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## 2009 CIVIL RIGHTS YEAR

*The State Bar Labor & Employment Law Section has joined with the California Department of Fair Employment & Housing to celebrate the FEHA's half-century mark.*

Throughout 2009, look for articles and special features in each issue of the Law Review with a special focus on the FEHA.

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# Fitness-for-Duty Examinations: Assessing the Legal Rights and Obligations under the Fair Employment and Housing Act and Related Laws From the Employer and Employee Perspectives

**By Mary L. Topliff, Esq., and Angela K. Perone, Esq.**

What is an employer to do if an employee starts to exhibit symptoms of a mental or physical condition that could potentially make him or her dangerous in the workplace? For example, what if an employee starts to behave erratically at work, and appears to display symptoms of bipolar disorder? The employer should obviously be concerned that the employee may harm himself or someone else in the workplace. The employer may also be worried about the employee's ability to continue performing his or her job competently. For these reasons, an employer may, under certain circumstances, require the employee to undergo a psychological or physical examination in order to assess whether he or she is able to perform the job, poses a safety risk, or may require an accommodation.

The following article explores the legal requirements and ramifications of employer-required medical and psychological examinations in the post-hire context, referred to as "fitness-for-duty" examinations.

## WHAT CIRCUMSTANCES JUSTIFY A FITNESS-FOR-DUTY EXAMINATION?

Both the Fair Employment and Housing Act (FEHA) and Americans with Disabilities Act (ADA) permit fitness-for-duty examinations. According to the FEHA, Government Code section 12940(f)(2), covered employers may require that an employee undergo a medical or psychological examination or make medical or psychological inquiries of employees that are "job-related and consistent with business necessity." The ADA contains language similar to the FEHA[1] and provides that covered employers may make inquiries into the ability of an employee to perform job-related functions.[2]

There is no published decision interpreting the FEHA's guidelines for fitness-for-duty examinations, or the types of

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# Fitness-for-Duty Examinations

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circumstances that would justify an employer's requirement.[3] Moreover, there is no statute or regulation defining the term "business necessity." However, the FEHA provides a covered employer with a defense to a discrimination claim where an employee cannot perform the essential functions of the position even with reasonable accommodations, or cannot do so in a manner that would not endanger the health or safety of the employee or others.[4] The employer cannot, however, claim that an individual poses a health threat because the disability poses a *future* risk.[5] Thus, the "business necessity" that drives the decision to require a fitness-for-duty examination would appear to require factual circumstances in which the employee cannot perform the essential functions of the job due to a physical or mental disability, or the reasonable appearance thereof, or there is a present safety risk due to the employee's condition.

Since the ADA has contained a fitness-for-duty provision from its inception, various federal courts have opined on the subject. The Ninth Circuit Court of Appeals, in *Yin v. State of California*,[6] held that business necessity is present under the ADA to justify a fitness-for-duty examination when an employee's health problems have had a substantial and injurious impact on his or her job performance.[7] It would thus be appropriate for an employer to require an employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether and to what extent the employee is disabled.[8]

Relying on *Yin*, the Sixth Circuit, in *Sullivan v. River Valley School District*, held that there must be "significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can 'perform job-related functions.'"[9] The *Sullivan* court further noted that the same rule applies when requiring a mental examination if aberrant behavior similarly affects an employee's job performance.[10]

The *Sullivan* court rejected plaintiff's contention that employers should be limited to ordering examinations when there is objective evidence that the employee poses a direct threat to himself or others.[11] It noted that an employee's protection from harmful intent by an employer stems from the requirement that there is evidence sufficient for a reasonable person to doubt whether an employee is capable of performing the job, and that any examination is limited to determining an employee's ability to perform the essential job functions.[12] The court went on to note that threatening other employees disqualifies an employee from a job.[13]

