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California Adopts New Disability Discrimination Regulations

By Diane Kimberlin

Regulations proposed by California's Fair Employment and Housing Commission governing disability discrimination have been finalized after public comment and are now in effect. According to the Statement of Purpose, the Commission intends that the definition of "disability" be construed as broadly as allowed by the Fair Employment and Housing Act (FEHA), California's principal anti-discrimination law. The Commission urges that the primary focus in cases brought for alleged violation of the FEHA should be on whether employers have provided reasonable accommodations, whether employers and employees have met their obligations to engage in the "interactive process," and whether discrimination has occurred. The Commission opines that whether the employee meets the definition of disability "should not require extensive analysis." It is true that, in many cases, an employee's status as a disabled person will be obvious. In other cases, unfortunately, the convoluted definitions of "disability" adopted by the Commission in its efforts to define that term to the outer limits of the law will require just the sort of extensive analysis the Commission wishes to avoid – unless employers are to abandon the question of a disability's existence entirely and simply assume that anyone requesting an accommodation is disabled under the law.

The amended regulations are reorganized in an effort to make them more user-friendly. In particular, the definitions are now set out in alphabetical order at the beginning of the regulations. The Commission has also explicitly adopted language and concepts used in the amended Americans with Disabilities Act (ADA), to the extent that those principles are not in conflict with the FEHA. The ADA amendments brought federal law closer to California's broader definitions of "disability," but there are still differences and these are recognized in the regulations. The amended regulations add new material to the definitions of "disability" and elsewhere. As expected, these new provisions pose the greatest likelihood of confusion and resulting litigation.

Applicants and Employees Must Prove They Are "Otherwise Qualified"

Most, but not all, of the regulatory amendments seek to expand the rights of employees. Several of the exceptions are amendments intended to incorporate the California Supreme Court's decision in *Green v. State of California*.¹ That case established that an applicant or employee suing for discrimination has the burden of proving that he or she is an "otherwise qualified individual with a disability" – that the individual is capable of performing essential functions of the job, with or without a reasonable accommodation. The amended regulations add new language under the section "Establishing Disability Discrimination" explicitly stating that the applicant or employee has this burden of proof.² The amended regulations also add a definition of "qualified individual,"³ and eliminate the previous defense of "inability to perform" in recognition that the decision in the *Green* case clearly places the burden on an applicant or employee to prove he or she could do the job, with or without reasonable accommodation, when suing for disability discrimination.⁴

"Assistive Animals" in the Workplace

The amended regulations include expanded provisions that address bringing animals into the workplace as a reasonable accommodation to a disabled individual. These provisions drew significant comment from employers during the public comment period, many seeking more specific statements of the circumstances when employers could be required to allow animals in the workplace. The adopted regulations, however, provide less specific guidance than the proposed regulations offered.

The regulations define "assistive animals" to include "support" animals, in addition to the guide dogs, signal dogs, and service dogs that most often come to mind. "Support" animals (and there is no limit to the type of animal) provide "emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities such as major depression" or other disabilities. Employers may require "minimum standards" for assistive animals. Those standards may include requirements that an animal is free from odors and "displays habits appropriate to the work environment, for example, the elimination of urine and feces." Employers may also require that the animal not engage in behavior that endangers the health or safety of employees and is trained to provide assistance for the employee's disability.⁵

New regulations governing the "interactive process" permit employers to require confirmation that the animal meets this definition, and specifically state that this confirmation "may include information provided by the individual with a disability." Indeed, it appears as though the required letter may consist entirely of the individual with a disability's own confirmation, as there is no provision in the regulation permitting an employer to require that this confirmation come from some other source.⁶ The regulations permit an employer to challenge that the animal meets the standards "within the first two weeks the assistive animal is in the work place based on objective evidence of offensive or disruptive behavior." The regulations are silent as to whether an employer may mount a later challenge based on changed behavior or changed circumstances in the workplace.⁷

Focus on the Interactive Process

The FEHA makes it a separate violation to fail to engage in the interactive process. In keeping with its intent to push reasonable accommodation and the interactive process to the forefront, the Commission has, for the first time, included a definition of the "interactive process"⁸ and a very detailed description of the obligations of employers, applicants, and employees.⁹ Amendments to the regulations now specifically state that

1 42 Cal. 4th 254 (2007).

