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Making the Interactive Process a Success: Leaves of Absence, Telework and Other Reasonable Accommodation

Association of Chief Human Resource Officer's Conference

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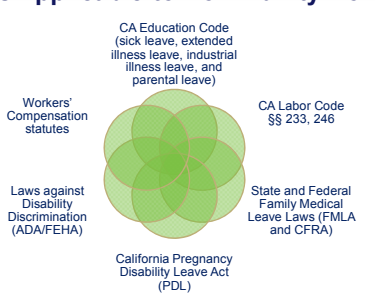
Agenda

- Leave as a reasonable accommodation
- Telework as a reasonable accommodation
- Issues related to COVID-19 testing/vaccination mandate

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Leave Laws Applicable to Community College Districts



CA Education Code (sick leave, extended illness leave, industrial illness leave, and parental leave)

Workers' Compensation statutes

CA Labor Code §§ 233, 246

Laws against Disability Discrimination (ADA/FEHA)

State and Federal Family Medical Leave Laws (FMLA and CFRA)

California Pregnancy Disability Leave Act (PDL)

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Challenges for California Community College Employers

Education Code already VERY GENEROUS even without added FMLA/CFRA/PDL protections.

Leave rights may be expanded even further by Board Policy, past practice and collective bargaining provisions.

Academic and classified employee leave rights are governed by parallel, and *almost* identical Ed. Code provisions.

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Reminder

- This presentation covers the statutes and regulations, which establish minimum levels of leave benefits.
- Districts have the authority to grant greater leave rights – check your contracts, policies, and past practices
- Leaves are within the scope of bargaining. Changes in contract language or past practice require negotiation.

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Leave as a Reasonable Accommodation

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Leave as a Reasonable Accommodation

"When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation."

-Cal. Code Regs., tit. 2, § 11068

See also EEOC Enforcement Guidance Regarding Leaves, available at:
<https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>

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Leave as a Reasonable Accommodation

"(b) Notice. An employer or other covered entity shall initiate an interactive process when:

[...] (3) the employer or other covered entity **becomes aware of the possible need** for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, for the employee's own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that **further accommodation is still necessary** for recuperative leave or other accommodation for the employee to perform the essential functions of the job. An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, title 2, section 11091(b)(1) & (b)(2)(A)1., prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."

-Cal. Code Regs., tit. 2, § 11069

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Leave as a Reasonable Accommodation

(d) Obligations of Applicant or Employee. The applicant or employee shall cooperate in good faith with the employer or other covered entity, including providing reasonable medical documentation where the disability or the need for accommodation is not obvious and is requested by the employer or other covered entity, as follows:

[...]

(9) If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced-schedule basis for planned medical treatment of the employee's disability, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

(10) If an employee requests leave on an intermittent or reduced-schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

-Cal. Code Regs., tit. 2, § 11069

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Leave as a Reasonable Accommodation

(i) "Undue hardship" means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

(1) the nature and net cost of the accommodation needed under this article, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

-Cal. Code Regs., tit. 2, § 11065

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Leave as a Reasonable Accommodation

Undue Hardship Factors Continued...

(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

-Cal. Code Regs., tit. 2, § 11065

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Leave as a Reasonable Accommodation

- Requests for leave may fall under employer's existing leave policies, in which case, employer must provide leave on equal terms as similarly situated individuals.
- However, ADA may require employers to provide additional unpaid leave to disabled employees as a reasonable accommodation.

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Placement on Reemployment List upon Exhaustion of All Leaves

Academic Employees	<ul style="list-style-type: none">No medical reemployment list available after leaves exhausted.
Classified Employees (Ed. Code § 88192 and § 88195)	<ul style="list-style-type: none">39 months: Industrial – probationary or permanent39 months: Non-industrial – permanent onlyEntitled to be reemployed in a <u>vacant</u> position in the class of the previous assignment

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Before Placing Classified Employees on the Reemployment List, Consider Leave Rights under Other Laws

Family Medical Leave Statutes <ul style="list-style-type: none">Family Medical Leave Act (FMLA)California Family Rights Act (CFRA)Pregnancy Disability Leave Act (PDL)	Disability Discrimination / Accommodation Statutes <ul style="list-style-type: none">Americans With Disabilities Act (ADA)Fair Employment and Housing Act (FEHA)
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Leave as a Reasonable Accommodation

