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Key Differences between the ADA and California's Anti-Disability Discrimination Law that Companies with California Employees Should Know

By Cynthia L. Sands, Esq.

As your business grows, so must your awareness of the anti-discrimination laws of the states in which you have employees. That seems like a simple notion, but it is a maxim that routinely trips up employers of all sizes. After all, the myriad state anti-discrimination laws rarely, if ever, receive the national press that federal anti-discrimination laws receive. One of the best examples of this is with California disability law. Employers with small California offices may be tempted to rely on their knowledge of the Americans with Disabilities Act ("ADA") and the ADA Amendments Act (collectively, the "ADA") to deal with California employees, because most state anti-discrimination laws track federal anti-discrimination laws. But this is not the case with California's disability discrimination statute, the Fair Employment and Housing Act ("FEHA"), which provides broader protection to disabled employees than the ADA in many important areas. Thus, to avoid liability for disability discrimination in California, businesses with employees in California should be aware of the key differences between the two statutory schemes.

California's anti-discrimination provisions are encompassed in the FEHA. The FEHA prohibits discrimination, harassment, and retaliation on the basis of not only physical and mental disability, but also race, religious creed, color, national origin, ancestry, medical condition, marital status, sex, or sexual orientation of any person. More than that, with respect to disability discrimination, the FEHA expressly states:

The law of this state in the area of disabilities provides

protections independent from those in the federal Americans with Disabilities Act of 1990. . . . Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

Some important differences between the ADA and the FEHA that employers with California offices should be aware of are:

Covered Employers: The ADA applies to employers with 15 or more employees. The FEHA applies to employers with five or more employees.

Degree of Disability Required: The ADA limits its coverage to physical or mental conditions that "substantially limit" a major life activity. The FEHA requires only that the disability "limit" a major life activity.

Working as a Major Life Activity: Under the ADA, a broad range of employments must be implicated for "working" to be considered a major life activity. Under the FEHA, however, "working" is a major life activity regardless of whether the employee cannot perform "a particular employment or a class or broad range of employments."

Transient or Temporary Conditions as "Disabilities": Because the FEHA requires only a "limitation" (not a "substantial limitation" as under the ADA) on a major life activity, individuals with short-term or temporary conditions may qualify for protection under the FEHA, though the same condition likely would not qualify under the ADA.

Duty of Reasonable Accommodation: As courts interpreting the FEHA have pointed out, the employer's duty to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA. California's Code of Regulations provide that a "reasonable accommodation" may include, but is not necessarily limited to, such measures as: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.

Amount of Damages Recoverable: The ADA limits the awardable amount of compensatory and punitive damages depending on the number of employees. The FEHA has no damages cap in a civil action.

Because of the greater protections under the FEHA than the ADA, employers should be careful when using ADA case law or EEOC regulations as a guide for issues under the FEHA. It is sometimes said that federal laws are merely a floor upon which more protective state statutes can be built; perhaps a better example does not exist than the ADA and FEHA. Although an ADA case or guideline may say your proposed course of action toward your

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California employees is legal and does not subject you to liability, you still may not be safe because the FEHA builds upon and expands the ADA's protections.

There are numerous free resources available for employers, including some from the California Department of Fair Employment and Housing, that outline and discuss the differences between the FEHA and ADA. However, as with all broad guidelines, the assorted permutations arising in real life demand caution from employers seeking to use such guidelines as a course of action. But with a solid floor of understanding between California and federal disability laws, you will be in a better position to build better protections against liability.

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