted	Date	Outcome
1.			
2.			
3.			
4.			

	Accommodation(s) Considered:	Cost	Source
1.			
2.			
3.			
4.			

Effective Accommodation(s) Considered Reasonable:

1.	
2.	
3.	

The employer is free to choose among effective accommodations; however the individual's preference should be considered - all things being equal. The accommodation selected should best serve the needs of the individual and the employer. (EEOC Technical Assistance Manual 3.8(4)). The accommodation need not be the best available as long as it is effective.

Selected Accommodation:	
Total Cost:	
Rationale for Selection:	

Financial Assistance Obtained: (Specify amount next to source)

Tax Credit for Small Business:	
Tax Deduction/Barrier Removal:	
Targeted Tax Credit:	
Applicant/Employee:	
Insurance: (Identify type):	
Other: (Identify source)	
Net Cost:(Total cost, less amount received from other sources):	

Accommodation device(s) or equipment is owned by:
 Employee ___ Employer ___ Insurance Company ___

Other:
If other, please specify: _____

An individual is not required to accept an accommodation; however, if the individual refuses an accommodation necessary to perform essential job functions and as a result cannot perform those functions, the individual may not be considered qualified

Applicant / Employee Rejected Accommodation:	
Reason(s) Given:	

Completed By:
Signature _____
Title _____

SAMPLE ONLY

DOCUMENTATION OF THE INTERACTIVE PROCESS MEETING

(Add additional pages as needed for subsequent discussions on job accommodations.)

EMPLOYEE'S NAME: ID#:

JOB TITLE: DEPARTMENT:

DATE OF DISCUSSION:

MEETING PARTICIPANTS (name and title):

Yessi Can (RAC), Joe Johnson (supervisor) Jane Doe (disabled employee), Henry Bibby (manager)

EMPLOYEE'S WORK RESTRICTIONS PER THE TREATING PHYSICIAN:

As stated in the attached, most current medical report from Dr. *Brown.*

RESTRICTIONS ARE:

TEMPORARY _____ PERMANENT UNCLEAR _____ (check one)

EFFECTIVE DATE: *April 1, 2010*

List restrictions and compare to the functions and physical/mental demands in the job description in order to determine if an accommodation is needed.

- 1. No lifting over 20 pounds*
- 2. No standing for more than three hours per day during an 8 hour shift.*

WORK RESTRICTIONS PER OTHER PHYSICIANS:

As stated in the attached, most current medical report from Dr. _____

Type of physician: (circle one)

Specialist, Workers' Compensation Consulting, Agreed Medical Examiner,
Qualified Medical Examiner

RESTRICTIONS ARE:

TEMPORARY _____ PERMANENT _____ UNCLEAR _____ (check one)

EFFECTIVE DATE:

List restrictions and compare to the functions and physical/mental demands in the job description in order to determine if an accommodation is needed.

- 1.
- 2.
- 3.
- 4.

EMPLOYEE'S REQUEST/IDEAS FOR ACCOMMODATIONS TO BE CONSIDERED:

- 1.
- 2.
- 3.

ACCOMMODATIONS SUGGESTED BY OTHERS (Please list their names, also):

- 1.
- 2.

AGREED UPON ACCOMMODATIONS:

1. Agreed implementation date: _____ Cost of Accommodation: \$ _____

Describe accommodation details:

2. Agreed implementation date: Cost of Accommodation: \$

Describe accommodation details:

3. Agreed implementation date: Cost of Accommodation: \$

Describe Accommodation Details:

SUPERVISOR'S/MANAGER'S EXPLANATION OF WHY A REQUESTED ACCOMMODATION CANNOT BE PROVIDED: (disruption of business operations; financial burden, other)

(Employee's Printed Name/Signature) (Date)

(Supervisor's Printed Name/Signature) (Date)

(Employee Rehabilitation Counselor's Printed Name/Signature)
(Date)

DENIAL OF REASONABLE ACCOMMODATION REQUEST

(Must complete numbers 1-4; complete number 5, if applies)

1. Name of Individual requesting reasonable accommodation:

2. Type(s) of reasonable accommodation requested:

3. Request for reasonable accommodation denied because: (may check more than one box)
 - Accommodation Ineffective
 - Accommodation Would Cause Undue Hardship
 - Documentation of Restrictions Inadequate
 - Accommodation Would Require Removal of an Essential Function
 - Accommodation Would Require Lowering of Performance or Production Standard
 - Other (Please identify) _____

4. Detailed Reason(s) for the denial of reasonable accommodation (Must be specific, e.g., *why* accommodation is ineffective or causes undue hardship):

5. If the individual proposed one type of reasonable accommodation which is being denied, but rejected an offer of a different type of reasonable accommodation, explain both the reasons for denial of the requested accommodation and why you believe the chosen accommodation would be effective.

6. If an individual wishes to request reconsideration of this decision, s/he may take the following steps:
- First, ask the decision maker to reconsider his/her denial. Additional information may be presented to support this request.
 - If the decision maker does not reverse the denial:
 - and the decision maker was the individual's supervisor, the individual can ask the Manager to do so.
 - and the decision maker was a department manager, the individual can ask a manager to do so.
 - and the decision maker was a manager, the individual can ask the official designated by the HR Department to do so. [Optional for larger employers].

Name of Deciding Official

Signature of Decision maker

Date reasonable accommodation denied _____

Adapted from EEOC Form 557a

SAMPLE TEMPLATE LETTER

PLACEMENT ON 39 MONTH REEMPLOYMENT LIST FOLLOWING LEAVE EXHAUSTION

Dear _____ :

As of May 1, 2012, you will have exhausted all accrued and unused paid leave, including extended sick leave. In addition, your twelve weeks of job-protected and benefit-protected unpaid leave under the Federal Family & Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) was previously exhausted. The district has been informed that your permanent work restrictions have not changed and you are therefore unable to return to your usual and customary position, or to any other vacant position, due to your permanent work restrictions

Accordingly, in accordance with Education Code section §45195, the Governing Board of the _____ Unified School District will, at its regular meeting on _____, 2012, place you on a 39-month reemployment list, effective May 2, 2012, as you were not able to return to work at that time.

Your Status on the Reemployment List

Pursuant to the California Education Code, when all available leaves of absence, paid or unpaid, have been exhausted following an industrial accident or illness, an employee who is not medically able to assume the duties of his position shall, if not placed in another position, be placed on a reemployment list for a period of 39 months. As noted, you have been deemed medically unable to perform the duties of your position and there is no other position for which you are qualified and can perform with your permanent restrictions. In addition to your eligibility for benefits under the workers' compensation system, you will be placed on this reemployment list.

The Education Code provides that when available, during the 39-month period, an employee shall be employed in a vacant position in the class of his previous assignment over all other available candidates except for a reemployment list established because of a lack of work or lack of funds, in which case he shall be listed in accordance with appropriate seniority regulations. An employee who has been placed on a reemployment list who has been medically released for return to duty and who fails to accept an appropriate assignment, shall be dismissed.

Education Code §45195 provides that if at any time while you are on the 39-month reemployment list you notify the District that you are able to resume the duties of your position and submit a doctor's statement verifying that you are medically able to do so, with or without restrictions, the District will hire you, over any other available candidate, into the next available vacant position in the classification of your previous assignment. Your availability for assignment to any vacant position during the 39-months would first require a medical release to return to duty with or without restrictions that are capable of being reasonably accommodated. Accordingly, if at any point you receive a release from a physician, you may notify the District and we will address it in the appropriate manner.

Your placement on the 39 month reemployment list will not affect your pending workers' compensation claim or any benefits to which you may be entitled for that claim.

Signature for HR department

RESPONSE TO WORKPLACE LEAVE REQUEST

(Use for all Initial and Leave Extension Requests –

Issue to Employee w/in 5 Days of each Request/Extension Request)

Name	Location:
Date Workplace Leave Request Received:	Supervisor:

A. We Have Received your Workplace Leave Request Regarding

Medical Leave (Employee – FMLA or DJUSD Med.)	Pending Workers' Compensation Claim
Medical Leave (Family Member)	Military Training / Active Duty (Employee)
Pregnancy Disability Leave (Employee)	Military Exigency Leave/ Family Member Active Duty
Child Birth / Foster Parent / Adoption Leave (Employee)	Personal Hardship / Non Necessary Medical Leave
State Leave Law	Special Leave under Union Agreement

B. Non-Medical Leave Requests

<input type="checkbox"/>	<p>Approved. We have received all supporting documentation and your Non-Medical Workplace Leave Request, or given extenuating circumstances we are unilaterally declaring your current absence as an approved leave of absence, for the period _____ to _____, pursuant to the terms and conditions of the Workplace Leave Request (copy attached and applicable whether or not signed) and the following additional provisions _____.</p>
<input type="checkbox"/>	<p>Not Approved. The request is <u>not approved</u> because <input type="checkbox"/> the Request is for a discretionary leave not governed by federal/state law, and Davis Joint Unified School District has determined that the leave should not be granted, <input type="checkbox"/> the provided documentation does not support the basis for the Request, and/or <input type="checkbox"/> we have not received all documentation supporting your Non Medical <i>Workplace Leave Request</i>. Please provide us with _____</p> <p>_____</p> <p>within the next ten (10) business days so we may further process your Request. If the supporting documentation is not received, your workplace absence will be considered unexcused. <u>If special circumstances prevent you from complying with this obligation, please immediately contact H.R.</u></p>

