

# PREEMPLOYMENT MEDICAL SCREENING AND THE LAW<sup>1</sup>

## INTRODUCTION

The process and decisions resulting from the medical screening of candidates are dictated as much by state and federal regulations as by accepted medical practices. It is therefore imperative that screening physicians as well as hiring authorities have an adequate understanding of the legal issues underlying medical screening for occupational suitability.

This chapter will distill both federal and state disability laws as they relate specifically to the conduct of preemployment medical screening of entry level peace officers in California. However, this information cannot and should not be considered legal advice; legal counsel should be consulted when specific compliance questions arise.

## BACKGROUND

California law requires all individuals empowered as peace officers to be evaluated by a licensed physician and surgeon to ensure that they are free from any medical or physical condition which might adversely affect their exercise of these powers [[2 Cal. Gov. Code 1031\(f\)](#)]. POST requirements on the conduct of this examination are spelled out in [POST Commission Regulation 1954](#).

California and federal law dictate the manner in which preemployment medical examinations can be conducted and the manner in which medical suitability determinations should be reached. The California Fair Employment and Housing Act (FEHA) was first enacted in 1975 to prohibit employers from discriminating on the basis of physical handicap or medical condition. In 1990, the passage of the U.S. Americans with Disabilities Act (ADA) prohibited employment discrimination on the basis of physical or mental disabilities on a national level.

Since their initial enactment, both FEHA and the ADA have undergone several amendments and revisions, largely to offset Supreme Court and other judicial decisions that were seen as weakening the rights of disabled applicants and employees. Most recently, in 2008 the Americans with Disabilities Act Amendments Act (ADAAA) extended coverage to individuals who heretofore were not protected under the ADA. FEHA protections and requirements are equal or in some instances greater than those of the ADAAA.

## WHO IS DISABLED

The ADAAA stipulates that individuals are considered disabled if their impairment substantially limits one or more major life activities. Under the ADAAA, to be "substantially limited," candidates would have to show that they are *significantly restricted as compared with the average person in the general population*. The FEHA definition of disability does not require that the limitation be substantial. Moreover, individuals who are "regarded as"

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disabled are also protected, whether the condition is actual or perceived, and whether the condition actually limits or is only perceived to limit a major life activity.

**Medical Condition.** Unique to California law is the specific inclusion of “medical condition” as a protected disability. “Medical condition” is defined, in part, as any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. Unlike the physical disabilities discussed above, a medical condition need not be linked to a limitation in performing a major life activity in order to qualify as disability. In contrast, *all* impairments must be substantially limiting to merit entitlement under the ADAAA.

The unique “medical condition” provision of California law includes genetic characteristics not presently associated with any symptoms of any disease or disorder. However, as discussed later, it is unlawful to subject an applicant or employee to a test for the presence of specific genetic characteristics.

**Major Life Activity.** The list of “major life activities” is quite broad and includes walking, speaking, breathing, hearing, seeing, sitting, standing, reaching, lifting, sleeping, bending, eating, learning, concentrating, communicating, sexual functions, caring for oneself, controlling bowels, performing manual tasks, reading, and running – to name a few.

Working per se is also considered a major life activity, although to be considered disabled under the ADAAA an individual generally must be unable to perform a class of jobs, rather than just one specific position. In California, however, the inability to perform in one specific position may meet the disability threshold under FEHA.

**Mitigating Measures.** A disability determination must be made without regard to the impact of mitigating measures. Employers must not consider the ameliorative effect of medications, prosthetics, therapy, or other mitigation measures when analyzing whether an applicant or employee is disabled. The one exception is ordinary eyeglasses or contact lenses: individuals whose vision can be corrected to normal are not considered disabled, regardless of their uncorrected vision.

**Excluded Conditions.** Both state and federal law exclude certain conditions from protection. These include:

- Sexual behavior disorders, compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.
- Temporary, nonchronic impairments/conditions of short duration, and with little or no permanent impact (e.g., broken limbs, sprained joints, concussions, influenza, pregnancy). There is no precise length of time that distinguishes temporary from permanent (several months is a common rule of thumb).
- Physical characteristics, such as eye and hair color, left-handedness, height, or a predisposition to illness or disease.

