

Representing People with Disabilities in Unlawful Detainers

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Disability Rights Education and Defense Fund
September 26, 2024**



Agenda

Disability Law

Reasonable Accommodations

Evictions and RAs

Preclusion

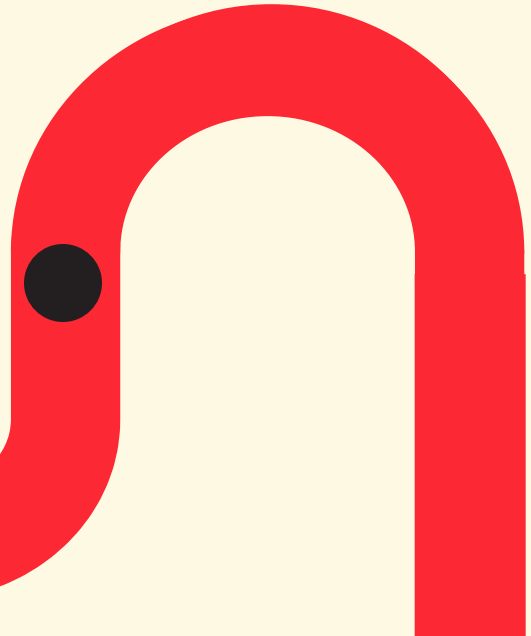
Hypotheticals



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Disability and Housing

- **Financial Constraints of Disability**
 - SSI/SSD does not cover rent
 - Subminimal Wages
 - Job instability
- **Disability Impact on Housing**
 - Hoarding
 - Assistance Animals
 - Live-in aide
 - Neighbor/landlord complaints about behaviors related to a disability

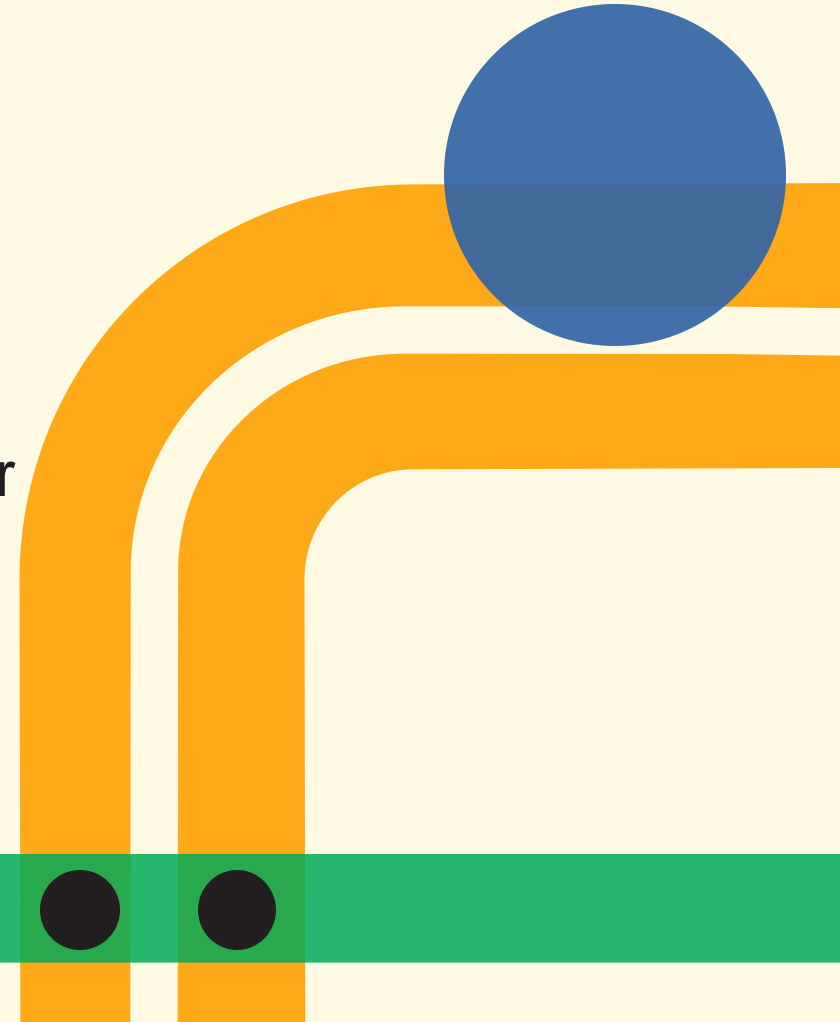
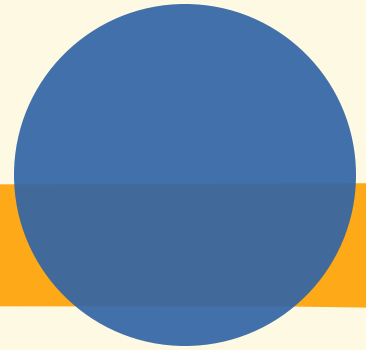




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FHA

- **Fair Housing Act (42 USC § 3604 et seq.)**
 - **Disability Definition:**
 - A physical or mental impairment that substantially limits one or more major life activities; or
 - A record of having such an impairment; or
 - Someone who is regarded as having a physical or mental impairment





