DEPARTMENT OPERATIONS MANUAL
CHAPTER 3 – PERSONNEL, TRAINING AND EMPLOYEE RELATIONS
ARTICLE 4 – EMPLOYEE WELLNESS PROGRAMS

Revised May 7, 2012

[Existing Sections 31040.1 through 31040.3 are unchanged]

31040.4 Return to Work Programs

Revised June 15, 2015

[Existing Sections 31040.4.1 through 31040.4.11 are deleted, and replaced with new Sections 31040.4.1 through 31040.4.13]

31040.4.1 Policy

It is the policy of the California Department of Corrections and Rehabilitation (CDCR) to provide an equal opportunity for all applicants and employees with disabilities. CDCR employees, including those in permanent intermittent positions, employment applicants, or interns are entitled to consideration for a reasonable accommodation. This policy applies to qualified individuals with permanent or temporary disabilities, or pregnancy related disabilities.

Contractors requesting accommodations shall consult with their hiring agency. If appropriate, CDCR will work with such hiring agency and contractor to evaluate the requests for accommodations.

31040.4.2 Purpose

CDCR is committed to complying with State and federal laws, including the Americans with Disabilities Act (ADA), Fair Employment and Housing Act (FEHA), and Uniformed Services Employment and Re-Employment Rights Act (USERRA), by making a good faith effort to:

- Engage in a timely, ongoing, interactive process with employees and applicants when there is knowledge of a physical or mental disability, or medical condition that limits their ability to perform the essential functions of their positions, or complete the application process.

- Provide a reasonable accommodation to all qualified employees or applicants who need such an accommodation, unless to do so would present an undue hardship on CDCR.

CDCR's goals are to:

- Keep employees productive in the work environment by eliminating barriers to employment for qualified individuals with disabilities, without waiving the essential function(s) of the position(s).

- Retain valued, experienced, and qualified employees.

31040.4.3 Definitions

31040.4.3.1 Americans with Disabilities Act

The ADA is a federal law that mandates the elimination of discrimination against individuals with physical or mental disabilities, with a record of a disability, or being regarded as having a disability.

31040.4.3.2 California Family Rights Act

The California Family Rights Act (CFRA) is a State law that grants eligible employees, who have more than 12 months and 1,250 hours (during the preceding 12-month period) of service with an employer, a right to take up to 12 workweeks of unpaid, job-protected leave in any 12-month period for medical leave related to a serious health condition; as well as to care for a family member who has a serious health condition; or bonding after the birth of a child, adoption, or foster care placement.

31040.4.3.3 Disability

A Disability is a physical or mental condition, which affects one or more body system(s) and limits one or more of a person's major life activities, or makes the achievement of a major life activity difficult; or a medical condition (cancer related or genetic characteristic). Working is a major life activity. Disability does not include compulsive gambling, kleptomania, pyromania, pedophilia, exhibitionism, voyeurism, or psychoactive substance use disorders resulting from current unlawful use of controlled substances or other drugs.

31040.4.3.4 Disability Retirement

Disability Retirement is a benefit for eligible employees of the State of California, which allows for a monthly pension and continuation of health benefits.

31040.4.3.5 Essential Functions

Essential Functions are the fundamental job duties of the employment position the individual with a disability holds or desires. Essential functions do not include the marginal functions of the position.

A job function may be essential because:

- The position exists to perform the function;
- A limited number of employees are available to perform the function; and/or
- The function is highly specialized and the person in the position is hired for his or her expertise.

Essential functions are defined in the written duty statement or List of Essential Functions. Some factors to consider when identifying essential functions are:

- The amount of time spent performing the function;
- The consequences of not requiring a person in this job to perform the function;
- The terms of a collective bargaining agreement;
- Work experience of employees who have performed the job in the past; or
- Work experience of employees who currently perform similar jobs.

31040.4.3.6 Fair Employment and Housing Act

The FEHA is State law that prohibits discrimination in employment against qualified individuals based on a physical or mental disability, or medical condition (cancer related or genetic characteristic); a history of a physical or mental disability; or being regarded as having a physical or mental disability. FEHA provides protections independent from those in the federal ADA.

31040.4.3.7 Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) is federal law that grants eligible employees, with more than 12 months and 1,250 hours (during the preceding 12-month period) of service with an employer, a right to take up to 12 workweeks of unpaid, job-protected leave in any 12-month period for medical leave related to a serious health condition; as well as to care for a family member who has a serious health condition; or bonding after the birth of a child, adoption, or foster care placement.

Unpaid, job-protected leave of up to 12 work weeks also may be granted to assist a family member who is called to active duty, or is stationed overseas, during military service. Additionally, up to 26 work weeks of unpaid, job-protected leave may be granted to care for a family member who has been injured in the military.

31040.4.3.8 Good Faith

Within the context of the interactive process, as used in this article, good faith means that the employer or designee and employee must communicate directly, exchange essential information, and neither side can delay or obstruct the process. For example, the employer or employee who rejects the reasonable accommodation proposed by the other party and offers no alternatives fails to engage in good faith in the interactive process.

31040.4.3.9 Health Care Provider

A health care provider is:

- A medical or osteopathic doctor, physician, or surgeon, licensed in California, or in another state or country, who directly treats or supervises the treatment of the applicant or employee;

- A marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations, including podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, nurse midwives, licensed midwives, clinical social workers, chiropractors, physician assistants, who directly treats or supervises the treatment of the applicant or employee; or

- A health care provider from whom an employer, or a group health plan's benefits manager, will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

31040.4.3.10 Hiring Authority

The Hiring Authority (HA) is any person authorized by the Secretary, CDCR, or the Receiver of the California Correctional Health Care Services (CCHCS), to hire, discipline and dismiss employees under his or her authority.