C. Medical Leave Requests

<input type="checkbox"/>	<p>Approved. We have received all supporting documentation for your Family Medical Leave/DJUSD Medical Leave/Pregnancy Leave Request/Workers' Compensation, and it is approved for the period _____ to _____ or on the following intermittent terms _____</p> <p>_____, pursuant to the terms and conditions of the <i>Workplace Leave Request</i> (copy attached) and the following additional provisions: _____</p> <p>_____.</p> <p>Note. The approved leave period can be no more than the period you sought in your Request and that is supported by the required Medical Certification/medical documents. The approved leave period may be less than your request and/or the maximum amount permitted by federal or state law or DJUSD Medical Leave program due to your earlier taking of a medical leave of absence or (b) the lack of medical support for a longer period. If you have any questions regarding the basis for the approved leave period, or any remaining potential leave that might be available under federal or state laws or DJUSD Medical Leave program, contact H.R.</p> <p>If you are covered by federal or state leave laws, you will be returned to your same or similar position at the end of the approved leave period as long as you are medically able to safely perform the essential functions</p>
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	<p>of your job. <u>You will be expected to return to the workplace for alternate/light/modified duty as soon as you may be able, unless you are subject to a collective bargaining agreement that prohibits such an interim assignment.</u> You must contact us to see if light/alternate/modified duty is available as soon as you are able to perform such services. <u>If your leave is granted under DJUSD Medical leave program, DJUSD may need to replace you or your position during the leave period.</u> In such a situation, there may be no position available for you at the end of the leave period.</p> <p>While on leave, you <input type="checkbox"/> will <input type="checkbox"/> will not be required to furnish DJUSD with periodic updates every ____ <u>days / weeks / months (circle one)</u> regarding your health status and intent and capability to return to work, <u>including return to work on alternate or light duty.</u> Calendar these dates and ensure that you regularly contact Human Resources with this information. We may also contact you regarding these issues, or issues arising in the workplace for which you may have needed information. You will need to timely respond to our inquiries. If circumstances of your leave change, and you can return to work earlier before the end of the approved leave period, notify us as soon as possible of your ability to return to, full or part time, full duty or alternate duty.</p> <p>You <input type="checkbox"/> will <input type="checkbox"/> will not <input type="checkbox"/> may not be required to furnish a return to work medical clearance before you return to the work. Contact H.R. and request a copy of DJUSD's <u>required</u> release to work form, or confirm the need for such a form, <u>in sufficient time for you to have your health care provider sign it and return it to H.R. at least three (3) business days before your planned return to work.</u> If we do not receive a required return to work release, on our form, we cannot allow you to return to the workplace. You may then be subject to discipline or separation from employment. <u>If you ultimately expect to return to work with restrictions/limitations, you should attempt to give us earlier notice so that we can work together to determine how to accommodate such limitations.</u></p>
<input type="checkbox"/>	<p><u>Not Approved.</u> The request is <u>not approved</u> because <input type="checkbox"/> the medical certification has not been provided (it must be received within 10 days from the date of this Response or your Request may be denied and your workplace absence may be considered unexcused; if special circumstances prevent you from complying with this obligation, please immediately contact H.R.) <input type="checkbox"/> the medical certification does not support the existence of a serious medical condition, <input type="checkbox"/> as a result of leave taken in the previous 12 mos., you have no longer have leave available, <input type="checkbox"/> you are not eligible because you did not work 1250 hours in the preceding 12 month period prior to this leave request (and/or <input type="checkbox"/> (other reasons, describe) _____)</p> <p>_____</p> <p>_____</p>

D. Alternate Compensation During Leave Period

You have requested that DJUSD provide you with compensation during the unpaid leave period through the use of Sick Days, extended sick leave (differential) Vacation Days, and/or _____.

<input type="checkbox"/>	<p>The request is <u>approved</u>, and ___ Sick Days/hours, ___ Differential Days/hours, ___ Vacation Days/hours, and/or _____ will be used to compensate you during the approved leave period. Once exhausted, the remainder of any approved leave period will be unpaid. [<u>This is a requirement absent a contrary union agreement</u>]</p>
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<input type="checkbox"/>	<p>The request is <u>not approved</u> because <input type="checkbox"/> you have no accrued days/benefits available, <input type="checkbox"/> the requested leave does not qualify as a "sick" day, and you have no vacation days available, and/or <input type="checkbox"/> other reasons (describe):</p> <p>_____</p> <p>_____</p>
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E. Additional Comments/Provisions/Requirements while Approved Leave:

Signature/H.R. Representative/ Title Date

Re: Follow up and Second Attempt to Engage in Return to Work Interactive Process

In accordance with the California Fair Employment and Housing Act (FEHA), the Americans with Disabilities Act (ADA) and the Districts policies, the District explores reasonable accommodation options when an employee requests accommodation or indicates a need for accommodation due to a limitation that may be a covered disability under the law. **This process is independent of your workers' compensation claim and the Company's leave of absence policies.** In order for the interactive process to be effective **you and the District must each participate in good faith.**

We made several attempts to reach you to schedule a meeting to review your job restrictions and your return to work. We have left messages on your home and cell phone on October 13th, 14th, and 17th. On October 17, 2011, we sent you a letter by Federal Express, overnight delivery, explaining the importance of your participation in a meeting to address your work restrictions and your potential return to work with or without reasonable accommodations. Our mutual obligation is to engage in a timely, good faith interactive discussion. Because time is of the essence, we set the meeting for October 24, 2011 at 9:00 a.m. and informed you in the letter of 10/17 that if you or your union representative wished to arrange an alternative meeting time to contact us by last Friday, October 21, 2011. We received no response and you did not arrive for the meeting this morning. We have received confirmation that the letter was delivered to your home on [REDACTED], and we enclose another copy, with a copy of the delivery receipt, for your information.

This process is **for your benefit** and yet we have not heard from you. It is very important that you cooperate in good faith in this process. Accordingly, we are setting another interactive process meeting for **October 27, 2011, which is this coming Friday.** If you do not respond and if you fail again to attend this scheduled meeting, the District will be unable to consider any input from you in addressing your work restrictions and in making a decision regarding your return-to-work.

SAMPLE GENERAL QUESTIONNAIRE - TEACHER
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **This employee is being evaluated for a potential reasonable accommodation based on objective barriers to effective performance.** This employee has informed the XXX Unified School District (“XUSD”) that she believes she may have a medical condition that limits her performance of major life activities and impacts her performance of her essential job functions as a Classroom Teacher.

XUSD needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of her position. XUSD **is not seeking information regarding diagnosis, prognosis or other protected information**; but rather, functional limitations and/or work restrictions. Also, **In accordance with the Genetic Information Non Discrimination Act, XUSD also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.” This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine; (B) “Limits” a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, thinking, concentrating, reading, interacting with others in a professional work environment, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ____ Yes ____ No
2. Describe the major life activities, if applicable, which this patient’s limitation or condition prevents, restricts or makes more difficult.

3. Is this patient currently prescribed medication that produces side effects limiting performance of one or more major life activities? ____ Yes ____ No. If yes, Without identifying the specific medication, dosages treatment or disclosing other protected medical information, please describe the major life activities, if applicable, which this patient’s medication and/or treatment may prevent, restrict or make more difficult.

4. This teacher has significant responsibilities for providing **instruction and supervision** for elementary school 4th grade students (ages between 9-10 years old) during classroom hours and other activities, and is responsible for their safety and security **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.** (Please use additional pages, as necessary).

5. This teacher is required to assume the responsibility for the safety and welfare of students during classroom hours, when escorting the class throughout the school and whenever a danger is observed on or about the campus. **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

6. This employee is required to maintain a regular structured daily schedule in which she is required to supervise her classroom and be relieved by another employee if she must leave during class hours. **Please describe any specific work restrictions or accommodations that may assist this employee in performing this function.**

7. This employee has significant responsibilities for handling sensitive and confidential information and a variety of tasks that require significant attention to detail. **Please describe any specific work restrictions and/or workplace modifications that may assist this employee to perform these essential job functions.**

8. With respect to each of the duties identified below that this teacher performs on a regular basis, please **describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

- Plan and coordinate the work of teacher aides, teacher assistants, and para professionals.
- Maintain functional learning environments, including orderliness of equipment and materials assigned to the classroom.

- Exercise supervision and care over books, supplies, and equipment; instruct pupils in the proper use and preservation of school property; and maintain records which establish student accountability for assigned property.
- Be responsible for **immediate interior and exterior supervision** during passing periods, recess, before and after school.
- Be accountable for supervision as assigned by the principal/designee and supervise pupils **in extra-curricular activities**

9. If the work restrictions specified in response to questions 4, 5, 6 and 7 are **temporary**, please provide the anticipated **duration** that the restrictions are in place.

_____ Weeks _____ Months _____ Cannot currently determine duration

10. With respect to this employee's ability to report for work for all or part of the next four months, please respond to the following:

a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? Yes No

Hours per Day Days per Week From: through:

b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: time(s) per week(s) month(s) Duration: hour(s) or day(s) per episode

11. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes No
 Cannot currently determine with reasonable medical certainty

12. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-45 days 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

Placer County Office of Education	Director, Personnel Services
Signature of Representative	
Address/Phone/Fax	

SAMPLE PHYSICAL TASKS - GENERAL

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual in her position as a **Nutrition Assistant**. The Marysville Joint Unified School District ("the District,") must fully evaluate all potential adjustments or modifications that will allow her to perform her essential job functions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. **In accordance with the Genetic Information Non Discrimination Act, the PCOE also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions**

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

Limits include making achievement of major life activities difficult.

1. Applying these definitions, does this individual have a limitation in the performance of **one or more major life activities**? ____ Yes ____ No
2. Please describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult. (Please use additional pages, as necessary).

3. Is this patient currently prescribed medication that produces side effects limiting performance of one or more major life activities? ___ Yes ___ No. If yes, without identifying the specific medication, dosages treatment or disclosing other protected medical information, please describe the major life activities, if applicable, which this patient's medication and/or treatment may prevent, restrict or make more difficult.

4. This employee has been issued the following permanent work restrictions:

- *No lifting, carrying, pushing or pulling more than 20lbs*
- *No work above chest level*
- *No repetitive use of the right upper extremity*
- *No overhead work with the left shoulder*

The District cannot reasonably accommodate her on a permanent basis in her current position within these restrictions. Please respond to the following, in order for the District to evaluate other potential positions for which she may be qualified, with or without modifications or adjustments:

➤ **Walking: Moving about on foot frequently to constantly**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, including any required rest periods during the day.

➤ **Standing: Positioned in a stationary position on her feet, frequently to constantly**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, including any required rest periods during the day.

