OVERVIEW OF 2009 CHANGES IN HUMAN RESOURCES LEGISLATION

Revisions and Changes in Significant Areas of H.R. Legislation and Their Impact on California Employers

May - 2009

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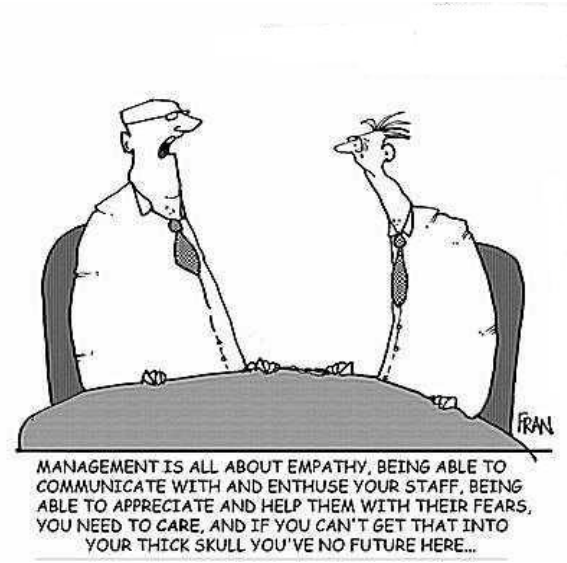
This presentation is provided for educational and informational purposes only and does not constitute the provision of legal advice. Review of this material is not a substitute for substantive legal analysis of any specific situation by a qualified attorney or HR professional.

The contents of this presentation are believed accurate only as of the time of its preparation. Interpretation and new law in this area is the rule rather than the exception.

You should always consult with an attorney or experienced HR professional to assure compliance with applicable laws and regulations.

General Contents

- ADA Revisions in Brief
- FMLA Revisions in Brief
- COBRA Revisions in Brief



- Significant Cases in California Human Resources Issues
- Hypothetical
- Appendix - Resources

Q & A

ADA Revisions in Brief

- ADAAA took effect 1/1/09
- Revises the definition of "disability" to more broadly encompass impairments that substantially limit a major life activity
- More generous interpretations under the Rehabilitation Act will become the standard under the amended ADA
- Mitigating measures don't count (E.g. hearing aids/medication)
- Episodic Conditions may be disabilities
- Major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
- May apply to someone "regarded as" having a disability if condition is not transitory.
- Disapproves several existing cases
- Expands the scope of coverage and shifts focus from question of disability to actions of employer in accommodating disabilities.

Interactive Process

- Good Faith
- Documentation and recordation
- Court Reporter
- Written confirmations
- Historical recitation and recapitulation
- Medical evidence/Privacy issues
- When to involve counsel
- Allowing employee/physician to suggest accommodations
- Scheduling and representation

FMLA Revisions in Brief

- New rules effective 1/16/09
- Special leave rights for military families – includes aunts, uncles, grandparents, & first cousins – Military caregivers are allowed up to 26 weeks within a single 12 month period measured from start of leave
- National Guard included – also short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities are qualifying exigencies (broadened)
- Narrows definition of "serious health condition"
- Permits employers to obtain additional documentation of conditions (HIPAA considerations for retention of records). Administrator may directly contact health care provider
- Workers with chronic conditions must submit periodic medical reports
- Employer may require a fitness for duty exam before returning employee to work
- May consider FMLA leave in determining bonuses and other perks
- Procedural changes