- Advanced age (but medical conditions commonly associated with age, such as hearing loss and arthritis, are protected).

## WHO IS QUALIFIED

**Otherwise Qualified.** Regardless of the degree of disability, individuals are not entitled to protection under the ADAAA/FEHA unless they are found to be *otherwise qualified*. A qualified individual includes any person with the skill, experience and education to perform the essential functions of the job, with or without reasonable accommodation.

**Essential Job Functions.** Not every function that employees perform constitutes an essential function. The key to determining whether a job duty rises to the level of being "essential" is if the removal of the function would result in a fundamental change in the position itself.<sup>2</sup>

Decisions on medical suitability must be based on a complete, adequate understanding of the job and its medically-relevant demands. The next section, "Patrol Officer Job Demands: Their Implication for Medical Screening," provides listings of statewide patrol officer job functions based on several statewide job analyses performed by POST. It also includes several listings of patrol officer job demands that have relevance to the medical screening of candidates.

It is the employer's responsibility to analyze job functions of their officers and identify which of those functions are essential at their agency. [Commission Regulation 1954\(c\)](#) requires law enforcement employers to provide screening physicians with agency-specific peace officer duties, powers, demands, and working conditions upon which to base their suitability determinations.

This job information also allows physicians to provide information on the candidate's *functional limitations* to enable employers to themselves determine, in light of these limitations, whether the candidate is qualified. The physician must understand the job for which the candidate is being considered so that the appropriate functional abilities can be evaluated.

Medical screening decisions that are based on mistaken assumptions about what the job requires can well be discounted by the court. For example, in *King v. Yellow Freight System, Inc.* (2000), the court sided with the rejected candidate, finding that the employer presented inflated physical job requirements to several doctors who then determined that an employee couldn't perform the job.

When it comes to public safety positions, courts generally (but not always) accept the judgment of the employer in identifying essential job functions. For example, in *Hoskins v. Oakland County Sheriff's Dept.* (2000), a deputy sheriff at a county jail was deemed unqualified due to her inability to restrain inmates, even though deputies are infrequently

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<sup>2</sup> Note: To be able to perform job functions (required or otherwise), an individual must consistently show up for work. Therefore, a candidate whose medical status/history indicates a high likelihood for needing time off beyond what can be reasonably accommodated by the hiring agency could be considered unable to perform the essential job functions by virtue of these excessive absences.

called upon to do this. In their ruling, the appeals court acknowledged that controlling inmates is the reason the position exists, and that the consequences of a deputy's failure to successfully restrain inmates could be severe.

**Individualized Assessment.** Blanket rules forbidding employment of all individuals with a particular disability rarely survive legal scrutiny. In virtually all cases, medical screening decisions must be based on an assessment of specific risk posed by the individual and the specific physical impairment creating the risk. This evaluation cannot be based upon stereotypes, patronizing assumptions, or generalized fears about risks. Nor can it be based on speculation about health insurance or workers compensation costs. Rather, it must be based upon *reasonable, medical judgment* that itself is based upon the most current medical knowledge and/or best available objective evidence. Reasonable medical judgment may include: (1) input from the candidate; (2) experience of the candidate in previous jobs; and (3) documentation from specialists and/or direct knowledge of the candidate. The assessment must also include consideration of reasonable accommodations as a means of eliminating or reducing the level of risk.

## REASONABLE ACCOMMODATION AND MITIGATING MEASURES

If a candidate with a disability is found unable to perform an essential job function, the next step is the consideration of reasonable accommodation options. A reasonable accommodation is defined as "any change or adjustment to a job or work environment that permits a qualified candidate or employee with a disability to participate in the job application process, to perform essential job functions, or to enjoy the benefit and privileges of employment equal to nondisabled employees."