- Approximately 30 days prior to exhaustion of paid leaves, send employee a letter:
 - Your last doctor's note of [DATE] indicates that you remain off work at least until [DATE]
 - Unless you return to work sooner, your paid leaves will expire on [DATE]
 - If you believe you are able to return to work, with or without reasonable accommodation, please contact us, and provide a doctor's note releasing you to return to work, and stating work restrictions (if any)
 - If you are released to return to work with restrictions, we will schedule an interactive process meeting to be held prior to your exhaustion of paid leave

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Leave as a Reasonable Accommodation

- Classified: If you are unable to return to work, with or without reasonable accommodation, you will be placed on a 39 month medical reemployment list upon exhaustion of paid leave, unless prior to exhaustion of paid leave you request and receive approval for additional paid or unpaid leave. You have the right to request additional leave per Educ. Code 88192, 88195. If you want to request additional leave, please contact us by [DATE] and we will schedule an interactive process meeting. If we do not hear from you, you will be placed on a 39 month medical reemployment list upon exhaustion of paid leave. Placement on the 39 month list will terminate your active employment status with the district, and pay and benefits, subject to your right to return to work if/when medically able, with or without reasonable accommodation, and if there is a vacancy in your classification.

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Leave as a Reasonable Accommodation

- What to address during the interactive process when an employee requests leave:
 - The specific reason(s) the employee needs leave (e.g., surgery, recuperation, adjustment to new medical regimen, training a new service animal, or doctor visits/physical therapy);
 - Whether the leave will be a block of time or intermittent; and
 - When the need for leave will end.

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Leave as a Reasonable Accommodation

- How much leave is considered reasonable?
 - No bright-line rule
 - Fact-specific
 - Consider other circumstances in which unpaid leaves are granted and whether the position can be temporarily filled
 - E.g., *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243 [holding one year of leave may not be an undue hardship where company had a policy of allowing employees to take leave for up to one year and it regularly hired seasonal employees to fill positions]

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Leave as a Reasonable Accommodation

- Leave for a definite v. indefinite time
 - Indefinite leave is not a reasonable accommodation
 - What if the employee's doctor keeps extending the leave?
 - How many extensions have been requested?
 - Has the doctor indicated any firm return date?
 - Is the employee undergoing *treatment* that should enable him/her to return to work?
 - Is it reasonably foreseeable that the employee will be able to return to work?
 - Because leave is an accommodation so that the employee will be able to come back to work, if there is no evidence the employee will return to the job, leave would likely not be a required accommodation.

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Leave as a Reasonable Accommodation

- Full vs. partial leave
 - ADA specifically identifies part-time schedules as reasonable accommodations.
 - Is the restriction temporary or permanent?
 - Do you permit part-time work for other reasons?
 - Consider asking doctor for clarification.

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Leave as a Reasonable Accommodation

- Does the employer have to hold the employee's job open during the leave?
 - EEOC says unpaid leave = holding the employee's job open, unless doing so would cause an undue hardship
 - EEOC also says if holding a position open would pose an undue hardship, employer must consider vacant, equivalent positions for which the employee is qualified for the employee to return to
 - FMLA/CFRA leave: same or comparable position
 - Check the contract!

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Leave as a Reasonable Accommodation

Must the employee follow call-in procedures and documentation requirements to report such absences?

- a. No. Requiring a disabled employee to follow these procedures is discriminatory.
- b. Yes. A disabled employee may be held to the same conduct rules and procedures as other employees.
- c. Yes, unless the terms of the leave provide that the employee need not call in the absences.
- d. Both b and c.

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Leave as a Reasonable Accommodation

d. Both b and c.

- Generally a disabled employee may be held to the same conduct rules and procedures as other employees. However, the terms of a particular leave may provide that the employee need not call in the absences.
- According to the EEOC, an employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, although it may reach out to an employee on an extended leave to check on the employee's progress.

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Leave as a Reasonable Accommodation

Leave for unreliable or unpredictable attendance is not required if it would pose an undue burden:

- *Fisher v. Vizioncore, Inc.* (7th Cir. 2011) [employee's request for "an open-ended schedule with the privilege to miss workdays frequently and without notice, and to telecommute without manager approval" was "unreasonable"].
- *Amadio v. Ford Motor Company* (7th Cir. 2001) [employer is not required to give an "open-ended schedule that allows the employee to come and go as he pleases"].