COBRA Revisions in Brief

- Effective 3/1/09 (Federal Economic Stimulus Bill)
- Eligible Employees "Assistance Eligible Individuals" (original eligibility between 9/1/08 – 12/31/09)
- Employee is only required to pay 35% of COBRA premium. Balance must be paid by employer but may be partially reimbursed in a payroll tax credit. Allows retroactive election of COBRA for qualified individuals (non election/non payment) – second chance
- Employer notification of "Assistance Eligible Individuals" within 60 days
- "Involuntary" termination of employment is pre requisite but will be addressed liberally
- Applies to all kinds of COBRA coverages
- Cheaper group policy COBRA replacement may be offered if not more expensive than COBRA premiums
- Subsidy terminates 9 months after starting, eligibility for any other group health plan (irrespective of quality) or on original COBRA termination date whichever is earlier
- Employee must notify employer of eligibility for replacement plan subject to 110% penalty of the full amount of any employer paid subsidies for the COBRA plan
- Subsidy is not considered "income" for tax purposes
- Subsidy denials may be reviewed by the office of the Labor Secretary
- High income recipients may have additional tax liability

HYPOTHETICAL

John Doe is employed by American Widget Company for 10 years. He develops cancer. At first, his symptoms are controlled by medication. However, ultimately he must undergo chemotherapy for his cancer. John advises his employer of the need for same and his need for some periodic absences to attend his medical appointments. AWC accommodates John. As a result of the chemotherapy, John develops severe pain, nausea and various other symptoms. His physician in California prescribes medical marijuana which is permissible under California law. AWC maintains a rigid zero tolerance policy for drug use. AWC discovers in a random drug screening that John is using marijuana. John asserts that the employer must "reasonably accommodate" his use. AWC terminates John instead. What result:

- Under FEHA
- (*Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920)
- Under ADAAA? (possibly different outcome)
- Would it change things if AWC had federal contracts or funding?
- What would be reasonable accommodation?

Recent Case Law of Note

Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920 – Employer not required to accommodate user of medical marijuana under FEHA.

Nadaf-Rahrov v. Neiman Marcus Group, Inc. (2008) 166 Cal. App. 4th 952 - disability discrimination laws prohibit an employer from discharging a disabled employee who is able to perform the essential functions of her existing position, or of any vacant position for which she is qualified; 2) the employee has the burden of proving that she could perform the essential functions of an available job with accommodation; and 3) the interactive process requires the employee to prove that the employer did not interact in good faith and that a reasonable accommodation was available.

Ahmadi-Kashani v. Regents of U.C.(2008) 159 Cal.App.4th 449 – Employee is not required to utilize internal grievance procedure established by Collective Bargaining Agreement prior to bringing FEHA lawsuit. See also: *Ortega v. Contra Costa Community College Dist*.(2007) 156 Cal.App.4th 1073

Jones v. Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158 – Non employer personnel are not personally liable to co employee for FEHA violations.

Miklosy v. Regents (2008) 44 Cal.4th 876 Tameny action for wrongful termination is considered a common law cause of action and does not apply to public entities.

Appendix and Resource Materials

- CFRA/FMLA Comparison Chart: http://www.dfeh.ca.gov/announcements/bulletins.aspx?bulletinId=35&fileId=1
- New FMLA poster (see attached)
- ADA/FEHA Comparison Chart (see attached)
- DOL FMLA Site: http://www.dol.gov/esa/whd/fmla/
- ADAAA Text: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3406enr.txt.pdf

Appendix – FEHA/ADA Comparison

	FEHA	ADA
No. of Employees	• 5 or more (1 more for harassment).	• 15 or more (private employers) All state and local governments regardless of employee count.
Employees Covered	• Any person regularly employing five or more persons or any person acting as an agent for an employer, directly or indirectly, the state or any political or civil subdivision of the state and cities (1 more employee for harassment based on disability) except religious associations or non profit corporations.	• Nonprofit, religious organizations are covered by the ADA but may give employment preference to persons of their own religion or religious organizations. They may not discriminate on the basis of disability against anyone. Executive agencies of the US Government are exempted.

