



Trending Labor and Employment Issues in the Healthcare Industry

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WAGE AND HOUR BASICS

WHICH ORDERS WILL APPLY?

- Wage Order No. 4, “Professional Technical, Clerical and Similar Occupations”
- Wage Order No. 5, “Public Housekeeping Industry”
- Wage Order No. 9, “Transportation Industry”
- Wage Order No. 15, “Household Occupations”
- Wage Order No. 17, “Miscellaneous Employees”

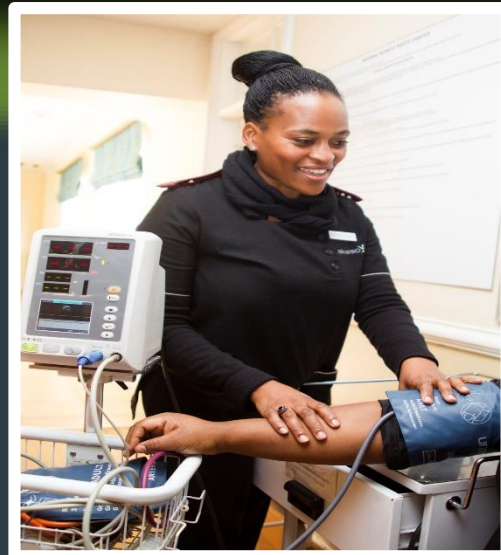
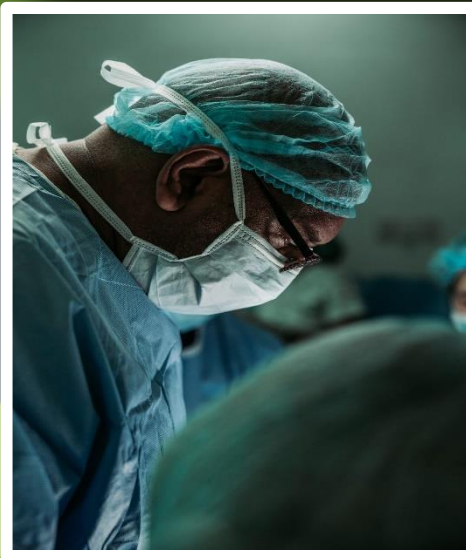
HEALTHCARE STANDARDS

1. Hours Worked
2. Exclusive Nature of Special Options
3. Partial FLSA Overtime Pay Exemption



ELIGIBLE HEALTHCARE EMPLOYEES

- ▶ 12-hour shifts at straight time are available only to a narrow group of employee who meet two conditions:
 - ▶ Employees must work for a “healthcare industry” employer as it is defined.
 - ▶ Only individuals who qualify as “employees in the healthcare industry.”
- ▶ Employees within this meaning either: provide patient care; work in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting; or work primarily or regularly as members of a patient care delivery team.



Excluded Healthcare Employees:

- ▶ Individuals who engage in providing meals, performing maintenance or cleaning services, or performing business office or other clerical functions, or employees who are engaged in performing a combination of the excluded duties are excluded.
- ▶ Healthcare industry is defined “as hospitals, skilled nursing facilities, intermediate care and residential care facilities, convalescent care institutions, home health agencies, clinics operating twenty-four (24) hours per day, and clinics performing surgery, urgent care, radiology, anesthesiology, pathology, neurology, or dialysis.”

Implementation of an Alternative Work Schedule

- ▶ Implementing an AWS of 12-hour shifts at straight time requires the employer to identify the group of affected employees who will vote on the AWS.
- ▶ A proposed AWS is only permissible if it receives at least two-thirds vote of all affected employees in the work unit.
- ▶ Special Overtime Rules.



OVERTIME RULES

Mandatory Overtime Rules for Health Care Employees (Wage Order No. 4 & 5)

- ✓ Employees assigned to 12-hour shifts established pursuant to the special alternative workweek schedule may not work more than 12 hours in a 24-hour period unless an emergency exists.
 - Even if an emergency exists, no employee may be required to work more than 16 hours in a 24-hour period.
 - To work more than 16 hours there must be a voluntary mutual agreement in existence between the employee and employer.

