

# Interactive Accommodations and Protected Leaves

August 10, 2022

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# Purpose

Educate

Train

Support



# Reasonable Accommodations

# Common Questions about the Americans with Disabilities Act and Employment Practices

ROCKY MOUNTAIN ADA CENTER

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[https://youtu.be/PD9Rh\\_nwQUE](https://youtu.be/PD9Rh_nwQUE)

what's the  
opposite of  
reasonable?



unreasonable, irrational,  
senseless, unwarranted, unsound,  
expensive, implausible,  
nonsensical, illogical



# The Laws

- Americans with Disabilities Act and 2008 Amendments (ADA), 42 U.S.C. Section 12012; 12101 et seq.
- Rehabilitation Act of 1973, 29 U.S.C. Sections 701 et seq.
- California Fair Employment and Housing Act (FEHA), Govt Code Sections 12940 et seq.

# What is a Disability?

ADA defines an individual as having a “disability” if...

- 1) The individual has a physical or mental impairment that substantially limits one of more major life activities
- 2) The individual has a record of such an impairment
- 3) The individual is perceived as having a physical or mental impairment

# Special Note: what is not a disability

While the list is long, some commonly presented characteristics that are not considered a disability include:

- Age
- Obesity, unless it is based on a physiological disorder affecting one or more of the basic bodily systems and limiting a major life activity (i.e. a genetic condition affecting metabolism)
- Stress and Depression, unless they result in a documented physiological or mental disorder



# Major Life Activities

“Major life activities” are those basic activities that an average person can perform with little or no difficulty.<sup>41</sup> The ADA<sup>42</sup> provides a non-exhaustive list of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.<sup>42</sup> The ADA<sup>43</sup> also specifies that major bodily functions are also major life activities, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>43</sup> The ADA<sup>44</sup> provides that the definition of disability “shall be construed in favor of broad coverage of individuals.”<sup>44</sup>

# What do the Laws protect?

Discrimination based on disability under ADA is prohibits in regards to...

- Recruitment, advertising and job application procedures;
- Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff termination, right of return from layoff, and rehiring;
- Rates of pay or any other form of compensation and changes in compensation;
- Job assignments, job classifications, organizational structures, position descriptions, lines of progression and seniority lists;
- Leaves of absence, sick leave, or any other leave;
- Fringe benefits available by virtue of employment, whether or not administered by the employer;
- Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
- Activities sponsored by a covered entity including social and recreational programs; and

...and any other term, condition, or privilege of employment

# How do we know?

- Known or should have known standard
  - Perception
  - Applicant or Employee reveals the disability or need for accommodation
  - Extended Leaves
  - Rumor
- In general, it is the employee's responsibility to notify employer about a needed accommodation

# Medical Information

- The District will not ask for a diagnosis
- Pre-offer drug testing (for illegal drug use) does not constitute a medical exam
- Questionnaires to determine functional limitations
- Fitness for Duty Exams – when needed to determine if the



# Functional Limitations

Employee Name \_\_\_\_\_ Location \_\_\_\_\_ Employee Number \_\_\_\_\_

Employee has restrictions Yes  No  Estimated duration of the restrictions? \_\_\_\_\_

## Posture/Movement

*Please indicate in hours/minutes*

Example Sit for 2 Hrs at a time for a total of 8 Hr with a 15 mi break of sitting \_\_\_\_\_ standing x walking x

Sit for \_\_\_\_\_ at a time for a total of \_\_\_\_\_ with a \_\_\_\_\_ break of sitting \_\_\_\_\_ standing \_\_\_\_\_ walking \_\_\_\_\_

Stand for \_\_\_\_\_ at a time for a total of \_\_\_\_\_ with a \_\_\_\_\_ break of sitting \_\_\_\_\_ standing \_\_\_\_\_ walking \_\_\_\_\_

Walk for \_\_\_\_\_ at a time for a total \_\_\_\_\_

## MENTAL AND PSYCHOLOGICAL DEMANDS

### Basic work

	Yes	No
Follow verbal instructions	<input type="checkbox"/>	<input type="checkbox"/>
Follow written instructions	<input type="checkbox"/>	<input type="checkbox"/>
Maintain the established workflow	<input type="checkbox"/>	<input type="checkbox"/>
Maintain the established work pace	<input type="checkbox"/>	<input type="checkbox"/>
Adhere to established work and safety procedures	<input type="checkbox"/>	<input type="checkbox"/>