The Equal Employment Opportunity Commission issued a "Guidance on Disability-Related Inquiries and Medical Examinations" in July 2000, in which it observed that an employee's actual job performance is the best measure of his or her ability to do the job. It advised that a medical examination may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."[14]

Indeed, courts have upheld mandatory fitness-for-duty examinations in the following circumstances:[15]

- Outburst by attorney in court towards opposing counsel and erratic behavior thereafter;[16]
- Multiple outbursts and inappropriate behavior;[17]
- Threats of violence and incidents of insubordination;[18]
- Disruptive and abusive verbal outbursts at school board meetings and disparaging remarks about superintendent with threat;[19]
- History of stress-related absences;[20]
- Excessive absences;[21]
- Arguments and inability to properly interact with co-workers;[22] and
- Diabetic episodes.[23]

### WHAT INFORMATION OBTAINED FROM A FITNESS-FOR-DUTY EXAMINATION IS SUBJECT TO DISCLOSURE?

Employees have privacy rights guaranteed under the federal and state constitutions, and by statute, that prevent certain information from being disclosed to their employers. California courts have held that medical and psychiatric histories fall within the zones of privacy created by Article I, section 1 of the California Constitution.[24]

Moreover, the California Confidentiality of Medical Information Act (CMIA)xxv protects the confidentiality of medical information for patients by restricting the release of medical information. The CMIA requires written authorization from a patient before a health care provider can release medical information.[26]

Section 56.10(c)(8)(B) of the CMIA allows a health care provider to disclose certain medical information to the employer if the health care provider provided health care services at the specific prior written request and expense of the employer. The health care provider may disclose medical information that describes "functional limitations" of the patient that may entitle the patient to leave work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of the medical cause may be disclosed.[27]

In *Pettus v. Cole*, a California appellate court found that a doctor's report containing detailed medical, family, and social histories, a psychiatric disability finding, and a thorough diagnosis of a patient's psychiatric condition went beyond the permissible disclosure of information to an employer who had requested and paid for a fitness-for-duty examination.[28] Thus, employers who are requiring a fitness-for-duty examination should ensure that the information they receive from the examining doctor complies with the CMIA.

### DOES AN EMPLOYER RUN THE RISK OF IMPROPERLY "REGARDING" THE EMPLOYEE AS HAVING A DISABILITY?

Both the ADA and the FEHA co-ver disabled employees as well as employees whom the employer has regarded or treated as having had any physical or mental disability or medical condition that makes achievement of a major life activity difficult.[29] These laws also cover employees if they were regarded or treated as having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical or mental disability or medical condition.[30]

In *Gelfo v. Lockheed Martin Corp.*,[31] the California Court of Appeal reversed a directed verdict in favor of the employer. The court found that the employer had regarded the plaintiff's back injury as sufficiently debilitating that it either made his ability to perform the job difficult or was likely to do so in the future.[32] Lockheed Martin had relied on qualified medical

evaluation reports and deposition testimony in connection with plaintiff's workers' compensation action in concluding that no reasonable accommodation was available. The court noted that employers ought not simply defer to a physician's opinion without first assessing the objective reasonableness of the conclusions.[33] It went on to hold that employers owe a duty to provide a reasonable accommodation to an employee who is not actually disabled, but regarded as having a disability.[34] To categorically deny reasonable accommodations to those who are regarded as disabled would allow biases of others to impermissibly deny an impaired employee his or her job due to the mistaken perception that the employee suffers from an actual disability.[35]

Although *Gelfo* did not involve a fitness-for-duty examination requirement by the employer, it raised the question as to whether an employer who requires such an examination "regards" its employee as disabled in doing so. The court in *Sullivan v. River Valley School District*,[36] held that an employer needs to be able to determine the cause of an employee's aberrant behavior without being automatically subjected to a finding that it has regarded the employee as disabled. It noted that an employer's perception that health problems are adversely affecting an employee's job performance are not tantamount to regarding the employee as disabled.[37]

