ADMIN 101:
A Manager’s Employment Relations Primer

Presented by:

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With offices in Los Angeles, Fresno and San Francisco, the law firm of Liebert Cassidy Whitmore represents public agency management in all aspects of labor and employment law, labor relations, and education law. The Firm’s representation of community college districts as well as school districts, cities, counties, special districts, and transit authorities throughout California, encompasses all phases of counseling and representational services in negotiations, arbitrations, fact findings, and administrative proceedings before local, state and federal boards and commissions, including the Public Employment Relations Board, Fair Employment and Housing Commission, Equal Employment Opportunity Commission, Department of Labor and the Office for Civil Rights. The Firm regularly handles a wide variety of labor and employment litigation, from the inception of complaints through trial and appeal, in state and federal courts.

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This workbook contains generalized legal information as it existed at the time the workbook was prepared. Changes in the law occur on an ongoing basis. For these reasons, the legal information cited in this workbook should not be acted upon in any particular situation without professional advice.
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INTRODUCTION

To effectively manage public employees today’s administrators and supervisors need to be aware of the many laws, rules, and policies affecting the workplace. The United States and California constitutions and statutes, case law, administrative regulations and decisions, collective bargaining agreements, and district personnel rules and board policies all shape the relationship between the employee associations and management, the employer and employee. An administrator or the supervisor’s ability to readily identify legal issues arising out of these relationships is a major factor in promoting productivity, protecting the district from liability, and ultimately being a more effective manager.

This workbook is, therefore, intended to serve as an administrator or supervisor’s basic survival guide in identifying and handling various legal issues. The workbook uses the terms of administrator, manager and supervisor in discussing the responsibilities of the administration and the district in this workbook. The workbook contains sections on management rights, grievances, employee performance evaluations, the disciplinary process, personnel files, and discrimination. The sections include an overview of these subjects with checklists and sample forms.

It is always important to note that labor and employment laws are constantly changing. The answer or direction an administrator or supervisor takes today might not be the appropriate response tomorrow or next month. The best approach is to work as a team with your human resources department, general counsel, and/or labor and employment relations attorney. With this team approach, along with the information in this workbook, you will be able to make important personnel decisions with confidence.

SECTION 1 MANAGEMENT RIGHTS/PAST PRACTICE

A. DUTY TO NEGOTIATE

The Educational Employment Relations Act (EERA) requires community college districts, among others, to negotiate with employee organizations regarding potential changes to “matters relating to wages, hours of employment, and other terms and conditions of employment.” Terms and conditions of employment mean health and welfare benefits as defined by statute, leaves, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, procedures for processing grievances, among other things. For example, the District must negotiate with the employee organizations regarding overtime pay, extra-duty pay, severance pay for laid-off employees, vehicle and travel expenses, timing and method of payment of wages, various benefits, school calendar applicable to the work of employees, scheduling of holidays and holiday pay, released time, leaves and
vacation, preparation time, establishment of faculty service areas, and a multitude of other terms and conditions.

All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating.

The phrase “management rights” refers to these areas in the employer-employee relationship that are not the subject of negotiation. These rights, often identified in the “management rights” clause of a collective bargaining agreement, are not within the scope of bargaining because they are intrinsic to the district’s management role. While the district is required to bargain over changes in such matters, it must bargain on their effects if there is an impact on wages, hours, or other terms and conditions of employment.3

Unless otherwise negotiated in the collective bargaining agreement, the matters that have traditionally been considered “management rights” and which are not subject to bargaining include:

- Determining the staffing levels and how the district structures its workforce.
- Directing the workforce and determining what work is to be performed by employees.
- Hiring, promoting, transferring, assigning and retaining employees and suspending, demoting, discharging or taking disciplinary action against employees.
- Directing and managing the employees of all divisions and departments.
- Decision to reorganize.
- Decision to layoff employees, but duty to negotiate the effect of the layoff.
- Decision to create or abolish a job classification but duty to negotiate any effects that fall with the scope of representation.
- Determining the size and composition of all divisions and departments, and establishing work schedules and assignments.
- Taking whatever actions may be necessary to carry out the mission of the district in situations of emergency.

Although the above are generally accepted management rights and prerogatives, this does not mean that management’s right to implement these prerogatives will not be challenged. The unique adversary nature of collective bargaining means administrators and managers must remain alert to such challenges at all times.

**B. THE MORALE FACTOR**

Administrators, managers, and supervisors must appreciate the impact of collective bargaining on day-to-day operations and develop a positive perspective toward dealing with employee
organizations. This perspective must include the important consideration of preserving fundamental management rights.

The first-line supervisor and middle manager must be knowledgeable about the district’s position with respect to applicable management rights. Know these rights and the scope of management’s discretion before any decision is made at first or middle levels of management. In this regard, the supervisor responding to an employee complaint and/or grievance must know enough to provide a reasonable explanation as to why the district is denying the employee grievance. Otherwise, employee morale may suffer if the employee feels that his or her grievance was improperly denied.

Furthermore, in denying a grievance, management should guard against making arbitrary, capricious, unreasonable, or discriminatory decisions. In effect, “management rights” should always be used as a defensive mechanism and not an offensive tactic. This will help to ensure that management’s decision is upheld in an administrative or judicial proceeding.

C. THE FIRST LINE SUPERVISOR’S ROLE AND A NOTE ON SHARED GOVERNANCE

The first-line supervisor has a major responsibility to:

- Implement and protect management rights.
- Carry out obligations imposed on management by the labor relationship.

Supervisors are involved in the day-to-day application of the collective bargaining agreement and therefore must know the contents of the agreement. They should operate on the premise that management has a right to make decisions and to protest when it feels there has been a violation of the agreement’s terms. Failure to carry out and exercise the fundamental rights of management will establish an unfavorable past practice. An inattentive supervisor can give away or abrogate the basic rights of management by simply allowing abuses to develop and continue.

The first-line supervisor is frequently the only management-level person with whom the majority of classified employees have direct contact. In effect, the supervisor is management. Therefore, she or he not only has the responsibility for interpreting the collective bargaining agreement, but has the paramount responsibility for supporting and preserving management’s positions, and for communicating these positions to the employees.

This is as true with academic employees as with classified employees. Deans are often the first-line, day-to-day decision makers. Practices often originate with them, and become established.

1. A NOTE ON SHARED GOVERNANCE

In addition to being alert to employee’s organizational rights under the EERA, supervisors must understand the complex interplay between organizational rights and shared governance obligations unique to community college districts. Community college districts are required by law to develop procedures to ensure staff, faculty and student involvement in district and college
governance. This both impacts the traditional notion of managerial rights, and complicates district compliance with employees’ organizational rights.

Specifically, in 1988, the California legislature enacted AB 1725 which, among other things, mandates community college districts to:

“[e]stablish procedures to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, and to ensure that these opinions are given every reasonable consideration, and the right to participate effectively in district and college governance, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.”

[Education Code Section 70902(b)(7).]

With respect to classified employees, the implementing regulations state that governing boards, “shall not take action on matters significantly affecting staff until it has provided staff an opportunity to participate in the formulation and development of those matters through appropriate structures and procedures . . . .” [Title 5, California Code of Regulations § 51023.5(a)(5).]

With respect to faculty, the implementing regulations state that the “primary function” of an academic senate is to make recommendations regarding “academic and professional matters.” [Title 5, California Code of Regulations § 53200(b).] The regulations limit “academic and professional matters” to eleven enumerated categories, as follows:

1) curriculum;
2) degree and certificate requirements;
3) grading policies;
4) educational program development;
5) standards or policies regarding student preparation/success;
6) district and college governance structures, as related to faculty roles;
7) faculty roles in accreditation;
8) policies for faculty professional development activities;
9) program review processes;
10) institutional planning processes; and
11) other academic and professional matters, as are mutually agreed upon between the governing board and the academic senate.
The regulations define “consult collegially” as permitting consultation through one of two methods:

- relying primarily on the advice of the academic senate; or
- the obligation to reach mutual agreement.

The regulations do not dictate which form of collegial consultation districts should utilize, but rather leave that determination to the discretion of individual districts. Therefore, administrators should also be familiar with district governance policies and procedures.

Further, in 2003, the legislature passed AB 235 (Education Code Section 70901.2), which gives exclusive representatives of classified employees the authority to appoint classified members to college and district task forces, committees and other governance groups. PERB explained that this “legislation merely states that once it is determined that a community college committee is to have a classified employee representative, he/she must be appointed by the exclusive representative.” AB 235 does not address the, “broader issue, i.e., whether specified committees will include an employee representative . . . .” Rather, districts should continue to refer to the procedures established in response to AB 1725 for determining whether it is appropriate to include classified employees in the composition of a governance group.

Implementing this constellation of shared governance statutes and regulations requires districts to distinguish carefully between matters that are the subject of negotiation under the EERA. In SEIU, Local 535 v. Ventura County Community College District, for example, the District was found to have violated the EERA by providing assistance to its classified employees’ senates. The evidence showed that, among other things, the District provided financial assistance to the senates, and dealt with them on negotiable topics including layoffs, early retirement, change in hours and agency-shop fees. The ALJ rejected the District’s argument that the rules of non-interference did not apply after passage of AB 1725.

The regulations prohibit any interference in the right of employees to engage in protected conduct and interference with negotiated agreements. They show sensitivity to the rights of exclusive representatives and make clear an intent that shared governance should not intrude upon collective bargaining relationships.

The regulations also make it clear that shared governance is inapplicable to matters within the EERA scope of representation.

With this distinction in mind between matters that are—and are not—mandatory subjects of bargaining, districts should approach their shared governance obligations with these general guidelines in mind:

- “Governance groups” are those committees, task forces and other groups that are convened to assist in the development of district and/or college policies or procedures;
- Groups that are convened to make one-time, particularized decisions without developing or altering district policies or procedures are not
“governance groups.” Examples of groups convened to make one-time, particularized decisions include: hiring committees, purchasing committees, and facilities committees;

- While not expressly prohibited, districts should avoid forming “governance groups” to address matters within the scope of bargaining;

- Education Code Section 70901.2 does not require districts to establish governance groups at the demand of the exclusive representative, or to include classified representation on an existing governance group at the demand of the exclusive representative;

- Education Code Section 70901.2 does not prohibit districts from allowing other employee groups that it has officially recognized (such as a classified senate) to appoint additional classified representatives to governance groups (unless they address matters within the scope of bargaining); and

- Where classified organizations, other than the official representative participate in governance groups, “[t]hese organizations shall not receive release time, rights, or representation on such task forces, committees, or other governance groups exceeding that offered to the exclusive representative of classified employees.” [Title 5, California Code of Regulations § 51023.5(a)(7)(C).] Thus, supervisors must make sure that release time is afforded equally to all classified members of governance groups.

D. PAST PRACTICE

The concept of “past practice” is critical to the interpretation of the rights of the parties under a collective bargaining agreement (CBA). Where a CBA is silent on an issue, or where the language is ambiguous, courts may consider the past practice of the parties to establish their respective rights.

To be binding, a past practice must be:

- Unequivocal;
- Clearly enunciated and acted upon; and
- Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.6

The California Public Employment Relations Board has described a valid past practice as one that is “regular and consistent” or “historic and accepted.”7
The areas most commonly associated with past practice arguments include:

- Benefits or working conditions such as procedures for granting personal leave (e.g., vacation);
- Overtime;
- Seniority rights;
- Call back procedures; and
- Lunch and other breaks.

For example, the issue of leaves of absence can be a thorny one for administrators in terms of past practice. Granting many types of leaves is a management prerogative, absent some language in the CBA or the board policies which restrict management’s authority. However, an administrator can unwittingly establish a binding practice by, for example, allowing employees to take leave without following the established policies and procedures.

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In order to identify and avoid negative past practice ask some of the following basic questions:

- Am I consistently implementing, and enforcing, current rules and policies? (Consistency in application can also minimize exposure to discrimination claims.)
- Am I holding employees in my department accountable for basic responsibilities (e.g., punctuality, satisfactory attendance, etc.)?
- Is there any laxity or disparity in disciplining employees?
- Are there any procedures that I now need to curtail or eliminate before they become a binding and undesirable past practice?

**E. EXAMPLES OF PAST PRACTICE**

The following are a few examples of decisions in which past practice has played a major role.

**1. MANAGEMENT POSITION UPHELD**

- Payment of medical travel expenses were not required by limited past practice. The past practice indicated that in the past five years, only nine of 200 employees who had sustained on-the-job injuries were reimbursed.8

- Public employer was not required to allow union to continue to hold union picnic during regular working hours. Despite the fact that picnics had been held on employer time for a long period of time, and the practice was considered binding, the employer’s position was upheld because social and
economic circumstances surrounding the employer’s operations changed and the employees’ union itself broke with past practice in scheduling the picnic.9

- School district was not required to negotiate the adoption of a policy requiring termination of any bus driver who failed to pass a recertification test. District did not engage in “past practice” of accommodating bus drivers who failed to pass their recertification tests, since there was only one clear instance and two “somewhat tainted” instances of post-revocation accommodation.10

2. MANAGEMENT POSITION DENIED

- Employer improperly discontinued paying time and one-half premium pay for Sunday work which had been paid pursuant to “past practice” without discussing matter during contract negotiations, despite employer’s claim that contract did not provide for payment of Sunday premium pay. Employer’s action constituted unilateral change in term and condition of employment.11

- Employer improperly added definition of word “serious” to incident exception clause of sick leave provision that had not been defined in any of the parties’ agreements, except that “past practice” had defined the term for the parties.12

- School district improperly prohibited school police detectives from using district automobiles for transportation to and from home. Detectives’ use of district’s vehicle for commuting to and from home was mandatory subject of bargaining, since the district had created a binding “past practice” of permitting detectives to use the district’s vehicle to commute for the past 14 years.13

3. REVISI NG PAST PRACTICE

A district’s discretion to take unilateral action on a practice that is subject to the duty to negotiate is rather limited. Unless there is clear and unambiguous contract language granting management the ability to act or the exclusive representative has by its conduct knowingly waived the right to negotiate (or in limited circumstances in the event of an emergency), the district must provide the exclusive representative with reasonable notice and an opportunity to negotiate concerning the proposed change in the practice. (If there is a binding labor agreement in place and it contains a “zipper clause,” the district may be foreclosed from forcing the union to the bargaining table. If such a situation occurs, legal counsel should be sought to obtain specific advice regarding available options.)

If there is no exclusive representative in place, a district generally has the right to change a past practice so long as it provides reasonable notice (see below).
The possible negotiation obligation aside, in order to modify an established practice, the district must:

- Publicize the intent to change the practice. Supervisors should be able to show by documentation that the employees were notified of the intention to change a practice. For example, this may be done by memorandums, directives or bulletins in which the supervisor points out how it has come to the latter’s attention that procedures are not being followed and need to be adjusted. It is important to remember the supervisor is merely putting employees on notice of an impending change; the supervisor should not make the effective date of such modification or change immediate.

- Consider the time element. Having publicized the intent to make such a change, the supervisor must now allow a sufficient amount of time for all employees to become informed, and to make the adjustment to what may constitute “new” ground rules. This period also provides an opportunity for dialogue with employees regarding the change. There is, of course, no hard and fast rule as to what length of time is required for a reasonable interval between announcement and implementation. The experienced supervisor will understand the purpose here is to provide ample transition time for conscientious employees to adapt to the change, and also to allow for any possible objections which might be forthcoming from individuals or the union. In addition, the supervisor should make clear to employees that all previous written directives regarding the practice are to be superseded by the “new” directive.

F. **BINDING PAST PRACTICE CHECKLIST**

- Does CBA address the issue?
  - If so, in clear and unambiguous terms?
  - If contract language not absolutely clear, can intent of parties be ascertained from negotiating history (prior CBAs, negotiating notes)?

- If CBA is silent on issue, is it a matter subject to the negotiation requirements under the EERA?
  - If yes, is there a binding practice? Has the alleged practice been clear and consistently applied? Has the practice been followed with a reasonable degree of frequency (as opposed to a few isolated instances) and for a reasonable period of time? Did employees and supervisors have knowledge of the alleged practice and regard it as the customary means of handling the issue?
  - If these standards were met, are the factual circumstances of the claim similar to the circumstances that gave rise to the binding past practice?
To some extent, employers may unilaterally change a past practice without committing either an unfair practice or a breach of contract, as long as the new practice is permitted by contractual provisions.\textsuperscript{14}

G. OTHER AUTHORITIES

Under EERA, when there is a conflict between the Education Code and a collective bargaining agreement, the Education Code prevails. But when there is a conflict between a district’s rules and regulations and a lawful collective bargaining agreement, the collective bargaining agreement prevails.\textsuperscript{15}

SECTION 2  EMPLOYEE GRIEVANCES

Effective dispute resolution is crucial to the success of any CBA. Parties typically resolve disputes through their CBA grievance procedure, which helps avoid litigation and ensure employees that the rights contained in the CBA will be enforced.

The grievance procedure provides management with an open and orderly procedure to appraise management decisions. Proper administration of the grievance procedure avoids discontent and resentment, which might otherwise lead to low morale, low productivity, or serious disruption in the workplace.

A. THE GRIEVANCE PROCEDURE

Administrators and supervisors, as agents of management, make operating decisions to the best of their knowledge and ability. Supervisors do not have to confer with the employee organization or subordinates in making day-to-day decisions. If subordinates feel the supervisor’s directions are unfair or do not conform with the CBA, they still have to comply so long as they do not have to do anything illegal or unsafe. While subordinates must comply with orders, they can still protest through the appropriate grievance procedures.

B. WHAT IS A GRIEVANCE?

Generally, a grievance is a written complaint submitted by an employee or group of employees and his/her/its employee organizations alleging that the district violated a CBA provision or some other district rule. The limitations of what is grievable vary based upon the language of the CBA itself. Most grievance appeal procedures have multiple steps that afford management the opportunity to review and seek to resolve employee concerns. Supervisors and managers need to know how to process grievances. All supervisors who might have to participate in the process should be familiar with the steps, the need to communicate with the grievant, typically in writing, and how to resolve grievances, if possible. Experience has shown that supervisors who are unable to satisfactorily resolve grievances are often the target of additional grievances by other employees. Managers and supervisors should discuss grievances after they have been resolved.
to learn what worked, what did not work, and improve the supervisor’s approach for future grievances.

C. WHAT IS A GRIEVANCE PROCEDURE?

A grievance procedure is a formal appeals system that allows employees to protest management’s action. It usually consists of a series of steps through which employees can present their grievance to higher levels of management. Districts should properly define employee grievances as grievances rather than complaints about policy.

Management and employee organizations agree on negotiated grievance procedures and usually include them as a provision in the CBA. The negotiated procedure typically applies to disputes over management’s interpretation and/or application of the CBA. Some negotiated grievance procedures open the lower levels of the grievance channels to all employee-employer disputes. Others may be open only to contractual and major disciplinary disputes.

The negotiated grievance procedure typically provides for, or requires, union representation of the grievant at each step in the process, and allows management and the union to seek resolution.

Resolution of an employee’s immediate dispute may also clarify a CBA’s meaning and set precedent for contractual application for resolving similar grievances. The final step in the grievance procedure often requires a decision by a neutral third-party, that could be advisory to the board or is binding upon both parties.

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The PERB recently upheld dismissal of a charge that a union violated the EERA by failing to adequately represent an employee who had met with two different union representatives to investigate his discipline and informed them he had hired an attorney to represent him. PERB found that the duty of fair representation does not end when an employee hires an attorney. However, a representative may exercise his or her “discretion on how far to pursue a grievance so long as it does not arbitrarily ignore a meritorious grievance.”

D. SCOPE OF THE GRIEVANCE PROCEDURES

1. CONTRACTUAL DEFINITION: ANY CONTROVERSY OR DIFFERENCE BETWEEN EMPLOYER AND EMPLOYEE OR EMPLOYEE’S REPRESENTATIVE

- Interpretation or application of agreement
- Alleged violation of agreement
- Whether a matter can be grieved depends on the scope of grievances as defined in the collective bargaining agreement
2. **“Rights” Grievances**
   - “Rights” disputes arise during the term of a written (binding) agreement and involve the interpretation and application of that agreement. The vast majority of arbitrations are over “rights” rather than “interests.”

E. **Purposes of Grievance Procedure**

1. **Explicit Purpose**
   - To interpret an agreement’s provisions
   - To apply the agreement to new and changing aspects of day-to-day relations
   - To protect employee rights
   - To protect rights of management and employee organizations

2. **As a Means of Identifying Problem Situations in the Working Relationship**
   - Explicit grievance not to be taken at face value
   - Grievance seen as a symptom of a problem
   - Aim is to seek out real and submerged difficulties

3. **As a Channel of Communication**
   Information is channeled both between top and bottom levels of employer and employee organization hierarchy.

Management and association/organization representatives use grievance procedure to keep in touch with developments at the individual employee level.

Reliability is generally good because grievances are subject to review at each step by higher levels within the district, and employees may appeal to neutral third-parties.

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The basic principles of grievance resolution are:
- Adjust grievances promptly, preferably at the initial stage;
- Resolve grievances on their merits;
- The grievance process should be easy to use, and well understood by the employee, job steward, and supervisor;
- Follow up grievance decisions to ensure
implementation; and

- When disposing of any grievance on procedural grounds (e.g., timeliness), the response should also address the merits of the grievance.

F. STEPS IN GRIEVANCE HANDLING

- Clearly and fully define the nature of the grievance.
- Investigate all relevant facts to determine when, how, where, to whom, and why the grievance occurred. Facts trump opinion, conjecture, speculation, or assumption and records play a vital role (including payroll records, time cards, case load, inspection records, attendance records, performance evaluations, etc.).
- Establish tentative solutions or answers to the grievance.
- Gather additional information to check validity of the tentative solution, and ascertain the optimal possible solution. This may involve checking board policies and contract provisions, studying the settlement of similar grievances, ascertaining past practice, and discussing problems with personnel staff.
- Apply the solution. Districts must take a definite stand - one way or the other. Whether favorable or unfavorable, districts should clearly and equivocally communicate this stand to the grievant and/or his or her representative.
- Any settlement should be in writing and signed.
- Districts should follow up to determine whether the matter was satisfactorily handled, where the decision favors the employee, and whether the difficulty has been eliminated.

G. CHECKLIST: HOW TO AVOID GRIEVANCES

Know the Collective Bargaining Agreement

- Comply with the requirements of the CBA.
- Know the definition of a grievance.
- Know how relevant provisions have been interpreted in the past by management.
- Avoid selective enforcement of the provisions of the CBA.
- Know important time lines for filing and responding to grievances.

Maintain a Positive Work Relationship with Job Stewards and Association Representatives

- Communicate frequently with association representatives.
- Encourage dialogue with association representatives.
Avoid mixed messages.
Keep an open mind and be flexible.
Respond timely to informal inquiries made by association representatives.
Do not promise to do something without checking the CBA or seeking advice.
Follow through with promises made.
Anticipate the association representative’s complaint and be prepared to respond appropriately.
Do not engage in personal attacks with association representatives.
Understand privileges, obligations, and protections of association representatives.

H. CHECKLIST: HANDLING GRIEVANCES AT THE INITIAL STEP

Prepare for the Meeting
- Adequately prepare for the meeting, because employees will often be represented by an association representative who will be extremely familiar with the collective bargaining agreement and probably past practice.
- Review grievance document (if any).
- Review applicable CBA and rules, procedures, etc.
- Fully understand what the grievance asks for.
- Discuss with human resources officer (e.g., allegation(s), employee’s conduct, supervisor’s role).

Get the Grievance
- Let the grievant tell his or her story with the assistance of association representative, if present (listen).
- Do not personalize the issues.
- Take notes, keep a record.
- Get names.
- Get times.
- Get the section or sections of the contract allegedly violated.
- Get the remedy desired.
- Repeat the essentials of the grievance to the employee in your own words.
- Ask questions to clarify basic questions.

Get the Facts/Investigate
- Check the agreement, policies, and regulations.
Check the time limits.

Process grievance promptly; do not miss a deadline.

If special circumstances prevent timely conclusion; advise grievant of the problem and get an extension of time. If you do obtain an extension of time, request written authorization.

Receive written authorization.

Check grievability.

Check policy and practices.

Check previous grievance settlements for precedent.

Check the experience of others in similar cases.

Give the Answer

Reach a preliminary decision and check it with your administrator or a human resources representative.

Settle the grievance at the earliest moment that a proper settlement can be reached after reviewing your settlement with human resources.

In deciding, give the benefit of the doubt to management.

Avoid selective enforcement or interpretation of the CBA (i.e., be even-handed).

Write a simple answer to the grievant.

Explain your position orally.

Explain the employee’s right to appeal.

Adhere to time limits and confirm any extensions in writing.

Follow Up

Make sure any action you promised was carried out.

Know your employees and their interests.

Once decision is made, stick to it.

Provide notice to all employees in the work unit when appropriate.

If you have done all of the above, expect management’s support.
## I. Sample Grievance Record

<table>
<thead>
<tr>
<th>Date</th>
<th>March 6, 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee(s) Involved</td>
<td>Molly Smith</td>
</tr>
<tr>
<td>Association Representative</td>
<td>Tammy Henderson</td>
</tr>
<tr>
<td>Complaint</td>
<td>Molly Smith and Tammy Henderson came into my office on 2/29 at 10:00 a.m., and complained that Smith should have been placed on the overtime work list. Smith contended she had not been getting equal overtime along with other employees.</td>
</tr>
<tr>
<td>Remedy Sought</td>
<td>Smith wants to be assigned to overtime at the next opportunity. Henderson agreed but thought Smith should get some money for the overtime lost on February 27.</td>
</tr>
<tr>
<td>Alleged Violation of</td>
<td>Article 8, Section I – Collective Bargaining Agreement, 2004-2007 [expired]</td>
</tr>
<tr>
<td>Grievance Filed Within Time Limits</td>
<td>Yes.</td>
</tr>
<tr>
<td>Facts Investigated</td>
<td>I reviewed Smith’s file and found that she was given an equal chance at overtime but turned it down on 10/15, 11/4, 1/12, and 2/24. If she had accepted overtime those days, she would be equal with other employees in her classification.</td>
</tr>
<tr>
<td>Answer Given</td>
<td>I met with Smith and Henderson on 3/6 at 8:30 a.m., and reviewed times that Smith had turned down overtime. Told Henderson I had to deny grievance. Henderson said they would think about filing a written grievance at the next step.</td>
</tr>
<tr>
<td>Action Taken</td>
<td>Deny informal grievance.</td>
</tr>
<tr>
<td>Follow Up</td>
<td>None except to work with Smith on future overtime assignments so she knows she is getting equal chance.</td>
</tr>
</tbody>
</table>
SECTION 3 EMPLOYEE PERFORMANCE EVALUATIONS

ACCURATE, FAIR, AND TIMELY PERFORMANCE EVALUATIONS ARE ONE OF A SUPERVISOR’S MOST IMPORTANT TASKS.

A. EDUCATION CODE NOTE

1. CLASSIFIED EMPLOYEES

In a merit system community college district, the Personnel Commission must establish rules regarding performance evaluations for classified employees. In a non-merit system community college districts, the governing board must adopt policies and/or procedures for evaluating the performance of classified employees. Oftentimes, the classified collective bargaining agreement incorporates the causes and procedures for discipline.

2. ACADEMIC EMPLOYEES

The evaluation of faculty has additional and different procedures. The Education Code provides at Section 87664:

The governing board of each district, in consultation with the faculty, shall adopt rules and regulations establishing the specific procedures for the evaluation of its contract and regular employees on an individual basis and setting forth reasonable but specific standards which it expects its faculty to meet in the performance of their duties. Such procedures and standards shall be uniform for all contract employees of the district with similar general duties and responsibilities and shall be uniform for all regular employees of the district with similar general duties and responsibilities.

Of course, since evaluation is a mandatory subject of negotiations, the “consultation” required by Section 87664 also includes negotiations with an exclusive representative (if any) for a unit of academic employees. The faculty senate, however, must also be given an opportunity to have input into the process. [Ed. Code, § 87663 (f)].

a. Probationary

Education Code Section 87610.1(a) provides that in community college districts where tenure evaluations procedures are collectively bargained, “the faculty’s exclusive representative shall consult with the academic senate prior to engaging in collective bargaining on these procedures.”

Absolute compliance with the policies and procedures for evaluation of probationary faculty is the most important element of the tenure review process. This is so because if a district has complied with these procedures, its decisions regarding whether to grant an additional contract,
whether to release the faculty member from employment, or whether to grant tenure will be
shielded from scrutiny by both arbitrators and courts.

b. Permanent

Well-prepared performance evaluations give employees notice of expectations, notice of
deficiencies and enable the district to defend disciplining personnel actions.

