



Preventing Employment Discrimination against People with Mental Health Disabilities

1. Are people with mental health disabilities protected against job discrimination?

Yes. Disability-based discrimination is illegal under federal and state law. Title I of the federal Americans with Disabilities Act (ADA) protects people with disabilities in employment. It applies to private employers with 15 or more employees. Under the ADA state, county, and local governmental employers are covered regardless of the number of employees. In the case of harassment, the California Fair Employment and Housing Act (FEHA) applies to all employers. FEHA also prohibits discrimination in employment because of a mental health disability and includes employers (both public and private) with five or more employees. See Cal. Government Code section 12926(d); for more information see: http://www.dfeh.ca.gov/Publications_FEHADescr.htm

2. Who is protected under federal and state law?

A person must be qualified to perform the essential functions of the job and have a disability. The term “essential functions of the job” means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position. A job function may be considered essential because the reason the position exists is to perform that function; there are a limited number of

employees available to perform that job function; or a person is hired for the expertise or ability to perform the particular function. Written job descriptions are relevant but do not determine the meaning of “essential functions of the job.” See 29 C.F.R. sec. 1630.2. See *also* U.S. Equal Employment Opportunity Commission, “The ADA: Your Responsibilities as an Employer” Addendum (www.eeoc.gov/facts/ada17.html).

Different laws define disability differently. For instance, under the ADA a person can show disability in one of three ways:

1. The person has a physical or mental condition that “substantially limits” a major life activity (such as walking or seeing).
2. The person has a history of disability (such as a condition that is “episodic” or “in remission”).¹
3. The person is regarded as having a disability.

This means that the impairment does not limit the person’s ability to do the job, but an employer or potential employer treats the person as if it does. An additional requirement is that the person is believed by the employer or potential employer to have a mental or physical impairment that is not transitory (lasting or expected to last six months or less).²

California law provides broader coverage than the ADA. It protects people with a physical or mental health disability that limits (makes the achievement of the activity difficult) a major life activity; a “disorder” requiring receipt of Special Education services; and a medical condition (including cancer or genetic characteristics).

¹ This is an impairment that would substantially limit a major life activity when active. Examples of impairments that are episodic or in remission include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer.

² The law also protects people from discrimination based on their relationship with a person with a disability and from retaliation against opposing discrimination (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because her husband has a disability or because she has testified on behalf of another employee who has filed a charge of discrimination.

3. What types of discrimination are prohibited?

Federal and state laws forbid discrimination in any aspect of employment, including hiring, firing, layoffs, pay, job assignments, promotions, training, fringe benefits, and any other term or condition of employment. These laws require an employer to provide reasonable accommodation to an employee or job applicant with a disability.

4. What are examples of “reasonable accommodation”?

Examples of reasonable accommodation may include a more flexible schedule, more rest breaks, changes in physical aspects of the workplace (such as accessibility or reducing noise or distractions) or changes in the supervisory process. An employee can request an accommodation for any term or condition of employment that affects the individual’s disability. Specifically, individuals with mental health disabilities may receive reasonable accommodations, for example, of flexible scheduling, frequent or longer work breaks, or time off for counseling. Whether an accommodation is reasonable in a particular case involves an analysis of the facts of the particular situation including its cost and the employer’s ability to pay for it.

The Job Accommodation Network is a good resource for examples of reasonable accommodations in the work place for individuals with mental health disabilities. (See <http://askjan.org>)

5. How does an employee obtain an accommodation?

The individual with the disability needs to ask the employer to make the desired change at work unless the disability and the need for accommodation are obvious. However, before any changes are made, the individual is required to tell the employer that the employee has a mental health or other disability. The person must also explain how the requested change will help at work. The employer has an obligation to engage in an interactive process regarding the employee’s need for an accommodation.

6. Can someone other than the employee request an accommodation?

Yes. A family member, friend, health professional or other representative may request a reasonable accommodation on behalf of an individual with a disability.

7. Do requests need to be in writing?

No. Requests for reasonable accommodation do not need to be in writing. Employees may request accommodations in conversation or may use any other mode of communication. While an accommodation request need not be written, giving employees correspondence in writing may help avoid confusion as to what an employer needs from an employee or what an employer will or will not accommodate and why.

8. What is an employer required to do?

An employer must keep an employee's request for an accommodation confidential. This includes keeping medical information in a separate locked cabinet. This means that other employees will not have access to the information unless they are supervisors or other employees who need to know in order to provide an accommodation. An employer's wrongful disclosure of confidential information may result in damages awarded to the employee. Employers must consult with the employee and give primary consideration to the employee's requested accommodation. The employer may select a less expensive alternative as long as it is appropriate and meets the employee's needs. An employer must provide an accommodation unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

9. May an employer ask for documentation?

Yes. When the need for accommodation is not obvious, an employer may ask an employee for reasonable documentation about the disability and functional limitations. The employer is entitled to know that the employee has a disability as defined by state or federal law for which a reasonable accommodation is needed.

10. Can an employer obtain all mental health records?

No. An employer cannot require an employee to submit mental health history records that are not relevant to the disability and reasonable accommodation under the ADA and FEHA. Such request for full documentation would not be considered reasonable. Only those records that determine if the employee has a disability as defined by the ADA and FEHA and that are required to demonstrate that the employee needs the requested reasonable accommodation because of disability-related functional limitations are allowed.

In the case of the hiring process itself, depending upon the stage of the process, mental health records may or may not be required to be disclosed under the ADA or FEHA. For example, if the job offer has been extended but before the start of employment, the ADA provides that disclosure is appropriate. The FEHA provides that disclosure is appropriate only if job related and is consistent with business necessity.

When it is after the first day of work, under the ADA and FEHA, disclosure is appropriate only if job-related and consistent with business necessity.

Disclosure of mental health records is not required at any time before a job offer has been extended.

For more information see, “EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities” at:
<http://www.eeoc.gov/policy/docs/psych.html>

We want to hear from you! After reading this fact sheet please take this short survey and give us your feedback.

English version: <http://fs12.formsite.com/disabilityrightsca/form54/index.html>

Spanish version: <http://fs12.formsite.com/disabilityrightsca/form55/index.html>

The California Mental Health Services Authority (CalMHSA) is an organization of county governments working to improve mental health outcomes for individuals, families and communities. Prevention and Early Intervention programs implemented by CalMHSA are funded by counties through the voter-approved Mental Health Services Act (Prop 63). Prop. 63 provides the funding and framework needed to expand mental health services to previously underserved populations and all of California's diverse communities.

