

# Employment Training Series Week #2: Reasonable Accommodations in the Workplace During COVID-19

## Slide 1

DRC Logo Employment Training Series: Reasonable Accommodations in the Workplace During COVID-19, presented by Aisha Novasky, Attorney, Pam Cohen, Attorney, Stephen Peters, Attorney

## Slide 2

### Our Mission as an Organization

Disability Rights California advocates, educates, investigates, and litigates to advance the rights, dignity, equal opportunities, and choices for all people with disabilities.

Photo: Photo of a boy with a disability in a wheelchair. His young sister is kneeling next to him holding his hand.

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### Training Objectives

- Overview of the applicable rules and regulations
- Protections in the workplace during COVID-19
- Reasonable accommodations
- Enforcement options

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### Federal and State Agencies and Regulations

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### Relevant Agencies

#### Equal Employment Opportunity Commission (EEOC)

- Federal agency that administers and enforces civil rights laws against workplace discrimination

## California Department of Fair Employment and Housing (DFEH)

- State agency charged with protecting Californians from unlawful discrimination in the workplace

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#### Americans with Disabilities Act (ADA)

The ADA prohibits most employers with 15 or more employees from discriminating against people with disabilities in job application procedures, hiring, firing, advancement, compensation, and other conditions of employment.

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#### California's Fair Employment and Housing Act (FEHA)

FEHA prohibits most employers with 5 or more employees from discriminating or retaliating against job applicants and employees with a disability or a perceived disability in job application procedures, hiring, firing, advancement, compensation and other conditions of employment.

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#### Definition of Disability: Who is Protected?

- A disability is a physical or mental impairment or condition that limits a major life activity.
- An impairment limits a major life activity if it makes the achievement of the major life activity difficult. This includes:
  - Difficulty standing, lifting, reading, breathing, etc.
  - Major bodily functions, such as functions of the immune system and brain, bladder, respiratory and reproductive functions

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#### Protections in the Workplace During COVID-19

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#### Executive Order N-33-20

- On March 19, 2020, Governor Gavin Newsom issued an executive order
  - All people living in California must stay at home unless for an essential activity (this may include going to work)
  - This order is currently in effect until further notice
- Helpful link: <https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf>

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### Who is an Essential Employee?

- An essential employee is a person whose work is so important that if they did not go to work, it would have a negative effect on security, the economy, economic security, public health or safety. This includes:
  - Healthcare employees
  - First responders
  - Food and agricultural workers
  - Transportation employees
- Helpful link: <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>

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Michael works at Trader Joe's. When he gets to work, his supervisor, Joe, takes Michael's temperature. Is this unlawful?

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Generally, measuring an employee's temperature can only be performed under limited circumstances. However, in light of the COVID-19 pandemic, state and federal guidelines have determined that an employer may measure an employee's temperature to determine if that employee's presence at work is a risk.

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Joe also asks Michael to wear gloves and a mask at work. Is this unlawful?

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An employer may require an employee to wear personal protective equipment (PPE) to lower the risk to others during the COVID-19 pandemic. However, the employer may have to provide the employee with an accommodation if needed.

- Stay tuned for more on reasonable accommodations...

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Zahra works at SoCal Edison in an office with 20 people. She tests positive for COVID-19 and tells her boss, Ed. Can Ed tell Zahra's coworkers that she tested positive?

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- Both the ADA and FEHA require employers to keep an employee's medical information confidential. This requires employers to store medical information separate from an employee's personnel file
- An employer may disclose to other employees in the workplace that someone tested positive for COVID-19; however, the employer CANNOT identify the employee by name or provide any identifying information

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Can Ed notify the local public health agency that Zahra tested positive?

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Yes, an employer may disclose the employee's name to a public health agency.

## **Slide 20**

Andres is a 67 year old front desk clerk at Turbo Tax in Los Angeles. Andres is a nonessential employee, and Turbo Tax is closed. His boss wants him to be the only person in the office to answer phones and make appointments with people that walk-in. His boss refuses to provide Andres with PPE. His boss says if he doesn't comply, he will be fired. What should Andres do?

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### **HE SHOULD STAY AT HOME!**

- Andres is a nonessential employee, so he must stay at home according to the state and local stay at home orders
- Andres is considered high-risk for severe illness from COVID-19 because he is over the age of 65
- LA County requires everyone to wear a mask when leaving the house
  - Even if the boss provided PPE, making Andres go to work still violates the stay at home order
- Andres may file a complaint against his boss with the DFEH or EEOC.