Education Code Section 87663 sets out the frequency with which evaluations of faculty must be
performed. It requires that contract employees be evaluated at least once in each academic year.
Regular employees must be evaluated at least once in every three academic years. Even
temporary employees must be evaluated; they must be evaluated within the first year of
employment, and thereafter at least once every six regular semesters or once every nine regular
quarters, as applicable.

c. Adjunct/Temporary

As discussed, temporary employees must be evaluated within the first year of employment, and
thereafter at least once every six regular semesters or once every nine regular quarters, as
applicable. (Ed. Code, § 87663) Legislation adopted in 2002 makes it particularly important
that districts comply with their statutory and contractual obligations regarding the evaluation of
temporary employees. Education Code Section 87482.9 requires that, for temporary employees,
“the issue of earning and retaining of annual reappointment rights shall be a mandatory subject
of negotiation . . .” In compliance with this provision, many districts have negotiated adjunct
seniority lists. Many of these provisions make eligibility for the adjunct seniority list contingent
upon obtaining satisfactory evaluations. Adjunct seniority lists curtail districts’ hiring discretion
by making it difficult to choose a new hire over a minimally performing individual on the
seniority list. Therefore, districts should ensure that adjuncts receive timely and accurate
evaluations so that poorly performing adjuncts do not get entered onto the district’s adjunct
seniority list.

B. PERFORMANCE MANAGEMENT

“Performance management” is a new model for performance evaluations. It embodies the
following concepts:

- Supervisors set goals and objectives with employees;
- Supervisors evaluate and measure employee performance progress;
- Supervisors provide continual feedback;
- Supervisors isolate performance problems and provide coaching when
  needed; and
- Supervisors recognize and reinforce positive performance.17

Performance management is more than the annual performance evaluation; it is an ongoing
process. For performance management to work, or for any performance evaluation system to
work, supervisors and managers must regularly evaluate employee performance, and not put off
reviewing employees until their review dates. This approach would need to be properly incorporated into the classified or faculty evaluation procedures.

C. WHY DO PERFORMANCE EVALUATIONS?

Properly prepared performance evaluations are good for you as a manager! Here’s why:

They positively affect employees’ performance by:

- Identifying ongoing performance problems;
- Addressing new problems as they emerge;
- Reinforcing positive behavior by providing positive feedback on what was done correctly;
- Increasing employees’ self-awareness;
- Encouraging improvement;
- Increasing employee motivation; and
- Rewarding achievements with monetary or non-monetary recognition.¹⁸

They enhance managers’/supervisors’ professional development because they:

- Force them to regularly review routine tasks, skills needed and working conditions;
- Evaluate productivity and help managers and supervisors to gain control over the conditions that affect productivity; and
- Relate employee performance to the objectives of the department and the goals of the district.

Performance evaluations provide written evidence supporting personnel decisions in the event they are challenged. As discussed below, evaluations often play a significant part in defeating an employee’s claims of retaliation or discrimination. In addition, they provide a warning to employees and an opportunity to improve performance.

Well-prepared performance evaluations give employees notice of performance deficiencies, which enables management to defend disciplinary personnel decisions. As an example, consider a district that wants to discipline an employee for tardiness. Assume that prior performance evaluations say that the employee is punctual. Assume further that the district never communicated its concerns to the employee. The district’s efforts will likely fail because its documentation reflects satisfactory performance.
D. **Prepare and Follow Through**

An effective performance evaluation includes the following steps:

- Meeting with employees and discussing expectations, goals and objectives;
- Gathering and documenting the facts, (i.e., the performance to support your ratings and comments);
- Preparing the written evaluation;
- The face-to-face evaluation meeting with the employee;
- Goal setting and developing an action plan; and
- Coaching and follow-up.

E. **Timing**

The ideal timing for performance evaluations is to conduct them at least once per year and to review all employees at the same time. Reviewing all employees at the same time enables the supervisor to more easily compare performances. However, many district’s rules provide for an employee review on his/her anniversary date.

F. **Identify Objective Criteria**

Many districts require use of preprinted evaluation forms. However, if your district’s evaluation form allows for your input in establishing the criteria, consider the following suggestions.

“Competencies” are the individual’s knowledge, skills, abilities or experiences that are actually demonstrated in a particular context. The context dictates which competencies are most relevant. For example, a safe driving record is relevant to a campus police officer who is required to patrol the campus, but not to a word processing position. The evaluation should measure the skills necessary for the particular position and the skills which contribute to the department or district.

Objective standards may come from the following sources:

- Job duties and performance standards as listed in the job description or other materials;
- The annual review form;
- Supervisor’s daily performance notes that were also given to the employee;
- Goals and objectives from the evaluation period.

Performance standards must reflect actual job duties. Therefore, the performance evaluation system should be updated as the internal organization of your district changes. Traditional criteria may not reflect today’s multi-faceted job positions. In addition, team projects involve...
different skills than individual work, such as contributing to the team and the ability to change focus and take on new responsibilities and develop new skills. The supervisor should meet with employees to communicate the employee’s goals and objectives.

G. Know the Employee’s Job Requirements

What are the employee’s job duties? This threshold question must be answered before the supervisor evaluates work performance. Your district should have up-to-date job descriptions which list job duties and responsibilities. If you do not have an up-to-date job description, look back over the work orders, assignment sheets or other records that describe the employee’s actual duties and responsibilities. Make sure the employee knows about these assignments and the expected standards of performance.

If the most current job description does not include all job duties performed, your district should consider updating it so that it fairly reflects the employee’s job duties. Note that some changes may be subject to negotiation if they change the terms and conditions of the employee’s employment.

H. Communicate Often

Effective performance management begins today. Supervisors and managers can and must evaluate employee performance every day. Continual evaluation has two components:

1. Face-to-Face Discussions

Continual communication is essential for a long-term performance partnership between the supervisor and employee. The annual evaluation should not surprise the employee.

2. Document the Facts

Documentation enables the supervisor/manager to keep “a running record” of performance which will refresh the manager’s memory at the time he/she prepares the formal evaluation. The responsible supervisor documents all performance achievements and deficiencies. Documentation can also support personnel actions.

Keep separate unofficial “supervisor’s file.” A supervisor should make notations or anecdotal observations about the employees he/she supervises. This is a very useful tool for preparing an annual evaluation, and will help you recall how the employee performed over the year.

Remember: Note accomplishments as well as negative performance.

Be aware that the Education Code requires that an employee be given notice of and the right to review information of a derogatory nature and be given an opportunity to review and comment.
on the information. The employee has the right to have his or her own comments attached to any derogatory statement. This right does not depend on the information being kept in a “personnel file.” Therefore, if you are retaining a document that contains derogatory information, you must provide the employee with a copy as well, along with notice of these rights. This does not mean that the supervisor cannot make appropriate notations on a calendar of employee tardiness, etc. But if the supervisor receives written complaints about the employee or creates a memo about the employee that may be relied on later to support a discipline, the employee must be notified of the document and given the right to review it and attach response. (See Ed. Code, § 87031.)

I. PREPARE THE WRITTEN REPORT

The annual evaluation is the final chapter in the year-long review process. The annual review chronicles employee performance during the entire evaluation period. Supervisors are responsible for deciding what information transfers into the annual review. Before writing the report, remember to:

• Determine the employee’s job requirements (i.e., review job description and actual duties);
• Follow any contractual procedural requirements;
• Review previous evaluations and goals; and
• Evaluate the employee’s performance during the evaluation period.

1. REVIEW PERFORMANCE DURING THE EVALUATION PERIOD

During the evaluation period, how does the employee’s performance compare with his or her job requirements? Did they meet their goals? When evaluating job performance:

• Set reasonable, objective standards;
• If subjective, personality-based standards are used, define them using performance-based criteria;
• Evaluate strengths and weaknesses of behavior, not personality; and
• Never discriminate.

a. Set Objective Standards and Apply Them Fairly

Supervisors must do more than just set objective standards; they must also be objective in applying the standards. For example, one female executive claimed that her “aggressive” personal style was the real reason she was discharged. Although the executive received excellent performance reviews, her boss noted that she must improve her “interpersonal issues” and become more aware of her “behavior issue.” However, two male executives who also had problems with interpersonal communication were not criticized for this in their performance reviews. The court stated that the female executive’s evaluations were marred by the references to her interpersonal skills that were tolerated in males. The employer may have relied on impermissible stereotypes of how women should behave.
If supervisors set and apply objective criteria from job standards, job descriptions, the annual performance review, and their notes, then these objective standards will go far in insulating the district from potential discrimination claims. THE KEY IS FAIR TREATMENT FOR ALL.

b. **Assess Both Strengths and Weaknesses**

- Compare the employee’s job performance against the employee’s most current actual job duties and performance standards.
- Commend good and exceptional performance and seek further improvement, if possible.
- Did the employee meet the district’s and his/her own goals as set forth in the previous review?
- Be honest with the employee and point out tactfully, yet clearly, performance weaknesses or deficiencies. The supervisor must communicate performance deficiencies.
- Offer coaching or further instruction as needed.
- Communicate, when necessary, how performance deficiencies may have disciplinary consequences. For example, if the employee is chronically tardy, without a valid excuse for tardiness, the supervisor should note that, and later discuss how continued tardiness will have disciplinary consequences.

2. **Give Accurate Ratings**

A common mistake is to give the employee an inflated evaluation which “sugar coats” any problems. An inflated evaluation is unfair. It gives the employee a false sense of security, deprives the employee of the opportunity to improve and, later, may provide a discharged employee with the incentive to sue. Remember, trying to “be nice” may ultimately be counter-productive. Your rating is important to provide the employee with feedback on his or her strengths and areas which need development and to document all significant problems. It should help the employee determine how to become more productive and do a better job.

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| Remember: A rating of “meets expectations” means “meets expectations,” not “needs improvement” or “unsatisfactory!” Be consistent and accurate. When in doubt between two categories, explain under the comments why you chose. |

Supervisors must also ensure that standards are being applied fairly. The evaluation must be fair in comparison to others. Consider whether other employees exhibiting the same performance deficiency were similarly evaluated. Being consistent helps avoid or win lawsuits. Consistency is also important because employees who feel they are treated unfairly may reduce their output to compensate for the perceived inequity.24
3. **TAKE THE TIME TO MAKE WRITTEN COMMENTS**

Simply checking boxes may be faster than writing comments, but comments provide detail, insight and examples to support the “conclusions” you reached by checking a particular box. Also, comments can become important legal evidence to support your evaluations and subsequent employment actions.

Make sure your ratings and comments are consistent. Make comments, then decide on the rating. Put the evaluation aside for a while. Go back to it and see if the ratings match the comments or vice versa.

Specific comments give guidance to the employee and support your opinions. Here are some examples of general vs. specific comments:

<table>
<thead>
<tr>
<th>General</th>
<th>Specific</th>
</tr>
</thead>
<tbody>
<tr>
<td>You did a great job on that project.</td>
<td>You took initiative in bringing your co-workers together to work as a team and helped the department make its deadline of getting the report to the president.</td>
</tr>
<tr>
<td>Poor attitude.</td>
<td>On January 17, when I asked you to deliver a package to the Admissions office, you stated “Why don’t you deliver it yourself?” When I asked you about your workload, you stated, “I don’t need to justify my time.”</td>
</tr>
<tr>
<td>Pay more attention to detail.</td>
<td>Ask questions if you don’t understand something. Always spell-check your documents before submitting them for my signature. Take notes if you can’t remember my instructions to be sure you give me what I need. I should not have to remind you to perform a task we have previously discussed. For example, the department’s accreditation self report was delayed because you did not promptly send it to the printer.</td>
</tr>
</tbody>
</table>
J. **SUMMARY OF RECOMMENDATIONS FOR SOLID EVALUATIONS**

The following recommendations will help your evaluations withstand challenges and reduce negative reactions:

- Do regular, scheduled evaluations;
- Throughout the evaluation period, keep notes or other documentation to assist you in making the evaluation and to support your ratings and comments;
- Give employees continual feedback throughout the evaluation period so there are no surprises;
- Be consistent and fair in how you evaluate employees;
- Make objective, behavior-related ratings and comments and avoid judgmental and subjective evaluations;
- Communicate your findings effectively in the face-to-face meeting with the employee;
- Recognize accomplishments as well as negative behavior and reinforce positive behavior; and
- Set goals and specify deadlines for meeting them.

If an employee has not progressed due to pregnancy, FMLA, or other approved leave, do not count this against them in the evaluation.

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**SECTION 4**

**DISCIPLINE AND EVALUATION OF COMMUNITY COLLEGE DISTRICT EMPLOYEES**

**A. CLASSIFIED EMPLOYEES**

**1. NON-MERIT SYSTEM**

In community college districts not incorporating the merit system, the governing board shall prescribe written rules and regulations governing personnel management of classified employees, including rules of procedure for disciplinary proceedings. In non-merit system districts, a permanent classified employee shall only be subject to disciplinary action for cause as set forth by the governing board’s rules or regulations. The governing board’s rules and regulations for disciplinary proceedings shall provide for the following:

- Informing the employee by written notice of the specific charges against him or her;
• A statement of the employee’s right to a hearing on those charges;

• The time within which the hearing may be requested which shall not be less than five (5) days after service of the notice to the employee; and

• A card or paper, the signing and filing of which shall constitute a demand for hearing and a denial of all charges.27

No disciplinary action can be taken for any cause that arose prior to a classified employee becoming permanent or for any cause that arose more than two (2) years preceding the date of the filing of the notice of cause (unless the cause was concealed or not disclosed by the employee).28

When commencing a disciplinary action against a permanent classified employee, the employee must be provided with a notice of disciplinary action which contains a statement in ordinary and concise language of the specific acts or omissions upon which the disciplinary action is based, including a statement of the cause for the action taken and any district rule or regulation the employee violated if any exist.29

2. Merit System

In community college districts adopting the merit system, the Education Code requires that a Personnel Commission shall be appointed.30 The Personnel Commission sets forth rules governing the classified service (i.e., applications, examinations, eligibility, appointments, promotions, demotions, transfers, dismissals, resignations, layoffs, reemployment, vacations, leaves of absence, compensation within classification, job analyses and specifications, performance evaluations, public advertisement of examinations, and rejection of unfit applicants without competition).31

Specifically, Education Code Section 88080 gives the Personnel Commission power to prescribe and amend and interpret rules necessary to insure the efficiency of the service and selection and retention of employees upon a basis of merit and fitness. However, the rules do not apply to bargaining unit members if the subject matter is within the scope of representation and is included in a negotiated agreement between the governing board and that unit.32 However, no rule or amendment which would affect classified employees who are represented by a certified or recognized exclusive bargaining representative shall be adopted by the Personnel Commission until the exclusive bargaining representative and the employer of the classified employees who would be affected have been given reasonable notice of the proposal.33

Demotion or removal of permanent classified employees must be pursuant to reasonable cause as designated by Personnel Commission rules.34 In addition to causes for suspension or dismissal designated by rule of the Personnel Commission, Education Code Section 88122 allows for suspension or dismissal of classified employees based upon one or more of the following causes:

• Knowing membership by the employee in the Communist Party.

Note: This provision would most likely be considered unconstitutional and we do not recommend proceeding with discipline under this provision.
Discipline of a classified employee may be taken in the form of a suspension, demotion or dismissal. Any suspension without pay pursuant to reasonable cause may not exceed 30 days. The personnel director is required to file written charges with the Personnel Commission and personally deliver a copy of the charges to the employee or deposit a copy of the charges in the United States registered mail to the employee’s last known address within ten (10) days of the suspension, demotion or dismissal.36 There are additional provisions applicable to the discipline of employees charged with certain specified offenses set forth in Education Code Section 88123 by complaint, information or indictment in a court of competent jurisdiction.

A permanent classified employee who has been suspended, demoted or dismissed may appeal to the Personnel Commission within 14 days after receipt of a copy of the written charges supporting such disciplinary action by filing a written answer to the charges. Unless provided by the rules of the specific Personnel Commission, such an appeal is not available to an employee who is not a part of the permanent classified service.37 If the disciplined employee has appeal rights and requests a hearing, the Personnel Commission shall order a hearing.38 Education Code Section 88126 also provides the Personnel Commission with authority regarding reinstatement and compensation issues relating to an employee’s appeal.

Pursuant to its powers under the Education Code, the Personnel Commission may conduct hearings, subpoena witnesses, require the production of records or information pertinent to investigation, and administer oaths.39 If the Personnel Commission does not undertake the responsibility of conducting a hearing, it may authorize a hearing officer or other representative to conduct any hearing or investigation which the Personnel Commission is authorized to conduct and may request the authorized representative to issue findings or recommendations. Upon receipt of findings or recommendations, the Personnel Commission may act or reject or amend any of the findings or recommendations of the authorized representative. However, any amendment or rejection must be based either on the review of the transcript of the hearing or investigation or upon the results of any supplemental hearing or investigation the Personnel Commission may order.

B. ACADEMIC EMPLOYEES

1. PROBATIONARY AND PERMANENT

A probationary faculty member may be terminated for cause, but if a district chooses to do so, it must do so in accordance with the due process procedures established by statute for all faculty members, both permanent and probationary.40
A community college district is required to comply with the causes and procedures set forth in Education Code Sections 87732 and 87734 when dismissing a probationary or permanent faculty member during the academic year. See, Education Code Section 87666 et seq., which specifically refer both to contract (i.e. probationary) and regular (i.e. permanent) employees.

Causes for dismissal listed in Education Code Section 87732 include:

- Immoral or unprofessional conduct;\(^41\)
- Dishonesty;\(^42\)
- Unsatisfactory performance;\(^43\)
- Evident unfitness for service;\(^44\)
- Physical or mental condition making him or her unfit to instruct or associate with students;\(^45\)
- Persistent violation of or refusal to obey the school laws of the state or reasonable regulations of the Board of Governors or the Board of Trustees;\(^46\)
- Conviction of a felony or a crime involving moral turpitude;\(^47\)
- Conduct specified in Government Code Section 1028 [e.g., relating to Communist party membership].\(^48\)

Dismissal proceedings for cause are initiated by action of the Board of Trustees to adopt a resolution incorporating a Statement of Charges submitted by the superintendent/president or another designee. The Board must assure that the following are satisfied:

- The employee has been evaluated;
- The Board has received all statements of evaluation which considered the events for which dismissal is to be imposed;
- The Board has received a recommendation from the president; and
- The Board has considered the evaluation and recommendations in a lawful meeting of the Board.

After the Board acts, a Statement of Charges is served on the faculty member, who must be given thirty days to request a hearing. If a hearing is not requested, the dismissal is effective at the end of the thirty days. If a hearing is requested, the District and the employee must try to select an arbitrator who is mutually acceptable to hear the matter. If they cannot agree, the Office of Administrative Hearings for the State of California takes jurisdiction of the matter and assigns the case to a State Administrative Law Judge. Thereafter the matter proceeds to trial before the Office of Administrative Hearings.
2. **UNPROFESSIONAL CONDUCT OR UNSATISFACTORY PERFORMANCE**

Prior to discipline for unprofessional conduct or unsatisfactory performance, the employee must receive a notice of the conduct at least 90 days prior to the discipline, and be given an opportunity to improve. This “90-day notice” and opportunity to improve are not required for other grounds for dismissal.

The 90-day letter should be considered both an extension of the evaluation process and the early groundwork for disciplinary action.

- It is an extension of the evaluation process in the sense that it must set out with particularity what the employee must do to correct his or her faults and overcome the grounds for the charge. The letter must be accompanied by the employee’s most recent evaluation.
- It is the early groundwork for disciplinary action in the sense that if the employee does not improve, the letter will serve as an early draft of the Statement of Charges to be provided to the employee. No new instances of unprofessional conduct or unsatisfactory performance can be included in a Statement of Charges.

A 90-day notice must be provided to an employee during the preceding term or half college year prior to the date of filing of any charges.

3. **EVIDENT UNFITNESS FOR SERVICE**

“Evident unfitness for service” as set out in Education Code Section 87732(d) has recently emerged as an important ground for discipline. It does not require a 90-day notice before it is invoked, but it can be compellingly demonstrated by some of the same evidence that would be used to prove a charge of unprofessional conduct as well.

Once a district has proved the facts alleged in its Statement of Charges by a preponderance of the evidence, the district must still establish that the facts demonstrate that a faculty member is evidently unfit for further service as an employee of the district. The roadmap for doing so is laid out in *Woodland Joint Unified School District v. Commission on Professional Competence* (1992) 2 Cal. App. 4th 1429 (“Zuber”).

The first inquiry is whether the conduct proven meets the criteria for unfitness for service set out by the California Supreme Court in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214. The factors include: 1) the likelihood that the conduct adversely affected students or fellow teachers; 2) the proximity or remoteness in time of the conduct; 3) the type of teaching certificate; 4) the extenuating or aggravating circumstances; 5) the praiseworthiness or blameworthiness of the motives resulting in the conduct; 6) the likelihood of recurrence of the conduct; and 7) the extent to which disciplinary action would have a chilling effect on the constitutional rights of teachers.
Evident unfitness for service requires a determination not only that an academic employee is unfit under *Morrison*, but that the unfitness is “evident”, i.e., caused by a defect in temperament. Evident unfitness for service, by its nature, is unresponsive to traditional notions of progressive discipline. In some cases, a district need not even show progressive discipline to support disciplinary action based on unfitness.

4. **Time Limitations Regarding Discipline Initiation**

No testimony may be offered nor evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the Statement of Charges described in the section below. Similarly, no decision relating to the dismissal or suspension of a faculty member can be made based on charges or evidence relating to matters occurring more than four years prior the filing of the notice. [Education Code Sections 87675, 87680].

In *Fontana Unified School District v. Burman* (1988) 45 Cal 3d 208, the California Supreme Court seemed to suggest that it is not a “true statute of limitations” which actually restricts a district’s ability to act. Rather, the Court said, it appeared to be simply a “bar against the use of stale information to buttress a current charge.” This has not been the reaction of most arbitrators, however. Most view the four year limit as a true jurisdictional bar.

The California Supreme Court recently decided whether the doctrine of equitable estoppel may apply to the four year statute of limitations for teacher disciplinary cases. In *Atwater Elementary School District v. Department of General Services (Truitt)* (2007) 41 Cal.4th 227, the Court held that a school district can suspend or dismiss a credentialed teacher based on matters occurring more than four years before issuance of the Notice of Intent to Discipline under the equitable estoppel doctrine and that Education Code Section 44944, subdivision (a) was not absolute. The same analysis should apply equally to the four year limitations period applicable to community college districts under Education Code Sections 87675 and 87680. However, regardless of the potential equitable exceptions to the four year limitations period, districts should:

- document misconduct in an accurate and timely fashion;
- assess misconduct in a timely fashion, and act upon it;
- not allow problems to fester.

These measures will not only help you to avoid a “stale evidence” problem, it will encourage core elements of effective management practices.

5. **Steps in the Disciplinary Process**

It is of critical importance that each procedural step be done correctly. The following is a general checklist, but in each case you should map out your steps carefully, and consult counsel as appropriate. The following steps, at a minimum, will be required:

- **President’s Recommendation for Statement of Dismissal** with Statement of Charges attached: The College President signs and dates this document,
and submits it to the Board of Trustees for its consideration at a regularly scheduled Board Meeting. (Education Code § 87671(c).)

- **Statements of Evaluations:** The President submits the evaluations for the listed time period to the Board of Trustees members along with the Recommendation of the President. (Education Code § 87671(b)). Education Code Section 87671(b) requires that the President submit to the Board “all statements of evaluation which considered the events for which dismissal or penalties may be imposed.” (Emphasis added).

- **Governing Board Agenda item:** An item should be inserted in the Closed Session portion of the Board Meeting agenda to reflect “Discipline of a Public Employee.”

- **Statement of Decision to Dismiss with Statement of Charges attached:** The Board should consider the recommendations and the evaluations in closed session, and act in its normal manner to adopt the resolution, also in closed session. The Board members then sign a resolution in the appropriate place, depending on their votes.

- **Notice of Decision:** The College President signs and dates a Statement of Decision to Dismiss, after the Board Action. It should be accompanied by a series of other documents, specifically:
  - Statement of Decision to Dismiss with Statement of Charges
  - Copies of Sections 11506, 11507.5, 11507.6 and 11507.7 of the Government Code
  - Copies of Sections 87666-87683 and 87732 of the Education Code
  - Notice of Objection to Decision

- **Proof of Personal Service of Notice of Decision to Dismiss and attachments OR Proof of Service by registered mail of Notice of Decision to Suspend and attachments:** The Notice must be sent by **registered mail** (not certified mail) or be personally served. We recommend that you do both. (Education Code § 87672.) It should be accompanied by a proof of service, completed by the person who personally serves the faculty member with the Notice of Decision to Dismiss. The person who serves it should not be interested in the action. A secretary would be a person not interested in the action. The original proof of service should be maintained in district files, attached to the letter. After receipt of any confirmation by the Post Office, the receipts and the proof of service should be maintained in your files.

After the Board acts and the Statement of Charges is served on the faculty member, he or she must be given thirty days to request a hearing. If a hearing is not requested, the dismissal is effective at the end of the thirty days.
If a hearing is requested, the district and the employee must try to select an arbitrator who is mutually acceptable to hear the matter. If they cannot agree, the Office of Administrative Hearings for the State of California takes jurisdiction of the matter and assigns the case to a State Administrative Law Judge. Thereafter the matter proceeds to trial.

Discovery is permitted and usually occurs: there are depositions of the witnesses and documents exchanged before the trial. Trials last anywhere from one to thirty days, depending on the charges.

The Administrative Law Judge’s decision usually comes within thirty days after the end of the trial. It is binding on all parties. It can only be overturned by a Superior Court judge through a writ of administrative mandamus pursuant to Code of Civil Procedure Section 1094.5.

California Code of Civil Procedure Section 1094.5 provides for judicial review of a decision following a disciplinary appeal hearing in most circumstances. Generally, these cases are filed by the affected employee when he/she is not satisfied with the result on appeal.

A governing board that is not satisfied by a result on appeal may also seek review under Section 1094.5. Courts will reverse the administrative decision where the Administrative Law Judge abused its discretion, or exceeded the bounds of reason. Since the standard of review when an action is brought by the appointing authority [the district] is difficult to overcome, appointing authorities rarely resort to judicial review.

SECTION 5 IMPLEMENTING THE DISCIPLINARY PROCESS

A. LEGAL REQUIREMENTS

California Education Code and collective bargaining agreements provide for disciplinary process which must be afforded a district employee. In addition, the courts have established minimum procedural protections (due process) which must be afforded academic and classified, merit and non-merit system employees who are subject to significant disciplinary action. These procedural protections apply to any public employee who has through state law or local regulation acquired a right to be disciplined or terminated only for “good” or “just” cause.

B. SIGNIFICANT PUNITIVE ACTION

Dismissals, demotion, and suspensions are significant punitive action. Warnings and reprimands, improvement needed performance evaluations, denial of merit increases, counseling sessions, and releases during probation are not significant punitive actions and in the absence of rules to the contrary, are generally not subject to the mandates of due process. The California Court of Appeal, however, ruled that placing an employee on an involuntary unpaid leave of absence was tantamount to a disciplinary suspension which triggered due process requirements.55
C. PRE-DISCIPLINE PROCEDURAL REQUIREMENTS

Permanent employees having “for cause” rights are entitled to the following minimal due process procedure before significant disciplinary action is implemented (the “Skelly Pre-Action Procedure”). The Skelly proceedings may either be a step before the final action of the governing board or the actual hearing by the final decision maker. Provided this “Skelly Procedure” is made available to the employee before the action is put into effect, the district need not provide the employee with formal evidentiary appeals hearing until some time after the action has been implemented.

The “Skelly Pre-Action Procedure” requires that:

- The employee receive a preliminary written notice of the proposed action stating the date it is intended to become effective, and the specific grounds and particular facts upon which the proposed action is based.
- Along with this notice, the employee be provided with any known written materials, reports or documents upon which the action is based.
- The employee be accorded the right to respond informally either orally, in writing, or both, to the proposed charges.

In preparing to implement the above pre-disciplinary procedures, the following suggestions may be helpful to keep in mind:

D. WRITTEN NOTICE IS REQUIRED

An employee must receive advance written notice of the proposed action. The notice must:

- State the date the proposed action will be effective, and the specific grounds and particular facts upon which the action is taken.
- Inform the employee of his right to respond to the proposed action and of his right to receive a copy of the written materials alleged to support the action.

E. EMPLOYEES MUST BE ALLOWED A REASONABLE TIME TO RESPOND

- There is no fixed rule stating how much time an employee must be given to exercise his right to respond.
- Time to respond is fixed by management and must be “reasonable” under all circumstances. Under normal circumstances, employees should be given at least five (5) work days to respond, unless otherwise stated in the collective bargaining agreement or the district’s board policies.
- “Reasonableness” is determined by the complexity of the issues involved, the volume of written materials relied upon and good judgment.
• If an employee requests an extension of time to respond, it should be granted if the request is justifiable and reasonable.