➤ **Carrying: transporting an object usually holding it in the hands, arms or shoulders**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, and identify a maximum weight and/or other relevant variables for the carrying requirements identified as 'frequently and occasional").

➤ **Pushing/Pulling: to exert force on or against an object in order to move it away, OR to draw towards oneself, in a particular direction into a particular position**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, and identify a maximum weight or other variables for the pushing/pulling requirements identified as 'occasionally to frequently").

➤ **Stooping/bending: bending body downward and forward by bending spin at the waist, requiring full use of the lower extremities and back muscles**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

20 degrees: _____ 45 degrees; _____ 90 degrees: _____

- **Twisting/Turning: Rotating the torso. This includes turning of upper and lower back, and hips. Occasionally to frequently 0 to 45 degrees**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions

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- **NECK POSITIONS**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, for the following:

Extension 0-70 degrees occasionally to frequently: _____

Flexion 0-80 degrees frequently to constantly: _____

- **Handling: seizing, holding, grasping, turning, or otherwise working with hand or hands. Fingers are involved only to the extent that they are an extension of the hand, such as to turn a switch: required up to constantly (page 8)**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, for the requirements identified as 'frequently and occasional').

--

5. This individual must be able to meet the physical demands of the job and adapt to change in work environment, effectively handle multiple tasks, and maintain a safe level of performance. Please describe any **work restrictions, modifications or adjustments** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position.

Identify restrictions: Restrictions are ___ Temporary ___ Permanent If temporary, please specify anticipated duration in weeks or months
--

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	Ramiro Carreon
Signature of Representative	
Title	Assistant Superintendent, Personnel Services
Address/Phone/Fax	<i>Phone:</i> 530.749.6144

SAMPLE SIT TO STAND WORKSTATION

REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. The CSAC Excess Insurance Authority ("EIA") needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other reasonable accommodations to allow her to perform the essential functions of her position. **The EIA is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non-Discrimination Act, the X-USD also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate).

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." Applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Major life activities include without limitation the following: working, remaining alert, learning, hearing, breathing, thinking, concentrating, processing verbal or written information, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks.

"Limits" includes making achievement of major life activities difficult. This is evaluated in the context of in relation to what **most people** in the general population can perform with little or no difficulty, what members of his **peer group** can perform with little or no difficulty or what **this individual would be able to perform** with little or no difficulty in the absence of the disability.

1. Applying these definitions, does this patient have a **physical** in the performance of one or more major life activities? ___ Yes ___ No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Is this patient prescribed medication that produces side effects that prevents, restricts or makes more difficult his performance of major life activities (such as focus, concentration, memory, stamina, etc.)? Yes No

If your answer to question #3 is "yes," **without disclosing the name or dosage of the medication**, please describe any **work restrictions** which in your opinion are medically recommended for this patient to enable him to perform his essential job functions.

The following questions are in relation to your note dated _____, you state **"please authorize a sit to stand desk for [name]."** With respect to this patient's functional limitations, **and in order for the EIA to evaluate all potential reasonable accommodations** to allow this individual to perform her essential job functions, please provide the following information:

4. Using your best medical judgment, does this person have a restriction on how long she can work in a standing position per hour? Yes No

If yes, please provide specific information on the **consecutive minutes per hour** that she can work in a standing position?

5. Using your best medical judgment, does this person have a restriction on how long she can work in a sitting position per hour? Yes No

If yes, please provide specific information on the **consecutive minutes per hour** that she can work in a sitting position?

6. Using your best medical judgment, will periodic rest breaks assist this patient in performing her essential job functions at her regular worksite? Yes No

If yes, please specify the frequency and duration of breaks during the regular work day

7. Using your best medical judgment, is there any other ergonomic modification or adjustment to this individual's desktop and/or work station that may assist her in performing her essential job functions (e.g., adjustment to desk, chair, computer monitor or workspace)?
 Yes No

If yes, please identify specific mobility devices, equipment or other workspace modifications:

Allison: the following are OPTIONAL and perhaps we don't need them in this situation. We are probably more likely to get the employee to sign the authorization and a better response if we keep it very narrowly focused. This is just a sample

8. Attached is the job description for the position of **[title]**. The physical requirements include: sits for extended periods, frequently stands and walks, stoops and crouches to pick up and move objects, ability to **lift xx pounds** or carry object weighing over xx pounds” **Please provide the following information concerning functional limitations and/or work restrictions to perform these tasks:**

- **Sitting for extended periods:** Restrictions: ____ Yes ____ No

Please identify specific restrictions, including any required standing during the day.

- **Walking: Moving about on foot frequently:** Restrictions: ____ Yes ____ No

Please identify specific restrictions, including any required rest periods during the day.

- **Lifting: raising or lower an object from one level to another (including upward pulling – 50 pounds:** Work Restrictions: ____ Yes ____ No

Please identify specific restrictions, and identify a maximum weight requirement:

- **Carrying: transporting an object usually holding it in the hands, arms or shoulders – 25 pounds** Work Restrictions: ____ Yes ____ No

Please identify specific restrictions, and identify a maximum weight and/or other relevant variables for the carrying requirements:

- **Pushing/Pulling: to exert force on or against an object in order to move it away, OR to draw towards oneself, in a particular direction into a particular position**

Work Restrictions: ____ Yes ____ No

Please identify specific restrictions, and identify a maximum weight or other variables for the pushing/pulling requirements

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

CSAC EIA Representative	
Signature of Representative	
Address/Phone/Fax	

SAMPLE GENERAL QUESTIONNAIRE - TEACHER
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **This employee is being evaluated for a potential reasonable accommodation based on objective barriers to effective performance.** This employee has informed the XXX Unified School District (“XUSD”) that she believes she may have a medical condition that limits her performance of major life activities and impacts her performance of her essential job functions as a Classroom Teacher.

XUSD needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of her position. XUSD **is not seeking information regarding diagnosis, prognosis or other protected information**; but rather, functional limitations and/or work restrictions. Also, **In accordance with the Genetic Information Non Discrimination Act, XUSD also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.” This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine; (B) “Limits” a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, thinking, concentrating, reading, interacting with others in a professional work environment, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ____ Yes ____ No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Is this patient currently prescribed medication that produces side effects limiting performance of one or more major life activities? ____ Yes ____ No. If yes, Without identifying the specific medication, dosages treatment or disclosing other protected medical information, please describe the major life activities, if applicable, which this patient's medication and/or treatment may prevent, restrict or make more difficult.

4. This teacher has significant responsibilities for providing **instruction and supervision** for elementary school 4th grade students (ages between 9-10 years old) during classroom hours and other activities, and is responsible for their safety and security **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.** (Please use additional pages, as necessary).

5. This teacher is required to assume the responsibility for the safety and welfare of students during classroom hours, when escorting the class throughout the school and whenever a danger is observed on or about the campus. **Please describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

6. This employee is required to maintain a regular structured daily schedule in which she is required to supervise her classroom and be relieved by another employee if she must leave during class hours. **Please describe any specific work restrictions or accommodations that may assist this employee in performing this function.**

7. This employee has significant responsibilities for handling sensitive and confidential information and a variety of tasks that require significant attention to detail. **Please describe any specific work restrictions and/or workplace modifications that may assist this employee to perform these essential job functions.**

8. With respect to each of the duties identified below that this teacher performs on a regular basis, please **describe any specific work restrictions in performing these duties and/or identify workplace modifications that may assist this employee to perform these essential job functions.**

- Plan and coordinate the work of teacher aides, teacher assistants, and para professionals.
- Maintain functional learning environments, including orderliness of equipment and materials assigned to the classroom.

- Exercise supervision and care over books, supplies, and equipment; instruct pupils in the proper use and preservation of school property; and maintain records which establish student accountability for assigned property.
- Be responsible for **immediate interior and exterior supervision** during passing periods, recess, before and after school.
- Be accountable for supervision as assigned by the principal/designee and supervise pupils **in extra-curricular activities**

9. If the work restrictions specified in response to questions 4, 5, 6 and 7 are **temporary**, please provide the anticipated **duration** that the restrictions are in place.

_____ Weeks _____ Months _____ Cannot currently determine duration

10. With respect to this employee's ability to report for work for all or part of the next four months, please respond to the following:

a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? Yes No

Hours per Day Days per Week From: through:

b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: time(s) per week(s) month(s) Duration: hour(s) or day(s) per episode

11. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes No
 Cannot currently determine with reasonable medical certainty

12. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-45 days 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

Placer County Office of Education	Director, Personnel Services
Signature of Representative	
Address/Phone/Fax	

SAMPLE PHYSICAL TASKS - GENERAL

**REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual in her position as a **Nutrition Assistant**. The Marysville Joint Unified School District ("the District,") must fully evaluate all potential adjustments or modifications that will allow her to perform her essential job functions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions. **In accordance with the Genetic Information Non Discrimination Act, the PCOE also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions**

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

Limits include making achievement of major life activities difficult.

1. Applying these definitions, does this individual have a limitation in the performance of **one or more major life activities**? ____ Yes ____ No
2. Please describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult. (Please use additional pages, as necessary).

3. Is this patient currently prescribed medication that produces side effects limiting performance of one or more major life activities? ___ Yes ___ No. If yes, without identifying the specific medication, dosages treatment or disclosing other protected medical information, please describe the major life activities, if applicable, which this patient's medication and/or treatment may prevent, restrict or make more difficult.

4. This employee has been issued the following permanent work restrictions:

- *No lifting, carrying, pushing or pulling more than 20lbs*
- *No work above chest level*
- *No repetitive use of the right upper extremity*
- *No overhead work with the left shoulder*

The District cannot reasonably accommodate her on a permanent basis in her current position within these restrictions. Please respond to the following, in order for the District to evaluate other potential positions for which she may be qualified, with or without modifications or adjustments:

➤ **Walking: Moving about on foot frequently to constantly**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent
Please identify specific restrictions, including any required rest periods during the day.

➤ **Standing: Positioned in a stationary position on her feet, frequently to constantly**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent
Please identify specific restrictions, including any required rest periods during the day.