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FEHA

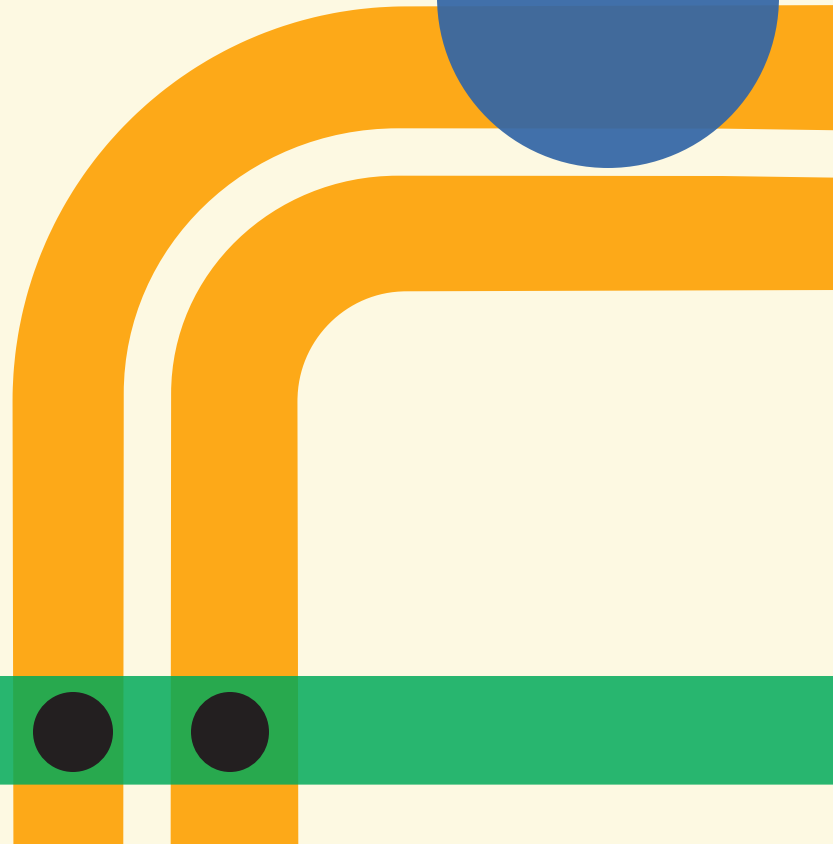
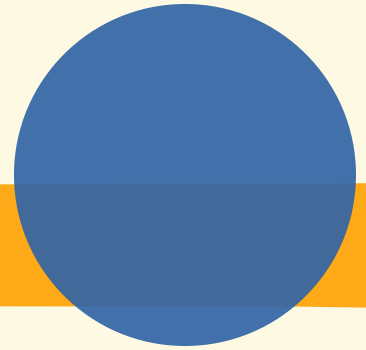
- **Fair Employment and Housing Act (Cal. Gov't Code § 12955)**
- **Disability Definition Similar to FHAA:**
 - Only requires a “limitation” to a major life activity
 - Impact of impairment is considered without regard to mitigating measures
- FEHA mirrors analysis under FHAA (*Broodmore San Clemente Homeowners' Assn. v. Nelson*, 25 Cal.App.4th 1, 5–7, 30 Cal.Rptr.2d 316 (1994))



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Other Relevant Laws

- Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.
- Rehabilitation Act, Section 504 – housing receiving federal financial assistance
- The Disabled Persons Act, Cal. Civ. Code § 54.1 et seq.
- Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq.
- Gov't Code 11135



A decorative graphic featuring a green line that starts from the left, curves down, and then continues horizontally. A blue line starts from the bottom, curves up, and then continues horizontally, overlapping the green line. A red line starts from the top right and curves down. An orange circle is positioned to the left of the green line. Two small black dots are placed on the green line: one at the top curve and one at the bottom curve.

Reasonable Accommodations



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Reasonable Accommodation Defined

- Change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling.
- Discrimination Includes Refusal to Grant a Reasonable Accommodation Request
- 42 U.S.C. § 3604(f)(3)(B); Cal. Gov't Code § 12927(c)(1)



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What is “necessary”?

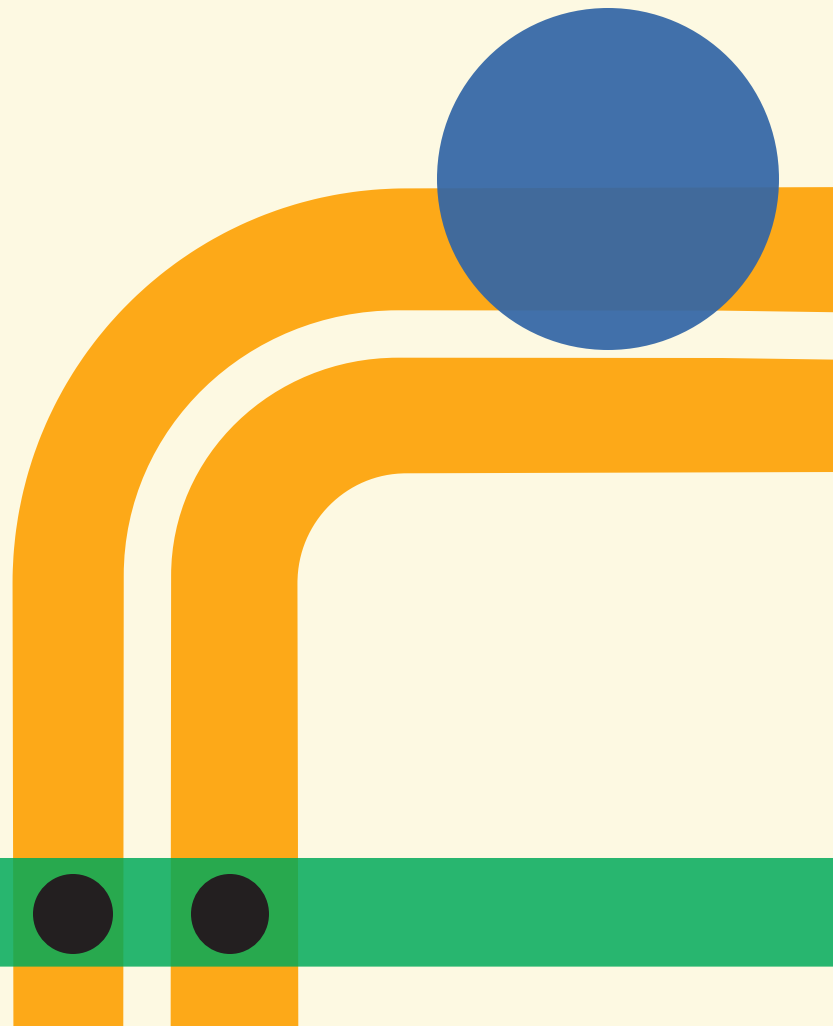
- Changes or removes rule/policy that interferes with right to use and enjoy the dwelling.
- Enhances the tenant’s quality of life by ameliorating the effects of the disability.
- Enables the tenant to satisfy the essential requirements of tenancy.