• Failure to respond within the time specified may result in the employee’s waiver of his procedural rights.

• Circumstances surrounding the waiver should be thoroughly documented.

**F. THE OPPORTUNITY TO ORALLY RESPOND NEED NOT BE A FORMAL HEARING**

• Rather, it is a meeting to give the employee a meaningful opportunity to tell his or her “side of the story.”

• Its purpose, according to the courts, is to minimize the risk of the employer making an error in the action it takes.

• These “Skelly Pre-Action Procedures” presume that the employee will be accorded the opportunity for an evidentiary appeals hearing after the action is implemented.

• The employee is entitled to have a union representative at the “Skelly” meeting.

**G. MANAGER REVIEWING EMPLOYEE RESPONSE SHOULD BE APPROPRIATE TO LEVEL OF EMPLOYEE RESPONDING**

• No fixed rule/person is mandated by law.

• “Skelly officer” may be one or two levels above the employee’s immediate supervisor.

• The official must have enough authority to make effective recommendations concerning the proposed action.

**H. THE LIBERTY INTEREST (“LUBEY”) REQUIREMENTS**

Where a dismissal involves charges that stigmatize the employee’s reputation, the employee, based on the constitutional right to liberty, may have due process rights even without a property right in his or her job. This interest is referred to as a “liberty” interest. It essentially gives the employee an opportunity to clear his or her name. An award of back pay from the date of the violation to the date of the hearing is not required unless the district has itself provided for such a remedy.

In termination cases, only those relating to immoral or dishonest conduct trigger liberty interest protection (as opposed to terminations for incompetence). For example:

• No liberty interest is implicated where only the dismissed employee is informed of the reasons for termination even if it stigmatizes him.
• Charges of incompetence, willful refusal to follow directives, arrogance towards the public, and failure to communicate with the board do not stigmatize reputation so as to require a name-clearing.61

• Charges against a manager that he had failed to provide leadership, constructive management and proper supervision, maintain proper morale, and taken actions indicating antagonism towards the board, did not implicate the manager’s liberty interest.62

• An employee who admits the charges for which he was discharged cannot claim that the resulting stigmatization violated his liberty interest.63

• One employee’s liberty interests were implicated where his discharge was based on charges of misconduct as well as incompetence. However, the employee was afforded an adequate opportunity to clear his name without a full evidentiary hearing, where the employee was notified of the charges, allowed to explain his conduct to the supervisors making the termination decision and file a written response, and allowed to appeal to a higher-ranking supervisor before his termination was effective.64

• Employee fired after his arrest for statutory rape, but later acquitted in criminal trial, was not entitled to a name-clearing. Although the termination involved stigma to his reputation, he had been afforded due process through his criminal trial.65

Under California Labor Code Section 1053 an employer can provide a truthful statement concerning the reason for why an employee was discharged or why the employee voluntarily left the service of the employer, but ONLY if a special request has been made for such a statement and it otherwise complies with Labor Code Section 1053.

I. REMEDIES FOR FAILURE TO PROVIDE PRE-ACTION DUE PROCESS

Recognized remedies:

• Reinstatement when an employee has been discharged in violation of his constitutional property interest rights.66

• Damages can also include back pay accrued between the date of discharge and the final decision of the authority.67 However, an improperly discharged or suspended employee must mitigate his damages.68

• Attorney’s fees may be awarded under “private attorney general” statute to improperly discharged employee.69

• Though at-will employees may be entitled to procedural due process either because their liberty interest has been implicated or based on local rules, normally they are not entitled to back pay.70

J. ISSUANCE OF FINAL NOTICE OF DISCIPLINE
Employers must give the employee a final notice of disciplinary action. Normally, this notice mirrors in most respects the notice of proposed discipline. It should contain the statement of charges and facts upon which the final decision to discipline is based. The employee should be informed of his or her appeal rights.

**K. REDUCTION OF DISCIPLINE**

The manager who conducts the *Skelly* pre-disciplinary hearing may decide based upon the facts presented or review of other disciplinary matters that the discipline initially proposed should be reduced. It is important to remember that unless you have an agreement from the employee to accept the lesser discipline without appeal, the employee may still challenge the reduced discipline. If you wish to reduce the discipline in exchange for an agreement to accept and not appeal the discipline, this must be memorialized in a written agreement.

If termination has been proposed and there is a desire to provide for a resolution short of termination with assurances that any future violations of a similar nature will result in automatic termination, a “Last Chance Agreement” can be used.

Some cases have held that an employee cannot contract away their right to arbitrate grievances in a last chance agreement. However, other rulings have recognized that last chance agreements may bar arbitrability if the agreement language “clearly and unambiguously described the issue or issues excluded from arbitration.” These agreements are particularly effective in drug and alcohol abuse situations. To ensure that a last chance agreement is legally enforceable, consult with the Human Resources Department and/or legal counsel.

**L. POST-DISCIPLINARY APPEAL HEARING**

Due process requires that an employee receive a post-disciplinary evidentiary appeal hearing before a non-biased hearing officer or body. This can be an arbitrator, hearing officer, personnel commission or other third party neutral, depending upon district policy and/or the collective bargaining agreement. This must be someone not personally involved in the discipline process. At the hearing, the employer bears the burden of proof.

The direct supervisor’s input and cooperation are essential for preparing the appeal. The supervisor can help identify potential witnesses and gather supporting documentation. Further, the supervisor can best explain how the employee’s failure of conduct or performance affected the operations of the department or the campus or district as a whole.

**M. ADMINISTRATOR’S OR SUPERVISOR’S CHECKLIST FOR HEARING PREPARATION**

- Gather and review relevant education code sections, board policies and regulations and collective bargaining agreements;
- Review the disciplinary notices and supporting documentation;
- Assist in identifying witnesses and determining availability of witnesses;
Prepare a time-line of events, including employment dates, relevant evaluation dates, dates of misconduct;

Keep notes of all meetings regarding the discipline, particularly the *Skelly* Pre-disciplinary hearing;

Attend the hearing as district representative, if requested;

Keep copies of newspaper and/or other media sources relating to charges in disciplinary matter, if available; and

Maintain confidentiality of the disciplinary process.

### N. DOCUMENTATION

Maintaining accurate and complete records is an essential part of an effective disciplinary system. Complete attendance, evaluation and personnel status and action memos form the beginnings of a documentation system. Copies of operational and personnel bulletins, handbooks, and orders and memoranda about rules and policies should be retained. Any and all communications regarding performance or behavior should be reduced to writing and maintained. Such records help the supervisor in evaluating and aiding the employee and monitoring employee performance.

These records become absolutely essential should the employee appeal an adverse action taken against him or her. The documentation and the accounts of any witnesses form the basis of proof for the district’s actions. For this reason, names of witnesses to an incident and their signed accounts of the event are essential documentation.

Providing pre-printed forms to managers and supervisors for recording unusual employee behavior and performance ensures management that the necessary and appropriate information is recorded. Model letters may be developed where such letters are required for warnings, notice of intent, or notice of disciplinary action.

### O. CRITERIA FOR SUCCESS AT THE HEARING

Hearing officers typically consider the following questions in determining the reasonableness of a disciplinary action:

- Was the rule applied uniformly to all persons covered?
- Should extenuating circumstances be taken into account? Should the employee’s age, past record, years of service, family problems or other factors be considered in deciding on a lesser penalty?
- Were employees notified of the establishment of the rule or any change? Did the employer take pains to let covered employees know there was such a rule, and did they notify all persons covered as to the penalty which might be incurred if the rule was violated?
- Was the rule clear and understandable?
• Was the rule enforced in the past? If the rule has been in effect for a long time but not enforced, the employees are entitled to formal notification that the rule will again be enforced before any disciplinary action.
• Was the penalty for violation too harsh? Should an employee be discharged for violating a policy or rule which only slightly harms the district?
• Did the district follow due process in disciplining the employee?
• Did the district provide sufficient proof of guilt? Sometimes proof of guilt is insufficient to show that the employee did indeed break the rules.
• Can the rule be strictly followed?
• Does the rule violate laws, Board policy, or the collective bargaining agreement? This would include state laws which require an employer to provide a safe workplace and where an employee is disciplined for refusing to obey an order where his safety is endangered.
• Does the rule serve a useful employer purpose?

P. “Good Cause”

Education Code Section 87732 provides a list of the acts of misconduct which are the causes for disciplinary actions for regular or academic employees.

Education Code Section 87732 includes the following causes for suspension or dismissal:
• Immoral conduct.
• Unprofessional conduct.
• Dishonesty.
• Unsatisfactory performance.
• Evident unfitness for service.
• Physical or mental condition that makes him or her unfit to instruct or associate with students.
• Conviction of a felony or of any crime involving moral turpitude.
• Conduct specified in Section 1028 of the Government Code.

Education Code Sections 88013 and 88016 authorize the governing boards to set forth the grounds and procedures for discipline of classified employees for non-merit districts.

Q. “Good Cause” Checklist

Did you give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of his or her conduct?
Did you use a progressive discipline approach? (Major violations such as theft or violence, can result in dismissal without prior disciplinary action.)

Was your policy, rule, or directive reasonably related to the orderly, efficient and safe operation of the department or district?

Have you, before administering discipline, made an effort to discover whether the employee did in fact violate or disobey your policy, rule, or directive?

Have you conducted a fair and objective investigation of the situation?
  • Is the degree of discipline you plan to administer reasonably related to:
  • The seriousness of the employee’s proven offense?
  • The record of the employee’s service with the district?
  • Penalties imposed previously in the department or district in comparable circumstances?

If you can answer “yes” to all of these questions, your action will probably be upheld throughout the appeal process should the employee appeal the action.

R. CONDUCTING THE DISCIPLINARY COUNSELING INTERVIEW CHECKLIST

1. PREPARE FOR THE INTERVIEW
  • Avoid a significant time lapse from date of incident.
  • Select a time and place that is private and free from interruption to avoid embarrassing the employee. Ensure confidentiality.
  • Review all the facts.
  • Have the personnel record file and other information on hand at the time of the interview.
  • Consider having another person (human resources director) present.
  • Consider what you know about the employee: his/her personality, personnel record, and the requirements of his/her particular job.
  • Prepare an outline as to what you want to accomplish during the counseling session.
  • Expect the employee to request a union representative be present, and allow the union representative to attend.
2. **Conduct the Interview in a Constructive Manner**
   - Start on a cooperative, positive note.
   - Stick to the facts; don’t become involved in personalities.
   - Listen to what the employee has to say; practice “constructive silence.”
   - Encourage the employee to express how he or she feels and don’t show disapproval when the employee does so.
   - Openly focus questions; avoid yes or no alternatives.
   - Reiterate and paraphrase statements made by employee.
   - Seek detailed description from employee of what occurred.

3. **The Need for Cooperation**
   - Acknowledge any help or information of value that is received from the other party.
   - Disassociate one’s self with the dislikes of the other party.
   - Be descriptive, not judgmental.
   - Deal with things that can be changed.
   - Consider motives of the employee for giving you certain feedback.
   - Give feedback when it is desired.

4. **Make Sure the Employee Understands**
   - Discuss the requirements of the employee’s job. Point out the facts that show how he or she is not meeting these requirements and what the effects are in the work place.
   - Help the employee to uncover the real cause of the problem: not only what employee is doing wrong, but why he or she is doing it.
   - Explain fully the purpose of any action as a corrective measure rather than a punishment.
   - Make certain the employee completely understands that his or her behavior must change. Indicate the consequences if behavior does not improve.

5. **The Use of Criticism**
   - Focus on behavior rather than the person.
   - Make observations rather than inferences.
   - Describe behavior in terms of more or less, rather than good or bad.
   - Focus on behavior related to specific and recent situations rather than on the abstract.
   - Share ideas and information rather than giving advice.
Explore alternatives.
Stress why mutual cooperation is necessary.
Limit the amount of different information.
Concentrate on what is said, rather than why it is said.

6. PROVIDE FOR FOLLOW-UP

- Set up a plan for improvement with the employee.
- Include in the plan commitments both by the employee and yourself as to the steps you will take to bring about the desired improvement.
- Include also specific time limits for accomplishing the desired goals and for formal re-evaluation of the employee’s behavior.
- Prepare a Performance Improvement Plan or, if applicable, a Last Chance Agreement.

7. MAKE A WRITTEN RECORD OF THE INTERVIEW

- Note in your calendar or note to file the time, date, and content of the disciplinary counseling.
- Prepare confirming Counseling Interview Memo to the employee.
- Insure that you keep your boss advised and have his/her support.

5. SAMPLE LETTER CONFIRMING VERBAL REPRIMAND

(To provide both supervisor and employee with a permanent record of specific violation. This does not become a part of the employee’s permanent personnel file.)

TO (Employee’s Name)
FROM (Supervisor/Manager’s Name)
SUBJECT CONFIRMATION OF VERBAL REPRIMAND
DATE (Date)

This memo will confirm our conversation of (date), during which you received a verbal reprimand for (state the offense in a brief and concise manner).

__________________________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

(Note: Provide background information of specific incident(s); state what you discussed with the employee and what the employee has agreed to do to correct the situation. If time limits have been agreed to for certain actions, make sure they are included. Make sure you state what the possible
negative consequences are if the action is not corrected.

T. **SAMPLE WRITTEN REPRIMAND**

*(To make a permanent record of a specific violation of behavior. A copy of the written reprimand is forwarded to the Human Resources Office for retention in the employee’s permanent personnel file. The original memo should go to the employee and the supervisor should retain a copy for his or her files.)*

<table>
<thead>
<tr>
<th>TO</th>
<th>(Employee’s Name)</th>
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</thead>
<tbody>
<tr>
<td>FROM</td>
<td>(Supervisor’s Name)</td>
</tr>
<tr>
<td>SUBJECT</td>
<td>WRITTEN REPRIMAND</td>
</tr>
<tr>
<td>DATE</td>
<td>(Date)</td>
</tr>
</tbody>
</table>

*(Start out by stating in a brief and concise manner those events that have led up to the written reprimand. Example:)*

As you will recall, on *(date)*, I talked to you regarding _______________________________.

We again discussed this on *(date)*.

*(Be sure to include specific situations with dates and times.)*

As a result of the above situation(s), this memo shall serve as a written reprimand, a copy of which will be placed in your permanent personnel file.

*(Identify the specific expectations you have for the employee to change.)*

*(Depending on the nature of the situation, you may want to use one of the following where appropriate.)*

Further actions of this nature could result in further disciplinary action up to and including dismissal.

*(or)*

Failure to correct this situation by *(date)* could result in further disciplinary action up to and including dismissal.

Should you wish to discuss this situation further, please arrange a meeting with me.

*(If the employee has any rights to appeal or grieve, you will want to reference the appeal procedure.)*
U. **SAMPLE NOTICE OF REJECTION OF PROBATIONARY APPOINTMENT**

(To inform probationary employee of termination. A copy of the notice is to be forwarded to the Human Resources Office for retention in the employee’s permanent personnel file. The original memo should go to the employee and you should retain a copy for your files.)

TO  
(Employee’s Name)

FROM  
(Supervisor/Manager’s Name)

SUBJECT  
NOTICE OF REJECTION OF PROBATIONARY APPOINTMENT

DATE  
(Date)

Pursuant to Section __ of Article __ of the ___________ Collective Bargaining Agreement and Board Policy _____, this is to inform you that you are released from your position of ___(job title)___ with ________ College, effective (time) on (date) because of your failure to satisfactorily complete your probationary period. A copy of Article ____________ and Board policy ____ is attached for your information.

If you have any questions concerning this action please contact ___(person’s name)____.

---

**LCW Practice Advisor**

In talking to a probationary employee about why he or she was released, keep any comments general. Remember, the employee can easily misinterpret what you say and use this as “evidence” in a subsequent lawsuit.

V. **SAMPLE NOTICE OF “LUBEY” HEARING**

(To inform employee of “Lubey” name-clearing hearing prior to termination.)

TO  
(Employee’s Name)

FROM  
(Name of Disciplinary Authority)

SUBJECT  
NOTICE OF “LUBEY” HEARING

DATE  
(Date)

This is to advise you that I am proposing that you be immediately terminated from your job of ___(job title)___ effective on ___(date after “Lubey” hearing)____.

The action is proposed to be taken for the following listed grounds:

(List all applicable rules or ordinance numbers.)

1. Violation of Education Code § _____
2. Violation of Education Code § _____
3. Violation of Board Policy § - ______
Based on these charges of misconduct that may stigmatize your reputation, you will be afforded an opportunity to be heard on __________ at __________ before the termination becomes effective.

The above grounds are based on the following acts or omissions: (Set forth clearly and specifically all of the details, dates, places, and events which give rise to the action.)

I considered the following documents in making this recommendation:

(List all applicable documents.)

Copies of these documents are attached.

(If copying of documents would be unreasonably burdensome, indicate that documents may be reviewed/available for copying at specified location upon request during regular business hours.)

If you intend to attend your “Lubey” hearing, please contact __________ so we can confirm your attendance. Written responses must be sent to __________ at __________.

W. SAMPLE NOTICE OF INTENT TO DISCIPLINE

(To inform employee of intended disciplinary action prior to taking such action.)

Date
Name
Address
City/State/Zip

Re.: Notice of Intent to Suspend/Demote/Dismiss

Dear: (person’s name)

I.
Notice of Pending Disciplinary Action

You are hereby notified of pending disciplinary action against you, initiated pursuant to Board Policy _____ and Article _____ of the Collective Bargaining Agreement between the Board of Trustees and the [name of classified union].” A copy of the Board Policy and Article ___ is attached.

II.
Cause for Discipline

This disciplinary action will be taken against you for the following grounds:

[List GROUNDS]

III.
Reasons for Discipline

The events upon which the foregoing cause(s) is/are based are as follows:

[Insert Charges]

Attached are copies of the materials upon which the foregoing charges are based. The causes of action are based jointly and severally upon the foregoing events.

Appeal Rights and Procedures

You have the right to request a hearing before the governing board, within five days of service of this notice of intent. A request for hearing form is enclosed. Failure to request a hearing by [date], constitutes a waiver of your right to hearing in which case the board will take action to suspend/demote/or dismiss you effective [date].

You have the right to attach your response to these charges for inclusion in your personnel file ___ days from today’s date. Please submit your response to ________ should you desire to file a response.

If you should have any questions regarding this matter, please contact ________________ at ________.

Sincerely,

Vice Chancellor, Human Resources

SECTION 6 PERSONNEL FILES

A. ACCESS TO EMPLOYEE’S PERSONNEL FILES
Employees have the right to inspect their personnel records including records relating to their performance and/or any grievance concerning them. Employers must make these personnel records available to the employees “at reasonable intervals and at reasonable times.” However, employers are not required to make these personnel records available at a time when the employees are actually required to work. Nonetheless, employers must:

- Keep a copy of each employee’s personnel records at his or her actual workplace;
- Make the employee’s personnel records available at his or her actual workplace within a reasonable period of time following his or her request; or
- Permit the employee to inspect the personnel records at the location where the personnel records are stored, with no loss of compensation to the employee.

It is important to note that these inspection requirements do not apply to:

- Records relating to the investigation of a possible criminal offense;
- Letters of reference;
- Ratings, reports, or records that were obtained prior to the employee's employment;
- Ratings, reports, or records that were prepared by identifiable examination committee members; and
- Ratings, reports, or records that were obtained in connection with a promotional examination.

If your district has a personnel commission, an employee must first seek relief regarding any matter or dispute relating to the inspection of his or her personnel records from that commission before pursuing any judicial remedy.

Furthermore, employers may establish additional reasonable rules regarding employee access. For example, a district can require that an employee give reasonable notice before inspecting his or her personnel file. The district can also have rules regarding the handling of the files and locations of inspections. Any such rules must not unreasonably limit access.
California Education Code Section 87031 provides employees with the right to inspect personnel records. Specifically, Section 87031 states that:

a) Every employee has the right to inspect personnel records pursuant to Section 1198.5 of the Labor Code.75

b) In addition to subdivision (a), all of the following shall apply to an employee of a community college district:

1. Information of a derogatory nature shall not be entered into an employee's personnel records unless and until the employee is given notice and an opportunity to review and comment on that information. The employee shall have the right to enter, and have attached to any derogatory statement, his or her own comments. The review shall take place during normal business hours and the employee shall be released from duties for this purpose without salary reduction.

2. The employee shall not have the right to inspect personnel records at a time when the employee is actually required to render services to the district.

3. Nothing in this section shall entitle an employee to review ratings, reports, or records that
   
   (A) were obtained prior to the employment of the person involved;
   
   (B) were prepared by identifiable examination committee members; or
   
   (C) were obtained in connection with a promotional examination.

B. INVESTIGATIVE CONSUMER REPORTING ACT

Under the Investigative Consumer Reporting Agencies Act (ICRAA), if a third party performs an employee background investigation, the employer must make a “clear and conspicuous” disclosure to the applicant on a separate form before the report is procured. The applicant or employee must also be provided an option to receive or not receive the report.

Furthermore, if the employer decides not to hire an applicant, or takes other action that adversely affects any applicant or employee based in whole or in part upon the third-party report, the employer must provide verbal, written, or electronic notice of: (i) the adverse action to the applicant; (ii) the name, address, and telephone number of the consumer reporting district that furnished the report; (iii) the applicant’s right to obtain a free copy of the report; and (iv) the applicant’s right to dispute the accuracy or completeness of any of the information in the report.

Employers should be aware that many similar requirements also exist under the Fair Credit Reporting Act (FCRA), which is federal legislation similar to the ICRAA.

In a similar vein, final rules have been put in place for the Fair and Accurate Credit Transactions (FACT) Act of 2003, that require compliance by November 1, 2008. The FACT Act added new provisions to the FCRA to protect consumers against identity theft. These new provisions are also known as the Red Flag rules.
To comply with the Red Flag rules, entities will be required to provide for the identification, detection, and response to patterns, practices, or specific activities (“red flags”) that could identify theft in their identity theft prevention programs. These rules apply to “creditors” with “covered accounts.” Covered accounts include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts and savings accounts. While not yet clearly established, these rules probably apply to districts that act like creditors and where they defer payment for goods or services [e.g. books or tuition/registration fees].

C. Placement of Information into Personnel Files

Personnel files may contain any (or all) of the following:

- Employment applications and test results;
- Form I-9 required by Immigration and Naturalization Service;
- Performance evaluations/appraisals;
- Written confirmation of employment actions (e.g., salary information, reclassifications, transfers, promotions);
- Documents regarding discipline or proposed discipline;
- Personal data, including marital status, family members, educational and employment history, or similar information;
- Applicable tax documents;
- Commendations;
- Fringe benefit information, including authorizations for deduction or withholding of pay;
- Leave records (including attendance records);
- Retirement records;
- Other records relating to the employment history with the employer; and
- Access log.

Any of these records could be used to affect the employment status or opportunities of present or former employees. Employees have the right to review their personnel files for records which are used to determine the employee’s qualification for employment, promotion, additional compensation, or termination or other disciplinary action.
D. **INSPECTION CHECKLIST**

- Review the file to determine whether any of the statutory exemptions apply (e.g., letters or reference regarding employee, criminal investigations). If so, remove such documents from the file.
- Determine whether any of the documents in the file are from non-supervisory personnel with an assurance of confidentiality. If so, remove such documents from the file.
- Enter a notation indicating date and time of employee’s inspection.

E. **INTERNAL DISCLOSURE**

Employers have a duty to ensure that the information contained in an employee’s personnel file or supervisor’s desk folder not be disclosed to others in the district in ways that are unfair to the employee. For example:

- Personnel and payroll records should only be available internally to authorized users on a need-to-know basis;
- Security records or records relating to security investigations should be maintained apart from other records, but access need not be given to the employee unless the information is incorporated into their personnel files or is used for discipline, termination, promotion or evaluation;
- Medical records used for work restrictions and life and health insurance records should be kept confidential and be separated from the general personnel file. These records should not be made available for use in any employment decision; and
- Records of work-related insurance compensation, disability and sick pay should be available internally only to authorized recipients on a need-to-know basis.

1. **EMPLOYEE’S RIGHT TO DISPUTE THE CONTENTS OF PERSONNEL FILES**

An employer’s desire to maintain the confidentiality of an employee’s personnel file should not be separated from the duty to maintain accurate records. An employee who questions the accuracy of records in his or her file should be able to correct and/or amend those records. If a correction or amendment is made, the employer should include the correction or amendment in any subsequent disclosure of the file. If the employer rejects the employee’s requested correction or amendment, the employee’s comments regarding the dispute should be incorporated into the record and forwarded when the records are disclosed.
2. **Employee’s Right to Be Given Notice and Opportunity to Comment About Entry**

*Employee Response Procedure*

Good personnel practice dictates that when a supervisor or manager intends to issue a memorandum which could be interpreted as “derogatory” in nature (e.g., letter of reprimand), the employee should be given notice and an opportunity to respond in writing prior to placement of this document in the employee’s personnel file. The law requires such practice under Education Code Section 87031.

A typical sequence of events leading to the placement of derogatory material into an employee’s personnel file is as follows:

- Written materials or notations that apply to the employee’s conduct are accumulated and placed in the supervisor’s folder;
- A conference with the employee is held to discuss the subject matter of the supervisor’s concern;
- A determination is made;
- The employee is called in and informed of the nature of the decision, which includes a statement that the supervisor intends to put the decision in writing and send it to the employee’s personnel file;
- The “decision” (e.g., written reprimand) is written and given to the employee. The employee is informed of his or her right to respond in writing within a specified time; and
- Upon receipt of the employee’s response or the expiration of the deadline, the material is placed into the personnel file and the employee is notified of such placement. If the employee files a timely response, such response is attached to the supervisor’s adverse comments.

The ability to examine and correct information in personnel files may significantly improve employee morale, even though the great majority of employees do not take advantage of the opportunity.

F. **Disclosure to Non-Employees**

An employee may consent to the release or disclosure of information in his or her personnel file. This can happen when:

- An employee places matters in the personnel file at issue in a legal proceeding, such as a challenge to a disciplinary action involving the employer; and
- An employee requests that information be provided to a third party, such as a prospective employer or educational institution.
In these situations, it is advisable to obtain a written release or authorization in which the employee agrees to hold the district harmless for any disclosure made to the third party.

G. **Discussing Current or Former Employees**

Because of the laws of defamation, employee due process rights and potential litigation, employers are discovering that the safest practice when asked about an employee or former employee is to give only “neutral” information.

In the absence of a signed written consent/waiver from the employee, the prudent employer should limit its remarks to such information as:

- Dates of employment;
- Job titles; and
- Relevant salary information.

To help prevent inadvertent disclosures of information, incorrect information or the disclosure of inconsistent information, all requests for information should be referred to the Vice Chancellor of Human Resources (or his/her designee). A sample consent to release information form is as follows:

1. **Sample Consent to Release Information Form**

<table>
<thead>
<tr>
<th>TO</th>
<th>Vice Chancellor of Human Resources, The Best Community College District</th>
</tr>
</thead>
<tbody>
<tr>
<td>FROM</td>
<td>Employee</td>
</tr>
<tr>
<td>SUBJECT</td>
<td>Consent to Release Employment Information</td>
</tr>
</tbody>
</table>

I hereby consent to your release of information to prospective employers who may inquire regarding my employment, including information based upon materials in my personnel file.

I further authorize you and/or such agents whom you may designate to respond to verbal or written inquiries from such prospective employers regarding my employment record with the Best Community College District.

I do hereby agree to release, save, defend, indemnify, and hold harmless the district and/or its officers, employees, and agents from any claims arising from the release of such employment information.

Dated ___________________________ Signature of Employee

Even if the employee signs a consent to release information form, the following guidelines should be considered:
• Make only statements that are based on relevant, observed and documented evidence.

• Make no statements with an intent to harm. Any statements, whether true or false, made with an intent to harm, are considered actionable and could become the basis of a lawsuit.

• Separate facts from opinions when providing information about an employee. Give only factual information.

• When describing an employee’s poor performance, cite specific incidents, times, and places. Avoid making categorical statements such as “He had sloppy work habits.”

• Do not allow personal dislike or anger toward the employee to lead you to make damaging statements. Although personality may be an important factor in determining the employee’s job performance, discuss only his or her performance and competence.

• Do not make statements that are legally defamatory by their very nature.

• Do not share negative information with a third party who is not authorized to receive it. Avoid making negative statements about former employees, even in informal discussions with colleagues or others.

• Do not abuse the qualified privilege. Although the law grants some protection to managers and administrators who are acting in an official capacity, this privilege should not be used unfairly or capriciously. Statements should reflect the highest professional and ethical standards.

• Before making a controversial or negative statement about a former employee, consider whether you can prove that it is true and that it was made without malice.

2. DEFAMATION

Employers who “publish” derogatory statements concerning an employee’s ability to perform his or her job may be subject to a defamation claim if the statements are false and injure the employee’s reputation. Even false impressions created by ambiguous language may amount to defamation if the statement can be reasonably deemed derogatory.