### Interaction with Others

	Yes	No
Work cooperatively with coworkers	<input type="checkbox"/>	<input type="checkbox"/>
Interact and deal with customers or the public	<input type="checkbox"/>	<input type="checkbox"/>
Direct or supervise others	<input type="checkbox"/>	<input type="checkbox"/>
Maintain composure under all circumstances	<input type="checkbox"/>	<input type="checkbox"/>
Respond appropriately to direction and evaluation	<input type="checkbox"/>	<input type="checkbox"/>
Work autonomously, or with minimal supervision	<input type="checkbox"/>	<input type="checkbox"/>

### Attention to Task/Details

	Yes	No
Perform simple or repetitive tasks	<input type="checkbox"/>	<input type="checkbox"/>
Perform complex or varied tasks	<input type="checkbox"/>	<input type="checkbox"/>
Organize tasks and set priorities	<input type="checkbox"/>	<input type="checkbox"/>
Perform and or direct multiple tasks simultaneously	<input type="checkbox"/>	<input type="checkbox"/>

### Decision Making

	Yes	No
Give training or instruction	<input type="checkbox"/>	<input type="checkbox"/>
Use basic problem-solving techniques	<input type="checkbox"/>	<input type="checkbox"/>
Make independent judgments and decisions based on data/circumstances	<input type="checkbox"/>	<input type="checkbox"/>

# Fitness for Duty

Ninth Circuit Court of Appeals on a public employers right to conduct fitness for duty exams:

“The government clearly has a valid concern with the productivity and stability of its work force. Citizens rightly expect the government to operate as effectively and efficiently as it can, given the diverse task with which it is charges. The government cannot operate with any degree of efficiency if its employees miss work...Regular performance of [an employee’s] work is a prerequisite for...most if not all full-time governmental jobs.”

## Then What?

- If the employee is determined to have a disability that limits one of more major life activity, then the employer will engage in the interactive process to evaluate if there are any reasonable accommodations that would enable the employee to perform the essential functions of the position

# The interactive Process

## What is Reasonable?

- Job-related
- Reasonable and good faith effort
- Modifications and adjustments that enable employees with disabilities to enjoy the benefits and privileges of other employees
- Customarily done
- Not an undue hardship



# Steps of The Interactive Process

- Analyze job function
- Identify precise limitations
- Identify possible accommodations and assess how each will enable the ee to successfully perform job functions
- Consider employee's preference and implement accommodation that is most appropriate for employee and employer

# Union Representation/ Support Person



# Forms of Reasonable accommodation

Examples:

Modifications to job application process

Making facilities accessible

Modified work schedule

Acquisition of equipment or devices

Permitting the use of accrued paid leave or providing additional unpaid leave

Providing reserved parking space

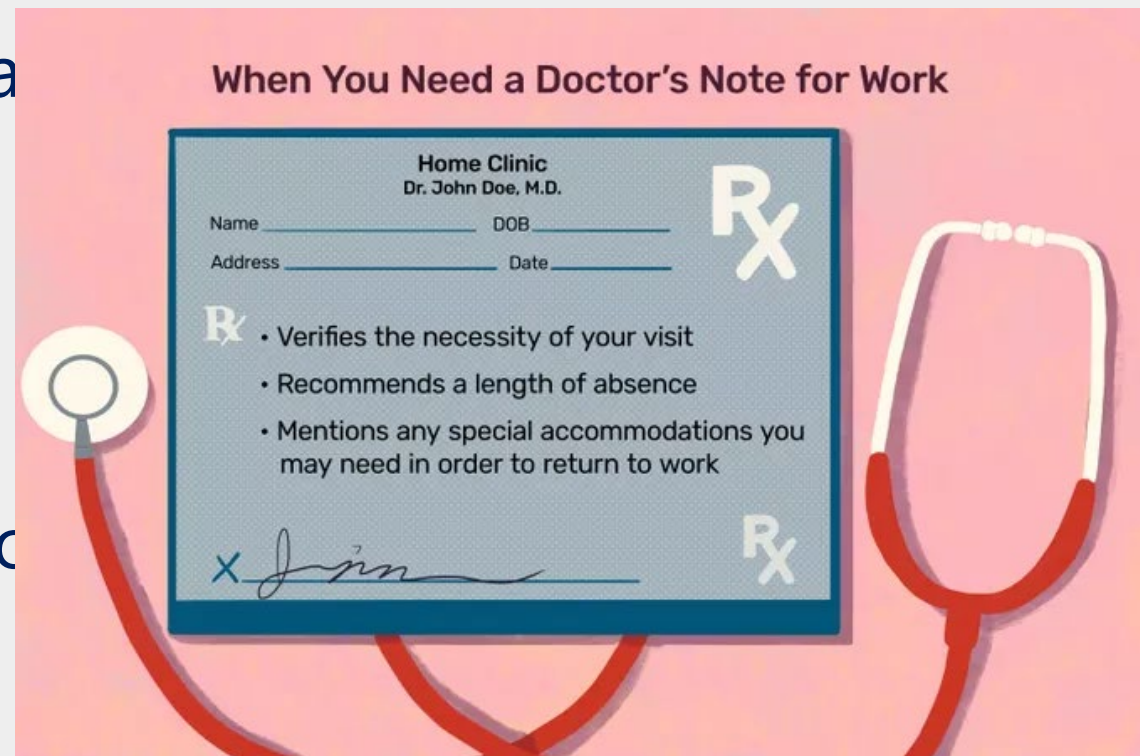
Allowing the qualified individual with a disability to provide and use equipment, aids, and services that employer is not required to provide

# Quiz

The employee's physician submits – via the employee – a note that states that the employee has a medical condition for which 3 hours of paid break

Is this reasonable?

Does this note provide a work restriction or limitation?



# Protected leaves



# FMLA & CFRA

Family and Medical Care Leave

California Family Rights Act of 1993

Overlap and Diverge:

Employer follows whichever is of greater benefit to the employee

# FMLA/CFRA: Reasons for Leave

## **FMLA**

- Birth of child and care for newborn
- Placement of a child with ee for adoption or foster care
- Serious health condition of self or family
- Qualifying exigency
- Care for service member

## **CFRA**

Most FMLA conditions, and covers domestic partners

Does not include pregnancy or related medical condition under “serious health condition”

# FMLA/CFRA: Required?

Case law ebbs and flows on the requirement of the employer and employee to apply FMLA/CFRA.



## FMLA/CFRA: Paid Leave?

Employees may use accrued sick leave to pay themselves during any FMLA/CFRA absence, but these leaves do ensure paid status. Rather, they provide protections.

# FMLA and CFRA Eligibility

## FMLA

- Employed for at least 12 months
- 1,250 hours of service during 12-month period prior to leave

## CFRA

- Employed for at least 12 months
- 1,250 hours of service during 12-month period prior to leave

Exception to 1,250 hours: Parental Leave

# FMLA/CFRA: How much leave?

## **FMLA**

- 12 workweeks of leave during any 12-month period
- 26 weeks for care of a service member in ees family

## **CFRA**

- 12 workweeks of leave during any 12-month period
- 26 weeks: active duty for employee's spouse, registered domestic partner, or parent

Leave may be used consecutively or intermittently

# PDL: Pregnancy Disability leave

Eligibility: Pregnancy disability

How much leave: 4 months (based on hours worked per week)

Use of leave: consecutive or intermittent

# CFRA Baby bonding

12 weeks of leave is applied up to one year after child's birth

Bonding leave must be taken in a minimum of 2-week blocks

(some exceptions)

# Chart of FMLA/CFRA/PDL

	<b>Pre-birth Disability</b>	<b>Post-birth Disability</b>	<b>“Bonding”</b>
<b>Health Care</b>	FMLA and PDL	FMLA and PDL	CFRA
<b>Job Protected</b>	FMLA and PDL	FMLA and PDL	CFRA
	Up to four months (FMLA runs concurrently until available FMLA expires)	Up to four months total, including any pre-birth PDL (runs concurrently with available FMLA)	12 Weeks

# Questions?