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Maximum Leave Policies

Leave policies that provide a fixed amount of leave before employment is terminated, regardless of reason for the leave

- **True or False:** If the policy is uniformly applied, the employer need not provide additional leave.

True

False

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Maximum Leave Policies

False. Employers must be prepared to grant additional leave as a reasonable accommodation for a disability.

- *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) [employer may have obligation to exceed its maximum 1-year leave policy as an accommodation]

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Hypothetical

A faculty counselor has submitted a medical certification note from a large HMO medical provider for their own serious health condition that states the employee "needs to teach fully online" to minimize their exposure to COVID-19. The faculty association president has asked to speak with the VP of Human Resources because the forms the District provides for medical certification are too complicated for those who are "clearly" at risk of serious injury should they contract the virus.

How should the District respond?

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Hypothetical Response

- ❖ Engage in the Interactive Process:
 - ❖ Follow-up with employee or medical provider for limitations/restrictions – working from home is the accommodation and not a limitation
 - ❖ Consider all other possible accommodation and/or leave options
 - ❖ Personal protective equipment, masks, plastic barriers, social distancing
 - ❖ If no other options consider leave as an accommodation
- ❖ Tips for Discussion with Labor Representative:
 - ❖ The form is provided and consistently used for all employees
 - ❖ The accommodation process is a legal requirement and not a mandatory subject of bargaining

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Telework as a Reasonable Accommodation

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EEOC Guidance – Telework as a Reasonable Accommodation

- Equal Employment Opportunity Guidance indicated that the “temporary telework experience” that occurred during the COVID-19 pandemic could be relevant to considering a request to telework.
- “For example, the period of providing telework because of the COVID19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”

See also EEOC Enforcement Guidance Regarding Telework at:
<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>

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EEOC Guidance – Application

- Can the employee be effective while working remotely?
 - Consider the essential duties of the position
 - Involve the supervisor because the job description might not be accurate
 - Consider whether the employee was able to perform those duties efficiently remotely during the COVID-19 pandemic
 - Consider whether circumstances have changed in a way that would prevent the person from being effective while working remotely (i.e. now that school is back in session and students are on campus)
 - Consider the Duration of the request
 - Have other employees with similar job duties have been permitted to work from home?

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Telework as a Reasonable Accommodation

- **Consider preferences of employee**
- **Need information regarding the employee’s restrictions**
- **The Interactive Process is an Interactive Discussion**
- The interactive process does not require the employer to accept the employee’s proffered accommodation, especially if another accommodation would suffice. (Weeks v. Union Pacific Railroad Co. (E.D. Cal. 2015) 137 F.Supp.3d 1204, 1217.)

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Telework as a Reasonable Accommodation

- As part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability. If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective. (Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86, (11th Cir. 1997).)
- **Assess effectiveness of each potential accommodation**

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Telework as a Reasonable Accommodation

- If the medical restrictions do not preclude doing so, discuss whether possible less burdensome alternatives might work
- Possible alternatives might include:
 - Additional PPE/Modifications to the site
 - Reassignment to a position with less employee/student contact
 - Reassignment to a more secluded location
 - Assigning non-essential functions to other employees
 - Alternative work schedule
 - Hybrid work schedule
 - Leave
- Include the employee and the supervisor to determine what is feasible

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Telework as a Reasonable Accommodation

- **Additional Factors to consider and discuss:**
 - Assessing home setup capabilities
 - DFEH Guidance requires accommodations to be provided in the remote work setting unless they would be an undue burden on the employer
 - If the accommodation(s) would be an undue burden in the remote work setting, the employer and employee should engage in the interactive process to discuss alternatives
 - Reimbursement for work expenses and equipment
 - Communication
 - Tracking and monitoring hours worked and productivity

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Hypothetical

The following classified employees all submitted a medical provider's certification from a large HMO medical provider for their own serious health condition that states "they must work 100% remote" to minimize their exposure to COVID-19:

- ❖ Maintenance Worker
- ❖ Laboratory Technician
- ❖ Academic Advisor

Would Telework/remote work be a reasonable accommodation for each of these employees?

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Hypothetical Response

Would Telework/remote work be a reasonable accommodation for each of these employees?