31040.4.3.11 Interactive Process

The Interactive Process, required by both the ADA and FEHA, consists of timely, good faith communication between the Return-to-Work Coordinator (RTWC), the supervisor or manager, and an employee or applicant, when necessary due to a physical or mental disability, or medical condition that limits an employee's or applicant's ability to perform the essential function(s) of his or her current position, or the position for which he or she is applying. The purpose of this communication includes identifying the employee's restrictions or limitations and determining whether the applicant or employee needs a reasonable accommodation to perform the essential functions of the job, and if so, what options are available to reasonably accommodate him or her. (Refer to Section 31040.4.5.2.)

31040.4.3.12 Limited Term Light Duty Assignment

A Limited Term Light Duty Assignment is the temporary placement of a CDCR employee who has medical limitations in his or her ability to perform the essential functions of his or her job. Such placement allows for the temporary waiver of the essential functions of the employee's position, or another position within the employee's bargaining unit, and shall not extend beyond 60 calendar days in a 6-month period for an employee with such medical limitations.

31040.4.3.13 Medical Personnel Actions

Medical Personnel Actions (MPA) are voluntary or involuntary, non-disciplinary personnel actions. MPAs are approved by the HA, in consultation with the Office of Employee Wellness (OEW) when necessary or required, and may include the transfer, demotion, termination, or the filing of a disability retirement application, on behalf of a permanent or probationary employee

who has become unable to perform the essential functions of his or her position with or without reasonable accommodation.

31040.4.3.14 Options Letter

The Options Letter is sent to an employee as part of the interactive process. This letter outlines the different options that may be available to an employee with a disability that impairs his or her ability to perform the essential functions of his or her position, and invites discussion of these options. (Refer to Section 31040.4.5.2.)

31040.4.3.15 Pregnancy Related Disabilities

A woman is disabled by pregnancy, childbirth, or a related medical condition, if in the opinion of her health care provider she is unable to perform any of the essential functions of her job, or if she is unable to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons.

31040.4.3.16 Qualified Individual with a Disability

A Qualified Individual with a Disability is one who possesses the necessary skill, experience, education, and other job related requirements of the employment position the individual holds or desires, and who, with or without a reasonable accommodation, can perform the essential functions of such position.

31040.4.3.17 Reasonable Accommodation

Reasonable Accommodation (RA) is any modification or adjustment to a job and/or the work environment that is effective in enabling an employee or applicant to perform the essential functions of the job the employee or applicant holds or desires. RA's may include, but are not limited to, providing assistive aids and services such as qualified readers or interpreters, job re-structuring, providing a modified schedule, providing additional training, providing paid or unpaid leave, or transfer/demotion, which are accommodations of last resort when no other accommodation is possible in the employee's current position.

The Department must reasonably accommodate a qualified individual with a disability, if that individual can perform the essential functions of his or her job with the RA. Failure to provide a RA to the known physical or mental limitations, or medical condition of an otherwise qualified person with a disability, absent an undue hardship to the Department, is considered discriminatory.

31040.4.3.18 Return-to-Work Coordinator

The RTWC is an individual at the analyst level, assigned to provide assistance and recommendations to employees, supervisors, managers, and HAs, regarding return-to-work matters relating to MPAs and requests for RA, in compliance with the ADA, FEHA, USERRA, the Civil Service Act, and other applicable laws. RTWCs shall engage in interactive discussions

with employees, supervisors, and managers to assist employees through the return-to-work process.

31040.4.3.19 Undue Hardship

Undue Hardship is any action requiring significant difficulty or expense incurred by CDCR when considered in light of the totality of the circumstances. For CDCR, this would include, but it is not limited to, any action that would endanger the health or safety of the employee or applicant requesting the accommodation, co-workers, inmates, wards or parolees; any action that violates a bargaining unit agreement; any action that creates a conflict with State or federal laws; or any action that results in a waiver of any essential function of a position.

31040.4.3.20 Uniformed Services Employment and Re-Employment Rights Act

The USERRA is a federal law that prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. Under USERRA, if a veteran has a disability incurred in, or aggravated during, his or her military service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service. If the veteran is not qualified for that position due to the disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status, and pay.

31040.4.4 Roles and Responsibilities

31040.4.4.1 Employee

An employee with a disability in need of a RA shall initiate the process by making a request for RA and cooperating in good faith with his or her supervisor, manager, RTWC, and/or HA in identifying modifications, equipment or services needed to accommodate the employee's functional limitations. Employees can submit a request for accommodation verbally, in any written format, or on a CDCR Form 855, Request for Reasonable Accommodation, which can be obtained from the local RTWC, or the OEW website.

If requested, the employee shall provide information on the need for a RA including medical documentation, as defined in Section 31040.4.5.3. **A medical diagnosis shall not be required.** Failure to provide the required medical documentation will result in the delay or denial of a request for accommodation.

Where reassignment to an alternate position is being considered as an accommodation because the employee is not able to perform the essential functions of his or her position with or without a RA, the employee shall also provide information about his or her educational qualifications and work experience that may help determine a suitable alternate position for which the employee is qualified and can perform the essential functions. Failure to provide personal qualifications, when requested, could result in CDCR having to rely on outdated information, and placement of

the employee in a position at a lower pay rate than the employee would have otherwise been qualified to receive.

