



## ***Understanding Disability Law in the State of California***


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...a continuing education program of work-life knowledge for the  
members of the Alliance of Schools for Cooperative Insurance Programs





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## ***The American with Disabilities Act***

- 2 sets of laws**
- The Federal American with Disabilities Act**
- California's Disability Standard**
- Disability in the Workplace Overview**
- I think I'm Disabled...What Do I Do?**
- Returning Back to Work**
- A Time for Questions**



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...an overview



Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.



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An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business.

Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:

- A deaf applicant may need a sign language interpreter during the job interview.
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
- A blind employee may need someone to read information posted on a bulletin board.
- An employee with cancer may need leave to have radiation or chemotherapy treatments.

An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.



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An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation.

Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.



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## ADAAA

President Bush has signed the ADA Amendments Act of 2008 (ADAAA), one of the most sweeping pieces of employment legislation in the past decade. The law—which took effect on Jan. 1, 2009—rolls back a series of U.S. Supreme Court decisions and Equal Employment Opportunity Commission regulations that have narrowed ADA protections. It makes clear that the definitions of "disability" and what it means for a major life activity to be "substantially limited" are to be broadly construed in favor of covering individuals under the ADA.

The ADAAA gives employers nationwide new obligations with respect to disabled workers. It now becomes closely aligned with CA law.


### Key Changes

**Mitigating measures.** The determination of whether an impairment substantially limits a major life activity, raising it to the level of a disability, must now be made without considering the effects of mitigating measures. Thus, some employees with correctable impairments might qualify as disabled. This provision overturns a 1999 U.S. Supreme Court holding that employers could take into account mitigating measures.

Examples of mitigating measures employers now should not factor in include medication, hearing aids or cochlear implants, mobility devices (a wheelchair, for example), and prosthetic devices. Ordinary eyeglasses and contact lenses can be taken into account in making the determination.



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**Major life activities.** The ADAAA provides a sweeping but not exhaustive list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The operation of major bodily functions (the immune, respiratory, reproductive, and neurological systems, for example) also amounts to a major life activity. Previously, federal courts interpreted what a major life activity is fairly restrictively.

The ADAAA also makes clear that an impairment that substantially limits one major life activity need not limit others to be considered a disability. And, the legislation lowers the bar for ADA coverage by rejecting a Supreme Court ruling and a current EEOC regulation that construe "substantially limits" to mean significantly or severely restricted.


**Remission.** Under the ADAAA, an impairment that's in remission or episodic qualifies as a disability if it "would substantially limit a major life activity."

**"Regarded as."** The ADAAA eases the standard for being "regarded as" disabled. Now, in a change from previous law, an individual will have to show only that he or she was discriminated against because of an actual or perceived impairment, even if the impairment doesn't limit or isn't perceived to limit a major life activity.

But, in a bright spot for employers, the ADAAA provides that impairments that are transitory or minor—with an actual or expected duration of six months or less—don't qualify for regarded as protection. What's more, the Act states that you don't have to provide a reasonable accommodation for an individual who's regarded as disabled.





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**2010 Accessible Design**

On July 23, 2010, Attorney General Eric Holder signed final regulations revising the Justice Department's ADA regulations, including the ADA **Standards for Accessible Design**. The official text was published in the Federal Register on September 15, 2010. The final rules take effect on March 15, 2011.

Employers may bring their businesses into compliance with the 2010 Standards for Accessible Design as early as September 15, 2011, but are required to do so no later than March 15, 2012.



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## California and Disability Law



As of **January 1, 2001**, California labor law in relation to disabilities dramatically changed. **AB 2222** expanded the definition of physical and mental disability and **removed California from conformity with the federal Americans with Disabilities Act (ADA)**. Whereas California will acknowledge the ADA statutes, California employers will have to look **first** to AB 2222 in determining what to follow for their employees who are sharing they are disabled. **Under FEHA.**

A physical or mental disability under the state Fair Employment and Housing Act (FEHA) includes one that simply **"limits" a major life activity**. This is very different from the ADA, which defines a physical or mental disability as an impairment that **"substantially limits"** one or more of the major life activities of an individual. In the past, cases had been dismissed before trial on the ground that a physical or mental impairment did not **"substantially limit"** and major life activities.

Removing the word **"substantially"** in the definition of disability makes it significantly easier for employees to establish a disability under California law.



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### AB 2222 brought about 6 major change:



Redefining who is disabled under CA law. The new law **lowers the standard** for determining when a major life activity is limited. ADA: **"unusually difficult"** / CA: **"difficult"**.