Appendix – FEHA/ADA Comparison

	FEHA	ADA
Definition of Disabled	• A person is "disabled" if s/he has a physical or mental impairment that *limits* a major life activity; has a record of such an impairment, is regarded as having or having had such an impairment, or is regarded or treated as having an impairment that has no present disabling effect but might become a future disability. [§§ 12926(i) & (k), 12926.1(c)] Definitions of physical and mental disabilities are to be *broadly construed*. [§ 12926.1(b)] • FEHA is specifically distinguished from the ADA. [§ 12926.1(a) & (d)]	• Congress reaffirmed that the definition of "disability" should be construed in favor of *broad coverage* of individuals, specifically disapproving U.S. Supreme Court cases which had narrowed coverage. [See Congressional findings at Pub. Law 110-325, §2(a) & (b); 42 U.S.C. § 12102(1) & see rules of construction language at § 12102(4)]

Appendix – FEHA/ADA Comparison

	FEHA	ADA
Ameliorative Measures	• Mitigating measures are not considered in determining whether an individual has an impairment that "limits" a major life activity unless the mitigating measure itself limits a major life activity. [§§ 12926(i)(1)(A) & (k)(1)(B), 12926.1(c)] • No mention of eyeglasses or contact lenses.	• Mitigating measures are *not* considered in determining whether an individual has an impairment that substantially limits a major life activity [§ 12102(4)(E)], but "ordinary eyeglasses or contact lenses" may be taken into account. [§ 12102(4)(E)(i)(I)]
Limitations	• FEHA requires that the physical or mental condition "limits" one or more major life activities, making "the achievement of the major life activity "difficult." [§§ 12926(i)(1)(B) & (k)(1)(B)(ii), 12926.1(c)]	• The ADAAA's Congressional findings provide that the EEOC and the Supreme Court have incorrectly interpreted the term "substantially limits" to establish a greater degree of limitation than Congress intended.
Major Life Activity	• Major life activities are to be "broadly construed" and include physical, mental, and social activities and working. [§§ 12926(i)(1)(C) & (k)(1)(B)(iii), 12926.1(c)] • An employee's impairment need affect only a particular job, not a class or broad range of employment, to "limit" the major life activity of "working." [§ 12926.1(c)]	• Disavows *Toyota v. Williams* and gives a non-exhaustive list of major life activities, including seeing, hearing, eating, sleeping, walking, learning and concentrating, as well as the operation of "major bodily functions" such as the immune and endocrine systems and normal cell growth. [§ 12102(2).] • Only one major life activity is needed to establish a limitation. [§ 12102(4)(C)]

Appendix – FEHA/ADA Comparison

	FEHA	ADA
Episodic Condition	• Specifically states that chronic or episodic conditions are covered as disabilities. [§ 12926.1(c)]	• Clarifies that impairments that are episodic or in remission are considered disabilities if the impairment while in its active phase substantially limits a major life activity. [§ 12102(4)(D)]
"Regarded as…"	• FEHA still focuses on an employer's perception. An individual is protected if s/he is "regarded or treated as" having or having had any physical or mental condition that • (1) makes achievement of a major life activity difficult; or (2) has no present disabling effect but may become a future qualifying physical or mental condition. [§ 12926(i)(4)-(5) & (k)(4)-(5)] There is no durational limit to be a disability in FEHA. Note that FEHA provides that when the ADA's definition of "disability" results in "broader protection" of the civil rights of disabled individuals than the FEHA's, then "that broader protection" or coverage prevails over conflicting FEHA provisions. [§ 12926(l)] • Employer has a duty to engage in interactive process to explore reasonable accommodation with an employee *regarded as* disabled. [*Gelfo v. Lockheed Martin* (2006) 140 Cal.App.4th 34]	• ADAAA focuses on how an individual is treated rather than proving the employer's perception. ADAAA provides that an individual meets the "regarded as having such an impairment" if the individual establishes that s/he has been subjected to an ADA-prohibited action because of an actual or perceived physical or mental impairment whether or not that impairment is actually a disability (that is, the impairment limits or is perceived to limit a major life activity, so long as the impairment lasts more than six months). [§ 12102(3)(A)] • Employers have no duty to provide a reasonable accommodation or modification to individuals who fall solely under the "regarded as" prong. [§ 12201(h.]

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

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WHD Publication 1420 Revised January 2009