31040.4.4.2 Supervisor/Manager

Supervisors and managers shall attend training on Equal Employment Opportunity covering State and federal laws which protect disabled employees from discrimination, and which require a RA be provided when an employee with a disability needs assistance in performing the essential functions of his or her job. (Refer to Chapter 3, Article 1, Section 31010.6.)

Supervisors and managers shall inform employees of the return-to-work policy and refer requests for RAs, either written or verbal, to the RTWC upon receipt of the request from an employee.

In addition, supervisors and managers shall refer employees to the RTWC when the supervisor or manager becomes aware that the employee may need a RA to perform the essential functions of his or her position (e.g. through observation, a third party, or the employee's request for leave due to a serious health condition under the FMLA or CFRA, or due to a work-related injury under the Worker's Compensation Act [WCA]).

Supervisors and managers shall work cooperatively with the RTWC to identify the essential functions of a position, and to discuss RA options. Supervisors and managers shall not waive (formally or informally) the essential functions of a position to accommodate a disabled employee.

31040.4.4.3 Return-to-Work Coordinator

RTWCs manage and process return-to-work cases to assist the HAs in providing disabled employees with an accommodation when necessary. RTWCs routinely must engage in interactive discussions with employees, supervisors, managers and HAs, to assist employees through the return-to-work process.

The RTWC shall review and process all requests for RA received from supervisors, managers, employees, or HAs. The RTWC shall meet with the employee and discuss possible RAs as part of the interactive process to find an effective RA. The RTWC shall ask employees to complete a CDCR Form 855, and assist the employee in completing the CDCR Form 855 as necessary. Completion of the CDCR Form 855 is not required to trigger CDCR's responsibility to provide a RA; even if the employee does not complete the CDCR Form 855, the RTWC must document the employee's request for a RA and engage in the interactive process with the employee. If the existence of a disability and/or the need for RA is not obvious, the RTWC shall request that the employee provide information on the need for a RA including medical documentation as defined in Section 31040.4.5.3. **A medical diagnosis shall not be requested**.

When additional medical information is needed, the RTWC shall ask the employee to sign a medical release authorizing direct communication between the RTWC and the employee's health care provider; or in the alternative, request the employee to provide the request for additional medical information to his or her health care provider and secure a written response from the

health care provider. The RTWC shall communicate with the employee's health care provider only if the employee has consented to such communication and the medical documentation received does not provide the information specified in Section 31040.4.5.3.

The RTWC shall monitor the submission and evaluation of medical information, as well as any correspondence between CDCR and the employee that is necessary to process the request for RA. If necessary, the RTWC shall ask the employee for additional information or inform the employee that additional information is needed before a decision can be made. Medical inquiries shall be limited to information specifically needed to address the request for a RA and outlined in Section 31040.4.5.3.

The RTWC shall evaluate each request and advise the employee of the return-to-work policy, as well as other employment options available under the return-to-work policy. Options that could be available to the employee shall be outlined in writing in an Options Letter to the employee. The RTWC shall consult with OEW, as needed, to determine the appropriateness of any chosen option and to verify any other options that may be available to the employee.

The RTWC shall provide recommendations to employees, supervisors, managers, and HAs regarding appropriate accommodations for every request for RA, after the RTWC has gathered the information, specified above, from the employee and/or the employee's health care provider. The RTWC shall submit the completed CDCR Form 855 or documentation of the request for RA, with the requisite attachments, to the HA with a recommendation for the HA to make a final determination.

The RTWC shall consult with the OEW, as necessary, when assistive devices or ergonomic equipment are requested in order to identify appropriate equipment, furniture, or facility modifications. The implementation of such approved accommodations should be coordinated with the appropriate Business Services and Accounting offices to purchase the necessary services, equipment, or furniture.

31040.4.4.4 Hiring Authority

Each HA shall have the responsibility to determine the appropriate course of action to follow when responding to requests for RA and providing RAs to qualified individuals with disabilities. The HA shall make every effort to accommodate each employee's individual needs and consider a combination of return-to-work options in reaching final determinations.

The HA shall be responsible for the oversight of the return-to-work functions within his or her institution, facility, or program. The HA shall not waive the essential functions of a position to accommodate a disabled employee or provide an accommodation that creates an undue hardship as defined in Section 31040.4.3.19. In addition, the HA, in consultation with OEW when required or necessary, is responsible for:

- Reviewing the completed CDCR Form 855 or the documentation of the request for RA, supporting medical documentation, and the recommendations from the RTWC for RA requests;

- Making the final determination on requests for RA, medical transfers, medical demotions, medical terminations, and employer generated retirement applications;

- Approving Limited Term Light Duty Assignments, as appropriate; and

- Approving requests for Fitness for Duty Evaluations.

31040.4.4.5 Office of Employee Wellness

The OEW, RTW Services Section (RTWSS), an office within Employee Health and Wellness (EHW), Human Resources, shall assist all employees, and their supervisors and managers, in working through RA, Limited Term Light Duty Assignments, and MPA processes. That assistance includes facilitating Fitness for Duty Evaluations; processing medical transfers, demotions, or terminations; and filing for disability retirement on behalf of employees. The OEW shall solicit review of the above requests by the Office of Legal Affairs (OLA), as needed, and forward a recommendation for final review and determination by the appropriate HA. The OEW is responsible for:

- Providing return-to-work services for all Headquarters based personnel;

- Providing liaison assistance and functional oversight to all CDCR RTWCs, statewide;

- Providing training for all CDCR RTWCs and supervisors and managers at all levels regarding requirements under State and federal laws and CDCR policies for the return-to-work program;

- Developing and implementing CDCR's return-to-work policy;

- Facilitating the development and retention of all standardized and other essential functions lists used in the return-to-work and RA processes; and

- Reviewing, consulting on, and providing recommendations to the HAs on all of the following:

    - Peace officer requests for RAs;
    - Vest wear RAs;
    - Medical demotions/transfers/terminations;
    - Employer generated Disability Retirement Applications; and
    - Requests for Fitness for Duty Evaluations.