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Affirmative Obligation

- **Legal obligation that requires some effort to satisfy.** (*McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004))
- **Applies to physical accommodations and administrative policies for housing.** (*United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994))

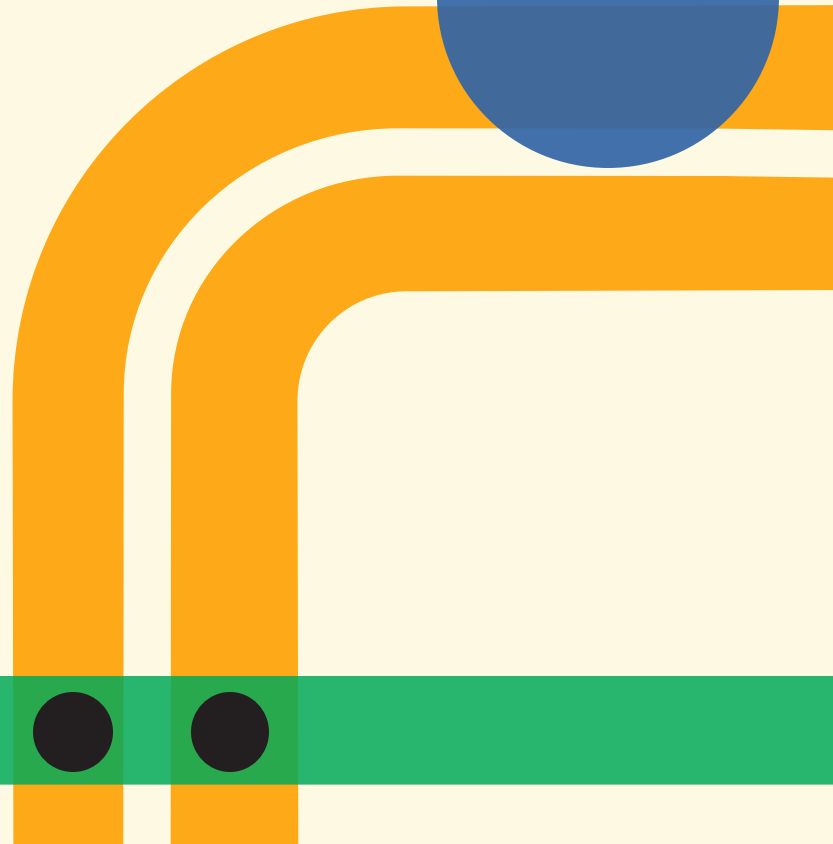
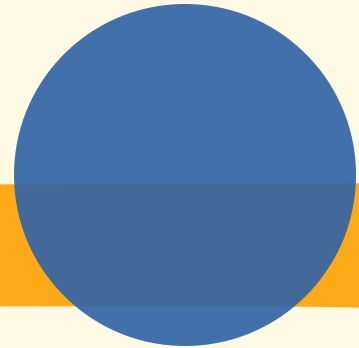




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Affirmative Obligation Part 2

- **Housing provider must know or reasonably be expected to know the requestor has a disability.** (*McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004); *Dubois v. Ass'n of Apartment Owners of 2987 Kalakauu*, 453 F.3d 1175, 1179 (9th Cir. 2006))
- **May require housing provider to pay for accommodations that are not unduly burdensome.** (*Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1148-52 (9th Cir. 2003))





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When can you make a request?

Requests can be made, and must be considered at any time:

- After notice of eviction is served
- After time to cure expired
- After Summons and Complaint Served
- After Trial
- After writ of eviction is issued
- After eviction (in certain circumstances)
- (2 CCR 12176)

What should be in your reasonable accommodation request?