Moreover, FEHA sections 12940(f)(1) and (2) are not limited to employees who have disabilities, whether actual or perceived, or whether covered or not covered by the FEHA. Further, section 12940(f)(2) states that an employer may "require *any* examinations or inquiries" so long as they are job-related and consistent with business necessity. Section 12940(m) requires covered employers to make reasonable accommodations for the known physical or mental disability of an employee, unless undue hardship would result. Reading these provisions together suggests that if an employer reasonably believed that an employee was unable to perform the duties of the position based on objective evidence, the fitness-for-duty examination would determine if a reasonable accommodation would enable the employee to perform the job. Therefore, it would seem unlikely that an employer's requirement that an employee submit to a fitness-for-duty examination would in and of itself result in a finding that it had inappropriately regarded the employee as disabled.[38]

The results of the examination and the action the employer takes based thereon will more likely dictate whether it has a duty to accommodate and how it will do so. As *Gelfo v. Lockheed Martin* instructs, employers must be careful not to form assumptions about the employee's abilities to avoid "regarding" the employee as disabled, without assessing reasonable accommodations.[39]

## LEGAL RAMIFICATIONS

The FEHA's requirement of reasonable accommodation is triggered when the employer becomes aware of an employee's disability, which may occur because it is an obvious disability, the employee has disclosed the condition, or the employer has obtained a medical opinion through a fitness-for-duty examination.[40] The three primary results of an examination are: (1) the employee is qualified to perform the job without the need for any accommodation and poses no safety risk; (2) the employee will be able to perform the job with a reasonable accommodation; or (3) the employee is not qualified to perform the job due to his or her condition or due to a safety risk, and there are no reasonable accommodations that would enable him or her to safely do so.

If the employee is qualified and requires no accommodations, the employer must return the employee to the job or risk a disability discrimination claim. If the employee requires reasonable accommodations upon returning to work, the employer must explore if and how this can be accomplished. Accommodations can include a wide variety of job or work station modifications. Several California courts have held that an employer has an affirmative duty to reassign an employee with a disability if an already funded, vacant position at the same level exists.[41] However, various federal courts have found that an employer is not required to accommodate an employee with a disability through reassignment if other employees are more qualified for the vacant position.[42]

If the determination is that the employee is not fit to return to work, the employer must consider whether the employee is temporarily unable to perform the essential functions of the job and, if so, whether a leave of absence is required or appropriate. If the employee's condition qualifies as a "serious health condition" and he or she is otherwise eligible, covered employers are required to provide such an employee with up to twelve work weeks of unpaid, job-protected leave under the federal Family Medical Leave Act (FMLA)[43] and the California Family Rights Act (CFRA).[44] Other California leave laws may also come into play.[45] It should be noted that fitness-for-duty certifications in the context of an employee returning from a medical leave under the FMLA/CFRA are much more limited in scope than under the FEHA and the ADA.[46] If FMLA/CFRA do not apply or have already been exhausted by the employee, additional time off must be evaluated as a disability accommodation under the FEHA (and the ADA).[47]

If the employee cannot perform the essential functions of the job with reasonable accommodations, or the employee poses an imminent and substantial safety risk to herself or others, the employer may have an affirmative defense for terminating or refusing reinstatement. However, the CMIA creates limitations on terminating an employee after learning information from a fitness-for-duty exam. Civil Code section 56.20 of the CMIA prohibits employers from using, disclosing, or permitting its employees or agents to use or disclose medical information that is not necessary for determining eligibility for paid and unpaid medical leave without a signed authorization from the patient.[48]

## THE EMPLOYER'S PERSPECTIVE

As noted above, the cases that have involved challenges by employees to fitness-for-duty examinations have largely resulted in findings of job-related reasons, dictated by business necessity. Although the courts may not have taken a strict view of the employer's rationale in reported cases thus far, it does not mean that employers should not be diligent about ensuring that there is, in fact, an objective basis for the decision to force the employee to submit to a fitness-for-duty examination. Any medical examination is an intrusion at some level on an individual; thus, employers would be well served by recognizing the considerations noted in the section below regarding the employee's perspective.