➤ **Carrying: transporting an object usually holding it in the hands, arms or shoulders**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, and identify a maximum weight and/or other relevant variables for the carrying requirements identified as 'frequently and occasional").

➤ **Pushing/Pulling: to exert force on or against an object in order to move it away, OR to draw towards oneself, in a particular direction into a particular position**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, and identify a maximum weight or other variables for the pushing/pulling requirements identified as 'occasionally to frequently").

➤ **Stooping/bending: bending body downward and forward by bending spin at the waist, requiring full use of the lower extremities and back muscles**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent
20 degrees: _____ 45 degrees; _____ 90 degrees: _____

- **Twisting/Turning: Rotating the torso. This includes turning of upper and lower back, and hips. Occasionally to frequently 0 to 45 degrees**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions

--

- **NECK POSITIONS**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, for the following:

Extension 0-70 degrees occasionally to frequently: _____

Flexion 0-80 degrees frequently to constantly: _____

- **Handling: seizing, holding, grasping, turning, or otherwise working with hand or hands. Fingers are involved only to the extent that they are an extension of the hand, such as to turn a switch: required up to constantly (page 8)**

Work Restrictions: ___ Yes ___ No ___ Temporary ___ Permanent

Please identify specific restrictions, for the requirements identified as 'frequently and occasional').

--

- This individual must be able to meet the physical demands of the job and adapt to change in work environment, effectively handle multiple tasks, and maintain a safe level of performance. Please describe any **work restrictions, modifications or adjustments** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position.

Identify restrictions:

Restrictions are ___ Temporary ___ Permanent

If temporary, please specify anticipated duration in weeks or months

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	Ramiro Carreon
Signature of Representative	
Title	Assistant Superintendent, Personnel Services
Address/Phone/Fax	<i>Phone:</i> 530.749.6144

SAMPLE FRAGRANCE ALLERGY

REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. This employee is a **teacher working in a classroom setting, with responsibilities to accompany students on occasion to other areas of the school site, including the library, computer lab, auditorium and cafeteria. She has reported that exposure to soaps, cologne, perfumes, and scented cleaning supplies resulting in respiratory and other limitations.**

Accordingly, the **[EMPLOYER OR DEPT]** needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. The District also needs this information to assist in a determination of whether the patient has a covered disability under the law and the extent to which the employee's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. **The District is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.**

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. **In accordance with the Genetic Information Non Discrimination Act, the District also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.** Please contact the representative listed below if you have any questions. Attach additional pages if necessary.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) "Limits" a major life activity

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing , breathing , thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical, mental or medical condition that limits** the performance of one or more major life activities?

____ Yes ____ No

2. Describe the major life activities, if applicable, which this patient’s limitation or condition prevents, restricts or makes more difficult.

3. This employee may require that the District to accommodate her condition within the classroom and in other areas of the school site due to reactions when exposed to certain scents, smells, fumes, fragrances, products or other environmental conditions. **Please describe any substances, allergens or other environmental factors that are relevant to this patient’s functional limitation(s).** (Please use additional pages, as necessary).

4. With reference to your response to question #3, please describe **all appropriate work restrictions and/or workplace accommodations that may mitigate any environmental conditions in her classroom and within the school campus.** (Please use additional pages, as necessary).

- a. Please identify specific substances, products, fragrances, scents, or other environmental factors to which she may not be exposed at all, or for **specific increments of time** (e.g., 10 minutes, 20 minutes, 30 minutes, 60 minutes or 60+ minutes).

- b. Please identify specific substances, products, fragrances, scents, or environmental factors to which she may not be exposed at all or within **specific distances** within the classroom, staff lounge, school office, computer lab, library, auditorium or some combination of locations (e.g., specify how many inches or feet away from the substance the patient may perform work).

- c. Please identify any mitigating measures that may be taken to minimize or prevent adverse reactions when exposure to the substances, products, fragrances, scents or conditions identified in #3 (such as air filters, personal protective equipment or other devices)

SAMPLE – EMPLOYEE AT IMMINENT RISK QUESTIONNAIRE
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **The County of XXX - Department** is evaluating whether or not this individual requires reasonable accommodations to perform the essential functions of alternative positions within the agency, or further leave as a reasonable accommodation.

The County needs this information to assist in a determination of whether the extent to which the individual's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. **The County is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non-Discrimination Act, the County also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve."

Limits" includes making achievement of major life activities difficult.

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine. (B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ___ Yes ___ No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult (e.g., physical, neurological, cognitive, emotional/mental, including memory, concentration, communication limitations, etc.).

3. Is this patient prescribed medication or ongoing treatments that produces side effects that prevents, restricts or makes more difficult her performance of major life activities (such as focus, concentration, memory, ability to work and interact with others, stamina, etc.)? _____
Yes _____ No If your answer to question #3 is "yes," **without disclosing the name or dosage of the medication**, please describe any **work restrictions** which in your opinion are medically recommended for this patient to enable her to perform the essential job functions.

4. Based on objectively observed behaviors I the workplace, this individual was referred to, and agreed to participate in an independent Fitness for Duty evaluation to determine her fitness to perform her duties as a [title] T he evaluation was conducted during the time period from October - December, 2-21 by [INSERT NAME OF FFD evaluator]. After extensive evaluation, including psychological and an extensive face-to-face evaluation, Dr. XXX reached the following conclusions **in the attached report**:

- Ms. Boyers experiences a mental impairment that limits her ability to engage in the major life activity of working. The impairment makes functioning effectively at work more difficult than would be the case was she not so impaired.
- Ms. Boyers' impairment poses a significant current risk of substantial harm to the health and safety of Ms. Boyers and to others at work.
- "... The problem is current, imminent. If is not a simple conflict. The severity is such that she is not able to produce all the work defined in her job description or to maintain safe and health relations with others at work..."
- Based on all the documentation I have and based on repeated conversations with Ms. Boyers, I know of no accommodations that would reduce or eliminate the risks..."

Based on your medical care and treatment of this patient, please respond to the following:

1. Patient is currently medically unable to perform the major life activity of working, in any capacity in a XXX County worksite: ____ Yes ____ No
 2. Patient presents a current and imminent risk of substantial harm to her own health and safety ____ Yes ____ No
 3. Patient presents a current and imminent risk of substantial harm to t others: ____ Yes ____ no
 4. Patient cannot currently perform the essential job functions of any position in a County workplace, with or without reasonable accommodations: ____ Yes ____ No ____ cannot currently determine
 5. If you answered "no" to any of the above questions, please identify specific functional limitations, work restrictions, modifications or adjustments that would enable this patient to engage and interact in a County workplace safely and capably:

Restrictions are ____ Temporary ____ Permanent ____ Cannot currently determine
If temporary: state anticipated duration in ____ weeks, ____ months

ANSWER # 6 AND #7 ONLY if it is your opinion that this patient is able to work i without presenting a current, imminent and substantial threat to her own health and safety or the safety of others in any capacity within a County workplace:

6. This individual must be able to adapt to change in work environment, effectively handle multiple tasks and competing demands, work cooperatively in group situations, and work well with others on a team. Please describe any **work restrictions or modifications** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

Patient is entirely precluded from performing these essential duties: <input type="checkbox"/> Yes <input type="checkbox"/> No
Patient has specific work restrictions in performing this task: <input type="checkbox"/> Yes <input type="checkbox"/> No Identify applicable restrictions:
Restrictions are <input type="checkbox"/> Temporary <input type="checkbox"/> Permanent <input type="checkbox"/> Cannot currently determine
If temporary: anticipated duration in <input type="checkbox"/> weeks <input type="checkbox"/> months <input type="checkbox"/> years

7. Please identify any specific work restrictions that involve a modified or adjusted daily or weekly schedule, including work hours, work locations and travel restrictions, if any.

Patient currently has the functional capacity to work <input type="checkbox"/> hours per day Patient currently has the functional capacity to work <input type="checkbox"/> days per week
Patient has the functional capacity to work a full schedule, and to maintain regular and dependable attendance, without schedule modifications for at least twelve (12) consecutive months beginning in October, 2018: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Cannot currently determine

8. With respect to this employee's ability to report for work for all or part of the next four months, please respond to the following:

- a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? Yes No

Hours per Day Days per Week From: through:

- b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: time(s) per week(s) month(s) Duration: hour(s) or day(s) per episode.

9. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes
 No
 Cannot currently determine with reasonable medical certainty

10. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days
 30-45 days
 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

XXX County Representative	
Signature of Representative	
Title	
Address/Phone/Fax	

SAMPLE – EMPLOYEE AT IMMINENT RISK QUESTIONNAIRE
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **The County of XXX - Department** is evaluating whether or not this individual requires reasonable accommodations to perform the essential functions of alternative positions within the agency, or further leave as a reasonable accommodation.

The County needs this information to assist in a determination of whether the extent to which the individual's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. **The County is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non-Discrimination Act, the County also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve."

Limits" includes making achievement of major life activities difficult.

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine. (B) "Limits" a major life activity

Mental Disability is defined as: (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that may limit a major life activity. (2) Any other mental or psychological disorder or condition ... that requires special education or related services.

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? ___ Yes ___ No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult (e.g., physical, neurological, cognitive, emotional/mental, including memory, concentration, communication limitations, etc.).

3. Is this patient prescribed medication or ongoing treatments that produces side effects that prevents, restricts or makes more difficult her performance of major life activities (such as focus, concentration, memory, ability to work and interact with others, stamina, etc.)? _____
 Yes _____ No If your answer to question #3 is "yes," **without disclosing the name or dosage of the medication**, please describe any **work restrictions** which in your opinion are medically recommended for this patient to enable her to perform the essential job functions.