OVERTIME RULE EXCEPTIONS

Late Reliever Exception: Wage Orders No. 4 & 5 provide an exception that an employee may be required to work up to 13 hours in a 24-hour period if his/her replacement fails to report as scheduled.

- ▶ Exception only applies if the employer was not informed of the anticipated lateness/absence within two hours of the shift.

24-Hour Rule: No employee may work more than 24 consecutive hours unless he receives at least 8 consecutive hours off duty immediately following the 24 hours of work.

REGISTERED NURSES

- ▶ Registered nurses engaged in the practice of nursing are not exempt from any provisions of the Wage Order unless they individually meet the criteria for exempt executive or administrative employees. Labor Code § 515(f).
- ▶ Disqualification does not apply to certified nurse midwives, certified nurse practitioners, and certified nurse anesthetists who might otherwise satisfy the requirements of the professional, executive, or administrative exemption including salary requirements.



PHARMACISTS

- ▶ Individuals who are employed in the practice of pharmacy are entitled to overtime compensation under state law unless they individually meet the criteria for exempt executive or administrative employees. Labor Code § 1186.



PERSONAL ATTENDANTS AND COMPANIONS

- ▶ Individual employed by a private household or third-party employer recognized in the healthcare industry to work in a private household.
- ▶ Vocational nurses and workers who regularly give medications or take temperatures, pluses, or respiratory rates do not qualify as personal attendants.
- ▶ Wage Order No. 15 requires overtime at one and one-half for work in excess of nine hours in a workday or 45 hours of a workweek. Labor Code § 1454.
- ▶ FLSA contains minimum wage and overtime pay exemption for employees who provide companionship to aged or infirmed people in a private home.
 - ▶ Not included are trained personnel, i.e. registered nurse or certified nursing assistant, who perform medically related services.
 - ▶ Unavailable to employee when the services are not provided in a private home.

MEAL PERIODS

LABOR CODE §512 AND WAGE ORDERS



- ▶ Employers are prohibited from not providing a meal period of at least 30 minutes to an employee whose work period is more than 5 hours.
- ▶ Duty to Provide Meal Periods
- ▶ Employees may recover premiums if they are forced to forgo meal periods.
- ▶ Premiums will not be imposed when an employer provided a meal period but the employee choose to work through their meal period

REST PERIODS



- ▶ Required that rest periods fall in the middle of work periods “insofar as practicable” but employers may deviate where practical considerations render it infeasible.
- ▶ Employees whose total daily work time is less than 3 ½ hours do not need to be given a rest period.
- ▶ Employees who qualify as exempt executive, administrative, or professional employees are not covered by rest period rules.



Changes Ahead

Lactation Accommodations

Labor Code §§1030-1033

- ▶ Employers must provide nursing mothers break time to express breast milk.
- ▶ Employers must make a reasonable effort to provide a private area other than a bathroom for nursing mothers.
- ▶ If providing a private room imposes an undue hardship, must make reasonable efforts to provide use of a temporary room/location in close proximity to employee's work area.
- ▶ Civil fine of \$100 for each violation of the statute.

Independent Contractor



Or Employee

*DYNAMEX
OPERATIONS
WEST
V.
SUPERIOR
COURT*

This case establishes the test to qualify a worker as an independent contractor versus an employee, making it more difficult to classify a worker as an independent contractor.

ABC TEST FOR INDEPENDENT CONTRACTORS

A) That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work.

Example: The employer must demonstrate that a worker is sufficiently free from the company's control where the worker set his own schedule, worked without supervision, purchased all materials.

ABC TEST FOR INDEPENDENT CONTRACTORS (CON'T)

B) That the worker performs work that is outside the usual course of the hiring entity's business.

Example: A retail store hiring an outside plumber to repair a leak in the bathroom on its premises or hiring an outside electrician to install a new electrical line. Such services are not part of the store's usual course of business meaning that the workers could not reasonably be seen as having suffered or permitted the workers to provide services as if they were employees.

On the other hand, a clothing manufacturing company hires work-at-home seamstresses to make dresses from materials supplied by the company or cake decorators hired by a bakery to work on custom-designed cakes, these workers would reasonably be viewed as employees.

