

**SPECIAL PRESENTATION****Agenda Item # 2****AGENDA REPORT SUMMARY**

Meeting Date: August 27, 2019

Subject: Presentation: Americans with Disabilities Act (ADA)

Prepared by: Chris Jordan, City Manager

Attachment(s):

- Presentation by Shaw HR Consulting

Initiated by:
City Council

Previous Council Consideration:

Fiscal Impact:
To be determined

Environmental Review:
Not Applicable

Policy Question(s) for Council Consideration:
N/A

Summary:

- To respond to concerns raised by members of the City Council regarding ADA compliance for elected officials, the City hired Shaw HR Consulting to review the situation, work with the Council, and with individual Council members
- The City Council will receive a presentation by Rachel Shaw regarding compliance with the ADA, specifically addressing compliance by, and for, elected officials

Staff Recommendation:

The Council will receive the presentation and any public comment, and may provide input to the consultant

Reviewed By:

City Manager

CJ

City Attorney

CD

Finance Director

SE



CITY OF LOS ALTOS

FEHA/ADA Disability Compliance Fundamentals for Elected Officials



Presented by: **Shaw HR Consulting, Inc.**



FEHA & ADA Overview

Disability Laws

- **Americans with Disabilities Act** and 2008 Amendments (ADA), 42 U.S.C. §§ 12012; 12101 *et seq.*
- **California Fair Employment and Housing Act (FEHA)**, Government Code §§ 12940 *et seq.*

Title I of the Americans with Disabilities Act

“Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against **qualified individuals with disabilities** in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of **employment**.”

BACKGROUND AND ENFORCEMENT OF THE FEHA:

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (CALIFORNIA GOVERNMENT CODE § 12940 ET SEQ.)

On September 30, 2000, California enacted sweeping changes to FEHA resulting in a substantial expansion of state protection against disability discrimination. Most notably, these reforms intentionally separate FEHA from its national counterpart, the ADA. The FEHA continues to track the ADA in certain ways (i.e., adopting ADA guidelines with regard to physical examinations for applicants with disabilities and FEHA's adoption of ADA provisions or related case law that would provide even broader protection than FEHA). The ADA still preempts "inconsistent" requirements established by state or local laws for safety or security-sensitive positions. FEHA is already interpreted as providing the broadest protection against disability discrimination among state laws given its preemptive effect over those laws that would provide narrower protection.

ADAAA

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009.

The law made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA.

The ADAAA now more closely tracks the country's strongest disability law, California's Fair Employment and Housing Act.

FEHA & ADA

Mandates:

1. Employers must engage in a Timely Good Faith Interactive Process, and
2. Employers must provide Reasonable Accommodation

Each is a stand alone statutory obligation

Code Reference: 2 CCR § 11069(c)

Shared Responsibility to Act in Good Faith

- **California Law:** The employee must also “cooperate in good faith” and provide “reasonable medical documentation” identifying the existence of the disability and the related work restrictions, if requested. (2 Cal. Code Regs., tit 2 § 11069(d).)

Individual Liability

THE ADA: Individual supervisors and employees are not liable for disability discrimination, but may be subject to individual liability for retaliation under the ADA.

THE FEHA: The California Supreme Court has ruled that supervisors can be held individually liable for harassment claims wherein the claim is based on the “type of conduct not necessary for performance of a supervisory job...outside the scope of necessary job performance [and]...presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.” A supervisor who operates outside of company protocols may be liable, personally, for their actions that result in disability discrimination findings.



Employee (Elected) Eligibility

FOR THE DISABILITY INTERACTIVE PROCESS

Eligibility

FEHA Definition of a Disability

- Physical or mental medical condition that “limits... a major life activity”
- “Limits” = “makes the achievement of a major life activity difficult”
- Work is considered a major life activity

Government Code Sections 12962(i),(k)

Eligibility

Employer / Human Resources may not ask questions to determine if a person is disabled, such as:

- What disability / condition they have / claim to have
- What treatment (medication, therapies, etc.) they are receiving
- If they have had a workers' compensation injury in the past
- If they are taking their medications / what medications are being taken

Eligibility

Employer / Human Resources will ask:

- For a medical note indicating if the employee / elected official:
 - Has a serious medical condition that impacts their ability to perform one or more of the essential functions of their job
 - What are their work restrictions / functional limitations / leave needs
 - What is the duration of work restrictions / functional limitations / leave
 - Supervisors **cannot** contact health care providers directly for clarification or additional detail. Only HR has this ability.



