

Comparison of ADA & FEHA

Shaded areas indicate which law affords the most protection to an individual with a disability.

Attribute	FEHA	ADA
Jurisdiction	State	Federal
Applies to Employers with these number of employees	<u>1 or more employees:</u> for harassment based on mental or physical disability. <u>5 or more employees:</u> for physical or mental disability cases.	15 employees or more
Religious & non-profit Employer exceptions	Excludes: religious, non-profit organizations.	Covers religious, non-profit organizations (however, a religious institution may give preference in employment to individuals of their particular religion but may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled.)
Individual Liability	Individuals may be liable as: 1. Harassers 2. Agents of an employer 3. Any person who discriminates in the selection of training in any apprenticeship training program or any program leading to employment. 4. Any person who retaliates against a person who engages in protected activity. 5. Any person who aids or abets conduct prohibited by FEHA.	No individual liability.
Eligibility: definition of "disability"	Does not require <i>substantial</i> limitation of major life activity. AB 2222 changed FEHA to go even further stating that the definition of " major life activity " will be "broadly construed" . It also states that the limits determined will not take mitigating measures into consideration. "9 Definitions of Disability" that generally provide broader protection than the ADA via AB 1077; incorporates any ADA definition of disability that results in greater protection.	<u>"3 Prongs of Disability"</u> 1. Mental or physical impairment must substantially limit a major life activity (by Supreme Court decision, June, 1999, mitigating measures will be considered), or 2. Individual must have record of impairment, or 3. Individual must be regarded as having such impairment.
Eligibility:	SIMILAR: Person must be able to	Person must also be "qualified" for

<p>“Qualified individual”</p>	<p>safely and effectively perform a position’s “essential job functions” with or without reasonable accommodation.</p>	<p>the job, i.e., satisfies the requisite skill, experience, education, and other job-related requirements and can perform the essential functions with or without reasonable accommodation.</p>
<p>Pre-Employment (Pre-offer) Inquiries & Medical Exams</p>	<p>Prohibits non-job-related inquiries that directly or indirectly express any limitation, specification, or discrimination based on any of the FEHA’s protected bases. For employers of 15 or more, AB 1077 limits pre-offer medical exams and disability-related questions as the ADA does. (Employers of less than 15 employees may request info regarding physical fitness, medical condition, physical condition, or medical history IF directly related to and pertinent to position applicant is applying for, or directly relate to whether applicant would endanger self or others.)</p>	<p>Prohibits pre-offer medical exams and disability-related questions.</p>
<p>Pre-Employment (Post-offer) Inquiries</p>	<p>NO general inquiries permitted, but post-offer employers of any size may request info regarding physical fitness, medical condition or medial history IF directly related to and pertinent to position applicant is applying for, or directly related to whether applicant would endanger self or others. AB 2222 added language equal to ADA that inquiry must be 1) job-related and 2) consistent with business necessity, but emphasized additionally that inquiry must be asked of all applicants job offer is made to!</p>	<p>General disability-related questions are OK, as long as:</p> <ol style="list-style-type: none"> 1. Required of all entering applicants in the same job category 2. Results are treated as confidential medical records <p>HOWEVER, If individual is screened out because of disability, employer must show inquiry is :</p> <ol style="list-style-type: none"> 1. job –related 2. consistent with business necessity
<p>Pre-Employment (Post-offer) Medical Exams</p>	<p>Same as ADA regarding timing of medical exam (post-offer) but nature & scope of exams are more limited than under ADA:</p> <ol style="list-style-type: none"> 1. Nature of exam must be directly related to the position applicant is applying for, or directly related to whether applicant would endanger self or others (for example, a med exam may be lawful in a physically demanding job, but not for a sedentary job). 2. Scope of exam must be job- 	<p>Medical exams are permissible after a conditional offer of employment, provided that all entering applicants in the job classification are required to take the exam and results are treated like confidential medical records. General medical exams are permissible and do not have to be job-related; however, if an employee is screened out because of disability, employer must show it is job-related and</p>