2 Cal. Code Regs. tit. 2, § 7293.7(a). All further citations to the amended regulations will be referred to by the appropriate section number.

3 Section 7293.6(o).

4 California Fair Employment and Housing Commission, *Initial Statement of Reasons for Proposed Amended Disability Regulations Adopted 10/3/11*, page 15, section 7293.8, available at <http://www.dfeh.ca.gov/FairEmploymentAndHousingCouncil.htm>.

5 Section 7293.6(a).

6 Section 7294.0(e)(1) and (2).

7 Section 7294.0(e)(2).

8 Sections 7293.6(j).

9 Section 7294.0.

employers cannot establish the affirmative defenses that the employee presents a danger to his or her own health and safety, or the health and safety of others, without first having engaged in the interactive process.¹⁰

An employer's obligation to engage in the interactive process is triggered when: (1) a request for accommodation is made by an applicant or employee with a known physical or mental disability or medical condition (very specifically defined under the FEHA to include cancer and genetic information); (2) an employer is made of aware of the need for an accommodation by a third party or by observation; or (3) an employee with a disability exhausts leave under the California Workers' Compensation Act, or under the California Family Rights Act or the federal Family and Medical Leave Act when leave was for the employee's own serious health condition, and the employee's healthcare provider indicates that further leave is needed.¹¹

Several provisions of the detailed regulations regarding the interactive process are troubling. Portions of earlier regulations allowing employers to receive a restricted range of medical information about the disability have been removed. Under the amended regulations, an employer receiving requests for accommodation in circumstances where the existence of the disability or need for accommodation is not obvious is permitted to ask for "reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation." However, the regulations explicitly state that "[d]isclosure of the nature of the disability is not required."¹²

The regulations become even more troubling when the new definition of "required medical information" is taken into consideration. An employer may ask for the name and credentials of an employee or applicant's healthcare provider to determine that the provider is a person qualified to opine in the area in question. An employer may ask the employee or applicant to provide information from that healthcare provider stating that "the employee or applicant has a physical or mental condition that limits a major life activity or a medical condition, and a description of why the employee or applicant needs a reasonable accommodation"¹³ If an employee provides "insufficient information," an employer must explain to the employee or applicant why it is insufficient and allow him or her an opportunity to provide sufficient information. Information is deemed insufficient "if it does not specify the existence of a FEHA disability and explain the need for a reasonable accommodation."¹⁴

Taken together, the newly enacted regulations governing the "interactive process" appear to require that employers look to the healthcare provider to make the legal analysis of whether or not his or her patient meets the very detailed and expanded definitions of "disability." That is a significant and seemingly unrealistic task to assign to a healthcare provider, especially at a time when the nation is struggling to find ways to deliver more care for less money. Healthcare providers are unlikely to have either the time, training, or desire to analyze the definition of "disability" under the FEHA.

Safeguarding Private Medical Information

The regulations setting out the interactive process acknowledge that an employer might secure a medical examination by its own chosen healthcare provider. Any such examination must be "job-related and consistent with business necessity . . . [meaning it] must be limited to determining the functional limitation(s) that require(s) reasonable accommodation."¹⁵

The amended regulations contain new and detailed rules on "medical and psychological examinations and inquiries."¹⁶ These make it unlawful to require such an examination before an offer of employment is extended to an applicant,¹⁷ set conditions on the use of such examinations after a conditional offer of employment is extended¹⁸ and the conditions under which an offer of employment may be withdrawn on the results

10 Section 7293.8(b) and (c).

11 Section 7294.0(b).

12 Section 7294.0(c)(2) and (d)(1).

13 Section 7294.0(d)(5)(A) and (B).

14 Section 7294.0(d)(5)(C) and (C)(1).

15 Section 7394.0(d)(5)(C).

16 Section 7294.2.

17 Section 7294.2(a).

18 Section 7294.2(b).

of a medical or psychological examination.¹⁹ They also state that medical or psychological examinations may be used during employment – including fitness for duty examinations – only when they meet the standards of job-relatedness and business necessity.²⁰

Provisions are made for disability-related inquiries by an employee assistance program counselor, so long as the counselor: does not act on behalf of the employer; is required to shield any information an employee reveals from decision makers; has no decision making power; and discloses these requirements to the employee.²¹ Similar provisions are made to allow compliance with other federal or state regulations requiring medical examinations (for example, for truck drivers and pilots),²² and for voluntary wellness programs.²³

As before, any information regarding the medical or psychological history or condition of employees must be kept in separate, confidential files.²⁴

Who Is Disabled?