Moreover, counsel for employers should assess whether their conclusions regarding the examination are based on something objective and tangible (such as, "the employee has had fainting spells") compared to a less than rational belief as to the employee's safety threat (such as, "the employee is making everyone uncomfortable"). Ensure that the reasons are not exaggerated or based on fears or stereotypes. Mental disorders are susceptible to assumptions since they are less understood (and sometimes less tolerated) by laypersons.

The decision to go forward with an examination must be balanced with the risk of an accident or violent episode caused by the employee in question. In some cases, an employee may have already submitted medical certification from his or her own health care provider. The employer must determine if the risk is too great to rely on what might be a brief doctor's note.[49]

Once the employer makes the decision to require the fitness-for-duty examination, it must locate and retain a suitable medical professional. This presents a practical difficulty for many employers who do not have ready resources of medical specialists. Moreover, if the rationale for the examination is that the employee poses a safety risk, the employer may need to prove the extent of the employee's safety risk compared to others without such an impairment with expert testimony.[50]

If the employer has determined that it needs a medical opinion regarding the employee's fitness for the job, it may decide to place the employee on a leave of absence, particularly if there are safety concerns. The longer it takes the employer to locate the appropriate medical professional, the longer the employee will be off from work. Moreover, the time off should generally be paid, since the employer is requiring the examination as a condition of employment. This also means that the employer must pay for the total cost of the examination and any reports from the medical professional.[51]

The employer must be very careful and deliberate in the information conveyed to the medical professional conducting the examination. All information must be job-related, such as the employee's detailed job description and the job's physical requirements. For assessments regarding potential mental impairments, employers should provide a brief statement describing the employee's observable behaviors without any opinion or commentary. Finally, the employer must be specific as to what information is desired from the medical professional, ensuring that it follows the CMIA requirements.

Once it obtains the information from the medical professional, the employer must carefully observe its obligations to engage in an interactive dialogue with and, if possible, reasonably accommodate the employee. Avoid making assumptions about the employee's condition or ability to perform job duties in the future.

## THE EMPLOYEE'S PERSPECTIVE

One of the biggest concerns for employees in submitting to fitness-for-duty examinations is maintaining confidentiality and privacy in their medical records. An employee can prevent disclosure of certain medical information by making a specific written request upon the health facility.[52] However, a verbal instruction to one's doctor not to share such medical information with an employer is not necessarily sufficient to safeguard the information. For example, in *Garrett v. Young*, a patient verbally instructed her doctor not to discuss her medical issues with her supervisor, whom she alleged was harassing her at work.[53] The California appellate court in *Garrett* found that such an oral request was not protected under the CMIA and noted that the patient's expectation that "busy physicians" should be expected to recall oral instructions not to speak to specific parties was unreasonable because such an expectation would "unduly burden medical facilities with additional administrative work."[54] Thus, employees should make in writing any objection to disclosure.

Employees also face a disclosure pitfall when requesting medical or disability leave. For example, an employee injures his back outside of work. He informs his employer that he suffers lower back pain that will prevent him from working for a significant period of time. He then obtains several doctor certifications indicating that he is temporarily unable to work. Generally, an employer is not entitled to medical information regarding an underlying diagnosis or statement of medical cause pertaining to an employee's medical or disability leave.[55] However, because this employee previously disclosed information about his back injury to his employer, such information may not be protected under confidentiality and privacy laws.[56] Thus, an attorney representing an employee should caution the employee to avoid disclosing unnecessary medical information to her employer or potentially lose her right to maintain the confidentiality of the medical information.[57]