	<p>related or directly related to whether employee would endanger himself or others. (For example, an individual with a back disability who performs physically strenuous work may be required to submit to back exam, but not an exam for cancer or AIDS).</p> <p>3. Where the results of a medical exam would result in disqualification, employer must allow applicant to submit an independent medical opinion before a final decision on disqualification is made.</p>	consistent with business necessity.
Drug Tests	<p>Since drug tests may identify an individual's disability, they may only be required if job-related. (May be required pre-offer).</p>	Drug tests are not medical exams , so employers can require applicants to take them before making a conditional offer, and can require employees to take them without having to show that they are job-related and consistent with business necessity. However, if drug test reveals medical condition or history, such info must be treated as confidential medical records.
Alcohol Tests	Same as ADA regarding alcohol tests to post-offer. However, alcohol tests are only lawful if job-related.	Alcohol tests are medical exams so they can only be required after a conditional job offer. Thus all rules for "medical exams" above apply.
Physical Ability Tests	Permissible pre-offer, but limited to situation in which they are job-related.	NOT medical exams, so permitted pre-offer. However if individual is screened out because of disability, employer must show inquiry is job-related and consistent with business necessity.
Employees Disability-related Inquiries & Medical Exams	Same: only permitted if job-related and consistent with business necessity.	Same: only permitted if job-related and consistent with business necessity.
Employees Definition of ESSENTIAL JOB FUNCTION	SAME	SAME
Reasonable Accommodation Requirement	<p>ESSENTIALLY SAME</p> <p>Except it is not good enough for employer to only make reasonable "good faith" efforts to</p>	<p>ESSENTIALLY SAME</p> <p>However, under ADA employer will not be liable for compensatory & punitive damages if it has been engaged in good faith efforts, in</p>

	<p>accommodate. AB 2222 goes further, requiring beyond a good faith effort that the employer must engage in a timely, good faith, interactive process to determine effective reasonable accommodations at the request of:</p> <ol style="list-style-type: none"> 1. an employee 2. an applicant with a known disability 	<p>consultation with disabled employee, to make reasonable accommodation.</p>
Undue Hardship Defense	SAME	SAME
Affirmative Defenses -- Reasons for NOT Providing Reasonable Accommodation	<ol style="list-style-type: none"> 1. Inability to perform, even with reasonable accommodation 2. Danger to self, even with reasonable accommodation 3. Danger to others, even with reasonable accommodation 4. Bona fide occupational qualification 5. Otherwise required by law 6. Any other defense provided in FEHA (example: job-relatedness) 	<p>Less affirmative defenses available:</p> <ol style="list-style-type: none"> 1. Qualifications and selection standards that screen out individuals with disabilities may be excused if they are job-related and consistent with business necessity and no reasonable accommodation would permit the individual to perform the essential job functions. 2. Direct threat to safety of others.
Workers Comp Relationship	<p>TBA</p> <p>Worker's Compensation Act preemption issue is currently before the California Supreme Court.</p>	<p>Worker's Compensation Act related claims:</p> <p>If work-related injuries meet ADA definition of disability, they are not preempted by the California Worker's Compensation Act.</p>
Enforcement & Remedies	<p>Enforced by the California Department of Fair Employment & Housing:</p> <ol style="list-style-type: none"> 1. Administrative adjudication = make whole remedy available, plus a limit of \$150,000 in combined emotional distress & administrative fines per respondent. 2. Civil litigation = make whole remedy and unlimited emotional distress and punitive damages. 	<p>Enforced by United States Department of Justice. NO Administrative Adjudication option available.</p> <p>Make whole remedy available, plus emotional distress & punitive damages in federal court limited to intentional discrimination cases according to size of employer:</p> <p>15-100 employees = \$50,000 (combined emotional distress & punitive damages)</p> <p>101-200 = no more than \$100,000</p> <p>201-500 = no more than \$200,000</p> <p>501 or more = no more than \$300,000</p>
Complaint filing: statute of limitations	<p>EEOC requires filing at the state level with the California Department of Fair Employment & Housing regardless of filing with</p>	<p>Complaint filing with EEOC must be within 180 days from the alleged discriminatory act (EXCEPT FOR THE EXCEPTION</p>

	<p>EEOC. Complaint filing with the California Department of Fair Employment & Housing must be within 1 year from the alleged discriminatory act.</p> <p>EEOC filing limits to the right are extended as follows when a state level agency like the California Department of Fair Employment & Housing exists:</p> <p>Can file w/EEOC up to 300 days after receiving notice from the California Department of Fair Employment & Housing that they have terminated processing the charge (but recommended to contact EEOC immediately).</p> <p>The California Department of Fair Employment & Housing informs EEOC that a complaint was filed with them.</p>	<p>TO THE LEFT WHERE A STATE LEVEL AGENCY EXISTS – then the time limit is extended as to the information in the left column).</p> <p>EEOC does not notify the California Department of Fair Employment & Housing that a complaint was filed with EEOC.</p>
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