ABC TEST FOR INDEPENDENT CONTRACTORS (CON'T)

C) That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

- ▶ Independent contractor is understood to be a person independently has made the decision to go into business for himself or herself.
- ▶ Evidence will be the workers' own business incorporation, license, advertisements, offering to provide services to the general public or other potential customers.
- ▶ Simply designating a worker an independent contractor, does not establish that that a worker is engaged in an independently established trade.

PRIVATE

HIPPA

National standards for when protected health information may be used and disclosed.

HIPAA (CON'T)

PROTECTED HEALTH INFORMATION: information, whether electronic, paper, or verbal, that relates to any of the following:

- **An individual's past, present, or future physical or mental health or condition.**
- **Provisions of health care to the individual.**
- **Past, present, or future payment for the provision of health care to an individual.**

NOTE: A covered entity may not use or disclose PHI, unless: As the Privacy Rule permits or requires, or as the individual (or the individual's personal representative) who is the subject of the information authorizes in writing.

HIPAA (CON'T)

PERMITTED DISCLOSURE:

- ▶ To an individual (unless required for access or accounting of disclosures)
- ▶ Treatment, Payment, and Health Care Operations
- ▶ Opportunity for Individual to Agree or Object
- ▶ Public Interest and Benefit Activities
- ▶ Limited Data Set for the purposes of research, public health, or health care operations.

REQUIRED DISCLOSURE:

- ▶ An individual (or their personal representative) specifically requests access to or an accounting of disclosures of their PHI.
- ▶ To HHS when it is undertaking a compliance investigation or review or enforcement action.

HIPAA (CON'T)

SECURITY RULE

- ▶ Specifies safeguards that covered entities and their business associates must implement to protect the confidentiality, integrity, and availability of electronic protected health information (e-PHI).
- ▶ Entities must develop and implement reasonable security measures, through policies and procedures, to protect the security of e-PHI they create, receive, maintain, or transmit.
- ▶ Identify the risks to e-PHI in your environment and create solutions that are appropriate for the situation.
 - ▶ Determining reasonable and appropriate measures depends on the nature of the entity's business as well as its size, complexity, and resources.

HIPAA (CON'T)

SECURITY RULE

To implement safeguard provisions, the HHS recommends that entities perform a risk analysis process which includes:

- ▶ Evaluating the likelihood and impact of risks to e-PHI.
- ▶ Implementing appropriate security measures to address the risks identified.
- ▶ Documenting the chosen security measures and the rationale for adopting those measures.
- ▶ Maintaining continuous, reasonable, and appropriate security measures.

▶ Administrative Safeguards includes designating a security office to implement security policies, providing workforce training and supervision, and performing periodic assessments.

▶ Physical Safeguards includes limiting access to its facilities and specifying proper use of and access to workstations and electronic media.

▶ Technical Safeguards includes implementing technical policies/procedures to allow only authorized persons to access e-PHI through hardware or software that records access and ensures it is not improperly altered or destroyed.

HIPAA (CON'T)

Breach of Notification

Requires covered entities to notify affected individuals, U.S. Department of Health & Human Services (HHS); and, in some cases, the media of a breach of unsecured PHI.

- ▶ Impermissible use or disclosure of PHI is presumed to be a breach unless you demonstrate there is a low probability the PHI has been compromised based on a risk assessment of at least the following factors:
 - ▶ Nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification
 - ▶ The unauthorized person who used the PHI or to whom the disclosure was made
 - ▶ Whether the PHI was actually acquired or viewed
 - ▶ The extent to which the risk to the PHI has been mitigated.