31040.4.5 Reasonable Accommodations

31040.4.5.1 Initiation of the Reasonable Accommodation Process

It shall never be assumed by any manager or supervisor that an employee is disabled, has a medical condition, or requires RA. The RA process shall be initiated by the employee, supervisor, manager, HA, or RTWC when one or more of the following occur:

- An employee states he or she needs assistance to perform the essential functions of his or her job, due to a physical or mental disability, or medical condition;

- The supervisor, manager, HA, or RTWC becomes aware of the need for an accommodation through a third party or observation; or

- The supervisor, manager, HA, or RTWC becomes aware of the possible need for an accommodation, because the employee takes leave due to his or her serious health condition under the FMLA or CFRA, or due to a work-related injury under the WCA.

A request for RA can be submitted by employees verbally, in writing, or on a CDCR Form 855. A verbal request for an accommodation shall be immediately documented, in writing, by the person receiving the request and delivered to the RTWC.

The HA or designee shall provide a written acknowledgement to the employee regarding his or her request for RA due to a disability or medical condition within a reasonable time, but no later than 20 working days after the receipt of the request from the employee. This acknowledgement shall notify the employee if additional information is needed before a decision can be made.

The HA or designee shall respond to the employee regarding a request for RA, transfer, or leave due to pregnancy or pregnancy related disabilities, within 10 calendar days from the receipt of the request from the employee. (CCR, Title 2, Section 11050.)

31040.4.5.2 Interactive Process

The interactive process requires employer and employee flexibility and cooperation to identify appropriate accommodations for qualified individuals with disabilities. The interactive process shall be documented, in writing, by the RTWC or any manager or supervisor involved in the process, even if conducted verbally, and shall continue until a RA has been identified and implemented or other resolution has occurred.

The assigned RTWC shall make every effort to assist the employee by engaging in a timely, good faith, interactive process. The interactive process consists of communications designed to explore whether or not the employee needs an accommodation for the employee's known functional limitations, to perform the essential functions of the job. As part of the interactive process, and with the employee's consent, the RTWC may send a list of the essential functions of the employee's position to the employee's health care provider. Communications between the RTWC and the employee requesting RA should be in person, whenever possible, and may include providing an Options Letter to the employee**,** which identifies information, including but not limited to, RAs, disability benefits, retirement benefits, or leave of absence options. The Options Letter shall be sent to the employee when medical information has been received

indicating that the employee may need a RA to perform the essential functions of his or her position.

If one does not already exist, rapid development of an essential functions list is a critical component of the interactive process. This list facilitates discussion among the supervisor, manager, employee, RTWC, OEW, HA, treating health care providers, and/or fitness for duty physicians.

If the health care provider outlines work restrictions that can be accommodated, the interactive process shall continue and the employee should return to his or her current position with any appropriate RAs. If the requested RA would create an undue hardship for the CDCR (as defined in Section 31040.4.3.19), or the employee cannot perform the essential functions of his or her job with the accommodation requested, the interactive process shall continue with the employee to discuss alternatives. The RTWC shall consult with the local Labor Relations Analyst, or the Office of Labor Relations for Headquarters employees, as needed, to rule out a conflict between the proposed accommodation and a bargaining unit agreement. An employer is not required to provide the specific accommodation requested by the employee, but has a duty to provide an effective accommodation that is reasonable.

For those accommodations that cannot be granted initially, RTWCs shall continue the interactive process by communicating with the employee and HA and exploring alternative accommodation opportunities, if any. Alternative accommodations may include, but are not limited to, paid or unpaid leave or transfer/demotion, which are accommodations of last resort when no other accommodation is possible in the employee's current position. Other options may include disability retirement or medical termination when no accommodation is possible in any CDCR position.

31040.4.5.3 Processing Requests for Reasonable Accommodation

RAs are processed by the assigned RTWC, through the appropriate chain of command, to the HA, in consultation with OEW as needed or required. The RTWC can receive requests for RA from the requesting employee or any manager or supervisor who received a request for RA from an employee. The RTWC shall review the request for RA and/or medical documentation; work cooperatively with managers and/or supervisors to identify the essential functions of the employee's position and discuss RA options; and make a recommendation to the HA regarding the request for RA.

If the existence of a disability and/or the need for a RA is not obvious, upon receipt of a request for RA, the RTWC shall require the employee to provide medical documentation verifying: the functional limitations that affect the employee's ability to perform the essential functions of his or her position; the need for a RA; the estimated duration of the RA; and the health care provider's expertise to certify the employee's functional limitations and the need for a RA.

Upon receipt of a request for RA due to pregnancy, the RTWC shall require the employee to provide medical certification from her health care provider containing: a description of the requested accommodation; a statement describing the advisability of the RA; the date upon

which the need for the RA will become medically advisable; and the estimated duration of the RA. For peace officers, and other classifications that may be required to wear a protective vest, a vest re-fit may be necessary during the employee's pregnancy.