This makes it easier for an employee to show they are disabled.

Evaluating someone's condition or impairment **without consideration of mitigating measures**...even when the condition or impairment can be controlled!

ADA candidates/individuals had to be precluded from a class or broad range of jobs...not just A PARTICULAR JOB. With California employees, the **inability to perform A PARTICULAR JOB** can be considered being disabled.

AB 2222 requires employers to engage in a timely, good faith, interactive processes with disabled employees or applicants to determine effective reasonable accommodations. This means actually meeting more than once, trying more than one possible solution and documenting the results.


Just in case employers DID NOT get the message, the new law specifies **SOME** disabilities: HIV/AIDS, hepatitis, epilepsy, bipolar disorder, multiple sclerosis and heart disease to name a few.

**DAMAGES** are **exhaustive**. Under the ADA the maximum fine was \$300,000. Under AB 2222, there are **NO LIMITS** placed on the amount of compensatory and punitive damages! (ouch!!).

Note that ADAAA brought federal law in to align with many of the changes that occurred in CA first.





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### **Disability Status**

A person with a physical or mental impairment that substantially limits a major life activity is "disabled" under the ADA or Section 504. A person with a physical or mental impairment that limits a major life activity is "disabled" under the Unruh Act and other California state laws. Interesting, the definition of substantially limits under ADAAA and limits, under the Unruh act are very similar.

It is helpful to break down the areas of potential disability in to major life activities:





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"Major life activities" include:

- Seeing
- Hearing
- Speaking
- Performing manual tasks
- Sexual relations
- Sleeping
- Breathing
- Concentrating
- Walking
- Caring for oneself
- Learning
- Thinking
- Reproduction
- Interacting with others
- Working

In CA, "**Substantially limiting**" means the impairment significantly restricts how someone can perform a major life activity, compared to the average person. "**Limiting**" means the impairment makes the achievement of a major life activity difficult. Negative side effects of medications may be considered in determining whether someone is substantially limited.





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***What if my condition is stabilized with medication or I use a prosthetic device?***

According to a 1999 United States Supreme Court case, "mitigating measures" should be considered in determining whether an individual is disabled under the ADA. This means if a person is very stable on her medication, or is using a prosthetic, and is not currently substantially limited in a major life activity, that person is not "disabled" under the ADA or Section 504. California law is distinct from, and stronger than, the ADA or Section 504. Under the Unruh Act, Section 11135, and Section 54, mitigating measures may not be considered in determining whether a person is disabled. This means that people who are currently stable due to medications or other treatment are still protected.





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***What is a Qualified Person?***

Disability law defines a qualified person with a disability as an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the position, either with/without reasonable accommodation.

**An employer is not required to hire or retain an individual who cannot satisfactorily perform the job. The need for reasonable accommodation does not make an individual less qualified than another individual who need no accommodation.**



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### ***What is a Disability?***


- **A physical or mental impairment that limits one or more major life activities.** Generally this disability has to be considered permanent in order to qualify, yet under AB 2222, the disability is very broad.

**Examples:**  
**physical impairment:** physiological disorders, cosmetic disfigurement, anatomical loss, neuro, respiratory, speech, hearing loss, etc...  
**mental impairment:** mental retardation, emotional or mental illness, a specific learning disability.

- **Someone having a record of such an impairment...even if you are not currently impaired.**
- **Someone regarded as having such an impairment.** This is intended to protect those not actually disabled if they are PERCEIVED to have a disability. Example: Someone with HIV positive but have not yet acquired AIDS.





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### ***What is the Essential Functions of a Job?***

The essential functions of a job must be identified in order to determine whether a disabled individual is qualified for the job. The essential functions of a job are defined as the fundamental job duties of the position. A job function is essential if the job exists to perform that function. For example, for a position as a proof reader, the ability to proofread documents accurately is an essential function because that is the reason that the position exists. The proofreader going up a flight of stairs to their office is not an essential function.



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### ***What is a Reasonable Accommodation?***



Under disability law, an employer must reasonably accommodate an individual with a disability. In general, a reasonable accommodation is any modification or adjustment in a job, an employment practice, or a work environment which allows an individual with a disability to enjoy an equal employment opportunity. It may include, but not be limited to:

- making existing facilities used by employees readily usable by disabled persons
- job restructuring
- part-time or modified work schedules
- reassigning a disabled individual to a vacant position
- acquiring or modifying equipment or devices
- appropriately adjusting or modifying examination training materials, or policies
- providing qualified readers or interpreters



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### ***What is an Undue Financial Hardship?***



The ADA only requires an employer to reasonably accommodate an individual with a disability; an employer is not required to undergo undue hardship to make such accommodations. The EEOC states that the concept of undue hardship includes any action that is unduly costly extensive or substantial to the particular employer or which would fundamentally alter the nature of the operation of business.