Many classic forms of reasonable accommodation do not apply to the peace officer position (e.g., wheelchair ramps); however, there are several types of accommodation that are pertinent, including:

- Restructuring a job by reallocating or redistributing **marginal** job functions;
- Altering when or how an essential function is performed;
- Permitting use of accrued paid leave or unpaid leave for necessary treatment;
- Modifying examinations, training materials or policies (e.g., use of learning aids);
- Acquisition or modification of equipment and devices (e.g., modified car seats or uniforms).

It is the *employer's* obligation to engage in a timely, good faith, *interactive process* with the candidate in order to determine whether there exists an effective, appropriate reasonable accommodation, as well as to make the ultimate selection of the reasonable accommodation that would allow satisfactory performance of the essential job functions.<sup>3</sup> Candidates must also cooperate in the interactive process; they cannot refuse an accommodation merely out of preference, nor can they refuse to provide additional

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<sup>3</sup> A Job Accommodation Network (JAN) has been established to assist employers in identifying appropriate reasonable accommodations. The JAN telephone number is (800) 526-7234.

information as necessary (for example, updated medical records).

Although the *physician* can identify work restrictions, limitations, or other constraints that must be considered before placing the individual on the job, it is the *employer* who has the ultimate responsibility for determining if an accommodation is not only "reasonable" (i.e., would actually enable the candidate to perform the job), but also one that would not constitute an "undue hardship." To be considered an undue hardship, an accommodation must be unduly costly, extensive, substantial, or disruptive, or one that would fundamentally alter the nature or operation of a business.

Some of the most common forms of reasonable accommodation relevant to peace officer candidates are not actually reasonable accommodations, but rather mitigating measures. Mitigation measures include things that lessen or ameliorate the effects of impairments, such as medications or medical devices. Medical monitoring programs can also be seen as mitigating measures, including the use of glucose monitoring systems by those with diabetes, the use of anti-epileptic drugs by those with epilepsy, and the use of soft contact lenses or other corrective devices for those with vision impairments.

The use of pre-placement contracts and monitoring systems can ensure complete and safe compliance with a prescribed regimen. Examples of pre-placement agreements in the Manual are contained in the sections dealing with diabetes ([Endocrine System](#)) and contact lens wear ([Vision](#)).

Monitoring medications is not generally considered the purview of the employer; however, an employer may be *permitted* to monitor medications if it is necessarily job-related and consistent with business necessity; that is, if there is a reasonable belief, based on objective evidence, that the candidate's ability to perform essential functions would be impaired by the condition or he/she would pose a *direct threat* as a result of the condition.

**Direct Threat.** An employer may exclude a person who poses a *direct threat* -- a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced by reasonable accommodation. The direct threat assessment must be based on the most current medical knowledge and/or on the best available objective evidence. Relevant evidence may include input from the individual, the experience of the individual in previous similar positions, and opinions of medical doctors or other health care professionals who have expertise in the disability involved and/or direct knowledge of the individual.

Specific factors to be considered when evaluating risk level include:

1. The duration of the risk (i.e., whether the risk is present throughout the work day or only at certain times or under certain conditions);
2. The nature and severity of the potential harm (i.e., what an employer believes could happen to the individual and/or others while performing the job, and how severe the employer regards the anticipated harm);
3. The likelihood that the potential harm will occur;
4. The imminence of the potential harm; and
5. Consideration of relevant information about the individual's past work history.

Although a “significant” risk implies a high potential for serious harm, courts have generally afforded great deference to law enforcement and other public safety employers, given the public health and safety implications inherent in law enforcement and the likelihood of encountering extremely stressful and dangerous situations during the course of their work (*Brownfield v. Yakima*, 2010). Case law reveals that courts typically balance the likelihood of risk against the severity of potential harm. In *Burroughs v. City of Springfield* (1998), for example, the court stated that “the risk of an armed patrol officer being unable to function in an emergency situation is not a risk we are prepared to force a police department to accept. The inherent and substantial risk of serious harm arising from such episodes, given the nature of police work, is self-evident.” Similarly, in *Atkins v. Salazar* (5<sup>th</sup> Cir. 2011), a case involving a diabetic park ranger, the court held that because of “carrying out a dangerous arrest, responding to a medical emergency, or fighting a fire, the consequences of sudden incapacitation are sufficiently large to justify disqualification on the basis of even a small risk.”

