

2022 CALIFORNIA STATE HR

REASONABLE  
ACCOMMODATION AND  
COVID-19:  
TRAPS FOR THE UNWARY

# ADVOCACY & LEGISLATIVE CONFERENCE

Erika Frank

Of Counsel

Shaw Law Group, PC

SHERATON GRAND HOTEL • SACRAMENTO

APRIL 20-22, 2022



---

## REASONABLE ACCOMMODATION AND COVID-19: TRAPS FOR THE UNWARY

---

### Table of Contents

	<u>Page No.</u>
Please Note.....	1
COVID-19 Reasonable Accommodation.....	1
Reasonable Accommodation: The Basics .....	2
The “Interactive Process” .....	2
Reasonable Accommodation Protocols .....	3
<b>Disability Accommodations</b> .....	<b>3</b>
What Is a “Disability”? .....	4
Who Is a “Qualified Individual With a Disability”?.....	4
What Are the “Essential Functions” of a Position? .....	5
Working Onsite as an “Essential Function” .....	5
What About the “Direct Threat” Exception? .....	6
Who Chooses the Accommodation? .....	7
Undue Hardship/Burden .....	8
<b>Religious Accommodation</b> .....	<b>8</b>
What Is A “Religious Belief”?.....	9
What Makes a Religious Belief “Sincerely Held”? .....	9
What Is a “Reasonable Accommodation” In the Context of Religious Belief? ....	10
What Is an “Undue Hardship” In the Context of Religious Belief? .....	11
How to Obtain Information About Religious Beliefs .....	11
Ask Appropriate Questions.....	12
<b>Special Issues In COVID-19 Accommodations</b> .....	<b>12</b>
Vaccinations: How Disability or Religion May Come Into Play.....	13
Potential Vaccination Accommodations .....	13
COVID-19 Long-Haulers .....	14
Pregnancy .....	15
Protecting Other Household Members .....	15
Employees 65 and Over .....	16
Leaves of Absence .....	16
Working Remotely .....	17
Your “To Do” List .....	18

## ERIKA FRANK

Erika Frank is Of Counsel with Shaw Law Group. She is a well-respected employment attorney with a passion for advising and educating employers about California's complex workplace laws.

Leveraging more than two decades of legal, regulatory and legislative experience, Erika offers a practical and insightful approach to helping clients deal with the effects of California's employment laws on employee relations and workplace policies.

Erika is a sought-after speaker. She has produced and conducted numerous seminars and webinars on topics including leaves of absence, wage and hour compliance, and harassment, discrimination and retaliation prevention. She is known for her relentless energy and ability to transform legal concepts into simple stories and realistic scenarios. Erika enjoys educating employers and convincing them that the law can be fun (at least most of the time!)



**425 University Avenue  
Suite 200  
Sacramento, California  
95825**

**Telephone: 916.640.2240  
Facsimile: 916.640.2241**

**<http://shawlawgroup.com>**

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Please Note...

- This program is intended to be a general overview, and should not be considered legal advice regarding your specific situation
- Consult with your regular employment law counsel before making any changes to your practices

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## COVID-19 Reasonable Accommodation

- Employers must reasonably accommodate employees due to a medical condition or religious belief
- May affect vaccinations, face coverings, “long haulers,” and other COVID-19 issues
- Important to distinguish between legal entitlements and vaccine hesitancy/personal objections or concerns

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Reasonable Accommodation: The Basics

- Applies to applicants and employees
- Four factors for disability accommodations
  - Medically necessary
  - Effective
  - No undue hardship/burden on the employer
  - No direct threat
- Two factors for religious beliefs/practices
  - Sincerely held religious belief or practice
  - No undue hardship/burden on the employer

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Reasonable Accommodation Protocols

- Employees with medical conditions or religious beliefs may be entitled to accommodation if it will enable them to perform the “essential functions” of their jobs
- Employers find out more by engaging in an “interactive discussion” with the employee to assess