- Describe Disability (do not need diagnosis)
- Describe accommodation
- Make connection between disability and accommodation → how the accommodation keeps the tenant housed.
- Don't forget to include
 - Contact information
 - Deadline to respond
- Cite to the law (although not necessary)



Verification of Disability

People Who Can Verify

- Doctor
- Case worker
- Therapist
- Social worker
- Non-medical service provider
- Member of a peer support group
- Reliable Third Party
- Parent, child, or other relative
- Individual (FEHA)

Documentation

- ** Only what is necessary to show disability related need for accommodation** (2 CCR § 12178(a))
- Doctor's Note
- Documentation of Disability Benefits
- Prescriptions
- Credible statement of individual (FEHA) (2 CCR § 12178(f))

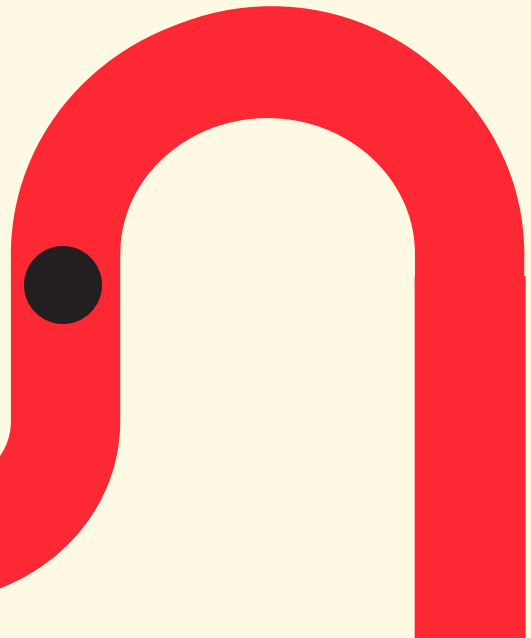


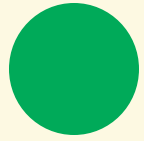


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How Does the Landlord Respond?

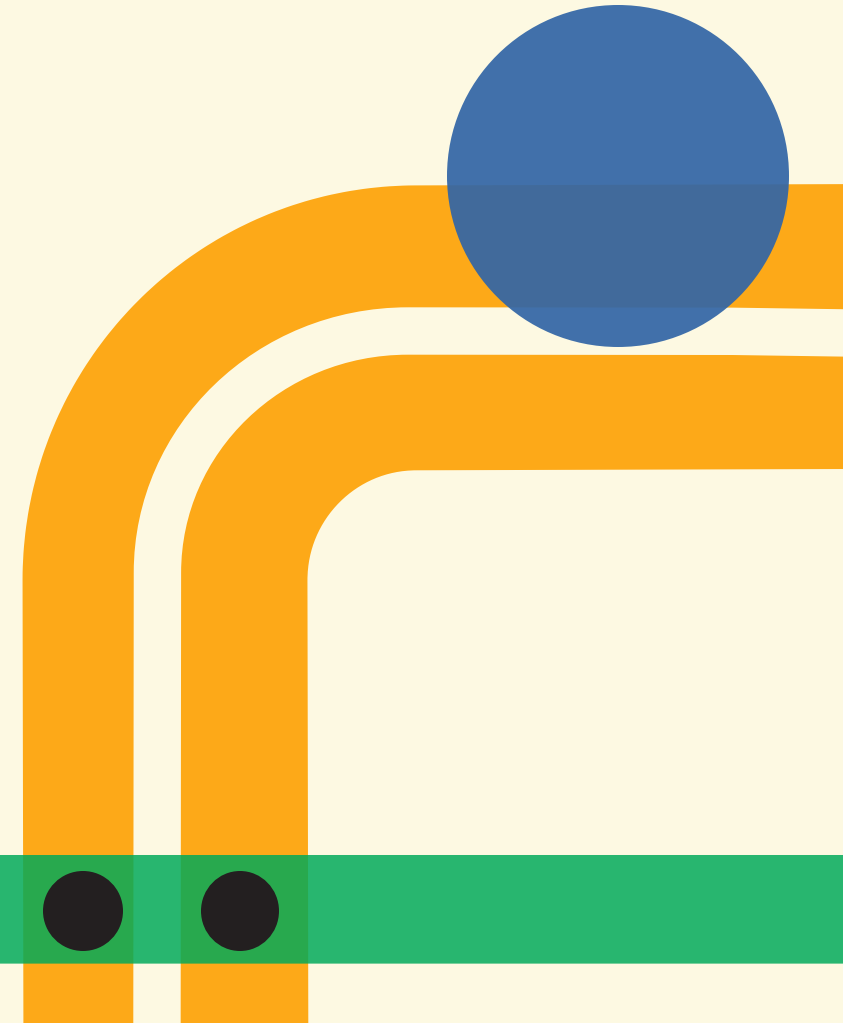
- Individualized Assessment
- Each request considered separately regardless of prior or future requests
- If same request was denied to another person, must still consider
- Cannot base decision on “opening door” to similar requests
- Interactive process





