

Reasonable Accommodations in the Workplace

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Legal Aid Society – Employment Law Center

AIDS Legal Referral Panel
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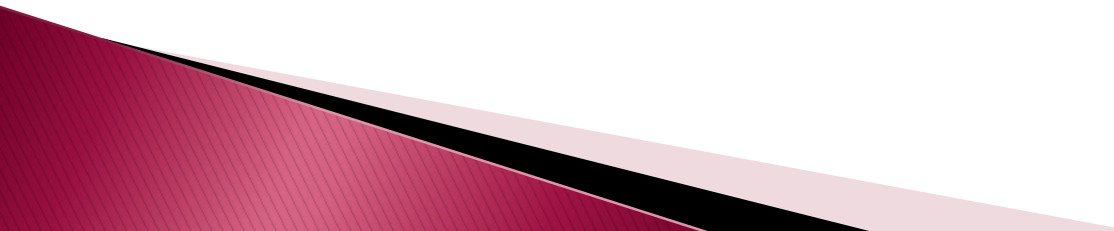
Federal Protections

- ▶ Federal Americans with Disabilities Act of 1990 (ADA) (amended 2008)
- ▶ Federal Rehabilitation Act of 1973 (Rehab Act)
 - Federal Employers
 - Federal Contractors
 - Recipients of Federal Funds

State Protections

- ▶ California Fair Employment and Housing Act (FEHA)

Covered Employers

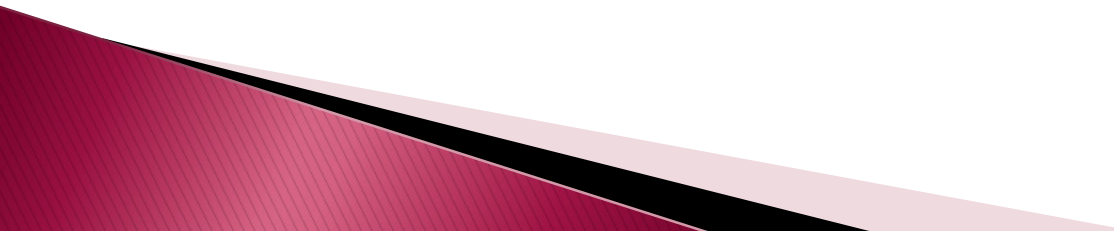
- ▶ Under Federal Law – 15 or more employees
 - ▶ Under State Law – 5 or more employees
 - Does not cover federal government or religious employers (except healthcare)
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Establishing “Disability” under the ADA

ADA Definition – 3 prong definition

- Physical or mental impairment that substantially limits one or more of the major life activities of an individual
- Record of such an Impairment
- Regarded as having such an impairment

The ADA Amendments Act of 2008

- 1) Broad construction of disability
 - 2) Mitigating measures no longer considered
 - 3) Conditions that are episodic or in remission are assessed in active state
 - 4) New major life activities of bodily functions (e.g. neurological, brain, respiratory, circulatory)
 - 5) Expanded “Regarded as” prong
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Establishing Disability under the FEHA

- ▶ FEHA's definitions require only a limitation of a major life activity
- ▶ Cal. Gov't Code 12926.1(c): “Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.”

New EEOC Guidance

- ▶ On pregnancy discrimination
 - Clarifies that pregnancy is not a disability
 - But pregnancy-related complications might be disabilities
- ▶ Updated EEOC guidance on cancer, diabetes, epilepsy, and intellectual disabilities (f/k/a “mental retardation”)

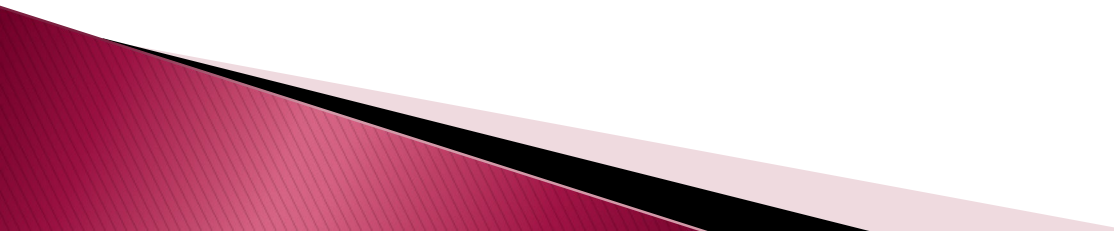
Protections Available under the ADA/FEHA