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### ***Documentation of a Disability?***

You may ask for documentation related to a disability to help you accommodate the disability. However, you may not require medical examinations or records unless required for the job. Certain medically-related questions are not allowed under the state Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA). Private.



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### ***Handling an Employee's Return to Work***

If holding the position open while the employee is on leave would create an undue hardship, you must consider the employee for a vacant, equivalent position for the duration of the leave, then reinstate him/her to that position when the need for leave ends.

You may also require that the employee obtain a release to return to work from his/her health care provider stating that he/she is able to resume work. You can use the Certification of Physician or Practitioner for Employee Return to Work for this purpose.

However, require a release only if you apply this practice uniformly or maintain a policy of requiring such releases from other employees returning to work after illness, injury or disability.

If the employee can no longer perform the essential functions of his/her job, reasonable accommodation might include transfer to a different job or schedule.



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### ***Inquiry About a Disability***



The Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA) restrict what kind of questions you can ask applicants and employees, including questions related to a disability.

#### ***Examples of Disability-Related Inquiries***

A "disability-related inquiry" is a question, or series of questions designed to elicit information about a disability. Consider the following examples of disability-related inquiries that are not permitted:

- Asking an employee whether he/she has (or ever had) a disability or how he/she became disabled or inquiring about the nature or severity of an employee's disability;
- Asking an employee a broad question about his/her impairments that is likely to elicit information about a disability; e.g., "What impairments do you have?";
- Asking an employee's coworker, family member, doctor, or another person about an employee's disability;
- Asking about an employee's prior workers' compensation history;
- Asking an employee whether he/she currently is taking any prescription drugs or medications, whether he/she has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
- Asking about an employee's genetic information.



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The Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA) restrict what kind of questions you can ask applicants and employees, including questions related to a disability.

Under the ADA, you may make disability-related inquiries or require a medical examination if you learn about an employee's or applicant's medical condition from another person. The information must be reliable and give rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or that he or she will pose a direct threat to the safety of others due to a medical condition. Consult with counsel prior to making such inquiries.



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**Examples of Inquiries Not Likely to Cause a Problem**

The ADA allows you to ask questions that are not likely to elicit information about a disability. Questions that are permitted include:

- Asking generally about an employee's well-being (e.g., "How are you?"), asking an employee who looks tired or ill if he/she is feeling OK, asking an employee who is sneezing or coughing whether he/she has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- Asking an employee whether a job-related disability will interfere with the performance of the essential functions of a job being performed or under consideration after the employee has self-identified the disability or if the disability is obvious to the observer;
- Asking an employee to provide medical documentation regarding his/her job-related disability after the employee has self-identified the disability or if the disability is obvious to the observer;
- Asking an employee about non-disability-related impairments (e.g., "How did you break your leg?");
- Asking an employee whether he/she can perform job functions;
- Asking an employee whether he/she has been drinking;
- Asking an employee about his/her current illegal use of drugs;
- Asking a pregnant employee how she is feeling or when her baby is due; and
- Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.



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**Workers' Compensation**

You cannot terminate, threaten, or discriminate against an employee because he or she has filed, or is going to file, a workers' compensation claim.

**Basic Requirements**

Under Labor Code section 132(a) you cannot terminate, threaten, or discriminate against an employee because he/she has received an award from, has filed, or even intends to file, a workers' compensation claim. This includes any conduct that is detrimental to the employee unless that conduct "is necessitated by the realities of doing business."

If you must take any negative action against an employee who has either received an award from, has filed, or intends to file a workers' compensation claim, there is a possibility that you could be charged with a discrimination



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***I got injured at home and I now think I am disabled. What am I to do?***

**First and foremost, continue to get better.**

**Next, speak with your immediate supervisor and/or Human Resources to start the process of determining if you are a qualified disabled employee and if so, if and how you can be accommodated.**



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***I became disabled and now have a note to return back to work...now what?***

**Again, contact Human Resources. They will see if accommodation is needed and if so, what can be done to get you back to your position (or another), with or without accommodation.**



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# Questions?

Websites

ehs International, Inc.  
[www.ehsinternational.org](http://www.ehsinternational.org)

ASCIP  
[www.ascip.org](http://www.ascip.org)

ADA  
[www.ada.gov](http://www.ada.gov)

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