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## The “Interactive Process”

- Employers should not make decisions about reasonable accommodations without engaging in the “interactive process”
- The interactive process is a collaborative effort to determine what accommodations, if any, are appropriate
- “Interactive” means talking to the individual
  - Do not substitute written communications for conversations
  - Use written communications to confirm conversations
- The duty is ongoing

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Disability Accommodations

California  
State  
HR Advocacy  
and  
Legislative  
Conference



## What Is a “Disability”?

- A physical or mental impairment that “limits” a major life activity (i.e., makes it difficult to achieve)
  - May be temporary
  - May be invisible/without symptoms
- Always determined by a health care provider

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Who Is a “Qualified Individual With a Disability”?

- A “qualified individual with a disability”
  - Meets legitimate skill, experience, education, or other job-related requirements of the job
  - Can perform the “essential functions” of the job, with or without “reasonable accommodation”

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Are the “Essential Functions” of a Position?

- Essential functions are the tasks most frequently performed or fundamental to the job
- Physical, educational, or other criteria are not “functions”; explain why they are needed by describing the job
- Think of functions as tasks
- Ask yourself, “What does this person do?”

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Working Onsite as an “Essential Function”

- Working onsite is not an “essential function” for every job
- However, it may be an essential function even if you permitted an employee to temporarily work from home as a result of the pandemic. Consider issues such as:
  - Did you temporarily reassign essential functions/reduce the employee’s essential functions?
  - Is the employee successfully performing the essential functions while working remotely?
  - Is the request for accommodation related to the employee’s disability or medical condition (as opposed to generalized fears about COVID-19, convenience, or preference for working remotely, etc.)?

California  
State  
HR Advocacy  
and  
Legislative  
Conference



## What About the “Direct Threat” Exception?

- Employers are not required to accommodate employees who pose a “direct threat” at work, which is a “significant risk of substantial harm”
- Direct threat is determined by an “individualized inquiry” that assesses: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What About the “Direct Threat” Exception? (cont.)

- According to the EEOC, in the context of COVID-19, the “direct threat” analysis includes a determination that an unvaccinated individual will expose others to the virus at the worksite
- Must be based on reasonable medical judgment that relies on current medical knowledge, such as current level of community spread, statements from the CDC, and information from the employee’s health care provider

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Who Chooses the Accommodation?

- The employer:
  - Has ultimate discretion to choose among effective accommodations, but must consider all reasonable accommodations and employee's preference
  - May choose a less expensive accommodation, or one that is most appropriate from employer's perspective, so long as the accommodation is effective
  - Should not deny a desired accommodation without documenting a good reason for doing so
  - EEOC suggests consulting the Job Accommodation Network (<https://askjan.org>) and OSHA (<https://www.osha.gov/SLTC/COVID-19>) for accommodation resources

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Who Chooses the Accommodation? (cont.)

- The employee:
  - May reject an effective accommodation, but then may be unable to perform the essential functions of the job
- Be flexible based on the circumstances, but you need not provide an accommodation of employee's choosing if another accommodation is effective

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Undue Hardship/Burden

- Employers are not required to grant a requested accommodation that would cause an undue hardship or burden (i.e., one that is so unduly costly or extensive that it fundamentally alters the nature of the business operation)
- Larger employers are expected to devote greater effort and resources than smaller employers
- Analyze on a case-by-case basis; extremely high burden for employer

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Religious Accommodations

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Is a “Religious Belief”?

- Not social, political, or economic philosophies, or personal preferences
- Broadly defined and include “moral or ethical beliefs as to right and wrong. . .” usually concerning “ultimate ideas” about “life, purpose, and death”
- Employee may be the only person with such beliefs, and the beliefs need not be associated with a particular religion

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Makes a Religious Belief “Sincerely Held”?