At times it may be prudent to accept some increased risk, depending on the magnitude of the absolute risk. For example, as discussed in the [Neurology](#) section, a 1/2000 per year risk of seizing while driving a patrol car is three times higher than baseline, yet the absolute risk is quite small. On the other hand, a candidate with a risk > 1/100 has both a risk sixty times greater than baseline and an absolute risk that would likely expose the employer to negligent hire litigation by injured third parties.

**Future Risk.** One of the more common mistakes made in preemployment screening is disqualifying an individual because a medical condition will render him/her unable to perform the job *in the future*. Employment decisions must be based on the person’s ability to *currently* perform the job. It is permissible, however, to expect the candidate to be able to safely perform throughout the academy and throughout field training. Given that the basic academy program requires a minimum of six months to complete, followed by an 18-month field-training program, it is reasonable to consider a candidate’s ability to safely perform the essential duties of a patrol officer as extending over a two-year time period.

The physician must keep in mind, however, that the test for deciding whether a candidate poses a direct threat to future health or safety constitutes more than merely determining the likelihood of experiencing symptoms, but rather whether the individual will create a direct threat when those symptoms occur. For example, when evaluating a candidate with a history of epilepsy, consideration must be given to the candidate’s history of seizure triggered by job-specific stimuli and/or the likelihood of a random seizure occurring during police duties that could result in major injury to the officer or others.

It is important to note that it is the **employer**, not the **physician**, who has the ultimate responsibility to determine whether a risk is “significant,” whether the harm is “substantial,” and whether a reasonable accommodation is available. The risk of liability (on both the employer and the M.D.) is much greater when the physician makes a determination that the employer follows unquestioningly (Fram, D., 1993).

## MEDICAL QUESTIONS AND EXAMINATIONS

The ADA allows screening physicians to conduct any post-offer medical examination or make any medical inquiries as they see fit. However the medical suitability determinations themselves must be job-related and consistent with business necessity.

Questions and examinations should therefore be tailored, to the extent possible, on assessing the impact of a particular medical condition on the ability to perform essential job functions and/or pose a direct threat.

## GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

Title II of the [Genetic Information Nondiscrimination Act of 2008](#) (GINA) prohibits the use of genetic information in making employment decisions. Unlike the ADA, which allows for the acquisition of medical information at the post-offer stage, GINA prohibits the intentional acquisition of genetic information at any stage of the employment process (e.g., pre-offer, post-offer, fitness-for-duty). Medical history information can be collected on the candidates themselves, including histories and current manifestations of conditions, diseases or disorders. However, GINA prohibits collecting this same information on family members. This extends to biological family members up to great-great grandparents and first cousins, and to any non-biological family member who is a dependent of the candidate as a result of marriage, birth, or adoption.

GINA's prohibitions apply to questions seeking information about a covered family member's condition, disease or disorder, including substance abuse disorders, mental illness, etc. However, questions designed to understand the conduct or actions of such a family member and their consequences for the candidate are permissible, as long as the focus of the discussion is on the impacting behavior.

At the onset of the medical evaluation, it is imperative that candidates be made aware of the prohibition against the collection of genetic information as defined by GINA. Screening physicians must also include admonitions against providing such GINA-prohibited information when requesting information from other health care professionals. The following admonishment from the EEOC should be provided to all candidates prior to the evaluation:

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting, or requiring, genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

Use of this warning creates a "safe harbor" for employers who receive genetic information in response to a request for health-related information. Screening physicians who fail to

give such admonitions may not be able to claim the “inadvertent acquisition” defense in the event of a GINA violation. However, if family medical information is provided unintentionally, it cannot be considered when making employment decisions and, like the ADA’s treatment of medical information, is subject to strict confidentiality requirements.