- ▶ No discrimination in terms, conditions, privileges of employment
 - ▶ No harassment
 - ▶ No segregation
 - ▶ Reasonable accommodation unless employer can show undue hardship
 - ▶ Interactive process
 - ▶ No discrimination on the basis of association with people with disability
 - ▶ Restrictions on medical inquiries
 - ▶ No retaliation or interference
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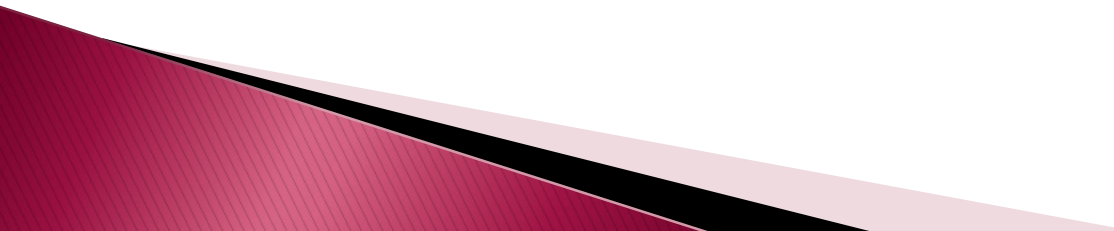
Reasonable Accommodations

- ▶ “Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities”
 - Enable employees with disabilities to perform essential functions
 - Allow employees with disabilities to enjoy the same “benefits and privileges of employment” enjoyed by non-disabled employees (e.g., promotional opportunities, training, services, social functions)

Examples of Common Reasonable Accommodations

- ▶ Making existing facilities used by employees readily accessible to and usable by persons with disabilities
 - ▶ Job restructuring
 - ▶ Part-time or modified work schedules
 - ▶ Leave
 - ▶ Reassignment to vacant position
 - ▶ Acquisition or modification of equipment or devices
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Examples of Common Reasonable Accommodations (cont.)

- ▶ Modified training
 - ▶ Modified supervisory methods
 - ▶ Modifications of employer policies
 - ▶ Provision of qualified readers or interpreters
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Examples of Accommodations by Limitation

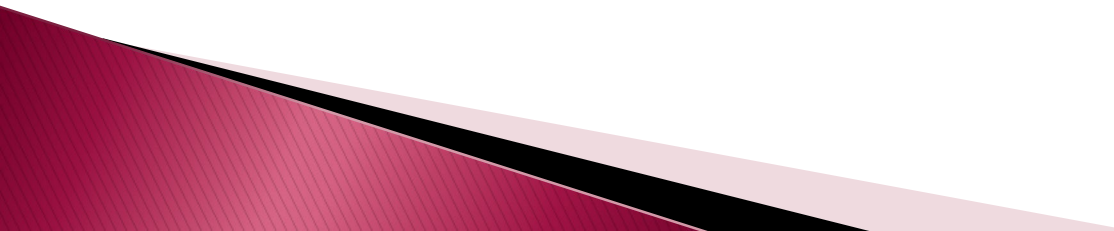
▶ **Organization:**

- Use daily, weekly, and monthly task lists; use calendar with automated reminders to highlight meetings and deadlines

▶ **Stamina During the Workday:**

- Allow longer or more frequent work breaks; allow telecommuting

▶ **Difficulty Handling Stress and Emotions:**

- Provide praise and positive reinforcement; allow telephone calls during work hours to doctors and others for needed support; allow the presence of a support animal
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Further Examples

▶ **Attendance:**

- Allow flexible work environment: Flexible scheduling, modified break schedule or leave for medical appointments including therapy

▶ **Concentration:**

- Reduce distractions in the work area: space enclosures, panels or use headphones


▶ **Memory:**

- Provide written minutes of meetings; allow additional training time

Leave as an Accommodation

- ▶ Employees who do not qualify for or have already exhausted FMLA/CFRA leave may still be able to take leave as a reasonable accommodation
- ▶ Differences from leave under FMLA/CFRA
 - No strict, pre-defined time limitation (but cannot be indefinite)
 - Employer can deny based on undue hardship
 - Employer not required to continue benefits during leave taken as an accommodation under ADA/FEHA

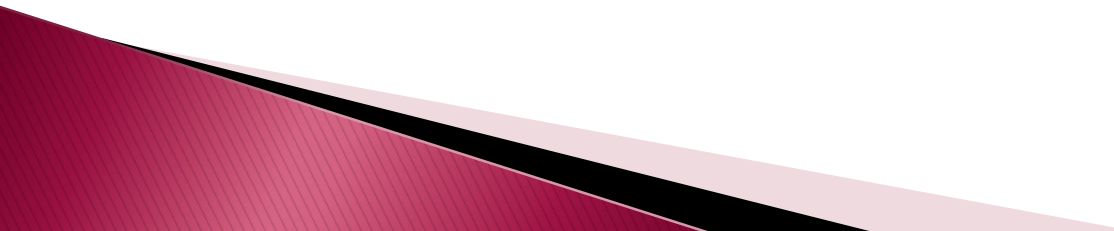
Job Accommodation Network (“JAN”)