- “Whether or not a religious belief is sincerely held...is rarely at issue” (EEOC)
- Employer should “*ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief,*” but may request additional supporting information if it has “*an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance*” (EEOC)
- Factors to question whether belief is “sincerely held” (EEOC)
  - Whether employee has behaved in a manner inconsistent with the belief

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Makes a Religious Belief “Sincerely Held”? (cont.)

- Whether the accommodation sought is particularly desirable for secular reasons
- Whether the timing renders the request suspect (e.g., it follows a similar request for non-religious reasons)
- Whether employer has reason to believe the request is for non-religious reasons
- If unsure, employer may seek “additional information” which may include written materials, or even employee’s first hand explanation

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Is a “Reasonable Accommodation” In the Context of Religious Belief?

- *“A reasonable accommodation... eliminates the conflict between the religious practice and the job requirement”* (2 C.C.R. § 11062)
- Examples include job restructuring, job reassignment, or modification of work practices
- Not segregation from customers or the general public, unless requested by employee (DFEH)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## What Is an “Undue Hardship” In the Context of Religious Belief?

- A religious accommodation is an “undue hardship” if it creates more than a de minimis cost or burden on employer (EEOC)
- *But, employer cannot establish an undue hardship by relying on “potential or hypothetical hardship,” or “[a] mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation”*
- This is a significantly lower standard than undue hardship in the context of disability accommodation

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## How to Obtain Information About Religious Beliefs

- There is no explicit interactive process obligation or independent legal claim for failure to engage, but failure to engage may have “adverse legal consequences,” because the employer may not have all the information it needs (for example, to establish undue hardship) (EEOC)
  - Also, an inquiry may help employer determine whether a belief is sincerely held
  - Whether employer may obtain additional information depends on the circumstances
- Information provided need not be “formal,” and may be written materials or explanations provided by employee

California  
State  
HR Advocacy  
and  
Legislative  
Conference



## Ask Appropriate Questions

- Generally, do not ask questions about the sincerity of the belief, unless you have objective reasons to question it
- Focus on the range of potential accommodations/solutions (e.g., safety-related changes to permit unvaccinated person to continue to perform their job)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Special Issues In COVID-19 Accommodations

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Vaccinations: How Disability or Religion May Come Into Play

- Employee cannot obtain a vaccination because of a medical condition or religious objection, and needs an exception to a mandatory policy
- Employee is not receiving the same privileges and benefits of employment because they cannot obtain the vaccination (e.g., a vaccination incentive, the ability to work onsite, freedom to travel)
- Employee is treated differently because they are unvaccinated

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Potential Vaccination Accommodations

- Wearing facial coverings or PPE
- Working a staggered shift
- Implementing additional safety or distancing protocols
- Requiring COVID-19 testing
- Providing private workspace (but not segregating employees, unless by choice)
- Alternating work hours or shifts
- Delayed vaccination (e.g., if medical condition/disability will permit vaccination at a later date, or if employee's objection is to a particular vaccination)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Potential Vaccination Accommodations (cont.)

- Allowing remote work
- Reassignment (last resort)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## COVID-19 Long-Haulers

- Long-haul COVID-19 may be a disability (definition is broad), even if temporary
- Engage in the interactive process and check in often, as conditions may improve
- Common symptoms are brain fog, fatigue, shortness of breath, headaches; may also cause depression or anxiety

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Pregnancy

- Pregnancy alone is not a disability, but some disabilities are pregnancy-related
- Pregnancy disabilities may require accommodation
- Pregnant employees who do not wish to be vaccinated but do not have a disability should be treated like other similarly situated employees (EEOC)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Protecting Other Household Members

- Protecting others is not required (e.g., permitting remote work because a family member has a medical condition that increases COVID-19 risks)
- Employers should consider employee relations issues in crafting solutions
  - Communicate sensitively about loved ones
  - Perceptions of fairness and consistency (e.g., the “optics” of allowing a manager to work remotely because of a family member with a medical condition, but direct reports are required to work onsite)