For example, informing a prospective employer that a former employee had been “terminated,” although in fact he had merely resigned may be defamatory. Even though “termination” can refer to voluntary and involuntary separations from employment, a court may conclude that the statement may have created a false impression the employee was fired.76
Moreover, the California Supreme Court has held that an employer may also be held liable for giving a positive recommendation. In *Randi W. v. Muroc Joint Unified School District*,77 a 13-year-old female student allegedly was sexually molested by a teacher. One of plaintiff’s allegations was against the teacher’s former employer who had written letters of recommendation for the teacher, even though they knew or should have known that the teacher had previously engaged in sexual misconduct with female students. The Supreme Court held that an employer who makes a misrepresentation in a letter of recommendation about a former employee that leads to physical or other injury, may be liable for injuries suffered not only from the direct recipients of the false information, but by third party non-recipients as well.

3. **Qualified Privilege**

Generally, employers have a qualified privilege in publishing defamatory statements about employees to individuals with a legitimate interest in the information.78 The qualified privilege is designed to enable managers and supervisors to evaluate employees candidly and to discuss their performance, even though the comments may be derogatory, and may adversely affect the employee’s status. To preserve a qualified privilege, employers should communicate information in the personnel file only to individuals with a legitimate, job-related interest in the information.

**SECTION 7  ELIMINATING DISCRIMINATION IN THE WORKPLACE**

Harassment, discrimination, or retaliation against a district employee or job applicant is unlawful and wrong. It also interferes with employment opportunities, morale, job performance, and the providing of public services. Moreover, harassment or discrimination based on the protected status of an employee or applicant—including sex, race, color, national origin, religion, age, disability, and sexual orientation—can result in hundreds of thousands of public dollars spent on attorneys’ fees and damages rather than on public services. It also creates a negative public image.

The federal law that prohibits harassment, discrimination and retaliation is Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq.79 Although there are some differences that provide employees greater rights, the corresponding state law is the California Fair Employment and Housing Act (the “FEHA”), California Government Code Section 12925 et seq.

Other California laws prohibit and address sexual harassment, but do not subject the employer to a lawsuit for monetary damages by the aggrieved employee or applicant. For example, the California Education Code prohibits sexual harassment in employment by any educational institution receiving or benefiting from state funds, but does not provide a private cause of action for money damages.80 The Unemployment Compensation Code states that sexual harassment is good cause for an employee to leave his or her job, for purposes of unemployment insurance.81
In addition, aggrieved individuals can rely on non-statutory common law causes of action to sue for monetary damages from their public employer. So long as they have complied with the Tort Claims Act, public employees or applicants may sue for the following, if applicable:

- **Assault**—fear or reasonable apprehension of an unpermitted touching;
- **Battery**—unpermitted touching of another;
- **Defamation**—written and/or spoken false statements are communicated to others about an employee or applicant which generally hold that person to ridicule or embarrassment;
- **Invasion of privacy**—private facts which are offensive and embarrassing to a reasonable person of ordinary sensibilities that are publicly disclosed; an unreasonable intrusion into an employee’s private affairs; or, physical intrusion that violates an employee’s privacy;
- **Constructive wrongful discharge**—employer either intentionally creates or knowingly permits illegal harassment that renders working conditions so intolerable or aggravated that an employee’s only reasonable alternative is to quit;
- **Wrongful discharge**—discharging an employee who is a victim of or witness to harassment, discrimination or retaliation;
- **Intentional infliction of emotional distress**—harassment that is willful, outrageous, designed to inflict emotional damage, and actually inflicts emotional injury; and
- **Negligent infliction of emotional distress**—harassment, discrimination or retaliation that causes emotional distress.

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While most workplace injuries are covered exclusively by Workers’ Compensation, emotional distress and other injuries resulting from harassment, discrimination, and retaliation generally are not. Thus, an injured employee may seek additional damages from his or her employer.

**A. WHO IS LIABLE FOR DISCRIMINATION - FEHA**

- Supervisors (and co-workers) may be individually liable for harassment.
- Supervisors are not individually liable for discrimination. This means that supervisors are not individually liable for management decisions later considered to be discriminatory. Such decisions include hiring, promotions and similar personnel decisions.
- Supervisors (and co-workers) are not individually liable for retaliation.
Individual liability means that the supervisor may be sued by the employee/plaintiff and become a defendant in a lawsuit, potentially liable for monetary damages.

In order to maximize the possibility of the employer being able to invoke the avoidable consequences doctrine, a supervisor/manager should never discourage a harassment or discrimination complaint, or ignore any such conduct in the workplace. Always avoid any response an employee could interpret as being unconcerned, biased against, or even worse, hostile toward, a complaint of discrimination. Do not reveal your personal opinion to the employee about whether you believe the complaint is valid or invalid. Treat all such complaints in an objective and fair manner. At a minimum, when a supervisor receives a harassment/discrimination complaint, whether orally or in writing, he/she should immediately report it to human resources and promptly follow all of the district’s policies and procedures regarding harassment complaints. Never treat the employee differently because he or she has made a complaint.

B. **Illegal Discrimination, Harassment and Retaliation Defined**

1. **Discrimination**

   To establish discrimination, an employee and/or applicant must show that he/she was treated differently as to the terms or conditions of employment because of his/her protected status.93

2. **Retaliation**

   To establish retaliation under the law, an individual must prove: (1) protected activity – meaning taking any action to complain about harassment/discrimination, or participating in an investigation into same; (2) an adverse employment action – meaning an employer’s actions that has a substantial and material adverse affect on the terms and conditions of employment; and (3) a causal connection between the two.94

3. **Harassment**

   To establish harassment under the law, an individual must show that: (1) he/she was subjected to verbal or physical conduct of a harassing nature because of any protected status;95 (2) the conduct was subjectively and objectively unwelcome; and, (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim’s working environment so as to create an abusive working environment.96

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   A person does not have to lose tangible job benefits to win a harassment case.97 Whether harassment has occurred will depend upon the particular context in which the conduct occurs.98

Conduct amounting to harassment may include:
• Speech, such as epithets, derogatory comments, slurs, jokes, or lewd propositions;
• Physical acts, such as assault, impeding or blocking movement, offensive touching, or any physical interference with normal movement;
• Visual insults, such as derogatory posters, cartoons, or drawings;
• Unwanted sexual advances, requests for sexual favors and other acts of a sexual nature, where submission is made a term or condition of employment, where submission to or rejection of the conduct is used as the basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual’s work performance or creates an intimidating, hostile, or offensive working environment;\textsuperscript{99} and
• Widespread supervisor favoritism toward select subordinates that communicates a message that the only way to advance is to have close friendships or sex with supervisors.\textsuperscript{100}

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Verbal Harassment can occur even if employees of a protected class do not hear the epithets directly, but learn from a third party that the epithets were made.\textsuperscript{101}

C. PROTECTED STATUSES

It is illegal to harass/discriminate against an employee or applicant because of or based on:

• Race or Color
• Religious Creed
• National Origin or Ancestry
• Physical or Mental Disability
• Medical Condition (including cancer or record of cancer, and genetic characteristics, diseases, disorders, or other inherited characteristics)
• Marital Status
• Sex (including pregnancy, childbirth, or medical conditions related to pregnancy or childbirth)
• Gender (including transgendered persons)
• Age
• Sexual Orientation (including heterosexuality, homosexuality, and bisexuality)
• Opposition to Unlawful Harassment\textsuperscript{102}
• Association with a person that has any of the protected characteristics
• Perception that a person has any of the protected characteristics

1. Race and National Origin

Harassment based on race and national origin is defined broadly. Employees are protected if they are a member of a group which is perceived as distinct when measured against other employees. The group need not have a common birthplace but should be ethnically and physiognomically distinct. Thus, a public employee of African, Native American, Mexican, or Asian ancestry is a member of a protected class, as is a public employee who describes himself as East Indian.

In addition, harassment based on an individual’s language can fall under the protected status of race and/or national origin. English-only rules are unlawful under California law unless: a) there is no alternative practice available that would meet the employer’s business need for the rule; and b) the employer has notified its employees of the rule and the consequences of violating the rule.

a. Accents

Discrimination occurs when an employee is harassed or subjected to adverse employment action because of his or her spoken accent.

For example, a federal court rejected an employer’s asserted reason for not promoting a Nigerian-born Black employee because of his “heavy accent.” The court held that the employer’s “accent defense” was nothing more than a pretext for discrimination based on the employee’s race and national origin. The court based its holding, in part, on the fact that a management employee who spoke with an Austrian accent had not been required to undergo speech therapy to advance his career, whereas the plaintiff was encouraged to go to a speech pathologist to help his chances of being promoted.

However, in another case, the court held a public entity employer did not discriminate against a job applicant for the position of civil service clerk who was not hired based, in part, on his “heavy Filipino accent.” The court found that the oral ability to communicate effectively and clearly was a legitimate occupational qualification for the job at issue, which involved providing services and assistance to the general public.

Despite this court’s holding, the EEOC cautions that denying employment opportunities because of an individual’s foreign accent, insofar as it creates an inability to communicate well in English, may be a “cover” for unlawful discrimination. The EEOC carefully investigates such charges.
b. “English-Only” Rules
California law prohibits employers from adopting policies that prohibit the use of languages other than English in the workplace unless two requirements are met:

- The restriction is justified by a business necessity. The statute defines “business necessity” as an overriding legitimate business purpose such as the “safe and efficient” operation of the business. Strict scrutiny is required for violations of this provision; and

- The employer has notified its employees of the circumstances and the time when the language restriction is required, as well as the consequences for violating the language restriction.

Thus, unless there is a true business necessity for requiring employees to speak English, such rules will be considered unlawful.

2. RELIGIOUS CREED

Religious creed includes all aspects of religious belief, observance, and practice. More generally, it can include moral or ethical beliefs as to what is right and wrong, where the beliefs are sincerely held with the strength of traditional religious views.111 Employers have a duty to accommodate the employee’s religious beliefs, unless no accommodation could be made without imposing an undue hardship on the employer.112 Under FEHA, the employer must show that it has explored “any available reasonable alternative means” of accommodating the employee’s religious belief.113

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The U.S. Department of Education’s Office for Civil Rights (OCR) issued a letter warning of increased harassment of Jewish, Arab Muslim, and Sikh students in the nation’s high schools and colleges since September 11, 2001. The letter noted that while OCR lacks the jurisdiction to prohibit religious discrimination per se, “OCR will exercise its jurisdiction to enforce Title VII prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics.”114

a. Reasonable Accommodation
For an employer to satisfy its obligation to reasonably accommodate an employee’s religious beliefs, all that is required is a showing that the employer initiated good faith efforts to accommodate the employee’s religious beliefs. While an employee has a concomitant duty to cooperate in the search for an acceptable accommodation, the employee’s duty arises only after the employer has suggested a possible accommodation. Moreover, an employee is not required to reschedule a religious activity so that participation in the activity would not conflict with his
or her employment before notifying his or her employer of the conflict and before the employer attempts to accommodate the conflict. The burden to accommodate the employee’s religion rests with the employer.\textsuperscript{115}

However, an employer’s duty to accommodate an employee’s religious beliefs ends when the employer offers any reasonable accommodation. An employer is not required to further show that other alternative accommodations suggested by the employee would result in undue hardship.\textsuperscript{116}

In another example, an employer was not required to accommodate an employee who wanted to discuss religion with clients and display religious items in his cubicle where clients frequented.\textsuperscript{117}

Examples of possible accommodations include the following:

- Allowing time off or authorizing a leave of absence;\textsuperscript{118}
- Adjusting work schedules;\textsuperscript{119}
- Restructuring or reassigning job duties that conflict with an employee’s religious beliefs to be performed at a different time or by another employee;\textsuperscript{120}
- Modifying dress or personal appearance standards or requirements, or adopting more flexible standards or requirements.\textsuperscript{121}

**LCW Practice Advisor** Accommodation is made on a case-by-case basis. Always consult with Human Resources when an employee makes a request for accommodation based on their religion.

\textbf{b. Undue Hardship}

An employer is not required to accommodate an employee’s religious beliefs if it would impose an undue hardship on the employer. An accommodation causes an undue hardship when it results in a more than de minimis cost to the employer.\textsuperscript{122} In determining whether an accommodation would impose an undue hardship, the following factors should be considered:

- Size of employer/facility, budget, number of employees, etc.;
- Type of business operation, including composition and structure of workforce;
- Nature and cost of accommodation involved;
- Reasonable notice to employer of need for accommodation; and
- Reasonable alternative means of accommodation.\textsuperscript{123}

As an example, an employer is not required to pay other employees overtime to accommodate an employee’s need for time off to observe his or her Sabbath day.\textsuperscript{124}
Since it is the employer’s burden to prove undue hardship, always document efforts to accommodate an employee’s religious belief.

3. **Physical Disability**

The definition of *physical disability* is also broad. It is any physical condition that makes achievement of a major life activity more difficult. The condition includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects a *major body system*. The disability could be neurological, immunological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

**Example:** *Obesity* may be a physical disability if it is caused by a physiological, systemic disorder affecting one or more of the referenced body systems.

Under the federal Americans with Disabilities Act, this condition must *substantially limit* the employee or applicant’s ability to participate in *major life activities*. Under the FEHA’s more encompassing approach, the condition need only limit the employee or applicant’s ability to participate in major life activities. Major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Moreover, any other impairments which requires special education or related services may be physical disabilities. Being *regarded* as having any of the above conditions is also included in the physical disability definition. The unlawful use of drugs is not a physical disability.125 Harassment based on physical disability includes harassment because of a person’s physiological, anatomical or other physical impairment.126

4. **Mental Disability**

Unlawful harassment based on *mental disability* includes harassment because of a mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and learning disabilities. It does not include the unlawful use of drugs.127

5. **Medical Condition**

Under the FEHA, harassment based on *medical condition* includes harassment because of any health impairment related to or associated with *cancer*, for which the employee or applicant has been rehabilitated or cured.128 Medical condition includes “genetic characteristics” defined to include genes or chromosomes shown to cause a disease or disorder.129 Title VII does not include medical condition as a protected status distinct from disability unlike the FEHA.

The FEHA requires employers to provide reasonable accommodation for conditions related to pregnancy or child birth if the employee so requests on the advice of her health care provider.130

6. **Sex**
Discrimination based on sex includes sexual harassment, as well as gender harassment, and harassment based on pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. **Gender** includes a person’s identity, appearance, or behavior, even if it is different from that traditionally associated with the person’s sex at birth.

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Employers must allow employees to dress consistently with the employee’s gender identity and protect them from harassment on that basis.

In addition, harassing conduct of a sexual nature, whether motivated by hostility or by sexual interest, is deemed based on sex, regardless of the gender of the victim or the sexual orientation of the harasser. Thus, same sex harassment and harassment by a homosexual employee against an employee of the opposite sex are also unlawful.

Employers can be held liable for a third party’s harassment of an employee, if the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

### 7. Pregnancy Discrimination

FEHA also prohibits discrimination against an employee on the basis of her pregnancy and medical conditions related to pregnancy. Specifically, it is an unlawful practice for an employer to:

- Refuse to promote a female employee on the basis of her pregnancy or a medically related condition;
- Refuse selection of a female employee on the basis of her pregnancy or a medically related condition, for a training program leading to promotion providing that she can complete the program at least three months prior to her anticipated date of departure for maternity leave;
- Discharge a female employee from employment or from the training program on the basis of her pregnancy or a medically related condition; or
- Discriminate against a female employee in compensation or in terms, conditions, or privileges of employment on the basis of her pregnancy or a medically related condition.
- Deny the same benefits or privileges granted by that employer to persons not so affected who are similar in their ability or inability to work, including taking disability or sick leave or any other accrued leave that employer allows to temporarily disabled employees. This applies in instances where the female employee’s condition creates a temporary disability.

FEHA also makes it an unlawful practice for employers to refuse to provide an employee with reasonable accommodations for conditions related to pregnancy, childbirth or other related medical conditions, upon the advice of the employee’s healthcare provider and upon her request. Employers must also, if reasonable, temporarily transfer an employee to a less
strenuous or hazardous position for the duration of her pregnancy upon her request, and on the advice of her physician. It is an unlawful practice for employers who have an affirmative duty to make such transfer based on policy, practice or collective bargaining agreement, to refuse to do so.141

8. Age

The prohibition of age harassment protects employees who are at least 40 years of age.142

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- It is not unlawful to refuse to hire applicants an employer believes to be overqualified for the position, as this may be a legitimate business reason for certain personnel decisions. The fact that overqualified employees may also be older does not necessarily mean that hiring a younger, less qualified applicant will be a violation of the ADEA or FEHA.143

- There is no “reverse” age discrimination under the ADEA for employees over 40 years old. It is not unlawful for a collective bargaining agreement to eliminate the employer's obligation to provide health benefits to subsequently retired employees except as to then-current employees at least 50 years old. Employees between age 40 and 50 cannot claim reverse age discrimination because the ADEA does not prohibit favoring the older employees over the younger employees.144

- Evidence that an employee over 40 is replaced by a substantially younger person, or that younger employers receive more favorable treatment, may give rise to an inference of age discrimination. Typically, an age gap of ten years or less may not be considered significant.145
9. Sexual Orientation

Discrimination or harassment based on sexual orientation includes harassment against people who identify themselves as homosexual, heterosexual or bisexual. Sexual orientation is protected under the FEHA and the right to be free of discrimination is a civil right.146

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Under Family Code Section 297, et. seq., (the California Domestic Partner Rights and Responsibilities Act “Domestic Partnership Act”), domestic partners must generally be treated as spouses under California law. For employers, this means that domestic partners are protected from discrimination in employment under the Fair Employment and Housing Act (Gov’t Code Section 12940, et. seq.), included within the California Family Rights Act provisions, and various labor code provisions. The Domestic Partnership Act specifically prohibits public agencies from discriminating against any person or couple on the grounds that the person “is a registered domestic partner rather than a spouse.”147

10. Marital Status Discrimination

Employment discrimination based on marital status is expressly prohibited by the FEHA.148 FEHA prohibits an employer from denying or granting employment benefits based on the fact that a job applicant or employee is either married or unmarried.149

In addition, the right to marry is a fundamental right protected by the due process and equal protection clauses of the United States Constitution. Thus, if a governmental rule or regulation substantially interferes with that right, the rule or regulation will only be upheld if it is necessary to promote a compelling governmental interest.150 However, if the fundamental right to marry is not threatened, or unduly burdened, the governmental policy or regulation will be upheld unless there is no rational basis for its enactment. In California, distinctions based upon marital status need only be rationally related to a legitimate governmental purpose.151

As an example, a public employer’s nepotism policy, which prohibits spouses from working in the same department, is lawful and does not violate due process or equal protection because such policies have been held to be rationally related to a public employer’s interest in avoiding conflicts of interest and favoritism in employee hiring, supervision, and allocation of duties.152

While Title VII does not specifically prohibit marital status discrimination, an employee may state a cause of action under Title VII if he or she can show a discriminatory employment decision was made based on the employee’s sex plus marital status. As an example, an employee would be required to show that his or her employer treated married men differently from married women to sustain a cause of action under Title VII for sex plus marital status discrimination.153
a. **“Marital Status” Defined**

“Marital status” is defined to include an individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state. 154 “Spouse” is defined as a partner in marriage, which is defined as “a personal relation arising out of a civil contract between a man and a woman.” Consent to making the contract is necessary, and consent alone does not constitute marriage. There must exist the issuance of a license and solemnization as authorized by law for a marriage to exist. 155

b. **Domestic Partners**

As noted above, the Domestic Rights and Responsibilities Act of 2003 extends the same rights, protections, and benefits to registered domestic partners that are granted to spouses. Public agencies are specifically prohibited from discriminating against any person based on the fact that the person is a registered domestic partner rather than a spouse.

c. **Reasonable Regulations of Spouses Employed by the Same Employer Allowed**

The California Fair Employment and Housing Commission has held that employers can assume that married couples, because of the unique emotional, legal and financial nature of the marriage relationship, may create problems of supervision, security, or morale if they work together in the same department, division, or facility. 156 Thus, the FEHA expressly allows employers to reasonably regulate the working of spouses/domestic partners in the same department, division, or facility, for reasons of:

- Safety,
- Security, and
- Morale. 157

An employer, therefore, may lawfully refuse to place one spouse/domestic partner under the direct supervision of the other, or refuse to place both in the same department, division, or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons. In addition, if co-employees marry, an employer is required to make reasonable efforts to assign job duties, so as to minimize problems of supervision, safety, security or morale. 158

Included in this section is a sample Marital Status/Nepotism Policy.

d. **Pre-Employment Inquiries**

An employer cannot ask a job applicant about his or her marital status. In addition, while an employer can ask an employment applicant if he or she has ever used another name (e.g., for purposes of verifying the applicant’s past work record), an employer cannot ask if the applicant’s current or other name(s) are his or her maiden or married name(s). An employer may also lawfully ask an applicant if he or she has a spouse or registered domestic partner who is presently employed by the employer, but only for the purpose of regulating their working together as discussed above. 159

e. **Sample – Marital Status/Nepotism Policy**
It is the policy of the ____(name of district)____ that no job applicant or employee shall be denied employment or benefits of employment solely based on his or her marital status/domestic partner status.

For purposes of this policy, “marital status” is defined as an individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state. Domestic partners are defined as registered domestic partners.

Notwithstanding the above provisions, the ____(name of district)____ retains the right:

1) To refuse to place a spouse [domestic partner] under the direct supervision of another spouse [domestic partner], or
2) To refuse to place both spouses [domestic partner] in the same department, division, or facility,

where such placement has the potential for creating an adverse impact on supervision, safety, security or morale, or involves other potential conflicts of interest.

The ____(name of district)____ will make reasonable efforts to assign job duties to minimize the potential for creating an adverse impact on supervision, safety, security, or moral, or creating other potential conflicts of interest.

If a spouse [domestic partner] is currently working under the supervision of the other spouse [domestic partner], or both spouses [domestic partners] are working in the same department, division, or facility, prior to the adoption of this policy, the ____(name of district)____ will consider whether or not there have been any actual problems with supervision, safety, security or morale, in determining whether a risk of such problems exists. The ____(name of district)____ retains the right to reassign or transfer one of the spouses [domestic partners] to eliminate any potential for creating an adverse impact on supervision, safety, security, or morale, or other potential conflicts of interest.

### 11. OPPOSITION TO UNLAWFUL HARASSMENT/RETLATION

Discrimination or harassment based on opposition to unlawful harassment is itself unlawful because it is retaliation for trying to comply with or enforce compliance with Title VII and FEHA. An employee need not say the word “harassment” in order to be protected from retaliation for reporting behavior that amounts to harassment. Because it is difficult if not impossible for a public employee to know if the harassment is “unlawful,” all that is required is a sincere, good faith and reasonable belief that the harassment is unlawful. Thus, even if no unlawful harassment has occurred, a public employer may not retaliate against an employee for complaining about conduct which he or she sincerely and reasonably believes is unlawful harassment. Moreover, it is unlawful to harass or take any adverse action against an employee who supports or associates with a co-worker who has complained about unlawful harassment.

| Example: | An employee engaged in protected activity when she complained about the sexually offensive conduct of an outside consultant whose seminar she had been required to attend. |

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Although the employee might have been wrong as to whether the conduct was illegal, she had a good faith and reasonable belief to that end. As a result, her employer could not retaliate against her for complaining.\footnote{163}

The California Supreme Court has held that under FEHA, an adverse employment action for the purposes of determining whether retaliation has occurred, is an action or series of actions, viewed in their totality, that materially affect the terms and conditions of employment. This includes not only “ultimate” acts such as termination, but also “the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement”\footnote{164}.

In \textit{Wysinger v. Automobile Club of Southern California},\footnote{165} the Court of Appeal upheld a jury verdict in favor of the plaintiff for retaliation under the FEHA. The employer refused to promote plaintiff after he complained about age discrimination and also engaged in a pattern of conduct, the totality of which constituted an adverse employment action. There, the pattern consisted of an undeserved negative job review, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.

\section*{D. HOSTILE WORK ENVIRONMENT}

There are two types of harassment. One type is “hostile workplace” harassment. A work environment is hostile if it is both \textit{objectively} and \textit{subjectively} offensive such that it interferes with an employee’s ability to do his or her work. The harassment must be so severe or pervasive that it creates an objectively hostile or abusive work environment—an environment that a reasonable victim would find hostile or abusive. Likewise, the victim must subjectively perceive the environment to be abusive.\footnote{166} Important factors to be considered are the frequency, severity and the level of interference with work performance.\footnote{167} In determining whether a hostile work environment exists, courts look at the totality of the circumstances—the context of the offensive conduct. Courts must consider common sense and the appropriate sensibility and social context of the workplace.\footnote{168}

Whether an environment is hostile or abusive must be determined on a case-by-case basis.\footnote{169} Factors to consider are:

\begin{itemize}
\item The frequency of the harassing conduct;
\item The severity of the harassing conduct;
\item Whether the harassing conduct is physically threatening or humiliating;
\item Whether the harassing conduct is unwelcome;
\item Whether the harassing conduct unreasonably interferes with an employee’s work performance or alters other conditions of employment; and
\item Whether a member of the protected class would consider the harassment hostile and offensive, i.e., the “reasonable victim” standard.\footnote{170}
\end{itemize}
Thus, a work environment is unlawfully hostile or abusive if there is a concerted pattern of harassment of a repeated, routine or a generalized nature. Occasional, isolated, sporadic, or trivial acts of harassment do not comprise a hostile environment. Generally, one offensive utterance would not render a work environment hostile. Similarly, an isolated instance of favoritism on the part of a supervisor toward a subordinate with whom the supervisor is having a consensual affair ordinarily will not constitute sexual harassment. Nevertheless, employers should promptly address and remedy any seemingly “minor” acts of harassment to avoid the development of an unlawfully hostile work environment.

An employee’s work environment can be unlawfully hostile if the harassment is directed specifically at the employee or if the employee personally witnesses unlawful harassment of another employee in his or her immediate work environment. Under the Fair Employment and Housing Act, an employee need not be a direct victim of the harassment. If an employee is not personally subjected to harassing remarks or touching, he or she must establish that he or she learned about the harassment from a third party. A work environment can also be unlawfully hostile even if no sexual advances have been made. Work environments in which those who have sexual relationships with supervisors receive job benefits create a sexually hostile work environment for third party employees who were not involved in the sexual relationships. Of course, unwelcome sexual advances that are sufficiently pervasive so as to alter the conditions of employment can comprise a hostile work environment.

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Workplace surveys have found that dating others from work is widespread. In 2005, approximately 58% of employees reported dating someone from work. Fourteen percent dated a boss or superior, while 19% had dated a subordinate. Employers can respond by maintaining appropriate standards of non-sexual conduct in the workplace, and should also train employees about the potential individual liability that can result from workplace romances.

Employers may potentially be liable for sexual harassment committed against their workers by clients, customers, vendors, and other third parties if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment. Thus, it is up to the district and its supervisors to ensure that nobody in the work environment engages in harassing conduct, even clients or other non-employees.
Court Cases Illustrating Hostile Work Environment

Miller v. Department of Corrections182
Edna Miller worked at the California Department of Corrections. She learned that the Chief Deputy Warden was having sexual affairs with three different subordinates. Miller competed for promotion against one of the subordinates who was having an affair with the boss. Miller did not get the promotion, and watched the subordinate who was having the affair with the boss make an unprecedented rise in the ranks. Miller and others witnessed the boss and the subordinates engage in sexual touching during Department social events. Miller complained, but did not use the term “sexual harassment” or “sexual discrimination.” The California Supreme Court determined that widespread sexual favoritism creates a hostile work environment even for third party employees who are not having sex with the boss because this conduct communicates the demeaning message that female employees are viewed as sexual playthings, or that the only way for women to get ahead in the workplace is to have sex with the boss. If management could reasonably believe that an employee is complaining about sexual harassment, the employee is protected from retaliation and the employer has a duty to investigate.

Equal Opportunity Commission v. National Education Association183
Plaintiffs were employed by the National Education Association of Alaska (NEA) and worked under its executive director. The women alleged that the director would yell at them loudly and publicly for no reason and stand behind them while they worked. In addition, he was physically aggressive and frequently used aggressive gestures to make a point such as shaking his fist in the women’s faces, pumping his fist in their direction or lunging towards them. The women alleged a hostile work environment. The Court held that the hostile acts do not need to be overtly sex or gender specific. “A pattern of abuse in the workplace directed at women, whether or not it was motivated by ‘lust’ or by a desire to drive women out of the organization, can violate [the law].” A hostile work environment can exist where “an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men.”