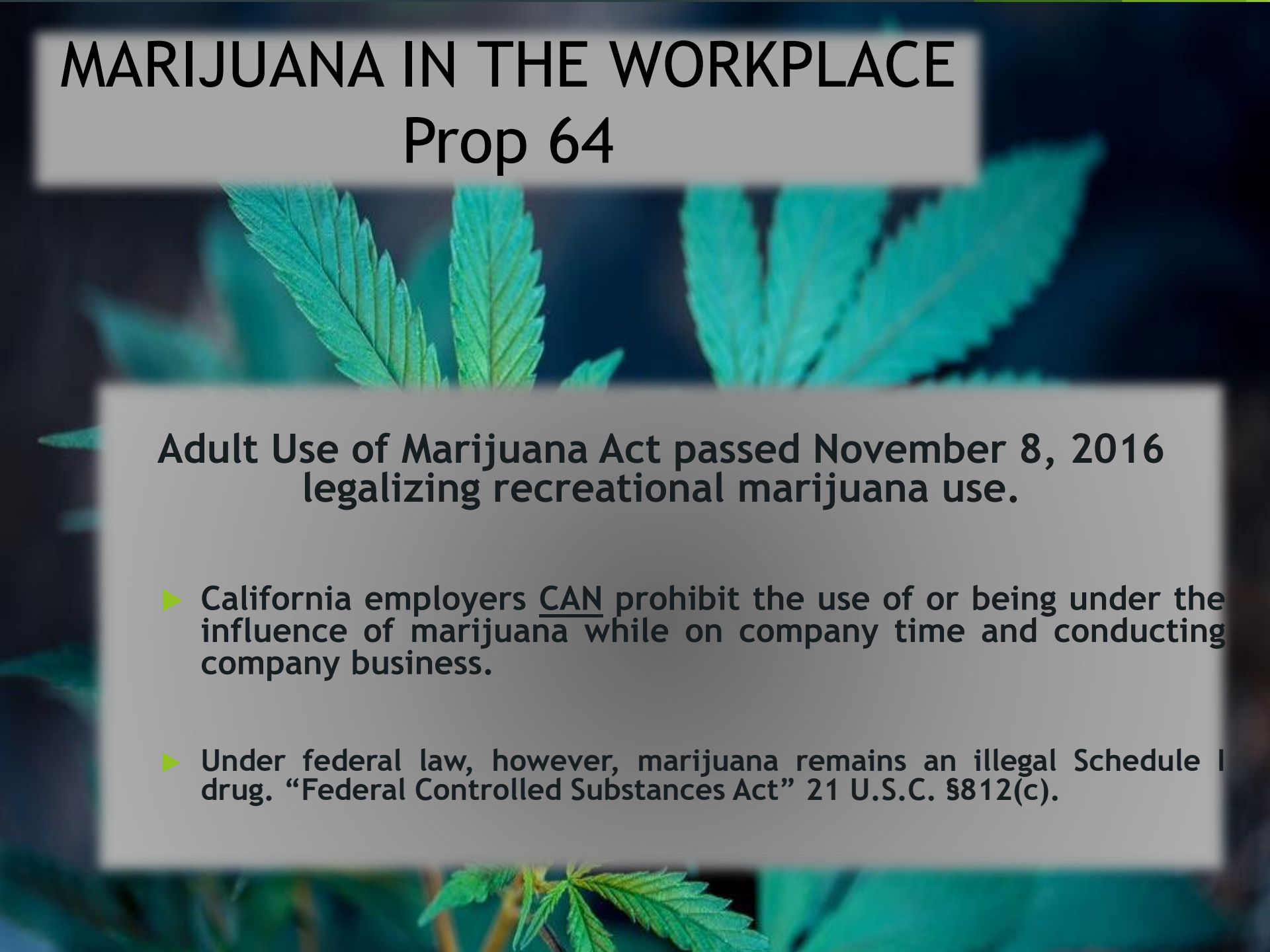
HIPAA (CON'T)

Breach of Notification

- ▶ Notifying affected individuals can be done through written form or e-mail no later than 60 days following discovery of the breach.
 - ▶ If there is insufficient or out-of-date contact information, the notice can be posted on the entity's website or in print or broadcast media, where the individual likely resides. Notice must remain active for 90 days.
- ▶ Notifying the Secretary is done through an electronic breach report on the HHS website.
 - ▶ If less than 500 individuals are affected, then the entity may inform on an annual basis.
 - ▶ If more than 500 individuals are affected, notification must be no later than 60 days following a breach.
- ▶ Notifying the media is done when the breach affects more than 500 residents of a state or jurisdiction through prominent media outlets. Notice must be provided no later than 60 days following breach.

MARIJUANA IN THE WORKPLACE

Prop 64



Adult Use of Marijuana Act passed November 8, 2016
legalizing recreational marijuana use.