- ▶ Service of the U.S. Department of Labor’s Office of Disability Employment Policy
 - ▶ Provides free consultations to employees with disabilities and their employers regarding disability-specific accommodation ideas
 - ▶ 1-800-526-7234
 - ▶ askjan.org
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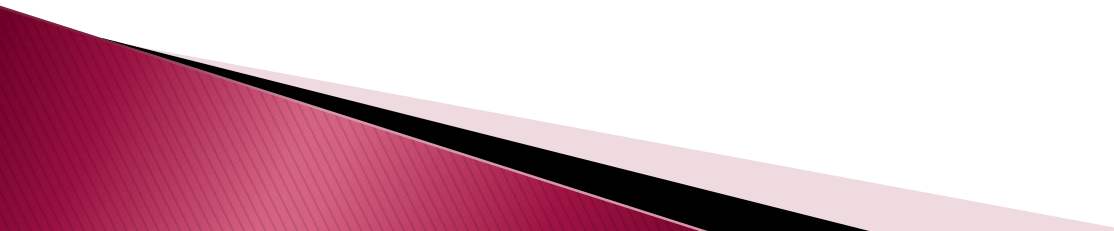
What are NOT Reasonable Accommodations?

- ▶ Elimination of an essential job function
- ▶ Lowered production standards (where production standards are consistently applied to all employees)
- ▶ Employer-provided personal use items needed in accomplishing daily activities **both on and off the job** (e.g., wheelchair, eyeglasses, hearing aids)

Reasonable Medical Documentation

- ▶ Confirms disability by describing impairment and limitation of major life activity
 - ▶ Confirms need for reasonable accommodation
 - ▶ Explains link between disability and need for reasonable accommodation
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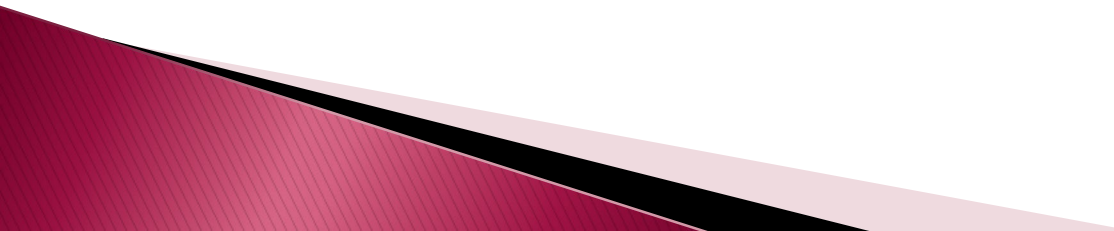
Timing for Requesting an RA

- ▶ Can request at any time
 - ▶ Wise to request before performance suffers
 - An employer must make reasonable accommodation to enable employee with disability to meet a conduct standard in the future
 - However, an employer is not required to excuse past misconduct even if it is the result of an employee's disability
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Undue Hardship

- ▶ Significant difficulty or expense, considers the resources of the particular employer
- ▶ Includes accommodations that are unduly extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business

Key steps in a Failure-to-Accommodate Claim

- ▶ Employee's request for an accommodation (unless need for one is obvious)
 - ▶ Requirement that both parties engage in flexible, interactive process
 - ▶ Identifying accommodation that is reasonable and would not pose an undue hardship
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Medical Inquiries:

Pre-offer (application/interview)

- ▶ ADA/FEHA prohibit any and all disability-related inquiries at the pre-offer stage
 - What impairments do you have?
 - What prescription medications do you take?
 - Have you ever been hospitalized?

- ▶ Employer can ask whether you can perform essential job functions
 - Are you able to meet this job's attendance requirements?

Medical Inquiries: After Conditional Job Offer

- ▶ Federal law: Exams and inquiries allowed
- ▶ State law: Only allowed if job-related and consistent with business necessity

Medical Inquiries: After Employment Begins

- ▶ Disability-related inquiries and medical examinations allowed only if job-related and consistent with business necessity.
 - “Job-related and consistent with business necessity”: when employer has reasonable belief based on objective evidence that either (1) employee’s ability to perform essential function will be impaired by medical condition; or 2) employee will pose a direct threat due to a medical condition.

Administrative Requirements

- ▶ File with the EEOC within 300 days

SF EEOC 415-625-5600

www.eeoc.gov

- ▶ File with the DFEH (within 1 year)

800-884-1684

www.dfeh.ca.gov

Any questions?

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