Interactive Process

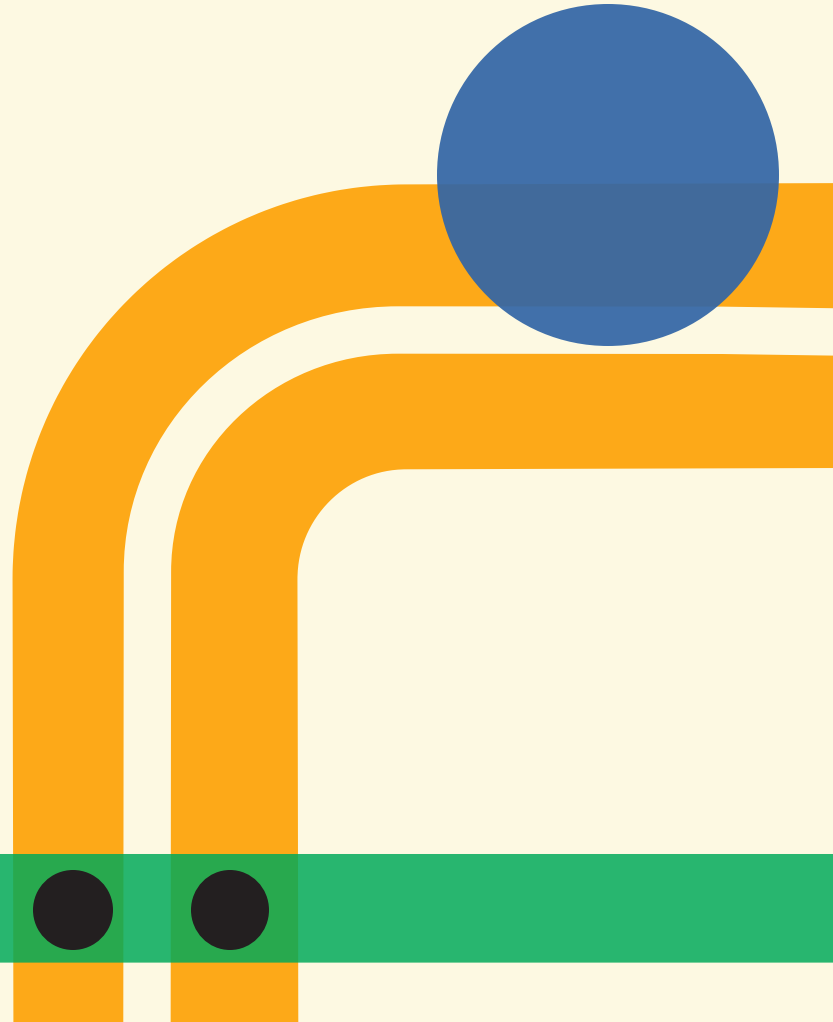
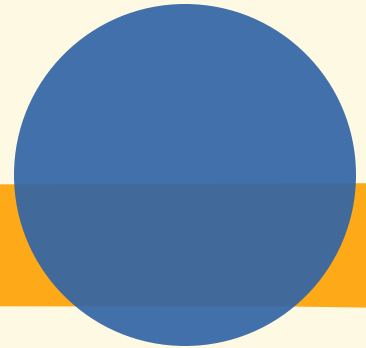
- Good faith interaction between landlord and tenant.
- Questions
- Information sharing
- How to implement accommodations
- Reasonable limitations of landlord
- Process required even if request is “unreasonable”
- Alternative accommodations
- (2 CCR § 12177)





Interactive Process and the Law

- Required under FEHA (2 CCR § 12177)
- Not required under FHA but encouraged by HUD/DOJ.
- Failure to engage in an interactive process is a factor to be considered by the courts when analyzing accommodation claims (*Rodriguez v. Morgan*, No. CV 09-8939-GW CWX, 2012 WL 253867 (C.D. Cal. Jan. 26, 2012)).





RA Examples

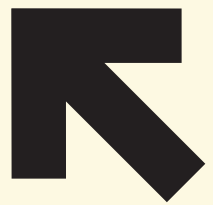
- **Rescind notice of eviction**
- **Dismiss unlawful detainer** (*McAlister v. Essex Prop. Tr.*, 504 F. Supp. 2d 903, 906 (C.D. Cal. 2007))
- **Changing policies and rules -**
 - **Emotional Support Animals**
 - **Guests**
 - **Subleasing/home health aides**
 - (2 CCR 12176)



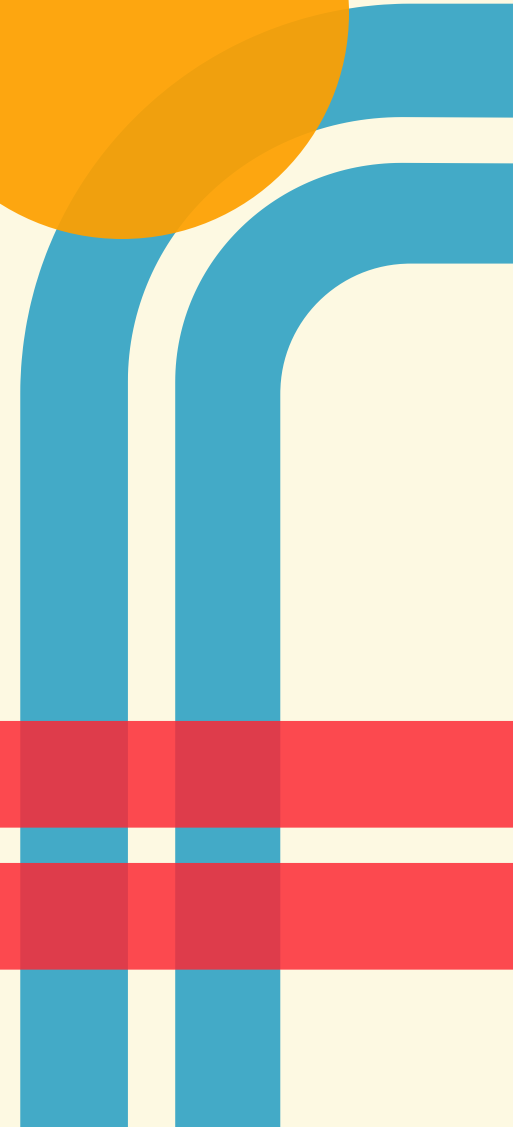
Examples

- **More time to comply with a notice to cure/predicate notice.**
- **Paying Rent on a Different Schedule (2 CCR 12176)**
 - **Based on disability-related income (SSD/SSI)**
 - **Rent money used for disability-related needs**
- **More time to move after writ of eviction issued (2 CCR 12176)**
- **Excuse property damage**





