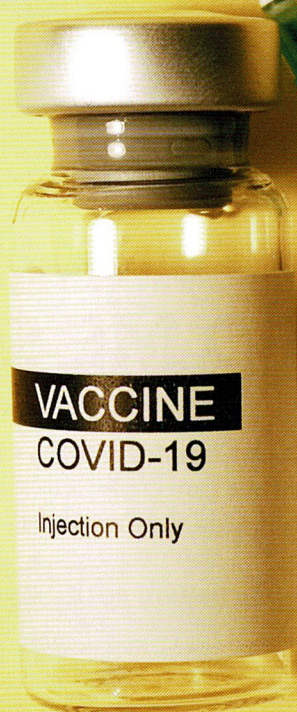




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Protections for Employees With Psychiatric Disabilities Under California's Fair Employment And Housing Act (FEHA)

by Jeannette Vaccaro

The mental health of American workers has undeniably suffered during the Covid-19 pandemic.

Indeed, numerous studies show that American workers are experiencing increased work stress and anxiety, depressive symptoms, and other mental health issues. Some pre-existing mental health issues have become exacerbated. But as Covid-19 abates, and more businesses require employees to return to work, many workers are wondering what legal protections they have to help cope with psychiatric disabilities. Fortunately, California law provides broad protections for disabled employees and job applicants. Not only does California's Fair Employment and Housing Act (FEHA) prohibit discrimination in employment, but it also requires employers to engage in the interactive process with disabled workers to determine what reasonable accommodations are available.

Covered Employers

The FEHA applies to employers with five or more employees. Govt. Code § 12926(d). For the purposes of counting, "employees" include paid and unpaid interns, "persons performing services pursuant to a contract," as well as employees who work outside of California. 2 CCR § 11008(d). However, the FEHA's anti-harassment provisions apply to all employers with one or more employee. Govt. Code § 12940(j)(4).

Covered Employees

The California legislature has made it clear that coverage under the FEHA is intended to be broad. Govt. Code §§ 12965(d), 12940(a).

Under the FEHA, a "mental disability" is defined to include "any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities that limit a major life activity." Govt. Code 12926(j)(1); *see also* 2 CCR § 11065(d)(1).

Mental disabilities may include conditions such as:

- Depression
- Bipolar disorder /manic depression
- Schizophrenia

- Panic, anxiety and stress disorders
- Traumatic brain injury
- Post-traumatic stress disorder
- Obsessive compulsive disorder

Notably, while alcoholism is considered a disability under California law if it limits a major life activity, the FEHA expressly excludes psychoactive substance use disorders that are a result of unlawful drug use from the definition of mental disabilities. Govt. Code 12926(j)(5). The FEHA also expressly excludes "sexual behavior disorders, compulsive gambling, kleptomania, [and] pyromania." *Id.*

Additionally, while anxiety is a covered disability if it limits a major life activity, California Courts have held that an employee's inability to work under a particular supervisor because of anxiety and stress related to that supervisor's standard oversight of the employee's job performance does not constitute a disability under FEHA. *Higgins-Williams v. Sutter Med. Found.*, 237 Cal. App. 4th 78, 84, 187 Cal. Rptr. 3d 745, 750 (2015); *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 628 ["the inability to perform one particular job, or to work under a particular supervisor, does not constitute a qualified disability" under the FEHA].

"Major life activities" is also construed broadly and includes seeing, sleeping, learning, hearing, breathing, thinking, speaking, concentrating, reproduction, performing manual tasks, walking, interacting with others, sexual relations, caring for oneself, standing, reading, and working. 2 CCR § 11065(l). Major life activities also include bodily functions, such as normal cell growth, or the functioning of the respiratory, cir-



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culatory, cardiovascular, endocrine, immune, and digestive systems. *Id.*

An impairment “limits” a major life activity if it makes the activity more difficult. 2 CCR § 11065(1)(3). Notably, whether an employee is considered disabled under the FEHA is determined without regard to “mitigating measures” such as medication, or reasonable accommodations, such as assistive devices. Govt. Code §§ 12940(j)(1)(A) and (m)(1)(B)(i). This means that people with mental conditions who are currently stable due to medications or treatment are still protected. Additionally, a condition which is episodic or in remission is considered a “disability” if it would limit a major life activity in its active phase. 2 CCR § 11065(d).

The FEHA Prohibits Disability-Based Discrimination And Harassment In The Workplace

Discrimination against employees and job applicants with a physical disability, mental disability, medical condition, or genetic condition is unlawful under the FEHA. Govt. Code §§ 12965 (d), 12940(a). Prohibited discrimination includes not only terminations, but other adverse actions which affect a worker’s terms, conditions, or privileges of employment. Govt. Code §12940(a). The FEHA also prohibits harassment on account of an individual’s disability. Govt. Code. § 12940(j).