Employees do not abandon the confidentiality of their medical information simply by participating in an employer-paid fitness-for-duty exam. As noted above, the CMIA acknowledges that the employer is entitled to certain medical information from a fitness-for-duty examination that it specifically requested in writing and whose expenses the employer paid.[58] However, the mere fact that the employer has paid for the exam does not eradicate the employee's confidentiality.[59] In *Pettus v. Cole*, the court held that public policy warrants the existence of confidentiality in employer-paid examinations because otherwise employees would have a "great disincentive to full and honest disclosure."[60] Nonetheless, an attorney representing an employee should caution the employee that refusing to take an employer-paid fitness-for-duty examination could result in termination.[61]

Finally, an employee may have several recourses if an employer threatens to terminate the employee in order to protect the health or safety of the employee or of others.[62] The employee can request information on how the employer made the determination, to ensure that it was based on valid and objective data, as opposed to stereotypes.[63] The employee can also challenge any determination based on a health threat that poses a future risk.[64]

## CONCLUSION

Employers and employees have different concerns regarding fitness-for-duty examinations. Employers want assurance that an employee is capable of performing the essential functions of a job with or without a reasonable accommodation and will not pose an imminent or substantial safety risk to herself or others. In addition to demonstrating fitness for duty, an employee wants assurance that her confidentiality and privacy rights are protected when submitting to a fitness-for-duty examination. Such concerns need not be at odds with one another. California and federal case law has created a framework to protect employees' right to privacy and employers' need for workers who can safely perform the essential functions of the job. ⚖

## ENDNOTES

1. 42 U.S.C. § 12112(d)(4)(A) (covered employers "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.").
2. 42 U.S.C. § 12112(d)(4)(B).
3. Cal. Gov't Code § 12940(f)(1)-(2) was added to the FEHA by the Prudence K. Poppink Act (AB 2222) in 2001.
4. Cal. Gov't Code § 12940(a)(1); Cal. Code Regs., tit. 2, § 7293.8(c), (d); *see also* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r) (direct threat defense under ADA).
5. Cal. Code Regs., tit. 2 § 7293.8(e).
6. 95 F.3d 864 (9th Cir. 1996).
7. *Id.* at 868. *See also Nunes v. Wal-Mart*

*Stores*, 980 F.Supp. 1336, 1340 (N.D. Cal. 1997) (finding that employee who suffered fainting spells posed a direct threat to customers), *reversed by Nunes v. Wal-Mart Stores*, 164 F.3d 1243 (9th Cir. 1999) (noting that district court erred because it based its finding on deposition testimony from a doctor that was not available when the employee was terminated, which indicated that any risk of harm was "possible" but "extremely unlikely.").

