

Domestic Violence, Sexual Assault & Employment: Disabilities in the Workplace

An Introduction to State and Federal Laws

YOUR LEGAL RIGHTS

Domestic violence and sexual assault survivors often have physical or mental health disabilities that are caused or exacerbated by domestic violence or sexual assault. Under the federal Americans with Disabilities Act and the California Fair Employment and Housing Act, domestic violence and sexual assault survivors with disabilities are entitled to a workplace free of discrimination and harassment and may be eligible for workplace reasonable accommodations for their disabilities, including a reduced work schedule, a leave of absence from work, or a transfer to a different position.

1. Who is protected by the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA)?

A person with a **physical** or **mental impairment** that **substantially limits** a **major life activity** is “disabled” under the ADA. A person with a **physical** or **mental impairment** that **limits a major life activity** is “disabled” under the FEHA. Under both laws a person with HIV/AIDS, for example, is considered to be disabled.

Physical disabilities may include conditions such as:

- Diabetes
- Epilepsy
- Blindness
- HIV / AIDS
- Paralysis

Mental health disabilities may include conditions such as:

- Depression
- Bipolar disorder/manic depression
- Schizophrenia
- Panic, anxiety and stress disorders
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Other mental health conditions

It is helpful to break down the definition of disability into its parts:

“Major life activities” include:

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

“**Substantially limiting**” means the impairment significantly restricts how someone can perform a major life activity, compared to the average person. “**Limiting**” means the impairment makes the achievement of a major life activity difficult. For example, an individual who sleeps two hours per night because of bipolar disorder while an average person sleeps seven hours per night is substantially limited in sleeping. Negative side effects of medications may be considered in determining whether someone is limited.

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

According to a 1999 United States Supreme Court case, "mitigating measures" should be considered in determining whether an individual is disabled under the ADA. This means if a person is very stable on their medication, or is using a prosthetic, and is not currently substantially limited in a major life activity, that person is not "disabled" under the ADA. Disability and mental health advocates opposed this ruling as contrary to the underlying policies of the ADA. California law is distinct from, and **stronger** than, the ADA. Under California law, mitigating measures may not be considered in determining whether a person is disabled. This means that people who are currently stable due to medications or other treatment are still protected.

3. Who else is protected?

The ADA and the FEHA also provide protection for people who are regarded or treated as having a disability, even if they do not. Also protected are persons with a record or history of a disability. In addition, the FEHA protects persons who are not currently disabled, but who may become disabled in the future.

4. What are my rights if I have a disability?

Under the ADA, employers with **15** or more employees cannot discriminate against qualified individuals with disabilities. The FEHA bars discrimination by employers with **five** or more employees. This means that if you have a disability and can do the basic duties of the job, you cannot be harassed, demoted, terminated, paid less, or treated more poorly because of your disability. Qualified disabled employees may also obtain **reasonable accommodation** to enable them to perform their jobs. Similarly, qualified applicants cannot be rejected on the basis of their disabilities, and may obtain reasonable accommodation during the hiring process.

REASONABLE ACCOMMODATION

5. What is a reasonable accommodation?

Reasonable accommodations are adjustments or modifications made to a job or the workplace to enable an employee to successfully perform the basic duties of a position. A reasonable accommodation does not change essential job functions. What is a reasonable accommodation for a particular employee will depend upon the situation and the type of job. The accommodation, however, may not be unduly costly or disruptive for the employer. An employee has the right to refuse an accommodation.

The following are examples of possible reasonable accommodations:

- Modification of facilities
 - **Physical:** An employee with a spinal disability might need a different desk or changes in workspace.
 - **Mental Health:** An employee with schizophrenia or another condition might need dividers or a more private workspace to reduce distractions.
- Equipment or devices
 - **Physical:** An employee with repetitive arm/wrist stress might need different keyboard or telephone headset.
 - **Mental Health:** An employee who hears voices or is sensitive to distractions might rely on headphones.
- Part-time work schedule
 - **Physical:** An employee with chronic fatigue syndrome may need a part-time schedule.
 - **Mental Health:** An employee with a mental health disability interfering with sleep might need a part-time schedule.
- Modified work schedule
 - **Physical:** An employee might need flex time or time away for surgery.
 - **Mental Health:** An employee who takes psychiatric medications may experience grogginess in the morning, and might need a later or flexible schedule.