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Employees 65 and Over

- Despite increased COVID-19 risks, there is no federal or state employment protection based on age alone
- Do not assume protections are needed or desired
- Obviously, some medical conditions are more common as employees age, and merit disability discrimination analyses

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Leaves of Absence

- Employees may be entitled to leave under existing laws (FMLA, CFRA, SB 114 sick leave)
- Beyond that, ensure leave is reasonable and effective
- Indefinite leave is not effective
  - Leave for the duration of COVID-19 is indefinite
  - Do not make decisions until you participate in the interactive process

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Working Remotely

- Working remotely may be an effective accommodation for certain conditions/issues
- It may not be effective or required for all jobs, even if provided temporarily in response to the pandemic
- According to EEOC, employer cannot require if employee does not want it (i.e., segregating employee from the public or coworkers)
- Some employees may prefer it, especially if previously provided the option
- There may be some social/cultural opposition to onsite work

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## Working Remotely (cont.)

- If granted, consider the duration (and limit it!)
- Recognize that extending remote work over the longer term will make it more difficult to establish that the work must be performed onsite
  - This may be important if an employee wants “permanent” remote work as a reasonable accommodation in the future
  - It also may be important to your organization’s culture
  - Legally, it can lead to unintended consequences and ambiguity, particularly if employees move

California  
State  
HR Advocacy  
and  
Legislative  
Conference



## Your “To Do” List

- Develop a vaccination plan/protocol (if haven't already)
- Conduct an individualized assessment of each employee's request
- Engage in the interactive process and document
- Obtain medical certification for accommodation requests based on a disability
- Properly assess accommodation requests based on religion
- Document again!

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## “Workplace Wake-Up With Jen” Podcast

- Join us for a new episode every Wednesday morning
- Listen, subscribe, and comment where you get your podcasts



California  
State  
HR Advocacy  
and  
Legislative  
Conference

## 2022 Upcoming Webinars

### **"Train-the-Trainer": The Essentials of EEO Compliance Training**

April 26

### **Sexual Harassment Prevention and Other EEO Issues (SB 1343 Compliance Training for Staff)**

May 5

August 11

October 20

December 6

### **Sexual Harassment Prevention and Other EEO Issues**

#### **(AB 1825/SB 1343 Compliance Training for "Supervisors"/All Employees)**

May 10

August 9

October 13

December 8

### **Intensive Workshop: Effectively Managing Leaves of Absence and Reasonable Accommodations**

September 20 and September 29

### **Intensive Workshop: Conducting Effective Internal Investigations**

October 4, October 11, and October 18

### **California Employee Handbook Update (2023)**

November 10

### **Annual Employment Law Update (2023)**

December 1

December 7

January 10, 2023

[Click Here to Register Online](#)



California

State

HR Advocacy

and

Legislative

Conference

## Our DFEH Partnership

“Workplace Insights with Jen and the DFEH!”

Every month, Jen and Adam Romero, the DFEH’s Deputy Director of Executive Programs, cover a key employment law topic and answer your questions! Topics TBA as developments dictate.

Check out dates and topics here:

<https://shawlawgroup.com/employment-law-training-calendar/>

California  
State  
HR Advocacy  
and  
Legislative  
Conference

## California State HR Advocacy & Legislative Conference

# Thank You!



425 University Ave, Suite 200  
Sacramento, California 95825  
Telephone: 916.640.2240  
Facsimile: 916.640.2241

Email: [info@shawlawgroup.com](mailto:info@shawlawgroup.com)  
Website: <http://shawlawgroup.com>





If you are interested in receiving free legal updates and announcements of our public seminars, please provide the following information:

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Company: \_\_\_\_\_  
Address: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
E-Mail: \_\_\_\_\_

Would you like to receive more information about the employment law services our Firm provides? ☐ Yes ☐ No

Give completed forms to Jennifer Shaw,  
email to: [pchavez@shawlawgroup.com](mailto:pchavez@shawlawgroup.com), or  
fax to: (916) 640-2241.