8. *Id.*; *see also Rice v. City of Oakland*, 1999 U.S. Dist. LEXIS 8330 (N.D. Cal. 1999).
9. 197 F.3d 804, 811-812 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262 (2000). *See also Krocka v. City of Chicago,* 203 F.3d 507, 515 (7th Cir. 2000) (stating that if inquiries into the psychiatric health of an employee are job related and reflect a concern for the safety of employees, the employer may require the employee to undergo a physical examination designed to determine his ability to work or require specific medical information from the employee, depending on the specific facts).
10. *Id*. at 812.
11. *Id.*
12. *Id.* at 813.
13. *Id.*
14. United States Equal Employment Opportunity Commission: Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000).
15. In some cases, collective bargaining agreements were at issue which set forth the procedural requirements for fitness-for-duty exams, *see, e.g., Rice v. City of Oakland*, *supra*.
16. *Fritsch v. City of Chula Vista*, 2000 U.S. Dist. LEXIS 14820 (S.D. Cal. 2000).
17. *Ward v. Merck & Co., Inc.*, No. Civ.A. 04-CV-5996, 2006 WL 83114, at * 4, 9 (E.D. Pa. Jan. 9, 2006); *Moreno v. County of San Joaquin*, 2002 Cal. App. Unpub. LEXIS 4289 (2002).
18. *Williams v. Motorola, Inc.*, 303 F.3d 1284 (11th Cir. 2002).
19. *Sullivan v. River Valley, supra*.
20. *Rice v. City of Oakland*, *supra*.
21. *Yin v. State of California, supra*.
22. *Fredenburg v. Contra Costa County Dept of Health Servs.*, 172 F.3d 1176 (9th Cir. 1999).
23. *Hutton v. Elf Atochem N. Am.*, 273 F.3d 884 (9th Cir. 2001).
24. *See e.g.*, *Long Beach City Employees Assn. v. City of Long Beach*, 41 Cal. 3d 937, 944 (1986); *Pettus v. Cole*, 49 Cal. App. 4th 402, 440-41 (1996); *Davis v. Super. Ct.*, 7 Cal. App. 4th 1008, 1019 (1992) (noting that a person's medical profile is an area of privacy which cannot be compromised except upon good cause; right of privacy extends to the details of one's personal life); *Cutter v. Brownbridge*, 183 Cal. App. 3d 836, 842 (1986), *disapproved on another ground in Jacob B. v. County of Shasta*, 4 Cal. 4th 948, 962 (2007).
25. Cal. Civ. Code § 56 et seq.
26. Cal. Civ. Code § 56.10(a).
27. Cal. Civ. Code § 56.10(c)(8)(B).
28. 49 Cal. App. 4th 402, 432-33 (1996).
29. Cal. Govt. § 12926(i)(4), (j)(4), (k)(4).
30. Cal. Govt. § 12926(i)(5), (j)(5), (k)(5).
31. 140 Cal. App. 4th 34 (2006).
32. *Id.* at 49.
33. *Id.* at 50.
34. *Id.* at 55, *citing Williams v. Philadelphia Hous. Auth.*, 380 F.3d 751 (3d Cir. 2004). However, the ADA Amendments Act of 2008, effective January 1, 2009, explicitly provides that there is no reasonable accommodation obligation for those "regarded as" being disabled. 42 U.S.C. § 12201(h).
35. *Id.* at 60.
36. *Sullivan v. River Valley Sch. Dist., supra,* at 810.
37. *Id.; see also Cody v. CIGNA Health Care of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) (holding that an employer's awareness of behavior that one might associate with an impairment does not of itself demonstrate treatment of an employee as disabled and requiring the employee to be evaluated before returning to work does not run afoul of the ADA); *Jackson v. Lake County*, No. 01C6528, 2003 U.S. Dist. LEXIS 16244, at 27-28 (N.D. Ill. 2003) (holding that non-disabled employee need not prove he is qualified individual with a disability to state a claim under the ADA provision allowing for medical examinations of employees).
38. *See Walton v. U.S. Marshals Serv.*, 492 F.3d 998 (9th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 62 (Jan. 7, 2008) (holding that an employee's failure to pass an audiology test during an annual physical examination, which resulted in her failure to meet the employer's hearing standards for the job did not, without more, mean the employer had "regarded" the employee as disabled, and setting forth appropriate evidentiary standards).
39. 140 Cal. App. 4th at 55.
40. Cal. Gov't Code § 12940(m); Calif. Code Regs., tit. 2, § 7293.9.
41. *See e.g.*, *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376, 1389 (2000) (stating that reassignment obligation under the FEHA entails "affirmative action" for an employee with a disability); *Jensen v. Wells Fargo Bank*, 85 Cal. App. 4th 245, 262 (2000) (noting that an employee with a disability who is being accommodated by reassignment should be given preferential consideration over employees who are more qualified or have more seniority); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-65 (10th Cir. 1999) (en banc) (finding that reassignment under the ADA resulted in automatically awarding a position to a qualified employee regardless of whether other better qualified applicants were available).
42. *See Huber v. Wal-Mart Stores*, 486 F.3d 480, 483 (8th Cir. 2007) (finding that employer did not violate duty under ADA to provide reasonable accommodation to employee by failing to give a current disabled employee preference for filling a vacant position when the employee was able to perform the job duties but was not the most qualified candidate), *cert. granted*, 76 U.S.L.W. 3303 (U.S. Dec. 7, 2007) (No. 07-480); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027-28 (7th Cir. 2000) (finding that ADA reassignment does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant).
43. 29 U.S.C. § 2611 et seq.
44. Cal. Gov't Code § 12945.2.
45. *See, e.g.,* Cal. Gov't Code § 12945(b)(2) (a covered employee who is temporarily disabled due to pregnancy, childbirth, or related medical condition may be entitled to up to four months of job-protected leave under California's Pregnancy Disability Leave Act).
46. 29 C.F.R. § 825.310 (1995); new rule codified at 29 C.F.R. § 825.312 (effective Jan. 16, 2009) (requires the employer to provide the employee with a list of essential job functions if the employer requires the fitness-for-duty certification to address the employee's ability to perform the essential functions of the employee's job).
47. *Nunes v. Wal-Mart Stores*, *supra,* 164 F.3d at 1247 (finding that an employee's inability to work during a leave period —pursuant to the FMLA and the CFRA did not exclude her from relief under the ADA as long as the employee could establish that her leave was a reasonable accommodation); *Dang v. Solar Turbines, Inc.*, No. 07cv520 BTM (POR), 2007 WL 4536632, at * 4 (S.D. Cal. Dec. 18, 2007) (rejecting employer's argument that because employee was unable to perform essential functions of his job while on medical leave an employee was not a "qualified individual" and thus finding that employee was eligible for protection under the ADA); 29 C.F.R. 1630.2(o); *Velente-Hook v. E. Plumas Health Care* (E.D. Cal. 2005) 368 F.Supp.2d 1084 (finding that employer was required to reasonably accommodate employee by granting her personal leave while she completed chemotherapy).
48. Cal. Civ. Code § 56.20(c)(3); *see also Pettus*, 49 Cal. App. 4th at 451 (finding that employer's use of confidential medical information as grounds for terminating employee violated section 56.20 of CMIA).
49. *See, e.g., Porter v. United States Alumoweld Co.,* 125 F.3d 243, 245-46 (4th Cir. 1997) (upholding a discharge in an ADA case where an employee had his private doc-