A qualified individual with a disability is entitled to a RA, which may include reassignment to a vacant, budgeted position over other applicants and existing employees, when no accommodation is possible in the employee's current position; however, when considering a reassignment or other RA, the CDCR is not required to:

- Waive the essential functions of the job/classification;
- Reduce or transfer the employee's workload involving essential functions to another employee;
- Create additional employment that would not otherwise have been created;
- Discharge another employee;
- Violate the terms of a collective bargaining agreement or Memorandum of Understanding, including post and bid rules;
- Transfer another employee to create a vacancy for a disabled employee;
- Promote or transfer any employee who is not qualified to perform the new job and/or who otherwise does not meet civil service requirements or minimum qualifications for such position; or
- Provide an accommodation, if the accommodation creates an undue hardship for the CDCR.

RAs shall first be considered within the employee's current position without waiving the essential functions of the job. A RA may include the transfer of the employee to a vacant and budgeted, less strenuous or hazardous position, within the same classification, where the employee is still capable of performing all of the essential functions of his or her classification, when called upon to do so. A RA also can consist of job restructuring, which may include, but is not limited to, reallocation or redistribution of non-essential job functions in a position with multiple responsibilities.

If an employee requests a transfer to a less strenuous and/or hazardous position, and a vacant, budgeted position within the same classification does not exist that can accommodate the employee's restrictions, the employee may elect to continue working in his or her present position, performing all the essential functions of the position, with or without an accommodation, or take leave utilizing his or her own leave credits. The RTWC will refer employees to the FMLA Coordinator to discuss potential eligibility for protected leave under FMLA or CFRA, or if pregnant, to the Personnel Office for information on Pregnancy Disability Leave entitlements.

If a RA within the employee's current classification is not possible, alternate placement, in the form of a transfer or demotion, shall be considered as a RA of last resort. The interactive process shall occur prior to considering alternate placement; and this accommodation shall only be considered after all possible accommodations within the employee's same classification have been explored.

A transfer or demotion shall be considered if:

- The employee can no longer perform the essential functions of his or her current position or classification, either with or without a RA;

- CDCR cannot provide a RA in the current classification without undue hardship; or

- There are no vacant, budgeted positions in the employee's current classification for which the employee is qualified and can perform the essential functions either with or without a RA.

Prior to transferring or demoting an employee, as an accommodation of last resort, documentation (including but not limited to, the employee's request for RA, documentation of the interactive process, medical reports, a list of essential functions, the employee's current qualifications, State Application, and resume) must be submitted to OEW for approval and processing. The employee shall meet the minimum qualifications of any proposed position and must be able to perform the essential functions of the proposed position either with or without a RA. Transfers and demotions (except those that occur in compliance with USERRA) shall not result in a salary increase for the affected employee. However, CDCR is required to attempt to place the employee in the highest paid, vacant, budgeted position for which the employee meets the minimum qualifications.

If the transfer or demotion is involuntary, the employee shall be given written notice of the medical action and appeal rights, at least 15 calendar days prior to the effective date of the transfer or demotion. (Government Code, Section 19253.5.)

31040.4.5.4 Finalization of the Reasonable Accommodation Request

The HA, in collaboration with the OEW when required, shall make the final determination, and provide a written response to the employee, on requests for RA.

Any grant of a RA request resulting in an alternate placement, or any peace officer accommodation, shall be processed by the assigned RTWC and shall require consultation with the EHW, Associate Director, and final approval of the HA.

No accommodation shall be granted that results in an undue hardship for CDCR, as defined in Section 31040.4.3.19.

Denials of a RA request shall require the approval of the HA, after consulting with the EHW, Associate Director.

The employee has the right to file a complaint alleging discrimination, at any time during CDCR's process, in accordance with Chapter 3, Article 1, Section 31010.5.2.

31040.4.5.5 Documentation/Record Keeping/Records Retention

All discussions regarding a potential accommodation must be documented in writing, provided to the RTWC, and stored in the return-to-work file. Utilization of the CDCR Form 855 is recommended for this purpose, although not required.

The ADA and FEHA limit the use of information obtained from medical records of employees for the purpose of providing RA. All medical information obtained shall be treated as a confidential medical record. In accordance with the ADA, FEHA, and the California Confidentiality of Medical Information Act (CCMIA), the CDCR is responsible for the confidentiality and security of these medically-related materials. Employees improperly disclosing confidential medical information will be held accountable in accordance with departmental policy.

Information contained in the return-to-work file shall be kept separate from the employee's Official Personnel File (OPF) or Worker's Compensation File, and shall be kept confidential, except that: (1) supervisors, managers, and HAs may be informed of restriction(s) on the work duties of employees with disabilities and necessary RAs; (2) first aid and safety personnel may be informed, when appropriate, that the condition may require emergency treatment; and (3) government officials investigating compliance with the ADA, FEHA, or USERRA shall be provided relevant information through the Office of Internal Affairs (OIA) or the OLA.

Requests for RAs and supporting documentation shall be retained by the assigned RTWC in confidential files and stored in a secure location to prevent unauthorized access, for a period of 30 years, or for the duration of any related pending litigation, whichever is longer.

For RAs extending beyond one year, the RTWC may ask for medical documentation substantiating the need for continued RA, on a yearly basis.

31040.4.6 Lactation Accommodation

It is the policy of the CDCR to make every reasonable effort to provide a lactation accommodation for an employee as required by State and federal law.

Generally, lactation without medical complications is not a disability requiring pregnancy disability leave; however, lactation may require a transfer to a less strenuous or hazardous position or other RA. Approval of such a RA shall be based on review of a request from the employee, accompanied by medical documentation stating that the RA is medically advisable, the date upon which the need for the RA will become medically advisable, and the estimated duration of the RA.