Exceptions





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Exceptions – Undue Financial and Administrative Burden

- Cost and financial resources of the landlord
- Benefit to tenant
- Availability of equally effective less expensive alternative.
- Part of larger entity with more resources
- If the accommodation is needed because of failure of landlord to comply with the law/repair property.
- Undue Administrative Burden
- Fundamental Alteration – cannot change essential nature of service.
- (2 CCR 12179 (d))



Fundamental Alteration

- Cannot Change Essential Nature
- For example, if a landlord does not normally provide shopping for residents, a reasonable accommodation request to shop for an individual with a disability could constitute a fundamental alteration.
- (2 CCR 12179(e))

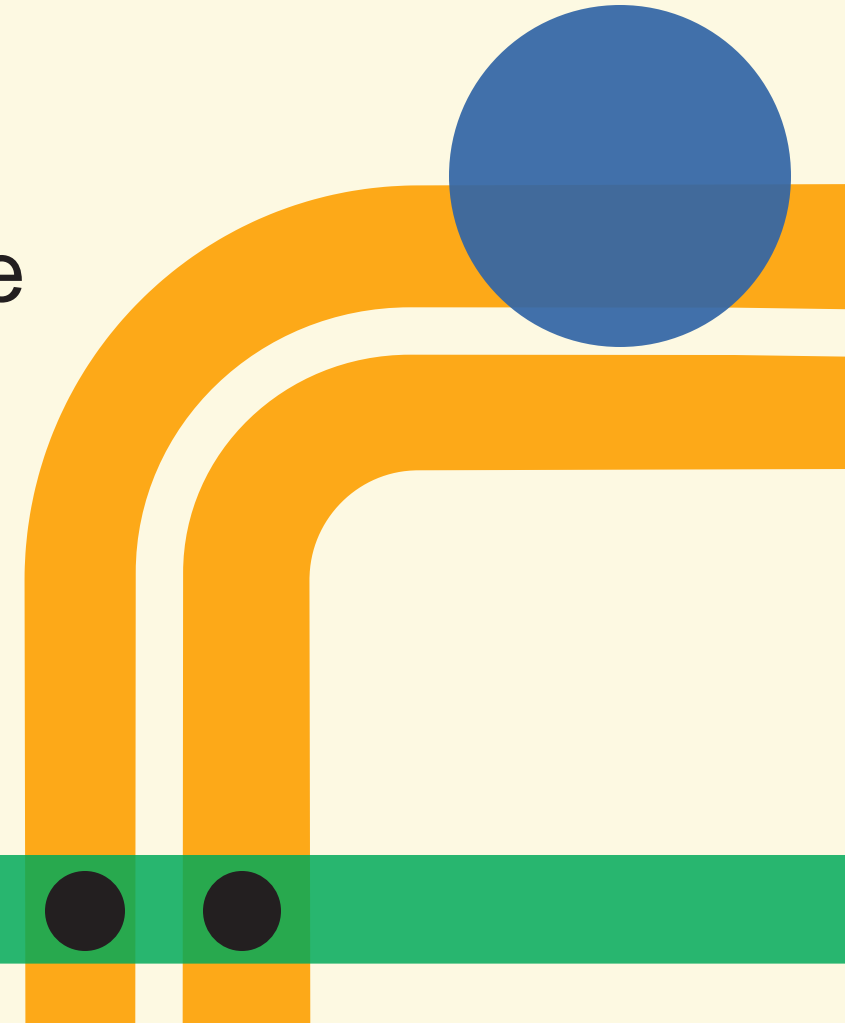




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Direct Threat to Health and Safety

- Substantial risk of bodily harm
- Physical damage to property
- Threat not mitigated by a reasonable accommodation
- (2 CCR 12179 (b)(3))

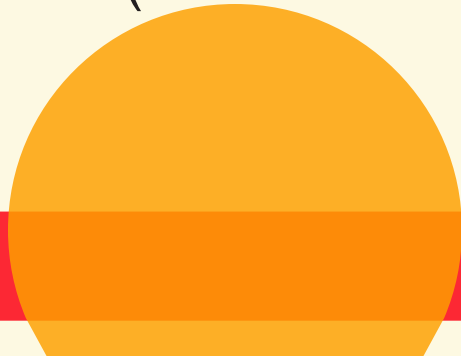




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Determining Threat

- Individualized assessment
- Objective and recent evidence
- Nature, duration, severity of risk
- Likelihood something will actually happen
- Direct threat applies to support animals (2 CCR 12179 (b)(4))
- **NOT** : Speculation, stereotype, unsubstantiated inference
- (2 CCR 12179 (b)(3)(B))



The image features a minimalist, abstract graphic design on a light cream background. On the left side, there are thick, rounded lines in red and orange. A vertical orange line runs down the left edge, with two horizontal red lines crossing it from the left. A black dot is positioned at the intersection of the orange line and the lower red line. To the right of the orange line, another red line curves upwards and then downwards. In the bottom right corner, a large, solid green circle is partially overlapped by a red line that curves around it. Another black dot is located on a vertical red line segment to the right of the green circle.