tor's release to work but refused to take a functional capacity evaluation required by the employer).

50. *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023 (9th Cir. 2003) (where among the factors considered by the court were the qualifications of the physicians involved and the refinery's doctors had no special training in liver disease whereas the complainant's treating physicians were specialists in toxicology and liver disease).
51. *See, e.g.,* Labor Code § 222.5 (prohibiting employers from requiring employees to pay for pre-employment medical or physical examinations).
52. Cal. Civ. Code § 56.16.
53. *Garrett v. Young*, 109 Cal. App. 4th 1393, 1406 (2003) (affirming directed verdict on patient's invasion-of-privacy claim for doctor who informed employer that patient suffered from itching and stress and was unable to return to work at that time because an oral request to the doctor not to discuss an employee's medical issues with patient's supervisor was not protected under section 56.16).
54. *Id.*
55. Cal. Civ. Code § 56.10(c)(8)(B); Cal. Code Regs. tit. 2 § 7297.11.
56. *Id.*
57. *See e.g.*, *Stolar v. S. Cal. Permanente Med. Group*, No. E028547, 2001 WL 1660046, at * 8 (Cal. Ct. App. Dec. 28, 2001) (finding that employee had no reasonable expectation of privacy in information she already provided to employer through previous notices).
58. *See Garrett v. Young*, *supra,* at 1398 n.2 (denying an employer's motion for summary judgment under section 56.10(c)(8)(B) because employer presented no evidence that employee consulted with the doctor at the request of her employer or that the visit was paid for by her employer).
59. *See Pettus, supra*, 49 Cal. App. 4th at 433 (noting that "[b]ecause the employer arranged and paid for the medical examination does not abrogate the employee's right to confidentiality of the information generated by the examination.").
60. *Id.*
61. *See, e.g., Porter, supra*; *Ward v. Merck & Co., Inc.*, *supra,* at * 4, 9 (granting employer's motion for summary judgment on employee's ADA and FMLA claims because employee refused to submit to a fitness-for-duty psychological exam after expressing erratic behavior, persistent non-communication, anger and hostility toward other co-workers)
62. Cal. Code Regs., tit. 2 § 7293.8(c), (d); *see also* 42 U.S.C. § 12113(b) (direct threat defense under the ADA).
63. *See Nunes v. Wal-Mart Stores*, *supra,* at 1340.
64. Cal. Code Regs., tit. 2 § 7293.8(e).