An employee may request (verbally, in writing, or on a CDCR Form 855) lactation accommodations to express breast milk for her infant child. The RTWC shall process such requests. The HA shall make the determination on the request and shall provide written notice of the decision to the employee within 10 calendar days from the receipt of the request from the employee.

Employees needing a lactation accommodation to express breast milk shall be entitled to reasonable time, used concurrently with any break time already provided, and shall be responsible for the storage of expressed milk. Employees who do not have authorized breaks may use available leave credits or take unpaid leave during the time spent expressing milk. The CDCR shall provide the employee with the use of a private, locking room, in as close a proximity to the employee's work area as reasonably possible, for the employee to express milk. Any existing windows must be covered for the employee during lactation. A pre-designated lactation room is not required; however, it is recommended. For peace officers, or other classifications that may be required to wear a protective vest, a vest re-fit may be needed. Essential functions shall not be waived for employees granted a lactation accommodation.

31040.4.7 Limited Term Light Duty Assignment

In accordance with the provisions of the California Code of Regulations, Title 15, Division 3, Section 3436, it is the policy of the CDCR, when operational needs allow, to provide Limited Term Light Duty Assignments (LTLDA) to all CDCR employees who have medical limitations in their ability to perform the essential functions of their job.

The HA may utilize LTLDA, when operationally feasible, to allow employees with documented medical limitations to work. The HA shall place the employee in a vacant, budgeted position within the employee's bargaining unit, or allow the employee to continue working in his or her current position, while temporarily waiving the essential functions of the job, as long as safety and security is not jeopardized.

No position will be identified permanently as a light duty position. The duration of a LTLDA for any one employee may vary; but, in any case, it shall not extend beyond 60 calendar days in a 6-month period for any medical condition(s). In addition, LTLDA shall be offered only for the duration of the vacant, budgeted position, but not exceed 60 calendar days. The HA shall not create a position to accommodate LTLDA for an employee.

An employee with medical limitation(s) can make a request for a LTLDA. Medical documentation from the employee's health care provider is required as part of the LTLDA request, and the medical documentation must state an expectation that the employee will be able to return-to-work full duty, with or without RA, upon or before completion of the LTLDA.

The HA has the discretion to approve or disapprove all LTLDAs, based on the operational needs of the institution/unit. Requests for LTLDAs shall be assessed individually. A request for LTLDA shall not be approved when the grant of the request will impose a risk to the safety and security of staff, inmates, wards, parolees, or visitors.

The designated RTWC and the employee's supervisor shall work together to: (1) identify a LTLDA, (2) monitor and track the time frame of the LTLDA, and (3) document the LTLDA in writing to include a signed agreement between the employee, RTWC, and the HA or designee at the management level.

While on a LTLDA, the employee shall continue to receive the salary commensurate with his or her currently appointed civil service classification, adjusted for any reduced time base worked, if necessary. The HA may terminate the LTLDA at any time.

Refusal by an eligible employee to accept a LTLDA may result in the employee being placed on leave status, paid by using available leave credits and/or unpaid, if the employee has limitations that prevent him or her from performing the essential functions of his or her position with or without a RA. Refusal may also result in the loss of workers' compensation wage loss benefits, such as Industrial Disability Leave, Enhanced Industrial Disability Leave, or Temporary Disability.

31040.4.8 Fitness for Duty

The purpose of a Fitness for Duty Evaluation is to determine the employee's capability of performing the essential function(s) of his or her position and classification through a medical or mental health examination mandated by the HA, and performed by a Board certified physician. The results of this evaluation will be used to determine whether the employee has limitations on his or her ability to perform the essential function(s) of the employee's position, or any other position in CDCR. (Government Code, Section 19253.5.)

Any Fitness for Duty Evaluation processed by CDCR must be job-related and consistent with a business necessity. The evaluation must be limited to determining whether there are functional limitation(s) that require(s) RA.

A Fitness for Duty Evaluation shall be considered, in consultation with OEW, for various reasons, including, but not limited to, the following:

- The employee refuses to consent to communications between the RTWC and his or her health care provider or to provide the requested medical documentation;

- The employee's health care provider refuses to review the list of essential functions and provide written documentation of the employee's work restrictions;

- Evidence that the employee with a disability has exhausted leave under the CFRA and/or FMLA, WCA, or other federal, State, or employer leave provisions, but is still unable to perform the essential functions of his or her position with or without a RA;

- Evidence from a third party, or information from the employee directly, that, due to medical or psychological limitations, he or she cannot perform the essential function(s) of his or her position with or without a RA;

- The employee displays behavior that causes a safety or security concern for himself or herself, and/or the staff, inmates, wards, or parolees;

- The employee or employee's health care provider(s) submits insufficient medical information, after requests from the RTWC to the employee or his or her health care provider(s);

  - Sufficient medical information should include: documentation of the existence of functional limitations affecting the employee's ability to perform the essential functions of his or her position; the need for a RA; the estimated duration of the RA; and the health care provider's expertise to certify the employee's functional limitations or need for a RA;

- The medical documentation is not from a health care provider with the expertise to certify the employee's functional limitations or need for a RA;

- Conflicting or disputed medical information is received from health care providers or experts;

- Indication that the medical documentation is fraudulent; or

- The employee is not treated by a health care provider, as defined in Section 31040.4.3.9.

Prior to ordering a Fitness for Duty Evaluation on an employee, approval must be obtained from the EHW, Associate Director, who will review the information submitted by the HA justifying the need for the Fitness for Duty Evaluation. The HA must be able to articulate the reasons for the evaluation that:

- Are job related; and

- Indicate the employee may jeopardize the safety or security of the institution, facility or program; or

- Create a credible question about the employee's ability to perform the essential functions of their job, with or without a RA.