4. Based on objectively observed behaviors I the workplace, this individual was referred to, and agreed to participate in an independent Fitness for Duty evaluation to determine her fitness to perform her duties as a [title] T he evaluation was conducted during the time period from October - December, 2-21 by [INSERT NAME OF FFD evaluator]. After extensive evaluation, including psychological and an extensive face-to-face evaluation, Dr. XXX reached the following conclusions in the attached report:

- Ms. Boyers experiences a mental impairment that limits her ability to engage in the major life activity of working. The impairment makes functioning effectively at work more difficult than would be the case was she not so impaired.
- Ms. Boyers' impairment poses a significant current risk of substantial harm to the health and safety of Ms. Boyers and to others at work.
- "... The problem is current, imminent. If is not a simple conflict. The severity is such that she is not able to produce all the work defined in her job description or to maintain safe and health relations with others at work..."
- Based on all the documentation I have and based on repeated conversations with Ms. Boyers, I know of no accommodations that would reduce or eliminate the risks..."

Based on your medical care and treatment of this patient, please respond to the following:

1. Patient is currently medically unable to perform the major life activity of working, in any capacity in a XXX County worksite: ___ Yes ___ No

2. Patient presents a current and imminent risk of substantial harm to her own health and safety ___ Yes ___ No

3. Patient presents a current and imminent risk of substantial harm to t others: ___ Yes ___ no

4. Patient cannot currently perform the essential job functions of any position in a County workplace, with or without reasonable accommodations: ___ Yes ___ No ___ cannot currently determine

5. If you answered "no" to any of the above questions, please identify specific functional limitations, work restrictions, modifications or adjustments that would enable this patient to engage and interact in a County workplace safely and capably:

Restrictions are ___ Temporary ___ Permanent ___ Cannot currently determine
 If temporary: state anticipated duration in ___ weeks, ___ months

ANSWER # 6 AND #7 ONLY if it is your opinion that this patient is able to work i without presenting a current, imminent and substantial threat to her own health and safety or the safety of others in any capacity within a County workplace:

6. This individual must be able to adapt to change in work environment, effectively handle multiple tasks and competing demands, work cooperatively in group situations, and work well with others on a team. Please describe any **work restrictions or modifications** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

Patient is entirely precluded from performing these essential duties: <input type="checkbox"/> Yes <input type="checkbox"/> No
Patient has specific work restrictions in performing this task: <input type="checkbox"/> Yes <input type="checkbox"/> No Identify applicable restrictions:
Restrictions are <input type="checkbox"/> Temporary <input type="checkbox"/> Permanent <input type="checkbox"/> Cannot currently determine
If temporary: anticipated duration in <input type="checkbox"/> weeks <input type="checkbox"/> months <input type="checkbox"/> years

7. Please identify any specific work restrictions that involve a modified or adjusted daily or weekly schedule, including work hours, work locations and travel restrictions, if any.

Patient currently has the functional capacity to work <input type="checkbox"/> hours per day Patient currently has the functional capacity to work <input type="checkbox"/> days per week
Patient has the functional capacity to work a full schedule, and to maintain regular and dependable attendance, without schedule modifications for at least twelve (12) consecutive months beginning in October, 2018: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Cannot currently determine

8. With respect to this employee's ability to report for work for all or part of the next four months, please respond to the following:

- a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? Yes No

Hours per Day Days per Week From: through:

- b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: time(s) per week(s) month(s) Duration: hour(s) or day(s) per episode.

9. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

Yes
 No
 Cannot currently determine with reasonable medical certainty

10. If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days
 30-45 days
 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

XXX County Representative	
Signature of Representative	
Title	
Address/Phone/Fax	

**SAMPLE PARK MAINTENANCE WORKER - PHYSICAL
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION**

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified himself as your patient. The **XXX Recreation & Park District** is evaluating whether or not this individual requires reasonable accommodations to perform the essential functions of his position as a **Parks Maintenance Manager**.

The District needs this information to assist in a determination of whether the extent to which the individual's "functional limitations" require job modifications or other accommodations to allow him to perform the essential functions of his position. **The District is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non-Discrimination Act, the District also specifically directs you **not to provide genetic information**, including family medical history, in your response to the following questions.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve."

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (A) 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, skin and endocrine. (B) "Limits" a major life activity

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing, breathing, thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

1. Applying these definitions, does this patient have a **physical limitation** in the performance of one or more major life activities? Yes No

2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Is this patient prescribed medication that produces side effects that prevents, restricts or makes more difficult his performance of major life activities (such as focus, concentration, memory, stamina, depth perception etc.)? Yes No

Without disclosing the name or dosage of the medication, please describe the major life activities which the side effects restrict or make more difficult to perform.

4. Attached is a current job description for the position in which this individual is employed. The position has the following Physical Demands:

- Sitting; standing; walking over uneven ground;
- lifting, pushing, pulling heavy objects **up to 50 lbs. unassisted**;
- dig ditches and post holes;
- mix concrete,
- kneeling; stooping; bending; squatting;
- close vision; distance vision;
- use of hands to finger, handle, or feel objects, tools or controls;
- driving vehicle.

Patient is entirely precluded from performing these physical functions: Yes No

Patient has specific work restrictions in performing these tasks: Yes No

Identify applicable restrictions:

Restrictions are Temporary Permanent Cannot currently determine

If temporary: anticipated duration in # of weeks # of months Cannot currently determine duration:

5. This position requires the following Environmental Demands:

- Frequently and routinely works outside in a variety of weather conditions ranging from cold rainy weather to +100^o F.
- Inside: Routinely works indoors in a temperature —controlled environment. Fumes/Gases:
- Exposure to fumes from petroleum-based products, fertilizers, paints, pool chemicals, and other chemicals commonly utilized in the performance of maintenance procedures, perfumes/colognes.
- Noise and Vibrations: Landscape equipment and power tools, office machines, general construction noise, exposure to outside noise.

Patient is entirely precluded from working in these environmental conditions: Yes No

Patient has specific work restrictions in this work environment: Yes No

Identify applicable restrictions:

Restrictions are Temporary Permanent Cannot currently determine

If temporary: anticipated duration in # of weeks # of months Cannot currently determine duration:

6. This individual has significant management and supervisory responsibilities. He has been objectively observed experiencing episodic periods of fatigue, at the start and end of his work day that present objective barriers to his performance. As a result, the District is evaluating potential reasonable and appropriate workplace accommodations to help facilitate his performance of his job duties. For each of the following essential job functions, please identify any functional limitations and/or work restrictions:

- Directs and performs skilled and semi-skilled work in landscaping, irrigation, carpentry, electrical, horticulture, masonry, mechanical, painting, pest control and other crafts as required
- Oversees the planning and coordination of maintenance operations ● Coordinates the work of the Maintenance Division with other District activities
- Lays out and assigns routine and special projects in the maintenance of parks, park buildings, swimming pool, splash park, athletic fields, and recreation areas
- Supervises the servicing of motorized equipment
- Schedules, supervises, and personally performs planting, cultivating, pruning, and spraying of trees, shrubs, and landscape areas
- Inspects plants for disease and insect pests, and determines appropriate control measures
- Inspects the construction of facilities
- Investigates complaints from the general public regarding the maintenance of facilities

Patient can perform these tasks safely and capably: YES ___ NO ___

Patient is entirely precluded from these tasks: YES ___ NO ___

If no, state specific restrictions to facilitate safe and effective task performance:

Specific Work Restrictions (specify lifting, push/pull, reaching, crawling, stooping, walking, standing, etc.)

Restrictions are: ___ Temporary ___ Permanent ___ cannot currently determine
 If temporary, state anticipated duration in ___ weeks ___ months

7. Does this patient currently have work restrictions for the following physical functions?

- | | | |
|------------|---------|--------|
| ➤ Lifting | Yes ___ | No ___ |
| ➤ Pulling | Yes ___ | No ___ |
| ➤ Pushing | Yes ___ | No ___ |
| ➤ Carrying | Yes ___ | No ___ |
| ➤ Kneeling | Yes ___ | No ___ |
| ➤ Reaching | Yes ___ | No ___ |
| ➤ Bending | Yes ___ | No ___ |
| ➤ Crawling | Yes ___ | No ___ |

➤ Specify the **maximum weight** this patient is functionally capable of **lifting** to perform his essential job duties throughout the park worksite. _____

- Specify the **maximum weight** this patient is functionally able to **push/ pull** to perform his essential job duties throughout the park worksite _____
- Specify the **maximum weight** this patient is functionally able to **carry** work-related objects to perform his essential job duties throughout the park worksite _____
- Specify the maximum distance this patient is functionally able to **carry** work-related objects to perform his essential job duties throughout the park worksite _____

8. This individual works a full day. He is required to follow a specific schedule. Please identify any specific work restrictions that involve a modified or adjusted daily or weekly schedule, including work hours, work locations and travel restrictions, if any.

Patient currently has the functional capacity to work ____ hours per day
 Patient currently has the functional capacity to work ____ days per week

Restrictions are ____ temporary ____ permanent ____ cannot currently determine
 If temporary, anticipated duration in # of weeks ____ # of months ____

9. Is it medically necessary for the employee to miss work on an **INTERMITTENT** basis or requires a **REDUCED WORK SCHEDULE**? ____ Yes ____ No

Date **Intermittent** Leave Begins: _____ Date Intermittent Leave ends: _____

Frequency: ____ time(s) per ____ week(s) ____ month(s) Duration: ____ hour(s) or ____ day(s) per episode

10. Is it medically necessary for the employee/patient to receive necessary medical care on an intermittent basis, including any time for recovery? ____ No ____ Yes

If yes, estimate the hours of needed care by the employee/patient:
 ____ Hours per Day ____ Days per Week From: _____ through: _____

11. This individual's position requires him to walk and stand for significant portions of his work day. **In order for the district to evaluate all potential reasonable accommodations** to allow this individual to perform his essential job functions, please provide the following information regarding his functional capacity and/or work restrictions:

- How long in consecutive minutes or hours may he sit without a standing break? _____
- How long in consecutive minutes or hours must he stand/walk without sitting during the work day? _____
- Will periodic rest breaks in a seated position assist this patient? If so, please provide specific information on the **frequency and duration** of breaks from performing work in a standing or walking position? _____

12. In performing his supervisory and management duties, this individual must be able to adapt to change in work environment, effectively handle multiple tasks and competing demands, work cooperatively in group situations, and work well with others on a team. Please describe any **work restrictions or modifications** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

<p>Restrictions:</p> <p>Restrictions are ____ Temporary ____ Permanent ____ Cannot currently determine</p> <p>If temporary: anticipated duration in ____ weeks ____ months ____ years</p>

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

District Representative	Linda Montijo
Signature of Representative	
Title	Superintendent of Administration
Address/Phone/Fax	2201 Cottage Way ▲ Sacramento, CA. 95825 Phone: 916-927-3802 Ext 110 ▲ Fax: 916-927-3805

SAMPLE – MENTAL HEALTH / PTSD QUESTIONNAIRE
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified himself as your patient. The Western Placer Unified School District needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations, to allow her to perform the essential functions of her position as a **Paraprofessional, Specialized Physical Health Care.**

XXXUSD is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions. In accordance with the Genetic Information Non-Discrimination Act, the XXXUSD also specifically directs you not to provide genetic information, including family medical history.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.” This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926].