E. QUID PRO QUO

“Quid pro quo” is the other type of harassment. “Quid pro quo” means “this for that” in Latin. In the context of sexual harassment, quid pro quo occurs when submission to sexual conduct is explicitly or implicitly made a condition of a job, a job benefit, or the absence of a job detriment.184 Thus, the accused harasser must be in a position to affect the accuser’s employment (i.e., a supervisor). This form of harassment can include sexual propositions, unwarranted graphic discussion of sexual acts, or commentary on the employee’s body.185
Implicit conditioning of job benefits on submission to sexual conduct is more common but harder to detect than explicit quid pro quo harassment. The factors to evaluate in determining whether quid pro quo harassment has actually occurred are:

- Whether the sexual conduct was unwelcome;
- Whether a reasonable person in the accuser’s position, who is the same gender as the accuser and has the same fundamental characteristics as the accuser, would have believed he or she was the subject of quid pro quo harassment;
- Whether the accused harasser intended to subject the accuser to quid pro quo harassment; and
- Whether there is a close connection between a discussion about job benefits and a request for sexual favors.\footnote{186}

**Court Case Illustrating Quid Pro Quo**

*Nichols v. Frank*\footnote{187}

The Ninth Circuit found that a deaf-mute subordinate was subjected to quid pro quo harassment when her supervisor, who was the only employee who knew sign language, requested oral sex from her right after discussing her request for a leave of absence, her attendance record, and her continued employment.

### F. Preventing Harassment, Discrimination and Retaliation

Community college districts must take all reasonable steps necessary to prevent discrimination and harassment from occurring in the workplace.\footnote{188} The FEHA prohibits harassment by a person providing services pursuant to a contract.\footnote{189} Both supervisors and non-supervisors may be personally liable for harassment, and an employer may be liable if it fails to take immediate and appropriate corrective action regarding known harassment.

Under Title VII, an employer may be relieved of liability if it takes sufficient disciplinary and remedial action in response to complaints of harassment.\footnote{180} Under the FEHA, however, prompt remedial action will not relieve the employer of liability if the harasser was a supervisor.\footnote{191} Thus, it is imperative to educate and train all supervisors to avoid the FEHA’s strict liability rule for harassment by supervisors.

The likelihood of liability under both Title VII and the FEHA is lessened if, by the time the harassment occurred, the employer had already taken reasonable steps to prevent harassment from occurring, including:

- Affirmatively addressing the subject of harassment;
- Expressing strong disapproval of harassment;
- Developing appropriate sanctions for harassment;
• Informing employees of their right to raise and how to raise the issue of harassment under California (FEHA) and federal (Title VII) law; and
• Developing methods to sensitize all concerned.  

Indeed, to satisfy several of these steps, the FEHA requires the following specific actions:

• Post the California Department of Fair Employment and Housing’s (“DFEH”) poster regarding discrimination and harassment in a prominent and accessible location in the workplace and
• Distribute a sexual harassment information sheet to all employees in a reliable way, such as with the employees’ paychecks. You may obtain an information sheet from the DFEH or Department of General Services, or you may draft your own information sheet or include the information in your policy. If you draft your own information sheet, it should include the following: (1) A statement that sexual harassment is illegal; (2) The definition of sexual harassment under state and federal law, (3) A description of sexual harassment, using examples; (4) The district’s internal complaint process that is available for each employee; (5) The legal remedies and complaint process available through the DFEH and the Fair Employment and Housing Commission (the “FEHC”); (6) Directions on how to contact the DFEH and the FEHC; and (5) Notice of protection from retaliation for opposing unlawful discrimination and harassment.

LCW Practice Advisor | You may obtain one free copy of the poster and the information sheet from your local office of the DFEH or online at www.dfeh.ca.gov, or you may obtain multiple copies from the Office of Documents and Publications of the Department of General Services. Make sure you have the most recent version of the poster.

LCW Practice Advisor | Other reliable ways to distribute your sexual harassment information sheet are to: (1) distribute it as part of an orientation/employment packet to new hires; (2) re-issue the information sheet to employees on a regular basis; (3) include the required data in your employer’s harassment prevention policy; or (4) permanently post the information sheet at all work sites in prominent and accessible locations.

LCW Practice Advisor | Districts should ensure that their policies expressly state that they apply to all forms of discriminatory harassment, not just sexual harassment.

While compliance with these steps will not insulate a district from liability for unlawful harassment under the FEHA, it will help to prevent unlawful harassment from occurring and possibly insulate the district from Title VII and tort liability as well as damages. The United
States Supreme Court held that an employer can raise an affirmative defense in a sexual harassment suit that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the employee or applicant failed to take advantage of it.194

The following are additional measures to deter harassment:

- Promote equal employment opportunity at all levels of the workplace;
- Treat all people on their individual merits, without regard to their sex, race, or other protected status;
- Ensure that the visual, verbal, and physical aspects of the work site do not contain indicators of stereotyping based on any protected classifications;
- Do not allow joking or rumors based on physical attributes or other basis for protected status;
- Do not allow innuendo or gossip which isolates individuals by their protected status;
- Be sensitive to supervisor/subordinate personal relationships which could adversely impact the good judgment and neutrality of the supervisor;
- If your employer monitors the attire of district employees, be sure to monitor the attire of both genders;
- Adopt, disseminate to all personnel, and re-disseminate to all personnel an effective policy against harassment;
- Regularly train all employees, particularly supervisors and managers, on how to avoid harassment;
- Investigate promptly all complaints of harassment and intolerable working conditions;
- Take corrective action promptly, if needed, after each investigation of a complaint; and
- Do not take punitive action against anyone for complaining about harassment unless the complaint was malicious.

G. DEVELOPING AN ANTI-HARASSMENT, DISCRIMINATION AND RETALIATION POLICY

Some harassing behavior may not be sufficiently severe or pervasive enough to violate the law, but is still unproductive and offensive. A district is well-advised to prohibit inappropriate behavior even if that behavior does not reach the level of unlawful harassment, discrimination or retaliation.

It is advisable for an employer to develop a policy that does not simply mirror the law for two reasons. First, prohibiting less severe inappropriate behavior enables an employer to take corrective action at an early stage, thus preventing more severe and potentially unlawful conduct.
from developing. Secondly, if the employer’s policy simply recites the legal standard, the employer could be held to have admitted that illegal conduct occurred if it finds its policy was violated. Such an admission could be used against the employer if litigation develops. For both of these reasons, a “zero tolerance” policy is recommended. In a zero tolerance policy, harassment, discrimination and retaliation is prohibited, whether or not it would be found to be unlawful.

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An employer may be able to limit damages in a harassment lawsuit if it can prove that it has internal complaint procedures that are designed to eliminate harassment.195

A district can limit damages in a FEHA case if it assures all employees that they can use the district’s internal complaint procedure without retaliation.196

Employers must take the following steps if they want to limit damages in a FEHA lawsuit:

- have a comprehensive complaint procedure that is user friendly;
- deal with complaints in a prompt, non-judgmental, objective fashion;
- communicate/publicize the complaint procedure to all employees; and
- periodically update, and remind employees about, the complaint procedure.197

A complaint procedure should contain all of the following:

- Prohibit discrimination, harassment and retaliation from both employees and non-employees based upon any protected status;
- Protect applicants, independent contractors, and employees from harassment, discrimination, and retaliation;
- Prohibit retaliation for reporting alleged violations, participating in the complaint investigation process, or supporting those who complain or participate;
- Give supervisory employees the duty to report discrimination and harassment;
- A thorough, prompt and objective/non-judgmental investigation procedure
- Provide confidentiality to the greatest extent possible given the need to investigate, discipline as necessary, and take other appropriate remedial actions;
- A reference to the remedies and complaint processes available from the U.S. Equal Employment Opportunity Commission and to the California Department of Fair Employment and Housing, and directions regarding how to contact those offices; and
• A description of harassment, including examples of the types of harassment.\textsuperscript{198}

A district’s complaint procedure must provide a meaningful mechanism through which an aggrieved employee may inform his or her district of discriminatory harassment.

To be meaningful, the complaint procedure must be designed to encourage victims to come forward. Thus, if the procedure requires an aggrieved employee to complain first to his or her supervisor, it should provide an alternative route of complaint to an employee who feels he or she is being harassed by his or her supervisor. Otherwise, the employee would feel powerless and discouraged from complaining.

Complainants should be informed that their complaints will be conveyed only to those who need to know about it, such as those investigating the complaint and any others involved in remedial or disciplinary action. The district should maintain confidentiality to the greatest extent possible but complete confidentiality cannot be guaranteed.

Complainants should be permitted to complain verbally, although the complaint procedure should encourage and may require employees to state their complaints ultimately in writing. After receiving a written complaint, the district should acknowledge its receipt in writing and indicate when the complainant can expect a follow-up report.

The complaint procedure must also be distributed to all employees.

The person designated to receive the complaints should keep a confidential log of the complaints received as to non-sworn personnel. A log can serve as a checklist, help the district spot repeat victims and alleged offenders, track the effectiveness of the district’s prevention and remediation efforts, and serve as evidence of the district’s thorough prevention and prompt remediation efforts. The log may include:

• The names of the complainant and alleged harasser;
• The basis for the complainant’s protected status, if any;
• The nature of the complaint;
• The date the complaint was received;
• The person assigned to investigate the complaint;
• Any findings made after the investigation;
• What, if any, remedial action was taken;
• Whether the complainant was satisfied with the result;
• Whether the complainant or alleged harasser filed a claim with the DFEH or the United States Equal Employment Opportunity Commission (“EEOC”); and
• Whether the complainant filed a Tort Claim with the district or a lawsuit.
The one potential weakness of a log is that it might have to be produced in a lawsuit. The likelihood of production is rare, however, because of the privacy interests of the people who file complaints and the people who are disciplined. In the event that a court ordered the disclosure of complainants’ identities, the district would have to make such disclosures, regardless of the existence of a log. Thus, the benefits of keeping a log, so long as it is kept confidential, outweigh its potential risk as it may assist the district in subsequent litigation.

H. TRAINING EMPLOYEES TO PREVENT HARASSMENT, DISCRIMINATION AND RETALIATION

All community college districts, and particularly administrators, managers and supervisors, must treat their co-workers and subordinates on the basis of their individual merit and not on the basis of their protected status, or of stereotypes related to their protected status. Education and training can further this goal and can take many forms, including (but not limited to) the following:

- Orientation sessions for all new employees;
- Management/supervisory training sessions and special meetings in each office of the employer with a trainer/facilitator;
- At least annual refresher training for all employees;
- Working lunch meetings with harassment prevention as the agenda item; and
- Speakers from organizations at the forefront of harassment prevention.

Peace officers must receive instruction on sexual harassment in the workplace as part of their basic training. The instruction must include at least:

- The definition of sexual harassment;
- A description of sexual harassment, with examples;
- A statement of the illegality of sexual harassment; and
- The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.

Harassment prevention training for supervisors is now mandated in California. Employers with more than fifty (50) employees were required to provide all supervisors and above with at least two (2) hours of such training, in an interactive format, by December 31, 2005.
After January 1, 2006, the supervisor training must occur every two (2) years for existing supervisors and within six months of being appointed to a supervisory position.\textsuperscript{202}

The FEHA defines “supervisor” as: “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”\textsuperscript{203} The California Court of Appeal has found that this definition is very broad and that supervisors are not limited to only those who are accountable or responsible for the work of their subordinates.\textsuperscript{204}

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Any employee who has any level of supervisory discretion, as opposed to routine clerical duties, is a “supervisor” as defined in the Fair Employment and Housing Act.\textsuperscript{205}

\section{8 \textbf{Disability Discrimination}}

\subsection{A.\ \textbf{Laws Prohibiting Disability Discrimination}}

The following state and federal laws prohibit disability discrimination:

\begin{itemize}
  \item \textit{California Fair Employment and Housing Act} (FEHA), Government Code §§ 12940 et seq.;
  \item \textit{Title VII of the Civil Rights Act of 1964}, as amended in 1991, 42 U.S.C. §§ 2000e et seq. (prohibits discrimination in employment based on race, color, religion, sex, or national origin);
  \item \textit{Age Discrimination in Employment Act} (ADEA), 29 U.S.C. §§ 621 et seq. (prohibits discrimination in employment based on age);
  \item \textit{Americans With Disabilities Act} (ADA), 42 U.S.C. §§ 12101 et seq. (prohibits discrimination in employment based on disability);
  \item \textit{Equal Pay Act of 1963}, 29 U.S.C. § 206(d) (prohibits wage discrimination on the basis of gender);
  \item \textit{Title IX of the Education Amendments of 1972}, prohibiting discrimination on the basis of sex in educational programs; has been construed by courts to extend to employment practices.
  \item California Education Code §§ 220-221.1 et seq.
\end{itemize}

\subsection{B.\ \textbf{The California Fair Employment and Housing Act}}
FEHA makes it unlawful for an employer to discriminate against individuals with disabilities by engaging in the following prohibited employment practices:

- Refusing to hire or employ an applicant because of his or her physical disability, mental disability, or medical condition.
- Refusing to select an individual for a training program which would lead to employment on the basis of his or her physical disability, mental disability, or medical condition.
- Barring or discharging an individual from employment or from a training program leading to employment on the basis of his or her physical disability, mental disability, or medical condition.
- Discriminating against an individual in matters of compensation on the basis of his or her physical disability, mental disability, or medical condition.
- Discriminating against an individual with regard to the terms, conditions, or privileges of employment on the basis of his or her physical disability, mental disability, or medical condition.

1. **Employer’s Actual Knowledge Requirement**

FEHA requires a showing that the employer actually knew about the employee’s disability and that this disability was in fact the chief motivation for this decision.

2. **What Is a Disability under FEHA?**

   - FEHA’s definition of physical and mental disability now only requires a limitation on major life activities whereas the ADA’s language requires that the disability “substantially limit” a major life activity. The California Supreme Court stated, in *Colmenares v. Braemar County Club, Inc.*, that the changes from “substantially limits” to “limits” merely clarified the legislature’s original intent in drafting the FEHA.
   - FEHA’s definition of physical and mental disability will not take into account mitigating measures such as medications, assistive devices or reasonable accommodations, unless the measures themselves present a substantial limitation on major life activities. In *Sutton v. United Airlines*, the United States Supreme Court had previously inferred this requirement into the ADA.
   - FEHA’s definition of “major life activities” is now to be interpreted broadly and is expanded to include physical, mental, and social activities and working.
   - FEHA’s definition of medical condition, a basis for disability discrimination that does not exist under the ADA, has been expanded to include any health impairments related to or associated with a diagnosis of cancer “or a record or history of cancer.”
3. Physical Disabilities Covered by FEHA

A “physical disability” under FEHA is defined under California Government Code Section 12926(k) and includes but is not limited to, the following:

- Having 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 an individual’s ability to participate in a major life activity;
- Any other health impairment not described above that requires special education or related services;
- Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraphs above, which is known to the employer or other covered entity.
- Being regarded or treated by the employer or other covered entity as having, or having had, any physical condition that makes achievement of a major life activity difficult.
- Being regarded or treated by the employer or other covered entity having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described above.

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Based on the language of this statute, the list of physical disabilities that are included under FEHA’s umbrella of protection is seemingly all-inclusive. However, there are several limits to this definition. Courts have qualified this definition by requiring that the nature and degree of the disability make achievement “unusually difficult.” Also a complaint of disability must be rooted in an “actual or perceived physiological disorder affecting one or more of the basic bodily systems and limiting a major life activity.”

a. Limits on One or More Major Life Activities

There is an undeniable difference in the language of FEHA and ADA with regard to this qualification of the definition of physical disability. The ADA specifically requires that the physical disability “substantially limits one or more of the major life activities of such individual.”

b. Major Life Activities under FEHA

FEHA’s definitions of physical and mental disability require that the impairment limit a major life activity. California regulations define a major life activity to include “functions such as
c. Being Regarded as Disabled
FEHA includes in its physical disability definition impairments which an individual is regarded as having. Therefore, an individual who is regarded as having one of the disabilities included under FEHA is entitled to protection from discrimination. This perception can be based on an underlying physiological disorder already defined under FEHA. This definition also includes medical conditions that are perceived as making achievement of a major life activity difficult.

d. Mitigating Measures Not Considered
FEHA expressly does not take into account “mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.”

For example, in *Sutton v. United Airlines*, the U. S. Supreme Court held that the plaintiff Sutton was not disabled under the ADA because she could not show that her vision problem imposed a substantial limitation on the major life activity of working as she could wear glasses to correct this problem. Under FEHA, a disabled individual’s abilities are evaluated without the benefit of mitigating measures.

e. Past Disabilities and Potential Future Impairments
FEHA’s definition of disability includes a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment known to the employer or other covered entity. This addition extends FEHA’s protection against disability discrimination to employees who are discriminated against by the actual or perceived impairments that employers may believe exist as a result of a prior medical condition. It represents one of the few adoptions that FEHA has made from the ADA, which has an identical provision that covers a “record of such an impairment.”

Physical or mental disabilities or medical conditions which pose the threat of future impairment are also protected from discriminatory employment practices.

f. Obesity as a Physical Disability
The courts do not currently view obesity as a physical disability unless it is based on an underlying “physiological disorder.”

g. Chronic or Episodic Ailments
“Chronic or episodic ailments” such as HIV/AIDS, epilepsy, seizure disorders, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease and hepatitis, are included in the definition of physical and mental disabilities.

FEHA follows the ADA in excluding “sexual behavior disorders, compulsive gambling, kleptomania, [and] pyromania” from the definition of physical disability.”
Whether the FEHA protects temporary disabilities is an issue that has not yet been litigated. The factors that distinguish the FEHA from the ADA may ultimately lead a court to decide that even temporary disabilities are protected by state law. Since this is an open question, consult with Personnel/Human Resources or legal counsel when dealing with an employee with “temporary” disabilities.

4. **Mental Disabilities Covered by FEHA**

Under FEHA, a mental disability may be defined as:

- Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.
- Any other mental or psychological disorder or condition not described above that requires special education or related services.
- Having a record or history of a mental or psychological disorder or condition described above, which is known to the district.
- Being regarded or treated by the district as having, or having had, any mental condition that makes achievement of a major life activity difficult.
- Being regarded or treated by the district as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described above.

Examples include:

- Post-traumatic stress disorder\(^{228}\)
- Manic depression\(^{229}\)
- Severe anxiety or depression\(^{230}\)
- Organic mental syndrome not otherwise specified\(^{231}\)
- Panic attack disorder\(^{232}\)
- Bipolar disorder\(^{233}\)
- Paranoid schizophrenia\(^{234}\)
- Borderline personality disorder\(^{235}\)
- Memory loss resulting from brain surgery\(^{236}\)

Not every mental condition or personality trait will qualify as a mental impairment. Examples of mental conditions or personality traits that, without additional manifestations, do not qualify as mental impairments include:
• Poor judgment
• Irresponsible behavior
• Poor impulse control
• Irritability
• Chronic lateness
• Quick temper

In addition, relatively mild neuroses not considered “clinically significant” under DSM-IV probably would not qualify as mental impairments.

It can be difficult for employers to determine whether an individual with a psychiatric condition has a mental impairment. Unlike many physical impairments such as paralysis or blindness, a mental impairment often is not readily apparent. Also, an individual with a mental condition is less likely to be able to effectively communicate to the employer the nature and severity of his or her condition or the difficulties it creates for the individual in the workplace.

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When it is unclear whether an individual has a mental impairment, an employer may want to ask the individual about his/her condition. Supervisors should be aware, however, that FEHA and the ADA significantly restrict the time and scope of these questions. Always consult with your district’s human resources department when an employee tells you they have a psychological condition which is affecting their performance in the workplace.

5. **Medical Conditions Covered by FEHA**

FEHA also protects individuals from discrimination on the basis of:

a. **Cancer-Related Condition**

The FEHA defines a medical condition as “[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.” FEHA also covers persons with a “record or history of cancer,” thus prohibiting discrimination against individuals who are in remission from cancer. This definition exclusively relates to cancer-related impairments and cannot be extended to any other medical conditions.

b. **Genetic Characteristics**

A medical condition under FEHA also includes genetic characteristics. Genetic characteristic is defined as either:

• Any scientifically or medically identifiable gene or chromosome that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased
risk of development of a disease or disorder and that is presently not associated with any symptoms of any disease or disorder; or

- Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

- It is an unlawful practice under FEHA for an employer to either directly or indirectly subject an employee, applicant or other person to a test for the purpose of ascertaining the presence of a genetic characteristic.\textsuperscript{241}

C. AMERICANS WITH DISABILITIES ACT

The ADA prohibits discrimination against a qualified individual with a disability on the basis of that disability with regard 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 district;
- 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 the district including social and recreational programs; and
- Any other term, condition, or privilege of employment.\textsuperscript{242}
An employment decision must be connected to a disability to establish discrimination. For example, if it can be shown that the employee is discharged for excessive absenteeism which was not the result of any covered disability, there is no discrimination. However, if it can be shown that the absenteeism is because of a disability, there may be a basis for a charge of discrimination.

The ADA specifies types of actions that may constitute discrimination. For example:

- Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability.
- Participating in a contractual or other arrangement or relationship that subjects a district's qualified applicant or employee with a disability to discrimination.
- Denying employment opportunities to a qualified individual because he or she has a relationship or association with a person with a disability.
- Refusing to make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability, unless the accommodation would pose an undue hardship on the district.
- Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability unless they are job-related and necessary for the district.
- Failing to use employment tests in the most effective manner to measure actual abilities. Tests must accurately reflect the skills, aptitude, or other factors being measured, and not the impaired sensory, manual, or Speaking skills of an employee or applicant with a disability (unless those are the skills the test is designed to measure.
- Denying an employment opportunity to a qualified individual because he or she has a relationship or association with an individual with a disability.

1. **What Is a Disability Under the ADA?**

Under the ADA, an individual is considered to have a “disability” if he or she:

- Has a physical or mental impairment which substantially limits one or more of the person's major life activities; and/or
- Has a record of such an impairment; and/or
- Is regarded by the covered entity as having an impairment.\(^\text{243}\)

*Note: Under FEHA, the condition only has to limit a major life activity.*
2. Physical or Mental Impairment Which Substantially Limits One or More Major Life Activities

To understand the term “disability,” it is necessary to understand the terms which make up the definition: “physical or mental impairment,” “substantially limits” and “major life activities.”

a. Physical or Mental Impairment

The following conditions are examples of physical or mental impairments:

- Any physiological disorder or condition
- Cosmetic disfigurement
- Anatomical loss affecting one or more of the following systems: (1) neurological; (2) musculoskeletal; (3) special sense organs; (4) respiratory, including speech organs; (5) cardiovascular; (6) reproductive; (7) digestive; (8) genito-urinary; (9) hemic; (10) lymphatic; (11) skin; or (12) endocrine.²⁴⁴
- Orthopedic and neuromotor disabilities
- Visual, speech and hearing impairment
- Muscular dystrophy, epilepsy, cerebral palsy and multiple sclerosis
- AIDS and Human Immunodeficiency Virus (HIV) infection²⁴⁵
- Cancer
- Heart disease
- Chron’s disease
- Diabetes
- Parkinson’s disease
- Mental retardation if “substantially limiting”
- Obesity (depending on cause)
- Emotional or mental illness if “substantially limiting”
- Specific learning disabilities if “substantially limiting” (such as dyslexia and developmental aphasia)
- Asthma
- Drug addiction (only if no longer using illegal drugs and have either rehabilitated or are in the process of completing a rehabilitation program)
- Alcoholism
- Tuberculosis and hepatitis

b. Major Life Activities
“Major life activities” are those basic activities that an average person can perform with little or no difficulty. They include, but are not limited to: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, reaching, and “participating in community services.”

To be substantially limited in the major life activity of working, the employee must be limited from performing a whole class or range of jobs and life activities. The U.S. Supreme Court now requires employers to show that they have a condition which prevents them from performing tasks that are part of every day life, not just tasks specific to a particular job.

c. “Substantially Limits”

“Substantially limits” is defined as:

- Unable to perform a major life activity that the average person in the general population can perform; or
- Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

The determination of whether or not an individual is substantially limited in a major life activity must be made on a case-by-case basis. However, the factors to be considered are:

- Nature and severity of the impairment,
- Duration or expected duration of the impairment, and
- Whether the impairment has permanent or long-term impact, or expected permanent or long-term impact of, or resulting from, the impairment.

Examples of substantially limiting conditions are:

- A paraplegic is substantially limited in the major life activity of walking.
- A person with asthma may be substantially limited in the major life function of breathing.
- A mentally retarded person may be substantially limited in the major life function of learning.
- A person with HIV virus has limitations on the major life activity of procreation and sexual intercourse.

If an individual is not substantially limited with respect to any other major life activity, the ability to perform the major life activity of working should then be considered.

It is not clear whether an individual is substantially limited in working because he or she is unable to perform a specialized job or profession requiring extraordinary skill, or talent. Some courts have found that these individuals are not substantially limited, and thus not “disabled” under the law:
• A postal clerk who had strabismus, commonly known as crossed eyes, was not an individual with a disability where the condition had never had any effect on any of his activities, including his past work duties, except for one job to which he was promoted as a machine operator.

• A discharged utility systems repairer, suffering from acrophobia (fear of heights), was not handicapped under the Rehabilitation Act because evidence showed that the condition did not substantially limit a major life activity; it merely prevented the individual from performing a particular job as a systems utility operator.

• A teacher who was allergic to fungus in her classroom was not disabled because the condition did not substantially limit a major life activity. The court noted that an inability to perform a particular job for a particular employer is insufficient to establish a handicap and that an impairment must substantially limit employment generally. Plaintiff was able to work while on medical leave and thus, her allergies did not substantially limit her ability to work.

   i. Medication and Mitigation

   The Supreme Court has ruled that mitigating measures such as medication, contact lenses and other corrective devices should be considered in determining whether an individual is substantially limited in any major life activity.

   In one case, the Court held that two pilot applicants with 20/200 vision who had 20/20 vision when wearing corrective lenses did not have a disability. In another case, the Court held that a mechanic with high blood pressure which was controlled by medication also was not substantially limited in any major life activity and thus did not have a disability.

   Note: Under FEHA, mitigating measures are not considered.

   ii. Temporary Impairments

   Temporary, non-chronic impairments of short duration which have little or no long-term or permanent impact are usually not disabilities. They include such impairments as: appendicitis; concussion; broken limbs; sprained joints; and influenza.

   For example, one court found that an employee whose knee required surgery was not disabled since the injury was temporary and did not continue to limit major life activities, even though the injury may have impaired life activities during recuperation.

   Another example is an individual who breaks his leg. The impairment is short-term, and not substantially limiting unless it heals improperly and results in a limp. The limp then becomes the permanent impact of the impairment, which can result in substantially limiting the individual in the major life activity of walking. Hence the individual with the broken leg is not disabled. The same individual whose broken leg develops into a limp may be disabled.

3. Record of Substantially Limiting Condition
Even if an individual does not currently have a disability which substantially limits a major life activity, an individual with a record of an impairment which substantially limits a major life activity is an individual with a disability. This provision was intended to protect persons with a history of disability who have recovered from physical or mental impairments, such as cancer patients or persons with a history of heart disease. This provision also protects persons who have been misclassified as having such impairments, such as persons improperly classified as mentally retarded. For example:

- It protects a person who may at one time have been erroneously classified as being mentally retarded or having a learning disability. These people have a record of disability. If an employer relies on any educational, medical or employment record containing a record of disability in making an adverse employment decision about a person who currently is qualified to perform a job, the action could be challenged as discriminatory.

- A job applicant was hospitalized for treatment for cocaine addiction several years ago. He has been successfully rehabilitated and has not engaged in the illegal use of drugs since receiving treatment. This applicant has a record of an impairment that substantially limited his major life activities. If he is qualified to perform a job, it would be discriminatory to reject him based on the record of his former addiction.  

4. REGARDED AS SUBSTANTIALLY LIMITED IN A MAJOR LIFE ACTIVITY

Similarly, an individual who does not have disability but who is regarded by an employer or prospective employer as having an impairment that substantially limits a major life activity is an individual with a disability. 

An individual is “regarded as having a disability” if:

- The individual has an impairment which is not substantially limiting but is perceived by the employer as constituting a substantially limiting impairment; and/or

- The individual has an impairment which is only substantially limiting because of the attitudes of others toward the impairment; and/or

- The individual does not have an impairment at all but is regarded by the employer as having a substantially limiting impairment.

The rationale for protecting such an individual is that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling.