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### **Reasonable Accommodations in the Workplace During COVID-19**

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### **REASONABLE ACCOMMODATIONS**

The law requires employers to provide a reasonable accommodation to an employee or applicant with disabilities, unless doing so would cause undue hardship.

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Reasonable accommodation: a change or exception to a rule that is necessary to give employees with disabilities the same benefits that employees without disabilities have

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Undue hardship: if the change or exception to the rule would create a burden to the employer or threaten the health or safety of others, AND the risk cannot be mitigated by another reasonable accommodation.

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Back to Michael...

Michael works from 9-5 as a cashier at Trader Joe's. Michael is considered high risk for COVID-19. Michael asks for a reasonable accommodation to stock shelves overnight to avoid coming in contact with people. Joe would rather have Michael wear PPE instead of changing Michael's schedule. What should Joe do?

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- Unless there is an undue hardship, Joe should grant Michael the reasonable accommodation
- While Joe prefers that Michael wear PPE, the EEOC requires that the employee's preferred reasonable accommodation be given primary consideration

### **Slide 28**

Aiden has been an emergency room nurse at State Hospital for 8 months. He tests positive for COVID-19, and cannot come to work. What protections, if any, is Aiden entitled to?

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What would be an accommodation for Aiden?

Leave of absence from work:

- Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) provide 12 weeks of job-protected leave for employees that cannot to care for themselves, or a spouse, parent, or dependent child with a serious health condition
- Both apply if there are at least 50 employees within 75 miles of their worksite; the employee has worked there for at least a year; and the employee has worked at least 1250 hours in the year before they need the time off

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Aiden has only worked at State Hospital for 8 months, so he would not be entitled to FMLA/CFRA.

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## Does Aiden have any other options?

- If Aiden has sick or vacation time, he can ask the employer to use that time so he can still get paid
- Employers must consider unpaid leave and telework as reasonable accommodations
  - He can ask his employer for unpaid leave
  - He can ask his employer to work from home, if that is possible

### **Slide 32**

Gia has been a firefighter for 10 years. Gia is diagnosed with anxiety disorder that has worsened due to the stress of COVID-19. Gia tells her supervisor that due to her disability, she can only work one day per week as a reasonable accommodation, and she can resume full-time work after the pandemic. This is the first time Gia's boss was informed that Gia had a disability. Her boss says this is too short of notice and if Gia does not produce her entire medical record by tomorrow, she will be fired. What are Gia's options?

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- Generally, Gia's boss may ask about her condition to determine if it is a disability, and he may request medical documentation to confirm the existence of the disability and the need for the reasonable accommodation.
  - Due to COVID-19, DFEH recommends that employers waive this requirement until the employee can obtain the necessary documentation
  - An employee only needs to provide support from a treating professional explaining the disability and the need for the reasonable accommodation

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- It will be difficult for Gia to give any advance notice due to the pandemic. Employers must exercise sound judgment and follow recommendations from public health officials when considering reasonable accommodations.

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Employers and employees must work together to determine a reasonable accommodation - this is called the interactive process.

The interactive process must be conducted timely and in good faith, although it may be delayed because of the pandemic.

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#### Enforcement Options

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#### Complaints and Appeals

- If in a union, consult with your union representative
- File a complaint with the EEOC
- File a complaint with the EEO office if you are a federal employee
- File a complaint with the DFEH
- File a complaint with the U.S. Department of Justice (DOJ) if you work for a state or local government employer
- File a lawsuit in state or federal court

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#### Considerations for DOR Clients

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#### DOR and Reasonable Accommodations

- The DOR may provide accommodations when an employer does not;
- Accommodations must be reasonably necessary to secure, maintain, or regain employment;
- Accommodations should be included in an Individualized Plan for Employment (IPE).

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#### Comparable Benefits



- Paid for at least in part by a public program, health insurance, or employee benefits;
- Available at the time needed to ensure progress in the IPE; and
- Commensurate to DOR services

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### DOR's Responsibility to Fund Reasonable Accommodations in Education and & Employment

If the service is necessary for participation in training or employment retention and no comparable benefit exists, the DOR must fund the service.

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### RESOURCES

- DFEH fact sheet: [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf)
- EEOC fact sheet: [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- DRC's employment publications: <https://www.disabilityrightsca.org/publications/employment>
- The Job Accommodations Network website, for information about reasonable accommodations in employment: <http://askjan.org>
- The Legal Aid at Work website, for resources and legal representation: <https://legallaidatwork.org/>

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### How to Get DRC Services

Intake line: (800) 776-5746

[www.disabilityrightsca.org](http://www.disabilityrightsca.org)

Photo: Person reading braille