## **CONFIDENTIALITY AND PRIVACY**

ADA and FEHA impose strict confidentiality limitations on employers and their agents (e.g., screening physicians) on the communication of medical information. Such information must be kept separate from the candidate’s background investigation file, limiting access only to those with a need to know: supervisors and managers who may be told about work restrictions and accommodations, first aid and safety personnel, government investigators, and workers’ compensation and insurance personnel.

A common misperception is that these confidentiality rules restrict the screening physician from disclosing relevant medical information to the employer. Since they serve as agents of the employer, there are no statutory prohibitions against screening physicians sharing medical information with the hiring authority and others involved in the peace officer hiring process. In their 1995 Enforcement Guidance, the EEOC indicates that medical information may be given to “appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA.”

This is not to say that the physician should share all the details of their evaluation with the law enforcement agency. As stipulated in [Commission Regulation 1954\(e\)\(3\)](#), additional information beyond the medical suitability determination itself should be limited to that which is necessary and appropriate, such as the candidate's job-relevant functional limitations, reasonable accommodation requirements, and potential risks posed by detected medical conditions.

It is important to note that the confidentiality provisions prohibit the sharing of any protected information resulting from the candidate’s medical evaluation with other prospective employers. However, the mere fact that a candidate was disqualified on the basis of the medical evaluation is not considered medical information.

The right to privacy is guaranteed by the United States and the California Constitutions. In California, the right to privacy is an inalienable right on par with defending life and possessing property (Article 1, Section 1, California Constitution). To survive allegations of privacy invasion, medical tests and inquiries must be directly related to the job demands and responsibilities.

## **SUMMARY**

Laws protecting the employment rights of qualified individuals with disabilities have many important implications for the medical screening of peace officer candidates. Those aspects of the law with the most direct relevance to medical screening of officers are reiterated below:

1. **The medical evaluation and the resulting determinations of medical suitability must be job-related and consistent with business necessity.**
2. **Physicians must be provided with a sufficiently detailed description of the job demands (essential and marginal) and working conditions that have relevance for medical screening.** Physicians cannot make a valid determination of a candidate's medical suitability unless they understand the tasks and demands of the job, and the conditions under which they are to be performed. All hiring agencies must ensure that the job information they supply to their physicians is current, accurate, and appropriate for medical screening.
3. **All screening decisions (particularly disqualifications) must be based on an explicit link between the candidate's condition(s) and his/her ability to perform specific job functions.** A summary decision that does not provide this level of detail is not adequate. The physician should identify the specific job duty(ies) or condition(s) that prohibit a candidate's performance as an officer and/or create an unacceptable risk of harm.
4. **Treat all medical information confidentially.** Maintain these records separately; limit the individuals who have access.
5. **Evaluate each candidate on a case-by-case basis; do not make blanket rules excluding all candidates with specific disabilities.** Examine each situation based on the particular facts of the individual and the job.
6. **Physicians and hiring authorities must use the correct risk evaluation criteria in making their screening recommendations and decisions, respectively.** Evidence associated with the immediacy, severity, and likelihood of the risk must all support any decisions of disqualification due to the direct threat posed by the candidate.
7. **Medical decisions should be supported by generally-accepted, current medical evidence.** Screening physicians must understand that their personal opinion is less important than evidence-based information and generally-accepted medical opinion. However, general medical evidence must also be appropriately applied to the specifics of the individual's condition.
8. **Consider reasonable accommodations and mitigating measures.** Before denying a candidate a job because of an inability to perform the essential functions of the job or due to a direct threat risk, there must be a consideration of accommodations and mitigating measures that could eliminate or reduce this risk.

## REFERENCES

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*Brownfield v. City of Yakima*, No. 09-35628 (9th Cir. 2010)

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U.S. EEOC. Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008. [www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm)

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