- ▶ California employers CAN prohibit the use of or being under the influence of marijuana while on company time and conducting company business.
- ▶ Under federal law, however, marijuana remains an illegal Schedule I drug. “Federal Controlled Substances Act” 21 U.S.C. §812(c).

DRUG TESTING UNDER CALIFORNIA LAW

- ▶ California Drug-Free Workplace Act states only employers who are awarded contracts of grants from any state agency must certify that they will provide drug-free workplace.
- ▶ Employers can refuse to hire or choose to terminate an employees' employment because of marijuana use. Testing based on reasonable suspicion requires an employer to identify compelling reasons why either:
 - ▶ Its interest in drug testing is elevated.
 - ▶ The employee's expectation of privacy should have been reduced.
- ▶ Employers should take steps to minimize their risk for random testing including but not limited to:
 - ▶ Requiring two supervisors to observe behavior raising suspicion of drug use.
 - ▶ Involving human resources to ensure consistency in how employees are treated.
 - ▶ Maintaining confidentiality to the fullest extent possible.

AMERICANS with DISABILITIES ACT (ADA)

- ▶ Prohibits discrimination of individuals with disabilities.
- ▶ Protects qualified individuals from disparate treatment or harassment based on disability, and absent undue hardship, a qualified individual with a disability is entitled to reasonable accommodations.
- ▶ Applies to applicants and employees, does not cover independent contractors. Designation as an independent contractor is not dispositive.