Understanding the ...

DISABILITY INTERACTIVE PROCESS

Interactive Process

Statutory Obligation # 1:

Provide a timely good-faith interactive process



Disability Interactive Process Hallway™

Door #1

- **Gather Data:** Obtain Clear Medical Work Restrictions; May determine an Essential Functions Position Analysis™ (EFPA™) document needs to be created

Door #2

- **Research Accommodations:** Call/email/discuss with employee / elected official and supervisor the restrictions and begin exploring accommodation ideas

Door #3

- **Schedule Meeting & Prepare:** Schedule meeting and invite the right people to attend; confirm attendance in advance; prepare notes for meeting; meeting and make decisions

Door #4

- **Do What You Said You Would Do:** After meeting, implement decisions; do what was said would be done

The Hallway: Door #1



Door #1

Obtain Necessary Documentation/Information

Medical report with:

- ✓ Serious medical condition impacting work
 - Yes/No answer
- ✓ Clear work restrictions
- ✓ Duration of work restrictions, or
- ✓ Leave Needs & Duration

Fitness for Duty Examinations

Employer can coordinate a Fitness for Duty examination with a qualified Health Care Provider (physical or mental impairment) in the event that they determine that the need to do so is job related and consistent with business necessity (42 USC § 12112(d)(4)(A), 42 USC § 12101 et seq. (ADA); Gov. Code § 12940(f)(2) (FEHA) and there are objective facts that:

- **Safely:** The employee / elected official may have a medical or psychological condition that could result in a direct physical threat or other liability to themselves, a co-worker or the public.
- **Fully:** The employee / elected official may have a medical condition or injury that impacts their ability to perform the essential functions of their classification fully and it is unclear as to what type of reasonable accommodation is necessary.

Disability Interactive Process Hallway™

Door #1

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The Hallway: Door #2



Engage, Interact and Explore Together

- Ensure applicant/employee / elected official is aware of process
- Talking and/or informal meeting with applicant/employee / elected official
- Seek applicant/employee / elected official opinions and interests
 - **Research ideas of employee / elected official/applicant, department or organization before accommodations meeting**
- Consult with professionals in the field for assistance to identity reasonable accommodation options
- Use Resources: Colleagues, attorneys, WC examiners, consultants
- No Decisions, but research options

Disability Interactive Process Hallway™

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The Hallway: Door #3



Schedule Accommodations Meeting / Have the Right People Involved in Decisions

- **Long-Term decisions**
 - Human Resources
 - Workers' Compensation / Risk Management
 - Employee's Manager / Supervisor (not elected official)
 - Employee / elected official
 - Employee / Elected Official Representative of choice
 - Facilitator & Note Taker

Disability Interactive Process Hallway™

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The Hallway: Door #4



Post-Meeting Activities / Close Process Correctly

- Place all documents in the accommodations file
 - Process Letters (Summaries of events, meeting invites)
 - Meeting Notes Templates
- Complete Post Meeting Agreements
 - Inform others that need to know of a result
 - Complete post meeting forms, letters, etc.
- Identify Next Steps of the Interactive Process

Interactive Process

Statutory Obligation # 2:

Provide Reasonable Accommodations

Reasonable Accommodation

Reasonable accommodations include:

- Any appropriate measure that would allow the applicant or employee / elected official with a disability to perform the **essential functions** of the job, such as:
 - Facility modifications
 - Schedule changes
 - Equipment purchases
 - Modifying examinations
 - Changing policies

Reasonable Accommodation

An accommodations can be **ANYTHING**

- You are not required to provide accommodations. You are required to provide **REASONABLE** accommodations.

What makes an accommodation **REASONABLE**

1. Provides the employee / elected official/applicant with a **SAFE** work environment
2. Allow the employee / elected official/applicant to perform the **FULL** set of Essential Functions of their position.

Technically:

- **Undue Hardship** (29 CFR §1630 app. §1630.15(d)) (1996)
- **Direct Threat** (42 U.S.C. § 12113(b); see 29 CFR §1630 app. §1630.2(r))

Elected Officials Accommodation Considerations

- Assumed coverage under FEHA/ADA
- No supervisor role
- Questions on who has authority to make decisions on what accommodations are reasonable and which are most appropriate to implement
- Budgeting and approving expenditures



Questions / Answers