The “regarded as” disabled protection of the ADA covers any limitation caused by stereotypes, myths or misconceptions about physical or mental condition, as well as decisions based on unsubstantiated concerns about productivity, safety, insurance, liability, attendance, costs of accommodation, accessibility, workers’ compensation costs or acceptance by co-workers or members of the public.
5. **Conditions or Impairments Excluded by the ADA**

The ADA distinguishes between conditions that are impairments and physical, psychological, environmental, cultural or economic characteristics that are not impairments. Thus, the term “impairment” does not include the following:

- Physical characteristics such as eye color, hair color, left-handedness
- Height, weight or muscle tone within the “normal” range and are not the result of a physiological disorder
- Common personality traits such as poor judgment or quick temper, where they are not symptoms of a mental or psychological disorder
- Environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record
- Pregnancy, in and of itself
- Characteristic predisposition to illness or disease
- Advanced age, in and of itself (Note: medical conditions commonly associated with age, such as loss of hearing or arthritis would constitute impairment)

Furthermore, for varying policy reasons, the following conditions are expressly not considered a “disability” under the ADA:

- Exhibitionism
- Transvestitism
- Transsexualism
- Voyeurism
- Homosexuality
- Bisexuality
- Pedophilia
- Gender identity disorder, which are not the result of physical impairments
- Disorders based on sexual behavior
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from current use of illegal drugs

6. **Relationship or Association with an Individual with a Disability**
It is unlawful for an employer to exclude or otherwise deny equal jobs or benefits to a qualified individual because he or she has a family, business, or social relationship or association with a disabled person. This provision seeks to protect qualified individual, from discrimination because they associate with a disabled individual.

For example:

- An employer may not reject a police officer candidate if it discovers that the individual has a family history of schizophrenia.
- An employer may not refuse to hire an applicant who associates with people infected with the HIV virus (AIDS).
- An employer may not refuse to hire an applicant because the applicant lives with a disabled family member based on the fear that the applicant would often be absent to care for their disabled relative.

7. Mental Impairments Under the ADA

Under the ADA, only mental conditions that are considered “impairments” qualify for protection. The ADA regulations state that a mental impairment means, “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” In addition, the EEOC explains that “stress” and “depression” are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder. The EEOC Enforcement Guidance does not set forth an exclusive list of mental impairments covered by the ADA. Instead, it describes the types of conditions that constitute impairments.

8. When Does a Covered Mental Impairment Constitute a Disability?

As discussed previously, the ADA only protects against discrimination based on certain types of mental illnesses that courts recognize as mental impairments.

If an individual has an otherwise covered mental impairment, an employer must then determine whether the individual’s mental impairment constitutes a “disability” within the meaning of the ADA.
If an individual's mental condition is not expressly excluded, the ADA considers the individual to have a mental “disability” only if the individual falls into one of the following three categories:

- Has a mental impairment which substantially limits one or more of the individual’s major life activities; or
- Has a record of having such a mental impairment; or
- Is regarded by the covered entity as having such a mental impairment.²⁶²

a. Substantially Limits a Major Life Activity

A mental impairment “substantially limits” a major life activity if the impairment:

- Renders the individual unable to perform a major life activity that the average person in the general population can perform, or
- Significantly restricts the individual as compared to the condition, manner or duration under which the average person in the general population can perform the major life activity at issue.²⁶³

“Major life activities” are those basic activities that an average person can perform with little or no difficulty. They include:

- Breathing
- Learning
- Walking
- Seeing
- Hearing
- Speaking
- Caring for oneself
- Performing manual tasks
- Concentrating
- Sleeping
- Sitting
- Standing
- Lifting
- Reaching
- Participating in community services.

To establish a psychiatric disability, an individual need not show that s/he is limited in working. In fact, the first question is whether an individual is limited in a major life activity other than
working (e.g., sleeping, concentrating, caring for oneself). Working should be analyzed only if no other major life activity is limited by an impairment.

Under the ADA, in determining if an impairment is a substantial limitation to “working,” the key inquiry is whether the impairment disqualifies an individual from a class of jobs or a broad range of jobs in various classes.266 An impairment that prevents an individual from working at one particular job, because of circumstances or materials unique to that job, does not substantially limit that individual’s ability to work.

But under FEHA, the question is merely whether the metal condition limits the major life activity. Thus, oftentimes the federal analysis might not be applied. Instead, a litigant would go to the State court where the California Court would likely find inability to perform one job sufficiently limiting to be covered under FEHA.

The EEOC has stated that the determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition. Relevant evidence includes descriptions of an individual’s typical level of functioning at home, at work, and in other settings as well as evidence showing that the individual’s functional limitations are linked to his/her impairment.

i. Medication and Mitigation under the ADA

Employers are free to consider the effects of medication and other mitigating measures in determining whether an individual’s mental impairment actually substantially limits their ability to perform any major life activity. But employers may not consider medication or mitigating measures under FEHA.

ii. Temporary or Non-Chronic Impairments

Temporary, non-chronic impairments that have little or no long-term or permanent impact usually are not considered substantially limiting.

Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms. For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years. Such conditions would likely be considered permanent in nature and, thus, disabilities protected by the ADA and FEHA.

iii. Length of Mental Impairments

Because the “limiting” standard in FEHA is relatively new, it will take time for courts to decide how long the limiting condition must be present to qualify for protection under State laws. However, there is considerable authority interpreting the federal standard. The EEOC has answered this question by stating that impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity. It should be
anticipated that based on the federal authorities, “limiting” under the FEHA will be interpreted to apply to impairments lasting shorter periods of time.

iv. **EEOC’s Analysis as to When Mental Impairments Are “Substantially Limiting”**

The EEOC released guidelines specifically discussing when a mental impairment substantially limits an individual’s ability to perform the major life activities of interacting with others, concentrating, sleeping, and caring for oneself.

(a) **Interacting with Others**

According to the EEOC, an impairment substantially limits the major life activity of interacting with others if, due to the impairment, the individual is significantly restricted in his or her ability to interact with others as compared to the average person in the general population. Some unfriendliness with co-workers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others. An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.

(b) **Concentrating**

According to the EEOC, an impairment that substantially limits an individual’s ability to concentrate would constitute a disability. An impairment would substantially limit an individual’s ability to concentrate if, due to the impairment, the individual was easily and frequently distracted, meaning that the individual’s attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if the individual experienced his/her “mind going blank” on a frequent basis. Such limitations must be long term or potentially long term, as opposed to temporary, to justify a finding of ADA disability.

(c) **Sleeping**

According to the EEOC, an impairment substantially limits the major life activity of sleeping if, due to the impairment, an individual’s sleep is significantly restricted as compared to the average person in the general population. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

For example, an individual who sleeps only a negligible amount without medication for many months, due to post-traumatic stress disorder, would be significantly restricted as compared to the average person in the general population and therefore would be substantially limited in sleeping. Similarly, an individual who for several months typically slept about two to three hours per night due to depression, also would be substantially limited in sleeping.

(d) **Caring for Oneself**

An impairment substantially limits an individual’s ability to care for him or herself if, due to the impairment, an individual is significantly restricted as compared to the average person in the
general population in performing basic activities such as getting up in the morning, bathing, dressing, and preparing or obtaining food. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

b. Record of Impairment That Substantially Limits a Major Life Activity

Even if an individual does not currently have a mental disability that substantially limits a major life activity, a record of mental impairment that substantially limits a major life activity will also qualify as a disability under the ADA. Protection for individuals who have a record of having a disability was intended to prevent discrimination against individuals who have been classified or labeled, correctly or incorrectly, as having a disability. It includes persons who have had a disabling impairment but have recovered in whole or in part and are not now substantially limited. Of course, the employer must have knowledge of the record of impairment. If the employer is unaware of the record of impairment, the employer cannot have discriminated based on that record of impairment.

D. THE FEHA/ADA INQUIRY

Under the FEHA and ADA, the employer has the right to choose and retain only qualified workers so long as the qualifications are job-related and consistent with business necessity (that is, reasonable accommodation is not possible, or reasonable accommodation creates undue hardship, or the individual poses a direct threat to the health or safety of others in the workplace).

Determining whether an individual with a disability is qualified for a particular position is a two-step process:

- Determining if the individual has the prerequisites for the position such as educational background, skills, licenses, etc., and
- Determining whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.

For example, if a district was considering hiring a paraplegic as an accountant, the district would first consider his or her educational skills and license as a CPA. If the paraplegic met these requirements, the district would next consider what the essential functions of the job are and if the applicant could perform those functions with or without reasonable accommodation.

E. ESSENTIAL FUNCTIONS OF THE POSITION

The FEHA and the ADA prohibit employers from disqualifying job applicants or employees because of their inability to perform marginal or nonessential job functions. Hence, the employer cannot refuse to employ an applicant or refuse to continue to employ a current employee for a position based on their disability unless the employer can show that the function to be performed is actually required and fundamental.
The frequency with which a function is performed helps determine if it is essential. For example, an employer could not successfully argue that the ability to lift 70 pounds was an essential function for the position of distribution clerk where there was no evidence that all distribution clerks were actually required to lift this weight on a regular basis.287

However, frequency is not determinative. If a function is critical, it is essential even if infrequently used. For example, it is essential for a firefighter to have the capacity to lift another person out of a burning building. Therefore, analyzing whether a job function is essential is also dependent on the type of position in question.

In determining whether a job function is essential the question should be asked: would removing the job function fundamentally alter the position? The answer will generally include consideration of one or more of the following factors:

- First Factor: Does the position exist to perform a particular function? For example, the position of proofreader entails the ability to proofread documents. Therefore, one could not remove the essential function of being able to proofread since this is the sole reason for the existence of the position.
- Second Factor: Are there other employees available who could perform the job function?288 For example, ________________.

Therefore, if there is an insufficient number of employees to whom a job function can be distributed, the function will be seen as essential for the employee to perform. If there is a larger staff, the function may not be seen as essential.

- Third Factor: Degree of expertise or skill required to perform the function. This usually occurs with certain professions and highly skilled positions where a person is hired for his/her particular expertise or skill. The performance of that specialized task becomes an essential function.

Because of the different factors involved, determining whether a job function is essential should be made on a case by case basis. All relevant evidence should be considered in making this determination, including, but not limited to:

- Established job descriptions (although not required by the Regulations, they are relevant);
- Employer’s judgment as to what functions are essential;
- Terms of the collective bargaining agreement, if applicable;
- Work experience of past employees in the job or current employees in similar jobs;
- Time spent in performing the particular function;

There are consequences if an employee cannot perform a particular function that is deemed to be an essential function of his/her job. The previous scenario regarding the fire fighter who must...
have the capacity to lift another person out of a burning building is an example here. The consequence of not being able to perform this task is serious. Therefore, this task would be considered as essential under FEHA and the ADA.

Examples of Essential Functions

- No reasonable accommodation existed for a bus driver whose diabetes, heart condition, and hypertension put him at risk of losing consciousness. Since driving was an essential function of his job as a bus driver, he was not a “qualified individual” with a disability.

- An employee with panic disorder and extreme anxiety was not a qualified individual since the employee could not do the essential functions of her job as an inquiry correspondent. Persons in the position of inquiry correspondent spent almost all of their time on the phone speaking with the public. Because the employee’s mental illness was brought on and exacerbated by phone contact with the public, she could not do the essential functions of her job.

- A customer service representative who was unable to adequately handle telephone calls from customers because of panic attacks caused by post-traumatic stress disorder was not a qualified individual. Handling the calls was an essential function of the job, and eliminating telephone work would not have been a reasonable accommodation.

- Satisfying the attendance requirements of a job also can be considered an essential function. One court held that an employee who missed almost forty (40) days of work during a seven (7) month period, despite the need for regular attendance, could not perform the essential functions of his job. Another court, however, was unwilling to hold as a matter of law that a truck salesman who missed one (1) day of work and was late seven (7) times during an approximately ten (10) month period could not perform the essential functions of his job.

F. THE INTERACTIVE PROCESS

The first step in determining whether an employee’s disability can be reasonably accommodated is engaging in what is called the “interactive process” with the employee. This process is mandatory. The interactive process is a continuing obligation, requiring an employer to consider alternative accommodations if the current accommodation is ineffective.

FEHA specifically requires employers to engage in a “timely, good faith, interactive process” with the employee or applicant in response to requests for reasonable accommodation. Failure to engage in this process is a separate FEHA violation independent from an employer’s failure to provide a reasonable disability accommodation, which is also a FEHA violation.

Once an individual requests an accommodation, the EEOC regulations envision an interactive process that requires participation by both parties:
“[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.”

Although the regulations do not explicitly assign responsibility for a failure in the interactive process, the regulations do acknowledge:

“[I]n some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual’s disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation.”

With this limitation in mind, the employer’s obligation to engage in the interactive process to identify and implement a reasonable accommodation is one to be made in good faith. The employer and the employee are required to make a good faith effort to engage in the interactive process.

To establish that it is has met its reasonable accommodation obligation by engaging in the interactive process, the California Court of Appeal has held that the employer must show that an accommodation was offered and refused, that there were no appropriate vacant positions, or that the interactive process broke down due to the employee’s failure to engage in good faith in the process.

1. **The Steps of the Interactive Process**

   Once the need for reasonable accommodation arises either by the employee’s request or by the employer’s knowledge of the employee’s disability, the employer must engage in the interactive process. This includes:

   - Analyze job functions and establish essential and nonessential job tasks;
   - Identify precise limitations of the position held by the employee;
   - Identify possible accommodations and assess how each will enable the employee to successfully perform the position;
   - Consider the preference of the employee or applicant to be accommodated and implement the accommodation that is most appropriate for both the employee/applicant and the employer.
In selecting from among several alternatives of reasonable accommodation, the expressed choice of the employee/applicant must be given primary consideration unless another equally effective accommodation exists which may be utilized instead.\(^{302}\)

2. EEOC Interactive Process Guidelines

The EEOC’s internal interactive process guidelines, also applicable to public and private sector employers, require:

- That accommodation requests by an employee or applicant be defined liberally and broadly to include both oral or written requests by an employee, an applicant or a healthcare provider, a family member or another representative.
- That the decision to provide the reasonable accommodation be made quickly. For example, the EEOC established its own internal guidelines which gives the decision maker 15 days to make the decision if it is within his/her authority to do so and 20 days for accommodations that require approval from a higher authority.
- That interaction is essential to the process of locating a reasonable accommodation.
- That the denial of an accommodation be supported by specific, legitimate reasons.\(^{303}\)

a. Determining the Appropriate Reasonable Accommodation

Determining the appropriate reasonable accommodation must be made on a case by case basis. Generally, the appropriate reasonable accommodation will be obvious (e.g., an employee confined to a wheelchair has his/her desk elevated by placing bricks under it). One court has held that the employer has the ultimate discretion to decide which of several reasonable accommodations it can offer to a disabled worker.\(^{304}\)

Where such accommodations are not so obvious, the EEOC regulations provide a step-by-step process for determining the appropriate reasonable accommodation, which involves both the employer and the qualified individual with a disability. This process applies to accommodations regarding the job application process and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. Such process involves the following steps to be made by the employer:
Steps in Determining the Appropriate Reasonable Accommodation

- Analyze the particular job involved and determine its purpose and essential functions;
- Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations would be overcome with reasonable accommodation;
- In consulting with the individual, identify the potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- Consider the preference of the individual to be accommodated and select and implement the accommodation most appropriate for both employer and employee.

If the employer or the individual with a disability is still unable to determine the appropriate reasonable accommodation, the employer should try to seek assistance from the Equal Employment Opportunity Commission, state or local rehabilitation agencies, or from disability constituent organizations. However, the failure to obtain or receive technical assistance from federal agencies that administer the ADA will not excuse the employer from its obligation to reasonably accommodate.305

Once potential reasonable accommodations have been identified, the employer has the ultimate discretion to select the appropriate accommodation. Reasonable accommodation does not necessarily require the employer to grant the accommodation requested by the employee if an alternate reasonable accommodation is provided by the employer. The accommodation need not be the best accommodation possible, so long as it is sufficient to allow the disabled individual to perform the essential functions of his/her job. One case has held that an employer is not liable under the ADA for failing to provide a disabled employee a reasonable accommodation when the employee fails to specify what accommodations are needed to perform her job.306

- In one case it was found that the employer reasonably accommodated an employee who suffered from multiple sclerosis, and was not required to grant the employee’s request to work at home, as recommended by her physician, where she did not provide medical records or submit to a fitness for duty exam to support that request.307

- In another case it was held that the Department of Education reasonably accommodated a blind employee when it provided him with readers, decreased his workload and furnished him special equipment. The Court held these were sufficient to perform the essential functions of the job and rejected the employee’s contention that he be provided with a voice synthesized computer and two floppy disk drives.308

- If an individual with a disability does not request accommodation, he/she may not be compelled to accept the reasonable accommodation provided by the employer. However, such an individual will not be considered as qualified if, as a result of refusing to accept such accommodation, he/she is
unable to perform the essential functions of the position. This is true even where the individual requests accommodation, but refuses the accommodation given by the employer and there is no other viable reasonable accommodation.

- A physician’s letter to an employer, describing the employee’s conditions as permanent and stationary, and precluding the employee from returning to work as a transit operator, triggered the interactive process. Thus, the employer had a good faith duty to process the employee’s request for a reasonable accommodation.309

- An employer does not have a duty to convert a temporary light duty position into a permanent one, which in effect would create a new position, in order to accommodate a disabled employee.310

G. REASONABLE ACCOMMODATION APPLIES ONLY TO KNOWN DISABILITIES

An employee’s request for a reasonable accommodation may use plain English and need not mention the ADA, FEHA, or the phrase “reasonable accommodation.”311 The duty to reasonably accommodate is imposed only as to “known” physical or mental impairments.312 If an employer knows or should have known of an employee’s disability then, as part of its reasonable accommodation obligation, the employer has a duty to identify and implement a reasonable accommodation. In one case, the California Court of Appeal held that an employer that had knowledge of an employee’s disability has, as part of its reasonable accommodation obligation, an affirmative duty to inform the employee of alternative positions.

In addition, under the FEHA, employers must provide reasonable accommodations and participate in an interactive process with employees “regarded as” disabled, even if not actually disabled.

For example, in Gelfo v. Lockheed Martin Corp.,313 an employer revoked its job offer based on a review of the applicant’s medical restrictions, which were incompatible with the physical demands of the position. The employer also determined that it would not be able to reasonably accommodate the applicant’s medical restrictions. The trial court found that the applicant did not have an “actual” disability and therefore the employer had no legal duty to provide a reasonable accommodation or to engage in the interactive process with the applicant. However, the Court of Appeal reversed on the basis that FEHA covers individuals regarded as being disabled even if not actually disabled.

In general, it is the responsibility of the individual with a disability to notify the employer that an accommodation is needed. In the absence of this notification, the employer must inquire whether the employee with a known disability is in need of a reasonable accommodation if the employee is unable to make such request. Prudent employers should be sensitive to all requests for assistance or accommodation, regardless of the form of the request and regardless of whether the individual himself or herself or someone else familiar with the individual makes the request. In
California, the courts have adopted EEOC regulations to require employers to engage in the interactive process and initiate a reasonable accommodation discussion where:

"An employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation."  

1. AN INDIVIDUAL WITH A MENTAL DISABILITY GENERALLY NEEDS TO NOTIFY THE EMPLOYER OF THE NEED FOR AN ACCOMMODATION

An individual with a mental impairment also generally has the responsibility to notify the employer of the need for an accommodation.\textsuperscript{315} Placing the duty on the individual with the disability empowers that person to decide whether an accommodation is needed. It also protects employers from disability discrimination lawsuits based on disabilities about which they are unaware.\textsuperscript{316} Nonetheless, employers should be proactive and ask employees if they need accommodations.

The court decisions vary as to what burden an individual must satisfy to be considered to have sufficiently notified an employer of his or her need for accommodation. The EEOC and some courts have indicated that an individual may use “plain English” and need not mention the ADA or use the phrase “reasonable accommodation” to request an accommodation.\textsuperscript{317} Also, requests for accommodation may be made in conversation or through any other mode of communication and need not be in writing.\textsuperscript{318} Finally, because the reasonable accommodation process presumes open communication between the employer and the individual claiming disability, the employer should be receptive to any relevant information or requests it receives from the individual or anyone acting on the individual’s behalf.\textsuperscript{319}

Other courts have placed a greater burden on individuals claiming to have notified an employer of their need for accommodation. For instance, in one case, the Eighth Circuit held that an employer did not discriminate against its employee based on the employee’s disability since the employer did not know of the severity of the employee's manic-depression until after the employee was terminated.\textsuperscript{320} Although the employer knew the employee was experiencing family stress, was suffering from “situational stress reaction,” and was “mentally falling apart” such that her family was trying to get her into a hospital, this information and the employee’s symptoms did not make it obvious to the employer that the employee suffered from a disability that the ADA required the employer to accommodate.\textsuperscript{321}

Despite the existence of these and other decisions that place a heavy burden on individuals claiming to have notified their employers of their need for accommodation, the emerging dominant view appears to be that courts will apply the more lenient standard favored by the EEOC and other courts.
2. **EMPLOYER HAS NO DUTY TO FURTHER INVESTIGATE ONCE AN EMPLOYEE HAS INFORMED IT OF AN IMPAIRMENT**

If an employee informs the employer that he/she has an impairment and produces a doctor's evaluation or report to that effect, an employer may take this to be factually correct and need not make any further investigations into the impairment. This is true even if it is later determined that the employee did not have such a disability.

H. **STANDARDS FOR A REASONABLE ACCOMMODATION**

The ADA and FEHA have different reasonable accommodation standards.

1. **THE ADA**

Once it is determined that particular functions of the job are essential, it must be determined whether the essential functions can be performed with or without reasonable accommodation. The employee must first show that reasonable accommodation is possible. Once it is determined that the disabled employee or applicant can perform the essential functions of the job if reasonable accommodation is made, the burden is then upon the employer to make a reasonable accommodation or show that accommodation cannot be made.

2. **THE FEHA**

Throughout FEHA, the term “reasonable accommodation” arises frequently and is used to indicate different employer responsibilities. Reasonable accommodations by the employer are required to assist individuals with disabilities in performing the essential functions of their jobs. FEHA makes it an unlawful practice for an employer or other covered entity to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. The exception to this requirement is if it would create undue hardship for the operation of the employer’s business.

The requirement of reasonable accommodation asks whether an employer has taken a minimum number of measures to ensure a disabled individual’s ability to perform his/her job duties. The California courts appear to have inferred an active and affirmative duty out of this requirement. FEHA has been interpreted to require “not only that employers remove obstacles that are in the way of the progress of the disabled, but that they actively re-structure their way of doing business in order to accommodate the needs of their disabled employees.” The Fair Employment Housing Commission, the state district charged with enforcing FEHA, has successfully argued to the courts that a reasonable accommodation has not been made where: (1) the measures taken by an employer are unsuccessful; (2) the measures taken are not taken specifically to accommodate the affected employees; or (3) implementation of such measures resulted in deprivation of the affected employees’ employment privileges.
In summary, a reasonable accommodation is any change in the work environment or in the way things are usually done that results in an equal employment opportunity for an individual with a disability and allows an individual with a disability to perform the essential functions of the job. A reasonable accommodation does not have to be the “best” accommodation, however, or even the accommodation that the individual with the disability wants the most. However, a reasonable accommodation must be an “effective” accommodation and need not be inexpensive.

Also, an employer is not required to accommodate all employees with similar disabilities in a similar fashion. Such a requirement would discourage employers from ever offering extraordinary accommodations which thereafter would become legally required.

To determine whether an accommodation is “reasonable” or “effective,” an employer should consider the reliability of the requested accommodation, whether the employer is capable of providing it, and whether or not the accommodation would help the individual perform the essential functions of the position.

I. WHAT TYPES OF ACCOMMODATIONS ARE REASONABLE?

Reasonable accommodation applies to all employment decisions and to the job application process. It includes modifications or adjustments that enable employees with disabilities to enjoy benefits and privileges that are equal to the benefits and privileges that are enjoyed by non-disabled employees.

There are various ways for employers to accommodate individuals with disabilities. Reasonable accommodation may include, but is not limited to, the following:

- Making existing facilities accessible
- Job restructuring
- Establishing part-time or modified work schedules
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Appropriate adjustment or modification of policies, examinations and/or training materials
- Providing qualified readers and interpreters
- Permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment
- Making employer provided transportation accessible
- Providing reserved parking spaces
- Providing personal assistants to help with specified duties related to the job
• Allowing the qualified individual with a disability to provide and use equipment, aids and services that an employer is not required to provide (e.g. wheelchair)
• Other similar accommodations for individuals with disabilities

1. **MODIFYING A WORKPLACE POLICY**

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. As an 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. In addition, an employer, in spite of a “no-leave” policy, may, in appropriate circumstances, be required to provide leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.

2. **MAKING FACILITIES ACCESSIBLE**

This accommodation includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employees, such as break rooms, lunch rooms, training rooms, restrooms, etc.

3. **JOB RESTRUCTURING**

A job may be restructured by reallocating or redistributing nonessential, marginal job functions. However, an employer is not required to reallocate essential functions of the position, since the ability to perform such functions is a prerequisite to being a qualified individual with a disability.

• A court held that an employer, the Equal Employment Opportunity Commission, did not discriminate against a blind applicant when it failed to hire him for the position of research analyst, which required extensive reading. The Court rejected the applicant's position that he be provided with a reader since hiring a reader would mean that the essential functions of the job would be performed by the reader rather than the handicapped individual.

• An example of job restructuring in law enforcement might involve altering the job to allow a detective in a wheelchair to perform only office work such as telephone interviews, personal interviews at the station and report writing while his/her partner does all of the field work.

• Job restructuring may not be a reasonable accommodation where less demanding, vacant positions exist. The California Court of Appeal held that where such positions exist, it may not be a reasonable accommodation to restructure an existing position and that reassignment would be required in the absence of a showing of undue hardship.
4. **Modifying Work Schedules**

Another form of job restructuring is altering when and/or how an essential function is performed. For example, an essential function which is customarily performed in the morning may be rescheduled at a later time in the day. Or a job which is ordinarily performed at the office can be performed at home at the employee's convenience. This type of reasonable accommodation may also include providing flexibility in work hours or the work week, or part-time work, where this will not be an undue hardship.

5. **Flexible Leave Policies**

Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability. An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship. An employer may be required to provide unpaid leave beyond the employer’s policy if it would be a reasonable accommodation and would not impose any undue hardship. Cases have held that an employer is not obligated by the reasonable accommodation provisions of the ADA to keep an employee on indefinite leave while recovering from a disability.

6. **Reassignment to a Vacant Position**

Employers must consider, as a reasonable accommodation, reassigning a disabled employee to an already funded, vacant position at the same level, provided the individual is qualified and the position is vacant within a reasonable amount of time. Reassignment to a lower graded position is permissible if there are no accommodations that would enable the employee to maintain his/her current position and there are no equivalent vacant positions for which the employee is qualified with or without reasonable accommodation. Under the FEHA, the fact the new position may in actuality be a demotion is acceptable if it is commensurate with the employee’s current abilities and it is the most appropriate existing position available.

7. **Some Other Examples**

- The employer is not required to create a position. If no vacant position exists and there is no other way to reasonably accommodate a disabled individual, that individual will not be otherwise qualified for a position and may be terminated or denied a position. In addition, an employer need not reassign an employee to another job if the employee fails to prove that the reassignment to another job would reasonably accommodate his disability.

- Once a new position that would accommodate the employee is created, the employer has the duty to determine whether the employee is qualified for it. Once a suitable position becomes permanent, it must be offered to the employee.
• Reasonable accommodation does not include promoting the disabled employee or violating another employee’s rights under a Collective Bargaining Agreement.349

• Reasonable accommodation does not include reassigning a civil service employee to a different civil service classification job without the employee complying with the competitive examination process. Thus, a probationary corrections officer who became disabled and was unable to perform the essential functions of that job was not entitled to be reassigned to a different job in a different civil service class.350

8. Acquisition or Modification of Equipment and Devices

Purchase of equipment or modifications to existing equipment may be effective accommodations for people with many types of disabilities.

There are many devices that make it possible for people to overcome existing barriers to performing functions of a job. Many of these assistive devices and modifications are inexpensive. Sometimes, applicants and employees can suggest effective low cost devices or equipment. They have had a great deal of experience in accommodating their disabilities, and many are informed about new and available equipment.

9. Modifying Examination, Collective Bargaining Agreements or Board Policies

Reasonable accommodation may require modifying the examination process, training or employer policies. This requirement seems to impose a new burden upon the employer under the ADA. Under the Rehabilitation Act, courts have held that the obligation to reasonably accommodate did not require an employer to modify its policies. For example, a Court of Appeals has held that an employer was not obligated to place a handicapped postal worker in permanent light duty where it had a policy (a collective bargaining agreement) that such duties were not generally assigned to employees who have served less than five (5) years.351 In a similar case, another court concluded that the postal service was not required to further accommodate an employee by placing him in another position since to do so would violate the seniority provisions of the collective bargaining agreement.352 Thus, an employer is not required, as part of the reasonable accommodation obligation, to violate any collective bargaining agreement.