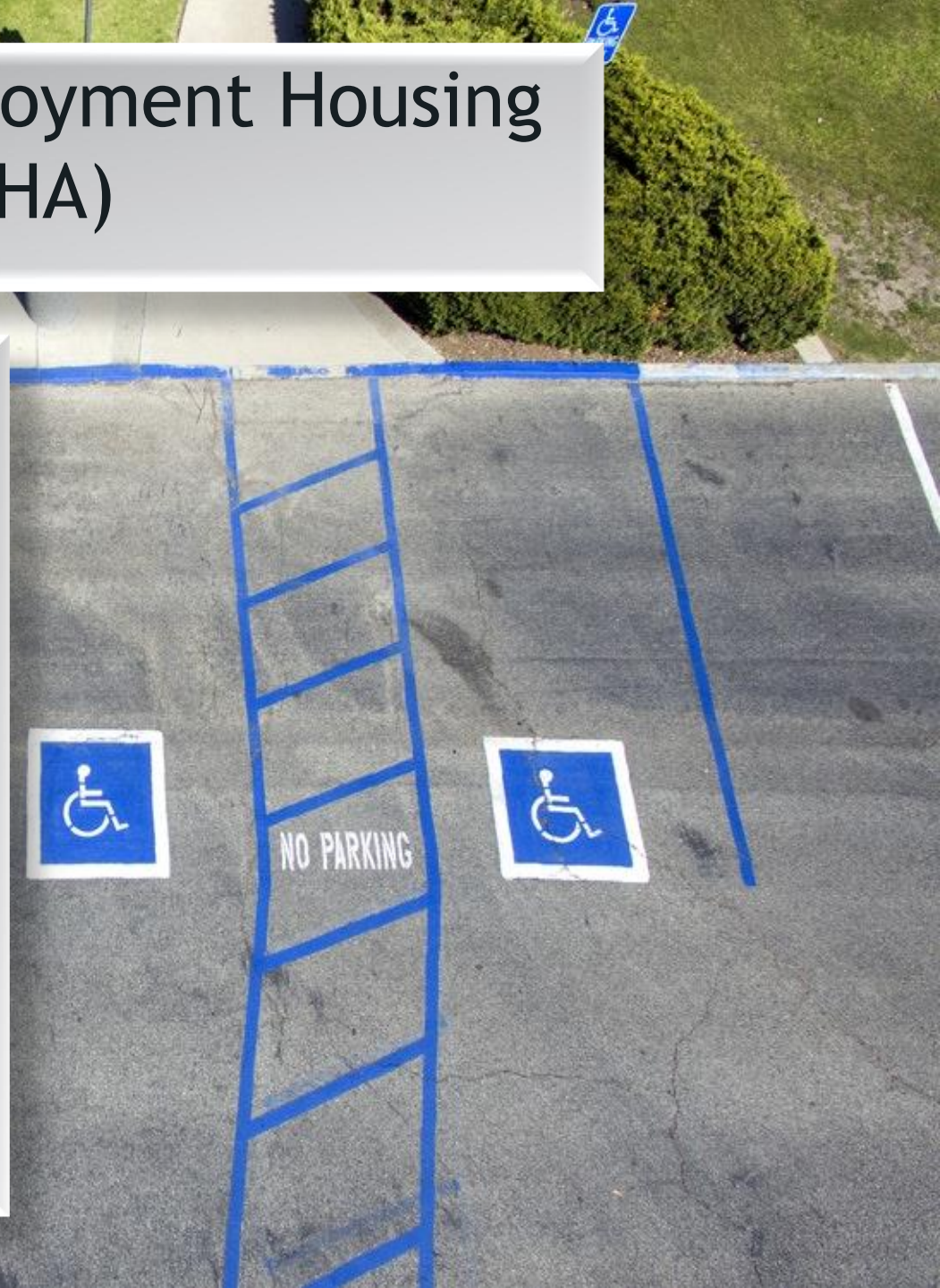


NO PARKING



California Fair Employment Housing Act (FEHA)

- ▶ Illegal for employer to discriminate because of physical or mental disabilities.
- ▶ Employers required to make reasonable accommodations.
- ▶ A reasonable accommodation is an adjustment to the employee's work environment that can enable the employee to perform the essential functions of the job.



INDIVIDUALS WITH A DISABILITY

- ▶ A person is an individual with a disability under the ADA when he or she:
 - ▶ Has a physical or mental impairment that substantially limits one or more major life activities (i.e. walking, sitting, standing, hearing, speaking, etc.);
 - ▶ Has a record of a substantially limiting impairment; or
 - ▶ Is regarded (treated by employer) as having a substantially limiting impairment.
- ▶ Alcoholism is covered under the ADA if the alcoholism currently substantially limits a major life activity, was substantially limiting in the past, or is regarded as substantially limiting
- ▶ An individual with a history of a past drug addiction is an individual with a disability. However, if an individual is currently engaging in the illegal use of drugs, they are not covered under the ADA.

EXAMPLES OF REASONABLE ACCOMMODATION FROM THE EEOC

Making Changes to Workplace Facilities

Example: Employee who is a licensed radiology technician has asthma and chronic sinusitis aggravated by exposure to chemicals and poor ventilation.

Accommodation: Paying for a respirator mask for the employee and installing a vent to increase ventilation.

Acquiring or Modifying Equipment or Devices

Example: Employee develops a substantial limiting hearing impairment.

Accommodation: Provide a stethoscope with an amplifier, a vibrating pager, etc.

Modifying Work Schedule

Example: A hospital's policy is to require its nurse to rotate morning, evening, and night shifts every so often. A nurse must have a regular sleep schedule due to managing his/her disability.

Accommodation: Granting the individual a fixed schedule.

REASONABLE ACCOMMODATION IS NOT REQUIRED WHEN:

- ▶ Accommodation would result in an undue hardship.

NOTE: Barring a health care worker with a disability from employment for safety reasons is only allowed if the individual poses a direct threat (significant risk of substantial harm) to health and safety.

- ▶ To determine whether applicant/employee poses a direct threat, the following factors are to be considered on an individualized assessment:
 - ▶ Duration of risk;
 - ▶ Nature of the severity of the potential harm;
 - ▶ Likelihood that the potential harm will occur;
 - ▶ Imminence of the potential harm.

OTHER CONSIDERATIONS TO KEEP IN MIND REGARDING REASONABLE ACCOMMODATION

- ▶ Inquiring about applicant's health specifically any disability-related question are generally unlawful.
- ▶ Asking current employees disability-related questions if the employer has a legitimate business necessity (i.e. reasonable belief that employee may be unable to perform essential functions of job or they pose a direct threat due to a medical condition).
- ▶ ADA does not prevent employers from testing applicants or employees for current illegal drug use or making employment decisions based on verified results.
- ▶ ADA considers a test for alcohol a medical examination and may not be administered before a conditional offer of employment.
- ▶ If the employer has a reasonable belief based on objective evidence that an employee has been drinking on the job or is under the influence of alcohol a test can be required.