## New Labor & Employment Laws

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awareness, including the creation of the Construction-Related Accessibility Standards Compliance Act and the California Commission on Disability Access, an independent advisory body. The bill also includes new potential limitations on damages, including evaluating attorneys' fee awards requests in light of prior settlement discussions, and limiting statutory damages only to plaintiffs who actually personally encountered the violation or were actually deterred access.

**Streamlined Workers' Compensation Reporting (AB 2181)**

The Governor also signed a bill designed to eliminate duplication in the filing of workers compensation reports. Previously, all employers were required to file a complete report of occupational injury through the DLSR or with the employer's insurer. This bill eliminates the requirement to file the report with the DLSR, and instead requires insured employers to file the report with their insurer, and self-insured employers to electronically file a report to the Workers Compensation Information System, which is administered by the Division of Workers Compensation. This bill, which essentially eliminates the need to send a duplicative report to the DLSR, will become effective once the administrative director adopts regulations reflecting these changes.

**"Volunteer" Public Works Exemption Extended (AB 2537)**

California law generally requires workers paid on public works to be paid at least the general prevailing rate, but contains exemptions for work performed by "volunteers," as defined in Labor Code section 1720.4. This bill extends until January 1, 2012 (from January 1, 2009), the exclusion from the law governing "public works" for work performed by volunteers, volunteer coordinators, members of the California Conservation Corps or certified Community Conservation Corps, as defined. This bill also adds to section 1720.4 a requirement that the Director of Industrial Relations submit to the Legislature a written report providing specifically-enumerated information, including the number of complaints received regarding the use of volunteers on public works projects.

**Expanded Protections for National Guard Members (AB 2449)**

Federal and state law prohibit discrimination or retaliation against National Guard members deployed by the Governor and the President, and these laws generally require reinstatement and provide civil action rights if employers violate these provisions. California law previously authorized a district attorney to represent the service member at no charge to the service member. This new law expands these provisions allowing any city prosecutor to act as a service member's attorney.

**San Francisco Enacts New Commuter Benefits Ordinance (Municipal Ordinance 199-08)**

On August 22, 2008, San Francisco enacted municipal ordinance 199-08, requiring San Francisco employers to offer commuter benefits to employees in order to encourage them to use public transit or van pools. Effective January 19, 2009, employers with twenty or more employees will be required to provide commuter benefits to employees working more than ten hours per workweek in San Francisco. To comply, employers must provide one of the following commuter benefit programs to employees: (1) a program allowing employees to make pre-tax elections of up to $110 per month for commuting costs; (2) employer-provided transportation (e.g., vanpool, bus, etc.) at no cost to employee; or (3) an employer-provided transportation pass of at least $45 per month. Employers who fail to comply are subject to administrative or civil penalties.

### 2. NEW LAWS AFFECTING PUBLIC SECTOR EMPLOYMENT

The 2008 legislative session produced a mixed bag of public sector labor and employment laws, none of them even approaching the magnitude of last year's Firefighters Procedural Bill of Rights (AB 220). Most of this year's new public sector laws concern issues that affect only certain groups of public employees. Of