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) “Limits” a major life activity

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing , breathing , thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical or medical limitation** in the performance of one or more major life activities? ____ Yes ____ No
2. Please describe the major life activities that this individual’s injury limits, restricts, or makes more difficult to perform.

3. Is this patient prescribed medication or ongoing treatments that produces side effects that prevents, restricts or makes more difficult her performance of major life activities (such as focus, concentration, memory, ability to work and interact with others, stamina, etc.)? _____
Yes _____ No If your answer to question #3 is "yes," **without disclosing the name or dosage of the medication**, please describe any **work restrictions** which in your opinion are medically recommended for this patient to enable her to perform the essential job functions.

4. In your letter dated January 17, 2019 to AIMS, you state: ***"the patient will attempt part-time work beginning next week."*** *The District requires clarification of this restriction in order to evaluate all potential reasonable and effective accommodations.* Please identify any specific work restrictions that involve a modified or adjusted daily or weekly schedule, including work hours, work locations and travel restrictions, if any.

Patient currently has the functional capacity to work ____ hours per day
Patient currently has the functional capacity to work ____ days per week

Patient has the functional capacity to work a full schedule, and to maintain regular and dependable attendance, without schedule modifications for at least twelve (12) consecutive months beginning in February, 2019: ___ Yes ___ No ___ Cannot currently determine

5. With respect to this employee's ability to report for work for all or part of the work day or five-day work week, please respond to the following:

- a. Would this employee benefit from a modified work schedule on **INTERMITTENT** basis or a **REDUCED WORK SCHEDULE**? _____ Yes _____ No

_____ Hours per Day _____ Days per Week From: _____ through: _____

- b. Please indicate the estimated frequency of the employee's need for absences due to the medical condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ time(s) per _____ week(s) _____ month(s) Duration: _____ hour(s) or _____ day(s) per episode.

6. This individual assists teachers and paraprofessionals providing specialized physical health care procedures to specific disabled students. She is responsible, among other duties for performing basic first aid/CPR and assisting with student health monitoring, assisting and instructing special needs students with personal hygiene, feeding skills, toileting, tooth brushing, and hand washing, lifting or assisting with lifting students from wheelchairs to changing tables, and assisting with behavior management techniques.

Based on your medical care and treatment of this patient, and **with respect to her current temporary restrictions**, please respond to the following:

1. Patient is currently medically unable to perform the major life activity of working, in any capacity in providing specialized physical health care to students with disabilities: ___ Yes ___ No
2. Patient presents a current and imminent risk of substantial harm to her own health and safety in performing her essential job functions: ___ Yes ___ No
3. Patient presents a current and imminent risk of substantial harm to the health and/or safety of others in performing her essential job functions: ___ Yes ___ no
4. Patient cannot currently perform the essential job functions of any position in a special education physical health care work environment, with or without reasonable accommodations: ___ Yes ___ No ___ cannot currently determine
5. If you answered "no" to any of the above questions, please identify specific functional limitations, work restrictions, modifications or adjustments that would enable this patient to engage and interact in her physical health care position safely and capably:

Anticipated duration of temporary restrictions in ___ weeks, ___ months

ANSWER # 7 and 8, ONLY if it is your opinion that this patient is able to work without presenting a current, imminent and substantial threat to her own health and safety or the safety of others in any capacity within a school district work workplace:

7. This individual must be able to adapt to change in work environment, effectively handle multiple tasks and competing demands, work cooperatively in group situations, and work well with others on a team. Please describe any **work restrictions or modifications** which in your opinion are medically recommended for this patient to enable her to perform the essential functions of this position. (Please use additional pages, as necessary).

Patient is entirely precluded from performing these essential duties: ___ Yes ___ No

Patient has specific work restrictions in performing this task: ___ Yes ___ No

Identify applicable restrictions:

Restrictions are ___ Temporary ___ Permanent ___ Cannot currently determine

If temporary: anticipated duration in ___ weeks ___ months ___ years

8. Attached is a job description for **Paraprofessional, Specialized Physical Health Care**. With respect to the following Essential Functions, please identify any other applicable work restrictions in performing the task:

- **Physically participates in physical activities as part of the basic program.**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **Assists with behavior management programs and techniques**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **Understand and be aware of medical needs of students**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **Assists and instructs pupils in personal hygiene; feeding skills; toileting, tooth brushing and hand washing.**

Identify specific restriction:

Restriction is permanent: ___ YES ___ NO

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **Lifts or assists with lifting students from wheelchairs to changing tables or designated areas**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **After training & with supervision, may administer specialized health care procedures.**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

- **Performs basic first aid/CPR and assists with student health monitoring.**

Identify specific restriction:

Anticipated duration in weeks or months: _____
___ Cannot currently determine with reasonable degree of medical certainty.

9. During dialogue about potential return to work, this individual has informed the District that Light and noise are overwhelming. Please identify specific restrictions:

- Patient must “limit” exposure to daylight in working with students at lunch and outside activities: ___ YES ___ NO
- If yes, please state the maximum number of consecutive and cumulative minutes per day this individual may be exposed to daylight and identify any other work applicable restrictions and the anticipated duration of temporary restrictions

- Patient must limit exposure to ambient or florescent lighting in the classroom setting during her regular work day ___ YES ___ NO

If yes, please state the maximum number of consecutive and cumulative minutes per day this individual may be exposed to classroom lighting and identify any other work applicable restrictions and the anticipated duration

- Patient must limit exposure to “noise” during her work day ___ YES ___ NO

If yes, to the extent this is medically required, please state the maximum number of consecutive and cumulative minutes per day this individual may be exposed to noise, and the anticipated duration, as follows:

- Playground or schoolyard noises:
- Classroom conversation:
- Other

10. If the patient is currently unable to work perform essential job functions **would a leave of absence for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform essential job functions with or without restrictions?

____ Yes ____ No
____ Cannot currently determine with reasonable medical certainty

11. If your answer to #10 is YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-45 days 45-60 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

XXXUSD Representative	
Signature of Representative	
Title	
Address/Phone/Fax	

SAMPLE – PSYCHIATRIC SERVICE DOG REQUEST
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. **xxx County** (“the County”) is evaluating potential reasonable accommodations, if any, that may be required to facilitate this employee’s performance of the essential functions of her job as **Family Services Specialist II.**

The County needs this information to assist in a determination of whether the extent to which the employee’s “functional limitations” require job modifications or other accommodations to allow her to perform the essential functions of her position. **The County is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non Discrimination Act, the County also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions.

Please note: “Disability” is defined under the California Fair Employment & Housing Act (FEHA) as “a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve.”

Physical Disability is defined as: Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) 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, skin and endocrine.

(B) “Limits” a major life activity

“**Limits**” includes making achievement of major life activities difficult.

1. Applying these definitions, does this patient have a **physical limitation** in the performance of one or more major life activities? ____ Yes ____ No

2. Describe the major life activities, if applicable, which this patient’s limitation prevents, restricts or makes more difficult.

3. This employee has requested that, as a reasonable accommodation, she be permitted to bring an assistive animal to her worksite, to facilitate her performance of her essential job functions.

a. Does this patient require the presence of a trained psychiatric service dog?

___ yes ___ No

If yes, please describe the total or partial hours during her regular work day that she requires the presence of the service animal.

b. Does this patient require the presence of a trained therapy dog?

___ yes ___ No

If yes, please describe the total or partial hours during her regular work day that she requires the presence of the service animal.

c. Does this patient require the presence of a companion animal?

___ yes ___ No

If yes, please describe the total or partial hours during her regular work day that she requires the presence of the service animal.

4. In order for the County to fully evaluate this employee's work restrictions that require the presence of an assistive animal in the workplace, please provide the following information with respect to each essential job function listed:

- **Interviews applicant/recipient (in person and on the telephone) in order to gather information needed to determine eligibility for public assistance;**

Is patient restricted from performing this task without the presence of an assistive animal in the workplace? ___ Yes ___ No

If yes, please describe the role of the service animal while the employee is performing this task and/or the manner in which the service animal will assist the employee in performing this essential duty.

- **Responds to inquiries regarding program eligibility and employment services;**

Is patient restricted from performing this task without the presence of an assistive animal in the workplace? ___ Yes ___ No

If yes, please describe the role of the service animal and/or manner in which the service animal will assist the employee in performing this essential duty.

- **Reviews, evaluates and verifies the accuracy and completeness of information submitted by the applicant/recipient;**
- **Refers families to eligibility and employment assistance programs;**

Is patient restricted from performing these tasks without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal while the employee is performing these tasks and/or the manner in which the service animal will assist the employee in performing these essential duties.

- **Diverts families from ongoing cash assistance through special programs or community resources;**

Is patient restricted from performing this task without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal while the employee is performing this task and/or the manner in which the service animal will assist the employee in performing this essential duty.

- **Utilizes case controls/case alerts to maintain accurate data as required;**
- **Explains rules, regulations, court orders and policies to customers/families and the public to apprise them of their rights, responsibilities, and eligibility for participation;**

Is patient restricted from performing these tasks without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal and/or manner in which the service animal will assist the employee in performing these essential duties.