- Time away for therapy
 - **Physical:** An employee who relies on regular visits with a physical therapist may need time away to attend appointments.
 - **Mental Health:** An employee who relies on periodic visits with a mental health professional may need time away to attend appointments.
- Unpaid leave of absence
 - **Physical:** An employee who suffers from periodic aggravation of his or her condition may require time away to recover, in a hospital or at home.
 - **Mental Health:** An individual with depression or another condition might need an unpaid leave for recovery, in a hospital or at home.
- Job restructuring
 - **Physical:** An employee with a lifting restriction may need to delegate that function if it is not essential to the job.
 - **Mental Health:** An employee with bipolar disorder or another condition might seek to avoid contact with the public, where such contact is not an essential job duty. Similarly, an employee with a stress disorder might ask that someone else moderate a monthly meeting, where running the meeting is not an essential job duty.
- Training
 - **Physical:** An employee who cannot type at a computer may need training to operate a voice-activated computer.
 - **Mental Health:** An employee with post-traumatic stress disorder or another disability interfering with concentration or learning may need additional or specialized training to master the job.
- Modified supervision
 - **Physical:** An employee who has with a hearing impairment might prefer supervision in writing to meeting regularly with his or her supervisor.
 - **Mental Health:** An employee with a mental health disability may seek modified supervisory techniques, such as positive and negative feedback, more frequent performance reviews, and more detailed instruction or task assignment. Another effective adjustment might be an alteration in communication techniques, such as a switch to or away from email, an increase in written instructions, or an increase in face-to-face meetings.
- Job coach to assist the employee in learning the job
 - **Physical:** A visually impaired employee may seek permission to bring a job coach to the worksite to assist the employee in learning to navigate the job site.
 - **Mental Health:** An employee with a mental health disability might seek permission to bring a job coach to the worksite to assist the employee in learning the job. In some cases, an employer might provide such a coach as an accommodation.

- Policy Changes
 - **Physical:** An employee with a disability requiring frequent bathroom breaks might need a modification to the employer’s break policy.
 - **Mental Health:** An employee who takes psychiatric medication might need to periodically drink water, and might need more frequent breaks than permitted under an employer’s policy.
- Education of co-workers and supervisors to raise awareness and debunk fears and stereotypes
 - **Physical:** An employee with epilepsy might seek disability education of co-workers and supervisors to raise awareness of how to respond if the employee has a seizure.
 - **Mental Health:** An employee with obsessive-compulsive disorder facing misunderstandings on the job might seek disability education of co-workers and supervisors to raise awareness and debunk fears and stereotypes.
- **Transfer:** An employee who is not able to perform the essential job functions of a current position may seek a transfer to a vacant position for which the employee is qualified. A transfer may also be appropriate where the employee remains qualified for the current position with accommodation, but the employee and the employer agree that a transfer is an appropriate modification.

6. When is an employer required to accommodate an employee?

An employer is only required to accommodate known disabilities. There is no one specific way to notify an employer; an employer’s knowledge of a disability may be implied. However, to guarantee the legal right to accommodation, an employee should explicitly disclose the disability.

7. What do I have to say to tell my employer if I am seeking an accommodation?

You must provide the employer with enough information to show the existence of an impairment, and its impact on a major life activity. To be safe, you should use words such as “disability,” “impairment,” “limiting,” “major life activities,” and “accommodation.”

Disclosure to an employer of a hidden disability is an extremely personal decision. Employees considering disclosure of a mental health disability should compare the costs and benefits, including:

- Need for accommodation to perform the job.
- Need for accommodation to avoid discipline or termination.
- Need for accommodation to protect health.
- Whether modification may be obtained without disclosing disability.

- Risk of stigma and harassment.
- Risk of loss of privacy.
- Potential for more successful and supportive employment experience.

8. Do I have to request an accommodation in writing?

NO. You can request accommodation in writing, orally, through e-mail or by any other form of communication. However, you may want to keep records in case there is a dispute in the future over whether you made the request.

9. Am I required to disclose my DSM* diagnosis to obtain accommodations? (*Diagnostic and Statistical Manual of Mental Disorders)

Not necessarily. You must provide information specific enough for the employer to understand that you have a mental disability as defined by law. Simply disclosing “stress” or an “emotional” problem may not be sufficient. However, revealing a DSM diagnosis or detailing every diagnostic feature may not be necessary. In fact, disclosing a DSM diagnosis without explaining the limitations it causes may be insufficient.

10. Am I required to release my medical or psychiatric records to obtain accommodations?

NO. If your disability or your need for accommodation is not obvious, your employer may ask for reasonable medical documentation. The documentation should be limited to a doctor’s note or other medical documents showing that you have a disability and need accommodation. You are not required to produce your entire medical or mental health history.

11. Do I have to disclose my disability to everyone at work?

NO. You must disclose to someone who represents the employer, such as a supervisor or a human resources person. However, you are not required to disclose to co-workers. In fact, medical information obtained by an employer must be kept confidential, and maintained in files separate from your personnel file. This information can be revealed only to supervisors and managers who need to know about the accommodation and any restrictions on the employee’s work or duties.

12. What happens after I request an accommodation?

Once you request an accommodation, your employer must make a reasonable effort to determine the appropriate accommodation. However, you must also be willing to participate in the process of developing and implementing the accommodation.

Employees who do not fully participate in the process may lose their ADA and FEHA rights. This participation may require the employee to submit requested medical documentation and to attend scheduled meetings. If the employer or employee rejects a suggested accommodation, the employee must take steps to continue the process.

To protect ADA and FEHA rights, employees should take proactive steps, such as:

- presenting accommodation requests to the employer in writing;
- suggesting alternative accommodations;
- scheduling and attending meetings with the employer to discuss accommodations;
- offering the employer referrals to accommodation specialists like the Job Accommodation Network (800-526-7234) or Disability and Business Technical Assistance Centers (DBTACs) (800-949-4232).