The amended regulations state the Commission's expectation that employers and employees will not spend much time analyzing whether employees are disabled, and will focus instead on how to accommodate employee limitations.²⁵ This same goal, the Commission explains, underlays amendments to the Americans with Disabilities Act. However, before the amendments to the ADA, the ADA had defined "disabilities" more narrowly than the California FEHA. Moreover, the ADA's change in focus is the result of amendments to the statute itself, not just amendments to regulations. The Commission's stated intent to expand its regulations to the widest possible interpretation of "disability" may have taken it into territory not contemplated by the FEHA itself and ultimately may blur any meaningful distinction between those who are to be accommodated as "disabled" and those who are not.

For example, the much expanded definition of "disability" now includes a "special education disability." A "special education disability" is a "recognized" impairment or disorder that requires or has required in the past special education or related services.²⁶ By definition, it is something in addition to the "mental disabilities" already defined elsewhere in the regulations (Those "mental disabilities" include intellectual or cognitive disability as well as organic brain syndrome, specific learning disabilities, autism spectrum disorders and a wide array of mental illnesses).²⁷

A "special education disability" may include, or may be something in addition to, a "specific learning disability." "Specific learning disabilities," in turn, are broadly defined in the amended regulations as manifested by "significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities" and may include "perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia."²⁸

Thus, according to the amended regulations, there is a "special education disability" that is above and beyond all the specific sorts of "mental disabilities" and "specific learning disabilities" enumerated in the regulations and that is defined as being "recognized" and to have required, at some point in the past, the use of services that may be "related to" "special education services."

The amended regulations also include definitions of "perceived disability" and "perceived potential disability."²⁹ Thus, a "perceived potential disability" could be established if an employer regarded, perceived, or treated an employee as having a special education disability that has no present disabling effect but may become a special education disability. Of course, an employer who took adverse action against an employee on the basis of a "perceived potential disability" would be, at least in the eyes of the Commission, in violation of the FEHA.

19 Section 7294.2(c).

20 Section 7294.2(d).

21 Section 7294.2(d)(3)(A).

22 Section 7294.2(d)(3)(B).

23 Section 7294.2(d)(3)(C).

24 Sections 7294.2(d)(4) and 7294.0(g).

25 The amended regulations eliminate language in earlier regulations that specifically noted that "homosexuality and bisexuality are not impairments" because the Commission regarded these provisions as unnecessary in light of "evolving societal norms." Section 7293.5(b). The Commission notes that homosexuality and bisexuality have not been regarded as "mental disorders" under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-II) since 1973, and that both are protected categories under other provisions of the FEHA.

26 Section 7293.6(d)(3).

27 Section 7293.6(d)(3), (d)(1), and (d)(2).

28 Section 7293.6(d)(3).

29 Section 7293.6(d)(5) and (6).

It takes nothing away from the laudable goal of requiring employers to make reasonable accommodations that will permit disabled employees to enjoy equal participation in the workplace to conclude that definitions as imprecise and elastic as these leave employers without needed guidance about their obligations under the FEHA. Indeed, such definitions will require increased focus on who is and who is not disabled, unless employers respond by abandoning any effort to determine whether employees seeking accommodation are actually among those protected by the law and proceed immediately to an interactive process.

Recommended Employer Action Items

- The protections of the FEHA are broad, and employers must be sensitive to the requirement that they initiate the interactive process not only on request for an accommodation, but if the employer has reason to believe one might be needed.
- The definition of "disabled" included in the regulations is very broad. Despite the Commission's wish that it require little analysis, employers should consult their legal counsel if they are in any doubt that an employee might be protected by the FEHA.
- Employers should take care to guard the privacy of medical information they have in their files.
- The right to require that employees provide medical information, even to establish the existence of a disability, is very limited, and employers should consult counsel before asking for such information. Employers have greater rights to ask employees to provide information from their healthcare providers about any limitations or restrictions on their activities and how those might be accommodated.

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