However, under the ADA, there is legislative intent that the collective bargaining agreement is not controlling.353 The United States Supreme Court ruled that while an accommodation is usually not reasonable if it violates a seniority provision, an employee might be able to show “special circumstances” that the seniority system should be set aside in a particular case.354 Furthermore, even under the Rehabilitation Act a policy will be held as discriminatory if there is no direct connection between the particular policy applied and the consideration of business necessity and safe performance that the Act requires.355
Hence, the employer should first consider reasonable accommodation rather than merely relying on its policies as a defense to discrimination under the ADA.

**Example**

- A retail employer does not allow individuals working as cashiers to drink beverages at checkout stations. The retailer also limits cashiers to two 15-minute breaks during an eight-hour shift, in addition to a meal break. An individual with a psychiatric disability needs to drink beverages approximately once an hour in order to combat dry mouth, a side effect of his psychiatric medication. This individual requests reasonable accommodation. In this example, the employer should consider either modifying its policy against drinking beverages at checkout stations or modifying its policy limiting cashiers to two 15-minute breaks each day plus a meal break, barring undue hardship.

**10. TRAINING**

An employee with a mental disability was constructively discharged from employment. This resulted from taunting by co-workers and inappropriate discipline from a supervisor due to her disability. The court held that the employer failed to “accommodate” the employee even though the employer required other employees to attend sensitivity training sessions. The court found such sessions to be untimely and that the employer took a “soft approach” to disciplining employees.356

**11. ADJUSTING A SUPERVISORY METHOD**357

In some circumstances, adjusting a supervisory method or approach may be a reasonable accommodation. For example, supervisors could modify the way they communicate assignments, instructions or training to a medium that is more effective for a particular individual with a disability (e.g., in writing, in conversations, or by electronic mail).

- For Example: An otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.

- For Example: An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next.
12. PROVIDING A JOB COACH

According to the EEOC, an employer also may be required to provide a temporary job coach to assist in the training of a qualified individual with a disability as a reasonable accommodation, barring undue hardship. A job coach is a professional who assists individuals with severe disabilities with job placement and job training. Reasonable accommodation also may include allowing a job coach paid by a public or private social service district to accompany a disabled employee at the job site.

13. LEAVES OF ABSENCE

Relying on federal case law, California courts have indicated that under FEHA, a leave of absence may properly fall under the definition of reasonable accommodation especially where it would be successful in rehabilitating an employee well enough to the extent that they can return to work. The Ninth Circuit held that “[a]s long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation.” That Court went on to rule that a limited, finite leave of absence is a reasonable accommodation under the ADA as long as it gives the employee sufficient time to recover to be able to return to work and perform his or her work duties.

14. REASONABLE ACCOMMODATION DOES NOT ENTAIL LOWERING OR SIGNIFICANTLY ALTERING STANDARDS OR REQUIREMENTS

In interpreting what reasonable accommodation entails, courts have held under the Rehabilitation Act, that it does not entail lowering standards or requirements in connection with qualifying for a position. In one case the Court held that a university was not required to admit an applicant to its nursing school where to do so would lower or affect substantial modifications of its standards to accommodate her. The employer has the right to set its minimum standards and it is not the court’s job to establish minimum standards for employees. The only limitation is that the standards must be job-related and consistent with business necessity.

In one case, a federal court held that the Rehabilitation Act did not require an employer to alter minimum qualification standards for a disabled individual seeking a state teaching credential. The candidate had a learning disability which prevented her from passing a written communication portion of the exam. She sought any one of the following accommodations: a waiver of the requirement, an oral exam, or unlimited time to complete the examination. The court held that such accommodation would alter the minimum qualification standards. Thus, she was not protected under the Rehabilitation Act as she was not otherwise qualified as a teacher.

15. EMPLOYER MAY NOT SEPARATE A MEMBER WITH A DISABILITY WHO IS ELIGIBLE TO RETIRE
Under California Government Code Section 21153, an employer may not separate a disabled member otherwise eligible to retire for disability, but must apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions, or to permit contributions to remain in the fund with rights to service retirement.

J. THE EFFECT OF DISABILITY DISCRIMINATION LAWS ON THE APPLICATION AND HIRING PROCESS

Disability discrimination laws impact three different aspects of the application and hiring process:

- Qualification standards and other selection criteria;
- Testing procedures for screening job applicants, and
- Pre-employment inquiries.

K. QUALIFICATION STANDARDS AND OTHER SELECTION CRITERIA

The first step in ensuring compliance with disability laws is to establish job-related qualification standards and selection criteria that seek out the most qualified person for the job. Disability laws do not interfere with the district’s authority to establish job qualification standards that enable the district to hire people who can perform the job effectively and safely. Disability laws also do not prevent a district from hiring the most qualified individual based on both subjective and objective standards. Disability laws do require, however, that qualification standards be established so as not to exclude disabled applicants because of their disability from jobs they can perform.

Disability laws apply to all selection standards and procedures, including, but not limited to:

- Education and work experience requirements;
- Physical and mental requirements;
- Safety requirements;
- Paper and pencil tests;
- Physical and psychological tests;
- Interview questions; and
- Rating systems.\(^{365}\)
Employer’s Legal Obligations

Prospective Need for Reasonable Accommodation
It is unlawful for an employer to refuse to hire a disabled individual because of a potential need to reasonably accommodate the individual.366

Job Related and Consistent with Business Necessity
No matter what qualification standards or selection criteria are used for a particular job, if they screen out or tend to screen out individuals with disabilities because of their disability, they must be “job-related” and “consistent with business necessity.”367

To be “job related,” selection criteria must be a legitimate measure or qualification for the specific job for which it is being used. For example, a qualification standard for a clerk typist position requiring that the individual take shorthand dictation is not job related if the person in the particular job will only be typing from handwritten notes. Here, typing, not shorthand dictation, would be a job-related qualification standard.

Selection criteria that exclude or tend to exclude individuals with disabilities because of their disability are “consistent with business necessity” only if they relate to an essential job function. For instance, applicants for a secretary position are asked whether they have a valid driver’s license because it would be desirable for the secretary to occasionally run errands or take a package to the post office. The driver’s license requirement may be job related, but it is not a business necessity because it is not an essential function of the job. Driving is simply an incidental (marginal) function. Hence, if the requirement disqualifies a disabled applicant who cannot obtain a driver’s license because of a disability, it would not be justified by business necessity. If, however, the disabled applicant could not obtain a driver’s license merely because he or she had never learned to drive, then the employer would be free to hire another applicant who could best perform all aspects of the job.

Employer’s Consideration of a Reasonable Accommodation
Even if a qualification standard is “job-related” and “consistent with business necessity,” if it screens out an individual because of a disability, the employer must still consider whether the disabled applicant could perform the job with a reasonable accommodation. Reasonably accommodating an applicant does not require an employer to lower its qualification standards for a particular job, so long as those standards are uniformly applied to all applicants.

For example, if an essential function of the job is to type at least 60 words per minute, and the disabled applicant cannot meet that requirement using the employer’s basic equipment but could by using a computer assistive device, then the employer need not reduce its standard to 40 wpm to accommodate the disabled applicant unless it accommodates all other applicants by reducing the standard for them as well.

Qualification Standards Necessary for Health and Safety
Under both the ADA and FEHA, an employer may require as a qualification standard that an individual not pose a “direct threat” to the health or safety of the individual or others. FEHA has long been understood to protect employers from safety threats to both employees and others, but
a United State Supreme Court ruling in 2002 applied this standard to the ADA as well. To exclude an applicant who cannot satisfy this standard, the employer must apply it to all applicants for a particular job. The employer must be able to demonstrate by objective medical or other evidence, related to the individual, that there is a specific, significant risk of substantial harm to the applicant or others, and that the risk cannot be eliminated or reduced below the level of “direct threat” by reasonable accommodation.

L. THE RECRUITMENT PROCESS

1. THE ADA

The ADA does not require districts to undertake special activities to recruit individuals with disabilities. Nonetheless, districts must provide disabled individuals with an equal opportunity to participate in the recruitment process and to be considered for a job.

   a. Accessibility to Job Information

Information about job openings must be accessible to people with different disabilities. Although there is no obligation to provide written information in alternative formats in advance, such information must be made available on request (e.g., large print, cassette, Braille or use of a reader). Regulations addressing Title II of the ADA provide that public entities must take steps to ensure that communications with applicants with disabilities are as effective as communications with others. Compliance with Title II requirements may require districts to expand their communication media when advertising and recruiting job applicants to ensure access to the information.

If a job advertisement only provides a telephone number to call for information, a TDD (Telecommunications Device for the Deaf) number must be included, unless a telephone relay service has been established. (This service enables TDD users to speak with anyone through the use of a relay operator.)

   b. Job Announcements and Recruitment Notices

Announcements generally provide information about job duties and qualifications. If this information is included in an announcement or notice, the Equal Employment Opportunity Commission (EEOC) recommends that it elaborate on the essential job functions in order to attract applicants, including individuals with disabilities who have appropriate qualifications.

If specific job information is not listed, the notice should include a brief job description and an indication of where further information may be obtained.

Job announcements and notices should also include a statement that the employer does not discriminate on the basis of disability or any other legally prohibited basis. For example, “We are an Equal Opportunity Employer. We do not discriminate on the basis of race, color, national origin, ancestry, religion, creed, sex, age (over 40), disability, marital status, or sexual orientation.”
c. **Job Descriptions**

Although the ADA does not require employers to develop or use job descriptions, accurate, up-to-date descriptions may benefit applicants and employers alike. Job descriptions enable an applicant to evaluate the expectations of the job. Disabled applicants can better determine whether they will be able to perform the essential functions of the job with or without accommodation, and then, to discuss during their interviews how they could perform the job with a reasonable accommodation.

For the employer, an accurate job description may be considered as evidence of the job’s essential functions. If employees are not performing the duties reflected in the job description or are performing the duties very infrequently, identifying the actual work performed will make the description more relevant. Frequency alone is not determinative. For example, an essential function of a firefighter often reflected in a job description is to carry people out of a burning building. Even though this function is performed rarely by most firefighters, the courts and the EEOC would still consider the function to be essential.

The EEOC and some practitioners further recommend stating the essential functions of a job because the process allows both the applicant and employer to identify the fundamental duties in case the need for reasonable accommodation should arise.

Other practitioners, however, recommend against separately identifying essential and nonessential functions. They contend that separating the two types of duties creates confusion regarding job responsibilities, usurps management’s ability to determine how to use particular employees, and dictates a format which may not be useful for the other functions of a job description that are unrelated to recruitment.

In any event, if job descriptions are used in the application process, they should be updated to accurately reflect the position’s current functions. Outdated descriptions could unlawfully screen out a disabled applicant who could otherwise perform the job.

**2. Recruitment and Advertising Under FEHA**

FEHA requires employers and other covered entities to consider individuals with disabilities on an equal basis with all other individuals in their recruitment activities unless a permissible defense applies. Job advertisements which are designed or which in any way discourage individuals with disabilities to apply for jobs less than individuals without disabilities are unlawful.370

FEHA also prohibits any publication or non-job-related inquiry of either an employee or applicant that expresses verbally or by application form, directly or indirectly, any “limitation, specification or discrimination” on the basis of physical or mental disability or medical condition.371

**M. Inquiries About Disabilities**
1. **The ADA**

During the application process, employers need to obtain information to evaluate an applicant’s qualifications. Although the ADA recognizes this need, it restricts an employer from asking questions about disability at the pre-job offer stage. Even if the employer is aware of an applicant’s disability, the employer may not ask about its nature or severity.372

However, if an applicant has an obvious disability, or volunteers that he or she is disabled, and if the disability might interfere with performance of job-related functions, the employer may ask the applicant to describe or demonstrate how he or she would perform the job functions affected by the disability.373 If a disability does not appear to prevent the performance of an essential job function, the applicant can be asked to demonstrate how he or she would perform the function only if all applicants for the position are required to do the same.

The restriction against pre-offer questions about disability applies to application forms, interviews, and background and reference checks. This prohibition does not preclude an employer from asking questions regarding an applicant’s ability to perform specific job functions with or without an accommodation, as long as the questions are not phrased in terms of a disability.

The ADA does not prevent an employer from obtaining necessary information regarding an applicant’s disability; it only requires that the employer make such inquiries after it has made a job offer, conditional on the applicant being able to satisfy job requirements.

**a. Inquiries Prior to an Offer of Employment**

Prior to an offer of employment, an employer may not ask a job applicant questions that are likely to elicit information about treatment, hospitalization or the existence of mental illness.374 However, there are two situations where an employer may inquire or ask an applicant for reasonable documentation about the applicant’s condition:

- If the applicant asks for reasonable accommodation for the hiring process; or
- If the employer reasonably believes that the applicant will need accommodation to perform the essential functions of the job.375

The employer then is still limited to asking only whether the applicant needs a reasonable accommodation and what type of reasonable accommodation the applicant needs to perform the functions of the job.376

**Example**

- An applicant for a secretarial job asks to take a typing test in a quiet location rather than in a busy reception area “because of a medical condition.” The employer may make disability-related inquiries at this point because the applicant’s need for reasonable accommodation under the ADA is not obvious based on the statement that an accommodation is needed “because of a medical condition.” Specifically, the employer may ask the applicant to provide documentation showing that she has an impairment that
substantially limits a major life activity and that she needs to take the typing test in a quiet location because of disability-related functional limitations.\textsuperscript{377}

\textbf{b. Conditional Job Offers – Post Offer/Pre-Employment}

At this stage, an employer may ask health-related questions, which are prohibited in the pre-offer stage, provided that all individuals in the same job category who receive a conditional job offer are asked the same questions. Under FEHA, the inquiries need not focus on the ability to perform the job functions and do not have to be job related and consistent with business necessity.

However, if a conditional job offer is withdrawn because of the responses to such inquiries, the employer must be able to show that:

\begin{itemize}
  \item Its reasons are job related and consistent with business necessity or made to avoid a direct threat to health or safety; and
  \item No reasonable accommodation was available that would enable the individual with a disability to perform the essential functions of the job without a significant risk to health or safety, or that such an accommodation would cause an undue hardship.\textsuperscript{378}
\end{itemize}

The case of \textit{Leonel v. American Airlines, Inc.} (9th Cir. 2005) illustrates why the sequence of background investigations, medical examinations and drug testing in the hiring process can be a trap for the unwary employer. In \textit{Leonel}, three HIV positive individuals applied to American Airlines for flight attendant positions. They were extended a conditional offer of employment subject to passing a background investigation and a medical examination. They were required to provide a medical history along with blood and urine samples for testing. The applicants did not disclose their HIV status, but the blood test revealed they were HIV positive. As a result, American Airlines withdrew their conditional offers, which resulted in litigation.

The rejected applicants alleged that the practice of medical testing before completing the background investigation violated the ADA and FEHA. The Ninth Circuit held that medical information cannot be collected or analyzed until after all non-medical information has been evaluated, unless the non-medical information could not reasonably have been obtained.

After \textit{Leonel}, if an employer intends to do a medical examination, it should conduct its background investigation and other “non-medical” inquiries before extending a conditional offer of employment, unless the employer can demonstrate it could not have reasonably obtained the non-medical information earlier.
c. Inquiries During Employment

During employment an employer may make inquiries and require medical examinations only if (1) job-related and (2) consistent with job necessity. This requirement may be met when an employer has a reasonable belief, based on objective evidence, that:

- An employee’s ability to perform essential job functions will be impaired by a medical condition; or
- An employee will pose a direct threat due to a medical condition.

Thus, for example, inquiries or medical examinations are permitted if they follow up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of the individual’s position.

Examples of Lawful and Unlawful Inquires

- A delivery person does not learn the route he is required to take when he makes deliveries in a particular neighborhood. He often does not deliver items at all or delivers them to the wrong address. He is not adequately performing his essential function of making deliveries. There is no indication, however, that his failure to learn his route is related in any way to a medical condition. Because the employer does not have a reasonable belief, based on objective evidence, that this individual’s ability to perform his essential job function is impaired by a medical condition, requiring a medical examination (including a psychiatric examination) or asking disability-related inquiries would not be job-related and consistent with business necessity.

- A limousine service knows that one of its best drivers has bipolar disorder and had a manic episode last year, which started when he was driving a group of diplomats to around-the-clock meetings. During the manic episode, the chauffeur engaged in behavior that posed a direct threat to himself and others (he repeatedly drove a company limousine in a reckless manner). After a short leave of absence, he returned to work and to his usual high level of performance. The limousine service now wants to assign him to drive several business executives who may begin around-the-clock labor negotiations during the next several weeks. The employer is concerned, however, that this will trigger another manic episode and that, as a result, the employee will drive recklessly and pose a significant risk of substantial harm to himself and others.

- There is no indication that the employee’s condition has changed in the last year, or that his manic episode last year was not precipitated by the assignment to drive to around-the-clock meetings. The employer may make disability-related inquiries, or require a medical examination, because it has a reasonable belief, based on objective evidence, that the employee will pose a direct threat to himself or others due to a medical condition.
• An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on the employee’s hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would, for example, exceed this limited scope.384

2. **Inquiries under FEHA**

FEHA specifically prohibits inquiries on job applications, pre-employment questionnaires and in the course of the selection process which ask:

- Whether applicant has had any particular disabilities
- Whether applicant has ever been treated for any particular diseases or conditions
- Whether applicant has ever received Workers’ Compensation benefits385

Subject to the ADA’s limitations, inquiries regarding an applicant’s physical fitness, medical condition, physical condition, or medical history are still valid if that information is directly related and pertinent to the position for which the application is received. It is also valid if the purpose for the query relates to the health and safety of that applicant or others.386

<table>
<thead>
<tr>
<th>Examples of Questions That May Not Be Asked in the Pre-Offer Stage of the Application Process</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>• Have you ever had or been treated for any of the following conditions or diseases? (Followed by a list)</td>
<td></td>
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<tr>
<td>• Please list any conditions or diseases for which you have been treated in the last three years.</td>
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<tr>
<td>• Have you ever been hospitalized? If so, for what condition?</td>
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<tr>
<td>• Have you ever been treated by a psychiatrist or psychologist?</td>
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<tr>
<td>• Is there any health-related reason why you may not be able to perform the job for which you are applying?</td>
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<tr>
<td>• How many days were you absent from work due to illness last year? (Employers may provide information about their attendance requirements and ask an applicant if he or she will be able to meet those requirements.)</td>
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</tr>
<tr>
<td>• Are you taking any prescribed drugs?</td>
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<tr>
<td>• Have you ever been treated for drug addiction or alcoholism? (The ADA protects individuals who have been successfully rehabilitated or are</td>
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undergoing rehabilitation.

- Have you ever filed for workers’ compensation benefits?

<table>
<thead>
<tr>
<th>Examples of Questions That May Be Asked During the Pre-Offer Stage of the Application Process</th>
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<tr>
<td>• Are you able to perform all of the job functions listed on the job description with or without an accommodation?</td>
</tr>
<tr>
<td>• If so, how would you perform the function, and what kind of accommodation do you need?</td>
</tr>
<tr>
<td>• Can you meet the attendance requirements of the job?</td>
</tr>
</tbody>
</table>

a. **Background and Reference Checks**

If background and reference checks are conducted before a conditional job offer is made, employers may not request information about an applicant from third parties (such as previous employers) that could not be asked of the applicant directly. A previous employer can be asked about job duties and performance, attendance record, and other job-related issues unrelated to disability.

Once the background or reference check is completed after a conditional job offer is made (i.e., applicant is hired subject to passing background/reference check), then previous employers and other third parties can be asked questions that the employer could ask of the applicant at that stage (e.g., disability, illness, workers' compensation history).

b. **Making Job Applications Accessible and Accommodating for Interviews**

Employers must provide disabled applicants with reasonable accommodations to enable them to complete a job application on time. Applications should advise applicants that accommodation in the application process is available on request and that they will not be penalized in the selection process for seeking accommodation. Accommodations may include, but are not limited to, applications in large print, in Braille, on cassette, or through a reader.

c. **Interviews under FEHA**

FEHA requires prospective employers to make reasonable accommodations to applicants in facilitating interviews. Examples of these accommodations include providing interpreters for the hearing-impaired or scheduling interviews in rooms accessible to wheelchairs.
N. PRE-EMPLOYMENT TESTS AND MEDICAL EXAMINATIONS

1. PRE-EMPLOYMENT TESTS (NON-MEDICAL)

An employer may want to administer a test to assess an applicant’s qualifications. Pre-employment tests include, but are not limited to, tests of aptitude, knowledge, skill, and physical agility and job performance demonstrations. If such a test is used, it should be given to all applicants in the same job category, (job categories generally relate to a broad grouping of jobs, such as “all clerical staff,” rather than specific jobs) regardless of disability. 393

2. UNDER THE ADA

Although the ADA permits an employer to use any kind of test to measure job qualifications during the pre-offer stage of the selection process it must meet two requirements:

- If a test screens out or tends to screen out individuals with disabilities because of their disability, the test must be “job-related” and “consistent with business necessity.”

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A test meets these criteria when it closely measures actual skills and ability needed to do the job. For example, a typing test, which measures speed and accuracy, would satisfy this requirement for a secretarial position. In contrast, a written test for a job as a heavy-equipment operator might screen out an applicant with dyslexia who is able to perform all of the essential job functions. In that case, the test would not closely measure the skills and knowledge necessary to do the job.

- Even if a test is job related and justified by business necessity, the employer has an obligation to provide a reasonable accommodation, if needed, to enable the applicant to take the test (e.g., making test sites accessible to people with mobility disabilities).

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The ADA also requires that tests be given to individuals who have impaired sensory (hearing, seeing, information processing), speaking, or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that skill.
3. Testing under FEHA

Regarding applicant tests for employment, an employer or other covered entity cannot use any testing criterion which discriminates against individuals with disabilities unless one of the following exceptions apply:

- The test score or job criterion is job-related for the position in question; or
- An alternative job-related test or criterion that does not discriminate against individuals with disabilities does not exist.394

Employers and other covered entities can only utilize tests of physical agility or strength where they are related to job performance.395

Reasonable accommodations must be made with regard to testing conditions to ensure that the test results of every individual, including those with disabilities, correctly reflect the applicant or employee’s job skills, aptitude or any other measure for which the test is being administered. Skills measured should not focus on an employee or applicant’s disability unless they are the factors that the tests are purported to measure.396 These accommodations must be provided where they are reasonable and appropriate.397

Examples of these accommodations398 include:

- Test sites accessible to the disabled;
- Availability of a reader, Braille translation or oral presentation of the test for blind persons;
- The provision of someone to write for the applicant or permitting oral answers for quadriplegic individuals;
- The services of an interpreter for individuals with hearing impairments;
- Additional examination time for individuals whose disabilities interfere with their ability to communicate;
- Alternate tests or individualized assessments where any of the above test modifications is inappropriate.399

4. Pre-Employment Medical Examinations under the ADA

Employers may obtain medical and related information about an applicant's ability to perform essential job functions and promote health and safety on the job. An employer, however, may not require an applicant to submit to a medical examination, respond to medical inquiries, or provide information about workers’ compensation claims before a conditional job offer is made.400

A job offer may be conditioned on the results of a post-offer medical examination if all entering employees in the same job category are required to take the examination. Employers do not have
to justify the requirement. Post-offer examinations may be given to determine whether an applicant has the physical or mental qualifications to perform certain job functions, or can perform a job function without posing a direct threat to health or safety. Thus, a medical examination for the position of heavy-equipment operator might examine whether the applicant has any disabilities such as uncontrolled seizures, which could pose a significant risk to the applicant, other worker, or the public.

Rules to Follow if the District Decides to Require a Medical Examination as a Condition of Employment:

- Medical exams must follow a conditional offer of employment;
- Keep the results confidential;
- Require medical exams of all employees in a particular category or type of work;
- Provide the examining doctor with a copy of the job description; and
- Require the examining doctor to notify the district of all tasks the employee cannot perform without undue risk of harm to self or others.
- The doctor should only inform the district of the applicant’s performance limitations, not the underlying medical condition.

On July 27, 2000, the Equal Employment Opportunity Commission published an enforcement guide which addressed employers’ use of medical examinations. The enforcement guide provides some guidance as to the type of tests which are medical and those which are not.

Factors Used to Determine Whether Any Particular Test Is Medical:

- Whether the test is administered by a health care professional or trainee;
- Whether the results or the test are interpreted by a health care professional or trainee;
- Whether the test is designed to reveal an impairment or the state of an individual’s physical or psychological health;
- Whether the test reveals an individual’s performance of a task;
- Whether the test is invasive (e.g., requires drawing of blood, urine, breath, etc.);
- Whether the test measures physiological/psychological responses (to performing a task);
- Whether the test is normally done in a medical setting; and
- Whether medical equipment/devices are used for the test.

The Above Factors Should Be Used to Analyze Any Challenged Test. However, the Following Are Tests Which Generally Are Not Medical:
• Physical agility/physical fitness tests which do not include medical monitoring;

• Certain psychological tests, such as tests which simply concern an individual’s personality traits, habits and preferences.

Medical Examinations Include, But are Not Limited to:

• Vision tests conducted and analyzed by an ophthalmologist or optometrist;

• Blood, urine, and breath analyses to check for alcohol use;

• Blood, urine, saliva and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington’s disease);

  ▪ Note: the EEOC considers certain genetic testing to be in violation of the ADA. Recently, Burlington Northern Santa Fe Railway agreed to settle a lawsuit brought by the EEOC by paying up to $2.2 million to workers subjected to genetic testing as part of a comprehensive medical examination after they submitted work-related injury claims for carpal tunnel syndrome.

• Blood pressure screening and cholesterol testing;

• Nerve condition tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);

• Range-of-motion test that measure muscle strength and motor function;

• Pulmonary functions tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);

• Psychological tests that are designed to identify a mental disorder or impairment; and

• Diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).
O. Medical Examinations and FEHA

1. Medical Examinations as Part of the Application Process

Like the ADA, FEHA makes it an unlawful practice for an employer or employment district:

- To require any medical or psychological examination of an applicant, OR
- To make any medical or psychological inquiry of an applicant, OR
- To make an inquiry whether an applicant has a mental disability or physical disability or medical condition, OR
- To make any inquiry regarding the nature or severity of a physical disability, mental disability or medical condition.\(^{401}\)

An exception to this rule is that an employer or employment district may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant’s request for reasonable accommodation.\(^{402}\)

2. Offers of Employment Conditioned on Medical Examinations

Under the FEHA, an employer or employment district’s ability to require post-conditional job offer medical examinations is more limited than under the ADA. Under the FEHA, an applicant may be required to submit to a physical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties only if the examination or inquiry is:

- Job-related;
- Consistent with business necessity; and
- If all entering employees in the same job classification are subject to the same examination or inquiry.\(^{403}\)

3. Medical Examinations for Current Employees

Like the ADA, an employer or employment district generally may not:

- Require a medical or psychological examination of an employee, OR
- Make any inquiry whether an employee has a mental disability, physical disability, or medical condition, OR
- Make any inquiry regarding the severity of a physical disability, mental disability or medical condition.\(^{404}\)
Certain exceptions to this general prohibition exist:

- Examinations or inquiries are allowed if the employer or employment district can show that it has probable cause to believe the employee is not mentally or physically able to perform the job.

Also, voluntary medical examinations including voluntary medical histories, may be conducted which are part of an employee health program available to employees at a work site.\(^{405}\)

### 4. Disqualification of an Applicant Because of the Results of a Medical Examination

An employer may disqualify an individual because of medical examination if: (1) the reasons for disqualifying the applicant are job related and consistent with business necessity (i.e., posing a direct threat to health and safety); and (2) no reasonable accommodation is available.

A qualified applicant (one who can perform the essential job functions) may not be disqualified from a job after taking a medical examination because of fear or speculation of future injury.

An applicant may only be excluded from a job based on possible future harm if the medical examination reveals specific medical information, reflecting current medical knowledge, that the applicant would pose a significant, current risk of substantial harm to health or safety.

Even if a genuine significant risk of substantial harm exists, the employer must still consider whether the risk can be eliminated or reduced below the level of direct threat by reasonable accommodation. Hence, an applicant with an abnormal back X-ray may not be disqualified from a job that requires heavy lifting because of the fear that she is prone to injuring her back. However, if medical documentation shows that she has injured and re-injured her back performing work similar to that which she is applying for, and if there is no reasonable accommodation to avoid or substantially reduce the likelihood of re-injury, she may be rejected for the job.\(^{406}\)

### 5. Confidentiality of Medical Records

Even though disability discrimination laws do not limit an employer’s ability to require applicants to submit to medical examinations during the hiring process, it does require that such information be kept confidential with few exceptions. Information from medical examinations or inquiries should not be placed in an employee's personnel file, but rather in a separate medical file.