- **Makes appropriate follow up on case data including but not limited to contacting customers regularly and monitoring eligibility to assure compliance with program requirements;**

Is patient restricted from performing this task without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal while the employee is performing this task and/or the manner in which the service animal will assist the employee in performing this essential duty.

- **Maintains accurate and complete data so that necessary case records and documents are processed and updated within time limits established by regulation and local policy;**
- **Utilizes automated database systems to establish and maintain case data on families receiving assistance;**

- **Researches and prepares written and/or oral reports and correspondence as required;**
- **Performs data entry and possesses basic computer skills;**

Is patient restricted from performing these tasks without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal and/or manner in which the service animal will assist the employee in performing these essential duties.

- **Makes home visits as required.**

Is patient restricted from **making home visits** without the presence of an assistive animal in the workplace? Yes No

If yes, please describe the role of the service animal and/or manner in which the service animal will assist the employee in performing this essential duty.

5. Please identify any medically required modification to her work schedule (such as frequency and duration of breaks) that would assist this patient in performing her job tasks both in the office setting and when transporting clients by driving a motor vehicle).

6. Does this patient require any other equipment, modifications or adjustments to her physical work space to perform her work tasks? Yes No. If yes, please specify (example: natural lighting, florescent lighting, workspace configurations, computer configuration, natural lighting, or other environmental conditions, etc.).

7. If this patient cannot currently perform the essential functions of her job, with or without a reasonable accommodation, would a leave of absence **for a finite period of time** assist the patient in making a recovery sufficient to allow her to perform those essential job functions with or without restrictions?

Yes No Cannot currently determine with reasonable medical certainty.

If YES, please provide your medical opinion on the amount of time that the patient may reasonably require to be able to return to essential job functions with or without restrictions:

Less than 30 days 30-60 days 60-90 days
 Cannot currently be determined with reasonable medical certainty

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

SAMPLE MENTAL HEALTH CLARIFICATIONS
REQUEST FOR REASONABLE ACCOMMODATION IN EMPLOYMENT
MEDICAL PRACTITIONER CERTIFICATION

Name of Patient	
Address/Phone Number of Patient	
Name/Address/Phone of Medical Practitioner Addressed	

To the medical practitioner: Your assistance is appreciated in providing information to assist in determining reasonable accommodation in employment for the above-named individual, who has identified herself as your patient. This employee is requesting that the Folsom Cordova Unified School District consider a workplace accommodation(s) to facilitate her performance of the essential functions of her job as an **Special Project Coordinantor**

The District needs this information to assist in a determination of whether the extent to which the employee's "functional limitations" require job modifications or other accommodations to allow her to perform the essential functions of her position. **XXUSD is not seeking information regarding diagnosis, prognosis or other protected information; but rather, functional limitations and/or work restrictions.** In accordance with the Genetic Information Non Discrimination Act, the XXXUSD also specifically directs you not to provide genetic information, including family medical history, in your response to the following questions.

All information relating to an accommodation request, including medical documentation, shall be maintained in separate files and shall be treated as confidential medical records with access limited to supervisors/managers who need to be informed regarding necessary work restrictions and accommodations, first aid personnel (when appropriate), and review by government officials investigating compliance with the California Fair Employment & Housing Act (FEHA), the Family & Medical Leave Act (FMLA) and California Family Rights Act (CFRA) or other pertinent law. Please contact the representative listed below if you have any questions.

Please note: "Disability" is defined under the California Fair Employment & Housing Act (FEHA) as "a limitation of a major life activity or a limitation that makes achievement of a major life activity more difficult to achieve." This may be a physical or mental illness or medical condition that limits a major life activity or makes achievement more difficult. [California Government Code § 12926]. Further applicable definitions are:

Major life activities include without limitation the following: working, seeing, sleeping, remaining alert, learning, hearing , breathing , thinking, concentrating, reading, interacting with others, communicating, performing manual tasks, performing cognitive tasks, walking, lifting, reaching, caring for oneself.

1. Applying these definitions, does this patient have a **physical or mental limitation** in the performance of one or more major life activities? Yes No
2. Describe the major life activities, if applicable, which this patient's limitation or condition prevents, restricts or makes more difficult.

3. Your Work Status Report dated 11-6-19 states “**Ms. Moffett may return to work 11/26/19 if employer can accommodate no interactions between Ms. Moffett and supervisor Denise.**” In order to evaluate potential reasonable accommodations that involve reassignment to vacant positions or other workplace adjustments, please provide clarification and specific work restrictions on each of the following items:

- Is the patient entirely precluded from reporting directly to, and/or performing assignments for her supervisor? Yes No

If answer is “no,” please identify specific work restrictions:

Restrictions are: Temporary Permanent Cannot currently determine

Anticipated duration in # of weeks # of months
 Cannot currently determine duration with reasonable medical judgment

- Is the patient **entirely precluded** from reporting to any administrator if that administrator reports to, or interacts with, the patient’s supervisor Denise? Yes No

If answer is “no,” please identify specific work restrictions:

Restrictions are: Temporary Permanent Cannot currently determine

Anticipated duration in # of weeks # of months
 Cannot currently determine duration with reasonable medical judgment

- Your work status report identifies an option that the patient may “**work from home.**” Is the patient **entirely precluded** from direct contacts with her supervisor Denise by telephone (such as answering a telephone call and/or taking a message for another administrator in the work site or the district)? Yes No

If answer is “no,” please identify specific work restrictions:

Restrictions are: Temporary Permanent Cannot currently determine

Anticipated duration in # of weeks # of months
 Cannot currently determine duration with reasonable medical judgment

- Is the patient **entirely precluded** from indirect contacts with her supervisor by email or other electronic communication? ____ Yes ____ No

If answer is "no," please identify specific work restrictions:

Restrictions are: ____ Temporary ____ Permanent ____ Cannot currently determine

Anticipated duration in # of weeks ____ # of months

____ Cannot currently determine duration with reasonable medical judgment

- Your work status report suggests an option of reassignment to **a different supervisor, or different school or department**. Is the patient **entirely precluded** from attending any meeting or group gathering at which her supervisor Denise is either present or is presiding? ____ Yes ____ No

If answer is "no," please identify specific work restrictions:

Restrictions are: ____ Temporary ____ Permanent ____ Cannot currently determine

Anticipated duration in # of weeks ____ # of months

____ Cannot currently determine duration with reasonable medical judgment

- Is the patient **entirely precluded** from working in a workspace which is located in an area that her supervisor walks through or interacts with other employees?
____ Yes ____ No

If answer is "no," please identify specific work restrictions:

Restrictions are: ____ Temporary ____ Permanent ____ Cannot currently determine

Anticipated duration in # of weeks ____ # of months

____ Cannot currently determine duration with reasonable medical judgment

- Is the patient restricted or precluded from any other foreseeable work-related encounters or interactions with her supervisor that may occur on a regular or periodic basis? Yes No

If answer is "no," please identify specific work restrictions:

Restrictions are: Temporary Permanent Cannot currently determine

Anticipated duration in # of weeks # of months
 Cannot currently determine duration with reasonable medical judgment

4. You state that if employer cannot accommodate this restriction, the patient will remain TTD until 12/6/2019. Is it your reasonable medical opinion 12/6/19, will the patient be released without this restriction? Yes No

As of 12/6/19 patient will be released without the current restriction on reporting to her supervisor Denise Yes No

As of 12/6/19, patient is anticipated to have the following work restrictions:

Restrictions are: Temporary Permanent Cannot currently determine

Anticipated duration in # of weeks # of months
 Cannot currently determine duration with reasonable medical judgment

Certification:

Medical Practitioner's Name and Specialization	
Medical Practitioner's Signature (Original signature only)	
Date form completed	

Please return this form directly to:

XXXUSD Representative	
Signature of Representative	
Title	Director of Human Services
Address/Phone/Fax	

SAMPLE MONITORING ACCOMMODATION FORM

Employee First Name: _____ Employee Last Name: _____

Classification Title: _____ Worksite: _____

Supervisor Name: _____ Supervisor Title: _____

Date of meeting: _____ How was the meeting discussed? In person By Telephone

A. DOCUMENTING CURRENT ACCOMMODATIONS

What accommodations have been implemented to enable the employee to perform essential job duties or enjoy equal benefits or privileges?

When were the current accommodations implemented (month, day, year), and who was responsible for implementation?

B. EVALUATING CURRENT ACCOMMODATIONS FOR EFFECTIVENESS

If equipment or software was provided, was the employee trained in the use of that equipment or software?

Yes

No

Does the employee report that the training was sufficient to meet his/her needs?

Yes

No

If no, explain:

If a service (e.g., interpreter, reader) was provided, does the employee report that the service is meeting his/her needs? Who is responsible for arranging the service?

If workstation equipment was provided, is it being used effectively and properly? **Explain** any issues in using workstation equipment.

Are the accommodations currently enabling the employee to perform essential job functions? **Explain.**

If applicable, explain how accommodations have enabled the employee to improve his/her performance/conduct.

What difficulties, **if any**, does the employee experience when engaging accommodations (i.e., equipment does not work, scheduling needs not met, etc.)?

Is the employee currently requesting additional or alternative accommodations?

Yes

No

If yes:

- What job function(s) is s/he having difficulty performing?

- What employment benefit(s) is s/he having difficulty accessing?

- What limitation(s) is/are interfering with his/her ability to perform the job or access an employment benefit?

Describe the *employee's perception* of how well accommodations have worked.

C. RECOMMENDATIONS

Current accommodations have been found to:

- Be effective and employee will continue “as is”.
- Require adjustments.
- Ineffective for the purpose.
- Require additional accommodations to be effective.

Explain.

SIGNATURE:

Employer Representative:

Date: _____

Employee:

Date: _____

(IF CONTACT WITH THE EMPLOYEE IS BY TELEPHONE INDICATE ON THE EMPLOYEE SIGNATURE LINE “PHONE CALL” AND INCLUDE THE DATE OF THE CALL.)