- ❖ Maintenance Worker – No. Telework would not be reasonable as the essential functions cannot be performed anywhere other than on campus.
- ❖ Laboratory Technician – Possibly. Some duties may be performed remotely such as ordering supplies and creating and editing lesson plans. But, some functions such as setting up the lab for supporting in-person teaching cannot be performed remotely. May consider shifting some duties.
- ❖ Academic Advisor – Possibly. Some duties may be performed remotely such as phone and video conferencing. However, serving student during "drop-in hours" would not be an essential function that could be supported remotely. Consider allowing use of a larger conference space to accommodate greater social distancing while serving drop-in students.

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Reasonable Accommodation

An employee is not entitled to the best accommodation or the one they desire.

He or she is entitled to a reasonable accommodation.

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Issues Related to Vaccine/Testing Mandate

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Potential Scenarios

- Employee asks for accommodation of employee's own illness/disability.
- Employee asks for accommodation because employee is age 65 or older.
- Employee asks for accommodation to avoid exposing family member with illness/disability to COVID-19 risk.
- Employee asks for accommodation to avoid exposing family member age 65 or older to COVID-19 risk.
- Employee asks for accommodation based on childcare needs/school schedule.
- Employee refuses vaccination based on disability.
- Employee refuses vaccination based on religion.
- Employee refuses vaccination and testing.

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EEOC Guidance – Mandatory Vaccinations for Employees

- Equal Employment Opportunity laws do not prevent employers from requiring employees be vaccinated for COVID-19, **however**, employers must provide exemptions accommodating disability and religion.
- Employer vaccine mandate is permitted, if "job related and consistent with business necessity."
- If employee seeks exemptions from vaccine requirement due to pregnancy, employee may be entitled to job modifications.
- "Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccine than others, some employees may be more likely to be negatively impacted by a vaccination requirement."

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EEOC Guidance - Medical Condition/Disability

- If employee cannot meet vaccination requirement due to disability, employer may not require compliance unless "direct threat" to health or safety of employee or others in the workplace.
- "Direct threat" determination requires "individualized assessment of employee's present ability to safely perform essential functions of the job."
 - "Reasonable medical judgment that relies on the most current medical knowledge about COVID-19"
 - Duration of risk
 - Nature and severity of potential harm
 - Likelihood that potential harm will occur
 - Imminence of potential harm
- If direct threat exists, assess whether reasonable accommodation would reduce or eliminate (via interactive process)

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EEOC Guidance – Religious Exemptions

- EEOC observations:
 - “The definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar.”
 - “[E]mployer should ordinarily assume that an employee’s request is based on a sincerely held religious belief, practice or observance.”
 - Employee request for exemption from employer policy based on employee’s religious beliefs or practices may require the employer to accommodate the request, unless to do so would pose an “undue hardship.”
 - **Note also:** In addition to religious belief, moral/ethical beliefs that are held with the strength of traditional religious views are also entitled to accommodation.

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EEOC Guidance – Religious Exemptions

- Undue hardship considerations include:
 - Proportion of employees in the workplace already vaccinated
 - Extent of employee contact with non-employees whose vaccination status may be unknown

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EEOC Guidance – Employee Religious Exemptions

- Laws
 - Title VII of the 1964 Civil Rights Act prohibits religious discrimination in employment and requires employers to make reasonable accommodations for an employee’s religious observance where such accommodations would not impose an undue hardship upon the employer. (*Trans World Airlines v. Hardison* (1977) 432 U.S. 63.)
 - **Note also:** FEHA (see, e.g., Gov. Code 12926; 2 CCR 11062) may provide a more deferential standard than Title VII when dealing with accommodation of religious belief.

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EEOC Guidance – Reasonable Accommodations

- Examples of reasonable accommodations:
 - Wear a face mask
 - Work at a social distance from coworkers or non-employees
 - Work a modified shift
 - Get periodic tests for COVID-19
 - Opportunity to telework
 - Accept a reassignment
 - Temporary leave (including unpaid leave)

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EEOC Guidance – Communication to Employees

- Managers and supervisors responsible for communicating with employees about return to campus should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration.
- Under California law, failure to engage in an interactive process may be an independent violation, even if the employee cannot be reasonably accommodated!

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**Question & Answer
Session**

Thank You

For questions or comments, please contact:

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