These protections extend to workers who are currently experiencing a disabling condition, those with a history of a disability or medical condition, or who are “regarded as,” or perceived to

Examples of accommodations for workers with psychiatric disabilities include:

- Anxiety: apps for anxiety; use of ear phones; work from home part- or full-time; exchange non-essential job tasks with another employee; use of instant messaging and email; changes to methods of work assignments.
- Concentration/distraction issues: use of fidget devices; more frequent reminders of tasks and due dates; a quieter work environment or use of noise cancelling headphones; more frequent short breaks; work from home.
- Managing treatment and medication: Flexible schedule to allow for appointments; more frequent breaks for medication; part-time schedule until medication plan stabilizes.

be disabled. Govt. Code § 12926(j); 2 CCR § 11065. The FEHA also prohibits discrimination because an employee is associated with a disabled person. Govt. Code § 12926(o); *see, Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 657.

The FEHA Imposes Affirmative Obligations On Employers To Provide Reasonable Accommodations For Psychiatric Disabilities.

In addition to prohibiting employment discrimination, the FEHA imposes affirmative obligations on employers to engage



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in the “interactive process” with disabled workers and provide “reasonable accommodations” to qualified employees with psychiatric disabilities. Govt. Code §§ 12940(m) and (n).

“Reasonable accommodations” are adjustments or modifications that enable people with disabilities to perform the essential functions of a job. Reasonable accommodations can take on a variety of forms and can include job restructuring, modified work schedule, assistive devices, reassigning an employee to a vacant position, or even a leave of absence. While many employers are familiar with accommodations for physical disabilities, employers often fail to properly address the needs of employees with psychiatric disabilities.

The “interactive process” means a timely, good faith communication between the employer and employee (or representative) to explore whether or not the employee needs reasonable accommodations in order to perform the essential functions of the job, and if so, how the person can be reasonably accommodated. 2 CCR § 11069. As part of the interactive process, the employer and employee must exchange information relative to the employee’s limitations (but not disability), as well as potential accommodations. 2 CCR § 11069(a) and (c).

Under the FEHA, an employer is required to consider the requested accommodations, as well as the employee’s preferences regarding accommodations. 2 CCR § 11069(c). The

These additional resources provide information and answers to frequently asked questions regarding accommodations for psychiatric disabilities in the workplace:

- The Equal Employment Opportunity Commission’s Enforcement Guidance on the ADA and Psychiatric Disabilities answers some of the most common questions about the ADA and persons with psychiatric disabilities (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities>)
- The Job Accommodation Network (JAN) is a free consulting service from the U.S. Department of Labor’s Office of Disability Employment Policy that provides individualized accommodation solutions and information on the ADA and services related to employment for people with disabilities. JAN can be accessed at www.askjan.org or 1-800-526-7234 (V/TTY).
- The Center for Psychiatric Rehabilitation’s Reasonable Accommodations page includes specific tips for employers on developing and implementing accommodations (<https://cpr.bu.edu/resources-and-information/reasonable-accommodations/>).
- Ten regional ADA National Network Centers, sponsored by the U.S. Department of Education’s National Institute on Disability, Independent Living, and Rehabilitation Research, provide ADA information, training and technical assistance across the nation. They can be contacted at www.adata.org or 1-800-949-4232 (V/TTY)

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interactive process is an ongoing legal obligation and is not satisfied when the employer simply offers an ineffective accommodation.

For example, in *Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138, a medical transcriptionist with OCD struggled to arrive to work on time because her OCD caused her to engage in a series of obsessive rituals. In response to her request for accommodations her employer agreed to allow her to work a flexible start-time schedule. But when that accommodation did not work and she suggested she work from home, the employer denied her request and provided no alternative accommodation. She was then fired after additional absences. The Ninth Circuit held that the employer failed to engage in the interactive process because it had a continuing duty to accommodate the employee once it learned the accommodation provided was ineffective. This is important because a disabled employee's accommodation needs may change over time.

Limitations of the FEHA

The FEHA does not require an employer to provide reasonable accommodations to disabled employees if doing so would constitute an "undue hardship." Govt. Code §§ 12940 (m), 12926(u). What constitutes an "undue hardship" is often a fact intensive inquiry which looks at whether the requested accommodation "require significant difficulty or expense" when considered in light of a number of factors. Govt. Code 12926(u). These factors include the nature and cost of the

accommodation in relation to the size, resources, nature, and structure of the employer's operation. *Id.* For example, it may not be possible to accommodate an employee in his current position if he works as a salesperson in a busy department store and needs a reduction in visual distractions and ambient noise as an accommodation.

Additionally, an employer is not obligated to hire or retain an employee who cannot perform the essential functions of the position with accommodations. "Essential functions" refers to the position's fundamental duties. Govt. Code 12926(f). A job duty is considered "essential" if the job exists for the performance of that duty, if there are a limited number of employees who can perform that duty, or if the job is highly specialized, such that the employee was hired to perform that specific function. Govt. Code 12926(f)(1).

Conclusion

Returning to work post-Covid will undoubtedly come with challenges. Workers who have managed their psychiatric disabilities while working at home will now need to adjust back into a more traditional work environment, which may require reasonable accommodations. Understanding the protections afforded by California's FEHA is an important first step in addressing psychological disabilities in the workplace and ensuring a smooth transition back to work for those who suffer from them.¹¹



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