RE: Notification of Disability Rights and Request for Reasonable Accommodation

Dear :

The Risk Management Department (OR Human Resources) is in receipt of information which indicates you may have a medical condition or disability which impacts your abilities to perform your position of CLASSIFICATION at LOCATION. This information indicates your condition may impose functional limitations on your abilities to perform one or more essential functions of your job. Given this information, the purpose of this letter is to advise you of civil rights to which you may be entitled under the California Fair Employment and Housing Act (FEHA), and the federal Americans with Disabilities Act (ADA).

According to these statutes, if you have a medical condition which may impair one or more major life activities, including but not limited to the life activity of working, mobility, cognitive functioning, and/or major bodily function(s), then you may be an individual with a disability as defined by the law. If you have such a disability, then you are protected from discrimination on the basis of that disability. If the impairment limits your performance of one or more essential functions of your job, then in order to protect you from such discrimination, you have the right to be reasonably accommodated, and the right to participate in that decision-making process. That decision-making process is called the Interactive Process. The Interactive Process is an informal, ongoing process of good faith communication directly between you and the District. Through the Interactive Process, we thoroughly evaluate potential effective accommodations that will allow you to perform the essential functions of your job, and whether those accommodations are reasonable and can be implemented within the standards set forth in the statutes.

About the Interactive Process

The Interactive Process is an ongoing process of good faith communication directly between you and the District. The Interactive Process is conducted on a case-by-case basis, which

means, your situation is unique from anyone else's. Depending upon your circumstances, we will communicate about one or more of the following elements of the Interactive Process:

Element of the Interactive Process	Description
Assess the nature of the medical condition or disability.	<p>Ensuring there is accurate information about your functional capacity or condition is vital to affording you rights, and you exercising your rights.</p> <p>Medical information must be job related and consistent with business necessity; based upon an individualized assessment; and objectively reasonable. Medical information must include impairment to one or more major life activities, major bodily functions, and/or activities of daily living. All information is protected under confidentiality laws.</p>
Determine limitations.	<p>We have to determine if your condition/disability imposes limitations on the performance of one or more essential functionsⁱ of your job. Identification of the essential functions includes discussion, review of the class description, and/or the completion of a job analysis.</p>
Identify forms of accommodation.	<p>Accommodation enables the performance of essential functions by overcoming the limitations. In order to find out if there is such an effective accommodation, we have to explore all possible forms of accommodation.ⁱⁱ</p>
Assess reasonableness.	<p>Accommodation can be provided if it is both effective and reasonable. The basic reasonableness criteria are if the accommodation does not pose a threat to your safety or the safety of others, and/or if the accommodation does not pose an undue hardship on the District's ability to conduct business or finances.</p>
Select reasonable accommodation.	<p>There may be more than one form of accommodation we consider. But we have to select the one(s) that are reasonable.</p>
Plan of Action.	<p>If reasonable accommodation can be provided, then we figure out how to provide it. If it can't be provided, then other options are explored.</p>
Evaluate Effectiveness.	<p>If reasonable accommodation has been provided, then we continue to evaluate its effectiveness after the accommodation is implemented.</p>

Because the Interactive Process is an ongoing process of communication, such communication may be composed of meetings, correspondences (e.g. letters, faxes, emails), and phone conversations over a period of time.

Request for Reasonable Accommodation

If you would like to request reasonable accommodation and participate in the Interactive Process, please complete and submit the enclosed *Request for Reasonable Accommodation* form to the Risk Management Department within thirty (30) calendar days of the date of this letter. If you do not return the form within this time frame, we will assume that you are not requesting reasonable accommodation from the District at this time. In the event that you are not requesting reasonable accommodation at this time, we encourage you to contact us in the future if there are any changes to your accommodation needs. If you need more time or assistance in preparing the form, please contact the Risk Management Department.

Endnotes

ⁱ **Essential** functions are basically why the job exists. If the job didn't exist, then these functions would not get performed. Essential functions are critical to the school district meeting its public education and related legal obligations.

Marginal functions are ancillary to essential functions. If a marginal function is not performed, the organization will not be adversely affected. Their performance is basically optional.

ⁱⁱ Basic forms or types of accommodation include: Accessibility; job modification/restructuring (marginal functions only); assistive devices; flexible leave; modified schedule; reassignment; and training.

Request for Disability Related Accommodation - Confidential

- For complete instructions and important information, see Page 3 of this form.
- Please submit this form to the Risk Management Department after completion.

REQUESTOR INFORMATION

First Name: _____ Last Name: _____

Employee Identification Number (EIN): _____

Please check (✓) if you are seeking accommodation for a position you **hold** or **desire** .

Classification/Job Title: _____

Admin/Supervisor Name/Phone #: _____

Site/ Department: _____

ACCOMMODATION REQUESTED

Accommodation(s) requesting (Be as specific as possible, for example adaptive equipment, reader, schedule change, training, etc.):

Reason for making this request. Please do **not** disclose your diagnosis, prognosis, or specific prescribed medications. Do attach any pertinent medical information such as a note from your doctor explaining your disability related functional limitations. (Examples: walking, hearing, seeing, memory loss, learning, concentrating, lifting, pushing or pulling, working.)

Documentation must be written on the official letterhead of the qualified health professional or health professional's organization. (Credentials identified as M.D./D.O./D.C)

Is your limitation(s):

Permanent Temporary, until; _____ Unknown

Is the above described disability the subject of a Worker's Compensation Claim? Yes No

Do you have a previous reasonable accommodation request on file? Yes No

INTERACTIVE PROCESS

By completing this form, I certify that I have a disability that requires a reasonable accommodation. All information provided is true and correct. I understand my rights and the district's obligations.

Date: _____ Signature: _____

PURPOSE

If you have a medical condition or disability as defined by federal and state law,¹ you have the right to be free from discrimination on the basis of that condition/disability. The district maximizes opportunities for you to receive your disability rights which include the right to be reasonably accommodated and to participate in that decision-making process (i.e. the Interactive Process). The purpose of this form is to give you the opportunity to request reasonable accommodation and engage in the Interactive Process.

MEDICAL INFORMATION/CONFIDENTIALITY

Your disability rights are based upon you having a substantial impairment to one or more major life activities, and/or major bodily functions. You may be asked to provide evidence for such impairment(s) from a qualified and appropriate physician. The physician must describe the level of impairment based upon an individualized assessment, and the physician's conclusions must be objectively reasonable. All medical information is confidential and protected by federal and state confidentiality laws.² Pursuant to these laws, and depending upon circumstances unique to your situation, you may be asked to sign an *Employee's Authorization For Use and Disclosure of Medical Information* form to enable communication between EGUSD and your physician. Within the parameters of these confidentiality laws, information might be shared with superiors on a strictly need-to-know basis.

ESSENTIAL FUNCTIONS

Essential functions are basically the reasons the job exists – i.e. the job exists so these functions can be performed. What constitutes an essential function includes, but is not limited to the function: can only be performed by a limited number of employees; requires particular knowledge, skills and abilities; fulfills the district's and/or a department's mission, goals and objectives (e.g. A function may be performed with low frequency, but when it is performed, it is absolutely critical to providing education.); and the consequences if the function is not performed. Reasonable accommodation enables the performance of essential functions.

REASONABLE ACCOMMODATION

Reasonable accommodation enables the performance of essential functions by overcoming limitations imposed by the medical condition/disability on the performance of essential functions. All possible forms of accommodation are considered, especially your request. Forms of accommodation can include: accessibility; assistive devices; flexible leave; job modification/restructuring (marginal functions only); modified schedule; reassignment; and training. The reasonableness of an accommodation is based upon criteria such as: safety to self and others; and undue hardship to the district's finances and/or business necessity.

INTERACTIVE PROCESS

The Interactive Process is an ongoing process of good faith communication directly between you and the district. Together we communicate about: the nature of your condition/disability (e.g. impairments); limitations on the performance of essential functions; identify forms of accommodation and assess the reasonableness of each; select the best accommodation that is reasonable; develop and implement a plan of action; and if reasonable accommodation has been provided, evaluate its effectiveness. Ongoing communication includes meetings, emails, letters, faxes, and phone calls. We recognize this may be a difficult time in your life. Therefore, as a courtesy, we extend to you the opportunity to have a responsible person assist/support you in this process. Please note that we cannot discuss your issues with someone other than you. If you follow the advice of others, please be mindful that since this is about you and your job, you bear the consequences of their advice.

WHAT TO EXPECT

When we receive your request, we will be contacting you as soon as possible and will guide you through the Interactive Process. If you have any questions, comments or concerns, please do not hesitate to contact the Risk Management Department

¹ The federal Americans With Disabilities Act (ADA), and the California Fair Employment and Housing Act (FEHA).

² The federal Health Information Portability Protection Act (HIPPA), and the California Medical Information Act (CMIA).

NAME
ADDRESS
CITY, STATE ZIP

SUBJECT: **Follow Up IP Meeting**

Dear NAME:

You are invited to participate in a follow up Interactive Process Meeting to further discuss and evaluate potential reasonable accommodations, if any that may be implemented to assist you in performing your essential job functions. The meeting will take place \as follows:

Date:	
Time:	
Location:	

Present at the meeting will be representatives from Risk Management, Human Resources, and your supervisor or manager. You have the right to request support from a union representative, if you wish to do so. To help make this meeting a success, we ask for you to begin your participation by doing the following:

What to do:	How to do it:	Due date:
Confirm your attendance	Please contact the Risk Management Department by phone (916-686-7775), fax (916-685-2606), letter or email by the due date.	
Courtesy Support	When you confirm your attendance, please let us know if you will be bringing someone with you, also by the due date.	
Need for accommodation	If you need a reasonable accommodation to enable you to participate in the Interactive Process, please let us know your request as soon as possible and no later than 24 hours prior to the scheduled meeting.	
Medical Information	Any medical information you have from your healthcare provider regarding your functional limitations and prescribed work restrictions as they	Meeting or in follow-up to the meeting.

What to do:	How to do it:	Due date:
	relate to the essential functions of your position would be very helpful.	
Video	Please view a multimedia presentation we have prepared to give you an overview of the Interactive Process. On your computer, open the following link: http://www.nationaledonline.org/EGUSD	ASAP