After the HA, in consultation with OEW, approves the Fitness for Duty Evaluation, the local RTWC shall work with the OEW to procure the Fitness for Duty Evaluation provider.

Upon receipt of the Fitness for Duty Evaluation report, the HA and designated institution staff (i.e. RTWC or designee) shall consult with the assigned OEW Liaison Analyst, Manager, and EHW, Associate Director, along with the assigned OLA Attorney, if necessary, to analyze and discuss the findings, a possible plan for the employee's return-to-work, or other options as follows:

- Resuming the interactive process discussions with the employee and reviewing available options;

- Identifying if the employee needs an accommodation; or

- If the employee is unable to return-to-work to his or her classification with or without a RA, a transfer, demotion, disability retirement, or termination shall be explored, and appropriate action shall be taken, consistent with Government Code, Section 19253.5.

31040.4.9 Medical Rejection on Probation

A probationary employee may be rejected during probation for medical reasons if it is determined that the employee has functional limitations that prevent the employee from performing the essential functions of his or her job, with or without a RA.

A medical rejection on probation shall require the approval of the HA, after consulting with the EHW, Associate Director.

31040.4.10 Disability Retirement

It is the policy of the CDCR to comply with State of California disability retirement laws and to provide information regarding disability retirement benefits through the California Public Employees' Retirement System (CalPERS) to an employee, upon request, or when the employee can no longer perform the essential functions of his or her position with or without a RA. Disability retirement, if approved, allows for a monthly pension and continuation of health benefits.

Disability Retirement is a benefit for employees of the State of California as defined under the Government Code, Sections 21150-21176. The CalPERS determines an employee's eligibility for a disability retirement. Eligibility is determined upon receipt of an application for disability retirement and medical evidence that a member is substantially incapacitated from his or her usual duties. If the employee is eligible, CalPERS provides a monthly retirement allowance payable to the employee for life, or until recovery from a disabling injury or illness allows a person to return to his or her previous employment.

If the disability is the result of a job-related illness or injury, and the employee is a State safety, State peace officer/firefighter, or State industrial member, he or she may be entitled to an industrial disability retirement.

Employees shall be informed that disability retirement and industrial disability retirement are considered temporary separations resulting in mandatory reinstatement rights to their classifications, should they recover from the disabling injury or illness and are able to perform the essential functions of their previously held positions or classifications. There is no minimum age requirement for disability or industrial disability retirement, and no minimum service requirement for an industrial disability retirement.

If the HA, after considering the conclusions of medical reports from the employee's health care provider(s) or the results of a Fitness for Duty Evaluation, concludes that the employee is unable to perform the work of his or her present position, or any other position in the CDCR, and the employee is eligible and does not waive the right to retire for disability, the HA shall file an application for disability retirement on the employee's behalf. The HA shall give the employee 15 calendar days written notice of its intention to file such an application and a reasonable opportunity to respond to the appointing power prior to the appointing power's filing of the application. (Government Code, Section 19253.5.)

Upon filing the application for disability retirement, the HA may remove the employee from the job and place the employee on involuntary leave status. The employee may use any accrued leave during the period of the involuntary leave. If the employee's leave credits and other entitlements are exhausted, or if they do not provide benefits at least equal to the estimated retirement allowance, the HA shall pay the employee an additional temporary disability allowance, so that the employee receives payment equal to the retirement allowance. CDCR shall continue to make all employer contributions to the employee's health plans during the period of the involuntary leave. (Government Code, Section 19253.5.)

CDCR shall submit an employer-generated disability retirement application on behalf of an employee if all of the following occur:

- The employee is vested and entitled to retirement benefits through CalPERS and has not waived his or her right to those benefits;

- The employee is unable to perform the essential function(s) of his or her position, or any other position within the CDCR statewide; and

- There is no RA available in his or her current, or any other, position. (Refer to Section 31040.4.5.)

All applications for disability retirement filed on behalf of an employee must be approved by the EHW, Associate Director, and are processed through the OEW, with the assistance of the assigned RTWC and the HA.

Upon receipt of a notification that an employee’s application for disability or industrial disability retirement has been denied, and the employee has not previously service retired, the HA and RTWC must take immediate steps to determine if the employee will be returned to pay status. In consultation with the RTWC, the HA shall immediately contact the employee, in writing, to inquire whether the employee wishes to return to work and arrange for a reporting date. The employee will remain off pay-status only if he or she advises of his or her intent to appeal CalPERS’ decision or provide a current off-work health care provider’s note, at which point the interactive process resumes. If the employee states an intent to return to work and the HA questions the employee’s ability to safely perform all essential functions of the job, the HA or RTWC shall contact their OEW liaison/analyst immediately for guidance.

If the HA has evidence, after an employee's return to work from retirement, that an employee is unable to perform the essential function(s) of the employee's position, with or without a RA, or if the employee's continued employment adversely impacts CDCR operations, because the employee's behavior creates an imminent risk for others in the workplace, the HA shall request a Fitness for Duty Evaluation, subject to OEW's approval. (Refer to Section 31040.4.8.)

31040.4.11 Medical Termination

For an employee who, due to a disability or medical condition, has work restrictions that prevent him or her from performing the essential functions of his or her job, or any job in CDCR, either with or without a RA, and is not vested through CalPERS, or otherwise waives his or her right to disability retire, it is the policy of the CDCR to process a medical termination from State employment. This is an administrative action that separates an employee when all other medical options (e.g., RA, medical leave of absence provided under CFRA or FMLA, or disability retirement) have been exhausted, or discussed with the employee and determined inappropriate under the specific circumstances of the employee's employment status and medical condition or disability.