Evictions



Unlawful Eviction

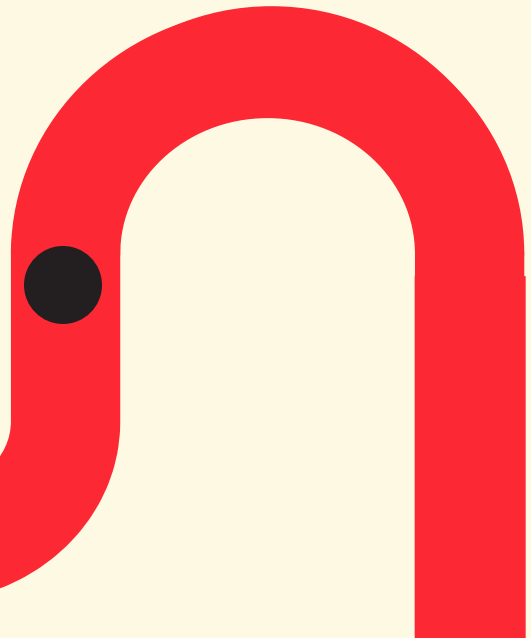
- Eviction because of a disability
- Because of association with a person with a disability
- Regarded as having a disability
- For having a Section 8 voucher
- Failing to provide a reasonable accommodation related to possession/eviction.
- Other protected class
- Retaliation for asserting rights/making complaint



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Nuisance

Cal Civ Code § 3479: Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.



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Failure to Provide RA is an Affirmative Defense to a UD

UD Form 105 – Page 2

- d. *(Nonpayment of rent only)* Plaintiff's demand for possession is based on nonpayment of rent due more than one year ago.
- e. Plaintiff waived, changed, or canceled the notice to quit.
- f. Plaintiff served defendant with the notice to quit or filed the complaint to retaliate against defendant.
- g. By serving defendant with the notice to quit or filing the complaint, plaintiff is arbitrarily discriminating against the defendant in violation of the Constitution or the laws of the United States or California.
- h. Plaintiff's demand for possession violates the local rent control or eviction control ordinance of *(city or county, title of ordinance, and date of passage)*:
(Also, briefly state in item 3t the facts showing violation of the ordinance.)

Page 3

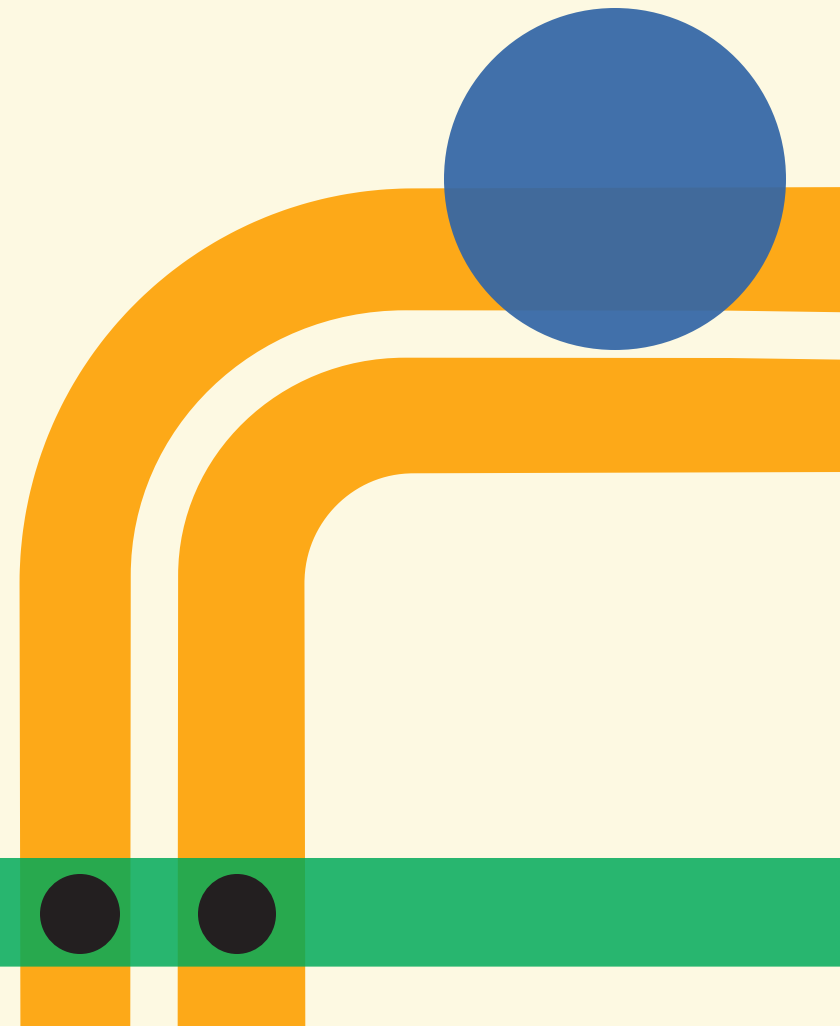
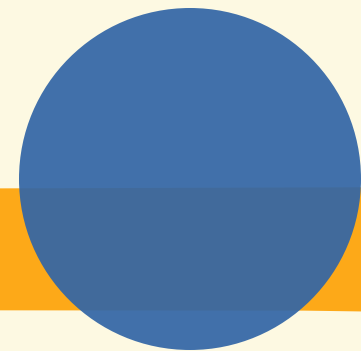
- q. Plaintiff refused to accept payment from a third party for rent due. (Civ. Code, § 1947.3; Gov. Code, § 12955.)
- r. Defendant has a disability and plaintiff refused to provide a reasonable accommodation that was requested.
(Cal. Code Regs., tit. 2, § 12176(c).)
- s. Other defenses and objections are stated in item 3t.



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Fighting the Eviction

- Affirmative Defense
- After receiving first notice – file temporary Restraining Order/Preliminary Injunction
- File an affirmative case than request a stay of the unlawful detainer



The background features abstract geometric shapes. On the left, a vertical orange line is intersected by two horizontal red lines. To the right, a vertical red line is partially visible, with a small black dot on it. At the bottom right, there is a large green circle. The text 'Affirmative Cases' is centered in the middle of the page.