### 6. Specific Examinations

#### a. HIV Tests

HIV, the virus that causes AIDS, is considered a disability at least under the ADA.\(^{407}\) An employer may not require an HIV test until after it makes a conditional job offer. In addition, some practitioners question whether an employer may even use the results of a positive test to...
disqualify an applicant from a particular position. Litigation regarding this issue has already begun and undoubtedly will continue for some time.

b. Psychological Tests
An employer may not require a psychological examination until after it makes a conditional offer of employment because some mental impairments are protected by ADA and/or FEHA. As with any medical examination, disqualification of an applicant because of the results of a psychological examination must be job-related and consistent with business necessity, and then only after reasonable accommodation has been considered.

c. Physical Agility Tests
Employers may give physical agility tests to determine an applicant's physical qualifications for the job.

Unlike medical examinations, physical agility tests do not involve an examination or diagnosis by a doctor. Consequently, they are not considered to be medical examinations and may be given at any time in the application process.408

Like other examinations, however, if the physical agility test screens out or tends to screen out disabled individuals, the employer must be able to show that the test is job related and consistent with business necessity, and that the test or job cannot be performed with a reasonable accommodation.409

Under some circumstances, an employer may require a medical screening before administering a physical agility test to insure that the test will not harm the applicant (e.g., an asthmatic employee who wishes to apply for a police officer position). The EEOC recommends two ways to require the screening without violating the prohibition against pre-offer medical inquires: (1) provide a written description of the test and ask a doctor the narrow question, “Can this applicant safely perform this test?” or (2) administer the agility test after making a conditional job offer.410

d. Drug Tests
An employer may test applicants for current use of illegal drugs because their use is not protected by ADA or FEHA. An employer may refuse to hire an applicant based on a test result that indicates the illegal use of drugs.411

Drug tests are not considered medical examinations. Applicants may be tested for illegal drugs prior to a conditional offer of employment. However, since testing for illegal drugs may also reveal the presence of lawful drugs, and since an employer may not ask what prescription drugs an individual is taking before a conditional job offer has been made, most employers will find it safer to test after presenting a conditional offer. However, drug testing of current employees is only allowed for those employees that are offered a promotion to a safety- or security-sensitive position.412

P. Illegal Use of Drugs and Substance Abuse
The ADA specifically permits employers to ensure that the workplace is free from illegal drug use, alcohol use, and to comply with other Federal laws and regulations regarding alcohol and drugs. The ADA, FEHA and Rehabilitation Act also provide limited protection from discrimination for recovering drug addicts and alcoholics.413

1. CURRENT USERS OF ILLEGAL DRUGS

The ADA excludes current illegal drug users from its definition of “qualified individual with a disability.” The ADA does not protect these people when employers take adverse action because of their illegal drug use. An employer may discharge or deny employment to an illegal drug user on the basis of such use, without violating the ADA. Current illegal drug users are not entitled to reasonable accommodation because they are excluded from the definition of “qualified individual with a disability.

Whether drug use is “current” is determined on a “reasonable belief” test based on the employer's observations of the employee. It is not limited to the day of use, or recent weeks or days, in terms of employment action. It is determined on a case-by-case basis. If, however, the employee tests positive for illegal drugs, the employer can presume that usage is current.

The ADA also amended the Rehabilitation Act to exclude current users of illegal drugs from its definition of handicapped individual.415 Thus, current illegal drug users are not disabled or protected under the ADA or Rehabilitation Act.

2. USE OF LEGAL DRUGS

The ADA prohibits discrimination against an individual who has used drugs taken under the supervision of a licensed health care professional. However, an employer may prohibit the use of legal drugs if their use poses a direct threat to the health and safety of the employer and coworkers. Consider a police officer suffering from a disabling condition requiring that he take a particular drug which impairs his alertness and reaction. The employer may prohibit his use of the drug because the officer could pose a direct threat to the health and safety of others. This is similarly addressed under the Rehabilitation Act and the FEHA.

3. ALCOHOL USE

Alcoholism is a disability under the ADA. But neither the ADA nor the Rehabilitation Act protect current use of alcohol that prevents employees from performing their job duties without threatening property or the safety of others. However, if alcohol use does not prevent an employee from performing the duties of the job in question, or does not constitute a direct threat to property or the safety of others, the employee might be considered disabled or handicapped. This would trigger the reasonable accommodation obligation.416
4. **Former Drug Users**

Former users of illegal drugs may be protected by the ADA. Former drug users are qualified individuals with a disability if they:

- Have successfully completed a supervised drug rehabilitation program and are no longer engaging in illegal drug use;
- Have otherwise successfully rehabilitated and are no longer engaged in illegal drug use;
- Are participating in a supervised rehabilitation program and are no longer engaging in such use; or
- Have erroneously been regarded as a user of illegal drugs, but have not engaged in such use.

Consequently, an employer may not discharge an employee or deny employment to an individual who is a rehabilitated drug user who may be prone to relapse. The ADA entitles these individuals to a reasonable accommodation. This provision of the law may be particularly problematic for law enforcement agencies who often reject applicants with a history of drug use. However, participation in a drug rehabilitation program does not protect an employee who is still engaging in drug use.

5. **Reasonable Accommodation for Drug and Alcohol Users Protected by the ADA and/or the Rehabilitation Act**

Alcohol abusers identified as qualified individuals with a disability under the ADA or qualified individuals with a handicap under the Rehabilitation Act, may be entitled to reasonable accommodation. The form of reasonable accommodation will vary in each case. Some forms include transfers, counseling, leave of absence for the purpose of enrolling in a rehabilitation program, or a modified work schedule to allow the employee to attend therapy, Alcoholics Anonymous meetings, Narcotics Anonymous meetings, or a last chance agreement.

To avoid liability under the ADA and the Rehabilitation Act employers should:

- Document a suspected drug or alcohol user’s inability to perform the job competently and safely;
- Explain disciplinary action taken against an alcohol or drug abuser based on the employee's inability to safely and effectively perform the job, rather than in terms of the employee’s disease; and
- Establish a practice of progressive assistance and/or progressive discipline in dealing with substance abusers.
6. LIMITS ON THE REASONABLE ACCOMMODATION REQUIREMENT

An employee recovering from drug or alcohol abuse is disabled under the ADA. Therefore, an employer must consider reasonable accommodation focused on rehabilitating the employee from his/her addiction. However, the courts have ruled that reasonable accommodation must be “limited in scope” since continued accommodation would only “enable an alcoholic to continue his or her drinking.” The courts have recognized that “both effective treatment and the needs of the workplace require that an alcoholic employee be firmly confronted with the consequences of his drinking . . . in the final analysis ‘reasonable accommodation’ is the establishment of a process which embodies a proper balance between the two.” The courts have ruled that there is no reasonable accommodation available for employees who continue to drink notwithstanding an employer’s repeated efforts to provide reasonable accommodation, or who threaten the safety of others, or fail to perform the essential duties of their position. A California Court of Appeal inferred this standard into FEHA. It ruled that an employee who has been given reasonable accommodation to recover from a drug or alcohol addiction but nevertheless lapses back into drug or alcohol abuse cannot “gain yet another last chance despite prior warnings, and cannot stave off discharge indefinitely by attempting to enter into yet another course of treatment after each relapse.”

7. AUTHORITY OF AN EMPLOYER TO PROHIBIT DRUG OR ALCOHOL USE

The ADA provides that employers may:

- Prohibit the illegal use of drugs and the use of alcohol at the work place by all employees;
- Require that employees shall not be under the influence of alcohol or engaging in the illegal use of drugs at the work place;
- Require compliance with the Drug Free Work Place Act of 1988; and
- Hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals.

8. DRUG TESTING OF EXISTING EMPLOYEES

Congress provided that nothing in the ADA shall be construed to encourage, prohibit or authorize testing job applicants or employees for illegal drug use or employees or making employment decisions based on such test results. Therefore, under the ADA, concerned employers may require tests for illegal drug use. But, court decisions prohibit drug testing of certain employees under the State and federal Constitutions. The trend is to limit reasonable suspicion testing and random testing to safety-or security-sensitive positions.

Finally, employers may only test for illegal drugs.

9. ALCOHOL AND DRUG ADDICTION UNDER FEHA
FEHA does not directly state whether or not alcohol or drug addictions are disabilities. However, before the 2000 FEHA amendments, California courts relied on the traditional practice of interpreting the ADA and FEHA uniformly to infer that FEHA’s definition of disability covered drug and alcohol abuse. Though the California Legislature has expressly halted this policy in its newest incarnation of FEHA, the expansive nature of this disability coverage might still be valid because FEHA expressly adopts ADA guidelines where it would result in broader coverage. Therefore, arguably FEHA would adopt ADA regulations in this instance. FEHA still follows the ADA in excluding “psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs” from its definition of disability.
ENDNOTES

1  Gov. Code, § 3540-3549.3.
2  See Gov. Code, § 3543.2(a).
3  Gov. Code, § 3543.2(a).
9  Gas Service Co., and Gas Workers Metal Trades, Local 781, 81 LA 245.
12 San Francisco Bay Area Rapid Transit District and Service Employees Local 390 (1983) 81 LA 639.
15 See Gov. Code, § 3540.
16 Banos v. United Educators of San Francisco (2005) PERB Decision No. 1764-E [29 PERC 124].
17 Lee, Chris, Performance Appraisals: Can We Manage' Away the Curse? Training. 33, No. 5 (May 1996): 44.
22 Generally, written job descriptions constitute conditions of employment which are within the scope of bargaining. Bloomsburg Craftsman, Inc. (1985) 276 NLRB 400, 404. Changing job descriptions may require the employer to meet and confer with the union before implementing any changes.
23 Bellaver v. Quanex Corp. (7th Cir. 2000) 200 F.3d 485.
25 Ed. Code, § 88013(a).
26 Ed. Code, § 88013(b).
27 Ed. Code, § 88013(c).
28 Ed. Code, § 88013(d).
29 Ed. Code, § 88106.
30 Ed. Code, § 88060.
31 Ed. Code, § 88081.
32 Ed. Code, § 88080(a).
33 Ed. Code, § 88080(b).
34 Ed. Code, § 88121.
35 Government Code section 1028 provides that it is sufficient cause to dismiss a public employee who advocates or is knowingly a member of the Communist Party or of an organization which during the time of the employee’s membership the employee knows advocates overthrow of the Government of the United States or of any state by force or violence. It is rarely, if ever, invoked today.
36 Ed. Code, § 88123.
37 Ed. Code, § 88124.
38 Ed. Code, § 88125.
39 Ed. Code, § 88130.
41 Ed. Code, § 87732(a).
42 Ed. Code, § 87732(b).
43 Ed. Code, § 87732(c).
44 Ed. Code, § 87732(d).
45 Ed. Code, § 87732(e).
46 Ed. Code, § 87732(f).
47 Ed. Code, § 87732(g).
48 Ed. Code, § 87732(h).
49 Ed. Code, § 87734.
50 The precise articulation of the “Morrison factors” has evolved through subsequent cases; Morrison itself simply identifies certain factors a fact finder “may consider.” Morrison v. State Board of Ed. (1969) 1 Cal.3d 214, 229 [82 Cal.Rptr. 175].
51 Morrison v. State Board of Education (1969) 1 Cal.3d 214, 229 [82 Cal.Rptr. 175].
54 The Education Code makes no procedural distinction between the dismissal of an academic employee for cause and the imposition of a lesser penalty. Accordingly, we recommend that as closely as possible, a district follow the same process for suspension as it would for dismissal of a faculty member.
60  Harrington v. United States (1st Cir. 1982) 673 F.2d 7.
62  Roley v. Pierce County Fire Protection Dist. No. 4 (9th Cir. 1989) 869 F.2d 491.
65  Graham v. City of Philadelphia (3rd Cir 2005) 402 F.3d 139.
66  Barthuli v. Board of Trustees (1977) 19 Cal.3d 717 [139 Cal.Rptr. 267].
72  Lab. Code, § 1198.5.
73  Lab. Code, § 1198.5.
74  Lab. Code, § 1198.5.
75  Lab. Code, § 1198.5 states in pertinent part that: (a) Every employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee. (b) The employer shall make the contents of those personnel records available to the employee at reasonable intervals and at reasonable times. Except as provided in paragraph (3) of subdivision (c), the employer shall not be required to make those personnel records available at a time when the employee is actually required to render service to the employer.
76  See Patton v. Royal Industries, Inc. (1968) 263 Cal.App.2d 760 [70 Cal.Rptr. 44].
77  Randi W. v. Muroc Joint Unified School Dist. (1997) 14 Cal.4th 1066 [60 Cal.Rptr.2d 263], as modified.
78  California Civil Code Section 47 states “a privileged publication or broadcast is one made . . . (c) in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer.”
80 Ed. Code, §§ 220, 262.3.
81 Unemp. Ins. Code, § 1256.7.
82 Rojo v. Kliger (1990) 52 Cal.3d 65, 82 [276 Cal.Rptr. 130].
83 Rojo v. Kliger (1990) 52 Cal.3d 65, 81 [276 Cal.Rptr. 130].
88 Rojo v. Kliger (1990) 52 Cal.3d 65, 81-82 [276 Cal.Rptr. 130].
90 Gov. Code, § 12940(j)(3).
92 Jones v. The Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158 [72 Cal.Rptr.3d 624].
100 Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].
103 Gov. Code, §§ 12926(m); 12926(p); 12926(q); 12940(a).
105 Gov. Code, § 12951.
29 C.F.R. § 1606.1 (1988) (defines discrimination to include the denial of equal employment opportunity because an individual has the linguistic characteristics of a national origin group).

Odima v. Westin Tucson Hotel (9th Cir. 1993) 991 F.2d 595, 600, affirmed (9th Cir. 1995) 53 F.3d 1484, 1493. See also Ortiz v. Bank of America (E.D.Cal. 1982) 547 F.Sup. 550.

Odima v. Westin Tucson Hotel (9th Cir. 1995) 53 F.3d 1484, 1491 n.2.

Fragante v. City and County of Honolulu (9th Cir. 1989) 888 F.2d 591, cert. denied (1990) 494 U.S. 1081 [110 S.Ct. 1811].

Fragante v. City and County of Honolulu (9th Cir. 1989) 888 F.2d 591, 596, n.3, cert. denied (1990) 494 U.S. 1081 [110 S.Ct. 1811]; 29 C.F.R. § 1606.6(b)(1).

42 U.S.C. § 2000e(j); Gov. Code, § 12926(n); 29 C.F.R. 1605.1; E.E.O.C. v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, overruled on other grounds.


Gov. Code, § 12940(l).


Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1438-1440.


Berry v. Department of Social Services (9th Cir. 2006) 447 F.3d 642.

Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433 [holding that an employer’s refusal to give an employee two hours off work to attend his wife’s conversion ceremony violated Title VII’s prohibition of religious discrimination].

E.E.O.C. v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512-1513, overruled on other grounds.

Gov. Code, § 12940(j).

2 C.C.R. § 7293.3(a) and (c).


2 C.C.R. § 7293.3(b).


Cassista v. Community Foods, Inc. (1993) 5 Cal.4th 1050; 29 C.F.R. § 1630.2(h); Gov. Code, § 12926(k); 2 C.C.R. § 7293.6.

Gov. Code, § 12940(a).

Gov. Code, § 12926(i); 29 C.F.R. § 1630.2(h).

Gov. Code, § 12926(h).

Gov. Code, § 12926(h).

Gov. Code, § 12945(c).

132 Gov. Code, § 12926(p).
133 Gov. Code, § 12949.
137 Gov. Code, § 12945(a).
138 Gov. Code, § 12945(b)(1).
139 Gov. Code, § 12945(c)(1).
140 Gov. Code, § 12945(c)(3).
141 Gov. Code, § 12945(c)(2).
142 Gov. Code, §§ 12926(b), 12941(a); 29 U.S.C. § 631.
143 E.E.O.C. v. Insurance Co. of North America (9th Cir. 1995) 49 F.3d 1418.
146 Gov. Code, §§ 12920, 12921, 12926(m), (p), 12940.
147 Fam. Code, § 297.5(h).
148 Gov. Code, § 12940(a).
149 2 C.C.R. § 7292(b).
154 2 C.C.R. § 7292.1(a).
155 2 C.C.R. § 7292.1(b); Fam. Code, § 300 (formerly Civ. Code, § 4100).
158 2 C.C.R. § 7292.5.
159 2 C.C.R. § 7292.4.
160 Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].
Trent v. Valley Electric Association Inc. (9th Cir. 1994) 41 F.3d 524, 526, citing Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695.

Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 624].


29 C.F.R. § 1604.11(b).


Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].


Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].

Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].

Vault, Inc., Publications.


Miller v. Department of Corrections (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].


Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475 n.1; 29 C.F.R. § 1604.11(a)-(a)(2).


Fuller v. City of Oakland, Cal. (9th Cir. 1995) 47 F.3d 1522, 1527, as amended.; Nichols v. Frank (9th Cir. 1994) 42 F.3d 503, 511-513, overruled on other grounds; 29 C.F.R. § 1604.11(a).


Gov. Code, § 12940(i).


2 C.C.R § 7287.6(b)(3); 29 C.F.R. § 1604.11(f).

Gov. Code, § 12950.


State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

State Dept. of Health Services v. Superior Court (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].


Pen. Code, § 13519.7.

Gov. Code, § 12950.1.

Gov. Code, § 12950.1.

Gov. Code, § 12926(r).


Gov. Code, § 12940(a).


In Albertson’s, Inc. v. Kirkingburg (1999) 527 U.S. 555 [119 S.Ct. 2162], the United States Supreme Court disagreed that a disability under the ADA had been established since the disability did not impose a “substantial limitation” on a major life activity.


See Gov. Code, §§ 12926(i)(1)(C); 12926(k)(1)(B)(iii).

Gov. Code, § 12926(h)(1).


See City of Moorpark v. Superior Court (1998) 18 Cal.4th 1143 [Cal.Rptr.2d 445].


2 C.C.R. § 7293.6(e)(1)(A)(2)(a).

2 C.C.R. § 7293.6(e)(1)(A)(2)(a).

Gov. Code, § 12926(k)(4), (5).

221 Gov. Code, § 12926(k)(4).
224 Gov. Code, § 12926(k)(3).
227 Gov. Code, § 12926(k)(6).
233 Bultermeyer v. Fort Wayne Community Schools (7th Cir. 1996) 100 F.3d 1281.
234 Bultermeyer v. Fort Wayne Community Schools (7th Cir. 1996) 100 F.3d 1281.
238 Treatment Will Lessen Suffering, Yield Significant Cost Savings, Psychiatric News, April 16, 1993, at 4 (stating that, according to the National Institute of Mental Health, only about half of the 10.9 percent of the population that seek mental health treatment in a given year meet the DSM criteria for a mental health disorder). In addition, not all conditions included in the DSM-IV for which people may seek treatment (for example, problems with a spouse or child) are mental disorders. Because these conditions are not disorders, they are not impairments under the ADA. EEOC Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities at 4 (Mar. 25, 1997).
239 Muller v. Automobile Club of Southern California (1998) 61 Cal.App.4th 431 [71 Cal.Rptr.2d 573], review denied, [court would not extend the definition of medical condition to include temporary stress disorders].
240 Gov. Code, § 12926(h)(2).
241 Gov. Code, § 12940(o).
242 29 C.F.R. § 1630.4.
243 29 C.F.R. § 1630.4.
244 29 C.F.R. § 1630.2(h); 34 C.F.R. § 104.3(j)(2)(I).
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29 C.F.R. § 1630.2(I).


Fortissi v. Bowen (4th Cir. 1986) 794 F.2d 931.

Byrne v. Board of Education, School of West Allis-West Milwaukee (7th Cir. 1992) 979 F.2d 560. See also Miller v. Springfield (8th Cir. 1998) 146 F.3d 612, rehearing denied (psychological test for police candidates which screen for depression not a violation of the ADA. Plaintiff was currently employed as a dispatcher. Court held plaintiff could still work as a dispatcher even though plaintiff was rejected for police officer position because of depression); Thompson v. Holy Family Hosp. (9th Cir. 1997) 121 F.3d 537 (lifting restriction not a disability where employee could not establish inability to perform a broad range of jobs).


Evans v. City of Dallas (5th Cir. 1998) 861 F.2d 846.

These examples come from the EEOC’s Technical Assistance on Title I of ADA at 2.2(b), 8 FEP Manual (BNA) 405: 6981, 6989 (1992).


29 C.F.R. § 1630.2(h).

Respectively, ADA §§ 104(a), 510(a); § 508; § 1511(a); § 511(a); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(1); § 511(b)(2); § 511(b)(2); § 511(b)(3).

29 C.F.R. § 1630.2(h).


29 C.F.R. § 1630.2(g).

29 C.F.R. § 1630.2 (i)(1).


EEOC Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities at 5 (Mar. 25, 1997); 29 C.F.R. § 1630.2(j) (Appendix) (“[i]f an individual is not substantially limited with respect to any other major life activity, the individual’s ability to perform the major life activity of working should be considered . . .”).

See 29 C.F.R. § 1630.2(j)(3).


Gov. Code, § 12926(i)(1); § 12926.1(c), (d).

Gov. Code, § 12926(i)(1); § 12926.1(c), (d).


29 C.F.R. § 1630.2(i).


ADA §§ 103(A) and (B); 29 C.F.R. §§ 1630.2(o), 1630.2(p), 1630.2(r).

29 C.F.R. § 1630.2(n).


Treadwell v. Alexander (11th Cir. 1983) 707 F.2d 473.

Myers v. Hose (4th Cir. 1995) 50 F.3d 278. The Myers court did not specify whether the bus driver had a mental or physical disability. Instead, the court stated that the bus driver suffered from “several disabling medical conditions.” Myers v. Hose (4th Cir. 1995) 50 F.3d 278, 280. The court’s description of the bus driver’s condition, however, suggests that he suffered from one or more physical disabilities which, alone or in combination, affected his mental state. Significantly, just as this bus driver’s physical disabilities had a debilitating affect on his mental state, a mental disability can have debilitating physical effects. See, e.g., Dees v. Austin Travis County Mental Health and Mental Retardation (W.D.Tex. 1994) 860 F.Supp. 1186 (considering claim of mentally disabled individual whose taking of prescribed psychotropic medication limited her ability to function before 10:00 a.m.).


Humphrey v. Memorial Hospitals Association (9th Cir. 2001) 239 F.3d 1128.

Gov. Code, § 12940(n).


Beck v. University of Wisconsin Board of Regents (7th Cir. 1996) 75 F.3d 1130.


Rowe v. City and County of San Francisco (9th Cir. 2000) 186 F.Supp.2d 1047.


Rowe v. City and County of San Francisco (9th Cir. 2000) 186 F.Supp.2d 1047.

ADA § 102(b)(5)(A); 42 U.S.C.A. § 12112(a).


29 C.F.R. § 1630.9.

See, e.g., Stola v. Joint Industry Board (S.D.N.Y. 1995) 889 F.Supp. 133, 136 (stating that it would be unreasonable to hold employer responsible for failing to determine - in absence of any suggestion from employee's doctor - whether employee's behavior was product of mental disorder).


Miller v. National Casualty Co. (8th Cir. 1995) 61 F.3d 627. The EEOC specifically stated that, in the EEOC’s view, this case was incorrectly decided. EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 20 n.48 (Mar. 25, 1997).


Gov. Code, § 12940(m).


See also 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p).

See, e.g., Myers v. Hose (4th Cir. 1995) 50 F.3d 278, 284.

See, e.g., Myers v. Hose (4th Cir. 1995) 50 F.3d 278, 284.


See, e.g., McDaniel v. Allied Signal, Inc. (W.D.Mo. 1995) 896 F.Supp. 1482, 1489-90 (holding that an employer could not reasonable accommodate an employee with a mental disability because the United States Government, not the employer, had ultimate decision-making authority regarding the employee's security clearance, the maintenance of which was an essential function of the employee's job).

Gov. Code, § 12926(n).


See Dutton v. Johnson County Bd. (D.Kan. 1995) 1995 WL 337588, 6 AD Cases (BNA) 213 (unpublished case concluding that permitting an individual with a disability to use unscheduled vacation time to cover absence for migraine headaches was a reasonable accommodation where doing so did not pose an undue hardship and the employer knew about the migraine headaches and the need for accommodation).

29 C.F.R. § 1630.2(o).

29 C.F.R. § 1630.2(o).

Coleman v. Darden (10th Cir. 1979) 595 F.2d 533, cert. denied by 444 U.S. 927 [100 S.Ct. 267].


Garcia-Ayala v. Lederle Parenterals, Inc. (1st Cir. 2000) 212 F.3d 638.


29 C.F.R. § 1630.2(o).

Gaines v. Runyon (6th Cir. 1997) 107 F.3d 1171.

Wellington v. Lyon County School District (9th Cir. 1999) 187 F.3d 1150.

Wellington v. Lyon County School District (9th Cir. 1999) 187 F.3d 1150.


Shea v. Tisch (1st Cir. 1989) 870 F.2d 786.


Bentivegna v. U.S. Dept. of Labor (9th Cir. 1982) 694 F.2d 619, 623.


See Hanson v. Lucky Stores, Inc. (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487], [citing Schmidt v. Safeway Inc. (D.Or.1994) 864 F.Supp. 991, 996 (“The ADA may require an employer to provide a leave of absence to an employee with an alcohol problem, particularly if the employer would provide that accommodation to an employee with cancer or some other illness requiring medical treatment.”)].


Southeastern Community College v. Davis (1979) 442 U.S. 397 [99 S.Ct. 2361].

Lucero v. Hart (9th Cir. 1990) 915 F.2d 1367.


EEOC’s A Technical Assistance on Title I of ADA at 4.1, 8 FEP Manual (BNA) 405 (1992).


29 C.F.R. § 1630.10.


28 CFR § 35.160.


Gov. Code, § 12940(d).

29 C.F.R. § 1630.13.

Appendix to the Equal Employment Opportunity Commission Regulations on Title I of the ADA, § 1630.14(a).


29 C.F.R. § 1630.14(b).
42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c).


EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 15 (Mar. 25, 1997). Employers should be aware that inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee’s ability, with or without reasonable accommodation, to perform essential functions or to work without posing a direct threat. EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 16 (Mar. 25, 1997).


2 C.C.R. § 7294.0(b)(2)(1995).
2 C.C.R. § 7294.0(b)(3)(1995).

EEOC’s A Technical Assistance on Title I of ADA at § 5.5(b), 8 FEP Manual (BNA) 405 (1992).
EEOC’s A Technical Assistance on Title I of ADA at § 5.5(f), 8 FEP Manual (BNA) 405 (1992).
EEOC’s A Technical Assistance on Title I of ADA at § 5.5(g), 8 FEP Manual (BNA) 405 (1992).

Appendix to the Equal Employment Opportunity Commission Regulations on Title I of the ADA, § 1630.14(a); Manual, § 5.6.
EEOC’s A Technical Assistance on Title I of ADA at 5.5(e), 8 FEP Manual (BNA) 405 (1992).
2 C.C.R. § 7294.0(c)(1995).

Appendix to the Equal Employment Opportunity Commission Regulations on Title I of the ADA, § 1630.14(a).

Gov. Code, § 12940(e)(1).
Gov. Code, § 12940(e)(2).
403  Gov. Code, § 12940(e)(3).
406  EEOC’s A Technical Assistance on Title I of ADA at § 6.4, 8 FEP Manual (BNA) 405 (1992).
408  Appendix to the Equal Employment Opportunity Commission Regulations on Title I of the ADA, § 1630.13(a).
409  EEOC’s A Technical Assistance on Title I of ADA at § 4.4, 8 FEP Manual (BNA) 405 (1992).
410  EEOC’s A Technical Assistance on Title I of ADA at § 4.4, 8 FEP Manual (BNA) 405 (1992).
412  EEOC’s A Technical Assistance on Title I of ADA at § 8.1, 8 FEP Manual (BNA) 405 (1992).
415  Fuller v. Frank (9th Cir. 1990) 916 F.2d 558, 561 (citing Rodgers v. Lehman (4th Cir. 1989) 869 F.2d 253, 259 (“Under Rodgers, “reasonable accommodation” requires that a governmental employer follow a progression of increasingly severe responses to an employee’s alcoholism. The employer should (1) inform the employee of available counseling services; (2) provide the employee with a “firm choice” between treatment and discipline; (3) afford an opportunity for outpatient treatment, with discipline for continued drinking or failures to participate; (4) afford an opportunity for inpatient treatment, if outpatient treatment fails; and (5) absent special circumstances, discharge the employee for any further relapse.”)
416  Fuller v. Frank (9th Cir. 1990) 916 F.2d 558, 561 [citing Rodgers v. Lehman (4th Cir. 1989) 869 F.2d 253, 259].
417  Fuller v. Frank (9th Cir. 1990) 916 F.2d 558, 561 [citing Rodgers v. Lehman (4th Cir. 1989) 869 F.2d 253, 259].
421  42 U.S.C. § 12114(c)(1), (2), and (3).
422  Gov. Code, § 12926(f).
423  Gov. Code, § 12926(k)(6).