A medical termination shall be considered only if all of the following apply:

- The employee can no longer perform the essential functions of his or her classification with or without a RA;

- There are no funded, vacant positions in the employee's current classification for which the employee is qualified and can perform the essential functions with or without a RA;

- The employee is unable to perform the essential functions of any other position in the CDCR anywhere in the State, for which he or she meets the minimum qualifications, with or without a RA;

- CDCR cannot provide a RA without undue hardship; and

- The employee: is ineligible for, or waives the right to, disability retirement; refuses to cooperate when CDCR files for disability retirement on his or her behalf or has been denied disability retirement (after waiving or exhausting his or her appeal rights), and still refuses; or is unable, for medical reasons, to return to work.

Prior to the HA serving a notice of medical termination on an employee, consultation with the EHW, Associate Director, or RTWSS Chief, shall occur, including the review of appropriate documentation (including, but not limited to, the employee's request for RA, documentation of the interactive process, medical reports, and a list of essential functions of the employee's job/position). OEW, in consultation with the OLA, will draft the appropriate Notice of Medical Action – Termination document and forward it to the HA for finalization, signature, and service to the employee. This document shall give the employee written notice of the medical action and appeal rights, at least 15 calendar days prior to the effective date of the medical termination.

31040.4.12 Reinstatement

An employee who is subjected to a medical action such as a demotion, termination, or disability retirement (voluntary or involuntary), retains mandatory reinstatement rights to the civil service position from which the medical action was taken. These rights may be exercised by the employee if the employee provides sufficient medical evidence that the functional limitations from which he or she previously suffered, and which impacted his or her ability to perform the essential functions of that classification, with or without a RA, are no longer present.

An employee seeking mandatory reinstatement from disability retirement must initially seek approval from CalPERS. A request for such reinstatement, including all supporting medical documentation, must be addressed to the HA or assigned RTWC, who shall then contact the OEW for assistance.

An employee seeking reinstatement after a medical termination, transfer, or demotion must initially seek approval from the State Personnel Board (SPB). In approving or ordering the reinstatement, the SPB may require the satisfactory completion of a new probationary period.

31040.4.13 Other Options

A disabled or injured employee, when he or she is unable to perform the essential functions of his or her current position, may be entitled to additional benefits or employment opportunities; such as, but not limited to, the following:

- Unpaid leave under the CFRA or FMLA relating to a serious medical condition for up to 12 weeks;

- An unpaid leave of absence for medical reasons, at the discretion of the HA, for a period not to exceed one year. Extension of an unpaid leave of absence for a rank-and-file employee may be granted in accordance with the applicable bargaining unit contract, federal and State laws. Prior California Department of Human Resources' approval is required for an extension of an unpaid leave of absence beyond one year for excluded employees. CDCR is not required to provide an indefinite leave of absence as a RA*;*

- Use of existing leave balances;

- Pregnancy leave for up to four months, with a right to return to the original or exact same job, if the position still exists;

- Non-Industrial Disability Insurance payments administered by the California Employment Development Department (EDD);

- State Disability Insurance payments administered by EDD;

- Temporary Total Disability/Industrial Disability Leave for workers' compensation injuries administered and adjusted through the State Compensation Insurance Fund; or

- Voluntary medical termination.

[Existing Sections 31040.5 through 31040.6 are unchanged]

31040.7 References

Revised June 15, 2015

Government Code Sections 3527(b), 12926, 12940, 12945, 19050.8, 19170, 19253.5, 19253.5(1)(d), 19261, 19572, and 19991.6.
California Labor Code Sections 139.48, 1030 – 1033, and 6400 – 6413.
CCR, Title 15, Sections 3391, and 3436.
CCR, Title 8, Sections 3203, 5110 and 14300 – 14400.
CCR, Title 2, Sections 52.3, 53.2**,** 321, 426, 443, 7291.2 et seq., 7293.6, 7293.7, 7297.0, and 7297.6.
DOT, Federal Motor Carrier Safety Regulations, Controlled Substances and Alcohol Use and Testing, Part 382, Title 49, Code of Federal Regulations, Part 40.
U.S. Occupational Safety and Health Act of 1970, 29 USC 654.
SAMHSA, Mandatory Guidelines for Federal Workplace Drug Testing Programs, Sub-part B, Section 2.4, Parts, (e) and (f), 59 Federal Register 29916.
DPA, Article 29, Substance Abuse, Rules 599.960 – 599.966.
Governor's Executive Order D-58-86.
State of California Penal Code Part 2, Title 3, Chapter 4.5, Sections 830.2(d) and 830.5.
FMLA 29 U.S.C. 2601, et seq. & FMLA regulations, 29 CFR 825
Pregnancy Discrimination Act of 1978
Prevailing MOU.
State's Implemented Terms.
References specific to Return to Work Programs:
29 U.S.C. § 2601 et seq ; 38 U.S.C. §§ 4301 et seq; 42 U.S.C. §§ 12101-12213;
20 C.F.R. §§ 1002.198, 1002.225, 1002.226;
Civil Code, § 56.20(a);
Government Code, §§ 12900-12993, 19253.5, 19991.1, 19786, 21150 - 21176;
Labor Code, §§ 1030-1033;
CCR, Title 2, §§ 11035, 11040, 11042, 11050, 11065, 11067, 11068, 11069;
CCR, Title 15, § 3436.)