Affirmative Cases



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Unlawful Detainers & Preclusion

- Disability discrimination/reasonable accommodations defenses litigated in a UD may later be precluded in an affirmative case.
 - Vice Versa
- Unlawful detainers = court of competent jurisdiction → Preclusion Applies
 - Summary nature doesn't void issue preclusion
- Issue necessary to possession
- (*McAlister v. Essex Prop. Trust* (C.D.Cal. 2007) 504 F.Supp.2d 903.)



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Issue Preclusion/Collateral Estoppel

Issue Preclusion/Collateral Estoppel

- (1) Final Judgment
- (2) Identical issue
- (3) Issue litigated and decided
- (4) Same party or in privity with party.
- (*Grande v. Eisenhower Medical Center* (2022) 13 Cal.5th 313)

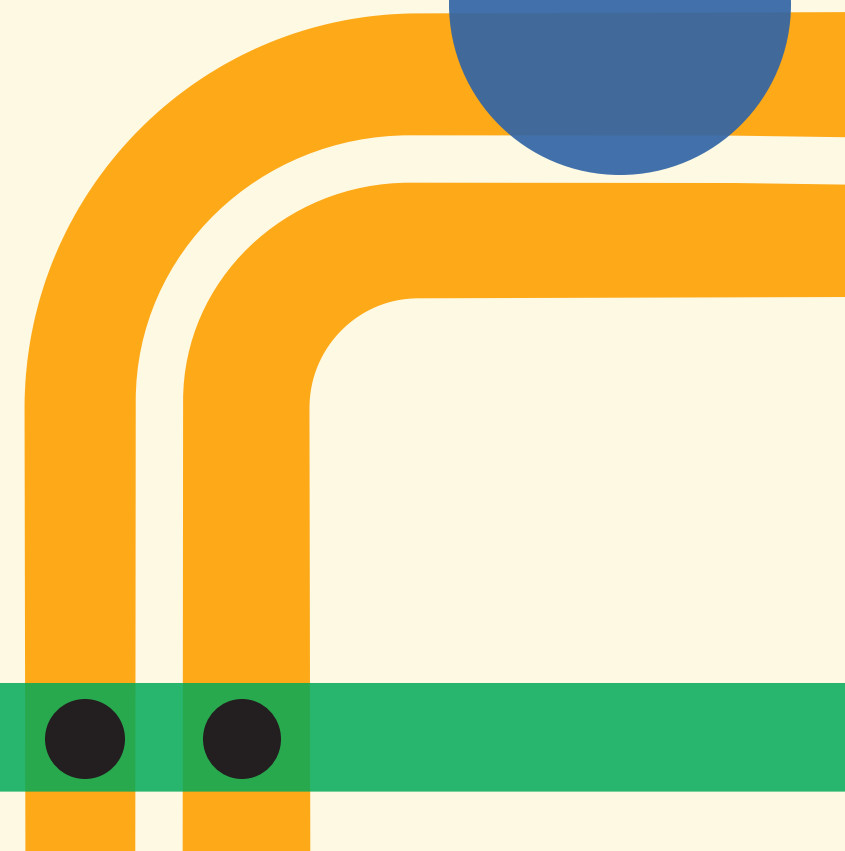
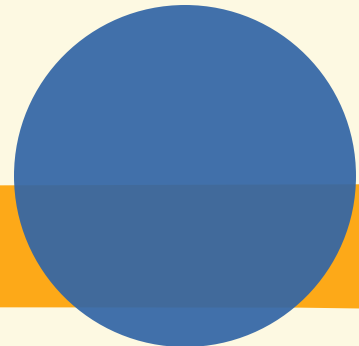


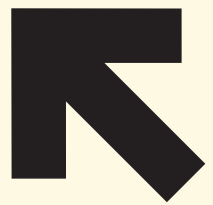
Claim Preclusion/Res Judicata

Claim Preclusion/Res Judicata Elements

- (1) Same cause of action
- (2) Same parties or privity of parties
- (3) Final judgment on the merits

- **Res judicata is narrow in UDs**
 - Summary proceeding
 - Determines immediate right of possession
- Whether had opportunity to litigate affirmative defenses
- (*Ortiz v. Eisler*, 2022 Cal. Super. LEXIS 86214, *10)





Hypotheticals





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Hypothetical

Heather has lived in her apartment for 10 years and has Parkinson's. Last month, she received a notice of termination for having a friend move into her apartment in violation of her lease, which prohibits subleasing without landlord approval and for noise violations. Heather asks for a reasonable accommodation to allow her friend to stay and to rescind the notice. The landlord says no and moves forward with eviction.

What are Heather's Options? What other information do you need to know?

36 Resources

- FEHA Regulations:
[https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I6E9A95005A0A11EC8227000D3A7C4BC3&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I6E9A95005A0A11EC8227000D3A7C4BC3&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))
- HUD & DOG Joint Statement on RA:
<https://www.hud.gov/sites/dfiles/FHEO/documents/huddojstatement.pdf>
- HUD & DOG Joint Statement on RM:
https://www.hud.gov/sites/dfiles/FHEO/documents/reasonable_modifications_mar08.pdf
- HUD Notice on Assistance Animals:
https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf
- DREDF Additional Trainings on RA/RM - <https://dredf.org/using-reasonable-accommodations-and-reasonable-modifications-to-avoid-eviction/>

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Thank you

You can contact
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