APPLYING FOR A JOB

13. What may an employer ask me when I am applying for a job?

Before a job offer is made, an employer may not ask you any questions that are likely to reveal information about a disability. This rule bars direct questions about a particular disability (“Do you have any heart problems or mental illnesses?”), questions about the ability to perform “major life activities” unrelated to the job (“Have you ever been unable to take care of yourself?”), and most questions regarding prescription drug use (“Do you take pain killers or antidepressants?”).

However, if the disability is obvious or if the applicant has voluntarily disclosed a disability, and the employer reasonably believes that the applicant will need an accommodation to do the job, or if the applicant has requested accommodations during the application process, then the employer may ask limited questions about accommodations.

14. Am I required to disclose my disability when I apply for a job to protect my rights?

NO. You are not required to disclose your disability at the time you apply for a job, even if you later need a workplace accommodation. You may wait until you actually are seeking accommodation—which may be months or years later—before you disclose.

15. What may an employer ask me after a job offer has been made, but before I start working?

The ADA does not prohibit post-offer, pre-employment medical examinations or inquiries—even those unrelated to job performance—so long as the information is kept confidential, and all entering employees in the same job category are asked the same questions. If an employer uses the results of such examinations or inquiries to revoke the job offer, the employer must prove that its reasons are “job-related and consistent with business necessity.”

Under the FEHA, medical inquiries and examinations made after a job offer has been given but before the person starts working must be job-related and consistent with business necessity.

ON-THE-JOB MEDICAL INQUIRIES AND EXAMINATIONS

16. What may an employer ask after I start working?

Employers cannot ask questions about your disability, or require a medical examination, unless the questions or examination are “job-related and consistent with business necessity.” Even if you seem sickly or ill, an employer cannot ask medical questions unless there is a job-related reason. The following situations may justify limited medical inquiries. Otherwise, your employer is probably not entitled to medical information:

A request for reasonable accommodation: If an employee requests an accommodation and the disability or need for accommodation is not obvious, the employer may request reasonable documentation showing the employee’s right to accommodation. Medical documentation must be confidentially maintained in a separate medical file.

Evidence of the inability to perform the essential functions of the job: If an employer has a reasonable belief that a disability will impair an employee’s ability to perform the essential duties of the job, the employer may ask limited medical questions or request a medical examination.

Evidence of a direct threat to the health or safety of others: If an employer has a reasonable belief that the employee’s disability poses a direct threat to the health or safety of others, the employer may ask limited medical questions or request an examination.

A workplace injury: If an employee has a work-related injury, the employer may ask limited medical questions or request an examination in order to assess its liability under workers’ compensation.

Even if there is a job-related reason, the employer’s request for medical information or documentation must still be **reasonable** and related to the situation. No requests can exceed the scope of the employer’s need to evaluate the impact of the disability on the situation. Most important, any medical information the employer obtains must be kept confidential, and stored in a separate medical file -- not with your regular personnel file.

MENTAL HEALTH CONDITIONS: ON-THE-JOB BEHAVIOR

17. What if I have a problem with my medication or my condition, and my behavior changes at work?

It depends. If your conduct interferes with the job or violates basic and important workplace rules, then you may no longer be considered “qualified” for the purposes of state and federal laws. An unqualified individual with a disability may be disciplined or terminated.

One way to determine whether you are still qualified is to look at any workplace rule you may have violated. If the rule is job-related and necessary, then the employer can discipline or terminate the employee, even if the behavior is caused by the disability.

18. What rules are “job-related and necessary?”

Necessary, job-related rules include safety rules and rules against violence. Other necessary rules are those essential to the business of the employer. For example, rules regarding personal appearance or dress are probably job-related and necessary for employees in customer service positions. Such rules may not be necessary, however, for employees working in isolation away from public view. Rules about tardiness are likely to be job-related for receptionists and drivers, but may not be necessary for someone working alone on independent projects.

19. What if other employees engage in the same conduct without being disciplined?

As a result of myths and stereotypes associated with psychiatric conditions, disruptive or “strange” behavior by an individual with a mental health disability may be viewed with greater alarm than comparable behavior by a non-disabled individual. An employer cannot impose greater discipline upon an employee with a disability than it would upon a non-disabled employee who engaged in the same conduct.



20. What can I do if my rights are violated?

You can file an administrative charge with the federal Equal Employment Opportunity Commission (800) 669-4000 for a violation of the ADA and file a charge with the California Department of Fair Employment and Housing (800) 884-1684 for a violation of FEHA. Remember, depending on your employer's size, you may have claims under both laws and your administrative charge should be cross-filed with both agencies.

21. Where can I get additional help or learn more about my rights?

Contact the **Domestic Violence and Employment Project** of the Legal Aid Society – Employment Law Center **toll-free at (888) 864-8335**. We can help you to understand what your rights are, how to exercise your rights, and what to do if your rights are violated.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

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For further information about your employment rights, call:

The SURVIVE Project

(888) 864-8335 Toll-free in California **(415) 593-0033** Outside California

The SURVIVE Project is a Project of the Legal Aid Society – Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.